

## **FEBRUARY 2005 BAR EXAMINATION**

### **QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

#### **QUESTION 1**

Southside, a town in Somerset County, Maryland, is known for its local, family-owned small businesses and small-town atmosphere. For over 200 years this area has attracted tourists drawn to shop and dine in the quaint shops and restaurants. No commercial facility in Southside utilizes building space in excess of 5,000 square feet.

Mega Mart is a national chain of 50,000 square foot stores with hundreds of locations throughout the United States. Mega Mart wanted to purchase property in Southside to take advantage of the tourist trade. On September 1, 2004, Mega Mart paid \$1,000,000 for a lot and hired contractors to survey the land and begin grading.

Existing store owners in Southside learned of Mega Mart's plans and became upset. They read of instances in other cities where Mega Mart quickly displaced existing small businesses and didn't want this to happen to them. They lobbied the Southside town council to enact emergency legislation to thwart Mega Mart. On October 1, 2004, the council introduced and enacted the following law:

“Nationally owned commercial establishments in excess of 1,000 square feet and locally owned commercial establishments in excess of 5,000 square feet are prohibited.”

**You serve as general counsel to Mega Mart. What legal issues should you raise on behalf of Mega Mart to challenge the law? Discuss fully.**

#### **REPRESENTATIVE ANSWER 1**

First thing to consider is whether Mega Mart has standing. Mega Mart does have standing because there was legislation enacted that prohibits national commercial establishments from being in excess of 1,000 square feet. Mega Mart is a national chain whose stores are 50,000 square feet. Mega Mart will suffer harm from the legislation and it is redressable – if the law is found unconstitutional it will no longer harm MM.

The attorney should challenge the law based on a violation of the Due Process Clause of the 14<sup>th</sup> Amendment. It is interfering with Mega Mart's livelihood. And must be necessary for a compelling state interest. The interest that the legislation is protecting is a local interest. Also, Mega Mart should have had notice and hearing because the legislation is affecting it. The legislation could be challenged as being vague and overbroad, since a reasonable person would not know what

they could do.

The legislation could be attacked under the Equal Protection Clause. It is treating outsiders differently than locals. The legislation is based on geography and must be necessary for a compelling governmental interest. Protecting local interests will not meet that burden.

The legislation could also be considered a taking. The law was passed after MM paid \$1,000,000, and due to legislation MM may not have a use for the lot. If so, it will be a taking and the Town of Southside will have to compensate MM for the fair value of the land.

The legislation is also a violation of the Commerce Clause. It interferes with the instrumentalities or effects of interstate commerce. Under the dormant commerce clause no local regulation should burden interstate commerce unless it has an important government interest – protecting local businessmen would not meet that test. Therefore, the law would be struck down.

The law also violates the Contracts Clause. The law substantially interferes with MM's existing contracts with the contractor. Thus it would be found unconstitutional unless the Town can show an important governmental interest.

## **REPRESENTATIVE ANSWER 2**

Mega Mart may raise the following issues:

- Standing – To have standing the party seeking to challenge the law must be the party injured and court must be able to remedy the situation. The law was enacted to prohibit Mega Mart from building, and Mega Mart will be injured. If the court strikes the law as being unconstitutional the situation will be rectified.
- Contract Clause – The government cannot enact laws that will inhibit existing contracts. Mega Mart bought the land for \$1,000,000 and had hired contractors to survey land and begin grading. The law will force Mega Mart to cancel its contracts with the contractors.
- Commerce Clause – This law violates the Commerce Clause because it unduly burdens interstate commerce, which is not allowed unless there is a compelling state interest. Mega is a national chain, and its products most probably come from a warehouse located out of state by a trucker from some other instrumentality. As such, this law will unduly burden interstate commerce. Favoring the local storeowners is not permissible.
- Taking – This law is also a taking. Congress or a government can take a person's land providing just compensation is given and as long as it is for a justified governmental purpose. Now that Mega will not be able to use the land for the purpose intended it has no use for the land and this should equate to an unlawful taking.
- Equal Protection – Through the 14<sup>th</sup> Amendment, the Equal Protection Clause prohibits this law as it is unfair to out of state businesses. The law allows commercial establishments of 5,000 square feet but national chains of only 1,000 square feet.
- Due Process – The law violates the Due Process Clause as it is a taking of life, liberty or

- property. Mega should have been entitled to a hearing on this taking of its property.
- Vague/Overbroad – Lastly, the law can be challenged for vagueness and overbreadth as it does not say what it is that the law is prohibiting besides square feet and does not provide a reasonable alternative.

## **QUESTION 2**

Sheila and Ben, husband and wife, purchased Blackacre as tenants by the entirety in 1970. Blackacre consists of 25 rolling acres and is improved with a 5,000 square foot house, a gazebo and an Olympic-sized swimming pool. Additionally, in 1972, Sheila and Ben purchased Whiteacre as Tenants by the Entirety. Whiteacre is a 10-acre parcel, improved with a house that Sheila and Ben use as a vacation house.

On July 1, 1998, their nephew Steve obtained a written 3-year option signed by both Sheila and Ben "to purchase Sheila and Ben's house for \$600,000". Steve paid \$150 in cash in consideration of this option.

On June 1, 2001, Sheila and Ben signed an addendum that read as follows:

We, Sheila and Ben, agree to continue this option for 3 more years until June 1, 2004.

Ben died in 2003. On May 1, 2004, Steve notified Sheila of his intent to exercise his option to purchase Blackacre for \$600,000 and that the settlement date would be September 15, 2004. Sheila replied that she would not honor the option. Steve angrily informed her that he would file suit and force her to do so.

Sheila comes to you, a Maryland attorney, and asks if she can keep Blackacre.

**What legal arguments will Sheila make to keep Blackacre? Discuss fully.**

### **REPRESENTATIVE ANSWER 1**

Sheila will make a number of arguments to attempt to keep Blackacre and Whiteacre.

First, Sheila will argue that the original option contract did not satisfy the statute of frauds because it is missing a material term, and is thus, unenforceable, making any attempt to extend it unenforceable as well. Contracts for land must always satisfy the requirements of the statute of frauds. In particular, land contracts must sufficiently identify the parcel of land in question. Sheila will claim that the option does not identify sufficiently which land is to be sold. Sheila and Ben purchased both Blackacre and Whiteacre as tenants by the entirety, and used both as "houses". Thus, the term "Sheila and Ben's house" could refer to either parcel of land. In response, Steve will claim that the term is unambiguous, and refers to Blackacre; claiming people don't commonly refer to vacation houses in the same manner as their regular house, and will attempt to provide evidence of such.

Second, Sheila will claim that no contract exists (or that any contract that may exist is voidable) due to honest and reasonable mutual mistake as to a material term. She will state that she honestly believed the contract to be about "Whiteacre" (the vacation home), which is a reasonable belief to have (after all, why would you make an option to sell your main residence out from under you during the course of three years). Steve, on the other hand, appears to honestly and reasonably

believe that the contract refers to “Blackacre”. When there is a mutual mistake as to a material term of the contract (and the piece of land to be sold is a material term of land contracts), there is effectively no “meeting of the minds” or “mirror image of offer and acceptance” required to form a valid contract at common law. If it is voidable, Sheila will claim she voided the contract by saying she would not honor the option as soon as she became aware of the mutual mistake. For these same reasons, she could also attempt to get the contract rescinded if the court holds it a valid contract for one of the properties.

Third, Sheila will claim that the addendum to the contract is not valid, even if the original contract was valid. In support of this, Sheila will claim two things. The addendum is a modification of an existing contract, which, at common law, required modification to be supported by additional consideration. Since there was no additional consideration, it is not valid. In the alternative, she will claim that the addendum to the contract formed a new option contract, which has all the problems of the claims above, and is either not enforceable, or voidable, and was voided.

Last, Sheila has some weak claims that the contract was terminated when Ben died, as the contract stated that “Sheila and Ben agree” and Ben is dead. However, death of one party does not normally terminate the contractual obligations of the other signing party, assuming they can perform, which Sheila can, as she is now the sole owner of both Whiteacre and Blackacre. Sheila can claim that the contract specified “Sheila and Ben’s house” and neither house belongs to “Sheila and Ben”, and thus, the thing identified in the contract (even if it was held to be one house or the other) no longer exists, making performance impossible.

Steve will respond to all these claims in the same way, which is to attempt to provide evidence that all of these ambiguities in the contract are not, in fact ambiguous, or if they are ambiguous on their face, that the parties knew what was meant. Because there is nothing in the contract that specifies it is the final expression of the parties, he will be able to introduce such parole evidence.

If Sheila wins any of these arguments, she will keep Blackacre. If she loses, she may lose Blackacre or Whiteacre depending on which the court identifies as “Sheila and Ben’s house”.

## **REPRESENTATIVE ANSWER 2**

Tenancy by the entireties is a form of co-ownership available only to married couples where the couple owns as a legal unit with rights of survivorship. A party may not unilaterally affect the ownership rights held in T by E. Here, both Sheila and Ben signed the option; therefore, the T by E ownership does not affect its validity. Upon Ben’s death, the property held in T by E passed to Sheila, who survived Ben. Therefore, the houses are rightfully owned by Sheila and she was under paid \$150 in consideration of the option to hold the offer no obligation to keep the offer to Steve open beyond 2001.

Contracts for land must be in writing to satisfy the Statute of Frauds. Here there was a

writing, therefore this requirement is satisfied. A contract for land must describe the property with enough specificity to identify it. Here, “Sheila and Ben’s house” is not sufficient because they own two houses; therefore the contract is impermissibly vague.

An offer is held open and accepted according to the terms of the offer. An offer can be held for a specific amount of time, where consideration is given to hold the offer. Here, Steve open until 2001. Again, consideration must be given for an option contract. No consideration was given on June 1, 2001 to accompany the addendum; therefore Sheila and Ben were not obligated to hold the offer past June, 2001.

### **QUESTION 3**

In 2003, Paula Plaintiff purchased a new home from Builder. Several months later, Plaintiff developed a severe asthmatic condition. Plaintiff learned that her house had high levels of airborne

mold. Plaintiff filed a civil action against Builder in the appropriate Circuit Court. The gravamen of the suit was that the mold conditions caused Plaintiff's health problems. Plaintiff designated Ed Smith as an expert witness to express an opinion that Plaintiff's condition was caused by airborne mold. During his deposition, Smith testified as to the following:

- He has a Masters Degree in Public Health and has completed his PhD studies in that subject. He is now working on his dissertation which analyzes the relationship between airborne mold spores in residences and respiratory diseases such as asthma.
- He has evaluated every scientific study relating to the topic of his dissertation published within the last 20 years. As a result of his research, Smith is convinced that airborne mold can cause asthma in otherwise healthy persons.
- Based upon Plaintiff's prior medical history (which revealed no indication of asthma), the mold levels measured in her house, and the absence of any other triggering event, Smith opined that the mold conditions in Plaintiff's house caused her asthma.
- Smith admitted that very few experts in either the public health or medical fields agree with his conclusions as to the relationship between airborne molds and respiratory illnesses but he testified that his dissertation, when published, would help establish a causal relationship.

Builder's lawyer filed a pre-trial motion referencing Smith's deposition testimony and seeking a court order that Smith not be allowed to testify as an expert witness

**What grounds can be asserted to prevent Smith from testifying as proposed? How should the Trial Court rule on the motion?**

### **REPRESENTATIVE ANSWER 1**

For expert testimony to be acceptable in Maryland Courts, it must meet the Frye standard. Maryland has not adopted the Daubert (more lenient) approach to admissibility.

In any event, to be admissible under Frye, the testimony must conform to generally accepted scientific principles. Smith admits that his proposed link between airborne molds and asthma is not generally accepted, and as such fails to meet the Frye standards. Furthermore, he has not established medical credentials to testify about Plaintiff's medical history and conclusions drawn therefrom.

An expert can normally testify as to items underlying his opinion it generally relied upon by others in the field in arriving at opinions even of the evidence itself would not be admissible (i.e. reports, hearsay). The defense shall object to (a) Smith being qualified as an expert - we do not know whether he will be acknowledged with a Ph.D. a peer reviewed publication and (b) any testimony

based upon inadmissible evidence.

Under Frye (MD) the evidence should not be allowed. Under Daubert, the evidence Testimony would be allowed (close call). There are some experts in both public health and medical fields who agree, it appears, that the methods of arriving at the conclusions meet scientific standards (review of literature). However, Maryland still follows Frye and requires general acceptance. Accordingly, Court should not allow Smith's testimony.

## **REPRESENTATIVE ANSWER 2**

### Grounds to Prevent Smith from testifying as proposed.

Plaintiff seeks to use Smith as an expert witness in the filed of airborne mold. Defense will raise the following issues to prevent Smith from testifying as proposed.

### Expert Witness.

Expert witnesses are those non-lawyers who testify usually for the purpose of making a point at issues clearer for the court or jury. Expert witnesses are usually required to prove the basis of their expertise by education, experience in the particular field, publishing history or other relevant qualifications. He would seemingly qualify as an expert by virtue of his education - Masters and completed Ph.D. studies in Public Health. Additionally, he purports to have received all of the scientific studies regarding the relationship between airborne mold spores in residence and respiratory diseases. So based on the education and experience pursuing his PhD, he would be qualified.

### Scope and Standard of Testimony

Scope of Testimony: It is questionable whether the proposed testimony of Smith would be allowed in based upon what he is offering for them. He looked up Plaintiff's medical history and made an assessment as to her condition. This may be out of the scope of what he can testify to. Such testimony may require a medical doctor's opinion, not just someone who has a Masters plus additional course work. Should this be testimony delivered by a medical doctor? He should be barred from testimony at trial.

### Standards regarding testimony

The action was filed in Circuit Court, a court based in the State Court system of Maryland. If this action was filed in federal court, the Daubert Standard for scientific evidence would apply. Here in Maryland, Frye is still the relevant standard for use in MD courts.

Frye requires the expert to be an expert in the field using research and conclusion standard and accepted in the field. Here Smith seeks to introduce evidence for doctoral work that airborne mold can cause asthma in healthy people. As discussed previously, he would generally be considered an expert in his field based on education. However, the theory he would offer in his testimony is not accepted in his field. By his own admission, he states very few experts in either public health or medicine agree with his conclusions. His dissertation would be the first to establish such a casual relationship.

Because his purported testimony cannot be corroborated by experts in public health or medicine or by other sources such as journals or learned treatises, his proposed testimony does not meet the fundamental requirements for admission. The trial court should sustain the motion afforded by the defense precluding his testimony.

#### **QUESTION 4**

Connie Consumer purchased a home computer from EZ Compute, Inc. that manufactures computers and sells them at a retail store in Montgomery County, Maryland. The computer did not function properly and Connie was unable to obtain satisfaction from EZ Compute. Frustrated, and acting *pro se*, she filed a civil action in the District Court of Maryland for Montgomery County

against EZ Compute. Connie, not sure how to serve the summons and complaint, took the papers to the store and encountered Bill, a sales clerk. Connie explained what the papers were and Bill, who knew of Connie's problems with her computer and was trying to be helpful, told Connie that he would take them and "make sure that they got to management." Bill meant to give the court papers to his supervisor but forgot.

Connie completed and signed an affidavit of service which stated that she delivered the summons and the complaint to Bill on behalf of EZ Compute.

EZ Compute did not file any pleading in the case and, in due course, the District Court of Maryland for Montgomery County entered a judgment on affidavit against EZ Compute for \$1,500, the amount claimed by Connie.

Six months later, the entry of the judgment has come to the attention of EZ Compute's management. They wish to have their day in court.

**A. What actions should EZ Compute take to allow it to present its case?**

**B. What should be the grounds for such actions?**

**C. How will the Court rule?**

**Explain your answer thoroughly.**

### **REPRESENTATIVE ANSWER 1**

EZC=EZ Computer

C=Connie Customer

A. EZC should immediately file a motion with the District Court asking the court to use its revisory power and grant a new trial.. EZC should also file a motion for a new trial.

B. EZC can argue it should receive a new trial on the ground of insufficient service of process. The general concept of service is that it is "reasonably calculated to give actual notice." [Rule 3-121]. However, CC violated the Maryland Rules in 2 different ways. First, Rule 3-123(a) clearly states that "a party to the action" may not serve process. Second, Rule 3-124 states that when the party to be served is a corporation, as EZC probably is, (it has "Inc." in its name), process must be served on a "resident agent, president, secretary or treasurer." CC served process on a sales clerk-clearly not a person authorized to receive process. Also, even if Bill had given them to "management", as he had told CC he would, it would not have been a proper service - a "manager" of a corporation can only receive process if there is a good faith attempt to serve the corporate officers mentioned above, that failed, creating the necessity of servicing a manager. Here, CC never attempted to serve the correct officers.

C. The court will likely grant EZC a new trial. The court has latitude to revise a judgment under Rule 3-535; here, Rule 3-535(b) appears to apply (irregularity or mistake - no evidence of fraud on CC's part). While generally, the Court can only exercise its revisory power within 30 days (Rule 3-535(a), Rule 3-533(b) specifically allows the power to be used "at anytime."

When a court invokes its revisory power, it "may take any action that it could have taken under Rule 3-534 - which includes opening the judgment to receive additional evidence, amending the judgment, or even entering a new judgment. Since Rule 3-534 allows motions and to amend judgments to be joined with motions for new trial, and the reason a motion for new trial would not be available to EZC because the time for filing had passed was done solely to CC's insufficient service of process, the court would likely grant a new trial.

## **REPRESENTATIVE ANSWER 2**

### **A. Motion to Revise Judgment.**

Unfortunately, six months after entry of judgment, it is too late for EZ Compute, Inc. to file a Notice of Intention to Defend (before trial), a Motion for New Trial (10 days), a Motion to Alter or Amend a Judgment (10 days), or an appeal (30 days). EZ Compute can only try to file a Motion to Revise Judgment for irregularity based on defective service of process under Rule 3-535(b). It can be filed at any time. If granted, the court will revise the judgment. It will not necessarily grant a new trial.

B There are two grounds for irregularity, both related to service of process.

#### **Service by the Wrong Person**

Connie, a party to the action, should not have served EZ Compute herself. Rule 3-123(a). She should have used another person at least 18 years of age.

#### **Service on the Wrong Person**

EZ Compute, Inc., a corporation, must be served by serving its resident agent, president, secretary, or treasurer. Rule 124(d). EZ Compute has a store in Montgomery County and is required to have a resident agent. If it did not designate one, the State Department of Assessment and Taxation should be served.

It is only if none of these people can be served that a manager may be served. In this case, Sheila has not even attempted to identify the resident agent, president, secretary or treasurer of the corporation. therefore, her service on the matter was defective.

#### **Lack of Personal Jurisdiction-No Notice.**

Even though EZ Compute conducts business in Montgomery County, Maryland and arguably "was served" in Montgomery County, the District Court for Montgomery County does not have personal jurisdiction if it does not meet general standards of fair play and justice. Bill forgot to give

the papers to his supervisor. It follows that the management of EZ Compute did not know about the lawsuit until judgment was entered.

C. The defense of improper service of process and lack of personal jurisdiction should normally be asserted before filing an answer. However, in this case, EZ Compute never had an opportunity to be heard and should be permitted to assert them now. The court should grant the motion and revise its judgment or reopen the case.

## **QUESTION 5**

Chris Counselor and Andy Attorney, sole practitioners with law practices located in Towson, Maryland, filed Articles of Organization with the Maryland State Department of Assessments and Taxation (“SDAT”) on June 12, 2004, creating Counselor and Attorney, LLC (the “LLC”). The Articles of Organization provide (i) that the LLC is created for the purpose of the practice of law; (ii) that both Chris and Andy will be indemnified and held harmless for any claims of malpractice filed against the LLC; and (iii) that individual members are not authorized to act as agents of the LLC solely by virtue of being members, and that persons doing business with the LLC are presumed to have knowledge of the limits of the liability of individual members.

On June 15, 2004, Chris signs, individually, the order for stationery from Sally Stationery, Inc. (“SSI). Chris tells SSI that the new firm is ready to operate and that he must have the stationery within 5 days. SSI delivers the rush order to Chris on June 20, 2004, along with an invoice addressed to the LLC, Andy and Chris for \$2,560.24. On that same day, Andy used the stationery when he wrote to the owner of SSI to thank her for the prompt service and to notify his most important client about his new firm.

The Articles of Organization are accepted by SDAT on June 25, 2004. Andy and Chris merge their practices effective July 1, 2004, and they send an announcement on the SSI printed stationery to all of their clients.

On September 1, 2004, Marty Malaprop, M.D. (“Marty”) files suit against Chris, Andy and the LLC alleging that Andy was negligent in representing Marty in a medical malpractice claim in September 2002.

On November 18, 2004, SSI files suit against Chris, Andy, and the LLC for failing to pay the invoice for the stationery.

**A. Based solely on the facts given above, what defenses can Chris, Andy, and the LLC raise in the lawsuit filed by Marty? What is the likelihood of success of each defense? Explain your answer fully.**

**B. Based solely on the facts given above, what defenses can Chris, Andy, and the LLC raise in the lawsuit filed by SSI? What is the likelihood of success of each defense? Explain your answer fully.**

### **REPRESENTATIVE ANSWER 1**

A. Chris and Andy will raise the defense that Chris and Andy are not personally liable because they are members of a limited liability company. Generally, the members of an LLC are not personally liable for any of the LLC’s debts or liabilities and any such liability is limited to the assets of the LLC. Moreover, they will argue that Marty had constructive notice of the articles of organization that are filed with the SDAT which states that both Andy and Chris will be indemnified and held harmless of any claims of malpractice. Chris and Andy will be unsuccessful in these defenses. An attorney cannot use such an “exculpatory clause” to limit its malpractice liability. An attorney, even though a member of an LLC remains personally liable for any professional malpractice. To that end, Andy would be personally liable for his negligence in his representation of Marty. Chris will argue that he should not be held liable for Andy’s negligence and he will be successful in this argument unless Chris negligently supervised Andy or otherwise participated in/contributed to the negligent representation.

B. Chris, Andy and the LLC will argue that SSI had constructive/actual notice of the articles of organization that state that individual members are not authorized to act as agents of the LLC.

Andy will argue that Chris individually ordered the stationary from SSI and was not authorized as an agent to act on behalf of Andy or the LLC. Andy will further argue that Chris was acting as a promoter, prior to the SDAT's acceptance of the LLC's filing, and therefore, Chris is personally liable and could not bind him or the LLC. However, these arguments will fail. While Chris was a promoter and will be personally liable for his order of stationery on behalf of the LLC, he also had implied and apparent authority to order the stationery. SSI could not have had any notice (actual or constructive) of the provisions in the article of organization because they were not accepted by SDAT at the time Chris contracted with SSI. Moreover, Andy ratified Chris' action by using the stationery. The LLC, however, did not adopt the contract, and therefore, will not be liable. However, Chris and Andy will be liable to pay for the stationary.

## **REPRESENTATIVE ANSWER 2**

A. The LLC can defend against Marty's suit that it wasn't in existence at the time of the alleged tort. The LLC was a legally valid limited liability company on June 25, 2004. Marty alleges that the tort occurred in September 2002. Judgment for LLC. Chris will also defend by stating that prior to June 2004, he was a solo practitioner with no ties to Andy, hence he owed Marty no duty. Judgment for Chris. Andy will have to defend the action as the only properly identified defendant. The LLC's operating agreement (ii) is prohibited because members of an LLC cannot disclaim professional malpractice so Andy can't defend based on the LLC's clause and because it wasn't in existence at the time Andy was alleged to have committed malpractice.

Andy will have to find defenses that are only applicable to him. If Marty obtains a judgment against Andy he will be personally liable. Andy may not use LLC assets to pay for the judgment. Marty may not seize LLC assets to get paid on the judgment. But Marty as a creditor of Andy could seize Andy's rights to payment that Andy receives from the LLC.

B. Chris will be personally liable for the debt owed to SSI. Normally, members of an LLC are not personally liable, but LLC did not exist when Chris entered into the contract with SSI. Chris will be liable under promoter liability. He will remain liable until there is a novation. Chris, SSI and LLC have to agree the contract was between LLC and SSI, otherwise Chris is liable. If Chris tries to defend that the LLC's clause (iii) bars his liability he will fail. If SSI reasonably believed Chris could bind LLC as its agent, then Chris is liable, because despite the clause if a third party thinks Chris can bind the LLC to a contract, Chris will be liable.

If Chris tries to argue he is protected via corporate estoppel, he might prevail. Since SSI addressed the bills to LLC, Andy and Chris, it appears SSI acknowledged LLC's existence, so it should be estopped from denying its existence.

Andy and the LLC will argue they have no liability under the agreement because Andy did not sign it, and the LLC didn't validly exist until 6/25/04. If Chris is successful with his corporate estoppel argument, Andy and the LLC will be liable. If not, then Andy and LLC have no liability. Simply using the stationary does not constitute a novation. Andy and LLC would have obtained a

benefit from Chris' agreement, but they didn't incur liability.

### **QUESTION 6**

Milky King, LLC is a popular ice cream shop that caters to high school students in Frederick County, Maryland. Mike worked at Milky King during the summer of 2004 until the sole member, Tim, terminated his employment because sales had decreased due to the opening of a new competitor, Candy Heaven. Although Mike was one of Milky King's longer term employees, he was terminated during an economic slowdown because customers had complained that he was rude and angry all of the time. After Mike's employment was terminated, his best friend Ray continued to work part time at Milky King. Ray was 15 years old and his job at Milky King was the first job he ever had.

One afternoon in August 2004, Mike stopped by Milky King to visit Ray. Tim was out for lunch at the time, so Mike went behind the counter and assisted Ray in serving ice cream to the customers. While he was working behind the counter, Mike's former girlfriend, Sue, came into the

Milky King and began making loudly critical comments about Mike. Mike responded by throwing a container of boiling fudge sauce at Sue. Sue was rushed to the hospital where she was treated for second degree burns that required several painful skin grafts over a period of six months. She has permanent scars.

In October 2004, Sue files suit against Mike, Tim, Ray, and Milky King, LLC for the injuries she sustained.

**Analyze the potential liability of each party under the alleged claims. Discuss your answer fully.**

### **REPRESENTATIVE ANSWER 1**

Sue vs. Mike: Sue may successfully sue Mike for the intentional tort of battery. Battery, defined as a harmful or offensive touching of one to another without consent, was committed by Mike when he threw the boiling fudge sauce onto Sue, which made contact with Sue and caused second-degree burns. (Note that the touching need not be skin-to-skin – a projectile or other object propelled by the defendant that touches the victim is sufficient.) Sue can recover against Mike.

Sue vs. Tim: Sue will be unsuccessful in a suit against Tim personally for the acts of Mike. As a member of a properly formed L.L.C., members are not personally liable for the actions of the LLC or of agents or employees of the LLC. Hence, Tim as a member of the LLC – and himself not the tort feisor, Tim cannot be held liable under these facts. (See also Sue vs. Ray and Sue vs. LLC).

Sue vs. Ray: Sue will be unsuccessful in a suit against Ray. Sue could allege that Ray was acting with the apparent authority of Tim or the LLC to permit Mike to go behind the counter while Tim was out. However, under these facts, Mike came to the LLC to merely visit Ray. Sue will argue that Ray had a duty to prevent Mike from working, but that duty would rest on Tim, a supervisor, and not on Ray, a mere employee and a minor. It is arguable that Ray acted reasonably as any 15 year old and did not encourage Mike to commit the wrongful act.

Sue vs. LLC: Sue will be successful in a suit against the LLC. The LLC, as the employer and a principal, is responsible for the acts of its employees and servants under the theory of respondent superior.

- A. Tim's Negligence: The LLC will be responsible for Tim's negligence in leaving the store staffed with no one other than Ray, a 15-year old, who presumably is without the knowledge or experience to operate the store alone. Tim owed a duty to Sue: 1) to ensure that the store was safe and 2) to properly supervise the employees of the LLC. Under these facts, when Tim left the store, he created an unsafe situation by which Mike could enter and work behind the counter of the store without objection, even though he was no longer an employee. Tim had the duty to either supervise or

to close the store when he was unable to do so, and that duty was breached, which directly and proximately resulted in Sue's injuries.

- B. Vicarious Liability of LLC: The LLC may be liable also for the acts of Mike. Mike was cloaked with the appearance of being employed by the LLC when he was working behind the counter assisting Ray. As such, the LLC is liable because Mike was an agent of the LLC for purposes of vicarious liability. The LLC will also argue that the intentional tort was not within the scope of the employment, and such ultra vires acts cannot be imputed to the LLC.

## **REPRESENTATIVE ANSWER 2**

1. **Mike's Liability**: Mike is clearly liable as he committed an intentional tort. However, there is a question as to whether he could claim indemnification from the LLC. Mike could argue that Ray allowed him behind the counter to work to the benefit of the LLC, and as such was acting as an employee of the LLC. Mike could argue that the LLC/Tim leaving an inexperienced employee (part time employee) alone, it would be foreseeable that Ray would need help and could ask anyone to assist. But even if Ray's allowance for Mike to assist were to be constituted as establishing agency, Mike acted outside the scope of any perceived employment (even through Ray's authorization) by an intentional battery. Thus, Tim/LLC cannot be held liable for Mike's action based on Mike's agency.

2. Ray could have liability for allowing Mike to get behind the counter. Sue would argue that Ray knew Mike had been terminated, knew or should have known that Mike was partly terminated because of his anger and rudeness to customers. Thus, Ray is liable for allowing Mike to get behind the counter. Ray could argue that, irrespective of Mike's status as an employee, Ray is indemnified through the LLC and that he cannot be held liable for Mike's conduct, as the conduct was not reasonably foreseeable.

Ray would likely succeed in claiming indemnification, (see infra with regard to Tim's/LLC's arguments) but the jury could find that Ray is also personally liable, (i.e., parents up to \$10,000 for allowing Mike behind the counter).

3. **Tim and LLC**

As stated above, Tim and LLC would argue that Mike was not an employee/agent and that even if he was, Mike acted outside the scope of his employment. Thus, the LLC would not be liable. Tim, on this argument, would never be personally liable because the store is an LLC. Thus, Tim is indemnified. Indeed, Tim would not be personally liable, owing to the LLC status. Sue might prevail, however, because she could argue that Tim left Ray in charge. Given Ray's inexperience (e.g., first job ever, age, part-time) it was foreseeable that Ray would need help and that Ray would enlist an ex-employee who had experience working in the shop. Tim/LLC would have to argue that Ray was acting outside the scope of his employment and was unauthorized to allow someone else

to work (i.e., in effect hiring someone for even a brief interval). The issue for the tier of facts would be did Tim leaving Ray in charge authorize Ray to enlist the help of someone who had been terminated or anyone else for that matter.

Therefore, the LLC could be liable if Ray were deemed to be acting within the scope of his employment. Given that serving ice cream was Ray's job, it is not likely the LLC will be liable for Mike's conduct

### **QUESTION 7**

Hugh and Wilma were married on May 1, 1995. Hugh, a widower, has three adult children by a previous marriage. On February 2, 2002, Hugh sold his residence in Baltimore County and entered into a written contract with Sidney to purchase Sidney's home in a residential subdivision in Charles County, Maryland for \$800,000. At closing on April 7, 2001, at Hugh's direction, title to the property was deeded to Hugh and Wilma as tenants by the entireties.

On June 10, 2003, because of Hugh's failing health and resultant diminished income, Hugh and Wilma sold the property to a third party for \$1,200,000 and purchased a smaller residence in the same locality for \$200,000. Title was deeded in Hugh's name only. The balance of the purchase price was deposited by Hugh without Wilma's knowledge in the Charles County Bank & Trust Co. in Hugh's name only and was thereafter used to pay joint expenses and Hugh's mounting medical bills. Hugh died on November 1, 2004.

By his Will, Hugh bequeathed the sum of \$200,000 to Wilma and the remainder of his estate, including the account in the Charles County Bank & Trust Co., equally to his children. Hugh's oldest child was appointed personal representative of the estate.

**As Wilma's attorney, properly admitted in Maryland, what advice would you give Wilma with respect to her interest in Hugh's assets?**

### **REPRESENTATIVE ANSWER 1**

At the time of Hugh's death he was married to Wilma, had three adult children, and what we assume to be a valid will and testament. His estate at the time of his death included mostly his bank account and his residence.

The bank account was funded by the profits of the sale of Hugh's and Wilma's home on June 10, 2003. The house, originally bought in 2001, was deeded to Hugh and Wilma as tenants by the entirety. When the house was sold, they owned the profits equally together – not half to each party – as tenants in common could take. Here, Hugh seems to bequeath half of the \$400,000 to Wilma – or \$200,000 – apparently, considering this her equal share of profits.

However, Wilma's interest should be the balance of the account. She is entitled to the full amount of the proceeds of the sale. Hugh did not have the right to deposit the money in his name alone. The original property was deeded as tenants by the entirety – showing Hugh and Wilma's intention to create a right of survivorship. Had Hugh died prior to the sale in 2003, Wilma would have unquestionably inherited the property. I believe the intent should also be transferred to the home sale proceeds as well. Wilma has a right to receive the full balance of the account in Charles County Bank & Trust, provided it was only funded with the home sale proceeds, as the facts seem to indicate.

Wilma's Interest in House: Although Wilma and Hugh were married at the time of the purchase in June 2003, Hugh did not put her name on the deed. This would indicate that he did not intend for their to be a right of survivorship. Two issues cloud this fact – the marriage created an expectation of at least a life estate in the property for Wilma, especially considering that the house had been purchased with profits from their previous home, which they had explicitly held as tenants by the entirety. Hugh's will, however, seems to want to remove the asset from the marital property and add it to his estate, which would then be equally divided amongst his children. It is possible that the house might be treated as such.

I believe Wilma has a full interest in the house that was purchased with the rest of the \$200,000 profit. Any other asset in Hugh's estate would conceivably be inheritable by Hugh's children. The bank account and marital residence are tied to Wilma and should become her property regardless of Hugh's will.

## **REPRESENTATIVE ANSWER 2**

As Wilma's attorney, I would advise her that she can claim an interest in Hugh's assets.

The Charles County residence will not pass to Wilma by operation of law as a result of Hugh's death because they did not own the residence as tenants by the entirety.

The creation of a tenancy by the entirety requires 5 unities. First, the unity of time requires that Hugh and Wilma acquire the property simultaneously. They did so here. Second, the unity of title requires that they acquire the property through the same title or instrument. This did not happen here because the property was deeded to Hugh alone and not to Wilma. Third, the unity of interest requires that they acquire the exact same interest in the property. This fails because Wilma's absence in the deed makes her interest subordinate to Hugh's. Fourth, the unity of possession requires that they both acquire possession of the property. Wilma's possession is only as a result of her marriage to Hugh and not directly as the result of the conveyance to Wilma. But arguably Wilma obtained possession through the conveyance because she "purchased" the property with Hugh. Fifth, the unity of person requires that Hugh and Wilma be married constituting one entity or person. This unity is satisfied. However, because the unity of title and interest are not, Wilma and Hugh did not own this property as tenants by the entirety and Wilma therefore has no right of survivorship.

However, as to the proceeds from the sale of the previous Charles County residence, Wilma has an interest. That property (Sidney's home) was held by both Hugh and Wilma as tenants by the entirety because all five unities were satisfied – the property was titled in both names. When the residence was sold, the proceeds were owned by the marital relationship – that is, by both Hugh and Wilma. I would advise Wilma to argue that she has an interest in the \$800,000 left over from the proceeds after the current residence was purchased for \$200,000.

Hugh's children will likely argue that Hugh was entitled to direct this money on behalf of both of them by virtue of the marital union. I believe this argument will fail because it takes both the husband and the wife to convey an interest in property held as tenants by the entirety.

In conclusion, I would advise Wilma to seek an interest in the remainder of the proceeds that Hugh put in the bank, notwithstanding the \$200,000 bequeathed to Wilma in the will.

## QUESTION 8

Alice was attempting to cross “A” Street at its intersection with “B” Street in suburban Baltimore County, Maryland. “A” street is a four-lane highway running north-south and has a median separating the northbound from the southbound lanes. “B” Street runs east and west and is a two-lane street. Alice was on the south side of “B” Street and intended to cross “A” Street walking from east to West.

A traffic signal was in place and Alice waited for the “walk” light before proceeding across “A” Street. Alice crossed the northbound lane of “A” Street and stepped on to the grassy median. As she was about to step off the median, the light changed to a flashing red “don’t walk” signal. She looked for traffic, saw none and proceeded across the southbound lanes of “A” Street. When she had almost reached the curb, a vehicle traveling on “B” Street in an east-west direction driven by Bennett turned left into the southbound lane of “A” Street and struck Alice, seriously injuring her.

The following statute was in effect at the time of the accident:

### Pedestrian Control Signals

- (a) Walk – A pedestrian having a “walk” signal shall cross the roadway in the direction of the signal and shall be given the right of way by the driver of any vehicle.
- (b) Don’t Walk – A pedestrian shall not start to cross the roadway in the direction of a “don’t walk” signal.
- (c) Partially Completed Crossing – If a pedestrian has partially completed crossing on a “walk” signal, the pedestrian shall proceed without delay to a sidewalk or safety island while the “don’t walk” signal is showing.

Undisputed evidence from traffic control authorities indicates that the light in question was properly functioning and that after the “walk” light goes off a “flashing” red light appears which then changes to a “steady” red.

Alice filed suit against Bennett, the driver of the vehicle which struck her.

- a. What is the basis of Alice’s suit?**
- b. What arguments and/or defenses can Bennett raise, or attempt to raise?**
- c. What is the best argument Alice can make to Bennett’s defenses?**

### **REPRESENTATIVE ANSWER 1**

- A. Alice will sue Bennett alleging negligence and possibly battery (see discussion of negligence elements *infra*).
- B. Bennett will argue that Alice was contributorily negligent and thus be totally barred from recovering against him. In a suit for negligence in Maryland the Plaintiff must establish duty, breach, causation and damages which Alice can do here because Bennett had a duty to operate his vehicle safely and avoid pedestrians and he breached that duty by striking Alice with his car but for his striking her with his car she would not have been “seriously” impaired.”

Once the Plaintiff establishes negligence the Defendant can assert the defense of contributory negligence which means that the Plaintiff failed to exercise due care for her own safety, and that failure is the cause of her injuries. Bennett will argue that Alice’s negligence is established by her violation of the “Pedestrian Control Statute” in starting to cross the roadway in the direction of a “don’t walk” signal. To use Plaintiff’s violation of a statute as evidence of negligence a defendant must establish that plaintiff was among the class of persons the statute was designed to protect and that the harm plaintiff suffered was of the type that statute was designed to protect against, or in other words satisfy the “class of person claiming harm” test. Bennett will clearly be able to satisfy this test as the pedestrian contract statute is designed to protect pedestrians from being struck by cars

as they cross the street. In some states this would amount to negligence per se but in Maryland this is merely evidence of negligence.

In the alternate, Bennett will argue that Alice assumed the risk – a negligence test based on plaintiff’s actual knowledge of the potential danger of a situation and her voluntary negligence to “risk it.” Here it is easy to establish that a pedestrian crossing a large street was aware of the inherent dangers – however, because Alice exercised due care – a reasonable person would assume that it was safe to cross a street if she looked for traffic and saw none – this argument will likely fail.

Alice’s best argument in response to Bennett’s defense that she was contributorily negligent is that Bennett had the last clear chance to avoid the collision. If defendant’s negligent act a breach of duty of care comes chronologically after plaintiff’s contributory negligence, then defendant is deemed to have had the last clear chance to avoid the incident and will still be held liable if he failed to do so. Clearly, while Alice may have acted negligently in crossing while the light was flashing the red “don’t walk” signal, Bennett as the driver of the vehicle had the last clear chance to avoid the collision (he could have swerved, slammed on the brakes, etc) and failed to do so. Thus, Bennett Will be found negligent.

## **REPRESENTATIVE ANSWER 2**

Alice will bring a suit based on negligence against Bennett. Alice will claim that Bennett had a duty to drive with car as any reasonably prudent driver would; Bennett breached that duty when he had his turn onto A Street; Bennett’s breach of duty was the actual and proximate cause of Alice’s injury; Alice as harmed by Bennett.

Alice will argue that Bennett was under duty to be careful when making his turn, especially because the intersection was a busy intersection because “A” was a four lane street. Alice would argue that a reasonable and prudent driver, when turning from a two lane street to a busy four lane highway would exercise care and be on the lookout for pedestrians. Alice will claim that Bennett breached that duty by not being observant enough under the circumstances. Alice will claim that Bennett was the actual cause of her injury because he struck her with his car. Alice will claim that Bennett was the proximate cause of her injury because it was foreseeable that if a driver does not exercise due care, he can strike a pedestrian. Alice will argue that Bennett’s breach caused her injuries.

Maryland is a contributory negligence state. Therefore, Bennett will first argue that Alice was contributorily negligent because she walked across the street when the “don’t walk” sign was flashing. Bennett will argue that a reasonable and prudent pedestrian would not attempt to cross the street in similar circumstances. Bennett would point to the statute as proof of Alice’s negligence.

The statute specifically states that “a pedestrian shall not start to cross the roadway in the direction of a “don’t walk” signal.” In Maryland, violation of a statute is not per se negligence, but rather evidence of negligence. For these reasons Bennett will argue that Alice was contributorily negligent and as a result Bennett should not be held liable.

Assumption of risk – Bennett will also argue that Alice assumed the risk is an affirmative defense. As outlined above, Alice stepped off the median while she had a “don’t walk” signal. She therefore knew that there was a risk of on-coming traffic. She assumed the risk, so Bennett would argue that Bennett’s not liable.

Alice would point to the other statutory powers, say that she is allowed to proceed to the sidewalk without delay, which is what she did. As such she was not negligent nor assumed the risk. Alice would further argue that even if she assumed the risk Bennett had the best clear chance to avoid the accident which, due to his negligence, he did not.

## QUESTION 9

Kwame Kane owns Kappa Title, a title and settlement company in Silver Spring, Maryland. When he started the company in 1999 it was a small company but has grown to be a multi-million dollar a year business. On May 15, 2004 at 4:40p.m., Kwame conducts a settlement for the sale of a \$900,000 home.

As part of the settlement, the buyer, Bill Biggins, presents a check to Kwame in the amount of \$1 million drawn on his account with Acme Bank. The check bears what appears to be an Acme Bank certification stamp signed by an officer of Acme Bank. After settlement costs are calculated, Kwame disburses a check from Kappa’s escrow account for \$10,000 to each of the real estate agents for Biggins and the seller, Sam Seller. Kwame then issues a check from Kappa’s escrow account to Biggins for \$80,000 which represents the difference between the amount of the certified check and the final purchase price of the home.

On the next business day, Kwame takes the certified check to Acme Bank to verify that the check was certified by the bank before depositing it into Kappa’s escrow account at First Bank because of his fear of what damage a \$1 million deficit could do to his business. Kwame meets with the bank’s branch manager, Ida Indy, who takes the check from Kwame and then states “the certification looks fine, but if you have Mr. Biggins’ phone number I can call him to see if he wrote the check.” Kwame tells Ida that a call was not necessary because Mr. Biggins personally gave the check to him along with his driver’s license. Ida then says “well that is our certification.” Kwame

then goes to First Bank and deposits the \$1million certified check into his escrow account. He then wires \$900,000 to Seller's mortgage company from Kappa's escrow account as payoff on that mortgage.

Three days later, Kwame receives a call from Acme Bank's security dishonoring payment on the \$1million check because the certification stamp on the check was a forgery and the signature on the certification was forged. As a result of the one million dollar short-fall in Kappa Title's escrow account, a number of checks drawn on the escrow account are dishonored. Kwame receives numerous complaints and calls from real estate agents and customers who state they will never do business with Kappa again. Kappa has a 50% decrease in business.

Kappa Title has retained you for legal advice.

**Give a detailed analysis of any rights Kappa Title may have under Maryland Commercial Law to recover its losses.**

### **REPRESENTATIVE ANSWER 1**

Kappa Title has a cause of action against Acme Bank. The signature on the check and certification were both forgeries, therefore, they were unauthorized signatures of Acme Bank, the drawee. Therefore, the unauthorized signature and stamp were ineffective as Acme Bank's certification, but the signature was effective as that of Biggins'. Kappa Title was a holder in due course. Kappa Title took the instrument, which had been negotiated, in good faith for value without knowledge of the forgery. However, pursuant to § 3-403 of the Annotated Code of Maryland, Acme Bank ratified the unauthorized signature when the bank's officer, Ida, stated that ". . . [it] is our certification, so the check is fine." Kwame relied on her statement to his detriment and upon Ida's statement, the certification became authorized. Moreover, Acme Bank's negligence may have contributed to Kappa's loss if the bank did not exercise ordinary care in verifying that the certification was authorized and therefore, should be precluded from asserting the forgery against Kappa, and/or First Bank, who, in good faith, took the check for value/collection. [§ 3-406].

When Acme Bank ratified the certification it became the "obligated bank" pursuant to § 3-411 and is liable to Kappa Title for the amount of the check, plus his loss in business. Acme Bank also satisfied "acceptance" as defined in § 3-409 when the signature was ratified and was obligated to pay the check amount as required under § 3-413. Moreover, once Acme Bank became an "acceptor," Biggins, the drawer, was discharged of liability pursuant to § 3-414. Moreover, once the check was "accepted" through Acme's ratification of the certification, Acme Bank made warranties of presentment (title, enforcement, no alteration, no forgery, no insolvency).

Kappa can also argue that Ida made a representation to him and that based on the negligent misrepresentation, he relied on it and acted to his detriment and he is entitled to equitable relief, pursuant to § 1-103 of the Code of Maryland.

## REPRESENTATIVE ANSWER 2

This question involves the UCC Articles 3/4 because it is a certified check. A negotiable instrument is a promise or order to pay a sum certain with or without interest at a time certain.

Here BB provided a \$1,000,000 check to KK for the purchase of a house.

A certified check is a check made payable to holder or bearer that has been “authorized” by the bank. The “certification” verifies that the funds are in the account of the drawer. Here, Acme had certified the check according to Ida Indy. I. I. “ratified” the check on behalf of Acme.

A holder is a person entitled to enforce the instrument. Here, KK is a holder of BB’s certified check. KK is a holder in due course because he took for value and without notice of any deficiencies in the instrument. In fact, he exercised diligence in verifying that the check bore Acme’s certification.

Certification means that the bank has accepted the check. Here, the stamp and the signature by the bank officer. Acme is obligated to pay the check as the acceptor, and is obligated to pay the \$1,000,000. The unauthorized signature is good as against Acme. Acme accepted the check.

Negligence substantially contributing will bar a party from enforcing an instrument in certain cases. Here, the bank Acme failed to exercise due care through its agent, I. I. The burden is on KK to assert that Acme failed to exercise due care. The negligence will be apportioned depending upon the respective actions of the parties. Here, KK checked BB’s driver’s license and checked with the bank.

A drawer is obligated to pay the draft. Here, BB has absconded and likely will not be found.

Acme accepted the check and must pay expenses and lost interest resulting from the non-payment. KK may be able to recover consequential damages as well.

First Bank is not liable, but will also be able to recover.

### **QUESTION 10**

Officer Gonzales, while off-duty in his marked police vehicle, observed a vehicle driving in the opposite direction at a high rate of speed in excess of the posted speed limit. He made a U-turn and activated his emergency equipment and pulled the vehicle over for speeding. The vehicle was driven by Danny. Earl was in the backseat.

Officer Gonzales asked for Danny's license and registration. When Danny opened the glove compartment, Officer Gonzales saw a roll of money. Officer Gonzales asked the two occupants whether they were hiding drugs or weapons in the vehicle. They both responded by stating "no." Officer Gonzales asked Danny if he could search his car, to which Danny responded "no." Officer Gonzales informed Danny that he suspected that the vehicle contained drugs and asked them to exit the vehicle. They exited the vehicle, but Earl ran off.

Officer Gonzales searched the vehicle and ultimately found 1 kilogram of cocaine between the backseat and a back armrest. He also found \$5,000 in cash. When Officer Gonzales asked who owned the contraband, Danny denied ownership.

Officers who arrived on the scene pursued Earl. Trae, a captain in the U.S. Air Force Special Forces, saw Earl running from the police. He did not know what Earl had done, but believed something illegal was afoot. Trae hurdled a fence, chased down Earl and then subdued him with hand-to-hand combat techniques. Trae then searched Earl's pockets and retrieved a loaded handgun. Trae handed the handgun over to the police.

Officer Gonzales arrested both Danny and Earl and transported both of them to the station. At the station Officer Gonzales stated to Danny, "as the driver you will do the most time and boy

will the guys in the joint love you!” At that point Danny yelled at Earl stating: “I am not doing time for you!” Upon further questioning Danny said the drugs belonged to Earl.

Based on the confession of Danny, Gonzales charged Earl with possession of a controlled dangerous substance and possession with the intent to distribute a controlled dangerous substance. In addition, Earl was charged with possession of a handgun in the commission of a felony and simple handgun possession.

Earl’s attorney wants to file a motion to suppress all evidence obtained.

**What issues do you anticipate Earl’s attorney will raise in the suppression motion? How do you believe the Court will rule on each issue? Discuss fully.**

### **REPRESENTATIVE ANSWER 1**

Illegal Search Earl’s attorney will make the case that the search of Danny’s car was not reasonable under the fourth amendment applied to the states under the fourteenth amendment. The police officer conducted a search based upon speeding, a roll of money, and Earl running away. None of these are probable cause of the occurrence of a crime, or obviate the need for a warrant (despite the automobile exception). However, this argument will probably not succeed because Earl had no ownership interest in the vehicle and thus no standing to object to its search.

Citizen Search He may object to the tackling of his client by a private citizen. However, private citizens are not subject to the constitution in this example unless they are acting at the direction of the police. There is no indication that is occurring.

Contraband The contraband was found in Danny’s car not Earl’s, therefore it should be presumed to be Danny’s. Or, under the illegal search argument, fruit of poisonous tree.

Charge Earl is being charged with 4 crimes that are really two. The two lesser included offenses should be dropped.

5<sup>th</sup> & 6<sup>th</sup> Danny was interrogated by the police and the facts indicate that he was not advised of his Miranda rights, in particular of his right to remain silent and his right to counsel. However, Earl has no standing to object to this.

### **REPRESENTATIVE ANSWER 2**

Earl's attorney will argue that the search of the car was illegal, in violation of the 4<sup>th</sup> Amendment, and that all evidence obtained therefrom should be excluded under the fruit of poisonous tree doctrine.

While the stop of the vehicle was justified due to the speeding, the officer had no reason to search the car. A roll of money in the glove compartment does not give rise to probable cause that there are drugs in the vehicle. The officer asked for consent to search the car and Danny said "no." The court will not suppress the evidence against Earl however, because he lacked standing because the car belonged to Danny. Earl had no right of privacy in the car because it was not his. The drugs were obtained by an illegal search of Danny's car and cannot be excluded by Earl.

The gun that Earl had was retrieved by a "special forces" person, not the police. So Earl could not say that the police illegally searched him. There is no standing to suppress if there is no state action.

Additionally, Earl cannot be successful in suppressing Danny's statements, even though it seems his statement was coerced and violated Miranda rules under the 5<sup>th</sup> Amendment. Earl could only try to suppress statements he might have made.

The Court will deny Earl's suppression motion on the evidence for the above stated reasons.

## QUESTION 11

Able, a homeless person, was cold and hungry. He observed Baker going into Baker's house at about 9:30 p.m. in Waldorf, Charles County, Maryland. Baker left the front door partially open. After a few moments, Able went up to the door of Baker's house and knocked on the door. Baker responded with "come on in". Able pushed the door so that it was fully open and took one step over the threshold of the doorway and stopped. Able then stated loudly: "I am cold and hungry. Give me food and money!" Baker was caught by surprise. He felt threatened by Able's presence and statements. Able then stuck his hand in his own pocket in such a way that Baker feared that Able had a weapon. Baker yelled out to his wife who was in the kitchen to call the police. Able turned and fled. He was lawfully apprehended by the Charles County police, given his Miranda rights, and legally searched at which time a lock blade pen knife was recovered from his pocket. Able was charged with first degree burglary and first and second degree assault. He is in the Charles County jail awaiting trial.

As an attorney in the Maryland Public Defenders' Office, you have been assigned to defend Able.

**State in detail Able's defenses to the crimes charged and provide an analysis of whether the defenses will be successful for Able.**

## REPRESENTATIVE ANSWER 1

**1<sup>st</sup> Degree Burglary.** 1<sup>st</sup> degree burglary is the breaking and entering the dwelling house of another with the intent to commit a felony or a theft therein. Here, Able did not make a "breaking" for purposes of this charge. Able "knocked on the door" and pushed the already open door fully open and entered in response to Baker's command to "come on in". This is not a breaking for purposes of this crime because Able entered with the consent of the homeowner Baker.

In addition, Able did not have the requisite intent to commit a felony or a theft once inside Baker's home. We have no facts to suggest Baker's intent was unlawful in anyway. He may have simply intended to approach Baker's house as a panhandler, not a thief. In addition, stating "I am cold and hungry. Give me food and money" is not sufficient to infer Able's intent at the time of the entering of Baker's home. As a result of the above rationale, Able will be successful in asserting a defense to the burglary charge.

**2<sup>nd</sup> Degree Assault.** Is the placing in fear of an imminent battery or an attempted (CL) battery in Maryland. Here Able only stated to Baker "I'm cold...Give me food and money". This is not sufficient language to substantiate a threat to Baker, nor is it an affirmative act that would indicate that Able intended to harm Baker. Able's reaching onto his pocket may satisfy the "placing in fear" element of second degree assault circumstantially, but this is certainly not beyond argument on Able's behalf. This charge is the most likely one to convict Able, although it is weak. It will hinge on whether Baker's fear was reasonably objective.

**1<sup>st</sup> Degree Assault.** Is second degree assault with a handgun or a dangerous and deadly weapon. Here Able only had a penknife, which is not considered to be a deadly weapon under Maryland Law. In addition, Able made no affirmative act to attempt to do serious bodily harm to Baker, other than placing his hand in his pocket. This does not rise to an inference of the required intent for 1<sup>st</sup> degree assault.

As a result of the above rationale, Able will be successful in defending the burglary charge and 1<sup>st</sup> degree assault. We need more facts to determine Able's culpability for second degree assault. It is my belief that Able will probably be convicted of the second degree assault charge, because Baker's fear was probably objectively reasonable and subjectively, actual fear.

## **REPRESENTATIVE ANSWER 2**

Here are the available defenses to Able's charges.

**1<sup>st</sup> Degree Burglary.** 1<sup>st</sup> degree burglary is the breaking and entering a dwelling of another during night or daytime with the intent to commit a felony therein.

Since burglary is a specific intent crime, in order to establish burglary, the prosecution needs to prove that Able had a intent to commit a felony.

Here, Able's intent was not to commit a felony, but rather to ask for some food and money. Therefore, he did not have the requisite intent.

Another element is the "breaking and entering". Here, Baker left the front door partially open, and Able knocked on the door before he actually entered premise. Moreover, when Able knocked on the door, Baker responded by saying "come on in". Usually, a consent is not a defense to a crime, but in this case, Able did have the consent of the owner to enter the premise.

You could argue that breaking occurred when Able pushed open the door that was already partially opened. However, the entering part seems unlikely to succeed since Able only took one step over the threshold of the doorway and stopped.

Therefore, with the lack of mens rea and breaking and entering elements, it seems that the public defender can successfully argue the defense.

Defense to 1<sup>st</sup> & 2<sup>nd</sup> Degree Assault – 2<sup>nd</sup> degree assault is the common assault, meaning intent to commit battery or intent to threaten type.

Here, the defense of Able would be that he did not intend to threaten Baker or commit a battery upon Baker. According to the facts, Baker was “threatened” by Able’s presence and statements. The defense of lack of requisite mens rea would not probably succeed in this charge because although Able may not have intended to threaten Baker, Able’s loud statement of “I am cold and hungry. Give me food and money” did in fact create a threatening situation.

1<sup>st</sup> degree assault is the assault in the 2<sup>nd</sup> degree with a dangerous weapon or with the intent to inflict serious bodily harm. Although Able did not have a penknife in his pocket, Able did not pull out that knife in a threatening manner nor did he even grab the knife in his coat to present to Baker that he may hurt Baker if the conditions are not met. Therefore, it is unlikely that Able will be convicted of 1<sup>st</sup> degree assault.

## QUESTION 12

Abe was injured in a motor vehicle accident in which the other driver was clearly at fault and adequately insured. The next day Abe wrote a check for car repairs<sup>1</sup> caused by the accident that bounced. He was served with a criminal summons charging him with theft arising out of the bounced check. The criminal case is pending in Anne Arundel County, Maryland, District Court.

Abe hired Bentley, a member of the Maryland Bar to represent him in his civil and criminal case. Bentley advised Abe Maryland does not require written fee agreements.

Bentley told Abe he would charge a customary contingent fee in the personal injury case, a flat fee of \$1,000 in the theft case plus a bonus of \$1,000 if Abe received a probation before judgment. Bentley required \$1,000 immediately. Bentley deposited the \$1,000 in the firm's general business operating account.

Bentley immediately recovered \$5,000 under the personal injury protection (PIP) automatic no fault payment provision of Abe's own automobile policy and promptly settled the personal injury claim for \$50,000. Abe was placed on probation before judgment in the criminal case.

Bentley has now told Abe that the contingent fee is 50% of the entire \$55,000, calculated before deduction of expenses and demanded payment of the bonus in the criminal case.

Abe has asked you to represent him with respect to the fee dispute and has asked whether Bentley is allowed to charge him that much.

**What would you advise Abe concerning the enforceability of the fee arrangement with Bentley?**

## REPRESENTATIVE ANSWER 1

I would advise Abe regarding numerous deficiencies in the fee arrangement with Bentley, including various unenforceable provisions.

First, a written fee agreement is required in a contingency fee case in Maryland. Bentley's statement that one is not required violated his professional responsibility to his client. Such a fee arrangement must state how the contingency is to be calculated and whether it deducts expenses before or after the attorney is paid. This oral agreement for a contingency fee in the civil case with no other specific terms is unenforceable.

Second, a contingency fee may not give the lawyer a greater interest in the outcome of the case than the client. Here, a fifty percent contingency does not give either party a greater interest. Since a contingency fee must be reasonable in light of the novelty of the case, the amount of time necessary to handle the case, the complexity of the issues and the risks taken by the lawyer, a fee arrangement giving Bentley fifty percent of Abe's recovery from the personal injury claim appears to be unreasonable and may not be enforced in court.

Next, Bentley deposited the \$1,000.00 upfront bonus in the firm's operating account when he had not yet earned the fee. Since these funds still belonged to the client, they should have been held in the escrow account until the case is over and Bentley was entitled to payment of his fee.

Further, an attorney may not consent to a settlement without the permission of the client. Bentley settled the personal injury claim for \$50,000.00 without first securing Abe's approval. Therefore Bentley's attempt to collect a percentage of this recovery is questionable and may not be enforceable in court.

Additionally, contingency fees are never allowed in criminal cases. Here, Bentley expressly made a \$1,000.00 bonus contingent on the result of the criminal case. This is not a traditional contingency arrangement but is still questionable, especially since Bentley paid it to his operating account before earning it as mentioned above.

Lastly, the \$5,000.00 from Abe's no-fault payment insurance provision was money due to Abe regardless of Bentley's action, as to request a fifty percent contingency fee as to these funds is likely to be viewed as unreasonable by a court.

## **REPRESENTATIVE ANSWER 2**

The underlying rule for all fees is that they must be reasonable given the circumstances.

### **Civil Case.**

Bentley misinformed Abe when he said the fee arrangement need not be in writing because all contingency fee agreement must be in writing. They must state the percentage to be paid and whether that percentage will be calculated before or after the deduction of expenses. Furthermore, the percentage charged must be reasonable. In this case, fifty percent is unreasonable. Reasonableness of a fee will be based on the complexity of the case, how much work must be put into it, the experience and skill of the attorney, whether the attorney must turn down other clients,

and what is customary in the local legal community. In this case, the work Bentley did was easy: the other driver was “clearly at fault” and “adequately insured.” The claim was settled promptly so Abe didn’t have to invest much time. His skills were not called upon, and fifty percent is likely much higher than is local custom.

Furthermore, it is doubtful whether Bentley should be allowed to include the \$5,000.00 recovered from Abe’s own policy in the total. This was paid automatically to Abe and Bentley did no work for this. Therefore, this fee “agreement” should not be enforced. Abe probably has to pay for the reasonable value of Bentley’s legal services in this case, but it won’t be that much. Bentley should be subject to discipline.

### **Criminal Case.**

Contingency fees are absolutely barred in criminal cases. How much the attorney gets paid cannot depend on the outcome of the criminal case. Here, Bentley has tried to disguise the contingency fee by calling it a bonus if Abe got probation. This bonus was wholly dependent upon the outcome of the criminal proceeding, and so is forbidden. Abe will not have to pay the “bonus” and Bentley is subject to discipline.

Bentley may also have violated the Rules of Professional Conduct in handling Abe’s deposit. Since the facts do not suggest this was a retainer, Bentley should have deposited the \$1,000.00 in a client trust account, not the firm’s general operating account. As he spent the \$1,000.00 on expenses or his fee, he could deduct the \$1,000.00 from the client trust account and make an accounting. He retained the \$1,000.00 flat fee for the criminal case without having done any work on Abe’s behalf. This is a questionable practice.