

**JULY 2010 MARYLAND BAR EXAMINATION  
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

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1. The Essay Question is a reprint of the question as it appeared on the examination. Extracts of statutory material and rules are not included.

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

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

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**QUESTION 1**

Fred was the owner of Blackacre Farms, a 100 acres parcel of land in Carroll County, Maryland. On June 1, 2009, Fred agreed to convey 10 acres on the northeastern corner of Blackacre Farms to his Church so it could expand its cemetery. In lieu of payment for the land, the Church agreed to provide and maintain burial plots for Fred's descendants for the next 100 years. On June 30, 2009, Fred signed and delivered to the Church a Deed for the 10 acres, but the Deed was not recorded in the Land records for Carroll County.

On July 1, 2009, Fred entered into a contract to sell all of Blackacre Farm to Developer. The contract between Fred and Developer was silent as to the conveyance of the 10 acres to the Church.

Developer performed a full and complete title search, and found no record of a conveyance to the Church. On August 5, 2009, Fred and Developer met to settle on the sale of Blackacre Farms. Immediately prior to the settlement, Fred showed Developer a copy of the Deed to the Church together with a diagram of the portion of Blackacre Farms he had conveyed. Despite this disclosure, the settlement was consummated and later that day, the Deed from Fred to Developer for all 100 acres of Blackacre Farms was recorded and indexed in the land Records for Carroll County, Maryland.

On September 1, 2009, the Church's Deed was properly recorded and indexed in the Land and Records for Carroll County, Maryland.

In 2010, Developer sought county approval to build a road on the 10 acres conveyed to the Church. The Church protested, but Developer claimed that he had purchased all 100 acres of Blackacre Farms and that Fred's conveyance to the Church was invalid, as it was not recorded or consummated prior to his purchase.

Developer timely files a lawsuit in the Circuit Court for Carroll County to Quiet Title, claiming the Church has no rights to any of Blackacre Farms.

**What arguments will be made by Developer and the Church?**

**How should the Court rule? Explain the reasons for your Answer:**

**REPRESENTATIVE ANSWER 1**

Developer's arguments:

The Developer will argue that his action for quiet title is supported by the fact that Maryland is a race-notice jurisdiction, which requires a purchaser of land to actually record in order for his conveyance to be perfected and preclude subsequent transfers.

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Here, the Church received the deed on June 30, but did not record until September 1, well after August 5, 2009, the date on which Developer received its deed from Fred and properly recorded.

Further, the contract that Fred and Developer entered into was for the sale of all of Blackacre, and was silent as to the conveyance of the 10 acres to which the Church claimed ownership. Developer performed a “full and complete” title search, but was unable to find the Church’s recorded deed. Thus, it had no actual notice and it cannot be deemed to have record notice (since the Church had not recorded its deed). Once the land contract was entered into, the terms of the agreement were set, and having no notice or imputed notice of the conveyance to the Church, the Developer was entitled to rely on the actual terms of the contract.

Church’s arguments:

The Church will argue that, despite the fact that Maryland is a record-notice jurisdiction, Developer will lose because he was not a bona fide purchaser. In order to win the race to record in a race-notice jurisdiction, a purchaser must be a bona fide purchaser and be the first to record. A bona fide purchaser is a purchaser for value, with no notice of competing (or superceding) claims to ownership of the property. Under the facts here, Developer is not a bona fide purchaser. Immediately prior to the settlement, Fred showed Developer the Church’s deed, which gave Developer actual notice of the deed – precluding bona fide purchaser status. Further, even prior to this time Developer might be deemed to have had inquiry notice of Church’s deed. A buyer of property is required to inspect the property prior to settling the agreement. An inspection of Blackacre likely would have put the Developer on notice as to the Church’s use of the land to expand its cemetery, and thus, notice may be imputed to the Developer who was delinquent in its duties as a buyer.

Ruling:

The Circuit Court should rule for the Church because Developer was not a bona fide purchaser, and thus does not meet the requirement to “win the race” to record in a race-notice jurisdiction. The terms of the land contract do not provide a successful argument for Developer because he had actual notice of the Church’s deed prior to the consummation of the settlement.

**REPRESENTATIVE ANSER 2**

Developer Arguments:

The developer would argue that it has good title to the deed of Blackacre Farms because the deed was recorded and indexed in the Land Records for Carroll County, Maryland on August 5, 2009. In Maryland, the recordation of a deed is a rebuttable presumption of title ownership. Furthermore, the developer would argue that the prior deed of 10 acres

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to the Church was not recorded in the land records for Carroll County when the developer first initiated its title search. The consideration for the deed to the church was gift deed. In lieu of payment of the land, the Church agreed to provide and maintain burial plots for Fred's descendents for the next 100 years. This would not be sufficient value for the deed from Fred to the Church. Thus, the Church was not a purchaser for value and the Developer would hold record title to the deed to Blackacre Farms.

Church's Arguments

The Church would argue that it had good title to the deed of Blackacre Farms because the developer was not a subsequent purchaser for value without notice. In Maryland, which is a race-notice jurisdiction, one that purchases land without notice and then records would win the race of recordation. Here, the developer recorded first but took with notice of the prior conveyance to Church when Fred showed the developer a copy of the deed to the Church together with a diagram of the portion of Blackacre Farms Fred had conveyed. Despite the disclosure on August 5, 2009, the deal went through and the deed was recorded on August 5, 2009. Thus the developer was not a subsequent purchaser for value without notice of the prior conveyance. Although the Church recorded its conveyance after the developer on September 1, 2009, the developer loses in this race-notice jurisdiction. Furthermore, Fred intended to deliver the deed to the Church when Fred delivered the deed to the Church on June 30, 2009. The intent of Fred to deliver the deed to the Church, plus developer taking the land with notice of the prior conveyance, makes the Church the proper owner of Blackacre Farms.

Court's Ruling

The court would rule that the Church has good title to Blackacre Farms with respect to the 10 acres that was conveyed to it by Fred. Although the initial land conveyance to the Church was one without monetary value, value is measured in different ways. Here, the value would be to provide and maintain burial plots for Fred's descendents for the next 100 years. Furthermore, the fact that the Developer recorded and indexed his deed on September 1, 2009 with prior notice of the deed to the Church does not make him the proper record holder of the deed. In Maryland, which is a race-notice jurisdiction, one has to record first without notice of the prior conveyance. Here, the developer recorded first but with notice. Although the Church did not record its deed first, the fact that the developer was not a bona fide purchaser for value without notice makes the Church the proper record holder of the deed to Blackacre Farms. Therefore, the Church owns the 10 acres of Blackacre on the northeastern corner. The Church holds title to the remaining 90 acres.

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**QUESTION 2**

In February 2007, Defendant was arrested and charged with a third degree sexual offense. He was arraigned in the circuit Court for Baltimore City on June 25, 2007, at which time defense counsel entered his appearance, and a trial date of September 25, 2007, was set. On that date, the judge assigned to hear the case was involved in a continuing jury trial. Consequently, the administrative judge, with the consent of the State and Defendant, rescheduled the trial for December 12, 2007. (1<sup>st</sup> postponement) On the December 12, 2007 trial date, the State requested a continuance, claiming that results of a crucial DNA test were not available on December 12, 2007. although defendant's counsel objected, the administrative judge, finding there was good cause and that the State was not at fault, reset the trial date to February 25, 2008 (2<sup>nd</sup> postponement)

Trial did not proceed on February 25, 2008, however, for once again the judge to whom the case was assigned, was involved in a continuing jury trial. The administrative judge finding good cause, rescheduled the trial to March 5, 2008, over Defendant's objection. (3<sup>rd</sup> postponement) Defendant thereupon filed a motion to dismiss the criminal charges for violation of Defendant's right to a speedy trial under the state and federal constitution as well as under rights granted by Maryland statutory law and Rules of Procedure. Defendant's Motion to Dismiss was denied.

On March 5, 2008, the trial was again rescheduled to June 25, 2008, and good cause was found due to the unavailability of the prosecutor because of illness. (4<sup>th</sup> postponement) Defense counsel objected to this postponement. The trial commenced on June 25, 2008. Defendant's counsel, before evidence was presented, renewed his motion to dismiss because of the trial delay. Defendant's motion asserted that he had been incarcerated since February 2007, and, therefore, had been unable to assist in his own defense by locating an individual to whom the complaining witness allegedly had confided that the sexual contact with the Defendant was consensual.

Defendant's motion was denied. A jury found the Defendant guilty and he was sentenced to a term of imprisonment. Defendant filed a timely appeal to the Court of Special Appeals claiming that the Circuit Court erred in denying the motion to dismiss.

How should the appellate court rule as to:

- a. Defendant's assertion that his rights under Maryland statutory law and Rules of procedure had been infringed by the trial delay.
- b. Defendant's assertions that his constitutional right to a speedy trial had been violated.

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**REPRESENTATIVE ANSWER 1**

**PART A: Maryland Laws and Rules**

Maryland Code, Criminal Procedure Article and the Maryland Rules of Criminal Procedure govern the timing of trial after arrest and initial appearance in Circuit Court (arraignment). Generally, a trial must begin within 180 days of arraignment.

**Arraignment (Initial Appearance in Circuit Court)**

Arraignment, also known as initial appearance in Circuit Court, is to take place within 30 days of formal charges being filed. In this case, defendant was arraigned in the Circuit Court for Baltimore City on June 25, 2007, 4 months after being arrested and charged. Therefore, the State violated the Maryland Code, Criminal Procedure Article and Rules of Criminal Procedure with respect as to arraignment.

**Trial Date after Initial Appearance.**

At the arraignment, a trial date is to be set that is no more than 180 days after arraignment. In this case, the Defendant was given a trial date for September 25, 2007, which complied with the Rules of Procedure in that it is within 180 days after June 25, 2007.

**First Postponement**

Postponements are permitted whenever there is good cause shown and the postponement will not substantially prejudice either side. In this case, the original trial date of September 25, 2007 was first postponed to December 12, 2007 due to a scheduling conflict with the court. Because both the Defendant and the state consented to the postponement, good cause had been shown, and the trial date was still within 180 days of arraignment, the first postponement was permissible.

**Second Postponement**

On December 12, 2007, the trial was postponed again. This time the State requested a continuance to obtain test results from a DNA test. Defense counsel objected to the postponement, but Court granted it, finding good cause and stating that the State was not at fault for the delay. Even though the new trial date was set after the 180 day mark, the Court did not find the Defendant to be prejudiced by the postponement, and there are no facts suggesting otherwise.

**Third Postponement/Motion to Dismiss**

On February 25, 2008, the trial was postponed again due to scheduling conflicts with the judge. Defense Counsel again objected to the postponement, but the postponement was granted anyway, and Defense Counsel filed a motion to Dismiss for

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violation of Speedy Trial rights. At this time, the Defendant had been in jail for a year, and unable to assist in his trial, and the trial date had gone past the statutory 180 day mark. Therefore, Defendant could show that he had been prejudiced by the postponement, and the trial court erred in not granting the motion.

**Fourth Postponement**

On March 5, 2008, the trial was postponed again due to the prosecutor's illness. The court erred in finding good cause for this postponement, because another prosecutor could have handled the trial until the assigned prosecutor became well, and the Defendant was prejudiced by the delay, as the new trial date was set for a year after arraignment.

**Motion to Dismiss**

A Motion to Dismiss on the basis of speedy trial is granted whenever the trial date occurs after 180 days after arraignment, and the Defendant has been prejudiced by the delay. In this case, the trial began a year after arraignment, and the Defendant had been incarcerated the entire time, unable to assist in the defense, and causing a witness to remain unlocated. The witness could have had a substantial effect on the outcome of the case, as he would have testified to consent, thus, showing that one of the elements to third degree sexual assault had not been met. Because the trial was past the 180 day mark, and the Defendant was prejudiced by the delay, the Court erred in denying the motion to dismiss.

**Ruling of Appellate Court**

The appellate court should rule that the trial court erred in granting postponements 2 through 4 and in denying both of the defendant's motions to dismiss.

**Part B: Constitutional Right to Speedy Trial**

The Constitutional Right to a Speedy trial states that a criminal trial must begin within a year after the Defendant is formally charged. In this case, the defendant was formally charged in February of 2007. The trial did not commence until June 25, 2008, 1 year and 4 months after the filing of formal charges. Therefore, the trial court ruled in error as to the third and fourth postponements, and the Defendant's Motions to Dismiss on the basis of the Defendant's constitutional rights to a speedy trial.

**REPRESENTATIVE ANSWER 2**

**Maryland Law & Rules**

**Arraignment** A Defendant must be arraigned and a trial date set within 30 days of arrest. Here Defendant was arrested and charged on 2/07, but was not arraigned until 6/25/07, this is a violation of Maryland Statutory law, however the violation is not

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grounds for dismissal, but can be used against the State when weighing prejudice to Defendant.

**Right to Speedy Trial** A Defendant must be tried within 180 days of arraignment in Circuit Court. Undue delay will be grounds for dismissal unless good cause is shown and Defendant is not prejudiced. Here Defendant was arraigned on 6/25/07, trial was set for 9/25/07, but trial didn't commence until 6/25/08. This was a violation of the rule, but good cause was shown for each postponement. (1/25 Judge was in trial, 12/12 good cause by Prosecutor, 2/25 judge was in trial, 3/25/08 Prosecutor was sick). Since good cause was shown there was no violation of right and shouldn't be overturned.

**Constitutional Arguments**

**Right to Speedy Trial** A Defendant has a right to speedy trial through the 6<sup>th</sup> amendment incorporated through the 14<sup>th</sup> amendment. Trial delay is based on when Defendant was arrested and the delay and prejudice caused to Defendant will be weighed. Here Defendant was not brought to trial for over 1 year from arrest (2/2007). This is an unconstitutional delay, and prejudice must be weighed.

**Prejudice** On 2 occasions 9/25/07, and 2/25/08 the judge was to blame for the delay; neither party is charged with this delay. On the other two occasions (12/12/07 & 3/5/08) the prosecution was to blame (DNA evidence & sick Prosecutor). The Defendant was never to blame for the delay and defense counsel made an objection each time. Also, Defendant's counsel raised in motion to dismiss; twice. However, Defendant did not file a request for speedy trial.

When weighing the fault and the prejudice to defendant (Defendant was in jail for over a year and couldn't help counsel find a key witness), along with the long delay in arraignment and trial the Appellate Court would reverse the conviction for violation of Defendant's Constitutional right to speedy trial.

**QUESTION 3**



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Baltimore Electronics, a Maryland corporation with offices in Towson, Maryland, ordered by mail 5,000 microprocessors from American Micro, a California company. Baltimore Electronics' purchase order provided that any dispute would be resolved by arbitration conducted by the American Arbitration Association in Baltimore, Maryland. American Micro executed and delivered by facsimile transmission to Baltimore Electronics its form which confirmed receipt of Baltimore Electronics' order and contained the following provision: "The seller's acceptance of any purchase order is subject to the terms and conditions herein. The American Micro form also stated: "This transaction shall be governed by the law of the State of California. Any disputes shall be resolved by a judicial action in the State of California." Ten days after faxing the confirmation form American Micro shipped the parts, which were received and accepted by Baltimore Electronics.

A dispute has now arisen concerning the workmanship in the manufacture of the microprocessors. The microprocessors are defective. The defect constitutes a breach of warranty. Baltimore Electronics made a timely demand for arbitration in Baltimore, Maryland.

- (1) Is Baltimore Electronics entitled to arbitration in Baltimore?
- (2) Since Baltimore Electronics accepted the goods, what action must Baltimore Electronics take to seek a remedy/
- (3) What damages may Baltimore Electronics seek?

**REPRESENTATIVE ANSWER 1**

As this contract between Baltimore Electronics (BE) and American Micro (AM) is a contract for the sale of goods, it is governed by Article 2. Given that American Micro's acceptance (by fax) of Baltimore Electronics' offer (by mail) contains different terms than BE's offer and indicates that the law of the State of California should govern the transaction and disputes should be resolved in California courts, the first question is whether or not these terms are included in the contract.

Under Maryland Code § 2-207(1). American Micro's fax confirming receipt of Baltimore Electronics' offer could be an acceptance, in that it is a written confirmation sent within a reasonable time, despite its inclusion of additional or different terms (BE's offer provided for arbitration in Baltimore and AM's possible acceptance provided for resolution of disputes in a California court under California law). However, AM's fax stated that the seller's (AM's) acceptance is subject to the terms and conditions herein. "This statement would be construed as acceptance being made "expressly conditional on assent to the additional or different terms" § (2-207(1). Therefore, there is no acceptance and so, no contract based on this writing.

Any contract arises under section 3 of § 2-207. The parties' conduct (AM sending the microprocessors and BE received and accepted them) is sufficient to show the existence

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of a contract, despite the fact that the writings do not otherwise establish one. This contract includes the terms on which both parties' writings agree plus supplementary terms found in the law. The parties agree on quantity (5,000) and product (microprocessors). Supplementary terms will be provided by the law.

- a) Baltimore Electronics is not entitled to arbitration in Baltimore. The arbitration term is not found in both offer and acceptance, and so, does not become part of the contract based on the conduct of the parties. Unless Titles 1 through 10 of the Annotated Code, Commercial Law provide for arbitration, BE's request for arbitration will be denied. Baltimore Electronics may sue AM in a Maryland court however, because Maryland has personal jurisdiction over AM based on its long arm statute. AM contracted to sell goods in Maryland and has such minimum contacts as to satisfy traditional notions of fair play and substantial justice Venue is proper in Baltimore, as defendant does not reside, work, or habitually carry on a vocation in any Maryland venue, and so may be sued in any venue based on the breach committed in the state.
- b) Baltimore Electronics must pay for the goods (and presumably did this upon receipt and acceptance) under § 2-607(1). Baltimore Electronics must also, within a reasonable time after discovering the defect in workmanship and manufacture, notify the seller, AM of breach. If the buyer, BE is sued based on this breach by AM, BE must also notify AM of this litigation. Baltimore Electronics is then required to establish breach.
- c) Thereafter, buyer may recover damages under § 2-714 for the loss resulting in the ordinary course of events from the seller's breach. Baltimore Electronics' measure of damages is the difference at the time and place of acceptance (receipt and acceptance of the microprocessors) between the value of the microprocessors accepted (with the defect in workmanship and manufacture) and the value the microprocessors would have been if they had been as warranted. If special circumstances show damages in another amount, this will be considered. Baltimore Electronics may also be entitled to incidental and consequential damages.

**REPRESENTATIVE ANSWER 2**

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This situation involves a sale of goods subject to Title 2 of the Commercial Code. A valid contract was formed under § 2-204.

A. Arbitration

Baltimore Electronics is entitled to arbitration in Baltimore because the additional terms added by American Micro did not become part of the contract between them. Under § 2-207 (1) of the commercial code, confirmation of an order acts as acceptance even if additional terms are included. Maryland is generally media-neutral, and a fax is valid media for giving acceptances. Here, American Micro faxed a confirmation of Baltimore Electronic's order in a timely manner. Thus, this confirmation served as an acceptance so long as the acceptance was not made expressly conditional on American Micro's acceptance of a new term. The clause added by American Micro does not make its acceptance expressly conditional; it merely said "subject to" rather than more direct wording that the transaction would be void if Baltimore Electronics did not agree to the proposal (i.e. "on the condition that" or "only if"). Under §2-207(2), additional terms in dealings between merchants generally become part of the contract. Under §2-104(1), a merchant is a person who deals in goods of the kind involved in the transaction at issue. Here, it is apparent from the buyer and seller's names (Electronics and Micro) that they deal in microprocessors and are thus merchants under the code. Under §2-104(2)(b), additional terms in an acceptance/confirmation are mere proposed additions and do not become part of the contract if they "materially alter it". Here Baltimore Electronics made its offer based on arbitrating any disputes in Baltimore while American Micro proposed making disputes subject to California law. This is a material alteration in the contract's terms. It is a material change because Baltimore Electronics may have bargained differently had it assumed disputes would be subject to California law. Thus, because this contract is between merchants and the California clause materially altered it, the California clause is not part of the contract and Baltimore Electronics is entitled to arbitration in Baltimore.

B. Remedy

Baltimore Electronics must timely notify American Micro of the defect and will have the burden of proving the defect. Under §2-607(2), acceptance does not itself "impair any other remedy...for nonconformity." Thus, just because Baltimore Electronics accepted the goods does not preclude it from seeking a remedy for the breach by American Micro. Under §2-607(3), a buyer must notify the seller within a reasonable amount of time after discovery of the breach of the breach. From the facts, Baltimore's notification was timely. Second, under §2-607(4), the buyer has the burden of establishing the breach. Thus, the burden of showing the defectiveness of the microprocessors falls on Baltimore Electronics.

C. Damages

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Baltimore Electronics may recover damages. In Maryland, all monetary damages are principled on the idea that the non-breaching party should be placed into the position in which it would find itself had the breach not occurred. Under §2-714(2), the general measure of damages is the difference between the value of the goods accepted and the value they would have had if they had worked as warranted. Here, this would translate into the difference between the value of the defective goods that Baltimore Electronics accepted and the value of the same goods if not defective. In addition, under §2-714(3), Baltimore Electronics is entitled to incidental and consequential damages in some situations. Consequential damages require a special circumstances that the seller had unavailable to Baltimore Electronics. On the other hand, Baltimore Electronics may be entitled to incidental damages. Incidental damages include the cost of finding replacements, the cost of removing the defective goods, and the cost of fixing problems resulting from defects.

**QUESTION 4**

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Your law firm represents a plaintiff in a Maryland civil case against a Dentist alleged by your client to have been negligent in performing minor cosmetic surgery on his teeth. Plaintiff is seeking monetary damages in the amount of \$45,000. Dentist is a general practitioner who has regularly performed minor cosmetic surgery in the past. The Plaintiff's senior attorney has asked you, the law clerk, to brief her on whether the following evidence would be admissible at trial:

- a. Evidence that that surgical instruments used by Dentist on the date of the surgery have since been discarded and dentist now uses more advanced versions that were available at the time of Plaintiff's surgery.
- b. Testimony from a dental technician employed by Dentist as to what is in the standard waiver of the damage form that the Dentist's patients generally sign before surgery.
- c. Testimony from Dentist's insurance agent that Dentist is not insured to perform cosmetic surgery.
- d. Testimony from Dentist's estranged wife that Dentist told her one evening over dinner in their home that he had screwed up in performing surgery on Plaintiff.
- e. Testimony from another dentist who is recognized as an expert in performing complex reconstructive dental surgery as to the standard of care in performing complex reconstructive dental surgeries.

**What would you advise the senior attorney? Discuss fully.**

**REPRESENTATIVE ANSWER 1**

Generally, all relevant evidence is admissible unless otherwise prohibited by the Rules of Evidence, in the discretion of the Court.

**PART A**

Evidence of a subsequent remedial measure taken by a defendant is inadmissible for the purpose of showing that the defendant was negligent, but may be admissible for other purposes. Here, evidence that Dentist (D) has discarded the surgical instruments used on the date of Plaintiff's (P) surgery, and now uses "more advanced versions" of the equipment, is evidence of a subsequent remedial measure, and is not being offered for any other purpose than to prove that D was negligent on the date of the surgery. The evidence is not admissible.

**PART B**

Under the best evidence rule, when the contents of the document are being proven, the original document must be produced, unless it is excused. Here, the dental technician would be testifying as to "what from D is in the standard waiver of damage

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form”, thereby proving the contents of the document, and mandating that the form itself be introduced under the best evidence rule. Hearsay is an out of court statement being offered for its truth, and is inadmissible with limited exceptions. Here the dental technician would be testifying as to what is in the standard form, making her testimony hearsay, which does not fall under any exception. This testimony is not admissible.

**PART C**

Evidence of insurance coverage is not admissible to prove liability. Here testimony from D’s insurer that D “is not insured to perform cosmetic surgery” is not admissible for the purpose of proving liability. Evidence may also be excluded if it is substantially more prejudicial than probative, even if the evidence is relevant. Here allowing in evidence that D is not insured to perform the procedure he performed on P may lead the jury to erroneously conclude that because D was not insured to perform the procedure, he was not qualified to do so, thereby allowing the jury to make an improper inference of negligence. This testimony is not admissible.

**PART D**

The marital communication privilege allows a defendant to prevent his/her spouse from testifying about confidential communications made by the defendant to his/her spouse while married. Here, although D and his wife are currently estranged, if they were married at the time D stated that he “had screwed up in performing surgery on P”, this statement would be protected by the marital communication privilege. Further, the fact that this statement was made by D to his wife over dinner in their home shows that this communication was intended to be confidential. This testimony is not admissible.

**PART E**

Expert testimony is allowed if the witness is qualified as an expert and testifies about a proper subject, and gives a relevant, proper opinion. Here although the other dentist is recognized as an expert he seeks to testify about the standard of care in performing complex reconstructive dental surgeries, while D is a general practitioner and the action in this case involves minor cosmetic surgery. Evidence is relevant if it has any tendency to make a fact of consequence in the case more or less probable. Here the expert seeks to testify about the standard of care in complex reconstructive dental surgeries, making this testimony irrelevant. This testimony is not admissible.

**REPRESENTATIVE ANSWER 2**

A.

Evidence that Dentist previously used surgical instruments that have now been discarded for more advanced versions that were available at the time of surgery will be inadmissible. Such evidence constitutes subsequent remedial measures, which is a

categorical exclusion in the evidence rules (with some limited exceptions) and thus cannot be admitted to show the individual was negligent in the first place.

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B.

Testimony from Dentist's technician as to what is in the standard waiver of damage form that patients usually sign before surgery cannot be admitted because it violates the Best Evidence Rule. This rule provides that whenever there is a writing at issue, which has legally operative content, that actual writing should be brought in (with limited exceptions that do not apply here). This writing is a form that is legally operative because the patient will be waiving liability for any damages that occur during the procedures. Thus the Best Evidence Rule would mandate that the actual form be brought into trial and not have the dental technician simply testify as to its contents.

C.

Testimony from the Dentist's insurance agent that Dentist is not insured to perform cosmetic surgery cannot be admitted because, like the policy based exclusion of subsequent remedial measures, evidence of liability insurance (or the lack thereof) cannot be admitted. Liability insurance is allowed under certain circumstances, such as to show ownership, but that situation is not present here.

D.

Testimony from Dentist's estranged wife about their dinner conversation that Dentist had erred during the Plaintiff's surgery will only be admissible if the Dentist allows it. There exists a privilege for confidential marital communications so that any conversations made in confidence between two spouses cannot be compelled unless both spouses agree- that is, both spouses are the holders of the privilege. It is true that Dentist's wife is estranged from him, but the two are not only still married, the conversation was made during the marriage and the privilege survives.

E.

Testimony from an expert dentist as to the standard of care will not be admitted because it is not relevant and is not helpful as expert opinion. As a general rule, evidence is not admissible unless it is relevant, that is, if it makes a fact in issue more likely than not. Also, ordinarily, testimony or other evidence of the standard of care can be admitted only to show the standard to which others in the field adhered. However, all expert testimony must be helpful. Here the expert dentist is an expert in "complex" reconstructive dental surgery, and will testify as to the standard of care in such surgeries. This evidence would not be helpful to the jury and is not relevant to Dentist's purported error in minor cosmetic surgery. This evidence should not be admitted.

**QUESTION 5**

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Abby is a single parent of a son, Ben, who was born on July 4, 2001, and has been in her sole custody since birth. Abby was the only child of Charles and his first wife. Charles' first wife died and he married Dorothy the year before Ben was born.

Charles and Dorothy had regular visitation with Ben, and Dorothy provided work related daycare weekly for Ben, at Abby's request, from the time he was born until he started first grade. Ben also went on family vacations with Charles and Dorothy, regularly spent overnight weekends with them, and had his own room at their house. He developed a close bond with both Charles and Dorothy.

Charles died when Ben was seven years old. After Charles' death, Dorothy continued to have a close relationship with Ben seeing him routinely until Abby learned that Charles' Will left all of his assets to Dorothy. At that point, Abby's relationship with Dorothy became strained. On July 4, 2009, at Ben's eighth birthday party celebrated at Dorothy's house, Abby, who has a history of drunk driving arrests and convictions, proceeded to drink too much and argued with Dorothy about being disinherited. She blamed Dorothy for influencing Charles to leave her out of his Will, and Abby told Dorothy that she would never see Ben again.

From July 2009 forward, Abby has denied Dorothy any access to Ben. Ben has repeatedly called Dorothy telling her he misses her and wants to see her. Abby has been steadfast in her denial of visitation.

Dorothy has come to see you, an experienced family law attorney licensed in Maryland, and asks you what you can do to assist her in getting court ordered visitation with Ben.

**What advice would you give Dorothy? Evaluate her chances for success.**

**REPRESENTATIVE ANSWER 1**

Dorothy is requesting third party visitation with Ben. The fact that Dorothy is not related by blood to Ben may weigh slightly against her claim but is not significant to the court's analysis.

In Maryland, any person may request and receive court ordered visitation with a minor child if it is in the best interest of the child, subject to a parent's due process right under the United States Constitution to raise her own child. When a parent objects to a third party receiving visitation, the third party must prove as a threshold matter either that the parent is unfit or that exceptional circumstances exist. If the Court makes that threshold finding, then it will award visitation based on the best interests of the child.

Dorothy's chances of obtaining court ordered visitation are slim because she probably cannot make the threshold showing of that Abby is an unfit parent or that there are exceptional circumstances. The fact that Abby has a history of drunk driving arrests



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and convictions is in Dorothy's favor because it shows that Abby does not take proper care of herself and if she is drunk while driving Ben then it further shows that Abby places Ben in situations harmful to his health. However, this fact alone is probably not sufficient to show that Abby is an unfit parent. To succeed on that claim, Dorothy would probably have to show that Abby neglected or abused Ben and there is no evidence of that.

A court is more likely to find exceptional circumstances where one party has been absent in caring for a child and the third party filled the void to the extent that the child treats the third party as a parent. In making the claims for exceptional circumstances, Dorothy can marshal the facts that she had regular visitation with Ben, went on vacations and had over-nights with Ben, provided day care for Ben, and Ben has expressed interest in seeing Dorothy. These facts all show that Dorothy cares for Ben, but in the role of grandmother, not as a primary caretaker or parent. The record indicates that Dorothy's daycare was work related and this allows for the assumption that Abby provided care for Ben while Abby was not at work. The record also does not indicate that Abby abandoned Ben at any point in time. Consequently, the court will probably not find there are exceptional circumstances to allow it to grant visitation to Dorothy over the objections of the parent, Abby.

If the court did find that Dorothy could pass the threshold showing of parental unfitness or exceptional circumstances, then she could most likely show that court ordered visitation with Ben would be in the best interest of Ben. In determining the best interest of the child, the court is allowed to consider the preferences of a child of suitable age. Ben is eight years old, old enough to express a preference, and his repeated calls to Dorothy telling her that he misses her and wants to see her express a clear preference for visitation. Also, the relationship that existed between Dorothy and Ben from the time that Ben was born – with Dorothy providing day care, overnight visits, vacations, and birthday parties shows Dorothy has a legitimate concern for Ben and visitation would allow those bonds to continue. Although the tension between Abby and Dorothy weighs against an award of visitation to Dorothy, the judge would probably find in the exercise of his discretion that visitation with Dorothy is in the best interest of Ben if he makes it past the threshold constitutional analysis.

**REPRESENTATIVE ANSWER 2**

Whenever the court considers custody, visitation, and child support issues, the standard it employs is the best interest of the child. Here, there is a strong case for permitting the step-grandmother to continue seeing Ben, however, it will likely be trumped by Abby's fundamental right to privacy, which includes the ability to raise her child as she sees fit.

Dorothy is the only grandmother on Abby's side that Ben has ever known. At Abby's request, Dorothy provided care for Ben from birth until he started the 1<sup>st</sup> grade. Dorothy and Abby's father Charles had frequent visitation with Ben, took family

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vacations with Ben and Ben often spent overnight weekends at Charles and Dorothy's house, where he even had his own bedroom. During this time, Ben naturally developed a close bond with his grandparents. Additionally, after being separated from his grandmother, Ben calls Dorothy "repeatedly" telling her that he misses her and wants to see her. But Ben is only 8 years old. Even when deciding issues of physical custody between parents, the child's preference is usually only given substantial weight when that child is 12 or older. Despite the strong bond that has developed between Ben and his grandmother, any request for court-imposed visitation would have to overcome significant hurdles.

The Supreme Court has recognized that there is a fundamental privacy right in a parent's ability to make decisions as to their minor children. In order for a court to trump this right, and force Abby to allow Dorothy visitation with Ben, Dorothy would have to show that either Abby is an unfit parent or that exceptional circumstances exist that would permit the state to show it had a *substantial* interest in interfering with the family unit. Here, Abby has a history of drunk driving arrests and convictions. These are evidence of a problem with alcohol. But there is no evidence here that this problem rises to the level of making Abby an "unfit" parent. Nothing indicates that Abby has endangered Ben. It is quite possible that she has never driven Ben around while intoxicated. Lacking evidence to the contrary, it would be unlikely that a court would find her "unfit". There is also no evidence that supports exceptional circumstances either. The strong bond between child and grandmother is by itself likely insufficient for court interference in Abby's parenting decisions.

Although the child would most likely, based on these facts, benefit from a relationship with his grandmother, Abby is neither unfit nor do exceptional circumstances exist that would constitute a substantial justification for interfering with her parenting decisions. Dorothy is unlikely to prevail in her attempt to get court-ordered visitation with Ben.

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**QUESTION 6**

For ten years prior to attending law school, McCoy worked in the procurement division of the U.S. Department of Defense, which is commonly known as the “DOD”. After obtaining his Maryland law license, McCoy decided to establish his own practice and focus on government procurement law, something with which he was obviously familiar.

McCoy immediately drafted advertisements in which he touted his “specialization in military procurement law.” He sent these advertisements in a plain envelope labeled only with the intended recipient’s address to all of the business-people he encountered while in his previous position with the DOD. In the advertisement, McCoy claimed that he possesses “inside knowledge of the people, policies, and procedures of the DOD” and that with this knowledge he “will guarantee that you are awarded whatever you want from the government – no matter what it takes.” He also claimed that his knowledge and experience render him “without a doubt, better than every other procurement attorney around.”

In order to capitalize on this advertising approach, McCoy named his practice “DOD Military Matters, LLC,” and located his office as close to the DOD as possible. The advertisement does not contain McCoy’s name, but simply lists the firm name and contact information and states, “In your dealings with the government, you want the real McCoy.”

McCoy immediately secured his first client and received a \$10,000 retainer. He deposited this retainer into his operating account and used it to pay his first month’s expenses before doing any work for the client. McCoy anticipates that the work for his client, once it commences, will amount to at least \$10,000, particularly at his hourly rate of \$600.

**Identify any professional responsibility issues which might arise for McCoy. Explain fully.**

**REPRESENTATIVE ANSWER 1**

**Competency** - Maryland requires a lawyer to be competent in which the lawyer is required to possess the required knowledge (or can easily access of the required knowledge/expertise) of the areas that he is working in. McCoy, having 10 years of experience with procurement law, is competent to work as a government procurement lawyer.

**Advertisement:** First, direct solicitation is permitted in only very limited cases. It is disallowed most times, except when the lawyer is not seeking money gain, and is seeking public interest work or if he is seeking business from his family or former clients. Here, McCoy is clearly seeking money, so he does not qualify under the public interest exception. However, he sent the letters to the business people he encountered while in

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his previous position with the DOD. This is a tricky issue-they are not his former clients, but they are people who are familiar with McCoy and would not be under the same kind of undue influence that may result from direct solicitation that the Professional Rules are seeking to prevent. Since he encountered them while not as a lawyer, McCoy was not entitled to directly solicit from them.

Second, he presented himself as someone having “specialization in military procurement law”. Presenting oneself as a specialist in an area of law is prohibited in Maryland, and this is a violation of the rules.

McCoy was required to send the letters in an envelope that stated “advertisement material” or “ad” or similar. A plain envelope for solicited mail is a violation of the rules.

Fourth, Maryland rules prohibit an attorney from making false or misleading claims in an ad, which McCoy implied when he said he had “inside knowledge” – this suggested that McCoy knew how to beat the system.

Maryland also prohibits an attorney from making guarantees in an ad, which McCoy when he guaranteed that he would win whatever the prospective client wanted. Additionally, “whatever it takes” implied that McCoy would be willing to violate the rules to win for his client, which is also prohibited.

Furthermore, the rules do not allow an attorney to claim that he is better than anyone else in an ad. McCoy said he was “without a doubt, better than every other procurement attorney around”. This is a clear violation.

The ad, to comply with the rules, must have the attorney’s name on it. “the real McCoy” does not suffice, because it is an expression everyone knows and a reasonable person may not realize the attorney’s name is actually McCoy. McCoy did not put his name otherwise. This is a violation.

**Firm name/address:** A firm cannot have misleading or false name. In particular, the firm cannot imply an association with a government agency. “DOD Military Matters LLC” suggested an implication that McCoy was working with DOD, this is prohibited. While he is welcome to set up his firm anywhere he wants, setting it near the DOD adds to the implication of association with the DOD. This makes the argument that he violated the rule stronger.

**\$\$/Funds:** An attorney is required to charge a reasonable fee. As someone newly out of law school and newly licensed attorney, an hourly rate of \$600.00 per hour may be excessive. Even though he has a lot of knowledge of the law, he has never actually practiced law as a lawyer. To ensure this is reasonable, a review of comparable lawyers’ fees in the area is required. Also, it is required to look at the nature of work, the time constraints, and whether he has given up other businesses for this client. Even so, \$600 at first sight is unreasonable.

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If it is determined that \$600/hour is reasonable, then he can ask for a retainer fee of \$10,000 if he reasonably believes it will cost him that much. However, he must put this money in a separate client account, not in his own operating account. He cannot touch the money until he has actually earned it. When McCoy used this money to pay his first month's expenses without actually doing any work for his client, this violated the rules.

**REPRESENTATIVE ANSWER 2**

As a Maryland attorney, McCoy is subject to the Maryland Rules of Professional Responsibility ("Rules"). He is currently subject to potential discipline based on several of his actions thus far.

McCoy can face discipline because his advertisement references his "specialization in military procurement law." Under the Maryland Rules of Professional Responsibility, an attorney cannot hold himself out as a specialist. By saying he specializes in military procurement law, he is holding himself out as a specialist in violation of the Rules.

The form of McCoy's advertisements is also problematic. In general, an attorney is permitted to send direct mail advertisements to potential clients, as he did in this case. However, the mailings must say "advertising material" on the envelope. In this case, McCoy's advertisements were placed in an envelope labeled only with the intended recipient's address. This violates the Rules regarding mailed advertisements.

In addition, an attorney cannot imply an affiliation or association with a government agency. McCoy has violated this rule in several ways. First, his advertisement states that he has "inside knowledge of the people, policies, and procedures of DOD". Additionally, he sent the advertisement to all of the business people he had encountered while he was in his previous position with the Department of Defense ("DOD"). This can create the misleading impression that he is associated with the DOD when, in fact, he has established his own law practice. Additionally, McCoy's firm name implies an association with the DOD because it includes the agency's name in the firm name- "DOD Military Matters, LLC." Finally, the location of McCoy's office, as close to the DOD as possible, combined with the factors above gives potential clients that he is affiliated with the DOD even though he is not. Each of these actions violates the Rules, and can subject McCoy to discipline.

An attorney is also prohibited from producing advertisement which are misleading, including advertisements which guarantee certain results. Here, McCoy's advertisement makes a clear guarantee regarding results by stating that he will "guarantee that you are awarded whatever you want from the government – no matter what it takes." This guarantee of results violates the rules.

An attorney also cannot state or imply that he will violate the law or the rules of professional responsibility in obtaining a result for a client. McCoy's statement that he will get his clients whatever they want from the government "no matter what it takes"

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implies that McCoy will violate the law or the rules of professional responsibility in order to ensure that his clients' claims succeed. This violates the Rules.

McCoy's advertisement also states that he is "without a doubt, better than every procurement attorney around." In advertisements, an attorney may not make a comparison between his services and the services of other lawyers unless that comparison can be substantiated. McCoy certainly cannot prove that he is better than every procurement attorney. This statement therefore violates the Rules.

McCoy's advertisement is also problematic because it does not state his name. All written advertisements must include the name of the attorney responsible for producing them. Failure to include the responsible attorney's name constitutes a violation of the Rules. Stating "you want the real McCoy" is not sufficient to satisfy this obligation.

McCoy also violated the Rules when he deposited his first retainer into his operating account. Client funds must be kept separate from the funds of the attorney or the firm. When an attorney receives a retainer, it generally must be deposited into a client trust account. Disbursements can thereafter be made to the attorney as the money is earned. The only exception is when, like in a flat fee case, the client signs a writing stating that the funds immediately belong to the attorney. No such writing exists in this case. Nevertheless, McCoy deposited the entire \$10,000 retainer directly into his operating account before performing any work whatsoever on the case. This violated the Rules by commingling McCoy's funds with those of his client.

McCoy also violated the Rules by charging his clients an hourly rate of \$600. Under the Rules, all fees charged must be reasonable. Reasonableness is determined based on a number of factors including, but not limited to, the attorney's expertise and experience and the complexity of the case. In this case, although McCoy has 10 years of experience working in the procurement division of the DOD, he only recently became licensed as an attorney in Maryland. Furthermore, this is his first client. Although McCoy may have some limited expertise in procurement, he does not have any expertise in the practice of procurement law. Furthermore, McCoy does not have any legal experience. His hourly rate of \$600.00 is therefore unreasonable and violates the Rules.

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**QUESTION 7**

Glinda is a well-known rock star who decided she needed to take a break from her hectic concert performance schedule. One day she voluntarily admitted herself into the Rehabilitation Center under an assumed name. The Rehabilitation Center is a non-profit facility owned and operated by the town of Eagle Shores, Maryland.

A few weeks later, Joe was visiting a patient at the Rehabilitation Center when he spotted Glinda whom he recognized from the music video channel that he constantly watched. Joe followed Glinda into her room, locked the door behind him, took several photographs of her, and told her he would leak word to the press that she was being treated for schizophrenia unless she agreed to pay him \$10,000. Approximately twenty minutes later, an orderly passing in the hallway heard loud voices coming from her room and unlocked the door. As Glinda rushed out, she heard Joe tell the orderly that Glinda had been “all over him” and was “one whacked out, has-been star!”

Glinda ran to the Center’s office and hysterically demanded to be released. Dr. Killjoy, the physician on duty, saw that Glinda was partially robed and was in no condition to be released at that point. He led the distraught Glinda back to her room and asked her to stay there until someone could be found to drive her home. A few hours later, Glinda’s manager arrived and successfully orchestrated her release.

Glinda learned that Joe posted her photo on his Internet blog and wrote that “Glinda is a whacked out druggie, and she attacked me!” Shortly after the Internet posting, a promoter cancelled Glinda’s concert citing a decrease in ticket sales and the negative publicity generated by Joe’s blog.

**Incensed over the cancellation, Glinda comes to you, a Maryland attorney, and asks what civil causes of action she may have against Joe, the Town, and Dr. Killjoy. What would you advise? Discuss fully.**

**REPRESENTATIVE ANSWER 1**

I would advise Glinda as follows:

**GLINDA V. JOE**

False imprisonment occurs when the defendant acts intentionally to confine the plaintiff in a defined area, the plaintiff is conscious of the confinement or otherwise harmed by it, and the plaintiff is not aware of any feasible, reasonable, available routes of escape. Here, Joe followed Glinda into her room and locked the door behind him, effectively trapping Glinda in the room with him.

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Defamation occurs when the defendant publishes false and defamatory statements about the plaintiff to a third party. Here Joe posted Glinda's photo on his internet blog and wrote that "Glinda is a whacked out druggie and she attacked me!" We don't know from the facts whether Glinda is a druggie or if she attacked Joe. If these things are false, then Joe is liable for defamation (libel because it was in print) and Glinda suffered damages in the form of a cancelled concert. Also, Joe told the orderly that Glinda had been "all over him" and was "one whacked out, has-been star." Though the "has been" comment is likely opinion and not a part of the defamation, if Glinda had not been "all over him" then this statement might rise to the level of slander depending on whether the orderly took it to mean that she was unchaste and it was reasonable for him to do so.

Though this meaning, if ascribed, would be slander per se, Glinda suffered no damages as a result. Where a defendant has thrust herself into the public limelight, information concerning the matter on which that person has become a public figure is only defamation when it is published with actual malice. It is not clear if drug rehab and other personal information is relevant to status as a music star, but even if it is, Joe's actions likely rise to actual malice (knowledge of falsity or reckless disregard for the truth). It was not defamation when Joe told Glinda that he would tell everyone she was being treated for schizophrenia, because it was not published to a third party.

False light occurs when the defendant publishes information about the plaintiff that is not technically false, but places the plaintiff in a false and damaging light. Here Joe published the photos and made it seem that Glinda was a druggie and crazy, when ostensibly she just checked herself into rehab because she needed a break.

Trespass occurs when the defendant intentionally enters upon land thereby interfering with the plaintiff's superior possessory right. Here, Glinda had a superior right to the room in rehab and Joe trespassed when he entered into it without permission.

Intentional infliction of emotional distress is when defendant acts intentionally in an extreme and outrageous manner, thereby inflicting substantial emotional distress on the plaintiff, evidenced by objective symptoms. Glinda was "distraught" but we don't know what Joe did or if it caused objective symptoms.

**GLINDA V. DR. KILLJOY**

False imprisonment as above. Here, Killjoy just led Glinda back to her room and asked her to stay there. Arguably, she was not confined.

Negligence is the duty, breach, causation, and damages. Usually there is no duty to affirmatively aid others, but one exists where there is a special relationship. Here, Dr. Killjoy had a duty to protect Glinda from the tortious actions of others while she was under his in-patient care in the rehabilitation center. He breached this duty by allowing Joe to act as described above.



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Dr. Killjoy might enjoy governmental immunity from personal liability for negligent actions taken within the scope of his official duties.

**GLINDA V. TOWN**

A principal is vicariously liable for the tortious actions of his agent when those actions are taken within the scope of an employment relationship. Here, Dr. Killjoy is an employee of the Town's Rehab Center. Intentional torts are not impugned to the principal unless the job is infused with the risk of intentional tort. Governmental immunity has been waived in Maryland, but only to the limits of the town's insurance coverage. Therefore, though Glinda might be able to recover, it will only be for the insurance coverage that the town has available.

**REPRESENTATIVE ANSWER 2**

Glinda has potential civil causes of action against Joe, Dr. Killjoy and the Town. I will discuss the possible causes of action, organized by defendant.

**JOE**

False imprisonment – False imprisonment is an intentional tort wherein one, with intent to do so, confines another against their will. In order to constitute confinement the plaintiff must either know of the confinement or be harmed by it, and the plaintiff must not have a known and reasonable means of escape. Here, when Joe followed Glinda into her room and locked the door behind him, he had intent to confine Glinda to the room without her consent and did so. Presumably Glinda knew she was confined and the facts do not indicate any reasonable and known escape route. Furthermore, because it is an intentional tort, there is no requirement that Glinda be harmed. As a result, she will likely prevail against Joe on the false imprisonment claim.

Intrusion into seclusion – An intrusion into one's physical seclusion occurs when one seeks to photograph or surreptitiously record another without their consent in a manner that would be offensive to a reasonable person. A photograph taken in public, where there is no right to privacy, is generally not actionable under this tort. Here, Joe entered Glinda's room without her permission and took photographs of her. Although Glinda is a famous singer, the action took place in her private room at a rehab facility where she checked-in under an assumed name and clearly desired privacy. Had Joe taken the photo on the street, that would not be actionable but given the circumstances, her action is likely to prevail.

Intentional Infliction of Emotional Distress (IIED) – An IIED claim exists when one, acting intentionally or recklessly, partakes in extreme and outrageous conduct that causes emotional distress to another. In an IIED there is no requirement of physical harm. Here, Joe's combined actions of storming into Glinda's room, photographing her when she desired privacy, saying that he will say that she was being treated for schizophrenia unless she paid him, and telling the orderly that she was "all over him" and "whacked out" probably constitutes extreme and outrageous conduct. This is especially so since Joe

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knew that Glinda was especially susceptible given her state of being in a rehab facility. The next inquiry is whether Glinda's distress was severe enough to maintain a claim. The facts state that she ran to the office partially robed and "hysterically" demanded to be released. It seems that her distress was considerable and she probably has a valid IIED claim.

Defamation – Defamation exists when one makes a defamatory statement, of and concerning another, that is publicized. In addition to proving those facts, a plaintiff in Maryland always must prove falsity of the statement and some degree of fault. When the plaintiff is a public figure, the requisite degree of fault is actual malice (derived from New York Times), which means that the false statement was made with knowledge or recklessness as to its truth or falsity. Here, Joe has made statements on two different occasions that likely qualify as defamatory. He told the orderly that Glinda was "all over him," and more pertinently, he posted on his web site that she "attacked him." Both of these statements would act to harm Glinda's reputation and are defamatory. The statements he made calling her a "whacked out druggie" may or may not constitute defamation. It seems that they are merely opinion, but the allegations of drug use may rise to the level of defamation. The publication requirement is met in both cases, as the defamatory statement need only be made to one person other than the plaintiff. Glinda will have to prove that the statements about her attacking Joe are false and that Joe made them with knowledge of their falsity or with reckless disregard of their truth. If she can obtain the evidence to do so she will prevail. In addition, she has suffered actual damages, as evidenced by the cancellation of her tour as a result of the bad press generated by Joe's blog.

**DR. KILLJOY**

False imprisonment – As explained above, false Imprisonment is an intentional tort wherein one, with intent to do so, confines another against their will. In order to constitute confinement the plaintiff must either know of the confinement or be harmed by it, and the plaintiff must not have a known and reasonable means of escape. Here, when Dr. Killjoy took Glinda back to her room and asked her to stay there until someone could be found to drive her home, that could be construed as a confinement against her will. However, due to her state and the fact that she was partially robed, it may be argued that Dr. Killjoy had Glinda's implied consent to take her back to her room to save her from any further embarrassment. In addition, there is no evidence that Glinda could not have left the room if she wanted to. As a result this claim will likely fail.

**TOWN**

Vicarious Liability – Since the Town owns and operates the rehab center, and Dr. Killjoy is an employee of the center, the Town has potential vicarious liability of any tort Dr. Killjoy commits. In order for vicarious liability to arise, the tort must have been committed in the scope of Dr. Killjoy's employment. Here the doctor was acting pursuant to his duties as the physician on duty, thus vicarious liability would arise, but as noted above, it appears that Dr. Killjoy did not commit any actionable tort. Therefore there is no tort to impute to the Town.

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Negligence – The Town is potentially liable on a claim of negligence for failing to take proper precautions to secure patients from Joe. A negligence claim requires a finding that (1) the defendant owed a duty to the plaintiff, (2) that the duty was breached, (3) that the breach was both the actual and proximate cause of the plaintiff's injury, and (4) that the plaintiff suffered injury. Clearly the Town owes its patients a duty to keep them safe since they have entered into a special relationship. However, it is unclear that they breached that duty. This is a matter for the finder of fact, but there is no evidence that the hospital knew Joe posed a danger to other patients, and thus there is no evidence that it acted in any manner other than that which a reasonably prudent person would. As a result, this claim will likely fail.

**QUESTION 8**

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John Smith (Smith) wanted to start a window replacement company in Talbot County, Maryland, and met with an attorney to form a corporation to be called A-1 Window Replacement, Inc. The attorney advised Smith that the articles of incorporation must be filed with the State Department of Assessments and Taxation (SDAT) after the availability of the name was confirmed.

Smith was excited about his new endeavor, and immediately purchased stationery and business cards using the name A-1 Window Replacement, Inc., and which showed Smith as the President. Smith also opened a checking account in the name of A-1 Window Replacement, Inc., with Smith as the authorized signatory on the account in his capacity as President. Shortly thereafter, Smith was informed by his attorney that the name A-1 Window Replacement, Inc. was not available because another corporation with a similar name existed, and therefore the articles of incorporation were not filed with SDAT. Smith wanted to wait to incorporate under a different name, however, until the stationary and business cards he purchased had been used.

Over the next several months Smith met with his supplier, Manufacturer, Inc., and: (i) introduced himself as the President of A-1 Window Replacement, Inc. and provided his business cards to several sales associates; (ii) regularly used the A-1 Window Replacement, Inc. stationery when communicating with Manufacturer, Inc.; (iii) signed every contract with Manufacturer, Inc. for the purchase of supplies using the title off President of A-1 Window Replacement, Inc.; (iv) always used and signed checks from the checking account he opened under the name of A-1 Window Replacement, Inc. to pay for the supplies purchased from Manufacturer, Inc.

Unfortunately, business slowed considerably and A-1 Window Replacement, Inc. was unable to pay \$25,000 that was owed to Manufacturer, Inc. for windows that had been purchased pursuant to a written contract. Manufacturer, Inc. attempted to file suit against A-1 Window Replacement, Inc. but discovered that no such corporation existed. Manufacturer, Inc. then sued Smith individually for the \$25,000, in a court of proper jurisdiction and venue.

- a. What is the legal theory on which Manufacturer, Inc. may bring and action against Smith?**
- b. What defense, if any, might Smith raise?**
- c. What is the likelihood of Manufacturer, Inc. succeeding against Smith?**

**REPRESENTATIVE ANSWER 1**

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a. Manufacturer will bring an action against Smith on the theory that he was operating the business as sole proprietorship and that he is personally liable for the debts of the business. When a business becomes an incorporation, the directors and officers are not personally liable for the debts of the corporation. However, in order to become a corporation, the business must make the appropriate filing with SDAT. Here, the articles of incorporation were denied by SDAT because there was another corporation with a similar name. Because Smith failed to have a de jure corporation, courts may choose to treat the corporation as a sole proprietorship.

In a sole proprietorship, the owner of the business is personally liable for all debts that exceed the assets of the business if the person acts within the scope of the employment. Here, Smith was acting as the agent of A-1 and held himself out to be the president. Because Manufacturer reasonably believed because of the business cards, the stationary, and the checking account that Smith was an agent of A-1 and acting within his capacity of President, the contracts would be binding. Also, Manufacturer will argue that since Smith failed to have a de jure corporation, he should be held personally liable for the debts of the business. Because business has slowed considerably and A-1 Window Replacement, Inc. has been unable to pay the \$25,000, Manufacturer would want Smith to be personally liable.

b. Smith may raise the defense of corporation by estoppel but not the defense of a de facto corporation. In Maryland, if a creditor treats a business as a corporation, they may be estopped later from treating the business as a corporation when the creditor finds out that it is not. Here, Manufacturer treated A-1 as a corporation and believed that it was incorporated because A-1 had the word Inc, in its name, and Smith conducted all business as if A-1 was a de jure corporation. In this case, Manufacturer knew Smith as the President of A-1 because that was the way that Smith introduced himself and he provided the business cards with the business name and which stated that Smith was the President. Additionally, Smith regularly used the A-1 Window Replacement Stationary, Inc. when communicating with the Manufacturer, so the Manufacturer believed that they were making a contract on behalf of the business and not with Smith personally. Also, Smith signed every contract with Manufacturer for the purchase of supplies using the title of President of A-1, meaning that Manufacturer knew it was doing contracts with Smith in this professional business capacity as President of A-1 and not with Smith personally. Finally, Smith always used and signed checks from the checking account he opened under the name of A-1 Window Replacement, Inc. to pay for supplies purchased from Manufacturer, meaning that Manufacturer was aware that the business was making the payments and not Smith personally.

Smith may not raise the defense of a de facto corporation. This defense may be abolished in Maryland, but if it exists, it can be a defense where there are laws governing when a corporation becomes a statute, when the incorporators make a good faith colorable attempt to incorporate, and where the incorporators exercise corporate privileges. Here, there are laws and the attorney made a good faith effort to incorporate. However, for this defense to apply, the incorporators must not have known about the failure to become a corporation before exercising corporate privileges. Here, the attorney

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told Smith that SDAT had not accepted the articles of incorporation because a corporation with a similar name existed, so Smith was aware that the business was not incorporated. Despite this knowledge, Smith decided to exercise corporate privileges by entering into these contracts on behalf of A-1 and cannot seek protection from this defense.

c. The Manufacturer will likely succeed against Smith for the claim of \$25,000. Courts are more willing to apply the defense of corporation by estoppel where the incorporator acted under the belief that he was incorporated. However, here, Smith was aware that he was not incorporated and had no legitimate reason to act as though he is the President of A-1. His only reason for using the name A-1 was because he had already purchased business cards and stationary before the articles of incorporation had been accepted by SDAT, even though he knew that incorporation was dependent on SDAT accepting the papers. Because he was fully aware that the corporation was not existent, the court will likely hold him personally liable and Manufacturer would not be estoppel from denying the existence of a corporation.

**REPRESENTATIVE ANSWER 2**

The Maryland laws governing business associations control here.

A corporation is a business entity that allows its shareholders and directors to enjoy limited liability. A corporation is created when its articles of incorporation are accepted by the SDAT. Here the articles of incorporation for A-1 were never accepted because the desired name for the corporation was not available; thus, the corporation never existed.

**A. LEGAL THEORY FOR SUIT AGAINST SMITH**

Manufacturer Inc. (MI) can bring an action against Smith for breach of contract, because A-1 was unable to pay the \$25,000 that was owed to MI for windows that had been purchased pursuant to a written contract. Smith will be liable in his capacity as a promoter of A-1. A promoter is one who is responsible for the formation, organization, and financing of a corporation. A promoter is liable on any pre-incorporation contract that he enters into on behalf of the corporation, unless the corporation subsequently ratifies the transaction or there has been a novation.

Here, Smith was a promoter because he started the window replacement company. Smith entered into several contracts with MI for the purchase of supplies. However, since no corporation was ever created because the articles of incorporation were never accepted, no ratification or novation occurred. Smith therefore could likely have promoter liability on the contracts.

**B. SMITH'S DEFENSES**

Smith might raise the following defenses:

*Corporation by Estoppel*—Under this theory, where a party conducted business with an entity under the belief that it was transacting business with a corporation, and therefore also believing that it was limited to recovering damages for any breach of contract from

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the corporation itself and not from its shareholders or directors, then the party is estopped from raising lack of corporate entity as a defense. Corporation by estoppel requires a good faith belief on the part of the shareholders/directors/promoters that the articles of incorporation would have been accepted and that a corporate entity exists. This defense is only available as against the particular third party in the transaction.

Here, Smith met with MI and introduced himself as the president of A-1; his business cards used the name “A-1 Window Replacement Inc.; he provided his business cards to several sales associates; he regularly used the A-1 stationery when communicating with MI; he signed every contract with MI for the purchase of supplies using the title of President of A-1; and he always used and signed checks from the checking account he opened under the name of A-1 to pay for the supplies purchased from MI. Smith will likely argue that, based on these facts, MI believed that it was conducting business with a corporate entity and that Smith is therefore not liable.

*De Facto Corporation*—Under this theory, a corporation is said to exist against the world where all steps necessary to form a corporation have occurred, and where a good faith belief exists that the articles of incorporation will be accepted but, due to no fault of the corporation or its promoter, the articles of incorporation are not accepted.

Here, Smith will likely argue that A-1 was a de facto corporation because his attorney was to file the articles of incorporation. He will argue that he therefore had a good faith belief that the articles of incorporation would be accepted and that A-1 would be created.

**C. LIKELIHOOD OF SUCCESS**

Smith’s *corporation by estoppel* and *de facto corporation* defenses will likely fail because, when he entered into the contracts with MI, he lacked a good faith belief that the corporation existed. Smith was informed by his lawyer that the corporation would not exist until the articles of incorporation are accepted by the SDAT. Nonetheless, he purchased the stationery and business cards in the name of A-1 and created a bank account in the company name. Additionally, prior to entering into the contracts with MI, Smith’s lawyer informed him that the articles of incorporation were not accepted by the SDAT because the name “A-1 Window Replacement” was not available. Smith nonetheless wanted to wait until all the stationery and business cards purchased under the name “A-1” had been used. He therefore lacked the good faith belief required for both of the aforementioned defenses to succeed.

MI will likely succeed and Smith will likely be found liable.

**QUESTION 9**

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**PART A**

On November 15, 2009, Adam was driving his elderly neighbor, Ben, to a local food market in Howard County, Maryland, a weekly courtesy that Adam has provided to Ben for the past year. Ben no longer drives because of physical infirmities.

Adam drove East on Secondary Drive to its intersection with Favored Avenue. A “Stop” sign controlled traffic entering Favored Avenue from Secondary Drive. At that time, Carl was driving his automobile South on Favored Avenue at a speed substantially in excess of the posted speed limit of 50 miles per hour. The vehicles collided at the intersection. Adam, Ben, and Carl sustained injuries.

Based on the police investigation at the scene, Adam was cited for failure to stop and yield at the intersection. Carl was cited for speeding and negligent driving.

On December 5, 2009, Adam and Ben met with a Howard County attorney to discuss his representation of them in a joint suit against Carl for their injuries and for damages to Adam’s car.

- 1. What ethical issues are raised by these facts?**
- 2. Can the attorney appropriately represent both Adam and Ben?**

**PART B**

On January 7, 2010, Carl’s attorney filed a complaint against Adam in the Circuit Court for Howard County claiming property damage and personal injury in the amount of \$200,000.

- 1. What preliminary motions and/or pleadings should Adam’s attorney file in response to the complaint? State the basis for any such motion or pleading.**
- 2. Attached to Carl’s complaint is a set of 30 interrogatories addressed to Adam. When must Adam’s attorney file responses?**

**PART C**

Upon receipt of Adam’s answers to interrogatories, Carl’s attorney learned for the first time the purpose of Adam’s trip on November 15, 2009. What effect, if any, does this information have on Carl’s pending suit against Adam?

**What action should Carl’s attorney take in light of this information?**



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**PART D**

In preparation for trial, Adam's attorney served on Carl a request for production of the following:

- A taped recording of Adam's interview with the representative of Carl's insurance company concerning the accident.
- A copy of written statements from witnesses to the accident taken by the same representative.
- A copy of Carl's automobile insurance policy or a certified statement of the nature and amount of liability coverage.
- A list identifying all medical experts who treated Carl following the accident, and a copy of any written opinion of these experts relative to the nature and extent of injuries claimed to have been sustained by Carl in the accident.

**Is Adam entitled to all or any of the documents sought? Explain your response.**

**REPRESENTATIVE ANSWER 1**

**Part A**

1. A conflict of interest issue arose from the fact that both Adam and Ben meet with the same Howard County attorney to discuss their representation in a joint suit against Carl for their injuries and for the damage to Adam's car. Although in civil actions the same attorney often can represent multiple clients if they have similar claims against a party, such as in a class action. However, when the parties interests are directly adverse or have a risk of being adverse, then there is a conflict of interest issue. (Rule 1.7) There is also a conflict of interest when the representation of one may be materially limited by the lawyer's representation to another. (Rule 1.7) Here, the conflict exists because as the driver of the car, Adam, may also be sued by Ben for his injuries sustained. Although the two are aligned at this point, Ben may later become adverse to Adam (and in fact an independent attorney may suggest that it is in Ben's best interest to sue Adam directly).

2. At this point, the attorney can appropriately represent both parties because their interests are aligned and not adverse. (Rule 1.7) However, there is significant risk that they may become adverse for the reasons mentioned above with regard to Adam's liability to Ben. Therefore, the attorney must obtain informed consent, in writing, from both parties and should inform them that either of them may want to consider obtaining separate counsel. (Rule 1.7) That way the attorney only represents one client and is not impaired in his zealous representation while the other person can also ensure that all of his legal interests are protected and not subject to the interest of another. Additionally, it should be noted that confidentiality is required even with prospective clients, so that even if one party finds a new attorney there may be a problem based on any information

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already disclosed.

**Part B**

1. In response to Carl's complaint against Adam claiming property damages and personal injury in Circuit Court for Howard County for \$200,000, Adam's attorney has the option of strategically filing different motions, if they are warranted. For example, the attorney may file a mandatory motion for lack of personal jurisdiction, improper venue, insufficient process, or improper service of process. Any of those must be filed as a consolidated preliminary motion. The outcome of that motion will determine how soon an answer must be filed. Also, it is possible to include permissive issues in either the preliminary motion or the answer, including failure to state a claim upon which relief can be granted or failure to join a party. (Section 2-322). However, assuming that the motions were denied, then Adam's attorney should file a timely answer. The answer can just state a general denial of liability. (Section 2-323). The answer should also state any affirmative defenses. Here, Adam will want to claim contributory negligence (Section 3-323). In Maryland, contributory negligence is an absolute defense if proven. However, the opposing party can defend with last clear chance and claim that the other party had the last opportunity to avoid the accident.

2. Adam's attorney must file response's to Carl's interrogatories within 30 days after service or within 15 days after date on which that party's initial pleading or motion is required, whichever is first. (Section 2-421).

**Part C**

Carl's attorney should file an amended complaint against Ben. Given that Adam was driving Ben, Ben may be liable as a principal and Adam as his agent. Permissive amendments are allowed if not within 30 days of a set trial, if within those 30 days then leave of court is required. (Section 2-341).

**Part D**

With regard to the production of documents, Carl does not have to turn over everything, but Adam is indeed entitled to some of the items. A tape recording of Adam's interview with the insurance company is factual trial preparation or non privileged as a business documents. (2-402). A copy of written statements from witnesses is discoverable as long as the information is purely factual, any opinion of the representative (if an agent of an attorney or an agent of the attorney) is protected. (2-402). A copy of Carl's automobile insurance policy is factual and discoverable. (2-402(c)). A list identifying all medical experts who treated Carl may be privileged if the medical examination was done at the recommendation of the attorney, such that the records are protected under attorney-client privilege. (2-403).

**REPRESENTATIVE ANSWER 2**

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**PART A**

(1) There are a few ethical issues raised by these facts. First, can an attorney properly represent both Adam (A) and Ben (B) against Carl (C)? If yes, there is still the issue of whether B has claims against A, as well. Second, A and B met with an attorney 20 days after the accident; there may be an ethical issue here, depending on whether the attorney contacted A and B, or vice versa (an attorney must wait 30 days after an accident).

(2) Attorney cannot properly represent both A and B because the representation of one client will be directly adverse to another client. B has a claim against A as well as C because A was also negligent; obviously the attorney cannot represent A and B under this situation. It would be adverse to both A and B to do so. There is a loophole to this rule: an attorney can represent clients regardless of a conflict of interest if the lawyer reasonably believes he can provide competent and diligent representation to both clients; the representation does not involve the assertion of a claim by one client against another; and each affected client gives informed consent in writing. This loophole cannot apply because the attorney cannot get informed consent. If he advises B that he has a claim against A, which he would have to do in order to get informed consent, then B will likely want to sue A, and thus the attorney cannot represent them both. In fact, it could be argued that now he cannot represent either A or B at all, because both A and B will be materially limited by the lawyer's responsibility to the other--which arose the moment both A and B walked in together and asked for legal advice.

**PART B**

(1) Before filing his Answer, A's attorney should file a motion to dismiss for failure to state a claim upon which relief can be granted because Maryland follows the theory of contributory negligence which imposes a complete bar on recovery if the plaintiff was also negligent. This gives A an automatic extension of 15 days after the court's order on the motion, so it is not necessary for A to file an extension. If the court rules against A, he should file his Answer. The Answer should state contributory negligence as an affirmative defense. In case that does not work, A should also assert a counterclaim for damages to his car and personal injury.

(2) The rule is 30 days after service of the interrogatories, or 15 days after the date on which that party's initial pleadings or motion is required. A's initial pleading is required by February 22, because he is filing a motion to dismiss, fifteen days after that the response to the interrogatories is due, rather than February 7, which is when the response would have been due had it not been for the extension.

**PART C**

C might sue B as well, under agency theory. But it has no effect on C's suit against A. A's liability does not change. C's attorney should, however, join B. A person not previously a party to the action may be made a party to a counterclaim or cross-claim and shall be served as a defendant in an original action.

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**PART D**

A may obtain a copy of C's insurance policy, although he cannot submit it as evidence at trial. A may be able to obtain the tape of his interview with the representative of C's insurance company because it is electronically stored information by the representative of a party, but only upon a showing that there is a substantial need for the tape and he won't be able to obtain the substantial equivalent without undue hardship, which would be true. He can receive a list of medical experts and the results of the physical examinations under rule 2-401. A copy of witness statements may not be allowed; A would again have to show undue hardship—he cannot simply take advantage off another's work product. In this case, A can probably interview witnesses himself, unless he does not know who the witnesses are. In that case, he can get the names but possibly not the interviews.

One issue is whether these items prepared by the insurance agent was for trial. If not, it is not work product and can therefore be requested without showing undue hardship. Generally everything an insurance agent does is to settle the claim, not for litigation.

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**QUESTION 10**

Addison School is a private middle school in rural Dorchester County, Maryland. Brenda and Bill Barnes, parents of Callie Barnes entered into a Re-enrollment Agreement to enroll their daughter at Addison School for the 2009/2010 school year. The Agreement, which was executed on March 10, 2009, contained, among other terms, the following language:

1. A One Thousand Dollar (\$1,000) non-refundable payment is due upon execution of this Agreement.
2. You may unilaterally cancel this Agreement, provided you give written notice to the business office at Addison School on or before May 31, 2009.
3. Because it is not possible to assign an exact amount to the impact of losing a child for the school year, you agree that if you cancel this Agreement after May 31, 2009, you will be responsible for payment of tuition for the full year. Payment may be made in two installments of Ten Thousand Dollars (\$10,000) each. The second installment shall be due on or before January 1, 2010.
4. NO MODIFICATION TO THIS AGREEMENT WILL BE ACCEPTED BY THE SCHOOL.

Brenda and Bill Barnes sent notice of cancellation to the business office on July 15, 2009, indicating Callie would not re-enroll and requested return of their deposit. Addison refused, citing the Agreement.

Addison School filed suit in the District Court of Maryland for Dorchester County, for the balance (\$19,000) of tuition due. Brenda and Bill Barnes filed a Notice of Intention to Defend and a Counter Claim, demanding the return of their deposit. Over objection at trial, testimony was permitted to show that Addison school did nothing to try to fill Callie's space. The evidence also showed the school had more students for the year than the school budget had projected.

At the conclusion of the trial, the District Court judge took the matter under advisement. You are a Maryland lawyer serving as the District Court judge's law clerk. You have been asked by the judge to prepare a Memo applying the law to the facts at issue.

**Discuss fully the issues you would raise on behalf of each of the parties.**

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**REPRESENTATIVE ANSWER 1**

To: Judge

From: Law Clerk

In Maryland, the purpose of a court decision regarding breach of contract is based on the party incurring the breach to be made whole, and receive the “benefit of their bargain.” Maryland law does not allow punitive damages for breach of contract. If the liquidated damages clause of a contract is unnecessarily high in proportion to the actual damages sustained as a result of a breach, the court can engage in reformation of the contract and does not have to hold the party to the unconscionable clause.

**I. Arguments in Favor of Addison**

On behalf of the school, I would suggest the court consider the plain language of the contract. Addison’s refusal to return the deposit and demand for the full payment is allowed under the terms of the contract. The contract states that the damages based on breach of the contract were hard to define, and this may be so. There is no information before the court on how much financing is put into each individual student by Addison in anticipation of their enrollment prior to mid-July. Addison may be able to argue that the amount due to the school based on breach of contract would be \$19,000 of the tuition due. The contract also clearly states that it is not subject to modification, however this contract can be reformed by the court to reflect a reasonable sum for damages. The school will also argue that the clause was conspicuous, and that the parents entered into the contract voluntarily and with knowledge of the results of a breach.

**II. Arguments in Favor of the Parents**

On behalf of the parents, I would suggest that the court should consider whether the damages clause under the contract is punitive.

This court does not have to uphold a liquidated damages clause within a contract, and they will be void unless they show that they are based on a reasonable calculation of the damages a party expects to incur as a result of the breach. There is no evidence that the Addison school attempted to reasonably calculate the actual damages from a breach.

The fact that the contract’s clause for damages doesn’t even consider the length of time a child would be in school to determine how much the school had relied on the student’s enrollment is problematic for Addison’s argument. The fact that the contract was cancelled only 15 days after the due date, and presumably about a month before classes were scheduled to begin, so not showing any hardship on the school that would be so severe as to require the payment of the full year’s tuition. The evidence available to the court is that the school did not attempt to mitigate their losses, and in addition already had more students than it projected for the school year.

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In Maryland, you cannot seek punitive damages for a breach of contract, so therefore the school must meet the burden of showing that these damages are the likely consequential and incidental damages of the parent's breach. The school did nothing to mitigate its losses by trying to replace the student. Therefore, it would be difficult for the school to argue that the damages of \$19,000 are consequential or incidental damages of the breach

The court should likely find that these damages are not based on a reasonable calculation, though it will likely find that the Addisons are entitled to receive the return of their \$1,000 deposit as a reasonable calculation of the damages incurred.

**REPRESENTATIVE ANSWER 2**

This action involves Addison School ("Addison") against Brenda and Bill Barnes ("the Barnes") in an action for breach of contract of the Re-enrollment agreement under which the Barnes agreed to enroll their child Callie into the school. Because this is not a transaction for the sale of goods, the transaction is governed by common law.

**First issue: Is there a contract?**

First Barnes will likely argue that they are not obligated to pay anything to the school and should obtain a refund of the one thousand dollar down payment because there was no contract between themselves and Addison. Addison will successfully counter that there was. By entering into the Re-enrollment Agreement, the parents and Addison formed a contract, which is a legally enforceable agreement. This is so because (1) there was mutual assent to be bound by the terms of the agreement when they signed the agreement; (2) the terms of the agreement (including the provisions for payment) were sufficiently certain, as the payment terms (i.e., how much money is due and when) were laid on in the agreement; and (3) there was consideration, which is a bargained for exchange of either a benefit to the promisor or a detriment to the promise. Here, there was consideration because the school agreed to give up its right to admit another student in Callie's place, while the parents' gave up their right to send her elsewhere, their right to the \$1,000 that they paid as a deposit, as well as the promise to give Addison the balance of the \$19,000 if they did not decide to keep Callie in school.

**Second issue: Is there a defense of unconscionability to the contract?**

Second, the Barnes will likely argue that even if there was a contract, they have a defense to the contract. They will argue that the contract is void as a matter of public policy because it was a contract of adhesion, and thus, it was both procedurally and substantively unconscionable. Addison will counter that there is no such defense to the enforcement of the contract because even if the contract was one of adhesion, the contract is not unconscionable and thus is enforceable. An adhesion contract is one in which the bargaining power of the parties is grossly uneven such that the weaker party must take the contract on a take it or leave it basis. Here, the contract was an adhesion contract, as the terms left no room for the Barnes to negotiate with the school in any way. Illustrating the fact that this contract is an adhesion contract is the fact that the contract said in capital

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letters “NO MODIFICATION TO THIS AGREEMENT WILL BE ACCEPTED BY THE SCHOOL”, leaving no room for any negotiation. However, contracts in Maryland are not void simply on the basis that they are contracts of adhesion. Moreover, since this is a contract for entry into a private middle school and thus one that the parents could easily walk away from if they were not satisfied--as opposed to a contract that concerned a vital service important to the public at large--the contract will not be unenforceable simply because it is a contract of adhesion.

In addition, the Barnes will argue that the contract is substantively unconscionable because the terms of the contract grossly and unfairly favor the school, as it provides that if the parents cancel the agreement after May 31, 2009, they will be responsible for the full tuition for the year, which is a total of \$19,000 even though no one attended the school. In response, the school will argue that the contract should not be voided on that basis alone. While the contract’s liquidated damages clause may be unenforceable (as described below), the court will not find that the contract is as a whole substantively unconscionable and thus unenforceable.

**Third issue: What should the parties’ damages be?**

Since there is a contract, and since there is no defense to the contract, the School will argue that it should be entitled to the damages for which it contracted \$19,000. In defense, the Barnes will argue that (1) the liquidated damages provision is unfair and should not be enforced as such and (2) that even if it is unfair, it cannot be awarded in this instance because Addison failed to mitigate its damages. First, the Barnes will likely not win on the fact that the liquidated damages provision is unfair. Liquidated Damages provision will be upheld (1) if it is hard to determine in advance what the parties’ damages will be and (2) if the amount of money claimed to be liquidated damages is a reasonable forecast as to what that damages might be. Here, it likely would be difficult to determine what the school’s damages would be if the agreement were canceled before May 31, 2009 as it would be unclear whether or not they would be able to fill the missing spot at that late date. Second, the amount of money claimed could be a reasonable forecast as to what the damages might be, since the amount would be the cost of tuition, and it could be likely that the school would not be able to fill the missing student’s spot if the family were to cancel after may 31, 2009, since most students will know where they were going at that time.

However, here the enforcement of the liquidation damages provision is unfair, and Addison will not be able to receive the \$19,000. Under the common law, a party has to mitigate. Thus, because Addison did nothing to try to fill Callie’s space, and because the school had more students for the year than the school budget had projected, the court should not give Addison the \$19,000 that was specified as liquidated damages. Rather, the amount should be reduced by what the court finds fair: If the school had been able to fill Callie’s space with a reasonable effort, then damages should be reduced accordingly. However, the Barnes’ should not be able to receive back the deposit, as that amount of money as damages is reasonable, especially since they agreed in the contract to pay that as a non-refundable payment.