FEBRUARY 2003 BAR EXAMINATION

BOARD'S ANALYSIS

QUESTION 1

The question asks for an analysis of the "criminal charges" that can be brought against Lois, Clark, Jimmy or Megan. Maryland Code, § 10-402(a)(1) of the Court's and Judicial Proceedings Article makes it unlawful for any person to "(w)illfully intercept, endeavor to intercept, or procure any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication [,]" unless all parties to the communication consent. Violation of the Maryland Wiretap Law constitutes a felony, subject to 5 years imprisonment and/or a fine up to $10,000. In 2001, the Maryland Court of Appeals in *Deibler v. State*, 365 Md. 185 (2001) held that, "willfulness" for purposes of the Wiretap Law, did not require knowledge on the part of the defendant that his actions were unlawful, thus abrogating prior Maryland law. Therefore, an interception that is not otherwise specifically authorized is done "willfully" if it is done intentionally or purposefully. Here, Lois was aware of the fact that Jimmy worked at a surveillance equipment store and instructed him to "show the world what they're up to" and thus solicited Jimmy to violate the wire tap law. Jimmy followed through with Lois' instructions and therefore they both can properly be charged with violating Maryland's wiretap law as co-conspirators by recording the oral communications of Clark and Megan.

Megan and Clark may also properly be charged with violating the Maryland Wiretap law as co-conspirators as evidenced by their agreement to "record everything Lois says." The fact that they wanted to use the recording as evidence is not a defense. Moreover, the illegal recording would be inadmissible as evidence.

Maryland Code, § 3-903 of the Criminal Law Article makes it a misdemeanor subject to imprisonment not exceeding six months and not exceeding $1,000 or both for a person to place or procure another to place a camera on real property where a private residence is located to conduct deliberate surreptitious observation of an individual inside the private residence. Thus, as co-conspirators, Lois and Jimmy may both properly be charged with the unlawful camera surveillance of Megan and Clark.

Maryland Code, § 6-204 of the Criminal Law Article makes it a felony for any person to break and enter the dwelling of another with the intent to commit a crime. It is reasonable to infer from the facts that Lois knew Jimmy would have to break and enter Megan's apartment in order to place a hidden camera in violation of the Wiretap Law. Therefore, as co-conspirators, both Lois and Jimmy may properly be charged with burglary in the 3rd degree. Because violation of the Maryland Wiretap Law is a felony, Lois and Jimmy may also be charged with common-law burglary if Jimmy broke into Megan's apartment at night. Otherwise, they may be convicted of common-law daytime house breaking.

Jimmy may be charged with burglary in the 1st degree if he had the intent to steal Clark's $5,000 watch when he broke into the apartment. Jimmy can properly be charged with felony theft

for taking Clark's $5,000 watch. The facts do not support Jimmy's theft as part of the conspiracy with Lois, thus, Lois should not be charged with these offenses.

Although Lois may be charged with telephone abuse, she may defend on the basis that she made only two calls with the intent to annoy or harass and as such, it is insufficient to constitute "repeated calls" within the meaning of the Statute. Whether there is sufficient evidence to support a conviction of telephone abuse is to be determined by the trier of fact. Similarly, Lois may be charged with harassment if her phone calls constituted "a course of conduct" that alarmed or seriously annoyed Clark or Megan.

BOARD'S ANALYSIS

QUESTION 2

Discussion of admissibility of Confession:

Bob's extrajudicial confession is admissible at trial against him only if it is (1) voluntary under Maryland non constitutional law; (2) voluntary under the due process clause of the Fourteenth Amendment to the United States Constitution, and Article 22 of the Maryland Declaration of Rights, and; (3) elicited in conformance with the mandates of Miranda v. Arizona, 384 US 436, 86 Supreme Court 1602 (1966). The facts confirm that the police acted in conformity with the requirements of Miranda so that issue need not be addressed.

Once a confession is challenged, the State will have the burden of showing affirmatively by a preponderance of the evidence that the confession was freely and voluntarily made and was not the product of a promise or a threat at the pre-trial suppression motion. If there is an issue of voluntariness at trial, it is the State's burden to prove voluntariness beyond a reasonable doubt. A confession is generally voluntary if it is freely and voluntarily made at a time when the Defendant knew and understood what he was saying (Hoey v. State, 311 MD 473, 536 A2d 622 (1988)). A confession is involuntary if it is induced by force, undue influence, improper promises or threats. The confession can be suppressed if the conduct of the police has overborne the Defendant's will to resist and produces a statement that was not freely self determined. Improper coercion can be physical or psychological. Ultimately the voluntariness of the statement turns on the "totality of all the attendant circumstances" (see Widner v. State, 362 MD 275, 765 A2d 97 (2001)). The factors relevant to the totality of the circumstances standard include: (1) where the interrogation was conducted, (2) its length, (3) who was present, (4) how it was conducted, (5) its content, (6) whether the Defendant was given Miranda warnings, (7) the mental and physical condition of the Defendant, (8) when Defendant was taken before the Court Commissioner following arrest, (9) whether Defendant was physically mistreated, physically intimidated or psychologically pressured (see Hof v. State, 337 MD 581, 655 A2d 370 (1995)).

Generally, coercive police activity is a necessary element to finding a confession involuntary (see Colorado v. Connelly, 479 US 157, 107 S.CT 515 (1986)).

The use of police deception is a proper consideration in regard to voluntariness and a confession can be suppressed if is the product of excessively deceptive conduct. The use of trickery to encourage a suspect to confess, however, is not inherently unlawful. Use of deception does not compel suppression, but it is a proper factor in determining voluntariness.

Under the legal maxims just discussed, primarily the Court will have to determine if the use of police deception with reference to the bogus claim that Bob's fingerprints were found at the crime scene (see Finke v. State, 56 MD App 450, 468 A2d 353 (1983)) and the bogus claim that his semen was found, which deception was buttressed by the fabrication of a document (see State v. Cayward, 552 SO.2d 971 (Florida District Court of Appeals 1989) and Arthur v. Commonwealth, 24th VA. App. 102, 480 S.E.2d 749 (1997)) compel a finding of involuntariness.

The Court would also have to determine whether the police suggestion that Bob would be "better off if he told the truth" and that "if he confessed he would get medical treatment instead of being locked up" were sufficient police suggestion to make the statement involuntary. Where improper promises or inducements are alleged to destroy voluntariness, the Court requires a finding both: (1) that a police officer promised or implied to Bob that he will be given special consideration in exchange for the confession and (2) that Bob made the confession in apparent reliance on the police officer's statement. In analyzing this second factor, the Court looks at intervening factors, such as the time elapsed between the promise/threat and the confession; who initiated the subsequent interrogation; whether the confession was to the same officer, etc. Basically, there needs to be a causation analysis to see if there was a sufficient nexus between the promise and the confession or in this case the deception and the confession.

Applying the totality of circumstances test, the critical factors on the voluntariness issue under the facts given appear to be the following: (a) Bob was a young adult with limited education and no prior criminal interrogation experience, who was not under arrest and was properly given Miranda warnings and waived his rights; (b) Bob appears to have been in police custody for more than 7 hours; (c) He was given food, drink and an opportunity to use the bathroom; (d) He was only interviewed by one officer at a time at the police station. (e) Bob was deceived by the police, but there is no "bright line test" and the facts suggest that the confession came some eight hours after the two deceiving comments had been made, such that Bob's will was not overborne by the phony fingerprint and semen evidence; and (f) The improper verbal inducement that he might receive medical treatment instead of being locked up, is the most troubling factor. However, Bob ended up confessing to a different officer more than 1 hour after the improper oral inducement. It appears that the real issue in this fact intensive analysis is whether there will be a sufficient nexus between Captain Douglas' improper inducing remark and Bob's confession 1 hour later to Lieutenant Frank.

BOARD'S ANALYSIS

QUESTION 3

A. Papers, pleadings, and defenses to be filed:

Maryland Rule 2-121(a) sets forth the methods by which service of process may be made. On the given facts, there was no compliance with this rule. Jeff was not personally served; no one answered the private process server's knock on the door; and the summons, Compliant, motion, and affidavit were not mailed to Jeff. If a resident of suitable age and discretion had responded to the knock at the door, service could have been effected even in Jeff's absence.

A motion to dismiss can be filed under Maryland Rule 2-322(a)(4) for insufficiency of service of process. This is a mandatory defense which is waived if not made before the Answer is filed.

The facts upon which Jeff would rely in his motion are not part of the record or papers on file in the case so Jeff must support his motion to dismiss by affidavit accompanied by any papers on which the affidavit is based. Maryland Rule 2-311(d).

The filing of a motion to dismiss pursuant to Maryland Rule 2-322 would extend the time for filing an answer to the Complaint and to the motion for summary judgment, without special order, to 15 days after entry of the Court's order on the motion. Maryland Rule 2-321(C).

If Jeff did not care to challenge the service, an Answer could be filed on his behalf pursuant to Maryland Rule 2-323.

If an Answer is filed, Jeff must also answer the motion for summary judgment filed by Mutt with his Complaint. Jeff's response must be accompanied by an affidavit or other statement under oath. Maryland Rule 2-501(b).

B. Response to order for default:

Jeff can file the motion to dismiss and add to the caption that it is a motion to vacate the order of default as well. His combined motion(s) should be filed within 30 days after the entry of the order for default. The mandatory defenses to the Complaint would be preserved and the combined motion(s) would inform the Court of the jurisdictional and service issues confronting the order of default and the reasons for vacating that order.

If Jeff did not challenge the service and filed an Answer instead, he should move to vacate the order for default within 30 days after its entry stating the reasons for the failure to plead and the legal and factual basis for the defense to the claim. Maryland Rules 2-613(b), (c), and (d).

EXTRACT SECTIONS FOR QUESTION 3

Annotated Code of Maryland, Maryland Rules

TITLE 2. CIVIL PROCEDURE – CIRCUIT: Rule 2-121, Rule 2-311, Rule 2-321, Rule 2-322, Rule 2-323, Rule 2-501, and Rule 2-613.

BOARD'S ANALYSIS

QUESTION 4

Defamation – public figure – actual malice – punitive and compensatory damages – respondeat superior – humor as defamation.

A defamatory statement is a false statement about another person that exposes that person to public scorn, hatred, contempt, or ridicule, thereby discouraging others from having a good opinion of, or from associating or dealing with that person. (MPJI 12:1 – Defamation). When the statement is made about a public figure, it is defamatory only if made with actual malice. Actual malice is defined as clear and convincing evidence that the statement was made with knowledge that it was false or with reckless disregard of whether it was false or not. *New York Times. Sullivan, 376 U.S. 254 (1964).*

Whether a statement is capable of being defamatory is a question of law for the court to decide, however, once a statement is found by the court to be capable of both defamatory and non-defamatory meanings, it is for the jury to decide whether it is a harmless joke or a harmful injury to reputation. *Embry v. Holly. 48 Md. App 571, aff'd in part, rev'd in part 293 Md. 128.* If found to be mere humor, even in bad taste, damages will not be awarded. The intent of the defendant in making the statement is irrelevant to this issue as the test is not the intent of the person but rather how others reasonably understood the joke. *Embry v. Holly, supra.*

The trier of fact also decides whether the statement was made with reckless disregard of its truth or falsity, or with actual knowledge that the statement was false. The trier of fact can award compensatory damages for damage to one's reputation, as well as special damages for out-of-pocket loss or emotional distress. Furthermore, punitive damages are allowed if the defendant had actual knowledge the statement was false. "Reckless disregard" or "reckless indifference" as to whether a defamatory statement is true or false has been rejected as a standard for an award of punitive damages in Maryland. Le Marc's v. Valentin, 349 Md. 645, 709A. 2d, 222 (1998).

As Lester is a public figure, he would have to prove by clear and convincing evidence that Zookeeper acted with actual malice, i.e. he knew that Lester was not a child molester. It is likely that Lester will sustain his burden of proof based upon the fact that Zookeeper did not believe Lester was involved in child molestation. Thus, a jury could award Lester both compensatory and punitive damages in this case.

With respect to Radio, Inc., generally, an employer is liable for the tortious acts of its employee. This includes punitive damages when the employee acts within the scope of his employment and with knowledge of falsity. However, punitive damages may be apportioned between the parties, depending upon the degree of culpability and pecuniary status of each. *Embry v. Holly, 293 MD. 128, 442 A. 2d.966 (1982).*

Zookeeper and Radio, Inc. will argue the statement was not defamatory as it was meant to be humorous. They will argue that a reasonable person would not perceive the comment to be truthful and would understand that it was said in jest.

Radio, Inc. also may argue that punitive damages should not be awarded against it because it did not authorize, participate in or ratify Zookeeper's defamatory acts. *See Rest. 2nd Torts, §909 (1979).* The Restatement test has not been adopted in Maryland. See dissent in *Embry, supra.*

BOARD'S ANALYSIS

QUESTION 5

Defamation – Third Party Statements – Hearsay Exception – Character Evidence – Evidence of Financial Ability

PART A

The trial court should overrule defense counsels' objection. The substance of the anonymous telephone calls is hearsay. But in defamation cases, statements made by third persons in reaction to the alleged defamatory comment are admissible under the state-of-mind exception to the hearsay rule. *Embry v. Holly, supra, 429 A.2d at 268.* The evidence is offered, not for its truth, but to demonstrate the extent and effect of the publication by establishing that there were people who believed Zookeeper's remark to be true and not a joke. Consequently, it is not "hearsay" under the definition provided in Rule 5-801(c).

NOTE: Answers reaching the opposite conclusion may receive equal credit so long as the hearsay rule and the state-of-mind exception are referenced and discussed.

PART B

The trial court should overrule the objection and allow the testimony.

In general, evidence of a person's character or trait of character is not admissible for the purpose of proving action in conformity therewith as to a particular occurrence. Rule 5-404(a). But in cases in which character or trait of character of a person is an essential element of a….claim, proof may also be made of specific instances of that person's conduct." Rule 5-405(b).

In this defamation case, Lester is seeking damages for injury to his reputation. Lester's character and reputation are an essential element of his claim. Hence, proof of reputation, both by opinion and by proof of relevant specific instances of Lester's conduct, is admissible. Rule 5-405.

PART C

The trial court should admit the letter, but redact the sentence relating to the $1,000 check.

Statements made in compromise negotiations are not admissible to prove the validity or amount of a civil claim in dispute. Furnishing or offering to furnish a valuable consideration for the purpose of compromising or attempting to compromise the claim, likewise is inadmissible. Rule 5-408(a)

On the other hand, the statement's of Radio, Inc.'s President that Zookeeper's remark was "outrageous and untrue" is admissible as an admission against interest by Radio, Inc., a party-opponent. Rule 5-803(a).

The jury should be allowed to consider that portion of Radio, Inc.'s letter which is admissible, but not the portion relating to settlement.

BOARD'S ANALYSIS

QUESTION 6

Mary and Sara can show danger of substantial injury from the operation of the laws and therefore have standing to challenge each. Both sisters may argue that the laws violate the Equal Protection Clause found in the 14th Amendment to the United States Constitution. The facts indicate that both sisters are presently residing within the United States but are treated differently from Maryland residents born in the United States. Mary will argue there is no rational basis for the disparate treatment since any United States born citizen is allowed to freely enroll, and persons within this group are just as likely as Mary to be terrorists. Sara will argue there is no rational basis for the disparate treatment since the law excludes all vehicles that are registered in Maryland and also excludes vehicles under 5,000 pounds regardless of registration, without any reasonable basis to assume that such exclusions will promote safety.

Sara could argue that the law is violative of the Privileges and Immunities Clause of the 14th Amendment, and the right to travel guaranteed thereby, since burdens are placed upon certain out-of-State vehicles and, as noted *supra*, no substantial reason exists for the discrimination. *See*, Saenz v. Roe, 526 U.S. 489, 501 (1999) ("[B]y virtue of a person's state citizenship, a citizen of one State who travels in other States, intending to return home at the end of his journey, is entitled to enjoy the 'Privileges and Immunities of Citizens in the several States' that he visits.")

Article I, Section 8, of the United States Constitution empowers Congress to regulate interstate commerce. The State may not burden or obstruct interstate commerce. Sara Lawson may argue that the law does just that since it requires an out-of-State business, such as hers, to either "register" before it can enter Maryland, or have its trucks undergo numerous stops while traveling therein.

The State law concerning school registration may be challenged on the grounds that it is unconstitutionally over broad or under inclusive, and vague. In an attempt to make the State "safe", citizens are required to go through an undefined security process *if they were born in another country*, while citizens born in America can attend the State school. The law concerning vehicle registration is under inclusive since there's no reason to assume that vehicles under 5,000 pounds could not be used in an act of terrorism and over broad in that there has to be a more narrowly tailored means to achieve the goal of safety than to require out-of-State vehicles to pull over at every weigh station passed.

Finally, the federal law arguably preempts the State from enacting its legislation. Article VI of the United States Constitution (the Supremacy Clause) notes that the "Constitution and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Law of the Land . . . ." A federal statute preempts State law when it is clear that Congress intended the federal law to occupy a field exclusively or when the state law is in actual conflict with the federal law. While the Federal Homeland Security Law does not expressly pre-empt the State from enacting its own legislation, an argument could be made that the State laws are too restrictive in that they prohibit that which the federal law would allow, and therefore conflict with the federal law.

BOARD'S ANALYSIS

QUESTION 7

There are two inter-related theories which can be of assistance to the Smiths.

First, Maryland recognizes a "prescriptive easement" theory for creating public roads. A public road will arise if a landowner has no intention of offering his property for dedication to public use, but he allows the public to use his land as a road, and the public does use the road in an uninterrupted manner for twenty years. *Garrett v. Gray*, 258 Md. 363 (1970):

> "In *Thomas v. Ford*, 63 Md. 346, Chief Judge Alvey for the Court said . . . `It is certainly a settled doctrine in this State that public roads or ways of any kind can only be established by public authority, or by dedication, or by long use by the public, which, though not strictly prescription, yet bears so close an analogy to it that it is not inappropriate to apply to the right thus acquired the term prescriptive. Hence the existence of a public way may be established by evidence of an uninterrupted use by the public for twenty years; the presumption being that such long continued use and enjoyment by the public of such way had a legal rather than an illegal origin." *Id.*, 376, 377.

In addition, the Smiths can allege that they have acquired a private right to use the farm road by the doctrine of prescriptive easement. That doctrine involves proof that the Smiths had used the road for more than twenty years in an adverse, exclusive and uninterrupted manner. See e.g. *Clayton v. Jensen*, 240 Md. 337 (1965). The use of the roadway by the Smiths' predecessor's-in-title, the Jones', can be "tacked" to the period of use by the Smiths to reach the required twenty year minimum period. *Zehner v. Fink*, 19 Md. App. 338 (1973).

The facts do not clearly support a prescriptive easement claim. The Smiths have used the road in a manner to establish a prescriptive easement for 16 years. The fact that Owings was their friend does not change the adverse nature of their use - the concept of "adversity" pertains not to the relationship between the parties but to whether or not the use is consistent with fee simple ownership of the property over which the road passes. To establish a prescriptive easement, the Smiths must show 20 years of such use. Other than Joe Jones' use of the road for two years while he was a high school student, the Jones' use of the road was only occasional. In addition, Joe's use occurred in 1973 and 1974 - eleven years before the Smiths acquired the farm. It is unlikely that a court would view the Jones' use of the road as being continuous in relationship to the Smith use. Thus, the Smiths will be unable to show 20 years of continuous use.

In order to prove that the road is a public one, it will need to be determined whether there has been uninterrupted use of this road by the public for twenty years. The road need not have been heavily traveled by the public as long as the members of the public passed over it freely without seeking the permission of the owners. Mr. and Mrs. Jones can testify that the road was used by neighboring families for a period in excess of 20 years. A court might well find that a public road was established by prescription in the 1950's and 1960's. The Smiths used the road since 1985. This fact indicates that no attempt was made to close the road until the Gray's recent action.

BOARD'S ANALYSIS

QUESTION 8

Theories of Recovery

Without an express agreement regarding payment, the hospital's attorney will need to use a *quantum meruit* theory of recovery. A *quantum meruit* recovery refers either to an implied-in-fact contractual duty, or an implied in law duty, requiring compensation for services rendered. *Caroline County v. Dashiell*, 258 Md. 83 (2000)*; Mogavero v. Silverstein*, 142 Md. App. 259 (2002). An implied in fact contract is inferred from the conduct of the parties. *Dashiell, supra*; *Silverstein, supra*. Contracts implied by law, commonly called "quasi-contracts", are not based on the intention or consent of the parties, nor are they promises; they are obligations created by law for reasons of justice and equity. *Dashiell*, supra.

Cindy was unconscious when she arrived at the hospital and therefore her intentions cannot be ascertained. Therefore there is not a contract implied in fact. However the attorney could successfully claim that a quasi-contract was created, obligating her to pay the $75,000, in order to prevent the injustice of the hospital performing services that benefitted Cindy without compensation.

Similarly, the hospital's attorney could successfully use the doctrine of "unjust enrichment" as a basis of recovery. Maryland courts have set forth the following three elements that must be established to successfully bring a claim based on unjust enrichment:

1. A benefit conferred upon the defendant by the plaintiff;

2. An appreciation or knowledge by the defendant of the benefit; and

3. The acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without payment of its value. *Dashiell, supra*; *Bery & Gould v. Berry*, 360 Md. 142 (2002); *Everhart v. Miles*, 47 Md. App. 131 (1980).

The treatment of Cindy's injuries and her full recovery was a benefit she received from the hospital, and Cindy is aware of this benefit. It would be inequitable for Cindy to receive such a benefit without payment of its value to the provider of those benefits.

Possible Defenses Against Recovery

Cindy was a minor when the services were rendered. In Maryland, the contractual obligations of minors are voidable, giving the child the choice of avoiding the contract or performing it. *Schmidt v. Prince George's Hospital*, 366 Md. 535 (2001). Therefore, Cindy could declare the implied agreement or quasi-contract to pay the hospital for treatment of her injuries void, even though she now is an adult. *See, Schmidt*, *supra*. This defense, however is likely to fail because Maryland recognizes the "doctrine of necessaries". *Schmidt*, supra, *Garay v. Overholtzer*, 332 Md. 339 (1993). Under the doctrine of necessaries, a minor may be liable for the value of necessaries furnished to her. Cindy's injuries rendered her unconscious, and her injuries were severe enough to cause the physicians to render treatment without any agreement regarding payment. Therefore, it would be difficult for Cindy to argue successfully that the medical treatment she received was not necessary.

Finally, Cindy could argue that the amount of the bill is unreasonable, or exceeds the value of the services rendered. Cindy only will prevail on this argument if she can show that the charges are more than those customarily charged by other hospitals for performing the same or similar services.

BOARD'S ANALYSIS

QUESTION 9

Sections 4-406(c) and (d) of the Maryland Commercial Law Article require a customer to promptly notify the bank of any unauthorized payments. Section 4-406(d) gives the customer a reasonable amount of time (arguably at least 30 days) to examine the statement. However, Section 4-103(a) allows for the provisions of Title 4 to be varied by agreement, so long as the agreement does not disclaim a bank's responsibility for its lack of good faith or failure to exercise ordinary care. Thus, because Small Co. was required under the Deposit and Disclosure agreement to give written notice within 15 days, it may be precluded from recovering from the bank on the May and June checks because notice was not timely given. Although notice was timely given on the August check, it was reported more than 15 or 30 days after the first unauthorized transaction should have been reported (June 18-20). Therefore, because the August transaction was a result of the same wrongdoer, Slick, Small Co. may also be precluded from recovering against the bank under Section 4-406(d)(2). The bank's defenses under 4-406 and the Deposit Agreement are still subject to the requirement that the bank exercised ordinary care in paying the item. If Small Co. can prove that the bank failed to exercise ordinary care, such as paying a salary check when Small Co. never paid salaries on the business account, then the loss will be allocated between the parties. Whether the bank failed to exercise reasonable care is generally an issue for the trier of fact.

EXTRACT SECTIONS FOR QUESTION 9

Annotated Code of Maryland, Commercial Law Article

Title 4. BANK DEPOSITS AND COLLECTIONS: §4-103(a); §4-406(c), (d), and (e)

BOARD'S ANALYSIS

QUESTION 10

Preliminarily, as counsel to multiple clients you must evaluate whether a nonwaivable conflict of interest precludes your representation under the Rule 1.7 of the Rules of Professional Conduct. If the conflict is waivable, then representation can be undertaken with the consent of all clients after consultation.

Charles can raise any number of causes of action grounded in traditional business associations law, contract and equity. However, in analyzing any complaint the Court must consider the following issues, which are determinative of any liability.

Did the operative formation documents or Maryland Law authorize the Board to take the actions challenged by Charles?

If the Board or the Members were empowered to act, by what standard should the court review the Board's exercise of that power?

Did the Board meet the appropriate standard?

Generally, the Business Judgment Rule does not apply to limited liability companies. However, because Keg's Operating Agreement requires that the Board of Directors will be held to the same standard as Boards of Directors of corporations, Charles' claims are subject to the Business Judgment Rule. The Business Judgment Rule defines the scope of the duty a director owes to the corporation, or in this case to Keg and limits the liability of Directors who act in the best interests of and in good faith to Keg. Furthermore, Maryland Law provides that a court will overturn the action of a board if there is evidence of bad faith. See *Froelich v. Erickson*, 96 F. Supp. 2d. 507 (D.Md. 2000), affirmed 246 F.3d. 664 (C.A.4 (Md. 2001)); and *National Association for the Advancement of Colored People v. Golding*, 342 Md. 663, 679 A. 2d 554 (1996).

Based on the facts, the Board viewed Bob's proposal as the only sound plan for saving Keg and rectifying its liquidity problems. All Board members (except the Plaintiff, Charles, and the defendant, Bob) voted to approve and recommend the proposal to the members even though the proposal was against their own personal interests because their respective fractional interests may be cashed out or extinguished. Since the Board and the Members carefully reviewed all analyses and reports prior to their respective votes, there is no evidence of bad faith and the standard of the Business Judgment Rule is met. The Board's procedures and decisions are not subject to a second guess by a court.

The breach of contract claim is without merit because the Board was authorized in the Operating Agreement to reclassify the member interests provided the plan of reclassification is first approved by the Board and ratified by the Members. Since Bob disclosed the ramifications of the transaction and abstained from the votes thereon that recommended, approved and ratified the plan, the claims made by Charles will fail.

BOARD'S ANALYSIS

QUESTION 11

Bruce is the sole member and manager of Bruce's BBQ Pit, LLC ("Restaurant"). Bruce is not personally liable to Vicky for her tort claim unless Vicky can show that Bruce was negligent as an immediate supervisor or manager. A member of a limited liability company ("LLC") is not personally liable for the obligations of the LLC arising in tort simply because a person is a member of the LLC. Bruce instructed Danny to keep the restroom closed until the floor was dry. It is unlikely that a court would find that Bruce's instructions were negligent or that he contributed to the cause of Vicky's injury.

Danny is responsible to Vicky for his negligence when he ignored Bruce's instructions and allowed Vicky to enter the restroom before the floor was dry. Danny is an employee of the Restaurant, and the Restaurant, as Danny's principal, will be liable to Vicky. The Restaurant is liable whenever an employee is acting within the scope of his authority. Here, the Restaurant will claim that Danny acted beyond the scope of his authority, and that the Restaurant should not be liable. However, this defense will fail.

Terry was responsible for supervising Danny. Terry may be responsible to Vicky for his negligent supervision of Danny's cooking. When Danny added marijuana to the chili, he committed an unlawful act, which act is presumed to be outside the scope of his authority. Neither Terry nor Bruce nor the Restaurant should be liable for the injuries resulting from Danny's criminal act unless they knew or should have known that Danny was spiking the chili with controlled substances. The level of required supervision to avoid liability is a question that will be determined by the fact finder. However, the fact finder will take into consideration that Danny was merely enhancing his employer's food and that he did not personally benefit from his actions.

Bruce was aware that Danny was tending bar at the time that Johnny was served. Harold, the bystander, was injured as a result of Johnny's actions. Danny wrongfully served alcohol to Johnny, who was both a minor and already intoxicated when served. Because Bruce failed to properly supervise Danny, the Restaurant will be liable to Harold for his damages. It is arguable that Bruce was negligent in not stopping Danny from tending bar because Bruce's distraction may not be an adequate defense.

Any non-culpable defendant may seek indemnification from any other culpable co-defendant. In addition, the Restaurant and Bruce may also seek indemnification from Johnny for his willful acts. Under all circumstances, Howard and Vicky may sue all allegedly responsible parties, however, each injured party is entitled to only one satisfaction for his or her damages. Grinder, et al. v. Bryans Road Building and Supply Co., Inc., 290 Md. 687, 432 A2d 453 (1981).

BOARD'S ANALYSIS

QUESTION 12

Lawyer's conduct violates the following Rules of Professional Conduct, and as Bar Counsel I would bring charges for the violation of each:

- Rule 1.1 of the Maryland Rules of Professional Conduct requires Lawyer to provide competent representation. Lawyer did absolutely nothing to secure his client's claim. This failure raises questions of his competency to handle the case.

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- Rule 1.2 notes that Lawyer must abide by a client's decision whether to accept an offer of settlement. Lawyer never informed John of the offer prior to accepting it on his behalf, thereby violating this provision.

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- Rule 1.3 requires Lawyer to act with reasonable diligence and promptness in representing a client. Again, Lawyer did nothing for his client and, therefore, did not act in a diligent manner in his representation of John.

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- Lawyer failed to keep John informed of the status of his case. This failure is a violation of Rule 1.4. This Rule notes that a lawyer shall keep a client reasonably informed about the status of the case and shall promptly comply with reasonable requests for information.

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- Although it may be proper to have the fee be contingent upon Lawyer's ability to collect the debt, the total fee charged John is nearly half of the amount to be collected! Given Lawyer's lack of competence and/or diligence, this fee is excessive and in violation of Rule 1.5 's mandate that fees be reasonable based on the time and labor required, the requisite skill needed to properly handle the case, the fee customarily charged for such cases, the time limitations involved, and Lawyer's experience in this area.

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- Under Rule 1.16 (d) a lawyer is charged with the duty of surrendering papers and property to which the client is entitled and refunding any payment of fee that has not been earned upon termination of representation. Lawyer did neither, under the instant facts.

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- Finally, Lawyer's advertisement arguably raises an unjustified expectation about the results he can achieve. This, therefore, violates Rule 7.1's proscription against false or misleading communications that are likely to create such expectations and that improperly compare the lawyer's services with other lawyers' services.