**FEBRUARY 2004 BAR EXAMINATION**

**QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

## QUESTION 1

On May 1, 2003, North County, Maryland solicited proposals for the construction of a county office building. The solicitation notice provided that the County would accept the lowest bid from a qualified bidder. On June 3rd, the county administrator recommended to the County Council that it accept the proposal of BigCo, a Pennsylvania company. The administrator explained that BigCo's bid was the lowest and it appeared fully qualified. The Council deferred awarding the contract. The administrator's recommendation dismayed Joe Smith, a local builder who was the next lowest bidder.

Anne Attorney is a lawyer practicing in North County and is also the president of the North Chamber of Commerce, a non-profit civic organization which lobbies local government bodies on issues relating to the business community. Smith retained Attorney to block the award of the contract to BigCo. Without disclosing her relationship with Smith, and stating that she was acting as president of the Chamber of Commerce, Attorney appeared before the Council and argued that the construction contract should be awarded to a local contractor. Attorney also persuaded the local newspaper to publish an editorial with the same message.

Smith met with the members of the County Council privately on an individual basis. Smith told each Council member that BigCo had been involved in three lawsuits arising out its projects over the last five years and that Len Large, the president of BigCo, was a convicted criminal. Smith knew, but did not tell the Council members, that BigCo had won each lawsuit and that Large's criminal record was a conviction for assault when he was eighteen, more than 30 years ago.

The Council awarded the contract to Smith during the Council's deliberations, one Council member referred to the "serious legal problems facing BigCo and Large." The meeting was televised on local cable television. Smith boasted of his achievement at a local bar shortly thereafter and Large is now aware of the facts. Had BigCo been awarded the contract, it would have made substantial profits.

**Based upon these facts:**

**a. What causes of action can be asserted by Large and/or BigCo against Smith and/or Attorney? What are the chances of success?**

**b. What ethical considerations are raised by Attorney's conduct?**

## REPRESENTATIVE ANSWER 1

A. Cause of Action and Potential for Success

First, BigCo may have a cause of action versus Attorney for interference with a prospective business contract. It was clear that BigCo submitted the lowest bid for the project prior to Attorney being retained by Smith to "block the award of the contract (K) to BigCo." Thereafter, abusing her position, an issue discussed in more detail later, as president of the North Chamber of Commerce, Attorney lobbied the County Council to award the bid to a local contractor while not divulging her representation of Smith. Ultimately, Attorney's efforts resulted in the contract being awarded to Smith and resulting in BigCo losing substantial profits. As Attorney did nothing that could be construed as illegal, her tortious conduct toward BigCo is most likely actionable with a marginal success potential.

Second, BigCo will have causes of action versus Smith for interference with the prospective business contract/advantage. Indeed, BigCo's success against Smith is more likely because Smith made affirmative representations to the County Council regarding BigCo (and Large's) fitness to perform, the work by meeting with the Council' members individually, and advising them of BigCo's litigation woes as well as Large's prior involvement with the police. These representations apparently were the basis for not awarding the K to BigCo. Therefore, the chances of success are very good.

BigCo will also have a cause of action versus Smith for portraying the company in a false light to the Council without regard to the curative facts - BigCo won all lawsuits and Large's conviction was over 30 years old - Smith painted BigCo as a less than desirable company. This resulted in not obtaining the K, and a loss of substantial profits.

BigCo may be able to sue for defamation because there were statements concerning BigCo problems to the Council members by Smith. However, both were true which is an affirmative defense to slanderous statements when not involving a public figure or public concern. This would not be successful.

Large may also sue, as President of BigCo, for interference with a business K/advantage based on the reasons alone and his status as president. Large may also sue Smith for false light based on Smiths statements to the Council regarding Large's conviction. These will most likely be successful.

B. Attorney has violated the Rules of Professional Conduct. First, she failed to disclose her representative capacity of Smith when appearing before the Board. Second, although permitted to be on the Board of a non-profit organization she is not permitted to use that position to the advantage of her client without disclosing her status as an interested party, especially where the subject matter of the representation is so closely tied to the position Attorney has with the Chamber of Commerce.

**REPRESENTATIVE ANSWER 2**

Large v. Smith

Slander per se is a defamatory statement which concerns either a loathsome disease, criminality and does not require proof of special damages.

Here, Large will allege that Smith's statement that he was a "convicted criminal" was slander per se. However, Large's chances of success in a slander per se action is low because truth is always a defense to an allegation of defamation and Smith will argue that he is a convicted criminal as evidenced by the assault conviction.

False Light is when one person portrays another in a way that is misleading, even thought the underlying claim may be true.

Here, Large will argue that calling him a convicted criminal portrayed him in a false light because it was an assault charge that is over 30 years old.

Large's chances of success on a false light claim are better than with slander per se and it would ultimately be for a jury to decide.

BigCo v. Smith

Tortious interference with contract occurs when one party tortiously interferes with the contract between 2 other parties.

Here, BigCo could argue that Smith tortiously interfered with it potential contract with the Council by hiring Attorney to lobby for Smith and by making statements to the Council. Had it not been for Smith's interference, BigCo would have gotten the contract because the Council was going to award it to the lowest bidder which was BigCo.

BigCo's chance on this claim is 50/50 because there was no contract at the time, however it was the lowest bidder and should have been awarded the contract.

Intentional Misrepresentation occurs when an individual intentionally misleads the other party as to a material fact to induce reliance and there is reliance.

Here, BigCo will argue that Smith's statements to the Council were an intentional misrepresentation of fact about BigCo because Smith knew BigCo had won the lawsuits. There was detrimental reliance on the Council's par because it had to accept the higher bid. The chance of success on this is questionable because BigCo may not have standing to bring this claim.

BigCo v. Attorney

Intentional Misrepresentation and Tortious Interference with contract (See definitions above)

Attorney misrepresented the facts buy intentionally not disclosing her relationship to Smith. She also tortiously interfered with the contract because she was hired by Smith to block the award of the K.

B. Ethical Considerations

It was unethical for Attorney to go to the Council and argue that the K should be awarded to a local contractor without disclosing her relationship to Smith. It also may be a conflict of interest for her to lobby the government on issues while also representing contractors such as Smith.

## QUESTION 2

The ABC Corporation was a Maryland corporation engaged in the real estate development

business. Able served as president and treasurer. The corporation's by-laws provided for three directors, Able, Baker and Carla. Able owned 90% of the outstanding stock in the company; Baker and Carla owned 5% each. The corporation's sole asset was "Greenfields", a farm in Queen Anne's County, Maryland. In order to finance the purchase of the property and its operations, the corporation borrowed $1,000,000 from First Bank (the "Bank"). This obligation was personally guaranteed by Able but was not otherwise secured. The business did not prosper and, at a Board meeting on May 15, 2003, Able suggested to the Board that the company sell the farm quickly to minimize losses. Baker and Carla said they would consider the matter.

On June 1, 2003, the corporation's articles of incorporation were forfeited for failure to pay taxes. The forfeiture was pursuant to Maryland law. On June 5, 2003, Able received written notice of the forfeiture. The next day, as president of the corporation, Able signed a contract to sell Greenfields to Bulldozer Inc. for $800,000. Settlement on the contract took place two months later. The only document signed pertaining to the title to Greenfields was a deed to Bulldozer which was signed by Able as president of the corporation. The deed was recorded in the land records of Queen Anne's County. Able did not inform Ben or Carla of the forfeiture, the contract or the sale until after the settlement. Able took the sale proceeds and departed for Brazil. His current whereabouts are unknown.

In September, the Bank learned that the articles of incorporation of ABC had been forfeited and also learned of the sale of Greenfields. The Bank has demanded that Baker and Carla pay the money owed the Bank from their personal assets.

**1. Was the transfer to Bulldozer valid?**

**2. Are Carla and Ben personally liable to the Bank?**

**3. How can Carla and Ben transfer Greenfields at this point? Explain your answer thoroughly.**

## REPRESENTATIVE ANSWER 1

1. The transfer to bulldozer was not proper under corporations law. Greenfields was the sole asset of the corporation. Therefore, sale to anyone would require approval of a majority of the board or unanimous written consent that action can be taken without.

Here, Baker and Carla were not informed. The only other way for this sale to be valid would be if B and C ratified it which they didn't. The main problem here is that the charter was forfeited. Under Maryland law a director can be personally liable for still acting as though he is a corporation when he knows the charter has been forfeited or he allows it to be. A had knowledge before the sale. He therefore breached his duty of loyalty and care to the corporation because he did not act as a prudent director in good faith as a reasonable person would. Although the sale was not ratified, the charter no longer existed so all of the directors acting to wind up would have had to sign it, transfer therefore was not valid because Able didn't have the authority.

2. Carla and Ben as directors could be liable if they know of the forfeit of the charter or they acted in such a way to allow the charter to forfeit. The facts do not indicate such action or knowledge on their part. They did not ratify the sale so Able's actions were not valid corporate acts. Additionally, shareholders are generally not personally liable for the debts of the corporation but in some instance the court will pierce the corporate veil to get to them to prevent fraud or enforce a paramount equity. There are no facts present here to consider they acted with Able, they didn't know about the charter being forfeited, they said they would think about the sale and the facts don't indicate they allowed the charter to forfeit, unless their failure to act to sell the land indicated this.

The bank can't sue them personally on Able's signature because he breached his duty of care to the corporation and they didn't ratify or participate. Unless it is shown they acted fraudulently, allowed the corporation to be undercapitalized or enforce paramount equity, the corporation could also not sue them as a shareholder. Able personally guaranteed the loan as an individual and they did not sign it, therefore they cannot be personally liable to the bank for Able's personal guarantee not secured by assets of the corporation.

3. Since the charter has been forfeited Carla and Ben need to dissolve the corporation and wind up. As the other directors they could ratify the sale and create a new deed selling the property to Bulldozer as directors acting to wind up the corporation's assets. They should reform the deed to have their signatures because Able did not have the authority to transfer or sell without their approval. If the court demands dissolution, a trustee may be appointed and such person could sign and sell the property.

## REPRESENTATIVE ANSWER 2

1. The transfer to Bulldozer was not valid. Able suggested selling Greenfield, , but Baker and Carla did not agree to it. Had they known Able was going to make, or had made the transfer, they could have objected, asked A to reconsider, brought Shareholder derivative action or sold their shares to avoid liability. A's actions do not appear to have been in the best interests of the corporation and constitute a breach of his fiduciary duties of loyalty and care. A. alone lacked the capacity to validly transfer the corporation's only asset. Under agency principles, however, Bulldozer will have a strong argument that A had apparent authority to do so (Able was President of the Corp.) Upon which Bulldozer reasonably relied - B may be charged with constructive notice that the Corp no longer existed. (matter of public record).

2. C and B are not personally liable to the bank. Only A personally guaranteed the loan. Further, there is no indication B or C acted fraudulently or otherwise breached their duties as directors. Rather they were defrauded by A.

3. B and C should bring a quiet title action to protect Greenfield from any claim by A or Bulldozer. While the loan from Bank was not secured by a lien (mortgage) on Greenfields, it will seek to attach it in satisfaction of the loan. Since the corporation technically does not exist anymore, B and C either need to reinstate the corporation or wrap it up and convey the land to themselves so a legal existing entity has ownership.

## QUESTION 3

Tom, Debbie and Harry spend an evening drinking and taking illicit drugs. The three of them cruise the streets in Harry's van and pick up Georgia who is hitchhiking. Georgia is offered, and shares refreshments with the three of them.

Debbie is driving the van and Tom is in the rear of the vehicle with Georgia. Tom begins struggling with Georgia but is unable to overcome her resistance. Tom has Debbie stop the vehicle at which point Debbie and Harry climb into the rear of the van and watch Debbie struggle against Tom's advances. At Tom's request, Debbie helps to subdue Georgia. At that time Tom assaults and rapes Georgia. Harry also has intercourse with Georgia while Debbie continues to restrain her. Harry then replaces Debbie in holding Georgia down while Tom attempts intercourse with her. Tom is physically unable to perform and abandons the attempt. Georgia at this point has passed out from the stress and the alcohol and drugs which she ingested. Tom, Debbie and Harry decide that they should leave Georgia by the side of the road in the hope that she will be disoriented and either not remember or report what has just occurred; that if left in a remote area Georgia might not survive due to her physical condition (injuries sustained in her rape and her intoxicated state). To further ensure that Georgia might not ever be able to report the rape or identify them, they drive to a remote area where they drag Georgia out of the van and leave her in the woods.

Georgia survives and Tom, Debbie and Harry are each charged with two counts of first degree rape as well as a single count of attempted first degree rape.

**Under what theories of criminal responsibility could Tom successfully be prosecuted for the rapes and attempted rape?**

**Discuss defenses which Debbie might raise as to her criminal responsibility and their likelihood of success with regard to the two counts of first degree rape and one count of attempted first degree rape**.

## REPRESENTATIVE ANSWER 1

Tom could successfully be convicted of two counts of rape both as a principal (for actually committing his rape of Georgia) and a principal in the second degree for Harry's rape of Georgia.

In Maryland, first degree rape is the sexual assault by a man of a woman, in which a male, through physical force or violence, and without the woman's consent, engages in sexual intercourse with her.

In this case, Tom physically struggled with Georgia, and did in fact use physical force (and caused others to use such force) in order for Tom to have vaginal sexual intercourse with Georgia. The person who performs the actual physical act of a crime is a principal.

When Harry raped Georgia, he also used physical force though the agency of Debbie, in order to accomplish the crime of first-degree rape. Although Tom did not physically participate in this particular rape, he does meet the requirements for a principal in the second degree. A principal in the second degree is one who is physically present at the scene of the crime, and aids or encourages others to commit the crime. Tom used physical force against Debbie and further encouraged Debbie to use physical force to allow him to commit the first rape, and Debbie continued this use of force through the second rape. Because Tom was present at the scene, and this act was

a foreseeable consequence of a prior or criminal action, Tom is a principal in the second degree.

Tom could successfully be convicted of attempted first degree rape, because he attempted to perform a third rape. Attempt requires an intent to commit the crime, and a substantial step toward its commission. Impotence is not a defense to attempted rape. Although Tom's specific intent to attempt may potentially be negated by the voluntary intoxication, voluntary intoxication is not an absolute defense to attempt, especially not when the defendant had recently performed the crime that is newly attempted.

Debbie's primary defense to the rape charges is that she is a woman and cannot be guilty of rape. This would be true, if Debbie were the only person charged with rape. Debbie was a principal in the first degree to the two counts of rape. In order to be a principal in the first degree, a person must be physically present at the scene and actually contribute to the commission of the crime. Debbie was present at the scene, and although she could not have committed intercourse element of the actual rape, she did provide the necessary element of physical force. Therefore, because she actually participated in Tom and Harry's rapes of Georgia, Debbie is liable as a principal in the first degree.

Debbie may be charged as an accessory after the fact in the crime of attempted rape. She will allege that she did not have the requisite specific intent to perform attempted rape. However, specific intent is not required for accessory liability. In this case, although she did not restrain Georgia during Tom's attempted rape of Georgia, Debbie did participate in the decision to abandon Georgia, and therefore provided aid and comfort to Tom and Harry after the commission of the attempted rape.

## REPRESENTATIVE ANSWER 2

Conspiracy is an agreement between two or more individuals to commit a crime. Here, Tom, Debbie and Harry are all guilty of conspiracy to commit the attempted rape of Georgia by their actions of Debbie stopping the van, climbing into the rear of the van with Harry and watching Georgia struggle against Tom's advances, Harry having intercourse with Georgia while Debbie restrained her and Tom assaulting Georgia and attempting to have intercourse with her.

Rape is a general intent crime and the act of having intercourse with the victim will suffice. The intent of the offender will be irrelevant. Here, Tom assaulted and raped Georgia and his conduct alone will be successful in getting a conviction of the rape.

Attempted rape is a specific intent crime and the offender's intent to have intercourse with the victim will suffice even if the act of raping the victim is incomplete. Here, Tom attempted to have intercourse but is physically unable to perform and abandons the attempt. Tom's abandonment of the effort will not prevent conviction of the attempted rape because he possessed the *mens rea* to commit the crime. Again, it's the intent that is relevant, not so much that the act itself was incomplete.

Debbie's defenses: As a female, Debbie will argue that it is impossible for her to be charged with two counts of first degree rape and one count of attempted first degree rape because she can't penetrate a woman. The crime of rape is defined as the unlawful penetration by a man of a woman. However, women may be convicted for this crime as well due to her urging, exciting and encouraging a man to commit the rape. Here, Debbie at Tom's request, helps to subdue Georgia while he assaults and rapes her. Debbie continues to restrain Georgia while Harry has intercourse with Georgia. Her involvement in the rape was substantial and she will be convicted of these charges.

Voluntary intoxication may be a defense to a specific intent crime because the defendant may lack the requisite *mens rea*. Here, Georgia may be able to negate the charges of the attempted rape but may not be successful in the two counts of first degree rape, which is a general intent crime to which intoxication is not a defense.

The reasoning regarding voluntary intoxication will apply to Tom as well.

## QUESTION 4

On June 1, 2002 Adam was driving his elderly neighbor, Ben, to a local food market in Somerset County, Maryland, a weekly courtesy that Adam has provided to Ben for the past year. Ben no longer drives because of physical infirmities.

Adam drove East on Secondary Drive to its intersection with Favored Street. A "Stop" sign controlled traffic entering Favored Street from Secondary Drive. At that time, Carl was driving his

automobile South on Favored Street at a speed substantially in excess of the posted speed limit of 50 miles per hour. The vehicles collided in the intersection. Adam, Ben and Carl sustained injuries.

Based on the police investigation at the scene, Adam was cited for failure to stop and yield at the intersection. Carl was cited for speeding and negligent driving.

A. On July 8, 2002, Adam and Ben met with a Somerset County attorney to discuss his representation of them in a joint suit against Carl for their injuries and for damages to Adam's car.

**Based on the stated facts, can the attorney appropriately represent both Adam and Ben?**

B. On August 1, 2002, Carl's attorney filed a standard negligence complaint and demand for jury trial against Adam in the Circuit Court for Somerset County claiming property and personal injury damages in the amount of $200,000.00.

**What preliminary motions and/or pleadings should Adam's attorney file in response to the Complaint? State the basis for any such motion or pleading.**

C. Attached to Carl's complaint is a set of 30 Interrogatories addressed to Adam. **When must Adam's attorney file responses?**

D. Upon receipt of Adam's answers to Interrogatories, Carl's attorney learned for the first time the purpose for Adam's trip on June 1, 2002. **What effect, if any, could this information have on Carl's pending suit against Adam?**

**What action should Carl's attorney take in light of this information?**

E. In preparation for trial, Adam's attorney served on Carl a request for production of the following:

i. A cassette recording of Adam's interview with the representative of Carl's insurance company concerning the accident.

ii. A copy of written statements from witnesses to the accident taken by the same representative.

iii. A copy of Carl's automobile insurance policy or a certified statement of the nature and amount of liability coverage.

iv. A list identifying all medical experts who treated Carl following the accident, and a copy of any written opinion of these experts relative to the nature and extent of injuries claimed to have been sustained by Carl in the accident.

**Is Adam entitled to all or any of the documents sought? Explain your reasons.**

## REPRESENTATIVE ANSWER 1

1. The conflict of interest exists when an attorney is asked to represent two or more parties with competing and/or potentially competing interests. Here, as a passenger in Adam's vehicle, one of Bens' likely claims for damages will be a claim of negligence against Adam, which will be permitted, as there is no guest statute in Maryland. As a result, the interest of Ben and Adam are or will be directly counter to one another, making the Attorney's representation of both Adam and Ben inappropriate.

2. If the attorney wishes to assert any mandatory defenses identified in Maryland Rule 2-322(a) a Motion to Dismiss should be filed. As venue and jurisdiction seem proper in Somerset County Circuit Court, jury trial prayer and accident in Somerset County any such motion seems unlikely.

   Attorney must file an answer to the Complaint within thirty days from the date of service on Adam. Attorney must include all affirmative and negative defenses and permissive defenses as a part of the answer. As the claim sounds in tort and is for a specific amount, Attorney may file a general denial on Adam's behalf. Also, if Adam wishes to pursue his claim for property damage and bodily injury he should file a counterclaim against Carl as part of his pleading.

3. In the Circuit Court interrogatory responses are due within 30 days of service or within 15 days after the party's initial pleading is due. Because these Interrogatories are served with the Complaint they will be due 15 days after the time for Adam's initial pleading. As Adam's initial Response/Motion to Dismiss is due 30 days after service of the Complaint the interrogatory answers will be due 45 days after service of the Complaint and Interrogatories upon Adam.

4. Under the theory of <u>respondeat superior</u>, a principal is liable for the torts of his agent. Here, as Adam was driving Ben to a local food market an agency relationship appears to exist. Also, Ben's presence in the car and his inability to drive because of physical infirmities gives greater support to the agency claim. Accordingly, Carl and his attorney should file an Amended Complaint adding Ben as a party under and agency/<u>respondeat superior</u> theory.

5. (i) Under Maryland Rule 2-402(d), Adam may obtain a recording as it is a statement of the party.
   (ii) A party is not entitled to statements of a nonparty taken in anticipation of litigation. Here Carl's insurer interviewed the witnesses in anticipation of litigation. The statements are not discoverable. However, Carl must identify the witnesses so that Adam may conduct his own interviews.
   (iii) Under Maryland Rule 2-402(b), the insurance agreement is discoverable and must be provided.

(iv) If the experts treating Carl are expected to testify at trial, all requested information/documents must be produced. If the doctors are not going to testify, the documents are likely still discoverable as they serve as support for Carl's monetary claim and they are discoverable by Adam.

## REPRESENTATIVE ANSWER 2

1. The attorney here should not represent both Adam and because the likelihood of potential conflicts is too high. Ben will want to use Adam's ticket as evidence of negligence per se. Adam will resist this because any finding of contributory negligence will foreclose his collecting in tort from Carl. A reasonable attorney would not assume these conflicts can be managed and should only agree to represent one or the other.

2. In response to the Complaint, Adam's attorney should file preliminary motions for any of the mandatory defenses that must be either claimed or waived. As to these defenses a lack of jurisdiction/venue do not apply, as it appears that Somerset County is the appropriate venue and there is no indication that the Defendants didn't reside there. There is no indication that a summons/complaint was not issued or served on Adam. It does not appear that any preliminary mandatory defenses are applicable in this case. If no preliminary motions are to be filed, I would file an answer to the Complaint within 30 days of service of process including therein my admissions or denials of the averments in the Complaint and any negative or affirmative defenses and an information report. A general denial of liability would be fine since this is a tort for money relief only. I would also file a counterclaim against the Plaintiff for negligence. The counterclaim must be filed within 30 days of the Answer or Plaintiff may file a Motion to Strike.

3. Adam's attorney must file Answers to Interrogatories within 30 days of service of the Interrogatories. Service of the Interrogatories along with the Complaint is proper and because it was served with the Complaint which is due in 30 days, the Answers to Interrogatories must also be filed 15 days from that date which is acceptable under 2-421(a).

4. This information would indicate that Adam may have been acting as an agent/servant to Ben. Carl should consider vicarious liability/<u>respondeat superior</u> as an avenue to add Ben as a Defendant. Carl should amend his Complaint to include Ben as a Defendant. Carl's counsel should have summons, complaint and all pleadings served on Ben as long as it is not less than 15 days before a scheduled trial date. Within 15 days of filing the Amended Complaint a Motion to Strike may be filed by Adam's counsel. Ben's counsel will have 30 days to answer/file preliminary motions.

5. Adam's attorney is entitled-not entitled to the following:
   (i) Cassette recording – yes, Adam's counsel is entitled to a recording of his client's statement without a showing of hardship as a party to the action.
   (ii) A copy of witnesses statements is work product and must only be turned over on a showing of substantial hardship. Therefore, Carl need not produce these statements.

(iii) Carl must provide the insurance information pursuant to 2-402(b) although it would not be admissible as evidence at trial.

(iv) Carl must only disclose any medical experts he plans to call at trial per 2-402. A written report from any such expert is required. Carl can only obtain the statements and reports of physicians not being called at trial on a showing of relevance, substantial need and inability to obtain without undue hardship. This information may be obtainable by interrogatory but not by request for production of documents.

## QUESTION 5

Al and Barbara were married on December 31, 1984 in Cumberland, Maryland. Three children were born of the marriage, David, now seventeen years old and in his third year at Private High School, where he is on the honor roll; Tony, now fourteen, a disabled child, who attends a special education program provided by the public school system for disabled children; and Mary, age thirteen and an eighth grade student in a public middle school. Al is a private contractor in business for himself earning $75,000 per year annually. Barbara is a public school teacher earning $40,000 per year. Medical coverage for the family is provided as a fringe benefit of Barbara's employment with the Board of Education. Al and Barbara own a home in Allegany County, Maryland where the family resided.

Al told Barbara on May 31, 2003 that he could no longer handle the stress within the household and that he was moving into the apartment above the detached garage located at the family property. He promptly moved to the apartment on June 1,2003 leaving the children with his wife.

On January 1, 2004, Barbara contacts you, a respected domestic relations lawyer in Western Maryland, and relates the above facts. She also informs you that Al does not work regularly and is spending time on his new boat. She further related that Al has complained to her that the poor economy has reduced his income to $50,000 annually and that his future economic prospects are bleak Nevertheless, she believes Al has turned down work recently. Barbara is concerned that Al will not continue to make the monthly mortgage payment on the family home, which Al has been paying from his earnings.

Barbara has asked you the following specific questions:

**A. Do either of the spouses have grounds for divorce?**

**B. What economic assistance to the family is available to be secured from Al through the Court?**

**C. Can the Court do anything if Al has turned down contracting jobs thereby reducing his earnings?**

**D. Can Al be required to contribute to the school tuition at Private High School for David and for Mary, whom Barbara would like to enroll at Private High School?**

**Respond to each of Barbara's inquiries and explain your reasons for each response.**

## REPRESENTATIVE ANSWER 1

A. There are two kinds of divorce (absolute and limited) based on two grounds (no fault and fault) in Maryland. First, there do not appear to be grounds for an absolute divorce based on fault grounds as there is no adultery, 12 month desertion, excessive cruelty, or violence. Second, doesn't appear to have necessary grounds yet for an absolute divorce on non-fault grounds, which requires that a marriage be irreconcilable, broken, which needs to be evidenced by one year separation (both parties seek divorce) or two year separation (if only one party seeks). Al and Barbara have not yet been separated one year. Thus, the best option is for a limited divorce (i.e., legal separation), perhaps Barbara can claim physical desertion because Al has left the marital home (technically) and there is not required desertion time duration for an absolute divorce.

B. Possible economic assistance for the family would include child support and spousal support (alimony).

1. Child support. Al has an obligation to financially support his children until they reach maturity, (18 or until finish high school if 19) in Maryland. In assessing a support action, Maryland uses parental income levels in accordance with statutes, tables and guidelines. Note, Al's support to Tony may run past age 18 if due to his disability, he will not be self-supportive once he reaches age of majority.

2. Spousal support. While divorce or separation proceedings are occurring, Barbara can seek alimony *pendente lite*, which would provide support before a final support order is entered. Given that Barbara is working, permanent support would not likely be granted. In fact, it is questionable whether or not Barbara would quality for rehabilitative alimony because she is already working and drawing a salary.

C. Yes, a court in equity can always modify child support arrangements and hold Al in contempt of court for not pursuing work in good faith. While a court cannot specifically compel Al to work, they can order garnishment of wages or asset seizures to satisfy obligation to his children.

D. A court can require Al to make necessary tuition payments to David's private high school under these circumstances as he only has one year remaining at his school and it is clearly in the best interests of David to avoid disruption at school due to parental divorce plus the economic hardship to Al does not seen unreasonable. As per Mary, who is currently in public middle school, the court must assess the hardship to Al by requiring him to pay for four years of private tuition. Here, absent a compelling interest on Mary's behalf, and Al's bleak economic prospects, I find it unlikely the court would order Al to pay four years of private tuition for Mary.

## REPRESENTATIVE ANSWER 2

A. I would advise Barbara that currently she does not have any grounds for an absolute divorce. She does not have grounds for desertion even though Al has technically moved out because it hasn't been a year and they also have not been separated for a year. I would inform her that she does have grounds for a limited divorce which is a legal separation. Since Al has deserted her, they are no longer cohabitating because the garage is detached and since they have voluntarily separated and have not been cohabitating, she has grounds. She can pursue this route and sort out custody and alimony issues or she can wait until Al has been out for a year and seek an absolute divorce.

B. Alimony. During litigation, Barbara can receive *pendente lite* alimony if he can pay and she shows need. After the divorce, the court will award rehabilitative or temporary. Maryland courts favor rehabilitative and aim to get spouses working and self-sufficient. Barbara already makes $40,000.00 and she is a teacher and is relatively young. Extra schooling could benefit her. I would

advise her that temporary is unlikely.

Child support. Under the Child Support Guidelines and examining the best interests of the children, the courts will take both spouses' income into account up to $10,000 per month. Since Al now makes $50,000 and Barbara $40,000 they are below. The court will take into account Al's reduced income and the disabled child's needs. Al will be required to pay the amount the court deems necessary. David is also at a private high school so that is considered. Barbara will also receive the marital home as primary care giver for three years, then since it is titled in both names, it will be sold. Maryland is an equitable distribution state and will consider all marital property which does not include property before marriage or inheritance. The court will then decide to make an equitable distribution or to give a monetary award.

C. If a parent acts in bad faith and seriously reduces his income intentionally, the court will not take this into consideration. To do so would give parents an out and allow them to avoid paying child support. Circumstances can however change and the economy can suffer and individuals can lose their job. As long as the parent has not acted in bad faith and circumstances have legitimately changed, the court will adjust payments accordingly. If Al is turning down work for no good reason, this is bad faith. However, custody is determined when the parents enter divorce not necessarily what they had before. This question involves a factual analysis of the circumstances which the court can and will consider to determine what is in the best interest of the children.

D. When the court is determining child support, it looks at the current state of affairs. Currently, David is in private high school and Al has been contributing. Mary is not in private school probably because she is not old enough yet. What was the parent's intent, can Al pay? If the court deems that it is in David's best interest for him to remain in private school and in Mary's best interest for her to attend private school, then yes the court will consider it. The court will examine various factors such as parent's income, changed circumstances, and upheaval to remove them from private school. The court can and does have the authority to require Al to pay.

## QUESTION 6

Marvin Ramblin purchased 7 acres located in Prince George's County approximately 4 miles from the Mason/Dixon River in April, 2002, with the intention of developing it in phases. The zoning in that area required all dwellings to be located on a buildable lot of 2 acres or more. He constructed his home on 2 acres in October, 2002.

On March 22, 2003, the County Council of Prince George's County, Maryland, enacted a subdivision law that requires all parcels in excess of 2 acres and located within five miles of the Mason/Dixon River to dedicate ½ acre of land to the County as recreational open space. The dedication was a required condition of subdivision approval. The law was enacted for the purpose of reducing the possibility of adverse impact of development to the river. The law exempts property owned by churches.

On March 24, 2003 he went to the applicable County office to begin the subdivision process for the remaining acres to construct two homes on two acres each and was informed that he would have to dedicate ½ acre pursuant to the new law, and could therefore only construct one home.

Marvin is outraged by the law and has come to you, a licensed Maryland attorney, to find a way to challenge it.

**Under what theory(ies) might you challenge the County's law, and what is your likelihood of success? Discuss fully.**

## REPRESENTATIVE ANSWER 1

Marvin can make several constitutional challenges to this law based on procedural and substantive due process, equal protection, takings and the establishment clause.
Marvin has standing because his property fits within the ordinance and he is subject to the dedication.

### Procedural Due Process

When a person's life, liberty or property rights are violated they are entitled to notice and a hearing. Here, Marvin's property is going to be taken and there are no procedures. The deprivation to his rights must be balanced against the government's interest. Some procedural safeguards would not be a huge hassle in comparison with the extent of deprivation entailed in losing ½ acre.

### Substantive Due Process

Marvin can argue that the statute is vague because it's unclear what is included. It is also overbroad because it includes too much land for all subdivisions. There is no fundamental right involved here so the ordinance needs to be rationally related to a legitimate interest. Marvin can argue the probable impact on the river is not a significant reason.

### Takings

This ordinance is taking an individual's property for a public purpose without just compensation. However, since it is a regulation and the government can use its police power to enforce measures for health, safety and welfare it will most likely be deemed rationally related to the legitimate interest in preventing adverse impact of development on the river. Marvin can argue that all economic viability of the land is taken, but this will probably lose because this is a regulation and it's only ½ acre of land that is affected.

### Establishment Clause

Under the First Amendment the government cannot enact laws that either advance or inhibit religion. The court uses a 3-part test: (1) was there a secular purpose? (3) did it advance or inhibit religion?,

and (3) did it cause excessive government entanglement? Here we have an ordinance which appears to have the purpose of reducing adverse impact of development on the river. But under the second prong, by exempting property owned by churches the County is advancing religion by allowing them to keep this land. There does not appear to be substantial government entanglement because once exempt the government does not have to deal with churches. The property does however violate the second prong and this would violate the Establishment Clause.

Equal Protection

The 14th Amendment protection is provided to individual's facing discrimination by government action if they are in a suspect or quasi-suspect class. Marvin is not in a suspect or quasi-suspect class. Although this law is discriminating against non-religious property that is in excess of 1 acre this group is not a suspect class. Therefore the law will only be viewed under the rational basis test and it needs to be rationally related to a legitimate government interest with the burden on Marvin to show there is no legitimate interest. The government almost always wins under this test. Marvin can attempt to argue that reducing adverse impact from the development is not a legitimate reason to take ½ acre of his property. However, under its police power government has broad discretion and protecting the river will most likely be upheld as a legitimate reason.

## REPRESENTATIVE ANSWER 2

Procedural Due Process: Procedural Due Process requires a party who has a property, liberty or life interest to receive notice and a hearing before they are deprived of that interest. Here, Marvin purchased 6 acres of land with the intent of developing the property into 3 homes with 2 acres each. He purchased the land in April 2002. On March 22, 2003 the County enacted the statute that required all property in excess of 1 acre located within 5 miles of the Mason Dixon River to dedicate ½ acre. It had been approximately one year since Marvin bought the property before the County enacted the law. Marvin should have received notice and the opportunity for a hearing before potentially depriving him of his land.

Substantive Due Process: Under the Substantive Due Process Clause the state shall not infringe upon a person's life, liberty or property without a compelling reason. Here we are dealing with a law requiring Marvin to give up ½ acre of land for every acre in excess of 2 acres. The County must have a compelling reason to deprive him of his property for the law to be constitutional. The courts apply the compelling interest test. The facts indicate the purpose for the statute was to minimize the adverse impact of development on the river. Certainly the County is concerned about the impact of development and the preservation of water, so this could satisfy as a compelling interest. However, the compelling interest test also stipulates it must be the least restrictive means in obtaining the compelling interest. Depriving someone of their property for this purpose is not the least restrictive means.

Takings: If a county government plans to deprive a party of their property, the government must provide just compensation to the property owner.

Equal Protection: The Equal Protection Clause of the 14th Amendment provides that every person shall be treated equally under the laws of the land. Similarly situated persons are to be treated similarly. Here the law exempts property owned by churches. Again, owning property is not a fundamental right. Therefore, the test to be applied is the rational basis test. Marvin would have to prove that the statute is not rationally related to a legitimate interest.

Establishment Clause: The Establishment Clause of the First Amendment provides that the government shall not inhibit or help religion. The courts apply the Lemon test to determine if the Establishment Clause has been violated. First, does the statute have a secular purpose? Second, does the primary effect of the statute hurt or help religion? Third, does the statute foster government entanglement? Here the purpose of the statute is secular because the county is trying to minimize the impact of development on the Mason Dixon River. Second, the primary effect of the statute is preventing churches from contributing tax dollars which is helping religion. Third, it is a fine line in determining whether the statute fosters government entanglement with religion. The law is enacted by the government which means it will be required to monitor and give notices to churches to give them the exemption. It does promote excessive entanglement from the requirement. Although it is required to satisfy all the elements of the Lemon test, prongs two and three are not satisfied. Thus, it is unconstitutional under the Establishment Clause. To be constitutional the County would have to prove that they have a compelling interest in exempting property owned by churches and must be the least restrictive manner in reaching or satisfying its interest. As noted above, its interest is protecting the Mason Dixon River. Exempting property owned by churches is not the least restrictive means nor necessary, and is, therefore, unconstitutional.

## QUESTION 7
## Common Facts
Part I

Paul, a wealthy Maryland resident, wishes to invest in collectable antique automobiles by purchasing, restoring and reselling the vehicles for a profit. Recognizing he knows little about automobiles, he contacts Dave, an experienced automobile restorer. Dave agrees to help Paul renovate and maintain the cars. Paul agrees to pay Dave $25.00 an hour for time spent. Paul also instructs Dave not to incur any expenses related to the vehicles without his specific approval.

Dave promptly locates a collection of potential automobiles owned by a third party. The Seller's asking price is $220,000, but Dave knows he would take less. Dave tells Paul the price is $220,000. At Paul's request, Dave spends 8 hours inspecting the cars and tells Paul they are a good investment. Paul pays Dave $200 for the time he spent for inspection. Paul purchases the cars for $220,000. The Seller promptly pays Dave a "fee" of $20,000, which had been agreed to between the Seller and Dave. Dave does not tell Paul about the fee.

Shortly after purchasing the automobiles, Paul finds out that he could have purchased the cars for only $200,000. He immediately fires Dave and demands a return of the $20,000.

Dave refuses to return the funds claiming the fee was earned and would have been charged by any broker to handle the transaction. Dave further asserts that even with the fee, that the transaction was still a "good deal" for Paul.

Paul sues Dave in the appropriate Maryland Court. He claims $20,000 compensatory damages plus $100,000 punitive damages.

**Explain the legal theories under which Paul's damage claims may be brought and evaluate Paul's likelihood of success.**

Part II

A. At trial, Paul testified that prior to purchasing the automobiles, Paul asked David if the Seller would take any less than $220,000. Paul then testified, over objection, that in response to his question Dave replied, "The Seller says he won't take anything less."
Dave's counsel moves to strike this testimony, claiming it is "hearsay within hearsay."
**How should the court rule on Dave's objection?**

B. In his defense, Dave's counsel asked him: "Dave, in your opinion, what is the fair market value of the cars that Paul bought?"
Paul's lawyer objects.
**How should the trial court rule on Paul's objection?**

## REPRESENTATIVE ANSWER 1

Part I

It appears Paul can bring a few claims for damages. Paul can bring cause of action in tort fraud/misrepresentation based on Dave's failure to disclose his commission and Paul's known ability to obtain the cars for only $200,000. Normally, omissions are not actionable unless there is a duty to disclose and the Plaintiff relied on that duty/special relationship. Here by contractual agreement of privity and under general agency principles, Dave owed Paul a duty to disclose material information and fairly represent Paul's pecuniary interest. He knew Paul would be relying on his unique expertise in antique cars, and dealing with the seller on Paul's behalf. As such, he owed a duty to disclose to Paul. Paul's reasonable reliance on Dave's loyalty (and as a result on his misrepresentation by this omission) caused him to spend $20,000 more than he would have had he known the true state of affairs.

Paul can assert a related claim against Dave for breach of the duty of good faith/fair dealing and loyalty that agents owe their principals. Dave was paid for his services but entered into an undisclosed dual agency relationship, thereby breaking his duties to Paul, for his own gain. He is like a promoter who engages in secret profits and should disgorge the gains made at Paul's expense. Because he breached these duties, Paul may be entitled to punitive damages if the breach was egregious, but he seems plainly entitled to the $20,000, despite Dave's assertion that the deal was still fair. Fairness would only be relevant if the deal were disclosed.

Part II

A. Hearsay is the out of court statement of a Declarant offered for the purpose of proving the truth of the matter asserted. If the testimony were hearsay within hearsay, an exception would be needed for each level of hearsay. Here, however, it appears Paul's testimony is not

being offered for the truth of the matter asserted, but rather to show Paul's reliance and Dave's fraud. Dave's statement itself is an admission/statement by a party-opponent, which may be used against him, and Seller's alleged statement is used to establish Dave's state of mind/intent to defraud Paul.

As such, I think the testimony is admissible and the objection should be overruled and not stricken.

B. Generally, lay opinion is allowed on issues within the witness' knowledge and experience (things like whether a car was speeding, if someone was intoxicated, the value of a home owned by the witness. But not on ultimate legal issues, like was the defendant negligent.) If Dave were not an experienced automobile restorer, this testimony would be inappropriate lay witness testimony – not helpful to the trier of fact because unreliable, an "expert" would be best. (Dave may even properly qualify as an expert based on his experience.) It seems, based on the ability of Paul to cross-examine and Dave's experience in the field, this testimony would be proper and the objection overruled. If the court finds this testimony is only proper from an expert, Dave may qualify if the requisite showings are made (experience, training; factual probability, permissible basis for the opinion – the evidence (basis is of the type reasonably reliable.)

## REPRESENTATIVE ANSWER 2

Part I

Paul could sue Dave under theories of breach of contract, and misrepresentation and breach of fiduciary duty, deceit.

Paul would argue that a contract was created between Paul and Dave for Dave's services as an automobile restorer, which included his consulting and advising Paul on which cars to buy, as well as providing and maintaining the cars. However, the facts do not maintain anything about a clear agreement between Paul and Dave, for Dave to find the cars. Nonetheless, Dave was an agent of Paul and owed Paul a duty of loyalty, among others.

Dave breached his duty of loyalty to Paul when he made the side agreement with the Seller, that Seller would pay Dave a broker's fee of $20,000.

Paul could argue misrepresentation the best, in that Dave misrepresented the price and possibly the value of the vehicles to Paul by stating that the price was $220,000. Paul relied on Dave's statement and his skills in determining that the cars were in fact worth purchasing for the price of $220,000. Had Paul known that the Seller would take less, he would not have paid $220,000.

Another possible action is deceit, that is probably wrapped up with the misrepresentation in that Dave deceived Paul with the amount of the purchase price of the cars and pocketed $20,000 to his own benefit, that such deceit was intentional.

Paul would recover his $20,000 loss, however to prove punitive damages, Paul must show that Dave acted with specific intent to harm, (i.e. malice), or an extreme disregard. While some would argue that such deception and misrepresentation should warrant punitive damages, Maryland courts are very hesitant to make such awards without a clear and absolute showing of malice.

Part II

A. In order to get Dave's statement in, Paul's attorney would have to show that each part of the statement constitutes hearsay in hearsay would have to be admissible separately.

However, the statement is a party admission and should be admitted as such against Dave. It is Dave's statement to Paul. Dave is a party, the statement constitutes an admission and the objection should be denied.

B. The objection should be overruled provided that a proper foundation has been laid that would enable Dave to testify about such opinion. If Dave's counsel has established Dave's experience and expertise in valuing antique automobiles then the court can allow Dave to testify regarding his opinion. A party may testify on expert opinion issues provided proper foundations have been laid and it is the matter in dispute between the parties. The fact finder would weigh the credibility of Dave and the other witnesses and determine whether or not to believe Dave.

## QUESTION 8

Bob Brown went to Sam, a farm equipment dealer, to buy a tractor. Sam showed Brown a used tractor that Sam repeatedly stated "is a 2001 Everfarm tractor in great shape."

Relying on Sam's assurances, Brown bought the tractor from Sam for $20,000 with $5,000 down and the remaining balance to be paid in installments. Sam and Brown signed a written sales contract which described the tractor as "Everfarm Tractor, Serial No. 4L3, "As Is."

Brown took delivery of the tractor on May 15, 2003. On June 1, 2003, after using the tractor several times, Brown changed oil in the tractor and found that a 2001 Everfarm oil filter would not fit. Brown contacted Everfarm with the serial number and discovered the tractor is a 1999 model.

A 1999 Everfarm tractor is worth $15,000 at retail.

On June 2, 2003, Brown demanded that Sam take back the tractor and return Brown's down payment, "as a fair adjustment." Sam refused, but offered to reduce the price to $15,000, Sam produced the documents by which he acquired the tractor, which listed it as a year 2001. Sam conceded that he did not verify the tractor's model year when he acquired it. Brown has not made any installment payments.

**Brown comes to you, a Maryland lawyer, and wants to know if he can make Sam take the tractor back and get back his down payment. What do you advise? Explain your reasons.**

## REPRESENTATIVE ANSWER 1

I would explain that as a good movable at the time of contract worth over $500 this sale is governed by Article 2 of the Uniform Commercial Code ("UCC") as adopted by Maryland. Next, I would explain that the circumstances under which he can force Sam to take the tractor back are limited. When Bob Brown (BB) took delivery of the tractor on 05/15/03 he "accepted" the Seller's tender of goods since he failed to discover that Seller's tractor was not a perfect tender (as required) under the contract in which they agreed to exchange a "2001 Everfarm tractor…" Once the goods have been accepted, "revocation of acceptance" and hence BB's ability to return the tractor – will govern his ability to return. Under the UCC, revocation of acceptance is only permitted where the goods have a substantial defect. The substantial defect test is satisfied by the 2 year model difference that the Buyer failed to discover because of the difficulty in discovering the defect or the Seller's assurances of conformity. Here both are present, Sam repeatedly stated "that the tractor was a 2001 Everfarm" even though it was not and thus he assured BB the goods were conforming. BB relied on Sam's assurances. Also, this defect is difficult to discover because, at least based on the facts provided, there is nothing that should have put BB on notice the goods were not conforming to the contract. Because these facts are so greatly in BB's favor as outlined above, I would advise him he has a good chance of success.

Sam's attempt to limit his express warranty(s) that the tractor was a "2001 Everfarm" by putting in the contract that it was for a "Everfarm Tractor, As Is" was not effective. Under the UCC, limits to express warranties must not only be express but they will be read as not conflicting with the express warranty. Here there is an obvious conflict and the express warranty that it is a "2001 Everfarm" will be given effect.

One potential problem here is the parol evidence rule which would prohibit evidence of a prior agreement (that the sale was for a 2001 model) when it conflicts with the express terms of the contract. Here, this term does not directly contradict the contract because no year of the tractor was recorded. Further, the Rule will not prohibit evidence of a parties fraudulent conduct. He will recover.

## REPRESENTATIVE ANSWER 2

The transaction between Brown (B) and Sam (S) is a contract for the sale of goods and therefore Article 2 of the UCC applies. Art. 2 requires strict compliance with the contract in order to avoid an action for breach. In the case at bar, S sold B a 1999 Everfarm tractor, whereas he initially held it out as a 2001 model. This breaches the strict compliance rule.

Additionally, S held out the used tractor as a "2001 Everfarm tractor in great shape." This clearly is an express warranty which is not negated by the sales contract language "as is". (This language would negate an implied warranty of merchantability. However, because the facts indicate that the tractor functioned properly, there is no cause of action against S for the breach of any

implied warranty. If S had known of any special purposes for which B required a 2001 model, there would be a breach for an implied warranty of fitness for a particular purpose (if B relied on S's expertise)).

The true issue here is whether B can revoke the contract based upon S's misrepresentation. Once a Buyer accepts the goods, he has a reasonable time to inspect if it is a cash on delivery contract. Here, B inspected and then paid. Therefore, the issue is one of revocation. Unfortunately B can only revoke the contract if the misrepresented fact materially inhibits the purpose of the contract. It does not appear as though B's use of a 1999 model would materially inhibit the operations for which he purchased it. Therefore it appears as though B could obtain a refund of the $5,000 or apply that $5,000 to future installment payments. This will constitute a reformation of the initial contract. I would advise B of this and advise him to make those arrangements with S. However, if B was unwilling to accept this, I would advise him to return the tractor to S and we could file an action for breach of contract (revocation) for S's failure to strictly comply with the terms of the contract, which listed the tractor as a 2001 model.

## QUESTION 9

While driving her marked police car in Annapolis, Maryland, Officer Walker observed a vehicle driving at a high rate of speed in the opposite direction. She also observed the vehicle run a red light. Officer Walker made a U-turn and activated her emergency equipment and pulled the vehicle over. The vehicle was driven by Earl. Mary Jane was in the front passenger seat while Danny was in the backseat. Officer Walker recognized Danny and Earl from a previous encounter. She informed Earl that she had stopped the vehicle for speeding and for not stopping at a traffic light and then asked for his license and registration, with which Earl complied.

While Officer Walker ran a license check, her partner, Officer Blair, a trained canine officer and his drug detection dog, Officer Fido, scanned the vehicle. Fido then made two positive alerts for the presence of drugs between the front and rear doors of the vehicle. Officer Walker informed the driver that she suspected that the vehicle contained drugs and asked the occupants to exit the vehicle so that they could search them. The occupants were taken out of the car one at a time and searched.

Officer Blair searched Danny first because he believed Danny looked nervous. Officer Blair believed his actions to be more than a mere frisk or pat down but instead intended to discover anything apparent including weapons or anything illegal. During Officer Blair's search of Danny, he felt several pebble-like objects near Danny's left thigh area, which he knew was not a gun, knife or other weapon. Officer Blair handcuffed Danny and told him that he was "not under arrest at this time" and that he had handcuffed him for his and Danny's safety. At this time, Danny stated, "I don't

know how that stuff got in there." Officer Blair then searched Danny's thigh area again but the object was gone. However, Officer Blair noticed something protruding from Danny's left pant leg, which turned out to be a clear plastic baggie containing several pieces of cocaine. Danny was placed under arrest and charged with possession of a controlled dangerous substance and possession with the intent to distribute a controlled dangerous substance.

You are the Assistant State's Attorney assigned to analyze the case. Danny's attorney has filed a motion to suppress all evidence obtained from Danny.

**What issues do you anticipate Danny's attorney will raise in his suppression motion? How do you believe the Court will rule on each issue? Discuss fully and in detail.**

## REPRESENTATIVE ANSWER 1

4th amendment of the Constitution prohibits warrantless search & seizures except for limited circumstances.

(Seizure) Stopping the vehicle = The officer noticed the car was at a high rate of speed and run a red light, thus giving the officers the right to pull over the car.

This does not violate the constitution because it is for a brief time and to issue a ticket.

(search) The search was conducted by a Government employee. Here officers. For there to be a violation of the 4th the person must have a reasonable expectation of privacy in the thing searched.

Dog one does not have an expectation of privacy in ones smell. The dog is allowed to go around the car and sniff for drugs.

Probable Cause= The positive reactions the dog gave gives the officers probable cause to do a warrantless search of the car. This exception is due to the mobility of the automobile.

Step out of the car= officers are allowed to ask the individuals to step out of the care while they conduct a search.

Searching the individuals= while the individuals step out of the car the officers can conduct a pat down and look for weapons or illegal contraband. They can not put hands in the pockets or squeeze the item.

The positive reactions from the dog do not give the officers the authority to conduct a complete search of the individuals. In fact, officer Blair believed his actions to be more than a mere frisk or pat down. The officer knew it was not a gun, knife or weapon. The pat down is for the safety of the officer and when the officer did not feel a weapon he should have discontinued the search.

Handcuffed= the officer then handcuffed Danny but told him "he was not under arrest" However, someone under these circumstances would not feel free to leave and feel like he was under an arrest.

Statement= Before the officer knew what the object was Danny said "I don't know how that stuff got in there"

Fruit of the poisonous tree = Evidence obtained in violation of the 4th will be inadmissible. Here, they did more than a mere pat or frisk, handcuffed Danny when the officer knew it was not a weapon. The evidence should be suppressed as violation of the 4th.

Suppression of the Statement= The statement was made as a result of him being handcuffed and thinking the officer was going to continue the search.

This statement was made due to a violation of the 4th and thus will also be suppressed as fruit of the poisonous tree.

Since the def has standing to bring these defenses both the evidence (physical) and the statement will be suppressed and thus inadmissible.

## REPRESENTATIVE ANSWER 2

This question discusses 5th Amendment rights to be free from unreasonable search and seizure, made applicable to the states via the 14th Amendment.

Danny will first object to the stop of the car, but it appears that the stop was perfectly legal in that the officers had probable cause to stop when they noticed the vehicle speeding and running a red light.

Danny will next object to the dog sniffing drugs inside of the vehicle, however, there is no reasonable expectation of privacy in odors emanating from a vehicle, thus the police were fully justified in their "sniff search."

Additionally, the question can be raised if Danny ever has standing to object to the sniffing because it was not Danny's car and not Danny's right to claim privacy in the smells emanating from it.

The next objection Danny will make is to the pat-down of him. He will state that the pat-down exceeded the allowable scope of the pat-down and even Officer Blair believed he was exceeding the scope of the pat-down. However, what Officer Blair believed in terms of the scope of the search in this case is irrelevant, because he was well within his power to conduct a pat-down if he had a reasonable articulable suspicion as to Danny's actions. Here, the combination of drug smells from the vehicle and the nervous action of Danny gave the officer the authority to conduct his frisk.

When conducting his frisk, the officer is allowed to pat down the clothes of the individual to feel for weapons or contraband, and that is exactly what the officer did. The officer did not remove the object he felt (that felt like pebbles) so he did not receive this item as a result of this search. When the officer finally discovered the cocaine, it had fallen and was protruding out of Danny's pant leg and thus was in plain view of the officer, thus it was permissible for him to seize the evidence. For the above-stated reasons, the Court will rule that the cocaine is admissible and not suppressed.

However, Danny's statement, "I don't know how that stuff got in there," might not be admissible, and might be suppressed. Danny will argue that the statement was made prior to his Miranda warnings and thus should be suppressed.

Miranda warnings are required if the suspect reasonably believes he is not free to leave and he is being interrogated by the police. In this case, a reasonable person would believe that they are in custody and not free to leave once they are handcuffed, despite the officer saying that it was only "for protection." Danny, however, must also have been being questioned at the time, and it was clear that the officer was not interrogating him. Danny's statement was freely uttered, and thus, will be deemed not suppressed by the Court.

## QUESTION 10

Jenny Logan owns a successful chain of florist shops throughout Maryland. One of the stores in Harford County, Maryland was not as profitable, and she wanted to sell it. On May 1, 2000, an interested buyer named Sunny Dollar agreed to purchase the shop for $500,000, after completing due diligence. Mr. Dollar paid $100,000 in cash and signed a promissory note from his company Dollar Florist, Inc. to Ms. Logan in the principal amount of $400,000. Mr. Dollar also personally guaranteed the note. The note provided for monthly payments towards the principal over the course of four years.

Always operating in an entrepreneurial spirit, Jenny decided to open a day spa. She borrowed $400,000 from Pratt S&L. Repayment of the loan was secured by the pledge of the Dollar Florist Note to Pratt Savings and Loan. On September 1, 2000, Ms. Logan executed a note in the principal amount of $400,000, a security agreement covering the Dollar Florist Note, naming Pratt S&L as a secured party, and financing statements for the Dollar Florist Note. Pratt S&L recorded the financing statements in the appropriate records section of the Maryland State Department of Assessment and Taxation. Pratt S&L never took possession of the Dollar Florist Note and Ms. Logan retained its possession.

Dollar Florist, Inc. has not been profitable. In fact, sales have declined drastically during the last quarter. Dollar Florist has not been able to make payments on the note to Ms. Logan since September 2002. Without payments from Dollar Florist, Ms. Logan was unable to make the

required payments on the Pratt S&L Note. As a result, she defaulted and the entire amount became due. In December 2002, Pratt S&L demanded payment from Ms. Logan in the amount of $150,000—the remaining balance due on Pratt S&L's loan to her. Ms. Logan has not paid Pratt S&L as requested.

Pratt S&L would like to collect the $200,000 balance due on the Dollar Note. Pratt Saving and Loan retains you for legal advice.

**Give a detailed analysis of any rights Pratt may have under Maryland Commercial Law to enforce the Dollar Note, and what steps it must take to enforce the note.**

## REPRESENTATIVE ANSWER 1

Pratt is entitled to enforce the Dollar note under §3-301 of MD Comm. Law because although they are not in possession of the Dollar note they have a security interest in the Dollar note and have the same rights as the holder, Jenny Logan, has in the note to enforce the instrument. Jenny used the note as collateral to obtain the money she needed to open a day spa.

Since Pratt has the same rights as Jenny would have because they perfected their security interest by filing the statements with SDAT, they are free to collect on the debt.

Pratt has the right to take possession of Dollar Florist note because Jenny has defaulted. They could under §9-610 sell, lease, license or otherwise dispose of the florist in its present condition or following any commercially reasonable preparation in order to get the monies that are owed. If Pratt intends to take possession, Pratt must notify Jenny and Mr. Dollar of its intent and give Dollar reasonable time to cure the debt. If the debt is not cured, Pratt may then use the court system by way of a writ of execution to secure Dollar Florist, but if they choose not to use the judicial process they must secure Dollar Florist without breaching the peace.

Once Pratt has decided to sell, lease, license or otherwise dispose of the property, they again must give notice to Jenny and Mr. Dollar that states the date, time, place, and manner by which the property will be disposed of. Again, this should be done within a reasonable amount of time to give them an opportunity to cure the debt and redeem the property. Once the property is disposed of Pratt must notify Jenny and Mr. Dollar of the amount that was received during the disposal. If there is money remaining after the disposal that is not owed to Pratt, Pratt has to return it to Jenny. If during the disposal there is a deficiency in the amount received, Pratt could file a civil action against Jenny and Mr. Dollar to get a judgment in their favor to cure the deficiency.

Since Mr. Dollar personally guaranteed the note, Pratt could go after his personal assets to cure the debt. However Pratt decides to proceed to enforce the note under §9-610 everything must be done in a way that is commercially reasonable.

## REPRESENTATIVE ANSWER 2

A. Negotiable Instruments/Enforcement

It appears that the Dollar Note is a negotiable instrument, and as such entitlement to enforce is controlled by 3-301. The note appears to be a two-party promise to pay a specific amount in a definite time period without any restrictions, which makes it negotiable. The best way for Pratt to be able to enforce the note would be to get possession from Jenny (3-301(i)). It may also have rights under 3-301(ii) or (iii). It does however have the rights to get possession of the note as a secured creditor due to Jenny's default.

B. Security Interest

Pratt has a perfected security interest in the Dollar Note. The interest attached when Jenny took possession of the $400,000 she borrowed from Pratt secured by the Dollar Note. Since Pratt did not take possession of the note, it perfected its interest when it filed pursuant to 9-312(a).

C. Default

At the point that Jenny defaulted on the loan with Pratt, Pratt had a right to take possession under 9-609(a)(i). The options are to take matters into their own hands and recover the note from Jenny themselves, if it can be done without a breach of the peace pursuant to 9-609(b)(2). Alternatively, and probably the better choice, they could get the note from Jenny pursuant to judicial process under 9-609(b)(i). They would then arrange for Jenny to turn over the note at the place convenient for both pursuant to 9-609(c).

D. Surplus/Deficiency

They would then try to enforce the note either by collection from Dollar or by selling the note pursuant to 9-610(a). The sale would have to be commercially reasonable pursuant to 9-610(b). If they are able to recover more than their $150,000 (plus reasonable expenses), they would owe Jenny any surplus pursuant to 9-608(4). Likewise, Jenny would be liable for any deficiency under 9-608(4).

## QUESTION 11

In 1985, Bob and Carol purchased a dwelling in Fredrick County, Maryland. Bob and Carol were not married, but told the title attorney that prepared the deed that if one died, they wanted the other to get his or her share. The title attorney prepared a deed that contained the following language: "To Bob and Carol as tenants by the entirety with right of survivorship."

Bob and Carol lived together in the home. After repeated arguments, Bob voluntarily moved out, telling Carol that he was moving to California "to start a new life". Carol continued to live in the home. In 1997, Carol granted a written option to Ted to purchase the property within one year. Ted did not exercise the option, and Carol continued to occupy the home.

In 2002, Carol received official notification that Bob had died that year in California, leaving all of his property by will to his companion, Alice.

**a. What interest in the home does Bob's estate have, if any?**

**b. Would your answer be different if Carol had moved out and leased the property to Ted in 1997?**

**c. Assume Bob had executed and delivered a deed conveying his interest in the property**

**to himself and Alice as Tenants in Common in 1997. What effect, if any, would the conveyance have on the ownership of the property after Bob's death? Discuss Fully.**

## REPRESENTATIVE ANSWER 1

(a) Bob's estate has no interest in the property. Under the facts, the property was transferred to Bob (B) and Carol (C) as Tenants by the Entireties. Since they were not married at the time, however, they are not able to take the property in that form. However, based on their instructions to the lawyer that they wanted a right of survivorship, a court would probably determine that the parties intended to take the property with a right of survivorship as Joint Tenants. Intent is the driving force in this determination.

Although Carol granted an option to Ted to purchase (which is effectively an option to purchase her ½ share), until that option is exercised the joint tenancy is not severed and the right of survivorship remains intact. Accordingly, when Bob died the property automatically passes to Carol in fee simple and there is no interest in the property that can pass to Alice under his will, or to his estate.

(b) Yes, my answer would change. If Carol moved out and leased the property she would have granted a present possessory estate in the property to another, which would have severed the joint tenancy. The parties would have then held the property as Tenants in Common. With no right of survivorship Bob's ½ interest would pass to his estate under his will.

© ) If Bob had executed a deed in 1997 for his interest in the property to him and Alice as Tenants in Common this act would have severed the joint tenancy and created a Tenancy in Common estate held ½ by Carol, ¼ by Bob and ¼ by Alice. Upon Bob's death his 1/4 interest passed to his estate and Alice and Carol continue to hold their interests respectively.

## REPRESENTATIVE ANSWER 2

(a) Tenancy by the Entireties is created when the interests of time, title, possession, interests and marriage exist. Here as Bob and Carol were not married at the time of purchase a Tenancy by the Entireties did not exist.

A Joint Tenancy is created by default where the parties indicate an intent of survivorship. Here as Bob and Carol indicated that if one died the other should receive their share, such an intent exists, rendering a joint tenancy. Joint tenancy has a right of survivorship, meaning when one dies the interest goes to the remaining survivor. Since Bob died his estate gets nothing and Carol gets both interests in the house.

(b) Once a lease occurs during a joint tenancy it severs one of the four unities required (time, title, interest and possession) rendering a Tenancy in Common. Here had Ted leased the property the unity of interest would have been severed and the Tenancy in Common created. Alice would then

have acquired Bob's ½ share of the property upon his death since a Tenancy in Common has no right of survivorship.

( c) The conveyance of a deed to Bob and Alice of his share of the property would have severed one of the four unities and created a Tenancy in Common. Upon his death, Alice would keep her ¼ share and Bob could devise his ¼ share to her.

## QUESTION 12

Eric, a Maryland attorney with his office in Glen Burnie, Maryland, represented Wanda in a dispute over the termination of her employment at Conglomerate, Inc. Alleging a breach of her employment contract, Eric filed a suit for Wanda against Conglomerate in the Circuit Court for Anne Arundel County Maryland. Max, a member of the District of Columbia Bar, assisted Eric on the case. Max was listed on Eric's letterhead as an associate. Max did not sign any pleadings in the case; his name was set forth below Eric's signature on the pleadings. Because of his trial schedule, Eric turned the case over to Max. Max attended a status conference held in chambers in the case when Eric had a hearing conflict in another case in another county. There was no request to have Max specially admitted in the case.

Counsel for Conglomerate filed a motion for summary judgment and sent copies to Eric and Max. Max sent a copy of the motion to Wanda and then Max told Eric that he could no longer assist Eric in the case. Eric did not respond to the motion. He did not return Wanda's calls to him about the motion.. The Circuit Court granted the motion and dismissed Wanda's suit.

As a result of a complaint filed by Wanda, information was requested of Eric on this matter

by Bar Counsel Two months have gone-by and Eric has not - yet responded to Bar Counsel. Assume that you are a member of the Maryland Bar. Eric asks you: "Am I in trouble?"

**Evaluate Eric's conduct as it relates to the grievance complaint of Wanda.**

**REPRESENTATIVE ANSWER 1**

I would advise Eric that he is in a lot of trouble and he should act now to try to save his license to practice law in Maryland. Eric has already waited two months to respond to Bar Counsel, which is far too long. Eric should immediately write a memo to Bar Counsel in order to provide clear and accurate information on each of the charges contained with Wanda's complaint.

Once Wanda filed her grievance complaint, the Bar Counsel asked Eric for information on the matter. Eric has an ethical obligation to respond to Bar Counsel promptly with thorough and accurate information so that Bar Counsel can investigate the matter. Eric's delay/non-compliance is a violation of the Maryland Rules of Professional Conduct.

Presumably, the issues raised in Wanda's complaint are the following:

- ERIC IS WANDA'S LAWYER AND MUST REPRESENT HER ZEALOUSLY

Eric agreed to represent Wanda in her case involving the termination of her employment at Conglomerate, Inc. Eric filed a complaint on Wanda's behalf alleging a breach of Wanda's employment contract in the Circuit Court for Anne Arundel County. Once Eric accepted the employment as Wanda's lawyer and entered his appearance by filing the complaint, Eric was ethically required to represent Wanda zealously and responsibly. It is a violation of the Rules of Professional Conduct to "hand off' a case to another attorney and not keep track of the case or communicate with the client. Eric will not be permitted to advance the defense that Max was the one really handling the case. Eric was Wanda's lawyer, and Eric was responsible for communicating with Wanda with enough frequency and effectiveness in order to represent Wanda adequately with zealousness. Anything less is a violation of the Rules of Professional Conduct.

- ERIC'S STATIONERY MAY BE MISLEADING

If Max is not actually an associate of Eric, then his name may not appear on Eric's stationery. This would be a violation of the Rules of Professional Conduct, because it would mislead Wanda, the client, and any other member of the public. If Max is just helping out with Wanda's case, this does not make Max an associate. Eric needs to address this matter clearly in an immediate memo to Bar Counsel.

If Max actually is Eric's associate, then Eric's letterhead should clearly indicate that Max had only been accepted to the D.C. Bar. (Some sort of clear coding system on the stationery will be adequate.) The letterhead should not in any way imply that Max had been accepted to the Maryland Bar. It must be clear. We are not told whether Eric's letterhead clearly indicated that Max was a member of the D.C. Bar and not the Maryland Bar. This is important, because Eric is not allowed to hold out that Max is a member of the Maryland Bar. This would be a fraudulent misrepresentation and confuse Wanda and the general public

- MAX WAS NOT ADMITTED *PRO HAC VICE*

If Max were going to actually handle the case and effectively practice in Maryland, then he would have to file a motion for admittance pro *hac vice*. If approved, this would enable Max to practice in Maryland for the purposes of this case only. Eric must ensure that Max follows this procedure. It will not be a defense to simply say that Max simply helped out a bit too much here. It is one thing to delegate simple matters. It is quite another thing to turn over a case to another lawyer. Clearly, Max has effectively become Wanda's attorney. Max is handling the status conference and corresponding with the client. Both Eric and Max are in violation of the Maryland Rules of Professional Conduct. At Eric's request, Max was engaging in the unauthorized practice of law in Maryland. Max cannot claim that he was just "following orders." This is an inadequate defense.

- ERIC FAILED TO COMMUNICATE EFFECTIVELY WITH WANDA

We are told that Max sent a copy of the motion for summary judgment to Wanda. It is Eric's responsibility to ensure that a copy of the motion is mailed to Wanda. Because Eric did not return Wanda's calls about the motion, the response time expired and the motion to dismiss was granted. Wanda forfeited her chance to respond to the motion because Eric would not return her calls. This is a most egregious violation of the Rules of Professional Conduct. An attorney must communicate with his clients so that they can be involved in the decision-making process, just as they are entitled to be. Effective communication between attorney and client also helps to ensure that the attorney is representing the client in the best, most effective manner. If Eric unilaterally decided to let the response time to the motion run, this was unethical. If Eric accidentally let the response time to the motion lapse due to laziness or disorganization, he is still responsible for violating the Rules of Professional Conduct. There is no excuse. Wanda is entitled to sue Eric for malpractice, since she was unable to effectively respond to the motion for dismissal. Wanda will probably win. Eric will be lucky to hang on to his license.

## REPRESENTATIVE ANSWER 2

Eric faces trouble: lack of zealous representation, assisting in the unauthorized practice of law, lack of communication.

First, Eric needs to be made aware that he could not unilaterally turn the case over to Max. Eric has entered his appearance and he should have sought Wanda's permission to withdraw or seek the court's approval. This is in violation of the rules of professional conduct on proper withdrawal. His withdrawal in this manner prejudiced Wanda's claim.

Second, Eric's conduct in having Max represent Wanda in Maryland constitutes his participation in the unauthorized practice of law. While Max is licensed in D.C., he is not in Maryland and did not seek to have him specially admitted for this purpose.

Third, concern for Eric. The Rules Of Professional Conduct require an attorney identify his bar admissions on the letterhead. Had Eric complied with this mandate, the court and Wanda would have been aware that Max was not licensed in Maryland.

Eric's fourth concern: Not responding to Conglomerate summary judgment motion. Eric is still the attorney of record here and his failure to respond amounts to malpractice in violation of the Rules Of Professional Conduct which require a lawyer to be competent. Basic competency requires a responsive filing to a summary judgment motion. This lack of competency is in violation of the Rules of Professional Conduct.

Eric's fifth concern: His duty to respond and keep his client informed. Eric breached this duty by failing to keep in contact with Wanda, his client, and appraising her of the status of her case.

Eric's sixth concern: Eric has an affirmative duty to cooperate with Bar Counsel. He breached that duty and obligation by failing to Bar Counsel's request.

Wanda's grievance relates actionable conduct by Eric. Eric will be subject to discipline.