

**JULY 2000 MARYLAND BAR EXAMINATION
BOARD'S ANALYSIS**

QUESTION 1

This question is intended to raise issues relative to three distinct tort actions:

Defamation (libel and slander);
Intentional infliction of emotional distress; and
Tortious interference with contract.

Applicant is expected to identify the three separate actions set out, identify the elements of each and apply the facts to these elements to reach a conclusion as to whether or not any of them create a viable cause of action.

A. Defamation. On these facts, Alex has a cause of action for defamation (the unprivileged publication of false and defamatory statements which naturally and proximately result in injury to another) against Hal and Wilma. Libel is defamation in written form (printing, writing, signs, pictures, etc.); slander is speaking defamatory words which tend to injure the reputation of another.

Hal and Wilma's letters to the local newspaper and the Motor Vehicle Administration, assuming their content asserts gross negligence, recklessness or willfulness would give rise to an action for libel, in light of the fact that Alex was found not to be responsible for the happening of the accident. The sidewalk painting also qualifies as libel and is likely to be libel per se, i.e., published with actual malice. In such cases, damages are presumed without proof of harm. Otherwise, Alex would have to plead and prove actual damages. The letter to Alex is not defamatory no matter its content, because it was not published or communicated to any third party.

The telephone calls to Alex' neighbors may give rise to a case of slander. The fact that Hal and Wilma "assailed" Alex and Beth in telephone calls to neighbors suggests that these communications were in the same vein as the spray painting on the sidewalk.

Malice, either actual or implied, is an essential element of an action for libel or slander. The applicant is expected to determine by analysis of the facts given whether these elements exist for either cause of action.

B. Intentional Infliction of Emotional Distress. First recognized in Maryland in Jones v. Harris, 35 Md. App. 556 (1977) and Harris v. Jones, 281 Md. 560 (1977) as an independent tort in Maryland. One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress. The elements are:

Conduct must be intentional or reckless;
The conduct must be extreme and outrageous;
There must be a causal connection; and
The emotional distress must be severe.

Whether or not the facts presented establish grounds for an action for intentional infliction of emotional distress depends upon how one views the conduct described in the facts. Equal credit is to be given for recognition of the elements, their application to the facts presented and a reasonable conclusion.

C. The facts raise an issue of tortious interference with a valid contract by Statewide Insurance Company in its dealings with Hal and Wilma with actual knowledge that they were represented by legal counsel. This tort is generally defined as a third party's intentional interference with an individual's business or occupation when such interference induces a breach of an existing contract. Tortious intent and improper wrongful conduct are essential elements of proof in this action. Macklin v. Logan, 334 Md. 287 (1994). Tortious intent is established by showing that the Defendant intentionally induced the breach or termination of contract in order to harm Plaintiff or to benefit the Defendant at the expense of the Plaintiff.

The elements of this tort are:

Existence of a valid contract between Lou, Hal and Wilma.
Statewide's knowledge of that contract.
Statewide's intentional interference with the contract.
Breach of the contract by Hal and Wilma.
Resulting damage to Lou.

In Maryland, a cause of action is established by proof of any purposeful conduct, however subtle, by which an insurer improperly or intentionally induces or persuades a client to discharge his counsel and settle directly with the insured.

An attorney has a legitimate interest in a contingent fee contract; however, a client has a good faith right to settle his cause of action without the attorney's consent, and an insurance company has a duty, whenever reasonable and possible, to settle claims made against its insured.

There must be present some egregious conduct usually in the nature of fraudulent statements made to the Plaintiff which induces him or her to dismiss the attorney and settle with the company. Sharow v. State Farm, 306 Md. 754 (1976).

Mere negotiation and settlement of a claim by the insurance company directly with a claimant, even when the company is aware of the attorney's employment, is not enough to create liability for tortious

interference with the attorney's contingent fee contract.

QUESTION 2

A. Opening sessions of legislative and other deliberative public bodies with prayer has coexisted with the principles of disestablishment and religious freedom from colonial times. Thus, an invocation which is traditional and offered for a secular purpose may be permissible if it does not have as its primary effect either the advancement or the inhibition of any religion. The Supreme Court has devised a three part test to determine whether the invocation impermissibly advances religion:

- (1) Does it have a secular purpose?
- (2) Does its primary effect advance or inhibit religion?
- (3) Does it cause excessive governmental entanglement with religion?

Needless to say, the invocation cannot be a precondition to anyone's participation in the process. There is also the question of whether a county board of education is primarily a "deliberative body" and therefore entitled to otherwise permissible invocations. Looking more for a general discussion of the First Amendment Freedom applicable to the states through the Fourteenth Amendment and an application of those principles to these facts.

B. The Bill of Rights in general and the First Amendment in particular deny those in power legal right to coerce the consent of the governed. Neither teachers nor students lose their constitutional rights to freedom of speech and expression at the schoolhouse gate. The memo should advise the superintendent that the proposal is unconstitutional based on free exercise of religion and freedom of speech grounds. There has been a long standing exemption with regard to flag salutes and pledges of allegiance based on religious freedom. Likewise, there is a more recent exemption based on freedom of speech. Citizens in general, including students, have the right to speak freely and the right to not speak at all. While states and school officials have comprehensive authority to prescribe and control conduct in the schools, there is no essential aspect of "government" involved which would allow the board to override the speech and freedom of religion issues. Thus, the memo should advise the superintendent that the proposal is unconstitutional.

C. The term "Bible study" is undoubtedly too broad and vague to pass constitutional muster. In giving advice to the superintendent, the attorney should again mention the "purpose and primary" effect of the proposal. The establishment clause prohibits official support behind the tenets of any orthodoxy. Also the free exercise clause guarantees everyone the right to freely choose his or her own course of religious

training. If the purpose of the proposal is to either advance or inhibit religion it is unconstitutional. However, it would also most likely be constitutionally infirm to require that the Bible be included as a part of all literature classes. The advice of the attorney to the superintendent should reflect that it is permissible to teach about the Bible and to teach about the differences between religious sects. So long as the Bible is taught as literature and not for the intrinsic values contained therein, it is a permissible part of a history or a literature course. Indeed it has been held that it would be difficult to teach many subjects in the sciences and humanities without some mention of religion.

D. Statutes or regulations requiring the posting of copies of the Ten Commandments on the walls of public school classrooms violate the establishment clause. It is certainly arguable that a proposal which makes its way into public school policy requiring the posting of the Ten Commandments in any place is constitutionally infirm. On the other hand, it is the public act that presents the problem. With the possible exception of a zoning violation of some sort there is no prohibition against citizens purchasing property and posting the Ten Commandments thereon. The memo should suggest that while there is nothing to prevent private citizens in engaging in this type of activity, it would be highly improper and perhaps unconstitutional for the board members to do this in their official capacities.

Question 3

The assets that are available to secure payment of the remainder of the purchase price by Jones are: the real property, which includes the land and the improvements on it (the building and the parking lot); the shoes, shoelaces, and other items offered for sale in the store; the moveable display racks and other items used in the business; and the petty cash in the safe. These items are classified as follows under the Uniform Commercial Code (the “UCC”):

- A. The land and improvements are classified as real property. Under §9-104 (j) of the UCC, real estate is not subject to Title 9 of the UCC.
- B. The shoes, shoelaces, handbags, and other similar accessories for sale are classified as inventory under §9-109 (4) of the UCC because they are goods held for sale in the business.
- C. The movable display racks, chairs, cash registers, and foot measuring devices are considered to be equipment according to §9-109 (2) of the UCC because they are used primarily in the business. These items are not fixtures because the facts make it clear that none of these items are permanently affixed to the real estate.
- D. The petty cash (U.S. currency) is money. Money is specifically excluded from the UCC definition of goods in §9-105 (h), and is excluded from the definition of general intangibles contained in §9-106 of the UCC.

To fully secure the right to payment of the full purchase price, Smith must obtain a perfected security interest in the property transferred to Jones in the sale of the business. For property that is covered by the UCC, a perfected security interest is created in a two-step process. First, the security interest must attach as required in UCC §9-203 (1). Second, the attached security interest must be perfected by either taking possession of the collateral or by filing a financing statement with the State Department of Assessments and Taxation. See, §9-302 through §9-305 of the UCC. Clearly, Smith should undertake to perfect by filing a financing statement because possession of the inventory and equipment is impractical since Jones needs this collateral to operate his business.

For the real property, which is covered under other statutory and common laws, Smith must obtain a mortgage duly executed by Jones, securing the payment of the remaining purchase price. The mortgage must be recorded among the land records of Allegany County, Maryland. Since the real property is probably the most highly valued asset in the transfer of the business, the mortgage should secure payment of the entire debt owed by Jones and should remain effective until the debt is paid in full. No financing statement is required to perfect a security interest in a mortgage [§9-302 (1) (h)].

Since the facts reveal the creation of purchase money security interests in the property that is covered by the UCC, Smith must satisfy additional conditions to ensure the priority of his interest in the

event of conflicting security interests in the same collateral.

Smith must perfect his security interest in the petty cash either by taking possession of it [§9-304 and §9-305], or by increasing the purchase price of the business by \$500.00. If Jones opts to leave the cash with the business and to perfect his security interest by increasing the purchase price by \$500.00, the right to repayment would be secured by the note and mortgage or deed of trust executed by the debtor, Jones.

Assuming Smith perfects his security interests in the inventory and equipment, Smith should be certain that the security agreement and financing statement cover proceeds of the collateral and after-acquired property. See, §9-306 and §9-204 of the UCC.

Question 4

A. The personal representative of the Estate should claim that Brown breached his duties of loyalty, obedience and care as agent to Jones because he failed to act in Jones' best interest. Brown should be required to account to the Estate and to disgorge his secret profits to the Estate as well as to pay any damages sustained by the Estate, including without limitation, the cost of the 500 pairs of shoes that were delivered to the competitor but paid for by Jones.

The claims are grounded in the fact that Brown did not disclose that he had an agency relationship with Meta Shoes and a personal and business relationship with Green. Jones refused to do business with Green, a fact that Brown knew but ignored. Knowledge of these concealed facts would have affected the authorization given to Brown by Jones. In addition, no authorized dual agency existed for Brown because Jones was never notified of the dual representation, and Jones did not give his consent.

Further, Brown breached his fiduciary duty to Jones by purchasing from Meta Shoes and redirecting to a competitor the delivery of 500 pairs of shoes and by keeping the profit for himself. It is arguable as to whether Jones actually ratified the purchase order from Meta Shoes even though he signed the check to pay for that purchase order. The personal representative should argue that Jones did not ratify Brown's conduct or the purchase order because Jones was unaware of all pertinent facts. On discovery of Brown's disobedience and disloyalty, Jones expressly revoked Brown's authority, and Jones demanded return of the check.

B. Best Bank should prevail as the death of a customer does not revoke the authority to pay a check until the bank knows of the fact of death and has a reasonable opportunity to act, §4-405(a) of the UCC. The check was paid six (6) days after Jones' death. Under §4-405(b), Best Bank could pay an instrument for up to ten (10) days after Jones' death whether or not Best Bank had knowledge of the death. Since the facts do not state that a person claiming an interest obtained a timely stop payment, Best Bank paid the check properly and it did not violate a duty to its customer.

QUESTION 5

The Squads will most likely argue that Julie is in breach of her lease for her failure to pay rent and should pay the outstanding rent for the months of February through September (or the remainder of her term). Julie will counter that the Squads' failure to enforce the express provision of the lease that precluded dangerous pets on the premises was a breach of her quiet enjoyment of the apartment and tantamount to a constructive eviction.

In order to successfully defend against the Squads' action for rent Julie will have to address the following:

- A.** Whether the landlords owed any duty to tenants to keep the common areas of the apartment building safe. In, Matthews v. Amberwood Associates Limited Partnership, 351 Md. 544 (1998), the Court of Appeals reiterated the general rule that "the landlord ordinarily has a duty to maintain the common areas in a reasonably safe condition." Accordingly, Julie should be able to convince a court that the Squads owed this duty to her.
- B.** If a duty is owed, whether the landlords had knowledge that the dog was on the premises in violation of Pete's lease. The facts note that Julie complained to both Squads about the dog some months prior to the event that led her to quit the premises. Thus, Julie can show that the landlords had knowledge of the dog's existence.
- C.** Whether Julie has an argument that a constructive eviction resulted. If the Squads owed the duty, Julie may assert that their failure to ensure a safe habitat resulted in a constructive eviction and she should not be liable for any rent. A constructive eviction is usually found to occur "when the acts of a landlord cause serious or substantial interference with the tenant's enjoyment of the property which results in the tenant vacating the premises." Stevan v. Brown, 54 Md. App. 235, 240, 458 A.2d 466(1983); *see also* Nicholson Air v. Allegany County, 120 Md. App. 47, 706 A.2d 124 (1998). Julie may convince the court that the Squads failure to protect her in the common areas of the apartment was substantial interference with the quiet enjoyment of the property and left her no alternative but to vacate. It would, therefore, be inequitable to assess damages or the unpaid rents against her.
- D.** If the court concludes that there was no constructive eviction, the Squads may still have a duty to mitigate any damages by reletting the property. Julie will be liable for any rents owed as a result of her breach minus the amount received in mitigation.
- E.** Whether the Squads may resort to self help to remove Julie's personal property from the apartment. At common law a landlord may have been allowed to resort to self help to seize a tenant's properties in exchange for rent due, although this practice has now been precluded by statute. Quigley v. Simon, 24 Md. App. 493, 332 A.2d 270 (1975); Maryland Real Property Code Annotated,

Section 8-301 *et. seq.* It would have been better for Squad to have sought a court order prior to entering Julie's apartment. Again, Julie may successfully argue that any rent assessed against her be offset by the value of the property taken from her apartment by the Squads.

Bar Counsel could file the following charges against the lawyers:

- A.** Lawyer Bob could be charged for telling his client to ditch possible evidence in advance of the trial (Rule 3.4); this bad advice also violates the requirement that a lawyer provide competent advice (Rule 1.1) and not engage in conduct involving fraud, deceit, or dishonesty. (Rule 8.4)
- B.** Lawyer Bob could be charged for claiming a specialty in evictions (Rule 7.4)
- C.** Lawyer Bob could be charged for directly contacting Julie (Rule 4.2)
- D.** Attorney Adam could be charged for the advance publicity which impugned Mr. Squad's character (Rule 3.6 (b)(1))
- E.** Attorney Adam could be charged for the advance publicity which promised the introduction of evidence which he reasonably knew could be inadmissible due to the spousal privilege (Rules 3.6(b)(5) and 8.4)

QUESTION 6

Trixie has no interest in Honeymoon Estate because the unilateral conveyance of a remainder interest to Trixie is void. Ralph and Alice owned Honeymoon Estate as Tenants by the Entirety. It is generally held that a tenancy by the entirety cannot be severed or divided by an individual spouse. 12 MLE, Husband and Wife, Section 66. Thus, a deed to Honeymoon Estate executed by only one spouse is ineffective. When Alice died, Ralph became the sole owner by virtue of the right of survivorship incident to the tenancy by the entirety. See, Barron v. Janney, 225 Md. 228, 170 A.2d 176 (1961)

When Ralph died in 1999, the property validly passed to Norton for life with a vested remainder to Mo and Larry as joint tenants. When Mo died in 1999, the conveyance by will to Shemp was invalid because Mo's interest passed to Larry by right of survivorship. Even though the law favors tenancy in common, the express language of Ralph's will stated "remainder to Mo and Larry as Joint Tenants with right of survivorship." Thus, when Mo died his interests passed to Larry.

At this point the only parties with an interest in Honeymoon Estate are:

- A. Norton (Life Estate), and
- B. Larry (remainder interest)

As a life tenant, Norton is entitled to all the ORDINARY uses and profits of the land but cannot lawfully do any act that would injure the interests of the remainderman (Larry). Moreover, a life tenant is obligated to preserve the land and structures in a reasonable state of repair. Absent a statute to the contrary, Norton's actions may not result in a forfeiture of the life estate. 28 Am Jur. 2d, Estates, Section 101. Under Section 14-102 of the Maryland Real Property Code Annotated, Larry can sue for damages suffered by the property as a result of Norton's actions. He may also file for an injunction against such continued acts. Larry should record his interest in the property as a further protection in the event that Norton attempts to transfer the property. Finally, as a practical response, Larry could insure the premises, since he has an insurable interest in the property and there is no requirement for the life tenant to obtain insurance.

QUESTION 7

Maryland Rule 5-609 governs the admissibility of prior convictions intended to be used for impeachment purposes. You should argue that the prior convictions for assault with intent to murder and distribution of cocaine are admissible only if:

- A. Each conviction is less than 15 years old; and
- B. Each conviction is for an infamous crime or the prior conviction is deemed relevant to Ben's credibility; and
- C. The Court determines that the probative value of admitting the evidence outweighs the danger of unfair prejudice to Ben.

You should argue the prior conviction for assault with intent to commit murder is not an infamous crime since it does not involve treason, a common law felony or crimes falsi, e.g., perjury, false statement, false pretenses, criminal fraud, etc. involving some element of deceitfulness bearing on Ben's propensity to testify truthfully. You should argue that even though murder was a common law felony, assault with intent to commit murder is not (see generally, Fulp v. St., 130 Md. App. 157, 745 A.2d 438 (2000), Watson v. St., 311 Md. 370, 535 A.2d 455 (1988)).

You should also argue that assault with intent to commit murder is not a crime relevant to Ben's credibility. Ben's prior conviction for that offense does not tell us anything about Ben's truth telling propensity.

Even if the judge should conclude that it is a prior conviction that can be utilized to impeach Ben's credibility, the Court, in applying the balancing test, should prevent its use. In weighing the probative value vs. prejudicial effect of the admissibility of the prior conviction, the Court should conclude:

- A. The prior conviction has little impeachment value — not relevant to trait for truthfulness.
- B. The prior conviction is eight years old with no evidence of subsequent bad acts.
- C. The very pronounced similarity between the prior conviction and the current charge is such that this jury might use the prior conviction for an improper purpose, i.e., to prove the likelihood Ben committed the murder of Al.
- D. Ben's entire defense rests upon the hope the jury will believe his testimony that he acted in self defense.
- E. Ben's credibility is central to his defense.

(See generally, Jackson v. St., 340 Md. 705, 668 A.2d 8 (1995))

Based on the above analysis, Ben should be allowed to testify without fear of impeachment because of the prior conviction for assault with intent to commit murder.

As to the prior conviction for distribution of cocaine ten years ago, the State would likely be successful in arguing that this conviction is relevant to Ben's credibility. Applying the balancing test referenced above, it is more likely that this conviction could be used for impeachment purposes by the state. (See generally, *St. v. Giddens*, 335 Md. 205, 642 A.2d 870 (1994)).

QUESTION 8

A. The police observed Max sitting in front of an open telephone equipment box with cut and pulled out wires, tools, and a hand set used to monitor or make telephone calls within several feet of him. Max told the police that he was just walking by and that he did not work for the telephone company. The police had no search or arrest warrants. The wire cutters, a common tool, were in his pocket and not in plain view. At the time of detention, the police did not know that the other tools were not generally available to the public. The Fourteenth Amendment guarantees to Max the right of protection against unreasonable search and seizures. However, there are exceptions. A warrantless search incident to an individual's lawful arrest is one of the exceptions. Given the suspicious circumstances, the police had reasonable articulable suspicion that Max was tampering with the telephone equipment box. The stop of Max by the police to investigate this suspicious behavior was a lawful *Terry* stop. Except for the wire cutters, all tools were in plain view. Max was detained by the police when he wanted to leave; he was told to "Stay here." At that point, Max was in police custody since a reasonable person would have believed he was not free to leave. The pat down of Max was permissible under *Terry* to determine if there were any weapons that Max may have sought to use to resist arrest or effect escape. The discovery and confiscation of the pair of wire cutters were lawful under the *Terry* search in order to safeguard any evidence from concealment or destruction. The police had probable cause to reasonably believe that a felony or misdemeanor had been committed by Max. A motion to suppress would not be successful.

B. The given facts are sufficient for a conviction of Max of willful and malicious molestation of the personal property of the telephone company. Max was sitting in front of the telephone equipment box and not just walking by. Wires were pulled out of the telephone equipment box and cut wires and tools were within several feet of Max. A pair of wire cutters were found in his possession. Max stated to the police that he did not work for the telephone company.

C. The given facts are not sufficient for a conviction for theft of the tools or for theft of telephone service. As to the tools, the facts place Max at the scene with the tools. However, the telephone company representatives identified the tools as the type used by the telephone company and not generally available to the public. Therefore, the tools at the scene were not identified as stolen. Only the potential for the theft of telephone service is given in the facts by the presence of the hand set which could be used to monitor or make telephone calls. No facts are given as to the telephone service.

See *Rosenberg v. State*, 129 Md.App. 221, 741 A.2d 533 (1999).

QUESTION 9

A. Venue and Grounds for Divorce.

The divorce action may be filed in Talbot County, where Ross resides; or in Cecil County, where Monica resides. §6-201(a) and §6-202 of Courts Article, Rule 9-201. Based on the facts the grounds are: (1) a two year separation, (2) Ross' adultery (since he is living openly with another woman in the Talbot County estate), and (3) a one year voluntary separation, since Ross voluntarily agreed to separate at Monica's request. §7-103 of Family Law Article.

B. Monica's rights with respect to custody, the stock, her inheritance, and the house.

1. Custody: The Court will make its custody decision based on the child's best interests. It is likely that as Monica was the primary caretaker for the children that she will maintain custody. There is no evidence that she is an unfit custodial parent.

2. The stock is marital property. Even though acquired after separation, it was acquired during the marriage. §8-201(e)(1) of Family Law Article. Monica may argue that she quit her job to spend more time with the children so Ross could work more hours for the company and the stock is a joint reward for the hard work and sacrifice. Although she clearly has a right as a monetary award, the court might award her less than half of the value of the property acquired by Ross while the parties were separated, since it was Ross' work during this period that created these assets. The relevant factors in determining the amount of monetary award are listed in §8-205(b) of the Family Law Article.

3. Monica's inheritance is not marital property because it was acquired from a third party. The bonds purchased with the inheritance remain non-marital property, as they are "directly traceable" to property acquired by inheritance. §8-201(e)(3) (ii) and (iv) of Family Law Article.

4. Cecil County Home: The home is marital property, as it is owned as tenants by the entirety. The Cecil County property is a family home since it is being used as a principal residence by Monica and the children. §8-20199(c) of Family Law Article. Despite joint ownership, the Court may, in granting a divorce, award Monica sole possession and use of the family home for a period not to exceed three (3) years. §8-208 of Family Law Article. And, may allocate the mortgage payments and expenses of the family home. In exercising its discretion the Court will consider the factors set forth in §8-208 of Family Law Article. Except for the three (3) years of "family use," the Home will be held by the divorced parties as tenants in common, and each will be entitled to ½ of the proceeds of the sale.

QUESTION 10

A. Review of The Master's Actions: Ross' lawyer must file written exceptions in the Circuit Court within five (5) days of the date the recommendations were served. Rule 9-207(d) requires that exceptions set forth the contested errors with particularity, or else they are waived. In order to avoid waiver, the exceptions should allege error in the two (2) evidentiary rulings and also that each of the specific factual findings and recommendations were erroneous. A transcript should be ordered and a hearing should be requested. Rule 541(i); Rule 9-207(g).

B. Right of Appeal: The order for temporary alimony, custody, child support and use and possession of the family home is an interlocutory order. Generally, interlocutory orders are not immediately appealable because a final judgment has not been rendered. §12-301 of Courts Article; Rule 8-131(d).

However, under §12-303 of the Courts Article, certain interlocutory orders are immediately appealable. These include: (1) an order with regard to the possession of property; . . . (3)(v) . . . or for the payment of money . . . [and] 3(x) depriving a parent with care and custody of his child ***.” The temporary (interlocutory) orders relating to use and possession, alimony, custody and child support all fall within the categories specified in §12-303, and are immediately appealable. See, Pappas v. Pappas, 413 A.2d 549 (1980).

C. Motion to Dismiss: The Separation Agreement was intended to fully resolve Ross' obligation to support Monica. The agreement specifically states that the provision with respect to alimony cannot be changed or is not subject to court modification, as required by §8-203(c) of the Family Law Article. Consequently, the court may not modify the amount of alimony, even though it is incorporated in a divorce judgment. §11-107(b) of the Family Law Article.

Child support, however, is always subject to Court review and modification based on changed circumstances. Here the circumstances of the injured child have changed materially between May 1 and July 1, 2000. Although the time is short, the court may modify its judgment as to child support from the date the motion for modification is filed. Family Law Article, §12-104.

QUESTION 11

Maryland has long followed the common law rule that, except as otherwise provided by law, an association of two or more persons to carry on as co-owners a business for profit results in the formation of a partnership, regardless of the intention of the parties. *See e.g. Rowland v. Long*, 45 Md. 439 (1876). The principle is now codified in the Maryland Revised Uniform Partnership Act. Maryland Anno. Code, Corporation and Associations Article §9A-202(a). Thus, unless there is a defense, Dentist, Artist and Lawyer are jointly and severally liable on the amount due to Vindictive Bank. *Id.* 9A-306(a). A corporation is a business entity designed to shield shareholders from personal liability and the existence of a valid corporation constitutes the most significant of the exceptions provided by law to the general rule imposing liability.

Articles of incorporation are effective in Maryland when accepted for recordation with the Maryland Department of Assessment and Taxation. *Id.* 1-206(a). When DAL borrowed the money from Vindictive, the articles were not recorded so there was no corporation. Thus, Dentist, Artist and Lawyer are personally liable on the loan unless they assert a successful defense. *Cranson v. I.B.M. Corp.*, 234 Md. 477, 200 A.2d 33 (1964).

Traditionally, two doctrines have been used by the courts to clothe an officer of a defectively incorporated association with the corporate attribute of limited liability. The first, often referred to as the doctrine of *de facto* corporations, has been applied in those cases where there are elements showing: (1) the existence of [a] law authorizing incorporation; (2) an effort in good faith to incorporate under the existing law; and (3) actual use or exercise of corporate powers. The second, the doctrine of estoppel to deny the corporate existence, is generally employed where the person seeking to hold the officer personally liable has contracted or otherwise dealt with the association in such a manner as to recognize and in effect admit its existence as a corporate body. *Id.* (Citations omitted).

The two doctrines overlap and Maryland's appellate judicial pronouncements on the subject have been described as "not at all clear" and "seemingly irreconcilable" by the Court of Appeals. *Id.* at 481.

The Court of Appeals in *Cranson* ruled that the defense of *de facto* corporation was not available if the failure of the corporate existence occurred as a result of defect in the conditions prerequisite to corporate formation. Thus, where, as in these facts, the Articles of Incorporation were never filed, the doctrine was of no avail.

The Court in the same case recognized that estoppel might apply where a creditor deals with the enterprise as if it were a corporation and does not rely upon the credit of the shareholders involved, it is estopped from asserting that the corporation was not in existence as a means of imposing liability upon the shareholders or officers.

However, either defense is available only if the officers or shareholders were acting in good faith. *Hill v. County Concrete*, 108 Md. App. 527, 538, 672 A.2d 667 (1996). In that case, the officer of the invalid corporation knew of the defects but failed to disclose them to the other party. Thus, it imposed liability. The defense of estoppel would not be available to Lawyer, as he knew that DAL, Inc. was not properly incorporated when the loan was finalized.

Lawyer's conduct also raise some concerns with regard to professional responsibility issues. First, he provided legal services to an entity of which he was a part owner. If it were determined that he was representing Artist and Dentist as well, he would have to follow the strictures of Maryland Rule of Professional Conduct 1.8(a) regarding financial dealings with clients. Second, his failure to disclose the fact that the articles of incorporation were not filed at the time of settlement is problematic. He is under a duty to take reasonable efforts to inform his client of significant developments in the matter he is handling. MRPC 1.4(a). He violated this rule. In addition, his silence in the face of the Bank's belief that the corporation was formed is arguably a violation of MRPC 4.1 (truthfulness in statements to third parties.) Finally, with regard to the collection action by the Bank, there is clearly a disparity of interests between him and Artist and Dentist. Artist and Dentist have defenses available to them but not available to Lawyer. If Artist and Dentist are successful in convincing the court that the Bank should be estopped from pursuing a claim against them personally, Lawyer's own liability is increased. Representing all three parties in the litigation would be a violation of MRPC 1.7(b) (conflict between client's interests and lawyer's interests.) Because the conflict is so fundamental, it is not a conflict that a client could waive, even after consultation with another lawyer.

QUESTION 12

The first issue is whether there was a contract, i.e. mutual promises supported by consideration, between the parties. The writing (which was signed by both parties) states that Old has agreed to convey her house to the Neighbors in return for their taking care of her as long as she can remain in it. The bargained-for exchange of promises forms a bilateral contract.

Is the contract enforceable against Old?

Contracts for maintenance and support are enforceable in Maryland if their terms are fair and equitable, *Mackey v. Davidson*, 222 Md. 197, 205, 159 A. 2d 838 (1960). The fact that the agreement does not extend to payment for care in a facility does not render the contract invalid. *Nowell v. Larrimore*, 205 Md. 613, 109 A.2d 747 (1954).

Every contract must be supported by consideration. Generally, courts will not examine the value of the consideration. However, inadequacy of consideration, when coupled with other factors indicating inequity in the making of the contract, will cause a court to grant equitable relief. *Straus v. Madden*, 219 Md. 535, 150 A. 2d 230 (1959). There is clearly consideration here in the Neighbor's promise to provide services in the future but their past services which were rendered gratuitously do not constitute consideration. *Ellicott v. Turner*, 4 Md. 476 (1853).

Old's best defense is perhaps frustration of purpose:

The general principle underlying commercial frustration is that where the purpose of a contract is completely frustrated and rendered impossible of performance by a supervening event or circumstance, the contract will be discharged. The courts in determining whether frustration will apply usually look to three factors. The first and probably most important is whether the intervening act was reasonably foreseeable so that the parties could and should have protected themselves by the terms of their contract. The courts then . . . consider . . . whether the act was an exercise of sovereign power or vis major, and whether the parties were instrumental in bringing about the intervening event. The courts have generally held that if the supervening event was reasonably foreseeable the parties may not set up the defense of frustration as an excuse for non-performance. *Acme Markets v. Dawson*, 253 Md. 76, 90, 251 A.2d 839 (1969) (Citations omitted).

Obviously, because of her injury, Old will never receive any benefit from the contract. A court may excuse her from performance if it concludes that her injury was not foreseeable and that she should not have been expected to protect herself by a term in the contract. A related defense, impossibility of performance, is not applicable because nothing prevents Old from performing her end of the contract, i.e. conveying the house to the Neighbors.

Old should also raise the defense of undue influence based upon what may be a fiduciary relationship between the Neighbors and her. If a person stands in a fiduciary relation to another, having rights and duties which he is bound to exercise for the benefit of that other, he will not be allowed to derive any unfair or unreasonable profit or advantage from the relationship. *Rice v. Himmelrich*, 222 Md. 234, 239 159 A.2d 647 (1960).

Old was heavily dependent upon the Neighbors both for physical assistance and for financial and bookkeeping help. If a fiduciary relationship exists, the contract is not void, rather the burden shifts to the Neighbors to show that the contract was fair and reasonable. In light of Old's age and the value of her residence on the one hand, and the degree of services provided by the Neighbors on the other, a court could find that the contract should be set aside. *See, e.g., Gamer v. Gamer*, 176 Md. 171, 4 A. 2d 132 (1939.)

Some candidates suggested that Old could raise the defense of duress. In Maryland:

[D]uress sufficient to render a contract void consists of the actual application of physical force that is sufficient to, and does, cause the person unwillingly to execute the document; as well as the threat of application of immediate physical force sufficient to place a person in the position of the signer in actual, reasonable, and imminent fear of death, serious personal injury, or actual imprisonment. *U.S. for use of Trance Co. v. Bond*, 322 Md. 170, 182, 183, 586 A. 2d 734 (1991).

The facts do not support the defense of duress.