BOARD'S ANALYSIS

QUESTION 1

The facts indicate that Bob may have violated the following provisions of the Maryland Rules of Professional Conduct:

Rule 1.1 **Competence** – A lawyer shall provide competent representation. Bob's failure to record judgments, as well as his failure to effect service in many of the lawsuits, may demonstrate incompetence.

Rule 1.3 **Diligence** – A lawyer shall use diligence and promptness in representing a client. Bob's failure to obtain service may show a lack of diligence in his representation of the Board.

Rule 1.4 **Communication** – A lawyer shall properly keep client reasonably informed. Bob's answer at every meeting was "all is well." In reality he wasn't doing anything. This misleading update by Bob may have violated this rule.

Rule 1.5 **Fees** – A lawyer may not charge a contingency fee in a divorce proceeding. Bob clearly violated this rule.

Rule 1.7 **Conflict of Interest** – Conflicts of interest must be avoided. Representation of Board member Mary and client Mary who is in arrears may have violated this conflict of interest rule. At the very least Bob had a duty to inform the Board and Mary of the dual representation and receive their informed consent thereto.

Rule 3.2 **Expedite Litigation** – A lawyer has a duty to make reasonable efforts to expedite litigation. Bob's actions or inactions may show a lack of effort in pursuing the litigation.

Rule 7.4 **Communication of fields of practice** –Although a lawyer may communicate that he does or does not practice in particular fields, he may not hold himself out as a specialist. Bob's advertising himself as a specialist in condominium law is a violation of this rule.

Rule 8.4 **Misconduct** – Various actions or inactions of Bob could be viewed as dishonest or fraudulent, especially his status report. It is misconduct to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

BOARD'S ANALYSIS

QUESTION 2

Since the Treasurer was authorized to complete the check, Widgets is bound by Treasurer's act in making the check payable to Suzy Que with respect to the bank. Since Employer signed the check, there is no forged signature at issue. Because there is no forged signature, drawee bank properly paid the check and Widgets has no course of action against the bank. Suzy Que received the funds of Widgets which were used for the personal benefit of Treasurer. The issue in this scenario is whether Suzy Que was or was not a holder in due course. If Suzy Que is a holder in due course, Suzy Que takes free of any problems with or claims to the check, and Widgets has no recourse against her. Annotated Code of Maryland, Commercial Law Article, Title 3- Negotiable Instruments, Section 3-306. If she is not one, Widgets can assert a claim to these funds against Suzy Que. Whether Suzy Que is a holder in due course depends upon whether Suzy Que had notice that Widgets had a claim (or potential claim) to the proceeds of the check. Section 3-302 (2). Whether Suzy Que had such notice depends upon whether she knew that treasurer was a "fiduciary" of Widgets with respect to the check and whether Suzy Que knew that the debt being paid by the check was a personal debt and not a debt of Widgets. Section 3-307 (b).

Treasurer is likely a "Fiduciary" as defined in Section 3-307. Widgets is a "Represented person" as defined in that section. It does not matter if Treasurer, as the "Chief Financial Advisor," is in reality not an officer or otherwise a "Fiduciary" of Widgets as defined in Section 3-307. The debt was known to Suzy Que to be personal and not that of Widgets, and Suzy Que believed that Treasurer was the "CFO" (a fiduciary position) of Widgets. Despite such knowledge, Suzy Que deposited a clearly identified corporate check as payment for a personal debt. Thus, under the facts, a Court will likely find that Suzy Que had notice of Widget's potential claim to the proceeds of the check under the UCC.

Widgets may also file a common law claim against Treasurer for conversion and/or recoupment of the $60,000 misappropriated by her.

BOARD'S ANALYSIS

QUESTION 3

Dan and John must each maintain separate claims against Rugby for two independent negligence actions. Dan may wish to recover damages for negligence in Rugby's failure to monitor the weather and to protect Dan from injuries caused as a result, and John can seek to recover damages for negligence in maintaining the bleachers for use by the spectators of the tournament.

Dan's claim will not succeed because no special duty existed between Rugby and Dan. Dan will not be able to show that he was dependent on the actions or judgment of Rugby nor that he entrusted himself to the control and protection of Rugby. Dan was an adult who was able to observe the weather conditions, extricate himself from the match and use reasonable care in protecting himself from the lightning strike by avoiding the trees under which his personal belongings were situated. No duty was owed to Dan by Rugby. Therefore, a claim for negligence will not be successful. *Patton v. United States of America Rugby Football*, 381 Md. 627, 851 A.2d 566 (2004). However, if a duty were found to exist, then Dan will likely be found to have assumed the risk of his injury, thereby negating any recovery.

John's claim may have greater likelihood of success since Rugby owned and maintained the bleachers. It was foreseeable that spectators may sit or stand simultaneously to view a rugby match and tournament. It is also arguable that it is foreseeable that all spectators may decide to leave the bleachers in a hurry and do so simultaneously in the case of inclement weather, including thunderstorms with lightning.

John, as an invitee, is owed a duty by Rugby to keep the bleachers safe for use by John and other spectators, and Rugby must use reasonable and ordinary care to protect John from injury caused by an unreasonable risk, which risk John would not discover even if he were to exercise ordinary care for his own safety. *Blood v. Hamani Partnership, LLP*, 143 Md. App. 375, 795 A.2d 135 (2002).

Counsel for John will be required to produce evidence showing that Rugby's negligent conduct in installing and maintaining the bleachers was the proximate cause of John's injuries, and that this proximate cause was not negated by an intervening act of either the other spectators or the inclement weather. *See, Collins v. Li*, 176 Md. App. 502., 933 A.2d 528 (2007). If there is an intervening force or cause other than Rugby's negligent failure to install and maintain the bleachers, then Rugby will be relieved of liability.

BOARD'S ANALYSIS

QUESTION 4

The factual scenario presents two separate areas of Contract Law. The first is the effect to be given to a contractual provision requiring the purchaser of a modular home to obtain fire insurance where the Builder's negligence may have caused or contributed to the destruction of the modular home by fire. The second issue requires a review of the third party beneficiary doctrine and whether a subcontractor, whose conduct may have caused or contributed to the property loss may insulate himself from liability as an "intended" beneficiary of the insurance provision in the contract between the purchaser and the Builder. The final issue is the dual representation provided by the attorney to Builder and Electrical.

1. Owner vs. Builder. The provision in the contract between Owner and Builder, requiring Owner to obtain fire insurance is clear and unambiguous. It is part of the negotiated bargain between them. The agreement is susceptible to only one interpretation, to wit: It was the Owner's responsibility to insure the modular home against fire once it was placed on the foundation. If the modular home was damaged or destroyed thereafter by the occurrence of fire, then Owner must look to the insurer and not to his Builder to make him whole. This is to even if the fire might have been attributed to negligence of Builder.

Where fire insurance is purchased to cover a property loss, it is distinguishable from the line of cases such as *Chesapeake and Potomac Telephone Company vs. Allegheny Construction*, 340 F.Supp. 734 (D.Md. 1972) that contend that contracts will not be construed to indemnify a person against his own negligence (unless such indemnification is expressed in clear and unequivocal language). Here, it is obvious that the contracting parties entered into an agreement to shift the risk of loss by fire to the insurer irrespective of negligence. This is not a hold harmless or indemnification provision. *Weems v. Nanticoke Homes*, 37 Md. App. 544 (1977).

It is settled law that fire insurance covers the property loss sustained regardless (generally speaking) of its cause. Insurance against negligence indemnifies the negligent person as to his liability to another. *Brodsky v. Princemont Construction Company*, 30 Md. App. 569 (1976). Thus the Court should rule in favor of Builder.

Recognition of the issue and sound reasoning will be more important than coming up with the correct answer.

2. Owner vs. Electrical. Electrical is a "stranger" to the contract between Owner, the owner, and Builder. Thus to avoid potential liability, Electrical must establish that it is an intended third party beneficiary.

The Restatement (Second) of Contracts substituted "intended" beneficiary for "creditor" and "donee" beneficiary. However the analysis has remained the same. That is, in order to be an intended beneficiary the requirement would remain that one party intended to confer a direct benefit upon another. To do so

would require that the intended beneficiary be either a "donee" or "creditor" beneficiary.

Thus the Restatement of Contracts provides that the third party beneficiaries fall into three categories, to wit: Donee beneficiary, creditor beneficiary or incidental beneficiary. If the third party is neither a creditor nor a donee of a party to the contract, the benefit is merely incidental, and no legal rights under the contract ensue. Nor is it enough that the contract may operate to the benefit of the promisee. It must clearly appear that the parties intend to recognize him as privy to the promise.

A party claiming third party beneficiary status must show that the contract was intended for its direct benefit and that the intent stemmed from the promisee status as a debtor of the third party or from donative motives. In our case, there is limited language in the facts which could be argued by Electrical that it should fall under the donee beneficiary category. However, even if a close or mutual relationship was contemplated between Builder and Electrical, it would be difficult to infer a gift from Builder to Electrical when it contracted with Owner that Owner was to bear the burden of providing insurance against loss. While it could be argued both ways, the better argument would preclude Electrical having donee beneficiary status.

The only other way Electrical could prevail would be to meet the requirements for status as a creditor beneficiary. Under the restatement, unless performance of the promise would satisfy an actual or supposed or asserted duty of the promisee to the beneficiary, creditor beneficiary status would not be obtained. Nothing in the facts above could be construed as a duty on the part of Builder to insulate its subcontractor from liability for its possible negligence. Thus, there is no basis for Electrical's claim that it is a creditor beneficiary. Thus, on the facts above at least, the Court should rule that Electrical is not an intended third party beneficiary of the contract between Owner and Builder.

3. These facts suggest at least a potential conflict of interest for the attorney. Rule 1.7 of the Maryland Rules of Professional Conduct prohibits representation of a client if it will be directly adverse to another client. Here there may not be a direct conflict but there is at least a significant risk that the representation of one of the clients will be materially limited by the lawyer's responsibility to another client or by a personal interest of the lawyer. At the very least, it would have been better had Electrical asked the attorney to file an Answer on its behalf rather than the attorney "offering" to do so. The applicants may also discuss the mechanics of waiver of a conflict and will hopefully conclude that, while it may not be impossible to represent both, Builder's Attorney would avoid the appearance of impropriety by representing only Builder with whom he had a previous relationship.

See generally Weems vs. Nanticoke Homes, Inc. et al., 37 Md. App. 544 (1977); *Mattingly Construction vs. Hartford*, 415 Md. 313(2010). (Distinguished)

BOARD'S ANALYSIS

QUESTION 5

If the court were to issue the injunction there would be state action, and the protections of the Constitution would come into play. The sidewalk and right-of-way in front of the Church of Now are traditional public forums. *Frisby v. Schultz*, 487 U.S. 474, 108 S.Ct. 2495 (1988). The activity enjoined is a protected form of speech. *Snyder v. Phelps*, 562 U. S. ___, 131 S. Ct. 1207 (2011) Since the facts involve an injunction restricting speech rather than a statute, the appellate court may use "a somewhat more stringent application of general *First Amendment* principles." *Madsen v. Women's Health Center*, 512 U.S. 753, 765, 114 S.Ct. 2516, 2524 (1994). The *Madsen* court concluded that a content-neutral injunction must "burden no more speech than necessary to serve a significant government interest." *Id*. The provisions of the injunction at issue are arguably not content-neutral since they prohibit speech if it involves the Church of Now. Thus the terms of the injunction must survive a strict scrutiny analysis, with the test being whether its restrictions are necessary to serve a compelling state interest and are narrowly drawn to achieve that end. The injunction should fail under this analysis.

A. Should the Court permanently preclude the Members from gathering or picketing within 500 feet of Church of Now property?

It is reasonable to regulate picketing in a residential neighborhood and around churches since people should feel free to worship and enjoy their homes without encountering high levels of noise. However, the 500-foot buffer is not a limited intrusion upon the First Amendment right to free speech, and it is improbable that any noise attributed to the Members would be heard on the Church of Now's property at that great a distance.

The 500-foot restriction would also prohibit leisurely walking, chatting, and similar activity by Members. This freedom of individuals to associate is staunchly protected by the First and Fourteenth Amendments. *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782 (1977). The 500-foot buffer would substantially impact the right of freedom of association since no Member could join with any other person, for any reason, within 500 feet of the Church of Now and one of the Member's home.

Moreover, it has been held that a blanket ban on picketing such as that found in paragraph (a) is too broad and would burden more speech than necessary to protect the rights of those entering the Church of Now. *Madsen v. Women's Health Center*, 512 U.S. 753, 114 S. Ct. 2516 (1994).

B. Should the Court permanently bar Members from filming and/or videotaping any person who walks on the public sidewalk located adjacent to Church of Now property?

The videotaping of public events has been recognized as a protected form of speech under the First Amendment. *Iacobucci v. Butler*, 193 F. 3d 14 (1st Cir.

1999). The injunction totally prohibits any Member from filming any person walking on the public sidewalk – a list that could include children taking their first steps, newly married individuals being carried into their new home, or other sundry event. Accordingly, this injunction is overly burdensome on speech and should not be imposed.

C. Should the Court permanently bar the Members from discouraging others, in any manner, from attending the Church of Now?

The requested injunction further violates both the Freedom of Speech Clause and the Freedom of Religion Clause of the First Amendment by barring the Members from ever encouraging others to avoid the Church of Now. The Members are also a religious ministry and proselytism is a common function for such groups. A permanent ban in no way furthers the stated goal of noise reduction but seriously infringes these rights.

BOARD'S ANALYSIS

QUESTION 6

The issues in this question require the applicant to apply the law regarding the three basic tenancies in Maryland, to wit: 1. Tenancy in common, 2. Tenancy by the entireties, and 3. Joint tenancy. The two issues involved require the applicant to know the difference among the three types of tenancies and the rules which apply to each.

A. Although Adam may have honestly believed he had been divorced from Beth, in fact, they remain married. Because Adam remained married to Beth, he could not have been legally married to Nancy. A tenancy by the entirety cannot be established unless the Grantees are legally married. *Downing v. Downing*, 326 Md. 468, 606 A.2d 208 (1991). Thus, the parties, not being legally married, could only hold title as either joint tenants or tenants in common. Under a joint tenancy, each tenant owns an undivided share in real property and has the right of survivorship. Tenancy in common, on the other hand, does not result in survivorship but rather the share of a deceased tenant in common passes to the estate of the decedent.

Joint tenants are disfavored but a clear manifestation of intent to create a joint tenancy will be effectuated. *McManus v. Summers*, 290 Md. 408, 430 A.2d 80 (1981). Thus while a tenancy by the entirety was a legal impossibility for Adam and Nancy, there was a clear intent that they be joint tenants. Upon a failure of a tenancy by the entirety, the parties are deemed to hold as joint tenants. *Id*.

The crucial distinction between joint tenancy and tenancy in common is the right of survivorship which is identified with joint tenancy.

Thus, Adam's children have no interest in the property. The property belongs to Nancy as the surviving joint tenant.

B. For the reasons mentioned in A above, Adam and Nancy, prior to Adam's death, would hold the property as joint tenants. The four unities necessary for a creation of joint tenancy are time, title, interest and possession. Should any of these be destroyed, the joint tenancy would be terminated and title would revert to a tenancy in common. Thus, the question turns to whether or not a judgment against one of the joint tenants destroys any of the four unities and thus converts the joint tenancy to a tenancy in common. Had Adam and Nancy held legal title as tenants by the entireties, a judgment against one would have no effect. In this case, the rule will be the same with regard to a joint tenancy. That is, a mere judgment entered does not destroy any of the four unities of interest, title, time and possession. The mere obtaining or docketing of judgment lien does not operate to sever or terminate a joint tenancy. The unities would only be severed if there was an execution on the judgment. A levy and completed sale in execution would sever the joint tenancy but a writ of execution, even if delivered to the Sheriff would not terminate the joint tenancy until it was executed actually

by the Sheriff. *Helinski v. Harford Memorial Hospital*, 376 Md. 606, 831 A.2d 40 (2003).

BOARD'S ANALYSIS

QUESTION 7

1. The first statement – this was a spontaneous statement not in response to interrogation and Miranda does not apply. The volunteered statement is not barred by the 5th Amendment. It is also an admission of a party and an exception to the hearsay rule.

2. The second statement – this statement should be determined to be inadmissible as the advice of rights was invalid, especially as they relate to the right to have the presence of an attorney during interrogation. If Miranda warnings, viewed in the totality, in any way misstate Husband's rights to counsel and silence or mislead or confuse Husband with respect to these rights, then the warnings are constitutionally infirm rendering any purported waiver of those rights constitutionally defective requiring suppression of any subsequent statement. Police Officer's clarification and explanation of the rights as read from the Miranda card nullified the warnings. Police Officer's statement that the right to counsel applied only to discussions of the specifics of the case was wrong as a matter of law and rendered the advisement constitutionally infirm and therefore the waiver was not made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. *See Miranda v. Arizona*, 384 US 436, 86 S.Ct 1602 (1966); *State v. Luckett*, 413 Md. 360, 993 A.2d 25 (2010)).

The second statement is also arguably involuntary as the offer by Police Officer "to help" has the arguably seductive effect that Police Officer was there to help Husband, thus is an inducement to waive counsel and the statement may thus be ruled involuntary and suppressible. (See *Hillard v. State*, 286 Md. 145, 406 A.2d. 415 (1979), *Griner v. State*, 168 Md. App. 714, 899 A.2d 189 (2006)).

3. If Husband takes the stand to testify on his own behalf at trial in a manner that contradicts the prior statement, the State can attempt to impeach Husband with the prior statements if the Court rules that the statements were otherwise voluntary as a matter of Constitutional Law and Maryland Common Law. The first statement was voluntary and admissible for impeachment purposes. Whether the second statement was voluntary is arguable based on *Hillard* and *Griner*. *See, generally, Harris v. New York*, 401 US 222, 91 S. Ct 643 (1971).

4. At Common Law, the discovery of one spouse engaged in sexual intercourse with a non-spouse can be raised by Husband as heat of passion provocation in an effort to reduce the degree of homicide with which he is charged. Under Maryland Criminal Law §2-207(b), spousal adultery will not reduce murder to manslaughter, but Husband certainly should attempt to raise the heat of passion/provocation potential defense as a matter of trial tactics and possible jury nullification.

BOARD'S ANALYSIS

QUESTION 8

Pursuant to Courts and Judicial Proceedings Article sections 4-401(1) and 4-402(d)(1)(i), Dorkski's suit can be brought in either the District Court or Circuit Court because the $30,000 amount in controversy exceeds $5,000 exclusive of prejudgment or post judgment interest, costs and attorney's fees, but does not exceed $30,000. He may also request a jury trial because the amount in controversy exceeds $15,000. Article 4-402(e)(1).

Pennypincher's suit against the County may also be brought in either the District Court or Circuit Court because the $10,000 amount in controversy exceeds $5,000 exclusive of prejudgment or post judgment interest, costs and attorney's fees, but does not exceed $30,000. Sections 4-401(1) and 4-402(d)(1)(i). However, he may not request a jury trial because the amount in controversy does not exceed $15,000 as required to in order to request a jury trial. Section 4-402(e)(1).

Pursuant to Sections 5-304 (b)(1) and (c)(3)(ii), the notices should have been personally served or sent by certified mail to the Howard County Executive within 180 days of the sewage back-up. Dorkski's notice although within 180 days, was sent to an Assistant County Attorney, in the real estate division, not the County Executive as required by Section 5-304(c)(3)(ii). Nevertheless, his notice although defective may constitute substantial compliance with the notice requirement because an argument can be made that someone in the Howard County Attorney's Office will ultimately handle the claim. Even if Dorkski's notice does not establish substantial compliance, if he can show good cause through a motion for his failure to provide the notice to the right person, the court may entertain his suit, unless the County can affirmatively show that its defense has been prejudiced by lack of the required notice.

Pennypincher's notice, while it was served on the correct person in the correct manner, was not done so within 180 days as required and is untimely. Thus, Pennypincher can only maintain suit against the County if he can establish good cause by filing a motion for his failure to timely provide notice pursuant to Section 5-304(d), unless the County can affirmatively show that its defense has been prejudiced by lack of the required notice.

If Pennypincher or Dorkski cannot establish good cause in their motions for their failure to give timely proper notice, then their lawsuits will be dismissed against the County.

BOARD'S ANALYSIS

QUESTION 9

David's attorney would probably argue that the accountant-client privilege prevents disclosure by the certified public accountant. The accountant-client privilege protects from disclosure any communication by the client or any information derived from the client or from material of the client to a licensed certified public accountant who renders professional services to the client. *Md. Ann. Code Courts and Judicial Proceedings* §9-110. The privilege does not "affect" the criminal laws of the State, but this exception is inapplicable to purely civil fraud. *BAA, PLC v. Acacia Mutual Life Ins. Co.*, 400 Md. 136, 929 A.2d 1 (2007). The Court should rule that the delivery of the documents is not a privileged communication and that the documents are subject to disclosure. The Court should overrule that part of the objection. The Court should further rule that notes represent information derived from the client and are privileged. The Court should sustain that part of the objection.

Patricia's attorney would argue the attorney-client privilege in support of his objection. *Md. Ann. Code Courts and Judicial Proceedings* §9-108. The Court should rule that the "Summary" is a privileged communication. The Court could also rule that the entire report may be protected from discovery by the attorney work-product rule. The court should sustain the objection.

A witness may be impeached by evidence of conviction within the prior 15 years of a crime related to the witness's credibility if the value of the evidence outweighs the danger of unfair prejudice. Maryland Rule 5-609. However, a proper foundation must be laid. This question is factually improper. While theft may be a relevant offense, the court is unable to determine the date of any conviction, or whether the probative value outweighs any prejudice. *Deyesu v. Donhauser*, 156 Md. App. 124, 846 A.2d 28 (2004), *cert. den.* 382 Md. 685, 856 A.2d 721 (2004).

A duplicate of a document is admissible unless there is a genuine question of authenticity or some unfairness. Maryland Rule 5-1003. In this circumstance, the lack of a signature raises a question of authenticity. The Court should sustain the objection.

BOARD'S ANALYSIS

QUESTION 10

The Limited Partners should file an action against the General Partner for breach of contract; namely, the Partnership Agreement. The grounds for the action are as follows:

1. Under Section 12, the General Partner is not entitled to Compensation under the Partnership Agreement for the performance of the General Partner's duties, except for reasonable compensation to wind up the affairs of the Partnership on dissolution. The General Partner was acting within the scope of its authority in selling the Partnership Property, and it sold the Partnership Property pursuant to the express purpose for which the Partnership was formed. However, there was no authority to withhold the Compensation because neither Section 4 nor Section 12 of the Partnership Agreement provides for compensation to be paid in the nature of a management fee or for any other reason except for those services directly resulting from the termination of the business of the Partnership.

2. The basis for the Compensation claimed and withheld by the General Partner arose from acts or services performed prior to the event giving rise to the dissolution; namely, the sale of the Partnership Property on June 26, 2010. Therefore; upon consummation of the sale of the Property, the event of dissolution occurred, and those services preformed prior to that date in furtherance of the Partnership's desire to sell the property are not compensable under the Partnership Agreement.

3. Section 7 of the Partnership Agreement requires the Partnership to indemnify the General Partner for any claim arising out of the Partnership's business provided the General Partner acted within the scope of its authority and in good faith. This provision does not provide the basis for insulation from the Limited Partners' claim that the General Partner breached its contractual obligations under the Partnership Agreement. The General Partner acted outside the scope of its authority as expressly set forth in Sections 12 and 14, since the Compensation did not constitute a debt or other obligation of the Partnership incurred as authorized by the Partnership Agreement. The General Partner had a personal interest in the alleged Compensation. The General Partner sought to have the Limited Partners contribute to the bonus to be paid to the employees of the General Partner from what would otherwise be proceeds of sale that should have been distributed to them as part of their entitlements under the Partnership Agreement.

4. The General Partner was not acting in good faith in withholding the Compensation, *Ouestar Builders, Inc. v. C.B. Flooring, LLC*, 410 Md. 241, 978 A.2d 651 (2009) (application of objective standard for good faith and fair dealing). Therefore, the General Partner should be denied indemnification from the Partnership because it acted outside the scope of its authority and not in good faith.