

**JULY 2011 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

In order to assist the person wishing to prepare for the essay portion of the Maryland Bar Examination or to review their examination, the State Board of Law Examiners prepares a Board's Analysis and selects Representative good Answers for each essay question given in each examination. The Board's Analysis and the Representative Good Answers are intended to illustrate to potential examinees ways in which essay questions are analyzed by the board and answered by persons actually taking the examination. This material consists of three parts.

1. Essay Question is a reprint of the question as it appeared on the examination.

2. The Representative Good Answer(s) consist of one or more actual answers to the essay question. They are reproduced without any changes or corrections by the Board, other than spelling. The Representative Good Answers are provided to illustrate how actual examinees responded to the question. The Representative Good Answers are not average passing answers nor are they necessarily answers which received a perfect score; they are responses which in the Board's view, illustrate successful answers.

3. The Board's Analysis consists of a discussion of the principal legal and factual issues raised by a question. It is prepared by the Board. The Board's Analysis is not a model answer, nor is it an exhaustive listing of all possible legal issues suggested by the facts of the question.

QUESTION 1

Bob, a long-time resident and active Board member in his residential Condominium Association Board of Review, Maryland, was recently admitted to the Maryland Bar. Feeling confident that he knows condominium real estate law, Bob opened a solo practitioners' office advertising that he specializes in condominium law.

Bob was asked by the Condominium Association Board to file suits against the condominium homeowners who were at least three (3) months in arrears in payment of condominium fees. Bob filed the lawsuits.

Mary, a good friend and fellow Condominium Association Board member, is represented by Bob in her divorce case. Ironically, Mary is a condominium owner who was in arrears in paying the condominium fee and was sued. Bob knew through Mary's divorce proceedings that finances would be available for Mary to ultimately pay her condominium fees, which is why Bob agreed to represent Mary in her divorce proceedings on a contingency basis.

Every month, the Board members asked Bob for a status report on the law suits at the regular monthly meetings. Bob's answer at every meeting was the same, "All is well. The court is backed up".

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After fifteen (15) months of not receiving income from the law suits and hearing the same monthly report from Bob, some of the Board members began independent investigations and determined that several of the suits filed by Bob, including the suit against Mary, had been dismissed for lack of proper service.

The Board members filed a complaint with the Attorney Grievance Commission. Based on the above facts, what charges, if any, can bar counsel bring?

REPRESENTATIVE ANSWER 1

The bar counsel can bring several charges against Bob for violation of the Maryland Rules of Professional Responsibility.

First, under the Maryland Rules of Professional Responsibility, Bob is not permitted to advertise he is a "specialist" at any certain kind of law except to the extent that he is a patent attorney, in which case, he can identify himself as such. When Bob, in whatever medium he chose, advertised that he "specialized in condominium law," he violated this rule. Therefore, bar counsel can file charges for this improper advertising.

In regards to Bob's apparent representation of the Condominium Association Board, there are several problems. First, under Maryland Rules, attorneys have a duty to clearly

define the relationship between themselves and their clients. If they are in fact retaining him as counsel, he needs to consider whether the existence of potential conflicts of interest preclude him from serving as the Condominium Board's counsel.

Under Maryland Rules, lawyers cannot represent clients whose interests are directly adverse to another client or clients whose representation will be materially limited by the lawyer's other clients, prospective clients, or personal interests. Bob's representation of the Board poses a conflict with his personal interests in that he is a fellow resident and member of the Condominium Association at large and could have personal relationships with other condominium owners that preclude him from zealously representing the Board in the actions for arrears. Bob has a duty to consider this potential conflict and determine whether representation is proper. In fact, Bob's good friend Mary is also a client that he is representing in her divorce case. Although Bob's representation in the arrears action is not directly adverse to Mary's divorce proceeding, the likelihood that his representation of one could be materially limited by his representation of the other is too high to ignore. If Bob believes representation of both will not be materially limited, he is still required to seek waiver of the potential conflict from the two clients under the Maryland Rules. His failure to consider and take the proper steps to deal with this conflict of interest is grounds for more charges.

Under the Maryland Rules, contingency fees cannot be charged for divorce

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proceedings or other family law proceedings. Therefore, Bob's charging Mary a contingency fee violates the Maryland Rules and will lead to more charges by bar counsel.

Under the Maryland Rules, lawyers have a duty to competently and diligently work on their clients' cases and keep their clients informed of the status of their cases. Bob's failure to execute proper service of process and his failure to discover the deficiencies with service represent a material breach of this duty. The bar counsel is likely to file charges for Bob's violation of these requirements to perform competently and diligently. Further, Bob's failure to inform the Board of the correct status of the cases represents another violation in that he must keep his clients properly informed. Not knowing that there was a problem with the cases is no excuse. If the cases were not being considered in a timely manner, under the Maryland Rules, Bob has a duty to discover the reason for the delay and continue to stay in contact with the Clerk of the Court to ensure his cases proceed. Bob will also have charges against him for his failure to perform competently and diligently as a result of the dismissal of the Board's cases.

All told, Bob potentially faces charges from the bar counsel for violation of Maryland Rules on 1) advertising, 2) conflicts of interest with regard to his representation of the Condominium Board and Mary, 3) properly defining relationship with potential client, 4) competently representing clients, and 5) diligently representing clients in their cases.

REPRESENTATIVE ANSWER NO. 2

I would bring the following charges against Bob under the Maryland Rules of Professional Conduct:

Violation of Advertising Rules. An attorney, when advertising his practice, is prohibited from stating that he "specializes" or is an expert in an area of law, but may only indicate his "areas of practice. Here, B advertised that he "specializes in condominium law," therefore violating this rule.

Conflict of Interest Violation. An attorney must avoid representing two clients with directly adverse interests or interests which materially limit the other's interests unless the attorney reasonably believes he is able to competently and diligently fully advocate for each client's interests and obtains the affected parties informed consent in writing. Here, B has a potential conflict of interest as representing M, suing on behalf of the Condominium association, and being a member of the association's board.

Here, B, although a member of the board, agreed to sue those condominium owners in arrears on behalf of the association. His role as a Board member may materially limit his ability to sue on behalf of the organization, especially as he brought suit against M, a fellow board member. If he reasonably believed he could fulfill both his representation of the organization and his fiduciary duties as a Board member, he needed to obtain the association's informed written consent. He failed to do so, therefore B violated this rule.

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Here, B already represented M in a divorce case when he brought the suit against condominium owners, including M. An attorney is absolutely prohibited from filing suit against his own client; therefore B violated his duty of loyalty to M.

Fees. Fees must be reasonable and clearly communicated in writing. Further, an attorney must not accept a contingency fee for divorce proceedings. Here, B agreed to represent M in her divorce proceedings on a contingency fee basis, therefore violating this rule.

Violation of Fiduciary Duties:

Duty of Confidentiality. An attorney must not disclose confidential information regarding representation of a client unless an exception applies. Here, B "knew through Mary's divorce proceedings that finances would be available," hence B used this confidential information from representing M in her divorce against her in filing suit on behalf of the condominium association. No exception applies. Therefore, B violated his duty of confidentiality to M.

Duty of Loyalty. An attorney must be loyal to his client and avoid conflicts of interests. (Discussed above). Here, B violated the conflicts of interests rule and used confidential information against M, therefore violating his duty of loyalty to M.

Duty of Information. An attorney must keep his client reasonably informed of the material facts of representation so the client has sufficient knowledge as to assist in his representation and determine the objectives of representation. Here, when the Board asked B for a status report at the regular monthly meetings, he responded "All is well. The court is backed up," even though several of the suits had been dismissed for lack of proper service. Therefore, B violated this duty.

Duty of Competence. An attorney must be reasonably competent in his representation with sufficient legal knowledge and ability. Here, several of the suits were dismissed for lack of proper service, something B could have easily accomplished if he had been competent or sought advice from more experienced attorneys as he had only been recently admitted to the Maryland Bar. Therefore, he violated his duty of competence.

Duty of Due Diligence. An attorney must be diligent in his representation of his client's interests and avoid unreasonable delay or missing deadlines. Here, several of the suits were dismissed for lack of proper service and he continually falsely reported to the board "All is well." Therefore he violated his duty of due diligence.

Bar counsel should pursue sanctions against B's license to practice law in Maryland having established the above charges.

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AN EXTRACT HAS BEEN PREPARED FOR YOUR USE IN ANSWERING QUESTION 2. IT HAS BEEN PRINTED SEPARATELY. IF YOU DID NOT RECEIVE A COPY, PLEASE CONTACT YOUR PROCTOR AND OBTAIN A COPY BEFORE ANSWERING THE QUESTION.

QUESTION 2

Emily Employer owns and operates Widgets, Inc. (“Widgets”), a widgets dealer in Baltimore, Maryland. Widgets owed \$60,000 to Creditor for the purchase of business supplies. Having a banner year, Employer signed a blank check from the Widgets’ business account and delivered it to Trudy Treasurer, the company’s Chief Financial Advisor of more than 20 years. Employer instructed Treasurer to complete the check by typing in Creditor’s name and the amount of \$60,000 which was owed to Creditor. The check contained the Widgets’ company name and logo printed on the face of the check.

Treasurer knows Widgets has had an extraordinarily good year financially. Thinking the company owed her for her many years of service, Treasurer fraudulently completed the check by typing in the name “Suzy Que” as payee on the check. Treasurer owed Suzy Que \$65,000 for a personal loan Suzy Que made to Treasurer which was now in default. Suzy Que had threatened to sue Treasurer, contending that Treasurer had made “big bucks as the CFO of Widgets.” Treasurer then delivered the check to Suzy Que in payment of her overdue loan. Thereafter, Suzy Que quickly took the check to her bank which properly made payment to Suzy Que.

When Creditor sends a notice of default to Employer regarding the Widgets’ supply debt, Employer uncovers the betrayal by Treasurer, and contacts you, a Maryland lawyer, to advise her.

Give a detailed analysis of any civil redress Widgets may have under Maryland Commercial and common law.

REPRESENTATIVE ANSWER 1

Widget has a valid claim against Suzy Que and Treasurer.

First, Suzy Que is not a holder in due course of the instrument and therefore is subject to claims on the instrument. A holder in due course takes without notice of claims on the instrument. Here, the check was an official company check used to pay a personal debt of a fiduciary of that company —Treasurer. This qualifies as an “irregularity” that calls into question the authenticity of the check. This also calls into question whether Suzy Que took this instrument in good faith.

As Suzy Que is not a holder in due course, Widgets can make a claim to rescind the negotiation or recover the proceeds of the negotiation.

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Suzy Que took from a fiduciary to pay the fiduciary's personal debt. Suzy Que knew that Trudy Treasurer was a fiduciary based on the supplied facts ("Treasurer had made 'big bucks as CFO of Widgets"). Based on this understanding, Widgets may file a claim against Suzy Que to rescind the instrument and recover the proceeds (since Suzy Que already cashed the check).

According to 3-3307, Treasurer is a fiduciary and Widgets is the represented person. Suzy Que took the instrument from a known company fiduciary as payment for the fiduciary's personal debt. Therefore, Suzy Que has notice of a breach of fiduciary duty. Consequently, Suzy Que has notice of a claim of Widgets.

There is no signature liability for Widgets. Emily Employer did sign the instrument, but Treasurer fraudulently converted it. She was given explicit instructions to address the check as payable to the creditor. Additionally, Employer gave the dollar amount. Treasurer violated her fiduciary duty and is liable to Widgets for the loss.

REPRESENTATIVE ANSWER 2

Widgets v. Treasurer

Widget may have an action against Treasurer for conversion. Treasurer took property that was Widgets and converted it for her own use. Thus, Treasurer may be liable under a conversion theory to Widgets for the \$65,000 she misappropriated from the company.

Widgets v. Suzy Que

Widgets may have a claim under 3-302 and 3-306 against Suzy Que because it can argue that Suzy Que was not a holder-in-due course. Under 3-302(1) Suzy Que may have not been a holder-in-due course because the check from Widgets should have raised questions in her mind about irregularity. Treasurer owed money to Suzy Que personally. However, Treasurer delivered a check to Suzy Que that was clearly drawn on Widget's accounts. Such an action should have set off questions for Suzy Que. Under 3-307, Treasurer as a corporate officer had a fiduciary duty to Widgets. Under 3-307(2) Suzy Que was on notice that Treasurer had breached her fiduciary duty to the represented person —Widgets by using an instrument drawn on Widget's account to pay Treasurer's personal debt. Under the facts, it is clear that Suzy knew that Treasurer was an officer or fiduciary of Widgets. Thus, Suzy Que was aware of Widget's claims against Treasurer as to the check. Widgets may make a claim that Treasurer did not have authorization to write the check for her personal debt and only was to write it for \$60,000 not \$65,000. Therefore, Widget can seek to recover the \$65,000 check from Suzy Que.

Widgets v. Bank

Widgets probably cannot maintain an action against the bank because there was no forged signature on the check for the bank to know of any problems.

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QUESTION 3

On June 22, 2010, Rugby, Inc. (“Rugby”) organized, sponsored and held an adult recreational rugby tournament at its sports complex (“Complex”) located in Charles County, Maryland, where Rugby supplied the fields, referees, and related facilities.

Dan, an adult player for one of the teams, and his friend, John, attended the tournament. Dan placed his equipment and personal belongings under some trees adjacent to the players’ bench, and took his position on the playing field. His friend stepped up into the bleachers to watch the tournament.

Just prior to the commencement of play, the sky looked threatening, and it was obvious that a thunderstorm was moving towards the Complex. After 20 minutes of play, rain commenced, thunder could be heard and lightning could be seen in the near distance.

Dan continued to play through the approaching storm and John, along with the other spectators, continued to watch the rugby match. Suddenly, the referee for the match stopped the play due to the weather conditions. Dan ran from the field, and he was struck by lightning as he scooped up his personal belongings. Simultaneously, all spectators, including Dan’s friend, John, stood and began to descend the bleachers. Moments later, the bleachers collapsed, and John sustained severe injuries to his leg.

Dan was revived on the field, but he sustained permanent physical injuries from the lightning strike.

Several weeks later, Dan and John decide to seek the advice of a Maryland lawyer to determine if each of them has any cause of action to recover damages sustained during the tournament.

Describe the legal advice that you, a licensed Maryland lawyer, would give them, and explain fully the reasons for that advice.

REPRESENTATIVE ANSWER 1

Dan’s Claims

1. Dan will want to assert a claim of negligence against Rugby for not warning him and protecting him from the lightening. The claim will probably be unsuccessful. In MD, a person or company is liable for negligence if it is determined that they 1) owed a duty to that person, 2) breached their duty to the person, 3) as a cause in fact and proximate cause of the breach that 4) the person was injured. Here the case will center around finding a duty owed to Dan on behalf of Rugby. Typically an organization such as Rugby has no duty to warn of apparent and obvious natural weather conditions unless the customer is prevented from discovering them due to the organization’s fault. An example would be where a person is in a movie theater while a flood outside is occurring. A court might then find a duty to warn

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existed because the person was prevented from seeing that a flood was in fact occurring outside. Here we are dealing with an open field. The facts clearly indicate that lightning and thunder could be seen and heard and that Dan continued to play Rugby anyway. Therefore, it appears that he was on notice of the natural weather conditions. Accordingly, a court is likely to hold that Rugby had no duty to act on behalf of Dan. Even if there was a duty, the fact that the referee finally did blow the whistle to halt the match as the storm was approaching, is probably enough to satisfy the duty.

John's Claims

1. John will want to assert a claim of negligence based on premises liability against Complex. He probably will not recover under the facts. In order to recover, we must first classify John as an invitee or licensee. Here John is an invitee since he is on the premises of Complex for a business purpose and not merely a social guest. As an invitee, Complex owes John the duty to warn of unsafe conditions that it knows or has reason to know of. Here, the only fact we have is that the bleachers collapsed when everyone ran down. The first question is whether this sort of act is foreseeable to begin with? The answer is probably yes since it could be anticipated that everyone might exit at one time. Therefore, Complex has a duty to prevent this type of harm. However, the question remains as to whether they knew or had reason to know that the bleachers would collapse. This is questionable because no facts indicate whether they knew or that the bleachers were set up in an unsafe condition. Since this is the case, the court is likely to conclude that they did not breach their duty to John.

2. John might claim that Rugby caused negligent infliction of emotional distress when he saw Dan get hit by lightning as he watched the match. However, his claim will fail. A person may recover for NIED where due to the negligence of the defendant, a bystander suffered severe emotional distress. However, in order to recover, the bystander must be related to the person harmed. Here John is just a friend. Therefore, he cannot recover on this ground. Furthermore, the facts do not indicate that he suffered severe emotional distress.

REPRESENTATIVE ANSWER 2

1. The first issue is whether "Rugby" was Negligent in Dan getting struck by lightning.

For negligence, a Plaintiff must prove that there was a duty, that the duty was breached, that there was a causal connection between the injury and the Defendant's actions, that there was damages, and that the Plaintiff's action is not subject to any defenses by Defendant. A landowner has a duty in a place held out to the public to seek out and fix all dangerous conditions unknown to invitees. Furthermore, Defendant can only be said to be the proximate cause of the injury when that injury was foreseeable in relation to the Defendant's action. Also, a Plaintiff may assume the risk if the risk is known to him and he does so voluntarily. Additionally, since Maryland is a contributory negligence state, if Plaintiff is at all responsible for any part of the negligence, he will be barred from recovery unless the Defendant had the last clear chance to prevent the injury from occurring.

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The facts indicate the “Rugby organized, sponsored and held an adult recreational rugby tournament at its sports complex” and “supplied the fields, referees, and related facilities”. The facts also show that prior to playing, “the sky looked threatening” and that “after 20 minutes of play, rain commenced, thunder could be heard, and lightning could be seen”. Also, the facts state that “Dan continued to play through the approaching storm” and was “struck by lightning” when he ran to get his things. Since Rugby organized the tournament at its sports complex, it can be said to have a duty to the public to seek out and fix dangerous conditions located on the land. Lightning, a dangerous condition would be something Rugby would be entitled to seek out and inform all spectators and players of it if they would be unable to see for themselves. Since it was located outside, Rugby probably would not have a duty that arose as to the lightning. Furthermore, since Dan could see the lightning and hear the thunder, but yet continued to play, he would be seen as someone who assumed the risk since it was known to him and he was not forced to stay there, and continue to play and was therefore partly negligent in continuing to play after knowing the risk.

Therefore, due to Dan’s contributory negligence, Dan will not have a cause of action against Rugby for its negligence.

2. The second issue is whether Rugby was Negligent as to John.

For negligence, a Plaintiff must prove that there was a duty, that the duty was breached, that there was a causal connection between the injury and the Defendant’s actions, that there was damages, and that the Plaintiff’s action is not subject to any defenses by Defendant. A landowner has a duty in a place held out to the public to seek and fix all dangerous conditions unknown to the invitees. Furthermore, Defendant can only be said to be the proximate cause of the injury when that injury was foreseeable in relation to the Defendant’s action. Also, a Plaintiff may assume the risk if the risk is known to him and he does so voluntarily. Additionally, since Maryland is a contributory negligence state, if Plaintiff is at all responsible for any part of the negligence, he will be barred from recovery.

The facts indicate that “Rugby organized, sponsored and held an adult recreational rugby tournament at its sports complex” and “supplied the fields, referees, and related facilities”. Since Rugby organized the tournament at its sports complex, it can be said to have a duty to the public to seek out and fix dangerous conditions located on the land. Rugby had a duty to seek out and make sure the bleachers were in proper working condition and would therefore not harm persons using them. As Rugby did not seek out and fix the bleachers, it breached its duty to John, who was a foreseeable user of the bleachers. But-for Rugby’s action, John would not have fallen. The facts also show that “the bleachers collapsed” when the spectators “stood and began to descend” and that “John sustained severe injuries to his leg” as a result. It is foreseeable that bleachers would collapse when people ascended or descended them. Furthermore, damages will be associated with John’s severe leg injuries. In addition, since all John did was attempt to descend the bleachers, he did not contribute in any way to his injury and will not be found to be contributorily negligent.

Therefore, John will have a cause of action against Rugby for its Negligence.

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QUESTION 4

Owner owned real estate in Calvert County, Maryland. Owner contracted with Builder to erect a modular home on his premises for \$50,000.00. The contract was duly executed by the parties and included the following provision:

Owner to carry fire insurance, and all losses from fire, regardless of Cause, shall be the responsibility of Owner beginning on the day the Modular home is placed on the foundation.

All electrical work on the modular home was done by Electrical, who was employed by Builder as a subcontractor. Builder and Electrical were attempting to establish a relationship in the modular home construction business. The contract between them recited their hope that by working together, each would be more profitable. Their contract had been prepared by Builder's attorney.

The modular home was placed on the foundation on September 10, 2010. Owner had fire insurance in place on the same day. The local power supplier turned on the power to the modular home on September 12, 2010. On September 15, 2010, the modular home was totally destroyed by fire. The Fire Marshall could not pin point the cause of the fire but stated that it originated at or near the electrical panel in the modular home.

The Insurance Company, through whom Owner had obtained the fire insurance, paid substantial expenses to replace Owner's modular home. Owner and Insurance Company then brought suit in the Circuit Court for Calvert County against Builder and his subcontractor, Electrical, for negligence. Owner and Insurance Company alleged that the fire was caused by the negligence of Builder, Electrical, or both.

Builder answered through its attorney. He contended on Builder's behalf that by virtue of his contract with Owner, Owner was required to obtain fire insurance and be responsible for the loss. Builder contended that he had no obligation to Owner even if his negligence caused or contributed to the fire. Likewise, if he had no obligation to Owner, he had no obligation to Owner's insurer.

Because Electrical had not retained an attorney, Builder's Attorney, John Counsel, offered to represent Electrical. John Counsel's Answer on behalf of Electrical alleged that Electrical was an intended beneficiary under the contract between Owner and Builder and therefore Electrical had no responsibility for the fire loss.

Discovery in the case is ongoing.

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You are a Law Clerk for the Circuit Court for Calvert County. The Circuit Court Judge asks you to write a Preliminary Memo based on the facts above and discuss the following:

- a. The applicable law regarding the allegations of Builder and your opinion as to how she should rule.**
- b. The applicable law regarding the allegations of Electrical and your opinion as to how she should rule.**
- c. The representation of Builder and Electrical by John Counsel.**

REPRESENTATIVE ANSWER 1

Preliminary Memo

To: Circuit Court Judge, Circuit Court for Calvert County
From: Applicant
Date: July 26, 2011
Re: Owner, et al. v. Builder, et al.

A. Builder's Defense

Builder contends that it cannot be liable for the losses arising from the fire destroying Owner's modular home because of the exculpatory clause in the building contract. An exculpatory clause is generally held to be valid if it disclaims liability clearly and does not violate public policy or disclaim liability for intentional or reckless conduct. The exculpatory clause in the contract states that the Owner shall carry fire insurance and bar all losses from any fire "regardless of cause." This statement defines the scope of Builder's disclaimer, relates only to losses resulting from fire, and appears to be set off from the margins of the contract and in bold face type. The disclaimer is probably definite and clear so as to be enforceable.

Owner and his insurer have alleged claims of negligence against Builder, so there is no apparent argument that Builder has engaged in intentional or reckless conduct. To the extent that Owner or his insurer argues that Builder was engaged in gross negligence, causing the fire, the exculpatory clause may not limit liability for this behavior.

A clause in a building contract to delegate the risk of loss in the case of a fire does not contravene public policy. In fact, it is in the public interest to allow such disclaimer and assumption of the risk of loss in such a contract in order to define the party to carry insurance and to define responsibility in such a situation. The exculpatory clause contained in the contract between Builder and Owner should be enforced and Builder should not be held liable.

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Owner's Insurance Company steps into the shoes of the insured, Owner, when bringing a suit of this nature. The insurance company paid for the loss due to the fire and therefore has the right to collect from the party at fault. Because an insurer steps into the shoes of the insured, Owner's insurer will be no more successful in arguing that the exculpatory clause is inapplicable than Owner himself.

B. Electrical's Defense

Electrical contends that it is an intended beneficiary under the contract between Owner and Builder, however in order for a party to be a third party beneficiary under a contract; it must be named in the contract itself. Electrical is not a named beneficiary in the exculpatory clause limiting Builder's liability. There is no indication that Electrical was even aware of the exculpatory clause contained in the contract between Owner and Builder or that it relied on the clause prior to the negligence suit. The contract between Builder and Electrical does not mention an exculpatory clause, but only that the parties hope to work together in order to become more profitable. Electrical, a subcontractor of Builder, can still be liable for its own negligence.

C. John Counsel: Ethical Issues

By representing both Builder and Electrical, Counsel may potentially have a conflict of interest. The parties' positions are not materially adverse as both builder and Electrical deny liability for the modular home fire. However, there is the potential that the parties' positions may become materially adverse as the litigation progresses. A situation may arise where one of the parties blames the other for the modular home fire in order to avoid liability. Understanding that both parties intend to rely on the exculpatory clause for their defense, Counsel may reasonably believe that he can ethically represent both parties, but he should obtain a valid written waiver before doing so. It would be prudent in this case to advise Electrical to seek independent counsel because of the potential for adverse positions with Builder.

REPRESENTATIVE ANSWER 2

MEMORANDUM

To: Circuit Court Judge
From: Applicant
Re: Liability of Builder and Electrical
Date: July 26, 2011

(A) Allegations of Builder

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Builder claims that he is not negligent due to the exculpatory clause that was in the contract executed by both parties. The clause stated that the Owner must carry insurance, that if there is a fire, regardless of cause, it shall be the owner's responsibility as soon as the home is placed on the foundation. This clause shifts the risk of loss completely to the Owner, and it exculpates Builder from liability based on any of his conduct, since it says "regardless of the cause."

An exculpatory clause is valid and enforceable if it is clear and unambiguous, but will not be enforced if: 1) the clause exculpates the party from gross negligence, wanton or reckless conduct; 2) if the bargaining power between the parties is so significant that it leaves one party at the mercy of the others negligence, and 3) if enforcement of the contract would violate public policy. Here, it seems the clause is clear and unambiguous, as it clearly states the risk of loss will be on the Owner the moment the modular home is placed on the foundation. The clause says that all losses from fire will be on the owner after this point, "regardless of the cause." This seems to indicate that builder would not be liable, even if they were grossly negligent, or reckless. Thus, the clause may be unenforceable if this is what the clause means. As to the bargaining power between the parties, there is no indication that the bargaining power was so unequal. Finally it must be determined whether the clause relates to the public interest, and whether enforcement would violate public policy. Here, it is likely that enforcement of clauses such as these would leave homeowners at the mercy of contractors, allowing contractors and builders to behave recklessly and in a grossly negligent manner when building homes. This would violate public policy. Therefore, because the exculpatory clause seems to exculpate the builder from more than simple negligence, and because enforcement of the clause relates to the public interest, Builder should lose in his reliance that the exculpatory clause protects him from liability.

(B) Allegations of Electrical

Electrical is arguing that it is the intended third-party beneficiary of the contract between Owner and Builder. An intended beneficiary arises when there is a contract between two parties, and they decide that a third-party will be the intended third party beneficiary and will receive money or whatever benefit they agree to. There is no evidence that the contract between Owner and Builder designates that Electrical will be the intended third-party beneficiary, as nothing indicates that Electrical is to receive a benefit. Although Electrical may argue that it is the beneficiary because they were given the opportunity to work, this argument seems tenuous. Instead, the facts indicate that Builder employed Electrical to do the electrical work, therefore establishing an employer-employee relationship between them.

(C) Representation of Builder and Electrical

The representation of both builder and electrical raises ethical issues, as John must abide by the rules of Professional Conduct, and there may be a conflict of interest in

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representing both Builder and Electrical. By representing both Builder and Electrical, there is a potential current client conflict of interest since they are both current clients. A lawyer may not represent one client against another current client if: 1) their interests are directly adverse, or 2) representation of one of the clients would be materially limited by his obligations to represent the other client. The interests of Builder and Electrical may become directly adverse, since one may wish to cross-claim against the other that their negligence was the true cause. Also, there is definitely potential that representing Builder would materially limit John's ability to represent Electrical, as they may raise different defenses, conflicting defenses, and as mentioned above, they may even cross-claim and allege that the other was in fact the negligent party.

This conflict can be cured if John reasonably believes that he can competently and diligently represent both clients, and if he obtains written informed consent from each client. There is no evidence that John obtained written informed consent from both, therefore John has violated the Rules of Professional Conduct.

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QUESTION 5

The Church of Now recently opened in Echo, Maryland. Its primary tenet is the promotion of narcissism and it actively seeks members between the ages of 15-30 to join. To accomplish this aim, the Church holds weekly dances and the participants tend to be loud and rowdy.

Word of the Church's activities spread quickly in Echo. As a result, members of a neighboring church ("Members") requested the Church of Now to either tone down its activities or relocate. The Members began to march daily on the sidewalk in front of the Church of Now with picket signs proclaiming "the end is near" and with cameras to record those who enter and exit the Church. On one occasion, one of the Members who resides next door to the Church of Now, verbally attacked the Church of Now Bishop and a young lady as they entered the church, calling them both "slimy sinners."

The Church of Now filed a private nuisance action against the Members alleging that the noise emanating from their picketing, as well as their constant threatening presence in front of the Church property, materially interferes with all Church members' and/or visitors' use and enjoyment of Church property. After a full hearing wherein the above facts were admitted, the Church of Now requested an injunction to:

A. Permanently preclude the Members from gathering or picketing within 500 feet of the Church of Now property;

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

C. Permanently bar the Members from discouraging others, in any manner, from attending the Church of Now.

How should the Court rule and why? Discuss fully.

REPRESENTATIVE ANSWER 1

A private nuisance claim requires substantial and unreasonable interference with the plaintiffs use and enjoyment of the land. Nuisance includes noise, odors, and is not limited to physical invasions of the land. A person's hypersensitivity is not taken into account. The First Amendment right to free speech applies only to state action. A court issuing an injunction of a restriction on public sidewalks likely constitutes state action because the court is issuing an injunction to prevent the freedom of speech. Therefore, constitutional law principles under the First Amendment through the 14th Amendment are applicable.

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A court can issue an injunction to bar individuals with time, place, and manner restrictions in a public forum so long as the restriction narrowly serves a substantial state interest. Further, alternatives must be available, and the restriction must be neutral (i.e., no discretion in its application). In this case, the substantial state interest alleged is picketing within 500 feet of the Church of Now property. While that might be an interest to the Church of Now, it is not very compelling state interest and it does not just prevent general picketing on public sidewalks around town during certain hours of the day. Further, the restriction is not neutral because it only precludes Members from gathering. Finally, while alternatives are available (i.e., over 500 feet away), the injunction would apply to all times of day. Therefore, the injunction likely will not be granted because it violates the First Amendment.

Filming and videotaping any person who walks on the public sidewalk is not a violation, and the court likely would not grant an injunction against filming and videotaping. Filming and videotaping is a First Amendment right to freedom of speech and a person can be filmed in a public place (no privacy action). There is no reasonable expectation of privacy while walking on a public sidewalk. The First Amendment requires strict scrutiny of content control, which requires the state to provide that a law is necessary to achieve a compelling state interest. Here, the court could not suggest that barring filming and videotaping simply to harass is a compelling state interest because people are putting themselves out on the sidewalk, which can be viewed anywhere. Therefore, the court would not grant the injunction.

Under the First Amendment, content control is subject to strict scrutiny, which requires the state to provide that a law is necessary to achieve a compelling state interest. In this case, Members have a right to discourage others from attending the Church of Now, as any other individual in the United States has, because there is no compelling state interest in preventing others to join a religion. In fact, the state may not establish religion under the Establishment Clause through the Due Process clause of the 14th Amendment. By restricting simply negative speech against a religion, the state judicial system would be limiting content control without a compelling interest, and the injunction would not be granted. Further, the Establishment Clause prevents an injunction of discouraging others to join Church of Now because it violates the Lemon test. The Lemon test requires that state action be secular, not inhibit or advance religion, and no excessive entanglement. Here, the injunction would clearly inhibit the religion of Members if they cannot speak freely against the Church of Now, and there would be too much entanglement because the court would have to monitor the injunction. Therefore, this injunction would not be granted.

REPRESENTATIVE ANSWER 2

The court should rule as follows:

Nuisance is the substantial and unreasonable interference with the use and enjoyment of a person's land. Here, the issue is whether the gathering or picketing of Members substantially and unreasonably interferes with the use and enjoyment of the Church's land. Nuisance always requires a balancing of the uses-- each landowner is entitled to reasonable uses of his land. Here, it appears that the harm is substantial in that the marches take place every day on the sidewalk in front of the Church's property and includes verbal attacks of members. This type of harm is likely to materially reduce the value of Church's land, and is enough to be actionable

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under nuisance law. However, there is also a First Amendment free speech issue concerning this potential injunction. Specifically, sidewalks are generally considered to be a public forum. As such, the government may impose reasonable time, place, and manner restrictions as long as they are 1) content neutral, 2) allow for alternative opportunities for expression, and 3) are narrowly tailored to serve a substantial government interest. Under these facts, it is likely that the injunction to permanently preclude Members from gathering within 500 feet of the Church of Now would be unconstitutional. The injunction would not be content neutral because it would specifically target the Members and not any other groups. Also, the terms "gathering" and "picketing" are vague and overbroad. A more general, content-neutral time, place, and manner regulation prohibiting picketing at 500 feet might be reasonable. However, this proposed injunction is not such a regulation. Thus, the court should rule that this injunction is unconstitutional because it violates the First Amendment right to free speech. It should be denied.

Likewise, the court should rule that this injunction would be unconstitutional because it violates the First Amendment rights of Members. As stated above, public sidewalks are considered public fora under the First Amendment of the Constitution. Permanently barring certain groups from filming or videotaping people in public places would not be a reasonable time, place, and manner restriction. Certainly, surveillance of people in private places in which they have no expectation of privacy can be outlawed (in fact, in Maryland, surveillance of people in a private place is a misdemeanor). However, a permanent injunction against this filming and videotaping people on a public sidewalk would violate the First Amendment.

Finally, the injunction barring Members from discouraging others from attending Church of Now would be unconstitutional under the First Amendment as both a violation of freedom of speech and freedom of religion. Barring Members from discouraging others from attending Church of Now is a content control, which is subject to the "strictest scrutiny." The law is not necessary to a compelling government interest and thus is invalid. Furthermore, this injunction would have the result of the government preferring one religion over another (i.e., it would protect Church of Now as a religion at the expense of Members ability to exercise their religion). This is prohibited under the First Amendment, and thus the court should rule against the injunction.

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QUESTION 6

Adam and Beth were married on December 1, 1970, and lived in Ohio with their three children.

In 1995 Beth filed for divorce after Adam deserted his family and moved to Carroll County, Maryland. No divorce decree was ever entered in Ohio although Adam erroneously believed that Beth had been granted a divorce in a suit which Adam neither contested nor appeared. In 1997, Adam met and married Nancy.

In 1998 Adam and Nancy bought a home in Carroll County, Maryland. The property was conveyed by the then owner to “Adam and Nancy, his wife, as tenants by the entirety.”

Beth died in 2006. Adam died in 2010, survived by three adult children and Nancy. Nancy is Personal Representative of Adam’s estate.

In his Will, Adam devised and bequeathed his entire estate to his children.

a. Adam’s children filed a proper declaratory judgment action to determine ownership of the property. What interest, if any, do Adam’s children and Nancy have in the property? Explain.

b. Prior to Adam’s death, Tractor Co. obtained a judgment against Adam in the Circuit Court for Carroll County in the amount of \$50,000. Is this judgment against Adam enforceable as a lien against the property?

REPRESENTATIVE ANSWER 1

A.

Tenancy by the Entireties

A tenancy by the entireties is a concurrent tenancy between spouses, with the right of survivorship. There is a presumption that property conveyed to a husband and wife will be held as tenants by the entirety.

Marriage to Nancy

Adam and Nancy were married in 1997, prior to the acquisition of the home in Carroll County, and the deed is to them as tenants by the entirety. However, individuals who are not spouses may not hold property as tenants by the entirety. Thus, how the property was held depends upon the validity of this marriage.

Bigamy is grounds for annulment and makes a marriage void and of no legal consequence. Here, although Adam believed he had been divorced from Beth, no divorce

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decree was ever entered. Thus, Adam remained married to Beth. It is thus legally impossible for Adam to form a valid marriage with Nancy. The marriage is void. Thus, Adam and Nancy could not have taken title to the home as tenants by the entirety.

Note that a marriage is made void by bigamy at the time of the marriage. Thus, the fact that Beth died in 2006, making Adam free to remarry, should not create a valid marriage or cause or cause the property to become held as tenants by the entirety. A new, valid marriage would be required, as would a reconveyance as tenants by the entirety.

Joint or In Common

The presumption in Maryland is that a conveyance to two parties creates a tenancy in common. However, this presumption may be overcome by clear intent of the grantor. A joint tenancy with a right of survivorship may be created, although disfavored, by such clear intent, and no specific words are required. Joint tenants must share the four unities of time, title, interest and possession. Here, the house was conveyed to Adam and Nancy “as tenants by the entirety”. This expresses a clear intent to create a tenancy with a right of survivorship, as that is the primary distinguishing feature of a tenancy by the entirety. Thus a court would likely hold that Adam and Nancy took as joint tenants.

Devise in a will does not sever a joint tenancy, nor does a lien unless actually executed upon or foreclosed. The joint tenancy here should thus survive both the devise in Adam’s will to his children and the lien by Tractor Co.

If held as joint tenants, the entire property becomes the sole property of the surviving tenant upon the death of the other joint tenant. Here, Adam died in 2010, and Nancy would thus hold the property in fee simple absolute by herself. Adam’s estate would not hold the property, and it thus could not pass under his will to his children. Thus, Adam’s children would have no interest in the property.

Common Alternative

Note that if the court should find an insufficiently clear expression of intent in the devise as tenants by the entirety to create a joint tenancy, the two would hold as tenants in common. If this were the case, Adam’s half of the property would pass through his estate, and each child would own an undivided one sixth share in a tenancy in common with Nancy’s one half share.

B.

A properly recorded judgment becomes a lien against the real property held in the county of recordation. A judgment lien against Adam would not attach to property held as tenants by the entirety, because such tenancies may not be unilaterally alienated or attached by the creditors of one spouse. However, here there was a mere joint tenancy. Thus, the Tractor Co. obtained a lien enforceable against Adam’s share of the home prior to his death. However,

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it did not execute or levy. Thus, when Adam's share passed to Nancy, the Tractor co. lost its ability to enforce the lien against the property.

Note that if the court had found only a tenancy in common, Adam's share would pass his children subject to the lien.

REPRESENTATIVE ANSWER 2

Part A

A divorce is the legal recognition by the state of the termination of a marriage. Without a divorce decree, a marriage cannot terminate.

Under the Full Faith and Credit Clause, on state must recognize and credit an out-of-state marriage.

Here, Adam (A) and Beth (B) were married in Ohio. No divorce decree was ever entered, and Adam's erroneous belief of a divorce does not remedy the lack of divorce. Though the grounds for an absolute divorce exist: A desertion for over one year when A moved to Maryland, A's likely adulterous and marriage-like relationship with Nancy (N), and a separation of A and B for over 2 years. Nonetheless, without a court order, A and B's marriage is still enforceable.

Bigamy is the marriage of a person to more than one spouse and is illegal. Therefore, A's marriage to N is illegal because of his existing marriage to B.

The home in Carroll County was conveyed to N and A as tenants by the entirety (TBE). TBE requires the unity of time, title, possession and interest, and requires that the parties be married. TBE ownership provides the right of survivorship and cannot be terminated by the unilateral act of one spouse or one spouse's creditor.

Here, A and N were not married. Where the grantor intended a right of survivorship, as evinced by granting a TBE, A and N are co-owners of the property as joint tenants. Joint tenancy requires the unity of possession, interest, time, and title, and provides the right of survivorship.

When Adam died in 2010, his will devised his property to his children. However, the joint tenancy right of survivorship trumps A's will. Therefore, N is the rightful owner of the Carroll County property in fee simple absolute. A's children have no legal interest.

Part B

In Maryland, a Circuit Court Judgment automatically attaches to all property by the defendant in the county of the court for 12 years. No separate filing is required.

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Here, Tractor Co. obtained a judgment against A for \$50,000 in Carroll County Circuit Court, and automatically attached to A's property.

However, upon A's death and N's assumption of full ownership of the home, Tractor's interest is extinguished because Tractor failed to execute its lien, which would have granted an interest at that time.

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QUESTION 7

Husband suspected his Wife was having an affair with Coach who coached his son's football team. Husband followed Wife to Coach's residence in Prince George's County, Maryland, and stood in the yard looking through the window for 30 minutes. He then entered the residence and found Wife and Coach making love. He argued with Wife and Coach and then he pulled a handgun that he had brought with him firing one shot, killing Coach. Husband then turned the gun on himself. Wife called 911 and the police arrived. Husband was taken to the hospital. Police Officer accompanied Husband to the hospital in the ambulance. At the hospital, Husband told Police Officer he killed Coach because he found Coach and his Wife in bed making love.

Husband was indicted for murder and use of a handgun in the crime of violence. After he was released from the hospital and placed in jail, Police Officer met with Husband. Police Officer read the appropriate and correct Miranda warnings to Husband to which Husband responded he understood his rights and waived his right to counsel and to remain silent. Police Officer then additionally told Husband he was there to help him, that he only needed a lawyer with respect to questions about the homicide. Husband asked the Police Officer if he, Husband, was setting himself up in discussing the case without a lawyer. The Police Officer said in response that not everything they might discuss was covered by the right to counsel. Husband then gave a written statement in response to Police Officer's questions incriminating himself.

- a. Is the first statement to Police Officer at the hospital admissible in the State's case in chief? Explain fully.**
- b. Is the written statement to Police Officer at the jail admissible in the State's case in chief? Explain fully.**
- c. Assume the Court rules that both statements are inadmissible and Husband takes the stand and testifies in his own defense. Under what circumstances, if any, can the State use the prior suppressed statements?**
- d. What substantive defense, if any, do the facts suggest Husband may employ under Common Law? Would that defense position be acceptable under Maryland Law?**

REPRESENTATIVE ANSWER 1

A) The First statement to Police Officer at the hospital is admissible in the state's case in chief as an admission of a party opponent. The statement would qualify as hearsay, because it was made out of court (at the hospital) and offered for the truth of the matter asserted (the reason why Husband killed Coach). The statements were not made in violation of Husband's Miranda rights. Miranda warnings must be given prior to the police conducting a custodial interrogation. Any statements obtained in a custodial interrogation are inadmissible against the speaker in the prosecutor's case in chief. Here, it does not appear that Husband was in custody

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or being interrogated. A suspect is deemed to be in custody if a reasonable person in same circumstances would not feel free to leave. This is evaluated based on the totality of the circumstances. Here, even though the Police Officer accompanied Husband to the hospital, this would, did not create an atmosphere where a reasonable person would not feel free to leave. He was in a hospital seeking medical attention, and Police Officer's presence was not overbearing or controlling in any way. Furthermore, the facts simply state that Husband told Police Officer why he killed Coach. The facts do not suggest any questioning by Police Officer or any conduct which was intended to elicit a response.

B) The written statement to Police Officer at the jail will not be admissible in the State's case in chief. The same standards as in (A) apply to these statements. It is true that the Police Officer read the appropriate and correct Miranda warnings to Husband, and that Husband waived them. However, any waiver of Miranda rights must be voluntary, knowing, and intelligent. Merely stating that he understood his rights while Police Officer should have known this was not the case was not a knowing and intelligent waiver. Police Officer misstated the law by saying that Husband only needed a lawyer with respect to questions about the homicide. If he had asserted his right to counsel, Police Officer would have needed to honor this request and stop questioning Husband until he got his lawyer. This would have extended to any crime, not just the crime which Husband was being detained on. After he "waived" his rights, Husband clearly demonstrated that he did not understand the rights which he was waiving. It is true that asking if he was "setting himself up" in discussing the case with Police Officer is insufficient to assert his right to counsel; such an assertion must be unmistakably clear and unambiguous. However, Police Officer's response that not everything they might discuss was covered to the right to counsel goes directly against the Miranda warning that anything Husband were to say could be used against him in a court of law. Even though Husband "waived" his rights, Police Officer misstated Husband's rights and effectively lied to him in suggesting that some statements might not be used against him, or that he might not actually have the right to an attorney for some statements. Police officer directly contradicting the Miranda warnings is impermissible. Without clarifying what rights Husband had to cure this impermissible conduct, which the facts do not suggest happened, these statements were impermissible.

C) If Husband takes the stand and testifies in his own defense, statements made in violation of Miranda would be permissible for impeachment purposes only. If Husband made statements inconsistent with the unlawfully obtained statements, the prosecutor could use them for impeachment purposes as prior inconsistent statement but they would not be admitted as substantive evidence. Husband's attorney should ask for a limiting instruction to that effect. This would not run afoul of the Fifth Amendment right against self incrimination because Husband waived that right by taking the stand. Furthermore, he put his credibility for truthfulness at issue by taking the stand, just as any other witness, and thus impeachment through a prior inconsistent statement is permissible.

D) At common law, Husband could argue that his actions did not constitute murder, but merely voluntary manslaughter. Voluntary manslaughter is a homicide (the killing of a human being) in the heat of passion and as a result of adequate provocation. Many states recognize this defense when a husband finds their wife in bed with another man. There can be no

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“cooling off” period between the provocation and the killing, or the killing would not be in the heat of passion. The facts here suggest that upon finding his wife, he began to argue with her and Coach. He then pulled a gun that he had with him and killed Coach. This would be sufficient to mitigate murder to voluntary manslaughter in many jurisdictions. If Husband had gone downstairs to get a gun and come back, it would be seen as retaliation since there was at least some amount of time to cool off before the killing, but that is not what happened here. Husband simply pulled out a gun which he had just brought from the firing range, and in the heat of an argument, killed Coach.

This defense would not be available in Maryland. Maryland has held that finding your spouse in bed with another person is insufficient provocation to mitigate a homicide to voluntary manslaughter.

REPRESENTATIVE ANSWER 2

Hospital Statement:

The issue is whether the statement was made while the Husband was in custody or whether the statement was made spontaneously without questioning by the officer. Custody is determined based on whether a reasonable person, under a totality of the circumstances, would believe that they were free to go. In this case, the Husband had just shot and killed someone, the police had arrived, and an officer was accompanying the Husband to the hospital. While there are no acts that discuss whether the husband was in restraints, and there was only one officer who did not tell the husband he was under arrest, nor did the officer tell him that he was free to go, it is quite likely that the Husband believed that he was under arrest after committing a crime and having an officer accompany him to the hospital. If he was under the reasonable belief and was in custody or the functional equivalent “he killed coach because he found coach and his wife making love”. This is a spontaneous statement, made by a suspect, prior to being charged or subjected to questioning, and thus is not covered by either the 5th amendment right against incrimination, the 6th amendment right to counsel, or the 14th amendment due process right to not be coerced into a statement. This statement should be admissible in the prosecution’s case in chief.

Written Statement:

When the officer had the Husband provide a written statement at the jail, the husband had been indicted for murder and the use of a handgun in the crime of violence. Once the Husband was indicted, his 6th amendment right to counsel came into play. This right gave the husband the right to have counsel present at any criminal stage, including questioning after the indictment, but it is limited to the charged crimes, in this case Murder and use of a Handgun in the crime of violence. His 5th amendment right against self incrimination still applied as well, which applies to all crimes. The officer did give the husband the valid Miranda warnings and obtained a valid, knowing and voluntary waiver, where Husband knew and understood his rights and chose to waive them.

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Police officers in Maryland are not allowed to make any improper inducements or promises, but they are allowed to use basic deception so long as it doesn't rise to the level of coercion. The officer's statement that "he was there to help" though not necessarily totally true, is not coercive in nature and does not render any statement inadmissible. The statement that the Husband only needed a lawyer with respect to questions about the homicide however is absolutely false as the 6th amendment right to counsel also applied to the charged crime of using a handgun in a crime of violence, and the statement seemed intended to coerce the Husband into giving an incriminating statement. Even an improper inducement is harmless if it in fact did not induce an incriminating statement, but in this case, the Husband did in fact give an incriminating statement. The officer's statement that not everything they might discuss was covered by the right to counsel is also not true, as the 6th amendment right to counsel covers all statements made by a suspect, even those not yet charged.

The written statement should be inadmissible.

State's use of prior suppressed statements:

Maryland follows the "one bite of the apple" doctrine where the exclusionary rule only allows a defendant's statements, obtained in violation of the 5th and 6th amendments, to be kept out of the state's case in chief. The exclusionary rule does not prevent a prosecutor from using a statement obtained in violation of the 5th and 6th amendments, if it was not otherwise coerced, to be used to impeach the defendant if the defendant takes the stand. Here, the first statement, made spontaneously at the hospital, was not coerced in any way. That oral statement could be used to impeach the defendant; if he testifies in a manner inconsistent with his prior oral statement. However, the written statement would likely not be able to be used, even for impeachment, because it violates the improper promise and inducement rules. The written statement was a direct product of the officer's coercive false statements, and a coercive statement is not admissible even for impeachment value.

Substantive Defense:

The common law allows the mitigation of murder down to voluntary manslaughter if there was adequate provocation involved. In this case, the Husband found his wife in bed with another man having sex. If a reasonable person would have been provoked, and the husband was actually provoked, so long as there was no cooling off period, the common law would allow this as a defense to mitigate murder down to manslaughter. However, Maryland, while acknowledging the crime of voluntary manslaughter as basically murder caused by adequate provocation, Maryland does not recognize the catching of your spouse in bed with another person as evidence of adequate provocation. So, in Maryland, the husband cannot use this as mitigation from murder.

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AN EXTRACT HAS BEEN PREPARED FOR YOUR USE IN ANSWERING QUESTION 8. IT HAS BEEN PRINTED SEPARATELY. IF YOU DID NOT RECEIVE A COPY, PLEASE CONTACT YOUR PROCTOR AND OBTAIN A COPY BEFORE ANSWERING THE QUESTION.

QUESTION 8

Don Dorkski and Paul Pennypincher live together in Howard County, Maryland. On the morning of January 1, 2010, as Dorkski was about to take his bath, raw sewage backed up into the apartment from the toilet and the bath tub. The sewage overflowed onto the floors of the apartment contaminating Dorkski and Pennypincher's property. The damage was caused by problems from a sewage line owned and operated by Howard County which serviced the apartment.

On May 15, 2010, Dorkski mailed a letter by regular mail addressed to an Assistant County Attorney whom he met once at a school fundraiser, demanding \$30,000 for his damaged exotic framed painting that was on the floor at the time of the sewage backup. The Assistant County Attorney to whom the letter was addressed works in the real estate division of the Howard County Attorney's Office. That letter was received by the Howard County Attorney's Office on May 16, 2010. On August 2, 2010, Pennypincher hand-delivered a letter to the Howard County Executive demanding payment of \$10,000 for various work equipment he claimed was damaged by the sewage back up.

Not satisfied with the response from the County, Dorkski and Pennypincher both have come to you seeking to file separate suits against the County. They advise that the amounts sought in their claim letters are the same amounts they seek in their individual lawsuits. Both have advised you that they want a trial by jury.

a. Describe in detail the advice you will provide each person regarding jurisdiction of the suits they seek to file against the County.

b. Analyze the likely success of any statutory defenses you anticipate the County will raise.

REPRESENTATIVE ANSWER 1

A. In both cases Don Dorkski and Paul Pennypincher may file their suits in either the district or circuit court because both courts have concurrent jurisdiction since the amounts in controversy exceed \$5000 and does not exceed \$30,000. §§4-401, 4-402(d), 1-501. However, Paul Pennypincher will be unable to obtain a trial by jury. Maryland does not provide a right to a jury trial unless the amount in controversy exceeds \$15,000. §4-402(e)(1). Paul Pennypincher only seeks \$10,000 in his suit. Don Dorkski will be able to obtain a trial by jury because he seeks \$30,000. However, jury trials are only available in the circuit court, so I would recommend that Don Dorkski file his complaint there. Venue in Howard County is appropriate for both lawsuits because the injury occurred in Howard County, the defendant is Howard County, and both plaintiffs reside in Howard County.

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B. The County is likely to successfully defend on the basis of the Local Government Tort Claims Act. In a suit for damages against a local government such as Howard County, the Act requires notice of the claim within 180 days of the injury. §5-304(b). The notice must be in writing and state the time, place and cause of the injury. *Id.* It must be given in person or by certified mail. *Id.* And for Howard County, the notice must be given to the County Executive. *Id.* Pennypincher's suit will fail because he gave notice on August 2, 2010, more than 180 days after his injury in violation of the Act. (His notice was otherwise proper because it was given to the County Executive and delivered in person. There is not enough information to know whether his letter contained the time, place, and cause of injury.) Dorkski gave notice within 180 days, but his suit will also fail for improper notice: his letter was sent by regular rather than certified mail and was given to an Assistant County Attorney at the Howard County Attorney's Office rather than to the County Executive as required. (It is again unclear whether the letter contained the requisite information.)

I will advise Don Dorkski and Paul Pennypincher to attempt file a motion under the waiver provision in §5-304(d), which permits the court upon a motion for good cause shown to entertain the suit even though the required notice was not given, so long as the County cannot show prejudice. Although there is no apparent prejudice to the County in this case, it is unlikely that Don Dorkski and Paul Pennypincher will be able to show good cause for their failure to give proper notice. Hence both suits are likely to be barred under the Act.

REPRESENTATIVE ANSWER 2

Before undertaking representation, I would obtain written, informed consent from both Paul Pennypincher and Don Dorkski. After obtaining consent, I would provide the following advice.

Don Dorkski's Claim

Subject Matter Jurisdiction -- I would advise Don Dorkski that the District Court and Circuit Court in Howard County have concurrent jurisdiction over his claim, because the amount in controversy exceeds \$5,000 and is not above the statutory threshold of \$30,000. However, since Don Dorkski is demanding a jury trial, he should bring his claim in the Circuit Court for Howard County. Don Dorkski may properly demand a jury trial because his claim exceeds the statutory requirement of \$15,000.

Notice – Under Maryland law, a party filing suit for unliquidated damages against a local government entity must provide notice of the claim within 180 days after the injury. For suits brought against Howard County, notice must be given to the County Executive within the period mentioned above. The notice must be given in person by certified registered mail, return receipt. Here, Don Dorkski desires to sue for unliquidated damages that arose out of the January 1, 2010 event. Don Dorkski was required to provide notice to the County Executive by July 1, 2010. The facts indicate that Don Dorkski sent a letter by regular mail to an Assistant County Attorney on May 15, 2010. Thus, while the notice was timely it was neither sent by the required means or to the required person. Accordingly, I would advise Don Dorkski that he can proceed on his claim only upon filing a proper motion with the court and

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showing good cause for the failure to provide proper notice. I would explain, however, that the claim will not be heard if the County can show that its defense would be prejudiced by lack of proper notice.

Paul Pennypincher's Claim

Subject Matter Jurisdiction – I would advise Paul Pennypincher that he can file his suit for unliquidated damages in District Court or Circuit Court, as these courts have concurrent jurisdiction of his claim for damages. However, because Paul Pennypincher's claim does not satisfy the statutory threshold of \$15,000, he may not demand a jury trial in Circuit Court if he chooses to file there.

Notice – Applying the same notice provisions mentioned above, I would advise Paul Pennypincher that his notice was improper. Although notice was given in person to the County Executive as required, it was not given within the 180-day period (assuming the injury to his work equipment arose on January 1, 2010). Accordingly, I would advise Paul Pennypincher that he can proceed on his claim only by making a proper motion with the court and showing good cause for the failure to provide proper notice to the county. I would explain that the claim will not be heard if the County can show its defense would be prejudiced by lack of proper notice.

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QUESTION 9

Under a written revocable trust agreement executed by Patricia, David was appointed trustee to maintain and collect all her assets and pay her debts from those funds. The agreement required David to provide an annual statement to Patricia outlining in detail the assets received and the expenses paid by the trust.

David never provided Patricia with an annual statement. After the trust had been in effect for two years, Patricia came to believe that David was using funds of the trust for his own business and investment interests without her consent or permission. Patricia demanded an accounting of all transactions by David under the trust agreement. David refused to provide any documentation. He sent all the account books, records, and documentation of the trust transactions in his possession to Fred, a Maryland licensed certified public accountant, whom David as trustee had consulted in the handling of the trust. The certified public accountant had prepared all the trust's tax returns.

Patricia's attorney provided to Patricia an investigative report containing his analysis of the facts, conclusions and his recommended plan of action in a file marked "Summary". After receipt of the report, Patricia filed suit against David as trustee and in his individual capacity in the Circuit Court for Carroll County, Maryland alleging breach of trust and seeking an accounting.

Patricia's attorney served on Fred a notice of deposition, together with a subpoena *duces tecum* requesting the Fred produce all account books, records, and documentation of the trust transactions in Fred's possession and all notes of conversations with David. During the deposition of David, Patricia's attorney demanded the documents and notes of conversations. David's attorney objected.

David's attorney served on Patricia a notice of deposition together with a subpoena *duces tecum* to bring all records, correspondence and documentation regarding the trust and all written reports prepared by any expert. David's attorney noticed that while waiting to testify, Patricia was reviewing a file marked "Summary". During Patricia's deposition, David's attorney demanded that Patricia produce the file marked "Summary". Patricia's attorney objected.

Both objections were referred to the Court for a ruling.

At trial Patricia's attorney asks David on cross examination, "Have you ever been convicted of theft?" David's attorney objected.

At trial Patricia's attorney offers into evidence an unsigned copy of tax a tax return that appears to have been prepared on behalf of the trust. David's attorney objected.

What is the evidentiary basis, if any, of each the four objections? How should the court rule on each objection? Discuss fully.

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REPRESENTATIVE ANSWER 1

First Objection

David's attorney's objection is based on the accountant-client privilege as recognized in Maryland. This privilege safeguards all confidential communications between an accountant and his client. This would cover the requested notes from all conversations between David and Fred. It would not necessarily cover all the account books, records, and documentations of trust transactions.

There is a debatable issue as to who is Fred's client. Patricia is the owner of the trust, but David is the trustee. If Patricia can establish that she is the client, the court should overrule the objection. If David is the client, the court should sustain the objection as to the conversation notes, but deny it as to the financial records.

Additionally, David owes Patricia a fiduciary duty as the trustee of her trust. This includes providing an accounting of all transactions and allowing Patricia to inspect the books and records. Further, the trust agreement between Patricia and David required David to provide annual accountings to Patricia. David is in the wrong here.

Second Objection

Patricia's attorney's objection is based on the work-product doctrine. Attorney work product is privileged from discovery in the course of a lawsuit. The "Summary" file is attorney work-product because it includes the attorney's thoughts and conclusions related to the case. This privilege is held by the attorney (unlike confidentiality which is held by the client). The court should sustain this objection.

Third Objection

David's attorney's objection relates to the admission of character evidence at trial. In general, character evidence cannot be introduced to prove criminal tendency of a witness. The question may not be used as an attempt to prove David's character as a thief. It may, however, be admitted as impeachment evidence since it regards prior bad acts (instead of reputation or opinion evidence). Character evidence may be introduced to prove a witness' character for truthfulness or untruthfulness. Theft is a crime that involves lying and deceit. David's past history of lying is relevant as impeachment evidence to show that he might be lying about the current case. The court should overrule this objection.

Fourth Objection

David's attorney's objection is based on the authentication requirement and the best evidence rule. A document must be authenticated before it is admitted. An exception to the

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authentication requirement is for business records. A tax return is a business record that is systematically created for business purposes. This tax return is admissible as an authentic document. The best evidence rule requires that original documents be used as evidence. The tax return is a copy. Photocopies are admissible if they are truthful copies of the original and their authenticity is not in doubt. The court will probably find that this copy fulfills the best evidence rule. The court should overrule this objection.

REPRESENTATIVE ANSWER 2

1.

The evidentiary basis for the first objection is Maryland's certified public accountant – client privilege. The privilege allows a client and his CPA to protect confidential communications between the two of them, making them unavailable as evidence. Ordinarily, this is a valid privilege. However, here it appears that David conveyed all the books, records, and documents for the exclusive purpose on invoking the privilege. Courts will generally not recognize documents conveyed for such a purpose as confidential. Furthermore, a court likely will not consider them communications, as there is not evidence that there was any need for the action except to physically move the documents to invoke the privilege in an attempt to protect them. However, the notes of conversations between David and Fred are likely privileged and will not be admitted (meaning that part of David's objection would be sustained.).

2.

The bases of the second objection are the attorney client privilege and the work product rule. This privilege allows an attorney to protect confidential communications with his clients. The work product rule states that documents prepared for, or in anticipation of litigation are similarly protected. Here, the "Summary" file was prepared by Patricia's attorney in preparation for the incoming litigation with David. Thus, the document that he created for Patricia's use in the litigation is protected under both work product and attorney-client privilege. The court should sustain the objection and not admit Summary.

3.

The evidentiary basis for the objection to Patricia's attorney's question could be relevancy, unfair prejudice, outside the scope of cross-examination, or an improper attack on David's character. The court should rule that the question is relevant, does not unfairly prejudice David and is a permissible attack on David's credibility. However, if David did not bring up the issue of his own character, the court might see this question as an attack on David's character, which is impermissible without his "opening the door" in his own testimony.

4.

The evidentiary basis of David's objection is the best evidence rule and lack of authentication because there is no signature. The best evidence rule requires that when the contents of a written document (or any kind of record) are at issue, the document itself must be introduced instead of just testimony about it. Part of introducing the actual document is authentication, making sure the document is what it purports to be. Here, there is an unsigned tax return. Unless Patricia can provide further evidence that this is indeed the trust's tax return, the court should sustain David's objection.

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QUESTION 10

Jane and Joe are the only limited partners (“Limited Partners”) in Large Tract Limited Partnership; a Maryland limited partnership (“Partnership”). The general partner is a Maryland Corporation (“General Partner”). The Partnership was properly formed and a limited partnership agreement (“Partnership Agreement”) was signed by all partners in 1991. The purpose of the Partnership is to own, operate and sell a 186 acre parcel of land in Cecil County, Maryland (“Property”). The Partnership Agreement contained the following provisions, among others:

1. Section 4 provides that the Partnership “... shall be dissolved and its affairs terminated upon the sale of all or substantially all of its Property.”

2. Section 7 provides that the Partnership shall indemnify the General Partner for any claim arising out of the Partnership’s business if its “... acts or omissions were performed or made in good faith belief and that it was acting within the scope of its authority under the Partnership Agreement.”

3. Section 12 provides that no partner is entitled to remuneration or other payment for services performed for the Partnership “... except for reasonable compensation for the services directly resulting from the termination of the business of the Partnership.”

4. Section 14 provides that the Partnership is authorized to withhold funds determined by the General Partner “... to be necessary to pay the debts and obligations of the Partnership.”

On June 26, 2010, the sale of the Partnership Property was consummated and the Partnership received sales proceeds of \$3,000,000. Thereafter, the General Partner withheld from the dissolution distribution to the General Partner and the Limited Partners, the sum of \$75,000 from the sale proceeds (“Compensation”) to pay a bonus to the employees of the General Partner for their efforts in selling the Property.

The Limited Partners object to the withholding of the Compensation from the distribution to them of their proportionate share of the Partnership Property under the dissolution provisions of the Partnership Agreement.

The Limited Partners seek your advice, as a licensed Maryland lawyer, on (1) whether the General Partner is entitled to withhold the Compensation, and (2) whether the General Partner is entitled to indemnification for the payment of its legal fees incurred in defending any suit by the Limited Partners against the General Partner.

What advice would you give to the Limited Partners? Fully discuss your reasons.

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REPRESENTATIVE ANSWER 1

The General Partner is entitled to withhold the Compensation, but not for the stated purpose. Partnership law permits compensation to a partner if the partner is involved in the winding down of the business. Therefore, section 12 of the Partnership Agreement, is permissible under partnership law. However, the stated purpose for the withheld Compensation does not conform to section 12 of the Partnership Agreement. General Partner has withheld Compensation for the purpose of compensating employees for their efforts in selling the Property. This is the activity that took place before the dissolution of the partnership and was the primary purpose of the partnership. Under these facts, it is not possible for General Partner to claim that “efforts in selling the Property” were part of the winding down of the partnership because the selling of the property was actually the primary goal of the partnership. Therefore, General Partner can rightfully withhold Compensation, but it may not use the Compensation to pay a bonus to its own employees.

Furthermore, General Partner does not have a good faith belief that its withholding of Compensation was within the scope of its authority under the Partnership Agreement because the agreement explicitly states that no partner shall receive compensation except for reasonable compensation for the services rendered during the winding down process, General Partner’s belief that it is acting within the scope of its authority by withholding Compensation for services that were not rendered during the winding down process are not likely to be good faith beliefs that it is acting within its scope of authority. Section 7 of the Agreement indemnifies General Partner only if General Partner is acting in good faith belief that it was acting within the scope of its authority. Since General partner is not acting in good faith, Section 7 does not indemnify General Partner for this withholding. Therefore, General Partner is not entitled to indemnification for the payment of its legal fees incurred in defending any suit by the Limited Partners.

However, my advice to the Limited Partners is to serve notice of a complaint with General Partner stating that they do not believe that the withheld Compensation should be paid to the employees of General Partner as a bonus for their efforts in selling the Property. This complaint may not be futile if it properly explains to General Partner both that the contemplated compensation is impermissible and that General Partner would not be indemnified by the Partnership for legal fees. If General Partner still ignores the Limited Partners’ complaint, then I would advise them to sue General Partner. However, if they sue, I would also advise that they may wish to seek separate legal counsel because once the lawsuit starts, their interests may diverge if one of the Limited Partners is willing to settle for less than another Limited Partner. However, at the moment, there is no conflict of interest, and I would advise them that I could represent both of them in this matter by drafting and sending the complaint regarding the withholding of funds.

REPRESENTATIVE ANSWER 2

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1. Preliminarily, there is no problem with a corporation serving as a general partner in an LP. Also speaking generally, no partner is entitled to compensation from the partnership other than his share of the profits, except for work done in terminating the partnership. Section 12 of the partnership agreement is consistent with this principle. The general partner could have compensated its employees for their efforts in winding up the partnership business after the land was sold, but it cannot compensate them for actions they take in the ordinary course of partnership business (selling the land). Section 4 of the agreement should not change this result. Although dissolution occurs when the partnership sells the land that does not mean that selling the land counts as an act of terminating the partnership. Rather, dissolution starts the clock for winding up the partnership—it is during this phase that the general partner may compensate its employees. Similarly, although Section 14 grants the general partner a broad power to withhold funds, the bonuses to the general partner’s employees are not a partnership debt and may not be paid with partnership funds.

2. Assuming the general partner acted in good faith, it still faces difficulty in enforcing the indemnification provision. Section 12 requires that, for indemnity to attach, the general partner must have acted within the scope of its authority. First of all, an act outside the ordinary course of partnership business requires the unanimous consent of general partners and majority vote of limited partners. If selling the land was not in the course of business, then the general partner may have acted without authority.

The bigger problem, though, is that the general partner was not entitled to pay compensation to its employees under the partnership agreement. Section 7 suggests that the general partner’s good-faith belief that it was acting within the scope of its authority may be sufficient to trigger the indemnity provision. Good faith is a determination of fact, but the odds are against the corporation, since it is a sophisticated party and can be presumed to realize that selling the land did not constitute business terminating the partnership. Nevertheless, good faith is a subjective determination, and if the directors actually believed that paying the bonus was within its authority, the corporation is probably entitled to indemnity.