JULY 2004 BAR EXAMINATION

QUESTIONS AND REPRESENTATIVE GOOD ANSWERS

QUESTION 1

On December 29, 2003, Seller entered into a written contract with Buyer for the sale and purchase of Seller's house in Howard County, Maryland for the sum of $175,000.

The pertinent provisions of the contract provided for a down payment of $5,000 which Buyer paid upon execution of the contract with the balance to be paid in cash "at time of settlement which shall take place on or before sixty (60) days from the date hereof (February 27, 2004) at which time, and upon payment as herein provided, possession of the premises shall be given and a deed containing covenant of special warranty shall be executed and delivered to Buyer."

The contract further provided: "This Contract contains the final and entire agreement between the parties, and neither shall be bound by any terms, conditions or representations not contained herein; time being of the essence of this agreement."

During negotiations between the parties prior to signing the Contract, Seller told Buyer that he was not certain when a new house he had under construction in Ocean City, Maryland would be finished and ready for his occupancy but that his best estimate was two months.

On February 27, 2004, neither Seller nor Buyer had taken any steps toward settlement. However, on March 1, 2004, the settlement date was extended to March 11, 2004 by mutual agreement.

Buyer did not tender payment or notify Seller that he was ready for settlement on March 11, 2004; nor did Seller notify Buyer of his readiness to settle on that date. In fact, Buyer' attorney had not completed the title examination and Seller's house was not ready for occupancy.

On March 19, 2004 Seller' attorney notified Buyer by letter that inasmuch as the property settlement had not taken place within the time stipulated in the Contract as extended; and "that time being of the essence," Seller considered the Contract void and of no further effect. On March 28, 2004 Seller contracted to sell the property to a third party.

In a suit by Buyer for specific performance, what would be the likely outcome? What facts and principles of law support your conclusion?

REPRESENTATIVE ANSWER #1

The original agreement between Buyer and Seller dated December 29 is a land contract, which is the operative legal document in the first stage of a land conveyance. Normally, time is not considered a material element of such a contract; by inserting the phrase "time is of the essence of this agreement," however, the parties made time a material element of the bargain.

The December 29 agreement also contained the phrase "upon payment as herein provided," which conditioned Seller's obligation to turn over possession and the deed on Buyer's obligation to provide the remainder of the purchase price.

By not remitting the payment to Seller on February 27 as agreed, Buyer was in breach. On March 1, however, the parties agreed to extend the settlement date to March 11. The parties' mutual agreement (i.e., promises given by each to extend the settlement date) means that there was consideration for the new contract made on March 1. Despite this exchange of promises, however, the March 1 agreement constitutes a modification of the December 29 agreement. To validly modify a contract within the statute of fraud (and a contract for a conveyance of land is always within the statute) when the modification word means that the contract remains within the purview of the statute, the modification must be in writing. Unless the March 1 agreement was in writing, therefore, it is not an enforceable agreement and Buyer's failure to tender payment by February 27 constitutes a material breach. Buyer could not, therefore, succeed in his lawsuit.

Assuming that the March 1 agreement is in writing, Buyer will still not prevail in his lawsuit. Even if the agreement to extend the settlement is valid, Buyer breached the new agreement by failing to tender payment on March 11. In fact, Buyer had still not tendered payment by March 28. Though the court is unlikely to consider the time agreement a material element at this point, (assuming a written modification) given the parties' mutual agreement to extend the settlement date, Buyer is still likely to loose if the court considers Buyer's failure to tender payment by March 28 unreasonable and evidence of breach.

REPRESENTATIVE ANSWER 2

Buyer would not succeed in achieving specific performance of the land sale contract with Seller. As a preliminary matter the original contract was valid as it satisfied the statute of frauds, stated the consideration and identified the property in question. Further, specific performance is a proper remedy in land sale contracts due to the inherent uniqueness of each piece of property.

First, the original land sale contract contained a clear and valid merger clause ("the final and entire agreement"), which has the effect of making the agreement a complete integration – the parole evidence rule no additional terms can be added and evidence prior or contemporaneous to the contract can be added. Here, the contract said that "time is of the essence," and the Seller's statement regarding the completion of his new house are not given any effect. Without more, the

Buyer would have been in breach on February 27 had he not tendered the remainder of the purchase price. However, there appears to have been a valid modification of the original contract. Regardless of what a contract says ("neither shall be bound by any terms, conditions… not therein"), an agreement can always be modified at a future date. Here, the parties made a later agreement that the settlement date would be moved to March 1, 2004. (Note: for this modification to be valid, it must satisfy the "equal dignity rule" – as the original contract must satisfy the statute of frauds, so must the modification; here, the facts do not suggest whether in writing, so I am assuming that it was in writing. There is also consideration for the modification, as Seller could keep the house for a longer time in exchange of which Buyer did not have to tender the remainder of the purchase price).

On March 19, when Buyer had not tendered the remainder of the price, he was in breach. Buyer might argue that Seller was in breach, because he hadn't notified him of settlement, but this will fail, as it is B that has the greatest weight of performance left; Seller said ready to leave house on March 11, Buyer must express willingness to complete tender.

As B had not tendered by the agreed upon date, Buyer was in breach and Seller did not have to perform, so there can be no specific performance.

QUESTION 2

Molly Miser, a meter maid employed by the Town of Beverly, Maryland, dreams of becoming a police officer for the Town. One day while in uniform and on duty checking for expired meters, she noticed two young men, Wally and Eddie, engaged in what appeared to be a scuffle in the front yard of a residence. Sensing an opportunity for a true law enforcement experience, Molly charged across the street to investigate. At that moment, Wally's mom, June, looked out of the window and saw a stranger running toward her minor son and his friend. Fearing for their safety, she opened her front door and let the family pit bull "Vichuss" out without its muzzle, as required by the Town's animal control ordinance. Shocked by the sight of Vichuss, Eddie darted to the edge of the property to escape the dog. Molly, running from the other direction, whipped out her personal 22-caliber pistol and fired off a warning shot to scare Vichuss. However, the bullet struck Eddie in his left thigh.

As Eddie lay incapacitated in the street, Vichuss pounced on him and bit him in the thigh. Startled by the sequence of events, Molly stood frozen in the street and was hit by Ward who came careening around the corner in an SUV in this residential neighborhood. Because he was changing his compact disc at the time, he did not see Molly and Eddie in the street until too late to avoid an accident.

Eddie was treated at the local hospital for Vichuss' bite and the bullet wound in his thigh. After his release, Eddie experienced insomnia, headaches and nightmares. Molly suffered two broken legs and three broken ribs and was placed in traction for a full month. Fearing that she will never become the police officer of her dreams, she also suffers from recurring anxiety.

a. What causes of action might Eddie bring and against whom? What defense would you expect to be raised? Discuss fully.

b. What causes of action might Molly bring and against whom? What defense would you expect to be raised? Discuss fully.

REPRESENTATIVE ANSWER 1

Eddie v. June

Eddie would first bring a charge against June for negligence and for strict liability for a vicious domesticated animal. Under his cause of action for strict liability Eddie must show that June knew Vichuss had vicious propensities. This may be shown if Vichuss has bitten someone in the past. If Eddie can demonstrate such then June will be strictly liable for the bite caused by Vichuss.

If Eddie's suit for strict liability fails, Eddie may also sue June under a theory of negligence. Negligence requires that Eddie prove duty, breach, causation and damages. June had a duty of

care to act as a reasonably prudent person under similar circumstances. Eddie would argue June had a duty to not release Vichuss without a muzzle as required by law. In Maryland, failure to obey the law is not negligence per se, but is evidence of a duty of care and a breach of that duty. Further, Eddie can show that he was the type of person the statute was designed to protect; a statute requiring muzzled pit bulls demonstrates a fear they might bite; and this is the type of risk that the statute was trying to prevent. Eddie would argue June breached this duty by releasing Vichuss without his muzzle. He would further assert June's actions were both the legal and factual cause of his injury. But for June releasing Vichuss, he would not have been bitten and it was foreseeable Vichuss might bite someone, including Eddie. Here June may argue that Molly's gunshot was a superceding intervening cause, because Vichuss may have just been reacting to the gunshot. However, Eddie will counter that the gunshot should have caused Vichuss to then attack Molly, not him. Eddie can also prove damages as he was treated for the bite. Further, he can try to recover for negligent infliction of emotional distress. This is not a separate cause of action but could be asserted in his claim for damages.

June's defense will be defense of others. She will argue that she was trying to defend Eddie and her own child from a stranger she saw approaching them. However, Eddie will argue June was not reasonable in her actions, because she did not know whom the dog might attack. Further, because Molly was in her uniform, June should not have feared her as much.

Eddie v. Molly

Eddie will also assert a claim of negligence against Molly and a claim of battery. His battery claim will likely fail because he would have to show an intent that the bullet hit him, and here Molly fired a warning shot without intending that the bullet hit Eddie.

Eddie will be more successful in his negligence claim and will again have to show duty, breach, causation, and damages. Here he can show Molly breached her duty of care to act as a reasonably prudent person under similar circumstances because she should have been more careful in firing a dangerous weapon. Further, he can show his injuries were the actual cause and foreseeable result of her negligence. Damages are shown by his hospitalization and he may also tack on a claim of recovery for negligent infliction of emotional distress.

Molly may also assert a claim of defense of others and herself by firing the shot. But it will fail because she was not reasonable in defending the boys and in Maryland to defend herself she must try to retreat first, as there is a duty to retreat.

Eddie v. Town of Beverly

Eddie can also assert a cause of action against the Town as vicariously liable for the actions of its servant Molly under the doctrine of respondeat superior. Maryland has waived sovereign immunity for municipalities in tort suits. The town may argue Molly was not acting within the scope of her employment, but because she was at work in uniform checking meters this will

probably fail.

Molly v. Ward

Molly will assert a cause of action against Ward for negligence. He breached his duty of ordinary care by failing to stop for her when taking his eyes off the road and thus caused her damages. He will argue she was contributorily negligent by standing in the road which would completely ban her recovery. He could also argue she impliedly assumed the risk when standing in the middle of the road. She will counter that if she was negligent, he had the last clear chance to avoid hitting her so she can still recover. Further, like Eddie she can tack on a claim of negligent infliction of emotional distress in her request for damages.

Molly v. June

Molly can assert a claim of assault against June for intentionally causing fear of an immediate touching by Vichuss. Molly feared being attacked, as demonstrated by her warning shot. June will assert defense of others as her defense, but this will probably fail as Molly just approached the boys and was in her meter maid uniform so June was not reasonable in her belief the boys needed to be defended.

REPRESENTATIVE ANSWER 2

Eddie:

Eddie can bring a cause of action against Molly, the Town of Beverly, Ward, Wally and June.

Eddie v. Molly – Eddie can bring a cause of action against Molly for assault and battery. Assault because Molly intended or had substantial certainty that firing her gun would cause a reasonable person apprehension or fear. Molly will argue that she can't be liable since she did not intend to hit Eddie but rather intended to scare Vichuss. However, under the doctrine of transferred intent Molly will be liable for both assault and battery because the gun from her person caused an unpermitted touching of Eddie by the bullet. Eddie may also be able to bring a cause of action against Molly for intentional infliction of emotional distress, because her conduct in waving the gun may be viewed as extreme and outrageous and it appears that Eddie suffered severe distress with insomnia, headaches and nightmares. Edie may also charge Molly with negligence. She owed Eddie a duty of reasonable care under the circumstances, she breached this duty, this

breach was both the proximate and but for cause of Eddie's injuries and Eddie suffered damages. Eddie will argue that he is a foreseeable plaintiff because Molly saw him and came

running toward him. Molly had a duty of reasonable care which she breached by waving a gun and shooting it – an uncommon practice for meter maids. Eddie's injuries resulted due to Molly's negligence and he suffered damages – the bullet wound and getting bitten by the dog.

In her defense, Molly will argue that she was trying to defend Wally's defense of others.

Eddie v. Town of Beverly – Eddie will sue the Town under respondeat superior. He will argue that the Town is liable for Molly because she was an employee working in the scope of business, and negligent. The Town will argue that Molly's conduct was not for its benefit because it does not encourage meter maids to carry guns and shoot people/dogs. If Molly is found negligent, the Town can Sue her for indemnification.

Eddie v. June – Eddie will sue June for negligence and strict liability. Eddie will claim that June was unreasonable. She owed him a duty, she breached the duty by sending a pit bull on the lawn where he and Wally were playing, sending the pit bull was the proximate cause of his injuries and he suffered damages due to dog bite. June may defend that Eddie was a trespasser on her land and thus she owed him no duty. However, it is likely that Eddie was not a trespasser but a licensee, and June owed him a duty to protect him from known dangerous conditions such as a pit bull. Even if Eddie were a trespasser, he was a known trespasser since June saw him through the window, and she still had a duty to protect known trespassers from dangerous conditions of the land.

Eddie may also sue June in strict liability for the dog bite from a domesticated pet. It the pit bull has bitten previously June is put on notice that it is dangerous. June may defend that she was defending her property however one can't be unreasonable when doing so.

Eddie v. Wally – Eddie may have a claim for battery against Wally if the scuffle was an unpermitted touching. Wally could defend by arguing self-defense – that he was protecting himself.

Molly v. Ward – Molly can bring a cause of action against Ward for negligence. Molly will argue that Ward owed her a duty of reasonable care, he breached that duty because it was unreasonable to drive while changing a CD. Molly will argue that his negligence is both the but for cause of her injuries and the proximate or foreseeable cause. Molly will further assert that she suffered damages. Molly will have a cause of action against Ward for battery for the unpermitted touching of Molly by Ward with his car.

Molly v. June – Molly cannot use a theory of negligence per se against June for releasing her dog since Maryland does not recognize this.

June v. Molly - Because of her entry onto the land it is possible that June could sue Molly for trespass.

Both Molly and Eddie are entitled to compensatory damages.

QUESTION 3

E-Tronics is a Maryland corporation that sells televisions and other consumer electronics. In 2002, E-Tronics borrowed $500,000 from First Bank to enable the Company to keep a sufficient

inventory on hand to meet customer demand. E-Tronics granted First Bank a security interest in "all inventory and equipment now owned and hereafter acquired" which was so stated in the timely filed financing statements with the Maryland State Department of Assessments and Taxation. ("SDAT").

January 15, 2003, E-Tronics purchased fax equipment from Two Guys, Inc. for office use to allow E-Tronics' customers to fax orders. Two Guys financed the entire price of the fax equipment, and was granted a purchase money security interest in the fax equipment.

April 1, 2003, E-Tronics purchased computer equipment from Two Guys to handle customers' orders over the internet. Two Guys financed the purchase of the computers, and was granted a purchase money security interest in the computers.

April 15, 2003, Two Guys filed financing statements with the SDAT describing the fax machines and computer equipment as collateral.

February 14, 2004, E-Tronics arranged with Third National Bank to finance the purchase of $200,000 worth of Ace plasma televisions. The televisions were delivered on February 18, 2004. E-Tronics granted Third National Bank a purchase money security interest in the televisions.

February 20, 2004, Third National Bank filed a financing statement with the SDAT noting a security interest in "all of E-Tronics inventory of Ace plasma televisions."

Due to serious cash flow difficulties, E-Tronics fails to make payments to creditors and goes out of business. The secured parties seek to enforce their security interests.

Discuss and analyze the priority of the security interests of First Bank, Two Guys and Third National Bank in the fax machines, computer equipment and televisions.

REPRESENTATIVE ANSWER 1

Two Guys ("TG") has priority over First Bank ("FB") in its security interests in E-Tronics ("E") computer equipment. Under UCC 9-324 (a), a perfected PMSI in goods, other than inventory, has priority over conflicting security interests in goods if the PMSI is perfected within 20 days after debtor receives possession. Here, TG financed the debtor's fax equipment which were delivered on January 15, 2003. TG failed to file a financing statement until April 15, 2003. Therefore, FB has priority in the fax equipment. However, TG has priority in the computers because it filed its financing statement on April 15, 2003, which was within 20 days of delivery of the computers on April 1, 2003. FB has priority over Third National Bank ("TNB") in their security interests in E-Tronics inventory. FB filed its security interest in E's inventory and after acquired inventory in February 2002. As a PMSI holder in inventory, TNB lacks priority over FB because it failed to comply with 9-324 (b) to insure its priority over the inventory (plasma TVs) that it financed. Per 9-324 (b), for a PMSI in inventory to take priority over a prior perfected security interest in inventory, the PMSI holder must perfect on or before delivery of the inventory and give notice to prior conflicting holders of security interests in inventory. Because TNB filed its security interest

on February 20, 2004, after delivery, and failed to notify FB, FB has priority.

REPRESENTATIVE ANSWER 2

This question deals with Article 9 security interests.

Security Agreement. E-Tronics has security agreement with (FB), it attached when value was given by bank, they had an agreement and E-Tronics has right in the collateral. It was perfected upon filing at SDAT.

Two Guys has PMSI in fax machines and computer equipment. PMSI in equipment has a 20 day grace period to perfect its interests. Here 2 Guys did perfect on 4/15/2003 within the 20 day grace period for the computers but not for the fax machines. The fax machines are therefore unperfected.

Third National Bank had PMSI in plasma screen tvs. PMSI in inventory to have priority must be attached when debtor takes possession and the other secured party must be notified of the PMSI. Here attachment occurred at time of delivery, but Third National Bank did not notify other creditors (First Bank which had an after acquired property clause) before E-Tronics took possession. Third Bank therefore has an unperfected security interest in tv's, as it did not follow PMSI 9-324(b) requirement of notice to other secured parties.

Fax machines. First Bank wins. First Bank perfected interest in inventory/equipment is superior to 2 Guys whose PMSI was not filed during the 20 day grace period. Purchase 1/15/03 not filed until 4/15.

Computers. 2 Guys wins. 2 Guys PMSI was filed within grace period 4/1/03 purchased filed 4/15/03. Their interest of PMSI takes priority over First Bank.

Plasma TV's. First Bank wins. First Bank perfected security interests in after acquired property in 2002. Third National Bank failed to adequately perfect under requirements of 9-324, did not give notice.

QUESTION 4

Pete owns Pete's Pizza Planet, an unincorporated business consisting of six highly successful pizza delivery shops in Maryland. On June 1, 2001 Pete entered into a written four-year contract with Cheeze, Inc., (Cheeze) whereby Cheeze agreed to become Pete's "exclusive supplier of Grade A pizza cheese." This cheese is readily available on the market and its specific ingredients are widely known in the food business. Pete purchased approximately $1,000,000 worth of products from Cheeze each year.

Pete was very happy with his agreement with Cheeze and the superior customer service it provided. In fact, he was so happy that on June 1, 2002 Pete entered into a second written contract with Cheeze for the next three years to serve as his advertising agency to design, produce and coordinate Planet Pizza's marketing campaign. Pete agreed to spend, through Cheeze, $250,000 per year in advertising because he liked Cheeze's creativity and proven success in conducting advertising campaigns for pizza businesses.

On April 30, 2004 Mega-Mini, Inc. ("Mega Mini") purchased all of Cheeze, Inc's assets. The sale included an assignment of Cheeze's ongoing supply and advertising contracts with Pete.

Although Mega Mini assumed the contracts and continued to supply products and services as required, Pete did not like the new sales and advertising personnel he was now forced to work with at Mega Mini. Therefore, on June 1, 2004, with one year still remaining on each contract, Pete notified Mega Mini that he refused to accept an assignment of the contracts and was terminating both contracts.

Mega Mini consults you, its newly hired house counsel and recently admitted Maryland attorney.

Advise Mega-Mini as to:

- **a. The enforceability of the supply contract;**
- **b. The enforceability of the advertising contract;**
- **c. Damages, if any, Mega Mini may recover.**

Explain your reasons.

REPRESENTATIVE ANSWER 1

a. The supply contract (k) is for the sale of goods valued at over $500 and was therefore memorialized in a written k. In order for Mega-Mini (MM) to enforce the k against Pete (P), he must have signed the k. Assuming he has done so, MM must be concerned with the validity of the delegation by Cheeze (c) of its obligation of performance to MM. The UCC generally permits the delegation of one party's duties under the contract to another party, unless the original parties indicted otherwise. P would argue that the provision in the k requiring that c be the "exclusive supplier" was sufficient language to prevent a delegation. However, the readily available nature of

the product and its widely known ingredients would indicate that the cheese is tangible and therefore c should be permitted to delegate its duty; MM would also argue that the "exclusive supplier" is insufficient to prevent an assignment. P may request assurances from MM that it will continue to provide the cheese and MM must provide assurance [2-210(b)].

b. The contract (k) for advertising was a personal service k not capable of being performed within 1 year, so it was validly reduced to a writing. Like the sale of goods k, P must have signed the agreement in order for MM to proceed against P. Assuming P signed the agreement, MM must argue that the delegation of duty to perform this service k was valid. Personal services that require skill are non-delegable by that party owing the service. P will argue that the delegation of advertising responsibility to MM was invalid b/c such a duty requires skill and cannot be delegated.

c. If the assumption of the cheese k is valid, then MM would be able to recover damages for P's anticipatory repudiation of the rest of the k. P would be in breach and thus liable to MM for damages. MM would be able to recover expectation damages from P of the value of the remaining k, about $1,000,000. However, from this MM would have to subtract the price he gets from another buyer to whom he is able to sell the cheese. Or if MM is a lost volume seller then he may recover his lost profits.

Even if the court determines the delegation of the service k to be valid, it is very unlikely to order specific performance, instead, it would award monetary damages for P's breach, the value of 1 year or about $250,000 from which MM would have to subtract any money it saves from not having to perform.

If the enforceability of either k is denied, then MM would want to sue c for damages probably under the sale contract between the two for not providing its bargained for consideration.

REPRESENTATIVE ANSWER 2

A. Mega-Mini can probably enforce the supply contract against Pete. Because the contract does not contain an explicit prohibition against assignability, the contract is assignable by Cheeze, unless the service or product to be supplied by Cheeze is such that it cannot be assigned without causing substantial harm to Pete (e.g., if the product or service are truly unique to Cheeze and to Pete's needs). In this case, the supply contract is for a kind of cheese that is readily available from other suppliers, so it is a commodity and not unique. Thus, the contract will withstand assignment to Mega-Mini.

B. It is debatable whether Mega-Mini can enforce the advertising contract. Using the same analysis as above, it is unclear whether the advertising services are unique enough to prevent assignment of the contract. The ad design work is most likely to be considered a unique talent because of the creativity involved (unless Pete has relied on Cheeze solely for plain, unimaginative ads), while the production and coordination work is more commodity-like. Also, by waiting over

a month to terminate the contract, Pete might have waived his rights to do so if the delay was deemed unreasonable. However, this is unlikely, given the relatively short notice period (one month).

C. Mega-Mini can recover expectation damages only and not consequential damages or specific performance. Expectation damages are those damages that the plaintiff would have received had the contract been fully performed. In this case, the expectation damages amount to the foregone profits that Mega-Mini would have earned had Pete not repudiated the contracts.

For supply contract, Mega-Mini's foregone profits would likely be calculated based on a reasonable forecast of Pete's cheese purchases for the year remaining on the contract. Because Pete's cheese purchases had approximated $1 million per year for the previous three years, Mega-Mini can reasonably fix the sales forecast (from which expected profit would be calculated) at the same level based on Pete's past performance.

Mega-Mini's ability to recover foregone profits from the advertising contract will depend on whether the contract was validly assigned. If it was, then the foregone profits would also be calculated based on a reasonable forecast based on Pete's past performance on the contract.

QUESTION 5

Max and Morley are identical twin brothers who inherited, in equal shares, all of the member interests of Doughnut Heaven, LLC ("Heaven"), a successful Maryland limited liability company.

Max and Morley are unable to agree on significant management decisions. A dispute arises over the repayment of money loaned by Max to Heaven that was used by Morley for both business and personal reasons.

Max decides that he can no longer work with Morley, and consults with Heaven's lawyer, Amanda Attorney to find out how he can personally remove Morley from the business. Amanda is a recent law graduate who practices law in Lewes, Delaware. She is not a member of the Maryland Bar. Amanda advises Max that to assist him she expects to receive an interest in the business as part of her fee.

During one of Heaven's business meetings at its headquarters in Easton, Maryland, Max, without Morley's knowledge, instructs Amanda to immediately (i) create Doughnut Universe, LLC ("Universe"), a Maryland limited liability company, (ii) issue the member interests 90% to Max and 10% to Amanda, and (iii) prepare any documents to transfer all of Heaven's assets to Universe. In addition to the member interests, Amanda will receive from Max her hourly rate of $350 for preparing the necessary documents.

Max and Amanda refuse to answer Morley's telephone calls regarding Heaven. Consequently, Morley files a complaint with the Attorney Grievance Commission of Maryland. Max and Amanda fail to respond to the Commission's several requests for information.

You are the assistant bar counsel assigned to investigate Morley's complaint and you have confirmed the above facts.

Is there any basis for disciplinary action against Amanda? Explain your answer fully.

REPRESENTATIVE ANSWER 1

Possible violation of Professional Rules of Conduct:

(1) Conflict of Interest: As the facts indicate, Amanda (A) is the attorney for Heaven. An attorney must not represent a party if that party's interests are directly adverse to another client or if representing the party would materially limit the duties owed to the other client. A client can obtain the signed waiver of all affected parties, but waiver is only valid if the attorney is reasonable in thinking that representing both parties will not have an adverse impact on either

or both parties.

As counsel for Heaven, A can not represent one of the member's if the member's interests are adverse to the LLC. Although the LLC might want to remove Morley for his commingling of LLC funds, it is not proper for A to represent Max in his personal attempt to remove Morley. Moreover, creating a competing venture (Doughnut Universe, LLC) and transferring Heaven's assets to Universe are certainly not in the best interest of Heaven.

(2) Business Transactions with Clients: An attorney can not enter a business transaction with a client, unless the client receives a fair and reasonable deal and is advised to seek independent counsel. A will argue that this was merely the fee arrangement, but this is also seen as a business transaction.

(3) Reasonable Fees: Either stock or a member of interest is a valid form of payment, but it must still be reasonable (and it is subject to the business transaction rule). To determine if fee is reasonable, we look at the complexity and novelty of case, the skill and experience of the lawyer, the amount customarily charged by others in similar practice, the length in time of representation and whether representing client precludes attorney from accepting other business because of conflicts of interest that arise. $350.00 an hour for a recent graduate practicing in Lewes, Delaware, plus 10% interest in a company appears unreasonable.

(4) Unauthorized Practice of Law: A is a member of the bar in Delaware not Maryland. Although an out of state attorney can handle a company's legal business on a limited basis (not appear in court on behalf of client without pro hoc vice), all of Heaven's business appears to be in Maryland. Under these facts, A appears to have engaged in the unauthorized practice of law.

(5) Duty to Communicate: A has duty to communicate with her clients. Her failure to communicate with Morley on behalf of Heaven violates this duty. A must keep in close contact with client and return calls.

REPRESENTATIVE ANSWER 2

There are several bases for disciplining Amanda:

(1) Amanda (A) is not licensed in Maryland to practice law. While there is the exception allowing corporation attorneys' to provide counseling and guidance in their functions as corporate counsel, they can not go beyond that limited amount of legal work. When she prepared the documents for Universe for an hourly fee, she violated Maryland rules regarding

unauthorized practice of law.

(2) A is Doughnut Heaven's (DH) lawyer. As such she has a fiduciary duty to represent DH, not either Max or Morley individually. When Max asked A what he could do to get Morley out of the business, she was duty bound to tell Max that she was DH's attorney and as such Max would have to acquire his own attorney to investigate such matters. Additionally, she was duty bound to advise Morley of Max's statement. Since there is no way that A can remain free of the coming conflict between Max and Morley, she can not represent either one.

(3) A also was under an obligation not to create Universe without notifying Morley and getting his consent. Her actions are another violation of her duties.

(4) A should not receive a part of the new business without telling Max to get another attorney for independent advice. To protect herself, she should have Max make sure another attorney looks at the transaction so that she will not be seen as violating the Maryland rules regarding fairness in a transaction where the lawyer receives a part of a company.

(5) A also violated her duty to keep the owners of DH informed. A's refusal to return Morley's phone calls, as well as her failure to reply to the Commission's various requests is a violation of her duties under the Maryland rules.

(6) A can also be disciplined for implying that she could help Max oust his brother in exchange for an interest in the business. Her fees appear excessive. This violates her duties under the rules of professional conduct.

QUESTION 6

Al and Brenda began living together in Brenda's apartment in Pittsburgh, Pennsylvania in 1997. A child, Sally, was born to them in 1998. Because of complications arising out of Sally's birth, Brenda became disabled and began receiving $1,200 per month in Social Security disability payments. At the same time Sally began receiving Social Security dependency benefits of $400 per month.

In 1999, Al purchased in his own name a townhouse rental property in Cumberland, Maryland for $100,000. He put $50,000 down from his savings, and secured a first mortgage for $50,000. The rent received from the townhouse was sufficient to satisfy the monthly mortgage payments in their entirety.

In 2002 Al and Brenda were married in Pennsylvania. As a wedding present Al's father gave him 1000 shares in Turk, Inc. In December 2002 Al used his employment bonus to purchase a $12,000 interest in a mutual fund in his own name.

In December 2003 Al and Brenda moved to Maryland and set up residence in Al's Cumberland townhouse. Al paid his monthly mortgage payments from his earnings. Al also received an additional 500 shares of Turk, Inc. based on a stock split in December 2003.

In June 2004, Al learned that Brenda was having an affair with their next door neighbor when he caught Brenda in his bed with his neighbor.

Al contacts Charles, an attorney who regularly handles domestic relations matters concerning his domestic situation. He asks Charles the following questions:

a. Can he file for an absolute divorce in Maryland at this time?

b. In a successful divorce action is he entitled to any of Brenda's Social Security disability benefits?

c. Does Brenda have any entitlement to Al's previously described *assets?* (townhouse, stock in Turk, Inc., mutual fund)

d. What impact does Sally's Social Security Disability and dependency payments have on child support that might be payable by Al or Brenda as the result of a custody dispute?

How should Charles respond to each of the inquiries? Explain fully.

REPRESENTATIVE ANSWER 1

A. Charles should tell Al that he can file for an absolute divorce at this time. Normally, a plaintiff in a divorce case must have lived in Maryland for one year prior to filing for divorce here. But, in this case, the grounds for divorce arose in Maryland, so Al doesn't have to meet the one year residency requirements – he simply has to live in Maryland. Al's divorce will be based on the fault ground of adultery. He saw Brenda having an affair, but that testimony would need to be corroborated with evidence tending to show opportunity and disposition of Brenda to commit adultery. But he can file for absolute divorce at this time.

B. Brenda's social security disability benefits began before Al and Brenda were married. Therefore, they are not marital property. Additionally, they were granted to compensate her for a personal injury. As such, Al is not entitled to share her disability benefits.

C. Townhouse – Al's townhouse was purchased before they were married. But, it became the family residence in 2003 when they moved into it. Brenda likely contributed to its upkeep in some way, thus making it considered as marital property. If she were to become the custodial parent, she would also be entitled to remain in/possess the home for up to three years.

Stock – Al's stock was received as a wedding present. Therefore, it falls into the marital property category even though it was given to just Al. Brenda would be entitled to a fair share of the stock.

Mutual Fund – Brenda is also entitled to part of the value of the mutual fund. Al purchased the fund with his employment bonus after they were married. It does not matter that the fund was purchased with money that Al alone earned. But, the court may consider at what point in 2002 Al and Brenda were married. If it was close to the date of the December purchase of the fund, the court may fairly allocate a larger portion to Al because his bonus was based on employment from before they were married.

D. Brenda's social security dependency benefits may be considered part of Brenda's income when determining the payments to be made. If Brenda were to become the custodial parent, she wouldn't have to "pay" because her contribution would be providing necessities for the child. But if she was not the custodial parent, then her income could include the amount from social security.

The disability payments were granted to her specifically because of an injury and cannot be considered by the court when determining income of the parties for a child support decision.

REPRESENTATIVE ANSWER 2

A. Al can file for absolute divorce at this time. While neither Al or Brenda have resided in Maryland for a year, the adultery took place in Cumberland County and so Maryland has jurisdiction

over the marriage. Al's grounds are fault based adultery, and no waiting period is required. The fact that the marriage was in Pennsylvania is irrelevant. The Circuit Court has jurisdiction over the marriage and personal jurisdiction over all parties.

B. There is no entitlement to Brenda's SSDI benefits, although they are income and a factor in calculating distribution and alimony they operate like personal injury awards and are not considered marital property. So the court may not distribute them.

C. Brenda has no interest or entitlement to the Turk stock because they were a gift specifically to Al, the passive appreciation of the split is also not marital property. Brenda does have an interest in the mutual fund, regardless of title, since it was purchased from income during the marriage.

The townhouse is trickier. Al did own the townhouse before the marriage and so it is not technically marital property. However, Al is managing the investment (at least by paying the mortgage from marital income). Brenda likely is entitled to the active participation appreciation and the portion of the value that the marital income paid in mortgage payments but may not have an interest in the first $100,000 down payment.

D. Sally's dependency payments through Brenda will be an equitable factor in calculating child support. It will likely be included in Brenda's income when the Circuit Court Master calculates child support using the chart. So the effect will raise the overall combined income used to determine support amount and will count towards Brenda's support contribution, if any.

Question 7

In 2004, the Supreme Court of the State of Westover ruled that provisions of the Westover Code prohibiting marriage between persons of the same sex violate the Equal Protection and Due Process provisions of both the Westover State Constitution and the Fourteenth Amendment to the United States Constitution.

Two months later, Congress enacted, and the President signed into law, the Federal Marriage Act (the "Act") which provides:

Section 1 of the Act: (a) declares that the recent decision by the Westover state court, if adopted nationally, would raise profound societal, legal and economic problems; (b) states that the issues created by same sex unions are suitable for a uniform, national resolution and that Congress needs a period of three years to adopt such a solution in an orderly fashion; and (c) states that the Act has been enacted pursuant to Section 5 of the Fourteenth Amendment, which grants to Congress the authority "to enforce, by appropriate legislation, the provisions" of that amendment.

Section 2 declares that neither the Fourteenth Amendment nor any analogous state or local law renders invalid any prohibition against same sex marriages;

Section 3 provides that, while the Act is in effect, any federal, state or local official who presides over a same sex marriage or who issues a marriage license to two persons of the same sex is guilty of a misdemeanor punishable by a fine of $500;

Section 4 requires federal, state or local law enforcement officers to investigate any credible report of a violation of the prohibition contained in the previous paragraph and to make an arrest whenever probable cause exists after investigation;

Section 5 prohibits any state from enacting legislation allowing same sex marriages;

Section 6 states that the Act will expire three years after its enactment;

Section 7 provides that the invalidity of any section of the Act will not affect the remaining provisions of the Act.

Describe each of the constitutional grounds on which the Act or any of its sections can be attacked. How is a court likely to rule? Explain your answer thoroughly.

REPRESENTATIVE ANSWER 1

The federal judiciary is not likely to uphold this Act (Federal Marriage Act = Act). The Act is subject to several constitutional attacks, The most fundamental flaw in the Act is that it violates the constitution's separation of powers by presuming that Congress (acting with the President) has the authority to interpret and enforce the Constitution. It is the law of the land that the courts, not Congress, have the duty to say what the law is. The entire Act is predicated on the notion, as declared in Section 2 of the Act, that the Fourteenth Amendment does not protect same-sex marriages. It is the role of the judiciary (ultimately Supreme Court) not the Congress to decide that issue.

Moreover, Congress asserts that this Act is being created by its authority under § 5 of the 14th Amendment. See §1, paragraph c) of the Act. Under § 5 of the 14th Amendment, Congress may not enlarge or alter the scope of rights guaranteed (as recorded by the Courts) by the Constitution; it may only enact laws aimed to prevent or remedy violations of existing rights. Such measures must be cognizant and proportionate to the harm sought to be prevented. This is not a valid use of §5 power by Congress since the Act alters the rights that are currently recognized (namely Due Process and Equal Protection rights.)

The Act also suffers from federalism problems. The Act is essentially ordering all state courts and legislatures to cease enacting and upholding same-sex marriage laws. The Act asks for a 3 year period which Congress can act (See §1 (b) and §5 prohibits states from enacting legislation. These provisions arguably violate the Tenth Amendment and the anti-commandeering principles which flow from it. The Act also seeks to punish state and local officials who carry out their state's laws (see §3) by making it a crime to issue marriage laws. Congress' attempt to preempt state law will be unenforceable where, as here, Congress is not acting pursuant to valid authority.

Section 4 of the Act also has 4th Amendment problems. The Act asks citizens to basically spy on and report each other to the authorities. The standard authorizing police investigation is "credible report." This may be overbroad and vague. There are also anti-commandeering problems with this provision because state and locate officers are being ordered to enforce federal law.

Finally, individuals may attack this Act based on the Equal Protection and Due Process clauses of the Fourteenth Amendment. Congress is seeking to treat some citizens differently than others in an area generally recognized to be a fundamental right (privacy and family). Individuals may also seek to invalidate the law as a violation of privacy rights since it invades on same-sex relationships (recently the Supreme Court held states could not interfere there) and family life.

REPRESENTATIVE ANSWER 2

The Act poses an issue of state versus federal power. The 10th Amendment reserves all powers not expressly granted to the federal government for the states. The area of marriage has traditionally been an area in which states not the federal government regulate. The Act usurps the states' traditional power over marriage by postulating a uniform, national resolution of Congress to decide the issue. Section 5 of the Act in particular, which prohibits a state from enacting legislation allowing same sex marriage, takes a traditional state power over an area (without any power to do so) away from states.

The Act relies on Section 5 of the Fourteenth Amendment for its power and authority. Section 5 allows Congress to enact laws infringing on traditional areas of state or if Congress acts with the purpose of furthering the aims of the Fourteenth Amendment such as remedying specific past discrimination. The Act does not advance the interest to be protected by the Fourteenth Amendment. Instead of protecting a substantive due process right to marry or an equal protection right to marry, it strips a group of people of fundamental rights. It absolutely prevents same sex marriage and thus can in no way be construed as a power needed to remedy an injustice or discrimination.

Furthermore, by declaring that the Fourteenth Amendment and analogous state/local law does not render invalid a prohibition against same sex marriage, Congress impermissibly intrudes of the process of Judicial Review. It is up to the courts to decide the constitutionality of state and federal law and to interpret the U.S. Constitution's provisions. Congress cannot decide for itself what rights are/are not protected by the Constitution.

Section 3 of the Act violates the 8th Amendment prohibition against cruel and unusual punishment. The Act is unconstitutional on forbidding state and local officials from issuing same sex marriage licenses and cannot make such action a crime punishable with a fine.

Finally, by requiring state and local law enforcement to enforce the Act, Congress is making impermissible use of the state police power. Congress cannot co-opt the state police power unless, pursuant to a constitutional exercise of power. There the Act is unconstitutional and Congress cannot force the state to enforce it.

For these reasons, a court is likely to find the entire Act unconstitutional.

QUESTION 8

Carl and Roy were suspected of being drug dealers. Police learned that Carl frequently visited an apartment in Talbot County, Maryland, which was leased to Roy. Police began to observe the apartment and saw Carl there on several occasions. Eventually the police gathered sufficient information to obtain a search warrant for the apartment. Upon entering the apartment the police saw Carl and Roy. Carl's hands were covered with cocaine powder. During the search the police found a large amount of crack cocaine, a set of scales, plastic baggies, and other items associated with the process of changing powdered cocaine into crack cocaine. In addition, a photograph of Carl kneeling behind several stacks of money was found in a backroom of the apartment. Carl and Roy were placed under arrest and charged with possession of cocaine with intent to distribute.

Carl admits that he is a drug user, but maintains that he only was in the apartment to purchase drugs from Roy for his own use. Carl claims that his hands were covered with cocaine powder because he was testing the product before purchasing it.

At trial, the State introduces evidence through a qualified expert witness that the apartment was a "stash house", which the expert claims is used by drug dealers to store, process and package drugs for distribution. The expert testifies that drug dealers normally do not sell products at a stash house, and tend to keep the location of a stash house secret. The State also attempts to introduce into evidence in its case-in-chief the following: (a) the photograph of Carl found in the backroom of the apartment; (b) Carl's prior conviction of misdemeanor theft in 1998; and (c) Carl's offer to testify against Roy in exchange for probation, which was rejected by the prosecutor.

Carl's lawyer objects to the introduction into evidence of (a) the photograph; (b) Carl's prior conviction of burglary; and (c) Carl's offer to testify against Roy in exchange for probation.

1. How will the trial court rule on each of Carl's objections? Explain the basis for each ruling.

2. Would the Court's ruling change as to any objection if the evidence were offered to impeach Carl's testimony? Explain your answers.

REPRESENTATIVE ANSWER 1

<u>PHOTO</u> The cops obtained a valid search warrant. Since the facts stated that it was for the entire apartment, presumably, the photo was validly obtained. Also, Carl did not have an expectation of privacy in the house so could not object to the admission under the "fruit" doctrine.

Carl may object to the introduction based on relevance and appropriate authentication. It would have to be shown that the money behind which Carl was standing is somehow related to this trial and where and when the picture was taken. If this isn't possible, the prejudicial value of the picture would outweigh the probative value since a jury may assume Carl is a criminal because he had so

much money in stacks. It may be introduced to show that Carl and Roy were close, but again there is still too much of a prejudicial effect. The prosecution may say, because of the expert's testimony, the photo is necessary to prove that Carl had been to Roy's frequently and that he was not there to do drugs/buy drugs. The location of the picture and Roy's holding on to it may be considered relevant.

CONVICTION This will also be excluded. Evidence of prior crimes can not be entered to show actions at issue are in conformity of prior actions. A "mimic" exception because it is an unreached crime, if anything, it may assist Carl's case in that he is a drug user and stole to support his habit.

SETTLEMENT OFFER Offers of settlement are not admissible to show guilt. This is contrary to public policy and would have a likely effect to dissuade settlement negotiations. Evidence of a settlement agreement may be introduced to show bias if Carl testified against Roy. [It is also hearsay-offered as truth of the fact he committed the crime.]

B. The photograph may be admitted to show that Carl and Roy were friendly in the event Carl testified he was just trying to buy drugs. Again, the court would have to give specific instructions of what was proven by the photo, and may still exclude.

CRIME In MD, evidence of past crimes can be used to impeach if dealing with truth or if it is an infamous crime. Since I believe this requirement mandates the crime to be a felony, I don't believe it could be introduced. Plus, as a misdemeanor, it is not infamous.

If Maryland allows introduction of misdemeanors, so long as the crime was committed within the last 15 years, it may be OK since the crime is of a different nature and would not be overly prejudicial.

SETTLEMENT Evidence of settlement would still be prohibited for public policy reasons.

REPRESENTATIVE ANSWER 2

(a) Foremost, the facts do not indicate that the search warrant was sufficiently specific and indicated that the police had probably cause to search the entire apartment, including the backroom. I will assume that the police had a valid search warrant

Photograph A trial court would likely rule that the photograph is irrelevant and should not be admitted into evidence. The prosecution is offering the photo as his case-in-chief and is not relevant evidence since it does not show that a fact is more true or less true. Even if the photo were relevant, the probative value may be out weighed by prejudice (stacks of money.)

Prior Conviction Carl's prior conviction of a misdemeanor in 1998 can come in as substantive evidence if it is offered to show motive, intent, common scheme or identity ("mimic"

crimes). In the present case, the 1998 conviction for theft and the current charges are for drug possession and
possible intent to distribute. The 1998 conviction is therefore not relevant.

Carl's testimony against Ray The offered testimony against Roy was a plea bargain on the part of the defense. While this is clearly relevant, it is inadmissible. Offers to plead guilty or withdrawn guilty pleas are inadmissible as part of the prosecution's case-in-chief.

(B) If the prior conviction were offered as impeachment evidence, it would be admissible. Prior acts of misconduct are admissible as impeachment evidence as well as prior convictions for a felony or misdemeanor for a crime related to truth or honesty. In Maryland, the conviction for a felony or misdemeanor has to be for committing an "infamous crime", such as theft, and has to be within 15 years. Both of these elements are satisfied and therefore, came in as impeachment evidence.

The photograph of Carl only indicates that there were stacks of money. Photo can't come in a s a prior act of misconduct because extrinsic evidence is not permitted. It also can not come in under any other category for impeachment.

The offer to testify is also not admissible as impeachment evidence. His offer to testify against Roy bears little relevance on his own testimony.

QUESTION 9

On March 15, 2004, the day after her eighteenth birthday, Donna Doolittle and her mother, Eliza, filed a suit for libel, false light defamation, and intentional infliction of emotional distress against Louella Parsnip, a gossip columnist for the *Somerset County Weekly Bugle (“Bugle”)*, the local newspaper of Princess Anne, Maryland and against the *Bugle*. Somerset County is the location of both the residence of Ms. Parsnip and the principal place of business of the *Bugle*. The *Bugle* was distributed at no cost to the residents of Somerset County because the *Bugle* procured, through mail solicitations, advertisements paid for by local merchants located in Prince George’s, Somerset, Dorchester, Wicomico, and Worcester Counties, Maryland.

The basis of the Doolittles’ suit was that Parsnip had reported in the January 12, 2003 edition of the *Bugle* that Donna Doolittle had been disciplined for plagiarism at Happydale High School, and that Eliza had taken money from the School’s candy drive funds that were supposed to be used to replace the uniforms of Happydale’s marching band. As a result of the publication of the *Bugle* article, Eliza was terminated from her employment with the local bank and Donna had to seek medical attention for her sleepless nights and anxiety.

Because they were embarrassed by the *Bugle’s* report about Donna, and by the termination of Eliza’s employment, the Doolittle family moved from Princess Anne in June 2003, shortly after Donna graduated from Happydale.

Eliza and Donna filed their Complaint in the Circuit Court for Prince George’s County, where the Doolittle family resided. Parsnip continued to reside in Princess Anne and to write for the *Bugle.* Immediately, Eliza and Donna sent the complaint, the summons and a plaintiffs’ civil information sheet via first class mail to Parsnip at her home in Princess Anne and to the address of the *Bugle’s* resident agent.

What preliminary motions and/or responsive pleadings and papers should the defendants file, and how should the Court rule on each? Explain your answer fully.

REPRESENTATIVE ANSWER 1

The Bugle and Parsnip can file a preliminary motion to dismiss for improper service of process. This defense must be asserted in a preliminary motion or it is waived by the defendants. Here both parties were served via first class mail which is not a proper form of service under Rule 2-121(a). Service must be made personally or by certified mail, restricted delivery, or with Parsnip, by leaving a copy of the process at her home with a person of suitable age and discretion. The defendants have 30 days from the date of the improper service to file this motion.

The Bugle and Parsnip can also file a preliminary motion to dismiss for improper venue. Venue is generally proper for an individual defendant where she resides or works, and in the case

of a corporation, where it maintains its principal Maryland office. Improper venue is also a mandatory defense and must be asserted in preliminary motion or it will be waived. Here, venue would be proper as to both defendants in Somerset County, where I am assuming Princess Anne is located, because that is where it is distributed. Although the Bugle does engage in business in Prince George's County, Parsnip does not live or work there. Since venue is proper towards both defendants in Somerset County, § 6-201(b) is inapplicable. The defendants have 30 days from the date of service to file this motion. The court will likely rule venue as improper; however, the court may in its discretion transfer the case to Somerset County under Rule 2-377(b) instead of dismissing it.

The defendants can also in their Answer to the Doolittle's complaint assert the affirmative defense that the statute of limitations has run as to the libel and false light defamation claims. This defense must be asserted by the defendant in its answer or it is waived. The answer must be filed within 15 days from the disposition of the above listed preliminary motions.

As for Eliza her actions for libel and defamation must have been filed within 1 year from the date they accrued. Since it is now March 15, 2004 and the article was published January 12, 2003, it has been more than a year and her claim is barred by the statute of limitations.

As for Donna, she was a minor when the cause of action for false light defamation and libel accrued and as such lacked the capacity to sue until attaining the age of majority. Under § 5-201(a) she has an additional year from the date she turns 18 to file. Because she filed the day after her 18th birthday her action is not barred by the statute of limitations.

Finally, each defendant can file a permissive motion to dismiss for failure to state a claim based on the intentional infliction of emotional distress cause of action. Their motion to dismiss for failure to state a claim can be raised as a preliminary motion or in their answer. The court will likely grant leave to amend the complaint if it does find for the defendants on this motion.

REPRESENTATIVE ANSWER 2

Bugle and Parsnip should each file a motion to dismiss against each of the plaintiffs. The motion must be filed before filing an answer because some of the defenses are mandatory defenses under Rule 2-322. The motion must be filed prior to the date an answer is due.

Bugle and Parsnip should file motion to dismiss based on the mandatory defenses of improper venue and insufficiency of service of process.

In a civil action, a defendant may be sued where the defendant lives, works or carries a business (CJP § 6-201). When there are multiple defendants then the plaintiff must choose a venue common to defendants (CJP § 6-201).

Here the business's principal place of business and Parsnip's residence are both located

in Somerset County. Therefore, venue in Prince George's County is improper. While there are certain circumstances where the court allows for additional venue, none of these circumstances apply here.

An individual may be served in person by leaving sufficient process at defendant's home with a person of suitable age and discretion or by certified mail, restricted delivery, return receipt requested (Rule 2-121). In this case service of process was mailed first class to Parsnip. Service was improper.

When making service upon a business that has a resident agent, service should be made upon him, president, secretary or treasurer. Here, service was made upon the resident agent, but again was insufficient since it was merely mailed first class, the same rules for service upon an individual apply to an individual upon whom service can be made.

The court will likely dismiss the action on these grounds. However, Bugle and Parsnip should also move to dismiss Eliza's claims for libel, false light defamation since the statute of limitations for libel is one year from date of tort, and the limitations have run.

Donna is not barred by the statute of limitations because she was under disability when the claim arose, and under CJP § 5-201, she had, after she turned 18, either the lessor of 3 years or the applicable period of limitations left to run. Given this rule the court would not dismiss her action for libel.

The court will probably dismiss the case since there was more than one basis for which it could dismiss. However, if venue was the basis it would probably transfer venue under Rule 2-327(b).

QUESTION 10

Mighty Mall opened in Elkton, Maryland, on December 1, 2001 and was a huge success. Two of the most popular businesses in Elkton, Will's Florist and Card Shop and Grace's Barber Shop, relocated to the Mall and operated side by side in Suite A and Suite B.

The Mall Landlord provided both Will and Grace with standard five-year commercial leases. Grace's lease included the following language: "Grace shall operate a barber shop and only a barber shop, shall not compete with any other business in the mall, and shall not assign any portion of her lease or sublet any part of the premises." Will's lease included similar language: "Will shall operate a florist and card shop and only a florist and card shop, shall not compete with any other business in the mall, and shall not assign any portion of his lease or sublet any portion of the premises." Will and Grace signed their leases on Feb. 1, 2002.

Both businesses flourished in the Mall. After a year of success, Grace brought in a co-tenant to provide nail care services. The Landlord became aware of the nail care business a short time later but did not comment to Grace. A few weeks after the nail care service was up and running, Will began to notice an acrid smell in his shop, and that many of his flowers were beginning to droop. He also noticed that the paint on the wall that he shared with Grace's shop began to flake. Will learned that these phenomena were caused by liquids used by the nail care service. Although he complained to Grace and the Landlord no action was taken. Will decided to only pay a reduced rent in protest. This did not resolve the problem so six months later Will vacated the premises without notice to the Landlord.

On December 1, 2003 Landlord forwarded a letter to Will demanding the arrears and the remaining rent since Will vacated the premises with nearly three years left on the lease. On that same date Landlord advised Grace that her lease would be terminated as a result of her breach of its terms, and that she must vacate the premises forthwith.

1. Assuming no specific remedy in the lease, what are the rights of Landlord against Will and Grace?
2. Assuming no specific remedy in the lease, what are the rights of Will against Landlord and Grace?

Discuss fully.

REPRESENTATIVE ANSWER NO. 1

Landlord v. Will

L may sue W for a breach of his lease. W left his lease with nearly 3 years left on it. L had the option to treat the property as abandoned by mailing a letter to W at his last known address, ignore the breach of the lease and sue for the remaining rent, or re-let the property, with proceeds

going toward W's breached lease. While in Maryland a L of a residential lease has a duty to re-let, mitigating damages, a commercial L does not have this duty. Therefore , L may sue W for the remaining time on his lease.

Landlord v. Grace

L may sue G for affirmative waste if her occupancy greatly disturbed his property. However, unless the disturbance from the nail chemicals was so strong as to be a material breach of the lease, L may not sue G for breach of the lease for bringing in a co-tenant to run a nail salon because he waived this condition by not objecting for almost a year.

Will v. Landlord

W could counter L's argument that W breached his lease by arguing L breached his duty to prevent nuisance by other tenants, especially by something expressly forbidden in the lease. W notified L but L did not take action against G. W could argue he was constructively evicted because his purpose for leasing the property was greatly harmed (flowers). W should note that there was substantial interference, notice was given to L and W got out of the suite. Under Maryland law, W is allowed to move out, reduce rent to market value with disturbance, repair and deduct repairs from rent (assuming G's chemical problems could be fixed). In Maryland, however, if W were to reduce the rent or stop paying altogether, he must put the rent money in an escrow account with the court.

Will v. Grace

W could sue G under a nuisance theory since her actions substantially interfered with his enjoyment of his leased property. In a private nuisance action the court will balance the interests of a tenant with the interests of others to determine if there is a substantial interference with the use and enjoyment of the land and if that substantial interference outweighs the benefits of the non-burdened party.

REPRESENTATIVE ANSWER NO. 2

A lease is a right to occupy and possess property, while the owner retains an interest. Here, both Grace and Will have valid leases with Mighty Mall. They meet the statute of fraud requirement because the leases were in writing.

Landlord v. Will

A tenancy for years exists when a lease specified a certain number of years a tenant can occupy the property. Here both Will and Grace have a tenancy for 5 years. Tenants are required to pay their rent for the term of the lease. Here, Will left with 3 years remaining on the lease. Therefore Landlord has a claim against him for breach of contract. Landlord must mitigate his damages by seeking another tenant to fill his space.

Landlord v. Grace

A party is bound by the terms of the contract. Here, the lease prohibited assignments or sub-leasing, but Grace took in a subtenant to perform nail services. Normally this would be considered a breach, but Landlord waived his right to enforce it. Waiver occurs when a party knowingly gives up the enforceable right. Here Landlord knew about Grace's sub-tenant through his own knowledge through Will's complaint, but took no action. Therefore, he waived his right to evict her on this basis.

A property owner may sue to enjoin a tenant from making waste on his property. Here the nail technicians chemicals were causing the walls to crack. This is considered waste and they can be held liable for the damages.

Will v. Grace

Nuisance occurs if one party interferes with the reasonable use and enjoyment of property. Here, the nail techs use of the chemicals caused Will's walls to flake and his flowers to droop. This could be considered a nuisance.

Interference with economic relations is not appropriate because although Grace's actions may have caused Will's flowers to droop, she did not intentionally interfere with any people he did business with.

Will v. Landlord

A Landlord warrants quiet enjoyment in every lease. Here, Will's walls were cracking and his flowers were drooping. As a florist this could be detrimental to his business. The fact that the landlord refused to address or fix the problem, even after notice and Will's payment of partial rent) breached this warranty.

Constructive eviction occurs when the conditions are so adverse, the space is no longer habitable. Here there are no facts that Will absolutely had to leave, but he can claim or use it as a defense because his drooping flowers and the acrid smell would affect his business and the purpose of the lease.

QUESTION 11

Mary Jane is on trial for armed robbery in the Circuit Court for Charles County, Maryland. She has been incarcerated in that county since her arrest as she was never able to make bond. At her counsel's suggestion, she has made notes during the trial and discusses them with her counsel throughout the trial day. During recesses of the trial, she is held in lock-up in the Charles County Courthouse. When she was brought into the courtroom on the afternoon of the second trial day, she inadvertently left her trial notes in the lock-up. Those notes were found by a deputy sheriff in the lock-up. The deputy sheriff read the notes, realized they were about the ongoing trial, and turned them over to the prosecuting attorney who read them and notified counsel for Mary Jane. The notes contained Mary Jane's comments regarding the testimony and exhibits that had been presented at the trial to its present stage. The prosecuting attorney has informed the Court that he wishes to use the trial notes in the State's case.

a. What motion(s) will defense counsel file to prevent the use of Mary Jane's trial notes by the State? State the arguments of defense counsel in detail.

b. How will the Court rule on the motion(s) and why?

REPRESENTATIVE ANSWER 1

Attorney – Client Privilege

The attorney client privilege protects confidential communications between a client and the attorney concerning the legal representation/consultation. Here, an attorney-client relationship clearly exists, since Mary Jane is being represented by her attorney in a criminal trial. Mary Jane will argue that these notes should be considered as confidential communication between her and her attorney. The government will likely argue that these are just notes taken and were not part of oral communications between the defendant and her attorney. The court will rule in favor of the defendant. Here, the attorney has specifically asked the client to take notes, and the client discusses the notes with the attorney. The notes would be considered communications since they would presumably be passed back and forth while the trial is going on, in an attempt to communicate without talking, since the jurors would hear. The defense attorney would also argue that the notes consist of his work product, since the attorney discusses the notes with the client and it is likely that the client writes down what the attorney says. In this case, it would be considered to contain the attorney's thought processes and thus would not be admissible.

The government would argue that the privilege has been waived by Mary Jane's carelessness with the notes. This argument is persuasive, but in a criminal trial, the equities would favor exclusion.

Fourth Amendment – To have a Fourth Amendment claim, one must prove that a government actor conducted an unjustified search in a place where the person had a reasonable expectation of privacy. Mary Jane would lose this claim. As a prisoner, she has lost many of her civil liberties including any Fourth Amendment rights in the "lock-up".

The motion that the defense counsel should file is a motion for exclusion under the attorney-client privilege.

Sixth Amendment – The Sixth Amendment provides a right to an attorney at all critical stages of a prosecution. Here, trial is certainly considered a critical stage. Mary Jane should argue that by using her notes, she is being penalized for consulting with her attorney and thus being denied effective assistance of counsel. The standard for an ineffective assistance of counsel claim is that the counsel's conduct was deficient and the client suffered prejudice, i.e., would not have been convicted. This claim would not be successful and Mary Jane should pursue the attorney-client privilege basis for exclusion.

Normally, privileged information is not discoverable unless the party shows a substantive need and undue hardship. However, this rule only applies to civil case.

Fifth Amendment right against self-incrimination – Mary Jane will argue that these notes would be the equivalent of her testifying without consent and thus in violation of her Fifth Amendment right. However, the government will argue that these notes are no different than any other admission by a party. Furthermore, there was no Miranda violations since there was no interrogation. (Government would concede that she was in custody.) Furthermore, these statements were clearly voluntary and not the result of any due process violations.

REPRESENTATIVE ANSWER 2

A. Mary Jane's attorney should file a motion to exclude Mary Jane's notes. As the trial had already commenced, Mary Jane's Sixth Amendment right to counsel had attached. As part of that representation, Mary Jane's counsel suggest that Mary Jane prepare notes throughout the trial for discussion. Information in these notes could fall under the attorney-client privilege, for they were prepared and communicated by Mary Jane to her lawyer in the scope of her lawyer's representation of Mary Jane. So long as these notes were kept confidential, they should be privileged.

The problem that arises is that a third party gained access to the notes, destroying confidentiality. Defense counsel should argue that a state actor (sheriff) unlawfully seized these notes in violation of the Fourth Amendment (applicable to the states through the Due Process Clause of the Fourteenth Amendment). The prosecution will counter that Mary Jane had no reasonable expectation of privacy in a jail cell and thus no standing to challenge the seizure.

Defense counsel may also move for a mistrial, arguing her client was materially prejudiced by the sheriff's seizure because he then revealed the notes to the prosecution. Those notes could have been incriminating and would have given the prosecution unfair access and insight into defendant's case.

B. The court should exclude the evidence. Although Mary Jane may have had no legitimate expectation of privacy in a temporary lock-up, she inadvertently left the notes there. Provided the state can defeat the Fourth Amendment claim, it may not defeat the claim of privilege. Mary Jane did not intend to disclose the contents of her notes. The attorney-client privilege should be preserved, and this would bar admission of the notes.

The court probably would be reluctant to grant a mistrial. While Mary Jane may be prejudiced by the opposing counsel having access to her mental impressions, there are other safeguards. That evidence will be excluded, so the jury will not be tainted by such evidence. Furthermore, depending on the contents of the notes, the prosecutor may not have gained any unfair advantage whatsoever. For these reasons, the judge will be unlikely to grant a mistrial.

QUESTION 12

On June 1, 1997, Abe, Ben, Chris and Dan owned all of the issued stock in Zero, Inc., a Maryland corporation, each having paid $300 per share for his 500 shares.

The corporate Bylaws provided that, in the case of death of a shareholder, the Corporation had a first option to purchase the deceased shareholder's stock at his cost. This restriction was printed on each stock certificate issued by Zero, Inc.

On January 10, 1998, all of the stockholders of Zero, Inc. entered into a written buy-sell agreement giving each other a pro-rata right of first refusal on shares any of them wished to sell. This restriction was not noted on the stock certificates. On March 1, 2000, Abe sold 100 shares of Zero, Inc. to Ed who had no knowledge of the 1998 buy-sell agreement.

A. Discuss the respective rights of Zero, Inc., Dan and Ed, to the 100 shares sold by Abe.

Ben died on July 10, 2000 at a time when the fair market value of his stock was $1,000 per share. Ben's personal representative (executor) has contracted to sell Ben's stock to Fran at fair market value. Ben's estate needs the money from the sale of Zero, Inc. stock to satisfy claims against the estate.

Within a reasonable time after Ben's death, Zero, Inc. exercised its option to buy and tendered $300 per share to Ben's estate. Ben's personal representative refused to sell to Zero, Inc.

B. Discuss the rights of Zero, Inc., Ben's personal representative and Fran to the 500 shares held by Ben's estate.

Explain fully the basis of your answers.

REPRESENTATIVE ANSWER #1

A. In this instance Zero, Inc. has no rights to the shares of Abe as against Ed because Zero, Inc's rights do not rest in a sale of a stock by a shareholder that is still living. According to the bylaws they only have a right of first refusal if Abe had died.

Dan, who had a right of first refusal as a current shareholder under the 1998 Buy-Sell Agreement had that right against Abe's 100 shares of stock. However, as discussed below, Ed could have been a holder in due course which would not give Dan any rights against Ed, but it would create a right for Ed to sue Abe in breach of contract action for damages under the Buy-Sell Agreement.

Ed, who bought the shares in good faith, without notice of the 1998 agreement for value takes the shares as a holder in due course, free of the obligations of the agreement.

B. According to the Bylaws of the organization, Zero has the right to purchase the shares from a deceased shareholder at the cost to the shareholder. This was printed on the stock certificate so any holder after that time could not be a holder in due course because the notice on the certificate destroys the holder in due course requirements. Here Zero has the right to the shares because all requirements have been met because Zero paid the cost of the shares and exercised option in a reasonable time.

Fran however, has no right to the 500 shares because he has only contracted to buy them. He has not paid value for them yet, and if he had, the notice on the certificate would have destroyed his holder in due course status. He does, however, have a right against Ben's estate for breach of contract but he has no enforceable right against the 500 shares.

REPRESENTATIVE ANSWER #2

Rights of Zero, Inc. to 100 shares sold by Abe

Generally, stockholders in a corporation are entitled to sell, devise their shares of stock in a company to whomever they choose unless otherwise noted in the company Charter/Bylaws. With respect to Zero, Inc. their Bylaws stated that the company had a right of first refusal to purchase a deceased shareholders stock but says nothing regarding their right to first purchase a living shareholder's stock. Because the Bylaws do not specifically state that Zero has the right of first refusal in this instance, Zero has no rights in the shares sold by Abe.

Rights of Dan in 100 shares sold by Abe

With respect to Dan's right to the 100 shares of stock sold by Abe, the facts state that Abe, Ben, Chris and Dan entered into a written agreement giving each other a pro-rata share right of first refusal on any shares they wished to sell. The facts do not state that the shareholders were trying to alter the procedures of the company which could only be done through an amendment of the Bylaws, rather they merely state that Abe, Ben, Chris and Dan decided to enter into an outside agreement together. Dan's pro-rata share of Abe's stock would have been 33 shares. Because this agreement was in writing and satisfied the statute of frauds it would be enforceable. However, because the certificates did not note the restriction, Dan's rights to the shares may be cut off by a bona fide purchase.

Ed's rights in the 100 shares of stock sold by Abe

Ed will have superior rights to the shares of stock sold to him by Abe as long as he qualifies as a bona fide/good faith purchaser. In order to be a bona fide purchase, Ed must have purchased the stock for value, in good faith and with no notice of restrictions. The facts do not state whether Ed paid for the stock but assuming he did, if he had no actual knowledge of the restriction he would be entitled to the 100 shares because the certificates did not contain the restrictions.

Rights of Zero, Inc. in Ben's Shares

As stated before, the corporate Bylaws of Zero, Inc. give them the right of first refusal with respect to a deceased shareholder's shares. In this case, Ben has passed away. Therefore, Zero, Inc. has the right to exercise its option and purchase the shares of Ben's estate at $300 a share.

Rights of Ben's estate in Ben's Shares

Ben's estate does have a right to Ben's shares in that they are considered his personal property and therefore part of his estate. However, Ben's estate takes his personal property subject to any covenants or restrictions placed on it. In this case, the shares of stock contain a right of first refusal restriction and the estate must honor it. They may argue that the corporation is breaching its fiduciary duty of good faith by purchasing the shares at a price way below the fair market value but the court will most likely uphold the original contract between the deceased and the corporation.

Fran's rights in Ben's Shares

Fran will be deemed to have no right in Ben's shares because she had notice of the stock restrictions.