FEBRUARY 2001 MARYLAND BAR EXAMINATION
REPRESENTATIVE GOOD ANSWERS

QUESTION 1

Alan and Brittany are planning to open a pizza shop in Baltimore City. Alan will invest $60,000, to be secured by a lien on the assets of the business. Brittany will make no cash contributions, but will operate the business on a day-to-day basis. They want to make sure that Alan will not be required to increase his investment or have any liability to business creditors. Brittany has also agreed that Alan will have a veto power over certain decisions she makes in order to protect his investment. The "basic decisions" requiring Alan's approval include purchasing anything that costs more than $2,500, borrowing money, and hiring employees. Profits and losses are to be allocated equally, after Brittany is paid a salary of $500 per week. Alan's investments is to bear 10% annual interest, and be repaid over 5 years in equal monthly installments.

Alan and Brittany consult you, a Maryland attorney, for advice on forming a business entity, under Maryland law, and preparing legal documents to accomplish their objectives.

Consider a limited liability company and a general partnership.

1. Write a brief memorandum, explaining which of these entities you believe will better enable Alan and Brittany to implement their objectives. Explain your reasons.

2. Identify the documents which will need to be prepared to accomplish their objectives. State the purpose of each document.

REPRESENTATIVE ANSWER 1

1. Without the aid of a lawyer – or more possibly, the intervention of Maryland's statutory regime governing business associations, the venture planned by Alan and Brittany ("A" and "B") would result in an implied partnership, as this appears to be their intent. The challenge for the attorney, then, is to aid A & B in forming a legal entity that would allow them to act as partners (in a layman's sense), while also accomplishing their other objectives with regard to the rights and responsibilities of each person. An LLC would be preferable to a general partnership in this respect.

The general partnership form has several weaknesses in this case. In some ways, A seems to want to play the role of a general partner, but of a limited partner. In particular, his desire to avoid personal liability. However, his desire to participate (even through a veto power) in fundamental decisions concerning the operation of the business is inconsistent with the role of a limited partner and by

participating in such activities, he would open himself to liability as a general partner, which includes personal liability. Alan's desire to contribute assets beyond his initial investment might also be thwarted because of his legal responsibilities as a partner.

An LLC is preferable. Under this approach, A & B would become members of an LLC and be insulated from the entity's liability. The LLC form would also allow them to draft a governing agreement, equivalent to a charter or articles of incorporation, that would supplement and displace the default terms of the LLC statute governing LLC organization. This agreement would allow A & B to implement their wishes with respect to the allocation of profits, and work out A's veto power, etc.

2. Several documents will be required to accomplish the objective recommended above. As noted, A & B will have to execute an agreement to govern the management of their LLC, including provisions to vary from the default statutory rules. Additionally, A & B will have to make an LLC filing with the Maryland Department of Assessments and Taxation. This action enables business creditors, suppliers, customers, etc. of the pizza shop to discover the nature of the entity with which they are dealing – particularly its limited liability status. (Notice is also enabled by the requirement that the entity include a reference to its LLC status in its business name.)

In addition to these formation issues, A will want to perfect his investment. A note could be executed, as well as the security interest taken in the assets of the business. This security interest should be recorded as it can be perfected. Again, this serves to put other creditors on notice and to give, to the extent possible, A priority over subsequent creditors.

*It should be noted that A, B and the eventual LLC may now or later have conflicting interests (A & B already do to some extent) and representations by separate attorneys is therefore imperative.

REPRESENTATIVE ANSWER 2

1. A & B desire to enter into a business relationship where A acts solely as investor and B acts as an active manager with no investment. A would like to limit his investment to the initial amount and limit his liability to business creditors. A would like to retain veto powers in order to protect his investment. A general partnership would not be a recommended entity for A & B under these circumstances. A general partnership would expose A to liability from business creditors and might require additional investment should the business not be profitable. A general partnership would be easier to set up, in that no formal documents are needed for formation, but the form of entity is not appropriate for what A & B want to accomplish.

A limited liability company would be more appropriate. As a member, both A & B would be shielded from business creditors as to their personal assets. The investment in the company would be the only asset exposed to liability as to A. The documents of formation (operating agreement) would allow the parties to specify the rights, obligations and duties of each member.

2. a) Articles of Incorporation: This document would be drafted to specify the name of the limited liability company, which must include "limited liability company", "L.L.C." or "LLC" in the name, the names of the members, address of the business, purpose of the business and term of the business, if any is to be specified.

b) Operating Agreement: This document would specify the rights, duties and obligations of the members. Here is where A & B would specify that A is investor, with no day-to-day management responsibilities, that B is the day-to-day manager, that A will retain veto power over purchases exceeding $2,500, additional borrowings, and employee hires. The profit and loss allocation (50/50) would be specified as well. The parties could specify here that B is to be paid a salary of $500 per week, or they could execute a separate employment agreement.

c) Note Payable: A note will need to be drafted showing the investment by A, the interest rate, and the payment schedule.

d) Security Agreement: A security agreement will need to be drafted showing A's security interest in the assets of the company.

QUESTION 2

In 1997, Sam and Ronnie incorporated S & R, Inc., a Maryland general business corporation. The corporation's purpose, as stated in its Articles of Incorporation, is to own and operate hair salons and conduct other lawful business activities. Sam and Ronnie are the sole stockholders and directors of S & R, Inc., each owning a 50% stock interest. S & R, Inc. owns and operates a hair salon in a shopping center located in Baltimore City. After three years of operation, the business has become financially successful. After all expenses, annual profits of the corporation approximate $50,000.

In 2000, Sam learned that the shopping center in which the hair salon is located was for sale. Without telling Ronnie, Sam and his brother, Carl, formed a partnership and purchased the shopping center in October, 2000. Two months later, when the hair salon's lease came up for renewal, the partnership refused to renew the lease because it wanted to include the space into a large store for use by a major tenant, paying $150,000 annual rent. As a result, the hair salon had to close on December 31, 2000.

Ronnie consults you, a Maryland attorney. She wants to know what legal rights, if any, may exist against Sam arising from a) the purchase of the shopping center by Sam's partnership, and b) the partnership's refusal to extend the hair salon's lease. You review the corporation's charter, by-laws, and other relevant corporation documents. They are silent on these issues. No stockholders' agreement exists.

Write a letter to Ronnie, giving your advice and explaining the reasons.

REPRESENTATIVE ANSWER 1

Dear Ronnie,

We could sue Sam, and we have a decent argument, but it will be very difficult to sue the partnership. Sam is a stockholder, which doesn't give rise to much obligation to the corporation (S&R), but he is also a director which does give Sam certain duties and responsibilities. As a director, Sam owed a duty of care, duty of loyalty.

When Sam learned of the shopping center being for sale, he should have reported it to the Board of Directors (Ronnie) before usurping that corporate opportunity. Sam will counter that this was a corporation to run a hair salon, not real estate. We will rebut that with the language of the Articles of Incorporation "and conduct other lawful business activities". He will say that this isn't a direct conflict with the corporation, but it won't be enough to protect him. He may argue that he used good faith in applying the business judgment rule in not offering or disclosing the purchase. He will claim he had no

idea the corporation would be interested in, but that will not work here. He should have disclosed to you (Ronnie) and allowed you on behalf of S & R to refuse the purchase as being the only interested director, before buying it. He may argue that the corporation didn't have the assets to finance or get a loan to secure such a purchase since they were only generating $50,000 in profits which we will have to research, but if he and Carl could do it, then possibly you and Sam could have invested more into S & R or brought in Carl as a stockholder.

The partnership itself will be much more difficult to sue. The partnership (p/s) did not owe any duty to S & R. The Courts wouldn't want to penalize Carl for Sam's inappropriate behavior. The refusal to renew the lease may be protected by the business judgment rule and if they were smart, it would likely have been Carl's decision and not Sam's since he had a conflict of interest. The refusal to extend the lease is a legitimate business decision unless we find some other intentional tort, (**tortious** business interferences, etc.) which is unlikely.

(This all assumes I never represented the corporation which would give rise to an ethics issue).

REPRESENTATIVE ANSWER 2

Dear Ronnie,

You have requested my advice regarding Sam's actions in 1) the purchase of the shopping center and 2) the partnership's refusal to renew S & R's lease. You wish to know what rights you may assert against Sam. One question to be answered is whether you are seeking advice on behalf of yourself as a stockholder or director of the corporation. I am assuming in your capacity as stockholder/director.

Under Maryland Corporate Law, a director owes the duty to act in good faith, with the reasonable belief that his actions are in the best interest of S & R, and the care of an ordinarily prudent person in similar circumstances.

The first issue to address is the shopping center sale, which could be usurpation of a corporate opportunity because the shopping center was the same as which the salon was located. It is reasonable to believe that the now profitable salon may have wished to purchase it and avoid rent payments. Even if the beauty shop did not have the financial means, this should have been offered first to S & R and then only after S & R declined, may Sam personally take the offer.

Secondly, the failure to renew the lease is troubling. Sam owes the duty of loyalty to both S & R and the partnership and he cannot serve two masters. He should have disclosed the rental property and his interest in renewing the lease to S & R. However, all things given, the failure to renew the lease does appear to be for a valid commercial reason (need space for tenant) and the beauty shop had no

right to extend the lease indefinitely. But, Sam had knowledge that the shop would close without finding new space.

Given the usurpation of a corporate opportunity, Ronnie could force Sam to sell the building at cost to S & R or disgorge any profits from the lease to the new tenant. Further, she could seek to have Sam removed as a director for breach of fiduciary duty and also seek dissolution of S & R.

QUESTION 3

Steven and Valerie Jones were married in Howard County, Maryland in 1990 when Steven was 40 and Valerie was 38. Shortly after their marriage, Steven lost his job and began drinking heavily. When he drank, he became physically abusive to Valerie. Although he eventually found another job, the abuse continued.

Steven is the primary wage earner making an annual salary of about $200,000, and the family health insurance coverage is provided through his employer. While Valerie is employed, her salary is only $25,000 per year and, because of her lack of education and training, it is not likely to increase significantly.

The Joneses have two children, Melissa and Brenda, who are eight and ten years of age respectively. The parties purchased a home in Columbia, Maryland which is titled as tenants by the entireties and valued at $200,000 with a monthly mortgage payment of $1,365. Both of the children attend private schools at a cost of $20,000 per year. After school, they attend a daycare program, which cost $150.00 per week, where they remain until Valerie picks them up in the family van.

Just Before Christmas 2000, Steven, once again, became abusive and struck Valerie with his fist with such force that he fractured her nose. Immediately, Valerie packed up the children, went to a hospital for treatment, and , because she feared further violence, moved in to a motel.

She has come to your office and related these facts to you, a Maryland attorney, and told you that she no longer wishes to be married to Steven and that there is no hope of reconciliation.

1. What advice would you give her concerning obtaining immediate relief from her situation?

2. What advice would you give her concerning permanent relief from her situation, discussing all of the relevant issues?

REPRESENTATIVE GOOD ANSWER 1

As concerns obtaining immediate relief from her situation, Valerie may be able to obtain a protective order from the court. The order would say, in essence, that she may have temporary custody of the two minor children, Steven may or may not have visitation with his children, and that she might be able to stay in the family home until further developments. This immediate relief is granted by the court because of the abuse that Valerie has suffered throughout the ten years of her marriage. It is also for the best interests of the minor children that they be thus protected.

Also, obviously Valerie wants a divorce. As such, during the pendency of the proceedings, Valerie may also be awarded alimony pendente lite. This is simply alimony to maintain the status quo of the parties until the court determines the issue of divorce. Furthermore, Valerie may be awarded not only the use of the family home during the pendency of the divorce proceedings, for the stability of the children, but she will also be granted the use of property that was used by the family for a family purpose, ie. the family car and furnishings in the house.

In terms of permanent relief, Valerie would seek a divorce. The marriage was conducted lawfully, and with the required Maryland Family Law provisions being met. Here specifically, Valerie should seek an absolute divorce where the marriage is terminated and property rights and child custody are determined.

If she were to get a limited divorce, this would be a legal separation only which does not terminate the marriage. Thus, an absolute divorce would be best. The grounds for divorce here would probably be cruelty or excessively vicious conduct towards Valerie. Valerie would have to show that the conduct was such that it posed a serious risk of harm or injury to her. Here Steven continued a pattern of abuse for nearly ten years. In the last incident of abuse, Steven broke Valerie's nose. It is reasonable to argue that Valerie could fear for her safety and even her life. Thus the grounds for divorce are established. Steven would be able to assert a defense if he had any because the ground for divorce is fault based.

The next thing to be considered is division of the marital property. There is no prenuptial agreement, and no separation agreement. Thus the court would have to use the Marital Property Act. Thus the court should identify the marital property. Then value it as of the date of divorce, and then distribute it in the form of a monetary award, in its discretion. Here the only marital property is the house bought during the marriage as tenants by the entireties. The value of it is said to be $200,000.00 with a mortgage payment.

The court must now consider the other obligations that the parties have such as money for schooling of the children. After this, the court must then consider the factors laid out in the Marital Property Act to determine the amount of the monetary award. These factors include contributions of both parties, economic and non-economic, the age, health and mental stability of the parties, the parties employment, the grounds for divorce, etc. Once this is done, the court may, in its discretion, give a monetary award after the divorce is granted.

There is also the issue of alimony or spousal support. The purpose of alimony is rehabilitative to allow the recipient spouse, to in essence, get back on their feet. Here, Steven is the spouse with the biggest salary, and his salary has provided a certain lifestyle for Valerie and the children as evidenced by the children attending private school. Another consideration is that it is unlikely that Valerie will ever be able to provide for herself and the children in the way Steven has because, although she has a job,

her salary is nowhere near Steven's and is not likely to rise because of her lack of education and training, although Steven could argue that it would rise. Thus, there may even be an award of indefinite alimony, but that is in the judge's discretion.

Lastly, there is the issue of child custody and support. Each parent is responsible for supporting their minor children. Here the children are both minors and Steven and Valerie must support them. With respect to child custody, the court would have to consider the best interests of the children. It could give both Steven and Valerie joint custody, or give Valerie sole custody because of the abuse factor, in order to protect the children. However, even with sole custody, Steven would have to be given visitation rights. Again, this is a decision of the court based on the best interests of the children.

With respect to child support, the court would look to the child support guidelines and determine the amount.

REPRESENTATIVE GOOD ANSWER 2

Her best course of action at the present time is to go to Circuit Court and file for a protective order from Steven. I suggest a protective order because it will be heard ex-parte the day that she files for it. The ex-parte order will be followed by a hearing in which Valerie can get use and possession of the family home, child custody, child support, as well as a no contact order regarding Steven. This will give her immediate protection and financial relief.

Also, that day, I would file a request for absolute divorce based on the fault ground of abuse. Because of the fault grounds and both parties are residents of Maryland, no residency or separation period is necessary. Valerie would get, and I would ask for alimony pendente lite. Alimony pendente lite is pending the litigation. It is given based upon need and regardless of fault or the likelihood of success at trial. This would take Valerie a while to get, but with the help of the protective order, she should be financially O.K.

As for permanent relief, that would be addressed in an action for absolute divorce:

1) Child Custody - due to Steven's violent nature, it would be unlikely that a joint physical custody arrangement work. I would request sole physical custody to Valerie with Steven having liberal visitation rights, and joint legal custody of the children. Since we have no evidence that Steven has done anything to harm the children physically, there doesn't seem to be any grounds to limit his visitation or make it supervised.

2) Child Support - since the parties make more than $120,000.00 per year combined, the child

support guidelines do not provide a minimum amount of support. It would be whatever the court finds fair and reasonable. I would request that children be able to continue their private school education although there is no requirement that parents have to pay for private education. I would ask the court to order Steven to keep the children on his health insurance and to pay ½ of any uncovered medical expenses. I would also ask that Steven pay for all or at least ½ of the after school daycare. I would request an immediate wage withholding order.

3) Alimony - because of the disparity of salaries and educational training of the couple, I would request Steve pay rehabilitative alimony to Valerie in such an amount and or such a time that she will become able to be self sufficient.

4) Marital Property - because minor children are involved, I would ask for use and possession of the family home for the three year maximum allowed by statute. I would ask for a contribution from Steven for the mortgage because it is for the benefit of the children. At the end of the three years, the house would be sold and I would request that the profits be split equally between the parties.

I don't have enough information to deal with the entire property distribution under the equitable distribution theory. Valerie may be entitled to more than 50% based on the parties financial status.

I would also request that Valerie get to keep the van.

QUESTION 4

Good Sam lived next door to Nellie Jones, an elderly lady who lived alone in a detached dwelling in Glen Burnie, Anne Arundel County, Maryland. For many years, Sam performed minor household and lawn chores for Nellie with no expectation of payment. One day, Nellie told Sam that she was going to do something for him because of his many good deeds for her over the years. Sam thanked her, but said that he never really expected anything in return.

That same day, Nellie visited her attorney's office where she prepared and executed a Will leaving her home to Good Sam and her elderly sister, Gladys Smith, as joint tenants. Following a long illness, Ms. Jones passed away and Sam and Gladys took valid title to Nellie's home.

Gladys, in need of funds, asked Sam to sell the property and divide the proceeds. Sam refused, and Gladys hired an attorney who properly filed a Petition for Partition and Sale in the Circuit Court for Anne Arundel County. Gladys asked that the Court appoint a trustee to sell the property and distribute the proceeds. Sam retained counsel who filed an Answer to Gladys' Complaint opposing the sale of the property.

After discovery had been completed, Sam's counsel determined that there was no way to prevent the sale of the property, and the attorneys prepared, executed and submitted a Consent Judgment to the Court whereby the Court would appoint both attorneys as co-trustees to sell the property, pay all reasonable costs and expenses, including trustees' fees, and to distribute the proceeds.

The Consent Order was signed by the attorneys on May 2, 1999, and submitted to the Court for approval. Sam's attorney did not consult with him before signing the consent order. On May 15, 1999, Gladys died. On May 21, 1999, the Court approved the Consent Order, Sam received a copy of the Consent Order on May 25, 1999, and outraged by its terms, has come to your office asking you, a Maryland attorney, to assume the defense of his case.

1. What steps must you take to assume responsibility for his case?

2. What action would you take concerning the Consent Order executed by Sam's former attorney?

REPRESENTATIVE ANSWER 1

In order to assume responsibility for the case under Rule 2-132, when the client has another attorney of record, the former attorney may withdraw an appearance by filing a notice of withdrawal. After notice of the withdrawal, the new attorney has 15 days to enter an appearance, or the absence of counsel will not be grounds for a continuance.

Since this action is for a house, it is assumed to be over $25,000.00 which would give original jurisdiction to the circuit court and not the district court. Here, as the new attorney, I would have 15 days after notice to the court that the previous attorney is no longer on the case to file an appearance.

The scope of representation of an attorney in the Maryland Rules of Professional Conduct state that a lawyer must abide by a client's decisions concerning representation. A lawyer must communicate with his client and keep the client informed about the case.

The lawyer must inform the client about all major decisions, and may only proceed if there is consent after consultation. Here, the lawyer, as a co-trustee, signed the consent order on May 2, 1999, without consulting with Good Sam. Since the house was owned as a joint tenancy with Gladys Smith, there is a good chance that any delay in reviewing the consent order would have prolonged the process long enough for Gladys to die, and Sam would have received the house because of the right of survivorship in a joint tenancy.

Based on the first attorney's breach of his ethical conduct, I would first ask the court to set aside the consent order. If it was too late, I would sue the original attorney for malpractice for not consulting with Sam, and seek damages based upon what Sam would have received if he had received the house. I would also ask for costs, including attorney's fees, associated with the transaction.

REPRESENTATIVE ANSWER 2

To assume responsibility for Sam's case, first I would inform Sam that he must inform his former attorney that he no longer wishes to have the former attorney represent him. After Sam has notified his former attorney of my representation, I would then request his former attorney to forward Sam's file. Next, under Rule 2-131(b), I would enter my appearance for Sam with the Circuit Court for Anne Arundel County in writing. I would then forward a copy of my filing of my appearance to Sam's former counsel so he or she may strike their appearance under Rule 2-132(a).

I would then file a motion with the Circuit Court for Anne Arundel County asking that the consent order be stayed until a hearing could be held on the motion. With the motion, I would attach a memorandum of law setting forth the reasons why the consent order should be revoked by the court. I would argue that since Sam's former counsel did not consult him prior to signing the consent order, he acted inappropriately without his client's permission under Rules 1.2(a) and 1.4. I would further argue that the terms of the consent order are unconscionable and should be void and I would further argue that the point is now moot since his joint tenant, Gladys, died on May 15, 1999 which severed the joint tenancy and left Sam as the sole owner of the property under Maryland law because as a joint tenant, he has the right of survivorship.

I believe after making these arguments in writing in a memorandum of law, the judge would sign a new order. If not, then I would have requested a hearing on the motion where I could argue the case in

open court.

QUESTION 5

Anne Plaintiff had been a neighbor of wealthy Mr. Elderly, a Maryland resident, for years. In 1997, Mr. Elderly suffered a stroke and Plaintiff began to provide care for him on a regular basis at his home. Plaintiff made meals for Mr. Elderly, cleaned his house and drove him to the doctor's office. Her live-in boyfriend, Michael Boyfriend, cut Mr. Elderly's grass and made minor repairs to his house as needed. Mr. Elderly often spoke to his good friends, George and Martha Witness, about his gratitude towards Plaintiff.

In 2000, Mr. Elderly died of natural causes. His will left his entire estate to a distant relative. Plaintiff filed a claim against the estate on the basis that Mr. Elderly had orally promised her in 1997 that he would leave her $125,000 in his will if she cared for him for the remainder of his life. The claim was denied by the personal representative of the estate and, after appropriate proceedings in the Orphan's Court, the issues were transmitted to the Circuit Court for trial.

Plaintiff will seek to introduce the following evidence in her case in chief at trial:

1. The testimony of Plaintiff that Mr. Elderly had promised to leave her $125,000 in his will in return for her caring for him and that she provided care to him on that basis;

2. The testimony of Michael Boyfriend that Plaintiff told him of Mr. Elderly's statement and that she intended to provide care for him in return for the bequest;

3. Testimony by both George and Martha Witness that Mr. Elderly told them on several occasions that he was very fond of Plaintiff and grateful for her assistance and that he had promised her to leave her $125,000 in his will; and

4. Testimony by the Reverend James Knox, a local cleric, that Anne Plaintiff is an honest, truthful and forthright person.

Is any of this testimony admissible? Why or why not? Discuss each statement separately.

REPRESENTATIVE ANSWER 1

The testimony of the Plaintiff regarding Mr. Elderly's promise will not be admitted. Her testimony is hearsay. It is an out of court statement offered to prove the truth of the matter asserted. But because it is made by a party to the action, it would ordinarily be admitted. But because of the Dead Man's Statute, the testimony will be inadmissible. The testimony given by the Plaintiff is in her interest and adverse to the dead party's interest. Plaintiff clearly has motive for offering such a statement to the court.

The testimony of Michael Boyfriend will be inadmissible. The statement that she intended to provide care for him in return for the bequest does not go to prove the truth of the matter asserted, it goes to show what motive plaintiff had for doing the housework and chores necessary to help Mr. Elderly. The repetition of plaintiff's statement to Michael is hearsay, but it is admission of a party and would be inadmissible as discussed above. It is actually hearsay within hearsay and it would be necessary for both statements (plaintiff's statement to Michael and Mr. Elderly's statement to plaintiff) to fall within the exception to hearsay. They do both seem to be exceptions because they are both statements made by parties, but if the Dead Man's Statute makes it inadmissible, than it will not be admissible.

Testimony of both George and Martha witness will be admissible. Again, it is hearsay because it is an out of court statement which will go to prove the truth of the matter. But again, because it is an admission of a party, it is considered an exception to the hearsay rule. (Some say admissions by parties are non-hearsay) The deadman's statue would not apply in this situation because the witness's have nothing to gain. Their position is not in conflict with Mr. Elderly's estate.

Testimony of Plaintiff as to her honest, truthful and forthrightness will not be admissible in a civil trial. Testimony of this nature would not be admissible unless the suit is of the nature that her character is in question (i.e. defamation). Unless her character comes into issue, she cannot admit such testimony and this is her case in chief so I'm sure it has not.

REPRESENTATIVE ANSWER 2

Statement 1 seems to run afoul of the Dead Man Statute. A party cannot introduce evidence, that is oral, regarding the deceased's statement that is in favor of the party's claim because the deceased is not present to rebut such testimony. Here, Anne attempted to do just that, and her testimony is inadmissible.

Dead-man. This does not violate the dead-man statute because boyfriend is not the party who has benefit from the statement. (Although it is arguable that he would in his capacity as Anne's boyfriend). Anne is the party that stands to get $125,000 so she is the one barred from testifying about the statement.

Hearsay. Hearsay is a statement made by an out-of-court declarant offered for the truth of the matters asserted. Boyfriend will not be permitted to testify that "Plaintiff has told him of Mr. Elderly's statements" because that is hearsay offered for its truth subject to no hearsay exceptions. However, Anne's telling boyfriend that "she intended to provide care for him in return for the bequest" could come in because it goes to Anne's intent - a statement explaining Anne's future intent to provide care for Mr. Elderly. If the statement cannot be severed, then it will all come in under Anne's **intent** and then is not hearsay.

Dead-man statute does not apply because the witnesses are not interested in the transaction. This testimony would come in as an exception to hearsay as an admission by a party opponent, Mr. Elderly's statement is an admission, and the P.R. of his estate is bound by it. It is an admission because the P.R. and Mr. Elderly are said to be in privity, Mr. Elderly's statement constitutes an admission, as it is against the interest of his estate. It is therefore admissible.

Anne's character is not an issue here. This can be proved by opinion evidence ---- this would not be admissible. Her character for truthfulness would be at issue in a defamation action, for example. If Anne testifies, and her credibility is implicated, then the Reverend's testimony would be admissible.

QUESTION 6

To help revitalize its cities, the State of Saturn enacted legislation authorizing State funded grants to non-profit entities for purposes of acquiring and renovating vacant city buildings for use in a manner that would serve the community. The grant program is known as the City Revitalization Program ("CRP").

The Church of the Divine Light, a non-profit entity (the "Church"), has applied for a one million dollar grant from the CRP. The Church's application states that it intends to acquire a vacant building located in the most destitute areas of Saturn's largest city. The Church plans to turn the building into a community center (the "Center"), consisting of classrooms and a gymnasium. The Center will be open to the public, and will offer non-sectarian programs targeted to serve the low income and elderly families in the area. The programs will include child and adult day care, job training classes, and youth basketball and volleyball leagues.

In addition, the Church's application states that a portion of the grant proceeds will be used to construct a small chapel in the Center. The Church's application further states that large signs will be posted at each entrance to the Center, on the door to the chapel, and on the Center's bulletin board, that say the following:

> Christian devotional services are held at the Chapel daily at 6:00am and 7:00pm. Attendance is Voluntary. You are welcome to use the Center regardless of whether or not you attend.

You are the attorney representing the State agency that administers the CRP. The CRP Director has requested you to analyze any legal issues raised by the application.

Explain your answer fully.

REPRESENTATIVE ANSWER 1

This question is one which involves the Establishment Clause of the 1st Amendment of the Constitution of the US, applied to states. The test for Establishment Clause: does the action have a primary purpose which is secular, does the action enhance or inhibit religion, and is there excessive entanglement with religion.

Here, the church which is a non-profit entity qualifies to apply for this grant in many ways which are compatible with the 3-part test.

A community center consisting of classrooms and a gymnasium could clearly be construed as a primary secular purpose. However, if the classrooms are primarily used for religious instruction, this

could be a problem. Since the Center is open to the public, not just members of the church, this is secular. It will also offer non-sectarian programs which then will not promote or inhibit religion. This will be targeted not at religious groups but at low-income and elderly families in the area. This all works. Programs which include child and adult day care, job training classes and youth basketball and volley ball all appear to be quite secular without promoting or inhibiting religion, without excessive government entanglement.

The Chapel and the signs The problems arise when the application states that a portion of the grant proceeds will be used to construct a chapel. This will interfere with the Establishment Clause test provision which stated no enhancement of religion. The church should not use the money for construction of this chapel. It will have to find another source of revenue if it is determined that on balance the Church's Center will not overall be promoting religious activities.

The Signs It must be determined whether Voluntarily Attended Christian devotional services which take place at 6 AM and 7 PM will be enhancing/promoting religion and distracting from the primary secular purpose of the Community Center and its funding from the State.

The line which states "you are welcome to use the Center regardless of whether or not you attend" is encouraging to the fact that religion is not being shoved down anyone's throats. It is also questionable whether voluntary services at the designated times - early at 6 AM and at 7 PM would really take away from the secular character of the building and its programs.

The Church of the Divine Light could be awarded the grant if it did not use the grant money to construct a small chapel.

REPRESENTATIVE ANSWER 2

The CRP's application raises 1st amend Establishment of Religion issues. In order for the application to pass constitutional muster, it must pass the Lemon Test established by Lemon v. Kurtzman. The act must have a secular nonreligious purpose 2) neither advance non inhibit religion and 3) there must be no excessive gov't entanglement. There, the purpose of the CPR's application corresponds to the state's and meets the 3 part test up until the portion stating they want to construct a small chapel.

The community center's being open to the public, offering non-sectarian programs, the child and adult care, job training and basketball and volleyball league all meet the constit. standards. The fact that the application is sought by The Church of Divine Light, does not advance religion nor create excessive gov't entanglement because the church is a non profit organization and would be allowed access to the state funded grants as long as all activity, purpose and function of the community center was secular in purpose and no religious instruction taught in the classrooms. However, state funded grants creates

entanglement with religion when the center would house a chapel built with state funds. One will argue brick and mortar does not equate to religious purpose or goal. However, after the bricks and mortar form the chapel constructed with state funds, religious services will be held therein and the fact that these services will be voluntary does not change the outcome that a church is 1) not secular in purpose in that the Church of Devine Light will hold religions services based on their religion, 2) those services in the chapel will advance religion, 3) and the state funded grants will be found to be significant state involvement for excessive gov't entanglement.

I would recommend that CRP not construct the chapel and that they delete that portion of the application and in no way should any religious instruction or church services be held at the community center. The center is looking to do great things in the community and I applaud them, however, the state may not in any way fund, or help fund a program that is 1) <u>not</u> secular in purpose and effect 2) that advances or inhibits religion and 3) that involves excessive gov't entanglement. State funds are adequate to constitute government entanglement.

QUESTION 7

While driving to visit friends in Baltimore, Chris was caught in a sudden blinding snow and ice storm. Chris pulled of f the road in Howard County, Maryland, to seek emergency shelter for the night. Chris found a hotel near the exit of the Interstate, and drove into the parking lot to get a room to wait out the storm. Only the part of the parking lot directly in front of the hotel and the covered sidewalk by the front entrance were shoveled and relatively clear of ice and snow. The rest of the parking lot and sidewalks were untreated, and were covered with several inches of ice and snow.

Chris left his dog, Tray, in the car while Chris registered for a room. Chris asked the desk clerk for a room near an exit to the parking lot so that it would be easy to walk Tray and to move suitcases into and out of the hotel. Although it was against hotel policy to assign rooms at the far end of the hotel in inclement weather unless all of the rooms close to the core area of the hotel were filled, the clerk assigned Chris to a room at the far end of the hotel after Chris insisted that the requested location was essential. The Clerk reminded Chris that the parking lot and sidewalks were untreated, and advised Chris to walk carefully. Chris parked the car near the exit at the far end of the hotel, and Chris walked Tray into the hotel. As he took Tray in, Chris slipped on the ice all the way back to the hotel.

Chris went back outside to unpack the car. On the way back to the car, Chris slipped and fell on the ice and suffered a broken arm that required surgery. Chris filed a timely personal injury complaint in the proper court against the hotel for failing to clear the parking lot, for failing to keep the parking lot properly lighted, and for failing to provide adequate warnings about the condition of the parking lot. Chris also claimed that the hotel had a heightened duty to travelers in a storm to provide safe shelter in an emergency situation.

a) What defenses can the hotel assert against the complaint filed by Chris? Explain fully.

b) Assuming that the testimony is consistent with the stated facts, evaluate Chris's chances of success in prevailing against the hotel.

REPRESENTATIVE ANSWER 1

a) The hotel can assert two primary defenses against Chris. These are 1) contributory negligence and 2) assumption of risk 3) the hotel can also claim lack of negligence on the merits.

- Since Maryland recognizes contributory negligence as a defense, it can, if established, completely bar Chris from recovery. To prevail, the hotel must demonstrate that Chris did not act in a reasonable manner –i.e. by walking across the ice covered lot and that this action was the proximate and legal cause of his injury. This will, in effect, cancel out any negligence on the part of the hotel.

- Additionally, the hotel may assert that Chris assumed the risk of the icy lot, and is therefore barred from recovery. Assumption of risk may be either express (as through an affirmation) or implied, based on conduct. The person assuming the risk must be cognizant of its nature and scope. The hotel will therefore contend that Chris knowingly subjected himself to risk by requesting the room that he did and by attempting to negotiate the ice covered lot.

- The hotel may also assert that it did not owe a heightened duty as claimed by the plaintiff. It will base this on the fact that, while innkeepers do owe a high standard of care to guests, it is not enhanced or expanded to travelers in a storm. Whether the hotel was liable to Chris after he registered as a guest would turn on standard negligence principles – i.e. was there a duty, was it breached, was the breach the proximate and legal cause of the injury and were damages sustained.

The hotel will contend that, due to the suddenness of the storm and the explicit warnings given – that they reasonably complied with their duty to affirmatively inspect and warn their guest/invitee of potential hazards. Having done so, they will assert that they were not negligent and that Chris should not be allowed to recover.

b) Based on the facts presented, it appears that the hotel has a strong likelihood of prevailing. The hotel took prompt and reasonable steps to clear a portion of the lot from ice and snow accumulation – ostensibly while the storm was still ongoing. Thus, even though the hotel has a heightened duty, it is not strictly liable. Warnings were given and the icy condition of the lot were certainly apparent. Therefore, Chris is likely to fail through inability to establish a breach of duty/care.

Additionally, the hotel has strong grounds for an assumption of risk defense as noted above. Chris knowingly used the ice covered walkway, and he was presumably aware of the risk of slipping.

Finally, even if the hotel was found to be negligent through breach of the requisite standard of care, Chris will still be subject to the contributory negligence defense noted earlier. The exit at the far end of the hotel was not the only access – he used it merely as a convenience despite the condition and warnings.

Judgment for hotel.

REPRESENTATIVE ANSWER 2

a) In an action on the theory of negligence, as asserted by Chris, the plaintiff has the burden to prove 1) defendant owes him a duty, 2) defendant breached the duty, 3) the breach was the actual and legal cause of plaintiff's injury, and 4) plaintiff did suffer injury.

The hotel will argue that it did not breach any of its duty toward Chris, a hotel customer. It acted prudently like any other hotel would have reasonably acted under the circumstances. The duty owed to Chris as a business invitee include a reasonable inspection of the hotel premises, remove or warn any hidden conditions that may endanger a guest. The storm was a sudden one. The hotel did its best to clear the part of the parking lot most traveled by its guest, front entrance, sidewalks. The clerk warned Chris that the parking lot and sidewalks to the far end were untreated. On these facts, the hotel will contend that Chris failed to meet his burden to prove that the hotel breached its duty.

In addition, the hotel will argue that Chris was contributorily negligent, which will bar him from recovery even if the hotel is found negligent. Under the circumstances, Chris should walk carefully, and he failed to do so.

The hotel also has a strong argument that Chris assumed the risk. He was advised that the sidewalks to the far end of the room is not treated. He assumed the risk of insisting on a far end room. His assumption of risk became more apparent after he fell the first time. By then, he should know that the untreated part of the parking lot and sidewalk is extremely slippery, he nevertheless assumed the risk of walking back on the same path. His action led to his second fall, which caused the injury.

b) Chris's chance of success is not good. He could argue that the hotel, as a public accommodation, does have a heightened duty to the care of their guest. The hotel's failure to provide adequate lighting may be a good argument to negligence. He could further assert that the clerk assigned him rooms at the far end in violation of hotel policy, which is indicative of negligence.

The hotel could counter that even under a heightened duty, it acted like a reasonable hotel. The inadequate lighting is not a cause to Chris' fall. (The facts do not describe how bad the lighting was). Finally, the hotel policy was not designed for customer safety, instead, it was designed for convenience of hotel maintenance.

QUESTION 8

For many years, Jones has represented Smith, the sole proprietor of a mobile pet grooming business in Cecil County, Maryland.

In 1998, Smith's business and profits grew dramatically due to the success of his recently created customer locator program. Smith decided to incorporate his business, to bring an additional owner/manager into the business, and to raise additional capital by selling shares of common stock in the corporation. Smith made an offer to sell some of the corporation's common stock to Clark, the person who had helped him develop the innovative marketing program.

Smith and Clark met with Jones in early 1999 to discuss: (i) the structure of the sale of common stock to Clark; (ii) a possible initial public offering ("IPO") of stock to the public; and (iii) ways to attract venture capital through a private sale of stock to an investor. Jones was very eager to expand his law firm's business even though he had never before provided legal services related to an IPO. Jones told Smith that one of his existing clients, Ms. Investor, would be the perfect person to provide venture capital. Jones informed Smith and Clark that Jones would perform the legal work necessary to accomplish their goals at twice his usual and customary hourly rate. Jones estimated that the total fee for completing the work would be about $60,000.

Smith and Clark were surprised at the amount of the fee. Smith asked Jones to accept stock in the corporation instead of a cash fee because it seemed to be the only way to pay the substantial fee without taking cash out of the corporation. Smith, Clark, and Jones agreed to meet again in three days to finalize the business plan, legal representation, and fee arrangement.

What professional responsibility concerns does Jones have with respect to undertaking the potential representations and proposed fee arrangement? Explain fully.

REPRESENTATIVE ANSWER 1

As an attorney, Jones has a responsibility to represent his client's interest with utmost care and competence as stated in the Md. Rules of Professional Conduct (RPC). Although Jones can represent the business as a new client, he must also determine if he has any conflicts of interests (COI) with his existing clients (Smith). Smith can waive these conflicts after a discussion in which any potential and past conflicts are disclosed, and a reasonably prudent attorney would not object to a waiver of any conflict. Jones should ask Smith to waive and give his consent in writing to represent Smith and Clark. Jones should also disclose and seek consent from Clark about potential COI arising from this new representation.

Jones must also assess his skills and competence to do the legal work needed to structure the sale of common stock to Clark, the IPO to the public and its related legal pitfalls and SEC requirements. Although he has not done this work before, he can still adequately research the legal issues and related filing and disclosure requirements to do a competent job. However he must factor this into his schedule in order to adequately prepare and do the necessary work for this client's interests.

The fee must be reasonable in respect to his time, skills, and possible impacts on existing clients/future clients demand on his time. Since the IPO is very complicated and take additional preparation on his part, $60,000 may be reasonable – although it was twice his usual and customary hourly rate. It may still satisfy RPC standards.

It is permissible to bring Smith and Clark together with Ms. Investor only after discussing this with Ms. Investor and receiving her consent, because she is an existing client, he has a duty not to disclose any confidential information or share information without either client's consent. Jones should also carefully avoid potential COI with accepting stock instead of a cash fee because Smith and Clark would need to be advised that a business arrangement with a client demands independent representation to ensure RPC standards of the transaction are fair and reasonable. However, if Smith and Clark insist after independent representation is obtained, or if they waive this right in writing; this does not rise to the level of a prohibited transaction under the RPC. However, it increases the potential COI involved for all in the case of a legal problem arising with Jones' work.

Jones should clarify who he represents and in what capacity, and avoid any appearance of conflict of interest or taking advantage of past or current clients. His legal services may involve the public as potential buyers of stock – so he must disclose any financial interests he has in the IPO. This also puts him at risk of misrepresentation if the disclosure is not complete and accurate. The Bar Counsel would investigate any complaints and charge him with disciplinary sanctions and possible disbarment if he fails to document, disclose, and get consent in accordance with the ethical demands of RPC.

REPRESENTATIVE ANSWER 2

Potential conflict of interest between Smith and Clark

Jones's first concern arises in undertaking to represent both Smith, existing client, and Clark, a potentially new client, in this deal. A lawyer may not accept representation of a new client if doing so will create a conflict of interest with an existing client. A conflict of interest encompasses anything that might materially limit an attorney's representation of a client. Here, Jones's dual representation might materially limit his ability to act in the best interest of Smith, his existing client to whom he owes a fiduciary duty.

Jones should present this concern to both Smith and Clark and only if he obtains a waiver from both (i.e., consent), and reasonably believes that he can represent them without a potential conflict that would materially limit his representation of either can he undertake the representation.

Potential conflict between Smith/Clark and Ms. Investor

The same issue arises with respect to Ms. Investor's involvement in investing in the corporation. Should the corporation fail at any point, a conflict of interest might arise between Smith (and Clark) and Ms. Investor. Jones probably should not attempt to represent them all in this transaction.

Jones as corporate Lawyer

Moreover, a corporate lawyer represents the corporation first and foremost, and not its directors, officers, shareholders or investors. Therefore, Jones must make his status clear to all involved: he either represents an individual or the corporation, but not both together.

Conflict of Interest between Jones and his clients

Another potential conflict has arisen if Jones takes on this representation primarily to advantage his own business. He must remain wary that his own interests do no conflict with those of his clients.

Jones's competence

Perhaps even more disturbing, Jones would seem to lack the skill necessary to undertake this representation, which entails some complicated issues. A lawyer has a duty to represent his or her clients competently, and therefore not to accept representation that would clearly exceed the lawyer's degree of skill. Unless Jones is reasonably convinced that he can acquire the skill and competence necessary for effective representation in this context – i.e., through research, immediate training, or association with a lawyer experienced in such transactions – he should decline it.

Jones's fee

If Jones does represent Smith et al. in this matter, his proposed fee sounds excessive. An attorney's fee should be reasonable, and should reflect the attorney's level of skill and experience as well as the complexity of the issues and the likely time involved. Given Jones's relative lack of skill, $60,000 is a very high fee even for such complex issues. If that is the standard fee in the area for comparable representation, however, it may stand.

Stock as payment

Generally, an attorney may accept payment from a client in the form of stock, but here, given the nature of the corporation and its changing the status, it threatens to pose yet another conflict of interest. Jones may enter into a business deal with his client (which is what such acceptance would essentially entail) only if he thinks the deal is fair and reasonable to the client, and if he counsels the client to seek independent advice from another attorney.

QUESTION 9

In January 2000, Trust Bank agreed to loan Bob $75,000 to buy three trucks for his business. Bob told Trust Bank he was purchasing the trucks from Charles. Both Bob and Charles were customers of County Bank. To insure that the funds it was providing were used to purchase the trucks and that its name would appear on the truck title as lienholder, Trust Bank issued a joint check payable to Bob and Charles for $75,000 and gave it to Bob. Bob presented the check to County Bank. Charles never endorsed the check. Bob wrote his own name and Charles' name on the check prior to taking it to County Bank. County Bank took the check and deposited the funds into Bob's account. County Bank then presented the check to Trust Bank, which paid County Bank.

Bob made payments on the loan to Trust Bank each month. In July 2000 when Bob went into bankruptcy, Trust Bank learned it was not a lienholder on the three trucks owned by Bob and that Charles had never received the $75,000.

(a) What crimes has Bob committed? Explain briefly.

(b) What rights does Trust Bank have against County Bank to recover its loss? Explain fully.

REPRESENTATIVE ANSWER 1

(a) Bob has committed the crime of false pretenses, forgery and uttering. First, he is guilty of false pretenses because he made a material representation of a present fact which induced reliance in order to gain title to property of another. Indeed, Bob claimed that he needed $75,000 because he was buying three trucks for his business that he was purchasing from Charles. Relying on the information and reasonably, Trust Bank gave the money to Bob. However, it doesn't appear that Bob purchased the trucks and he did gain title to the trucks. Thus, false pretenses.

He is also guilty of forgery because he signed someone else's name to a legal document having consequences. Here the check issued by Trust Bank was jointly payable to Bob and Charles. In order to cash the check, Bob endorsed his name and Charles' name on the check prior to cashing it. Thus, he forged Charles' name on the check.

He is also guilty of uttering a forged document. After he fraudulently signed Charles' name on the check, he presented the check to County Bank to be cashed. At the time of presentment to County Bank of a forged document, Bob committed an uttering.

(b) Trust Bank issued a joint check to Bob and Charles for $75,000 and gave it to Bob. At this point, Bob became a holder of the check. He then took the check and endorsed both his name and Charles' name and presented it to County Bank. Both Bob and Charles were customers of County Bank and, therefore, their signature cards should be on file. County Bank had a duty to check the endorsed names on the check against both of Bob and Charles' signature cards. Had County Bank

done so, it would have been on notice that the endorsement was invalid. This is a breach of transfer warranty and County Bank had a duty to discover it because of the signature cards. Transfer warranties include that the warrantor is a person entitled to enforce the item, that all signatures on the item are authentic and authorized, the item has not been altered, the item is not subject to a defense of any party that can be asserted against a warrantor, and the warrantor has no knowledge of any insolvency proceeding.

When County Bank transferred the check to Trust Bank for payment on the check, County Bank gave these transfer warranties. Clearly, County Bank was not entitled to enforce the check because of the forged signature and the fact that it should have known that it was a forgery and Charles' signature was not authentic and authorized. Additionally, a cause of action for breach of warranty accrues when the claimant has reason to know of the breach. Trust Bank only learned that there was a breach upon Bob going into bankruptcy. Therefore, Trust Bank has 30 days after this time to confront the warrantor (County Bank) with the breach and may be discharged to the extent there is any loss equal to the amount suffered as a result of the breach, but not more than the amount of the check plus expenses and loss of interest incurred as a result of the breach. Trust Bank took the check from County Bank in good faith.

REPRESENTATIVE ANSWER 2

(a) Bob (B) has committed the following crimes: forgery, uttering, false statement and false pretenses.

B is guilty of forgery because he altered a written instrument, the loan check from Trust Bank, with an intent to defraud the Trust Bank. Hence, he received the money under the impression that he would use it to purchase trucks from Charles (C). B never purchased trucks from C. Hence, he specifically intended to defraud Trust Bank.

B is guilty of uttering because he possessed a written statement that now had been forged.

B is guilty of false pretenses because he made a false statement to the Trust Bank, that he intended to use the loan to buy Charles' trucks. This intent to defraud allowed B to get title of the money be needed.

(b) Trust Bank = Drawer, Drawee, Payor Bank
Bob and Charles = Payee
County Bank = Collections Bank, Presenting Bank

Trust Bank can sue County Bank under Section 4-208 for breach of warranty, but only if County Bank had knowledge, or should have had knowledge, that Charles' signature was forged.

Since County Bank can also be considered a collecting bank, Trust could sue for breach of warranty under Section 4-207. Specifically, the warranty that "all signatures on the item are authentic and authorized" under Section 4-207(a)(2).

Under Section 4-207(c), Trust could recover the amount equal to the loss suffered as a result of the breach. However, pursuant to Section 4-207(d) and Section 4-207(e), Trust must file within thirty (30) days of the date they had reason to know of the breach.

QUESTION 10

Andy and Zeke were partners in A&Z, a business which was financially distressed. The company owned $250,000 life insurance policies on both Andy and Zeke.

Andy approached Bert, a convicted felon, who worked as a maintenance man for A&Z and told Bert he needed to have Zeke killed in order to collect on insurance needed to prevent the business from closing, and asked if Bert knew anyone who would do the job. Bert replied that he would help out Andy.

Bert approached Carl, whom he knew from prison, and asked him if he could do the job. Carl immediately informed the Maryland State Police, but without mentioning Bert. The police sent Doug, an undercover officer, to meet Andy. The conversation began with Doug saying "I can give you a good price on getting rid of a business partner". Andy replied, "I don't think I want to go through with this". Doug said "It's your only way out". Andy then agreed to pay Doug $5,000 to kill Zeke. Doug told Andy he would have to supply the gun. Andy went to a gun store and, having a license to carry a handgun, bought a .38 caliber revolver.

Bert, not having heard back from Carl, but wanting to help out Andy and save the business, set fire to the A&Z warehouse so Andy could recover property insurance proceeds. Bert was arrested and confessed all, and agreed to testify against Andy.

Doug obtained a statement of charges from a District Court commissioner charging Andy with attempted murder and arson, and arrested Andy.

You are the prosecutor.

Discuss charges you will propose to include in an indictment of Andy, and any anticipated legal defenses.

REPRESENTATIVE ANSWER 1

Andy and Bert are guilty of conspiracy to commit murder. Conspiracy requires the agreement between two or more persons to complete an unlawful objective. Carl is not guilty of conspiracy because he never agreed to Bert's proposal for assistance.

Andy is also guilty of attempted murder of Zeke. Attempted murder is a specific intent crime that requires a "substantial step." Agreeing to pay Doug $5,000.00 to kill Zeke and buying a gun constitutes a substantial step. The defense will argue that Andy was entrapped by Doug, a police officer. Doug said "this is your only way out", thus encouraging Andy to commit this crime. However, this effort on the part of the defense will likely fail because Andy was "predisposed" to killing Zeke.

Andy is also guilty of solicitation when he agreed to pay Doug $5,000 to kill Zeke. It does

not matter that Doug was an undercover cop.

Andy is also guilty of arson if the prosecution can prove that it was a foreseeable consequence of the conspiracy between Andy and Bert that Bert would burn down the warehouse. The reason why Bert burned down the warehouse was to get the insurance proceeds. This was the objective of the original conspiracy to kill Zeke. The defense will argue that this was not foreseeable.

In Maryland, there are several degrees of arson. This arson would not be considered first degree because it did not occur at a dwelling. It would likely be third degree arson because it was a warehouse where people are not likely to be. It may also be arson by way of defrauding the insurance carrier.

REPRESENTATIVE ANSWER 2

1. Conspiracy to commit murder.

Andy approached Bert and solicited him to help him kill Zeke. Bert replied he would help out Andy, thereby constituting an agreement between two persons to commit an illegal act (murder). The solicitation merged into the greater offense of conspiracy when the agreement was made.

Defense.

Andy may claim that no avert act in furtherance of the agreement occurred and thus there was no conspiracy. In Maryland, the avert act is the agreement, thus this defense will not work. There is no conspiracy with the police officer because there was no agreement between two persons. Only Andy agreed to the agreement.

2. Solicitation of murder.

Andy agreed with the police officer to have him kill Zeke for $5,000. Andy agreed to the payment and bought the gun. Because only Andy agreed to the plan and the police officer lacked the requisite intent to conspire, there is no conspiracy. Thus, the solicitation does <u>not</u> merge into the conspiracy because there is no conspiracy.

Defense.

Andy will assert the defense of entrapment. The police officer approached Andy, made the offer and after Andy said he "didn't think he could go through with it", the police officer convinced Andy to agree to the plan. However, if Andy had a predisposition to commit the

crime, there is no entrapment. Andy had already solicited Bert to kill Zeke, evidencing Andy's predisposition to the crime.

3. Arson.

As a co-conspirator with Bert to kill Zeke, Andy is liable for the actions of his co-conspirator committed in furtherance of the conspiracy. Bert set fire to the warehouse in order to help out Andy. Thus, Bert's arson of the warehouse was an act in furtherance of the conspiracy and Andy is liable for it under co-conspirator liability.

Defense.

Bert's arson was not a reasonably foreseeable act in furtherance of the conspiracy. The conspiracy was to kill Zeke to collect insurance money on Zeke. Instead, Bert without consulting Andy, set fire to the warehouse to collect property insurance proceeds. There is no evidence to suggest Zeke was in the warehouse when the fire was set.

4. Attempted murder <u>will not be</u> included in the indictment of Andy.

In order to be guilty of attempted murder, Andy or a co-conspirator must have taken substantial steps towards committing murder. Although Andy bought a gun, that does not constitute a substantial enough step towards the murder of Zeke. In addition, there is no evidence that Zeke was in the warehouse when the fire was set or the intention of killing Zeke by burning the warehouse. Thus, Andy is not guilty of attempted murder via arson or the purchase of the gun. Therefore, I will omit this offense from the indictment.

QUESTION 11

Angie and Bert, residents of Howard County, Maryland, planned to get married on February 10, 1998. In anticipation of the marriage, Angie's parents wanted to convey two parcels of real estate to Angie and Bert. On January 1, 1998, the parents executed the first deed to Angie and Bert as tenants by the entireties. Angie and Bert married as planned and recorded their deed the next day.

On March 20, 1998, Angie's parents executed a second deed to Angie and Bert conveying to them as tenants by the entireties, a lot in a subdivision adjacent to the parcel previously conveyed. It was described in the deed as "…consisting of 6 acres, more or less, and known as Lot 10 of Melrose Subdivision, the same being one acre, all as shown on Plat 200 recorded among the Land Records of Howard County, Maryland". The description for Lot 10 on Plat 200 described Lot 10 as one acre. The deed was properly executed and recorded.

Angie and Bert had a stormy marriage largely because of many things Bert "forgot" to mention to Angie prior to the marriage ceremony. One of the things he forgot to mention is a Judgment in the amount of $75,000 against Bert in favor of J. Creditor which was properly recorded in the Clerk's Office for Howard County, on July 1, 1997. Revelation of the Judgment was the last straw for Angie. They are legally divorced on September 20, 2000. On September 25, 2000, Bert conveys both parcels to Angie and, distraught over the divorce, he moves to China for a fresh start.

A. What issues are raised regarding the deeds?

B. Does Angie have a potential problem with J. Creditor? Explain.

REPRESENTATIVE ANSWER 1

A. Issues raised regarding the deeds.

1) Angie's parents conveyed two parcels of real estate to Angie and Bert on January 1, 1998. The executed deed stated, to Angie and Bert as tenants by the entireties. Tenancy by the entireties can only be established if the two people are married when the deed is executed. Bert and Angie are not married until February of 1998. Therefore, tenancy by the entirety was not established when the deed was executed by Angie's parents. The property will likely be held as joint tenants with the right of survivorship between Angie and Bert. This is because they took the property at the same time, there was a unity of title, they both had an interest in the property and they both take possession at the same time. It is important to note that just because Angie and

Bert recorded the deed after they were married, a tenancy by the entirety was not established. The relevant date is when the deed was executed which was before they were married.

2) Angie's parents executed a second deed on March 20, 1998 to Angie and Bert as tenants by the entireties. The deed, as described, stated that the land conveyed consisted of "6 acres, more or less, and known as Lot 10 of Melrose Subdivision, the same being 1 acre, all as shown on Plat 200 recorded among the Land Records of Howard County, Maryland." Despite the inconsistency between the executed deed and the Land Records, it seems that Angie's parents have conveyed whatever interest they may have in Lot 10 on Plat 200. They have sufficiently described the land by mentioning the specific lot and plat. Angie and Bert may need to check back in the Land Records to find out the exact amount of land that Angie's parents have conveyed to them. This should clear up the discrepancy between the deed stating that there are 6 acres and the Land Records stating that there is only 1 acre.

This land has been conveyed to Angie and Bert as tenants by the entireties. Because they are now married such grant is valid.

B. Angie does have a potential problem with the creditor. The creditor properly recorded in the Clerk's Office for Howard County a Judgment in the amount of $75,000 against Bert on July 1, 1997. This Judgment attaches to any property that Bert has on or after this date until the Judgment is fulfilled.

The first deed executed by Angie's parents to Angie and Bert was unsuccessful as being granted to them as tenants by the entireties. As stated above, this grant will most likely be seen as joint tenants with the right of survivorship. Both Bert and Angie will have an undivided one-half interest in this property. Bert's undivided half is subject to the creditor's Judgment. This will sever the joint tenancy between Bert and Angie and the property will now be held between them as tenants in common.

The second deed executed by Angie's parents to Bert and Angie was conveyed to them as tenants by the entireties. As such, no creditor will be able to attach a Judgment or lien against this property because it receives special protection. Therefore, the creditor may not attach his Judgment against this property so long as the marriage remains intact. On September 20, 2000, Bert and Angie were legally divorced and the tenancy by the entireties was severed. At this point, the creditor could attach his judgment to Bert's undivided one-half interest in the property if the first property did not successfully alleviate the Judgment. The fact that Bert conveyed his interest in the parcels to Angie on September 25, 2000, only means that Angie takes that property subject to the creditor's Judgment.

REPRESENTATIVE ANSWER 2

Parcel conveyed on January 1, 1998 (Parcel 1)

In order to create a tenancy by the entirety, there must be five unities that are met. Unity of time: The tenants must receive the interest at the same time, here A and B both got the interest on same date. Unity of Title: The tenants must take by the same instrument - here Angie's parents conveyed the instrument by the same deed to both A and B. Unity of Interest: Both tenants must take some interest. Here A and B took as tenants by the entirety. Unity of Possession: An and B were able to take the parcel together and both possess it at the same time. Unity of Marriage: Not present here because they were not married at the time of the conveyance as tenants by the entireties (T/E).
However, if the parties are not married and the property is conveyed as T/E, there is a presumption that it becomes a joint tenancy. Therefore A and B owned Parcel 1 as joint tenants with the right of survivorship.

Parcel conveyed on March 20, 1998 (Parcel 2)

A and B are married at this time and so they would hold the property as tenants by the entireties, each with the right of survivorship. However, there is an ambiguity in the description of the property. It says that it is consisting of 6 acres, more or less. However, the deed then goes on to say that it is known as Lot 10 and that it is only 1 acre. Because the second description makes a reference to the plat, it would probably prevail and they would own as T/E one acre of land.

Angie's potential problem with J. /Creditor.

The property that A and B received from Angie's parents was held by A and B as joint tenants. However, Bert has a prior judgment of $75,000 against him in favor of J. Creditor on July 1, 1997. This judgment attached to Bert's interest in the property (parcel 1) when he received it from Angie's parents on January 1, 1998. This severed the joint tenancy and created a tenancy in common. When Bert conveys his interest in the property to (Parcel 1)Angie, she would take it subject to J. Creditor's Judgment.

Parcel 2:

J. Creditor's Judgment could not attach to Parcel 2 while A and B owned it as tenants by the entirety. However, once they were legally divorced on September 20, 2000, this severed the T/E. creating a tenancy in common. Once the tenancy in common was created on September 20, 2000, J. Creditor's Judgment attached to Bert's interest in Parcel 2 and when Bert conveyed

Parcel 2 on September 25, 2000, Angie took Parcel 2 subject to J. Creditor's Judgment.

QUESTION 12

Beacon Distribution, Inc., a Maryland corporation, purchased all of the assets of Sampo Suppliers, Inc., an importer and distributor of medical diagnostic equipment in the United States, with its principal office in Harford County, Maryland

The contract provided, *inter alia*, that Beacon assumed "all of the rights and liabilities of Sampo with respect to unfilled orders for the purchase of equipment contracted to be sold by Sampo".

Susan had been a salesperson for Sampo and had procured substantial orders for Sampo which, at the time of the sale to Beacon, were in the process of being shipped and/or billed. Her compensation arrangement with Sampo during the years of her employment, although not in written form, provided for a 10% commission on each order she obtained.

Along with other employees, Susan lost her job when Sampo transferred its assets to Beacon. She submitted a claim to Beacon for $40,000, representing her 10% commission on the orders she procured while employed by Sampo. Susan was not a party to the Beacon-Sampo contract. She was not mentioned in the contract and did not contribute any consideration to it. For these reasons, Beacon refused payment.

What right of recovery does Susan have against Sampo and, or Beacon, if any? Explain fully.

REPRESENTATIVE ANSWER 1

This question involves issues of contract law, therefore, the Maryland common law of contracts will apply. This does not involve the sale of goods, therefore, the UCC does not apply.

A contract is formed when there is an offer, acceptance and valuable consideration. Here, Beacon & Sampo contracted to assume all the rights and liabilities of Sampo with regard to unfilled orders, and the terms of the contract did not include Susan as a party.

However, Susan had an oral contract with Sampo, as a salesperson, whereby her compensation arrangement provided for 10% commission of each order she obtained during the years of her employment.

A breach by Sampo occurred when Susan lost her job during the transfer of assets to Beacon by Sampo.

A third party beneficiary can enforce rights under a contract if the third party has knowledge of the contract and is intended to be paid under the contract even if she is not a party to the contract. Here, Beacon's "assuming all rights and liabilities of Sampo" could reasonably include the payment of employees making the unfilled orders for the purchase of equipment. It would be equitably unfair for Sampo to assign its rights to a third party without fully paying its own employees from its assets. Here, Susan submitted a claim to Beacon for $50,000 representing her 10% commission while employed by Sampo.

As a third party intended beneficiary, Susan has a cause of action against Sampo, although insolvent, for her employment commission because of privity of contract between the two and she has a cause of action against Beacon as a third party intended beneficiary under the "assumable" Beacon-Sampo contract. She may have a statute of frauds problem that needs to be addressed.

REPRESENTATIVE ANSWER 2

Third Party Beneficiaries

Nonparties to a contract may have rights or duties in connection with the contract.

Here we have a contract between Beacon and Sampo. Beacon purchased all of the assets of Sampo Suppliers. The contract provided that Beacon assume all of the rights and liabilities of Sampo. Susan was not a party to the Beacon-Sampo contract and she was not mentioned in the contract.

There are two types of third party beneficiaries, creditors and donee beneficiaries. Susan is a creditor beneficiary because she is owed the 10% commission on each order she obtained - prior debt owed to her by Sampo. A third party beneficiary does not have contractual rights. Susan may vest her rights in the contract by bringing suit against Sampo or Beacon. Susan has a previous relationship with Sampo because she was employed by Sampo.

Here Beacon assumed all rights and liabilities of Sampo with respect to unfilled orders for the purchase of equipment contracted to be sold by Sampo. Beacon will have to pay Susan because Susan had been a salesperson for Sampo and had procured substantial orders for Sampo which at the time of the sale to Beacon were in the process of being shipped and/or billed unfilled orders. Beacon assumed all of the rights and liabilities of Sampo with respect to unfilled orders

for the purchase of equipment.

Susan is qualified as a third party beneficiary because of her previous relationship as an employee with Sampo. Sampo owed her so she is a creditor beneficiary. Susan may choose to sue Sampo or Beacon but she is only entitled to one recovery. I would suggest that Susan sue Beacon because of the assumption on unfilled orders on the contract.

Beacon will try to defend by stating that Susan was not a party to the contracts, she was not mentioned in the contract and did not contribute any consideration to it. Those facts do not help Beacon because Susan is a third party beneficiary.

Susan may sue Sampo as well because of the compensation agreement with Sampo during the ten years of employment. Sampo will defend by stating that the 10% commission on each order she obtained was not in writing.

Susan should sue Beacon because he assumed liability, therefore, he could not use any defense that Sampo had, such as the defense of the compensation agreement not being in writing.

Susan has right of recovery as third party beneficiary.