

## **FEBRUARY 2013 MARYLAND BAR EXAMINATION QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

In order to assist the person wishing to prepare for the essay portion of the Maryland Bar Examination or to review their examination, the State Board of Law Examiners prepares a Board's Analysis and selects Representative good Answers for each essay question given in each examination. The Board's Analysis and the Representative Good Answers are intended to illustrate to potential examinees ways in which essay questions are analyzed by the board and answered by persons actually taking the examination. This material consists of three parts.

1. Essay Question is a reprint of the question as it appeared on the examination. Extracts of statutory material and rules are not included.

2. The Representative Good Answer(s) consists of one or more actual answers to the essay question. They are reproduced without any changes or corrections by the Board, other than spelling. The Representative Good Answers are provided to illustrate how actual examinees responded to the question. The Representative Good Answers are not average passing answers nor are they necessarily answers which received a perfect score; they are responses which in the Board's view, illustrate successful answers.

3. The Board's Analysis consists of a discussion of the principal legal and factual issues raised by a question. It is prepared by the Board. The Board's Analysis is not a model answer, nor is it an exhaustive listing of all possible legal issues suggested by the facts of the question.

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**QUESTION 1**

Al Buyer (“Buyer”) had been working with a real estate agent to locate a house to buy in Baltimore County, Maryland. On his way home from work one day, Buyer noticed a house for sale by owner which interested him, and he stopped to investigate. Beth Owner (“Owner”), who held title to the house, invited Buyer into her home and led Buyer on a tour of the house and associated lot. Buyer and Owner decided immediately after the tour to sit down and jointly write an agreement for Owner’s sale of the house to Buyer. Buyer wrote a personal check for \$1,000 payable to Owner as a deposit.

The handwritten letter agreement they drafted and both signed was dated July 27, 2011. The letter included four paragraphs as follows:

*Paragraph one: I, Al Buyer, offer to buy 33 Northway, Towson, Maryland (“property”) for \$235,000. Personal check for \$1,000 delivered to Beth Owner this date and balance of \$234,000 to be paid by certified check not later than September 1, 2011.*

*Paragraph two: Buyer guarantees closing and does not require a financing contingency.*

*Paragraph three: Buyer does not require a Property inspection contingency.*

*Paragraph four: Buyer’s real estate agent will deliver to Owner within 72 hours a standard form Maryland Association of Realtors Residential Contract of Sale (“Contract”). Owner to sign and return the executed Contract to Buyer’s real estate agent within 48 hours of receipt. Owner to pay one-half of transfer taxes. All other costs of closing to be paid by Buyer.*

Buyer’s real estate agent hand delivered a packet of papers to Owner the next day. The packet included the Contract with standard verbiage and addenda, all properly executed by Buyer. The real estate agent provided a pre-paid overnight courier envelope to Owner and asked her to review, sign and return the executed Contract in the envelope to the real estate agent not later than the close of business the following day.

Owner reviewed the Contract and saw that the terms regarding financing and property inspection were satisfactory to her. There were a myriad of other terms in the Contract (for example, regarding settlement date, lead-based paint, termite inspection, fixtures, etc.) to which she also had no objection. She signed and initialed the Contract in the proper places and then put it in a drawer together with Buyer’s check for \$1,000, which check she did not negotiate or cash. Owner had decided, after a conversation with her neighbor, that she wanted more money for the Property. She called Buyer’s real estate agent and told him that she would not return the contract unless Buyer agreed to a higher price. Buyer refused to agree to a higher price.

**If Buyer sues Owner for specific performance, what argument(s) can he assert in support of his position? What defense(s) is available to Owner? Who is more likely to prevail? Explain your reasoning fully.**

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**REPRESENTATIVE ANSWER 1**

1. Buyer's Arguments for Specific Performance

A valid contract is created when there is offer, acceptance and consideration. The Buyer will argue that the handwritten letter agreement was a contract and is enforceable. There was a July 27, 2011 letter which was an offer containing detailed terms of the offer (not ambiguous), which Buyer accepted, and for which Buyer paid consideration (\$1,000 personal check).

Since this is a land sale contract, it must be valid under the Statute of Frauds, meaning it must be in writing, contain a sufficient description of the land and price and be signed by the party to be charged. Here, the handwritten letter agreement was written, stated the address of the home to be purchased, and the price of \$235,000. Both Buyer and Seller signed it. Therefore, Buyer will argue that it was a valid contract and the court must enforce it.

Buyer will further argue:

Paragraph 1: As stated above, it is sufficiently detailed to supply material terms of the offer.

Paragraph 2, the Buyer guaranteed closing so Buyer should be held to the contract.

Paragraph 3: No property inspection was required so the Buyer was agreeing to buy the property "as is."

Buyer will say that for all these reasons, all aspects of the offer were fully laid out and Owner was bound to the contract. Buyer will argue that Paragraph 4 was a mere formality of the contract.

Specific enforcement is a remedy ordered by the court when the property subject to a contract is unique. Here, this land (the home for sale) is a unique piece of property and Buyer will argue they are entitled to it under specific performance.

2. Owner's defenses

Owner will argue that the handwritten letter of July 27 was not a contract since it contained a provision in Paragraph 4 that Buyer's real estate agent would deliver to Owner within 72 hours a standard form Maryland Assoc. of Realtors contract of Sale ("Contract"). Owner will argue that "Contract" was the real contract and that the handwritten letter was an invitation to deal and was contingent on the delivery of the Contract.

Owner will also argue that terms were added to the contract, which differed from the original July 27 letter. She can say this was a counteroffer and therefore not an offer that she could accept.

Owner will argue that although she thought he signed the Contract and had no objections to its terms, she did not deliver it to the buyers and so there was no acceptance. Instead, she placed it

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in her desk drawer. Furthermore, she never negotiated the \$1,000 from the Buyer's. Therefore, she never accepted the Contract.

3. Who is likely to prevail

Owner is likely to prevail because she never delivered the Contracts to the Buyers. She never manifested the intent to accept the Contract to the Buyers. Therefore, there will be no specific performance for the Buyers.

**REPRESENTATIVE ANSWER 2**

The common law will govern this contract for the sale of real estate, which is the house.

A valid contract is formed when there is an offer, acceptance, consideration and compliance with the Statute of Frauds. Here, Buyer and Owner jointly wrote a handwritten letter agreement for Owner's sale of the house to Buyer. Buyer wrote a personal check for \$1,000 payable to Owner as a deposit. Thus, Buyer will argue that an enforceable contract exists between him and the Owner at the time they signed this agreement.

The terms of the handwritten letter agreement that they both drafted and signed on July 27, 2011 stated that Buyer offers to buy the Property for \$235,000, that a personal check for \$1,000 was delivered to owner on this date and that the balance would be paid no later than September 1<sup>st</sup>. The agreement terms also stated that the Buyer guarantees closing and does not require a financing contingency, that Buyer does not require a Property inspection contingency and that the Buyer's real estate agent will deliver to Owner within 72 hours a standard form Contract. The Owner would need to sign and return the Contract to Buyers's real estate agent within 48 hours of receipt. Owner to pay one-half of transfer taxes *and* all other costs of closing to be paid by Buyer.

Buyer will argue that he properly executed the packet including the Contract to Owner via his real estate agent, and even provided a pre-paid overnight courier envelope to Owner, asking her to sign and return the Contract to the agent not later than close of business the following day. Buyer followed all the terms he had agreed to in the handwritten letter agreement. He had his agent deliver the Contract within 72 hours. In fact, he had the Contract delivered the next day. Thus, Buyer complied with the handwritten agreement terms that he had agreed to.

Buyer will argue that Owner has not performed because she failed to return the Contract, and therefore is in breach. Owner will defend that the handwritten letter agreement was not the actual contract that would bind them. Owner will defend that the Contract that was delivered to her by the agent contained Buyer's offer and she would have to accept it in order for them to have a valid enforceable agreement. Since she never returned the Contract to the agent, she never accepted the Buyer's offer to purchase the house. Thus, no valid contract exists between both parties. Furthermore, Owner will defend that when she called Buyer's agent and told him she would not return the Contract unless Buyer agreed to a higher price, that was a counter-offer.

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Since Buyer refused to agree to a higher price, buyer rejected her counter-offer. Thus, Owner will maintain that there was never an enforceable agreement between the two.

Buyer will argue that even if the handwritten letter agreement was not a valid agreement, Owner accepted the contract that was delivered to her by the agent when she had read the Contract, had “no objection” to the terms, and “signed and initialed the Contract in the proper places.” Thus, she had accepted the terms of the Contract and a valid agreement was formed at the time she signed. Owner will defend that even though she signed the Contract, she never mailed it back to the agent via the courier. Instead, she “put it in a drawer together with Buyer’s check...which check she did not negotiate or cash.” Thus, she never accepted the Contract and no enforceable contract was formed.

For the reasons above, Owner will prevail. The handwritten letter agreement signed by both parties was not binding. The Contract that was delivered to her would have been binding if she had accepted Buyer’s offer, signed and delivered the Contract back to the agent by courier mail. Since Owner never did that, she never accepted the offer and no valid enforceable contract was formed.

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**QUESTION 2**

Question 2 of the February 2013 General Bar Exam, testing Maryland Civil Procedure, was found to be confusing because of a conflict between the Question as printed (which referred to procedures in “District Court”) and the Extract (which referred to procedures in “Circuit Court”). Because of this conflict, the Board, in the interest of fairness assigned all applicants the highest raw score of 6 for that question.

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**QUESTION 3**

In 2010, Andy purchased a six acre unimproved peninsula of land on the Bohemian River, in Kent County, Maryland, with plans to build a home on the property. After the purchase, Andy became aware of extensive public use of a beach area on the property by boaters (“Boaters”). After learning of the public use, Andy posted on the property “No Trespassing” signs. In 2011, Andy applied to Kent County, and was granted a permit to place a fence along the shoreline above the mean-high water line. The fence effectively prevented the public use of the dry sand beach area above the mean-high water line.

Boaters can show the public has used the areas above the fence line for more than thirty years to sunbathe, picnic, walk and swim. Boaters admit they did not know who owned the property prior to the fence being erected. Boaters never asked for, nor received, permission to use the property from any of the owners. Boaters believed the property was open for public use because it was common practice for members of the public to use the beach for recreation. The use of the disputed area was well known and visible within the community. The property has always been uninhabited and undeveloped.

Boaters, who have used the beach property, have come to you, a Maryland attorney, and want to bring an action to make Andy remove the fence and allow the public access to the areas of the dry sand beach previously enjoyed.

**How do you advise? Discuss your answer fully.**

**REPRESENTATIVE ANSWER 1**

Conflict of Interest: A lawyer may not represent multiple clients unless he reasonably believes, subjectively and objectively, that he can carry out the representation competently and without prejudice to any of the clients’ interests. The lawyer must obtain knowledgeable consent, confirmed in writing from both parties, in order to proceed. Here, although conflicts may arise between Boaters, it seems likely to be consentable under the facts, and I would seek such consent where necessary.

I would advise Boaters of the following.

Easement’s:An easement is a non-possessory right to use land of another. It may be granted expressly, or found through prescription, implication, necessity, or under a theory of estoppel.

Public Use Prescriptive Easement: An easement for the general public may be found where the terms for a prescriptive easement are found to apply to the general public instead of a particular individual. This means that where the land of another person is used openly, continuously, and under a claim of right by the public for a statutory period, a public use

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prescriptive easement may be found by a court. The MD statute requires 20 years of continuous use to claim such an easement. Here, there is “extensive public use” of the

property; “the public has used the area” openly to “sunbathers, picnic, walk and swim” for more than thirty years”, and Boaters “did not know who owned the property” nor did they receive permission to use the property, thus it may be possible such an easement may be found, though factors below make it highly unlikely.

Land in a ‘State of Nature’ or Undeveloped: Where real estate is entirely undeveloped and still in a ‘state of nature’, the use of such land is presumed permissive, and the parties claiming an easement have the burden of establishing the adversity of their use. Here, the “six acre” plot was “unimproved”, and furthermore, Andy learned of the extensive public use only “after the purchase” and took actions immediately to exercise his rights and communicate his intentions to exclude others by posting “No Trespassing” signs, and later building a fence. Boaters have a strong argument even with the presumption to establish adverse use-see the facts above, in addition to the facts that “it was common practice” for the public to use the beach and that the “use...was well known and visible”. Nonetheless, Andy’s ignorance of the use prior to his purchase, his subsequent acts to exclude the public, and especially the fact that the “property has always been uninhabited and undeveloped”, make it likely Andy may receive the benefit of this presumption here.

Public’s Rights: Per MD law, the public has a right to use the dry sand beach area only up to the “mean-high water line”. Thus, Andy is likely well within his rights here in building a fence above the mean-high water line and in “effectively preventing” public use above the mean-high water line.

Because of the above, I would advise Boater’s against an attempt to bring an action against Andy for removal of the fence and public access to the beach above the mean-high water line.

Trespass: It is a violation of Maryland law to enter land of another that is conspicuously posted against trespassing. Here, if Andy warns anyone not to enter or to leave his property, or if someone enters his property which is conspicuously posted against trespassing, Andy would have a cause of action against them, though damages are likely to be nominal for a minimal trespass.

**REPRESENTATIVE ANSWER 2**

Preliminarily, I would counsel each of the Boaters on whether there were any direct or potential Conflicts of Interest among them. Before agreeing to represent the Boaters (B), I would obtain written informed consent from each concerning the conflicts issue.

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An Easement is the right to use the land of another. Easements are created by Prescription, Implication, Necessity, Express, or Estoppel. I would have to advise that B do not have an Easement in using the areas of the dry sand beach previously enjoyed.

An Easement by Prescription is found where a property has been subject to open, continuous, adverse, and notorious use for the statutory period of 20 years. A public easement by Prescription may be recognized where those using the property are members of the public, not just a private individual. Here, while B can show the public has used the areas above the fence line openly to sunbathe, picnic, walk, and swim; notoriously, where it was well known among the B, who were members of the public; and this use continued for 30 years, 10 years in excess of the statutory period. However, because the property in question was undeveloped and uninhabited, B's use was not adversarial until Andy (A) purchased the property. Therefore, B falls short of having an easement by prescription.

An Easement by Implication is found where there is a necessity, a common grantor, and a continuous apparent prior use. There is no necessity demonstrated here, as B can continue to use and enjoy the non-fenced areas of the beach; no common grantor where the beach property in question was a single lot conveyed to A, not a division of that lot bequeathed to B. No such easement may be found here.

An Easement by Necessity recognizes strict necessity and a common grantor. A common grantor was not found above, nor was a lesser standard of necessity.

An Express Easement is one explicitly granted by the property owner. This is not supported by the facts.

An Easement by Estoppel is where a user of the easement reasonably believes that, based on promises made by the landowner, that an easement exists. Because A did not allow B to use the fenced beach property, no such easement exists.

The best I could advise B to do is allow me to file an Action to Quiet Title on their behalf in the Circuit Court of Kent County, to determine the existence of an Easement by Prescription. There is a possibility that Public Easement by Prescription may be found on the theory that the government as owner of the beach property, suffices as an owner to satisfy the "adverse" requirement of an Easement by Prescription.

Alternatively, I would advise B to seek a license or express easement to use the beach from A.

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**QUESTION 4**

John individually owned two unimproved lots in Dorchester County, Maryland, on which he wanted to construct two residences. He properly formed a limited liability company, John Investments, LLC (“Investments”) to act as the developer of the project. John was the sole and managing member of Investments. Investments entered into a contract with Buildstrong, LLC (“Buildstrong”) to construct the residences, and Investments agreed that it would deposit funds into a separate account, showing the name of the proposed development, to pay Buildstrong as the work progressed. John deposited personal funds into the general operating account of Investments to pay the obligations of Investments. These deposits were the only assets of Investments, and no separate account was ever created.

For several months, Investments timely paid Buildstrong for the work completed on the residences from its general operating account. The residences were complete and ready for sale. However, final payments had not been made by Investments to Buildstrong. The completed residences were sold in June 2011. Buildstrong did not receive the promised payments because the sales prices were lower than expected due to poor economic conditions.

Because Investments did not pay Buildstrong as agreed, Buildstrong sued Investments and John, individually, to recover its losses.

**Will Buildstrong be successful? Fully explain the reasons in support of your answer. Please do not address any issues concerning mechanics’ liens.**

**REPRESENTATIVE ANSWER 1**

Buildstrong will prevail in its suit against Investments.

Buildstrong will not prevail in its suit against John individually.

**Breach of Contract**

There is a contract between Investments and Buildstrong to build a housing development in exchange for payments as the work is completed.

The timely payments made from Investments to Buildstrong show that Investments was aware of and acknowledged their debt to Buildstrong and Investments has not offered any defenses to contract against Buildstrong to alleviate them from the debt burden. Also, Investments is not calling into question the workmanship of the buildings nor is asserting that Buildstrong has breached their contract or otherwise failed to perform. Investments have simply stopped payments as owed due to shortfall in its expected revenues from the sales of the residences.

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As such, Investments has no defense against the final payments owed to Buildstrong and the courts will find in favor of Buildstrong for the payment owed, any damages incurred by Buildstrong due to breach of contract including reasonable interest on the monies owed from the time of delinquency in payment through the recovery.

**Limited Liability Corporation and Personal Assets**

Buildstrong will not be successful in its suit against John individually because Investments is a Limited Liability Company which shields John's personal holdings and limits recovery to the holdings/assets of the LLC. The fact that John invested his personal funds as sole and managing member of the LLC does not pierce the protections afforded to his personal assets that were not part of LLC's accounts. John as an individual is not bound in contract with Buildstrong and therefore not in breach of contract.

Johns LLC is in breach and recovery will be limited to the assets of the LLC. Therefore, investments will be found in breach and held liable for damages, while John individually will not be found in breach and will not be liable to Buildstrong for nonpayment

**REPRESENTATIVE ANSWER 2**

**B v. I**

B will be able to recover its losses from I. Since I is registered as an LLC, it will be liable to third parties for any breach of contract. J, acting on behalf of I as its sole managing member, entered into a binding unilateral contract with B. B accepted this contract by performance, which was developing the lots. Upon completion of the residences, B was entitled to its compensation. This contract formation was within the scope of J's duties and I will be liable to B for its breach.

**B v. J, individually**

J will not individually be held liable to B for B's losses. In MD, a properly formed Limited Liability Company (LLC) shields its members from personal liability. Members of an LLC, however, can be held personally liable for tortious or fraudulent acts committed against third parties. In this case, J is the sole managing member of I and entered into a contract with B on behalf of I. B will argue that J fraudulently induced B into a contract with I by misrepresenting I's assets. This argument will likely fail because, from the facts given, it does not appear that J acted in bad faith when contracting with B. J made good faith payments to B up until the residences were sold. Further, there is no indication that J will not pay B when economic conditions improve. MD requires a party alleging fraud to prove that the wrongful party was liable by clear and convincing evidence. B will likely not be able to prove that here, because J has acted in good faith.

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In addition, B will argue in the factum, that I was never in fact an LLC, and J should not be shielded from its status as an LLC. B will show that J was the sole member, and used only personal funds as I's assets. This argument will fail because the LLC was "properly formed" meaning it was recognized by the State Dept. of Assessments and Taxation, and an LLC with a sole managing member is recognized in MD. J can also raise the defense of corporation estoppel, which will estopp B from denying I's LLC status after it has made a continuous dealings and accepted payment from I as an LLC in the past.

In conclusion, J will not be personally liable to B.

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**QUESTION 5**

Paul, who lives in Garrett County, Maryland, is an avid motorcycle rider. Larry owns an unimproved tract of land consisting of 300 acres. It is also located in Garrett County, Maryland. Paul asked Larry in January 2012 if he could, from time to time, ride his motorcycle on Larry's property. Larry gave his permission and he and Paul agreed on a \$30 fee each time Paul rode on the property. Paul always wears an appropriate helmet and other safety gear when riding his motorcycle.

By Lease dated July 15, 2012, Larry leased the mineral rights under the surface of his land to Digger Coal Company ("Digger"). The Lease included Easement for Digger to construct a power line across a portion of the property. During construction of the line, Digger left a large spool of cable on the property. Digger did not know of the agreement between Paul and Larry allowing Paul to ride on his motorcycle on the property.

On August 10, 2012, Paul was riding his motorcycle on a portion of the property upon which he had not previously travelled. It was near dusk and he was in a hurry to get back to his truck in order to go home. As he was riding along an animal path he suddenly ran into the large spool of cable and was thrown from his motorcycle. As a result of the accident, he was seriously injured. He was in the hospital for three weeks and incurred medical bills in excess of \$45,000.

Paul files suit against Larry and Digger in the appropriate court in Garrett County.

**A. Is Larry liable for the damages sustained by Paul? Discuss fully.**

**B. Is Digger liable for the damages sustained by Paul? Discuss fully.**

**REPRESENTATIVE ANSWER 1**

**A.**

Larry is unlikely to be held liable in tort for Paul's injuries.

A Maryland court would probably consider Paul to be either a licensee or an invitee on Larry's land. Maryland courts continue to adhere to the traditional categories of landowner duty of care based on whether the injured person is an unknown trespasser, a known trespasser, a bare licensee, a licensee, or an invitee. A licensee is one who is on the landowner's land for his own purposes but with the landowner's permission, such as a social guest. An invitee is one who is on the land for the landowner's purposes, such as the customer of a business. Here, Paul was on Larry's land for his own purposes, but he also paid Larry for the privilege of using the land, so he might be considered either a licensee or an invitee. A landowner owes an invitee a duty to warn of hidden dangers of which the landowner is aware or would be aware with reasonable inspection. Here, the facts do not indicate that the spool of cable was hidden in any way, nor do they indicate that Larry was aware of it. Even though the property in question was a very large

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tract of undeveloped land, Larry probably would have discovered the spool of cable upon making an inspection of his property, but it is unclear that even if he had discovered it he would have realized that it would pose a danger to Paul. Thus, it does not appear that Larry has breached his duty of care to Paul, and thus Larry is not likely to be held liable for Paul's injuries.

However, even if a court finds that Larry should have discovered the spool of cable and warned Paul of the danger, i.e. finds that the danger to Paul was or should have been foreseeable to Larry, Larry can still raise the defense of contributory negligence. Maryland adheres to the traditional doctrine of contributory negligence, under which a plaintiff whose own negligence contributed to his injuries will be absolutely barred from recovery. Here, Paul was driving his motorcycle at a high rate of speed even though it was dusk and the visibility was presumably poor. A court would likely find that if Paul had been driving more slowly and carefully, he would have seen and been able to avoid the spool of cable. If the court so finds, it will consequently hold that Paul was contributorily negligent and thus barred from recovering against Larry.

**B.**

Digger is also unlikely to be held liable for Paul's injuries.

First, Paul might argue that coal excavation is an abnormally dangerous activity, and therefore that Digger should be held strictly liable for his injuries. However, even if Paul is correct that coal excavation is an abnormally dangerous activity, Paul's injuries were not sustained as a result of Digger's excavation activities. Digger's rights on Larry's land included an easement to construct a power line, and the spool of cable that caused Paul's injuries was part of the power line construction. If Paul had fallen into a mining shaft and been injured that way, the situation might be different. However, absent a finding that construction of a power line is also an abnormally dangerous activity, Digger will not be strictly liable for Paul's injuries.

Paul will also argue that Digger is liable based on a theory of negligence. Because Digger was merely leasing the land, it does not owe the same specialized duties of care owed by a landowner such as Larry, as discussed above. However, Digger would still owe Paul the duty of care of a reasonable mining company under the same circumstances. Digger did not know of the arrangement between Paul and Larry for Paul to ride his motorcycle on the land, thus making Paul's injuries less foreseeable to Larry. But whether or not Digger breached its duty of care by leaving the spool of cable in a place where someone might run into it is a close call, and there are simply not enough facts to determine how a court would be likely to come out.

However, even if a court found that Digger breached its ordinary duty of care to Paul by leaving the spool of cable where Paul might run into it, Digger could raise the same contributory negligence defense against Paul as discussed above in Part A. And again, because a finding of contributory negligence on the part of Paul is likely, and because contributory negligence is an absolute bar to recovery, Paul is unlikely to recover against Digger.

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**REPRESENTATIVE ANSWER 2**

A. Larry is not liable for damages sustained by Paul. Paul was a bare licensee who used Larry's land for his personal use by paying him \$30 each time he rode his motorcycle there. As a bare licensee his duty of care to Paul is less than an invitee. As a bare licensee he only owed Paul a duty of care regarding all known artificial dangers on the land as opposed to an invitee where he would have a duty to warn of all knowable artificial dangers on the land. In a negligence action, Paul would have to prove duty, breach, causation and damages. Here, Larry did not know of the large spool of cable on the property that was left by Digger. His land was 300 acres so he would only be required to warn Paul of any known artificial hazards on the property. He did not know of this so he did not breach his duty of care to Paul. The "but for" cause of the injury was Digger leaving the spool of cable on the property. This was the proximate cause of his injury and Paul suffered \$45,000 of damages. Furthermore, the facts indicate that Paul may have been partially negligent himself and Maryland bars recovery for a tort action where the plaintiff was contributorily negligent. Here, Paul was riding near dusk and was in a hurry to get home riding on an animal path. A reasonable person would have been extra careful at night and it seems that he may have been going faster than would normally be reasonable especially considering the limited light. Therefore, Paul will not be able to recover anything even if Larry did have a duty because he was contributorily negligent.

B. Digger is not liable for the damages sustained by Paul. Digger's lease of the property along with an easement also gave him a duty to act reasonably. The only issue is whether he owed a duty of care to Paul since he was not even aware of the agreement between Paul and Larry. Digger would then only owe the duty of care of that of an unknown trespasser. Therefore, digger would not have a duty to warn or make safe because there was no notice that anyone drove motorcycles on the property.

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**QUESTION 6**

Credit card issuers are required under a federal act to disclose certain information, such as effective interest rates, all fees associated with the cards, and any penalties that may be applied to late payments. The legislative history of the Uniform Comprehensive Credit Card Act (“UCCCA”) indicates that Congress intended to provide “comprehensive protection for consumers from misleading credit card practices” and to “facilitate interstate credit card transactions by providing standardized disclosure requirements.”

The legislature of the State of Spendthrift, always aware of its fiscal responsibility, is concerned that credit card issuers are targeting ever younger customers, marketing cards even to high school students, most of whom have little or no income to pay off charges and loans. Many younger credit card customers, due to their lack of sophistication, often get multiple cards and pile up considerable debt. Aggressive collection practices often result in damaged credit ratings or bankruptcy for these younger consumers and often result in parents having to bail out their children. The State of Spendthrift passes a law prohibiting credit card issuers from providing credit to individuals under the age of 18, and prohibiting the solicitation of potential customers by card issuers, in person or by advertisements, on university and college campuses within the state. The law only applies to residents of the state and to transactions within the state. As there are no credit card issuers headquartered in the State of Spendthrift, the only affected businesses are out of state companies.

Ivan A. Carr (“Ivan”) is a 17 year-old high school student in Spendthrift who works part time at a local U Save Market. Ivan wants to get a credit card from Piranha Credit (“Piranha”), a national credit card company that specializes in “high risk” accounts. Piranha has approved Ivan for credit but is prevented by Spendthrift’s law from providing a card due to the state’s minimum age requirement. Additionally, Piranha wants to distribute flyers and advertise on college campuses in Spendthrift.

Piranha Credit challenges Spendthrift’s law regulating credit card practices and argues that the state law is preempted by the federal UCCCA law.

**A. Assume that the UCCCA law has preempted state law regarding credit card disclosure, is there any argument under which Spendthrift’s law can still be valid? Discuss fully.**

**B. Piranha also raises a challenge to Spendthrift’s law claiming the law violates due process. Discuss fully Piranha’s likelihood of success on this claim.**

**C. Piranha challenges the state law as a violation of the “dormant” Commerce clause. What arguments could it make? Discuss fully.**

**D. If Ivan challenges the state law as an interference with his fundamental right to make and enforce contracts, what argument(s) is he likely to make and what is the likelihood that he will succeed? Discuss fully.**

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**REPRESENTATIVE ANSWER 1**

**Part A**

Generally, federal laws preempt state laws that are contradictory to the federal laws, however, the state laws will still be valid if they merely provide additional regulation that is not inconsistent with the federal laws. Here, the state regulations do not contradict the federal law which requires disclosure of interest rates, fees and penalties but rather adds to the regulation that cards cannot be issued to people under 18 and placing limitations on advertising and solicitation of the cards.

As long as the state regulations are in harmony with the purposes of the federal law, the laws will be upheld. Here, Congress intended to “provide comprehensive protection for consumers from misleading credit card practices and to facilitate interstate credit card transactions by providing standardized disclosure requirements.” Additionally, the state is interested in reducing the amount of damaged credit and bankruptcy arising out of aggressive collection practices that you, uneducated card holders in the state face.

**Part B**

To challenge the Constitutionality of a law, the plaintiff must have standing. Standing requires a showing that the individual faces actual or imminent harm that is reasonably traceable to the government. Here, Piranha (P) has approved a person for a credit card with their company, but is prohibited from issuing it because of the state law, therefore P has standing.

The Due Process Clause of the 14<sup>th</sup> amendment limits the government’s ability to impede upon a person’s right to life, liberty, and property. Here, because the state is preventing P from enjoying the benefits of conducting business in the state of Spendthrift, the due process clause is implicated.

Under substantive due process, impeding on a person’s non-fundamental due process rights requires the plaintiff to satisfy the rational basis test. Here, because the right to conduct business is not a fundamental right, P is subject to the rational basis test.

The rational basis test requires the plaintiff to prove that the government’s actions are not rationally related to a legitimate interest – and is very difficult to prove against the government’s actions. Here, the state’s interest, as stated above, is to protect younger, less educated customers from aggressive practices that result in considerable debt and bankruptcy, which is a legitimate interest, and the state’s actions are rationally related. Therefore P will not succeed.

**Part C**

The commerce clause grants Congress the sole authority to regulate interstate commerce. The dormant commerce clause permits the states to also regulate, as long as there is no geographic discrimination, or substantial burden on interstate commerce unless an important government

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interest exists. Here, the state's regulation of out of state credit card companies implicates the dormant commerce clause. Because the state regulation does not treat out of state business different from in state businesses, there is no geographic discrimination despite the fact that since there are no companies in Spendthrift all out of state business are the only ones affected.

Therefore, the state's actions will only be permitted if there is an important government interest. As explained above, there is a legitimate, even an important state interest in advancing fiscal responsibility and protecting younger, less sophisticated credit card holders from being the target of aggressive credit card company practices.

**Part D**

Standing, explained above, is also implicated here. Here, because the state action has prevented Ian from getting a credit card, he has standing.

The contracts clause prohibits the government from creating laws that substantially interfere with existing contracts. Here, because Ian has not entered into a contract agreement with P, there is no violation.

Additionally, the right to enter into contracts is not a fundamental right, and therefore any violation of this non-fundamental right would be subject to the rational basis test. As explained above, the government will succeed under the rational basis test.

The Due Process Clause, explained above, is also implicated here. Ian may assert that the inability to make and enforce contracts impedes on his right to property. This will be subject to the rational basis test and satisfied in favor of the government as explained above.

The Equal Protection Clause limits the government's ability to treat individuals differently. Here, because the state prohibits the issuance of credit cards to minors, they are treating minors differently than adults.

A suspect class affected under the Equal Protection Clause is subject to strict scrutiny. Here, since age is a suspect class, the state law would be subject to strict scrutiny in relation to Ian's claim.

Strict scrutiny places the burden on the government to show that the law is necessary and the least restrictive means of achieving a significant interest. Here, the interest stated above is legitimate and important.

**REPRESENTATIVE ANSWER 2**

This question involves issues of state and federal law. In order to raise a claim, an individual must have standing afforded from suffering an injury or threat of imminent injury as a result of

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the law. Piranha will suffer the injury reduced sales and is losing the liberty interest in continuing business in SpendThrift. Piranha has standing.

**A. Preemption Argument**

Under the Supremacy Clause, federal laws preempt and overrule state law with respect to the subject matter of the federal law. This applies in areas where the federal government has individual and original authority and under any subject where the federal government has instituted law. If a state law contradicts federal law, the state law is invalid. The state law is valid however, if the state law merely adds additional or new requirements to the federal law. In this case, SpendThrift's law does not contradict the UCCCA, it merely adds an additional limitation on the creditor's practices. The law does not violate the UCCCA and the Supremacy Clause is not violated. The law is valid.

**B. Due Process Challenge**

The Due Process Clause of the 14<sup>th</sup> amendment incorporates the 5th amendment Due Process Clause against the states. The clause states that the government shall not deprive a citizen of a life, liberty, or property interest without due process of law. Due process at a minimum is notice and the opportunity to be heard. Here, Piranha is being deprived of the liberty interest in engaging in a part of its business in SpendThrift. They have standing under due process. Piranha was not afforded notice or a hearing prior to the SpendThrift taking their right to enter certain contracts in the state, however, engaging in such contracts could hardly be called an entitlement that would justify affording them due process. Since the right to engage in business with minors is not a fundamental right, Piranha will have to prove that the law fails the rational basis test, i.e. that the law is not rationally related to a legitimate state interest,. Here, the goal of the laws to protect minors from accumulating extensive debt and creating greater financial obligations for young people, including premature bankruptcy. Preventing credit card companies from marketing to them is rationally related to that interest. Therefore, the law does not violate due process.

**C. Dormant Commerce Clause Challenge**

Under the commerce clause, only federal government may regulate matters of interstate commerce. States can regulate interstate commerce provided that the restriction is not geographic in nature and does not unduly burden interstate commerce. Here, Piranha can argue that SpendThrift violates the Dormant Commerce Clause because they have made a law affecting interstate commerce based on geographical limitations and does not forward a compelling state interest. The law applies only to in-state residents and transactions within the state. Also, the only businesses regulated are businesses outside of the state. This creates a regulation that is purely geographic and therefore, the state law violates the Dormant Commerce Clause. Piranha will likely succeed.

**D. Right to Contract Challenge**

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The contract clause prevents the government from passing laws that interfere with the enforcement of present contracts. This clause does not apply to contracts that have not yet been formed. Ivan's argument here will likely fail, because he does not have an existing contract with Piranha, and therefore, the clause is not violated. Additionally, Ivan is a minor and lacks the

capacity to form contracts. Any contract he would enter into can be disclaimed by him unless he ratifies the contract after his 18<sup>th</sup> birthday. Given his diminished capacity to contract and the fact that the credit card contract does not yet exist, Ivan cannot challenge the law on these grounds.

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**AN EXTRACT HAS BEEN PREPARED FOR YOUR USE IN ANSWERING QUESTION 7. IT HAS BEEN PRINTED SEPARATELY. IF YOU DID NOT RECEIVE A COPY, PLEASE CONTACT YOUR PROCTOR AND OBTAIN A COPY BEFORE ANSWERING THE QUESTION.**

**QUESTION 7**

*On January 2, 2013, Buyer, a retail tire dealer, faxed the following purchase order to Seller, a tire manufacturer:*

<u>Quantity</u>	<u>Size</u>	<u>Price</u>		<u>FAX</u>
120	A	\$40 each	=	\$4,800
80	B	\$45 each	=	\$3,600
40	C	\$50 each	=	<u>\$2,000</u>
		TOTAL		\$10,400

Ship "C&F" to our warehouse in Baltimore, Maryland, by January 15, 2013.  
Terms: Payment 30 days from delivery.

Seller promptly faxed the following acknowledgement:

Your purchase order acknowledged.	<u>FAX</u>
Will ship by January 15, 2013.	
Additional terms: Interest on balances 30 days past due at 1 ½ % per month.	

Buyer did not respond to Seller's fax. Seller shipped tires, freight paid, by common carrier, which delivered them to Buyer's Baltimore warehouse on January 15, 2013. When Buyer's employees unloaded the tires, the warehouse manager noted on the delivery receipt:

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Received	120 Size A	<b><u>DELIVERY RECEIPT</u></b>
	100 Size B/20 over	
	20 Size C/20 short	

A fire of undetermined origin occurred at Buyer's warehouse on the evening of January 15, 2013, destroying all the tires. Buyer had no insurance on the contents of the warehouse. On February 16, 2013, Buyer sent the following fax to Seller:

<b><u>FAX</u></b>
Shipment received 1/15/13 was non-conforming. Sizes
not as ordered. Tires unavailable for return due to fire
in warehouse.

**Explain fully the rights of Buyer and Seller under the Maryland Uniform Commercial code.**

**REPRESENTATIVE ANSWER 1**

The Uniform Commercial Code (UCC) applies to transactions involving goods. Here, the transaction includes tires which are a good thus the UCC applies.

A contract requires mutual assent and consideration. Here, the purchase order was the offer, the fax back was the acceptance and the promise to ship by the manufacturer and the promise to pay by the retailer creates the consideration, thus a valid contract exists.

The general rule as to terms in a UCC contract is that additional terms are proposals unless two merchants are involved. Here, there are two merchants involved so the general rule does apply.

A contract with Merchants where the acceptance states different terms than the offer, the additional terms are part of the contract if they are not objected to and if they do not materially alter the agreement. Here the acceptance stated the additional term of adding interest if payment is not received in 30 days, and it was not objected to and does not materially alter the contract as a whole so this term is part of the contract.

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Delivery of the goods occurred within the time frame but were not a perfect tender so the manufacturer potentially breached.

Buyer's rights are to reject the whole, accept the whole, or accept parts where delivery is nonconforming. Here, the retailer has this option.

Right to inspect is given to the buyer for a reasonable time after delivery to determine acceptance of the goods. Here, buyer noticed that there was not a perfect tender when the goods were delivered.

Seller has the right to challenge whether a month later was reasonable time to reject the goods.

Acceptance of goods can occur after a reasonable opportunity to inspect, failure to make an effective rejection, or an act inconsistent with seller's ownership. Here, Seller can argue that reasonable time to reject passed and therefore an acceptance occurred.

Risk of loss where there is a breach based on failure to deliver conforming goods so that it gives the **right** of rejection, then the risk of loss remains on the seller until cure or acceptance. Here, the fire occurred before cure or acceptance, thus the seller assumes the financial loss of the goods.

Seller has the right to call their insurance company for coverage.

### REPRESENTATIVE ANSWER 2

The Buyer and Sellers Rights Under Maryland UCC

Offer and Acceptance-The initial fax or order can be construed as an offer (see 2-206 (b)) inviting acceptance by prompt promise to ship or actual shipment. Here, the buyer faxed an acknowledgement in return which can be viewed as an acceptance under 2-206.

Additional terms-However, the return included an additional term "interests on balance 30 days past due at 1.5% per month". Unlike in common law where the mirror image rule applies, the addition of material terms do not result in a reject/counteroffer under the UCC. Instead, material terms become part of the contract unless offer expressly limits acceptance to it terms, merchant objects or the terms materially alte Here, an argument can be made that the terms materially alter the contract by adding an additional cost. If the terms do materially alter, it will simply drop out. However, this doesn't count as a material alteration the terms will stay in. Regardless, the parties do indeed have a valid contract despite the addition.

Risk of Loss-Thus, when the fire broke out they had a valid contract and the risk of loss must be apportioned. Here, the risk of loss remains on the seller. While normally a risk of loss in a CF contract passes once the goods are duly tendered (2-509), if the goods are non-conforming the

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risk of loss remains on seller according to 2-510. That is because the UCC requires perfect tender. A buyer has a right to reject goods if they are not perfect (or to keep and sue). Goods sent with an accommodation, an acknowledgement that the goods are non-conforming, will not result in a breach, but here there was no such acknowledgement. As such, because the goods were not the correct quantity as ordered by buyer and therefore not perfect, the risk of loss remains on the seller under 2-510 and the buyer will not have to pay damages to the seller. However, there may be a defense here for seller that goods were not property rejected. The delivery receipt simply stated what had been received along with the words (over and short). The seller did not state that the goods were being rejected. Therefore, seller may try to argue that buyer did not properly reject and the risk of loss remains on the buyer.

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**QUESTION 8**

Mack and Celeste were married on June 20, 2008. Mack made an excellent living as a stockbroker and Celeste did not work. They resided in Maryland. Their son, Tony, was born in July 2009. Six months after Tony's birth, the couple decided to separate. Celeste took Tony and moved into a Maryland hotel in January 2010. The couple agreed that divorce was the best option for them and that they would proceed pro se.

In May 2010, Mack and Celeste entered into a Separation and Property Settlement Agreement in which Mack agreed to pay Celeste "spousal support in the amount of \$2,000 per month, non-modifiable by any court, until his or her death." The parties agreed to joint legal and shared physical custody of Tony with liberal visitation though Tony resided with Celeste. After a year of mutual separation, the parties were divorced on January 30, 2011. The Agreement was incorporated into the judgment of absolute divorce.

Celeste later met Donald, the very rich owner of the hotel where she resided. The two were married in December, 2012 and moved into Donald's estate in Baltimore, Maryland. Celeste and Donald thereafter purchased several hotels in various states and Celeste began living a care-free, jet-setting life, leaving Tony with Mack for weeks at a time. In January 2013, Donald and Celeste decided to reside in their hotel in Nevada, Donald's home state. Later that month, Celeste advised Mack that she intended to file for full custody of Tony at the appropriate time in Nevada. Mack is outraged.

**Mack comes to you, a lawyer licensed to practice in Maryland, to find out whether he can successfully petition a Maryland Court for sole legal and physical custody of Tony and whether he can stop paying alimony to Celeste. What would you advise? Discuss fully.**

**REPRESENTATIVE ANSWER 1**

I would advise Mack that he can petition a Maryland court for full legal and physical custody of Tony, and will likely be successful. I would further advise that the separation and property agreement would pose an obstacle to a court's reconsideration of the alimony payments.

Custody

First of all, I would tell Mack that he does not need to worry about a Nevada court hearing Celeste's request for custody of Tony. Although the facts do not expressly so state, it is a fair assumption that Mack and Celeste's judgment of absolute divorce on January 30, 2011 was entered by a Maryland court, as all the facts surrounding their marriage and divorce took place in Maryland. Both Maryland and Nevada have adopted the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"). Under the UCCJEA, the court with original jurisdiction over the divorce and child custody determination maintains

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continuing, exclusive jurisdiction over all subsequent child custody issues related to that family. Thus, under UCCJEA a Nevada court would refuse to hear Celeste's request for

custody, and would tell her that she has to return to the original Maryland court where the divorce was entered to have the custody dispute resolved.

Second, I would tell Mack that he has a strong argument to obtain a modification of the child custody arrangement from the Maryland court. A court will ordinarily defer to the terms of a mutually-negotiated separation and property settlement agreement, assuming the court finds that it is a fair and enforceable contract. Here, the court might find that there was substantially unequal bargaining power, as neither party was represented in the negotiation of the agreement and Mack was a stockbroker while Celeste was not employed. However, even if the court finds the separation agreement to be enforceable, Maryland courts are not bound by provisions in premarital or separation agreements dealing with child custody or child support. Accordingly, the Maryland court would likely agree to hear Mack's request to modify the custody arrangement based on the changed situations of the two parties.

In making the determination of whether to grant sole legal and physical custody to Mack, the court will apply the "best interest of the child" standard, considering factors such as the age and health of the parents, the marriage and family situation of the parents, the wishes of the parents, the financial situations of the parents, the physical distance between the parents, and any other factor the court deems relevant. Here, both parents appear to have sufficient funds to provide for Tony financially, and both appear to want full custody of Tony. However, Mack can make a strong argument that Tony will have a more stable life with him, as Mack appears to be staying put while Celeste travels around the country and leaves Tony with Mack for weeks at a time. Furthermore, Mack can also argue that Celeste is the one who is choosing to move to the other side of the country, and since the two parents will be separated by such a great distance, the court should award custody to Mack so that Tony can remain in Maryland, the home Tony has always known. For these two reasons, Mack has a strong argument that he should be given full custody of Tony.

Alimony

However, Mack's argument to modify the alimony arrangement is significantly weaker. Ordinarily, a Maryland family court would revisit an alimony award in light of changed circumstances, and Maryland courts are reluctant to approve indefinite alimony arrangements except where the recipient spouse has a disability or the disparity between the incomes of the two spouses is unconscionable. Here, Celeste has no disability and no disparity between incomes. In fact, it sounds like Donald might have a higher income than Mack. But this is all irrelevant, because even if a Maryland family court would ordinarily be sympathetic to Mack's plea to modify the alimony arrangement, here it would be bound by the agreement that Mack and Celeste worked out. The agreement stated that it could not be modified by any court, and was incorporated into the judgment of divorce.

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Thus, notwithstanding Mack's strong arguments that the alimony should be reduced or eliminated, a Maryland court would probably be bound to honor the agreement.

**REPRESENTATIVE ANSWER 2**

Sole legal and physical custody

Custody and support orders are modifiable at any time upon a petition for modification showing that such modification is in the best interests of the child. Further, under the uniform child custody act, a state has jurisdiction over a child when the child has resided in that state for the previous 6 months and no other state had jurisdiction. Once a state has jurisdiction over a child, that state retains continuing and exclusive jurisdiction absent circumstances not present here. Thus, Maryland has jurisdiction over the custody and support of Tony – not Nevada.

Mack can therefore petition a Maryland court for sole physical and legal custody of Tony. A change will be made if in the best interests of the child. Factors considered will be the time spent with father and the lack of time spent with the mother, and the mother's voluntary move miles away.

Here, because Celeste moved to Nevada and because she has essentially abandoned Tony for weeks at a time a court will likely grant primary legal and physical custody to Mack, and allow Celeste certain scheduled visitation time throughout the year.

Alimony

Generally alimony may be altered if a material change in circumstances requires such. Further, absent an agreement to the contrary, alimony ends upon the remarriage of the party receiving support.

Here, while there is clearly a material change in circumstances – Celeste is very rich now and is remarried- the parties agreed that the agreement to pay spousal support would be non-modifiable by any court. Thus, unless Mack can attack the separation agreement and have it declared invalid, a court will not alter his duty to pay support.

Further, because the agreement was incorporated into the divorce judgment Celeste may sue for breach and will petition the court for contempt if Mack discontinues payments.

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**QUESTION 9**

Michael, a tattoo artist, has been charged with the first-degree murder of Judith, who was killed on Halloween night in Haddonfield, Howard County, Maryland. The State is seeking the death penalty. Due to extensive pretrial publicity associated with a murder on Halloween, Michael's defense counsel has filed a motion to remove the case to a different Maryland county.

**A. How should the court rule on the motion? Explain fully.**

Jury selection is under way. The State's Attorney has systematically stricken all potential jurors with visible tattoos from the jury pool. Defense counsel objects to these strikes and the State's Attorney offers the explanation that people with visible tattoos are more likely to be unwilling to impose the death penalty.

**B. How should the court rule on defense counsel's objection? Explain fully.**

Michael is convicted and sentenced to death. While in prison awaiting execution, Michael's defense counsel discovers that the State was in possession of evidence of a psychiatric evaluation of Michael which was conducted immediately after his arrest, and which indicated that Michael had no appreciation of the difference between right and wrong. Defense counsel was unaware that this evaluation had ever taken place. In addition, the State was in possession of evidence that Judith had been visited by an unidentified male on the evening of the murder. This evidence was not disclosed to the defense. As a result, Michael's attorney files a timely motion for a new trial.

**C. How should the court rule on the motion? Explain fully.**

**REPRESENTATIVE ANSWER 1**

A. The court should grant the motion to remove. Removal of a criminal case to a different Maryland county is proper when a defendant's rights would be prejudiced by having the trial in a particular venue. Extensive pretrial publicity is a common reason for removal due to the tendency to have a tainted jury pool from whom a defendant may not be able to receive a fair trial.

Here the murder was committed on Halloween. The media covered the story extensively. It is likely that many details of the murder were released by the media and it is unlikely that the public would have been unable to avoid exposure to such details. For this reason, removal would be proper due to extensive media coverage. The court, therefore, should grant the motion to remove.

B. The court should deny the defense counsel's objection. Lawyers may strike jurors for cause or exercise a peremptory challenge and strike without cause. According to the Supreme Court case *Batson* and its progeny, peremptory strikes on the basis of race, ethnicity or gender are improper. Otherwise, peremptory challenges are largely left to the discretion of the attorneys

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and the judges overseeing them. Peremptory challenges exist to allow attorneys to strike jurors without a particular cause. Generally speaking, courts will not inquire into the reasonableness of an attorney's exercise of peremptory strikes so long as they do not violate the prohibition of striking on the basis of race, ethnicity, or gender.

Here, the State's Attorney has systematically stricken all potential jurors with visible tattoos. People with visible tattoos are not a protected class of the jury pool. The State's Attorney's belief regarding people with tattoos is therefore irrelevant to the consideration of whether striking them is valid. For these reasons, the court should overrule defense counsel's objection.

C. The court should grant the motion for new trial. The Supreme Court decided in Brady that any exculpatory evidence in the possession of the prosecution must be turned over to the defense. Failure to turn over such evidence creates an immediate right to a new trial.

In this case, both the evidence relating to Michael's psychiatric evaluation and the evidence of another person at the scene are both exculpatory. Maryland allows for an insanity defense to criminal charges if a defendant can show either 1) that due to mental disease he was unable to appreciate that what he was doing was wrong, or 2) that he was unable to conform his conduct within the bounds of the law. This is the same test employed by the Model Penal Code.

Michael's psychiatric evaluation indicated that he had no appreciation of the difference between right and wrong. Arguably, this means that at the time of the alleged murder of Judith, Michael lacked the ability to appreciate that what he was doing was wrong. This creates the basis for an insanity defense. As such it is exculpatory failure to turn over exculpatory evidence indicating a possible defense is a direct violation of Brady. This alone provides a basis for the court to rule in the defendant's in his motion for a new trial.

The evidence that Judith had been visited by another male is also exculpatory evidence. This evidence places another individual with Judith the night of the murder. At the very least, this proves another individual had the opportunity to commit the crime. Such evidence is clearly exculpatory and the failure of the State to provide this evidence to the defense is a violation of Brady. This too is sufficient for the court to rule in the defendant's favor in his motion for a new trial.

**REPRESENTATIVE ANSWER 2**

A)

The Court **MUST** grant his motion. In a death penalty case the defendant has a right to a change of venue by statute. The judge should refer the case to the administrative judge to pick another county where publicity is less likely to affect the outcome.

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B)

The court should overrule the defense counsel's objection. Preemptory challenges are at the discretion of each parties counsel unless they are done for a constitutionally impermissible purpose, by excluding a constitutionally protected class of people. If done by race, religion, sex, or nationality, the objection should be sustained but as long as there is a rationale that is constitutional the judge should not overrule.

C)

The court should grant a new trial. According to Brady the prosecution is required to provide the defense with all material evidence that would tend to exculpate the defendant even without a discovery motion. The psychiatric evaluation is material as it may have prompted an insanity defense and other visitor could have been the perpetrator or a witness that would point suspicion away from Michael. They were material and more than harmless error as they could have changed the outcome of the case. They should have been disclosed.

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**QUESTION 10**

The Office of Bar Counsel is hiring and you decide to apply for a job. As part of the hiring process, you are provided the following information and asked what, if any, charges Bar Counsel could file:

Attorney Y recently passed the Maryland Bar Exam and decided to start a criminal law practice with his best friend, Attorney Z. Attorney Z has been an Assistant State's Attorney in Prince George's County, Maryland, for two years, and believed it was time to start a private practice. They placed an advertisement on the web as the "NOT.GLTY.SPECIALISTS."

On January 5, 2013, after seeing their ad, X. Con visited the law office of Attorneys Y and Z asking that they represent him in a violation of probation case for a misdemeanor theft conviction. At the first interview, X. Con told Attorney Z that "You look like the lawyer my public defender was talking to last November when I got probation for my theft case." Attorney Z agreed that X. Con looked very familiar. Both attorneys assured X. Con that he wouldn't get jail time at the violation of probation hearing.

At the close of the interview, Y and Z asked for a retainer of \$30,000 and stated that an additional \$20,000 would be due if the matter is dismissed. X. Con paid the retainer. The next day Y deposited \$15,000 in the firm's trust account and \$15,000 in its operating account.

**Given these facts, what charges would you file if hired as Bar Counsel? Discuss fully.**

**REPRESENTATIVE ANSWER 1**

The first charge that I would file against the attorneys is in respect to the advertisement placed on the web. NOT.GLTY.SPECIALISTS implies that they would get a defendant off in a criminal action against them no matter the facts or circumstances. This is a breach of the Maryland Lawyers rule which states that an attorney shall not create an unjustified expectation by his advertisements.

Further, calling themselves specialists is a breach of the rule against attorneys holding themselves out as specialists. An attorney may state that he practices in an area of law but he cannot hold himself out as a specialist.

The facts imply that Attorney Z has handled this case while at the State's Attorney's Office. The confidential information he learned there cannot be divulged without being in breach of the Rules on conflict of interest. He is obliged to contact the Office of the State's Attorney and get informed consent in writing before he can continue. Here Lawyer Z's further handling of this case without getting informed consent from the State's Attorney is a breach and by virtue of the rules will be imputed to Attorney Y.

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The retainer of \$30,000 and the additional \$20,000 is a clear breach of Rule 1.5 which states that a lawyer shall not demand, collect or make an agreement for unreasonable fees or an unreasonable amount of expenses. This fee is unreasonable because Lawyer Y “recently passed the Maryland Bar Exam” and Lawyer Z has only 2 years of experience as an assistant State’s Attorney. The \$20,000 contingent on dismissal is a clear breach of Rule 1.5 which forbids contingency fees in criminal matters.

Finally, depositing \$15,000 in the firm’s trust account and \$15,000 in the operating account is a breach of Rule 1.15 and Title 16 since such money must be fully deposited in the trust account and withdrawn as earned by the attorney.

### **REPRESENTATIVE ANSWER 2**

The first issue is whether an attorney may hold themselves out as a specialist. The rules of professional responsibility state an attorney may not do so. Here, the title of the firm suggests that the lawyers of the firm are specialists in a particular field of law, and thus violates this rule.

The second issue is whether the firm’s name as advertised is misleading. The rule is that a firm’s name must not be misleading to the public. Here the “not.guilty.specialist” shingle implies they are more qualified than other lawyers in a particular field, suggesting the results obtained will be not guilty.

The third issue is whether a conflict of interest exists in representing X Convict. The rule is a lawyer must not represent clients where there is a conflict of interest. A lawyer must not represent a client in the same or substantially related matter in which the client had a direct adverse interest to the lawyer’s former government employer. The lawyer must get the consent of the former employer. Here Lawyer Z formerly worked for the State’s Attorney representing the State. Thus, the lawyer will violate the Rules of Professional Responsibility if he represents the client because he did not get the government’s consent.

The fourth issue is whether the attorney violated the Rules when he guaranteed an outcome. The rule is an attorney must not create expectations in clients they know can’t be guaranteed. Here, both attorneys assured X Convict that he would not get jail time at the violation of probation hearing thus breaching this rule.

The fifth issue is whether the agreement was reasonable. The rule is that a fee agreement must be reasonable. Factors to consider include: whether the fee is contingent or fixed; customary fees charged in the practice locale; and expertise required to achieve results. Here there is no evidence to determine whether the fee is reasonable but the amount seems unreasonable.

The sixth issue is whether the lawyers violated the rules when they deposited funds in the firm’s trust and operating accounts. The rule is client’s funds must be kept in a separate client trust account. Here the lawyer’s placed the \$15,000 in the firm’s account thus violating the rules.