**FEBRUARY 2002 BAR EXAMINATION**
**BOARD'S ANALYSIS**

## QUESTION 1

**1. a.** Robbery - Robbery is the taking and carrying away property from someone's presence or control by force or the threat of force with the intent to permanently deprive the victim of the property. Bob pointed the BB gun at the store clerk and forced him to turn over the contents of the cash register. He then fled the store taking the cash with him. Therefore, Bob could be charged with robbery.

**b.** Robbery with a dangerous or deadly weapon - All of the elements of robbery must exist, and the defendant must use a dangerous or deadly weapon in the perpetration of the robbery. A dangerous weapon is an object that is capable of causing death or serious bodily harm. Bob committed the robbery, and he used the BB gun to intimidate the clerk. It is not necessary that a gun be capable of discharging a lethal bullet to be a deadly weapon. Grant v. State, 65 Md. App. 547, 501 A.2d 475 (1985) Therefore, Bob could be charged with robbery with a dangerous or deadly weapon.

**c.** Felony Murder - Bob was in the process of committing a felony when Joe was killed by the clerk. However, Maryland applies the "Agency Theory" to homicides that occur during the course of a felony. In order for Bob to be charged with felony murder, the homicide must be committed by an accomplice during the course of or in connection with the felony. Therefore, Bob could not be charged with felony murder.

**d.** Battery - Battery is the causing of an offensive contact with the victim which is the result of intentional or reckless conduct by the defendant and to which the victim did not consent. Bob discharged the BB gun striking the clerk in the chest. This certainly was an intentional or reckless act causing offensive contact to which the clerk did not consent. Therefore, Bob could be charged with battery

**e.** Assault - Bob committed an act with the intent of placing the victim in fear of immediate bodily harm by pointing the BB gun at him. He had the apparent ability to bring about physical harm and the victim reasonably feared immediate physical harm and Bob's actions were not legally justified. Therefore, Bob could be charged with assault.

**f.** Possession of a controlled dangerous substance - Bob knowingly possessed marijuana, a controlled dangerous substance, in his motel room. We must assume that he knew that the substance was illegal and that it was a controlled dangerous substance. Therefore, he could be charged with possession of a controlled dangerous substance.

**g.** Possession of a controlled dangerous substance with the intent to distribute - While it is true that Bob possessed a controlled dangerous substance and the facts described it as a large quantity, there were not sufficient facts concerning the quantity to allow us to determine whether it was so large a quantity as to suggest that it was for other than personal use. Therefore, while Bob may be charged with possession with intent to distribute, further facts are required.

**h.** Theft - Although it might be suggested that Bob could be charged with theft for taking the cigarettes as he fled the store, the robbery was one continuous act and the theft would merge into the robbery. Therefore, he should not be charged with theft.

**i.** Conspiracy - Conspiracy is a combination or agreement by two or more persons to accomplish an unlawful act or to do a lawful act by unlawful means. Bob and Joe agreed to commit the robbery together. Therefore, they conspired to commit the robbery. Bob could be charged with conspiracy.

**2.** First, I would enter my appearance on Bob's behalf in accordance with Rule 4-214. Next, I would file a motion for discovery and inspection in accordance with Rule 4-263. Next, I would file a motion to suppress the evidence obtained in the search of the motel room in accordance with Rule 4-252. This motion must be filed within thirty (30) days after Bob's arraignment. Lastly, I would file a motion for a separate trial of the robbery case and the CDS case under Rule 4-253. I would also consider asking for a trial separate from Marjorie's on the CDS charge.

## BOARD'S ANALYSIS

## QUESTION 2

Since John wants to leave the marital home, he should obtain a limited divorce. This would allow the court to establish child custody and visitation, child support, use and possession of the family home and temporary alimony. The determinations made by the court would remain in place until there is either an absolute divorce or a reconciliation of the parties.

There is nothing in the facts to indicate that John is aware of Jocelyn's suspicions concerning his possible adultery. If he was aware of her suspicions, I would advise him that she would have to provide evidence sufficient to convince a judge that he was guilty of adultery. If she was able to do that, there would be serious ramifications. It would entitle her to file for and obtain an absolute divorce. Since she is not currently employed, the court would make a determination concerning either rehabilitative or permanent alimony. Since it is probable that, even if she was able to make as much progress as possible in becoming employed and receiving a salary, the difference between her income and his income would still be substantial. It is possible that she would be granted permanent alimony.

Regarding the issue of child support, since the parties' income exceeds the maximum amount for use with the child support guidelines, the child support will be determined based upon other factors. These factors include the children's current standard of living. Therefore, he would have to continue to pay the oldest daughter's private school tuition. In order for Jocelyn to work, it would be necessary for her to have child care. Since the family experience includes a full time nanny, it is probable that a court would also require him to continue to pay that cost. He would also be responsible for the payment of the outstanding medical bill since he is the sole support of the family.

A visitation schedule should be devised based upon the children's activities and the parties' work schedules so that John will continue to be involved with them. There should also be a decision made concerning legal custody. John should be sure to request joint legal custody (that is, joint decision making) of the children.

In settling the parties' rights to their marital property, the court would consider the equity in the marital home and John's share in his partnership. Following the period of use and possession, the property may be sold and an equitable distribution made from the proceeds.

Since John's share of the partnership is also marital property, the partnership would have to be valued, and Jocelyn would be entitled to a marital award equal to 50% of the current value of John's partnership interest.

I would advise John to talk to Jocelyn either directly or in the presence of a mediator, and attempt to resolve all of the issues and enter into a separation agreement concerning all issues if that is possible.

## BOARD'S ANALYSIS

## QUESTION 3

This question involves the liability of makers, endorsers and payors for payment of forged checks.

The facts establish that Twigg induced Wood Products' bookkeeper to issue checks payable to persons to whom the company was not indebted, intending the named supplier on each check to be the payee (Sec. 3-110). When the check was given to Twigg he became a holder entitled to enforce the instrument (3-404).

Dollar Bank's liability turns on whether or not it exercises ordinary care (reasonable commercial standards) in depositing or paying the checks. The fact that Twigg's signature and those of the suppliers were on record with Dollar Bank and could have been compared at the time that the transactions took place, is some evidence that the Bank did not exercise ordinary care. On the other hand, Twigg was a regular customer and maintained an account there and there are no other facts to suggest that these endorsements should have been viewed with suspicion. This is an issue of fact and the Bank's liability turns on all of the circumstances surrounding the transaction.

When he forged the name of the supplier-payee, the check became payable to the bearer because it was indorsed in blank (3-205(b)). Under these facts it was not necessary that Twigg indorsed it himself. The check may be negotiated by transfer of possession alone which he did on two of the three checks that he forged. (3-201(b) ). Under 3-204, Dollar Bank could have required Twigg to indorse but its failure to do so is probably explained by the fact that he had an account with the bank and was known to it. In any case no additional indorsement was required for a check payable to the bearer. Unless Dollar Bank was not exercising ordinary care or was acting in bad faith, it became a holder in due course; that is, the instrument when negotiated to Dollar Bank did not bear such apparent evidence of forgery or alteration….as to call into question its authenticity.

If Dollar Bank observed reasonable commercial standards it has not breached its warranty to City Trust under Section 3-407 because it was at the time the person entitled to enforce the checks, had not altered them, nor did it have knowledge that the signature of the drawer or endorser was unauthorized.

Unless Dollar Bank was not exercising ordinary care or was acting in bad faith, it became a holder in due course; that is, the instrument when negotiated to Dollar Bank did not bear such apparent evidence of forgery or alteration… as to call into question its authority. (3-404; 3-302). The facts do not establish that Dollar Bank acted in a way that substantially contributed to the loss sustained by Wood Products.

Under 3-406, a person whose failure to exercise ordinary care contributes to an alteration of an instrument or to the making of a forged signature on an instrument is precluded from asserting such alteration or forgery against a person who, in good faith, pays the instrument or takes for value.

If a person asserting preclusion also fails to exercise ordinary care, and the failure substantially contributes to the loss, it is allocated between the parties according to the extent to which the failure of each to exercise ordinary care contributes to the loss. Under these facts, Wood Products failed to exercise ordinary care in the following respects:

(a) It violated its own policies by giving both copies of the scaling slip to Twigg.

(b) The scaling slips were not numbered or otherwise marked in a manner which would permit Wood Products to control and account for them.

(c) It had no policy in place to safeguard the scaling slips or prevent their theft.

(d) It delivered the payment check to Twigg without authorization of the owner to whom the check was payable.

These actions are evidence of Wood Products' failure to observe reasonable commercial standards.

Under the preclusion provision of Section 3-406, unless City Trust also failed to exercise ordinary care, it would not be liable for the loss. Wood Products is clearly negligent in its handling of the scaling slips and, if it is concluded that Dollar Bank did not exercise ordinary care when it failed to compare the signatures, then it would share in the loss as provided in 3-406.

## EXTRACT SECTIONS FOR QUESTION 3

**Annotated Code of Maryland, Commercial Law Article**

**Title 3. Negotiable Instruments: § 3-103, 3-104, 3-109, 3-110, 3-201, 3-203, 3-204, 3-205, 3-301, 3-401, 3-403, 3-404, 3-406, 3-416**

**Title 4. Bank Deposits and Collections: § 4-105**

## BOARD'S ANALYSIS

## QUESTION 4

The question is designed to raise issues with regard to Rules 7.1 Communications Concerning a Lawyer's Services, 7.2 Advertising, and 7.3 Direct Contact with Prospective Clients.

Under 7.1(a) a web page constitutes advertising and it is a communication " …not involving in-person contact". Therefore, the rules in general allow such advertising. While it is not impermissible to state that she is a lawyer, her advertising in states where she is not licensed to practice could be violative under 7.1 which prohibits misleading communications about one's services. Because the ad is intended for people beyond the state of Maryland, the web site should make very clear that Ann is only licensed to practice law in the state of Maryland.

Direct solicitations in the form of telephone calls to obtain real estate listings present a problem if Ann discloses that she is a practicing attorney. The disclosure even if intended primarily for the purpose of obtaining real estate listings, constitutes a "personal contact" by a lawyer which violates 7.1(a). Because her intended communication states that using her services as a realtor and attorney may save money, it could raise the issue of a false or misleading communication about the lawyer or the lawyer's services and be violative of Rule 7.1. While application of these Rules is on a case b case basis, one could conclude that a violation has occurred under 7.1(b) b creating an unjustified expectation about the results the lawyer can achieve. It is also possible to suggest a violation of Rule 7.1(c). This Rule allows a comparison with the services of other lawyers only if the comparison can be factually substantiated.

The direct mail advertisement at open houses is not generally prohibited because it constitutes a communication which does not involve personal contact. However, if Ann actually attends the open house with the flyers it could be interpreted as a personal contact. Thus, whether this is violative of the Rules of Professional Conduct depends on her presence at the open house and whether her presence so closely identifies her with the ad as to constitute a personal contact. The calendar also raises the prohibition of a lawyer giving anything of value to prospective clients under Rule 7.2(c). The information on the calendar is otherwise permissible.

Under normal circumstances, written advertisements on windshields of automobiles are not "in person" contacts. Neither is placing the material on the vehicle an in-person contact. However, the quote at the bottom of the flyer would almost certainly run afoul of 7.1(c) regarding the comparison of the lawyer's services with the services of other lawyers.

Even nonpersonal contact advertisements must follow the provisions of Rule 7.2. These include keeping a copy or recording of the ad for three ears along with a record of where or when it was used and refraining from giving anything of value for recommending the lawyer's services. It must include the name of the lawyer responsible for its content, and it must make disclosure with regard to legal expenses.

**BOARD'S ANALYSIS**

**Question 5**

**Part A**

## NEGLIGENCE

To determine if Lumpy was negligent, it must be determined if Lumpy used reasonable care to avoid injury to Theodore's property. The five elements of a negligence action include: (1) duty of reasonable care; (2) breach of duty; (3) causation; (4) proximate cause; and (5) damages.

Theodore was a reasonable plaintiff harmed by Lumpy's action. Lumpy failed to take proper precautions to monitor the tank on a regular basis. If Lumpy had monitored the tank on a regular basis he would have known the tank was leaking. The leak caused the contamination of Theodore's well. The contamination of the ground water was reasonably foreseeable and that damage caused an actual loss to Theodore in that he can no longer use his well.

## STRICT LIABILITY

Lumpy may be held strictly liable for the damage to Theodore's real property. For an action in strict liability for abnormally dangerous activity it must be shown that (1) the activity was "abnormally dangerous"; (2) that the Defendant had control of the activity; and (3) that the Plaintiff or his property was injured as a result of the abnormally dangerous activity.

The factors to be considered in determining whether an activity is abnormally dangerous are:

(a) existence of a high degree of risk of harm to the person, land or chattels of others;
(b) likelihood that the harm that results from it will be great;
(c) inability to eliminate the risk by the exercise of reasonable care;
(d) extent to which the activity is not a matter of common usage;
(e) inappropriateness of the activity to the place where it is carried on; and
(f) extent to which its value to the community is outweighed by its dangerous attributes.

The most crucial factor is the appropriateness of the activity in the particular place where it is being carried on. The activity need only be abnormally dangerous in relationship to its surroundings.

Lumpy's storing of gasoline in a residential development is not an appropriate non-natural use of the land compared to the residential use. The inherent dangers of fire, explosion and contamination cannot be totally eliminated notwithstanding its proven social utility.

## TRESPASS

Trespass upon land consists of any physical entry upon the land of another without regard to harm if the entry interferes with the possession or use of another's property. The elements to a cause of action for trespass include (1) Entry upon land (2) In an unlawful manner (3) In the possession of another; and (4) Without consent.

When a tortfeasor is engaged in abnormally dangerous activity, a non-negligent unintentional entry upon land can constitute trespass.

**NUISANCE**

The elements for an action for private nuisance are: (1) Unreasonable or intentional conduct; (2) Which causes substantial and unreasonable injury or interference; (3) With another's use and enjoyment of his real property.

## Part B

There are four elements to establish actual agency. (1) Selection and engagement of servant; (2) Payment of wages; (3) Power of dismissal; (4) Power of control over servant's conduct.

From these facts there is an insufficient control of Lumpy by KO to establish actual agency.

For there to be liability on the ground of apparent agency or agency by estoppel there must be actual reliance on the care and skill of the apparent agent by the person injured.

The attraction of a customer to a station by gasoline companies signs and loyalty to a certain brand of gasoline is not sufficient to establish apparent agency or agency by estoppel. It is not an actual reliance on the care and skill of the apparent agent.

## BOARD'S ANALYSIS

## QUESTION 6

**1.** Yates would argue that say that District Court action bars the action for personal injuries. *Dill v. Avery*, 305 Md. 206, 502 A. 2d 1051 (1986), quoted, and applied, the rule enunciated in Restatement Second of Judgments:

> **"Section 24. Dimensions of 'Claim' for Purposes of Merger or Bar —— General Rule Concerning 'Splitting'** (1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar . . . the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose." Id. at 209, 210.

If Sam's action in District Court is an action to recover damages caused by the collision, then his subsequent claim for damages for personal injuries is barred.
``

Sam's action was for breach of contract. Does this change the result? Probably not. In *Kent Co. v. Bilbrough*, 309 Md. 487, 497 - 501, 525 A.2d 232 (1987), the Court of Appeals adopted the "transactional" analysis claim preclusion issues:

> The present trend is to see claim in factual terms and to make it coterminous with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff; regardless of the number of primary rights that may have been invaded; and regardless of the variations in the evidence needed to support the theories or rights. The transaction is the basis of the litigative unit or entity which may not be split.
>
> Consequently, the American Law Institute in § 24 of Restatement (Second) of Judgments has adopted the following standards for determining the "Dimensions of 'Claim' for Purposes of Merger or Bar -- General Rule Concerning 'Splitting'":
>
> (1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar (see §§ 18, 19), the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.
>
> (2) What factual grouping constitutes a "transaction", and what groupings constitute a "series", are to be determined pragmatically, giving weight to such considerations as whether the *facts are related in time, space, origin, or motivation*, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." (Emphasis added.)

Immediately after the accident, Yates admitted fault and promised to make amends. Sam couched his District Court claim in terms of breach of contract but the facts, both as to time, space, origin and motivation are the same. The question of whether a court would rule that the offer to pay for the property damage was part of the same "transaction" is an open one; examinees were given credit for either analysis.

The same result would apply to the claim against Bill based on *respondeat superior*, as his liability must be based on his agent's liability.

**2.** The fact that the judgment was entered by default does not bar its claims preclusive effect. *United Book Press v. Maryland Comp*., 141 Md. App. 460 (2001.)

**3.** There is a different result for the negligent entrustment action against Bill. Here, the facts are not the same transaction as those of the accident. Instead, they focus on Bill's allowing his non-licensed employee to use Bill's van after Bill knew he had been drinking. The timing and location of the pertinent events is different. This action could proceed.

## BOARD'S ANALYSIS

## QUESTION 7

The Jones and Smith LLC was properly formed when the Maryland State Department of Assessments and Taxation accepted the Articles of Organization for the Jones and Smith LLC. Md. Ann. Code, Corp. & Assoc. Art.; §§ 4A-101 et seq. The LLC was not defective because it did not adopt an operating agreement. Although advisable, an LLC does not require an operating agreement. Md. Ann. Code, Corp. & Assoc. Art. § 4A-402 (a).

Smith, as a licensed architect is individually liable to Mark and Mary for faulty design and supervision of construction of the deck. Pursuant to Section 4A –301.1, an individual who renders a professional service in Maryland as an employee of a Maryland limited liability company is liable for negligent or wrongful acts or omissions in which the individual personally participated to the same extent as if the individual rendered the service as a sole practitioner. Smith designed and supervised construction of the deck. Consequently, Smith should be personally liable.

Jones, a licensed architect, supervised the construction of the deck. He may be personally liable to Mark and Mary to the extent that damages were caused by that supervision.

Brown should not be personally liable to Mark and Mary. Although Brown is a member of the Jones and Smith LLC, Brown did not participate in the design and/or construction of the deck. Section 4A-301 provides, "…no member shall be personally liable for the obligations of the limited liability company, whether arising in contract, tort or otherwise, solely by reason of being a member of the limited liability company." **In addition, an individual who renders a professional service in Maryland as an employee of a Maryland limited liability company is not liable for negligent or wrongful acts or omissions of another employee or member of the limited liability company unless the employee is negligent in appointing, supervising, or cooperating with the other employee or member.** Since Brown neither appointed, supervised nor cooperated with Smith or Jones in either the design or supervision of construction of the deck, Brown is not personally liable to Mark or Mary. See, § 4A-301.1(a)(2).

Mrs. Smith was not a member of the LLC. She only acted as a manager and authorized person. Provided she did not participate in appointing, supervising or cooperating with Smith or Jones in either the design or construction of the deck, she is not personally liable to Mark and Mary.

Jones and Smith LLC accepted the assignment and adopted the contract for the construction of Mark and Mary's deck entered into by Jones and Smith before the formation of the Jones and Smith LLC, and Mark and Mary consented to such assignment. In addition to Smith and Jones, the LLC is liable for the acts of its employees who perform professional services within the scope of their employment or within the scope of the employees' apparent authority to the same extent as its employees. See, § 4A-301.1(b).

## BOARD'S ANALYSIS

## QUESTION 8

The trial court should rule in favor of Hilary, and should require Kay to allow Hilary to continue using the waterline.

The original common grantor of the Wet Parcel and the Dry Parcel was Mike. Mike created a dominant tenement and a servient tenement by reserving easements on the Wet Parcel for the benefit of the Dry Parcel before he severed the property into two different parcels. Mike and all of his successors, including Olive and Kay, recognized the obligation of the servient parcel, the "Wet Parcel," to provide water and access to the water to the Dry Parcel. The Owners of the Dry Parcel accepted and used their easements for access and to use the water from the Wet Parcel. Xavier enhanced the access onto the Wet Parcel for the Dry Parcel by constructing the waterline. By changing the mode of access, he did not relinquish the right of the Owners of the Dry Parcel to continue using water from the Wet Parcel for the benefit of the Dry Parcel.

The Owners of the Dry Parcel do not have riparian rights in the spring on the Wet Parcel. The Dry Parcel is not riparian land because it is not "land bordering upon, bounded by, fronting upon, abutting or adjacent and contiguous to and in contact with a body of water, such as a river, bay or running stream." People's Counsel v. Maryland Marine, 316 Md. 491, 493 n.1, 560 A.2d 32, 33 n.1 (1989). In this case, the Dry Parcel does not abut any body of water, and the nature of the interest in the water is a real property right rather than a riparian right. Kirby v. Hook, 347 Md. 380, 389-391, 701 A.2d 397 (1997).

Hilary might argue that she had acquired a prescriptive easement to use the waterline. Kay's permission to Xavier to construct the waterline did not extinguish any claim that Xavier might have had to access the spring or to use the water from the Wet Parcel. Kay's permission to construct the waterline and to access the spring through the waterline was in the nature of an interest in the land. The statute of frauds requires that any conveyance of an interest in land for a period of greater than one year must be in writing to be effective. In Kirby v. Hook, supra, the Court of Appeals determined that when the grantor of an easement to construct a waterline failed to reduce that easement to writing, the grant was no longer permissive, but rather it was adverse. However, the fact that the waterline installed by Xavier was used for more than 19 years but not the full statutory period of 20 years destroys the claim that a prescriptive easement was created. Tacking the use of the waterline to a predecessor in title before Xavier is not appropriate because the waterline did not exist prior to 1975.

It is also clear, as it was in Kirby v. Hook, supra, that Kay intended to create more than a mere license in Wet Parcel for Dry Parcel's benefit when she gave permission for the waterline to be constructed. As in Kirby, supra, the parties recognized that Dry Parcel had no other source of water than Wet Parcel. The Parties also recognized that by constructing a waterline, Xavier would be expending considerable effort and spending significant sums to construct the underground waterline. Moreover, Hilary can also argue that the original reservation of the easements benefitting Dry Parcel in the deed to Olive did not specify how that access was to be achieved. Kay and Xavier agreed to a modification of the surface ingress and egress to obtain water from the spring on the Wet Parcel. For the reasons stated earlier, Xavier and Kay understood that the construction of the waterline was intended to be permanent, and Xavier made the investment and changed his position in reliance on the fact that he and his successors would be able to use the waterline. Because Kay allowed Xavier to make the investments in the waterline and allowed Hilary to use the waterline for approximately 18 months before she capped it, Kay may be estopped to deny Hilary's right to continue using the waterline.

In the alternative, Hilary might also successfully argue that she and Xavier have established an easement by necessity for use of the waterline. An easement by necessity is created when a common grantor creates a beneficial use of one part of the land for another part prior to subdividing or conveying the land. A necessity exists because there is no other source of the benefit for the dominant tenement. In this case, a common grantor, Mike, used the spring on Wet Parcel for the benefit of Dry Parcel. The Deed conveying the Wet Parcel to Olive specifically reserved the easement favoring Dry Parcel. There was no other source of water for Dry Parcel. Typically, easements by necessity are found in cases where rights of way are established to enable land to have an access to a public road. Easements by necessity are not confined solely to rights of way. In this case, it is arguable that a right to use water is a necessity, and that installing a waterline to use the water is the least intrusive and reasonable way of obtaining the water. There were no facts stated that indicated the level of use was either excessive, disruptive to the Owner's enjoyment of the Wet Parcel, or unreasonable in this case. Under these conditions, the Court might find that an easement by necessity existed. The easement would be extinguished when the necessity no longer exists. In this case, that may be at the time public water is available to serve Dry Parcel. See, Tong v. Feldman, 136 A.822,152 Md.398 (1927) (easement for gas line).

## BOARD'S ANALYSIS

## QUESTION 9

**1. Contract Construction and the Parol Evidence Rule:** The cardinal rule in interpreting a contract is to determine the intention of the parties. *Seigneur v. National Fitness Institute, Inc.*, 132 Md. App. 271 (2000). When a contract is unambiguous, it is presumed that the parties meant what they expressed. *State v. Rodriguez*, 125 Md. App. 428 (1999), cert. denied, 354 Md. 573 (1999). Therefore, because the GIC defines "Funds" as an amount not to exceed the net income earned by the Company in 1995, the Bank's limitation on the amount it must invest may be justified. However, if the GIC is ambiguous and susceptible of more than one meaning, surrounding circumstances may be considered to determine the intent of the parties. *Mascaro v. Snelling & Snelling of Baltimore, Inc.*, 250 Md. 215 (1968). In this case, the provision of the GIC setting the $100 million dollar "cap" arguably creates an ambiguity. If the parties intended "Funds" to be limited to $10 million dollars, there would be no reason to negotiate and place a $100 million dollar cap on the amount invested under the GIC. Another possible source of ambiguity is the fact that the Company's bid specifications were included as part of the contract. Either or both provisions could allow a court to find that the GIC is ambiguous, and thus permit outside aids to interpret the GIC. Looking outside the "four corners" of the GIC, the Company's position is enhanced significantly. The Bank's ongoing acceptance of funds in excess of $10 million dollars indicates that the parties intended that the GIC not be limited to 1995 income amounts.

**2. Mistake:** Mutual or unilateral mistake can invalidate a contract. *Bartlett v. Department of Transportation*, 40 Md. App. (1978). Therefore, the Company should not argue that the definition of "Funds" was a mistake, or the GIC will be invalidated and the Bank will have the right to return all Funds to the Company. The Bank will not argue that the definition of "Funds" was a mistake (thus invalidating the GIC), because to do so would support the position of the Company regarding the intent of the parties.

**3. Equitable Estoppel:** The Company could claim that the Bank is estopped from asserting a $10 million dollar limit on the GIC. Estoppel prevents a party from asserting a right against another who, in good faith, relies on the conduct of the other party, and prejudicially acts on it. *Gould v. Transamerican Associates*, 224 Md. 285 (1961). The Company could claim that it relied on the Bank's acceptance of payments in excess of $10 million dollars. The reliance was in good faith given the GIC's negotiated "cap", and was prejudicial because, had the Bank rejected the additional payments immediately, the Company could have invested the funds when interest rates were higher.

**4. Waiver:** The doctrine of waiver may prevent the Bank from successfully claiming that the GIC has a $10 million dollar limit. Waiver is the intentional, voluntary surrender of a known right. *Cubbage v. State*, 304 Md. 237 (1985). A waiver may be inferred from circumstances. *Food Fair Stores, Inc. v. Blumberg* 234 Md. 521 (1964). Waiver must be supported by an agreement founded on consideration, or the conduct on which the waiver is based must be such as to stop a party from insisting on performance of a contract or forfeiture of a condition. *One Twenty Realty Co. v. Baer*, 260 Md. 400 (1971). The Company could argue that the Bank knowingly accepted payments in excess of $10 million dollars, and therefore waived its right to limit the amount of funds to be invested under the GIC. The consideration for the waiver is the additional profit made by the Bank by investing the additional proceeds.

**5. Laches:** The Company could raise the defense of "laches". Laches is an inexcusable

delay in the assertion of a right resulting in a disadvantage to another. *Salisbury Beauty Schools v. State Bd. Of Cosmetologists*, 268 Md. 32 (1973). The Company could claim that the Bank's delay in asserting the $10 million dollar cap prevented it from investing the funds when interest rates were higher.

**6. Construction:** The fact that Company's counsel prepared the GIC may cause it to be construed most strongly against the Company. *Truck Ins. Exchange v. Marks Rentals, Inc.*, 288 Md. 428 (1980). However, this rule of construction has little force where, as in this case, both parties were represented by counsel. *Acme Markets, Inc. v. Dawson Enterprises, Inc.*, 253 Md. 76 (1969).

## BOARD'S ANALYSIS

## QUESTION 10

### Part A

**A.** George will argue that the collision was primarily caused by the negligence of Reckless in driving while intoxicated and speeding. George will assert that he was not contributorily negligent, but if he is, that Reckless, nevertheless, had the last clear chance to avoid the collision and, therefore, is legally responsible. George will rely on the testimony of the Police Officer who was eyewitness.

**B.** Reckless's first defense would be contributory negligence. He will argue that George's entry into the intersection to make a left turn was also negligent and thus a bar to recovery. A plaintiff cannot recover if the plaintiff's negligence is a cause of the injury, and plaintiff's negligence is a complete defense to plaintiff's allegations of negligence, subject to the doctrine of last clear chance.

Reckless could also argue that George was in violation of a statute by entering the intersection before it was clear. If that violation was a cause of the injuries, it is evidence of negligence by George and will bar recovery.

### Part B

A good answer will discuss the agency relationship between Acme and George and whether when the incident occurred, George was acting within the scope of his employment with Acme. Acme will argue that driving to and from work is not generally within the scope of employment, that it asserted no control over the method or means that George operated his vehicle; that it did not supply or pay directly for the vehicle that George used or for its maintenance; and that it did not specify the route to be taken. See, Oaks v. Connors, 339 Md. 24, 660 A.2d 423 (1995)

Acme will also argue that even if George was acting within the scope of his employment, it was the acts of Reckless that were the cause of the injuries. Should the jury believe Acme and George, Reckless would be solely liable.

Hapless will have the burden to show which negligent act was the cause of his injuries; however, there may be more than one cause of an injury. If the jury finds against Acme, George and Reckless in favor of Hapless, Acme, George and Reckless would be jointly and severally liable and at a minimum, Acme's potential exposure will be reduced.

## BOARD'S ANALYSIS

## QUESTION 11

The answer should first address whether each person has standing to challenge the State's dress code. Under the facts, Mary was not a State employee and may, therefore, be precluded from challenging the law. To have standing, a person must have a concrete stake in the outcome of the case. The test for standing set forth in the Federal case, *Siera Club v. Morton*, 405 US 727 (1972) is 1) actual or threatened injury, and 2) injury traced to a challengeable action, and 3) injury redressable by adjudication, 4) injury is within the zone of interest.

There does not appear to be a conflict of interest that precludes the attorney from representing the three employees. Maryland Rules of Professional Conduct Rule 1.7 requires that the attorney refrain from representing more than one client when the clients' interests could be adverse. To be safe, the attorney should seek the consent of all of the employees involved.

The law that enacted the dress code may violate the procedural Due Process clause of the Constitution 14th Amendment since no notice nor hearing was provided prior to the enactment of the legislation or the employees' terminations. The law is also violative of due process safeguards in that it is vague (what is offensive to others?) and overbroad.

The vagueness/overbreadth of the law makes it susceptible to challenges under the 1st Amendment, as well, since portions of the law affect the employees' rights of free speech, freedom of association, and freedom of religion. All of these are considered primary rights; any law infringing upon them must be the least restrictive means of addressing an important governmental purpose. Since it's unclear what clothing the law restricts, it can't possibly be the least restrictive means.

Finally, the breadth of the law makes it susceptible to challenge on Equal Protection grounds. Why is some clothing worn by one person better than others? Why can an individual tattoo wording on his arm, but not emblazon it on his shirt. Why is one symbol on a dress professional clothing, but letters or certain colors not?

## BOARD'S ANALYSIS

## QUESTION 12

**I would make the following arguments against the admission of the evidence and the imposition of the sentence:**

The Court clearly erred in allowing the Assistant Manager's hearsay testimony. The Assistant Manager repeated a conversation he had with Louie, who did not testify. There is no exception in Section 5- 803 of the Maryland Rules' prohibition against hearsay that would allow this evidence to come in.

The facts indicate that Bailey was not seen by Dolly on the night in question and muffled his voice. Arguably, her testimony wasn't credible, under these circumstances, and in violation of Maryland Rule 5-802. However, the State may successfully argue that Bailey spoke clearly inside of the vehicle and Dolly would know his voice from their employment relationship of two years.

Bailey has a 5th Amendment right not to be compelled to give evidence against himself in a criminal proceeding. To protect this right, the Supreme Court recognizes certain procedural safeguards during custodial interrogations. Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966). Once he invoked his right to remain silent the Officer should not be allowed to testify concerning his alibi and refusal to put his statement in writing. Of course, the State may argue that these things occurred prior to his invocation, and are, therefore, admissible.

Bailey's prior conviction for arson is not admissible to prove his guilt since it was neither an infamous crime nor relevant to his credibility. Maryland Rule 5-609. The prior conviction was also more than fifteen years ago, and can be excluded on those grounds. Accordingly, it should not have been allowed into evidence.

Finally, the Court should not have imposed a penalty that was not in effect at the time Bailey was convicted. Assuming, arguendo, it was proper to impose the law, I would still challenge it as violative of the 8th Amendment's prohibition against cruel and unusual punishment.