

# JULY 1998 MARYLAND BAR EXAMINATION

## REPRESENTATIVE GOOD ANSWERS

### PART A

#### QUESTION NO. I (12 Points - 15 Minutes)

Carol was a single parent with a severely disabled daughter, Marsha. In 1986, Carol met Mike who was living alone in a home he owned in Harford County, Maryland. The relationship progressed rapidly. On January 5, 1987, Carol and her disabled daughter, age 3, moved into Mike's house. On February 1, 1988, Mike, as an engagement gift, legally transferred the title to the home to himself and Carol, as joint tenants with right of survivorship.

Carol and Mike were lawfully married in Maryland on March 8, 1988. Over the next ten years, Mike raised Marsha with Carol, although formal adoption was never pursued. Mike also paid many expenses for Marsha, including food, clothing, special schools and necessary equipment. Mike and Carol had no children of their marriage.

During the marriage, Carol developed recurrent problems with substance abuse and violent behavior. Additionally, in 1995, Creditor obtained a judgment against Carol in the amount of \$15,000, which was properly indexed and recorded in the Circuit Court for Harford County.

Last month, after a shouting match in which Carol hit Mike with a frozen lambchop, Mike decided he could no longer live with Carol's substance abuse and drug-induced rages. Creditor also has executed on its judgment by attaching Carol's interest in the Harford County home. To avoid further blow-ups and despite Carol's protest, Mike has moved in temporarily with his brother. Mike has sent Carol sufficient money for her monthly expenses.

**Mike comes to you, a Maryland attorney, for advice. He wants to know:**

- 1. What are my grounds for absolute divorce and how soon can I get one?**
- 2. What support obligation do I have for Marsha, now age 15, and still severely disabled?**
- 3. What effect will the judgment against Carol have on our interest in the home?**

**Write a letter to Mike, answering his questions. Be sure to explain the factual and legal reasons for your answers.**

## REPRESENTATIVE ANSWER NO. 1

Dear Mike:

1) The grounds for absolute divorce that you can file are: a one-year voluntary separation, two-year separation, and constructive desertion.

The first ground, a one-year voluntary separation requires that both Carol and Mike agree to separate and that they do not live or have sex together for a year. This will probably be difficult for you to pursue because of Carol's protest. Therefore, you might have to wait for the two-year separation. Carol, does not have to agree to this, you just have to live apart for two years.

Your last chance would be to sue for constructive desertion. If you could show that her violent behavior was constant, then a constructive desertion would be allowed. One incident of physical abuse is usually not enough. You would need to show more.

Therefore, either a two-year separation or constructive desertion would be your best alternative.

2) Mike does not have any legal obligation to Marsha, because he did not adopt her. Even though he provided for most of her support during the marriage, he does not have a legal obligation. However, you might have a moral obligation.

However, you might be required to pay Carol more alimony, so that she can continue to care for her daughter due to her disability.

3) Since the judgment on the home was properly levied, the joint tenancy with the right of survivorship is now severed. The property is now held as tenants in common, and the creditor can go against Carol's portion.

The property never became tenants by the entirety, because the deed was never changed. Your marriage did not create tenants by entirety property. If you have any further questions, please call.

## REPRESENTATIVE ANSWER NO. 2

Dear Mike:

On your first concern, grounds and timing for an absolute divorce, I believe that you will only be able to receive an absolute divorce after the statutory two-year separation period. In Maryland, several grounds exist for granting an absolute divorce. Some grounds include incarceration, adultery and mental illness (if committed in an institution). None of these grounds appears to exist here. In Maryland, you do not have grounds for a divorce based on substance abuse - Carol's problem is considered a disease by Maryland and does not give you grounds for an absolute divorce. Violence is a ground. However, Carol's hitting you with a frozen lambchop is probably not sufficient for purposes of Maryland law.

I would recommend that should you want an absolute divorce from Carol, you should live apart from her, and you cannot have sex with her at all during this period. After two years of living separate and apart, you will be able to get an absolute divorce.

As for Marsha, typically no child support is required for a child born before the marriage by a different parent. You may not be forced to pay child support. However, as you acted as Marsha's father for two thirds of her life, a court may decide that you cannot assert lack of blood relation in order to not pay support. However, under Maryland law, as you never legally adopted Marsha, you may not be liable for her expenses.

The judgment against Carol will probably affect your interest in the home. Because the title was in both names prior to marriage, it will be a joint tenancy instead of tenancy by the entirety (available only for husband and wife). In the State of Maryland, a judgment and attaching interest against one joint tenant severs the joint tenancy. Therefore, Carol's half interest in the home is subject to the attachment, but your half interest is not.

## QUESTION NO. II (23 Points - 30 Minutes)

Sam, age 52, and Jane, age 25, were engaged to be married on April 18, 1996. Sam and Jane both were Maryland residents. On April 15, 1996, Sam requested his attorney, Able, to prepare a Prenuptial Agreement.

Attorney Able drafted a Prenuptial Agreement, by which Sam and Jane each waived all rights in the estate and assets of the other, including any claim to a monetary award based on "marital property." Sam and Jane each provided a list of their assets, which was attached as an exhibit to the Agreement. Sam's assets consisted solely of valuable publicly traded stocks, most of which he had purchased at low prices years ago. Sam understated the value of all his stocks based on the prices he had paid for them rather than current market prices, which were considerably higher. Attorney Able also included a clause in the Agreement that neither party would be liable for misrepresentation which induced the other party to enter into the Agreement.

Sam and Jane met with Attorney Able. He correctly explained the intended effect of the Prenuptial Agreement on their legal rights in the event of death or divorce. Attorney Able orally advised Jane that he was representing Sam and she had a right to retain her own attorney to review the Agreement and advise her about it. Jane replied that she saw no need to consult another lawyer. Jane signed the Prenuptial Agreement immediately, stating, "I don't care about Sam's money. I'm marrying him for love." Sam then declared that after they were married, he would always give Jane \$500 a week spending money to buy whatever her heart desired for as long as he lived.

For the first year of their marriage, Sam gave Jane \$500 per week to spend as she pleased. Shortly after their first anniversary, Sam retired, receiving a substantial bonus which he invested in additional stocks, but thereafter, Sam did not provide any spending money to Jane and closely monitored all her expenditures. Bored and angry, Jane became intimately involved with Sam's stockbroker. The value of Sam's stock portfolio grew substantially. In April, 1998, Sam learned of the affair and filed suit against Jane for an absolute divorce on grounds of adultery. Jane currently has no assets or income. She needs training to obtain entry-level employment. Sam and Jane have no children.

Jane hires you, a Maryland attorney, to represent her and to pursue all her financial rights. Jane does not contest the divorce.

- 1. What monetary claims can you assert on Jane's behalf against Sam?**
- 2. What defenses, if any, will Sam raise to each of Jane's claims?**
- 3. What is the likelihood of success of each claim, based on the facts stated above?**

**Explain your answers.**

- 4. Advise Jane as to whether she can assert any claims successfully against Attorney Able.**

#### REPRESENTATIVE ANSWER NO. 1

1) On behalf of Jane, I would assert claims for a monetary award based on marital property, alimony, and the contract to provide Jane with \$500 a week.

I would assert that the stocks were marital property to the extent that they represent the retirement bonus because a pension is marital property. I would also assert the other stocks are marital property to the extent that they increased in value during the marriage, but would probably lose on that claim unless Jane assisted in managing the portfolio.

I would also assert a claim for alimony - at least rehabilitative, maybe permanent if the incomes would be unconscionably disparate. I would claim the contract to provide \$500 a week made by Sam in consideration for the marriage is valid.

2) Sam will assert that the Prenuptial Agreement is still valid and so Jane may not claim alimony or marital property. Sam will also claim that either the \$500 per week was only a gift and so not enforceable or that it was given in consideration for marriage and so falls into the Statute of Frauds and the statute is not satisfied because the promise was only oral.

3) Jane will probably succeed in having the Prenuptial Agreement set aside. For a prenup to be valid it must be fair in both result and procurement, there must be full and honest disclosure of all assets, and it is preferable that each party be represented by an attorney. In this case, Sam failed to disclose the true value of his stocks and so the prenup is invalid, notwithstanding the misrepresentation clause. Further, a confidential relationship is presumed in prenups and so Sam will bear the burden of showing fairness and full disclosure.

Of course, that does not mean that Jane will receive any award. In both alimony and marital property awards, courts consider: the age of the parties, their physical and marital condition, the contributions - monetary and non-monetary - to the well being of the family, and the circumstances surrounding the estrangement.

Jane does not appear to have contributed much, and seems to be young and healthy and had an affair. Thus, the court might favor Sam.

Jane will probably get rehabilitative alimony, however, until such time as she receives adequate education or training to be self-sufficient.

Jane will likely not get the \$500 per week because of the Statute of Frauds problem I mentioned earlier, but a court may still enforce the agreement because of Sam's past performance - giving the \$500 per week for a year.

4. Able was correct to advise Jane that she should have gotten her own attorney and that he represented only Sam. Able, however, should have put that in writing suggesting that she take time to consider the matter, but this alone will not give Jane a cause of action against Able.

Able correctly explained the agreement and did not represent himself to be a neutral party. He explained that he represented only Sam.

If, however, Able knew of Sam's misrepresentation or fraud then he would have violated the rules of professional conduct by helping Sam perpetrate this fraud against Jane and she could initiate a disciplinary action.

## REPRESENTATIVE ANSWER NO. 2

1(a) Jane can also request permanent (statutory) alimony which can be awarded to a spouse as part of a divorce proceeding.

1(b) Jane can claim for temporary alimony until the divorce case is heard on its merits.

1(c) Jane can claim the agreement she signed is void as it is unconscionable as Sam understated the value of the stock he owned, and the agreement negated any attempt by Jane to hold Sam liable for such a misrepresentation.

1(d) Jane can also claim that Sam contracted with her to provide her with \$500 a week spending money for "as long as he lived." Thus, Sam should continue to pay Jane that amount each week.

2. Sam will likely raise the following defenses to Jane's claims:

a) As to Jane's claim for statutory alimony, Sam will likely assert that Jane's adultery is the reason for the estrangement and that Jane is a young woman, only 26, and should be able to become self-supporting on her own. Also, there is nothing in the facts to indicate that Jane made any sort of substantial monetary or non-monetary contribution to the marriage. Also, the marriage was very short in duration.

b) As to Jane's claim for temporary alimony, Sam has no defense, as the only factor considered by the Maryland court is the need of the spouse requesting alimony and the ability of the other spouse to pay.

c) As to Jane's claim for a monetary award based on marital property, Sam will likely assert that the Prenuptial Agreement signed by Jane is valid as she voluntarily signed the agreement, thus Jane should be held to the contract. Further, Sam may assert that all of the stock he acquired prior to the marriage is not marital property and is thus not a proper basis for granting Jane a monetary award.

d) As to Jane's claim that Sam must pay, her \$500 per week for the rest of his life, Sam will likely assert that this was a gratuitous promise for which Jane gave no consideration. Thus, there is no valid contract for Sam to be held to.

3.(a) I think that Jane's claim for statutory alimony will likely be successful. Although Jane's adultery and the short duration of the marriage will be factors by the court in the amount and duration of the alimony award, it should not bar her receiving any award. The purpose of alimony is rehabilitation.

As Jane would need training to obtain even entry-level employment, she is likely to receive the alimony from Sam for a brief time in order to obtain the training.

(b) As to Jane's claim for temporary alimony, it too will likely be successful as Jane with no income or assets clearly has a need, and Sam with a substantial stock income clearly has the ability to pay.

(c) I think that Jane is also likely to be successful in obtaining a monetary award based on marital property as the Prenuptial Agreement appears to be invalid. Prenuptial agreements can be recognized in Maryland if there is a truthful and full disclosure of each party's assets. Here Sam understated the value of his stock considerably, thus the Agreement is void. Also, the clause stating that neither party would be liable for misrepresentation is void as against public policy. Jane would not be entitled to an award based on stock acquired before marriage, but could get an award based on the additional stocks purchased by Sam during the marriage.

(d) As to Jane's claim for \$500 per week, she will not be successful there is no contract for lack of consideration. Even if Jane's signing of the Prenuptial Agreement was consideration, it is past consideration and cannot support a contract.

4. Jane will likely not be able to successfully assert claims against attorney, Able. Able, as Sam's attorney, had a duty to advise Jane that he was representing Sam and encourage her to seek independent counsel. Able fulfilled his obligation to Jane and she consented; thus, Able was not in violation of the Rules of Professional Conduct.





## PART B

Acme Appliances advertised an appliance sale in the local newspaper. Among the items on sale was the WonderWasher, which the advertisement claimed was "suitable for super heavy duty washing jobs" and that "no household job is too tough for the WonderWasher."

In response to the advertisement, Jones went to Acme to see about buying a WonderWasher for both his household wash and to launder linens and uniforms from the restaurant that he owns and operates. Jones asked the sales clerk about the WonderWasher's capacity, and was informed that "if you can fit it in the WonderWasher, this machine can clean it." Jones did not tell the clerk that he would use the machine for both household and restaurant laundry.

Jones signed a contract to purchase a new WonderWasher for \$1,200.00, and gave the clerk a check payable to Acme for that amount. The check was drawn on Jones' personal account at OmniBank. Jones asked for same day delivery, which the clerk was able to arrange. Jones specified that delivery was to be made at his second floor apartment over the restaurant.

Acme delivered the WonderWasher at 5:00 p.m., at the height of the "Early Bird Special" dinner rush. Jones unlocked the apartment, and signed the contract acknowledging delivery and acceptance of the WonderWasher. Jones left the crew to install the new washer. The delivery crew installed the new washer, and asked Jones to come upstairs to test it. Jones declined saying that he is "way too busy for that now," which the crew chief noted on the contract. The crew removed and disposed of Jones' old washer.

That night, Jones loaded the new WonderWasher without reading the Owners' Manual, which states that "your new WonderWasher has a capacity of 35 pounds, and should be used with no more than one cup of detergent." Jones washed a small load of household items in warm water using one cup of detergent. The clothes were adequately cleaned without incident. Jones then packed the WonderWasher with 50 pounds of tablecloths and linens from the restaurant, and added two cups of detergent.

The WonderWasher overflowed during the wash cycle of the second load, flooding the kitchen of the restaurant below. During the spin cycle, the WonderWasher emitted smoke, shuddered, shook, and skidded across the floor, yanking the cord out of the wall.

The restaurant was shut down for a week, while repairs were made to it. The restaurant linens are now sent out to a commercial laundry for cleaning.

The morning after delivery of the WonderWasher, Jones called OmniBank and ordered a stop payment on his check to Acme, for which OmniBank charged him \$35.00. Jones also called Acme and told them to come and pick up their broken machine. Acme offered to send over a repair

technician to determine why the washer stopped functioning, but Jones rejected the offer.

After a two week stalemate, Acme sues Jones for \$1,200.00.

**YOUR ANSWERS TO THE FOLLOWING QUESTIONS SHOULD NOT INCLUDE DISCUSSION OF TORT CLAIMS OR CLAIMS UNDER ANY CONSUMER PROTECTION STATUTE.**

QUESTION I  
(10 points, 15 minutes)

**Discuss what defenses, if any, Jones may have to Acme's action under Article 2 of the Uniform Commercial Code and Acme's probable responses.**

REPRESENTATIVE ANSWER #1

Jones may claim that Acme tendered nonconforming goods and that he merely rejected them prior to acceptance. Hereunder 2-602 rejection was made within a reasonable time after delivery and he notified the seller of his rejection.

He may also claim that despite his acceptance of the goods. He may also claim that he rejected the goods under the assumption that the nonconformity would be seasonably cured but has not been.

He may also claim breach based on breaches of the express warranties made by Acme as well as breach of warranties with regard to merchantability and fitness for a particular purpose.

He may also claim that he did not have time to make a reasonable inspection of the goods in order to effectively reject them without first trying the washer, thus there was no effective acceptance.

Acme will claim the following in response:

Under 2-605, the buyer failed to particularize the defect which was ascertainable by reasonable inspection, thus he is unable to rely on that defect to justify action or establish breach.

Under 2-606(1)(a) he failed to make an effective rejection despite being offered an opportunity to inspect the washer.

Indeed, under 2-606(1)(c) he also, by using the washer, acted inconsistently with the seller's ownership.

Thus, Acme will claim that the buyer must pay the contract price for the goods accepted.

#### REPRESENTATIVE ANSWER #2

Article 2 of the UCC applies to this transaction because it involved the sale of goods, a washing machine. In defense to Acme's action against Jones under Article 2, Jones may argue that he rightfully rejected the WonderWasher.

In order to rightfully reject a good, the buyer must do so before accepting the goods. Jones, the buyer, never accepted the goods in this case. Jones did not inspect the goods, and the fact that he paid for them does not matter. Payment before inspection does not impair Jones' right to later inspect the goods and it does not constitute an acceptance of the goods. See Section 2-512. The washer was delivered while Jones was busy. He had already tendered payment, but had not inspected the goods.

Jones rejected the goods the morning after delivery of the WonderWasher. This is reasonable notification, and acts as an effective rejection under Section 2-602. Due to the fact that Jones' conduct does not constitute acceptance of the washer, despite his payment, Jones had the right to reject the goods. Therefore, Jones is not liable to Acme for a breach of contract.

Acme will likely argue that the delivery crew asked Jones to inspect/test the washer, but he failed to do so. He then used the washer for the second load, and by doing so, accepted the washer. He had a reasonable opportunity to inspect the goods through making use of them, and his actions constituted an acceptance. Acme will argue that, as a result, Jones could not rightfully reject the goods the following morning, and he is liable to Acme for payment of the washer.

Acme will argue that they made an attempt to repair the machine, but Jones refused and therefore Jones is liable for full payment of the washer.

#### QUESTION II

(20 points, 30 minutes)

**What counterclaims does Jones have against Acme under Article 2 of the Uniform Commercial Code? Include in your discussion Jones' claims for damages under the Code as well as Acme's probable responses.**

#### REPRESENTATIVE ANSWER #1

Jones has a number of counterclaims:

Breach of Express Warranties. Advertising using such terms "as for super heavy duty jobs" indicate that the washer could handle loads in excess of the stated capacity. I would argue that Jones relied on these warranties in his purchase of the washer. Also, the Salesman's statements regarding the washer lead him to believe it could handle large loads.

Breach of the Warranty of Merchantability. Under 2-314, the goods were not merchantable and Acme is a seller of goods of that time. Here, the washer was not fit for the ordinary purposes for which the goods were used, nor did they conform to the promises or affirmations of fact on the container.

Breach of implied warranty of fitness for a particular purpose. Jones could assert that the Seller at the time of contracting knew of his use and that he relied on the salesman's advice in selecting that particular washer.

Buyer's remedies include:

Under 2-715, buyer is able to recover incidental and consequential damages that were foreseeable. Thus, he would be able to recover profits lost as a result of the restaurant being shut down for over a week. He may also claim damages as a result of injury to his property for the breaches of warranty by the seller.

Buyer may also "cover" by purchasing a machine that is able to handle his requirements and recover the cost difference between the contract price and the cost of cover.

Finally, buyer may also recover incidental damages which were a result of the breach, such as charges incurred from sending his laundry out to a commercial cleaner.

Acme will respond that any express warranties were effectively disclaimed by the instructions that gave the correct safe load limits.

Acme will also claim that there was no breach of warranties for merchantability because the washer was not used for its ordinary purpose and that Jones used it in a nonapproved way that voided the warranty.

Finally, there was no implied warranty of fitness for a particular purpose because the facts clearly show that Jones did not tell the clerk about his particular use of the machine so it was not possible for him to rely on the seller's skill and judgment in selecting the correct goods.

With regard to monetary damages, Acme will claim as a result of his acceptance, he had ineffectively rejected the goods and must pay the contract price.

Acme will also not be liable for any consequential damages as a result of this alleged breach because they were not known at the time of contracting as per 2-715.

## REPRESENTATIVE ANSWER #2

Jones may counterclaim on the basis of breach of express warranty, as well as breach of the implied warranties of merchantability and fitness for a particular purpose.

1) Jones will argue that an express warranty was created in the WonderWasher based on the statements made in the ad, as well as by Acme's sales clerk. These statements regarding the abilities of the washer were more than mere puffing. The ad expressly stated that it was "suitable for heavy duty washing jobs," and the clerk made a similar comment. These assertions formed the basis of the bargain. Jones will argue Acme breached this express warranty due to the washer's failure to handle the 50 lb. load.

An express warranty on consumer goods cannot be limited in its remedies and an express warranty cannot be disclaimed, so Acme will unlikely be able to dispute its existence.

2) Jones will also argue that Acme breached the implied warranty of merchantability, which is implied in every sale of goods by a merchant. Acme is clearly a merchant, Acme regularly deals in the business of selling washers. This warranty was breached by Acme because the washer was not fit for its ordinary purpose - washing clothes and linens.

The warranty cannot only be disclaimed by clear language, which does not exist here. Jones will argue that the warranty was breached when he was using the washer for its ordinary purpose and it malfunctioned.

Acme will argue that Jones was not using the washer for its ordinary purpose when he put 50 lbs. into it, contrary to the instructions in the owner's manual, which indicated a capacity of 35 lbs. only.

3) Jones will also argue a breach of the implied warranty for a particular purpose. He will argue that Acme (through its agent clerk) breached this warranty by selling him a product not usable for his commercial and business purposes. He will argue that by asking the clerk the capacity of the washer, the clerk knew or had reason to know that he had a particular purpose in mind.

Acme will argue that they did not have knowledge or reason to know of Jones' particular purpose for the washer commercial use. Therefore, they could not have known of Jones' reliance on them for the fact that the washer was fit for that purpose. Acme will argue it never established an implied warranty of fitness for a particular purpose and Jones' claim on this basis must fail.

Acme will probably prevail on this basis, due to their lack of knowledge or reason to know of Jones' particular purpose, but Jones will likely prevail based on the breach of express warranty and implied warranty of merchantability.

Jones will be relieved of payment for the washer and may also claim damages against Acme.

Jones may recover damages for any injury he suffered, or to his property, as a result of the warranty breaches, including the flooding of the kitchen. He may also recover the \$35 spent in stopping payment on the check, as incidental damages.

Jones will argue that he should recover for the loss of profits, due to the shutdown of his restaurant for a week. Acme will argue that Jones should not recover such consequential damages because that loss could not have reasonably been contemplated by Acme at the time of sale. The loss resulted from Jones's use of the washer for his particular business needs which Acme had no reason to know of, and therefore, such losses of profits are not recoverable. I think Acme has a strong argument on this basis only.

Jones may also possibly recover from Acme the difference between his cost of cover, a new washer, and the contract price for the Wonder Washer.

## PART C

### QUESTION I

(15 Points 20 Minutes)

In 1980, Gus sold a portion of his farm (shown on the diagram as Parcel “A”) to Mike and Etta as joint tenants with rights of survivorship. Gus retained the balance of the farm and continues to own it. The deed provided that, in addition to fee simple title to Parcel “A”, Gus also conveyed to “the grantees and their successors in interest an easement from Parcel ‘A’ to North Road for purposes of ingress and egress to and from said property.” Mike and Etta built a gravel driveway across the easement and used it for access to and from North Road.

In 1985, the State constructed South Road, which bordered Parcel “A” and gave direct access to it. As a result, Mike and Etta used South Road as their access and ceased to use the driveway across Gus’s land.

In 1992, Mike executed a deed purporting to convey “all of his interest” in Parcel “A” to Bud. The deed was recorded in the appropriate land records but Mike did not inform Etta of the deed’s existence. The deed made no mention of an easement.

Mike died on January 1, 1998. Etta executed a deed which stated that she granted all her right, title and interest in Parcel A to Polly. The deed recited that Mike had died and that Etta was then the sole owner of Parcel A. The deed did not mention the easement. The deed was recorded in the appropriate land records. Gus, through his attorney, has written to Polly telling her that the easement to North Road has been abandoned. Polly is interested in using the driveway for access to North Road.

**What interest, if any, does Bud have in (a) Parcel “A” and (b) the easement?**

**What interest, if any, does Polly have in (a) Parcel “A” and (b) the easement?**

**Is Gus correct in his contention that the easement has been abandoned?**

**Explain your answers thoroughly.**

#### REPRESENTATIVE ANSWER #1

(a) Bud’s interest in parcel A is that of a tenant in common with Polly. He has the right to half of the property. When a parcel of land is owned by two individuals as joint tenants, those individuals must take possession of the land at the same time, title together, have the same interest and have the same possession of the land. If these requirements are met, there is a joint tenancy with a right of survivorship. Each person has an individual half interest in the property and when one of the individuals dies, the other will take possession of all of the property.

However, if one of the individuals transfers the property, the joint tenancy is destroyed and becomes a tenancy in common. Here Mike's transfers by deed of his share of Parcel A destroyed the joint tenancy and made Bud a tenant in common with Etta and Polly.

(b) As a tenant in common, Bud had a right to use the easement over Gus' land. The easement is an express easement created in writing, as required by the Statute of Frauds, in the deed. Mere non-use of an easement will not extinguish it. Gus has not shown that it has been abandoned and the facts indicate that Gus has not even been in possession of the unused easement for the requisite twenty year period to destroy it by prescription.

(a) Polly has a half interest in Parcel A as a tenant in common with Bud. As the facts indicate, Bud received and recorded a deed from Mike. This recording constituted notice of Bud's ownership. Thus, when she took title to the land by deed from Etta, she was receiving a half interest in the land as a tenant in common with Bud. Maryland is a race notice state and so Bud's recording of the deed constituted Notice to any future bona fide purchaser of Parcel A. By doing a record search Polly could have ascertained Bud's interest.

Polly has an interest in the easement across Gus' land. As mentioned before, the easement here is an express easement created by deed. It would also constitute as an implied easement by reason of necessity, since at the time of transfer, Parcel A was landlocked and thus an easement was needed to access North Road. The easement is appurtenant meaning it benefits Parcel A which is the dominant parcel while Gus' land is the subservient parcel of land. As owner of Parcel A Polly and Bud have a right to use the easement. The fact that it has not been used for some time will not constitute an abandonment.

#### REPRESENTATIVE ANSWER #2

(a) Bud has a tenancy in common in Parcel A. When Mike conveyed his interest in Parcel A to Bud, that severed the joint tenancy and converted it into a tenancy in common with respect to Bud. Since Etta was the only other owner, she also became a tenant in common with both her and Bud owing equal one-half interest in Parcel A. Mike's interest terminated, as did Etta's right of survivorship.

(b) Bud has a right to use the easement as owner of the dominant estate. The language of the easement expresses an interest for it to run with the dominant estate, and there is no language of reservation. Absent such language, an easement is presumed to exist in perpetuity and mere lack of use will not terminate it. It must be actively abandoned to be terminated. That has not occurred here.

(a) Polly is a tenant in common with Bud. Polly can only receive from Etta what Etta owned, and Etta was only a tenant in common and owned only one-half interest in Parcel A. Etta was not the sole owner. Also, Polly had constructive notice of Bud's interest because his deed had been recorded.



(b) Polly is still entitled to use the easement for the reasons stated above from Bud.

Gus is not correct in this contention. As stated above, an express easement cannot be abandoned without an affirmative act to abandon. Mere non-use, no matter how long, will not constitute abandonment of the easement. The building of South Road is irrelevant because this is an express easement, not an easement by implication or easement by necessity. An express easement, absent language to the contrary, is presumed to exist indefinitely.

QUESTION II  
(20 POINTS 25 MINUTES)

Anne, Bob and Claire formed the ABC Corp. (the “Corporation”) in 1990 to purchase and operate a retail computer store in Maryland. Anne owned 60% of the outstanding stock; Bob and Claire owned 20% each. The By-Laws of the Corporation provided that the Board of Directors would consist of Anne, Bob and Claire. ABC Corp. was neither organized nor operated as a close corporation. There is no agreement among the shareholders restricting the sale or transfer of stock.

From 1990 through 1996, Anne, Bob and Claire worked full-time for the Corporation without taking salaries. Profits earned by the business were either distributed to the shareholders as dividends or retained by the Corporation and used for business expansion.

While on vacation in 1996, Bob suffered a debilitating injury to his back and ceased to work. Two months later, Anne, as president of the Corporation, signed employment contracts with herself and with Claire whereby the two agreed to continue to work full-time for the Corporation. Anne’s contract provided that she would earn an annual salary of \$125,000 with an annual bonus equal to 10% of profits; Claire’s contract stated that she would earn an annual salary of \$90,000 with an identical bonus provision. The contracts were approved by the Board with Anne and Claire voting in favor and Bob voting against.

In both 1996 and 1997 the business had substantial profits after paying the salaries and bonuses specified in the contracts with Anne and Claire. In 1996, the Board voted to use these profits to purchase new equipment instead of paying a dividend. Bob objected. In 1997, the Board did not vote to declare dividends. Instead, the Board voted to use the profits to start additional stores. Bob voted against these decisions and objected strenuously to the lack of dividends.

By 1998, the business was thriving and had a fair market value of \$2,000,000. In June, Anne received an unsolicited offer to purchase the Corporation for \$2,250,000. She informed Bob and Claire and the three held a Board of Directors meeting at which Anne and Claire voted to reject the purchase offer. Bob voted to accept the offer. Bob, totally frustrated, announced that he would consult a lawyer as to his legal remedies.

Anne, Bob and Claire and all residents of Maryland. The Corporation is a Maryland corporation.

Since its inception, the Corporation's legal affairs have been handled by the law firm of Probity & Virtue. After the Board meeting, Anne and Claire requested the firm to represent them and the Corporation in what appears to an inevitable lawsuit with Bob. **Max Probity, the firm's senior partner, has asked you, as the firm's finest associate, to prepare a memorandum to him addressing the following topics:**

- (a) a description of each cause of action which Bob could raise and its basis;**
- (b) appropriate defenses which could be asserted by Anne, Claire and/or the Corporation; and**
- (c) any other pertinent matters.**

**Write the memorandum.**

#### REPRESENTATIVE ANSWER #1

Before examining the liability of ABC Corp. and that of the directors Anne and Claire, it is important to note that as the corporation's law firm this firm owes an absolute loyalty to the corporation and cannot represent Anne and Claire if their interests are adverse to the best interest of the corporation.

With that said, it appears that Bob may be successful in bringing a derivative action against Anne and Claire for self dealing when they initiated and approved salaries for themselves and not Bob. As interested parties, they were breaching their duty of loyalty to the corporation by voting to benefit themselves against an uninterested director's objection. Normally, it would vote to approve or disapprove such a salary increase. Here, with only three directors, Anne and Claire could argue that the rule is inapplicable. Moreover, Bob may have an ultra vires claim because by expanding to more than one store, the corporation is acting in conflict with its by-laws. An ultra vires action occurs when a corporation conducts business beyond the stated purpose in its by-laws. Anne and Claire could be held personally liable for this ultra vires activity.

Anne and Claire will argue that adding mere stores is not in opposition to the purpose stated in the by-laws and that they are in the same line of business, i.e., computer sales.

Bob may also bring a cause of action against Anne and Claire for their failure to pay out a dividend when they reinvested the corporations profits in 1996 and 1997. However, there is no requirement that a corporation pay dividends and Anne and Claire's decision not to pay dividends was a business decision and, provided that they acted in due care and with loyalty to the corporation, a legitimate one.

Bob may argue that Anne and Claire should have sold the corporation for \$2,000,000. This was an unsolicited offer presented to Anne. Acting with loyalty to the corporation, she presented it to the Board for a vote. Had she not, she might have been liable for usurping a corporate opportunity. The Board voted on the possibility of a sale and rejected it. Here there seems to be no liability. Bob may petition the court for dissolution claiming that Anne and Claire's actions here have been illegal. However, it is unlikely that such a claim would prevail. Moreover, if it is determined in good faith that there is a legitimate reason not to buy Bob out, should he make such a request, it would not have to be honored.

#### REPRESENTATIVE ANSWER #2

a) Bob could bring a shareholder derivative suit on behalf of the corporation against Anne and Claire, as directors, for breach of their fiduciary duty and of care to the corporation, on grounds that their voting decisions were not in good faith and against the best interests of the corporation. He would argue that their employment contracts were approved by interested directors were approved in bad faith since they had not received salaries before. He would also argue that the purchase of equipment rather than paying dividends was against the best interests of the corporation. Finally, he would say the decision not to accept the purchase offer was against the best interests of the corporation. Bob could also seek to enforce his right to have his shares bought out at fair market value.

Bob may also try to argue that the corporation is not really a true corporation at all, but just a close corporation or even a partnership. The grounds for this claim are that the shareholders are the directors, and the shareholders manage and control the affairs of the corporation. Anne, Bob and Claire shared the profits of the business and later when Bob became injured, Anne and Claire effectively shut out Bob from all major decisions. If the corporation is deemed to be a close corporation, then Anne and Claire violated their fiduciary duty to Bob.

(b) Anne and Claire would argue that their actions were made in good faith and in the best interest of the corporation. Their salaries were fair and reasonable and approved by a majority of directors. The same defense would hold for the other Board decisions (purchasing new equipment rather than paying a dividend, and rejecting the purchase offer). Bob does not have an absolute right to a dividend. If the Board duly decides not to pay out a dividend, such a decision is legal and valid.

Even if the corporation is not a true corporation because of the control of the shareholders, Bob is estopped from claiming that the corporation is not a legal entity since he treated it as a corporation and took actions consistent with it being a corporation.

(c) Our firm represents the corporation and there may be conflicts of interest in representing both the corporation and some of its shareholders/directors. Thus, Anne and Claire may have to seek independent counsel. Also, conflicts may arise if Bob brings a derivative suit on behalf of the corporation against Anne and Claire.



## Part D

### SINGLE QUESTION (35 Points 45 Minutes)

Sue was late and decided to leave her toddler, Bryan, in the Bronco with the engine running, while she retrieved money from the walk-up ATM machine. Sue did not notice Tom Crews and his brother, Raymond, approaching her vehicle. Tom always wished to drive a 4-wheel drive vehicle such as the Bronco and made a spur of the moment decision to take it for a test drive. He pushed Raymond into the rear with baby Bryan and drove off.

Naturally distraught, Susan began screaming for help, which caught the attention of Bystander, who immediately called 911 for police assistance. Bystander could not give a description of the driver, other than his sex. Hearing the commotion, and fearing that he would again be locked up, Tom slammed on brakes two blocks from the ATM and yelled to Raymond that he should "leave the car, NOW!". Bryan was thrown to the front of the Bronco as a result of Tom's actions, and began bleeding from his head and knee. Tom ran from the car. Raymond, too petrified to move, stayed in the Bronco.

A few minutes later Officers Friend and Lee arrived at the scene. Seeing Bryan's condition, Officer Friend called for an ambulance to transport him to the hospital. Despite Officer Lee's persistent questioning, Raymond only stated "I want my brother. Why did he hurt the baby? Please find my brother." At that point the officers decided to take a blubbering Raymond to the station for further questioning.

On the way to the station Raymond tells the officers "There's my brother, Tom. Can he go with me?" Officer Friend stopped the cruiser and motioned to Tom to come over. Before Officer Friend could say anything, Tom blurted out "I didn't do anything and I want a lawyer." Officer Lee promptly placed Tom in the vehicle advising that he too would be taken to the station for questioning.

At the station, neither brother provided any information concerning Susan's Bronco. On a hunch, Bystander was brought to the station to see if he could identify the brothers. He viewed the two men and Officer Friend thru a hidden mirror in the interrogation room and said "Yeah, they're the ones I saw." Shortly thereafter, Tom was properly informed of his *Miranda* rights, and invoked his right to remain silent until his attorney could be present. Once Officer Lee completed the administrative process for booking Tom, Tom was led from the interview room thru the officers' roll call room. Displayed on a table in that room were Bryan's battered car seat and 5 tinfoil packets of cocaine. Officer Lee informed the brothers that the drugs were taken from the front seat of the Bronco and Tom blurted "Those drugs were in the car, man! They weren't mine!" The officer said nothing in response to Tom's outburst.

That night, Susan received a call at home from an unidentified male who stated "I hope the baby is fine. . . I didn't mean to hurt him." She promptly telephoned police headquarters to report the call and was told by the sergeant on duty "That must have been Tom. We've detained him for the theft of your Bronco."

**A. As the prosecutor, what if any charges would you bring against Tom. Discuss fully.**

Tom retains you as his attorney and you promptly file a motion to suppress in the Circuit Court for Charles County, Maryland.

**B. As Tom's attorney, what would be the bases of your Motion? Discuss fully.**

At Tom's trial, the prosecution attempts to introduce in its case in chief evidence of Tom's 1981 conviction for stealing from a convenience store.

**C. Under what circumstances may the State introduce evidence of Tom's prior conviction?**

REPRESENTATIVE ANSWER NO. 1

A. I would first charge Tom with larceny under the Maryland Theft Offense Statute. Tom had the intent to steal, or to permanently deprive Sue of her Bronco. I would also charge Tom with kidnapping, despite the fact that he and Raymond had only gone two blocks after taking Bryan and the truck. Here Tom, seeing Bryan in the car, drove off with him in the car with seemingly no intent to return him to his mother, I would also charge Tom with possession of a controlled dangerous substance. This charge would be based on the proximity and opportunity Tom had to possess or to have control and dominion over the drugs. If there was an indication that the 5 tin foil packets meant that Tom intended to distribute the drugs, I would also charge Tom with the intent to distribute. I would charge Tom with reckless endangerment because he engaged in conduct that was very reckless and endangered Bryan's life when he braked quickly in an attempt to escape.

B. As Tom's attorney I would move to suppress his brother's statements, statements made by him before he got in the cruiser, the Bystander's identification, statements made by him in roll call room and Susan's phone conversation. I would base my motion to suppress the brother's statements on the fact that there was no Miranda warning given to Raymond. This would probably not be successful because the government would state that Tom cannot invoke Raymond's rights (no third party standing in the 5th Amendment). I would also suppress Tom's statement "I didn't do anything ...." Tom believed he was in custody at that time and should have received Miranda warnings immediately. However, this would probably fail because the prosecutor would argue there was no interrogation as is required for Miranda warnings to apply.

I would also move to suppress Bystander's identification at the line up. Tom requested a lawyer immediately upon apprehension and this is therefore a violation of his 6th Amendment right to counsel. I would also argue that the line up was unduly suggestive because it simply consisted of Tom and Raymond. Furthermore, Bystander had previously stated that he could only remember the sex of the perpetrator.

I would move to suppress Tom's statements regarding the five tin foils of cocaine because although Officer Lee did not say anything his conduct was calculated to elicit a response. Of course, in such circumstances as being led through a roll call room with the items in it, Tom would probably make an outburst! Hence, the officer's conduct could be viewed as having risen to the level of interrogation. However, these statements would most likely come in because Tom had been given his Miranda warnings and the officer did not respond.

Lastly, I would move to suppress Susan's statement regarding the phone call because she was not familiar with the voice and did not know who was on the phone.

C. The prosecution could introduce Tom's prior conviction if it was to prove motive, opportunity, intent or identity. However, the probative value versus the prejudicial effect of the evidence would have to be measured. The state could also use it to impeach Tom if he took the stand, so long as the prior crime was an inherently dangerous felony, probative value did outweigh prejudicial value and the crime was not more than 15 years old (from the date of conviction).

#### REPRESENTATIVE ANSWER NO. 2

A. As prosecutor, I would charge Tom as follows:

Theft by Unauthorized Control - I would charge one count of felonious (over \$300) theft of the Bronco by unauthorized control. Here Tom had specific intent to interfere with Sue's possession for a period of time. The fact that Sue left the engine running does not help Tom. Unauthorized control is the same as unauthorized use.

Kidnapping- Kidnapping is a general intent crime, requiring asportation and/or concealment. For general intent, Tom would have of a general understanding of the criminality of his actions. Here, kidnapping might not be available as to Bryan because Tom did not know Bryan was in the car. Kidnapping may be available as to Raymond.

Possession of a controlled dangerous substance - I would show that Tom knowingly possessed the drug and knew of its illicit nature.

Reckless endangerment - Tom engaged in behavior with reckless and wanton disregard of the safety of others by slamming on the brakes while driving a stolen car. Two counts - one for Bryan and one for Raymond.

Attempt of any of the above - Would be difficult to prove because attempt requires specific intent. The only crime which Tom appeared to have specific intent was to commit theft, and the attempt would merge.

B. The evidence against Tom that we could seek to suppress includes Tom's statements regarding the cocaine packets and the car seat, the telephone call to Susan, the identification by Bystander, and Raymond's initial statements to the police.

Raymond, half-blubbering, made statements but at the time they were made, he had not been Mirandized. If Raymond was in custodial interrogation at that time, Officer Lee's persistent questioning violated Miranda and his statements are not admissible. However, Tom has no standing to object to any violation of his brother's Miranda rights. Therefore, this part of the motion may not be successful.

The show up identification probably violated Tom's due process rights because it was unreasonably suggestive. After all, Bystander was initially unable to give any description of the driver when he called 911. Since Tom had been nabbed, the overwhelming tendency was for Bystander to simply affirm the police's preordained result even if Bystander wasn't really sure they had the right men. Another alternative ground for getting the ID excluded might be that allowing it to occur without Tom's counsel present violated his 6th Amendment right to counsel. Assuming Susan was not deputized or acting as an agent of the police, the admission in the telephone call is admissible only if there is some way to prove it was Tom.

Tom blurted out to the police that the drugs were in the car and not his. Should the prosecutor attempt to use this outburst, we probably don't have grounds to suppress it. When Tom invoked his Miranda rights and specifically asked for a lawyer, the police were obliged to cease all further questioning. However, it appears that they complied with Miranda - Tom's statements were an unsolicited outburst.

C. The prosecution will have difficulty presenting the conviction in its case in chief. The prosecutor can bring up prior conduct if the conduct is probative of motive, intent, absence of mistake, identity or common scheme. If in the prior conviction, Tom stole a car before robbing the store, the prior misconduct (but probably not the actual conviction) might be admissible provided, of course, the court find that its prejudicial nature is outweighed by its probative value.

The prior conviction probably could not even be used to impeach Tom if he took the stand because it is not an infamous crime and it is more than 15 years old.



## PART E

### QUESTION I

(8 Points - 12 Minutes)

Faust represents Camilla in her divorce litigation against Charles pending in the Circuit Court for St. Mary's County, Maryland. In an effort to get accurate information on Charles' liquid assets in advance of trial, Faust gave timely notice of a records deposition to the custodian of the records of County Bank. Faust issued the legally appropriate and sufficient subpoena to the bank for deposition of Charles' bank records pursuant to the appropriate Maryland Rules of Procedure and in a timely manner. The bank, as requested in the subpoena, is prepared to make copies of the requested records. Prior to the scheduled deposition the bank advised Faust that it was prepared to copy the records but that the time expected to be expended in complying with the subpoena and the cost of copies would total \$1000. The bank sought assurances that Faust would pay this expense. Faust has refused to give such assurance and has demanded compliance with the subpoena. **The bank has contacted you to see whether there is a remedy under the Maryland Rules to secure payment of its anticipated expense and any attorney's fees.**

**What advice would you give the bank?**

#### REPRESENTATIVE ANSWER #1

I would advise the bank that under Maryland Rule 2-403, the court can issue a protective order securing payment of the bank's anticipated expenses and fees. Rule 2-403 states that on motion of a person from whom discovery is sought (here, the bank), and for good cause shown (here, not burdening a non party \$1,000 to comply with a subpoena), the court may enter any order that justice requires to protect it from. . . undue burden or expense including (3) that the discovery may be had only on specified terms and conditions including an allocation of the expenses. Because of the significant burden on the bank and its willingness to comply if its expenses are paid for it should file a motion in the Circuit Court for St. Mary's County. This should cover its expenses for complying with the subpoena. Reimbursement of attorney's fees will be within the discretion of the court which will consider the reasonableness of Faust's denial of assurances to the bank.

#### REPRESENTATIVE ANSWER #2

I would advise the bank to move for a protective order from the St. Mary's County Circuit Court. The subpoena itself has no defects, so a motion to quash the subpoena would be ineffective. However, a person from whom discovery is sought, for good cause, may request the Court to enter an order to protect a party from undue burden or expense. (R.2-403) This includes that the discovery

may be had only on specified terms, such as an allocation of the expenses. (R.20403(a)(3)). Since the bank, as a non party, would incur costs of \$1,000 in an action which it has no interest in, the court would likely grant a protective order. Faust would be required to pay the money before the bank incurred any expenses in complying with the subpoena. A protective order may also grant attorneys fee to a moving party if the other party has been unreasonable in seeking the discovery Faust's refusal to pay may suffice for the court to award attorney's fees incurred in obtaining the protective order.

PART E - QUESTION II  
(10 Points - 15 Minutes)

Peter sued John and Mary in the Circuit Court for Anne Arundel County, Maryland for their breach of contract to sell their interests in a restaurant in Annapolis to him. The case was tried by a jury. At the close of all the evidence, Mary moved for judgment, but such motion was denied. The case was submitted to the jury which found in favor of Peter against John and Mary in the amount of \$135,000. The judgments were entered on February 28, 1998.

On March 4, 1998, John filed a motion for judgment notwithstanding the verdict (herein referred to as the motion) on the basis that the evidence was insufficient to support a judgment against John.

**(A) Set forth the arguments that you would make as Peter's counsel to persuade the Circuit Court to deny John's motion and state whether your arguments will be successful.**

Assume the Circuit Court denied John's motion at a hearing held on April 15, 1998 and that the Circuit Court Order of the denial was entered on April 20, 1998.

**(B) When was the judgment against John final? Provide your reasons and authorities for your conclusion.**

On April 24, 1998, Mary filed a notice of appeal to the Court of Special Appeals of Maryland.

**(C) Did Mary file a timely appeal to the Court of Special Appeals of Maryland? Explain the reasons and provide your conclusion.**

REPRESENTATIVE ANSWER #1

A. I would agree that under Rule 2-532, John is not permitted to make a motion for judgment notwithstanding the verdict. In order to make such a motion, John must have made a motion for judgment at the close of all evidence. The facts indicate that Mary but not John made such a motion. This indicates to me that Mary and John had separate counsel. As such, John made no motion

for judgment at the close of evidence and is not permitted to make a motion notwithstanding the verdict. I will likely succeed.

B. The judgment against John was final after the disposition of the pending motion for judgment notwithstanding the verdict. In Maryland, a judgment isn't final until all matters and motions are disposed of. (Essentially, all that may remain is enforcement of the judgment.) Here, that occurred when the Court's Order denying the motion was entered on April 20, 1998. (See Rule 8-202(c) B appeal may be filed after a final judgment.

C. Mary's notice of appeal was timely filed. Under Rule 8-202(c), in a civil action when a timely motion for judgment notwithstanding the verdict (Rule 2-532) is filed, the notice of appeal must be filed within 30 days of the order disposing of the motion. Here, such an order was entered on April 20, 1998 in response to John's motion. As such, Mary's notice four days later was timely.

#### REPRESENTATIVE ANSWER #2

A. A motion for judgment notwithstanding the verdict is essentially a renewal of a motion for judgment made at trial. That is why Rule 2-532(a) only allows a motion JNOV if the party moved for judgment at trial. Here, Mary made a motion at trial, John did not. John should be estopped from moving for JNOV now.

B. John's judgment was final when the court entered the denial of his motion on April 20, 1998. Only final judgments are appealable (as a general rule). Rule 8-202 states that appeal of a civil action must be filed within 30 days of entry of an order denying the motion JNOV. Thus, the judgment is final on the date of entry.

C. Mary's appeal was timely. The filing of a 10 day motion by John called the running of the 30 day appeal period for Mary. The period begins running after the denial was entered. Mary's filing was less than 30 days from entry so it was timely.

#### PART E - QUESTION III (12 Points - 18 Minutes)

On July 1, 1998, I.M. Gullible purchased the Landfill Office Building from Marx Brothers Partnership, a general partnership.

The next morning, having discovered that the seller concealed the fact that the building is located on a toxic waste dump, Gullible has filed suit in the Circuit Court for Montgomery County against Marx Brothers Partnership and the three partners, Groucho, Harpo and Chico. A legally sufficient summons for each defendant, with a copy of the complaint and each exhibit attached, was immediately issued and delivered to William C. Fields, Gullible's attorney.

On Tuesday, August 18, Charles Chaplin, Groucho's close friend, picked up Groucho's mail at the Beverly Hills, California, Post Office, including an envelope containing his summons, addressed to Groucho and mailed by certified mail requesting: "Restricted Delivery - show to whom, date, address of delivery". Chaplin signed his own name on the return receipt and later gave the envelope to Groucho.

On Wednesday, August 19, Harpo was handed his summons by Gullible at the BWI Airport in Linthicum, Maryland after a short, and unpleasant, conversation.

On Thursday, August 20, Chico was handed his summons by Gullible at the BWI Airport in Linthicum, Maryland after a short, and unpleasant, conversation.

On Friday, August 21, returns attesting service on each defendant were properly filed with the court.

At 4:00 p.m. on Friday, September 18, Groucho, Harpo and Chico appear in your office with directions to file timely responses to the Complaint on behalf of all defendants, raising all defenses that might avoid a trial on the merits. You are about to leave for a night at the opera, and want to wait until the morning of Monday, September 20, to draft responses, if possible.

**With respect to each individual defendant:**

**(a) What preliminary defenses, other than to the merits, can be asserted on behalf of each individual defendant?**

**(b) What pleading or paper will you file on behalf of each individual defendant?**

**(c) Can responses be timely made? Can you wait until Monday?**

**REPRESENTATIVE ANSWER #1**

The suit was filed on July 2, 1998. In answer, I have 30 days after being served to file an answer or make a preliminary motion. For Groucho, served August 18, I would have 60 days to answer because he was served out of state. I would make a preliminary motion to dismiss (PMD) for lack of personal jurisdiction and improper service. Since Groucho (G) is in California he is out of the jurisdiction of the court unless Maryland's long arm statute applies. Also, the service is arguably improper because it was not signed by G.

With regard to Harpo (H) it appears he was served by a proper person (Fields) and there was personal jurisdiction since he was in Maryland. I would have to answer this complaint 30 days after August

19. As such, I better not go to the opera. However, since the 19<sup>th</sup> is a Saturday, I also wait until the next business day, the 20<sup>th</sup>.

There is personal jurisdiction over Chico (C), however, Gullible cannot serve my client as a party. I would file a PMD to dismiss based on improper service by Monday as well.

I would have to file these PMD's (insufficient service and process) by the respective dates, otherwise they would be waived, since they are mandatory.

I would then have 15 days after the PMD's are decided to answer the complaint. At such time, I could assert the permissive PMD's, denials, affirmative and negative defenses.

#### REPRESENTATIVE ANSWER #2

Harpo - (a) Harpo was properly served in person by Fields. I would raise no preliminary defenses for Harpo. (b) I would file an Answer for Harpo. Since he was served in-state, he must reply within 30 days of service. Therefore, his Answer must be filed by today, September 18. (c) Harpo's Answer must be filed by September 18, so he cannot wait until Monday.

Chico - (a) I would raise the defense of insufficient service. Chico was served by Gullible, a party to this lawsuit, which is impermissible. (b) I would file a preliminary motion to dismiss for Chico, asserting insufficient service. (c) Chico's preliminary motion must be filed within 30 days of receiving service, which would be September 19, a Saturday. Since it is on a weekend, the motion can be filed on Monday, the next business day.

Groucho (a) Since Groucho did not personally sign for his summons, I would argue that he was insufficiently served. Although the summons was mailed Restricted Delivery show to whom, date, and address of delivery, @ Chaplin signed for the mail. Therefore, I would argue that Fields had actual notice that Groucho did not receive the mail personally. (b) I would file a Preliminary Motion to Dismiss for Groucho, asserting insufficiency of service. (c) Since Groucho was served out-of-state, he must reply within 60 days. Therefore, his Motion can wait until Monday.

## PART F - QUESTION I

(20 Points; 25 Minutes)

John Doctor, a surgeon employed at Big City Hospital in Baltimore, Maryland, learned that he was infected with the HIV virus following tests at the hospital in October of 1986. In February 1988, he performed successful abdominal surgery on James Patient at the hospital. In March 1989, Dr. Doctor was diagnosed as suffering from AIDS. He died from AIDS in September 1990.

James Patient learned of Dr. Doctor's illness for the first time when he read his obituary in the local newspaper. James immediately underwent tests for the AIDS virus which came back negative. James arranged for periodic tests over the next 2 years.

After the parties filed an election to waive arbitration under 3-2A-06A of the Courts and Judicial Proceedings Article of the Maryland Annotated Code, James then timely filed suit in the Circuit Court for Baltimore City alleging negligence and intentional infliction of emotional distress against Dr. Doctor's Estate alleging that Dr. Doctor acted wrongfully in operating on him without informing him that the doctor was HIV positive, and that, as a result of his discovery of Dr. Doctor's condition, he was injured by the exposure to the virus, the financial cost of periodic blood testing and severe emotional distress which caused sleeplessness, anxiety and headaches.

The defendant filed a Motion to Dismiss under Rule 2-322 of the Maryland Rules of Procedure on the ground that James's Complaint failed to state a claim upon which relief could be granted because he failed to allege that the virus had entered his body as a result of the surgery and that his fear of infection did not materialize.

**How should the Court rule on the defendant's Motion? Explain fully.**

### REPRESENTATIVE ANSWER #1

How should the court rule on defendant's motion. A motion made to dismiss because the plaintiff failed to state a claim upon which relief could be granted should be denied if the plaintiff has made out a prima facie case on their cause(s) of action.

In this case, as long as James made out a prima facie case of negligence and intentional infliction of emotional distress and can prove damages, the motion should be denied.

On the first claim of negligence James must prove (1) duty, (2) breach, (3) causation, and (4) damages.

In this case the doctor was under a duty to disclose to patients that he was HIV positive so that the patient could decide whether to go through with the surgery.

The doctor breached the above duty to disclose when he performed surgery on James in 2/88 and did not tell him that he was HIV positive.

The breach must be both the actual and proximate cause of James' injury. In this case, but for the doctor not disclosing to James that he was HIV positive, James would not have to submit to HIV tests periodically. James has satisfied cause in fact. Next James will have to prove proximate cause. In this case, proximate cause is satisfied because it is the doctor's HIV status that caused James problem. James is a foreseeable plaintiff since the doctor was performing surgery upon him as a patient.

Finally, the damages that James has are the financial costs of getting tested for HIV.

Defendant's motion against James regarding the negligence claim will be denied.

James must also make out a prima facie case that he suffered an intentional infliction of emotional distress. James must prove that the doctor's actions were intentional and extreme and outrageous, and that he suffered injury.

In this case, the doctor intentionally operated on James knowing that he was HIV positive. In addition, that conduct could be considered extreme and outrageous in 1989 when the world was panicked by the HIV cases and deaths.

James still must prove damages. In this case, the facts indicate that James suffers from severe emotional distress causing sleeplessness, anxiety and headaches. These damages will be sufficient to prove a prima facie case of intentional infliction of emotional distress.

The defendant's motion against the intentional infliction of emotional distress claim will fail.

#### REPRESENTATIVE ANSWER #2

The court should deny the motion to dismiss.

First, to show negligence, James only needs to prove that the doctor had a duty to James, that he breached that duty, that the breach was the factual and proximate cause of harm and damages. James has sufficiently pled these elements.

The doctor owed James a duty to inform him of risks of the surgery which the doctor knew included exposure to HIV. The doctor will be held to a standard higher than the ordinary prudent

person because he is a professional. The doctor will be held to the standard of reasonable surgeons in the locality. The doctor breaches that standard, or at least there is a sufficient jury issue, by not informing James of John's HIV status. James need not prove that the virus has actually entered his body because of the surgery and that he actually developed the infection to show causation and damages. In negligence, a plaintiff need not suffer physical harm, but may recover for financial damages and for emotional damages if he can prove that he was in the zone of danger. Thus, James can prove causation and, actual and proximate, if he can show that he has no reason to fear HIV/AIDS other than from John's breach. The cost of the tests and the physical manifestations of anxiety, sleeplessness and headaches, are damages sufficient to withstand the motion to dismiss.

As to the intentional infliction of emotional distress, James must show that John acted intentionally in a manner that was extreme and outrageous, and that such behavior caused actual damages, the behavior must be such that a reasonable person would have suffered emotional distress. John acted intentionally because he knew two years before he operated on James that he was HIV positive. As a doctor, he knew the development of the disease and that it could be transmitted through blood.

James must show that the conduct was extreme and outrageous. Given the doctor's knowledge and duty, the stigma attached to the disease in the 1980's, the terminal nature of the disease and the lack of a cure, John acted beyond the bounds of decency-extreme and outrageous.

As discussed above, causation and damages are met if James had no other substantial reason to fear infection and by his need to undergo constant testing because of the latent nature of HIV. Also, the physical manifestations of anxiety are sufficient damages.

## QUESTION II (5 Points; 8 Minutes)

(Assume for the purpose of answering this question that the matters and facts stated in Question I are true.)

The Court, in reaching its decision concerning the issues raised in the case, resorted to reading medical journals and reports of the Centers for Disease Control, U.S. Department of Health and Human Services *Surgeon General's Report on Acquired Immune Deficiency Syndrome 10 (1987)*, and other sources of information.

James, through his counsel, objected to the courts consideration of this material on the ground that the issues to be determined were properly the subject of expert testimony which could then be challenged by cross examination at trial.



**How should the Court rule on this objection? Explain fully.**

REPRESENTATIVE ANSWER #1

Deny the motion. The court may take judicial notice of facts that the court deems commonly accepted or that have a strong indicia of reliability. The court may allow the admission of expert testimony if it deems the testimony to be beneficial and helpful to the trier of fact. It may, in its discretion, allow experts.

REPRESENTATIVE ANSWER #2

The court may overrule this objection as expert testimony is not required to enter the governmental reports and the medical journals can be taken judicial notice of if they are well known authorities. However, the preferred method for learned treatises is to enter them into evidence through expert testimony although it is not necessary.

The court should overrule the objection.

**QUESTION III**

(10 Points; 12 Minutes)

At the time of the filing of the complaint, and without consulting James, his counsel decided not to include Big City Hospital as a defendant in the action.

After the litigation was concluded, James, while speaking to one of his friends, learned for the first time that it was possible at the time that the initial complaint was filed to also sue the hospital. The statute of limitations for such a suit against the hospital has now run.

James has come to you for advice.

**As a member of the Maryland Bar, what advice would you give him concerning his counsel's actions?**

REPRESENTATIVE ANSWER #1

As a member of the Maryland Bar, what advice would I give to James regarding (1) his attorney's decision to not include Big City Hospital, and (2) the running of the statute of limitations having expired to bring a cause of action against Big City Hospital?

First, on the decision of James' attorney to not include Big City Hospital without consulting James, I would tell James that his attorney breached his duty under the Maryland Code of Professional Conduct. An attorney in Maryland has the power to determine the course of strategy in a court case. This includes what motions to file, the content of the opening and closing arguments and witnesses to be called. The client has the option of which parties he or she wants to sue. The client is master of the suit and the attorney should have gotten James' OK to either sue or not sue Big City Hospital.

James' attorney is guilty of breaching the Maryland Code of Professional Conduct by not consulting with James regarding whether to sue Big City Hospital or not.

Second, the fact that the statute of limitations has run regarding a possible suit against Big City Hospital is also a breach of James' attorney's duties under the Maryland Code of Professional Conduct.

In Maryland, an attorney must file properly and on time all complaints and pleadings required to fully represent the client. In this case, Big City Hospital was a potential defendant that should have been sued and James' attorney missed the filing deadline.

I would advise James to have me or another attorney look into possibly bringing a cause of action against his former attorney for malpractice.

#### REPRESENTATIVE ANSWER #2

I would advise him that his counsel's actions may constitute actionable malpractice as well as a violation of the Maryland Rules of Professional Conduct.

Because the counsel's decision to not file against Big City Hospital might possibly preclude James from making a full recovery on his claim and now that claim is lost by the statute of limitations. This may constitute malpractice.

Also, his counsel should have consulted James on a major decision as whom to sue. While the Maryland Rules state that strategic decisions should be made by counsel and not by the client, I think it is arguable that the decision about which party to sue is significant enough to be more than a mere strategic decision but something James should have decided with the information given to him by his counsel.

Although a violation of an ethical rule is not malpractice per se, it is evidence of malpractice and therefore, bolsters his malpractice claim against his former counsel.