

**FEBRUARY 2009 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

QUESTION 1

Maryland residents Always A. Lone and her husband Nevar E. Lone, were married in Columbia, Maryland. For the first 5 years of their marriage, Nevar took care of the couple's three children, while Always worked at the local steel company. During the 6th year of the marriage, Nevar decided that he wanted to go to medical school. Always took on extra hours to pay for a nanny to watch the kids on the days that Nevar was in class.

Nevar became a surgeon with a successful medical practice in Bethesda, Maryland. At that point, Nevar told his wife to quit her job because he would support her and the children.

In 2006, Nevar met Rebecca and the two began to date. Eventually Nevar decided to leave his wife and children, and began living with Rebecca in January 2007. On December 21, 2007 Rebecca, who was known for giving expensive gifts, purchased a candy apple red corvette for Nevar as a Christmas gift.

Nevar and Always own a home in Columbia, Maryland as tenants by the entirety. They also own a vacation home in Mexico purchased in 2002 (but that property is titled in Nevar's name only) and a vintage Rolls Royce, which Nevar inherited from his father. The children are all of school age and are currently enrolled in a local private school for which Nevar pays.

Always promised to take every penny Nevar had if it was the last thing she did before she died. Nevar, not to be out done, threatened to stop paying the children's tuition and petition the court for full custody if Always requested child support or alimony.

You a Maryland attorney, are counsel for Always. Advise her on the grounds for divorce and the custody, financial and property issues in connection with her divorce.

REPRESENTATIVE ANSWER 1

Absolute Divorce

Always cannot get a voluntary divorce from Nevar because "he does not believe in divorce," and will likely not consent. Thus, Always must show grounds for divorce. Adultery and desertion are both grounds for an absolute divorce. Since Nevar moved in with his lover while still married more than 12 months prior to filing of divorce, Always may be able to meet the burdens for proving adultery and/or desertion.

**FEBRUARY 2009 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

Child Support

Nevar's threats "to stop paying the children's tuition and petition the court for full custody if Always requested child support or alimony," is of no effect. The Court will award child support based on the needs of the children and the Maryland Child Support Guidelines. In addition, Nevar will probably have to continue to pay tuition because that is what the children were accustomed during the marriage.

Child Custody

Weighing of "best interest of the child" factors for joint legal custody and/or visitation the Court will probably grant liberal visitation for Nevar and joint legal custody because Nevar was the person who took care of the kids for the first several years of their marriage. In fact, Always didn't herself take care of the children when Nevar was in medical school—she hired a nanny. Always will probably be granted custody because the kids lived with her while Nevar was off having an affair.

Alimony

In MD alimony is rehabilitative. Thus, Always can argue that she should get alimony in order to help her find a job or return to school to be retrained. She could also request *pendente lite* alimony during the divorce proceedings since she left her job at Nevar's request.

In addition, Always as the custodial parent can get use and possession of the family home for 3 years.

Property

In Maryland any property acquired during the marriage will be marital property regardless of title. Gifts and inheritances are not marital property. Thus, Nevar and Always' property will be divided as follows:

Marital

The Columbia home, Mexico vacation home and a percentage of Nevar's medical practice.

Not Marital

The Rolls Royce (inherited) and the Corvette (gift).

**FEBRUARY 2009 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

REPRESENTATIVE ANSWER 2

Always can obtain an immediate absolute divorce from Nevar if she can show grounds such as abandonment, desertion or adultery. Always must only show that the Nevar had the opportunity to commit adultery with Rebecca. Always may be able to show desertion and adultery since Nevar moved in with his Rebecca for over a year.

Custody

Always should argue that it is in the children's best interest to continue to live with her as the primary caregiver because that is what they are accustomed. Nevar, however, was the childrens' primary caregiver earlier on and may be able to successfully argue that for joint legal custody and visitation. The Court will likely grant joint custody because there is nothing to indicate that Nevar is not fit to have custody or that the children would be endangered.

Child Support

The Court will award child support based on the Child Support Guidelines not upon what Nevar or Always thinks he should pay. Because the children, who are school age, are probably accustomed to private school, Nevar will likely have to continue paying for their private school.

Alimony

Even though Nevar told his "wife to quit her job because he would support her and the children," Always will probably not be entitled to alimony forever. She clearly is employable because she was employed before Nevar became a doctor. Always should request, however, both *pendente lite* and rehabilitative alimony until she can get another job or more education and training.

Property division

All the property acquired during Always' marriage will be divided as marital property including the homes in Columbia and Mexico. Always will also be entitled to a percentage of the value of Nevar's practice at the time. This may be made by Nevar as a monetary award as part of the divorce. Always may also be giving the use and possession of their home for 3 years. The Rolls and the Corvette are not marital property because they were gifts to Nevar.

**FEBRUARY 2009 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

QUESTION 2

“Screwdrivers” is a popular Baltimore City nightclub with a reputation for large, boisterous crowds. To help maintain order and safety in the crowded bar, Screwdrivers employs security personnel whose function is to exhibit a conspicuous presence to deter disturbances among the patrons. The security personnel are all over 6 feet tall and weigh over 250 pounds. They also all wear a distinctive shirt with the Screwdrivers logo and the word “Security” in bold letters. Although the security employees are not permitted to hit or kick anyone, they are, depending upon the situation, authorized to grab boisterous patrons, separate those involved in altercations and, if necessary, physically eject those patrons from the nightclub.

On July 25, 2008, Peter Plaintiff was celebrating the completion of the Maryland Bar Examination. On that night, Peter and his friends arrived at Screwdrivers. Within a short time, Peter was intoxicated. While he was intoxicated, Peter started arguing and making obscene gestures to a female patron. Security personnel told Peter to stop or he would have to leave. Ten minutes later, Peter repeated the behavior.

Peter awoke in a hospital the next day with injuries consistent with a severe beating. He has no memory of the attack or of leaving Screwdrivers.

Peter filed a lawsuit alleging battery against Screwdrivers in the Circuit Court for Baltimore City. Witnesses testified they saw three large persons wearing the distinctive Screwdrivers Security shirts carry Peter to the Screwdrivers’ parking lot where they beat and kicked him until he was unconscious. The jury’s verdict awarded Peter \$1,000,000 in compensatory damages and \$300,000 in punitive damages. Judgment was duly entered against Screwdrivers in those amounts.

Screwdrivers appeals the judgment, arguing: (1) Peter did not prove Screwdrivers’ employees committed the attack, (2) if the assailants were Screwdrivers’ employees, it cannot be held liable for intentional torts of employees committed outside the scope of their employment and (3) it should not be held vicariously liable for punitive damages for the willful torts of employees.

Discuss Screwdrivers’ likelihood of success on appeal. Explain your answer fully.

REPRESENTATIVE ANSWER 1

1. As to whether Peter successfully proved that Screwdrivers’ employees committed the attack against Peter, Screwdrivers will likely lose their appeal. Screwdrivers may claim that as Peter has no memory of the attack and cannot identify his attackers that he has not successfully identified the Screwdrivers’ employees as his attackers. However the facts indicate that three, presumably independent, witnesses testified, with all penalties of perjury attaching, that they saw three persons matching the description of the Screwdrivers’ security personnel commit the

**FEBRUARY 2009 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

attack. Screwdrivers will argue that as the witnesses did not testify that they had personal knowledge these persons were in fact Screwdrivers' security personnel it has not been proven that they were. However, a jury may determine from circumstantial evidence the facts pertaining to a crime. Additionally, an appeals court may not review the findings of fact made by the jury unless clearly erroneous. Here, it was reasonable for the jury to determine that the three persons who the witnesses testified to seeing beat Peter were in fact the Screwdrivers' security personnel due to their clothing, size and location. The three persons were all "large" like the 6 feet tall and 250lbs security personnel wore Screwdrivers' "uniforms" and were seen committing the crime on Screwdrivers' property. It is clearly reasonable for the jury to have determined the persons to be Screwdrivers' security personnel and the appeals court should not overturn this determination.

2. On the second argument of Screwdrivers, the appeals court may make a determination of law but again may review only for a clearly erroneous decision. While an employer may not be held liable for the intentional torts of its employees committed outside of the scope of their employment, where the employees' scope of employment includes similar acts of violence and inherently and specifically requires the use of force in carrying out their duties, the employer may be held liable for those actions that were a foreseeable outgrowth from the employment. It is arguably foreseeable by Screwdrivers that its security personnel would injure someone and commit battery. Additionally, the extent of the battery was foreseeable given the parameters with which it chooses its security personnel. As Screwdrivers only hires employees who are very large and are authorized to use force, it is arguable the employees are inherently violent and any of their violence is foreseeable. Here the jury has made a determination that it was in fact foreseeable by Screwdrivers that its security personnel would injure someone by battery. As such, the battery on Peter would fall within a foreseeable outgrowth of the scope of the security personnel's employment and Screwdrivers should be held liable for those actions. Therefore, it is unlikely the appeals court would overturn this determination.

3. As discussed above in #2, it was reasonably foreseeable that Screwdrivers' personnel would commit such a tort. As such, Screwdrivers may be held vicariously liable for the damages resulting therefrom. Such damages may include punitive damages where as here, the victim has suffered extreme injury that is likely to have lasting effects. Therefore, it is unlikely the appeals court would find in favor of Screwdrivers.

REPRESENTATIVE ANSWER 2

Part 1

On appeal, absent clear error, the Court will defer to the record and evidence therein, since they do not have the opportunity to observe the witnesses in court. In this case, the witnesses (plural) testified that they saw three large persons, wearing the distinctive Screwdriver's (S) Security shirts, carry Peter (P) to S's parking lot, where they beat and kicked him until he was unconscious. Moreover, S has a reputation for large boisterous crowds, and therefore employs

**FEBRUARY 2009 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

conspicuous security personnel who are all large (all over 6 feet tall, 250 lbs) and all wear the distinctive shirts with the word "Security" in bold letters, as identified by the witnesses.

Therefore, no clear error has been demonstrated, and the appellate court will defer to the trial court on this issue and uphold the judgment.

Part 2

Vicarious liability/respondeat superior. Under the doctrine of respondeat superior, an employer (S) will be held liable for the acts of its employees who act in the scope of their employment. Here, S is arguing that these were intentional torts committed outside the scope of the employees' jobs. Normally, a frolic (or detour) of an employee will relieve (or at least mitigate) an employer's liability, as will gross negligence or intentional torts. Here, however, the employees function was to exhibit a conspicuous presence, they were all very large (see above), and - although not permitted to "hit or kick" anyone - they were authorized to grab boisterous patrons separate those involved in altercations and physically eject them from the club (e.g., take them outside) if necessary. Thus, the scope of the employees' duties inherently involved physical altercations with patrons. As a result, S cannot argue that they (S) should not be held vicariously liable due to them (the security personnel) acting out of the scope of their employment.

The appellate court will uphold the trial court on this issue.

Part 3

Punitive damages are not normally allowed absent gross negligence or extremely outrageous conduct such as reckless, malicious or wanton disregard for the safety of others. Here, the security personnel "beat and kicked [P] until he was unconscious". Thus, punitive damages are appropriate. It is also worth noting that the punitive damages of \$300K are less than the compensatory damages of \$1M.

Regarding the willfulness of the employees' torts, this does not absolve S from liability, as addressed in Part 2 above.

Conclusion

For the reasons stated above, Screwdrivers is unlikely to prevail on the appeal for any of the three issues.

**FEBRUARY 2009 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

QUESTION 3

Donald and Daisy are married. Both have a history of criminal activity. Donald has multiple convictions for theft and Daisy has convictions for theft and perjury. Upon Daisy's learning that Donald had recently committed several thefts, she and Donald separated.

In an attempt to resolve their marital problems, Donald and Daisy went for counseling with Joe, the minister of their church. Daisy and Donald discussed their problems, including the thefts, with Reverend Joe.

Because of the mental stress, Donald went to see his family doctor. He discussed the separation and thefts with the doctor. His doctor referred Donald to a licensed psychologist. Donald tells the psychologist about the problems with his marriage and about his criminal activity.

Donald has been charged with the thefts. Donald wants to know if Daisy, Reverend Joe, his family doctor, and the psychologist will be able to testify against him at his trial for the thefts.

Discuss fully the admissibility of the testimony of the four individuals over Donald's objection.

REPRESENTATIVE ANSWER 1

Testimony by Daisy

Under the marital privilege, conversations between a husband and wife that are intended to be confidential cannot be admitted in court. Here, the statements that Donald made to Daisy when it was just the 2 of them are protected by this privilege, but statements made in the presence of others (like the Reverend) will not be protected by the marital privilege.

Spousal immunity allows a spouse to choose whether or not to testify against their other spouse. Donald and Daisy have separated but are not divorced. If the separation is permanent (there is no intention to resume the marriage) then the immunity is lost. If it is not permanent, then Daisy has a choice about whether or not to testify.

Under Maryland law, a person convicted of perjury is not competent to testify unless they are a defendant in their own trial. Due to her prior perjury conviction, Daisy will be found incompetent and as a result, she will not be allowed to testify against Donald.

**FEBRUARY 2009 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

Testimony by Reverend

Donald will argue that this communication to the Reverend should be protected by the priest-penitent privilege which is recognized in Maryland. This provides for the exclusion of testimony by an individual to their religious advisor. Here, there may not be an expectation of confidentiality however because Daisy was in the room when Donald talked about his thefts. These statements will therefore not be privileged and Reverend Joe may be called to testify as to what Donald told him.

The statements made by Donald to Reverend Joe during the counseling sessions may be admitted.

While it is hearsay, Donald's out of court statements are being offered against him thus it comes in as a party admission. Daisy's statements during the same counseling sessions will not be admissible on those grounds because she is not on trial. Her statements will be an out of court statement being offered to prove the truth of what is asserted. Thus, they should not be allowed in against Donald.

The statements made by Daisy to Reverend Joe regarding the thefts should not be admitted.

Testimony of Doctor

The state of Maryland does not recognize a doctor-patient privilege so that cannot protect Donald here. The federal rules allow for protection of statements made for the purpose of treatment and diagnosis, but in Maryland, any statements made would be admissible. Again, the party admission would get past any hearsay concerns.

This testimony will be admitted.

Testimony by Psychologist

While Maryland does not recognize a privilege for doctor-patient, they do for psychotherapists and their patients. Here, Donald told his psychotherapist about his criminal activity because it related to the overall problems with his life. These statements would be protected by privilege because the psychologist is seeing him for the purposes of mental health counseling.

Thus, an objection to this testimony should be sustained.

**FEBRUARY 2009 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

REPRESENTATIVE ANSWER 2

Daisy

Daisy will not be able to testify against Donald because she has been convicted of perjury. In Maryland people who have been committed of perjury are barred from testifying. Even if Daisy were able to testify Donald could assert the privilege of confidential marital communications against Daisy if his communications with her about the thefts were communicated in confidence. If there was no expectation of confidentiality between Donald and Daisy when he communicated these things, he cannot assert this privilege. Furthermore, Daisy cannot be forced to testify against her husband in a criminal proceeding. This privilege belongs to the witness spouse, so that if Daisy wanted to testify against Donald (and thus damage the marriage) she could. Even if Daisy was able to testify, however, her credibility could be impeached with evidence of the prior perjury and theft as indications of her lack of credibility.

Reverend Joe

Donald will be able to prevent Rev. Joe from testifying because information communicated to clergy within the scope of religious absolution etc., is privileged. However, Donald will have to prove that his communication with Rev. Joe was in the scope of religious devotion. The discussion with Reverend Joe also included Daisy, which might destroy the privilege if the court finds that Donald had no legitimate expectation of confidentiality (but if he did, then marital confidence privilege would bar her – see above). Furthermore, if the scope of the conversation only included the marital problems and not the thefts, then it is possible that Rev. Joe would be able to testify as to that issue. However, he probably will not be able to testify against Donald at all because the facts indicate that his discussion with the Reverend was in the scope of religious observance/ guidance.

Doctor

MD does not recognize a doctor-patient privilege (although the federal rules do). Therefore, his communication to his doctor about the thefts will be admissible against him, and he will not be able to prevent the doctor from testifying.

Psychologist

MD does recognize a psychologist patient-privilege, and therefore, Donald will be able to prevent the psychologist from testifying as to the information he gave him in the course of his treatment. Again, the information must be communicated to the psychologist in the course of his treatment or the privilege will not apply.

**FEBRUARY 2009 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

QUESTION 4

Creative Publications, Inc. (“Creative”) provides page design, illustration layout and typesetting services for would-be authors. Ames is the author of a manuscript for a manual on home design. Ames entered into a written agreement with Creative for its services. The contract provided that the final design for the book would include illustration exactly as submitted by Ames. The contract further provided that Creative’s fee was \$2,500 and that if Ames failed to pay any invoice within 30 days of presentation, Creative would have the right to enter judgment by confession against Ames in the District Court of Maryland for Talbot County. The contract provided that Ames’ address was 222 Park Street, Easton, Maryland.

Creative provided its proofs to Ames on May 20, 2009, together with its invoice for \$25,500. Upon inspection, Ames noticed that the proofs did not include several illustrations. Ames refused to pay the invoice.

On July 1, 2009, Creative filed a legally sufficient complaint in the District Court for Talbot County stating it had performed the contract and seeking a judgment by confession for \$2,500. The affidavit in support of the complaint stated that Ames lived at 222 Park Street, Easton, Maryland. On July 6, the Clerk of Court prepared a notice of judgment. On that day, Smith, the president and sole owner of Creative, picked up the notice from the Clerk’s office and stopped by 222 Park Street on his way home from work. His knock at the door was answered by Bill, who told him that Ames no longer lived there. Smith, unsure what to do, left the notice with Bill asking him “to make sure Ames gets these.”

On July 7, Smith filled out a return of service form in which he stated that he “had left the notice at 222 Park Street in the possession of Bill.” On August 6, Bill saw Ames at a hardware store and gave Ames the notice, explaining how the documents had come into his possession.

- a. What grounds does Ames have to contest the confessed judgment?**
- b. What procedural steps should Ames take to accomplish her goals?**
- c. What are the time frames within which Ames must act?**

REPRESENTATIVE ANSWER 1

The MD Rules of Civil Procedure apply to these facts.

**FEBRUARY 2009 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

(a) Ames can challenge the confessed judgment on several grounds including improper service of process and Creative's breach of contract.

improper service to address

Service to a defendant must be reasonably calculated to provide actual notice.

Under rule 3-611, the court can enter a confessed judgment, if it is properly filed and states a liquidated amount, has an affidavit specifying the amount due, and states the address of the defendant or that the defendant's whereabouts are unknown. After entry of the judgment, notice must be made promptly of the judgment (instead of a summons) in the same manner required in 3-121. see 3-611.

The notice did not comply with 3-121(a)(1), however, because it was not hand delivered to Ames. The service also did not comply with 3-121(a)(2) because the address where the notice was left was no longer Ames' dwelling house or usual place of abode. Smith knew that when he arrived at the house but left the notice with Bill anyway. This was improper because it was the wrong address and Bill did not live with Ames (therefore, he was not a resident of suitable age and discretion).

Ames can also challenge the fact that the service was not made by a proper individual. Smith is the president and sole owner of Creative, the plaintiff, and therefore he is not a proper person to make service under section 3-123. Rule 3-123 requires the person be a sheriff, by a competent private person who is 18 years of age or older. Service can be made by an attorney of record, "but not by a party to the action." Thus, service by Smith was improper and invalid.

Smith did not try to complete service via the mail, as provided in rule 3-126(a), and did not comply with 3-126(a)(1) submit proof of the description of the person he served (Bill) or facts indicating that Bill was a proper person to serve. The July 7th statement was too vague to comply with the rule properly because it did not indicate why Bill was a proper person to serve. Smith also did not file proof under affidavit, as required in 3-126(2) that included his name, address, and telephone number and a statement that he is of the age of 18 or over.

merits: breach of contract

In addition to these service of process issues, Ames also has the substantive defense that Creative breached the contract by not including several of his illustrations in the proof. By refusing to pay the invoice, Creative and Ames should have worked together to solve the problem to avoid a total breach of contract. The facts, however, do

**FEBRUARY 2009 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

not indicate what happened after Ames refused to pay the invoice and before the complaint was filed. Ames can argue that a confessed judgment was not proper under the contract because Creative's breach is what caused him to refuse to pay.

(b) Ames should immediately file a notice of intention to defend, pursuant to rule 3-307. Ames "shall" file such a notice, which may include any explanation or ground of defense (i.e., improper service and Creative's breach). I would also recommend that Ames retain an attorney to represent her in this matter. If done, the attorney will need to serve the notice of intent to defend according to rule 1-321 (see rule 3-307).

Ames can also file a motion under rule 3-311 asking the court to reverse the judgment on the grounds of improper notice, etc. as discussed above.

A rule 3-534 can be filed, asking the court to reopen the judgment to receive additional evidence, to amend its findings or its statements of reasons, to set forth additional findings or reasons, enter new findings or new reasons, or amend judgment or enter new judgment. This should be filed along with a motion for new trial (motions joined together). (see 3-534).

The motion can also be filed under rule 3-611(c) to open, modify, or vacate the confessed judgment. The motion must state the legal and factual basis for the defense to the claim (Creative's breach of contract).

(c) The notice of intent to defend must be filed within 15 days of service of the complaint. see rule 3-307. Thus, Ames should file the notice as soon as possible. He did not receive actual notice of the judgment until August 6th, so the 15 day clock should not have started before then.

A motion to alter or amend judgment under rule 3-534 must be filed within 10 days of entry of judgment. A motion to revise judgment under rule 3-535 can be filed within 30 days. Here, however, Ames was not given proper notice of the judgment until August 6th, a full month after the judgment was entered. Thus, Ames should approach the court immediately to resolve the issue. August 6th still falls within the 30 day period (because the time frame is over 7 days and therefore doesn't count saturday, sundays, or holidays), so there may still be time, but if not, Ames should argue that the clock should not start until the date she received notice (Aug. 6), which will be granted under rule 3-611(c).

Under these facts, the court will likely find that there is "a substantial and sufficient basis for an actual controversy as to the merits of the action," and therefore will

**FEBRUARY 2009 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

order the judgment of confession opened, modified, or vacated to allow Ames to file a responsive pleading. see rule 3-611.

REPRESENTATIVE ANSWER 2

a. Ames has both procedural and substantive grounds for contesting the confessed judgment. Ames main substantive ground for contesting confessed judgment is breach of contract on the party of Creative. Because this is a contract for services, as opposed to goods, common law applies as opposed to the UCC. Under common law, breach by one party does not mean that the other party is excused from performing. In other words, there is no perfect tender rule. The standard instead is substantial performance with the terms of the contract.

In this contract, the parties specifically provided that the design would include illustrations exactly as submitted. Because this condition was not performed by Creative, several illustrations were omitted, Creative breach the contract. Ames does not have the right to refuse all payment, but rather has a claim for damages, which would likely be a reduced invoice price. Consequently, Ames should not have a judgment against him for the full contract price.

The main procedural ground for contesting the entry of judgment is insufficient/improper service. The first problem with the service here is that it was performed by a party. While an attorney may serve, a party may not. Smith as the president of Creative may not serve process. The second problem is that Ames was served at the wrong address. Ames no longer lived at the address. While Bill may be of suitable age and discretion, he is not a resident of Ames dwelling house. The return of service is consequently misleading because Smith knew that Ames was not served.

b. Ames should file a Motion to Vacate the Entry of Confessed Judgment, a Notice of Intention to Defend, and a Motion to Amend Judgment. The Motion to Vacate Entry of Confessed Judgment should allege that it is not a liquidated claim, based on the breach of contract by Creative and thus, it is inappropriate relief.

The Notice of Intention to Defend should include an explanation of why the 15 day filing should be waived due to insufficient service of process.

The Motion to Amend Judgment should allege that due to Creative's breach any judgment brought under the contract should be less than \$2,500. (See substantive ground in 4.a.)

**FEBRUARY 2009 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

Attached to the Motions should be a copy of the contract, a copy of the illustrations provided to Creative, and a copy of the inaccurate proofs recieved from Creative. Ames may also include an affidavit as to the breach of contract, though this is not necessary. Both motions should be filed in order to account for a variety of responses from both the judge and Creative.

c. Because there was improper service of process on Ames, the July 6 date is not determinative. Ames actually came to know about the claim on August 8. Ames needs to file the Notice of Intent to Defend immediately, as opposed to in 15 days. According to the courts documents, the entry of judgment was 30 days ago, thus Creative could seek final judgment at anytime.

Within 30 days of August 6, Ames should file the Motion to Vacate and Motion to Amend.

**FEBRUARY 2009 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

QUESTION 5

Able owned several unused commercial greenhouses in Maryland. Baker and Carr approached her with a proposal to go into business with one another to grow flowers for sale to local florists. They drew up and signed a document entitled "Business Plan" which provided that the three would form a Maryland corporation, that they would be equal shareholders, and that Baker and Carr would each invest \$25,000 for their stock. The business plan provided that marketing efforts would be handled by Carr, that Baker would be responsible for management, and the Able would be responsible for growing the flowers in her greenhouses in return for her stock.

The three persons signed Articles of Incorporation for "ABC, Inc." Baker said that he would "take care of the rest of the paperwork," but he did not file the Articles of Incorporation.

Shortly thereafter baker wrote a check for \$25,000 to ABC, Inc. and deposited it in a bank account in ABC, Inc.'s name. Carr deposited \$10,000 one week later. Baker and Able met with a sales representative from Northern States regarding establishing a credit account for fertilizer and supplies. They told the account manager that ABC, Inc. was a start-up business, gave him a copy of the business plan, and told him that ABC, Inc. had \$35,000 in working capital and was expecting an additional \$15,000 from Carr. The credit manager approved the application, and, for six months, Able purchased supplies from Northern States. Invoices were sent to her in the name of "ABC, Inc." and Baker paid the invoices with checks drawn on the company's account.

The business did not prosper and, after six months, it had no money in its account. Baker and Carr told Able that they were ending the corporation's operation. Able protested, saying that the business had fine prospects. Carr said that he "had lost enough money already" in the business. Baker informed Northern States that ABC, Inc. had ceased operations and had no assets to pay its balance due of \$10,000. Northern States has filed suit in a Maryland court of appropriate jurisdiction and venue against ABC, Inc., Able, Baker, and Carr personally for \$10,000.

What defense are Abel, Baker and Carr likely to assert to Northern States' claim? Under these facts how is a court likely to rule?

**FEBRUARY 2009 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

REPRESENTATIVE ANSWER 1

Able

Able will attempt to assert the defenses of de facto corporation and corporation by estoppel against Northern States. The corporate form protects officers of the corporation for personal liability for the actions of the corporation, as long as they act on behalf of the corporation. The defense of de facto corporation is available if the corporation has substantially gone through all of the elements of incorporating, but has failed to become incorporated because of a minor detail. Here, this defense is not available to ABC corporation because the articles of incorporation were never even filed with MDAT. Corporation by estoppel will be available as a defense to Able because Northern at all times dealt with ABC as if it was a corporation, sent ABC inc invoices and was paid by checks from ABC inc's account. Northern is now estopped from asserting that ABC is not a corporation for this reason. Furthermore, ABC will be liable to the corporation only as far as her personal investment in the corporation if she is protected by the corporate form. Therefore, Northern could argue that it has a right to put a lien on the green houses because it could consider them corporate property since she contributed them in return for corporate stock. However, Able is probably not liable to Northern.

Baker

Baker will not be able to assert either de facto corporation status or corporation by estoppel. As above, de facto corp is not available here since no effort was made to file. Furthermore, since Baker was the one responsible for filing the articles with MDAT, but he didn't do it, he cannot claim to be protected by the estoppel defense because he has unclean hands. His failure to file can be seen as a violation of his duty of care to the corporation - which is what a reasonably prudent person would have done. Here, a reasonably prudent person would have filed with MDAT. Therefore, he may be liable to the other members of the corporation if ABC or any of its members are found liable. The court is likely to rule that Baker is personally liable to Northern.

Carr

Carr will be able to assert corporation by estoppel because Northern dealt with ABC as if it was a corporation, and Carr believed that he was protected by the corporate form. However, he may be liable to ABC for the 15000 that he promised before operations were commenced. AN offer to buy stock before the corporation is begun will be held open until the corporation is created, and Carr only paid 10,000 of his own share. Therefore, he may be compelled by other officers of the corporation to contribute this money now that the corporation is winding up, in order to satisfy the debt owed to

**FEBRUARY 2009 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

Northern. Even though Carr has manifested a desire to end the corporation, he would still be protected by the corporate form during the dissolution process. Therefore, it is likely that since Carr thought he was acting under the protection of the corporate form and Northern dealt with him as such, he will be protected by corporation by estoppel.

REPRESENTATIVE ANSWER 2

A corporation is a business entity that shields the personal assets of its shareholders. Here, Able, Baker, and Carr signed Articles of Incorporation but they were never filed with the State Department of Assessment and Taxation and thus a legally recognized corporation was not created.

A general partnership is created by two or more people for a profit making purpose and the partnership does not give protection to the personal assets of the partners. Here, Northern States is likely to claim that ABC Inc. was actually a partnership since it was not formed under Maryland corporate laws and thus the partners are personally liable for the debts of the partnership.

A defacto corporation is one that does not meet the technical specifics of the law but where the shareholders honestly believed that there was a corporation and held themselves out to the rest of the world as a corporation. Here, Able and Carr truly believed that ABC was properly incorporated because Baker stated that "he would take care of the rest of the paperwork." However, Baker knew that ABC was not a corporation and thus may be estopped from shielding his assets under the doctrine of defacto corporation.

Corporation by estoppel is where third parties believe they are dealing with a corporation and thus are estopped from claiming that no corporation exists. Here, Baker and Able met with a Northern State representative, explained they were a start-up business, gave him a copy of the business plan, told Northern about ABC's working capital, sent invoice for "ABC Inc.", and the company paid on checks drawn on the company's account. Therefore, it is likely that all three could use the defense of corporation by estoppel since Northern had no knowledge and acted as if they were dealing with a corporation.

The fact that Carr is responsible for marketing, Baker for management, and Able for growing the flowers does not make the three of them personally liable for debts of the company. Yes they are officers (and possibly directors), but officers and directors are not personally liable for the corporation's debts.

**FEBRUARY 2009 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

Northern will also try to claim that since Carr did not make his entire investment, the company is owed another \$15,000 and that Northern can attach a judgment against that outstanding equity. However, this appears to be a matter of internal corporate business and thus does not entitle Northern to a claim against the outstanding equity investment.

Piercing the Corporate Veil is when a third party claims that the corporation is a sham and the court must find that there has been a substantial fraud or extreme and outrageous conduct that would work an injustice if the corporate veil is not pierced. Here, Northern believed that they were dealing with a corporation, there is no evidence of fraud by Able, Baker, and Carr, and thus it is unlikely that the court will allow Northern to pierce the corporate veil.

An additional issue is whether Able's commercial greenhouses are now corporate property. It does not state in the facts that Able transferred the greenhouses to the company and thus a property transfer cannot be inferred. Thus, it is unlikely that Northern can go after Able's greenhouses.

Therefore, it is likely that the court will allow Able, Baker and Carr to defend their personal assets from Northern. Since, ABC does not have any assets Northern will not be able to collect the \$10,000 debt.

**FEBRUARY 2009 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

QUESTION 6

The national home foreclosure rates are at an epidemic high. Forty percent (40%) of Maryland homeowners who purchased homes in the past two years have been subject to mortgage foreclosure actions by their mortgage companies. Research shows that most of these homeowners had a five percent (5%) or greater increase in their mortgage rate in one year.

In light of these conditions, on January 20, 2007, the State enacted a law that states in part as follows:

“Any homeowner in the State of Maryland who purchased a home within the last two (2) years, with an adjustable mortgage interest rate that adjusted more than two percentage (2%) points during these two years, is exempt from foreclosure actions for a period of one year from the date of notice to the homeowner by the mortgage company, in order to allow a cooling off period to negotiate refinancing terms with the mortgage company.”

The mortgage companies are understandably upset since mortgages originating in Maryland are customarily bundled with mortgages originating elsewhere and sold to investors.

A national mortgage company based in Maryland comes to you, a Maryland attorney, and asks you to challenge the law. What challenges might you bring and what defenses do you expect to be raised?

REPRESENTATIVE ANSWER 1

Challenges and Defense to Mortgage Law

Standing

First, I would assess whether the national mortgage company had standing to challenge the law. Standing requires injury-in-fact or threatened injury, causation, and redressibility. Here, the national mortgage company is based in Maryland. To the extent that the mortgages held by this company are like others which are customarily bundled with mortgages originating elsewhere and sold to investors, the enacted law poses the threat of significant economic injury to the mortgage company.

FEBRUARY 2009 MARYLAND BAR EXAMINATION QUESTIONS AND REPRESENTATIVE GOOD ANSWERS

Defense: The state would raise the defense of ripeness, since the national company has not yet shown any indication that it suffered harm as a result of the law's enactment.

Procedural Due Process

Under the Due Process clause of the 5th Amendment made applicable to the states by the Fourteenth Amendment, the mortgage company could challenge the law based on the fact that it deprives them of property without due process of law. The law as written does not provide the mortgagees with notice or a hearing. Rather, it exempts all Maryland homeowners from foreclosure actions for one year to permit the cooling off period. Without the proper procedural guarantees, the law should be challenged.

Defense: The state would argue that this is a legitimate exercise of police power for the general welfare of citizens' mortgage.

Substantive Due Process and Equal Protection

The mortgage company may also want to challenge the law because mortgage companies do not make up a suspect class, the rational basis test would apply. The company would bear the burden of proving that there is no rational basis for the law. The purpose of the law is to remedy the effects of the astronomical foreclosure rates and the dramatic increase in the mortgage rates. However, it singles out homeowners who are threatened by the prospect of foreclosure and it operates to the detriment of the mortgage companies. The class of mortgage companies is being treated differently.

Defense: The state would argue that the law is rationally related to a legitimate state interest and that it is implemented in the least restrictive means possible.

Impairment of Contracts

Since the law applies to existing mortgages, it poses implications for existing contracts. Therefore, the mortgage company could assert a challenge to the law on this basis.

Defense: The state would argue that this is a legitimate exercise of police power for the general welfare of citizens with mortgages that are being subject to foreclosure actions. It is permissible under certain circumstances for the state to impair contracts pursuant to its police powers, including in the realm of housing matters.

Takings Clause

**FEBRUARY 2009 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

Under the Takings Clause, the state is prohibited from taking property without providing just compensation. The mortgage company can argue that this law negates all economically viable use of the land and prevents the mortgagees from imposing a lien on property that rightfully belongs to them.

Defense: The state would argue that this action was necessary and promotes a legitimate government purpose.

Commerce Clause

The law runs afoul of the Commerce Clause by placing an undue burden on interstate commerce. Again, the law would disrupt the present practice of mortgage bundling with mortgages originating elsewhere and sold to investors. There is an argument, albeit slightly weak, that there is a lack of a sufficient nexus between the enacted law and the harm it seeks to remedy.

Defense: The state would argue that the law was enacted to achieve a legitimate governmental purpose.

REPRESENTATIVE ANSWER 2

Challenges I might bring:

The Commerce Clause of the Constitution grants Congress the sole authority to regulate interstate commerce, and as such, the states may not discriminate against out of state entities or substantially burden interstate commerce, absent an important governmental interest. Here, the law places an unreasonable burden on mortgage companies because mortgages are customarily bundled with mortgages originating elsewhere and sold to investors, and there is the absence of an important governmental interest. The “cooling off period” Maryland wants to allow someone to “negotiate refinancing terms with the mortgage company” is not a sufficiently important governmental purpose.

The Equal Protection Clause of the 14th Amendment to the Constitution states that “no state” shall deny any person the equal protection of its laws. Here, “homeowners who purchased a home within the last 2 years, with an adjustable mortgage rate, that adjusted more than 2 percentage points during those two years” are being given preferential treatment over homeowners who purchased it before the “2 year” mark, and there is not a rational relationship between this law and any legitimate state interest. See above.

**FEBRUARY 2009 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

The Due Process Clause , incorporated to the states through the 14th Amendment, states no person shall be deprived liberty. Here, the “mortgage company” is the person, and is being deprived of the liberty of making a contract with someone without having the government step in and change the terms of the legal agreement. The law is not rationally related to any legitimate basis for interfering with the company’s right to contract and their liberty. The company will simply wait one year and then begin foreclosure proceedings.

The Takings clause prohibits the government from taking private property and using it for public use without just compensation. Here, the state is taking the private property of “foreclosure actions” without just compensation.

The Contracts clause prohibits a state from interfering with a prior valid contract absent an important governmental purpose. Here, the “cooling off period” Maryland wants to allow someone to “negotiate refinancing terms with the mortgage company” is not a sufficiently important governmental purpose.

Defenses to be raised by the state:

Commerce Clause – Because the law is not based on geography it simply has to pass the test of whether it discriminates against out of state mortgage companies, which it does not.

Equal Protection Clause – there is a rational relationship between exempting foreclosure actions for 1 year from the date of notice to a homeowner who bought a home when mortgage companies were giving adjustable mortgages, etc. and the state’s interest in trying to decrease foreclosures and trying to “allow a cooling off period to negotiate refinancing terms with the mortgage company.”

Due Process Clause – See above.

Takings Clause – the government is not taking private property

**FEBRUARY 2009 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

QUESTION 7

In 1950, Willie Wonta and his wife, Ruth, purchased Hershey Acres, a vacant two acre lot in Cumberland, Maryland, in fee simple as Tenants by the Entirety. They eventually constructed a chocolate factory thereon. A few years later, Willie purchased an adjacent half-acre lot that was used as a parking facility for the chocolate factory.

Willie and Ruth lived comfortably from the profits of the chocolate factory for decades and Willie hoped that their only child, Kissy, would one day take over the operation of the family chocolate business. However, as Kissy came of age she ventured off into her own career, much to Willie's dismay.

On December 15, 2008, Willie entered into a written agreement to sell "his property" to his two veteran chocolate factory employees, Lucy and Ethel, for the purchase price of \$1.7 million. Lucy and Ethel paid \$200,000 as down payment, with the remainder due at the scheduled closing on February 20, 2009.

On January 1, 2009, Ruth learns of Willie's plan to sell to Lucy and Ethel and declares she will leave him if he tries to take Kissy's inheritance away. Willie called Lucy and Ethel the next day and told them he had to cancel the deal due to unforeseen circumstances. Lucy and Ethel angrily informed him that he had no choice and settlement on the entire two and one-half (2 ½) acres would take place as scheduled.

- a. Lucy & Ethel come to you and ask what rights do they have. What would you advise? Discuss fully.**
- b. What defenses might be raised by Willie and Ruth?**

REPRESENTATIVE ANSWER 1

Tenancy by the entirety:

Under Maryland law, when a married couple takes a property as a tenancy by the entirety they both jointly own the right to all of the property and each has a right of survivorship. This is similar to a joint tenancy however unlike a joint tenancy, any attempts to transfer an interest will not destroy a tenancy by the entirety the way it will destroy a joint tenancy. Not only that, but any attempt to transfer a tenancy by the entirety will be held to be void.

Because Willie and Ruth bought the lot that the factory is built on as a tenancy by

**FEBRUARY 2009 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

the entirety the attempted transfer to Lucy and Ethel will be held to be void.

This will not protect the parking lot however. Because Willie bought the land for the parking lot by himself, it is not subject to the same protections of the tenancy by the entirety. As a result, the tenancy by the entirety does not protect the parking lot.

Misrepresentation:

A separate action for misrepresentation may also arise because Willie made assurances that he was legally allowed to sell the land in question. If it is shown that he merely intended to sell the parking lot for the price of \$1.7 million and he implied that the factory was included then he could be found liable on a misrepresentation theory. This would involve showing a devious intent as well as false statements which were relied on during negotiations. Parol evidence would be admissible to show whether or not Willie's misstatements amounted to an actionable misrepresentation.

Statute of Frauds:

A contract for the sale of land must give adequate description of the property which is being sold. If it does not, then it violates the statute of frauds and the agreement is voidable by the person against whom it is being enforced. Here, the description of the land is merely "his property" referring to Willy. A court will almost certainly find that this description is insufficient to describe the property at issue in this case. As a result this agreement violates the statute of frauds and the contract will be held to be unenforceable.

Lucy and Ethel's Final Rights:

Lucy and Ethel still should be able to get their down payment back plus interest under a theory of quantum merit. This is a quasi contract theory which guards against unjust enrichment in cases where a contract is found not to exist. Because Willie should not be entitled to any of the \$200,000 down payment, that should be returned along with any interest or incidental damages.

REPRESENTATIVE ANSWER 2

Lucy and Ethel's rights

Conflict of Interest rules prohibit an attorney from representing two clients where their interests are materially adverse or potentially adverse unless the attorney reasonably

**FEBRUARY 2009 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

believes that representation will not be limited and the clients give informed consent. Here, Lucy and Ethel are both asking for representation. As they contracted to buy the property together, their interests are not materially adverse.

A contract for the sale of land must adhere to the statute of frauds. Here, Will contracted with Lucy and Ethel to sell his property for the price of 1.7 million. Statute of Frauds requires that the agreement be in writing, describe the property, and have the signature of the party against whom action is sought. Here, the written agreement only noted "his property."

When a contract for the sale of land is breached, the non-breaching party is usually entitled to specific performance. Here, if a contract is found, Lucy and Ethel would be entitled to specific performance.

In this case, Willie's half-acre lot is only his and would be considered his property, thus Lucy and Ethel should be entitled to enforce the contract with respect to the half acre parking lot and get specific performance for it. However, the 1.7 million contract price may be considered unjust and not enforced with respect to the parking lot alone. Given the vagueness of the contract and other defenses by Willie and Ruth, a contract with respect to the chocolate factory is unlikely.

When no valid contract exists a party may still sue under quasi contract or promissory estoppel. Under quasi contract, a party may sue to prevent unjust enrichment. Here, Lucy and Ethel have given Will \$200,000, thus he has been unjustly enriched. Lucy and Ethel can sue for the money back. Promissory estoppel estops a party from denying the validity of a contract where the other has detrimentally relied to the extent of the reliance. Here, Lucy and Ethel's reliance only amounted to a loss of \$200,000. Thus, Lucy and Ethel may sue to recover the \$200,000.

b. Willie and Ruth's defenses

Tenants by the Entirety ("t/e") will be found where a married couple has interest in property that was acquired under the unities of time, title, possession, and interest. Here there is a tenancy of the entirety as states with respect to the 2 acres on which the chocolate factory sits.

Generally, a t/e may only be severed by divorce (or upon death wherein the survivor owns in fee simple) and no one party can convey or devise the interest. Thus, any contract purporting to convey the interest in property owned as t/e is invalid. Thus, Willie and Ruth will defend on the ground that the contract cannot be interpreted to include the 2-acre land with chocolate factory.

**FEBRUARY 2009 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

Willie may also defend on the ground that the contract is vague and does not specify the property he intends to sell.

**FEBRUARY 2009 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

QUESTION 8

John, a Maryland lawyer, represents the accounting firm of Debit and Credit on all of its legal matters. Over the course of many years, several of the Debit and Credit accountants have referred numerous clients to John for legal services.

In the summer of 2008, Doris, an accountant at Debit and Credit, referred to John one of her clients, Freebee, Inc. (“Freebee”). Freebee engaged John to provide advice on the best way to structure the sale of a few of Freebee’s assets and to assist Freebee in closing the sale. John’s engagement letter contained only a description of his services and the payment terms.

A few days prior to closing, Doris informed John that a confidential memorandum he prepared for use in the Freebee transaction was accidentally mailed by her to the attorney for the prospective purchaser of Freebee’s assets. The memorandum revealed that Freebee had to receive all proceeds of sale within 60 days so that it could pay for other business obligations. The attorney for the purchaser stated that the purchaser used the confidential information to offer a substantially reduced price and an expedited closing date would occur. Consequently, Freebee was pressed to accept the unfavorable offer.

John comes to you as the managing partner of his firm seeking advice on his responsibilities to both Doris and Freebee.

What advice would you give to John regarding his ethical obligations to Doris and to Freebee in the matters described above and in other unrelated matters? Discuss your reasons fully.

REPRESENTATIVE ANSWER 1

This question requires an analysis of a variety of ethical obligations that apply to lawyers. As an initial consideration, there does not appear to be a problem with the referral that John has received from Debit & Credit, nor does there appear to be an ethical problem with the pattern of referrals. A lawyer may accept referrals from others, but Maryland forbids a lawyer from transferring anything of value in exchange for obtaining referrals. Here, the pattern of referrals is not, on its face, an ethical obligation (although it may present a conflicts problem--as described below) because John does not appear to be paying or otherwise compensating Debit & Credit for these referrals.

Representation of Both Debit & Credit and Freebee

**FEBRUARY 2009 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

I would advise John to be careful in checking for conflicts with respect to the clients he obtains from Debit & Credit's referral. An attorney must not represent two parties that are directly adverse, and an attorney must also refrain from undertaking or continuing representation where that representation would be materially limited by the attorney's duties to another client, his/her own interest, or a third party. Here, the practice of Debit & Credit referring its own clients to John for representation in those clients' separate legal matters may give rise to impermissible conflicts, for example where a dispute arises between the accounting firm and its client. In such a case, if a dispute arises, John would be representing two directly adverse parties. In other, less severe instances, John could obtain information from one client that would hinder his representation of the other.

With respect to John's representation of Freebie, there was no conflict of interest at the beginning of his representation of Freebie, but now that Doris accidentally mailed the letter, a conflict has arisen. Freebee may have a claim against Debit & Credit due to the acts of its agent, Doris. John owes a professional duty to communicate any helpful information that he receives to his client, but he also owes a duty of confidentiality. John has learned about the accidental mailing from Doris, and he has a duty of confidentiality with respect to that information in his representation of Debit & Credit. John also, however, has a duty of communication to tell Freebee about the inadvertent mailing. John cannot fulfill his duty to one client without breaching a different ethical duty to another.

As a result of the conflict of interest, John should withdraw from the representation.

Engagement Letter

John's engagement letter does not violate any rules of professional conduct. The only type of engagement letter that *must*, according to the Maryland Professional Rules, be in writing, is a contingency fee arrangement. The facts here do not state that John and Freebie have a contingency-fee arrangement, and by that omission, they imply that this is an hourly arrangement. As such, it is not a breach of John's ethical obligations. Nevertheless, as the managing partner of the law firm, I would suggest that, in the future, John should more completely draft his letters of engagement to detail the scope of the representation, the objectives, and detail the payment plan, explaining how John will handle payments, the trust account of the firm, and standard billing practices.

Confidential Information

As already discussed, all attorneys have an ethical duty to maintain the confidentiality of their clients' information. Here, it is not entirely clear how Doris came to possess John's confidential memorandum about Freebee's transaction. There is an implied authority in an

**FEBRUARY 2009 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

attorney-client relationship that an attorney may disclose information to the extent that such disclosure is necessary to pursue the objectives of the client representation. Here, the facts are unclear whether John's disclosure of the information to Doris was, in fact, in furtherance of his representation of Freebee. Specifically, it is not clear why Doris would be working with John's memo that described the terms under which Freebee would sign a contract. If the disclosure was outside the scope of John's representation of Freebee, then John has violated his duty of confidentiality to Freebee.

Even if John's disclosure to Doris of the confidential memo was proper, then Doris was acting as his agent. In that principal-agent relationship, John has violated the rules of ethical conduct because Doris---his agent---sent them to the opposing counsel's attorney.

Malpractice

As a final consideration, John may be liable for malpractice. An attorney owes a duty of competence to his client, and must act as a reasonable professional would act under similar circumstances. Here, if he failed to adhere to the reasonable standard of professional conduct in representing Freebee, then she could sue him to recover her damages in the sale. If John is liable for the disclosure to the opposing attorney, then he would be liable for amount of the price reduction that Freebee was "pressed to accept" because that reduced price flowed causally from John's breach of his professional duty of care.

REPRESENTATIVE ANSWER 2

John's ethical obligations to Doris and Freebie are complicated by the fact that, in making certain disclosures (in the course of his duties) to one client, Freebie he may violate the confidentiality of another, Debit and Credit.

John is aware that Doris, of Debit and Credit, accidentally mailed the confidential memoranda to Freebie's prospective purchaser, thus leading to a substantially reduced price and expedited closing date for the sale of Freebie's assets, a detriment to Freebie.

The actions of Doris may need to be kept confidential by virtue of her employment with Debit and Credit, John's company client. John has a duty to not disclose confidential information that would serve to harm the company client. In this situation, disclosing the actions of Doris to Freebie would almost certainly lead to legal action against Debit and Credit on the part of Freebie, for mailing confidential material to the prospective purchaser of his assets.

However, John also has a duty to Freebie, to disclose any and all information relevant to his representation of Freebie, "providing advice on the best way to structure

**FEBRUARY 2009 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

the sale..., and to assist Freebie in closing the sale." In addition, the Rules provide that John may, but is not obligated to disclose Doris's error, in order to remedy a substantial financial harm.

John will be bound by confidentiality not to disclose Doris's actions. His duty to not disclose is a mandatory duty. His disclosure of information to protect Freebie's financial interests is permissive.

However, he may have to withdraw from representation of Freebie, due to a conflict of interest. John can no longer represent Freebie, as John is now materially limited, with respect to the extent of representation. Material limitation may exist where the representation of one client is limited due to the present responsibilities and duties to another client. John's refusal to disclose Doris's actions cannot be said to be in Freebie's best interests, and as such, would make representation of Freebie highly unethical, particularly where Freebie may have a future cause of action against Debit and Credit.

**FEBRUARY 2009 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

QUESTION 9

Ian owns real property improved by a building in Baltimore City, Maryland, on which he operates Sir Cakes-A-Lot ("Cakes"), an upscale wedding cake shop. Ian's principle residence is also located in Baltimore City, Maryland. In November 2008, Ian received a commitment from Bank to borrow \$2,000,000 and he agreed to provide the Bank security interests in the following assets as collateral for the Loan:

- A. the land together with the building, ovens, signage, refrigerators, and built-in display cases;
- B. rolling baker's racks, hand mixers, cake pans, spatulas, and cash registers;
- C. contracts for all orders booked through calendar year 2010, and the payments to be received by Cakes upon completion of the contracts;
- D. flour, butter, chocolate, sugar, milk, eggs, lemon curd, cake toppers, extracts, flavorings, fruits, nuts, and any already baked and frozen cakes and cookies for tastings and sale to showroom customers;
- E. money contained in the cash registers (\$200 each in two registers);
- F. the Sir Cakes-A-Lot delivery van, which was purchased new with cash in 2007.

What further steps, if any, must Bank take to perfect its security interests in the above listed assets of the business?

In your answer, classify the collateral, and describe the manner in which Bank's security interests are perfected for each type of collateral.

REPRESENTATIVE ANSWER 1

Generally all property can be perfected by taking possession of it. [9-313] However, this may not be feasible because the property is needed for the business. Additionally, the property must have attached pursuant to 9-203 for the perfected security interest to be perfected.

**FEBRUARY 2009 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

(a) The collateral constitutes a mortgage [9-102(56)] because it is an interest in real property and the fixtures [9-102(41)] which include the ovens, building, refrigerators and built-in display cases. However, some of these items may be considered equipment [9-102(33)] if they are movable and not attached as fixtures. Here, a lien should be filed in Baltimore City for the land and all of the fixtures [9-501]. A financing statement should be filed with SDAT for any equipment. [9-501 (b)(2)]

(b) The collateral is Equipment [9-102(33)] because these items are not held for sale and are being used in the business. A financing statement should be filed with SDAT pursuant to 9-501 to perfect the creditors rights in the collateral.

(c) The payments to be received and contracts are accounts [9-102(11)] because they are the right to payment of a monetary obligation. A financing statement should be filed with SDAT pursuant to 9-501 to perfect the creditors rights in the collateral.

(d) These materials are inventory [9-102(48)] because they consist of raw materials, work in process and are going to be consumed by customers. Even though some will be used for sale in the showroom and not consumption they will still be considered inventory because the primary purpose is to sell them. A financing statement should be filed with SDAT pursuant to 9-501 to perfect the creditors rights in the collateral.

(e) Money contained in the cash register will be considered a general intangible [9-102(42)] because that section specifically classifies it as such. Pursuant to [9-313(b)(3)] money is not perfected until possession is taken of the assets. However, pursuant to 9-315 there will be perfection in money up until 21 days after the inventory that gave rise to the money was sold, so long as the inventory was perfected.

(f) It is likely the van will be considered equipment of the business [9-102(33)]. However, this equipment is separately titled with the Department of Motor Vehicles in Maryland, and therefore, the bank must ensure that its security interest is notated on the face of the certificate "certificate of title" [9-102(10)] in order to perfect its rights over other creditors. There is no need to file a financing statement so long as there is attachment, which there was in this situation because of the value given by the bank, perfection will occur by notating the lien on the certificate of title. [9-311 (a)(2)].

**FEBRUARY 2009 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

REPRESENTATIVE ANSWER 2

The bank is seeking to create a security interest, which is created when a creditor gives value in exchange for an interest in collateral to secure the repayment of a debt. A security interest is attached once the creditor gives value, there is a security agreement, and the debtor obtains rights in the collateral. Once attached, the security interest becomes enforceable.

A. The land, together with the building, oven, signage, refrigerators and built-in display cases: This collateral constitutes real property (land together with building) and fixtures, items that become so affixed to real property that they become part of the real property (oven, signage, refrigerators, and built-in display cases). To collateralize these items, the Bank should get a mortgage, a security interest in real property that secures the repayment of a debt by permitting the mortgagee to sell upon default. This mortgage should be filed in the land records.

B. Equipment: Equipment is defined as "goods other than inventory, farm products, or consumer goods." Here, the rolling baker's racks (not fixtures because moveable), hand mixers, cake pans, spatulas, and cash registers are equipment because they were purchased for the use in a commercial enterprise (as opposed to personal use) for Sir Cakes-A-Lot. A security interest can be perfected either by possession or attachment. However, for Sir Cakes-A-Lot to continue using this collateral, the Bank must perfect by filing. This may be secured under Art. 9 and the Bank must perfect this interest by filing a financing statement with SDAT, describing the collateral and providing the debtor's name accurately in the records.

C. Accounts: "Accounts" is described in Art. 9 as "a right of payment of monetary obligation, whether or not earned, by performance...for services rendered or to be rendered." The "Contracts for all orders booked through calendar year 2010, and the payments to be received by Cakes upon completion of the contracts," constitute "accounts" under Art. 9. To perfect this interest, because it is intangible, it must be perfected by filing a financing statement.

D. Inventory: inventory is "goods, other than farm products which are leased, or held for sale by a person, and they "consist of raw materials ... or materials used or consumed in a business." Flour, butter, chocolate, sugar, milk, eggs, lemon curd, cake toppers, extracts, flavorings, etc... are all items used in the business of Sir Cakes A Lot to produce cakes. Because the business will need to be in possession of these items, the Bank should file a financing statement with SDAT, describing the collateral and claiming a security interest.

**FEBRUARY 2009 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

An interest in the proceeds of inventory is usually implied, but the Bank may want to also include an after acquired property clause for extra protection.

E. Money: Money can be collateralized under Art. 9 as money, but to perfect, the bank must take possession of the \$200 in each of the two registers.

F. Vehicle: The Sir Cakes A Lot Delivery van is likely used as equipment, see above, but it is also a vehicle subject to titling laws. Therefore, to perfect this interest, the Bank should file an application with the MVA to place its name on the certificate of title as the secured party, to put others on notice of its interest, and pay the applicable fee to the MVA.

**FEBRUARY 2009 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

QUESTION 10

In March 2006, as Maryland State Senator Smith walked home from work he was robbed and violently assaulted. While struggling with the suspect, Smith scratched the suspect and pulled strands of hair from the suspect's head. The police were able to use these items to produce a DNA profile of the attacker. Senator Smith also provided a vague description of the suspect and advised the police that the suspect reeked of alcohol. The authorities, however, were unable to identify a suspect even after an extensive police investigation.

Angered by the attack upon him, Senator Smith introduced a bill that became law in October 2007, which required every person convicted of a Driving While Impaired offense "DWI," to submit to a blood test to provide DNA for identification purposes.

In December 2007, Al Key Hall was convicted of a DWI. After conviction Hall was required to provide a DNA sample pursuant to the new law. Hall protested the DNA process, refused to provide a sample and stated that he wanted counsel. Despite his protests Hall was forced to provide a blood sample because of his DWI conviction. Upset by the process, Hall went to his gym, "The Brick House," to blow off some steam. While working out, Griffin, the gym security guard, asked Hall why he was wearing a bandage on his arm. Hall responded by stating that the cops made him give a DNA sample. Griffin then asked Hall what was the big deal about that. Hall responded by stating that Griffin was right, after all he had not done anything really bad since he knocked that politician in the head last year.

The DNA profile of Senator Smith's attacker was ultimately submitted to the Maryland DNA data bank for comparison in order to discover the identity of his attacker. The attacker's profile matched the DNA profile from Hall's 2007 sample.

As a result of the DNA profile match, and both Griffin and Smith's testimony, Hall was indicted by a Maryland Grand Jury on the charges of assault and robbery. Hall has retained you as counsel to challenge the admissibility of the DNA and other evidence obtained from him in December 2007.

What arguments will you make at trial on behalf of Hall? How do you expect the State to respond?

**FEBRUARY 2009 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

REPRESENTATIVE ANSWER 1

Although this situation raises several constitutional issues, Hall will not likely be able to suppress the evidence obtained.

DNA

Fifth Amendment – There were two DNA samples involved in the match—the sample obtained from Smith and the sample obtained in jail from Hall. In terms of the sample obtained in jail, Hall may try to argue that being forced to give a sample of his DNA violated his constitutional right against self-incrimination. However, the Fifth Amendment only applies to testimony, not DNA, so he is not likely to prevail.

Fourth Amendment – Hall may also argue that his fourth amendment rights against unreasonable searches and seizures were violated by having to submit to providing a DNA sample. Hall is unlikely to prevail because as a prisoner he has a lesser reasonable expectation of privacy in jail. Moreover, the act of having his DNA taken is likely to be seen only as a reasonable intrusion, even if he did have such a right.

Ex Post Facto – Hall may also argue that the application of a 2007 enacted DNA law, in conjunction with gathering evidence for a crime committed in 2006, violates his right against ex post facto laws. However, the DNA law doesn't involve a new crime that he is being charged for, or an extended sentence—but merely provides the government with additional investigation tools. Accordingly, Hall won't likely prevail

Fourteenth Amendment Right to Privacy – Hall may assert that his fourteenth amendment right to privacy was violated by having to submit DNA, and that, moreover, due process protects him from having to make involuntary confessions. However, because there was no involuntary “confession,” in terms of an actual statement, he won't likely prevail. Moreover, the limited privacy, discussed supra, will also defeat this argument.

Right to Counsel - Hall requested counsel as his DNA sample was collected, and he will likely argue unsuccessfully, that his 5th and 6th Amendment Rights to Counsel were violated.

5th Amendment Right to Counsel – A Court would not likely find that Hall' fifth amendment Miranda rights were violated, even though he asked for his lawyer, because Miranda requires a custody and an interrogation. The security guard was not a law

**FEBRUARY 2009 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

enforcement officer and he was not compelled to give the statement. Thus, his confession-like statement won't likely be suppressed.

6th Amendment Right to Counsel – Because Hall hadn't yet been charged with the offenses against Smith when his DNA sample was taken, his sixth amendment right to counsel, which would require the presence of his lawyer when being questioned, would not apply. Thus, the evidence will likely be admitted against Hall.

REPRESENTATIVE ANSWER 2

Constitutional Issues

DNA Evidence

The DNA sample obtained from Hall would be challenged as a violation of the 4th and 5th Amendments and the ex post facto clause.

4th Amend

The fourth Amendment, applicable to Maryland through the 14th Amendment of the U.S. Constitution, protects individuals from unlawful searches and seizures. Here, the collection of a DNA sample could be considered a seizure of his person and search. Nevertheless, to challenge on the basis of the 4th Amendment, someone must have a reasonable expectation of privacy. In this instance, Hall, as a convicted drunk driver, will be considered to have less of an expectation of privacy. Additionally, there is a very limited intrusion by using a blood sample, and this will be balanced against the government's interest in obtaining the sample. Thus, the Court will most likely deny Hall's 4th Amendment challenge.

5th Amend

The 5th Amendment, through the 14th protects someone from self-incrimination. Although it could be argued that by providing the DNA sample, Hall incriminated himself related to the 2006 crime, the Court will not agree with this argument. The 5th Amend only protects testimonial evidence and DNA is not testimonial in nature. Thus, the Court will reject Hall challenge to the DNA Act on grounds of the 5th Amendment.

**FEBRUARY 2009 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

Ex Post Facto Clause

The ex post facto clause of the U.S. Constitution prohibits the government from enacting laws that retroactively punish someone for something that was not a crime when they committed it. Here, submitting a DNA sample is not punishment for the earlier crimes. Thus, the Court will reject Hall argument on this ground as well because the DNA Act is not punitive in nature. The fact that the DNA sample was used to connect him to the 2006 robbery is immaterial.

Hall Statement

Challenges to the admissibility of Hall's statement that "after all he had not done anything really bad since he knocked that politician in the head last year," on the basis of the 5th and 6th Amendments.

An argument could be made that this statement should be excluded because it was obtained without Miranda warnings, in violation of Hall's 5th Amendment right to not self-incriminate. Nevertheless, this is probably a weak argument because the gym security guard is not likely a law enforcement agent. Also, he not being interrogated at the time he made his statement. The Court will likely admit the evidence on this ground.

Hall can also say his right to counsel under the 5th and 6th Amendments violated his rights. But he was not at a "critical stage," it was unrelated to his trial from before, and he voluntarily made the statement.