

## JULY 2007 BAR EXAMINATION

### QUESTIONS AND REPRESENTATIVE GOOD ANSWERS

#### QUESTION 1

On February 1, 2007, Seller and Buyer entered into a valid written Contract to sell a Parcel of land in a commercial area of Prince George's County, Maryland for \$1 million. The Seller agreed to deliver marketable title free of liens, "subject to all restrictions of record."

Buyer retained Swift, a Maryland attorney, to examine title to the parcel. Swift provided Buyer with a written title report (opinion) dated November 15, 2006, certifying that Seller's title is "good and marketable and free and clear of all liens, encumbrances, and restrictions, without exception."

On February 28, 2007, at Buyer's request, Swift prepared and a provided to Buyer an Assignment and Assumption Agreement, by which Buyer, for valuable consideration, assigned the land contract to Commercial Developers, LLC, and by which Commercial Developers, LLC assumed all of Buyer's rights and obligations under the land contract. This Assignment was duly executed by Buyer and Commercial Developers, LLC and consented to by Seller. At the same time, without Swift's knowledge, Buyer forwarded the title opinion to Commercial Developers, LLC, even though this was not required by the Assignment.

Relying on the title opinion, Commercial Developers spent \$50,000 for engineering and made a required deposit of \$100,000 pursuant to the land contract. Prior to the scheduled settlement date, Commercial Developers, LLC learned that the parcel was subject to recorded restrictive covenants which severely limited commercial development. These restrictive covenants, which were unreported by Swift, rendered the parcel useless to Commercial Developers and substantially diminished its value.

Commercial Developers, LLC wants to rescind the contract with Seller and sue Swift for damages for his erroneous title analysis.

**You are in-house counsel for Commercial Developers, LLC. Advise your client of the likelihood of success in pursuing these two courses of action. Explain your reasons.**

#### REPRESENTATIVE ANSWER 1

This contract is governed by the common law because it is for the sale of land. There is a "valid written contract" between seller and buyer. There is a valid assignment of the contract from buyer to Commercial Developers, LLC ("CD, LLC"). The seller here consented to the assignment.

Terms: The price is 1 million. The seller also agreed to provide "good and marketable title" free of liens but "subject to all restrictions of record". Rescinding Contract with seller.

If the seller is in breach then CD, LLC will be allowed to rescind the contract if the breach causes the parcel to be “substantially diminished on value” which the parcel is to CD, LLC. The contract between seller and buyer which CD, LLC assumed all rights and obligations was only to deliver marketable title free of liens but also “subject to all restrictions of record.” The restrictive covenants on the parcel were “recorded” and thus in the chain of title. The seller here is not in breach according to the terms of the contract between buyer and seller. CD, LLC will not be able to rescind the contract. Unilateral mistake may not help because CD, LLC was supposed to run their own title search and seller is not implicated in Swift’s error.

### Suing Swift for Damages.

As buyers lawyer Swift owed a duty of care, and competence to buyer. Swift prepared the title report for buyer on November 15, 2006; if he was mistaken he is liable to buyer for that mistake.

Buyer sent the report to CD LLC “even though it was not required by the assignment” and “without Swift’s knowledge”.

CD LLC relied on the title opinion but it is questionable if the reliance was reasonable. First the report was 2 months old, second Swift was not CD LLC’s counsel nor did Swift try to induce reliance on the part of CD, LLC which may have different needs than buyer. Also the report was not part of the Assumption Agreement – indicating CD; LLC intended to do its own title report. Because the covenants have “substantially diminished the value” of the parcel, CD, LLC does have damages \$100,000 deposit and \$50,000 engineering on reliance of the sale. However, it is not as likely that CD, LLC can recover from Swift who did not prepare the report for CD, LLC’s behalf but for buyer alone.

Estoppel (because of reliance) may not work because CD, LLC and Swift have no direct relationship and Swift (in error) made no representations to CD, LLC. On the other hand, Swift prepared the assignment contract so he was on notice that CD, LLC was interested in the parcel, but buyer sent the title report without notice to Swift.

If CD, LLC’s reliance on the report was reasonable (a close question of fact) then CD, LLC can recover against Swift. If unreasonable, then no recovery against Swift.

## **REPRESENTATIVE ANSWER 2**

Commercial Developers, LLC (CD) acquired all rights and duties under the original law contract between Seller and Buyer. As a result, CD may sue under the contract for any breach by Seller that Buyer would have been able to.

There are generally two warranties made by the Seller in any land contract – that the Seller will provide marketable title at closing and that he will not make any material misrepresentation. Here, however, Seller expressly disclaimed the general warranty to provide marketable title – he promised to provide title free of liens, but subject to all restrictions of

record. The restrictive covenants that would end up rendering the parcel useless to CD were recorded, and thus within Seller's reference to "all restrictions of record." These restrictions were easily discoverable by an adequate, diligent title search. Seller is not responsible for the failure of Swift, to discover them, as Seller made no affirmative misrepresentations as to the property (or even failure to disclose) and thus has not breached the contract. CD has no cause of action for damages under the contract, and because there is a valid contract, may not sue under quasi-contract either.

Swift was Buyer's attorney. He was under no contractual duties to CD. Though CD assumed the rights and duties of the Buyer-Seller contract, there was no assignment or delegation of Swift's retention agreement with Buyer. Thus CD has no claim for damages under contract and would have to pursue an equitable claim. Though clearly CD relied on Swift's title search, Swift made no promise, let alone a clear and definite one, to them. He, in fact, had absolutely no knowledge of their use of the title search. Their reliance was thus not foreseeable. Even if he could have foreseen their use of his search, it does not rise to the requirements of quasi-contract or promissory estoppel claims in Maryland. Finally, CD would have a hard time showing their detriment was reasonable, or unjust. They could have, and as a corporate development company, should have retained their own counsel instead of relying, blindly on the counsel of the Buyer.

## QUESTION 2

Tom Jones and Sophie Western were celebrating their recent engagement at a tavern in Caroline County, Maryland, when they encountered Bill Blifill. Jones and Blifill got into a shoving match. Blifill filed a tort action against Jones in the Circuit Court for Caroline County, alleging that he suffered permanent injuries as a result of Jones' actions. Trial was held on June 1, 2006.

Smith, an eyewitness, was called by Blifill's lawyer to testify. Smith testified that she could not recall who started the fight. This statement varied from her earlier deposition testimony. Blifill's lawyer then asked Smith if she had ever made a statement which contradicted her last answer. The attorney for Jones timely objected to the question on the grounds that (1) Blifill was attempting to impeach his own witness and (2) Blifill had to disclose the contents of any such prior statement prior to asking the witness questions about it.

**a. How should the Court rule on Blifill's counsel's objections? Explain your answer thoroughly.**

At the trial, Blifill testified that he had been quietly nursing a beer at the bar when he was shoved and punched by Jones. On cross examination, Jones' lawyer asked Blifill whether he had been convicted of a crime. Blifill's attorney timely objected. Jones' lawyer then proffered to the Court that Blifill had been convicted of three crimes: possession of dangerous weapons in 2003, malicious destruction of property in 2004 and theft in 1990. Jones' lawyer proffered that the evidence was relevant to show Blifill's violent character and lack of credibility. All of the convictions were misdemeanors.

**b. How should the Court rule on Blifill's counsel's objection? Explain your answer thoroughly.**

On cross examination, Jones' lawyer also asked Blifill if he previously had stolen money from his former employer. In response Blifill invoked the Fifth Amendment. Jones' lawyer timely moved the Court to compel a response from Blifill, citing waiver.

**c. How should the Court rule on Jones' lawyer's motion to compel? Explain your answer thoroughly.**

## REPRESENTATIVE ANSWER 1

a. Even though Blifill's lawyer called Smith as a witness he can impeach her on her inconsistent statement that she did not know who started the fight. In Maryland it used to be the case that you could not impeach your own witness. That rule has been changed and anyone can

impeach a witness, even the lawyer who called the witness. The court will overrule Jones' lawyer regarding impeachment of Smith.

As to Jones' lawyer's second basis for objection that "Blifill had to disclose the contents of any such prior statement prior to asking the witness questions about it," the judge will also overrule the objection. A witness does not have to be told about the statement before being examined about it. This is especially true here where the statement was made in a deposition which would have presumably been conducted under oath and with Smith present. Blifill's attorney must only give Smith an opportunity to explain the difference, after she has been confronted with the prior statement.

b. Jones' attorney cannot use the crimes to show Blifill's "violent character." Such character evidence is inadmissible to show the same kind of behavior in another matter. Criminal convictions can only be used when they reflect on the candor of a witness. Although the 1990 theft conviction is a crime that reflects on credibility, it is over 15 years and is not allowed under the Maryland Rules (10 in federal court). The possession of dangerous weapons and malicious destruction of property convictions are not too old, but do not reflect on Blifill's credibility.

c. While in a criminal case, a witness waives the 5<sup>th</sup> once they take the stand and testify, in a civil case there is no such waiver. Therefore, Blifill can invoke his 5<sup>th</sup> amendment privilege on each question that he believes is incriminating. The Court may conduct a hearing to determine whether there is a legitimate concern of self-incrimination, but it will not compel Blifill to testify unless the concern is unfounded. Jones is entitled to have an adverse inference drawn from every question that Blifill invokes the 5<sup>th</sup>.

## **REPRESENTATIVE ANSWER 2**

a.

### Impeaching Own Witness

Objection overruled. Any party can impeach their own witness, as long as it is done in good faith and not tacking on. B's atty can therefore impeach S on account of her prior inconsistent statement regarding who started the fight.

### Disclosure of Statement

Objection overruled. B's atty does not have to disclose S's prior deposition statement. All that is required in Maryland is the witness be given an opportunity to explain her answer after she has testified.

b.

### Prior Crimes

Objections sustained. Prior crimes are inadmissible to show conformity with character. Thus, none of the crimes can be used by J's atty to show B's "violent character." Prior crimes can be used to show a witness' lack of credibility. However, the court must first see if the crimes bear on credibility and whether they are within 15 years. The court also must weigh the probative value of the evidence to determine whether it is outweighed by the danger of prejudice, confusion or misleading the jury. Here, B's crime of possession of dangerous weapons and malicious destruction of property do not bear on credibility, and are inadmissible. While B's theft crime does bear on credibility, it is more than 15 years and will not be allowed.

c.

### The Fifth Amend

Motion denied. The court will deny J's atty's motion to compel because a witness does not waive the 5<sup>th</sup> amendment by taking the stand in a civil case. Rather, in a civil case B can assert the 5<sup>th</sup> on a question by question basis.

### QUESTION 3

On June 1, 2006, Steve Sculptor (“Steve”) and Carla Collector (“Carla”) asked Luther Lawyer (“Luther”), a Maryland lawyer, to form a company to own and sell Steve’s work. Luther prepared Articles of Organization creating the Starving Artist LLC (the “LLC”), which provided that the LLC was created for the purpose of owning, marketing and selling the works of art created by Steve. Carla and Steve are the sole members of the LLC. Steve agreed to contribute all of his artwork and Carla agreed to contribute \$50,000. The LLC was to be the sole owner of any works of art created at any time by Steve and not sold prior to June 10, 2006, the date that the Articles were signed by Steve and Carla. The Articles also provided that individual members are not authorized to act as agents of the LLC solely by virtue of being members. Carla and Steve told Luther to wait to file the Articles of Organization until he received the filing fees from them. Luther received those fees on August 28, 2006, and the Articles of Organization were filed and accepted by the Maryland State Department of Assessments and Taxation (“SDAT”) on September 1, 2006.

On June 15, 2006, Steve signed a lease for the LLC for studio space (the “Space”) owned by Ignatius Landlord (“Landlord”) in Hyattsville, Maryland. He told the Landlord that Carla, on behalf of the LLC, will begin paying rent for the Space on July 1, 2006, and that she will send him a check by the first day of every month thereafter. Carla paid the July rent as promised.

On July 29, 2006, Steve moved into the Space, but shortly thereafter, on August 21, 2006, he had an accident with the welding equipment and started a fire that damaged the Space.

On September 11, 2006, Landlord notified Steve that the August and September rent were unpaid, and that Steve, Carla and the LLC are responsible for the rent and the damage to the Space caused by the fire.

**Based solely on the facts given above, discuss the liability of Steve, Carla, and the LLC to any claims for rent and the damages to the Space that are made by Landlord?**

**What claims, if any, does Steve have against Carla and the LLC? State, the basis for same in your answer.**

### REPRESENTATIVE ANSWER 1

Carla and Steve are individually, jointly, severally liable for the rent and the damages and the LLC likely has only limited liability.

The LLC can only be liable after its creation. To be liable for actions prior to its formation, it must either ratify the action through assumption or novation. In these facts, the LLC was not formed until September 1, 2006. The damages to space occurred prior to formation, thus the LLC will not be liable for that. Similarly, it will not be liable for rent prior to its existence unless it ratifies it. There is no indication of ratification. If the LLC used the space and benefitted from it after September 1, it would likely be found to have ratified the Agreement to pay rent from then forward. But since the space was damaged, it is unclear whether the space was in use

on September 1, to show ratification. Carla and Steve can argue that Landlord is estopped from not going after the LLC since he dealt with Steve as an agent of the LLC.

Steve is on the hook since he signed the Lease and caused the damage. Carla was in a partnership with Steve, which culminated in the formation of the LLC. Steve's actions of signing the Lease were as an agent of the partnership, thus Carla is jointly and severally liable. Also, the damages to space occurred in the course of the partnership, so again, Carla is jointly and severally liable (although she can get contributions from Steve, because it was due to his negligence). The fact that Steve and Carla were promoters of the soon to be formed LLC, does not change the outcome as promoters remain liable short of there being a novation.

Steve can ask for contributions from Carla under the partnership. Under the partnership agreement, Carla agreed to pay the rent. She failed to do so, thus, Steve can sue Carla for breach of that agreement.

Steve can also ask for contribution from Carla for the damages from the welding, as the welding was done in furtherance of the partnership. Although this could be limited if the damage was due to Steve's negligence.

Steve can get contributions from the LLC to the degree LLC assumed liability. Such ratification has been previously discussed.

## **REPRESENTATIVE ANSWER 2**

### **A. 1. Steve's Liability:**

Steve signed a Lease in the name of the LLC. According to the A of O, the individual members were not agents of the LLC solely by virtue of their being members. Carla ratified the Contract by paying the first month's rent in a timely fashion. The question is whether or not Steve, as a member of the LLC, is personally liable for the Contract that he signed in the LLC's name. In this case, the LLC did not exist until September 1, 2006. Steve could not hide behind a constructive incorporation argument because personally he knew they had not complied with the filing requirements because they had not yet given lawyer the money. As such, Steve would likely be personally liable on the Contract he signed. He would also be personally liable for his own negligence, if any in using the blow torch. Steve was also arguably acting outside of the scope of the A of O when he burned the building. The A of O limited the activities of the LLC to "owning, marketing, and selling" works of art. As Steve was engaged in making art, rather than owning, marketing, or selling art, he was acting outside the purpose of the LLC. As such, this would be further support for his personal liability.

### **2. Carla**

Cara would not be personally liable. First, there is nothing to indicate that Carla was negligent in any way. Second, she did not sign the Lease and was not in privity with the

Landlord. As such, she would not be personally liable.

3. LLC

The LLC would not be liable even though Steve signed in the LLC's name because:

1. The LLC did not exist at the time the Lease was signed or the fire was started. Both of these events pre-dated the acceptance of the A of O by SDAT on September 1, 2006.

B. Steve v. Carla, LLC

Steve would be held personally liable for the Contract, but could likely recover from Carla and/or the LLC. First, Carla ratified the Lease by paying the rent. Even if the LLC did not exist, Steve might be able to argue that the two were engaged in a partnership (which does not require a filing) or that Steve was Carla's agent. In either event, she expressed her acquiescence to the Lease, by paying the rent. She would likely be estopped from denying liability for it after the fact. The LLC could also likely be liable to Steve. The LLC filed its A of O on August 28, 2006. This was several days after the fire. This could be construed as ratifying Steve's actions, by proceeding into business with him. As such, the LLC would also likely be liable to Steve.

#### QUESTION 4

In April 2006, Buyer sought to purchase a new 2006 "Champion", a high performance English sports car from Dealer. He told Dealer that his present car, a 2003 Champion, was "the best car I've ever driven". During this conversation Dealer informed Buyer that, except for some cosmetic changes, the 2006 Champion model was identical to a 2003 model. Buyer asked Dealer to describe the exact differences between the 2003 and 2006 models; Dealer affirmed that they were cosmetic only. Shortly thereafter, Buyer purchased a 2006 Champion for \$70,000. Buyer took delivery of the vehicle on April 15, 2006.

The following morning, upon starting his new car, Buyer noticed that it was very noisy at low speeds. Buyer experienced the same problem on succeeding day. Buyer promptly complained to Dealer and, at Dealer's request, agreed to wait until the 1000 mile servicing to see if the problem worked itself out.

On May 3, 2006, Buyer brought his new car to Dealer for the 1000 mile checkup and described the problems he was having with the car. Dealer's service department reported that the vehicle functioned normally.

Over the next several weeks, Buyer, Dealer and a manufacturer's representative discussed the problem. Buyer learned that the 2006 vehicle was functioning as designed but that the exhaust, ignition and transmission systems had been changed from the 2003 model to improve gas mileage and save costs. On June 1, 2006, Buyer returned the 2006 Champion to Dealer and informed Dealer in writing that the automobile not as was represented by the salesman and that he was revoking his acceptance and rescinding the sale. Buyer left the keys to the 2006 Champion, requested return of his purchase price and informed Dealer that he would be renting a car until this matter was resolved. The 2006 Champion had approximately 3500 miles on it the day Buyer left it with Dealer. By return letter, Dealer took the position that the vehicle was not defective and that the sale was final.

The 2006 Champion sat untouched in Dealer' lot for three months until September 1, 2006 when Buyer retrieved the car. In disgust, Buyer subsequently traded in the 2006 Champion for a hybrid, which had a manufacturer's suggested retail price of \$30,000.

**a. Under these facts, is Dealer liable to Buyer?**

**b. What defenses can Dealer raise?**

#### REPRESENTATIVE ANSWER 1

a. Per Md. Code 2-313(1)9a), a contract contains an express warranty of any affirmation of fact or promise made by seller to buyer, if that promise relates to the goods and is part of the basis for the bargain. Md. Code § 2-317(1)(b), does not require special words of "guarantee" should this warranty be breached, then the contract is breached and an action for damages arises.

When buyer was considering purchasing a 2006 Champion, dealer told buyer that the

2006 version was identical to the 2003 version, except for cosmetic changes. Buyer asked for a description of the differences. Dealer affirmed that the differences were cosmetic only. Buyer then bought the car.

Dealer's representation and affirmation as to the nature of the differences between the 2006 and 2003 models and buyer's subsequent reliance thereupon, created an express warranty per Md. Code § 2-313.

The differences, however, were not cosmetic. Buyer subsequently learned that the 2006 model had different exhaust, ignition, and transmission systems. These differences cannot be considered cosmetic (in fact, they were intended to improve gas mileage and costs).

As such, dealer breached the express warranty and the contract. Buyer can reject the goods (per Md. Code §2-601). Buyer, however, had already taken delivery at the time he learned the true nature of the dealer's breach.

Md. Code §2-602 requires that rejection must be within a reasonable time after delivery. Buyer took possession/delivery of the 2006 champion on April 15, 2006. Buyer promptly complained to the dealer (within the next few days) of the problem that encompassed the breach. Dealer told buyer to wait. On May 3, 2006, Buyer again complained, but was told the car functioned normally. Buyer was unaware that what constituted "functioned normally" was a breach of the express warranty.

Buyer then learned of the true nature of the 2006's design and returned the car on June 1, 2006, with title and keys.

If buyer accepted the goods, he must pay full contract price per Md. Code § 2-607(1). Acceptance occurs when the buyer fails to make an effective rejection (Md Code § 2-606(b)). Thus, the key question is whether the buyer rejected the goods within a reasonable time per Md. Code §2-602(1).

The facts indicate that buyer almost immediately put dealer on notice of a problem. The length of time between delivery and rejection (46 days) is directly attributable to dealer's actions and continued misrepresentations. Under these facts, dealer would be liable to buyer.

b. After a buyer rejects a good, the buyer's continued exercise of ownership is wrongful against the seller. Here, buyer grew frustrated and returned the car on September 1, 2006. Dealer can claim (1) that if the rejection was effective that his action was wrongful to dealer and buyer is liable for damages and (2) that because of the wrongful conduct, buyer accepted the goods, per Md. Code §2-606(1)( c). The second argument, however, would require the dealer to acknowledge and ratify that act.\*

\*The problem is that dealer previously denied that the rejection was valid in a return letter. Dealer might be stopped from advancing this argument which is premised on rightful rejection.

In addition, dealer may argue the buyer's factual allegations that there was a breach. The

2006 was functioning normally. The dealer can argue that the aforementioned changes were cosmetic as they did not affect the performance of the sports car - only gave it better mileage.

## **REPRESENTATIVE ANSWER 2**

a. Buyer has several claims against dealer. First, under UCC 2-313, dealer made express warranties to buyer when dealer informed buyer, that except for some cosmetic changes, the 2006 Champion model was identical to the 2003 model. Further, when buyer asked dealer to describe the exact differences between the models, dealer affirmed that they were cosmetic only. This of course, was not true, since buyer later learned that the 2006 vehicle was very noisy at low speeds and that this was due to the fact that while the 2006 was functioning as designed, the exhaust, ignition and transmission system have been changed from the 2003 model. It was not necessary for the dealer to use formal words such as "warrant" or "guarantee" or that he had a specific intention to make a warranty. 2-313(2)

Second, under 2-314(3) dealer may have breached the implied warranty that arise from course of dealing because the buyer had told dealer that the 2003 was the "best car [he'd] ever driven" and buyer relied in the assurance of dealer that the 2006 would meet these same performance standards. However, the cause of buyer's dissatisfaction was changes in the design to improve cost effectiveness and gas mileage. Thus, he may not prevail on this ground.

b. Dealer may raise several defenses. (1) Buyer did not reject goods within a reasonable time after their delivery. Buyer bought the car and took delivery on April 15, 2006, but did not return the car to dealer until June 1, 2006.

Buyer will respond that he promptly complained to dealer, and at dealer's request, agreed to wait until the 1,000 mile servicing.

(2) Dealer may also argue that under 2-602(a) after buyer rejected any exercise of ownership by returning it on June 1, 2006, buyer wrongfully exercised ownership of the car by retrieving the car from dealer's lot on September 1, 2006 and then trading it in for a hybrid. This would constitute an acceptance under UCC 2-606 only if it is ratified by dealer. The facts are unclear to me whether dealer ratified or not because I do not know if buyer traded the car in at the same dealership or not.

## QUESTION 5

Sam Spade is the owner of a farm in Prince George's County, Maryland. He went to John Buck's Tractor Company to purchase a much-needed tractor. After haggling with Sales Person, he agreed to purchase the X200, their top model, for \$14,000. After signing the requisite financing documents and tendering a certified check for the down payment of \$4,000, Sales Person asked that Sam Spade return with additional insurance information and the tractor would be his. Sam returned with the documents and took the tractor home.

That evening, Sales Manager looked over Sam's paperwork and questioned some of the information therein. He asked Sales Person to call Sam and request that Sam come in and fill out additional documents. Sales Person left numerous messages on Sam's phone but Sam never returned his calls. Sales manager then asked Tommy Towem to stop by Sam's farm to repossess the tractor. Sam and his neighbor were in the yard when Towem arrived and Sam asked Towem what was happening. Towem replied, "John Buck says you're a thief, and I have to get their property back. If you've got a problem, go to the dealership." He then drove the tractor away. At that time, Sam had farm receipts in the amount of \$2,000 cash in the toolbox of the tractor, as well as some farm tools valued at \$500.

Sam and Neighbor followed Towem to the dealership. Once there, they spotted Sales Person and Sam angrily asked for his money and tools back. Sales Person began cursing Sam and said, "We won't deal with thieves, so beat it!" The Security Officer then grabbed Sam's arm and forcibly escorted him off the property.

**Distraught, Sam comes to you and asks if there is any way to make John Buck pay for the manner in which he was treated. What would you advise? Discuss fully.**

## REPRESENTATIVE ANSWER 1

This question sounds in Tort. John Buck Tractor employed Sales Person. John Buck can be liable under vicarious liability for the Sales Person and the Security Guard for defamation and battery.

Defamation occurs when a defamatory statement is directed to the Plaintiff and is published to a third party. Sales Person cursed at Sam and called Sam a thief in the presence of Sam's neighbor and the security guard. Tommy also called Sam a thief. Sales Person didn't know Sam was a thief but said the statement anyway. Sam can recover because he does not need to show damages – this is slander per se, it directly affects Sam's reputation in his ability to conduct business. For example, if he is a thief he may not be able to secure another tractor to use on his farm. Sales Person, an employee of John Buck, and his actions fall within the scope of employment because although defamatory they are conducted in the course of business with Sam and do not substantially deviate from them. It seems that the defamatory thief statement originated from Sales Manager of John Buck and this should solidify John Buck's vicarious liability and have the possibility of higher damages depending on how many people near John Buck heard it.

Battery is the intentional touching of another where that touching is offensive or causes injury. Although Sam was on John Buck's property he has a right to be free from other people touching him. Security Guard could have asked him to leave before forcing him to leave. Although not set out in the facts, the Security Guard probably is an employee of John Buck and, therefore, these actions fall within the scope of employment and John Buck is vicariously liable.

Trespass to Chattel is where the Defendant substantially interferes with another's property. Here, although the tractor was financed, Sam has not defaulted on the tractor or had trouble paying for it. The repossession would not be justified. Also, when Tommy Towem repossessed the vehicle he made a trespass to the chattel by not allowing Sam to retrieve his tools or deposit slips. This trespass continued when Sales Person did not allow Sam to retrieve the tools or money. If Sam cannot retrieve the tools at all this tort will become conversion and Sam can recover the fair market value of the items that were converted.

Trespass is the intentional invasion of another's real property. Tommy Towem committed trespass of Sam's farm to retrieve the tractor as an employee of John Buck. Tommy's trespass would entitle John to relief as well.

## **REPRESENTATIVE ANSWER 2**

Sam has several avenues he can pursue. First, Sam and the Company had a valid contract. Based on the facts given the Company had no right to repossess the tractor based on Sales Manager's questions alone. The Company may argue that the information gave them grounds for insecurity. Under the UCC a party to the contract has grounds to believe the other party can't or won't perform his duties may see its performance and request adequate assurances of performance. Insecurity is a weak argument here because Company doesn't seem worried about Sam's ability and Sam hasn't missed any payments or given any indication of inability to perform.

Conversion and trespass to chattels – Because the company had no right to repossess Sam might consider bringing an action for conversion. Conversion is interference in another's right of ownership of personal property. Conversion applies to serious interferences to property while trespass to chattels applies to less serious invasions. Here, the company took possession of the property from Sam so conversion is properly applicable.

Defamation – Sam may also bring suit for defamation. Defamation is a statement impugning one's reputation that is published and causes damages. Towem called Sam a thief in front of Sam's neighbor. The publication requirements are satisfied if at least one other person is made aware of the statement. Because Towem is the Company's agent, the Company can be held vicariously liable for Towem's statement, so both Towem and Company can be sued although only one recovery can be had. Company will argue that it is not vicariously liable for Towem's conduct under the crime of moral turpitude which gives rise to slander *per se* rules. Accusing a person of a crime of moral turpitude such as having a loathsome disease or impugning the professional reputation of a person is slander *per se* and does not require proof of special damages.

Sam can also bring a defamation claim against Company and Sales Person for Sales Person's statement that Sam was a thief made at the dealership. As previously discussed, Sam can sue both Company on a vicarious liability theory and Sales Person.

Company and Security Officer may also be liable for battery. Battery is intentionally causing an offensive touching or putting a person at apprehension of an immediate offensive touching. Security Officer grabbed Sam and forcibly removed him. This was an offensive touching for which Company would be vicariously liable.

## QUESTION 6

Two police officers were on patrol when they were instructed by radio to respond to a domestic disturbance. Upon arriving at the residence, they were met at the front door by Husband and Brother. The officers explained that they were responding to a domestic dispute call. Husband and Brother stepped outside onto the porch with the officers and said that there was no domestic dispute.

Wife then came out of the house. Wife explained to the officers that there had been no domestic dispute, but that she had called the police because she wanted the officers to arrest Husband, whom she identified as her husband, because Husband was spending all of their money on his cocaine habit. Wife also told the officers that she wanted Husband's brother, Brother, who was visiting from out of town, arrested because he also used cocaine. Wife then volunteered that both Husband and Brother had cocaine in the house.

The officers asked for permission to search the house. Husband emphatically instructed the officers to stay out of his house. Wife stated that it was her house too, and consented to the search. The officers ignored Husband's objections and followed Wife to an upstairs bedroom she identified as Husband's, and then to a second bedroom that she identified as the guest room where Brother was staying. Cocaine was seized from both bedrooms.

On the basis of this evidence, Husband and Brother were charged with possession of cocaine.

**At trial, separate motions to suppress the evidence were filed on behalf of Husband and Brother. How should the Court rule on each motion? Explain your answer fully.**

### REPRESENTATIVE ANSWER 1

The court should grant the motions to suppress. Evidence obtained in violation of a defendant's 4<sup>th</sup> amendment right against unreasonable search and seizure. To assert one's 4<sup>th</sup> amendment right there must be a reasonable expectation of privacy in the place searched. As the owner of the home, husband had a reasonable expectation of privacy there. Brother did not live at the home; however, the Court has determined that overnight guests do have a reasonable expectation of privacy where they are staying, thus Brother may assert this right.

The officers did not have a warrant to search the home; therefore, their search must fall into one of the exceptions permitting a warrantless search. One such exception is where the person consents to the search. Consent is valid if given by the person or someone else having authority to consent. As the other owner of the house, the prosecution will argue that wife's consent was valid and therefore there was no violation. However, the defense should assert, and will likely win the argument, that

1. The wife's consent was negated by husband's objection; and
2. She lacked authority to consent to the search of brother's room if it can be shown that she had previously been kept out of the room.

Since husband and brother had a reasonable expectation of privacy and he didn't consent to the search, his motion will be granted unless another exception applies. The prosecution may argue that exigent circumstances existed, thus permitting the warrantless search. Exigent circumstances include evanescent evidence, or evidence which may be destroyed by the defendant if its not taken. The wife's assertion that cocaine was present may have provided police with probable cause to believe that drugs were present in the house and may have been destroyed. The defense should argue that the police, if they had probable cause, should have merely detained husband and brother outside the home while they obtained a warrant. The court will likely exclude the evidence since there was nothing supporting the wife's claim and nothing to indicate the evidence would be destroyed.

## **REPRESENTATIVE ANSWER 2**

As to husband: The Supreme Court has recently ruled in *Randolph v. Georgia* that when the police are given consent from one spouse and are denied consent from the other spouse, the police must respect the non-consent and cannot legally conduct a consent search. Here, Husband did not consent and *Randolph* is directly on point. The court should suppress the evidence.

As to the Brother: In this case, Brother had a reasonable expectation of privacy in his room, even though he did not own the entire house. As such, Wife could not grant consent. If she was accustomed to having joint access she could then grant consent. Here, we have no facts that state that brother objected. Thus, in that case her consent would be legally permissible for the police to search.

Without Brother's consent (in the event that Wife did not have joint access) the police could not conduct a consent search. Court should suppress as to both. The police might have probable cause, but a search warrant is required to enter one's home. Absent a warrant, the police would have entered upon urgent circumstances. Here, the police had no warrant and no urgent circumstances because wife stated that she was not the victim of domestic violence. There is nothing here to change the already stated conclusion that the court should suppress the evidence.

Note: *Randolph* applies to more than just spouses, it applies to two persons with authority to grant consent to search.

## QUESTION 7

Ralph is the president and chief executive officer of DataMo, Inc. He is also the sole shareholder of PreMa, Inc. Both are Maryland corporations.

A minority shareholder of DataMo files a civil action in the Circuit Court for Baltimore County against DataMo, Ralph and PreMa alleging a variety of financial misdeeds arising out of transactions between the two companies.

Ralph contacts Horace, a Maryland lawyer, who enters his appearance on behalf of Ralph, DataMo and PreMa.

After news of the lawsuit becomes public, Fred, who is the chief bookkeeper of DataMo, telephones Barrister, the Maryland attorney representing the plaintiff. Fred tells Barrister that Ralph has mismanaged DataMo for years. Barrister arranges to meet with Fred who provides Barrister with documentation concerning transactions between DataMo and PreMa as well as information indicating that Ralph has stolen large sums of money from DataMo.

- a. **Assess the propriety of Horace's representation of Ralph, DataMo and PreMa.**
- b. **What preliminary action(s) should Barrister ask the court to take in this case on behalf of his client? What is the likely outcome of the action(s) requested?**
- c. **What issues are raised by Barrister's actions regarding Fred?**

### REPRESENTATIVE ANSWER NO. 1

- a. Horace should not represent the three parties because each has interests that may materially adverse to each other that would prevent Horace from diligently representing all three.

Interested officer transaction are implicated under these facts, meaning that Ralph may have breached duties to DataMo and PreMa and thus has adverse interests to them in the litigation. Furthermore, it may be that Ralph has stolen money from DataMo so representing a criminal defendant who embezzled from another client would not be proper.

Although Ralph is the sole shareholder of PreMa, the two may still have legally adverse interests here because each could be guilty of the same thing and Ralph could potentially settle in a way that dumped his liability on PreMa so there would be a conflict of interest here. It is not clear whether Horace has yet gathered confidential information from either defendant but if he has, he should not represent any of them.

- b. Barrister should ask the court to waive demand requirement for filing a derivative lawsuit on behalf of DataMo if demand would be futile and he should also post a

bond so he can follow through with suit on behalf of his client. This will be granted if demand would be futile.

With respect to Horace, Barrister should move to have him disqualified from representing Ralph, DataMo and PreMa due to his obvious conflicts of interest and inability to represent their interest as a result. The court should grant this motion.

- c. Fred's actions raised the problem of Barrister acquiring confidential information from an employee of DataMo. Also, Barrister should have advised Fred, as an employee of an opponent, that he, (Barrister) would be unable to carry on a conversation with Fred about this matter because to do so would amount to contact with the other party without notice to that party's counsel. Contact by an attorney with an opposing client is prohibited unless that client's attorney approves. While Fred is not personally the opponent, DataMo is, so his conflict is imputed to the corporation. Moreover, Barrister arranged a meeting with Fred himself, suggesting a willful violation of the rules against this conduct. Also, there is a question of whether Barrister received knowingly from Fred documents that were misappropriated from DataMo in which case Barrister may be liable for criminal activity.

## **REPRESENTATIVE ANSWER 2**

- a. Propriety of Horace's representation.

Horace has likely committed serious ethical violations. Horace has three clients, all defendants in the same lawsuit. However, despite Ralph's apparent significance with both DataMo and PreMa, it is critical to the knowledge that the entities are separate and distinct legally speaking from Ralph himself. Persons cannot just use corporations as alter-egos (as will be discovered later) and, Horace, duly admitted Maryland attorney, should not advance this fraud by representing three entities. The conflict potentially is obvious. The interest of the three parties, or at least of DataMo on the one hand and Ralph/PreMa on the other, could easily be directly adverse and the possibility that Horace's representation of DataMo will be materially limited by his obligations to Ralph is substantial. This is a derivative action by a shareholder against DataMo and also against Ralph and PreMa. Horace cannot reasonably believe that he can serve the best interest of the clients, as he is required to do while simultaneously providing zealous advocacy for Ralph.

Horace should not, at the least, represent DataMo. We know from the facts that DataMo has at least one share other than Ralph. On the other hand, representing PreMa and Ralph may be less problematic because, as sole shareholder, PreMa is more closely aligned with Ralph. However, even this representation could prove problematic if PreMa has creditors, employees, etc.

- b. Preliminary actions by Barrister and the likely outcome.

Barrister should first and foremost file a motion to pierce the corporate veil of DataMo

and PreMa. To insure that they are found liable, Ralph (if appropriate) can be subjected to complete liability. This is likely necessary to prevent fraud which Barrister must prove by clear and convincing evidence to pierce corporate veil and/or enforce a paramount equity.

From the limited information it has, it appears that Ralph has been abusing the corporate system in using corporations as financial alter-egos for himself. Corporations are solely a creature of statute in Maryland; their purpose is to allow investors to invest without subjecting themselves to personal liability and to allow effective and centralized management of substantial assets. Ralph should not be allowed to use the corporate veil and Maryland law to protect himself from what is his otherwise culpable conduct. Thus prevention of fraud and enforcement of equity demands piercing here.

Barrister may also want to move to have Horace disqualified from representing all three defendants, particularly DataMo, the corporation where his client is a shareholder. Relatedly, Barrister may want to request a preliminary injunction restraining order that prevents Ralph, acting as president and CEO of DataMo, from engaging in any financial machinations that might put his client's investment at risk.

From the limited facts we have I think the judge would agree to each motion, piercing of the corporate veil, disqualifying Horace from representing DataMo, and allow a temporary restraining order against Ralph's action with respect to DataMo.

c. Ethical violations by Barrister.

Even though he did not solicit the communication, Barrister likely violated the "no contact" rule by discussing, meeting and working with Fred, a management level employee with DataMo with information relevant to the litigation. Barrister's desire to speak and work with Fred is understandable since it appears that Fred has information critical to Barrister's case. Yet, however understandable Barrister's actions are, they violate a crucial rule of attorney conduct. Fred works for DataMo, a corporate defendant currently with counsel in an action in which Barrister represents the plaintiff. Barrister cannot communicate with Fred without violating ethical rules. He should have instructed Fred to speak to his employer's attorney. If this would be futile, as is likely, considering Horace's conflicted dual representation, then Barrister could have advised Fred through independent legal counsel. The information which Barrister acquired through Fred, while significant, is properly obtained through discovery. Barrister should notice Fred's deposition and request necessary documents to acquire the information to prove his case. He should not, however bad Ralph's actions might be, violate the rules to acquire a litigation advantage.

## QUESTION 8

During a domestic argument, Jane told her significant other, Dick to leave the house they owned in Westminster, Carroll County, Maryland. Dick was furious, but he left. Jane would not let him back into the house. Dick left a voice mail message for Jane that he was going to “get even” with her and that if he could not live at the house, he would make sure that she could not live there either. Sometime after midnight of the next day, Jane awoke smelling smoke in the house. She checked the house and found that a bag of charcoal brickettes had been placed against the side entrance door to the house and was engulfed in flames. She called the fire department, which responded promptly.

Jane was not injured in any way. The incident report of the fire department stated that when the fire department arrived the flames from the burning charcoal brickettes were 6 to 12 inches high, the side entrance door and its threshold had char marks, and there was smoke throughout the house. On that same day, Dick left a voice mail message for Jane that he was now satisfied.

Dick was charged and convicted of arson and reckless endangerment of another.

**a. Do these convictions merge for sentencing purposes? Discuss fully.**

Judge Jones gave Dick the maximum sentence. Dick was furious about the convictions and the sentence he received. He told his attorney immediately after the sentencing, with no one else present, that he was going to “get even” with Judge Jones as he knew where the judge lived and that this time he was going to do the job right. Dick was immediately incarcerated.

**b. Should Dick’s attorney reveal this conversation to the appropriate authorities? Discuss fully.**

## REPRESENTATIVE ANSWER 1

a. Merger

Under the Blockburger test charges merge only if they contain the same elements. Charges do not merge if both charges each contain an element that the other does not possess. Arson and reckless endangerment do not merge because each requires a mental state that the other does not. Arson requires a malicious burning of a dwelling. Reckless endangerment simply requires recklessness. Malice means that the defendant acted willfully and wantonly without regard and intended to do harm. Dick wanted to “get even” with Jane and said that he was going to make sure that she couldn’t live there. This constitutes malice. If one acted with malice, he cannot be said to have also been reckless. Recklessness does not rise to the level of malice; it simply requires that the defendant acted without regard for others. Therefore, because each conviction has different mental states, these convictions do not merge. Additionally arson requires harm to a building whereas reckless endangerment refers to human life.

b. Disclosure

Dick's attorney may reveal this conversation but is not required to. Confidentiality governs communications between an attorney and his client. The attorney-client privilege requires that communications made to one's attorney remain confidential. However, an attorney may disclose communications to prevent bodily harm to another person. However, he is not required to. Dick said he was going to get even with Judge Jones and was going to do it right this time. This statement was made to the attorney in private and therefore, the attorney-client privilege applies. Dick was immediately incarcerated. Therefore, the attorney may not want to disclose because he may not believe that Dick can actually accomplish the task but the attorney is permitted to.

**REPRESENTATIVE ANSWER 2**

a. At sentencing, multiple crimes may be merged for the purpose of determining the defendant's punishment in several circumstances. First, inchoate offenses-namely solicitation and attempt (but not conspiracy)- merge into a completed substantive offense (so, for example, attempted murder would merge into conviction for the completed murder). Second, lesser included offenses may be merged for sentencing purposes. In this latter situation, merger avoids punishing the same defendant twice for what is essentially the same crime (Double Jeopardy). In the case against Dick, however, reckless endangerment is not a "lesser included offense" of arson because they each require proof of elements that the other does not, under the Blockburger test. Arson requires the malicious burning of a dwelling, which can include one's own home, that results in damage to the building. The mental state required- "maliciousness"- means that the defendant must have acted recklessly. Any "charring" is sufficient, and thus it seems that the elements of arson were met in Dick's case. Arson does not, however, require that the fire endanger a person; the malicious burning need only damage the building, whether or not someone was inside.

By contrast, reckless endangerment, while also requiring recklessness for mental state, does require that a person be put in danger or at risk of harm. Furthermore, reckless endangerment does not require any "burning," though it may be accomplished by such an act. Thus, proving reckless endangerment requires an element that arson does not (creating a risk of harm to another), while arson requires an element (burning of a dwelling) that reckless endangerment does not. Therefore, the crimes should not merge at sentencing, and both may contribute to Dick's punishment.

b. An attorney generally has a duty to hold information and communications gotten from a client in strict confidence. However, under the Rules of Professional Conduct, an attorney may disclose confidential information from a client in several circumstances. First, the attorney may reveal if there is a reasonably certain likelihood of death or serious bodily injury. The attorney may also reveal confidential information in order to prevent, mitigate, or rectify substantial financial injury or injury to the property of another, if the client is using the attorney's services to further those ends. In this case, Dick's comments indicate pretty strongly that he is planning to set fire to the judge's home (since he said he was going to "do the job right"). Ordinarily, this would present a serious threat of bodily harm to the judge and other people living in his house. In this situation, however, Dick was immediately incarcerated. If the attorney has reason to know, or believes it reasonably certain, that Dick is going to hire someone else to commit the arson, he thus

should disclose the threat to the authorities. In the absence of such a belief, though, the fact that Dick is incarcerated prevents there from being a “reasonable certain likelihood” of this crime occurring, since Dick is not even physically capable of getting to the judge’s house.

## QUESTION 9

On June 10, 2005, Paul, a resident of Pennsylvania, was involved in an automobile accident in Cecil County, Maryland with Don, a resident of Baltimore County, Maryland. Don had failed to stop his car and grant the right of way at a stop sign to Paul, who was operating his vehicle at a high rate of speed on the Boulevard. On July 5, 2007, Paul filed a legally sufficient Complaint in the District Court of Maryland for Cecil County alleging damages in the amount of \$12,000.00. Don has just been served with the Complaint, and retains you, a Maryland attorney, to represent him. Don admits to you that he in fact failed to stop and grant the right of way to Paul.

Don objects to being sued in Cecil County, since he does not live or conduct business there. Don desires to have the case tried in Baltimore County before a jury.

**a. Is Don entitled to a trial in Baltimore County? Is he entitled to a jury trial? Explain.**

**b. What pleadings should you file to accomplish Don's objectives? Explain.**

Assume Paul's action against Don is now appropriately pending in a Circuit Court in Maryland.

**c. What affirmative defense(s) should you definitely plead in answer to Paul's claim for relief? Explain.**

Dr. Tough has examined Paul on behalf of Don, and has been designated by Don as an expert witness for trial. Paul's attorney serves 25 interrogatories on Dr. Tough with a copy to you.

**d. What papers, if any, should be filed in response to these interrogatories? Explain.**

Paul's attorney serves Requests for Admissions of Fact, which include the following request to Don: "Admit that you failed to stop at the Boulevard and grant the right of way to Paul."

**e. May you ethically advise Don to deny this request for Admission of Fact? Explain.**

## REPRESENTATIVE ANSWER 1

**a.** Don is entitled to a trial in Baltimore County, but the court does not have to grant his request. Pursuant to §6-201(a) venue is proper where Defendant works, lives, is employed or habitually engages in vocation. Under this line of Maryland Rules of Civil Procedure, Baltimore County would be the proper venue. However, under §6-202(8) and (11)

venue is also proper where the cause of action arose, Cecil County, or if the Plaintiff is a nonresident, as Paul is here, any county in the State. Therefore, venue is proper in both Baltimore and Cecil Counties and Don is not entitled to one over the other, unless, pursuant to Rule 2-327, on motion he is able to show that Baltimore County is more convenient and the action could have been brought there

### **Jury Trial.**

Don is entitled to a jury trial. As provided in §4-402(e)(1) jury trial will be permitted if the amount in controversy, excluding attorney's fees, exceeds \$10,000. Paul is suing Don for \$12,000 satisfying the amount in controversy requirement to demand a jury trial.

**b.** To accomplish Don's objectives I would file the following pleadings:

Notice of Intention to Defend. Paul brought suit in District Court. According to Rule 3-307, the Defendant must file a notice of intention to defend which includes explanation or grounds of defense. This must be filed within 15 days of service of complaint.

Notice to Demand Jury Trial. Defendant may elect a jury trial by filing a separate written demand within 10 days after filing a notice of intent to defend. Rule 3-325(2). If Don wants a jury, he must file this demand.

Motion to Transfer Action Based on Improper Venue. Lastly, I would file a motion for a change of venue to Baltimore County. Rule 3-327. Don should argue that the action could have been filed there and it will still serve justice.

**c.** I would definitely plead the affirmative defense of contributory negligence. Contributory negligence is an absolute bar to recovery. Here, Paul was operating his vehicle at a high rate of speed. Even though Don failed to stop, it should be argued that if Paul was not speeding he would not have crashed into Don and been involved in the accident.

**d.** I would file a motion to strike in response to these interrogatories. Interrogatories may only be served by a party to another party. Rule 2-421. Here Paul served the interrogatories on Dr. Tough. Dr. Tough is not a party to this litigation, he is the designated expert witness. For this reason he does not need to answer the interrogatories and notice of such should be recorded in the pleadings.

**e.** Ethically, I cannot advise Don to deny this request and commit perjury. Don has admitted to me that he failed to stop at the stop sign. A party is entitled to serve written admissions on another party for admission of the truth of any relevant matter. Rule 2-242(a). Failure to do so could result in paying reasonable expenses. Rule 2-424(e). An attorney cannot encourage her client to commit perjury and lie. His denial of this admission would constitute perjury and so therefore I would advise him to answer it truthfully.

## **REPRESENTATIVE ANSWER 2**

**a.** Under Rule 6-202, Don (D) may not be entitled to a change of venue to Baltimore County. Although the venue of Cecil County would not be appropriate under Rule 6-201, it is under 6-202, because the action is in tort and arose in Cecil County. Venue rules are rules of convenience, however, the court may consider a motion to transfer venue for purposes of convenience. However, because the accident occurred in Cecil County, it may prove to be the most convenient venue for witnesses and the plaintiff, which would cut against Don's argument for obtaining the change.

### **Jury Trial.**

The damages demanded exceed \$10,000, and under Rule §4-402, Don should be able to seek a jury trial.

**b.** Venue. Improper venue must be challenged in a motion to dismiss, before Don's answer to the complaint is filed. Here, for reasons stated above, such a motion will likely fail, as venue is not improper. Don may also file a motion for transfer to the Baltimore County court, on a non-convenience basis under Rule §2-327(b). Either motion should contain a factual basis for the request and affidavits, if based on facts not in Paul's complaint.

**Jury Trial.** I should file a demand to the District Court for a jury trial subject to rule §3-325(b) in order to request the jury trial and removal to Circuit Court.

**c.** Don's best affirmative defense is contributory negligence. While Don failed to stop at the sign, Paul was speeding and as such contributed to his own injury by his own negligent operation of the car. Contributory negligence, if found, is a complete bar to recovery.

**d.** In response to the interrogatories, Don is obligated to answer fully and to supplement information as it becomes available to him. However, Dr. Tough is under no obligation to answer the interrogatories, through he may be subpoenaed to a deposition. Therefore, I need to file no response. However, in the interest of ethically and cooperatively participating in discovery, I may want to alert Paul's attorney in case it was an error. Paul's attorney may then serve Don with interrogatories regarding Dr. Tough and I must file a response to those questions, however the scope of questions about Dr. Tough to which I am required to answer may be more limited than that which could be achieved through deposition.

**e.** The request for an admission of Don's negligence in failing to stop presents an ethical dilemma. Don must respond or else the fact will be deemed against him. However, a lawyer may not assist a client in providing false evidence or testimony. Therefore I may not, when Don has admitted to me he ran the stop sign, advise Don to deny the fact.

## QUESTION 10

Richard, a customer, got into an argument with Cathleen, an employee at Department Store located in Cecil County, Maryland. When Richard went to tell Jason, the store manager, about Cathleen's discourteous behavior, Cathleen went to her vehicle and got a handgun. Cathleen returned to the store and shot Richard, killing him in front of Jason. Cathleen fled and Jason called the police.

The police arrested Cathleen in the mall parking lot. They called Jason to the arrest scene to positively identify Cathleen as the shooter. Jason saw Cathleen handcuffed and restrained by a police officer as she was being placed in the rear of a marked police cruiser. Jason then calmly stated "that's her."

Cathleen, who was on probation for a prior felony conviction, was charged with the murder of Richard, 1st degree assault of Richard, reckless endangerment and possession of a firearm by a felon. Cathleen called Shelly, her attorney. Shelly was told that Cathleen's manager, Jason, the only eyewitness to the crime, would be at the station to identify Cathleen in a lineup at 5:00 p.m. When Shelly arrived at 4:45 p.m. she learned that the lineup occurred at 4:30 p.m. and that Jason positively identified her client as the shooter.

At trial, Jason was called as a witness and identified Cathleen as the shooter, over Shelly's objection. Cathleen was found guilty of murder, 1<sup>st</sup> degree assault, and possession of a firearm by a felon. She was sentenced to three years for the handgun charge and consecutive prison terms of 30 years for murder and 10 years for 1<sup>st</sup> degree assault.

Two months later, the federal prosecutor convened a federal grand jury which returned an indictment against Cathleen charging her in federal court with possession of a firearm by a felon, a federal offense.

- a. Assume all objections were timely. Discuss the admissibility of all Jason's identifications of Cathleen.**
- b. Discuss the likelihood of success of any appeal based on the sentences Cathleen received for murder and 1<sup>st</sup> degree assault.**
- c. Discuss the basis and likelihood of success of a motion to dismiss the federal charge against Cathleen.**

## REPRESENTATIVE ANSWER 1

a. Jason made three identifications of C: (1) at the scene (2) at the police station (3) in court. The 4<sup>th</sup> Amend protects against unreasonable searches and seizures. The ID at the scene was overly suggestive and violates the 4<sup>th</sup> Amend because "J saw C handcuffed and restrained by police in police the car." The line up also violates the 6<sup>th</sup> Amend because C has a 6<sup>th</sup> Amend right to counsel at critical stages of the criminal process. Here, the line up was such a stage, and the PO violated C's rights when they conducted the line up early, despite knowing that C's attorney was

told that the line up would occur at 5. The in Court line up might have been tainted because of the Constitutional violations that occurred in the previous IDs, but J had previous knowledge of C's ID because he was her manager. Therefore, the Court will allow J's ID of C based on this knowledge.

b. C can successfully challenge the sentence of "consecutive" prison terms of 30 years for murder and 10 years for 1<sup>st</sup> degree assault. This is because the assault charge is a lesser included offense of murder. Thus, C cannot be sentenced to both. The Court will overturn the assault conviction.

c. Double jeopardy prevents a person from being charged and tried for the same offense twice. However, this principle only applies to charges brought by the same jurisdiction. I believe the federal system is a separate jurisdiction and can try its own charges without implicating double jeopardy.

## **REPRESENTATIVE ANSWER 2**

a. **On Scene ID**

The police arrested C in the parking lot and asked J to ID C as she was handcuffed and sitting in the rear of a marked police cruiser. This was a show up. Show ups can be allowed if they are not overly suggestive. This ID violated the 4<sup>th</sup> Amend right against warrantless and unreasonable searches and seizures because it was overly suggestive. The court would exclude it except that Jason already knew C because she was his co-worker.

**Line Up**

The police seem to have intentionally tricked C's lawyer by telling her the wrong time for the line up. The PO violated C's right to have counsel present at the pretrial line up which is a critical stage of the proceedings. The court should disallow this evidence entirely.

**In Court ID**

The in court ID should be allowed because Jason already knew C and did not need a line up or show up to ID his employee.

b. **Assault Appeal**

C will win on appeal of her sentence. The judge erred by sentencing C to time for both the assault and the murder because the assault charge is a lesser included crime of murder.

c. **Double Jeopardy**

C will lose the appeal on the seemingly identical federal charges because the federal jurisdiction is a separate jurisdiction. Thus, double jeopardy does not apply and they are free to make their own charges based on federal law.