FEBRUARY 2003 BAR EXAMINATION

QUESTIONS AND REPRESENTATIVE GOOD ANSWERS

QUESTION 1

Lois and Clark have been dating for six months. Lois becomes suspicious that Clark may be having an affair with her best friend, Megan. Lois calls her brother Jimmy, who works at a surveillance equipment store, and asks him to follow Clark.

The next day at approximately 3:30 p.m., Jimmy secretly follows Clark to Megan's apartment and sees Megan greet Clark with what he believes to be a romantic hug outside her apartment. Jimmy calls Lois and reports what he sees. Lois immediately says to Jimmy, "lets show the world what they're up to; you know what to do!" A few hours later, Jimmy sees Megan and Clark leave the apartment. Jimmy quickly slips a credit card into Megan's apartment door jamb and unlocks the door. Jimmy then conceals a video camera equipped with a microphone under a large lamp in Megan's bedroom. As Jimmy leaves the apartment he takes Clark's antique Superman watch worth $5,000, which is on a counter. A few minutes later, Megan and Clark return to the apartment and go into Megan's bedroom to watch the Twilight Zone marathon on TV.

Angered by the thought of betrayal, Lois calls Megan and begins to threaten Megan with violence and then says to her, "I know what the two of you have been up to, and soon everyone else will too." Annoyed by the call, Megan tells Lois not to call any more. Recognizing that it was Lois, Megan tells Clark what was said. Clark, who is always quick on his feet, tells Megan that if Lois calls again they should press the memo button on Megan's phone and "record everything Lois says as evidence for the police." When Lois calls again, Clark presses the memo button after Megan answers the phone and then records Lois' profanity laced tirade directed towards Megan and him. Megan begins to laugh so hard at what is going on she knocks over the large lamp. Megan and Clark see a black box with wires attached. At first they do not know what the item is until they follow the wires to the video camera. They then watch the tape which was in the camera and realize that it recorded everything they said and did from the time they returned to the apartment.

Megan calls the Montgomery County Police. The police do a thorough investigation and accurately report to you the sequence of events as stated above, all of which occurred in Montgomery County, Maryland. You are the Assistant State's Attorney for Montgomery County assigned to analyze the potential criminal charges.

What charges would you bring, and against whom? Discuss the facts that substantiate each charge and any defenses you believe the defendant(s) may assert.

REPRESENTATIVE ANSWER 1

As Assistant State's Attorney I would charge as follows:

Lois:

Conspiracy, solicitation, harassment, wire tapping, burglary.

Jimmy:

Conspiracy, wire tapping, larceny, burglary.

Facts state that Lois "calls her brother Jimmy and asks him to follow Clark." The facts also state that Lois says to Jimmy "lets show the world what they're up to; you know what to do!" Lois was soliciting Jimmy to use his knowledge of surveillance equipment to tape Clark and Megan. As soon as Jimmy acted on Lois' suggestion, he had conspired with Lois to that end. All crimes which further the conspiracy are imputed on the conspirators, thus when Jimmy broke into Megan's apartment, Lois would also be guilty of that crime. Since the larceny of the watch was not in furtherance of the conspiracy, Jimmy alone would be guilty of that crime. Also, both Lois and Jimmy would be guilty of the wire tapping of Megan's bedroom. It can be also said that the phone call that Lois made to Megan is not in furtherance of the conspiracy, so Jimmy would not be guilty of harassment.

As for Megan and Clark pushing the memo button on the answering machine and taping everything Lois said is also illegal wire tapping. It should be pointed out that the facts state that Lois was in a tirade and was assaulting Megan with threats. Therefore, Megan could argue that Lois had no expectation of privacy since she was being so vocal, therefore the taping was acceptable.

Lois and Jimmy may both argue that a conspiracy was never formed since Jimmy never said anything in response to Lois' statement. This will most likely not work because Jimmy agreed to Lois' solicitation by his actions.

All charges brought would ultimately be decided by the judge or jury.

REPRESENTATIVE ANSWER 2

ISSUE LIST: CONSPIRACY, SOLICITATION, STALKING, HARASSMENT, BURGLARY, BREAKING AND ENTERING, UNLAWFUL RECORDING, LARCENY, TELEPHONE HARASSMENT.

1. SOLICITATION – LOIS WOULD BE CHARGED WITH SOLICITATION WHEN SHE ASKED JIMMY TO FOLLOW CLARK.

2. CONSPIRACY – ONCE JIMMY SECRETLY FOLLOWED CLARK, THE NEXT DAY THAT WAS HIS ASSENT TO ENTER INTO THE AGREEMENT FOR AN UNLAWFUL PURPOSE. JIMMY AND LOIS MAY THEREFORE BE CHARGED WITH THE CONSPIRACY.

SOLICITATION – WILL MERGE INTO CONSPIRACY.

COUNTER ARGUMENT – THE DEFENDANTS WILL ARGUE THAT THERE WAS NO CONSPIRACY AT THAT POINT, BECAUSE JIMMY NEVER VERBALLY AGREED TO DO ANYTHING.

STATE S ARGUMENT - ONCE LOIS SAID LETS SHOW THE WORLD … JIMMY THEN ENTERED MEGAN S APARTMENT BECAUSE HE WORKED AT A SURVEILLANCE STORE AND IMMEDIATELY BEGAN TO SET UP THE CRIME.

3. BURGLARY – JIMMY AND LOIS WOULD ALSO BE CHARGED WITH BURGLARY BECAUSE JIMMY USED A CREDIT CARD TO GET INTO MEGAN S APARTMENT WITHOUT HER PERMISSION TO COMMIT A CRIME THEREIN.

4. UNLAWFUL RECORDING – WHEN JIMMY CONCEALED A VIDEO CAMERA WITH A MICROPHONE UNDER THE LAMP, HE DID SO WITHOUT MEGAN S PERMISSION AND HE DID SO IN FURTHERANCE OF THE CONSPIRACY. THEREFORE, JIMMY AND LOIS WILL BE CHARGED WITH THIS CRIME.

5. LARCENY – JIMMY MAY BE CHARGED WITH LARCENY FOR STEALING THE WATCH WORTH $5,000.

6. TELEPHONE MISUSE/ABUSE – WHEN LOIS CALLS AND USES PROFANITY TOWARDS MEGAN THIS IS AN ABUSE OF THE USE OF THE TELEPHONE.

CLARK AND MEGAN

CLARK AND MEGAN CAN BE CHARGED WITH ILLEGAL RECORDING FOR RECORDING LOIS WITHOUT HER PERMISSION.

COUNTER ARGUMENT

CLARK AND MEGAN WILL ARGUE THAT THEY DID THIS TO PRESERVE EVIDENCE OF LOIS HARASSMENT.

QUESTION 2

Alice was found raped and murdered in her row house in Baltimore City. The police brought Bob, an 18 year old high school drop-out, to the police station for questioning about Alice's rape and murder. Bob was told that he was not under arrest. He was, however, given his Miranda warnings and he voluntarily waived his Miranda rights.

During questioning, Sergeant Carl showed Bob a written scientific report that had been fabricated. The report was written on Police Department stationery. The Sergeant told Bob that the report was genuine and indicated that test results revealed Bob's semen was found in Alice's underwear. Bob continued to maintain his innocence during questioning. The Sergeant also told Bob that his fingerprints were found at the scene, which, in fact, was not the case. Again, Bob continued to maintain his innocence.

Approximately four hours into the interrogation, Captain Douglas took over the questioning after giving Bob something to eat and drink and letting him use the bathroom. He began his questioning by telling Bob that "he would be better off if he told the truth". At one point, Captain Douglas told Bob that "if he confessed to the crimes, he may be eligible for medical treatment instead of getting locked up for the rest of his life and the key thrown down the sewer". After several unproductive more hours of questioning Captain Douglas left the room leaving Bob alone in the interrogation room for about one-hour. At that time Bob requested to see Lieutenant Frank who he had known growing up. Bob gave a written statement confessing to the crimes to Lieutenant Frank. Bob has now been indicted for the rape and murder of Alice.

Assume that the above facts are established at a suppression hearing. Discuss fully the arguments for and against the admissibility of Bob's written statement.

REPRESENTATIVE ANSWER 1

Arguments Against Admissibility of Bob's Statement:

I. The test is whether under the totality of circumstances the statement was voluntary. If it was, it is admissible. The factors that weigh against admissibility are:

a. Bob's education, only a high school drop out.

b. Told he was not under arrest though he was in custody and not free to leave.

c. Police tricked him by showing him fake report about semen and fingerprints.

d. The length of interrogation, four hours straight, is too long and made Bob's will more vulnerable.

e. A change of officers in questioning Bob; the interrogators were fresh and rested while Bob was fatigued.

f. The questioning continued two more hours after that.

g. Promise of treatment and leniency were made to Bob. The above factors weigh against the admissibility of Bob's statement as Bob was pressured primarily by the length of time of interrogation, by the misstatements to convince him that he might as well fess up as the scientific evidence was against him and by the promise that he'd be better off (get treatment or leniency) if he gave statement. If Bob's statement, in the end, is deemed voluntary, it is admissible.

II. Factors in favor of admissibility:

a. While the officers' interrogation may have been too long, Bob did not break during those two long periods of interrogation.

b. Officers may use trickery to interrogate suspects. Even though they did not have the scientific evidence (semen and fingerprint analysis) they told Bob they had, Bob maintained his innocence during that part of the questioning, also.

c. While the questioning was long, 4 hours and 2 hours, there were breaks, including one when Bob got food and water and a chance to use the bathroom.

d. Bob only confessed after being left alone for an hour. It is more likely he confessed as a product of his own self reflection than as a result of the tactics by the police.

e. Bob confessed to Lt. Frank, someone he knew growing up. Bob requested Lt. Frank; Frank was not brought in to put pressure on Bob. Bob could have continued to deny his involvement to Frank and asked Frank for assistance in obtaining relief (asked for a lawyer or asked to be released), but instead Bob confessed.

Despite the interrogation tactics, it will likely be found that Bob's statement was a product of self-reflection and will be deemed voluntary and admissible.

REPRESENTATIVE ANSWER 2

This question involves the voluntariness, or lack thereof, of a confession. Under Maryland law, where a confession is found to be involuntary, it will be inadmissible and accordingly suppressed at a suppression hearing. The arguments for and against the admissibility of Bob's confession will be discussed in turn.

The arguments for admissibility based on the voluntariness of the confession are as follows:

First, because Bob was told he was not under arrest, it may be argued that the interrogation was non-custodial. Moreover, Bob indicated/evidenced his awareness and willingness to cooperate by waiving his Miranda rights when read (it should be noted that although he is a high school drop out, Bob is 18, which also supports the inference of a knowing and voluntary waiver of his right to counsel). Additionally, although Bob was in the interrogation room for at least 7 hours (four hours and "several more" and an hour alone in the room), he was given food, drink and the opportunity to go to the bathroom.

Of additional significance, in indicating the voluntariness of his confession, is that Bob asked to speak to a police officer he had known all his life, following what may be referred to as an hour of "quiet contemplation". The hour of reflection, coupled with his request to speak to Frank, a man he had know growing up (reminder: he is only 18 now), gives added weight to an inference/presumption of voluntariness. Finally, although the police did tell Bob false information regarding the semen and fingerprints evidence, Bob's confession was voluntary, as it was sufficiently removed in time to support an inference of voluntariness.

There are, however, strong arguments against the admissibility of Bob's statement. At the time it was made, Bob had, as argued, supra, been in the interrogation for at least seven hours. Additionally, even though Bob was alone in the room for the hour prior to his statement, he had been through 4 plus "several more" hours of interrogation and may have had a reasonable belief that he couldn't leave.

Although, moreover, Bob had an hour of solitary contemplation in the room, arguably, this created panic in Bob following Douglas statement that if he told the truth, he may not be "locked up for the rest of his life". Leaving Bob alone in a potentially small interrogation room after so many hours of interrogation and the reference to being locked up forever, gives strong support for an argument that the subsequent confession was involuntary. Finally, the officer's false information re: the semen and fingerprint evidence is substantial evidence that Bob's confession was improperly coerced by the police. Accordingly, it would be deemed involuntary and, thus, inadmissible.

QUESTION 3

Mutt sued Jeff for fraud in the Circuit Court for Anne Arundel County, Maryland. He filed with his Complaint a motion for summary judgment with an accompanying affidavit supporting the motion. The Clerk of the Circuit Court issued the summons requiring a response within 30 days of service. Mutt employed a private process server to serve the summons, Complaint, motion and affidavit. The private process server went to Jeff's home in Glen Burnie, Anne Arundel County, Maryland, knocked on the door, but received no answer. He taped the summons with the accompanying suit papers on the door of Jeff's home and in his return of service filed with the Circuit Court stated that Jeff had been served.

Upon returning from a business trip the next day, Jeff found the summons and accompanying suit papers taped to his door. Jeff contacted his attorney 45 days later to represent him in Mutt's suit against him.

a. Based on the given facts, what papers, pleadings and defenses may be filed on behalf of Jeff at this time? Explain fully.

b. Assume the additional facts that before Jeff filed a response, Mutt filed a motion for order of default against Jeff for failure to respond within 30 days of service, which the Court signed. What response may be filed on Jeff's behalf to this order for default? Explain fully.

REPRESENTATIVE ANSWER 1

A. Jeff must first file a preliminary Motion to Dismiss, pursuant to Rule 2-322, on the grounds that there was an insufficiency of service and process. This Motion to Dismiss, including this mandatory defense, must be filed before the Answer or the defense is waived.

Generally, an Answer is due 30 days after service of the Complaint. However, pursuant to 2-321, when a preliminary Motion is filed, the time for filing an Answer is extended without special Order to fifteen days after entry of the Court's Order on the Motion. Since Jeff will be filing a preliminary Motion to Dismiss, his Answer will be due fifteen days after the Court rules on this Motion.

Since Jeff is a resident of Maryland and the suit was filed in Anne Arundel County, there are no other issues with regard to personal jurisdiction or improper venue. Further, the process itself appears to be fine.

In Jeff's preliminary Motion to Dismiss for insufficient service of process, he will argue that the summons and accompanying suit papers were never properly served. They were taped to his door. Pursuant to Rule 2-121(a)(2), if the person to be served is an individual, service can be had by leaving a copy of all relevant documents with a resident of suitable age or discretion at the individual's dwelling, house or usual place of abode. Process was not left with anyone,

suitable or otherwise, and the process server incorrectly indicated to the Court that Jeff had been properly served.

With regard to the Motion for Summary Judgment, a response is due within the time allowed for a party's original pleading , which is thirty days after the service of Complaint. Jeff will not have to respond to the Motion for Summary Judgment until a decision is made on the Motion to Dismiss and Jeff is required to file an Answer.

B. In response to the Default Order entered against Jeff, I would advise him to move to vacate the Order of Default within thirty days after entry, pursuant to 2-613(d). Jeff needs to set forth the reasons for his failure to plead and the legal and factual basis for the defense to the claim. Jeff will need to argue that service of process was insufficient and that Jeff is in the process of filing a preliminary Motion to Dismiss for insufficiency of service of process. The Court will have to decide whether there is a substantial and sufficient basis for excusing Jeff's failure to plead and thus vacating the Order. The Order is likely to be vacated because Maryland disfavors Default Judgments.

REPRESENTATIVE ANSWER 2

A. Jeff's attorney should first file a mandatory preliminary Motion to Dismiss under Rule 2-322(a) for insufficiency of service of process. Under Rule 2-121(a), service to an individual should be made by leaving the papers at the individual's dwelling home with a resident of suitable age and discretion or by mailing it by certified mail, restricted delivery. Therefore, Mutt's process server's service, by taping the papers to the door, was insufficient.

This preliminary Motion must be filed before Jeff files his Answer to Mutt's Complaint.

Next, Jeff's attorney must file an Answer that may contain permissive defenses. However, under Rule 2-321(a), this Answer must generally be filed within 30 days of service*. This time line would be impossible for Jeff's attorney to meet since he was not even contacted until 45 days thereafter (* the 30-day rule applies since Jeff is an individual, Maryland resident).

Therefore, Jeff's attorney would need to petition/file for an extension in order to file his Answer.

Assuming extension is granted, which is especially likely due to the insufficiency of the service of process, Jeff's attorney must file both an Answer to Mutt's Complaint, as well as a Response to Mutt's Motion for Summary Judgment.

A response to Mutt's Motion for Summary Judgment must be made within 15 days, or in this case, within 30 days, the deadline for Jeff's original pleading, since it is later, under Rule 2-311(b). However, because this response will require Jeff to "state with particularity" his grounds, Jeff's attorney may file a preliminary Motion for a more definite statement in his Answer so that he may sufficiently support his response. An affidavit will also be needed since Mutt included one in his Motion . Any other negative or affirmative defenses under Rule 2-323,

such as statute of limitations, may also be included in the Answer which will be due in 30 days under Rule 2-321(a) – BUT will be automatically extended to 15 days after Court's entry on Jeff's mandatory preliminary Motion or more definite statement under Rule 2-321(c).

B. Under Rule 2-613(d), Jeff must move to vacate the Order of Default within 30 days of its entry. This Motion should explain Jeff's reasons for failing to plead, as well as the legal and factual basis for his defense. If the relevant arguments outlined in Section (a) convince the Court that there is a substantial and sufficient basis for an actual controversy as to the merits, the Order will be vacated. However, due to Jeff's 45 day delay after service, the Court may be inclined to enter the Default Order.

QUESTION 4

Lester was the star player for the Baltimore Bombers professional football team. As a celebrity, he volunteered as a spokesperson for many youth organizations. He made numerous public appearances throughout Maryland on behalf of these organizations.

While Lester was serving as spokesperson, several of the organizations were rocked by revelations of child abuse within their ranks. Stories of child molestation by employees of these youth organizations were regularly reported in the media. Lester was not involved in the incidents.

At the height of the controversy, "The Zookeeper" a local radio personality known for his controversial and tasteless humor, commented on the scandal and jokingly referred to Lester as "Lester the Molester." Zookeeper did not believe Lester was involved in child abuse, and intended his comment to be taken as a joke by his audience. Radio, Inc., owner of the radio station which employed Zookeeper, did not authorize Zookeeper to make the remark and promptly issued a statement disapproving of Zookeeper's "joke."

This joke was heard by many listeners of "The Zookeeper's" show, and caused Lester a great deal of embarrassment. He also received numerous anonymous telephone threats and disparaging letters, referring to him as a child molester. As a direct result of this comment, Lester was asked to resign from his role as spokesperson by one youth group.

Angered by Zookeeper's comment, and bothered by the letters and phone calls, Lester comes to you, a Maryland attorney, to discuss bringing a defamation action against Zookeeper and his employer, Radio, Inc.

Advise Lester of his legal rights to obtain damages against both Zookeeper and Radio, Inc. and the defenses likely to be raised.

REPRESENTATIVE ANSWER 1

To maintain an action for defamation in Maryland, Lester (L) must show: 1) a defamatory statement; 2) which was publicized to others; 3) damages; 4) that the statement was false; and 5) that the speaker had the requisite degree of fault. As L is a public figure, the requisite degree of fault is actual malice in this case. Also, since this is slander per se because it relates to a crime of moral turpitude (child molestation), L need not show any damages – they are presumed.

Against Zookeeper (Z)

1) Z clearly made a defamatory statement by referring to the child molestation incident and then calling L "Lester the Molester."

2) The statement was widely heard over the radio and thus was publicized.

3) Damages are presumed, but L may recover punitive damages by showing Z's malice when making the statement. Z must have made the statement knowing that it was false or recklessly failing to research whether it was true or false. Z had the requisite malice since he knowingly made the false defamatory statement. It doesn't matter that he intended it as a joke, it is still malicious. As a result, L may recover punitives, as well as recover for any actual economic loss that occurred for harm to his reputation. This would include harms occurring for his loss of his spokesperson role, and any loss in economic value that his reputation may have suffered (future endorsement value, etc.). However, he likely can not recover for the phone threats and letters under defamatory action, since they are not linked to any economic harm.

4) L must prove that he was not a part of the child molestation case, in fact.

5) Z had the requisite malice (see #3 above).

L may recover against Z in defamation.

As against Radio, Inc. (R)

L would be suing R under the theory of vicarious liability for the tort of its employee, Z. This is an agency issue turning on whether Z would be an independent contractor or a servant. Here, Z is likely a servant of the radio station, since he probably only broadcasts on that station and is paid a long – term salary.

Servants can create vicarious liability for their employers (principal) for torts committed during the scope of their employment. In this case, Z was working at the radio station, doing his "normal" job of making tasteless wisecracks that were often controversial, when he made the defamatory statement. This is what he was paid to do, performed when and where he was paid to do it, and arguably done at the behest of R, the employer, who arguably implicitly authorized Z to make these kinds of statements (since it had notice of previous similar conduct by Z).

However, R will defend by saying that this conduct was committed by Z in a personal capacity, since it was not authorized in the scope of Z's employment agreement with R. In that case, R would not be vicariously liable for Z's defamation.

However, R may also be liable to L for negligent hiring and supervision of its employee, Z. L will likely be able to recover money damages on this theory as well.

REPRESENTATIVE ANSWER 2

First, I would explain to Lester (L) that defamation is a false publication of facts of someone that seeks to impugn their character. Defamation can take two forms, slander (spoken defamation) and libel (written defamation).

Lester (L) v. Zookeeper (Z) (L v. Z)

L is a public figure because he is a star football player and a celebrity and can sue Z for slander by referring to L on his radio show as "Lester the Molester". L will have to show malice as a public figure that Z made these comments in an intentional and reckless manner.

Here, the facts show that Z knew that L was not involved in any of the child abuse but still decides to defame him on the radio to his listeners. Certainly, L would argue that this behavior by Z constituted malice.

L can also pursue Z on the theory of libel if as a result of Z's show, L began receiving hate mail and disparaging letters from the radio listeners referring to him as a child molester.

L should also assert that because Z's actions were so egregious that he should be charged with per se slander because his comments infringes L's ability to continue as a spokesperson making L have to resign as a spokesperson.

As a result L would be entitled to compensatory and punitive damages against Z because his comments were clearly made with malice.

Lester (L) v. Radio, Inc. (RI) (L v. RI)

L can sue RI in respondeat superior for Z's actions on his radio station. L's cause of action would be that RI is vicariously liable for Z because Z works for RI and his comments were made within the scope of his employment and was to benefit his employer RI. L can argue that his comments certainly benefitted RI as evidenced by the many listeners who heard the joke and responded with threats and letters to L.

However, RI would argue that Z did not have any authority to make such statements and therefore RI should not be liable. Furthermore, RI issues a statement disapproving of Z's comments. RI did not ratify any comments made by Z and if they are held liable they could seek indemnification from Z. L will not be able to obtain any damages from RI because their actions were swift and curative to prevent liability. RI will state that Z's comments were outside the scope of his employment because RI did not authorize Z to make the remark.

Z will argue that his comments were only a "joke" because the nature of his show is controversial and tasteless, thus there was no malice intent. At the very least, his comments were tasteless humor. However, this argument will fail because of the repercussions that happened to L resulting in the phone threats, letters and finally his losing his spokesperson position.

QUESTION 5

Zookeeper, a local radio personality, broadcast a show in which he referred to Lester, a popular professional athlete, as "Lester the Molester."

Within two weeks of the broadcast, Lester filed suit in the appropriate Maryland Court against Zookeeper and his employer, Radio, Inc. Lester alleged that listeners to the Zookeeper Show understood the comment to mean that Lester was a child abuser and that the comment was false. Lester claimed compensatory and punitive damages. Zookeeper and his employer defended on the ground that Zookeeper's comment was intended as a joke, and that Zookeeper had no intention of accusing Lester of child abuse.

PART A

During discovery, Lester's counsel deposed Mary Smith, a telephone receptionist at Radio, Inc. She testified that in the hours following Zookeeper's broadcast, she received approximately 10 calls from unidentified persons who said they'd heard on the Zookeeper Show that Lester had molested a child and wanted to know if this was true.

At trial, Lester's counsel calls Ms. Smith as a witness and, after, laying a proper foundation, asks:

"Would you tell the jury about the substance of some of these calls you received?"

Both defense counsel object.

Should the trial court overrule or sustain the objection? State your reasons clearly.

PART B

As part of his case in chief, Lester calls the president of a local youth organization to testify as to: 1) his opinion that Lester was a person of very good character and excellent reputation; and 2) specific instances of public appearances by Lester which had helped the organization.

Both defense counsel object to this testimony.

Should the trial court sustain or overrule the objection? State your reasons clearly.

PART C

As part of his case in chief, Lester sought to introduce a letter, which the President of Radio, Inc. wrote to him two days after Zookeeper's broadcast. In relevant part, the letter said:

"Radio, Inc. apologizes for the outrageous and untrue remarks by Zookeeper. Enclosed is our check to you for $1,000, which we offer to resolve this incident."

Both defense counsel object to this letter. **How should the trial court rule on the objection? State your reasons clearly.**

REPRESENTATIVE ANSWER 1

A. The trial court should overrule the objection. The defense will object on the ground that the calls are hearsay. Hearsay is an out-of-court statement offered in court to prove the truth of the matter asserted. No question the calls are out-of-court statements, involving hearsay and double-hearsay (what Ms. Smith said is hearsay, her reporting others questions is also hearsay). However, the calls are not being used to prove the truth of the matter asserted – that Lester is or isn't a child molester. Rather, they are offered to prove something else – the wide nature of the dissemination of the remark, and offered to prove that it raised the question in the minds of the listeners. Thus it's for their state of mind, not truth.

B. The court should overrule the defense objections. Such Character evidence is permissible by the plaintiff and about the plaintiff in a civil case when character is at issue, as it is in a defamation case. Defense might object that it's not in fact at issue because they admit that their statement was false. However, this may be important for damages and character is still the issue in the case. Ordinarily reputation evidence is permitted while past specific acts are not, but a defamation case makes it all admissible.

C. The court should sustain in part and overrule in part. The first sentence contains an apology and acknowledges that the remarks were outrageous and untrue. This is an admission by a party-opponent and is therefore admissible. The second sentence is a settlement offer, and settlement offers are inadmissible regardless of whether they are accepted or not. (An exception would be a "Mary Carter" agreement wherein one defendant secretly settles yet remains in the case.) Thus the court should order the second sentence redacted and admit the rest of the letter.

REPRESENTATIVE ANSWER 2

A. Court should overrule the objection and allow Ms. Smith to answer.

1. Ms. Smith's testimony is relevant on the subject of damages. If proven, it simply shows that there might have been causation; that from hearing Zookeeper (Z)'s broadcast, people believed Lester might have been a child molester.

2. Ms. Smith's testimony is hearsay. Hearsay is an out of court statement made and offered to show the truth of the matter asserted therein. Ms. Smith's testimony is not being offered to show that Lester is a child molester. However, it is being offered to show that people heard Z's broadcast and then wanted to know if it was true. But, at the same time, the callers did not say they believed what Z said, but that they wanted to know if it was true. Such out-of-court

statements can be admitted to show a party's belief, reason, intent, bias, emotion or knowledge. Such statements can be admitted even though it may be considered hearsay.

B. Generally, character testimony is not allowed into evidence unless it (character) goes to the heart of the action.

Here, since Lester is presumably suing Zookeeper and Radio for defamation, character testimony is especially relevant. As such, Lester can call the witness to testify as to his opinion of Lester's good character.

The witness' testimony about Lester's public appearances which helped the organization may also be admitted if it is relevant to the defamation cause of action. The facts in this question does not say anything about Lester being asked to resign as a spokesperson. Assuming that to be true, then such testimony should be admitted.

The court should overrule the objection

C. As stated above, hearsay is an out-of-court statement being offered for the truth of the matter asserted therein. Hearsay is usually not admissible but there are exceptions.

Lester offers this letter. The court should overrule the defense counsel and admit this under the hearsay exception of an admission by a party opponent. The letter admits to Z's outrageous and untrue remarks and admits to Radio's liability as Z's employer under the theory of respondeat superior. Understandably, the defense counsel would argue that a settlement offer (such as this one - $1000.00) should be inadmissible because its prejudicial effect outweighs any probative value. As such, the court, in its discretion may admit the 1st sentence and not admit the second part, the offer.

QUESTION 6

The newly enacted Federal Homeland Security Law, provides in relevant part, as follows:

> "It is illegal for any person who is not a citizen of the United States of America, to enroll in any college or university within the United States without first registering with the Federal Office of Homeland Security. Failure to register will result in deportation... . It is illegal for any business engaged in interstate commerce to transport items of commerce across State lines unless it has first registered with the Federal Office of Homeland Security. States are permitted to enact laws in due exercise of these provisions."

In response to this legislation, and in concern for its residents located so close to the nation's capital, the Maryland General Assembly enacted the following two laws:

> "Any truck or vehicle that weighs more than 5, 000 pounds and does not have a Maryland license plate and is traveling within the State of Maryland, is subject to a daily search of its contents at the nearest weigh station."

> "No foreign born person, regardless of citizenship, may register in any college within the State of Maryland without having first received a security clearance from the Maryland State Police."

The Lawson sisters have asked that you, a Maryland attorney, challenge the Maryland laws. Mary Lawson, a U.S. citizen, was born in Mexico City, Mexico, and has been accepted into the University of Maryland. She would prefer not to have to go through the hassle of obtaining a security clearance. Sara Lawson is a truck driver whose business is based in northern Virginia. It would greatly impede timely deliveries if she had to have her truck searched every time she makes a delivery in Maryland.

What challenges would you make to the Maryland laws, and why? Discuss fully.

REPRESENTATIVE ANSWER 1

The Commerce Clause as applied to the states through the 14th Amendment does not allow the states to place an undue burden on interstate commerce. Here, Sara has standing to challenge the law because the law states any truck or vehicle with more than 5, 000 pounds and no MD license plates is subject to a daily search. Sara is a truck driver from Virginia. Since Sara is not a member of a suspect class and no fundamental right is being violated she will have to prove that the law is not rationally related to a government interest. Here, the state is following the Federal Homeland Security Law so it is rationally related to a legitimate government interest. However, the law places an undue burden on interstate commerce, so it violates the commerce clause. Out-of-staters have to be subject to inspections that impede on the time of deliveries.

Sara may also state that her due process rights applied to the states through the 14th Amendment are being violated. She is being deprived of her right to travel for business through Maryland without being subjected to a search.

Sara may also state that her equal protection rights as applied to the states through the 14th Amendment are being violated. Trucks and vehicles that weigh less than 5,000 pounds with Maryland license plates are being treated better with no inspection as opposed to trucks that weigh more than 5, 000 pounds and have out-of-state license plates.

Mary may challenge the law as over broad. It includes all foreign-born persons regardless of citizenship. Mary may challenge that her rights to an education are being violated. Since Mary is not an alien because she is a U.S. citizen and there is no fundamental right to an education she will have to use the rational basis test. The law is not rationally related to a legitimate government interest. The government of Maryland is to comply with the Federal Homeland Security Law that states it is illegal for any person who is not a citizen of the United States to enroll in any college without registering. If the states are permitted to enact laws that are inconsistent with the federal law then the law will not be deemed rationally related.

Mary's equal protection rights via the 14th Amendment are being violated because foreign-born persons who are citizens of the United States are being treated differently than citizens who are not foreign born.

Mary's due process rights via the 14th Amendment to life, liberty and property are also being denied. She, as a United States citizen, is not allowed to attend the University of Maryland without obtaining a security clearance.

REPRESENTATIVE ANSWER 2

Standing:

Mary's standing to challenge the registration requirement depends on whether she actually intends to attend the University of Maryland. If so, the need to obtain a police clearance would be a concrete detriment providing standing. However, if she has been accepted to colleges out-of-state, Maryland could argue she lacks standing as she has not established any effect on her yet.

Sara's standing is also open to attack. The truck law does not state that searches of out-of-state trucks have to be conducted, only that they may. Sara's fear of being searched is not a concrete injury.

Assuming each has standing, the following challenges may be brought.

Truck Law:

Sara can challenge the truck law as a violation of the Commerce, Equal Protection and Privileges and Immunities Clauses. If the law places an undue burden on interstate commerce, Maryland must show that it was necessary to achieve an important governmental purpose. Sara can argue that the daily searches on out-of-state trucks burden commerce and are not necessary to achieve safety. The State will counter that the act is within its police powers and that Congress expressly authorized it in the Homeland Law.

Sara can argue that the law discriminates against out-of-state truckers and impairs their ability to earn a livelihood, in violation of the Privileges and Immunities Clause. Based on this, the Law must be necessary to achieve an important purpose.

Under an equal protection analysis the discrimination against out-of-staters would only trigger a rational basis review, as they are not a protected class, so this is a weaker argument for Sara.

Student Registration Law:

It may be a violation of the Equal Protection Clause. Aliens are a protected class, so the targeting of them triggers strict scrutiny and the requirement must be necessary to achieve a compelling state interest. The State will not be able to meet this burden, given that the federal government is implementing national measures.

The power to regulate immigration is reserved solely for Congress under the Constitution and the State may not interfere. The authorization to enact laws consistent with the Homeland Security Law cannot override the Constitution. The State will counter that Congress can delegate such authority to act.

Question 7

In December 2002, the Grays bought a large farm in Anne Arundel County from Joe Owings. Across that farm was a dirt road, fifteen feet wide. This road went between Route 2 and Makin Road, which are two public roads. The dirt road is located completely on the Grays' property.

The Smiths live directly across from the Grays' property on Makin Road. They have lived there since 1985 and often use this dirt road as a short cut from Makin Road to Route 2. The Smiths acquired their property from the Jones who had owned the property since 1953. Mr. and Mrs. Jones and their son Joe still live in the area. Joe recalls using the dirt road as a shortcut when he drove to high school in 1973 and 1974. Mr. and Mrs. Jones said that throughout the time they lived on Makin Road, several neighboring families often used the dirt road as a short cut to Route 2. They said Owings was aware of the situation because they remember often seeing him waving at the cars. Mr. and Mrs. Jones said they didn't recall using the road themselves more than once or twice and don't recall ever discussing the use of the road with Owings.

The Smiths had never discussed their use of the "shortcut" with Owings but were long-time friends.

The Grays do not know the Smiths. After seeing the Smiths drive across this dirt road, they decided to put up a locked gate at the entrance to the dirt road at Makin Road so that neither the Smiths nor anyone else could use the road.

The Smiths have come to your firm to inquire as to their right to continue to use the road and have the gate taken down.

What legal theory or theories can be used to establish the Smith's right to use the road? Based upon the facts as presented, how will a court rule? Explain your answer fully.

REPRESENTATIVE ANSWER 1

The only legal theory to support or establish the Smith's right to use the dirt road would be to argue there is an easement created in the dirt road. There are four ways in which an easement is created; through necessity, express grant, prescription and implied.

1. The facts do not indicate the existence of a grant given by the Owings.
2. Neither is there any indication that the Owings once owned the Smith's land as well and used the dirt road, thus creating an implied easement.
3. There is no indication of necessity on the part of the Smiths to get from Route 2 since Makin Road is in front of the home and is a public road.
4. The only legal theory that would support the Smith's right would be an easement by prescription.

To obtain or create an easement by prescription, the Smith must show there has been continuous, open and notorious actual use of the dirt road for the statutory period that was hostile to the owner of the servient land-in this case the Owings.

The facts indicate that the Smiths have been using the dirt road for 17 years. While I can't recall if the period of years for adverse possession in Maryland is 15 or 20 years, it appears all the other elements would be met. The Smiths state that they often use the dirt road to get to Route 2 openly and the Owings were aware. Yet, even thought they were friends, the Owings never gave them permission. So, since easement appurtenant run with the land, this would still exist.

However, if the statutory period instead is 20 years, a somewhat tenuous argument could be the creation of a public easement. The facts indicate that several families often used the dirt road at least from 1953. A court could hold that the dirt road is now an easement that benefits the entire neighborhood.

Conclusion: At any rate, if the statutory period is 15 years a court could hold that the Smiths have created an easement by prescription based on the use for 17 years. If the statutory period is 20 years, a court could hold that since the Jones' themselves didn't continuously use the dirt road then there may be an equitable solution in that an easement to the public has been created.

REPRESENTATIVE ANSWER 2

Initially, it has to be determined whether or not a prescriptive easement has been created. A prescriptive easement is akin to a taking by adverse possession. Here, the dirt road had to have been used openly and notoriously continuous hostile to the rights of the landowner and for the statute of limitations period. The reason we are looking at a prescriptive easement is because an express easement was not granted by the Owings.

The Smiths have been using this dirt road since 1985 as a shortcut. This would eliminate the possibility of there being an easement by necessity because there was an alternative way to get from Makin Road to Rte. 2.

The fact that they had been using the road since 1985 is important because the statute of limitations in Maryland is 20 years. It had only been used by the Smiths for 17 years, this is insufficient to satisfy the statue of limitations.

However, this does not end the query. There is evidence that the predecessors in interest to the Smiths, the Jones' had owned the property since 1953. The Jones' state that they had used the dirt road a couple of times during their tenure of ownership. Their son Joe recalls using it regularly in 1973 and 1974. Joe stated that he recalled others using it and indicated that Owings would wave at the neighbors as they used the dirt road. The Jones' were not given an express easement by Owings because they stated such an easement had not been discussed.

The prior ownership and use by the Jones is important in determining whether or not the principle of tacking can apply. Tacking is a concept whereby the current possessor or user of an easement can add the number of years of use of a predecessor in order to satisfy the statute of limitations period. Here, tacking would apply if the other elements of adverse possession apply to the Jones' use. The Jones', as stated above, do not recall using the dirt road more than a couple of times during their ownership of the farm property now owned by the Smiths. Joe only used it in 1973 and 1974. Neither of these uses would satisfy the continuous element of prescriptive easement.

Having failed here, no prescriptive easement can be had. Additionally, though other neighbors used it, they are not predecessors in interest for the Smiths therefore, tacking cannot apply to their use. Finally, even if Owings had waved to neighbors as they used the land (dirt road) thereby making their use open, again, they are not predecessors in interest to the Smiths. This eliminates any possibility of a prescriptive easement.

However, there may be an opportunity to see an implied easement here. An implied easement only applies if Owings had owned both parcels of land and sold one and that became the dominant tenement to his servient tenement. He would have had to have previously been using the dirt road and there would have had to have been necessity.

There are no facts indicating Owings ever owned both parcels. Therefore this theory would be eliminated.

Question 8

17 year old Cindy Smith was in an automobile accident on February 1, 2002. She was taken to the emergency room of General Hospital in Talbot County, Maryland. Cindy sustained various injuries and was unconscious when she arrived at the hospital. Unable to find any identification and due to the severity of her injuries, the attending physicians treated Cindy immediately even though there was no agreement regarding payment. Several hours after she was admitted, Cindy regained consciousness; she remained in the hospital for three days. Cindy fully recovered from her injuries.

You are the attorney for the hospital in charge of debt collection. In March of 2003, you are asked to file suit to collect fees totaling $75,000 arising out of Cindy's treatment in connection with her automobile accident. The hospital file shows that previous attempts to collect this debt from Cindy's parents have failed, that Cindy's parents moved out of the State months ago, and probably are not able to pay the debt. Cindy, however, still resides in the area and is employed full-time as an office receptionist.

What legal theories of recovery, if any, exist to recover this debt from Cindy? What defenses, if any, may Cindy raise to defeat such theories, and what is the likely outcome? Explain your answer fully.

REPRESENTATIVE ANSWER 1

In this case, the best possible theory of recovery would be by virtue of the Talbot General Hospital attempting to recover quasi contract. Technically, a quasi-contract is not really even a contract at all; however, it provides a way for the plaintiff to recover for bestowing a certain benefit on the defendant. Here, we cannot argue that an actual contract was formed because we do not have the essential contract elements of offer, acceptance, and consideration. It would be impossible for such a bargained for exchange to take place because Cindy was unconscious at the time she reached the hospital, and therefore, it would be impossible for her to agree to any offer by the hospital to provide her with care.

However, it is undeniable that the hospital benefitted Cindy in a great way. In fact, they treated Cindy for severe injuries (from which she recovered fully), and they incurred expenses for care and treatment in the sum of $75,000, and should therefore be entitled to compensation for providing such a benefit.

It is likely that Cindy will raise a couple of defenses. First, she will claim that she did not consent to the hospital caring for her, and hence she should not be liable. The hospital can defeat this defense because they would have been subjected to a negligence suit had they not cared for Cindy. As a hospital, they had a special duty of care by virtue of their profession (doctors, nurses, medical personnel, etc.) to provide a severely injured patient with care or they would be held to have breached this duty. Therefore, any lack of consent or mental incapacity defense by Cindy should be unacceptable, as the hospital provided the appropriate care and met its legal duty.

Next, Cindy will likely raise the defense of incapacity by virtue of the fact that she was a minor when brought in for care. The defense can be overcome for two reasons: 1) Minors are responsible for necessaries, and 2) The individual can be held liable when the incapacity is ended. Medical care for a severely injured patient should be sufficiently established as necessary. Hence, Cindy is responsible. Second, at the time of the suit (March 2003), Cindy is over 18 and gainfully employed full-time. Hence, her incapacity is over. So, I could file suit and, potentially, have the court garner wages of Cindy to satisfy her debt. Hospital wins!

REPRESENTATIVE ANSWER 2

A. Theory #1: Contractual relationship implied by the behavior of the parties. Although there was clearly no express offer and acceptance in Cindy's case, a contractual relationship could be implied from the acts of the parties. The need for an offer and acceptance was obviated by the emergency situation. The contract would therefore be for services. (common law, not UCC) The implied condition precedent to Cindy's obligation to pay is the hospital's treatment of her injuries. This type of implied contract with implied conditions governing time for payment is not uncommon in the real world (e.g. hailing a taxi cab, having your haircut, services first, pay later).

Cindy, therefore, breached this implied contract when she failed to pay for the services rendered by the hospital. Under this theory, she owes the hospital $75,000.

B. Theory #2: Quasi-contract recovery. Maryland law allows aggrieved parties who have conferred a benefit in expectation of payment to recover the value of their services if another party would be unjustly enriched. Requirements are 1) Plaintiff conferred a benefit, 2) Defendant knew of that benefit, and 3) It would unjustly enrich the defendant if she were allowed to accept the benefits without payment. Clearly, the hospital has conferred the benefit of the life-saving medical treatment. Cindy knew of the benefit because she became conscious after a few hours and stayed for 3 days - then recovered. It would be unjust for Cindy to accept free medical treatment without obligation to pay.

C. Cindy's defenses.

Incapacity to contract: Under Maryland law, minors (less than 18) do not have contractual capacity. Cindy was 17 at the time of the accident and could defend based on her incapacity to contract. In addition, she is now over 18 (since the accident occurred in 2/02 and it is now 3/02) and she continues to disaffirm the contract by refusing to pay; she could have ratified if she accepted her obligation after reaching the age of majority, but did not.

Her defense of minority will likely fail because this is a contract for necessities. The law will not allow Cindy to disaffirm because knowledge that minors could freely disaffirm contracts for necessities would lead to service providers of necessities being unwilling to aid minors in emergencies.

No express contract: Cindy could also defend based on the failure of an express or implied contract due to her unconsciousness. This defense, however, would fail since she did eventually regain consciousness and continue to accept the hospital's services seemingly without protest (she stayed 3 days and recovered from her injuries).

Statue of fraud: Cindy has no valid argument that the contract falls within the statue of frauds (and should have therefore been in writing) since this is a contract for services capable of being performed within a year.

outcome: Cindy is obligated to pay the value of services rendered.

QUESTION 9

David Davidson is the branch manager for the Owings Mills branch of National Bank in Baltimore County, Maryland. National Bank gives all new customers a copy of the bank's Deposit Agreement and Disclosures as well as other documents concerning the customer's new account. The Deposit Agreement and Disclosures contains a provision which states:

> "You must give the bank written notice of any irregularity on your account promptly, and in no event later than 15 days after the date of your statement reflecting the irregularity. **Failure to give such notice of any irregularities within 15 days shall preclude you from recovering any amounts from us**."

National Bank provides a copy of bank statements to all customers between the 3rd and 5th day of every month. The statements reflect transactions on the account from the preceding month.

Small Co. is a small engineering company in Owings Mills. Small Co. has a business operating account with National Bank, but never pays any salaries through this account. Slick Rick was an employee of Small Co., but was fired for embezzling funds. Small Co. was unaware that the night after he was fired, Slick had stolen three company business checks. Slick forged the company accountant's signature on all three checks and made the checks all payable to himself. Slick wrote "Salary" in the memo line of all three checks.

Slick cashed the first check on May 9, 2002, in the amount of $5,000 at National Bank. Slick cashed the second check on June 15, 2002, in the amount of $6,000, and the last check for $7,000 on August 24, 2002. National Bank debited Small Co.'s account in the amount of each check on the dates the checks were cashed. Slick then moved to Alaska.

On August 30, 2002, Small Co.'s accountant reviewed the statements received in June and July which reflected the May and June transactions. As a result, he discovered the May 9 and June 15 unauthorized transactions and gave written notice to the bank. After reviewing the September statement which reflected the August transactions, the accountant also discovered the August 24 unauthorized transaction and gave the bank written notice on September 5, 2002. Small Co then brings suit against the National Bank to recover the $18,000 debited from the account as a result of the unauthorized transactions by Slick.

Davidson comes to you, a Maryland attorney, for advice on any defenses National Bank may have under Maryland Commercial Law.

Give an analysis of any defenses National Bank may have, and any counter-arguments you believe Small Co. may raise.

REPRESENTATIVE ANSWER 1

Section 4-103(a) of the Commercial Code in Maryland, states that the provisions of this title may be varied by agreement. However, the bank may not limit the measure of damages for the failure to exercise ordinary care or to act in good faith. Here, the agreement which is between

National Bank and Small Co. clearly states that the customer has 15 days to notify the bank after discovering an irregularity in the bank statement.

Section 4-404(c)(a), states that a customer must exercise reasonable promptness in examining the bank statement and determining whatever any payment was "not authorized because of alteration" or "a purported signature by or on behalf of a customer was not authorized."

The agreement indicates that Small Co. had 15 days after receipt of the bank statement to report irregularities to the Bank. 15 days seems to be a reasonable time in which to discover defects in a bank statement and in which to notify the bank. These standards do not seem to be manifestly unreasonable. Thus, under Section 4-103(a), the bank and the customer appear to have properly agreed upon the "standards by which the bank's responsibility is to be measured." Therefore, the 15 day discovery and notification in the agreement will be binding on the parties.

The first check was cashed by the bank on May 9, 2002 and the second check was cashed on June 15, 2002. It was not until August 30, 2002, that the Small Co. accountant reviewed the statements. The accountant notified the bank in writing of these discrepancies on August 30. Per their agreement, Small Co. did not notify the bank in a timely fashion. Therefore, the bank can assert that per the agreement, they are not liable on either the $5,000 check or the $6,000 check.

The third check for $7,000 was paid on the 24th of August. Small Co. did give the bank timely notice of this irregularity on the 5h of September. As to this check, Small Co. will assert that notification on the 5th of September was timely and that they therefore should not be liable on the $7,000 check.

The Bank can assert that because of Small Co.'s failure to notify the bank in a timely manner as to the first two checks, that Section 4-406(d)(2) precludes Small Co. from recovery of the money because the original failure of the company to timely notify the bank of the checks now works as a bar to asserting this defense because the unauthorized signature was the same as the other two checks and the bank paid the third check in good faith on the 24th of August, 6 days before they had notice.

Small Co. is going to claim that the bank failed to exercise ordinary care in paying checks marked salary out of an account that wasn't a payroll account – Section 4-406(e). This defense, if successful, would allocate the cost between Small Co. and the bank. Small Co. may also raise that the agreement is not enforceable because of the preclusion statement that limits the bank's liability. A bank under 4-103 cannot disclaim a bank's duty to act with good faith or reasonable care. This would be the case if Small Co. was successful with the ordinary care argument and Section 4-406(e) would pertain to the agreement, and the cost would be allocated between the bank and Small Co.

REPRESENTATIVE ANSWER 2

The bank can defend against the first two checks, cashed in May and June, because Small Co. did not give the bank written notice of the "irregularities" until after the 15 day period required by the deposit agreement. Section 4-406(d) also provides that a customer who fails to examine the statement and notify the bank is precluded from asserting their unauthorized signature.

The bank can defend against the third check because, even though Small Co. gave the bank notice within 15 days of the statement, Section 4-406(d) provides that if the customer fails to give notice the customer cannot assert the unauthorized signature by the same wrong doer on another item that was paid by the bank before receiving the customer's notice. The bank paid the third check on August 24, but did not receive notice of the first two checks until August 30.

Small Co. will counter that the bank failed to exercise reasonable/ordinary care and that failure contributed to the loss, so the loss would be allocated between Small Co. and the bank per Section 4-406(e). Small Co. never paid salary out of its National Bank account and yet the three checks Slick passed all said "salary" in the memo line. If the bank had exercised ordinary care, it would have noticed this and realized that something was wrong.

QUESTION 10

Keg, LLC ("Keg"), a limited liability company, was duly formed in Maryland. Its operating agreement lawfully contained provisions similar to those found in the formation of Maryland corporations, as follows:

1) The board of directors ("Board") is elected by the members of the LLC to manage the LLC;

Each director is subject to the duties of a member of a board of directors for a corporation as defined by Maryland law, and The Board may require each member to transfer all member interests and receive cash in lieu thereof to facilitate reclassification and restructure of the LLC that has been approved by the Board and ratified by the members.

Several years after its formation, Keg faced financial liquidity problems. After lengthy discussions at several joint meetings of the Board and the members, the Board voted to remove the current authorized person and manager, Charles, and replace him with Bob, a member of the Board. Bob owned a preferred member interest in Keg. All other members owned the remaining interests of Keg, which were subordinate to Bob's interests and which had no real value unless Keg's value exceeded $15 Million.

It took several months for Keg to locate financing to alleviate its liquidity problem. The lender required Bob to personally guarantee a $7 Million loan for Keg. Bob made a proposal to the Board that he would furnish the guarantee but only if Keg's membership interests were reclassified into a single class of member interests without any preferences. The reclassification would be based on a current fair market value of Keg as determined by an independent appraiser. Under Bob's proposal, if Keg's value does not exceed $l5 Million, he would own virtually all of Keg. After careful review and analysis of the proposal and reports, all members of Keg's Board (except for Charles and Bob, who both abstained) voted unanimously to recommend Bob's proposal to the members, and the members (except Bob, who abstained) ratified the proposal.

Thereafter, the Board obtained an independent appraisal that reported the value of Keg at $15.1 Million. Accordingly, Bob received nearly all of the reclassified member interests, and Charles and the other members received the fractional balance of the member interests. A month later, the Board (except Bob, who abstained) voted to eliminate all fractional interests in exchange for cash.

Charles sues Bob and each member of the Board for breach of contract and for breach of the standard of care for actions taken by the Board. Bob and the other members of the Board who have been sued by Charles seek advice from a Maryland lawyer regarding their defenses to the complaint.

Discuss the legal liability of Bob and the members of the Board, and address the likelihood of success of the claims made by Charles.

REPRESENTATIVE ANSWER 1

I would first advise Bob and the other members of the board sued by Charles that I have a potential conflict of interest issue (MD Professional Responsibility Rule 1.7). I cannot represent more than one client at a time unless I can demonstrate that my representation would not materially limit my representation of others. Here it is possible that there may be adverse interest. I would explain this to all of them. If they wished to proceed, and I thought I could represent them then they must consent. I also can't represent the LLC and the members. If I were to represent the LLC, which doesn't appear to be the case from the facts, I could not represent the individual members.

Here, Charles was voted out and Bob was voted in. To handle the liquidity problem, Bob presented a proposal to the Board. This included Bob personally guaranteeing the $7 Million loan for Keg provided Keg's membership interests were reclassified into a single class of member interests without any preferences. Under the proposal, if Keg's value doesn't exceed $15 Million, Bob would own virtually all of Keg. The proposal was disclosed to the Board. The Board carefully reviewed the analyses and reports and voted unanimously to recommend the approval (absent Bob) and the members ratified the approval.

The facts indicate that the remaining member interests had no real value unless Keg's value exceeded $15 Million. Therefore, the interests wouldn't really be worth anything unless over $15M. The independent appraiser reported a value of $15.1 Million so the members did receive a fractional amount.

As provided by the Operating Agreement, all directors owe the duties of care as provided by Maryland Corporate Law. Maryland law provides that a director must act in good faith in the best interests of the corporation and with the care of an ordinary prudent person under similar circumstances. These set forth the fiduciary duties of care and loyalty. There is a presumption that directors act in the best interest of the Corporation, this is called the Business Judgment Rule. This presumption can be rebutted if it can be demonstrated that the director's acted otherwise. Here, Charles is the only one who disagrees, and he merely abstained from the voting. In order to even bring an action on behalf of the LLC (similar to a shareholder derivative suit) he would have to have voted against the proposal in writing.

Further the board unanimously voted in favor of the proposal after full disclosure. There is no issue of interested director transaction due to a usurpation of a corporate opportunity.

The court is likely to find for Bob and the other members of the Board under the Business Judgment Rule. There is no evidence that the directors violated any fiduciary duties acted against the LLC's best interest. Charles is not likely to win on his breach of contract and breach of standard of care actions.

REPRESENTATIVE ANSWER 2

Conflict of Interest issues are implicated by this question. The Rules of Professional Conduct prohibit the representation of clients whose interest may be adverse to each other or whose representation may be limited or restricted by the conflict unless consent in written form is received from each person to be represented with full disclosure and the representation will not be limited or restricted in any way. Here, there appears to be a conflict that cannot be overcome by disclosure or written consent. I would encourage each party that I am not representing to seek independent counsel.

Business judgment rule is a rule that presumes that the board of directors of a company are acting in the best interest of the company. Even if it turns out to be a bad decision it is still seen as in the best interest of the company because being in business involves risk. Here Charles appears to be serving the board based on breach of standard of care by the board. The business judgment rule will likely be followed by the court unless Charles can show egregious conduct by the Board.

The Board of directors acting as a group have a fiduciary duty to the company to act in its best interests, show loyalty and care. Here it appears that the Board was acting under its fiduciary duties by restructuring the Board and the interests of the company to solve liquidity problems.

Limited liability companies enjoy a free flowing management system unlike corporations. While the board initially chose to run the company in some ways like a corporation it is bound to those provisions only until they are changed by the members. Here, it appears that Charles' interest was revised through the enumerated provisions of the articles of organization. The changes to the reclassification was done through the disinterested board members voting, Bob refrained. It does not appear that Charles has any claim against the actions of the Board.

Bob cannot be sued individually by Charles solely because he is a board member of the LLC. Bob will not be personally liable for the actions of the Board. Bob, by signing or personally guaranteeing the debt of the LLC can be personally pursued by the Bank for payment upon default on the loan by Keg.

The likelihood of Charles' claims against Bob are very unlikely. Charles' claims against the Board are unlikely as well so long as the Board acted in the best interest of the company.

QUESTION 11

Bruce's Barbeque Pit, LLC ("Restaurant"), is a thriving restaurant in Montgomery County, Maryland. Bruce was the sole member and manager of the Restaurant. Terry, a long time employee of the Restaurant, was authorized to supervise, hire and fire kitchen staff. Terry hired his nephew, Danny, as a cook. Danny was a convicted drug dealer sentenced to probation. Danny enjoyed his work in the kitchen. He frequently tinkered with the recipes by using his own spices, including small amounts of ground marijuana leaves to add flavor to the entrees.

One busy Saturday night, Bruce saw Danny tending bar. Bruce was distracted before he could tell Danny to return to the kitchen because Danny was not trained to tend bar. Danny served Johnny a beer even though he knew Johnny was merely 19 years old. Before he came into the Restaurant, Johnny already had consumed several beers.

Several minutes later, Johnny started a fight, and he hit a bystander ("Harold") on the head with a chair. At the same time, a sink overflowed in the restroom. Bruce sent Danny to clean up the mess. Bruce told Danny to keep the restroom closed until the floor was dry. Instead, Danny removed the closed sign and allowed Vicky to enter. Vicky slipped on the water, fell on the floor, and consequently, broke her knee.

The hospital determines that Vicky was under the influence of marijuana when she slipped and fell. The marijuana is traced to the chili prepared by Danny.

Vicky and Harold each sue the Restaurant, Terry, Bruce and Danny for recovery of damages. Discuss fully the defenses and cross claims that each of the defendants may raise and analyze the likelihood of success of his or its defenses.

REPRESENTATIVE ANSWER 1

As an LLC, the Restaurant itself has liability if it can be proven that through Bruce as the manager and Terry as the supervisor, negligently hired Danny. It appears under agency theory, that Terry had apparent and actual Authority to hire Danny. The fact that Terry was related to Danny means Terry probably knew of Danny's drug conviction and was probably negligent in hiring him.

The restaurant and Bruce are liable for both Terry's actions as well as Danny's actions. Both Bruce and Terry may be negligent for negligent supervision of Danny – their employee. It was negligent to allow Danny to put marijuana in the food. It was negligent to allow Danny to serve drinks without training. It is negligent for Danny to serve alcohol to an underage person. Bruce and the LLC are vicariously liable for Danny's action at the bar.

Generally, an employer is not responsible for acts committed by their employees outside the scope of their employment. However, Danny's negligence of serving Johnny beer when he was underage was conducted with apparent authority, and was a breach of a duty of care to Harold. The causation of the chair hitting Harold along with the proximate and legal cause of

Johnny's action did cause Harold damages, and the damages are recoverable against the Restaurant.

Vicky's injuries were caused by Danny's negligence, Danny breached his duty of care for Vicky, an invitee in a public business, the causation and legal cause of her injuries were Danny's negligence from opening the bathroom as well as putting marijuana in her food. Vicky's damages are real and recoverable against the LLC, and possibly Terry for negligent hiring.

The LLC can cross claim against Terry for negligent hiring of Danny with a known drug background. The LLC will cross claim against Danny to get contribution of money to recover the damages they will have to pay.

Vicky and Harold will recover damages from LLC.

REPRESENTATIVE ANSWER 2

Defenses of the Restaurant and Bruce, as member, include limiting liability to the assets of the LLC to avoid personal liability on the part of Bruce. There are no evident reasons for piercing the LLC's veil.

Defenses of Bruce, Terry and Danny against Vicky: Vicky should have seen the wet floor and assumed the risk of entering and slipping. This defense is likely to fail as Vicky's ability to intelligently assume the risk was hampered by marijuana given to her by the Restaurant.

In order to find negligence, it must be shown that there was a duty owed, a breach of that duty, that the breach was the legal and proximate cause of injury and that damages occurred. The Restaurant, Terry, Bruce and Danny will argue that each of these elements are lacking in Vicky's case, but they will likely fail. The Restaurant and Terry, Bruce and Danny as employees/agents owed a duty to provide a safe environment for Vicky, breached that duty and caused injury and damages.

Vicky may also have a claim against Danny (and Terry, Bruce and Restaurant through respondeat superior) for intentionally causing an illegal substance, marijuana, to enter her body. Terry, Bruce and The Restaurant will argue that Danny acted outside the scope of his employment in putting marijuana in food. This defense will likely fail as Danny was acting to serve his employer's interest by adding "flavor" to the entrees.

Harold may sue for negligence in light of Danny's giving Johnny a beer despite his age and intoxication. Danny, Bruce, Terry and The Restaurant will counter that Johnny's actions were independent, unforeseeable and beyond the control of anyone in the Restaurant. They may also claim that Harold provoked Johnny in some way, making Harold contributorily negligent.

The Restaurant and Bruce have cross claims against Terry for negligent hiring and supervision, Danny for negligence in three separate situations – cooking, tending bar and bathroom cleanup, and Johnny for destruction of the chair and his battery of Harold.

Terry will claim that he acted within the scope of his employment, and that he did not negligently hire or supervise Danny. Determining the likelihood of this defense depends on Terry's knowledge of Danny's behavior and his vigilance in supervising Danny.

Danny has very little defense against cross claims other than claiming he owed no duty or that he acted with the knowledge of Terry or Bruce.

Johnny's defense may be that Danny negligently served him beer, but this will not succeed.

QUESTION 12

All of the following events occurred in the State of Maryland. John obtained a judgment against Mary in the amount of $25,000.00. Shortly after the judgment was entered, Mary filed a voluntary petition for bankruptcy. On November 10, 2002, John received a notice as creditor advising that the deadline to file a complaint to determine dischargeability of certain debts was January 2, 2003.

On November 16, 2002, John read an advertisement in a local newspaper that read as follows:

> "Tired of chasing after deadbeat debtors? Call me, the Creditor's Lawyer. If I don't collect on your judgments, no one can."

On that same date John retained Creditor Lawyer to pursue the collection of his judgment. John signed an agreement whereby he agreed to pay a fee of $8,000 and an additional 50% of any monies collected. John also gave Lawyer a copy of the notice to creditors.

John called Lawyer several times in November and December and was assured that he was handling. Nonetheless, Lawyer failed to file a complaint by the January 2, 2003 deadline. On January 15, 2003, John learned that Lawyer had done nothing to collect the monies owed. He wrote to Lawyer and demanded that Lawyer return his fee and immediately forward his files to John. John also told Lawyer he would no longer need Lawyer's services. Lawyer did not respond to John's letter. Instead, he contacted Mary's attorney to see if she was willing to pay any of the moneys owed. Mary offered to pay $5,000 and Lawyer told her the offer was acceptable. Lawyer then called John with the news that the matter had been settled. John hung up on Lawyer and contacted you, Counsel for the Attorney Grievance Commission.

What charges would you bring against Lawyer, and why?

REPRESENTATIVE ANSWER 1

A lawyer cannot claim a specialty. Here Lawyer in his advertisement called himself the "Creditor's Lawyer". A lawyer cannot make false promises or hold themselves out to be better than other lawyers. Here, Lawyer said "if I don't collect on your debts no one can." Lawyer made a promise and expressed it in a way that other lawyers cannot do the job better than he can, in violation of the Rules of Professional Responsibility. Advertisement is allowed, but it cannot give false hopes or promises.

Fees should be reasonable. Here, John signed an agreement whereby he agreed to pay a fee of $8,000 and an additional 50% of any monies collected. When looking at the reasonableness of fees, one looks at the type of case involved, the difficulty, and the rates usually charged. Here the case involves collection of a judgment. Mary owes John $25,000 and has filed for bankruptcy. So, John will have to stand in line with other creditors, so the case should not be too difficult, and the fee seems excessive.

A lawyer has a duty to keep his client informed. Here John called Lawyer several times in November and December and was assured that he was handling the case. Lawyer is not keeping the client informed by lying to him. He lied because he failed to file a complaint by the January deadline.

A lawyer also has to be competent. By missing the deadline, Lawyer showed he was not competent.

Once he is terminated a lawyer still has the duty to protect the client's interests until another attorney is hired, and must return the client's property. Lawyer was fired and should have returned John's fee minus any money earned, and should have forwarded his files, minus any work product.

The client is the one who determines the objectives of the case and any settlement. Here Lawyer contacted Mary's attorney after being fired to see if she was willing to pay any moneys owed. This violated what John wanted - all of his money. Lawyer cannot settle without the client's permission. Here Lawyer accepted $5,000 without talking to his client.

REPRESENTATIVE ANSWER 2

I would bring the following charges against the Lawyer:

1. **Advertisement** – Even though Maryland does not regulate the tastelessness of ads, ads must not create unjustified expectation. "If I don't collect on your debts, no one can" is not allowed because it creates an unjustified expectation.
2. **Fee** – A lawyer cannot charge excessive fees, only reasonable ones based on time, skill, complexity of case, and customary fee in the area. Here, the fee seems unreasonable because Lawyer is charging a 50% contingency fee on top of an $8,000 flat fee. It seems a little high for collection-type lawsuits.
3. **Competency** - Lawyers must possess reasonable competency and due diligence. For example, Lawyer could be sued for malpractice for failure to file a complaint by the deadline.
4. **Must notify client of the progress of the case** – Lawyer must reasonably and seasonally notify client of the progress of the case and keep clients informed of all proceedings. Lawyer did not contact client in November and December thereby violating this rule.
5. **Must represent client zealously** – Lawyer did not represent client zealously because he did nothing to collect the monies owed. Also he did not zealously represent client by negotiating a more desirable settlement amount.
6. **Fired** - Here Lawyer is fired for failure to perform any services. Since he has not done anything, he is not entitled to any fee and must return it and the client's file in a prompt manner. Lawyer did not do this, in violation of this rule.
7. **Settlement** – Client has the ultimate right to make the decision to settle and determine the settlement amount. Lawyer should have contacted client first and have client decide the matter instead of calling him and telling him that the matter had been settled.