JULY 2009 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS

QUESTION 1

Mr. Burr owns Myrtle Farms, a 50-acre parcel in Garrett County, Maryland. During the winter months, Garrett County routinely experiences six-foot snowfalls. As a result, the area is a magnet for winter sports, especially snowmobiling on vast stretches of farmland, which is often done without the permission of the landowner.

Tired of the frequent trespassing snowmobilers on his property, Mr. Burr convinced the local legislators to enact a law banning snowmobiling on private property, and noticed a marked decrease in trespassing on Myrtle Farms once the law was enacted. However, a few trespassers continued to snowmobile on Myrtle Farms, so Mr. Burr decided to "get them" by erecting a barbed wire electric fence in the middle of the back 10 acres where the snowmobiling usually occurred. The fence was undetectable from distances greater than five (5) feet.

Joe is a neighborhood teen who often trespassed on Myrtle Farms. A few days after the fence was erected by Mr. Burr, Joe took his girlfriend Judy, who was visiting from Pennsylvania, for a ride on his single-passenger snowmobile. As Joe drove them through Myrtle Farms, their snowmobile collided with the barbed wire electric fence which was partially obscured by a recent snowfall. Both were thrown from the snowmobile and suffered severe cuts, bruises, and a few broken bones.

Three weeks after their release from the hospital, Joe and Judy come together to meet with you, a Maryland attorney, seeking advice as to their legal rights.

What would you advise Joe and Judy as to any potential claim(s) or legal action?

Discuss fully.

REPRESENTATIVE ANSWER 1

First, I would tell them that there may be an ethical problem with me representing both Joe and Judy. In Maryland, you can represent two plaintiffs in a civil suit as long as they give written, informed consent. I would first need written informed consent. Second, a lawyer cannot represent both parties if representation of one is directly adverse tot hee other or if the representation would materially limit the representation of the other. This is a conflict of interest. There is a conflict of interest here because Judy might have a claim against her boyfriend for negligence, as described below. Therefore, representing Joe could materially limit my representation of Judy.

I would also note there is not a jurisdictional problem with Judy being from

Pennsylvania.

She can sue in Maryland court because there is personal jurisdiction over Burr and subject matter jurisdiction.

I would tell them that they have a claim against Burr for negligence. A negligence claim is composed of (i) a duty, (ii) breach of the duty, (iii) causation, both actual and proximate, and (iv) damages. Although there was a marked decrease in the people who snowmobile, Burr still anticipated there would be trespassers on his land. He knew they came and that is why he erected the fence. Judy and Joe are anticipated trespassers. Under premises liability, burr has a duty to anticipated or known trespassers. Burr must use reasonably prudent care for activities and must protect the anticipated trespassers against known, hidden, man made, conditions that could cause death or serious bodily injury.

The barbed wire electric fence could cause death or serious bodily injury. He knew it was there because he built it. It was also therefore man made. It was hidden because it was undetectable from greater than 5 feet away and the snow partially obscured it. It would be undetectable to a person traveling fast on a snowmobile. This was the actual, but for cause of their injury. Since it was the direct cause, it is also the proximate cause. Proximate cause will be found where the injury was foreseeable and therefore it is fair to hold the tortfeaser liable. It is foreseeable that by building a fence riders will be severely injured. Even though Joe driving may have been the direct cause of Judy's injury, but for the fence the injury would not have occurred.

In Maryland minors are not owed a duty of care higher than what is owed other anticipated trespassers.

They could sue Burr for battery. Battery is the unconsented application of force to a person or something touching that person's body that causes offensive touching or harm. Here the barbed wire touched the snowmobile, and possibly their bodies. If it only touched the snowmobile it is still battery because this was connected to their bodies. The tortfeaser needs to intend to harm the victims. Her, intent may be shown because Burr did this to "get them", he knew that this would cause serious bodily injury and erected it for that purpose.

Burr would argue that Joe and Judy were contributorily negligent. Contributory negligence is a complete bar to relief in Maryland. Burr would have to show that they were not driving the snowmobile as a reasonably prudent person under similar circumstances would drive it. There was a recent snowfall so they should have driven carefully. The area routinely experiences 6 foot snowfalls. They were also on a single passenger snowmobile that they put two people on. This may have contributed to their injury and a reasonably prudent person does not put two people on a one person snowmobile. They may have been speeding.

Burr would probably also want to show that they were contributorily negligent because they broke the law banning snowmobiling on private property. A statute will provide the standard of care when the statute is designed to protect against the injury that is suffered and when the victim is in the class of people who the law was aimed at protecting. The law against snowmobiling on private property was enacted so that people would not go on private land. There is no evidence it was enacted because people were being injured on the land. Although the land was a magnet for this activity, there is no mention of previous injury. The law certainly did not anticipate injury from barbed wire. Therefore, it was not aimed at protecting snowmobilers from personal injury but from protecting landowners against trespass. Therefore, the statutory standard of care will not be used in this instance.

Finally, Burr would argue that they assumed the risk. Assumption of risk will be a total bar when there is evidence a person knew of the risk and accepted it anyway. In a sport like snowmobiling, there is an assumption of risk you may be injured. However, Judy and Joe can argue this is outside the scope of the injury they accepted by getting on the snowmobile. A person may anticipate falling off, but he does not anticipate falling into a barbed electric fence. Therefore, this will not be a good defense to their claim.

Joe and Judy would argue that since Burr built this fence and knew that they were there he had the last clear chance to warn them about the fence if they are found to be contributorily negligent. He could have posted signs or told them. He had the last clear chance to avoid injury and did not.

Damages, the final element of a negligence claim, is shown because they were in the hospital for cuts, bruises, and broken bones.

REPRESENTATIVE ANSWER 2

Potential Professional Responsibility issue arising from Joint Representation.

In Maryland, an attorney may not represent two clients when their interests are adverse or when the representation may be substantially limited because of, among other things, a conflict in the interests of the parties. In this case, because Joe may have been negligent in operating the snowmobile, and that may have contributed to Judy's injuries, Judy's interests may end up being directly adverse to Joe's-she may wish to bring suit against him for negligence. Judy and Joe can consent to the conflict of interest, but I would take extra care to explain their rights to them because they are young, and I would highly advise them to seek separate counsel. If I hadn't gained any confidential information, I could continue to represent Joe or Judy.

Generally, one can use reasonable force to defend property, but it is never allowable to

use deadly force for the protection of property. Mr. Burr will not be able to use defense of property as a defense. He erected barbed wire, which is dangerous and not very visible to people moving very fast, knowing that snowmobilers would be crossing his territory. Moreover, he electrified the fence, making it even more dangerous.

Joe and Judy were trespassing. They entered onto the land with the intent to be there. They didn't have to have the intent to be on Mr. Burr's property, though it appears from the facts that they did know they were on his property.

Joe and Judy, even though they were tresspassers, may have a claim against Mr. Burr because he is an owner of land, and owners of land owe certain duties to known trespassers. Mr. Burr knew that people trespassed on his land. He got a law passed because of such reason, and even after the law was passed, he was aware there were trespassers. Mr. Burr owed the known trespassers the duty to protect against known, manmade, concealed conditions that are seriously dangerous or life threatening. Here, Mr. Burr was aware of the barbed wire fence, and it was a man-made condition, not a naturally occurring condition. It was arguably concealed because people traveling at high speeds wouldn't have any knowledge of the fence until they were right on top of it. This is the case even if it wasn't concealed by fresh snowfall, which is common in the area around the time of the accident. Finally, the condition is severely dangerous. Barbed wire electrified fences appear to be able to cause grave damage, even when a snowmobile is not involved. Mr. Burr would argue that the fence is extremely dangerous, because many people use electrified barbed wire, but that might not be persuasive, because it's likely not commonly used to dissuade snowmobiling trespassers. He would also argue that the fence wasn't concealed, and that anyone using th property would have seen it. This probably wouldn't be persuasive.

Mr. Burr would thus be sued for negligence. Joe would have to show that Burr had a duty (here, the duty owed to trespassers), that he breached that duty (here, by erecting a known, manmade, dangerous concealed condition and protecting trespassers against it by removing it or erecting effective signage), that the breach caused damages (here, the dangerous condition was the but for and proximate cause–without the fence there would be no accident, and the accident was a forseeable result of erecting the fence), and there was harm from the breach–the injuries sustained by the riders.

Mr. Burr would assert that Joe was contributorily negligent. Joe is a child, but he was engaged in an adult activity–the use of a snowmobile, so he would likely be held to the standard, reasonably prudent person standard instead of the standard used for children (a child of like age, experience and intelligence). Joe had a duty to use the snowmobile in a reasonably safe manner to keep himself, his passengers and others from danger. Joe may have breached that duty by driving a one-person machine with two people on it (Judy could be contributorily negligent for engaging in this behavior, and can also be said to have assumed the risk of injury, because she knew the machine was one person, and apparently volunteered to ride regardless). There was

also a statute in place that may provide a standard of care for Joe. For the statute to be applicable, it must be designed to prevent the type of damage caused, and it must be applicable to Joe and Judy. Here, the statute is arguably primarily intended to prevent trespass and damage to the land of owners, but it could be argued that it is also intended to prevent damage to the trespassers themselves, since there a re a number of dangers that arise from trespassing. It certainly applies to Joe and Judy, because they were trespassers. If this statute is found to provide a standard of care, Joe's violation of that statute is evidence of negligence (but violation is not evidence per se).

Judy, though not a Maryland resident would be able to bring suit in Maryland because Mr. Burr resides there, and that is where the tort took place.

JULY 2009 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS

QUESTION 2

Alan and Lisa were married in College Park, Maryland in June 1995. Following the wedding, the couple moved to Florida where they ultimately had three (3) children. During the first several years of their marriage, Alan was incarcerated on various occasions for drug distribution. In 2000, angry at Alan's inability to hold down a job and his constant involvement in illegal activities, Lisa packed up the three (3) children and moved back to College Park, Maryland, to live with her elderly mother.

Lisa then filed a complaint for absolute divorce in the appropriate Maryland court. Divorce was granted. Lisa was awarded legal and physical custody of the children, and Alan was ordered to pay child support pursuant to the child support guidelines. Though the court granted visitation rights to Alan, he has not spoken with or visited the children since they moved to Maryland. Alan was also constantly in arrears with child support payments.

In 2005, Lisa became ill with cancer. As she was in a weakened condition for a few years, Lisa's mother saw to the daily needs and care of the children. Lisa died intestate in April 2009. After the funeral, Alan arrived at Lisa's mother's house and took his children back to Florida with him.

Lisa's mother comes to you, a practicing Maryland attorney, and asks you what issues are involved, or may arise, if she were to seek custody or visitation with the grandchildren.

Advise her. Explain your advice fully.

REPRESENTATIVE ANSWER 1

I would advise Lisa's mother that her case raises three separate issues: jurisdiction, custody, and visitation.

First, because Alan has moved the children to Florida, I would tell Lisa's mother that Maryland courts would need to have jurisdiction over the children to proceed with her case. In child custody cases that span state lines, I would inform Lisa's mother that courts apply the "home state" test to determine whether they have jurisdiction. Under that test, a court has jurisdiction if it is the child's home state (i.e., state where the child has lived with a parent for at least six prior continuous months). Here, Maryland courts would have jurisdiction over the children because they lived in Maryland with Lisa and her moth since 2000. Although they are now residing in Florida with Alan, they've only lived there since April of this year (i.e., not six months). Further, Maryland courts previously had jurisdiction over the physical

custody of the children, and such jurisdiction is continuing and exclusive. Thus, I would inform Lisa's mother that Maryland is the proper location to bring the action.

Second, I would discuss child custody with Lisa's mother. I would begin by explaining the difference between physical and legal custody over the children, with physical custody meaning actual placement of the children while legal custody meaning right to control their upbringing. I would suggest that she seek both types of custody. Next, I would discuss the Maryland standard for child custody. In Maryland, courts will look to the best interest of the children as the sole determinative factor in deciding custody of them. Maryland courts strongly favor keeping children with their natural parents, but that is not necessarily always the case. Here, I would suggest that Lisa's mother would have a very good case for custody of Lisa's three children. Alan is an ex-con who has proven past involvement with drug distribution and other illegal activities. Alan previously has been unable to keep a job and has been constantly in arrears with child support payments to Lisa. Although Alan has had visitation rights, he has never pursued them. Furthermore, upon Lisa's death, Alan seemingly absconded with the children to Florida without court permission. I would also suggest that the fact that Lisa's mother has cared for the children since Lisa became ill in 2005 strongly indicates that she is the only real parent figure they have left. Further, I would suggest that the court would favor giving custody to leases mother because she seems to provide a stable environment and the kids likely have friends here. Although the court might be concerned about Lisa's mother's elderly age, this would not likely be determinative. As a result, I would tell Lisa's mother that she has a strong argument that the best interests of the three children would be best served by granting legal and physical custody to her, despite the strong presumption in favor of keeping the children with their natural parent.

I would also mention to Lisa's mother that if she were granted custody of the children, she could seek child support payments from Alan. Maryland child support is also based on the children's best interests, including costs associated with the particular child. Here, I would warn Lisa's mother that Alan's history with child support is not great, but if she got custody she could likely get some court-ordered support. Further, I would tell her that if Alan refused to pay, there are federal and state procedures available for making him pay, including a federal criminal statute for interstate failure to pay child support in arrears of over $5000.

Finally, I would tell Lisa's mother that if the court refused to grant physical and legal custody to her, they would probably grant her visitation rights. Maryland courts have aligned themselves with U.S. Supreme Court rulings pertaining to third-party visitation rights. In Maryland, if a natural parent protests visitation rights being granted to a third person, courts will presume that granting such visitation rights would not be in the children's best interests. However, this presumption is rebuttable. Here, I would tell Lisa's mother that if the court

would be very likely to grant visitation rights to her if she wasn't able to obtain custody, even over the protests of Alan. For many of the same reasons stated above, Lisa's mother appears to be a good influence on the children. Further, Alan's prior indiscretions and poor fathering would weaken the presumption that he knows what's best for the children. As a result, I would ensure Lisa's mother that she would almost certainly get visitation rights if she didn't get custody.

REPRESENTATIVE ANSWER 2

I. Fundamental Right to Parent

The first thing that I would advise the grandmother about is that parent's have a fundamental right to the care, custody, and control of their children pursuant to the privacy rights of the first amendment. This fundamental right provides a strong presumption in favor of parents that they will act in the best interest of their children and that it is in the best interest of the child to live with and be raised by their biological children. Although parents have a fundamental right to raise their children, the state also has an interest in protecting the children under the doctrine of parens patriae. Under this doctrine, the state steps in and makes determinations in custody, visitation, and child support issues on behalf of the best interest of the child (which is the paramount consideration in such cases).

One other preliminary consideration is where jurisdiction is proper. Currently, Maryland has continuous and exclusive jurisdiction over the children because of the court order for custody that was awarded in Maryland. Also, because the children were living in Maryland until April of 2009, if the grandmother institutes an action now or within 6 months, jurisdiction will be proper in MD. If not, Florida, after six months will have jurisdiction over the children.

II. Third Party Custody and Visitation Rights

Because of this strong presumption and fundamental right, third parties who wish to seek visitation with the child, such as grandparents, may only be awarded custody or visitation with the child, over the objection of a parent, if the grandparent shows either that the parent is 1. unfit or 2. that exceptional circumstances exist such that it is in the best interest of the child to have either custody or visitation with the grandparent. Courts must give special weight to the parent's wishes as far as custody visitation in making this determination. The same standard is applied to a third party seeking custody and visitation. Only if the parent is able to satisfy this standard will the court be able to award grandparent custody or visitation.

In the instant case, although the mother was awarded legal and physical custody of the children, these rights do not pass intestate. It is assumed that when one parent passes away, it is in the best interest of the children to be with the other biological parent. To challenge this presumption, the grandmother must bring a complaint against Alan for custody and visitation. if Alan wishes to have custody of his children, the grandmother will only win custody or visitation rights over Alan's objections, if she is able to show that he is unfit or that exceptional circumstances exist to which the children would be harmed without such custody and visitation.

(a) Alan as an Unfit Parent: The grandmother may argue that Alan is unfit because he has been in jail multiple times, possibly continues to be involved in illegal activity, has not had contact with the children since they moved to Maryland and that he is in arrears in his child support payment. These factors may tend to show that it is not in the best interest of the children to live with Alan. Factors to consider for a best interest determination are the bond that the children have with the parent, the resources and opportunities available to them, possibly the children's preferences if they are 12 or older, and stability for the child. Because Alan is in arrears, he may not be able to provide for them and his criminal tendencies and lack of contact may show that he will be unable to create a stable and safe home environment for the children. However, Alan may argue that because he is a parent, his wish to have custody should be weighed heavier than the grandmother's because the two parties do not stand on equal footing (he has greater rights in raising the children as a parent). Also, because the grandmother is elderly, he may argue that she is unable to provide for and take care of the children, especially as they grow older.

(b) The grandmother may also try to show in the alternative that exceptional circumstances exist so that it would be detrimental for the children not to live with her or have custody with her. Exceptional circumstances may be proven by experts to prove the detriment to the child, but often times the court looks to factors such as the bond between the grandparent and the child, the length of time they have lived together, the absence of the parent, the wishes of the child and the grandparent and any other relevant factors specific to the case. In the instant case, the children have lived with the grandmother for nine years. Therefore, the grandmother may be able to show that the children have become bonded with her over that amount of time. Alan may argue that this was not his decision, and that the mother took the children away from him. However, this argument may fail because he could have had some contact with the children but he chose not to exercise it. Further, the grandmother may try to show that she stepped into the role of a parent by taking over most of the parental duties around the house when the mother because sick in 2005. The grandmother must be careful however, because Maryland does not recognize the existence of a de facto parent figure. All parties must prove the same standard as stated above. The focus of the court is always the best interest of the child balanced against the rights of the biological parent.

III. Mediation

If the grandmother does not want to pursue an court order against Alan, she may also consider mediating an agreement with Alan for custody or visitation. Mediation is often utilized by the family division of the circuit courts in Maryland and is an excellent way to resolve family issues and come up with an agreement that works best for both parties. Therefore, I would also suggest this an option for the grandmother.

JULY 2009 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS

QUESTION 3

Abel and Baker met at Baker's house and made a plan to break into a warehouse in Waldorf, Charles County, Maryland, and steal a supply of copper wire the next night. They agreed that Abel would drive the truck and remain in the parking lot; Baker would enter the warehouse and roll the wire on a cart out to the truck. Abel told Baker "I'm only in on this deal if there are no guns involved." Baker told Abel, "Be at my house at 6:00 pm sharp with the truck. If you're late, I'll get somebody else and you're out." At 6:00 pm the next night, Abel was unsure whether to go through with the plan and failed to show up at Baker's house at 6:00 pm. Baker called Charlie, who arrived with a truck at 6:15 pm. Baker and Charlie proceeded to the warehouse. Abel arrived at Baker's house at 6:30 pm., found no one there, and went home. Upon breaking the locked door and entering the warehouse, Baker encountered a security guard. Baker pulled out a handgun and shot the guard, seriously wounding the guard.

A police officer arrived at the hospital as the security guard was brought in. The officer showed the guard a picture of Baker and asked "Is this the guy who shot you?" The guard replied, "No, that's not the guy."

Abel has been indicted by a Grand Jury in Charles County, Maryland, for conspiracy with Baker and assault and battery upon the guard. Baker has not been charged. After the State's Attorney's opening statement, Abel's attorney learns for the first time about the attempted identification of Baker at the hospital, and moves to dismiss the charges against Abel.

a. What must the State prove to convict Abel of conspiracy an the first degree assault? Discuss in your answer defenses Abel will raise.

b. How should the Court rule on Abel's Motion to Dismiss?

REPRESENTATIVE ANSWER 1

(a) State's Burden of Proof

Conspiracy requires a showing of an agreement between two or more people to commit a crime and the specific intent that the crime be carried out. In Maryland, both participants must actually have the specific intent that the crime be carried out (i.e. there must be a "meeting of the minds"). Here, the state can prove the elements of conspiracy to commit burglary in an action against Abel. Abel and Baker met and made a plan to break into the warehouse and steal the wire (burglary requires the breaking and entering of the dwelling or building of another with the specific intent to commit a crime within). Abel and Baker both had the specific intent that the crime be completed-- neither one of them was just pretending to go along with the plan when the agreement was made. The crime of

conspiracy was complete when the agreement was made. Maryland does not require an overt act. Thus, Abel can be convicted of conspiracy to commit burglary. It does not matter that he later had second thoughts and ultimately did not participate in the burglary. Withdrawal is no defense to conspiracy. Withdrawal will, however, cut off liability for any crimes in furtherance of the conspiracy that occur after the withdrawal. Nor is it necessary that any co-conspirators be tried or convicted in order to hold other co-conspirators liable. Thus, it is no defense for Abel that Baker has not been charged. Only if all other co-conspirators are tried and acquitted will a co-conspirator not be able to be found guilty of conspiracy. In such a situation, no "meeting of the minds" can be shown. This is not the situation here.

In Maryland, first degree assault is second degree assault plus an aggravating factor of use of a deadly weapon or intent to cause serious bodily harm (i.e. bodily harm with the risk of death or serious injury). The basic assault offense covers both common law assault (specific intent to commit a battery or causing a reasonable apprehension in the mind of the victim of imminent bodily harm with the specific intent to do so) and common law battery (unlawful application of force to another with the intent to cause harm). Here, Baker certainly committed first degree assault when he shot and wounded the guard (battery with a deadly weapon). The question is whether Abel can also be found guilty of this offense. The State's theory will be one of co-conspirator liability since the assault was committed in furtherance of the conspiracy. A co-conspirator will be guilty to the same extent as the principal for any foreseeable crime committed in furtherance of the conspiracy. Shooting of the guard was undoubtedly in furtherance of the burglary since he was guarding the warehouse at the time and the theft could not proceed without incapacitating him. Abel's disclaimer that he did not want to be involved if there were guns will not relieve him of liability. When one is engaged in an inherently dangerous felony, there is a foreseeable risk of serious harm to others, and thus Abel could foresee that someone might be injured and even that Baker might choose to use a weapon even if did not wish for guns to be used. Abel might, however, be able to argue that he should not be held responsible for the assault since he withdrew from the conspiracy. After having second thoughts and arriving late to Baker's house, Abel missed the burglary and went home. Withdrawal from a conspiracy will cut off liability for acts that occur after withdrawal that are in furtherance. In order to have a true withdrawal, however, the defendant must communicate his withdrawal to his co-conspirators. Since Abel did not communicate his withdrawal to Baker and instead just went home, the State can argue that his withdrawal was ineffective. Abel can argue, however, that his withdrawal was impliedly communicated to Baker by his failure to show up on time. Baker told Abel the night before that if he failed to show up by 6 pm, he was "out." Thus, Abel can argue that his failure to show up at 6 pm communicated his withdrawal to Baker, and he should thus not be liable for any of the criminal acts in furtherance of the conspiracy that occurred thereafter. This will be a question for the jury.

(b) Court's Ruling on Motion to Dismiss

The court has the discretion to rule in favor of or against Abel's motion to dismiss because the prosecution has violated the discovery rules provided for in Rule 4-263. It should first be noted that Abel's motion is timely under Rule 4-252. Although motions related to pretrial identifications ordinarily must be filed within 30 days of first appearance, there is an exception if the discovery has not been properly furnished. Here, since Abel did not learn of the identification until the opening statement and timely filed a motion at that time, the motion is timely.

Under Rule 4-263, the State is obligation to disclose, without the necessity of a request by the defendant, any material exculpatory information (Brady material) and any impeachment information. Impeachment information specifically includes the failure of a witness to identify the defendant or a co-defendant. Although Baker is not a co-defendant here, he is a co-conspirator, and so would likely be considered a "co-defendant" under these rules since Abel's liability for the assault is based on the conspiracy. The failure to identify here is also exculpatory evidence since if Baker was not the shooter, this tends to negate Abel's guilty as the assault would not then have been either in furtherance of the conspiracy or (if Charlie, whom Abel did not even know of, was the shooter) foreseeable.

The failure of the state to comply with its discovery obligations as outlined above, allows the court to enter any one of a number of sanctions. The court is specifically allowed to grant a mistrial. The court has discretion, however, and so it is unlikely that the court here would take such a drastic measure. Although mistrial here would likely not bar reprosecution on double jeopardy grounds since it was requested by the defendant (no double jeopardy bar unless the defendant was coerced into seeking a mistrial), there are lesser sanctions that the court can use that will involve less waste of expense and time. For instance, Rule 4-263(n) allows the court to grant a continuance or even to disqualify a witness (though disqualification of a witness is also a drastic measure). It is much more likely here that the court will deny the motion to dismiss and instead grant a continuance. Whichever sanction the court chooses to employ, though, the state has failed to comply with its discovery obligations and some relief should be accorded to the defense.

REPRESENTATIVE ANSWER 2

(a) Conspiracy: In Maryland, conspiracy requires an agreement between two or more individuals to commit a crime. There is no overt act requirement. The crime is in the agreement, and does not require an attempt or completion of the underlying crime. Abel (A), therefore, was guilty of conspiracy when he agree with Baker (B) to break into a warehouse and steal a supply of copper wire ((burglary and larceny, respectively, in MD).

In Maryland, withdrawal is no defense to a charge of conspiracy, therefore A's failure to show up the next night at B's house will have no bearing on his guilt or innocence. Also in

MD, one cannot be convicted of a unilateral conspiracy (i.e., where there was only one guilty mind). However, as noted above, the crime is in the agreement and A's agreement with B constituted the conspiracy. B does not have to be charged or convicted for A to be found guilty (although if all other members of the conspiracy were found **not guilty** then A could not be convicted).

(b) First Degree Assault: In Maryland, 1st Degree Assault is where a 2nd Degree Assault is committed with either intent to cause serious bodily harm or with a deadly weapon. In this case, B's use of a handgun in shooting the guard constituted 1st degree assault. Generally, all members of a conspiracy may be charged with foreseeable crimes in furtherance of the conspiracy, and in this case, robbery of a warehouse where A knew or should have known that B could possibly use a gun and that there may be a security guard on duty was likely foreseeable. Thus, A will be guilty of the crime unless he can assert a defense.

Withdrawal is generally a defense to any crimes committed after D leaves the conspiracy. Here A will argue that he withdrew when he did not show up to B's house. However, the State will argue that when A showed up to B's house, albeit half-an-hour late, he showed his intent to remain part of the conspiracy.

A may also argue that because he said he was only in on the deal if "no guns were involved" constituted a withdrawal or made the shooting unforeseeable, but both of these arguments will likely fail. The former because he never told anyone of his withdrawal and did show up that night (albeit late), and the second fails for reasons mentioned above.

(c) A's Motion to Dismiss:

Generally, in a criminal trial in Maryland, under Section 4-263(d)(5) the State must disclose all possible exculpatory evidence to the defendant. Also, 263(d)(6)(G) potentially applies as failure of a witness to identify a defendant or co-defendant (although because B hasn't been charged, this may not yet be applicable). In this case, the guards failure to identify B as the shooter is evidence that B did not commit the assault, and therefore A would not be liable under the vicarious liability theory as a co-conspirator. The sanctions available to the court for the State's failure to comply with this rule are listed under 263(n). In this case, the failure of the defense to disclose the exculpatory evidence may have severely prejudiced A's defense by influence how he pled and what defenses he asserted. Note that dismissals are disfavored if there is another sanction available, therefore the court may simply grant a continuance and allow further discovery on the matter not disclosed. The court will have broad discretion on this matter.

JULY 2009 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS

QUESTION 4

PART A

On March 15, 2005, Jud. and his 14 year old son, Keith, were seriously injured in an automobile accident in Kent County, Maryland. While stopped at a red traffic signal, Jud's vehicle was struck from behind by a light truck operated by Alvin, who lives in Anne Arundel County, Maryland.

Jud suffered lacerations, a fractured jaw and broken teeth when his face hit the steering wheel. Keith spent his 15th birthday, March 21, 2005, in the hospital. He suffered fractures of his left leg which required several surgeries. Both Jud and Keith underwent extensive physical therapy. Jud's car was heavily damaged in the crash, and was declared a total loss by Jud's automobile insurer.

In June, 2005, Jud, who resides in Baltimore County, Maryland, retained a Maryland attorney, Sheila Wise, to represent both him and Keith in their personal injury and property damage claims against Alvin. Sheila advised Jud that because he and Keith were still being treated for their injuries it would be unwise to settle their case or to file suit until they were finished with medical treatments and physical therapy.

In June, 2008, Jud and Keith were finally released by their treating physicians and physical therapists. They have severe and permanent injuries.

Sheila promptly entered into settlement negotiations with Alvin's motor vehicle insurer, but was unable to reach a satisfactory settlement. Therefore, on January 2, 2009, Sheila filed a Complaint in the Circuit Court for Baltimore County against Alvin, alleging negligence, seeking damages of $5,000,000 and electing a jury trial. Sheila sends a summons, copy of the Complaint and Plaintiff's Information Report to Alvin and his insurance company via first class mail.

a. What preliminary motions should Alvin's lawyer file on his behalf, and how should the Circuit Court rule on them? Explain the reasons for your answer.

PART B

Assume Alvin's preliminary objections and other motions are denied.

During the discovery phase, Sheila properly files a Notice for Alvin's deposition. Alvin does not appear as required by the deposition notice and is not deposed prior to trial.
At trial, Sheila objects to Alvin testifying on the ground that he failed to appear at the deposition.

b. How should the trial court rule on Sheila's objection? Why?

REPRESENTATIVE ANSWER 1

Part A

Alan's lawyer should file the following motions under Rule 2-322: (1) improper service; (3) improper venue; and (4) the affirmative defense of statute of limitations. The statute of limitations could be raised at any time, as they are permissive motions. The improper service and improper venue motions would have to be raised before an answer or would be deemed waived, as they are mandatory motions.

Improper Service. Pursuant to Rule 2-121, a plaintiff may serve a defendant by various methods, including sending the complaint and summons by certified mail requesting "Restricted Delivery." However, Sheila sent the complaint and summons to Alvin and his insurance company via first class mail. This is improper and therefore this ground is valid and the motion should be granted.

Improper Venue. Pursuant to Rule 6-201, a civil action "shall be brought in a county where the defendant resides, carries on a regular business, or habitually engages in vocation." In addition, in a negligence action, venue is proper in the county where the negligence occurred. Here, Alvin, the defendant, lives in Anne Oriental County, and the accident occurred in Kent County. Sheila, however, brought the suit in Baltimore County. Accordingly, venue is improper and this ground for the motion to dismiss should be granted.

Statute of Limitations. Pursuant to Rule 5-101, there is a three year statute of limitations in general for a civil action. This statute of limitations accrues as of the time the a cause of action arises, or in the case of fraud when the plaintiff should have known of the fraud. Here, the accident occurred on March 15, 2005. Sheila, however, did not file the complaint until January 2, 2009, and this is more than three years from the date of the accident. The fact that the injuries were still being treated is irrelevant for purposes of the statute of limitations. Accordingly, as to J.D., this ground should be granted.

There is, however, an exception for Jud.'s 14 year old son which would allow the suit to continue in his name. Under Rule 5-201, persons under a disability toll the statute of limitations. Keith is considered under a disability with respect to his age - he is a minor and is incapable of bringing a suit in his own name. As a result, the disability would toll the statute of limitations, and thus Keith must file his action within the lesser of three years of the applicable period of limitations after the date the disability is removed. The disability will be removed on the day before his 18th birthday, and thus the three year statute of limitations period will apply

at that point. As a result, although Jud.'s claim against Alan should be dismissed, Keith's claim should continue.

Part B

The court should deny Sheila's objection. Generally, discovery is party driven. And with respect to party deposition, all that is necessary in a civil case is that an attorney properly serve an opposing party with a notice of deposition. This is what Sheila did in this case - she properly filed a notice for Alvin's deposition. Alan did not appear as required by the deposition notice, and was thus not deposed prior to trial. Alan certainly failed to comply with a discovery obligation - he was required to show up for a deposition and did not show up. But Sheila did not pursue the appropriate options, and therefore a court would likely consider this ground waived.

Under Rule 2-432, Sheila should have moved for sanctions and for an order compelling discovery. This is available because Alvin - a party - failed to appear for a notice of deposition. In addition, Sheila would need to certify that she has, in good faith, attempted to resolve the issue without involving the court. Sheila did not, however, move for an order compelling discovery. She simply waited until trial and then objected to Alvin testifying on the ground that he did not appear. And under Rule 2-432(d), this motion must be filed with "reasonable promptness."

Although a court can, as a result of discovery violations, grant an establishment order or prevent the introduce of evidence, these remedies are for serious discovery breaches that could not have been previously resolved. Had Sheila moved for an order compelling discovery, a court could have resolved the matter then instead of waiting until this issue came up at trial. Accordingly, although Alan clearly did not show up for a deposition, Sheila's failure to file a motion to compel likely deems her objection to his failure to show up waived, and a court would find that Sheila failed to act with "reasonable promptness" and would thus deny Sheila's objection.

REPRESENTATIVE ANSWER 2

PART A

a. Preliminary Motions by Alvin.

(1) Motion to Dismiss

Pursuant to Rule 2-322(a), Alvin must file and assert these defenses or lose the ability to assert them thereafter. Alvin should file a Motion to Dismiss for Alleging improper venue, and insufficiency of service of process, and thus lack of jurisdiction.

Per Code 6-201, venue is determined by where a defendant resides, carries on a regular business, or habitually engages in a vocation. It can also be determined based on location of the accident in a torts/personal injury matter. It can be brought in those counties only. Alvin lives in Anne Oriental County. The accident occurred in Kent County, Md. Mud and Keith filed in Baltimore County. Therefore, this is improper venue because the complaint must be filed in Kent or Anne Oriental.

For service of process to be effective on Alvin, under rule 2-121, the complaint and summons must be delivered in person to Alvin, or left with another of suitable age and discretion that resides with Alvin, or via certified mail, restricted delivery. Sheila only sent the materials via first class mail.

Thus, service of process is insufficient. In turn, the court still lacks personal jurisdiction over Alvin until service is effected.

The courts in Maryland are not likely to dismiss this case on these grounds, but rather transfer the matter to the appropriate venue and order that a reissue of summons be made to effect sufficient process on Alvin.

(2) Motion to Dismiss based on statute of limitations (SOL).

Alvin should also move to dismiss on grounds of SOL has passed for bringing the claim.

Under CJP 5-101, claimants had 3 years from March 15, 2005 to file suit, but did not do so until January 2, 2009, which would bar the litigation.

Nevertheless, the court will permit Keith's action as he is a minor, or under disability per CJP 5-201. 5-201 tolls the running of the SOL while he is a minor. Thus, while Jud's action will be dismissed, Keith's will remain intact.

PART B

b. Pursuant to Rule 2-432, and 2-433, the failure to appear for the depo by Alvin is sanctionable as a failure of discovery requirement (if properly noted).

Unfortunately, because Sheila failed to timely address the deposition issue by a Motion under first 2-432 then potentially 2-433, the court will overrule her objection and permit Alvin to testify. Discovery disputes are to be addressed prior to trial, and these Rules are there for that purpose. Sustaining the objection would severely prejudice Alvin's case. Sheila should have moved the court much earlier.

JULY 2009 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS

JULY 2009 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS

QUESTION 5

George and his wife, Laura, as tenants by the entireties, purchased Tidewater, a 20 acre tract of waterfront land, bounded on one side by Sandy Drive, a public road in Charles County, Maryland. In 1980, George and Laura built a house on five acres of the tract (Parcel A). Parcel A did not front on Sandy Drive, but had access to it by a 200 foot private driveway installed when George and Laura built their house.

On September 1, 1985, George and Laura conveyed the remaining 15 acres (Parcel B) to their sons, Bush and Chaney, as joint tenants. The deed made no reference to the 200 foot driveway which traversed Parcel B, and which George and Laura continued to use.

On September 30, 2005, Laura died. On December 31, 2005, George sold and conveyed all of his right, title and interest in Parcel A and the house to Chaney, who financed the purchase with a mortgage to Local Bank which included Chaney's interest in Parcel A and Parcel B.

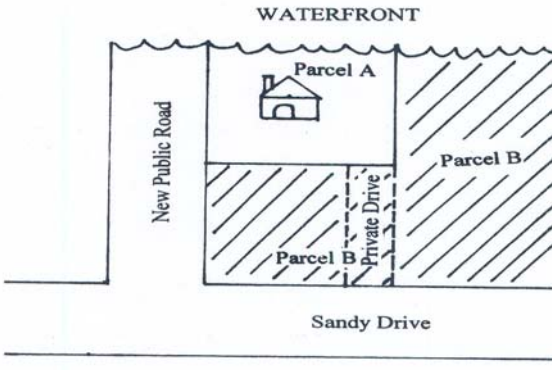
Bush, a widower, died intestate in 2006, survived by two daughters. Thereafter, a new public road, providing direct access from Parcel A to Sandy Drive was constructed by Charles County.

See diagram below.

Advise Chaney as to:

a. The interest, if any, of Bush's daughters in Parcel B;

b. The status of the private driveway.



JULY 2009 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS

REPRESENTATIVE ANSWER 1

PART A

A. Bush's daughters interest in Parcel B

Joint Tenancy

A joint tenancy occurs when the four unities of possession, interest, title and time exist. A joint tenancy creates a right of survivorship, which means each tenant owns an undivided interest in the tenancy. This means, that if one tenant dies, the other inherits their interest, unless that interest has been severed. Here, George and Laura conveyed Parcel B to Bush and Chaney as joint tenants. A joint tenancy is severed when one tenant grants an interest in the tenancy to another party. MD is a title state, which means if one joint tenant grants a mortgage in the property, this severs the tenancy and becomes owned as tenants in common.

Tenants in Common

Chaney purchased Parcel A, by granting a mortgage to Local Bank which included his interest in Parcel B. This severed the tenancy and following the mortgage on December 31, 2005, Bush and Chaney owned Parcel as tenants in common. They each owned a divided ½ interest in the property without a right of survivorship. When Bush died intestate in 2006, his interest in the property passed to his heirs. His two daughters now own their father's ½ interest in the property. Maryland does not have a presumption of a joint tenancy, therefore, the daughter's interest in the property will pass to them as tenants in common. They each own ½ of the father's interest in the property.

PART B

B. Status of the driveway

Implied Easement: An implied easement occurs when there was a common ownership, necessity, and quasi easement. George and his wife had an implied easement in the driveway, because there was previous common ownership, there was necessity to get to Sandy Drive and they used the road as an easement.

Easement by Necessity. Easement by necessity occurs when there is absolute necessity and common ownership. Both existed here, prior to the road being built.

There was no express easement, because nothing was in writing and recorded. An implied easement and easement by necessity are destroyed when there is no longer the necessity or if one owner acquires both the burdened and servient estate. Here, after building of New Public Road, Chaney no longer needs to use private drive to get to sandy drive, therefore no more necessity exists. Additionally, since Chaney now owns both Parcel A and Parcel B, the easement is destroyed.

REPRESENTATIVE ANSWER 2

PART A

a) Bush's daughters own an undivided ½ interest in Parcel B as tenants in common with Chaney. When Chaney received a mortgage on Parcel B, it destroyed the joint tenancy with Bush, converting it into a tenancy in common. Thus, Bush's interest was divisible to his two daughters.

PART B

b) The private driveway when created was merely a use of Tidewater when George and Laura owned it. There was an easement created by implication when George and Laura deeded Parcel B to Bush and Chaney. There was no merger when Chaney bought Parcel A, as Bush was an owner of Parcel B as a tenant in common. Even though the new public road was built, Bush's daughters will still be able to continue to use the easement, as it has been in use for over 20 years.

The easement by implication was created because it was open and visible to Bush and Chaney, and was continuously used by George and Laura. Even if an easement by implication did not exist, in 2006, an easement by prescription would have been established.

JULY 2009 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS

QUESTION 6

Dave Smith, owner of Dave's Dairy Delight Store in Mount Airy Maryland, decided to sell the store and retire. Wade and Cindy Buyer asked their lawyer to prepare a letter of intent to purchase the location and other items from Dave. The Buyers and their lawyer drafted a handwritten letter of intent. The text was as follows:

> "We, Cindy and Wade Buyer, offer to pay Dave Smith, Seller, $350,000 for the improved commercial lot at 111 Main Street, Mount Airy, MD by delivering $10,000 today, 2/1/2009, and the remainder of $340,000 by certified or cashiers check no later than 4/1/2009. A standard form contract will be delivered to Seller within 72 hours. The Buyers will pay all closing costs. The sale includes the store's 15 foot plaster cow displayed out front along with all of the store's fixtures."

All parties signed the letter of intent and the Buyers handed Dave their personal check in the amount of $10,000. Dave put the check into a file along with the letter of intent. On February 3, 2009, Dave received a contract signed by the Buyers with a letter requesting that he return the signed contract in the preaddressed stamped envelope. The contract incorporated all of the terms of the letter of intent.

Dave read the contract and struck out the provision allowing the Buyers to purchase the plaster cow and he struck out some of the fixtures listed for sale. Dave signed the contract and placed the contract and envelope in his file with the check and letter of intent. Later that day, Dave began to have second thoughts, and he told the Buyers he no longer wanted to sell.

Dave received a letter from the attorney for the Buyers the following week stating that a lawsuit would be filed against him for specific performance claiming there was a valid, binding and enforceable contract between the Buyers and Dave.

Dave contacts you, a licensed Maryland attorney, as to the potential outcome of the lawsuit to be filed against him.

What advice would you give Dave? Explain your reasons.

REPRESENTATIVE ANSWER 1

In order for there to be a valid contract there must be an offer, acceptance, and consideration. Here, it is clear that there was an offer in the handwritten letter of intent, but the issues of acceptance and consideration show that there was never a valid contract.

For real estate, to get past the statute of frauds, a contract must be in writing, signed by the parties, and sufficiently describe the subject matter and price, along with the specific dates and obligations of the parties. Here, though handwritten, the "letter of intent" specifically identified the parties and the subject matter to be sold, the dates of the contract and of closing, as well as the price to be paid. Additionally, both parties signed it. Thus, it appears to meet the statute of frauds requirement.

However, the letter of intent expressly indicates that it is only an offer, implying that Dave must expressly accept the offer. Acceptance in a case like this is valid when both of the parties act in accordance with the offer to buy. While the Buyers complied with the terms of the letter in delivering the down payment and sending Dave a standard form contract, Dave did not accept it because even though he signed the letter of intent, he never cashed the check that was the down payment, instead just placing it in a file. Additionally, the Buyers did not make substantial improvements to the land and there was no reliance on their part on the contract. Accordingly, the letter of intent was not a valid contract.

Finally, Dave did not accept the offer by signing the contract that the Buyers sent to him because he did not place the contract in the mail, and he rejected the offer before they became aware of the signed contract. However, even if it was in mail, or the Buyers became aware of the signing, because they were not merchants, Dave's acceptance must be a mirror image of the offer. When he received the contract, he crossed out specific provisions regarding the plaster cow and fixtures. Thus, if received by the Buyers, it would constitute a rejection and counteroffer, and therefore no valid contract. Thus, I would advise Dave that he is under no obligation to follow through on letter of intent that the Buyers drafted and that he still owns the Dairy Delight Store.

REPRESENTATIVE ANSWER 2

To determine if there is a valid contract, there must be an offer, a valid acceptance, and consideration. Contracts for the sale of land must be in writing or it is possible to meet the statute of frauds by performance. The writing must be signed by the parties to be burdened and must state consideration and must describe the property. In this case, the question is whether the handwritten letter of intent was the offer or whether the contract sent to Dave was the offer. If the letter of intent was the offer, then Dave accepted it by reading

and signing and accepting the cash as consideration.

If, however, the contract was the offer, then the question is whether Dave accepted by striking out some of the provisions and signing. Although the contract was for both the sale of land as well as for fixtures and the cow, common law will regulate because the main part of the contract was for the land. By striking out some of the provisions, Dave terminated the offer and created a counteroffer that was to be accepted by the buyers. Even if he had not stricken some of the provisions, the fact that Dave signed does not create an acceptance until either it was mailed or the offerer is made aware of the acceptance. In this case, Dave placed the contract in his file and later that day informed the Buyers of his rejection.

Although the letter of intent looked like a contract because it created the offer to pay Dave Smith in exchange for Dave selling the commercial lot, it stated that a standard form contract would be delivered to the seller, indicating that the letter of intent was not an offer, but instead a mere proposal. In that case, it is likely that the court will find that a contract was not formed between the buyers and Dave.

JULY 2009 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS

QUESTION 7

Sam, Mark and Willy have decided to open a sporting goods store in Lusby, Maryland to sell unusual fishing rods and other fishing equipment. They come to you, a Maryland attorney, for advice on the formation of the business entity and for the preparation of the documents to accomplish the following goals:

1. Sam, Mark and Willy will each invest $20,000, and each will receive an equal ownership interest in the business. They neither want to invest any additional cash into the business nor have any personal responsibility for the debts of the business.

2. Sam will loan the business an additional $10,000, which will bear interest at 6% and will be repaid in equal monthly installments over a 3 year period. Other terms and provisions will be decided by them later.

3. They do not wish to be bothered with any formalities to maintain the business other than accounting, tax and governmental reporting requirements.

4. All profits and losses of the business will be shared equally by Sam, Mark and Willy.

5. Mark will be responsible solely for the daily operations of the business. He will receive an annual salary of $30,000.

6. Sam and Willy insist that all three of them must consent to:

    a. Relocation of the business
    b. Borrowing money for the business
    c. Selection of equipment and rod suppliers, and
    d. Selling the business.

You recommend to Sam, Mark and Willy that they form a limited liability company.

Write a brief memorandum to them containing:

a. An explanation of why this entity will best achieve their goals;

b. A description of the documents that you would prepare to implement your recommendation, and

c. Any other legal advice you will give to Sam, Mark and Willy.

REPRESENTATIVE ANSWER 1

MEMORANDUM

TO: Sam, Mark, and Willy

FROM: Your Maryland Attorney

Regarding: Formation of your business

I believe that an LLC will most effectively meet your requirements and desires for a business. This is because of the following reasons.

(a) An LLC will require that each member invest a given amount of money into the business and that their interest in the business will be based on their individual amount of contribution. Because each will invest an equal amount, each will have an equal voting and ownership right in the LLC. Note that Sam's loaned money will not contribute towards this because that is a loan which will presumably be repaid by the business. Additionally, the operating agreement may be written so as to expressly give each member an equal ownership and voting right. LLC will also generally hold each member immune from any debts or liabilities from the business.

LLC will also not require any additional fillings except for the initial filing of the Articles of Organization for the LLC, which must be filed with Maryland State Department of Assessments and Taxation.

Operating agreement may also allow for Mark to be the general manager of the business, to run the day to day operations of the business and set his salary.

As members, each will have equal voting rights (in relation to their investment, which are all equal) as to any major business decisions of the business, and any restrictions can be placed in the agreement.

(b) Documents: I will need to draft and file Articles of Organization. I will also need to draft an Operating Agreement for all parties to sign. In addition to the provisions already explained above, this should also include:

- Express list of Mark's duties and powers as the general manager, in running the day to day operations of the business and may include his salary. However, it would likely be easier to do this under a separate employment contract and I recommend that it should be done. This way, if there is to be a change to Mark's duties or a new manager replaces Mark, an amendment to the Operating Agreement will not be necessary.
- Express list of powers of each member (including the provisions set forth in 6 of the question), including expectation of each member and time and frequency for each membership meeting.

- Sam’s loan should be set forth in a separate agreement with the LLC and a note.

- Should also state how members may get out of their interest in the business, how a member interest may be sold, dissolution of business and rights to payments should a member die.

(c) I would recommend that each member hire their individual counsel. I only represent the LLC as a business and not their own interests. This is especially true for Sam, as he is providing a loan to the business and Mark, who as a manager entering into an employment contract with LLC, may have interests which are directly adverse to that of the business (salary, etc.).

JULY 2009 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS

REPRESENTATIVE ANSWER 2

TO: Sam, Mark and Willy
FROM: Your Attorney
RE: Limited Liability Company

I have read the information that you provided me regarding your interest in forming a business organization in Maryland and have come up with the following suggestions. My recommendations below are in response to the concerns and interests that you have made me aware of thus far, therefore please do not hesitate to contact me with any additional changes, or concerns.

(a) Based on what you have told me, I believe that a limited liability company is the best entity to achieve your goals of opening a sporting goods store while retaining limited liability for the debts of the business.

A limited liability company would offer you three the protections of a limited liability shield based upon each of your individual capital contributions. Each of you, Sam, Mark and Willy would be considered "members" of the limited liability company and could outline the duties and roles you desire to have accordingly. The limited liability company is a good business entity for you three because you can limit your future investment responsibilities and avoid personal liability for business debts, a main concern of yours based on our past discussions.

Limited liability companies are a hybrid of a corporation and a partnership. They allow you three to share profits and losses equally as a partnership would, while simultaneously shielding you from further business debts. The three of you can make your initial investments of $20,000 each, and obtain equal ownership interests in the business. As mentioned above, you can also avoid the obligation of investing additional cash into your business.

(b) In order for you to form a limited liability company, I would have to file Articles of Organization with the State Department of Assessments and Taxation in Maryland. Prior to my filing this agreement, there are some tasks I need you to accomplish for me. It would be helpful if you could notify me of the address in Lusby, Maryland where your sporting goods store will be located. Also, I need you to select a resident agent to be named in the charter. It can be either of you as you see fit.

Also included in this document must be a purpose statement. Based on what you have told me, I understand your purpose to be selling unusual fishing rods and other fishing equipment. This is a limited purpose and engaging in business outside of this purpose could

result in ultra vires acts. To avoid such a situation, I would like to work with you in creating a broader purpose statement. This is to protect you all in the event that you wish to engage in business beyond the stated scope.

Sam, I understand that you intend to loan the company an additional $10,000. To ensure that you will be paid back, I suggest a security agreement be made granting you a security interest in collateral of personalty or fixtures of the company. This will help protect the loan you intend to make to the company.

Also, an Operating Agreement would be advisable to set forth the rules and requirements of each member and Mark, as Manager.

(c) Lastly, I have included other legal advice for you three Sam, Mark and Willy.

First, you will not be considered a limited liability company until the SDAT has accepted your Articles of Organization. Therefore, I advise you not to act on behalf of your company, including entering into contracts on its behalf, until the Articles described above has been filed and accepted. If you do enter into any contracts for your company prior to acceptance of the operating agreement with SDAT, you will be personally liable to them.

Lastly, I want to inform you that as agents of your company and members thereof, you are still liable for any tortious acts committed by you personally. Any limited liability shield applies to debts of the business, not personally.

I hope that you find this information useful and helpful. Please feel free to contact me with any questions, comments or concerns.

Signed, Your Maryland Attorney.

JULY 2009 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS

QUESTION 8

Lawyer, experienced in real estate transactions, was retained by Elder to represent him in the sale of Elder's business in Westminster, Maryland. A written retainer agreement was executed whereby Lawyer would receive $300 an hour for his professional services in the sale transaction.

Lawyer undertook the representation and prepared a contract of sale for the business and appropriate accompanying documents, billed for his services at the agreed hourly rate, and was paid by Elder. Subsequently, during the negotiation phase of the sale with potential purchasers, Lawyer requested and Elder verbally agreed to replace Lawyer's hourly rate retainer agreement with a commission fee to Lawyer for his professional services equivalent to 5% of the sales price of the business.

Lawyer attended various meetings, reviewed documents, prepared additional documents and revisions, prepared and sent correspondence, made and received telephone calls regarding the sale, and negotiated the sale of the business. Lawyer billed Elder for all these services rendered at the hourly rate of $300 and was paid by Elder.

During the time of his representation of Elder and before the closing of the sale transaction, Lawyer approached Elder for a loan of $45,000 to be secured by a deed of trust on Lawyer's home which he owned with his wife. Elder made the loan and Lawyer provided Elder with a deed of trust which Lawyer prepared and signed. The deed of trust did not include any description of Lawyer's home or of the liber and folio of the deed by which Lawyer and his wife had acquired the property. Lawyer's wife was not included as a borrower in the deed of trust. The deed of trust required monthly payments, but Lawyer made no payments. The business was sold and Lawyer received the commission fee of 5% of the sales price. Lawyer used the payment of the 5% commission to him to pay off the $45,000 loan from Elder.

Based on the given facts, did Lawyer violate any of the Maryland Lawyers' Rules of Professional Conduct? Explain fully.

JULY 2009 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS

REPRESENTATIVE ANSWER 1

LAWYER VIOLATED THE PAYMENT RULES OF THE RULES OF PROFESSIONAL CONDUCT, BY ACCEPTING AN HOURLY RATE AND A COMMISSION.

The rules of professional conduct allow a lawyer to charge a reasonable fee for his services. This may take the form of a contingency fee or an hourly billing rate. Any fee that is charged must be in writing, and be reasonable. It should also account for who pay the expenses. In this case, Lawyer and Elder agreed to an hourly rate in the retainer agreement. The hourly rate was $300. This rate must be reasonable under the circumstances. It must be reasonable in light of the complexity of the matter, the lawyers experience and special knowledge, the prevailing rates in the area. Lawyer is an experienced real estate attorney, thus he is allowed to charge a higher rate than new attorney or one not versed in real estate law. Lawyer is representing Elder in the sale of a business. This may be a rather difficult matter. The facts don't state all the circumstances of the sale or the amount of work done by Lawyer, however we know that he went to meetings, reviewed and prepared documents, sent correspondence and negotiated the sale. This sale finished closing at $900,000. It might be possible for lawyer to argue that his $300 an hour fee was reasonable in the light of the possible complexity of this sale.

During the representation Lawyer and Elder orally agreed to modify the retainer agreement and replace it with a contingency fee. A contingency fee is a form of payment where the lawyer gets a percentage of the recovery in litigation or the sale in a transaction. The new agreement paid lawyer 5% of the sale price, which happened to be $45,000. For a contingency agreement to be valid, it must be in writing, reasonable in rate and requirements, it must state who is paying the expenses and must state whether the % is paid before or after expenses. In this scenario, the modification to the retainer agreement that created the contingency fee was oral. Thus there was a violation of the contingency fee rules. Further, there was no mention of the expenses, who would pay them, and whether the 5% was before or after expenses. Thus due to all these deficiencies the contingency agreement is in violation of the rules. The only part that is within the rules is the 5%. The agreement did set up the fee %. However, like stated above the percentage of the sale paid in a contingency agreement must be reasonable in light of the circumstances. Thus the question is whether 5% is reasonable in the light of this case, Lawyers skill and knowledge, etc. We don't have the facts to determine the reasonableness here however, usually 50% is the highest fee allowable, and then only in the most extreme and complex cases.

Another issue with the fee is that Lawyer was paid twice. Lawyer billed Elder for all the services rendered at the hourly rate. Then Elder further paid him the 5% of the invalid contingency fee. Thus we must look at Lawyers entire haul and determine reasonableness.

Also, Lawyer was paid for the work done before the rate change, however the 5% was for the entire sale. Thus it appears he is being paid twice for the work done before the modification. This would be improper to be paid twice. Thus from all the circumstances provided Lawyer breached the rules via his oral modification of the payment scheme and may have breached the rules with an unreasonable fee.

LAWYER VIOLATED THE RULE ON BUSINESS DEALINGS WITH A CLIENT BY ASKING ELDER FOR A LOAN AND PREPARING THE LOAN AND DEED OF TRUST.

Lawyer during the course of the representation asked Elder for a loan and Elder granted it. Further, Lawyer prepared all the documents and security agreements in furtherance of the loan. The rules require that attorneys not do business with their clients. This is because this can be a breach of confidence and the attorney client relationship. When an attorney does business with a client there arises a question about his representation of the client since now his actions may be motivated by his interest. Thus the attorneys loyalty to the client is brought into question. The risk of self dealing in a situation like this is high and so the rules require an attorney from refraining from business deals with the client, unless the client gets outside counsel. An attorney doing business with a client is required to advise the client of the conflict and implore the client to get outside counsel. The attorney should not prepare the business documents and should leave that to clients outside counsel. In this case, Lawyer asked for a loan and prepared the deed of trust. Lawyer breached his duty to Elder because he did not inform Elder of the conflict nor did he advise elder to get outside counsel. Lawyer provided the documents, and thus may have acted in his interest instead of Elders. He could not represent both himself and Elder in this deal because of the conflict in interest between Elder and Lawyer as opponents in the loan transaction.

Lawyer also did not disclose all the material facts about the loan transaction to Elder. In this case Lawyer did not tell Elder that his wife had an interest in the land. And Lawyers wife did not sign the deed of trust. This is troublesome, because of the conflict created by Lawyers representation of Elder and the deal with Elder creating a conflict. Lawyer in this instance is leaving out a material fact that Elder would desire when making the loan agreement. If this property is owned by Lawyer and wife as Tenants by the entities then the deed of trust that lawyer created and signed was not enough to grant Elder an interest in the land. Thus Lawyer really hindered Elders representation in that case and it is evidence of improper self dealing.

REPRESENTATIVE ANSWER 2

The Rules require that a lawyer charge only reasonable fees and that those fees be disclosed in advance, preferably in writing, to the client. Lawyer's rate of $300 per hour was probably reasonable and he did disclose the rate to his client in writing at the outset of the representation. The initial work was billed and paid according to that agreement. However, when Lawyer asked to change the fee arrangement to a commission based on a percentage of the sales price he should have memorialized that change in writing. The client consented to the change, but Lawyer violated the Rules by entering into a percentage based fee arrangement without disclosing that fee in a writing. Hourly rates are preferred in writing under the Rules, but a percentage arrangement must be in writing.

Lawyer further violated the Rules regarding fees when he did not bill the client as promised under their revised oral agreement. The oral agreement was to replace the hourly rate with a commission percentage, however, Lawyer billed and was paid for both the hourly rate for his services and the commission. Lawyer has therefore not only violated the Rules, he has also engaged in a form of billing fraud by double-billing his client fro the same services as well as billing him in violation of their express agreement.

The Rules prohibit lawyers from loaning money to clients. They do not, however, prohibit a lawyer from obtaining a loan from a client. The mere fact that Lawyer approached Elder for a loan and received one from him, does not constitute a violation of the Rules. Lawyer did violate the Rules, however, by failing to fully explain and disclose orally and in writing the terms of this proposed transaction with his client, advise him to seek outside counsel, and provide him with an adequate opportunity to do so. Lawyer also failed to provide competent representation throughout that transaction by failing to properly execute the deed and security interest.

The Rules require that lawyers comport themselves ethically during all non-law related business dealings. Lawyer's failure to perform on his loan contract properly (by not making payments due) was therefore also a violation of the Rules.

The loan itself put Lawyer into a potentially conflicted position vis-à-vis this client which he should have fully explained to his client.

JULY 2009 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS

QUESTION 9

Diana Troy owns a successful chain of florist shops throughout Maryland. One of the stores in Harford County, Maryland was not as profitable, and she wanted to sell it. In May 2006, an interested buyer named Shamore Dollar agreed to purchase the shop for $500,000, after completing due diligence. Mr. Dollar paid $100,000 in cash and signed a promissory note from his company Dollar Florist, Inc. to Ms. Troy in the principal amount of $400,000. Mr. Dollar also personally guaranteed the note. The note provided for monthly payments toward the principal and interest over the course of four years.

Always operating in an entrepreneurial spirit, Ms. Troy decided to open a day spa. She borrowed $400,000 from Walker S&L. Repayment of the loan was secured by the pledge of the Dollar Florist Note and guaranty to Walker Savings and Loan. In September 2006, Ms. Troy executed a note in the principal amount of $400,000, a security agreement covering the Dollar Florist Note, naming Walker S&L as a secured party, and financing statements for the Dollar Florist Note. Walker S&L recorded the financing statements in the appropriate records section of the Maryland State Department of Assessment and Taxation. Walker S&L never took possession of the Dollar Florist Note and Ms. Troy retained its possession.

Dollar Florist, Inc. has not been profitable. In fact, sales have declined drastically during the last quarter. Dollar Florist has not been able to make payments on the note to Ms. Troy since September 2008, leaving an outstanding balance of $200,000. Without payments from Dollar Florist, Ms. Troy was unable to make the required payments on the Walker S&L Note. As a result, she defaulted and the entire amount became due.

In December 2008, Walker S&L demanded payment from Ms. Troy in the amount of $150,000-- the remaining balance due on Walker S&L's loan to her. Ms. Troy has not paid Walker S&L as requested.

Walker S&L would like to collect the entire $200,000 balance of the Dollar Note. Walker Saving and Loan retains you for legal advice.

Give a detailed analysis of any rights Walker S&L may have under Maryland Commercial Law to enforce the Dollar Note, and what steps it must take to enforce the note.

REPRESENTATIVE ANSWER 1

3-301 states that a person entitled to enforce an instrument means a nonholder in possession of the instrument who has the rights of a holder. WSL is entitled to enforce the Dollar note because they have a security interest in the Dollar note.

Even though WSL is not in possession of the note, WSL has put the world on notice of its priority interest in the note because when it perfected its security interest by filing the statements with SDAT. It can get possession through self-help so long as there is no breach in peace or through the legal system. I will advise them to go through legal means.

I would advise WSL to take possession of Dollar Florist pursuant to 9-609 because both Troy and Dollar have defaulted because they are no longer able to make payments. WSL could under 9-610 sell, lease, license or otherwise dispose of the collateral in any commercially reasonable manner in order to get the money owed. WSL must notify Troy and Dollar of its intent and give them reasonable time to cure the debt.

Once the property is disposed of WSL must notify Troy and Mr. Dollar of the amount that was received during the disposal. If there is money remaining after the disposal including all costs and fees that is not owed to WSL it must return that amount to Troy. If during the disposal there is a deficiency in the amount received, WSL could file a civil action against Troy and Mr. Dollar to get a deficiency.

Since Mr. Dollar personally guaranteed the note, WSL could also go after his personal assets to satisfy the debt.

REPRESENTATIVE ANSWER 2

Negotiable Instruments/Enforcement

The Dollar Note is controlled by commercial law because it is a negotiable instrument. The note is a promise to pay a specific amount in a definite time period without any restrictions, which makes it negotiable. Because Diana has defaulted on her payments, Walker can get possession from her (3-301(i)). Walker may also have rights under 3-301(ii) or (iii). It does however have the rights to get possession of the note as a secured creditor due to Diana's default. Walker can take matters into their own hands and recover the note from Diana, so long as there is no breach of the peace. A Walker could also get the note from Diana pursuant to judicial process under 9-609(b)(i).

Perfection

Walker perfected its security interest in the Dollar Note when it filed the finance statement with the State Dept. (9-312(a)).

Enforcement

Walker can enforce the note either by collection from Dollar or by selling the note pursuant to 9-610(a). The sale would have to be commercially reasonable pursuant to 9-610(b). If Walker is able to recover more than the $150,000 that is still from Troy (plus reasonable expenses), it must pay Troy any surplus pursuant to 9-608(4). Troy would be liable if there is a deficiency under 9-608(4). Also Walker could pursue recovery against Mr. Dollar on his personal guarantee.

JULY 2009 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS

QUESTION 10

Christine is being prosecuted in Howard County Circuit Court for conspiracy to engage in prostitution as a result of her alleged ownership of "The Client is Always Right Escort Service" (CARES). At trial, an attempt is made to introduce the following evidence and, in each instance, there is a timely objection:

a. Christine is asked on cross-examination whether she made a list of clients that included Governor Spitfire. Christine states "no." The Prosecutor then immediately attempts to offer a document into evidence written in Christine's handwriting which contains a list of persons including the Governor and the words "CARES takes care of even the highest government and business officials in the State."

b. Christine's 2007 Federal 1040 Tax Return and attached W-2 showing $2,000,000 in reported income earned as a "manager" for CARES.

c. The testimony of Johnny Dugooder, that as part of his effort to clean up "smut in his town," he pretended to be an interested business client and secretly recorded Christine state to him "my ladies are the best and the most beautiful women in the industry and for a small fee could get to know you better."

d. The secret recording made by Dugooder of Christine referred to in (c).

e. The compelled testimony of Dr. Bill, a licensed psychologist, who will state that he counseled Governor Spitfire, because the Governor spent "tens of thousands of dollars with CARES in order to have intimate relations with Christine's ladies," and his wife was threatening divorce.

f. The testimony of Governor Spitfire's wife, who will testify that the Governor stated to her, on many occasions, "I swear, I've only paid to be with a woman once!"

g. The testimony of Christine's ex-husband that when they were married, Christine told him one night while they watched a news expose' on prostitution, that she knew a lot of women who would be willing to get paid for their affections.

You are the judge presiding over the trial.

How will you rule on each evidentiary matter? Explain your answers fully.

REPRESENTATIVE ANSWER 1

All evidence that is relevant, material and based upon personal knowledge is admissible.

List

Objection sustained. The list contains hearsay. Although it is probably an admission by a party opponent-C and a prior recorded statement, the prosecutor cannot immediately introduce it into evidence. The list must be authenticated by C or someone who is familiar with C's handwriting. Also C must be first shown the list and then given an opportunity to explain her testimony before it can be offered into evidence. The prosecutor did not do any of these things so it cannot come in at this point.

Tax Records

Objection overruled. The tax records are definitely hearsay statements, but because they are statements by C, they come in as exception to hearsay—admissions of a party opponent. They may also be business records, which is an exception, because the IRS maintains these records in the ordinary course and it contains information from someone with personal knowledge—C.

JD Tape/Testimony

I would sustain the objection as to JD's testimony about cleaning up smut because it is irrelevant and seems argumentative. I would overrule the objection about JD's testimony about C's statement "my ladies are the best and the most beautiful women in the industry and for a small fee could get to know you better" because it is an exception to hearsay because it is an admission by C. I would sustain the objection on the admission of the tape because in MD you need all parties to the recording to consent. Here, C did not consent. So this is an illegal taping and is a crime and cannot come in.

Dr. Bill

Objection sustained. Dr. Bill's testimony about Spitfire is hearsay without any exception. Spitfire is not a party to the case (no admission) and the facts do not show that he gave permission for Dr. Bill to talk about his confidential psychological communications which also is protected in MD. Because Spitfire holds the privilege he could prevent the Dr. from testifying even is he is not in the case.

Governor's wife

Objection sustained. The Governor is not a party so his wife's testimony is hearsay without any exception. I also think it is irrelevant. The spousal privilege does not apply because

the Governor is not a party to a criminal case and in any event his wife would be able to testify if she wanted. Confidential Marriage Communication may also apply even though Governor not a party because both spouses hold the privilege.

Christine's ex

Objection sustained. His testimony is probably an admission by C, but will be excluded because it is probably a Confidential Marriage Communication because C made is while they were home and both spouses hold the privilege. The facts don't say that anyone else was present so he can't testify to what C said unless they both agree. No facts indicate that C did or would agree.

REPRESENTATIVE ANSWER 2

List of Client

The prosecutor has failed to authenticate the handwritten list. The P must have C admit that it is her handwriting or get someone else that knows C's handwriting to authenticate the list. Also, C must be shown the list and given a chance to explain her statements. The prosecutor cannot just mention the list and then offer it into evidence. I would sustain the objection.

Tax Records

The tax records are business and public records which are exceptions to the hearsay rule. The records are kept by the government in the ordinary course of business and the government is required to keep the records by law. Because the records contain C's statements they also fall under the admissions exception to the hearsay rule. I would overrule the objection.

Testimony of Dugooder

Dugooder's testimony was based upon his first hand information because C made the statements about her illegal business directly to him. Thus, I would overrule the objection.

Illegal Tape Recording

In MD you must have the consent of everyone involved in the recording otherwise it is an illegal wire tape, unless you are law enforcement. No facts, that Dugooder was a police officer. So I would sustain the objection and keep the tape out.

Dr. Bill

Dr. Bill cannot testify about what the Governor told him because that would be hearsay not within any exception. It cannot be an admission because the Governor is not on trial. MD also has a psychiatrist/patient privilege that would prevent the Doctor from testifying if the Governor objects because the Governor holds the privilege. Thus, I will sustain the objection.

Wife's Testimony

The Governor's wife cannot testify about things that were told to her in confidence while they were married because both parties hold the privilege of confidential communications. The testimony is also probably hearsay because she is attempting to testify about what the Governor said. I would sustain the objection.

Ex-husband's Testimony

I would sustain the objection for the same reasons stated for the Governor's wife. The statements by C to her ex were a confidential communication and he cannot testify to it because both of them hold the privilege. It doesn't matter if they are no longer marriage so long as the statement, as here, happened while they were married.