JULY 2000 MARYLAND BAR EXAMINATION
REPRESENTATIVE GOOD ANSWERS

QUESTION 1

On May 1, 1998, Clem, a five year old child, was killed when struck by a car driven by Alex at or near the intersection of Vine and Myrtle Streets in Littleton, Somerset County, Maryland.

Alex and his wife, Beth, were returning to their Maple Street home at approximately 1:30 p.m. on that date. Alex had stopped at the intersection of Vine and Maple and made a left hand turn. He entered Maple Street, traveling at approximately 10 miles per hour when Clem, who was playing with several other children on the sidewalk, ran into the street and was struck by the right front wheel of Alex's vehicle. A police investigation, including an accident reconstruction, established that Clem was attempting to go to his home located immediately across Maple Street from where the group of children were playing. In statements to the police, both Alex and Beth stated that neither saw the child run into the street and that Alex had stopped his car immediately when he "felt the car hit something."

Alex promptly reported the accident to his liability insurance carrier, Statewide Insurance Co.

Following the accident, Clem's parents, Hal and Wilma, sent a letter to Alex accusing him of gross negligence in connection with the accident. They also attempted to have Alex's driver's license revoked by sending numerous written communications to the Motor Vehicle Administration. They spray painted the words "child killer" on the sidewalk in front of Alex's house. They assailed both Alex and the police in letters to the local newspaper and in calls to Alex's neighbors. The official investigative report concluded that Alex was not responsible for Clem's death.

On September 15, 1998, Alex was hospitalized suffering from depression, hypertension and a mild stroke. He was released several days later and is currently on medication.

On February 2, 1999, Hal and Wilma retained Lou, a Maryland attorney, to file suit against Alex for the wrongful death of Clem. Lou obtained a written employment agreement which provided for a contingent fee of 1/3 of any recovery obtained by settlement and 40% if suit was filed. He gave written notice to Statewide of his representation, and on March 1, 1999, filed a wrongful death action against Alex.

On March 21, 1999, without consulting or informing Lou, Hal and Wilma contacted Statewide Insurance Company's adjuster inquiring about possible settlement. After a series of telephone conversations, Statewide, through its agent, agreed with Hal and Wilma to pay $50,000 in full and final settlement of the wrongful death suit. Hal and Wilma signed a written release of Alex and his insurer, together with a written certification prepared by Statewide's adjuster that Hal and Wilma had discharged

Lou as their attorney. Lou received no fee.

In light of these facts:

A. Do Alex and Beth have any legal recourse against Hal and Wilma for their activities subsequent to the accident?

B. Does attorney Lou have a cause of action against Statewide for fees as a result of the settlement with Hal and Wilma? Explain fully.

REPRESENTATIVE ANSWER 1

A. Alex has several causes of action available to him against Wilma and Hal, including possible claims for intentional infliction of emotional distress, libel, false light, slander and negligent infliction of emotional distress. The libel and slander claims have the strongest foundation of these five. Beth, on the other hand, only has potential claims for slander and loss of consortium, with neither case being particularly strong.

Alex's claim for libel may arise from H & W's written communications to the MVA, the spray painting of the sidewalk and the letters to the newspaper. Libel is permanently memorialized defamation. The requirements for a defamation claim include a statement made by the defendant which is published with damages, falsity and fault. The letters to both the MVA and the newspaper were statements made and signed by H & W, and the spray painting, while presumably unsigned, remains a statement made by the defendants. All three were published, because they were communicated to at least one other person. Damages here exist from a permanent memorialization of each of these writings. The tougher part of the analysis arises with the falsity and fault requirements. While the falsity requirement may be satisfied factually through the investigative report clearing Alex, the fault or bad faith requirement is a tougher element to prove factually. However, the totality of the facts including the reports conclusions and the persistent and incendiary manner of H & W's actions makes a strong case for fault.

Slander contains the same elements as libel, with a notable difference that slander, because it is not permanently memorialized, requires proof of damages The calls to Alex's neighbors qualify as published statements, and the falsity and fault element analysis is the same as for the libel tort, but proving damages may be difficult. If Alex's hospitalization can be directly traced to the statements, then he can maintain a

slander action.

An IIED claim requires outrageous conduct by the defendant causing severe emotional distress to the Plaintiff. IIED's generally disfavored, but the public, continuing and harassing nature of H & W's actions satisfy the outrageous conduct prong, and the conduct was done with clear intent. Alex's hospitalization provides evidence of severe distress if it can be linked with H & W's actions.

A false light claim requires statements by the defendant which are published and tend to severely affect the plaintiff's character and reputation. It is noted earlier, the statements by H & W are published and the accusation of "child killer" is certainly injurious to Alex's reputation.

An NIED claim may arise for Alex if he can show that the hospitalization was a physical manifestation of his distress from Defendant's acts, a likely scenario given their contemporaneousness.

Beth's loss of consortium would have to be based on the short time Alex was hospitalized, an unlikely cause for damages with such an incidental stay unless he can show commensurate loss of intimacy from Alex.

B. Attorney Lou does not have a cause of action against Statewide for his fees as a result of settlement with Hal and Wilma.

The right to settle belongs to the client and not the attorney. Hal and Wilma settled with Statewide without informing Lou and signed a written release with Alex and Statewide and discharged Lou as their attorney.

Statewide Insurance did not retain Lou and since they did not retain him he does not have a cause of action against them. He has a proper cause of action against Alex and Beth for the reasonable value of his services as he was not fired for cause.

REPRESENTATIVE ANSWER 2

A. Alex and Beth have several options regarding legal action against Hal and Wilma.

First, A & B can sue H & W for intentional infliction of emotional distress (IIED). In order to show IIED, A & B must show that H & W intentional or recklessly acted in an extreme and outrageous manner because of severe emotional distress to them. In this case, the most reasonable people would think that H & W's harassing behavior of trying to have A's license revoked, spray painting their sidewalk and

constantly writing negative letters about A and calling his neighbors is extreme and outrageous. Plus, H & W definitely acted with at least recklessness and may have intended to cause distress to A & B. Finally, A suffered severe distress because he was hospitalized and suffers depression, etc. If A can prove that these conditions are directly related to the acts of H & W they would have a claim for IIED. Also, B can get damages for loss of consortium under these facts.

A & B may also have a defamation claim against H & W. To show defamation, A & B must show that H & W made false defamatory statements to third parties with actual malice. Also, A & B may have to show damages. In this case, H & W definitely made defamatory statements to others (i.e., neighbors, newspapers) alleging that A was a "child killer." Furthermore, A & B may be able to show the falsity since A was found not libel for Clem's death. A & B can probably also show actual malice because H & W seem to have made these statements with a reckless disregard as to whether A was actually at fault. Regarding damages, because the defamation is not libel (i.e. not in written form), A & B may have to show damages. However, because H & W are accusing A of an awful crime, it may be slander per se, in which case damages need not be shown. In any event, A can probably show some loss to his reputation. If the letters to the newspaper are considered libel, then no damages need be shown.

In addition, A & B can sue H & W for placing them in a false light. Here, H & W made widespread statements about A & B that cast A as a ruthless child killer, so the elements seem to be satisfied.

Finally, A & B may have an intrusion claim if ordinary people would consider H & W's actions as an offensive intrusion into A & B's mental or physiological seclusion.

B. Lou may not have a claim directly against Statewide for fees, but he can proceed against H & W pursuant to their written fee agreement.

Generally, because S knew that H & W were represented by Lou, Statewide should not contact H & W directly to try to settle. However, in this case, H & W contacted Statewide and initiated settlement talks. Statewide probably should have informed Lou, or told H & W to involve Lou, but ultimately H & W have the final say regarding accepting the settlement. Thus, they could come to a settlement agreement with Statewide.

Lou may have some recourse against Statewide because Statewide prepared the certification that Lou was no longer H & W's lawyer. However, if H & W represented to Statewide that they had fired Lou, then Lou would have to proceed against H & W. Lou could try to argue that Statewide tortuously interfered with Lou's contract with H & W. Lou will argue that Statewide knew of the contract because Lou had sent Statewide notification of his representation. However, Lou will have to show that Statewide

purposefully acted in a way to disrupt the contract relationship that L had with H & W. In this case, it seems that H & W were the ones to disrupt the contract relationship. Under these facts, Lou has no cause of action against Statewide but is probably entitled to the fair value of the work that he did for H & W prior to settlement.

QUESTION 2

Retro, a small rural county deep in the hills of Western Maryland, has an elected school board. In the recent election three of the five members elected ran on a "return to traditional values" platform. They have proposed several measures which cause the superintendent of schools some concern. Among their proposals are the following:

A. Each public session of the Retro County School Board shall begin with prayer.

B. Each morning all students shall stand, salute the flag of Retro County, and recite a pledge of allegiance to the county, state and country.

C. Bible study shall be included as part of all literature classes.

D. The Ten Commandments shall be posted where they can be plainly seen by all students of Retro County High School. To facilitate their plan, the three members of the Board intend to purchase with their personal funds a small plat of land just across the street from the school's main entrance on which to place the "Commandments."

As an experienced Maryland attorney, write a memo to the superintendent addressing the issues raised in each of the above proposals.

REPRESENTATIVE ANSWER 1

The following is my memorandum as requested discussing relevant legal issues in relation to your four recent proposals.

A. Prayer to begin Board session.

The main legal issue here involves a possible violation of the incorporation clause of the First Amendment. While this does not seem to evidence a sect preference, I would advise you that you were to mandate a particular type/denominational prayer, you may open yourself to argument that the prayer discriminates based on religious sects, and thus would only be upheld if necessary to achieve a compelling government objective. This is a difficult standard to meet. Even if the prayer is sect neutral, the Supreme court has devised a three part test to assess whether the state action involves any impermissible advancement of religion.

First, the measure must have a secular purpose. You have only told me that the Board wishes a return to "traditional values," but you are probably going to need a more convincing argument that this measure has a secular purpose.

Second, the primary effect must be one that neither advances or inhibits religion. Again, absent a stronger justification than "traditional values" I would say that you would be hard pressed to argue that the primary effect here is not to advance religion.

Finally, you must demonstrate that the law does not foster an excessive entanglement with religion. This would not appear to be the case as no religions institution is being regulated or affected by the law.

I would also advise you not to make prayer mandatory. See First Amendment freedom of speech issues discussed in Part B, infra.

B. Pledge/Salute.

Your main potential problem here involves the first amendment provision on freedom of speech which also includes the freedom not to speak. Also, the flag salute is symbolic conduct that would probably be considered speech in this context. Thus, if you are going to compel the students to engage in this activity, it might be argued that this provision is a content based regulation on speech, and is thus subject to strict scrutiny. You would need to show that the law adopts to achieve a compelling government interest. We may be able to argue that having children say the pledge would make them better citizens and more respectful of their country. This is probably not sufficient to pass strict scrutiny. Thus, you would have to allow students who do not wish to participate to refrain from doing so.

Also, you might be challenged here under a free exercise clause by students with religious objections, but this is not a good argument as the provision is generally applicable, and any burden on religion is incidental.

C. Bible Study.

This issue presents a closer question. Like issue A the provision would likely be challenged on first amendment religious incorporation grounds. However, unlike A, you would have a much better argument that this is a secular purpose - to engage in literature study. Also, if the study is approached academically rather than an inculcating fashion, you would have a good argument that the primary effect is academic study rather than advancing religion. For the reasons discussed in, there appears to be no excessive entanglement with religious issues here.

D. Posting of Ten Commandments.

With this provision, unlike the previous three, there is a preliminary issue of whether there

would be state action involved. The First Amendment prohibitions only apply to government conduct. Arguably, there would be no government conduct here because the land being used is being purchased on a private basis through personal funds. There might be a counter argument that because the purchasers are school board members, and seem to be acting pursuant to an agenda developed in relation to that position, that this is government conduct. Nevertheless, I would suggest that a court would likely find no government action here.

Nevertheless, in the event that state action is found, I would suggest that this provision would probably fail the three prong Lemon test, unless the Board can provide some reason other than "traditional values". Also, this would probably constitute a sect preference as the Ten Commandments are uniquely Judeo-Christian in nature.

REPRESENTATIVE ANSWER 2

The School Board cannot require a session to begin with prayer. The establishment clause as applied through the Fourteenth Amendment, prevents any state actor from unnecessarily and excessively entanglement with state resources (time, money, or other) in the active promotion or implicit acknowledgment of a religious message, doctrine or teaching. Requiring school board meetings, obviously a state act of serving a public function, to open with a prayer implicitly acknowledges and perhaps even openly promotes the prayer makers religion upon nonparticipating members of the community at the meeting. This is clearly impermissible under the Federal and Maryland Constitutions.

This same problem arises in teaching Bible study and a literature class. If done strictly as an elective we might be able to argue separation of our curriculum from Bible doctrine (though I should note, even then, our chances are slim at best). By requiring all our students to participate in Bible study, even as a "nonreligious" literary study, we excessively entangle state resources and the very religious questions our constitutions proscribe us from entertaining.

Posting the Ten Commandments, even in the original Hebrew in any public school, clearly and excessively entangles the state actor with religious doctrine and is thus impermissible. The Board members seem aware of this as they collectively seek to place their display on private property across the street from the school. While crafty, this idea still fails. The Board members may use private/personal funds, but they cannot sidestep the purpose of the act - to fulfill a campaign promise and create this display. They cannot divorce themselves from their public roles as school board members and as such, state actors. Nor can they deny the intent that the display be clearly visible from the school. The display will be unconstitutional.

The pledges are better and outside the establishment clause as they serve a valid secular purpose. Requiring a recitation, however, still impinges upon an individual's right to speak (or not speak) freely. It requires some degree of associational activity and it is a state actor requiring such conduct. The only

argument we have to save this will be the age of the children, and the governmental secular purpose and national loyalty.

All these problems will face strict scrutiny requiring us, as the state, to show a compelling need for the regulations and a compelling state interest, without a less restrictive alternative. We cannot do so.

QUESTION 3

Smith owns a retail shoe store in Allegany County, Maryland. He has decided to retire. In 1996, he makes plans to sell to Jones the shoe store and all of its assets, consisting of the following property:

A. A two acre parcel owned by Smith in fee simple containing a free standing building with parking located in Allegany County, Maryland;
B. Shoes, handbags, shoelaces and other similar accessories for sale;
C. Movable display racks, chairs, cash registers and foot measuring devices; and
D. U.S. currency in the amount of $500 located in the office safe for use as petty cash in the operation of the business.

Jones agrees to pay immediately fifty percent (50%) of the purchase price for the shoe store business and all of its assets, and he will pay the balance of the purchase price over the next three (3) years.

Smith would like to secure the remaining balance of the purchase price owed to him by Jones. Describe the actions which Smith should take to perfect his security interest in each item of property listed in subparagraphs (A) through (D) above.

REPRESENTATIVE ANSWER 1

A. Two acre parcel in fee simple:

§9-104(j) states that Article 9 does not apply to the transfer of an interest in real estate. Thus, the ordinary sales of real property liens would control here. Smith would have to have Jones execute a lien document; for example, a purchase money mortgage on the property and Smith would have to file this lien in the Land Records Office of Allegany County. The filing of the lien would create an encumbrance of the property, which would protect Smith's interests.

B. Shoes, handbags, etc.:

These items are considered to be "inventory" under §9-109(4). For purposes of perfecting a security interest though, inventory is part of a larger category, "goods". Under §9-305, a security interest in goods can be perfected by possession, but this possession method is not really practical since we are talking about the sale of the business here. To protect Smith from claims from the debtor Jones only, attachment under §9-203 is sufficient. Smith would have Jones sign a security agreement, which contains the description of the collateral, value was given and that the debtor has rights in the collateral. To protect against claims by other potential creditors, Smith needs to file either a financing statement under §9-402's

requirements (the section has a sample financing statement). The section also allows the filing of the security agreement itself (§9-402(i)(e)), and it contains the necessary contents. I would also recommend concluding an after acquired property clause since inventory gets sold every day. You want to adequately protect the interest so file at SDAT.

C. Movable Display Racks, etc.:

Equipment which is a subset of "goods". To protect the interest in the equipment, Smith would follow the same procedure outlined above to make sure his interest attaches (protection against debtor) and make sure he is protected against 3rd party claims (perfect his interest). He would file a financing statement under §9-402 or the security agreement itself under §9-402(i)(e). The place of filing would be SDAT, unless the equipment is deemed to become a fixture then file in Land Records office of Allegany County.

D. U.S. Currency:

§9-304(1) indicates that the only way to perfect an interest in money is to take possession.

REPRESENTATIVE ANSWER 2

Smith and Jones are entering into a secured transaction governed by Article 9 of the U.C.C. In such a transaction a buyer gives the secured party an interest in collateral in exchange for a loan from the secured party to buyer (debtor). Where money is obtained from a lender to purchase goods, and the lender receives an interest in those goods as collateral, a purchase money security interest is created (PMSI). An interest attaches at the time it is created, but must also be perfected to afford the secured party the greatest protection against subsequent creditors. Perfection can be made through filing a financing statement, by taking actual possession of collateral, or automatically without filing in some cases. With respect to perfecting his security interests in the instant transaction, Smith should take the following steps:

A. Land – record mortgage in county where land is located.

B. Inventory PMSI – file financing statement with Maryland State Department of Assessments and Tax (§9-401) before giving possession and give all other creditors advance notice.

C. Equipment – file financing statement (§9-402(6)(d)) in county where mortgage is recorded if racks, chairs, etc. are to become fixtures attached to land, otherwise, file financing statement on business equipment with State Department of Assessments and Taxation (§9-401(c)).

D. Currency – only way is to take possession.

Question 4

Jones, the new owner of the shoe store, hires Brown to be his chief shoe buyer. Jones does not know that Brown is the local exclusive authorized distributor for the sale of Meta Shoes, an orthopedic jogging shoe. Meta Shoes is owned by Green, Brown's brother-in-law. Because of a prior disagreement, Jones refuses to do business with Green. Despite Brown's arguments on behalf of the quality of Meta Shoes, Jones instructs Brown not to buy Meta Shoes for his store.

Nevertheless, Brown orders 2,500 pairs of Meta Shoes for Jones' store. Later, Brown accepts delivery of only 2,000 pairs of Meta Shoes for Jones' store. Brown sells the remaining 500 pairs of shoes to a competitor of Jones at a higher price.

Several weeks later, Brown gives Jones the invoice and the check that Jones must sign to pay for the full order of 2,500 pairs of Meta Shoes. Jones signs the check and gives it back to Brown to send to Meta Shoes. Shortly thereafter, Jones learns of the discrepancy, fires Brown, and demands that Brown return the check. Brown refuses, and leaves the office. Later that same day, Jones collapses and dies.

Brown gives the check to Green. Green deposits the check into the Meta Shoes account at True Bank. The check is paid by Jones' bank, Best Bank, six (6) days after Jones' death.

Two months after Jones' death, the Personal Representative of Jones' Estate audits his business records and learns of the discrepancy in the Meta Shoes transaction. Jones' Estate sues Brown and Best Bank to recover its losses.

A. What claims (aside from conversion) should the Estate pursue against Brown? Explain fully.

B. You are counsel for Best Bank. What argument will you raise in Best Bank's defense?

REPRESENTATIVE ANSWER 1

A. The Law of agency is at issue in this question. The first question to analyze is whether Brown was an agent/servant of Jones, and if so, whether he was acting within the scope of his agency. Brown was hired as "chief shoe buyer" for the store. As such he was definitely an agent of Jones. Buying shoes was well within the scope of his employment as well. However, the question remains whether an agent may go against the principal's desires without being held accountable. It seems that Brown was also an agent of sorts for Green. This "dual agency" gives rise to a problem. Jones did not know of this prior relationship with Green when he hired Brown. An agent owes duties of a fiduciary nature to a principal. These are the duties of care and loyalty. Brown was not acting with good faith as a reasonably prudent agent would when he bought the shoes against Jones' wishes. He was certainly not loyal either, letting his loyalties for his brother-in-law Green get in the way of his judgment. In addition, he charged Jones for the entire amount of 2500 shoes, but in reality Jones only received 2000 shoes, and Brown pocketed the profit on 500 shoes by selling them to one of Jones' competitors. This is yet another breach of the duties of care and loyalty.

The next question to ask is whether Jones ratified the transaction with Green. Although it's arguable either way, the check itself didn't say what was being purchased. (it could have been non-orthopedic shoes) Regardless, a principal can only ratify what he has complete knowledge of, and can only do so voluntarily. In the case at bar, "shortly thereafter" (after giving check to Brown) Jones realized the mistake and demanded the check back before it changed hands. Brown refused and left the office. Because Jones was a disclosed principal, he still may be liable on the contract. However, he may (or rather his estate may) collect damages from Brown for his breaches of fiduciary duties. At the very least, the estate should get a return on the 500 shoes it never received but paid for nonetheless.

B. In Best Banks defense, I will argue that "we" were presented by a lawfully signed (by Jones), endorsed (by Green) document with no forgeries, alterations, or misprints. As such, it was our duty to honor the negotiable instrument presented to us by the holder in due course (Green). Whatever fraud and breaches of duty may have occurred, we have no knowledge thereof, and the problem is between Green, Jones' estate and Brown. In addition, §4-405 states that neither death nor incompetence of a customer revokes the authority to accept, pay or collect on account until the Bank knew of the death. We didn't know until two months after Jones' death. We honored the check six (6) days after Jones' death which is well within the ten (10) day limit in §4-405(b) even when a bank does have knowledge of death.

REPRESENTATIVE ANSWER 2

A. Aside from conversion, Jones' estate has several claims it can pursue against Brown. As an agent for Jones, Brown breached the duty of loyalty he owed. An agent can only have one master, and here Brown violated that rule by working for Jones as his chief shoe buyer while working for Meta Shoes as its local exclusive distributor. Brown did not serve Jones in good faith, and he did not exercise reasonable skill and care in executing Jones' orders, so Brown also violated the duty of care.

Brown knew Jones refused to do business with Meta shoes, yet he entered into a contract with Meta anyway. He also made Jones sign a check paying for more shoes than Jones actually received. Such fraudulent conduct leaves Jones estate capable of suing its agent Brown for fraud, misrepresentation, and self-dealing in addition to the claims noted above. To note, Brown may claim Jones' act of signing the check to pay for the 2500 shoes ratified the contract Brown entered into with Meta shoes. A ratification would relieve Brown of liability as to the contract. We can counter, however, that while an agent's knowledge is imputed to the principal, Jones was unable to ratify the contract because Brown had not fully disclosed all of the facts involved. Such facts would include Brown's dual role and the number of shoes actually received.

B. As Best Bank's counsel, I can raise several arguments in the bank's defense. First of all, the bank had no notice that it should not honor the check. The facts do not indicate that Jones had placed a stop order on the check (an oral stop order is good for 14 days, which would have covered the time in which the transaction in dispute occurred). The facts also don't indicate the bank had notice of Jones' death. But even with knowledge, a bank may for ten days after the date of death pay or certify checks drawn on or before that date. Here, the bank paid on the check, so it seems, six days after Jones death. Lastly, the payor bank (my client) had no reason to believe the signature of Jones was a forgery or that the check was materially altered, and thus it properly honored the check.

EXTRACT SECTIONS FOR QUESTIONS 3 & 4

Commercial Law Article:

Title 4 — § 4-401, 4-402, 4-405

Title 9 — §9-102, 9-104, 9-105, 9-106, 9-109, 9-203, 9-304, 9-305, 9-401, 9-402

QUESTION 5

Mr. Squad and his wife own a three-unit apartment building in Suitland, Maryland. He and his wife occupy one unit. The other two units were leased to two tenants, Pete and Julie, on September 1, 1999. The terms of the leases were for one year, with a monthly rent of $400. Both leases prominently noted that no dangerous pets are allowed.

Shortly after moving in, Pete purchased a pit bull dog. Julie saw the dog in the hallway of the building on several occasions and complained to Mr. and Mrs. Squad that she was worried that such a dangerous animal was in the building. On February 2, 2000, as Julie was leaving her apartment, Pete entered the hallway of the building with the dog on a leash. The dog ran toward Julie, growling and baring its teeth. Julie started screaming and Pete yelled "I don't like you. You'd better be quiet or I'll unleash him!" Julie managed to enter her apartment without further incident, but she was badly shaken. The next day Julie moved out of the building, explaining to Mrs. Squad that she would pick up her things later but had to vacate the premises because of Pete's dangerous dog. Mrs. Squad immediately informed her husband of Julie's departure.

On March 12, 2000, the Squads contacted Julie and demanded the payment of the overdue rent. Julie did not respond to the demand. On March 20, 2000, the Squads went to Lawyer Bob because of his advertisement in the yellow pages that noted his specialty in landlord/tenant actions. Lawyer Bob assured the Squads that they had a strong case against Julie and advised them to immediately enter the apartment and seize any furniture or other materials left by Julie and use it to offset funds owed.

A week later, Lawyer Bob served Julie with a complaint for breach of lease, seeking unpaid rent and attorneys fees. Thereafter, Julie went to see Attorney Adam who agreed to represent her in the matter. Attorney Adam contacted the local public access cable station and recorded a commercial wherein he vowed to "ensure justice for his client against that sleazy landlord, Mr. Squad!" Attorney Adam also stated that he would call Mrs. Squad to testify about what her husband told her about his shoddy landlord practices. Lawyer Bob learned of Adam's antics and advised Mr. Squad to "ditch" any items he may have retrieved from Julie's apartment. He then called Julie saying that the Squads would drop the suit if she'll pay $100 for her breach. Julie declined the offer.

On July 25, 2000, both parties and their attorneys appear for trial in the appropriate court.

A. What reasonable arguments would you expect the Squads to raise and what are Julie's possible defenses thereto? Assume there are no applicable statutes and the common law applies. Discuss fully.

B. As Bar Counsel, what charges, if any, might you file against the two attorneys? Discuss fully.

REPRESENTATIVE ANSWER 1

A. Julie breached her covenant to pay rent and she abandoned the lease. Each lease imposes a covenant to pay rent which is separate from the other covenants in the lease. Julie will argue that because the Squads failed to evict the dog pursuant to the "no pets" clause she was justified in not paying rent.. The Squads should argue that the breach does not excuse her from paying rent – the covenants are separate.

Squads may also argue that Julie abandoned the apartment – she moved out, told Mrs. Squad that she was leaving and said she would pick up her belongings. Under common law Squads can only sue for rent as it comes due. However, the Squads may relet the apartment and sue for damages. But the Squads do have a duty to mitigate – that is, show that they have been trying to relet the apartment.

Julie may counter that there has been a breach of quiet enjoyment and a constructive eviction. The Squads had notice of the dog. Pursuant to the no pets clause, Squads had power to remove the dog. Failure to do so constructively evicted her from her apartment and violated her quiet enjoyment. Squads, however, can argue that Julie did not give them reasonable notice to cure the problem before she moved. Prior to Feb. 2, the dog was only a potential problem. Julie needed to give them reasonable notice after the attack to fix the problem. They may also argue that the dog is not a sufficient reason to leave the premises. It does not infringe upon her in her own apartment and a reasonable person would not find the apartment uninhabitable.

B. Charges Against Lawyer Bob: misleading advertisement – Bob is not allowed to say he specializes in landlord/Tenant but may say he concentrates in that area; calling represented party without consent of counsel – Bob acted unethically by calling Julie directly instead of calling Adam; incompetent counsel – it may be illegal to enter Julie's apartment and seize her possessions without a court order, and unethical to tell clients to ditch possible evidence.

Charges Against Adam: unethical commercial – while Maryland cannot regulate the tastefulness of the ad and Adam may run the commercial, these ads can't be misleading. Saying he will ensure justice is creating false expectations, and calling Squads "sleazy" may have a substantial likelihood of prejudicing the suit.

REPRESENTATIVE ANSWER 2

A. Squads will argue that Julie breached the lease by failing to pay rent. They will therefore seek

to recover damages on the amount of unpaid rent. Julie's principal defense will be that there was a constructive eviction by a breach of the warranty of quiet enjoyment. Julie's claim would be that Pete's dog was in the common areas of the apartment complex making the entry and exit from her apartment unsafe and creating a nuisance. Julie would also point out that she had complained about the dog to the Squads but that nothing was done and when the nuisance continued, she moved out.

Julie's defense might be successful, but there is a significant counter-argument that Julie failed to satisfy the requirement of notice to allow the landlords to take meaningfully responsive action. It is not clear that Julie's expression of worry to the Squads was sufficient to put the Squads on notice that responsive action was required of them. In order for a breach of the warranty of quiet enjoyment to be imputed to the landlord on the basis of the conduct of third parties, the landlord must be given the opportunity to remove the nuisance. It is not clear whether the Squads had such an opportunity.

Julie can also raise the defense that the Squads had a duty to relet the premises and mitigate their damages once Julie had moved out. However, because Julie left her belongings in the apartment, it is not clear that the apartment was available to be relet. Finally, Julie can counter claim against the Squads for the value of the goods taken from her apartment. There is no question that the Squads were not within their rights to enter the apartment without first seeking an order of eviction from the courts.

B. As Bar Counsel, I would consider filing a number of charges against both Lawyer Bob and Attorney Adam.

Lawyer Bob

A. I would file a charge for misleading advertising because of his claim to specialize in landlord/tenant actions. Although it is permissible to advertise that an attorney concentrates in certain areas of law, claiming to specialize is misleading.

B. Bob should also be subject to an incompetence charge. Bob's advice regarding the entry to the apartment without first obtaining an order of eviction was incompetent advice.

C. Bob should also be charged for ordering his client to ditch evidence that was relevant to a pending case.

D. Finally, Bob should be charged for contacting a person whom he knew to be represented by counsel without first obtaining opposing counsel's permission to make the contact.

Attorney Adam

A. Adam violated the Rules of Professional Responsibility when he made prejudicial statements on cable tv. A lawyer is bound not to make statements to the media that would have a substantial likelihood of prejudicing the trial.

B. It was also misleading to comment that he would seek testimony from the landlord's wife when he knew it would not be admissible at trial.

QUESTION 6

Upon winning the Maryland Lottery in 1990, Ralph and Alice, husband and wife, purchased a 50 acre parcel of land in Bowie, Maryland, known as "Honeymoon Estate" in fee simple, as tenants by the entirety. Ralph and Alice promptly made extensive improvements to Honeymoon Estate, building a 20,000 square foot mansion with an Olympic size swimming pool and pool house, tennis courts, putting green, and breathtaking botanical gardens.

Alice became ill in 1995. Fearing that she might predecease Ralph, and that he would convey their beloved Honeymoon Estate to his favorite organization, "Benevolent Busdrivers," Alice secretly executed a deed conveying Honeymoon Estate "to Ralph and Alice for life, then to Trixie in fee simple." She immediately gave the deed to her dear friend, Trixie, who promptly recorded it. Ralph had no knowledge of the conveyance.

Alice died in 1996. Ralph continued to live on Honeymoon Estate, hosting numerous Benevolent Busdriver retreats and taking meticulous care of his beloved estate. Ralph died in 1998, and, much to the dismay of his bus driver cronies, left a will that devised Honeymoon Estate "to Norton for life, then to Mo, and Larry as joint tenants with right of survivorship."

Norton took immediate possession, inviting nine of his closest friends to move in with him. Norton and his cronies threw wild parties on the estate every weekend. The parties frequently resulted in extensive damage to the structure of the mansion, such as broken doors, windows and chandeliers and dented walls. Additionally, in a matter of months the tennis courts were irreparably damaged, the botanical gardens trampled, and the swimming pool destroyed.

Mo died in 1999, leaving a will that conveyed his interest in Honeymoon Estate to his son, Shemp. **You have recently completed law school and Shemp asks that you research what interest he, Trixie, Norton and Larry have in the property.**

What are the interests of each in Honeymoon Estate? How can they best protect said interest? Discuss fully.

REPRESENTATIVE ANSWER 1

The interests of each in Honeymoon Estate (HE) are as follows:

A. Trixie: Trixie has no interest in HE. Although a joint tenancy allows the joint tenants to sever the tenancy by transferring a deed to a third party, property held in fee simple as tenants by the entirety

is not subject to such a transfer without consent of both tenants. Because Ralph did not know or consent in the deed it is ineffective.

B. **Norton and Larry:** When Alice died in 1996, Ralph immediately possessed sole fee simple ownership of the property. Ralph's will validly granted Norton a life tenancy and Mo and Larry vested fee simple remainders in the property. As a life tenant Norton has the responsibility not to commit waste and injure Mo and Larry's future interests. By his wild parties and activities, Norton has committed affirmative waste on the property and has permanently damaged it. Larry can bring an action to enjoin Norton from committing future waste and can receive damages for the waste that has already occurred.

C. **Shemp:** Mo and Larry owned Honeymoon Estate as joint tenants with right of survivorship which means that upon the death of one the other will automatically own the property in fee simple. Although Mo could sever the joint tenancy during his life by granting his interest to a third party, his attempt to do so at death is ineffective. Therefore, at Mo's death Larry received ownership of HE in fee simple and Shemp has no interest in the property.

REPRESENTATIVE ANSWER 2

In trying to determine what the interests are, I'll handle the possible takers in the order they appeared on the scene, but here's the conclusion: Shemp and Trixie get nothing, Norton has a life estate and Larry has a future interest in fee simple but can go after Norton for committing waste.

A. Trixie gets nothing because Ralph did not consent to a deed transfer. A tenancy by the entirety requires the consent of both parties to transfer or even partition the property. Since Ralph did not know of or consent to Alice's transfer the transfer was not valid. Even though Trixie recorded the deed, she had no interest in the estate. Thus upon Alice's death, Ralph got the property in fee simple.

B. Norton received his life estate from Ralph in a valid conveyance by will. It was not subject to divestment so Norton takes for his lifetime and no acts by the parties subsequently named in the grant can take this away. However, Norton does owe a duty to future interest holders that he not waste the property and keep up repairs. Thus, his failure to maintain the property violates this duty.

C. Whether Shemp can take part of Honeymoon Estate depends on what his father Mo got in the grant from Ralph. Shemp can try to argue that Mo got a future life estate, given the placement of the comma after Mo's name. But that would make Larry in the future a joint tenant by himself and that makes no sense. A court would likely read the grant to mean that MO and Larry had a future interest as joint tenants regardless of the comma after Mo's name. As such, when Mo died his future interest in the joint tenancy immediately passed to Larry and Shemp had no interest.

D. Thus, Larry, as the sole survivor, now has a future interest in fee simple which will become possessory once Norton dies. Larry does have a present cause of action against Norton for repairs and to prevent further damage to the estate. As an aside, both Norton and Larry should file their deed with the land record office to protect their interests.

QUESTION 7

Al was fatally shot during an altercation with Ben on Charles Street in Baltimore, Maryland on January 1, 2000. Ben has been indicted for first degree murder and is scheduled for trial by jury in the Circuit Court for Baltimore City. You have been properly appointed by the Office of the Public Defender to represent Ben. Ben maintains to you that he shot Al in self defense after the two had argued and then struggled over a gun Al had pulled on him. Ben has also told you that he was convicted eight years ago of assault with intent to commit murder, and ten years ago, he was convicted of distribution of cocaine.

At the trial, the State's primary witness, Charles, testified on direct examination that he saw Al and Ben tussling; heard two gun shots; saw Ben standing over Al; and saw Ben flee the area on foot. On cross examination, Charles confirmed that he knew Al regularly carried a gun.

Prior to Ben taking the stand, you have asked the judge to prevent the State from impeaching Ben's credibility with evidence of his prior conviction. In doing so, you have proffered to the Court the relevant information on the prior conviction and given the Court a proffer of Ben's testimony.

A. State the arguments you should make in support of your request of the Court.
B. State the arguments the prosecution would make in opposition.
C. Analyze how the Court should rule on your request and why.

REPRESENTATIVE ANSWER 1

A. Arguments in support of my request.

To impeach a witness using prior convictions, the party offering the evidence must establish that the evidence passes a three part test.

First – The prior conviction must concern either an infamous crime (a felony at common law) or a crime involving dishonesty or deceit.

Second – After establishing that the conviction was for an infamous crime or a crime of dishonesty

or deceit, the offering party must satisfy the court that the probative value of allowing the evidence is not outweighed by the potential harm.

Third – Finally, no convictions can be used for impeachment if they are greater than fifteen years old.

1. Assault With Intent to Kill.

I would argue that this is neither an infamous crime nor a crime involving deceit or dishonesty. An assault is not a felony at common law and the fact that it was engaged in with the intent to kill will not make a difference.

Furthermore, I would argue that the prior conviction is sufficiently similar to the present cause of action to create a substantial likelihood of undue prejudice. A jury is likely to punish Ben for his prior conduct and they are likely to presume that because he assaulted someone, he is likely to engaged in similar conduct.

2. Distribution of Cocaine.

First, I would argue that the prior conviction does not involve dishonesty and is not an infamous crime. The selling of illicit drugs should not reflect on one's veracity on the stand. Although a weak argument, I would also argue that the probative value is outweighed by the likely prejudicial impact.

B. Arguments by the Prosecution.

1. Assault.

The prosecution will likely argue that the assault, coupled with an intent to kill, is analogous to an infamous crime and should be admissible. Rather than a simple assault, the prior conviction reflects a much more serious offense.

Also, the prosecution will argue that the crimes are not (sic) so similar as to create a significant likelihood of prejudice. Just because the prior crime reflects an aggressive characteristic, that alone does not make it so prejudicial as to outweigh the probative value.

2. Distribution.

The prosecution will argue that distribution of drugs directly reflects on the veracity of Ben and any minimal prejudicial impact is thereby significantly outweighed by its probative value.

C. Court's Ruling.

1. The Court will rule that the assault with intent to kill cannot be used to impeach. Even if it does involve an infamous crime, the nature of the offense is too similar to the current action.

2. As for the distribution conviction, the court should allow impeachment with this evidence. The conviction goes directly to the witness' veracity and is highly probative of veracity. Also, any prejudicial affect would be minimal.

In addition, I should note that both convictions are less than 15 years old.

REPRESENTATIVE ANSWER 2

A. I would argue that both conviction for assault with intent to commit murder and the conviction for distribution of cocaine are inadmissible to impeach Ben's credibility. Generally, prior crimes of a defendant are not admissible to show general criminal propensity as circumstantial evidence that the defendant committed the crime, but prior crimes are admissible for impeachment of a testifying defendant if the prior crimes meet certain requirements. In Maryland, only infamous crimes and crimes relevant to credibility are permitted for impeachment purposes and in all cases the judge must first determine that the probative value of the crimes for impeachment outweighs the danger of prejudice. I would argue that assault is not an infamous crime or crime relevant to credibility and that it is thus inadmissible. Further, even if assault with intent to murder is considered an infamous crime (common law felony), I would argue that due to its similarity to the crime charged, murder, the danger of prejudice is great – i.e., the jury is likely to use it as circumstantial evidence of Ben's guilt and probative value does not outweigh prejudice. With respect to distribution of cocaine, I would argue that its probative value is outweighed by the danger of prejudice. While simple possession of cocaine is not an infamous crime relevant to credibility, Maryland considers distribution of cocaine to be an impeaching offense, i.e., relevant to credibility. Thus, I would focus my arguments on the danger of prejudice…I would argue that distribution of cocaine does not have strong probative value with respect to Ben's credibility, unlike a conviction for a crime directly involving lying or deceit, and that the likelihood that the jury would misuse the conviction as evidence of Ben's guilt was great.

B. The prosecution would argue that both crimes are admissible to impeach, since they satisfy the requirements. The prosecution would contend that both are infamous crimes or crimes relevant to credibility, that the probative value of the crimes outweigh the danger of unfair prejudice, and that

both crimes are less than fifteen years old from the date of conviction. Regarding assault with intent to commit murder, the prosecution would argue that although simple assault is not an infamous crime, this more aggravated assault is. The prosecution would note that distribution of cocaine is a crime relevant to credibility. The prosecution would argue that both crimes have significant probative value with respect to Ben's credibility, and are evidence that he may not be telling the truth, which value outweighs the minimum danger that the jury would misuse the evidence.

C. I believe that the court would permit the conviction for distribution of cocaine to impeach Ben's credibility, but refuse to admit the conviction for assault with intent to commit murder. Regarding the assault conviction, simple assault is not an infamous crime or crime relevant to credibility, and it is unclear whether assault with intent to murder is thus within the impeachable offenses. More importantly, however, it is a crime that bears similarity to the crime for which Ben is currently on trial, which increases the likelihood of prejudice, since the jury may not limit the crime to impeachment use and use it as evidence of Ben's guilt. The distribution of cocaine conviction is an impeachable offense, it is not as likely to cause prejudice, and it is less than fifteen years old. the court would thus likely permit its use for impeachment, with a limiting instruction to the jury if requested by the defense.

QUESTION 8

On routine patrol, police saw Max sitting in front of an open telephone equipment box, a connecting point for telephone service between the central office and area residences. The police observed, within several feet of Max, cut wires, wires pulled out of the equipment box, a tool box full of various tools, and a hand set which could be used to monitor or make telephone calls. When asked by the police, Max said he did not work for the telephone company and was "just walking by". Upon request, he produced his driver's license; a warrant check by the police was negative. Max told the police officer that he wanted to leave. He was told "stay here". Max said nothing. Max was "patted down" by the police who felt something in his pocket. The police removed a pair of wire cutters from his pocket and confiscated the wire cutters. Max was handcuffed and transported to the police station for questioning. After Max was taken away, telephone company representatives arrived and identified the tools, valued at over $300, as the type used by the telephone company and not generally available to the public and estimated the damage to the telephone equipment box at over $300. The telephone company experienced weekly thefts of this kind of equipment from its vehicles. Max is charged with willful and malicious destruction, injury, defacement or molestation of personal property under Article 27, section 111(a) and with theft under Article 27, section 342.

A. Based on the facts given, would a motion to suppress any of the evidence be successful? Provide a detailed analysis of the arguments that would be raised by the State and by the defense.

B. Assume that the State proves the given facts at trial. Are the given facts sufficient for a conviction of willful and malicious destruction, injury, defacement or molestation of personal property under Article 27, section 111(a)? Provide a detailed response.

C. Assume that the State proves the given facts at trial. Are the given facts sufficient for a conviction for theft under Article 27, section 342? Provide a detailed response.

REPRESENTATIVE ANSWER 1

A. Normally, police require a search warrant based on probable cause and signed by an independent magistrate to search and seize. Protection from warrantless search and seizures is provided by the Fourth Amendment, made applicable to the states by operation of the Fourteenth Amendment.

Some situations exist which afford exceptions to the warrant requirement, which I consider for each piece of evidence:

1. Open equipment box – not suppressed. The box was in plan view, as were its contents. Thus, Max had no reasonable expectation of privacy in the box.

2. wire cutters – probably not suppressed. The validity of this search depends on whether this was a "stop and frisk" situation or "search incident to arrest". If Max was subject to a legitimate "stop" because the police had reasonable suspicion based on articulable facts (observed next to the equipment and telephone boxes), consensually responded that he did not work for the phone company that a crime was afoot and he was involved. Pursuant to that stop, police are permitted to "frisk" – pat down the exterior clothing of a suspect and, if feeling a weapon or contraband without manipulating it, reach in and secure that item. Here, a wire cutter may be considered a potential weapon (metal, sharp, pointing object) or sufficiently close in size and weight to feel like a weapon (gun or knife).

If telling Max to "stay here" crossed the line from "stop" to "arrest", the search is not good. Police observation of Max near a telephone box and the equipment box is enough for reasonable suspicion, but insufficient for probable cause to arrest, which requires a fair probability that he committed a crime. If a lawful arrest, police are allowed to search and seize from within the "wingspan" of the suspect, including his pockets. However, as there was no direct evidence linking Max to the boxes and no outstanding warrants, this arrest was unlawful and the evidence would be suppressed.

I believe that the frisk was sufficiently contemporaneous with the stop to call this situation a

"stop and frisk" prior to arrest and there existed no probable cause for arrest so the evidence would be suppressed.

B. Destruction of property/malicious mischief could be proven given the facts (and admission of the wire cutters). Max's proximity to the damaged box and the equipment box, and possession of the wire cutters is sufficient circumstantial evidence to convict Max for intentionally damaging the telephone box.

C. The State will not succeed with a theft charge based on existing evidence. Although the equipment box is not generally available to the public, the facts do not indicate that it is never accessible, or that Max engaged in "intentionally taking unauthorized control of the personal property of another", the Maryland standard for theft. Max had control, but the phone company did not identify the tools as the company's, only of the type commonly used by the company.

REPRESENTATIVE ANSWER 2

A. Evidence of wire cutters. Once Max told the police, voluntarily, that he did not work for the phone company, his proximity to the tools, the cut wires and the equipment box justified a Terry Stop. The police had reasonable suspicion based on articulable facts. The pat down was permissible for weapons and contraband. The wire cutters could fall into either category. This evidence would be permitted. It was a justifiable search under the Fourth Amendment. Tools and hand set. This question also implicates Max's Fourth Amendment (via 14th Amendment) rights against unreasonable search and seizure. However, two arguments by the state would prevail (1) that Max had no reasonable expectation of privacy in tools/equipment in plain view and (2) Max is estopped from claiming a right to privacy in equipment he denied ownership of.

Statements: His voluntary denial of employment was not made in custody or interrogation and therefore is admissible without Miranda warnings.

B. While the evidence against Max is circumstantial, his proximity to the tools, his possession of the wire cutter and his proximity to the equipment box are sufficient to allow reasonable jurors to decide he committed the damage beyond a reasonable doubt. Willful and malicious intent can be inferred from the conduct, if the jury so believes.

C. The facts as stated above would not support a conviction for theft. Theft requires the unlawful taking of property of another with intent to deprive. Here, that the equipment is the "type" used by the phone company would not establish beyond a reasonable doubt, even despite Max's denials, that he came into the $300.00 worth of property unlawfully

QUESTION 9

Ross and Monica married on June 1, 1990. Shortly thereafter, they purchased, as tenants by the entirety, a home in Cecil County, Maryland, where they were both employed. Ross worked as a programmer for a small computer consulting company. Monica worked as a registered nurse. Each earned in excess of $50,000 per year. Over the next three years, two children were born to this marriage.

In 1993, Monica inherited one million dollars as the only heir of her great uncle Fred. Monica invested the inheritance in government bonds, yielding her interest income of over $50,000 per year. She quit her job so she could devote more time to raising her children. Her professional nursing license lapsed.

On January 1, 1994, the parties separated. At Monica's request, Ross voluntarily left and moved in with his sister in Kent County, Maryland. The children remained with Monica in the Cecil County home. Over the next six years, Ross and Monica remained close. Neither filed for divorce or custody. Ross became so busy with his work that he rarely spent time with his children. Both parties' incomes were enough so they were self-supporting. They shared all the children's educational, support and medical needs. Each contributed one half of the mortgage payments.

On July 1, 1999, Ross' employer had a public stock offering. Ross had purchased stock in the company over the preceding five years and became a multi-millionaire when the stock began trading publicly. He immediately retired from his job and told Monica he wanted to end their separation so he could resume life with his wife and children. Monica refused to reconcile.

In December, 1999, Ross met a new woman. They are now living together in a waterfront estate that Ross rented in Talbot County, Maryland. Ross and Monica argued when he told her he wanted sole custody of the children.

A. Monica authorizes you, a Maryland attorney, to file a bill for absolute divorce. In which Maryland courts may this action be filed? On what grounds? Discuss.

B. Monica requests your advice, about her rights in the divorce proceeding with respect to custody of the children, Ross' stock, her bonds, and her rights to possess and eventually sell the Cecil County home. What advice do you give to Monica? State the reasons for your advice.

REPRESENTATIVE ANSWER 1

A. An absolute divorce may be filed in the Circuit Court for any County where the Defendant is employed, engaged, in a business, lives or habitually engages in a vocation, or the residence of the Plaintiff. In this case, the divorce could be filed in Cecil County, where Monica lives, or in Talbot County, where Ross lives.

Monica has a good case for a no-fault divorce because the two have been separated for more than one year voluntarily and more than 2 years if the separation is considered unilateral on Monica's part. The requirement is that the marriage be irretrievably broken with no reasonable expectation of reconciliation. However, since Ross might contest this since at one time he sought to get back together, Monica should look into fault grounds as well. First, adultery. Ross is living with another woman. Monica will have to show disposition and opportunity at the divorce proceeding, but this is clear from the fact that they are living together.

Second, desertion. This is a difficult ground for Monica to show because she asked Ross to leave and there was no evidence that he intended to end the marriage. Likewise, the facts do not support any claim for cruelty, or excessively vicious conduct.

B. CHILDREN

Custody of the children will be granted based on the best interest of the child. Ross may sincerely want custody now, but the facts show that there was a time when he rarely saw the children. As the "primary care giver", Monica will have this factor favoring her. Also, because of the amicable nature of Ross and Monica's relationship, joint custody may be a possibility if the two live in close proximity.

C. ROSS' STOCKS

Ross' stocks appear to be marital property. They were acquired during the marriage, even though they were separated for quite some time before that, and were not by gift or inheritance. Even though this is marital property, the Court will surely take this into consideration when determining an equitable division of property.

D. BONDS

Monica's bonds are the result of an inheritance directly to her and as such are not marital property. Passive appreciation of these bonds is also non-marital.

E. HOUSE

Monica, as the custodial parent of minor children may be able to get possession of the

family home for a period of up to three years. After that time, the divorce decree provisions dealing with the house will take effect. Monica may still be able to get the house if requested or stipulated to by agreement with Ross. If she wants to sell the house, because it is titled tenants by the entireties (after divorce this will become tenants in common). She must agree on this with Ross and/or the Court.

REPRESENTATIVE ANSWER 2

A. Absolute Divorce

1. The action for divorce may be filed in the Circuit Court for Cecil County, which is the County where the Plaintiff, Monica, resides. §6-202. It could also be brought where Ross lives in the Circuit Court for Talbot County, where he resides.

2. The grounds for the absolute divorce are as follows:

a. Adultery – Ross is committing adultery with his new woman. There is opportunity to commit adultery (he lives with her) and,

b. Voluntary Separation – Monica and Ross have lived separate and apart for over five years without cohabitation. By statute, Maryland only requires one year. Additionally, there is no reasonable expectation of reconciliation because Monica refused to reconcile in July of 1999, and now in December of 1999, Ross is living with another woman.

c. Two Year Separation – Monica and Ross lived separately and apart for five years without interruption before Monica filed for divorce. There are no desertion grounds because the separation was voluntary. All grounds would need to be supported by 3rd party corroboration.

B. Rights with respect to:

1. Custody
2. Stocks and bonds
3. Use of home/sale of home

1. Child Custody

Ross told Monica he wanted sole custody of the two children. The Court will decide that using the standard of the best interest of the child. When granting custody, the Court examines several factors.

a. The wishes of the parties – Monica and Ross' wishes will be examined, as well as the children's, though they are only 6-8 yrs. old. (The older the child, the more weight given the wishes.)

b. Age and health of the parents – Both Monica and Ross, absent facts to the contrary, seem to be in similar age and health.

c. Keeping up with familial relations – During the six year separation, Monica tended the children while Ross lost touch. It is unlikely that since Ross rarely spent time with his kids, he would work at keeping their family relationships intact.

d. Primary caretaker – Although no preference for the Mother, the Court will look at the primary caretaker for the last six years, that was Monica. With these and other factors, Monica has an excellent chance of maintaining custody. Over the past six years, she has had sole physical and joint legal custody. The Court will likely retain that arrangement, with liberal visitation for Ross.

2. Stocks and Bonds

Ross' stocks, though marital property because it was acquired during the marriage, most likely will remain his because Monica and Ross lived apart for six years, and made no contribution to Ross getting the stocks. Monica's bonds are not marital property because the bonds are directly traceable to her inheritance, which was not marital property. If Monica actively made investments with the bonds, then Ross could share in the income as that is marital property.

However, when determining an award, the Court examines the contributions the parties made to the marriage, their own financial well being, the value of their own property, the circumstances surrounding marriage and break up, duration of the marriage, etc. Here, Ross' stocks were acquired at the very end of the marriage, after six years of separation. (Monica made no contribution to getting stocks.) Monica has a substantial income and never relied on Ross' stocks. Therefore, the Court will probably keep the parties with their own assets, even though some were technically marital property.

3. Possession and sale of Home.

The Court may decide that Monica can live in the family home for up to three years. The Court will look to the best interests of the children, the interest in Monica's continued use, and the fact that Monica solely has lived there for six years. The Court will also determine whether there is a hardship to Monica if she is not granted use.

However, since the home is marital property, (Monica and Ross will be tenants in common once the divorce sever the tenants by entireties) if Monica wants to sell, the Court will decide how proceeds are divided according to §8-205 the distribution of marital property monetary award

section.

QUESTION 10

Assume that all of the facts in Question 9 also apply to this question.

Monica's Complaint for absolute divorce from Ross also sought alimony, child custody, and use of the family home, both pendente lite and permanently.

The Circuit Court referred the case to a domestic relations master for a hearing on the pendente lite issues.

At the hearing, the master overruled Ross' objections to hearsay evidence and refused to allow either party to produce expert testimony from psychologists on custody issues. Based on the evidence addressed at the hearing, the master made written findings of fact and recommended an Order be signed awarding Monica alimony pendente lite of $2,000 per week, temporary custody, child support pendente lite of $250 a week for each child, and pendente lite possession and use of the Cecil County home.

Upon being served with the Master's recommendations and proposed Order, Ross is incensed and immediately instructs you, his Maryland attorney, to appeal or otherwise contest the Master's actions.

A. What procedure will you use to obtain prompt review of the Master's actions? Discuss.

B. If the Order recommended by the Master is entered, advise Ross as to his right to appeal that Order.

On May 1, 2000, Monica and Ross entered into a Voluntary Separation Agreement. The Agreement contained provisions which "1) divided the parties' marital property; 2) gave custody of the minor children to Monica; 3) required Ross to pay child support of $500 a month for each child; and 4) required Ross to pay Monica "alimony" of $3,000 per month for 36 months which is not subject to any court modification." The Agreement was promptly incorporated in a judgment granting Monica an absolute divorce.

On July 1, 2000, Monica and one of her children were seriously injured in an automobile accident. As a result, Monica now can not work and the injured child needs special support services, not covered by insurance. Monica has filed a petition in the appropriate court to increase child support and alimony.

Ross moves to dismiss Monica's action on the ground that the Separation Agreement resolved these issues.

C. How should the court rule on Ross' motion to dismiss? Explain the reasons for your answer.

REPRESENTATIVE ANSWER 1

A. According to Rule 9-207d, Ross must file any exceptions to the Master's findings within five days after the recommendation is placed on the record. It must be in writing and set forth the asserted errors with particularity.

They must prepare and transmit a transcript within 30 days and serve it on the other side within 60 days. After filing, the Court will have a hearing at which time it will make its decision on the issue.

B. Ross would have to file an Interlocutory Appeal with the Court of Special Appeals. §12-203 sets out which judgements can be appealed in this fashion. Ross can appeal the custody order in an Interlocutory Appeal. He could also argue that he can appeal the Order as to the house, because it granted possession of the house and it is one of the subjects of this action. The alimony and child support awards can also be appealed at this time under §12-203(v). This states that an order to pay money can be appealed. They should file the Appeal within 30 days of entry of the Order.

C. The Court cannot modify the Alimony Award. Under §8-103, a settlement with regards to spousal support cannot be modified if it states specifically that it is not subject to any Court modification. The agreement clearly states this. Therefore, despite the accident it cannot be modified.

The child support, however, can be modified. Child support agreements are always modifiable if it is in the best interests of the child. In this case, the fact that the child now requires special support services which are not covered by insurance would surely seem to merit an increased award. It would clearly be within the best interests of the child to increase the Award to cover this. Therefore, the Court will order an increase in the Award.

REPRESENTATIVE ANSWER 2

A. Per Rule 9-207(d), I must file an exception with the Clerk of the Circuit Court within five days of Ross receiving service. My filing must be in writing and detail the errors alleged regarding hearsay, expert testimony, and any other grounds (otherwise deemed waived). Then, per Rule 2-541 (h) (2), I must order a transcript to be filed within 30 days of the exceptions (unless good cause shown). I must serve a copy of the transcript to Monica.

B. Failing to file a timely exception leads to the Court entering an Order. An Order constitutes an Interlocutory Order for purposes of the pendente lite issues, and thus should be appealable. A Notice of Appeal needs to be submitted to the Court of Special Appeals within 30 days. Specifically, the Order involves the payment of money, <u>not</u> to a Court receiver, and

meets the appealable Interlocutory Order criteria of §12-303(3)(v).

C. The Court should reject the Motion. The Court can alter the Voluntary Separation Agreement provisions in its judgment per §11-107(b), and §8-103(a) for the children. In this situation of an automobile accident and permanent damage to the children, "circumstances and justice require" some modification that accommodates the new factors. However, Monica will not recover greater alimony because §8-103(c)(2) provides that no modifications will be made where Monica's agreement included an express provision that alimony is not subject to Court modification.

EXTRACT FOR QUESTIONS 9 & 10

Family Law Article:

Title 7 — § 7-103

Title 8 — §8-102, 8-103, 8-201, 8-203, 8-205, 8-208

Title 11 — §11-106, 11-1107

Title 12 — §12-104

Courts and Judicial Proceedings Article:

Title 6 — §6-201, 6-202

Title 12 — §12-301, 12-303

Maryland Rules

Title 2 — § 2-541

Title 8 — §8-1331,

Title 9 — §9-201, 9-207

QUESTION 11

Dolores Dentist, Sam Artist and Larry Lawyer are friends living in Caroline County, Maryland. They decided to pool their resources to purchase a small office building as an investment. The three met with a loan officer of Vindictive Bank to arrange for financing. At that meeting, Lawyer suggested that they form a corporation, to be named "DAL, Inc.", to take title to the property and to borrow money from the Bank. This arrangement was acceptable to the Bank. Lawyer prepared Articles of Incorporation for DAL, Inc., which were signed on January 3, 2000. Lawyer then mailed the Articles, together with the required fee, to the Maryland State Department of Assessments and Taxation ("SDAT"). The material was lost in the mail and was never delivered to SDAT. Other than recordation of the Articles of Incorporation, Lawyer took all steps necessary to render the corporation valid and in good standing under Maryland law.

Dentist, Artist and Lawyer held an organizational meeting and elected Dentist president of the Corporation on January 5. Later that day, Dentist, as president of the corporation, signed a contract to purchase the building with settlement to occur on February 2.

On the morning of the scheduled settlement, Lawyer learned that the Articles of Incorporation had not been received by SDAT. He promptly refiled the Articles, sending them by an overnight delivery service. Lawyer told no one of the problem.

The settlement on the building proceeded as planned that afternoon. The corporation took title to the property and Dentist, as president of the corporation, signed a note for a portion of the purchase price to Vindictive Bank. No one personally guaranteed the corporation's obligations.

The Articles of Incorporation were accepted for recordation by SDAT on February 7.

For several months, DAL, Inc. made monthly payments on the loan by checks made out in its name. Eventually DAL, Inc. ceased making loan payments and the loan is overdue. Vindictive Bank has learned that the Articles of Incorporation were not recorded until February 7 and has demanded payment of the amount due on the loan from Artist, Dentist and Lawyer personally. Lawyer has offered to represent Artist and Dentist, as well as himself, in the matter.

A. Based on these facts, does the Bank have a cause of action against Dentist, Artist and Lawyer?

B. What defense(s) can Artist, Dentist and Lawyer raise to the Bank's action?

C. What ethical issues, if any, are raised by Lawyer's conduct?

Explain your answers thoroughly.

REPRESENTATIVE ANSWER 1

Based on the facts, Vindictive may have a claim for payment on the loan from Dentist, Artist and Lawyer, but it is not likely. The three defendants decided to make a corporation together. A corporation is a separate legal entity from its founder. To make a corporation, the Articles of Incorporation must be filed with the SDAT. If the Articles are not properly filed, then the corporation does not legally exist.

Vindictive will argue that because the Articles were not properly filed until Feb. 7, that DAL was not a valid corporation, but a general partnership instead. A general partnership, unlike a corporation is not a separate legal entity from its founders. In fact, the general partners of the partnership can be liable for debts of the partnership to creditors. Vindictive will argue that because there was not a valid corporation, all three defendants, Dentist, Artist, and Lawyer will be liable for the unpaid portion of the debt of the partnership.

DAL should be able to defeat such a claim by arguing that Vindictive is estopped from denying the existence of DAL as a corporation. While Maryland does not permit de facto corporations, the courts will recognize corporation by estoppel when a plaintiff believed he was transacting with a valid corporation when in fact the corporation did not yet legally exist. Here, Vindictive thought he was giving a loan to the corporation at all times. It did not make a loan to the 3 founders. Thus, it should be estopped from arguing that the corporation did not exist.

Dentist can also argue that the Bank should be estopped from going after him personally because he signed the note as president of the corporation. He was acting as an officer with authority of the corporation, not as a general partner. Thus, Vindictive's claim that the three will be liable for the debts will fail as they will be estopped from denying the existence of the corporation.

Larry's conduct will leave him subject to sanctions for creating a potential conflict of interest between him and his partners. It is foreseeable that there may come a time where Larry's interests are adverse to DAL. As DAL's counsel, he creates a conflict of interest. He should have advised Artist and Dentist of this possible conflict and advised them to get their own attorney for the corporation. Only after they have waived any objection to Larry being the corporate attorney would it be permissible to act as DAL counsel.

In addition, he may be subject to discipline for entering into a corporation with non-

lawyers. Ethics prohibit lawyers from splitting fees with non-lawyers. While the facts do not specifically mention it, if the agreement of the corporation was to split fees among the three, Larry could be disciplined.

Lastly, as counsel for DAL, Larry may be disciplined for not revealing to his clients that the Articles were not filed. A lawyer has a duty to keep his clients reasonably informed of their case. Failure to tell DAL of a crucial fact like that could leave Larry subject to discipline or even malpractice.

REPRESENTATIVE ANSWER 2

The bank will seek to hold Artist, Dentist and lawyer personally liable for the note on the theory that DAL INC. was not a de jure corporation when the note was signed and that, as a result, Artist, Dentist and lawyer are not protected by the usual limited liability provisions of the corporate form.

If not a corporation, DAL Inc. may be considered an implied general partnership based on the intent of the principals to join together to form a business and share the profits.

General partners are liable on debts undertaken by the partnership. Thus, under the bank's theory, Dentist signed the note as a general partner of the DAL partnership thereby rendering himself, the partnership, and the other partners ultimately liable on the note.

Artist, Dentist and Lawyer will raise defenses of defacto corporation and corporation by estoppel. The defacto corporation doctrine may not be available in Maryland. To the extent it exists, the doctrine allows a business in a state with an appropriate corporation law to enjoy the benefits of a de jure corporation even though it has not complied with all of the necessary elements to become a de jure corporation. The doctrine will apply only if the business took nearly all of the appropriate steps (i.e. made a colorable effort) to comply with the law and was unaware of the defect that resulted in failure to achieve de jure corporation status.

Here, the bank will argue that Lawyer has been aware of the deficiency, but failed to give notice to the bank. Typically, a client is bound by the actions of its lawyer, and Lawyer's knowledge could be imputed to the corporation.

As an alternative to the de facto corporation doctrine, Artist, Lawyer and Dentist could argue that the bank is estopped from asserting that the corporation was never formed because it has been dealing with DAL Inc. as a corporation, it made the initial deal believing DAL Inc. to be a corporation, and it has benefitted from the belief. Moreover, the corporation has clearly

adopted liability for the note by ratification, and Artist, Lawyer and Dentist relied on the corporation having full liability when they made the deal.

Under both the corporation by estoppel and the de facto corporation defenses the defendants are invoking the court's equitable power. Since he who seeks equity must do equity, both of these defenses are vulnerable as a result of lawyer's coverup. Ultimately, a court could well find for the bank.

Lawyer breached an ethical obligation by failing to inform his clients about the problem with the filing of the papers. He is breaching another by offering to represent Artist and Dentist along with himself in the matter. Lawyer's own interests are nearly completely adverse to Artist and Dentist since Lawyer's coverup is the bank's best counter to their defense. Moreover, Lawyer will likely be liable if Artist and Dentist are ultimately found responsible for the note. In addition, Artist and Dentist may have divergent interests since Artist may wish to assert that only Dentist is responsible on the note.

QUESTION 12

Anne Old was a ninety year old widow who lived alone. She was in frail physical health - she walked with difficulty and was unable to operate an automobile. Her immediate neighbors were Gus and Polly Neighbor. Over a period of several years, the Neighbors provided assistance to Old, including transporting her to church, to the grocery store, to the doctor's office, cutting her grass and shoveling snow for her in the winter. For the last several years, Gus prepared Old's tax returns for her and Polly occasionally helped Old balance her checkbook and pay bills. Between them the Neighbors spent about two hours a week assisting Old. Old did not compensate the Neighbors for their services at that time.

In June, 2000, the Neighbors met with Old and told her that they were going to become involved in a new business and that, as a result, they would no longer be able to provide assistance to her. Old became very upset and begged them to reconsider. Polly took out a piece of notepaper and wrote the following:

> "We agree to give Anne Old care in her house like we have done before and in payment for that and our past services, she will give us her house (No. 316 Lomax St., Baltimore, MD) when she can't live there anymore."

Polly then presented it to Old and told Old that if she signed the paper, she and her husband would continue to provide assistance. Old glanced at it quickly and then signed it. Gus and Polly signed it as well.

Later that afternoon, Old was badly injured in a fall. Her physician told her that she will have to live permanently in a long term care facility. Old has offered her house for sale through a realtor. The house has a fair market value of $175,000. When the Neighbors learned of this they demanded that Old convey the house to them. She has refused, saying that she wants to use the sale proceeds to pay for her nursing home.

The Neighbors have filed a contract action against Old based on the letter seeking specific performance and damages.

Based on these facts, what defenses can Old raise to the lawsuit? Evaluate their probable effectiveness.

REPRESENTATIVE ANSWER 1

A. Frustration of purpose.

Old can argue that while the K may have been valid, there is an excuse of performance based on an unforseen event that frustrates the purpose of the agreement. Old would argue that it was understood by both parties that the purpose of the K was for Gus and Polly to provide her with care subsequent to the K being signed. Since the purpose of the K is defeated now that she is living in a long term care facility, and she has no need of care. Might also argue <u>impossibility</u>, since K says in her house. This seems to be a very good argument, especially as no services have yet been performed.

B. Consideration, lack of.

Even if Old argues Frustration/impossibility, Gus and Polly might argue that the K also contemplated the exchange of the house for past services rendered. Old's response would be that past services do not constitute valid consideration for the K, unless there was some expectation of payment when services rendered. Here, that does not appear to be the case.

Polly and Gus will probably not be able to show detrimental reliance as a substitute since they took no action in reliance on the K yet.

C. Unconscionably.

Old could also try to argue that this K is void as it "shocks the conscience". However, it is not her best argument since courts are loath to use it except in cases involving unfair surprise and oppression. It seems Old knew exactly what she was trying to do here, despite the K term appearing grossly unfavorable to her.

D. Duress.

Old might argue that the pressure exerted on her by Gus and Polly, by making the signing of the K contingent on their helping her constituted duress, and thus the K was not validly formed. Probably not a good argument as courts are—unwilling to void Ks because of economic duress.

E. Capacity.

Might argue that because of Old's age, she lacked requisite capacity to sign. No evidence that mental condition was impaired, so probably no success there.

F. Unilateral K

Old might argue that the K were unilateral in that it only contemplated her performance upon the rendering of services to her. Not very likely to succeed as most K's, unless they state otherwise, are presumed bilateral -i.e., a promise to perform is sufficient consideration.

REPRESENTATIVE ANSWER 2

Old has several good defenses that she can raise in response to the lawsuit.

Frustration: Old can claim that the performance of the contract is discharged through the doctrine of frustration. Performance of a contract can be discharged under the doctrine of frustration in a case where a later event occurs, unforseen by both parties, that eliminates the purpose of the contract. In this case, Old was injured on the same afternoon that she signed the contract. This event was unforseen by both Old and the Neighbors. Furthermore, the accident requires that Old live permanently in a long-term care facility. Since Old will be getting constant care at the facility, there is no longer any purpose to the contract. She no longer has to go to the doctor's office or other care. Although the Neighbors can still render approximately 2 hours of assistance to Old a week, it is not necessary because of the constant care received at the long-tern care facility. However, the Neighbors also contracted that Gus would continue to prepare Old's tax returns for her and Polly would help Old balance her checkbooks and pay bills. It is unclear whether the long-term care facility will also provide these services for Old. Most likely, the facility will not provide such services. Consequently, there is still a purpose to the contract. As a result, Old will not win on her defense of frustration.

Consideration: Old can also defend on the grounds that there is no consideration supporting the contract. A contract without consideration is an invalid and unenforceable contract. The past services rendered by the Neighbors cannot serve as consideration for the contract. However, the new promises to help Old are good consideration. Although the

Neighbors do not have to provide care for Old anymore, they still can help her with her tax returns, her bills, and take her to church. This may seem like an unfair exchange given the small amount of work the Neighbors have to do to receive a house in return. However, a peppercorn of consideration is sufficient to support a contract. A court will not look into matters of sufficiency of consideration. Consequently, the contract is valid because there is sufficient consideration.