JULY 2005 BAR EXAMINATION

QUESTIONS AND REPRESENTATIVE GOOD ANSWERS

QUESTION 1

Following a year long humanitarian trip to South America, rock star Bruce Rocker, planned to return to his home in Maryland to announce his run for political office. Fans wanted to welcome Rocker home by gathering at Baltimore Airport when he arrived and to express their support for his candidacy. Baltimore Airport is a large international airport, which serves several major airlines and has five concourses with numerous gates, parking lots and grassy knolls. The planned welcome-home gathering would involve about 200 enthusiastic fans and a 15 minute speech by Rocker to the group about his political views.

Baltimore Airport is owned and operated by the State of Maryland's Department of Transportation. One of the airport's regulations, Reg. B, forbids "any gathering of more than 30 people anywhere in the airport unless travel related." The stated purpose of Reg. B "is to avoid congestion and to promote the smooth operation of the airport." Violators of Reg. B are subject to a fine up to $1,000 and/or incarceration of up to 6 months.

Rocker's fans have requested permission to hold their welcome-home gathering in the airport, but the airport has denied this request based solely upon Reg. B. Rocker's fans hire you to file a lawsuit challenging Reg. B in order to obtain access to the airport for the welcome-home gathering.

Discuss in detail the basis of any challenges to Reg. B and evaluate the Rocker fans' chances for success.

REPRESENTATIVE ANSWER 1

The first amendment to the U.S. Constitution guarantees to the fans the freedom of speech, which includes political freedoms and freedom of association. The government cannot restrict the freedom of speech unless the given speech is not protected, for example, because it is obscene or incites illegal and dangerous action. The government and the state government, which must adhere to the 1st amendment based on its incorporation through the 14th amendment, can, however, place reasonable time, place, and manner restrictions on otherwise protected speech. The political speech and welcome gathering the fans want to hold is of this type. If a public forum, the regulation by Md. Department of Transportation would have to be a reasonable time, place, and manner restriction leaving alternative channels of communication open in furtherance of an important government interest. Outside the terminals like on the "grassy knolls" may qualify as such making Reg. B unduly overbroad, because it restricts any gathering <u>anywhere</u> in the airport. Although the statute is content neutral and not aimed at any speech, the Rocker fans may still successfully challenge it as overbroad on that basis and because it leaves open no other channels for their speech related activity.

Although portions of the airport might be considered public forums, airports have been held not to be public forums even though publicly owned property. On this basis, as a traditionally "non-public forum," the State Dept. of Trans. has much more leeway to completely restrict use of the grounds for speech related activity, especially where the Reg's purpose is to avoid congestion and promote smooth airport operation. (200 fans and a speech would definitely congest the airport). The Regulation, however, may still be challenged though as overbroad or vague.

REPRESENTATIVE ANSWER 2

The first challenge to Reg. B should be made on the grounds that Reg. B is vague and overbroad. A regulation will be considered vague if a reasonable person would be unable to determine what conduct is prohibited. Here, "travel related" is vague because it could be open to many different interpretations, and it does not clearly prohibit any conduct. A regulation will be deemed overbroad if it prohibits substantially more conduct than is necessary to achieve the purported goal of the regulation. The stated purpose of "avoid(ing) congestion" and "promoting smooth operation" could arguably be achieved by less restrictive means.

A state may impose reasonable time, place, and manner restrictions on speech related conduct. Determining whether restrictions are reasonable will depend on whether the restriction seeks to restrict speech related conduct in a public forum or a non-public forum. If the airport is considered a public form because it is typically held out to the public, then the regulation of speech will be upheld if it is content neutral, narrowly tailored to advance a significant government interest, and if it leaves open alternative channels of communication. Here, due to vagueness of Reg. B, it is unclear whether it would be considered content neutral. It does appear to restrict gatherings of more than 30 people unless travel related.

If the court did find the restriction to be content neutral they would then determine if it was narrowly tailored to promote a significant government interest. As stated above, because the regulation encompasses potentially more conduct/behavior than is necessary to effectuate the smooth operation of the airport, it is unlikely to be found to be narrowly tailored.

In the event that a court did find Reg. Be to be narrowly tailored to promote a significant interest, the court would then determine whether it left open alternative channels of communication. Because Reg. B includes the language "anywhere in the airport" which includes concourses, parking lots and grassy knolls, Reg. B likely fails in this test also.

Thus Reg. B would not likely be upheld as a valid regulation on a public forum because it is not entirely content neutral, the means to achieve its purpose aren't narrowly tailored and it does not leave open alternative channels of communication.

QUESTION 2

In July 1994, as Sue walked home from work she was attacked and raped. The assailant also took $150 from her purse before fleeing the scene. The police recovered evidence from an examination of Sue that they were able to use to produce a DNA profile of the attacker. The authorities, however, were unable to identify a suspect even after an extensive police investigation.

In September 2001, Bobby Badmens was convicted of an unrelated robbery and sentenced to three years in the Howard County Correctional facility. In March 2004, pursuant to a newly enacted 2004 Maryland DNA Collection Act, every inmate convicted of a felony had to provide a DNA sample for identification purposes by having his or her cheek swabbed. Badmens protested the process, refused to provide a sample and stated that he wanted counsel. Despite his protests Badmens was forced to provide a DNA sample because of his robbery conviction. During the swabbing process, Rita Ratchet, one of the nurses assigned to the prison, began to question Badmens about whether he had anything to hide by refusing to give a sample. Badmens responded by stating that he was not saying anything without his lawyer, but he did not want anyone "finding out about that thing in '94." Badmens' sample was then taken and submitted to a Maryland DNA data bank.

After Badmens' release from prison later that year, the DNA profile of Sue's 1994 attacker was submitted to the Maryland DNA data bank for comparison in order to discover the identity of her attacker. The attacker's profile matched the DNA profile from Badmens' March 2004 cheek swab.

As a result of these DNA profile matches, and both Ratchet and Sue's testimony, Badmens was indicted by a Howard County Grand Jury on the charges of first degree rape, second degree rape and robbery. Badmens has retained you as counsel to challenge the admissibility of the DNA and other evidence obtained from him in March 2004.

Analyze the issues raised by the evidence obtained against Badmens and state how you believe the Court will rule on each issue. Discuss fully.

REPRESENTATIVE ANSWER 1

Although this situation raises several constitutional issues, Badmens will not likely be able to suppress the evidence obtained.

DNA Matches

Fifth Amendment – There were two DNA samples involved in the match—the sample obtained from Sue and the sample obtained in jail. In terms of the sample obtained in jail, Badmens may try to argue that being forced to give a sample of his DNA violated his constitutional right against self-incrimination. However, the Fifth Amendment only applies to testimony, not DNA, so he is not likely to prevail.

Fourth Amendment – Badmens may also argue that his fourth amendment rights against unreasonable searches and seizures were violated by having to submit to having his cheek swabbed to obtain a DNA sample. Badmens is unlikely to prevail because as a prisoner he has a lesser reasonable expectation of privacy in jail. Moreover, the act of having his cheek swabbed is likely to be seen only as a reasonable intrusion, even if he did have such a right.

Ex Post Facto – Badmens may also argue that the application of a 2004 enacted DNA law, in conjunction with gathering evidence for a crime committed in 1994, violates his right against ex post facto laws. However, the DNA law doesn't involve a new crime that he is being charged for, or an extended sentence—but merely provides the government with additional investigation tools. Accordingly, Badmens won't likely prevail.

Fourteenth Amendment Right to Privacy – Badmens may assert that his fourteenth amendment right to privacy was violated by having to submit DNA, and that, moreover, due process protects him from having to make involuntary confessions. However, because there was no involuntary "confession," in terms of an actual statement, he won't likely prevail. Moreover, the limited privacy, discussed supra, will also defeat this argument.

Right to Counsel - Badmens requested counsel twice as his DNA sample was collected, and he will likely argue unsuccessfully, that his 5th and 6th Amendment Rights to Counsel were violated.

5th Amendment Right to Counsel – A Court would not likely find that Badmens' fifth amendment Miranda rights were violated, even though he asked for his lawyer, because Miranda requires a custody and an interrogation. While arguably Badmens was in custody, nurse Rita's statement would likely not qualify as an interrogation, since she was not a law enforcement officer. Thus, his confession-like statement won't likely be suppressed.

6th Amendment Right to Counsel – Because Badmens hadn't yet been charged with the offenses against Sue, his sixth amendment right to counsel, which would require the presence of his lawyer when being questioned, would not apply. Thus, the evidence will likely be admitted against Badmens.

REPRESENTATIVE ANSWER 2

Constitutional Issues

DNA Evidence

The DNA sample obtained from Badmens pursuant to the Maryland DNA Collection Act would be challenged as a violation of the 4th and 5th Amendments and the ex post facto clause.

4th Amend

The fourth Amendment, applicable to Maryland through the 14th Amendment of the U.S. Constitution, protects individuals from unlawful searches and seizures. Here, the collection of a DNA sample with a cotton cheek swab could be considered a seizure of his person and search. Nevertheless, to challenge on the basis of the 4th Amendment, someone must have a reasonable expectation of privacy. In this instance, Badmens, as a convicted felon in prison, will be considered to have less of an expectation of privacy. Additionally, there is a very limited intrusion by using a cheek swab, even less than collecting a blood sample, and this will be balanced against the government's interest in obtaining the sample. Thus, the Court will most likely deny Badmen's 4th Amendment challenge.

5th Amend

The 5th Amendment, through the 14th protects someone from self-incrimination. Although it could be argued that by providing the DNA sample, Badmens incriminated himself related to the 1994 crime, the Court will not agree with this argument. The 5th Amend only protects testimonial evidence and DNA is not testimonial in nature. Thus, the Court will reject Badmens challenge to the DNA Act on grounds of the 5th Amendment.

Ex Post Facto Clause

The ex post facto clause of the U.S. Constitution prohibits the government from enacting laws that retroactively punish someone for something that was not a crime when they committed it. Here, submitting a DNA sample is not punishment for the earlier crimes. Thus, the Court will reject Badmens argument on this ground as well because the DNA Act is not punitive in nature. The fact that the DNA sample was used to connect him to the 1994 rape and robbery is immaterial.

Badmens Statement

Challenges to the admissibility of Badmens statement that he did not want anyone finding out about "that thing in 1994" on the basis of the 5th and 6th Amendments.

An argument could be made that this statement should be excluded because it was obtained without Miranda warnings, in violation of Badmens' 5th Amendment right to not self-incriminate. Nevertheless, this is probably a weak argument because Rita Ratchet the nurse, is not likely a law enforcement agent. Also, it is not clear that he was in custody or being interrogated at the time he made his statement. The Court will likely admit the evidence on this ground.

Badmens can also say his right to counsel under the 5th and 6th Amendments violated his rights. But he was not at a "critical stage," it was unrelated to his trial from before, and he voluntarily made the statement.

QUESTION 3

Paul was injured when his vehicle collided with that of Dave on June 5, 2003 in Calvert County, Maryland.

On August 1, 2004 Paul filed suit against Dave in Calvert County Circuit Court to recover for injuries he sustained in the accident. By discovery, Paul's attorney learned that Dave's liability insurance limit was $50,000, and on November 5, 2004 Paul's attorney filed an amended complaint adding Reliable Insurance Co., Paul's insurance company as a defendant. Paul alleged that Reliable had breached the underinsured motorist provision of his insurance policy by denying Paul's claim for damages in excess of Dave's liability policy limits. Reliable was served on November 10, 2004.

On November 20, 2004 Dave's insurance company tendered the policy limits of $50,000.00 in settlement of Paul's claim. On December 5, 2004, prior to the filing by Reliable of its answer to the amended complaint, and without informing Reliable, Paul, through his attorney, accepted the offer and signed a release of Dave and "…his heirs, agents, executors, and all other persons, firms or corporations liable or might be claimed to be liable to the releasor for injury or damage arising out of the accident of June 5, 2003." On December 5, 2004 a joint stipulation of dismissal of the suit against Dave (Count 1 of the Amended Complaint) was filed.

On December 10, 2004, Reliable filed its answer to Count 2 of the Amended Complaint and in a letter to Paul's counsel requested a settlement demand. Paul's written demand for $10,000 was accepted by Reliable on December 15, 2004. A check in that amount was written on December 18, 2004 but was not sent because Reliable learned of the settlement between Paul and Dave through Dave's attorney. Reliable claims that Paul breached the insurance contract by failing to obtain Reliable's consent prior to settlement, citing the following provisions:

(a) The underinsured motorist insurance does not apply if the insured settles without our written consent with any party who may be liable.

(b) We will not pay any underinsured motorist loss until the limits of all bodily injury liability coverage available from any source has been exhausted by payment of settlements or judgments.

As of December 10, 2004 neither Paul nor his attorney had informed Reliable of the settlement with Dave's insurer. Neither had made any false statements or otherwise actively concealed any facts from Reliable. Reliable made no inquiry as to the status of the suit against Dave before agreeing to settle Paul's claim under the underinsured provision of the policy.

In a motion by Paul to enforce the settlement with Reliable, how, and on what grounds should the court rule?

REPRESENTATIVE ANSWER #1

Paul is attempting to enforce the $10,000 settlement acceptance by Reliance Insurance. Conversely, Reliable Insurance is attempting to revoke its acceptance of Paul's written demand for $10,000 after it already accepted it. Reliable argues that Paul breached his contract with Reliable by failing to obtain Reliable's written consent prior to settlement. Thus, the primary issue is whether the acceptance is binding on Reliable Insurance. The acceptance is likely binding on Reliable.

Subsection A of the insurance contract unambiguously states that the underinsured motorist insurance will not apply without Reliable's written consent. Thus, absent Reliable's December 15th acceptance this provision would almost certainly apply and bar Paul's recovery against Reliable. Courts are hesitant to second-guess the nature of such provisions, even though it is likely that Reliable could take no action to prevent the settlement against Dave. Thus, absent Reliable's acceptance, this provision would be enforced.

Subsection B, however, is slightly more problematic. Subsection B states that Reliable will not pay any underinsured motorist loss until all other sources have been exhausted. Importantly, there is no notice requirement regarding this provision. Because the facts stipulate that Dave's liability insurance was exhausted, Paul has satisfied this provision (unless there is second tort-feasor or negligent party).

Because neither Paul nor his attorney informed Reliable of Paul's settlement with Dave, Paul breached Subsection A of the Reliable insurance policy. Nowhere in the provided two provisions does it state that Reliable had the responsibility to investigate as to the progress of Paul's case with Dave. However, with the given facts, Reliable could have easily investigated the progress of Paul's suit with Dave before accepting Paul's written demand and the court will not act as second-chance mechanism because of Reliable's failure to recognize that Paul breached his contract. Moreover, the fact that Paul recovered the full policy limit from Dave renders notice of the settlement somewhat immaterial because Paul could not recover anything further from Dave and Paul, therefore, would have made the demand to Reliable in any event.

Thus, on the whole, Reliable accepted Paul's written demand. Once it accepted Paul's demand, any argument that Paul breached Subsection A is without merit. Reliable could have easily investigated the progress of Paul's settlement with Dave and it did not. Thus, Paul should be able to enforce his judgment against Reliable.

REPRESENTATIVE ANSWER #2

The court will likely enforce Paul's settlement with Reliable if it finds Reliable waived the cited provisions.

Although provision (a) expressly requires Reliable's written consent for settlement with another party, Reliable waived that right when it agreed to accept Paul's written demand for $10,000 on December 15. Rights and obligations to a contract can be expressly or impliedly waived by the parties. Reliable impliedly waived its right to be informed of the other settlement.

Reliable became part of the suit when served on November 10. Therefore, it had ample opportunity to request discovery of Dave's insurance to learn of Paul's alternate source of recovery.

Also, Reliable had already denied Paul's claim in excess of $50,000 (Dave's liability limits) and, therefore, had notice that Paul would attempt to collect from Dave. Additional notice of potential settlement with Dave or his insurance company was the suit itself and that the suit was dismissed on December 5, prior to Reliable's request for settlement. Further, although Paul and his attorney did not inform Reliable of the settlement, they did not conceal it either. Reliable could have inquired prior to agreeing to the $10,000 settlement, but made no inquiry about it.

Also, when Reliable agreed to the $10,000 settlement, it was complying with provision (b) which says it won't pay settlement until other sources of payment had been exhausted. From Reliable's perspective, it did not inquire whether Paul received payment from any other source. Therefore, it waived its right under that provision as well.

Finally, a party may settle with multiple defendants so long as the total settlement is not in excess of damages. Paul's total damages were not disclosed but there is no indication Paul's damages were less than $60,000. Also, the facts tell us that Paul did not make any false statement to Reliable.

In conclusion, the court should enforce the settlement because Reliable waived the contract rights to notice under provision (a) by not inquiring about potential settlement when it was on notice and by agreeing to the settlement without enforcing its right under provision (b).

QUESTION 4

Bill Builder is in the business of building custom homes. He owns a residence, "Greenacre", in Anne Arundel County. In addition, he owns "Blueacre", a commercial property in Prince George's County, where he stores construction equipment worth over $100,000.

On December 1, 2004, a judgment was entered against Bill in the District Court of Anne Arundel County for $20,000 in favor of Henrietta Homeowner. On December 16, 2004, Bank obtained a judgment against Bill in the Circuit Court for Prince George's County in the amount of $100,000. On December 18, Bank recorded a properly certified copy of its judgment in the Anne Arundel County Circuit Court. On December 27, 2004, Leasing Company obtained a judgment against Bill for $50,000 in Anne Arundel County Circuit Court. All of the judgment were validly indexed and recorded in accordance with the Maryland Rules. Bill appealed the judgments in favor of Bank and Leasing Company to the Court of Special Appeals but did not file a *supersedeas* bond or similar security.

On January 15, 2005, while the appeals were pending. Henrietta recorded a Notice of Lien for her judgment in the Circuit Courts of Anne Arundel County and Prince George's County. On January 17, Henrietta obtained a writ of execution from the Circuit Court of Prince George's County. The writ listed Bill's construction equipment. On the next day, the Sheriff for Prince George's County served the writ on Bill and took possession of the equipment.

Based on these facts, analyze who has valid liens against "Greenacre", "Blueacre" and the construction equipment and in what priority.

REPRESENTATIVE ANSWER #1

Henrietta: On December 1, a judgment entered in the District Court for Anne Arundel County for $20,000 in favor of Henrietta Homeowner. Although she received her judgment on December 1, a judgment in a district court constitutes a lien from the date of recording a Notice of Lien in the county of recording. On January 15, Henrietta recorded a notice of lien for her judgment in the Circuit Court of Anne Arundel County and Prince George's County. On January 17, Henrietta obtained a writ of execution from the Circuit Court for Prince George's County. The writ listed Bill's construction equipment. On January 18, the sheriff for Prince George's County served the writ on Bill and took possession of equipment. Henrietta has a valid lien against the equipment as of January 17 and has priority because she took possession.

Bank: On December 16, Bank obtained judgment in the Circuit Court for Prince George's County in the amount of $100,000. On December 18, Bank recorded a properly certified copy of the judgment in the Anne Arundel County Circuit Court.

A money judgment of a court constitutes a lien to the amount and from the date of the judgment on the judgment debtor's interest in land located in the county in which the judgment was rendered. All judgments were validly indexed and recorded in accordance with Maryland rules. Therefore, all judgments constitute a lien to the amount in land located in both Anne Arundel County and Prince George's County.

A money judgment that is recorded and indexed in the county of entry constitutes a lien from the date of the entry in the amount of the judgment and post-judgment interest in the defendant's interest in land located in that county. The Bank lien is effective as of December 16 in Blue Acre (Prince George's County) and December 18 in Green Acre (Anne Arundel County).

Leasing Company: On December 27 Leasing Company obtained judgment for $50,000 in Anne Arundel County Circuit Court. Leasing Company did not file the judgment in Prince George's County (see above). Leasing Company's lien on the land in Anne Arundel County is effective as of December 27 in Green Acre (Anne Arundel County).

An appellant may stay the enforcement of any civil judgment from which an appeal is taken by filing with the clerk of the lower court a supersedeas bond or alternate security. Bill appealed judgments in favor of Bank and Leasing Company in the Court of Special Appeals but did not file a supersedeas bond or similar security. He will not be entitled to stay the enforcement of either judgment.

REPRESENTATIVE ANSWER #2

Per Section 11-403, Henrietta's writ of execution on her $20,000 money judgment constitutes a lien on the defendant's personal property when the actual levy was made, and extends only to the property included in the levy. Thus, Henrietta, at this point, has the only valid lien on Bill's personal property – the construction equipment – and has priority on that security up to $20,000.

Rule 2-623 extends this treatment to the Maryland District Court judgment upon receipt of a copy of the judgment. Henrietta recorded her notice of lien judgment on January 15, 2005 so she's okay as to the equipment. Her security interest in the equipment would have priority. Section 11-402 allows that a money judgment of a court constitutes a lien to the amount of the judgment in any real property located in the county of judgment, as long as the judgment was indexed and recorded pursuant to the Maryland Rules, which the facts state all of the judgments were so recorded.

Therefore, Bank's judgment attached as a lien on Bill's Prince George's County commercial property as soon as it was recorded – around December 16, 2004.

Leasing Company likewise obtained a lien on Bill's Anne Arundel County residence on December 27, 2004.

Henrietta obtained a judgment here on Bill's Anne Arundel County residence and the Prince George's County commercial property on January 15, 2004 (when she filed in the Circuit Court in those counties). Further, per Section 11-402(e), if a money judgment is later recorded in the Circuit Court in another county per Maryland Rules, a judgment lien will attach to real property in that county. Thus Bank, by recording its judgment notice in Anne Arundel Circuit Court obtained judgment hereon Bill's Anne Arundel residence on December 18 2004. Thus, for priority purposes, Bank has priority in both the Prince George's and Anne Arundel counties real properties (up to $100,000) since it was the first lien creditor to perfect its lien upon recording or obtaining judgment in the appropriate counties. Leasing Company has second priority since it filed second on the real property on the Anne Arundel County residence (up to $50,000).

Henrietta has third priority in the real property in Anne Arundel County since she filed third, but second priority in the Prince George's County property since Leading Company never filed notice of judgment there. Again, Henrietta has first priority in the equipment.

Finally, in order for Bill to stay the enforcement of any civil judgment during his appeal, he must comply with Maryland Rule 8-422(a)(1) and file with the clerk of the lower court a supersedeas bond per 8-424, alternative security per 8-425, or other security per 8-424. Enforcement can be stayed before the judgment is satisfied – he can still do it, but the facts show he hasn't done either.

QUESTION 5

The case of *Guest v. Landlord*, is a negligence action arising out of an accident in which Ms. Guest was injured March 1, 2004, where she tripped on a broken step in the stairway of Landlord's apartment building, where Guest was an invitee. The transcript of a jury trial includes the following excerpts:

EXCERPT A

A-1	Plaintiff's Lawyer:	Ms. Guest, tell us how the stairway was lighted?
A-2	Ms. Guest:	The stairway was dimly lit. The light on the landing of the
A-3		second floor was burned out – been burned out for quite a
A-4		while from what I understand. One of the tenants told me it
A-5		had been out for more than a week.
A-6	Plaintiff's Lawyer:	How did the lack of illumination impair your ability to see
A-A-7		the broken step?
A-8	Ms. Guest:	In the darkness, the steps all looked the same. I couldn't
A-9		see that one step was broken.

EXCERPT B

B-1	Plaintiff's Lawyer:	Mr. Smith, where did you live on March 1, 2004?
B-2	Mr. Smith:	I lived in Apartment C, the first apartment on the second
B-3		floor of Landlord's building.
B-4	Plaintiff's Lawyer:	On March 1, 2004, what was the condition of the light in
B-5		the stairway outside your apartment?
B-6	Mr. Smith:	Well, the light was out – burned out.
B-7	Plaintiff's Lawyer:	When did it burn out?

B-8	Mr. Smith:	I'd say that it had been burned out for about a week before
B-9		March 1.
B-10	Plaintiff's Lawyer:	When you first noticed that the light was burned out, what
B-11		did you do?
B-12	Mr. Smith:	The day it burned out, I called up Landlord and told him.
B-13	Plaintiff's Lawyer:	What did he say?
B-14	Mr. Smith:	He said he'd fix it right away – but he never fixes anything
B-15		when he says. Usually, it takes a week or two before he
B-16		gets around to replacing light bulbs.
B-17	Plaintiff's Lawyer:	With that light out, in your opinion, how well could a
B-18		person see the steps?
B-19	Mr. Smith:	With the light out, I know I couldn't see the steps very well
B-20		at all, and I have good eyes. The light being out made it
B-21		very difficult to see.

EXCERPT C

C-1	Plaintiff's Lawyer:	Dr. Jones, when you examined the Plaintiff, Ms. Guest,
C-2		what did you find?
C-3	Dr. Jones:	I don't remember – it was quite some time ago.
C-4	Plaintiff's Lawyer:	Are those your clinical notes that you are holding?
C-5	Dr. Jones:	Yes, they are the notes which I made immediately after my
C-6		examination.

C-7	Plaintiff's Lawyer:	Please review your notes and tell us what you found when
C-8		you examined Ms. Guest?
C-9		(A pause)
C-10	Dr. Jones:	Well, the notes appear to indicate that Ms. Guest had a
C-11		fracture of her left wrist and had a large abrasion of her left
C-12		knee…(etc).

Assume that all necessary objections and/or motions to strike were timely made by Landlord's lawyer. With respect to each excerpt, identify the objections and motions to strike which should have been raised by Landlord's lawyer and evaluate how the court would rule.

REPRESENTATIVE ANSWER 1

The Court will admit evidence that is relevant in assisting the trier of fact.

A-3 – Ms. Guest is speculating about how long the light has been burned out. Court should sustain the objection.

A-4-5 – Ms. Guest is testifying about hearsay, out of court statement offered for its truth. The tenant is not on the stand and no exception applies. It should sustain the objection and the testimony should be stricken.

A-6 – Seems that Plaintiff's lawyer is leading Ms. Guest. Court should sustain the objection and allow Plaintiff's lawyer to rephrase.

B-8 – Mr. Smith is speculating about when the light burned out. Objection sustained.

B-12 – "called up landlord and told him" sounds like hearsay, but not offering statement of what Mr. Smith told him. So court should overrule objection.

B-14-15 – Hearsay. See above. May be admission by party opponent, but not admitting liability. A negative inference may be drawn. However, Court would likely admit the statement.

B-15-16 – Characterizing the landlord and non-responsive to question. Objection sustained and statement stricken.

B-17-18 – Lay opinion is only admissible in certain areas, such as speed and intoxication. Objection sustained, Mr. Smith cannot testify about another person's ability to see steps.

B-20- Mr. Smith said he has good eyes non-responsive to question.

C-3 – Plaintiff's lawyer attempting to set up the foundation for refreshing recollection. Dr. Jones must show he remembered it at the time and then testify from present memory after having opportunity to refresh his recollection.

C-10 – Mr. Jones appears to be reading from his notes not testifying from present memory. Objection should be sustained. Dr. Jones should not be allowed to testify from reading his notes however Plaintiff's lawyer could attempt to admit his notes as past recollection recorded.

REPRESENTATIVE ANSWER 2

Generally all relevant and material evidence is admissible if not misleading @ the sound of discretion of the trial judge, if not violative of another rule of evidence. Relevant evidence is evidence that tends to prove a fact of consequence to the action. Hearsay evidence, out of court statements offered for the truth of the matter asserted are generally inadmissible subject to exception. Landlord's lawyer should have raised the following objections and motions.

A. Motion to strike what "one of the tenants" had told Ms. Guest as hearsay. Such an objection would be overruled as it is not being offered for the truth of the matter asserted, but rather to show the Landlord notice of a condition on the stairs. Notice being an element of the standard of care owed to an invitee.

Landlord's attorney (LA) should have objected to Plaintiff's Attorney (PA) second question (A-6) as <u>leading</u>. PA is asking non-preliminary questions on direct examination of a non-adverse witness. Accordingly, PA may not lead the <u>witness</u> as he is doing.

Also LA could object as the question assumes facts not yet in evidence (i.e. that the step was broken, impaired ability to see). Accordingly, LL attorney should move to strike the response.

B. LL should object to PA's question on line B-13 "what did he say" as calling for hearsay. However, the LL's own statements would be admissible as an exception to the hearsay rule as admissions of a party opponent. Here LL's own statements are being used against him and are therefore admissible.

However, I would move to strike everything after "away – " as it is non responsive and the prejudice that it would cause substantially outweighs the probative value.

Further, Mr. Smith's opinion testimony, B-17 + 18, should be objected to. Typically, only experts may provide opinion testimony. The need for an expert is in the sound discretion of the trial judge and the subject matter must be one in which expert testimony is needed to assist jury. Further, PL must qualify Mr. Smith as having any knowledge-skill to have expertise and that there is a factual basis for the expertise. Here, proper foundation has not been laid for the admissibility of expert testimony.

C. An individual may have their memories refreshed on the stand by any document. However, LL attorney has a right to examine those notes before they are used to ensure effective cross-examination. Accordingly, LL attorney should ask to review the notes.

Secondly, the notes should be taken away from the doctor when she indicates her memory has in fact been refreshed. She can not testify to the substance of the notes as C-10-C-11. I would move to strike.

LL could have her read the notes into the record as past recollection recorded, an exception to the hearsay rule, but proper foundation must be laid, (1) That they were made by the Dr. (2) at or near the time, (3) when she had good recollection, (4) fair and accurate. Then Dr. may read them into the record, this is not the same as testifying "the notes appear to indicate."

QUESTION 6

Harry and Wanda were divorced absolutely in 2003, based on a mutual and voluntary separation for at least one year. At the time of the divorce, the parties had two minor children, ages two and four. Harry had attended a few college courses, and regularly earned $200,000/annually from a bar and exotic dance club he owned and operated in Montgomery County. Wanda worked 16 hours per week as a registered nurse, earning about $25,000/annually in gross wages. The judgment of divorce by the Circuit Court for Montgomery County incorporated the parties' agreement dividing their marital property, awarding custody of the minor children to Wanda, and ordering Harry to pay child support of $2,000 per month and $3,000 per month alimony for five years.

Shortly after the divorce, Harry began attending a new church where the pastor preached against the sins of liquor and promiscuity. Harry vowed to the pastor and others in the church that he would change his lifestyle and no longer profit from what he called "the wages of sin." In 2004, Harry sold the club for a fair price and invested the net-proceeds of $300,000 in long term treasury bonds yielding $12,000 annually. Harry took a full time job as a manager at Home Supplies, a hardware chain store for $40,000 annually. He enrolled in an on-line divinity school where he pursued a degree in his spare time. Late in 2004, Harry inherited from his uncle a home, located in a Montgomery County community and valued at $600,000. Harry moved into this home.

In January 2005, Harry filed a Petition in the Circuit Court for Montgomery County to reduce his obligations to pay child support and alimony. Based on the above facts, Wanda argued that the trial court should ignore Harry's actual income of $52,000 annually, and that Harry had voluntarily reduced his 2003 income of $200,000 and now owned a valuable home. Harry also testified that the inherited home was his only residence and produced no income. Neither Harry nor Wanda have any other substantial assets.

The trial court agreed with Wanda, finding Harry had voluntarily reduced his $200,000 income and now owned a valuable residence. The trial court refused to modify its 2003 order, awarding Wanda $2,000 per month child support and $3,000 per month alimony for five years.

Harry appealed to the Court of Special Appeals, claiming that the trial court committed reversible error in its decision.

How will the appellate court rule? What reasons will it give for its decision?

REPRESENTATIVE ANSWER 1

The Appellate court will first address the issue of if Harry voluntarily reduced his income.

Under Maryland law, a party may not voluntarily reduce their income in order to avoid paying child support or alimony. If there is a change in circumstances that does not violate this rule, then a party may properly petition to have the payments adjusted as Harry has done.

The court will examine the reasons why Harry has decreased his income. His new church and a possible sincere belief that he should not profit from "the wages of sin" are factors to consider. The sale of his business and subsequent acceptance of a new job for $40,000 a year evidence his belief. Harry's income was reduced form $200,000 per year to $52,000 per year and he appeared to intend to live off this amount of income while he studies at divinity school. He did not inherit the home until after all of these changes, so that should not factor into evaluating Harry's purpose. The court may reasonably find that Harry's intent was not to lower his payments and should not automatically reject his request on that basis.

The evaluation of child support and alimony payments then is made using a number of factors. The court should weigh that Wanda only works 16 hours a week, if she still does, because she is taking care of two children. Harry also has a large amount of treasury bonds that, while not marital property, may allow him to continue his high standard of living. Harry additionally has a new house. If all of these facts are before the appellate court, and at least the information about the residence is in the facts, the lower court decision does not seem improper.

The appellate court should uphold the lower court decision that the child support and alimony payments are equitable. There is some doubt as to Harry's voluntary reduction in salary in order to lower his payments, but the decision of the trial court seems not to be erroneous and should not be overturned on these grounds.

REPRESENTATIVE ANSWER 2

First, as the parties had a settlement/post nuptial agreement, the court should attempt to look to the parties' intent as it was incorporated into the judgment.

The appellate court should address the issues involving the child support and alimony. Harry (H) needs to show that there was a material and substantial change to his circumstances that would constitute a reduction (or any change) in his child support payments. If the court finds H voluntarily impoverished himself, the court should not find the change substantial to reduce payments by imputing his original salary.

The court will most likely find that H did not voluntarily impoverish himself because nothing indicates that H sold his bar only to get out of alimony and child support. Instead, the facts

show that H intended to change his lifestyle and not profit from the bar and Liquor sales, or as H calls them, the "wages of sin. H sold the club for a fair price, showing he still was not thinking of his obligations of support when he chose to do this. Although H only took a job as a manager, significantly decreasing his salary, he did not have a college degree, having only taken a few courses in college. He most likely would have been unable to obtain a higher paying job, but certainly not one equivalent to the money he received from the bar.

His salary would still be higher than Wanda's ("W") because his $12,000 from the treasury bonds that he received annually (which he received from selling the bar, an item that was originally marital property) would be added to the $40,000 totaling $52,000. His child support and alimony payments would be reduced accordingly since that is much lower than the $200,000.

However, H also inherited a house worth $600,000. Now although this isn't marital property because H & W are divorced (even if they were married this would still be separate property because he inherited it from his uncle), the court may consider this house in determining H's value. Although the court could likely require H to sell the house, buy a smaller house for less money, use the money to pay his child support and alimony obligations, it seems unlikely that a court would do so. This was a gift to H, he makes no money from this house, it can't be given to W for use as the family home because even though she has custody of the kids, this was not the family home originally and nothing indicates W has an issue with housing.

Also, this is where H lives and he's entitled to live there and the court should not, and most likely will not, require H to sell the house that he inherited in order to pay W. Also, the agreement only required H to pay alimony for 5 years and he has been paying for at least 2 years, a factor the court may also consider. Thus, the court will most likely only reduce it's child support and alimony payments according to his $52,000 annual income.

QUESTION 7

John and Rose are members of the Church in Frederick, Maryland. Their neighbor, Helen, is an attorney licensed in Maryland and is also a member of the Board of Directors of the Church. Helen gave a short presentation on the financial needs of the Church and on the Church's desire to increase contributions through bequests or gifts to the Church. A week after Helen's presentation, John and Rose retained Helen to prepare the legal documents necessary to make a substantial gift to the Church. John and Rose completed the gift to the Church in 1998, and they had no further contact with Helen.

In January 2005, Rose called Helen to let her know that she wanted to divorce John. Helen suggests that Bill, one of her law partners, represent Rose in her divorce from John. After meeting with Rose that same afternoon, Bill accepted a retainer from Rose of $1,000. He deposited the retainer into the firm's operating account. In addition, Rose agreed to pay Bill fees at the hourly rate of $400 and one-third (1/3) of the value of either any property settlement or award made to her in the divorce.

Based solely on the above facts, describe any behavior that you believe constitutes an ethical violation under the Maryland Rules of Professional Conduct. Explain your answer fully

REPRESENTATIVE ANSWER 1

Helen – Conflict of Interest in 1998

Helen violated the Rules when she represented John and Rose in 1998 because Helen had a potential material limitation to her representation and did not properly obtain her clients' consent. Although joint representation of a donor and donee is not always a conflict, the reasonable possibility that her representation would be limited existed. For example, she may have been unable to be completely loyal to John and Rose as they decided how big of a gift to give. However, if Helen reasonably believed her representation of John and Rose would not be materially limited, she could offer joint representation after the clients gave informed, written consent. The facts do not indicate that Helen received such consent, so she violated the Rules.

Conflict in 2005 – Helen and Bill

Attorneys owe a duty of loyalty to former clients as well as clients, and the conflict rules are imputed to other lawyers working in a firm. Thus, Bill likewise entered a representation without properly following the conflict rules. Here, the interests of John and Rose were directly adverse. As such, Bill and Rose's firm had an imputed disqualification, unless Rose had entered the firm after 1998, and was completely screened off from the divorce case.

Failure to Protect Client's Property

By depositing Rose's retainer of $1,000.00 directly into the firm operating account, Bill failed to properly protect his client's property. He should have deposited it into a client trust account. Otherwise, he may only deposit it into the operating account with the signed, written, informed consent of Rose. Bill violated this rule.

Reasonableness of Fee

Bill's fee arrangement with Rose violated the Rules.

First, contingency fees are strictly prohibited in domestic relations cases (unless merely collecting on past due payments). As such, the agreement to take one third of any property settlement violated this rule. Even if the contingency fees were permitted in these cases, however, Bill still failed to get proper, signed consent from Rose for the contingency and failed to give written disclosure on the details.

In addition, the hourly fee is also subject to a reasonableness requirement. Depending on the complexity of the case, the customary fees in Frederick, Bill's skill and Bill's experience in domestic cases, Bill's hourly fee of $400 may or may not be reasonable. On its face at least, $400 is not an unreasonable rate.

REPRESENTATIVE ANSWER 2

Because of their purpose of sustaining the integrity of the legal profession and protecting client interests, ethical rules and violations thereof should be taken very seriously. These facts present numerous ethical violations

First, Helen's membership on the Church's Board of Directors puts her in an agency position as to the Church. As an agent, she owes a fiduciary duty to the Church. John and Rose, although members of the Church, do not have the same financial interests. For instance, John and Rose might be greatly concerned about maximizing their tax benefits while the Church need not consider it (at least not to the advantage of John and Rose). Helen is therefore representing multiple clients with potentially adverse interests. The ethical rules bar this conflict unless both clients give informed consent after being advised to retain separate counsel.

Second, Helen cannot recommend Bill to Rose as a way to avoid conflict caused by her prior representation of John and Rose. An attorney's conflicts are imputed to the entire firm unless the attorney is a new member of the firm and is screened. Unless Helen recently joined Bill's firm, he cannot represent Helen because it is a conflict of interest. The danger is real here because Helen's prior representation may have given her special knowledge of John's finances, which could be used to his detriment during divorce proceedings.

Third, Bill committed the heinous mistake of commingling client funds. Although the funds of multiple clients can be lumped together in a single account, client funds can never be commingled with the attorney's/firm's funds. By depositing the retainer in the firm's operating account, Bill commingled the funds. A retainer is not payment but is the client's money held in trust until the firm bills the client for services performed, at which time the amount due may be withdrawn out of the retainer.

Fourth, Bill accepted a contingency fee improperly. Contingency fees cannot be used in domestic relations cases. Although they are allowable in actions for past-due support, those are collection cases and not true domestic relations cases.

QUESTION 8

Quentin owned 50 acres of land in Carroll County, Maryland. Quentin, annually over a period of 20 years, granted permission to Ruby and Sam to hunt the land. At the end of the 20 years, Quentin created the Carroll County Hunt Club (the "Club") and transferred the land to the Club. The Club conveyed three acres of the Club's property to Ruby and Sam, as tenants by the entirety, to build a hunting camp. The deed from the Club to Ruby and Sam conveyed the three acres of land ". . . together with hunting rights on the Club's adjacent property to hunt and fish for the benefit of their hunting camp to be established on the three acres." Quentin died shortly after the transfer, and Ruby and Sam built a cabin on their land, and continued to hunt on the Club's land until Sam's death 10 years later.

After Sam's death, Ruby assigned the rights to hunt the Club's property to Sam's nephew, Tom. The year after Sam died, Tom and a few of his friends stayed at Ruby and Sam's cabin, and hunted on the Club's land. The Club filed suit in the Circuit Court for Carroll County and asked the Court to declare that the deed to Ruby and Sam granted them a license to hunt and fish the land which was personal to Ruby and Sam and could not be transferred to Tom or any other person. Ruby and Tom denied the allegations in the Club's complaint, and asked the Circuit Court to declare that Ruby had the authority to assign the hunting rights because the Club's transfer of hunting rights to Ruby and Sam was a grant of a real property interest, which was freely transferable by Ruby as the surviving owner.

What should the Court declare? In your answer, fully analyze the claims and defenses of each party.

REPRESENTATIVE ANSWER 1

The Court should declare that Quentin gave Ruby and Sam an easement appurtenant and that whoever owns or occupies the hunting camp has the right the hunt and fish on the Club's land.

An easement appurtenant arises from a relation between two pieces of land—a dominant tenement and a servient tenement. Here, the 3 acres of the camp are benefited land (dominant), and the Club's land is burdened (servient).

This would be a non-transferable easement in gross if the right to hunt and fish were personal to Ruby and Sam. It is not. The deed conveys the hunting and fishing rights "for the benefit of their hunting camp." This language, referring to Sam and Ruby's land and not to them personally, gave them an easement appurtenant in the hunting and fishing rights.

The deed did not grant a license. A license is a fully revocable conveyance of the right to use the conveyor's property. The Hunt Club is incorrect. A deed cannot give a license because deeds are irrevocable; furthermore, licenses are personal and deeds attach to and convey land..

But the easement is not transferable either without the transfer of the dominant tenement, upon which its existence depends. Therefore, Ruby and Tom are also wrong.

The Court should rule that Tom and his friends can hunt and fish on the Club's land as long as they own or occupy the camp. Only if they have rights in the dominant tenement can they have rights in the easement.

REPRESENTATIVE ANSWER 2

The Club's deed is best viewed as an express grant of a profit a prendre. It is a profit aprendre because Sam and Ruby (S and R) could take items off the land (animals they killed), and thus, is not a general easement. The deed specifically granted Ruby and Sam (with the 3 acres) a right to use the land to hunt and fish for the benefit of the camp. The profits and use of the Club's land were connected to Sam and Ruby's use of their land. Thus, it is a profit rather than a license.

As a profit, it is a transferable property interest, but only with the property of the dominant estate. In other words, the profit is transferable with the dominant estate, but not separate, because it is not personal. Thus, Ruby can't assign the rights alone. She must transfer the land.

If the rights are a license, then is revocable at any time. Maryland does not recognize reliance with licenses.

Finally, there are no issues of adverse possession or prescriptive profit because all use was permissive before this dispute.

So the Court should declare the rights to be a profit, which can be sold with the dominant estate but can't be assigned separately.

QUESTION 9

Bart worked as office manager for Lisa, a physician. Lisa maintained an office checking account at Springfield National Bank ("SNB"). On June 1, 2005, Bart prepared a check in the amount of $15,000 payable to Millhouse. Bart forged Lisa's signature on the check. Later that day, Bart took the check to Millhouse and used it to pay for a motorcycle. Millhouse endorsed the check and deposited the check in his bank account at SNB. SNB credited Millhouse's account for $15,000 and debited Lisa's account for the same amount.

On July 1, 2005, Bart took off on the motorcycle for parts unknown. The next day, Lisa learned about the check.

Lisa has consulted you, a Maryland attorney, about this matter. She told you that she trusted Bart and did not usually review her office bank statements. Since Bart disappeared, she learned that Bart had signed her name to other checks beginning in March, 2005. She also said that Millhouse has known her since she was a young girl and that he knew she would never own a motorcycle because she considers them unsafe. She would like to recover the $15,000 from either Millhouse or SNB.

Describe the possible causes of action Lisa might have arising out these facts. What defenses could be raised to them. How is a court likely to rule?

REPRESENTATIVE ANSWER 1

This matter deals with the rights and liabilities of account holders and banks, and those of negotiable instruments holders.

Action Against SNB Bank

Lisa can attempt to get relief from the Bank by claiming that they cashed an unauthorized check. In this case, a check bearing her forged signature. However, the Bank has two good defenses against Lisa. They had no notice that anything was wrong from Lisa and they exercised their duties and in a commercially reasonable manner with due care.

A bank customer is under the obligation to report any discrepancies or irregularities to their financial institutions within a regular, reasonable time. Usually, this period is for 30 days though it can be shortened by express consumer agreement. Also, a customer has a duty to read and analyze the statements their bank sends them for any indication of errors or irregularities.

Lisa is not just late in that she's more than 30 days late in claiming irregularities from the $15,000 check, because it was cashed on 6/1, but also, the facts tell us she neglected examining her statements.

There is absolutely no indication that the Bank exercised any other than good faith, reasonable commercial standards when they cashed Millhouse's check into his account. Their duty of care appears to have been met. Lisa would probably not recover from SNB. Even under comparative fault if any were to be found to rest with Bank, Lisa's fault exceeds the Bank's.

Against Millhouse

Lisa has a slightly stronger case against Millhouse because he may have been acting in collusion with Bart. However, should Lisa bring any claims against Milllhouse these should be on conversion and on fraud, which the facts do not fully support.

Millhouse may have known Lisa since she was young, but that alone does not permit the inference that he was familiar with her signature. She never would have bought a motorcycle, so she never had those types of dealings with Millhouse.

When Millhouse received the check from Bart, he became a holder with rights to cash the instrument. It was properly made out to him, he endorsed it and it was duly negotiated at his Bank that just happens to be Lisa's bank too.

There is no indication in the facts of any fraudulent behavior by Millhouse. He did not talk to Bart in the facts, or in any bad faith encouraged him to write out a forged check.

Millhouse, through knowing Lisa, probably knew Bart worked for her. For all he knew, under these facts, there is no evidence that Millhouse could not have deemed this a loan to Bart from Lisa. Should Lisa assert that Millhouse was negligent, she would also fail. He is not the bank, but a private party here selling his motorcycle. No facts give rise to a duty to Lisa or breach of such duty by Millhouse.

Lisa's own lack of care and negligent supervision of her employee, have landed her in this situation. No claim against either Bank or Millhouse would succeed.

REPRESENTATIVE ANSWER 2

Lisa v. SNB

Under Maryland Commercial law, 4-401, a bank may charge against the account of a customer an item that is properly payable. Such an item is properly payable even if it creates an overdraft. Here, because this is a forged cheek and thus Lisa did not authorize the check (her signature was forged as drawer) this check was not properly payable. In these circumstances all loss shifts to the drawer/payor bank, since it was not authorized by Lisa to debit her account. Furthermore, it can be argued that under 3-406, the bank who arguably took in good faith (honesty in fact) failed to use ordinary care when paying the check and thereby substantially contributed to the loss. Here, Lisa was a customer of "SNB" and they arguably have her signature on file (if this is the standard). Since Millhouse, the payee on the check was also a customer at "SMB" bank, arguably the bank could have checked Lisa's signature, and maybe have taken notice of the forgery.

In this situation, the bank "SNB" is able to shift loss to the customer (comparative loss under 4-406 where a customer fails to use reasonable care in examining statements to report or find unauthorized checks or possible forgeries.) This was Lisa's duty to review her statements and she admitted that she often did not. Therefore, she did not discover the unauthorized checks and the bank should be able to shift the loss between themselves and Lisa. The loss will be apportioned between the Bank and customer after this determination, whatever the Bank is responsible for should be credited back to Lisa's account.

Lisa v. Millhouse

Although Bart forged Lisa's signature, his signature is effective as the signature 3-403 of an unauthorized signor in favor of a person in good faith takes it for value. Anyone who comes into possession of that check will be holder and therefore entitled to enforce the check. Here, Millhouse took the check in good faith for value not knowing of any unauthorized signatures. He maintains holder status even though he is in wrongful possession of it (3-301). However, Lisa states that Millhouse knows her very well and would know that she would not have authorized this check and therefore it must be forged, she would agree that Millhouse took it in bad faith. If she can make a persuasive argument that Millhouse knew she didn't write the check, then she may be able to assert a claim against him. However, based on these facts, Millhouse arguably may have thought she wanted a motorcycle. How was he really supposed to know - I don't think it is necessarily his duty to go out and seek her and see if she changed her mind about motorcycles or if she did write the check. Therefore, her claim against Millhouse might be weak.

Lisa v. Bart

Bart will be liable for conversion under 3-420 because he took her check not as a person entitled to enforce it and obtained a benefit from it (motorcycle). He is liable for conversion.

QUESTION 10

Ajax, Baker and Carr are dentists practicing in Maryland. In 2004, they formed ABC, LLC ("ABC"), a Maryland limited liability company. ABC's articles of organization provided that it was managed by its members. Because of their growing practice, the three dentists decided to look for larger offices. Their accountant suggested that they purchase office space rather than renting it. The three dentists decided to follow that advice.

Several months later, Ajax purchased the Greene Building for $500,000. He then approached Baker and Carr and told them that he thought the Greene Building would be an ideal location for their offices. He also told them that the building was available for purchase for $600,000 and that he thought that price was a fair one. Baker and Carr agreed and told Ajax "to take care of the paperwork." Ajax did not disclose that he was the owner of the Greene Building. On July 1, 2005, ABC, LLC purchased the building for $600,000. The business has flourished in its new location.

In November of 2005, Carr learned of the facts set out above. She discussed the matter with Ajax and Baker. Ajax said that the building was fairly priced at $600,000 and gave Carr a copy of an appraisal done in June of 2004 stating that the fair market value of the building was between $575,000 and $615,000. Baker said that he was happy with the building and felt that there was nothing further to be done.

Carr believes that Ajax took advantage of her and Baker. **What rights and remedies exist against Ajax?**

REPRESENTATIVE ANSWER 1

The first point is that there could be a conflict. Under the Maryland Rules of Professional Conduct, attorneys who represent business associates cannot represent the directors/members or the directions/members in their own suits against associations. This does not appear to be a problem here, but it is worth mentioning.

Carr could bring a derivative suit against Ajax generally, claiming that he breached his duty of loyalty to ABC, LLC. A derivative suit would be proper since the LLC is the injured party. Normally, Carr would be required to bring the claim before the other members, Ajax and Baker to see if they wished to pursue the case. Carr need not bother because this would be "futile". That is, Ajax is not going to agree to sue himself and Baker has already said that he sees no reason to sue.

ABC's first claim would be that the deal with Carr is voidable as a deal with an "interested member.' LLC's are generally forbidden from dealing with interested directors. Any such undisclosed deal is voidable. Violation of this rule makes the contract voidable.

Ajax would counter that such deals are permissible so long as the terms are fair and reasonable to the LLC. This would be a difficult argument to make given the circumstances, but it could win. What Ajax could not likely defend against would be ABC's claim that he "usurped a business opportunity." Members are generally required to deal in good faith with their LLC's. This includes giving the LLC a right of first refusal on business opportunities that the LLC would legitimately be interested in. Not only did Ajax usurp an opportunity, he did so at loss of $100,000.00 to the LLC. The remedy for usurpation of business (corporate) opportunity is a constructive trust on the profits, i.e. ABC would get the $100,000.

ABC could also bring a claim against Baker for breach of duty. It could claim malfeasance on not voting to sue Ajax. This would be very hard to win. Baker could claim that he was acting in the best interests of the LLC, given the appraisal and the cost of litigation.

If Carr were to win the suit on behalf of ABC, she would be entitled to reimbursement for litigation expenses.

REPRESENTATIVE ANSWER 2

Carr has the ability to bring two breach of duty actions against Ajax. First, Carr can bring a derivative action on behalf of the LLC for the deprivation of a corporate opportunity. Usually Carr would have to first go to the other LLC members and demand a remedy. However, this appears to be futile as there are only 3 members including Ajax who is not going to agree that he should be sued and Baker who is just complacent. The doctrine of corporate opportunity allows an action to be brought when a managing member of the LLC usurps or interferes with an opportunity of interest to the company. Here Ajax, Baker & Carr had all decided to look for larger offices. They had agreed to purchase office space. Ajax purchased for himself, the Green Building, which is perfect for office space. He usurped an opportunity for ABC to expand and buy office space. Ajax had a duty to disclose the opportunity to the other members and then if the LLC decided not to pursue the purchase, Ajax could buy the Green Building himself. He didn't do this, hence he is liable to the LLC entity. ABC is entitled to buy the land from him at the same price he paid or to obtain the profits he incurred from the sale. Either way, the remedy would be to pay ABC $100,000.

Additionally, Carr can sue for a breach of fiduciary duty under the interested member agreement. A member of the member managed LLC had a duty of loyalty to disclose its interest in a proposed transaction. Here as the owner of the land ABC was going to buy, Ajax had a duty to

disclose that he owned the land. Ajax failed this duty and did not disclose, thus he is liable for the profit he made. Ajax can argue failed disclosure doesn't make him liable where the transaction was fair and reasonable. Here he has proof that the fair market value of the Green building was between $575,000 and 615,000. However he still incurred an unreasonable $100,000 profit which makes the transaction unfair and he will be liable.

QUESTION 11

There is a severe shortage of the flu vaccines available to citizens in the State of Maryland. The People's Hospital, located in Anne Arundel County, Maryland, managed to obtain 500 flu vaccines. To avoid the pushing and shuffling incidents that occurred last year when the hospital provided flu vaccines, the Hospital decided to limit the number of persons allowed to line up in advance. The Hospital also assigned three (3) security officers to patrol the area.

Information about the available flu vaccines spread quickly in the community and 3,000 people lined up outside the hospital before the 9:00am opening. The three (3) assigned security officers were overwhelmed. When the doors opened, people began to push and shove and a stampede occurred, injuring at least 25 people, requiring their overnight stay in the Hospital although none of the injuries appeared to be life threatening.

The flu vaccine was delivered to the People's Hospital by the manufacturer, Jones, Inc., in the usual prepackaged and sealed bottles. Dr. Smith, the Hospital's vaccination control officer, noticed that the medicine in the bottles had a slight discoloration to it, which he knew could be a sign of contamination. Dr. Smith did not worry about it however, since there was a certificate of freshness and authenticity signed by Jones, Inc., on all of the bottles.

Dr. Smith administered all 500 flu vaccines. Several days after administration of the shot to Joe, he died. Joe was one of the trampled individuals who stayed overnight at the hospital. The autopsy conducted on Joe proved to be inconclusive as to the cause of death.

As General Counsel to the Hospital, you have to prepare for litigation that is anticipated to occur. Analyze and explain the possible causes of actions that may be brought by Joe's estate and any defenses thereto. Do not discuss wrongful death claims by Joe's heirs.

REPRESENTATIVE ANSWER 1

There are three theories upon which Joe's estate (J) may sue – negligence, strict liability and product liability.

A prima facie case of negligence requires duty, breach of that duty, causation and damages. J was a foreseeable plaintiff because he was in the line at the hospital, which is right in the middle of the zone of danger. The hospital owed J a duty of high responsibility because J was there to obtain the vaccine and the hospital is responsible for making safe conditions. The court will have to decide whether making a line form and having 3 security officers met their duty of care. Next, J has to show breach of the duty. If the court finds that the hospital did not adequately make the premises safe, then there is a breach. Causation is satisfied because the hospital's negligence was a

substantial factor in his injury or he could argue that the hospital's negligence was the actual cause and but for their negligence he would not have been injured. They were also the proximate cause because no intervening unexpected tort or crime occurred. And, of course, J suffered damages which required hospitalization. To this negligence claim the hospital may claim as a defense contributory negligence or implied assumption of the risk. They may claim that J took on the risk by getting in line when he saw so many people anxiously waiting to get the limited flu shot.

There are two theories to be considered under products liability – negligence and strict liability. The manufacturer may be held liable for distributing a rancid product, especially since it was sealed when it arrived at the hospital (no intervening causes contaminated it) and had a warranty claiming its freshness. If the court considers the vaccine an ultrahazardous material then J won't even have to show duty, as in negligence (above), since in a strict liability case the duty to make it safe. If suing under negligence, J certainly is a foreseeable plaintiff and they owed him the duty to act as others in their business would to provide products that are fresh and safe. If sued on a products liability theory, the hospital will be able to sue the manufacturers for indemnification for any suit against them.

Finally, J may sure Dr. Smith for negligence or, in the alternative, J may also sue the hospital because Dr. Smith's negligence is imputed under the theory of respondeat superior. Since Dr. Smith was presumably acting with the consent of the hospital, for the benefit of the hospital, and under the control of the hospital, the hospital is responsible for his negligence in failing to act when he noticed the vials were discolored. J could sue Dr. Smith or the hospital and if the hospital is required to pay it may sue Dr. Smith for gross incompetence and negligence. Also note, the manufacturer may claim that the doctor's negligence in failing to stop the product from being distributed may counter its liability.

J may run into a problem on all of these theories because there is no way to prove what caused his death. This can be overcome by showing that he died because of someone's negligence and therefore res ipsa loquitor applies.

REPRESENTATIVE ANSWER 2

Causes of action by Joe's Estate:

A survival action is brought by the estate of a decedent for harm caused the decedent and it can bring any action the decedent could have brought.

Strict liability holds someone liable for ultrahazardous activities and in Maryland this includes landowners where ultrahazardous activities are taking place. Vaccinations themselves

may or may not be ultrahazardous, but the hospital knew that vaccinations plus large groups (known for shuffling and pushing) might be. The hospital will defend that none of these circumstances fall under "ultrahazardous activities" and there is no strict liability.

Strict products liability is imputed to manufacturers or retail distributors of defective products. A manufacturing defect will be imputed to the hospital if the hospital had reason to know the defect existed and could cause harm. Here Jones manufactured but Dr. Smith injected, knowing it was discolored and could therefore be contaminated. An unreasonable reliance on the certificate of freshness and authenticity will not absolve the Doctor or the hospital of resulting damage if it was caused by the vaccine. The best defense here is that the manufacturer is liable and the hospital should plan on suing them if it is sued.

Negligence is breaching a duty which proximately causes damages. There are two potential negligence claims by Joe's estate. The foreseeable stampede as a result of information about the vaccine spreading, and the hospital's failure to adequately address this foreseeable problem was negligent. The duty exists because patients are invitees on hospital property and the hospital has a duty to warn and inspect for problems. The defense is that the hospital decided to limit the number and hired three security guards. This will not likely be successful since there is no indication as to how the hospital planned on limiting the number.

The doctor was an employee of the hospital and its vaccination control officer. The hospital is therefore vicariously liable for his torts. The doctor had a duty to inspect and take reasonable steps to avoid harm to invitees. Dr. Smith saw "discoloration" and "knew it could be a sign of contamination" yet he still administered all 500 doses. This is negligence but a defense could be that the vaccine did not cause Joe's death as evidenced by the autopsy which was inconclusive.

However, these negligence claims will be hardest to defeat because when you combine both incidents (stampede and vaccine) the estate probably shows causation.

QUESTION 12

Trina is a famous dancer who shares joint custody of Son with her ex-husband, Mike. One day they appeared at a hearing before a family Court judge in Calvert County, Maryland. As Trina was exiting the elevator, Mike pushed her back in, grabbed her arm and told her he hated her and would make sure that she never saw her Son again. When Mike saw someone approaching, he quickly released her and walked away. Visibly shaken, Trina rubbed her arm and went to the courtroom.

Once on the witness stand, Mike told the judge that he wanted full custody of Son because "Trina dates any and everybody, acts whorish, is never home, and can't be trusted'. Mike knew none of his testimony was true. Next, Mike called his friend Gene as a witness. Prior to that day, he had paid Gene to agree with whatever he said. When asked about Trina's mothering skills, Gene said "She always leaves Son alone while she's out cavorting with some bum!" Trina was stunned since she had never seen Gene before and suspected that Mike asked him to give false testimony.

As Mike exited the courtroom Trina screamed in Hungarian, her native tongue, "Mike you are a syphilitic fool and a criminal!" In English she screamed "You both are lying sons of dogs!" Mike shouted back "I'll sue you, you untalented, has-been prostitute!" Unbeknownst to either, their antics were filmed by a local news station that aired the fracas repeatedly.

Later that week, Trina's manager called to say that her upcoming performance at the Hall of Dance was cancelled by the sponsors because of the unfavorable media broadcast.

Trina asks you, her Maryland attorney, if there is any way Mike can be jailed or otherwise made to pay for his actions, and whether he would have any legal recourse against her. She also questions whether she has any recourse against the television news station. What would you advise, and why? Discuss fully.

REPRESENTATIVE ANSWER 1

Trina's claims: Trina may attempt to have Mike brought up on charges of assault. When Mike grabbed Trina's arm, that was an offensive touching, uninvited by Trina. The thinly-veiled threat he made to her that she "would never see her son again" would also be construed as criminal assault. Trina could also file civil assault and battery charges against Mike. In tort battery is an unwelcome, offensive touching, and assault is a threat of force putting the plaintiff in imminent fear of a battery. Both of these are satisfied by Mike's actions.

Trina could also file a tort claim of false imprisonment (and seek the corresponding criminal charges). False imprisonment is the forceful confinement to a bounded area, where the person

confined is aware of the confinement. Here, when Mike "pushed her back in [the elevator and] grabbed her arm" he likely satisfied these elements.

Mike could also be brought up on the criminal charge of perjury since he "knew none of his testimony was true." Further, he could be charged with suborning perjury when he paid Gene to agree with whatever he said. Also in relation to this activity, he could be charged with solicitation, since he asked Gene to perjure himself. That charge would merge into the conspiracy charge that stems from his and Gene's agreement to perjure themselves, for which conspiracy they would be liable.

Finally, Trina could bring a defamation action against Mike. Defamation is a defamatory statement (tending to injure reputation) made to another that is not true. Maryland requires the statement to at least be negligently made, if not maliciously. While his statements in the courtroom may be argued to be absolutely privileged, the statements made subsequent to the trial outside the courtroom are not. They may be privileged as testimony, but given the fact that he knew the statements were false, and the fact that he again impugned her reputation for chastity makes both statements slander per se. Since Trina is a public figure, she must show malice on Mike's part and actual damages. The malice stems from Mike's intentionally defaming her even though he knew his statements were false. Her damages can be shown by the performance being cancelled because of the unfavorable media broadcast. Mike may argue that the damages stem from the broadcast, not his actual statement, but that defense is weak since his statement caused the broadcast to be made. Even if he is not liable for these actual damages, she can still get presumed damage to her reputation and perhaps punitive damages due to his malice.

Mike's claims: When Trina called Mike and Gene "lying dogs" she did not defame them since she knew they had both lied against her on the stand. Truth is an absolute defense to a claim of defamation. However, if Mike can show that someone who understood Hungarian heard her call him a "syphilitic fool and a criminal" which is likely since the words were broadcast repeatedly on the news, then he has a slander per se claim against her since she accused him of having a loathsome disease. If he does, in fact, have syphilis then she can use truth as a defense. In that case, he would have an intrusion of privacy claim since she caused a true fact about him that a reasonable person would find offensive to be widely disseminated. Her defense would be that she did not cause wide dissemination – the T.V. station did. Mike would only have to show negligence to get presumed damages since he is not famous.

Trina's claims against T.V. station: The station caused facts that a reasonable person would find offensive to be widely distributed and thus there was an intrusion of privacy. The station would have a "newsworthiness" defense since Trina is a famous dancer. Trina might also have a false light claim if the station negligently broadcast offensive information ("prostitute") tending to put her in a false light.

REPRESENTATIVE ANSWER 2

I would clarify that Mike cannot be jailed as a result of any civil actions she may bring against him. I would advise that if she wants Mike jailed she needs to make a police report and try to get the prosecutors to prosecute him.

Mike has likely incurred civil and criminal liability for his behavior before the hearing. Mike committed battery when he intentionally touched Trina in an offensive manner. A reasonable person would likely find this to be offensive because he pushed her, grabbed her arm and caused her physical discomfort. Trina could pursue Mike civilly on these facts. He also has criminal liability for assault.

Trina might be able to argue that Mike falsely imprisoned her because he grabbed her and held her against her will while he threatened her in the elevator. He did this intentionally with hopes of harming or scaring her. Mike would also be criminally liable for this act.

Mike's behavior during the hearing will subject him to criminal liability. While his statements about her during the hearing were defamatory, he likely had immunity because the statements were made during a judicial proceeding. He will be criminally liable for perjury because he knowingly lied under oath. He will also be liable for paying a witness to commit perjury because he paid Gene to agree with his statements regardless of their truthfulness.

Mike can be liable for making defamatory statements about Trina because his statement was slander per se and resulted in damages. By saying she was a former prostitute, Mike made a defamatory statement that he knows is not true. This will satisfy the falsity requirement. Additionally, there is enough info here to conclude the fault requirement was satisfied since there was malice. Since Trina is famous she must show actual malice. This is one of the few instances where actual malice is clear. Mike's statement was also published since Gene heard it and it was on t.v.

Mike can sue Trina for defamation because she made statements about him that weren't true and published them by saying them in front of others. She probably knew they weren't true and made these statements purposefully. She might escape liability for the Hungarian statement if no one understood it because he can have no damages as a result of a statement that no one understands.

While Trina might argue that her privacy was invaded by broadcasting this personal moment numerous times, she will not prevail against the t.v. because one's privacy can only be invaded if the matter is private. Screaming in a courthouse hallway is not something that someone can reasonably expect to be a private matter entitled to protection and deference. She was not put in a false light because her actions were broadcast exactly as she conducted them.