JULY 2008 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS

QUESTION 1

Biff McNamara, a power hitter on the downside of his career with the Los Angeles Devils, began to use anabolic steroids a year ago to salvage his chances to enter the Hall of Fame. His home run production started to pick up and Biff steadily increased the dosage of steroids, which have been linked to aberrant mental conditions. His teammates noticed that his behavior became increasingly obsessive. Biff kept a journal detailing the type and amount of steroids he used.

On an off-day while in Baltimore, Maryland, for a series with the Orioles, Biff injected himself with the largest dose of steroids to date. That is the last thing Biff remembers. Shortly after sunset, Biff left his downtown Baltimore hotel room and walked down the street. He broke and entered a residence while the residents were out shopping. Biff stole from the residence a collection of rare "bobble-head" figures featuring great home run hitters and worth thousands of dollars, and returned to his hotel room, where he lined up the figures on his dresser.

When Biff failed to board the team bus the following morning for an afternoon game, the team general manager went to Biff's room and found him seated in front of the figurines and staring into space. The general manager, who had read about the "bobble-head break-in" in that morning's newspaper, called the police and reported the situation. A police officer, possessing a valid search warrant setting forth probable cause, arrived at the hotel and lawfully arrested a barely-coherent Biff. Within a couple of days Biff's mental state was normal, but he could offer no clear account or explanation for his actions, stating that his mind went blank, and that he could not recall anything until several hours after he was arrested. Biff's mental state has been normal since then.

Biff has been indicted by a Baltimore City Grand Jury for common law burglary, for the lesser included misdemeanor offense "that he did break and enter a dwelling house," and for common law larceny.

What defenses, if any, should Biff's attorney consider and recommend? Why?

REPRESENTATIVE ANSWER 1

Biffs counsel should consider and recommend the following defenses. that Biffs actions do not satisfy all of the elements of common law burglary or larceny, involuntary and voluntary intoxication, temporary insanity, and that the misdemeanor *offense of* breaking and entering merges with the common law burglary offense.

First, Biffs actions do not satisfy all of the elements of either common law burglary or larceny. Common law burglary is the breaking and entering of the dwelling of another at night with

the intent to commit a felony therein. Here, the facts state that Biff "broke and entered" a residence. The facts further state that he did this "shortly after sunset." However, the facts do not indicate what Biff was thinking at the time he stole the rare bobble-head figures. Indeed the last thing that Biff remembers is taking the largest dose of steroids he has ever had. It is unknown what Biffs intent was when he decided to break or enter the dwelling, and therefore Biff most likely cannot be convicted of common law burglary. Common law larceny is the taking and carrying away (asportation) or the personal property of another by trespass with the intent to permanently deprive the owner of possession of the property. Here, Biff took and removed the bobble-head figures from the dwelling. He took this personal property by trespass because he did not have the owner's consent. However, as with common law burglary, Biffs intent when he took the bobble-heads is unknown_ Biff cannot remember what he was thinking. Thus, this charge also is unlikely to succeed. In contrast to the above crime, Buff's

actions do constitute misdemeanor breaking and entering. This crime is similar to common law burglary, except that the only elements needed are breaking and entered. The facts here clearly state that Biff "broke and entered."

Second, Biffs counsel should consider involuntary and voluntary intoxication as potential defenses. Involuntary intoxication is a defense to any crime, whether a specific intent or general intent crime. Asserting this defense would negate Biffs culpability for all of the crimes with which he has been charged. Involuntary intoxication can result from ingestion of a substance when the ingester does not know the effects it will have. Here, Biff has used steroids on several occasions in the past. However, the facts do not indicate that Biff has ever suffered a memory lapse as a result of his use of steroids. Therefore, Biff may be able to convince the trier of fact that he did not know that taking the steroids could cause him to lose his memory. If this defense is unsuccessful, Biff's counsel should also consider voluntary intoxication as a defense. This defense only negates culpability for specific intent crimes. Therefore, it would only be a defense to common law burglary and larceny, but not for the misdemeanor offense of breaking and entering. Here, Biff voluntarily injected himself with the largest dose of steroids he has ever taken.

Biff's counsel should also consider the defense of temporary insanity. In Maryland, insanity is a defense if at the time the crime is committed, a defect in reason made it such that the defendant could not either appreciate the criminality of his conduct or conform his conduct to the law. Here, Biff does not remember anything after he took the steroids, and he has not clear account or explanation for his actions. Since "his mind went blank," Biff's counsel can argue that Buff did not appreciate what he was doing, and therefore certainly did not appreciate the criminality of his actions.

Lastly, Biffs counsel should argue that the misdemeanor offense of breaking and entering merges with common law burglary. Since the facts state that breaking and entering is a "lesser included offense" of common law burglary, Biff should only be charged with the greater offense at trial. Therefore, Biff should only face prosecution for common law burglary and larceny.

REPRESENTATIVE ANSWER 2

Intent Requirements. The defenses available to Biff will be dependent upon the intent requirement associated with each crime. Here, Biff has been charged with two specific intent crimes and one general intent crime.

Common Law burglary is defined as the breaking and entering into the dwelling of another at night with an intent to commit a felony therein. Therefore, common law burglary is a specific intent crime, and Biff is entitled to raise any defenses which tend to negate his intent.

The misdemeanor offense of breaking and entering is a general intent crime, as the mere act of voluntarily breaking and entering constitutes the offense. As a general intent crime, breaking and entering is more limited in its defense.

Common law larceny is defined as the taking or carrying away the personal property of another with an intent to permanently deprive the rightful owner thereof. As such, common law larceny is a specific intent crime, and Biff is entitled to raise defenses which negate his intent.

Defenses. The first defense Biff may raise the defense of voluntary intoxication. Here, Biff injected himself with anabolic steroids on the date of the offense. The facts also indicate that

Biff regularly used steroids and kept records of his use, which demonstrates that he was aware of the harmful effects of the drug. Voluntary intoxication may be a defense to a specific intent crime, where the intoxication prevents him from forming the requisite intent. Therefore, Biff's statement that he doesn't remember the events following his injection on the day of the crime may be used to show that his injection (voluntary intoxication) caused him to black-out and therefore he could not develop an intent. This defense will negate his intent to commit a felony within the burglary statute and his intent to permanently deprive the owners of the "bobble heads" of their property. Biff may also raise a claim of involuntary intoxication if he was unaware (due to, inter alia, absence of doctor's instructions) of the extent of the effect of the intoxicating drugs. Here, Biff injected himself with the "largest dose" of steroids to date, indicating that he may not have known it would cause him to blackout. Involuntary intoxication is a defense to all crimes, both specific and general intent.

Lastly, Biff may raise on insanity defense. An insanity defense may be invoked when

prolonged use of an intoxicating substance renders a user insane even when he is not intoxicated. Insanity is a defense to all crimes. Biff must demonstrate that due to his mental defect (brought about by prolonged and consistent drug use), he was unable to appreciate the nature and quality of his actions and conform his behavior to the law. Here, Biff's mental state was impaired for days after the steroid dose, which may be used to establish the effect of his prolonged use even while not intoxicated.

QUESTION 2

MPES, Inc. is a Maryland civil engineering firm. In July, 2000, MPES hired Cal as an engineer. Cal and MPES signed an employment contract (required of all professional employees) which provided in pertinent part:

> If Cal's employment with MPES is terminated for any reason, Cal agrees that, for a period of three years after the date of such termination, Cal shall not perform any civil engineering service to any entity within 250 miles of the main office of MPES.

The contract also provided that the term of Cal's employment was two years and that MPES's main office was in Rockville, Maryland.

In 2002 and 2004, Cal signed employment contracts with MPES, all containing the same provisions. Cal's performance was outstanding and he received increasingly greater responsibilities for client relationships, marketing and project management.

In October of 2005, after Hurricane Katrina, the president of MPES asked Cal to start up a branch office in New Orleans. The president stated that if Cal accepted the position, his contract would be unchanged except that his salary would be increased and, in addition, he would receive a quarterly bonus equal to 10% of the net revenue of the New Orleans office. She told Cal to submit a bonus request each quarter. Cal agreed and promptly departed for New Orleans. The changes to Cal's contract were not documented.

Cal sent the president bonus requests for the last quarter of 2005, each quarter in 2006 and for the first two quarters of 2007. MPES paid the bonuses. In June, 2006, the president sent Cal a written employment contract for the period of July 2006 through July, 2008. The contract was identical to his previous contracts except that it contained a provision reflecting Cal's bonus arrangement. Cal did not sign the contract; instead, he telephoned the president and told her he had some concerns about its terms. The president asked Cal to provide her with his concerns in writing; he said that he would as soon as he could find the time to do so. Cal did not and he and the president did not discuss the contract again.

In August, 2007, Cal sent the president of MPES a letter notifying her that he was resigning so that he could move back to Maryland. MPES has learned that Cal intends to take a job as a civil engineer with a local competitor upon his return.

MPES has filed suit in a Circuit Court in Maryland with appropriate venue against Cal to enforce the non-competition clause.

a. What arguments can MPES use to support its contention that there is an enforceable contract? How is a court likely to rule?

b. Assuming that the contract is enforceable, what rights does MPES have to enforce the non-competition clause?

REPRESENTATIVE ANSWER 1

(a) MPES arguments that there is an enforceable contract

An enforceable contract requires an offer, an acceptance and consideration. Here, MPES will argue that its employment contract for this period of July, 2006 through July, 2008 constituted an offer when it was received by Cal. MPES will argue that there was acceptance of the contract by Cal's partial performance of the contract when he worked for over a year (from July, 2006 to August, 2007) after receiving the contract. Finally, MPES will argue that the consideration was the bargained for exchange that Cal would work for two years in exchange for being paid a salary and bonus.

Cal will respond with several legitimate defenses that MPES will have to overcome in order to enforce the contract.

Cal will assert that his phone call to the main office that he had concerns about the contract constituted a rejection of the offer to employ him under the terms of the contract. However, Cal stated that he would call back and never did. He continues to work. If Cal had wanted to reject the offer, he should have done so clearly, and in writing, so as to avoid confusion about whether he was merely bargaining.

Cal will also assert the Statute of Frauds as a defense. The Statute of Frauds applies to contracts that are not capable of being performed within one year. Because the MPES contract is for two years of employment, it is not capable of being completed within one year. Therefore, the contract is within the Statute of Frauds.

Cal will claim that the statue requires the contract to be written, but MPES should successfully respond that Cal's performance, pursuant to the contract is sufficient to satisfy the statue. Indeed, Cal submitted bonus requests for the second half of 2006 and first half of 2007. The bonuses were paid, and seem to be pursuant to the new (2006-2008) contract. Additionally, Cal continued to work in the New Orleans office. These facts are sufficient to create an enforceable contract pursuant to the terms of the 2006-2008 employment contract. The remainder of the terms (those with which Cal did not directly comply through performance) are likely enforceable due to

Cal and MPES's course of dealing.

Course of dealing is a method of inferring contract terms based on prior contracts between the parties. Cal has signed several identical contracts (absent the bonus clause) with MPES and worked pursuant to them in the past. The only modification was a mutually agreed upon transfer in exchange for more money. This would not give Cal reason to expect that he was free to ignore the terms of future contracts.

(b) Enforcement of the non-competition clause

A non-competition clause must be reasonable in scope. If the non-competition clause is in fact part of the contract, it is enforceable only to the extent that it is reasonable in geographic scope, temporal scope, type of work restricted, and in consideration of public policy. Maryland has adopted the Blue Pencil rule, allowing it to strike over broad terms, but not to rewrite the contract.

The three year restriction seems to be overly broad, and a term of one year would likely be more appropriate. (The terms should be less restrictive because Cal did not bring good will with him as part of his initial employment agreement. Rather, he developed clientele at MPES.) The geographic scope would be more reasonable if it related to Cal's New Orleans work because he probably has not retained new clients in MD in several years. The restriction on any civil engineering is too broad. The public is likely to be in more need of professional engineering services tan others, so the restrictions should be scrutinized more closely.

REPRESENTATIVE ANSWER 2

a) Even though the contract for the July 2006- July 2008 term was not in writing, MPES should argue that it is still an enforceable contract because it fits within an exception to the Statue of Frauds.

Ordinarily, service contracts that cannot be performed in a year or less are subject to the Statute of Frauds and therefore must be in writing and signed by the party who denies the contract (here, Cal). However, there are several important exceptions to the Statue of Frauds. One is part performance. Here, Cal kept acting as if there were a contract even though he hadn't signed one. Even though he informed the president that he wanted to discuss the terms before signing it, he never too any further action but instead kept working as if they still had a contract. He waived his objections by performance.

MPES could also say that Cal is equitably estopped from denying the that contract now.

b) As for the terms of the contract, they should be the same terms that the parties had been using the whole time. Cal had signed MEPS's standard non-competition agreement three times before, and it was a part of the contract he never go around to signing. He performed as if that contract was valid, and he accepted benefits under it, and its non-compete term was not surprising to him, so it is part of his contract.

However, this particular non-complete is likely unenforceable as written. Generally, an employer has the right to require its employees not to compete if the employer and the employee enter into a valid non-complete agreement that is reasonable in time, geography, and scope. Maryland courts sometimes enforce over-broad non-competes, but they blue-line them down to more reasonable restrictions, striking out the offensive portions.

The time component of MPES's non-compete clause is probably unreasonable. Three years is a long time for a person to be away from his profession, though it might be ok if this is really important to protecting MPES's interests and MPES will argue that it provided Cal with so many opportunities and inside knowledge that the three year non-compete is crucial.

As for geography, 250 miles of the main office is probably unreasonable, though it depends on the civil engineering market. A Maryland court might blue line this down to 50 miles or so.

Scope - any civil engineering service seems valid as a protection of MPES's interest while still allowing Cal to get many different kinds of jobs - it's reasonable.

QUESTION 3

Able is the female pastor of the Church of the Spirit in Talbot County, Maryland, and has served in that position since 1980 pursuant to a contract that allows her to serve so long as she espouses the religious tenets of the Church. She was also hired as the Executive Director of the Church's day care center ("Spirited Kids").

The Church experienced a surge in growth during the 1990's and many of the parishioners enrolled children in Spirited Kids. However, by 2005, the Day Care Center was losing money.

Kane is a member of the Board of Trustees for the Church and the Board of Directors for Spirited Kids. He is also a member of the Talbot County Council. He was instrumental in the passage of a 2007 County law that offered a $1,000 subsidy to those who enroll their children in Spirited Kids Day Care Center. In May 2008, Kane convinced the Board that Able should be removed as Pastor and Executive Director for espousing views contrary to the Church's religious tenets.

Able believes she has fulfilled her contractual duties and requests that you, a Maryland attorney, file suit in the Circuit Court for Talbot County seeking reinstatement to both positions.

a. Can Able challenge the terminations and on what grounds? What defenses do you expect the Church to raise?

Seth operates a private day care center in Talbot County. He is incensed by the County's law subsidizing the Spirited Kids day care center because he believes it to be a waste of resources.

b. On what grounds may Seth challenge the law, and why?

REPRESENTATIVE ANSWER 1

Able does not appear to be in good position to challenge the termination.

Contract Liability: Able may argue that the Church has breached its contract because she has an enforceable contract for employment. She will argue that the contract is a simple contract giving her the right to be pastor and Executive Director (XD) for as long as she fulfills the

condition of "espousing" the tenets of the Church. Without breach of this condition, she will argue, the Board had no grounds to terminate her, and thus acted wrongfully.

The major problem with this argument is that it would require a court to construe whether or not she had kept that contract or whether the allegations that she had espoused views contrary to the Church's tenets were true. This would require a court to examine both the statements that she made and the doctrines of the Church, and determine whether the two were compatible or incompatible. Such a course of action would raise serious First Amendment concerns. A court would violate the Establishment Clause by analyzing a sect's official doctrines and making pronouncements about what did and did not conform to them, and would arguably violate the Free Exercise Clause as well by telling a private person that her espoused beliefs were incompatible with an official creed.

Thus, this term is unenforceable in court and the remaining contract will likely be construed as an at-will contract for employment as pastor. Generally, churches have a First Amendment right to hire and fire as they see fit in positions which require conforming to the Church's beliefs. The pastor position is certainly such a provision. We are not told in the facts whether the XD of SK is such a position or not, but we are given no reason to assume that position is anything but an at-will position, whether in connection with the pastor position or independently.

Furthermore, a court will generally only award damages, not specific performance, for a breach of an employment or personal services contract. The chances of a court ordering an organization to take back a discharged employee for breach of contract are virtually, if not absolutely, nil.

Tort Liability: MD does recognize a tort of abusive discharge, the firing of an employee contrary to public policy. No grounds appear on these facts which would sustain an action; no public policy is violated by a Church firing a pastor for religious differences; on the contrary, the First Amendment protects Churches' abilities to govern them in this manner.

Seth may mount a constitutional challenge to the subsidy, and will be successful. Seth needs standing to challenge it. He must show injury in fact, causation, and redressability. He can argue that his daycare loses business due to the illegal subsidy (injury), that the lost business is caused by the subsidy (causation) and that the court can redress his harm by striking down the subsidy. However, he can also assert a simpler challenge due to his standing as a taxpayer. While the Supreme Court has limited taxpayer standing under other clauses, challenges brought arguing that the legislature is violating the Establishment Clause by diverting tax dollars to religious ends are justifiable in federal court (though such challenges are not allowed to

executive spending out of general funds). Since the spending of county tax dollars by the county council, a legislative body, violates the Establishment Clause rights of every taxpayer who may be forced to pay in support of a creed he opposes, any taxpayer may bring suit and have standing. Note that the provisions of the First Amendment, though only binding on Congress, have been incorporated against the states through the Due Process Clause of the Fourteenth Amendment.

As to the merits of the challenge, the law here is a naked subsidy for a religious day care center. Parents who send their children to a particular day care center will receive a subsidy, or have costs offset by the state. Such a subsidy is impermissible under the Establishment Clause. Under the Lemon test, the subsidy has the direct effect of advancing religion. The law may have some secular purpose but by singling out one religious day care to receive preferential treatment, the council will have a difficult time proving its secular intentions. While the law does not appear to lead to excessive entanglement between the state and religion (since no intrusive monitoring provisions are in place to ensure the funds do not go to sectarian ends), this is hardly enough to save a law that has failed another prong of the Lemon test.

A subsidy program to a day care could probably be constitutional if it applied to any daycare that qualified under neutral criteria set by the state, whether religious or not. The Rehnquist Court held that a parent's choice to use a neutral school voucher at a religious school was sufficient to break the chain of causation in the state action problem of tax dollars ending up in religious hands. Or a program of neutral assistance of secular supplies could be constitutional if applied even-handedly to religious and secular schools. However, none of these situations apply to this law, and court would strike it down under the federal Constitution on these facts.

REPRESENTATIVE ANSWER 2

Although Able has standing (she is directly injured from the Church's conduct), she will not be successful in challenging her discharge from the Church. In Maryland, an at-will employee can be fired for any or no reason. Although Able has worked at the Church for almost thirty years, it appears that she is an at will employee (there is no evidence to the contrary in the facts). There is one exception to the rule that she can be fired at any time, and that is where the discharge violates a "clear mandate of public policy." Able's firing does not rise to the level of "clear mandate of public policy." Courts find that there is a clear mandate of public policy when an employee is fired for asserting her own rights or refusing to violate the law. Neither is present here. Even if Able is asserting her own rights to espouse different views, she has no specific right to do that at the Spirit Church.

The Church will raise the defense that any court involvement will violate the Establishment Clause of the First Amendment, made applicable to the states through the Fourteenth Amendment. The Church will argue that if the courts get involved, and for the Church to reinstate Able, that the will unnecessarily be entangling itself with religion. This is a good argument and the court is not likely to hear this case. A court cannot order a Church how to engage in internal, religious functions.

Seth can argue that the subsidy violates the Establishment Clause of the First Amendment, made applicable to Maryland through the Fourteenth Amendment. In order to bring this suit, Seth must demonstrate that he has standing. Seth has two possible ways to show that he has standing. To demonstrate that a litigant has standing he must show that he (1) is injured or imminently will be injured and (2) that the harm was caused by the defendant and remedial actions by the defendant (and ordered by the court) will redress his injury.

First, he can demonstrate that he is personally injured by the subsidy to the Church's day care program and that ceasing the subsidy will redress his harm. As an operator of a competing day care owner he likely has actual or imminent economic injury as a result of such a generous subsidy. If enough clients switch to the Church's day care program he will have no trouble demonstrating this. Also, he will be able to show that the subsidy caused this client switch-over and that ending the subsidy will redress his problem. A court should easily find that Seth has standing to assert his claim.

Seth's second way to show that he has standing is through taxpayer standing. Although Seth may be most upset that the subsidy is a waste of resources, this method of showing standing will not be as successful as the first. Where a taxpayer is complaining about tax money being spent on religious institutions, the courts sometimes grant tax-payer standing. However, the court is much more likely to find standing based on Seth's personal economic injury, rather than his views that the subsidy is a waste of government resources.

After Seth has successfully demonstrated standing, he can argue that the subsidy is violative of the Establishment Clause. He will be successful if he can show that (1) there is no secular purpose to the subsidy; (2) that the subsidy advances religion; or (3) that the subsidy entangles the government in religion. The subsidy likely doesn't have a secular purpose. It appears that a board member of the Church heavily lobbied for the subsidy and that the lobbying was motivated by the fact that the Center was losing money. There does not appear to be a situation where there is insufficient child care in the area. Also, the subsidy appears to only go to this Church, rather than to similarly situated day care centers. The subsidy also appears to advance religion. Because Able was just fired for espousing different views, it seems very possible that the children in the day care center are exposed to different views.

Seth can also challenge the law based on equal protection grounds because the Spirited Church day care is being treated differently than other local day cares in the area. There appears to be no rational basis for this distinction. Therefore, the subsidy flunks even the lowest level of scrutiny ("rational basis") and will not be upheld.

QUESTION 4

Jasper entered into a written 3-year equipment lease agreement with Poindexter. Under the terms, Poindexter agreed to select and provide items of customized computer hardware as well as "in stock" software items to Jasper s place of business in Anne Arundel County, Maryland. Jasper agreed to pay Poindexter $90,000 over the 3-year period, as well as pay the license fees and taxes; keep the equipment in good repair; and assume the entire risk of loss of the equipment. The agreement included an option to purchase at the end of the lease for a nominal fee. The parties projected that the customized computer hardware and the software would be out of date in three years.

a. Based on the given facts, did this transaction create a security interest? Discuss and explain fully.

Within 2 years, Jasper defaulted on the agreement and sent Poindexter his written consent to take the hardware and software. The items of hardware were retaken by Poindexter who then sent notice to Jasper. The notice informed Jasper that he was entitled to redeem the hardware provided that he made certain payments within 15 days of delivery of the notice; that if the hardware was not redeemed within that time the hardware would be sold at private sale; and if a deficiency arose from the sale he would be liable for the deficiency. Jasper was financially unable to redeem. Poindexter sold the hardware at a private sale resulting in a deficiency several months after its notice to Jasper.

b. Based on the given facts, did Poindexter give reasonable notification of the time after which a private sale of the items of hardware was to be made? Discuss and explain fully.

Poindexter sought a deficiency judgment in the Circuit Court for Anne Arundel County, Maryland against Jasper because the private sale proceeds did not equal the cost of the hardware sold. Jasper opposed the relief sought by Poindexter.

c. Will Poindexter prevail in his deficiency judgment case? Discuss and explain fully.

REPRESENTATIVE ANSWER 1

A. According to 1-201 (37), of the *Maryland Commercial Law Article, a security interest is an interest in personal property or fixtures which secures payment or* performance of an obligation. In the contract between Jasper and Poindexter, Poindexter *had an interest in the*

customized computer *hardware and "in-stock"* software items in Jaspers place of interest and Jasper agreed to pay Poindexter $90,000 for that interest over a 3 year period. Therefore, Jasper did have a security interest in the goods provided by Poindexter.

Furthermore, 1-201 (37)(a) states that , *whether a transaction creates a lease or security interest is determined by the facts of each case; however, a transaction creates a security interest if the consideration the lessee is to pay the lessor for the right to possession and use of the goods is an obligation for the term of the lease not subject to termination by the lessee, and the original term of the lease is equal to or greater than the remaining economic life of the goods and the lessee has an option to become the owner of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement.* In this case Jasper is not given the option to terminate the lease during the 3 year equipment lease and the lease is equal to or greater than the remaining economic life of the goods because the facts state the parties projected that the customized computer hardware and the software would be out of date in three years. Also, the agreement included an option to purchase the equipment at the end of the lease for a nominal fee. So according to 1-201 (37)(a) (i-iii) looking at the facts of this particular situation a security interest is arguably created in this situation.

B. According to 9-612(b), of Title 9 *Secured Transactions,* [a] notification of disposition sent after default and 10 days or more before the earliest time of disposition set forth in the notification is sent within a reasonable time before the disposition. Poindexter sent notice to Jasper. In that notice he informed Jasper that he was entitled to redeem the hardware provided that he made certain payments within 15 days of delivery of the notice and that if the hardware was not redeemed within that time the hardware would be sold at private sale and if deficiency arose from the sale he would be liable for the deficiency. Considering the fact that Poindexter gave Jasper 15 days notice before disposition of the collateral and 9-612(b) only requires a notice of disposition 10 days or more before disposition, Poindexter gave reasonable notification of the time after which a private sale of the items of hardware was to be made. It could be argued by Jasper that the notification didn't give an exact date that the collateral would be sold at private auction and therefore, Jasper was not able to ascertain how much time he had to redeem the collateral. Since a debtors right to redeem is an important right under the UCC this is a good argument for Jasper to make and case law in Maryland backs it up. Jasper needs to be able to ascertain the exact date, time location the collateral is to be sold at auction because he is able to redeem right up until the second that it is sold. Therefore it is possible that even though 15 days is more than the mandatory 10 day notice because Poindexter did not specify any exact information in his notice it isn't reasonable, See 9-623 right to redeem collateral.

C. Poindexter sought a deficiency judgment in the Circuit Court for Anne Arundel County, Maryland against Jasper because the private sale proceeds did not equal the cost of the hardware sold and therefore Jasper sought relief in the form of the deficiency judgment. If

Jasper wants to oppose Poindexters right to the deficiency *judgment he will have to establish that Poindexter is in violation of 9-625, Remedies for Secured Party`s Failure To Comply With This Title.* Under 9-625(a), *if it is established that a secured party is not proceeding in accordance with* this *title,* a court *may order or restrain* collection, *enforcement, or* disposition *of collateral* on *appropriate terms and conditions.* Jasper can argue that Poindexter did not comply with this title because Poindexter didn't give him sufficient notice under the law. Because Poindexter didn't give Jasper sufficient notice Jasper suffered damages and should be awarded monetary damages and not be forced to pay for the deficiency judgment. However under, 9-625 (c)(1-2) it looks like the most Jasper will be able to do is get the deficiency judgment voided. Jasper will have his deficiency eliminated and Poindexter will learn to add more specificity in his notice to redeem.

REPRESENTATIVE ANSWER 2

This question is governed by UCC Article 9, as it involves a security interest.

A. Security Interest

A security interest is an interest in personal property on fixtures which secures payment or performance of an obligation. Here, Jasper (J) entered into a 3-year equipment lease agreement with Poindexter (P) for customized computer software and "in stock" software items for a 3-year period over which J would pay P $90,000.00, pay license fees and taxes, keep the equipment in good repair and assume the risk of loss. The agreement included an option to buy the equipment for a "nominal fee@ at the end of the lease.

The question of whether this agreement creates a lease or security interest is determined by the facts, however, it will create a security interest where the consideration the lessee is to pay the lessor for the right to possession and use of the goods is an obligation for the term of the lease not subject to termination by the lessee and the original term of the lease is equal to or greater than the remaining economic life of the goods or has the option to buy the goods at the end of the lease for no consideration or nominal additional consideration. Here, J is paying for the use of the equipment with no right to terminate and the parties project the equipment will be out of date in 3 years and gives J the option to buy the equipment for a nominal fee" at the end of the lease.

There is a security interest in the equipment.

B. Notification

Timeliness of Notice. A notification for disposition sent after default and 10 days or more before the earliest time of disposition set forth in the notification is sent within a reasonable time before the disposition. Here, P sent notice to J that he had 15 days to redeem his collateral, but did not include a time for disposition and in fact did not sell the collateral at a private sale until "several months after its notice to J thus not giving J reasonable notification of the time for sale and depriving him of his opportunity to redeem which extends until the collateral is sold. P did not provide reasonable notification under Title 9.

C. Deficiency Judgment

Secured Party''s Failure to Comply. Under '9-625 (a) if a secured party fails to comply with Title 9 a Court may restrain enforcement or disposition of collateral. Here, P did not give J reasonable notice of the sale and foreclosed J's right to redeem before the collateral was disposed of and a court may therefore rule against P in his deficiency judgment case.

QUESTION 5

On December 15, 2005, in Baltimore County, Maryland, Paul was seriously injured while a passenger in a taxi owned by Boco Transport, Inc. and operated by its employee, John. John lost control of the vehicle and struck a bridge abutment. As a consequence, Paul is confined to a wheel chair.

On June 15, 2006, while recovering from his injuries at a local rehabilitation center, Paul was visited by Andy, and agent of ABC Insurance Company, the liability insurance company for Boco. His purpose was to discuss Paul s claims against Boco. At the time Paul had not achieved maximum recovery from his injuries and there was no discussion about settlement. He did, however, sign a medical authorization to permit Boco to get Paul s medical records and reports.

On February 15, 2007, Paul retained the services of Smith, Maryland attorney, to represent him in his claim against Boco. On that date he signed an employment contract authorizing Smith to represent him in settlement negotiations with ABC Insurance and to file suit against Boco if a settlement agreeable to Paul was not achieved. The contract also provided for the customary contingent fee and expenses, dependent upon the case being settled or tried. Smith promptly, in writing, informed ABC of his representation of Paul.

Paul discussed his accident and pending claim with his good friend, Tom. During the course of the conversation Paul informed Tom that Attorney Smith was representing him. Tom said that Smith had represented his neighbor in a similar case and that he was dissatisfied with Smith in that he did not get the kind of settlement that Smith had led him to believe he would get.

Concerned, Paul called Smith who assured him that he was compiling the information and data needed to make a settlement demand or institute suit if negotiations failed.

On March 15, 2007 Paul received a call from Andy of ABC Insurance inquiring about his health. During the conversation he noted that Paul was now represented by counsel and that he was confident that the claim would be settled to Paul s satisfaction.

Encouraged, Paul instituted a number of calls to Andy in which settlement was discussed. Ultimately, ABC offered a sum acceptable to Paul and for which he released Boco and ABC from further liability.

Smith has filed suit against ABC for tortious interference with contract.

Who should prevail? Why?

REPRESENTATIVE ANSWER 1

To recover for tortious interference with a contract, the plaintiff must show that the defendant knew of the contract and its terms, either intentionally or negligently interfered with the performance of that contract, causing damages. Here, Smith alleges that ABC interfered with his employment contract with Paul, the terms of which authorized Smith to represent Paul "in settlement negotiations with ABC insurance" and to "file suit against Boco if a settlement agreeable to Paul was not reached."

First of all, ABC never contacted Paul, because it is a business entity. However, a principal can be vicariously liable for the torts of its agents acting with authority or in the scope of their employment. Here, Andy was an "agent of ABC Insurance Company," and therefore, ABC can be vicariously liable for Andy's actions.

The first visit from Andy when Paul was in the hospital does not trigger any issues because Paul was not represented by counsel at that point, nor were there any settlement discussions.

However, once Paul retained Smith's services, Paul signed the employment contract and Smith "promptly, in writing, informed ABC of his representation of Paul." This gave ABC notice that Paul was now represented by counsel.

Thereafter, Andy called Paul and "inquired about his health." Andy knew that Paul was represented in that he noted that "Paul was represented by counsel." However, during this conversation, Andy did not attempt to negotiate a settlement. However, he did make a comment that he was "confident that the claim would be settled." Moreover, it was improper for Andy to even contact Paul, knowing that Paul was represented by counsel. While Andy's actions most likely violated the Rules of Professional Conduct (if he is an attorney), there is not enough information to show that he tortiously interfered with Paul and Smith's contract yet.

Once Paul started calling Andy, though, where "settlement was discussed," and ABC "offered a sum acceptable to Paul," Andy had interfered with Smith's right to represent Paul in settlement negotiations with ABC. ABC could defend by saying that although they had notice that Paul was represented, they did not have notice of the terms of the employment contract. This argument is weak because Andy (and ABC) knew at least that Paul had counsel and they should have known that as counsel, Smith would be there for something as important as a settlement negotiation. Even though Paul was skeptical about Smith's abilities, Smith had never been discharged.

Smith's fee was contingent and was dependent on whether the case was settled or tried. Thus, ABC's actions (through its agent) had an outcome on the fee that Smith would get, and by interfering with Smith's ability to even participate in the negotiations, they caused him damages. Smith will prevail on his claim for tortious interference with contract.

REPRESENTATIVE ANSWER 2

In order to prevail under a tortious interference with contract claim in Maryland, Smith will have to show that a contract existed, that ABC knew of its existence, that ABC intentionally interfered with the contract and therefore caused it to be breached or repudiated, and damages. Furthermore, because Smith is suing ABC and not Andy, Smith will have to show that ABC is liable on Andy's actions based on agency theory.

First, Smith will be able to show that ABC is liable for the tortious conduct, if any, of its employee Andy. An employer is vicariously liable for the tortious conduct of its employees committed within the scope of employment. Andy, as an agent for ABC, was acting within the scope of his employment when he negotiated and entered into a settlement agreement with Paul.

Second, Smith will likely not be successful in showing the elements of tortious interference with contract. Paul and Smith signed an employment contract on February 15, 2007 authorizing Smith to represent Paul in settlement negotiations with ABC. It appears that the contract does not violate any of the requirements of the Maryland code of professional responsibility, in that Andy apparently gave his signed, written consent to the contract and the contract contained the requirements provisions regarding contingency fees such as how expenses are calculated. Andy became aware of the contract on March 15, 2007 when he called Paul to inquire about his health. However, Andy arguably did not intentionally interfere with that contract, rather it was Tom, who told Paul that his neighbor was dissatisfied with Smith's work, that constituted "interference" with the contract. Andy knew that Paul was represented by counsel, but that does not prevent Andy, a non-attorney, from speaking with Paul. Furthermore, Andy statement that he was "confident that the claim would be settled to Paul's satisfaction," is not the kind of statement that would cause someone to breach a contract. Rather, it is an ambiguous statement that could even be interpreted as Andy approving of Paul's choice of attorney. As Paul's attorney, Smith could have instructed Paul not to speak with Andy outside of his presence, but a client always has the option of entering into a settlement agreement without the aid of counsel. Here, in fact, it was Paul who initiated the calls to Andy. Client may fire their attorney at any time, although the attorney may receive quantum meruit compensation for services rendered. It is likely that it was not Andy's conduct that caused Smith's contract with Paul to be repudiated, rather it was Smith's own reputation speaking for him. Smith may be able to show that he suffered damages, although, because the contract was contingency based, he would have to show a likelihood of trying or settling the case and thus satisfying the contingency.

For the above-stated reasons, ABC should prevail.

QUESTION 6

On March 1, 2006 at approximately 4:30 PM David was operating his vehicle East on Route 7, a two lane paved highway in a rural area in Washington County, Maryland. There is a three-foot

berm or shoulder on both the North and South sides of Route 7. The speed limit on Route 7 in this location is 55 miles per hour.

At a marked passing zone, a tractor-trailer, also moving in an easterly direction, passed David's vehicle. In response to the passing truck David moved several feet toward the southerly shoulder of the roadway where his vehicle struck and injured Paula who was walking in an easterly direction on the adjacent shoulder at approximately two feet from the paved edge of Route 7. At the time of the accident, David was driving 50 miles per hour.

Upon investigation at the scene of the accident, the investigating state trooper issued David a ticket citing violation of Sec. 21-504 of the Transportation Article, Code of Maryland.

Section 21-504 provides, *inter alia*, that (a) "...the driver of a vehicle shall exercise due care to avoid colliding with any pedestrians", (b) "...the driver of a vehicle shall if necessary warn any pedestrian by sounding the horn of the vehicle."

On return to his home in Somerset County, Maryland, David mailed a check to the Department of Motor Vehicles in the amount of the preset fine noted on the citation.

On September 10, 2006, Paula filed a personal injury suit against David in Washington County alleging that his negligence was the proximate cause of the accident and her resultant injuries.

David, by counsel, filed a general denial of liability and a separate affirmative defense of contributory negligence.

At the trail before a jury, the following occurred:

a. Paula's counsel sought to introduce evidence (as an admission) that David had been issued a citation and had paid a fine. David's counsel objected.

How should the Court rule? On what grounds?

At the close of plaintiff's case, David's attorney moved for judgment on the ground that plaintiff's testimony that she was walking on the right side of the highway with her back to traffic showed that she violated mandate of Section 2-506(b) of the Transportation Article, Code of Maryland, which provides:

> "When a sidewalk is not provided, a pedestrian who walks along and on a highway, may walk only on the left shoulder if practicable, or on the left side of the highway as near as practicable to the edge of the roadway

> facing traffic that might approach
> from the opposite direction."

b. David's counsel asserts that Paula was guilty of negligence as a matter of law.

How should the court rule and why? Explain fully.

REPRESENTATIVE ANSWER 1

(A)

The Court should probably sustain David's objection to the introduction of the evidence as a party admission.

Under the rules of evidence in Maryland, party admissions is an exception to the hearsay rule which allows out-of-court statements to be offered in court for the purposes of proving the truth of the matter asserted in them. A party admission is any statement made by a party can be introduced against them by the opposing party as a party admission. Party admissions can be affirmative statements (either oral or written) by a party, or they can be vicarious (admissions of a party's employees or agents) or adoptive (admissions by a party through silence).

Here, it does not appear that the evidence of the ticket and David's payment of such ticket should be admissible as a party admission against him. Paula is attempting to introduce the evidence against David in order to establish the truth of the matter (1) asserted in the ticket - that David broke Sec. 21-504 - and (2) asserted in the check - that David's payment of the ticket amounts to his admission of guilt of breaking the law. However, this is likely improper grounds for allowing such evidence in as excepted hearsay on such grounds. There are no facts presented to suggest that David admitted being guilty of violating the law through the sending of a check to pay the fine. Rather, the facts suggest that David was simply paying the fine because he was issued a citation. Such payment, without any other accompanying oral or written statements, can not amount to an admission by David that he was guilty of breaking Sec. 21-504. Further, the mere fact that David was issued the citation does not establish that David actually committed the crime in question. Therefore, the court should not allow the evidence to come in under such an exception to the hearsay rule.

(B)

The Court should reject David's argument because Maryland does not recognize that the violation of a statute amounts to negligence as a matter of law (ie negligence per se), rather only that proof of such violation amounts to evidence weighing towards a finding that negligence occurred. Therefore, as a matter of law, Paula's violation of Sec. 2-506(b) does not amount to contributory negligence per se and, therefore, does not bar her from her claim against David.

A party defending a negligence action can argue that the opposing party was contributorily negligent during the transaction that gave rise to the plaintiff's injuries. Such a showing, in Maryland, bars the plaintiff from recovering unless the plaintiff can establish that the defendant was the one with the last clear chance to avoid the injury causing event. In the majority of states, such a showing of contributory negligence can be found as a matter of law if the plaintiff violated a statutorily imposed duty of care. However, in Maryland, such a violation will not establish contributory negligence as a matter of law. Therefore, a defendant asserting that the plaintiff's violation of a statutorily imposed duty of care amounts to contributory negligence that bars her claim must actually prove the negligence by a preponderance of the evidence.

Therefore, in this case, David's assertion that Paula's violation of Sect. 2-506(b) amounts to contributory negligence as a matter of law will not be permitted by the court. David will have to establish that (1) Paula was in-fact also negligent and (2) that David did not have the last clear chance to prevent the injury from occurring.

Here, it seems apparent that Paula was at least partially negligent during the events that occurred leading up to her injury. Paula was walking alongside of a 55 M.P.H. two lane highway with her back facing traffic. Further, the facts state that she was only two feet off of the side of the highway at the time the injury occurred. Therefore, it appears that her imprudent behavior was at least partially a cause of the accident that occurred.

As to whether Paula had the last clear chance to avoid the injury, the facts suggest that she did not have such chance. However, at the same time, it appears that David also did not have such a reasonable chance. The facts state that, upon being passed by the tractor trailer, David only drove a few feet towards the shoulder before he struck Paula. If David was going 50 MPH when the accident occurred, it is likely that a court would find that he would have had enough time to prevent the injury from occurring in those few feet.

REPRESENTATIVE ANSWER 2

a. The citation is an out of court statement entered for the truth of the matter asserted. As such, it is hearsay. Paula is obviously trying to enter it into evidence as an admission. However, the citation and subsequent payment of the citation are not admissions. First, a citation alone is not an admission - it is a document issued by the police directing one to pay. One's decision to pay the citation does not constitute an admission of anything. Rather, it is a decision not to contest the ticket. While party admissions need not be against interest, they also need to actually constitute oral or written out of court statements. David's check to pay the fine was not such a statement.

b. The court should deny David's counsels motion for judgment, because violation of a statute in Maryland is not per se evidence of negligence; rather, it is one factor that the trier of fact must consider in making a determination. Moreover, violation of a statute is never conclusive on the fact of whether there is causation and damages - Paula may've been negligent in walking on the wrong

side of the road, but it's still for the trier of fact to determine whether there is an issue as to causation.

First, it is clear that this is a case where Paula is arguing that David is negligent, while David is arguing that she is contributorily negligent, and thus barred from recovery under Maryland Law. In making her claim, Paula is obviously resting on the fact that David swerved off the road and hit her without honking or making an attempt to avoid her. Notably, she may not argue that Section 21-504 conclusively proves that David had a duty toward her and that he breached that duty, because Maryland only allows statutory standards of care to be some evidence of duty and breach. Nonetheless, she could make a prima facie case against David, because Paula was in David's zone of danger, and thus he owed her the duty of care of an ordinarily prudent person. It's at least a jury issue whether he breached that duty, because even though he was driving slowly, he probably should've seen her. His failure to see Paula was at least a factual cause of the injury. David, however, will argue that Paula's own negligence is a proximate cause of her injury and that, as such, he could not have foreseen her negligence. He may point to the statute in proving this, but as noted above, he will not able to conclusively prove, as a matter of law, that Paula should be barred from recovery because she did not abide by the statute. This is because:

Statutory standards of care are not presumptive evidence of negligence, but rather a question for the trier of fact.

Moreover, even a failure to abide by the statutory standard of care does not mean that Paula was the proximate cause of the resulting accident. Paula could, for instance, argue that even if she was negligent, David had the last clear chance to avoid the injury. To be sure, David would be able to point to the fact that he was being passed by a car on a narrow two lane road and his driving several feet off the road should mean that he is not even negligent in the first place.

Nevertheless, the point is that there are simply too many factual issues to resolve this question on motion for judgment. The trier of fact should decide whether Paula was negligent and whether it was a proximate cause of her injuries. As such, motion denied.

QUESTION 7

Sam and Lisa, husband and wife, live in Howard County, Maryland. Early in their marriage, they created a profitable internet advertising business. In late January, 2008, Sam and Lisa decided

to obtain a divorce.

To determine the best course of action, Sam and Lisa met with Seymour, a partner and member of the Maryland bar, and John, a member of the Virginia bar recently employed as an associate by Seymour's Howard County law firm. Seymour told Sam and Lisa that he was tied up in a trial and that John would handle the matter. During the meeting, John stated that he would represent them in the preparation of the initial draft of the property settlement agreement ("Agreement") if they would pay him $500 per hour. Sam and Lisa agreed, and they delivered to John a payment of $5,000 to be applied towards the services that John would provide. John gave them a receipt for the payment and two financial statements to complete. John promptly deposited the payment into the firm operating account.

Several weeks later, David Counsel called John to let him know that he was recently engaged to represent Lisa, and to recommend that John remove himself from the case. John continued to act as Sam's lawyer with agreement from Sam that Sam would pay an additional fee to John of 2% of the value of the assets John obtained for Sam under the Agreement that are in excess of 50% of the value of the marital assets.

After lengthy negotiations, John sent an electronic draft of the Agreement to David, from which David accessed certain data through his computer containing, among other things, the date and content of prior internal versions of the initial draft Agreement. Together with Sam's comments, the information revealed that Sam believed that the value of the internet advertising business was $2,000,000, and that Sam was prepared to offer Lisa $1,000,000 for her interest in the business. However, the initial draft Agreement sent to Lisa contained an offer for only $500,000. David consulted with Lisa, and a strategy was adopted using the revealed information to enhance Lisa's position in the division of the marital assets.

Subsequent to the execution of the voluntary separation agreement, Lisa told Sam that David was a much better lawyer than John because David knew more about what Sam was willing to give her to get her to sign the Agreement.

Sam confronted John about how David knew about Sam's position. In addition, Sam demanded from John the return of his legal fees of $15,000, consisting of $10,000 in hourly fees and $5,000 as the additional fee. John refused to return the fees. Consequently, Sam filed a complaint with the Attorney Grievance Commission.

You are assistant bar counsel investigating the complaint. Please identify and discuss any grounds for recommending disciplinary proceedings against John and Seymour.

REPRESENTATIVE ANSWER 1

John

Conflict of Interest

A lawyer shall refrain from representing two clients who are adverse to each other. While some lawyers think that this it is possible to represent a husband and wife in a divorce, by its nature, the positions are directly in conflict and a lawyer cannot represent both. Therefore, when Sam and Lisa came to Seymour and John, they should have advised them that the firm would only be able to represent one party in the dispute and the other should find another lawyer. Even here they have may have been a problem if Sam and Lisa provided confidential information to either attorney in confidence, since both could then be considered clients and further representation of either would be in violation of the rules.

Unlicensed Practice of Law

John is not barred in Maryland, he is only barred in Virginia. Maryland prohibits a lawyer from holding themselves out as being able to practice law in the state of Maryland if they have not been admitted to the bar. While there are some exceptions to this rule, none would apply under the facts related here.

Excessive Fee

Fees must be reasonably set for the representation of the client. While not conclusive, the complexity in the area of law, the rate charged by others in the field and the amount of work foregone are calculated in determining whether a fee is reasonable. Here there are no special circumstances that would indicate that John had to forego any other work or that the law itself was that complicated. The rate of $500 an hour is excessively high should be adjusted to something more reasonable for the representation.

Contingency Fee in a Family Matter

Maryland has a strict bar to contingency fees in family matters, especially divorce and child custody. The 2% contingency fee, while nominal, contradicts this blanket rule and will be held as a violation of the rules.

Conflict with Former Client

John represented both Sam and Lisa, in direct contradiction of the rules, but when Lisa obtained her own lawyer, John should have withdrawn. Lisa was at that time, a former client, having terminated her representation by John. With respect to former clients, a lawyer cannot take on new representation that adversely affects the interests of the former client. Here John's continued representation of Sam was in direct contradiction to Lisa's goals and therefore should be barred. While it is hypothetically possible that John could have received a waiver from the conflict, Lisa, through David, had already expressed her dissent to his continued representation, thus making a waiver of that conflict impossible.

Furthermore, John was likely in custody of Lisa's confidential information which could now be used against her during the subsequent negotiations. Attorneys must protect former clients confidential information in the same way they protect current clients.

Violation of disclosure of confidential information

When John sent the electronic draft of the Agreement to David he failed to remove the metadata which included significantly important information regarding Sam's confidential position on the internet business. While likely inadvertent and even possibly completely unforeseen by John, John still maintains a significantly high burden in protecting confidential information of his client. He should have been aware of the technological advances that make this sort of information readily accessible.

Seymour

Conflict of Interest

Seymour should also be imputed with the same **conflict of interest** that John had as above. As members of the same firm, any conflict that John is affected by is **imputed to the firm and all members of the firm.** Additionally, Seymour was the first to speak with Sam and Lisa and should have recognized the conflict in representing both parties in the divorce action. He should have explained to them that the firm could only represent one party.

Obligation to Supervise

Seymour as a partner in the firm has the **obligation to supervise** the attorneys and assistants below him to ensure that they are **not in violation of the rules.** This includes reviewing their credentials to make sure they can practice in the state and reviewing billing rates to ensure reasonableness. Here it seems that Seymour simply laid the case at the feet of the new associate and permitted him to run wild without supervision.

REPRESENTATIVE ANSWER 2

Claims Against Seymour--supported unauthorized practice of law, failure to recognize conflict of interest

Seymour may be disciplined for allowing John to engage in unauthorized practice of law. Under the Maryland Rules of Professional Conduct, an attorney may not practice law in Maryland without a Maryland license. In this case, the facts indicate that John was only a licensed attorney in Virginia. Thus, Seymour may be disciplined for passing off work to another lawyer who is not unauthorized practice law in the state of Maryland. The limited exceptions to practice law in Maryland without a Maryland license such as pro hoc vice, in association with a Maryland attorney, corporate representation, or representation naturally arising out of lawful practice in another jurisdiction do not apply in this case. The only plausible exception in this case is that John was working very closely with Seymour--a licensed attorney in Maryland--on the case. But the facts of the case do not indicate this whatsoever.

Claims Against John--Unauthorized Practice of Law, Member of Virginia Bar

As noted above, John would also be disciplined for unauthorized practice of law because he did not have a Maryland attorney license when he represented Sam and Lisa in their divorce settlement.

Claims Against John--Conflict of Interest

John may be disciplined for violating the rules regarding conflict of interest. Under the Maryland Rules of Professional Conduct, an attorney may not represent a client if the client has a responsibility to another client, a third party, or personal interest that would limit his/her representation of the client. In this case, Sam and Lisa are adverse clients in the same matter that he seeks to represent them in. Thus, representation of both of them in them in the same matter is inappropriate and in violation of the Maryland Rules of Professional Conduct.

Claims Against John--Unreasonable Fee

John may also be disciplined for charging an unreasonable fee of $500 per hour to his clients. Under the Maryland Rules of Professional Conduct, an attorney's fees must be reasonable. Reasonableness of fees is determined based on various factors such as skill and experience of the lawyer, the amount of time and labor required to prepare for the case, and the novelty of the

case. In this case, John was representing Sam and Lisa in a domestic relations case. This is not a case that is novel and high skill and experience are not necessarily required as long as the attorney becomes competent in the matters through research. Thus, a $500 per hour fee is likely to be found unreasonable. The fact that John had to engage in lengthy negotiations before coming to an agreement is not dispositive of the fact that the fee is likely unreasonable because domestic relations cases often require such negotiations and there are no facts to indicate that this case was especially difficult or unique.

Claims Against John--Unlawfully Taking a Contingent Fee in a Domestic Relations Case

John may also be disciplined for taking a contingent fee in a domestic relations case. Under the Maryland Rules of Professional Conduct, contingent fees are prohibited in domestic relations cases. They are only permitted in domestic relations cases to collect a past due judgment. In this case, John took a contingent fee in the case when he got Sam to agree that Sam would pay an additional fee to John of 2% of the value of the assets John obtained for Sam under the separation agreement to be developed that are in excess of 50% of the value of the marital assets. This undoubtedly qualifies as a contingent fee. Because this is a domestic relations case, such a fee is prohibited.

Claims Against John – Misappropriation of Client Funds

John may also be disciplined for misappropriation of client funds. Under the Maryland Rules of Professional Conduct, advance payment of fees made by clients to attorneys must be placed in a separate trust client account. In this case, Lisa and Sam made a payment to John of $5,000 to be applied towards the services that John would provide. John promptly deposited the payment into the firm operating account. This is unlawful under the Maryland Rules of Professional Conduct and such payment should have been placed in a separate trust account for the clients unless the clients gave written informed consent that the funds may be placed in the firm's operating account.

Claims Against John--Breach of Confidentiality, Failure to Act Competently

John may also be disciplined for breach of duty to maintain confidentiality on all communications between himself and his client. Under the Maryland Rules of Professional Conduct, one of the upmost duties of an attorney is to preserve the confidentiality of all information that is related between the lawyer and attorney during the course of representation. In this case, John sent an electronic draft of the separation agreement to Lisa's attorney which revealed the content of prior internal versions of the initial draft agreement and which revealed

that Sam believed that the value of the internet business was $2,000,000 and that sam was prepared to offer Lisa $1,000,000. These are all confidential information relayed to John by his client which John had a duty to protect. By revealing such information, it is likely that John has breached his duty of confidentiality. The fact that David, Lisa's attorney, discovered this information encrypted in the electronic draft is not persuasive that John did not breach is duty of confidentiality. John should have likely known that such an electronic transfer of the agreement may reveal confidential information.

Maryland Rules of Professional Conduct also require than an attorney act competently in his representation of a client. In this case, John failed to act competently by failing to protect his client's confidential information. He either knew or should have known that an electronic transfer of agreement may reveal such information.

QUESTION 8

Mother, Dad, Son and Daughter each own 25 shares of the 100 outstanding and issued shares of Dealership, Inc., a Maryland corporation. They comprised the entire board of directors. Dad was President and received an annual salary of $300,000; Mother, Daughter and Son were Vice Presidents at salaries of $100,000 each. For more than a decade, Corporation paid an annual dividend of $1,000,000.

In early 2005, as a result of a disagreement, Son resigned as Vice President and director. The three other shareholders and the Corporation agreed in writing to "act in good faith to continue the current dividend practices of the Corporation as permitted by business conditions." Mother, Dad and Daughter continued as sole directors. Dad retired as President but continued to serve on the Board. The Board designated Daughter as President. At a Board meeting in June of 2005, Daughter proposed that her salary be increased to $1,000,000, Mother's be increased to $700,000, and that Dad be hired as a management consultant for $500,000

annually. The three Board members unanimously approved the proposal. In December , 2005, the Board unanimously decided not to declare a dividend because of "adverse business conditions."

In 2006 and 2007, the Board again decided not to declare a dividend, each time citing adverse business conditions. In each year, the Board also voted to grant annual performance bonuses of $300,000 to Mother and Daughter and to continue to pay $500,000 to Dad for consulting services.

In January of 2008, Son obtained copies of the Corporation's financial statements, Board minutes and tax returns for 2005 - 2007. He learned that Dad performed no consulting services for the Corporation. The financial statements indicate that the Corporation has no debt and, after making ample allowance for reserves and capital investments, has accumulated more than $2,500,000 in surplus available for dividends. Sister's and Mother's salaries are in excess of what is normal for businesses of the size and revenue of Dealership, Inc. Son seeks to require the Board to declare a dividend and compensation for the excessive salaries and bonuses.

a. What remedies does Son have?

b. What defenses can be asserted by Dad, Mom, Sister or the Corporation?

REPRESENTATIVE ANSWER 1

a.) Son will have difficulty in obtaining any remedy at all, but if he is entitled to a remedy, he may petition for a writ of mandamus requiring a distribution of dividends, a dissolution of the corporation (under section 3-413(b)(2)), or, alternatively, a constructive trust for the payment of excessive wages. However, these remedies are unlikely. As discussed, below, the Corporation may assert successful defenses. Moreover, the writ of mandamus requiring dividends requires a showing of fraud. A dissolution also requires fraud. Son's most likely remedy will be a constructive trust for the wages in excess of reasonable salary, but even that will require a further fact finding, that the salary was unreasonably excessive. He cannot argue that the salaries were void for interested director transaction, because under section 2-419(d)(2), the fixing of reasonable compensation for a director, whether as a director or in "any other capacity" is specifically exempt from the interested director/voting regulations. Thus, he could not argue that Dad, who's consulting services pay seems unreasonable, was a voidable "interested" decision, because Dad, as a member of the board, may still have his salary set under the 2-419 exemption.

b.) The corporation, along with Dad, Mom and Sister may defend against these remedies. A corporate director is bound to perform his duties in good faith in a manner reasonable believed to be in the best interests of the corporation and with the care that an ordinary prudent person in a like position would use under the circumstances. (2-405.1) An act of the director is presumed to be proper. (id. At 401.1(e)) the court will not overrule an act of a director, absent fraud or dereliction of duty, under the business judgment rule. Absent fraud, self-dealing, or violation of the officer's duty, a stockholder has not right to a dividend unless and until one has been declared. A corporate director may st his own salary only so far as is reasonable and not excessive, or else he is in violation of his statutory duty of loyalty.

In this case, Son may attempt several theories of mismanagement or violation of duties by the corporate directors: first, that the fees paid to Mother, Sister and Dad are excessive in that they are "in excess of what is normal for businesses of the size and revenues of dealership, Inc." However, payment of a fee above normal is not prima facie evidence of a breach of duty, even where the corporation has not paid dividends in some time. The court will look to other factors, such as the requisite skill and training of the corporate directors. More likely to be found unreasonable, however, are the fees to Dad for "consulting services." If, in fact Dad provided no services for the corporation, payment of a salary to him would be a violation of the duty of loyalty. As a member of the board, he may only receive a reasonable salary. If he is found to receive an excessive salary, the amount above a reasonable salary will be placed in a constructive trust.

Second, Son may attempt to argue that the board was bound to deal in good faith and breached that duty when they failed to issue a dividend for years in which the corporation made significant revenue but issued no dividends. However, the decision not to issue dividends will be judged under the business judgment rule, meaning that the court will not inquire into the validity of legitimate business interest absent fraud or misconduct. The court does not sit as a super-board member and it will allow corporations to make decisions based on its own judgment. Here, the phrase "adverse business conditions" is too vague to provide any relief. It may well be that the board anticipates financial difficulties in the near future and is building a war-chest to withstand an economic downturn. This, Son's showing that the board could have issued a dividend, but did not, will not entitle him to relief.

REPRESENTATIVE ANSWER 2

Son's action to compel payment of the dividend will be a direct action against the corporation on his behalf; it is NOT a derivative action. Accordingly, demand is not required (even if it wouldn't be futile).

Son will argue that he has an agreement with the corporation that the corporation will

continue current dividend practices. Directors of a corporation, however, may not restrict their future actions as directors; they have a non-waivable duty to act in the best interest of the corporation. In any event section 2-405.1 prescribes the same conduct that was required by the contract: a duty to discharge director duties in good faith (duties which include the announcement of dividends).

Son will thus argue that Mother, Dad, and Daughter breached their duty to act in good faith when they set their levels of compensation as directors, when they set the compensation for themselves as officers, when they agreed to the terms of Dad's "consultancy" and when they decided to declare dividend. Directors, however, are ordinarily protected under the business judgment rule for the decisions they make as directors. That is, if there is a legitimate business for an act of the board of directors, then a court will not review the action to determine whether the action was wise. This is probably one of the rare cases, however, where the business judgment rule may not shield the directors from liability. The facts disclose no reason why such an astronomical percentage increase in salary would be needed.

Son's action to seek compensation for the excessive salaries must proceed as a derivative action on behalf of the corporation; it is the corporation that was harmed by any such wrong. Normally, demand on the board would be required for such an action. Here, however, demand would clearly be futile (as all the board members are allegedly complicit in the wrongdoing.)

Son will also that Mother, Dad and Son violated their duty of loyalty to the corporation my entering into an interested director transaction, for which they did not receive proper approval. If this argument is based solely on 2-419, the argument will likely fail. This is because the provision specifically exempts "fixing by the board of directors or reasonable compensation for a director, whether as a director or in any capacity". At all relevant times, Mother, Dad and Daughter were on the board. Thus, their fixing of their own salaries, their fixing of their salaries in their executive capacity, and their fixing of Dad's consultancy salary, are all exempted from the provisions of 2-419.

Son may nonetheless argue that the exemption only applies to "reasonable" salaries, and that even if a director is presumed to be acting in good faith and on a reasonable basis, the facts here lead to a necessary inference of unreasonableness. Son may also argue to reply that even if 2-419 does not apply, the directors still owe a common law duty of loyalty as agents of the corporation.

Son may also bring in equitable action to dissolve the corporation, on the grounds that the foregoing acts were illegal, oppressive, or fraudulent. While the acts may not be illegal or

fraudulent, Son has a good case that they are oppressive and that the corporation should be dissolved. Son will then be entitled to his one-fourth share of the 2,500,000 (750,000).

QUESTION 9

Al and Peg Mundy were married in 1988 and had two children, Bud and Kelly, in 1994 and 1996, respectively. Al is a self-employed neurosurgeon and Peg is a financial planner. Since they both worked long hours, they employed Hazel to live at their home and help care for Bud and Kelly.

In March 2008, Peg asked Al to leave the marital home, but Al refused to do so. On April 2, 2008, he informed Hazel that her services would no longer be required, knowing that Peg would be devastated if Hazel left. When Peg got home that evening and saw Hazel packing, she called Al into the living room and told him he had better leave and that she would make sure he did so immediately. She then called the police on her cell phone and told them "Get over here; my husband is acting crazy!? The police arrived but Al had left the home by that time.

The next day, Peg filed a petition for protection from domestic violence in the District Court of Maryland for the appropriate County alleging "mental injury to her children" and "threats of violence". A hearing was scheduled for April 23, 2008. Al and Peg appeared on that date and Peg testified as follows:

> When I got home Hazel was very upset because my husband told her that she was fired. My children were frightened by seeing Hazel, their nanny, so distraught. I was very angry and I just knew he would do something crazy; he wouldn't even leave the home when I told him I wanted a divorce! And, on top of that, he said to me "I'm leaving now because this could get ugly. Get Hazel out of the house before I get back." My husband has never hit me before, but he was acting weird, and you can never be too careful.

On the basis of this testimony, the District Court issued a protective order against Al, ordered that Al stay out of the marital home for a period of six months, that Peg has permanent custody of the two children, and that Al pay an amount of $3,000 monthly in support and family maintenance.

a. Al retains you, a Maryland attorney, and asks whether he may appeal the court order and/or reduce the amount required in the Child Support Guidelines by deducting from his income the monies he pays monthly to his personal pension plan and his business expenses, which were not brought to the attention of the lower court. What advice would you give?

The next day Peg filed for an absolute divorce in the appropriate Circuit Court, confident of success since the District Court granted a protective order against Al.

b. Al asks you if there any way to challenge the divorce proceedings filed by Peg.

REPRESENTATIVE ANSWER 1

(a) I would advise Al that the protective order is not a final judgment because it may be modified and that it ordinarily would not be immediately appealable; however, there are exceptions when the order is for child custody and support, and alimony. I would advise Al to file written exceptions in the appeal from the District Court to the Circuit Court and also to file a claim for divorce in the Family Division of the Circuit Court as that is the appropriate court to hear these matters.

In his appeal Al should object to the length of the protective order of six months. Generally, a protective order is awarded for thirty days and may be subject to renewal. Six months is quite lengthy especially considering the fact that Al did not physically injure the children or Peg. Furthermore, there's conflicting evidence about whether he really was as infuriated or as crazy as Peg tried to portray.

Also, the District Court did not have the authority to award ?permanent custody? or permanent support and maintenance. The Family Division of the Circuit Court has the jurisdiction for those matters and would be the appropriate court to hear the merits. The district court may have been able to award temporary custody and payment of the mortgage; however, without assessing the following factors, a proper determination could not be made. To determine custody the court must assess the best interest of the child based on the child's desire, whether there was actual violence, the reason for the separation, whether the parents could get along in the future, and whether the parents would live in close proximity. The testimony by Peg touches on a few of these aspects but not nearly enough to award permanent custody.

Also, in looking at the award of $3,000 monthly in support and family maintenance that too seems to be an arbitrary amount. Rather, to consider child support the court should look at the guidelines. There is no information anywhere in the facts about the income of the spouses other than the fact that Al is a neurosurgeon and Peg is a financial planner. It is likely that they are making a combined income of more than $10,000 however financial statements should be supplied. The Court would then have to consider the standard of living of the children to determine support. Money paid to Al's pension plan and his business expenses would be considered since that is not liquid money that he has to pay towards the support. However, the pension would be considered marital property since acquired and sustained during the marriage. Also, the business itself would be marital practice and Peg would be entitled to one-half of it should the couple divorce. As far as alimony is concerned, the court must consider whether to award alimony pendent elite, rehabilitative, or permanent. The $3,000 may have been alimony

pendente lite, however, it's not clear whether this was enough or too much to sustain Peg and the children. Also, because Peg is pretty sufficient herself as a financial planner and the couple has a nanny, those factors need to be considered in determining alimony. Peg may be entitled to rehabilitative alimony, but even that is not definite since she's been able to maintain work. Without financial statements, assessing all of the assets owned by the couple, and considering the best interest of the child, they were premature and not within the district court's discretion.

(b) Al may challenge the divorce proceedings filed by Peg. Since Peg has filed for absolute divorce, she will either be asserting no-fault or fault grounds. It is unlikely that she is seeking a divorce based on no-fault, but if she and Al were opposed to the divorce, he would assert his opposition in this response. For a no-fault divorce the court requires the parties to live separate and apart. If it were a voluntary divorce, the couple would only have to live separate and apart for one year. However, if Al wants to challenge it hoping that the marriage is reconcilable, then he should assert that and the court would require that the couple live separate and apart for two years.

Based on the protective order though and Peg's antics in court, it is likely that she will be bringing an action based on fault grounds. Fault grounds that she may be asserting include cruelty, or possibly excessively vicious behavior. As Al's attorney, I need to find out exactly what has transpired between the couple and perhaps speak to Hazel since she lived in the house and had knowledge of their relationship. Al's conduct as described by Peg would not rise to the level of excessively vicious behavior since there was no abuse; however, Peg may have a claim for cruelty if Al truly berated Peg in front of Hazel, made the children frightened, and otherwise treated Peg poorly. The fact that Al fired Hazel just to get at Peg is indication of his abusive behavior.

Al may be able to assert the defense of recrimination such that Peg contributed to the fault as well. Peg did ask Al to leave the marital home but the first time she did not indicate why. I should investigate as to what Peg may have been doing and see what the root of the problem is to ensure the best defense for my client.

REPRESENTATIVE ANSWER 2

Appealing the court order: Al may appeal the court order. Family law actions are appealable, as are just about every type of civil action. He has good grounds for an appeal too, and should file a statement of exceptions to the District Court's findings of fact as well as appealing several aspects of its orders as discussed below.

Jurisdiction of the Court: Generally, the Circuit Court has jurisdiction of actions for divorce. While the District Court may have jurisdiction to enter protective orders, orders

setting alimony (whether pendente lite or post-divorce), orders affective custody (whether temporary or permanent), and orders awarding disposition of marital property (such as a marital home) can only be entered by the circuit court as part of a limited divorce (not with respect to final property settlement) or absolute divorce action. Thus, the district court''s award of alimony, its determination of custody, and its order interfering with use of the marital home appear to be beyond its jurisdiction, and will likely be summarily vacated on appeal to the circuit court in the county in which the district court sits.

Computation of Support: Even if the district court's order was to be reinstated by a court with jurisdiction, that court would have to correctly compute the parties? incomes before awarding alimony/child support. It?'s not clear on these facts whether the ?support and family maintenance? is supposed to be alimony, child support, or both. If both, the alimony should be awarded separately, on the record, before the child support, because the alimony is income to the recipient and will be included in her income for purposes of determining the share of child support each party will pay. Furthermore, each party?'s income should be calculated from net income, not gross business receipts. Al should be able to successfully challenge the court's refusing to consider his business expenses insofar as they are not part of his net personal income. His personal pension plan is less likely to escape being included in his income ? at least, pensions are marital property that can be taken into account in awarding distribution of marital property, so Al cannot shelter money by diverting it into pension funds.

Validity of the Protective Order: Peg does not appear to have been granted a protective order properly on these facts, and an appellate court will likely vacate the order. A long-term protective order should only be issued to protect against a serious threat of violence. Peg presented no facts that indicated that Al was a threat of physical violence; on the contrary, she stated that Al had never hit her before, and was unable to articulate a specific reason to fear that he would hit her in the future. The law does not allow for protective orders merely because one side in a family dispute feels uncomfortable, or acts in unprecedented ways, there must be a specific threat of violence or some similar cognizable ground for the law to interfere to prevent serious harm. Allegations of emotional distress in a 12 and 10 year old over a family argument, and unfounded fears, should not give rise to a protective order.

Grounds for Absolute Divorce

Absolute divorce is available on six fault-based grounds and two no-fault based grounds. Al is challenging the divorce, so neither no-fault ground is available (in addition, insufficient time has passed for either to be available, assuming the problem takes place on July 29, 2008 (well under 1 and 2 years into the separation). Fault-based grounds include adultery, incarceration (under certain conditions), mental illness (under certain conditions), cruelty of treatment, excessively vicious conduct, and desertion. The first three of these are not

implicated on these facts, no adultery, incarceration, or institutionalization is mentioned.

Al's "bad" behavior that can be cited in Peg's divorce action includes: refusing to leave the marital home, firing the live-in child care assistant, leaving when Pet demanded he leave after firing Hazel, and being the subject of an erroneously given protective order based on Peg's insufficient testimony that he was "acting weird".

Cruelty of treatment is conduct reasonably calculated to impair the health or destroy the happiness of the other spouse. A single act of violence is not always sufficient to give rise to this ground; it seems unlikely that any of Al's actions enumerated above rise to the level of cruelty of treatment. It is not cruelty of treatment to not want a divorce, to refuse to leave the marital home when the other spouse requests, or to fire a nanny, even without consulting the other spouse. Peg may be able to argue that Al fired Hazel to "devastate" her (the facts do say that Al knew that Peg would be devastated by this). The facts don't indicate that he had the intent to bring about this result, though they imply that his action was taken in retaliation for her request for divorce. It is conceivable that a court could find that, if Al did this action solely to devastate Pet, that it would conclude it was conduct reasonably calculated to destroy Peg's happiness sufficient to rise to the level of cruelty of treatment; however, it seems more likely that a court would not so find.

Excessively vicious conduct: EVC overlaps considerably with CT, and is likely not available if CT is not. Cursing and vile epithets do not make EVC, so it seems, unlikely that an argument about divorce or about the nanny would either.

Desertion: Desertion would require a showing that a spouse left the marital home without reasonable excuse with intent to end the marriage. Constructive desertion could be shown if one spouse did not leave, but made it impossible for the other spouse to remain and maintain health, happiness, or self-respect. Peg can argue that Al has actually deserted her (though, as he does not want a divorce, his action in leaving does not seem to amount to this). She can also argue that firing Hazel made it impossible for her to remain in a manner that gave rise to constructive desertion. Regardless, neither option will help Peg because an absolute divorce on grounds of desertion is only available if the desertion has lasted more than 12 months, which it has not on these facts.

The only grounds on which Peg could conceivably get an absolute divorce on these facts would be the court finding cruelty of treatment. This is unlikely, as discussed above, and thus Al will probably be able to successfully oppose Peg's divorce action. If the parties don't eventually reconcile, though, Peg will be able to pursue a limited divorce and eventually an absolute divorce, if for no other reason that the parties may divorce after living apart for two years if the marriage is irretrievably broken.

QUESTION 10

On May 1, 2008, Husband and Wife sign a contract to purchase Blackacre, a 25 acre farm outside Havre de Grace, Harford County, Maryland. The contract requires that Husband and Wife conduct a title search, and notify the Sellers, A,B, and C, of any defects in the title. Settlement is scheduled to occur on June 30, 2008.

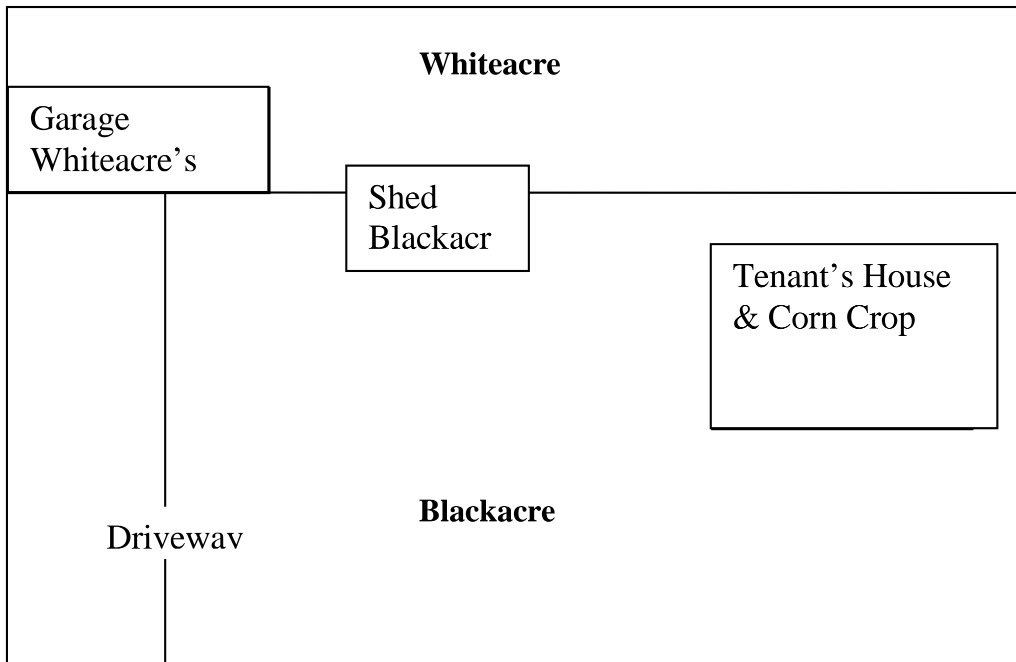
Husband and Wife ask a member of the Maryland Bar to represent them and to conduct a title search for Blackacre. The title search reveals the following:

a. A judgment was recorded in Harford County Circuit Court against the current owners of Blackacre, A, B, and C, on May 13, 2008;

b. A deed of trust securing a $150,000 loan signed by A, B and C was recorded against the property on March 1, 1993;

c. A pending lawsuit in the Circuit Court for Harford County against C for failure to pay for a tractor for use on Blackacre; and

d. The plat of survey provided to Husband and Wife is consistent with what they saw when they visited Blackacre prior to signing the contract. The survey shows:



1. An unpaved driveway running the length of Blackacre parallel to the west boundary line leading to a free standing garage on Whiteacre, which is north and adjacent to Blackacre;

2. Blackacre's shed, which was erected by A, B and C when they purchased Blackacre in February 1986, encroaches two feet over the property line onto Whiteacre; and

3. A corn crop planted by Tenant and a house occupied by Tenant on the land leased by Tenant on the rear ten acres of Blackacre.

What is the possible effect of each of the above items on the title to Blackacre?

REPRESENTATIVE ANSWER 1

1. Generally, when two parties enter into a contract for the sale of land, the seller warrants up until the date of closing that they have a marketable title. If any encumbrances on the property result in the seller not having a marketable title, the defendant can back away from the contract without breach. Therefore, if any of the items listed below would cause the title to become unmarketable, the buyer could choose not to go through with the transaction prior to closing.

Part (a)

Under the Doctrine of Equitable Conversion, what is considered equitable to be done is done. With respect to land contracts in Maryland, the doctrine provides that once two parties enter into a contract to buy and sell land, the equitable title to the land passes to the buyer and the equitable title to the purchase money passes to the seller, despite the fact that they do not have proper title until closing. Here, the contract was entered into on May 1, 2008, at which point Husband and Wife became equitable owners of the land. The judgment against the sellers was entered on May 13, 2008, which would entitle the plaintiff in that case to a judicial lien on the property of A, B, and C in Maryland. However, since Husband and Wife were equitable owners of the land prior to May 13, 2008, Blackacre would not be subject to the judicial lien (although the purchase money, now the equitable property of A, B, and C, would be subject to a judicial lien). Therefore the judgment does not have an adverse effect on the title. However, Husband and Wife should check if the plaintiff in the case attached the property prior to May 1, and if so, it may be subject to the judicial lien.

Part (b)

A deed of trust is analogous to a mortgage, though held by a trustee and not a mortgagee,

and is treated as such under Maryland law. If a land is subject to a deed of trust, the encumbrance stays with the land notwithstanding the fact that there will be a new owner of the land. Sellers who sell land encumbered by a mortgage are unable to convey marketable title. However, this does not necessarily violate the sellers' warranty to provide marketable title. There is an implication that the money received at closing will be used to cover any existing mortgages on the land. If the seller receives enough money from the sale of the land to pay off the deed of trust (including possible contribution from other assets), then they can convey marketable title.

Part (c)

The pending lawsuit in circuit court for failure to pay for a tractor could potentially be levied against any property interest C has in the state of Maryland. However, since C no longer has a property interest in Blackacre as described in Part (a), the plaintiff in that lawsuit wouldn't be able to levy on Blackacre. If the circumstances were such that the plaintiff could levy upon C's interest in Blackacre, it could only levy upon C's interest only.

Part (d)

Subpart (1)

The unpaved driveway could be evidence of an easement by necessity, which can be a valid implied easement even if not specifically mentioned turned up in the title search. Easements by necessity are easements granted against a servient tenement when (1) the dominant and servient tenements were granted in the same conveyance and (2) there is no means of ingress and egress to the dominant tenement other than through the land of the servient tenement. Since that driveway leads to a garage on Whiteacre, it seems that there is no means of ingress or egress other than over Blackacre. If that is the case, and there is no other way to enter Whiteacre, the title may be subject to that easement.

Subpart (2)

The shed encroaching upon Whiteacre is potentially subject to an action of trespass against Blackacre. It doesn't effect title to the land, however, but Husband and Wife may be liable for damages in trespass. If the shed has been on the land for over 20 years, however, and was done without the consent of Whiteacre, the owners of Blackacre might have acquired the land on which the shed sits by adverse possession. In Maryland, adverse possession does create marketable title, so if the shed was acquired by adverse possession, it would be part of the title to Blackacre.

Subpart (3)

The house of tenant are subject to a leasehold interest, which doesn't affect the title to Blackacre. At the end of the lease, the title to Blackacre will contain the house and all fixtures therein, including ones installed by tenant that can't be removed without substantial damage to the property. The Tenant generally retains title to the crops on the land if he planted them. However, if the crops remain of the land at the end of the lease, the title to the crops would revert to the owners of Blackacre, and they would have title to them.

Representative Answer 2

A) The judgment could make title unmarketable if it is attached to the property before title passes at closing on June 30, 2008. However, the judgment has not yet attached to the property. Moreover, the doctrine of equitable conversion entitles husband and wife to title of the property. Therefore, because the judgment was recorded after husband and wife signed the contract to purchase Blackacre, a court will likely estop the judgment creditors from attaching Blackacre to satisfy the judgment against A, B, and C.

B) The deed of trust recorded against Blackacre might also render title unmarketable. Maryland follows the Title Theory of Mortgages. However, Husband and Wife must give A, B, and C an opportunity to pay off the mortgage from the proceeds of the sale of Blackacre, thus clearing any title defect caused by said mortgage. If A, B and C assure that the loan will be satisfied upon sale, title will not be deemed unmarketable based on that loan.

C) The pending lawsuit against C will not likely have any effect on the marketability of title. Because there is not yet a judgment, there is nothing to attach, and thus no problem. If the plaintiff attempts to obtain attachment before judgment, a court will likely prevent attachment to Blackacre based on equitable conversion as discussed previously.

D) 1. The unpaved driveway appears to be an easement which would run with the land, give that Husband and Wife are on notice of its existence. This easement is an encumbrance that could render title unmarketable. If Husband and Wife take title to Blackacre, they will take subject to the easement.

2. The two feet of Whiteacre that has been occupied by the shed has been obtained through adverse possession. The shed was erected in 1986, over 20 years ago. Accordingly, the use of this portion of Whiteacre has been continuous, open and notorious, actual and exclusive and hostile for the 20 year statutory period required. Accordingly that portion of Whiteacre has been obtained by A, B, and C through adverse possession. In Maryland, adverse possession does not render title unmarketable. If Husband and Wife take Blackacre they will also acquire this portion of Whiteacre.

3. The lease may be an encumbrance that renders title unmarketable. However, if Husband

and Wife take Blackacre, they will only be responsible for covenants in the lease that touch and concern the land. They will collect rent from Tenant and will have general duties as landlord, but they will not be responsible for any express provisions in the lease that do not touch and concern the land.