

## FEBRUARY 2006 BAR EXAMINATION

### QUESTIONS AND REPRESENTATIVE GOOD ANSWERS

#### QUESTION 1

Hank and Wilma are married. In 2004, Wilma obtained a loan for \$20,000, from Bank. The loan was in both their names. This loan was taken without Hank's knowledge or consent.

When the loan documents were signed, Wilma told Bank that Hank was sick and could not be there. Bank required a Power of Attorney from Hank. Wilma produced a forged Power of Attorney that granted Wilma the power to sign Hank's name to the loan documents. Bank placed the proceeds directly into their joint account.

Within a few months, Wilma purchased a refrigerator, pool table and some other furniture with the loan proceeds. Additionally, she purchased jewelry for herself and a watch for Hank. Hank's watch cost \$1000. Wilma used the \$20,000 loan proceeds for these purchases and incurred debt of an additional \$5,000 to complete the purchases.

Hank inquired about the purchases and discovered Wilma has made the loan without his knowledge and has spent the entire \$20,000.

During 2005, Hank managed to pay off the \$5,000 balance owed on the purchases. No money was paid to Bank on the loan.

**Analyze Hank's potential liability to Bank. Discuss your answer fully.**

#### REPRESENTATIVE ANSWER 1

Hank and Wilma were a married couple. Wilma entered into a loan with Bank without Hank's knowledge or consent and forged a power of attorney for him granting her the power to sign on the loans. Now, Bank seeks to recover on the debt from Hank.

**Ratification.** Ratification of a contract occurs when the person not authorizing the contract learns of the material terms, approves of the entire agreement and has authority to do so. Here, Wilma obtained the loan without Hank's knowledge or consent, yet used forged authorization to sign his name. Although Hank did not know of the agreement, Wilma placed the proceeds into their joint account. Additionally, she purchased household items such as the refrigerator and pool table with the money.

Hank later asked about the purchases and was told about the loan. Subsequently, he paid off the \$5,000 balance owed on the purchases. Bank will agree that all of these acts put Hank on notice of the loan as his actions of taking the watch, learning about the loan and not disavowing it, and paying on the additional debt show that he knew of and approved of the agreement. Bank

can collect from Hank for ratifying the agreement.

**Signature Liability.** Bank can also argue that Hank's name is on the loan and they relied on his apparent authority via the power of attorney. However, the forged signature alone will not serve to bind Hank since he had no knowledge.

Bank may also argue that as a married couple, Wilma and Hank are like a partnership and Hank should be liable for all debts incurred during the marriage. However, here the debt was entered into via fraud on the part of Wilma. Since Wilma forged the power of attorney and Hank originally had no knowledge of the loan. He will not be liable on this theory.

## **REPRESENTATIVE ANSWER 2**

To act as the agent of another, one must have actual, implied authority. Here Wilma may have apparent authority only. Also, Hank probably ratified the transaction.

A husband and wife are not automatically agents of each other and cannot automatically bind the other. When Wilma went for the loan, in both their names, her signature was not sufficient to bind Hank. This is why the bank required a power of attorney.

When a third party is led to believe that one has the ability to act as another's agent, and relies on this representation, the person held out as an agent may have apparent authority to act on the principal's behalf. Here, Hank did not hold Wilma out as an agent, so it could argue she didn't have authority. However, Wilma's forged power of attorney led Bank to reasonably believe Wilma was his agent. Thus, Wilma probably had apparent authority and Hank, as the represented principal, is bound on the debt owed.

When an agent acts without any implied, actual, or apparent authority, the principal may be subsequently bound if they ratify the transaction by agreement, or probably accepting the benefit. Here, Bank can argue Hank's subsequent use and enjoyment of items bought with the loan proceeds constitutes a ratification binding Hank, even if Wilma had no apparent authority. The refrigerator, pool table, and furniture were all enjoyed and used by Hank, who shared (presumably) a home with wife. Certainly, the expensive watch inured to his benefit. Hank may defend he had no actual knowledge of how these items were purchased, but they obviously came from a source of funds, one which he could have seen on a joint bank account statement. Also, bills on the loan probably came addressed to Hank and Wilma several times over the past year. Hank shouldn't be allowed to use his willful ignorance to avoid liability via ratification. Additionally, the fact that Hank paid off \$5,000 additional debt could evidence a sense of obligation on these purchases.

Because Wilma had apparent authority and/or Hank ratified the loan, Hank is liable to bank for the loan amount, jointly and severally with Wilma, and any late fees.

## QUESTION 2

In 2003, The Carroll County Government invited area general contractors to bid on the construction of the Finksburg Senior Care and Animal Husbandry Center (“the Project”). The project’s anticipated construction cost was Five Million Dollars (\$5,000,000).

Mighty Contracting Company, (“MCC”) a general contractor located in Baltimore County, Maryland, obtained written estimates from area subcontractors including DDD Engineering (“DDD”). MCC was surprised by DDD’s low estimate but relied heavily on its estimate to submit a bid to the County. MCC was the lowest bidder and was awarded the contract to build the project for \$3,000,000.

Before signing the subcontract with MCC, DDD discovered a significant error in its own calculations and realized that its estimate should have been much higher. DDD withdrew its estimate and refused to sign any contract to perform the work at the originally quoted price.

MCC was forced to perform the contract with the County, and, as a direct result of DDD’s error, incurred an extra \$2,000,000 in expenses to complete the project.

MCC timely filed a lawsuit in the appropriate Maryland Circuit Court against DDD seeking damages for the \$2,000,000 it paid to complete the job in excess of its original bid.

**What must MCC prove to succeed in its claim against DDD? Discuss fully.**

### REPRESENTATIVE ANSWER 1

**A Contract.** In order to succeed in a claim against DDD, MCC must prove that there was a breach of a contract by DDD. This, first, requires proof that a contract existed between the two parties. A contract requires offer, acceptance, and consideration or a consideration substitute. Here, MCC must prove that a contract was formed.

**Offer.** Offer is manifestation of a present intent. To contract with definite terms, and communicated to the party. Here, MCC obtained written estimate from DDD (a low estimate). MCC must argue that this constituted an offer.

**Acceptance.** Acceptance requires accepting the offer and its terms. Here, MCC accepted the estimate and submitted bid to county and were awarded contract.

**Consideration or Substitute.** A consideration substitute is detrimental reliance or promissory estoppel. A person is estopped from denying the existence of a contract where they knew that their promise of acceptance would induce detrimental reliance or action. Here, DDD should have known that the submission of a low bid to MCC would reduce reliance on the bid to the County. Therefore, MCC can argue that based on low bid, they detrimentally relied on it — they “relied heavily” and thus, DDD is estopped from denying the contract because it was foreseeable that MCC would rely on the bid.

**DDD.** DDD will claim that there was no contract, they withdrew estimate before signing the contract and that MCC's reliance was not called for because MCC should have known it was a miscalculation, after all they were "surprised" by the low estimate.

**Custom in Industry / Ordinary Course of Business.** In order to win on a theory of detrimental reliance/promissory estoppel, MCC can prove that it is the custom in the contracting business to accept a low bid, and a bidder (subcontractor) should know that submission of a bid is an offer, to be accepted, and that person named detrimentally rely on bid. If MCC can prove this, then MCC can recover the \$2,000,000 from DDD based on a theory of detrimental reliance or promissory estoppel and DDD will be estopped from denying existence of contract.

## **REPRESENTATIVE ANSWER 2**

In order to recover damages resulting from DDD's refusal to perform, MCC must prove the following:

### **I. Detrimental Reliance**

Generally, once an offer has been accepted it may not be revoked, absent limited circumstances. In this case, MCC would be required to prove that it detrimentally and reasonably relied on DDD's bid and effectively created an acceptance by relying on such bid (offer) in submitting its proposal to the Carroll County Government Project. However, if it was not reasonable for MCC to rely on such a low bid which may be inferred from MCC's "surprise," a Court may not allow MCC to enforce the supposed contract between MCC and DDD. In other words, to the extent DDD's low bid would not have reasonably been relied upon by someone in the business of general contracting like MCC, the Court may not allow for MCC to be awarded damages for unreasonable reliance.

### **II. Unilateral Mistake**

Generally, courts refrain from rescinding contracts where one party has made a unilateral mistake. In this case, DDD has asserted that its offer (bid) to MCC was a mistake, as it should have been "much higher." However, MCC will have a defense to such claim if it can prove that it reasonably and detrimentally relied on such offer and as a result of DDD's breach of performance, DDD should not be excused from its contractual obligation. Here, once DDD submitted the bid, it was foreseeable that MCC would rely on such bid as it was invited to bid on the Carroll County Government Project. Since, DDD was aware of such use of the subcontractor offer, it would be unjust to force MCC to bear the burden of DDD's revocation. However, as stated above, a court may avoid assigning liability to DDD where MCC should have known that DDD's bid contained a mistake. Depending on the magnitude and scope of MCC's surprise, DDD may have a defense to such liability. Likewise, a court would also consider how quickly DDD notified MCC of the discovered mistake and whether any bad faith by DDD existed as to submit an "incorrect" bid in order to procure its status as a subcontractor on the Project.

If MCC can successfully prove that it detrimentally and reasonably relied on the DDD bid, and that such bid constituted an offer which was not revocable (these facts do not trigger analysis under an option contract), then MCC and DDD had a valid contract. Once DDD breached such contract by failing to perform its obligations as a subcontractor on the Project, it became liable for

damages (i.e. the \$2,000,000 difference to cover the cost of its obligation to perform under the project). In such case, DDD could not avoid liability of its mutual assent to contract with MCC.

### QUESTION 3

On June 1, 2004, Ann Plaintiff was involved in an automobile accident with a pickup truck driven by Darryl Defendant. The accident took place in Kent County, Maryland, where Ann resides and Darryl attends college. Ann was injured and was treated at the local hospital. There were several witnesses to the accident. The truck driven by Darryl was owned by Rich, Darryl's father. Rich and Darryl are residents of Maine and the truck is registered there. Before Darryl left for college, Rich gave him the keys to the truck and told him he could use it at college.

On October 3, 2005, Ann filed an action for money damages in the Circuit Court for Baltimore City against Darryl and Rich. Count I alleged that Darryl's negligent operation of the pickup truck caused the accident. Count II alleged that Rich negligently entrusted the pickup to Darryl.

A private process server served the summons and complaint on Rich at his office in Maine on October 17<sup>th</sup>. Darryl was personally served with a summons and the complaint while at his dormitory on the same day.

Rich is a college professor. Five years ago, he attended a conference in Baltimore regarding his academic speciality and has visited Darryl at college twice in the last two years. Otherwise, he has not been in Maryland. He is a major shareholder and a director of Hi-Tech, Inc., a high technology company which makes sales to Maryland businesses on a regular basis.

- 1. How long from the date of service does Darryl have to file an answer or other responsive pleading?**
- 2. How long from the date of service does Rich have to file an answer or other responsive pleading?**
- 3. Darryl's lawyer believes that it would be in Darryl's best interest to try the case in Kent County. What steps can he take to accomplish this? What factors will the Court weigh in ruling on the request?**
- 4. Based on these facts, does Rich have a basis for arguing that the action against him should be dismissed? How should the issue be raised? How is the Court likely to rule?**

### REPRESENTATIVE ANSWER 1

a.. Under Rule 2-321(a), if a party is served with process within the State of Maryland, he has 30 days within being served to file an answer.

Here, Darryl was personally served with a summons and complaint while at his Maryland dormitory on October 17<sup>th</sup> (within 60 days of Ann's October 3<sup>rd</sup> filing, so dormancy is not an issue).

Therefore, Darryl must file his answer by November 17<sup>th</sup> (unless it falls on a weekend or holiday). If Darryl files another responsive pleading (such as a motion to dismiss), his time to

file an answer is extended to 15 days after the court rules (and files an order) on the motion, under subsection (c) of 2-321.

b. Under Rule 2-321 (b)(1), if a party is served with process outside of Maryland but within the U.S., he has 60 days within being served to file an answer.

Here, Rich was also personally served on October 17<sup>th</sup>, only he was in his Maine office and not in Maryland.

Therefore, Rich must file his answer by December 17<sup>th</sup> (unless it falls on a weekend or holiday). As discussed above, the filing of another responsive pleading (e.g., a motion to dismiss) extends the time for an answer.

c. Under the law of Maryland civil procedure, venue is where in the State the action can be brought. It has nothing to do with jurisdiction per se, and it is the defendant's prerogative.

Here, Ann filed the action in Baltimore City, where neither she nor the defendant's reside. The accident did not take place in Baltimore City.

Therefore, if Darryl wishes to have the case tried in Kent County, he should file a motion to dismiss for improper venue (must be filed before the answer, or it is waived, as it is a mandatory preliminary motion). Section 6-201(a) authorizes venue in a county where the defendant resides (which is Kent County, in Darryl's case), and Section 6-201(b) authorizes venue in the county where the cause of action arose (also Kent County here) in a case where no single venue is applicable to all defendants. The court will also consider factors of fairness to parties and convenience (or lack thereof) for parties and witnesses.

d. Under the laws of Maryland civil procedure, a court must have personal jurisdiction over the parties, which can be obtained through various means.

Here, Ann is suing Rich for negligent entrustment. Since Rich lives in Maine (meaning that he is not domiciled in Maryland), and he was not served in Maryland, the court does not have personal jurisdiction under Section 6-102. Even though Rich is a major shareholder of Hi-Tech (which appears to do business in Maryland), the cause of action (the car accident) did not arise out of his business actions, as required by Section 6-103.

Therefore, Rich should file a motion to dismiss for lack of personal jurisdiction (must be filed before the answer, or it is waived, as it is a mandatory preliminary motion). Unless there is some agency relationship between Rich and Darryl (causing Rich to be subject to Darryl's personal jurisdiction), the court should grant Rich's motion.

## **REPRESENTATIVE ANSWER 2**

a. Darryl has to file an answer or other responsive pleading within 30 days of October 17<sup>th</sup> because he was served in state. Rule 2-321(a).

b. Rich has 60 days to respond after being served to respond, as he was served outside of the State of Maryland but within the U.S. Rule 2-321 (b)(1)

c. Darryl should file a motion for improper venue, which is a preliminary motion.

The plaintiff must bring the action in a place where all the defendants have proper venue, then the plaintiff may sue where any one defendant can be sued or where the cause of action arose. Rule 6-201(b). The court will likely rule that it is the proper venue because, since both Rich and Darryl are non-residents (as a student Rich does not obtain residency in the State of Maryland), and as non-residents they can be sued in any county in the State. Rule 6-202(11)

Darryl may also make a motion for change of venue, if there is more than one proper venue. The place where the accident took place, Kent County, is also a proper venue when, as here, the claims being made are based on negligence. Rule 6-202(8). In deciding this motion the court will look at the burdens imposed on the parties by the change of venue, any potential prejudice that might result from the change, the relationship of the new venue to the claim, and the convenience of the new venue. The court will likely grant the change of venue because Kent County is where the plaintiff resides, where Darryl attends school and where the accident occurred. Kent County has substantial ties to the claim and the parties, and a change of venue motion will likely be granted.

d. Rich can argue that the court should dismiss because it lacks jurisdiction over him. Rich was served in accordance with Maryland's long arm statute, 6-102(a); however it must also be demonstrated that Rich has such minimum contacts with Maryland that the exercise of personal jurisdiction does not offend traditional notions of fair play and substantial justice.

(i) Minimum contacts - Rich has visited his son and attended a conference, amounting to three visits and also is the director of a company which sells to Maryland.

(ii) Foreseeability - because Rich loaned his car to Darryl to attend school in Maryland, it is highly foreseeable that Rich could be sued for negligent entrustment.

(iii) Relationship between claim and forum state: There is clearly a direct relationship between the negligent entrustment claim resulting from the accident and the forum state.

(iv) Fairness - it is fair that Rich be sued in the State where car was lent.

(v) Convenience - it is highly inconvenient for Rich to travel from Maine to Maryland to defend the lawsuit.

(vi) Interest of Interstate Policies - it is in Maryland's interest to have this claim litigated, there was no harm suffered in Maine.

Rich will have to argue that it is inconvenient, and there are not minimum contact in violation of his due process rights. However, given the strength of the other factors this claims will not likely be successful. Court will not grant a motion to dismiss for lack of personal jurisdiction.



#### QUESTION 4

Acme owned a large parcel of land fronting on East Street and West Street. In 1990, he filed a subdivision plat among the county land records which divided his land into three parcels, Lots 1, 2, and 3. The plat showed Lot 1 and Lot 2 as fronting on East Street and separated by a street titled "Acme Street". Acme Street is 65 feet wide and extends the length of each lot. It terminates at the boundary of Lot 3, which fronts on West Street as well. (See diagram). Acme conveyed Lot 2 to Mr. and Mrs. Baker as tenants by the entireties. The deed of conveyance identified the property as "Lot 2 as shown on the Acme Subdivision Plat." Later, Acme conveyed Lot 3 to Carr and this deed also referred to the subdivision plat. Acme retained ownership of Lot 1.

Neither the subdivision plat nor either of the deeds contained information as to the ownership or right to use Acme Street. Acme Street was never accepted by any governmental authority but is used by all three lot owners for access to East Street. Lot 3 also has access to West Street.

In 1995, Mr. and Mrs. Baker were divorced. In 2003, Mr. Baker died and his will left all of his property to the local YMCA. Mrs. Baker is still alive and lives on the property.

The County Roads Commission has decided to widen East Street by 75 feet and make it a denied access highway, thus closing off the existing intersection of Acme Street and East Street. In order to properly compensate affected property owners, it is necessary to determine the ownership interests in Lot 1, Lot 2 and Acme Street as well as who has the right to use Acme Street for access to East Street.

**A. Who currently owns Lot 2?**

**B. Who currently has fee simple ownership in Acme Street?**

**C. Who currently has the right to use Acme Street for access to East Street?**

**Explain your answers thoroughly.**

#### REPRESENTATIVE ANSWER 1

a. Currently, Lot 2 is owned by Mrs. Baker and YMCA as tenants in common.

Lot was originally owned by Mr. and Mrs. Baker as Tenants by the Entirety. However, this Tenancy by the Entireties was severed when the Bakers divorced in 1995. At that point Mr. and Mrs. Baker each owned a  $\frac{1}{2}$  interest in Lot 2 as tenants in common. When Mr. Baker died he conveyed his interest to YMCA. As such the YMCA and Mrs. Baker now each own a one-half interest as tenants in common.

b. Currently fee simple ownership in Acme Street is held by Acme ( $\frac{1}{2}$  interest extending

to the center of Acme Street), Mrs. Baker (1/4 interest extending to the center of Acme Street), and YMCA (1/4 interest extending to the center of Acme Street). The facts indicate that Acme Street, 65 feet wide extends the length of each lot. Impliedly, therefore, the owner's of Lots 1 and 2's boundaries extend to the center of Acme Street.

c. Since the County Roads Commission has decided to widen East Street and make it a "denied access" highway, closing off the Acme Street intersection, it is doubtful that anyone has the right to use Acme Street for access to East Street (at least not by car). However, if the county decides that persons may still access East Street by foot, car, Mrs. Baker, the YMCA as well as Acme all have the right to use Acme Street for such access. The subdivision plat may be said to have placed such a covenant or equitable servitude on Acme Street that runs with the land.

Lot 3 would have a right by implication (i.e. an easement by implication) to use Acme Street to access East Street.

Lots 1 and 2 may claim access via their ownership interests and alternatively the equitable servitude running with the land.

## **REPRESENTATIVE ANSWER 2**

a. A Tenancy by the Entirety is a grant of land to a married couple with a right of survivorship. Here Acme conveyed Lot 2 "To Mr. and Mrs. Baker" as tenants by the Entirety, therefore, prior to 1995 Lot 2 was held by Mr. and Mrs. Baker as Tenants by the Entirety. A Tenancy in Common has not right of survivorship and may be devised by Will. Here when Mr. Baker died leaving his property to the local YMCA, the local YMCA became a Tenant in Common with Mrs. Baker.

Lot 2 is owned by Mrs. Baker and YMCA as Tenants in Common.

b. Acme filed a subdivision plot and retained Lot 1. Because the plat not the deeds contained information as to the owner and no government authority accepted Acme Street, it remains with Acme in fee simple.

c. An easement is a right to use the land of another and may be crossed in several ways. An Easement by Implication occurs when there is a necessity to use, a common Grantor, continuous use, apparent use, and prior use of the serviette estate by the dominant estate. Here there is a necessity to use Acme Street for Lot 3, not Lot 2 to access East Street, and there was no prior use of Acme Street by Acme before forming the subdivision, therefore no easement by implication exists.

An Easement by Necessity occurs when there is a necessity and a common Grantor. Here, there is a common grantor, Lot 3 may use West Street and Lot 2 may use East Street, therefore, it is not strictly necessary, and no easement exists.

No easement by prescription or adverse possession, does not meet statutory period of 20 years. Acme was right to use Acme Street. No easement exists for Lot 2 or 3.

## QUESTION 5

In the late 1990's, Mineral X was discovered. It is a mineral that, when ingested, causes the average adult to appear younger in age.

A few companies in the 7 states where Mineral X was plentiful began manufacturing processed Mineral X and began making it available to consumers via direct shipping from the manufacturing plant via phone or Internet orders placed by the consumer. Processed Mineral X was approved by the Federal Drug Administration (FDA) and actually produced the very results (skin that looked a decade younger) that it purports to produce.

Mineral X is found in some areas of the State of Maryland, most notably in the soil around the Patuxent River. To capitalize on this growing market, John and Mary formed a Mineral X processing corporation in Maryland. They purchased a tract of land in Maryland where Mineral X was found to be plentiful, established a processing plant and a distribution company. Using essentially the same processing formula as the other seven (7) companies in the U.S., John and Mary packaged and sold their product as "America's Idol."

John and Mary persuaded the General Assembly of Maryland to enact a law prohibiting the import of Mineral X into the State. The purpose of the law was to encourage Maryland consumers to buy Maryland products.

Forty-nine year old Narcissist, resident of Gorgeous, Maryland, distraught about turning 50 and the advent of wrinkles, decided to order some Mineral X products via the Internet. He found "America's Idol" on line, but after perusing all the Mineral X websites, found one in New Mexico with discounted prices. Narcissist placed his order on line with the New Mexico company, called Dessert Flower, only to be told that Maryland state law precluded direct shipment of out-of-state Mineral X.

**Narcissist and Dessert Flower contact you, a licensed Maryland attorney, to find out if there is any way to challenge the State law. What would you advise? Discuss fully.**

## REPRESENTATIVE ANSWER 1

**Professional Responsibility** – It can be construed as a conflict of interest to represent more than one client on one same matter. I would have to meet with Narcissist and Desert Flower separately to discuss their personal interests and would obtain informed consent confirmed in writing to continue representing both.

**Standing** is found when a person suffers a harm that is fairly traceable to government action. Here, Narcissist is a Maryland resident who wants to purchase the banned product, he has standing. Desert Flower is a corporation wishing to do business in Maryland but is prohibited and has standing.

The **Commerce Clause** applies when states substantially interfere in the flow of interstate commerce. The Commerce Clause gives Congress sole authority to regulate interstate commerce. Here, Maryland's prohibition of Mineral X is placing a substantial burden on interstate commerce.

By interfering with interstate commerce, the State of Maryland will have to show that they are using the prohibition because it is necessary to achieve a compelling state interest.

Here, "John and Mary persuaded the General Assembly of Maryland to enact" the law to encourage Maryland consumers to buy Maryland products. Though the purpose is legitimate, this is not necessary to achieve that purpose and is not the least restrictive means available. It merely creates a monopoly for John and Mary even though their product is "essentially the same" as those offered out of state.

Also, I would argue that this statute violates the **Equal Protection Clause** of the Constitution incorporated to the states through the 14<sup>th</sup> amendment by treating in state and out of state suppliers of Mineral X differently.

This is not a suspect class and the rational basis test would be applied with the burden on Desert Flower to prove the law is not rationally related to a legitimate government interest.

The challenge based on the Commerce Clause would be successful but the Equal Protection challenge would not.

## **REPRESENTATIVE ANSWER 2**

### **Narcissist**

First, Narcissist would have to satisfy standing requirements and show that he has suffered an injury and therefore has a concrete personal stake in the outcome of the suit to be filed. Narcissist (N) would easily satisfy the standing requirement because he has placed an order on line with Desert Flower (DF), the New Mexico company, and has been told he cannot get his order because of a Maryland (MD) state law precluding direct shipment.

The Commerce Clause under Article I precludes any state from imposing laws that pose an undue burden on interstate commerce or enacting laws that will prevent the free flow of commerce. The Maryland law as it stands is preventing other states (7 other OS companies) from selling their Mineral X wares in Maryland. This surely is creating an undue burden on commerce. Maryland must show that the law enacted was necessary to satisfy an important interest. The law will not be successful because the purpose was to encourage Maryland's locals to buy local products.

Maryland cannot do this unless it is a market participant. Apart from N challenging the law under the commerce clause, N could argue that his substantive Due Process rights have been violated. N could argue that his right to self-fulfillment and determination has been denied. This however is not necessarily a fundamental right and therefore, N stands a greater chance of winning against the State by arguing that Maryland is violating the negative implications of the Commerce Clause.

### **Desert Flower (DF)**

DF can also satisfy standing by showing it has suffered an injury and has a concrete personal stake in its outcome because N, a potential customer, has placed an order which cannot be fulfilled due to the Maryland law.

DF can challenge the Maryland law under the Commerce Clause because it places an undue burden on interstate commerce and for the same reasons already state above.

DF can also argue under the Equal Protection Clause that they as a class of Mineral X producers have suffered discrimination and that their Mineral X counterparts in Maryland are getting better treatment. DF will have to show that the law Maryland enacted was not rationally related to a legitimate purpose. DF can easily show that because the means Maryland chose were too restrictive. Maryland could have chosen to tax out-of-state Mineral X products higher but instead it chose to prohibit all imports. DF will win on this equal protection claim.

Lastly, DF could argue that its right to earn income in Maryland has also been abridged. Courts see this substantive due process right to be a low level one so it will get a low scrutiny. DF must show the law was not rationally related to a legitimate purpose and this can be shown easily as already explained above.

## QUESTION 6

Attorney Agnes was admitted to practice law in the State of Maryland in December 2004. Immediately, she established a solo practice in Baltimore, Maryland. She advertised in the local paper as “The Accident Specialist”, since she was told that automobile accident cases are the bread and butter of a solo practice. Agnes received so many cases during her first year that she raised her hourly fee from \$100 to \$500, and hired an experienced Paralegal to handle office matters. Agnes delegated to Paralegal all authority to handle accident settlements – i.e., to meet with clients, review the settlement sheets and disburse the funds. Paralegal was also authorized to write checks on Agnes’ operating checking account since Agnes anticipated being too busy litigating cases.

Agnes was inundated with work. Agnes delegated all client communications to Paralegal since Agnes said that she was too busy to hold a client’s hand. Paralegal quickly became overwhelmed with the amount of work. Unbeknownst to Agnes, Paralegal stopped reconciling the operating checking account and began overdrawing on the account.

On June 3, 2006, Chuck Client saw Agnes’ ad, went to her office, and asked that Agnes represent him in a personal injury auto accident case that had occurred in the Fall of 2003. Agnes explained her contingent fee arrangement: 33% of the amount recovered if the matter is settled out of court, or 40% of amount recovered if trial and/or appeal become necessary. Agnes then verbally agreed to become Chuck’s attorney. Chuck paid a retainer of \$5,000, which was to be used to cover expected pretrial costs Paralegal placed the \$5,000 in the operating checking account. On July 15, Chuck inquired about the status of the case and Agnes stated that she would get back to him, but it appeared that she might have to file suit on Chuck’s behalf. Chuck Client called several times after that, but Agnes directed Paralegal to answer all of his calls. On August 3, 2005, Chuck cornered Agnes at her office and requested that she return his money since he no longer wanted Agnes to be his attorney. Agnes begged him to give her some time to come up with a portion of the retainer, stating that Paralegal had quit and the office books were in a shambles.

Chuck Client contacted Bar Counsel on September 15, 2005, because Agnes failed to honor his request and asked if there was anything to be done.

**A. What disciplinary actions, if any, might be filed based on the above facts? Discuss fully.**

At the disciplinary hearing, Agnes testified that she relied on Paralegal to open all necessary accounts and Agnes believed that Paralegal had done so. Bar Counsel then sought to introduce the following evidence:

1. A statement from Agnes’ estranged husband that she told him she “did not see the need to open any additional bank accounts for her practice since it was too costly”;
2. A statement from Agnes’ law professor that “in his opinion, Agnes liked to puff herself up and take on more than she could handle”;
3. A copy of a court record showing Agnes was convicted of misdemeanor theft in 1990.

**B. How should the Court rule on timely objections to the above, and why?**

**REPRESENTATIVE ANSWER 1**

**Part A**

The Maryland Rules of Professional Conduct govern.

**Advertising** - An attorney may not advertise specialties (unless patent) and cannot make allegations of success rates or expectancies without backing up with facts. Agnes' (A) ad in local paper advertised "The Accident Specialist." Not only is she claiming a specialty but she has no facts to back it up because she is newly admitted and was told that those cases are the bread and butter of solo practice.

**Fees** - Attorney's fees must be reasonable and must be fully expressed to clients. \$100 is reasonable but her raise to \$500 per hour in her first year is not.

**Contingency Fees** - Fees based on outcome of case have to be in writing and lay out amount, payment of court costs and fees, and when payment is to happen, and must be reasonable. Chuck hired A, who explained her contingent fee of 33% or 40% and verbally agreed. This must be in writing. The \$5,000 retainer might be reasonable but must be kept in a separate account and any extra must be returned to Chuck. The retainer was put in the operating account and could not be returned.

**Duties to Client** - An attorney owes duties of confidentiality, competence, loyalty and diligence. Here an incompetent new attorney hired a paralegal to do all work, and took too many cases. Non licensed people cannot carry out the attorney's duties. Paralegal met with clients, handled settlements and the checking. There is a duty of obedience - certain things the client has the right to decide, such as bringing suit. A intended to do things without input from Chuck. There is a duty of communication. Paralegal had to answer clients' questions and A would not return calls. Agnes should have given clients information to make informed decisions. A also did not follow through and get back to Chuck in a reasonable time, so she was not diligent.

**Part B**

**Marital Communications** - Either spouse can raise the privilege if married at the time of communication and it was within the scope of the marriage. If they were married at time A made statement it will not be allowed in because of privilege. It does not matter that they are estranged now.

**Opinion** - Lay opinions are admissible if relevant and not of specific or scientific value. Character evidence is not admissible to show propensity to commit act on trial for. It is inadmissible to impeach by opinion or reputation in the community. If professor indicates through foundation that he has relevant opinion he can testify.

**Past Crime** - If A testifies, she can be impeached by prior conviction of a crime of moral turpitude (such as truthfulness) or an enumerated felony. Theft is a crime of truthfulness but it is more than 15 years old so it will not be allowed.

## **REPRESENTATIVE ANSWER 2**

### **Part A**

Advertisements as a specialist are prohibited unless it is a patent attorney. Here, Agnes advertised as an "accident specialist".

Reasonable fees must be charged based on a lawyer's experience, a case's complexity, the need to solely focus on one case. Here the rate is not reasonable after only one year in practice to raise it from \$100 to \$500 and no facts to justify that increase. Non-lawyer employee cannot be delegated work that is legal work. Here, Agnes delegated to Paralegal settlement matters. Paralegal can meet clients and disburse funds. There is a duty to communicate. The lawyer can delegate some communication to a non lawyer but not all communications, as she did.

There is a duty to manage clients' funds. All client funds must be managed separate from the attorney's operating funds and diligently managed. Here Agnes' funds were not reconciled and were overdrawn.

Contingent fees must be clearly communicated and reasonable. Here, Agnes' percentages are not reasonable or clearly stated.

Client can always terminate representation at any time and are to receive the remainder of their retainer after expenses are withdrawn. That didn't happen.

### **Part B**

Husband's statement is privileged under marital communications during the marriage even though they are now estranged. Overruled. It is hearsay as well.

Opinion evidence is admissible as character evidence as long as it is relevant. Here Professor's statement on his opinion of Agnes is admissible and relevant as to her character which is under review. Sustained.

Prior conviction can be admitted as character evidence if it is used within 15 years of conviction to show an element of the current charges. Here, A's theft conviction occurred 16 years ago. Overruled.



## QUESTION 7

Caleb is Rufus' older brother. Rufus always looked to him for advice and help. Caleb wanted to sell his farm equipment sales and lease business which he operated in Westminster, Carroll County, Maryland. Rufus wanted to buy that business. Rufus told Caleb that he intended to operate it exactly as it was in place except for the change in ownership. In response to Rufus' request for all audited financial statements from 2001 of the business and specifically all information on the profitability of the business, Caleb produced a computer printout stating a modest profit of the business for 2001, 2002, and 2003. Caleb gave verbal assurances to Rufus that the computer printout accurately reflected the financial status of the business. Caleb told Rufus that there were no audited financial statements. In reliance on the computer printout and the verbal assurances of Caleb, Rufus purchased the business on January 1, 2005.

The computer printout produced by Caleb did not include adjustments for employee bonuses and taxes which the business had paid in 2001, 2002, and 2003. Rufus was not informed of these omissions. The inclusion of these adjustments put the business in a deficit position for these years as Rufus found out after the first year of operation of the business. Rufus had a loss of \$85,000 in the business operation in calendar year 2005.

Rufus has asked you as his attorney whether there is anything he can do about it. Rufus also stated to you that he has second thoughts about owning the business.

**Based on the given facts, give an analysis of cause(s) of action, if any, and possible defenses, and possible relief Rufus may have against Caleb. Explain your response in detail.**

### REPRESENTATIVE ANSWER 1

#### Causes of Action

1. **Fraudulent Misrepresentation.** Fraudulent misrepresentation occurs when a person misstates a material fact with the intent to defraud another. The other person relies on the representation (reasonably) and is damaged.

In this case, Caleb did not include adjustment to the company's financial printouts and made verbal assurances that the printout accurately reflected the financial status of the business. Caleb may claim that he had no intent to defraud and was unaware that these things were left out. However, the statements indicated that the company realized a modest profit in 2001, 2002 and 2003. Yet, the company was actually in a deficit. As the owner of the business Caleb would/should know that the company did not make a profit as stated in the financials.

Caleb's knowledge may provide enough for a jury to infer that he knew the printouts

were inaccurate and that he acted with the intent to defraud Rufus.

2. **Negligent Misrepresentation.** Negligence requires the Plaintiff to show a duty, breach of that duty, causation and damages.

**Duty:** Rufus may argue that Caleb owes a duty to any potential purchaser of the business to know the financial status of the company and reveal the inaccuracies of the printout. Rufus may also argue that Caleb owes a special duty to him because they have a special relationship. To prove a special relationship, the fact that the parties are related is not enough, on its own. However, a special relationship of trust may exist where, as here, one party is dependent on the other for advice or assistance and the party depended on **knows** that the other party will rely on his advice. The relationship in this case is not likely to equal the status of a **fiduciary** type of relationship because Rufus is clearly capable of asking questions and making decisions. However, it is a relationship that may cause the court to apply a higher duty on Caleb than if he sold the business to a stranger.

3. **Defenses.**

**Lack of intent:** As to the first claim, the only defense that Caleb may successfully put forth is that he lacked the required intent to defraud.

4. **Assumption of the Risk:** Caleb may argue that Rufus assumed the risk that the documents were inaccurate or didn't include everything. To show assumption of the risk, Caleb must show that Rufus knew of the risk of depending on the printouts and he voluntarily assumed that risk. There is no evidence here that Rufus was aware the financial printouts were inaccurate or incomplete. There is also no evidence that he had any reason to believe Caleb would act negligently (or intentionally) in misstating the accuracy of the reports.

5. **Contributory Negligence:** Contributory negligence exists where the Plaintiff is negligent in some way and contributes to his own loss. It is a complete bar to recovery in Maryland. In this case, Caleb may argue that Rufus was negligent for failing to insist on inspecting the books or obtaining audited financial statements. Given the relationship of the parties, the fact that Caleb provided financial information for several years of the business, and Rufus' reasonable reliance on Caleb's assurances, this defense is unlikely to succeed.

6. **Relief:** Rufus can sue for damages of \$85,000. Rufus can sue for a **rescission** of the contract if he can show that he made a **unilateral mistake**, Caleb was **aware** of this mistake and Rufus **relied** on this mistaken belief when he entered the contract.

## **REPRESENTATIVE ANSWER 2**

Rufus has a possible action against Caleb for misrepresentation. An intentional misrepresentation will be found where there is an intentional false statement of material fact or material omission and the other party relies on this misrepresentation, resulting in injury. Caleb's failure to include adjustments for employee bonuses and taxes in the computer printout he gave Rufus was an omission of material information. Information is material if it would likely be used by a reasonable

person in making a decision. Here, Rufus wanted the printouts to determine the profitability of the business; therefore, they were material. To claim **intentional** misrepresentation, Rufus must show intent on the part of Caleb. It may be difficult for Rufus to show intent. Rufus would argue that there is circumstantial evidence of intent because he made it clear to Caleb that he wanted “**all**” information on the profitability of the business. If Rufus is unable to prove intent, then he may have to rely on a negligent misrepresentation theory. In this case, Rufus will argue that Caleb owed him a duty to provide **all** the information he had.

From where might such a duty arise? Rufus could claim such a duty arises because (1) there is a confidential relationship between the two brothers since Rufus has always “looked to [Caleb] for advice and help” or (ii) that the duty arises because he asked for **all** relevant information and Caleb gave him verbal assurances that the printout accurately reflected the financial status. The latter argument is much stronger than the former.

Whether his cause of action rests on intentional or negligent misrepresentation, Rufus must also show causation and injury. Rufus has suffered an injury – the loss of \$85,000 in business operation in 2005 – but is this attributable to Caleb? Rufus will argue that but for the omission of material info, he would not have purchased the business, and therefore would not have had any loss. Even if the misrepresentation is an actual cause, is it a proximate cause of Rufus’ economic injuries? Rufus will likely argue that it was reasonably foreseeable that without the bonus and tax info., a purchaser would have believed he could **continue** to operate the business profitably. In fact, Rufus specifically told Caleb that he intended to operate the business exactly as it was. It was foreseeable, therefore, that Rufus would, in fact, lose money once employee bonuses and taxes were transferred in.

Caleb may argue that the verbal assurances he gave should not be allowed in if the purchase agreement was in writing. He could argue that the purchase agreement amounts to a complete integration. Caleb will not be successful, however, as evidence of fraud is always allowed to be introduced and is not barred by the parol evidence rule.

With respect to possible outcomes, given the misrepresentation, it is appropriate for the court to order rescission of the contract and to award damages to Rufus equal to the amount of the \$85,000 loss which is attributable to employee compensation bonuses and taxes.

## QUESTION 8

Ace & Bertha were lawfully married in Cumberland, Maryland in 1975. Two (2) children were born of their marriage, Larry, DOB 2/2/85, a housebound disabled child and Moe, DOB 4/4/87. Ace left Bertha in January, 1992 and begin living openly with Doris. Bertha sued Ace for an absolute divorce in the Circuit Court for Allegany County where Ace and Bertha both lived, seeking also child custody, child support and alimony. After a contested hearing the Circuit Court Judge entered on 6/1/92 a Judgment of Absolute Divorce in favor of Bertha which provided *inter alia*:

(a) That Bertha would have custody of the two (2) children and Ace would pay child support to Bertha of \$50.00 per week per child dating from 6/1/92 until further order of Court.

(b) That Ace would pay alimony to Bertha of \$100.00 per week for two (2) years dating from 6/1/92.

Ace promptly moved to Georgia with Doris. He had no contact with Bertha or the children. He never visited or paid any child or spousal support. Because of his father's recent death, Ace returned on February 1, 2006 to Cumberland, Maryland where Bertha continued to reside with Larry and Moe and her significant other. The child Moe is in the 11<sup>th</sup> grade and Larry's situation is unchanged. Bertha learned that Ace had returned to the area and has come to see you, a practicing Maryland attorney, to make a claim for alimony and child support from Ace, who stands to inherit substantial property from his late father. She would also like him to pay your attorney fees.

**Analyze and discuss the merits of Bertha's claims and Ace's possible defenses.**

### REPRESENTATIVE ANSWER 1

**Child Support** is calculated in Maryland by taking into account the income of each party but does consider the best interest of the child. In Maryland, a parent is required to pay child support until the child is 18 or if still in high school, either to age 19 or when the child graduates, whichever is sooner.

Child support can be extended for an adult child under certain circumstance such as mental retardation.

Here, Larry is 21 but he is a house-bound disabled child. The court can force Ace to continue making child support payments indefinitely.

Moe is in 11<sup>th</sup> grade but he is close to turning 19. Ace will have to continue to pay until Moe's 19<sup>th</sup> birthday.

**Alimony** is generally awarded as rehabilitative. It is determined by factors including each spouse's income and ability to maintain or increase their income. The length of the marriage is also considered. Here, the court awarded rehabilitative alimony for two years.

Bertha will need to file for a contempt hearing in the Circuit Court for Allegany County for Bert

not paying the court ordered child and spousal support.

**Attorney's fees** can be awarded in an enforcement proceeding. It is granted at the court's discretion.

**Defenses** – Statute of Limitations. Both support order were dated 6/1/92. There is no Statute of Limitations on collecting child support.

It has been 14 years since the alimony was awarded. Bertha knew Ace moved to Georgia but did not seek to enforce the order in Georgia. Georgia would have given full faith and credit to both orders.

Ace could also try to argue there is a significant change in circumstance to either lower or terminate Larry's child support. Bertha now lives with a significant other. There are not enough facts to fully analyze this argument.

## **REPRESENTATIVE ANSWER 2**

(Ace – “A”; Bertha – “B”; Larry – “L”; Moe – “M”; Doris “D”)

I would explain the following to B regarding her claims against A and A's possible defenses:

1. **Child Support**: As per the Circuit Court order, which had jurisdiction since both A and B lived in the county, A had a duty to pay \$50 per week per child. Child support continues until the children reach the age of 18, or 19, if still in high school.

L would have turned 18 on 2/2/2003, so A is definitely obligated to pay until that done. Additionally, since L is housebound and disabled, A may have a duty to continue payments if it is in the “best interest of the child” beyond the age of 18.

M would have turned 18 in 2005, but since he is still in high school (11<sup>th</sup> grade), A has a duty to continue making payments until he turns 19 on 4/4/06.

**Defense**: A may claim that since he has had no contact with the children, he had no responsibility to pay. This claim is without merit since the “best interest of the child” standard governs regardless of A's contact with the children.

A may also claim that since he moved to Georgia with D, he had no responsibility to make payments in Maryland. This is also without merit since States give full faith and credit to family law determinations such as child support payments.

2. **Alimony**: As per the valid court order in 1992, A was required to pay B \$100 per week for 2 years (until 1994). When A moved to Georgia, he never paid any spousal support to B.

B should be able to recover the full amount of alimony from A. B may claim that since A now has a “significant other”, there is no reason to pay her support. However, we do not know

whether B moved in with the significant other before or after A's final payment was due, so there appears no factual basis for reducing past payments due.

3. **A's Best Defense: Lack of Jurisdiction:** If B tries to enforce these claims in a Maryland court, A will claim that he lives in Georgia so the court in Maryland lacks personal jurisdiction over him. Additionally, the only reason A came back is to attend to his family situation and there is no evidence he plans to remain in Maryland.

A series of federal statements will permit B to recover from A regardless of his move to Georgia including the full faith and credit given to family law decisions in other states.

4. **Attorney's Fees, New Inheritance:** B will have no right to recover any of A's newly inherited property, and it may be difficult to recover attorney's fees now that B is living with a significant other and the period for spousal support has terminated.

## QUESTION 9

Watson has a checking account with Alpha Bank. The account was designated as a “Petty Cash” account. Watson never wrote checks over \$10 from this account. Watson’s sister, Frieda, who was temporarily staying with Watson, forged Watson’s signature on two checks from Watson’s Alpha Bank account. One check was for \$1,000 and the other was for \$5,000.

Frieda first deposited the \$1,000 check in her account at Beta Bank. She then later deposited the \$5,000 check at Beta Bank. Beta Bank timely transferred each check to Alpha Bank for payment. Alpha bank debited Watson’s account for the \$1,000 check on May 1, 2004 and the \$5,000 on June 1, 2004. These transactions were included respectively in Watson’s June and July 2004 statements. Frieda later withdrew the \$6,000 from her Beta Bank account and left for parts unknown.

After bouncing a check for \$10 at the end of May 2005, Watson reviewed all of his bank statements for the past year and saw the unauthorized \$1,000 and \$5,000 transactions. He notified Alpha Bank in the beginning of July, 2005, of the unauthorized transactions. Watson demanded from Alpha Bank repayment of both checks.

**Discuss fully the rights of each party (except for Frieda) under Maryland commercial law with respect to the unauthorized transactions.**

### REPRESENTATIVE ANSWER 1

Generally, under 4-401 a bank may charge the account of a customer if the item is properly payable; properly payable means that the check was authorized.

Here, the check written by Frieda was not properly payable by Alpha bank because the check was unauthorized and therefore, the Alpha Bank may not charge the loss to Watson.

However, under 4-406, the dollar allocation of the damage is based on comparative fault. A customer must use reasonable care in examining statements received from the bank. Here, it does not appear that Watson exercised reasonable care because he did not notice the statements until a year later. So he may be somewhat at fault under 4-406(c). However, since the account was labeled “petty cash” and Watson only wrote checks for \$10, if Watson can show that the bank failed to use reasonable care in paying the checks, then Watson may be able to assert partial negligence against the bank. Under 4-406 (e) this loss is allocated between the customer and the bank.

However, under 4-406(f), a customer that fails to notify the bank within 12 months loses claims above. Applying the dates, since Watson failed to notify Alpha until July 2005, he will not be able to assert a claim for the \$1,000 because this was on the June 2004 statement. But the \$5,000 is on the July 2004 statement so he just made this one.

Assuming Beta submitted checks in good faith, there is no cause of action against Beta bank.

## REPRESENTATIVE ANSWER 2

This question involves UCC 3/4

*Watson v. Beta Bank*

**Negotiable Instrument** – Here, 2 checks (drafts) are at issue, which are negotiable instruments.

**Holder** – Is a person entitled to enforce who is in possession of bearer paper or in possession of order paper containing all necessary signatures.

**Holder In Due Course (HDC)** – Is a holder who took in good faith, for value, and without notice of any claims or defenses. Here, Beta Bank is an HDC, and the facts do not indicate it had notice.

**Conclusion** – Watson has no claim against Beta.

*Watson v. Alpha Bank*

**Properly Payable § 4-401** – A bank may only charge a customer's account if the item is properly payable/authorized by the customer. Here, "Frieda forged Watson's signature on the 2 checks," and thus the checks did not contain all necessary signatures and it was not properly payable and Alpha did not have a right to charge the account.

### **§ 4-406 – Customers' Duty to Report Unauthorized Signatures**

A customer has a duty to promptly review statements and notify the bank of any unauthorized signatures. Here, Watson's "June & July 2004 statements" included the unauthorized transactions and Watson did not notify Alpha until July 2005. Thus, Watson did not comply with his review duties with respect to the checks.

**Ordinary Care** – A bank must exercise ordinary care in paying items. Here, "Watson has a checking account with Alpha designated as 'petty cash' and he never wrote checks over \$10.00 from this account." Thus, Alpha was on constructive notice and did not exercise ordinary care.

**Result:** Because Watson failed to review the first check within 1 year he is precluded from asserting a claim against Alpha on that check but can get the damages for check number two apportioned between himself and Alpha. Alpha may not recover for breach of warranty.



## QUESTION 10

Bill operated a sports memorabilia shop on Empire Boulevard in Frederick, Maryland. As he prepared to close the shop for the day, Todd and Matt entered through the front door. Todd was armed with a handgun. He ordered Bill to the back of the shop while Matt stayed out front. Bill and Todd entered the office where Todd demanded the contents of the safe. Bill opened the safe, pulled a handgun out, and shot Todd, killing him instantly. Hearing the gunfire, Matt grabbed the contents of the cash register, \$475, and fled.

Officer Garcia was on routine patrol about half a mile from the shop when he received the call for a robbery in progress over the radio. En route to the shop, Officer Garcia came upon Matt who began running away at top speed when he saw the officer. Officer Garcia stopped Matt and explained that a store in the area had just been robbed. The officer asked Matt if he could search him. Matt put his hands in the air and said, “you’ll just be wasting your time.” Officer Garcia searched and found \$475 in Matt’s left front pants pocket. He wrote down Matt’s name and address and continued to the shop.

A week later, Officer Garcia learned that Todd had a younger brother named Matt. Armed with the knowledge that exactly \$475 had been stolen from the memorabilia shop in the robbery, and determined to earn his detective stripes, Officer Garcia went to the address Matt had provided and arrested him. Officer Garcia took Matt to the police station for questioning. He administered Matt’s Miranda warnings. Matt demanded to speak with an attorney. The officer stated “I can’t get you a lawyer but I can get you a free ride to the city jail.” Three hours later, while sitting alone in a holding cell waiting to be transported to jail, Matt yelled “Stop playing these mind games! I can’t take the pressure! I’ll talk! I’ll talk!” He then confessed to Officer Garcia.

- a. **What charges might be brought against Matt?**
- b. **Matt’s attorney files a motion to suppress the money and confession. How will the court rule on the motions? Discuss Fully.**

### REPRESENTATIVE ANSWER 1

(A) **Conspiracy to commit robbery** - Is an agreement by two or more to commit a crime. Robbery – To take personal property of another by force. Here, (T) & (M) entered a store with a deadly weapon to rob.

**Co-conspirator liability** - Co-conspirators are liable for all acts that are foreseeable by co-conspirators. The fact that (M) was not armed still makes him liable for (T’s) acts.

**Assault with a deadly weapon** - (T) assaulted (B) with the weapon (gun) to get contents of the safe, which is attributable to (M).

**Felony murder** - A killing in the commission of a felony. Here, (B) shot and killed (T). (M) will not be liable for co-conspirator's death because Maryland applies agency theory and (M) was not agent of (B).

**Theft** - (M) took \$475 from cash register with the intent to deprive.

(B) The **4<sup>th</sup> Amendment** gives citizens the right to be protected from **unreasonable search and seizures**.

**Standing** - Is the right to object to search and seizures. The defendant has to show that their rights were violated. (M) does have standing to object. His rights to an attorney were not violated because the police stopped questioning, but his arrest was improper because they had no arrest warrant. Thus, any evidence in the strictest standard has to show that the police had an independent source to escape the fruit of the poisonous tree standard.

### **Money**

Officer Jones had a right to stop (M) on the street

**Stop and Frisk exception** – (J) saw (M) running away at a fast speed in close proximity to the robbery. Thus, there was reasonable articulable suspicion that (M) may be involved.

**Frisk** – (J) knew it was armed robbery and the fact that (M) was running (J) could do a limited patdown of (M). Besides (M) consented to a search where the bundle of money was found. The money will not be suppressed.

### **Confession**

An argument can be made that even though the arrest was not valid because they had no warrant, they never forced (M) to talk. (M) did it on his own. However, the fact that (M) should not have been there in the first place because of the warrantless arrest, the statement will not come in.

## **REPRESENTATIVE ANSWER 2**

**A.** Matt will be charged for conspiracy, robbery, larceny, assault, false imprisonment and solicitation.

When Todd asked Matt to go and rob the store, the crime of solicitation was complete. However, solicitation merges with the substantive crime.

We can assume from the facts that there is conspiracy since Todd and Matt entered through the front door of the sport memorabilia shop. Conspiracy is an agreement between two or more people to commit a felony. The co-conspirator is guilty for all subsequent crimes. Therefore, Matt will be charged with armed robbery as Todd was armed with a handgun. Matt is responsible for the crimes committed by Todd in furtherance of the conspiracy. He will be charged with robbery which is larceny by threat or use of force. Matt, when he grabbed the contents of the cash register and fled

with \$475, could be charged with theft, as he took and carried away the property of another. Maryland criminal law does not require the element to permanently deprive the owner for the defendant to be guilty of theft crimes.

He could be charged with felony murder but the agency rule applies and therefore he will not be culpable hence Matt will not be liable for the death of Todd by Bill.

When Todd ordered Bill to the back of the shop while Matt stayed out front, Matt could be charged with false imprisonment for Bill was taken within a bounded area and he was aware of the confinement. Matt could also be charged with assault which is an intent to commit battery and causing of bodily harm or threat of harm on Bill, by using the handgun to threaten Bill.

**B.** Matt's attorney's motion to suppress will likely be denied by the Court as related to the \$475. Here, Officer Garcia has a reasonable suspicion and ultimately probable cause to stop and search Matt. Matt has a reasonable expectation of privacy and he is protected by the 4<sup>th</sup> and 5<sup>th</sup> Amendment of self incrimination. However, given the fact that Officer Garcia was around the area when he received the call that an armed robbery was in progress, and as he came upon Matt he began to run away at top speed. Officer Garcia has reasonable suspicion to stop and frisk Matt. Also, Officer Garcia asked if he could search him and Matt put his hands in the air and said you will not find nothing. This implies consent and therefore, even if no reasonable suspicion, it will come in under consent.

Officer Garcia violated Matt's 4<sup>th</sup> Amendment right (as defined above) when he arrested him in his home without a warrant. This is an illegal arrest and therefore, all evidence elicited by the unlawful arrest may be suppressed.

Matt's attorney will argue that Officer Garcia also violated Matt's 6<sup>th</sup> Amendment right to counsel or 5<sup>th</sup> Amendment right to self incrimination. However, Matt was not interrogated for Officer Garcia only told him that "I can't get you a lawyer, but I can get you a free ride to jail." This statement standing alone does not amount to interrogation. Therefore, Matt's confession may be voluntary as it was not coerced, it was made intelligently and knowingly.

Nevertheless, the Court may suppress the confession since it is the fruit of illegal arrest. Officer Garcia could simply go to a detached magistrate and obtain a warrant before executing the arrest.

Therefore, the Court may deny the confession but grant the 475.

## QUESTION 11

Bud and Lou formed New Frontier Development, Inc. ("New Frontier"), a Maryland corporation, for the purposes of acquiring, subdividing, developing, and selling residential lots in Montgomery County, Maryland. Bud and Lou were the sole and equal shareholders of New Frontier, and served as the sole officers and directors of New Frontier.

In 2002, New Frontier acquired land in Poolesville, Maryland, known as Greenacre Estates ("Greenacre"). During its development of Greenacre, New Frontier created the Greenacre Homeowner Association ("HOA") and appointed Bud and Lou as its sole officers and directors. After selling its final lot in Greenacre in February 2004, New Frontier declared a bonus and distributed all of the remaining cash from the sale of Greenacre lots to Bud and Lou in equal shares in March 2004.

In October 2005, the HOA had its books audited and determined that: (i) its chronic cash flow problems resulted from the failure of New Frontier to pay required annual assessments to the HOA during 2003 and 2004 when New Frontier owned lots in the subdivision; and (ii) New Frontier failed to convey the common area property to the HOA, as it was required to do under the HOA documents. When the HOA attempted to contact New Frontier about these deficiencies in November 2005, the HOA learned that New Frontier had forfeited its charter in 2004 after failing to file annual reports with the Maryland State Department of Assessments and Taxation ("SDAT") in 2003 and 2004.

In January 2006, the HOA president, with consent of the HOA board, comes to you, a Maryland attorney, to ask how the HOA can obtain title to its common area property and recover all past assessments from New Frontier.

**What advice will you give to the ROA about possible claims against Bud, Lou, and New Frontier? What is the likelihood of success? Explain your answer fully.**

### REPRESENTATIVE ANSWER 1

Specific Performance against New Frontier

The HOA can bring an action against New Frontier for specific performance on the agreement to convey the common area property. The action would be brought against Bud and Lou, in their capacities as trustees of the assets and the property owned by New Frontier (when a corporation forfeits its charter, its property is held in trust). This claim would probably succeed unless there is another competing claim to the property (creditor, etc.)

Action to Recover Assessments from Bud and Lou as Shareholders

The HOA can also bring an action against Bud and Lou as shareholders. Typically, a corporation's shareholders are not liable for the debts of the corporation; however, the Courts will "pierce the corporate veil" and hold Shareholders liable where there is a showing of fraud or it is

necessary to enforce a manifest equity. HOA can allege that Bud and Lou treated the corporation as a shell, and that they really just entered into business agreement on behalf of themselves and commingled corporate funds with their own. This will probably not win on the facts given.

#### Action against Bud and Lou for Breach of Duty of Loyalty and Duty of Care

HOA can bring an action against Bud and Lou as directors of HOA for breach of duty of care. Bud and Lou appear to have completely ignored their duties to HOA, and failed to exercise reasonably prudent judgment in not paying the assessments on delivering the property.

In addition, Bud and Lou may be held for breach of duty of care and loyalty to New Frontier, although I am not sure HOA has standing to bring that suit. If they do, Bud and Lou will likely be found liable. Although the business judgment rule typically protects directors in making business decisions, the decision to declare a bonus was likely a breach because it appears that New Frontier may have been rendered insolvent by this action. Thus, they likely breached their duties to New Frontier.

### **REPRESENTATIVE ANSWER 2**

#### **Duty of care/loyalty**

Directors and officers are required to make decisions concerning the corporation (1) in good faith, (2) that are in the best interests of the corporation, and (3) with the care that an ordinarily prudent person would under the circumstances. The HOA could argue that Lou and Bud did not exercise care in its duties to pay annual assessments or to convey the common areas, or alternatively, did so in bad faith. If the HOA succeeds it could collect from New Frontier, but since New Frontier has no assets, it would have to pierce the corporate veil (PCV) to collect. PCV is generally only allowed in the presence of fraud or to right a paramount equity. This is an extremely high burden for HOA and there are no facts to support this burden there is insufficient paramount equity. The HOA would not recover under this course of action.

#### **Breach of contract**

HOA could sue New Frontier for breach of contract for (1) not paying assessments and (2) not conveying the common areas. This action would be successful because there are express provisions that New Frontier did not comply with. However, since New Frontier has no assets, they would not likely recover money under this course of action, but could have the common areas conveyed.

#### **Ultra Vires Act**

In Maryland, a plaintiff can recover for an ultra vires act that has harmed the plaintiff. In this case, the charter for New Frontier was forfeited in 2004. At this point the corporation ceased to exist, and Bud and Lou are now trustees in liquidation. The distribution in 2004 was an ultra vires act (assuming charter forfeited before March 2004) because Lou and Bud could not distribute to

themselves as shareholders until all creditors were paid. Since the HOA was owed assessments it was a creditor and it should have been paid. Lou and Bud as trustees could be personally liable for the unauthorized distribution.

## QUESTION 12

In September 2005, Jane and Mark Jones, residents of Baltimore County, Maryland decided to seek a divorce. They met with their business lawyer, Charles Counsel, a Maryland lawyer. Counsel told them that since they did not have any children, they could divide their assets equally and he would draft a separation agreement for them and Me all appropriate documents with the Court. Counsel gave Jane and Mark each a set of forms for the preparation of their financial statements for use in their divorce action.

Mark Jones reported on his financial statement that he was the sole owner of a failing computer software company and that the business would be shut down by November 30, 2005. Mark delivered his completed financial statement to Counsel and to Jane. Counsel filed Mark's and Jane's financial statements in their divorce action in October 2005.

In November 2005, Mark asked Counsel to assist him with collecting money from a defense contractor that owed his computer company \$400,000 for services rendered in 2004 and 2005. After receiving Counsel's letter threatening legal action, the contractor paid the full amount owed on November 20th, out of which Mark paid himself his unpaid salary. He immediately began soliciting new contracts for the company.

In December 2005, the Court granted Mark and Jane a divorce. The Court approved the division of assets based upon the October 2005 financial statements filed by Counsel and the separation agreement signed by Mark and Jane.

In early February 2006, Jane learned that Mark did not close down his business, that he was able to pay himself his substantial past due salary from the company, and that Charles Counsel continued to represent Mark and the company.

Jane files a complaint against Charles Counsel based on the above facts with the Attorney Grievance Commission of Maryland.

**What, if any, ethical obligations did Charles Counsel violate? Please explain your answer fully, stating the bases for any violation of the Maryland Lawyers' Rules of Professional Conduct by Charles Counsel.**

### REPRESENTATIVE ANSWER 1

An attorney has an obligation to provide competent, diligent and zealous representation to his client, free from conflicts of interest.

Here, Counsel has violated the ethical obligation to avoid conflicts of interest as he was representing both Jane and Mark in the divorce action. The only way Counsel should have agreed to represent them both is after gaining written consent from both parties and ensuring that the interests of the parties were not directly or materially adverse to one another. Here, it could be reasonably inferred that Jane and Mark's interests were directly and materially adverse.

In addition, an attorney has a duty of competence. Here, Counsel was a business lawyer, not a divorce lawyer, which on its face does not mean Counsel was incompetent to handle a divorce, but does suggest that a referral to a lawyer more skilled in such matters may have been more appropriate.

An attorney also has an ethical obligation to be honest in his dealings and to give candor to the tribunal. Here, Mark delivered his financial statement to Counsel stating that his business would be shut down by November 30, 2005. Counsel filed this and Jane's statement in October 2005. After the filing of Mark's statement, Counsel assisted Mark in obtaining the full amount due from a contractor out of which Mark paid himself his unpaid salary and Mark continued his business. Counsel knew of these events and did not notify the Court or advise Mark to amend his financial statement. Consequently, he breached his ethical duties.

## **REPRESENTATIVE ANSWER 2**

1. Although Jane and Mark approached Charles together, he should not have agreed to represent them both. He should have explained that their interests were adverse and that he could not give both competent, fair representation. In the event that he did agree to represent both (although he should not), he should have gotten written, informed consent from both parties. He did not.
2. Charles helped Mark perpetrate a financial fraud against Jane after filing a financial statement in October 2005, he represented Mark in an action that netted Mark's company \$400,000. This money was not included in the financial statement that Jane saw or Charles filed. It is against the professional conduct rules for an attorney to assist a client in any illegal undertakings.
3. Charles did not provide Jane with competent legal counsel. He failed to provide her with all the information necessary to ensure that she received a fair settlement in the divorce action. The Rules require counsel to provide competent representation.
4. Charles also represented Mark's company. Although the representation worked out as an advantage to Mark, it created a disadvantage for Jane who was under the impression that the company was failing and would be closing down by the end of 2005.
5. Charles perpetuated a fraud on the court. Although the financial statement he filed on Mark's behalf was accurate in October, he knew by December that the statement was grossly inaccurate. He had a duty of candor to the tribunal and was required to file an amended statement based on Mark's change in circumstances.



6. It should be pointed out that while all Charles' actions were unfair to Jane, to notify her of Mark's change in circumstances would have been against Mark's interest. Charles acted competently/fairly in his representation to Mark.