

## JULY 2005 BAR EXAMINATION

### BOARD'S ANALYSIS

#### QUESTION 1

The standard of review for violation of first amendment issues must pass strict scrutiny analysis. Rockers supporters have the clear right to express their support for Rucker by gathering at his return home. The First Amendment also protects Rucker's right to speak to the crowd. See *Buckley v. Valeo*, 424 U.S. 1 (1976). The extent to which the state may limit public access to its property depends on whether the property is a public forum. *Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788 (1985). Although the terminals in large regional airports like Baltimore airport are generally considered to be non-public forums, there is a question as to whether other locations such as the grassy knolls would be considered public. *U.S. Southwest v. U.S.*, 708 F.2d 760, 764-66 (D.C. Cir. 1983).

In a public forum, the State may not ban activity protected by the First Amendment, but may impose reasonable time, place, and manner restrictions on such activity. A time, place, and manner restriction on speech in a public forum is reasonable only if (1) it is content-neutral, (2) is narrowly tailored to meet significant government interests, and (3) leaves open ample alternative channels of communication. Here, Reg. B is probably not a reasonable time, place, and manner restriction although it is content-neutral. Although the State has a significant interest in the smooth operation of the airport, the regulation is not narrowly tailored to that purpose. It prohibits all gatherings of more than 30 people regardless of the impact on the smooth operation of the airport that such a gathering may or may not have. The prohibition also applies to the entire airport without respect to whether or not any congestion problem may or may not be present in a given area or at a given time, such as on the grassy knolls which may be away from the flow of traffic.

Reg B may be subject to a facial attack as well as attacked as applied under the First Amendment's over breadth doctrine if it also threatens others not affected in this particular instance because those others may refrain from expressing themselves rather than face prosecution. A statute may be invalidated on its face, however, only if the over breadth is "substantial."

## QUESTION 2

Badmens' counsel will argue that the State violated Badmens' Fourth and Fifth Amendment rights by taking his DNA sample without his consent. The State, however, was not actually searching for evidence of a crime. Requiring individualized suspicion to obtain DNA for future use would negate the very purpose of the Act itself, considering that the Act does not seek to obtain evidence, but to merely identify persons. The Act does not constitute the gathering of direct evidence of a crime. The DNA evidence of the crime already exists prior to the match of any DNA profile in the data bank. The Act does not create direct evidence; the direct evidence is the semen acquired by a vaginal swab of the victim. The Act merely serves to identify the perpetrator similar to the way investigators have used fingerprints for many years. Balancing these factors illustrates the reasonableness of the minimal intrusion of a DNA swab in light of the profound public interest in identifying the perpetrators of crimes.

The only information obtained from the DNA linked to the individual pursuant to the Act is the DNA identity of the person being tested. The DNA profile thus serves the purpose of increasing the efficiency and accuracy in identifying individuals within a certain class of convicted criminals. The purpose is akin to that of a fingerprint. As such, Badmens and other incarcerated individuals have little, if any, expectation of privacy in their identity. Therefore, a search like the one authorized by the Act in this case, whose primary purpose is to identify individuals with lessened expectations of privacy, is totally distinguishable from search of ordinary individuals for the purpose of gathering evidence against them in order to prosecute them for the very crimes that the search reveals, and is not violative of the Fourth or Fifth Amendments.

Badmens' counsel will probably also argue that the collection of DNA samples from all persons convicted of a qualifying crime, when the qualifying crime was committed prior to the effective date of the Act, violates the relevant *ex post facto* clauses because the primary purpose of the Maryland DNA Collection Act is punitive in nature, making the statute retributive.

[Article I, § 10, clause 1 of the United States Constitution](#) prohibits the States from passing any *ex post facto* law, stating, "No State shall . . . pass any . . . *ex post facto* Law." The Maryland Declaration of Rights, Article 17, provides similar protections, as it states "that retrospective Laws, punishing acts committed before the existence of such Laws, and by them only declared criminal, are oppressive, unjust and incompatible with liberty; wherefore, no *ex post facto* Law ought to be made; nor any retrospective oath or restriction be imposed, or required."

The provisions of the DNA Act do not make a prior non-criminal act criminal. They do not make a prior criminal act a more serious crime. They do not change the punishment for any crime.

They do not alter the rules of evidence or require less evidence in order to support a conviction, than the level of evidence required before the Act. The taking of DNA data does not increase the punishment for any crime. It merely provides information. If no crimes exist to which the data is matched, nothing happens. By itself, the DNA data is data and nothing more. The Act

was intended not to elicit a punishment for acts already committed, but to create a sensible regulative scheme in order to protect the public by identifying individuals involved with crimes.

Badmens' counsel will probably argue that Nurse Ratchet unlawfully interrogated him without advising him of his *Miranda* warnings and in violation of his Fifth and Sixth Amendment rights. There is an issue as to whether Nurse Ratchet was acting as a State law enforcement official when she questioned Badmens. Under the facts here, however, it is unlikely that Nurse Ratchet would be viewed as a law enforcement official or acting pursuant to one. *See, State v. Raines*, 383 Md. 1 (2004).

### QUESTION 3

Agreement to settle a lawsuit is a contract and governed by ordinary contract principles.

Unilateral mistake – Mistake of only one of the parties to a contract as to the subject matter does not affect its binding force and ordinarily affords no grounds for its avoidance.

Reliable's ignorance of the status of Paul's negligence case against Dave – a unilateral mistake of fact – does not justify rescission of the settlement contract with Paul under the underinsured provision of the insurance policy.

Reliable had actual knowledge of Paul's suit against Dave when it received a copy of the amended complaint. Its failure to determine the status of the underlying tort case demonstrated a lack of due diligence.

In the absence of fraud, or misrepresentation, a party's post settlement discovery of a meritorious claim or defense, such as a pre-settlement breach of contract, does not excuse party's performance under a settlement agreement. A unilateral mistake is ordinarily not a ground for relief from a contract.

Under the circumstances here, the insured's failure to disclose or volunteer information does not constitute misrepresentation or fraud.

## QUESTION 4

As to “Green Acre” in Anne Arundel County Bank has priority over both Henrietta and Leasing by virtue of judgment obtained and recorded in the amount of \$100,000 in both Anne Arundel County and Prince Georges County as of December 18, 2004.

Leasing has priority over Henrietta by virtue of its December 27, 2004 judgment in Anne Arundel Circuit Court for \$50,000. Henrietta did not file a “Notice of Lien” in either Anne Arundel County or Prince George's County Circuit Court until January 15, 2005 as required by Rule 2-621(c).

As to “Blue Acre” in Prince Georges County, Bank’s judgment has priority over those of Henrietta and Leasing by virtue of the December 18, 2004 judgment for \$100,000 in the Circuit Court for Prince Georges County (assumes Clerk signed and entered judgment per Rule 2-601 on that date).

Henrietta has priority over Leasing because she filed her District Court (Anne Arundel County) “Notice of Lien” in Prince Georges County on January 15, 2005. Leasing did not file its Anne Arundel County judgment in Prince Georges County at all.

As to the “construction equipment” in Prince Georges County, Henrietta has priority over both Bank and Leasing because she had a Writ of Execution issued against the equipment on January 17, 2005 and the Sheriff levied upon and took possession of the equipment on January 18, 2005.

Neither Bank nor Leasing executed against the equipment and their judgments are liens only on the real property – not personal property. A lien attaches to personal property only after actual levy per 11-403.

Bill’s failure to file supersedes bond or other security per Rule 8-422 permits Bank and Leasing to enforce their judgments by Writ of Execution until Bill files the required security. Henrietta’s judgment was not appealed and is not subject to the stay of enforcement provisions of 8-422.

### EXTRACT SECTIONS FOR QUESTION 4

**Annotated Code of Maryland, Courts and Judicial Proceedings**

**TITLE 11. JUDGMENTS: §11-401, 11-402, AND 11-403**

**Annotated Code of Maryland, Maryland Rules**

**TITLE 2. CIVIL PROCEDURE – CIRCUIT COURT: Rules 2-601, 2-621. 2-622. 2-623. 2-641, and 2-642**

**TITLE 8. APPELLATE REVIEW IN THE COURT OF APPEALS AND THE COURT OF SPECIAL APPEALS: Rule 8-422**

## QUESTION 5

(A) Defendant's attorney should have objected to Guest's answer relating what a tenant told him. This is hearsay. The objection should be sustained, and a motion to strike the response should be sustained.

Defendant's attorney could also object to Plaintiff's lawyer's second question on the ground that it is a leading question. Defendant's attorney would contend that the question suggests that Guest's vision was impaired. Plaintiff's lawyer might counter that this fact has already been established or suggested in Guest's response to the preceding question. Whether or not a question is leading depends very much on the context. It is also important to note that the allowance of leading questions is discretionary with the trial court. Rule 5-611(c)

(B) One possible objection will be a hearsay objection to Landlord's response as related by Mr. Smith. However, it would appear that this objection should not be sustained, since Landlord's response would probably be classified as an admission by a party, admissible as substantive evidence, without the foundation of a prior examination of the party. Rule 5-803 (a)(1). Such statements are usually admissible because the party will have a full opportunity for explanation.

A second objection to this excerpt could be raised to Mr. Smith's gratuitous comments about Landlord's never fixing anything and taking a week or two to replace light bulbs on prior occasions. These comments are non-responsive and prejudicial. The information imparted about prior delay in replacing the light does not relate to a similar happening which shows that the situation as of the time of the accident was dangerous or that Defendant knew of the danger at the time of the accident.

Finally, objection might be made to Plaintiff's lawyer's solicitation of opinion evidence from a non-expert witness. This question is certainly inartfully phrased. Generally, lay witnesses should be called on to give the facts and not their inferences, conclusions or opinions. The answer, however, would appear to be unobjectionable since it relates the witness' personal perceptions and is helpful to a clear understanding of Smith's testimony. Rule 5-701.

(C) The problem arising in this excerpt is the witness testifies with no present recollection. It is permissible to refresh the recollection of such a witness from written memoranda. When the witness' recollection is thus refreshed, his testimony is what he says, not the writing. In the instant case, however, it does not appear that the witness is testifying from his recollection refreshed but rather is summarizing the notes. If such is the case, an objection should probably be sustained on the basis that the answer is not responsive and that the answer should be stricken. In such a case, Plaintiff's lawyer could probably then have Dr. Jones read his notes into evidence, since it is established that the notes were made at the event when the witness' memory was clear and the witness now has demonstrated no present recollection. Rule 5-802.1(e); or the records themselves may be introduced. Rule 5-803(b)(4) & (6).

## QUESTION 6

The trial court erred in continuing to base support and alimony on Harry's 2003 income of \$200,000 rather than his current income.

With respect to child support, a court may, upon a showing of substantial change in circumstances, modify an award of child support. A legitimate decrease in income of the payor may constitute a material change in circumstances. Sczudco v. Berry, 129 Md. 529, 743 A. 2d 268 (1999); Rivera v. Zysk, 136 Md. App. 607, 766 A. 2d 1049 (2001). On the other hand, FL.Art. §12-201(j) instructs that a parent's potential income is to be considered if the parent is "voluntarily impoverished."

To determine whether a spouse or parent is voluntarily impoverished, a court must inquire into his motivations and intentions. There was no evidence that Harry sold his lucrative club to avoid his duty of spousal or parental support. To the contrary, Harry's decision to sell his bar was based on a legitimate reason, grounded in his religious beliefs and the teachings of his church. "A child support obligation should not be used to shackle the parent by preventing him or her from making a needed lifestyle change, based on valid reasons, particularly when, as here, the parent is able to provide reasonable child support expenses." Malin v. Mininberg, 153 Md App. 358, 837 A.2d 178, 204 (2003). Harry has no college degree and is working full time in a managerial position.

Since a finding of "voluntary impoverishment" is not justified, the child support obligations should be recalculated in accordance with the guidelines.

**Note: An analysis reaching the opposite conclusion may be given substantial credit where it is recognized that the trial court may consider a party's "potential income" as well as actual income, as well as other relevant considerations. See FL Art., §12-201(j).**

Analyses may reach differing conclusions whether the trial court erred in including Harry's inherited home as an asset for basing an award of alimony or support. With respect to alimony, FL Art. §11-106(b) sets forth specific factors that must be considered by a court in determining whether an award or modification of alimony is appropriate. These factors include "(ii) the financial needs and financial resources of each party, including (i) all income and assets, including property which does not produce income." The Court of Appeals has stated that once a party has established new factors which support an extension of alimony, "the current financial situation of the parties are appropriately considered pursuant to §11-106(b)(q) and (u)." Blaine v. Blaine, 336 Md. 49, 646 A. 2d 413, 425 (1994). Similarly, if a basis exists for modifying alimony under FL Art., §11-107, the financial situation of the parties, including non-income producing assets, are appropriately considered. Absent a valid finding of voluntary impoverishment or decreased standard of living of the dependent child, the mere ownership of non-income producing assets alone does not constitute a basis for reliance upon those assets in determining child support (or alimony). Lempres v. McHenry CSA No. 734, September Term, 2003. Unreported.



## QUESTION 7

In reviewing the facts, it becomes clear that a conflict of interest exists in Helen representing John and Rose while serving on the Board of the Church. Thus, Helen violated Rule 1.7 in rendering advice to John and Rose absent either consultation and consent under either Rule 1.7(c) of the Rules of Professional Conduct in effect prior to July 1, 2005 (“Prior RPC”) or Rule 1.7(b)(4) under the amended Rules of Professional Conduct in effect July 1, 2005 (“Current RPC”). Helen owed a duty to John and Rose to explain her responsibility to and relationship with the Church, since Helen’s representation of John and Rose may be materially limited by Helen’s responsibility to the Church as a member of its Board of Directors. Certainly, an informed consent from John and Rose after the advice of independent counsel would have been appropriate prior to Helen undertaking the representation.

In January 2005, Helen should have informed Rose that she had represented John in 1998, and that while the subject matter of the representation of Rose and John by Helen’s firm was remote in time and there was no ongoing representation, it would be appropriate for Bill to advise John and Rose regarding the potential conflict of interest that may exist and otherwise comply with the provisions of Rule 1.9 under the Prior RPC and the Current RPC. Since Helen’s representation may be precluded by the application of Rule 1.9, Rule 1.10 under the Prior RPC and Current RPC may operate to disqualify the representation by Bill and the law firm in Rose’s divorce matter. Therefore, Helen, Bill and the firm must evaluate whether the earlier representation caused John or Rose to reveal confidential information to Helen and to the law firm as imputed through Helen, the use of which in the divorce matter would disadvantage John.

If Helen joined her firm subsequent to 1998, then Rule 1.10(b)(2), under the Prior RPC, and Rule 1.10(c) under the Current Rule permits Bill and the law firm to represent Rose provided Helen is screened from the case and receives none of the fee received by Bill or the law firm for services provided in the divorce matter.

Pursuant to Rule 1.5(a) of the Prior RPC and the Current RPC, all fees to be charged by Bill must be reasonable based on the factors contained in the Rule. Neither Bill nor the law firm can enter into an arrangement for or collect a fee in a domestic relations matter that is contingent on either the securing of a divorce or the amount of a property settlement or award. See Rule 1.5(d)(1) of the Prior Rule and the Current Rule.

All accounts must be separated from the lawyer’s own property and otherwise comply with Title 16, Chapter 600 of the Maryland Rules. Consequently, the retainer should have been deposited by Bill into an escrow account in accordance with Rule 1.15(a) of the Prior RPC and the Current RPC, and monies may be withdrawn only as earned.

## QUESTION 8

This analysis must focus on the nature and extent of the grant of hunting rights to Ruby and Sam in order to determine both the extent of their interest in the Club's property, and whether and under what circumstances the interest granted to Ruby and Sam can be assigned or granted to others.

The Club did not grant to Ruby and Sam a mere license (a personal, non-transferable permission) to use the Club's property. The Club granted a real property interest in its deed to Ruby and Sam that allowed Ruby and Sam to hunt and fish the Club's property for the benefit of their own property. The real property interest was more in the nature of a profit a prendre than an easement because the grant gave them permission to enter onto and use the property as well as to remove something of value from the property. An easement interest would have granted them permission to enter onto and use the property but it would not extend to the removal of anything from the property since "an easement implies [that its] owner ... shall take no profit from the soil." [Goss v. C.A.N. Wildlife Trust, 157 Md. App. 447, 458, 852 A.2d 996, 1002 (2004), quoting Anderson v. Gipson, 144 S.W. 2d 948 (Tex. App. 1940).]

The next part of the analysis requires a determination of whether the profit a prendre was appurtenant or in gross. If in gross, it can be freely transferred, while if appurtenant, it can only be transferred with the dominant estate. In this case, the profit a prendre was granted for the benefit of Ruby and Sam's land, which makes it a profit a prendre appurtenant. As such, the right is only transferable with a transfer of the dominant estate. The profit a prendre was not in gross because an interest in gross exists independently, and not solely to serve the dominant estate.

Under these facts, the Court should declare that the deed to Ruby and Sam created a real property interest in the Club's property, a profit a prendre appurtenant. The profit is a real property interest appurtenant to Ruby and Sam's property and is not transferable separate and apart from the property. Since Ruby attempted to transfer the hunting interest separately from the land, the transfer was invalid.

## QUESTION 9

Bart took one of Lisa's checks without her permission, made it payable to Millhouse, forged her signature on it and used the check to pay for a motorcycle. Lisa believes that Millhouse should have known that the transaction was not authorized by her. The question and extract provides remedial sections, as well as affirmative defenses, of the Md. Anno. Code Commercial Law Article ("UCC") and asks examinees to apply them to the fact pattern.

Lisa will not be able to bring a successful cause of action against Millhouse.

UCC 3-420(a) sets out several possible actions for conversion of a negotiable instrument:

The law applicable to conversion of personal property applies to instruments. An instrument is also converted if it is taken by transfer, other than a negotiation, from a person not entitled to enforce the instrument or a bank makes or obtains payment with respect to the instrument for a person not entitled to enforce the instrument or receive payment. An action for conversion of an instrument may not be brought by (I) the issuer or acceptor of the instrument or (ii) a payee or indorsee who did not receive delivery of the instrument either directly or through delivery to an agent or a co-payee.

First, Section 3-420 affirms that the common law tort of conversion is applicable to negotiable instruments. However, a common law action for conversion would fail because that action lies only when the defendant is under an obligation to return to the plaintiff the specific money or object entrusted to his or her care. *Commonwealth Land Title Ins. Co. v. Lawson*, 69 Md. App. 476482 (1986); *Simmons v. Lennon*, 139 Md. App. 15, 33 (2001). Here, Lisa is not interested in obtaining the check used by Bart. Instead, she wants to recover her money. Under such circumstances, a common law conversion action is of no assistance to her.

Section 3-420 also provides that an instrument is converted if it is transferred from a person not entitled to enforce the instrument or when a bank makes payment on a instrument to a person not entitled to enforce the instrument. A conversion in this sense may have occurred when Bart delivered the check to Millhouse, although Millhouse may have believed Bart was acting as Lisa's agent. Lisa did not occur a loss at this point, however. Lisa's loss occurred when the Bank made payment on the check to Millhouse and debited her account so, to prevail, Lisa would have to prove that Millhouse was not entitled to enforce the instrument. However, Millhouse is a holder of the check - it was physically delivered to him by Bart and the check is payable to Millhouse. UCC § 1-201(20). As such, Millhouse is entitled to enforce it, even if he is in wrongful possession of it. Section 3-301. Section 3-420 does not provide a remedy for Lisa against either Millhouse or the Bank. In addition, Section 3-420(b) also provides that a conversion action cannot be maintained by an issuer of the instrument. Lisa's signature appears on the check; she is the issuer, even if her signature is forged. UCC § 3-105(c). *Simmons v. Lennon, supra*, 28 - 29 (2001). For these reasons, Lisa has no cause of action against Millhouse.

Many examinees also discussed whether or not Lisa has a negligence action against Millhouse. To prevail, she would have to prove that Millhouse had a legal duty to her to inquire into the genuineness of her signature. Mere casual knowledge that Lisa did not consider motorcycles safe is not a basis for such a duty. *Simmons v. Lennon, supra* at 41 - 42.

If Lisa has a remedy, it lies in the provisions of the UCC governing a bank's duties to its customers. UCC § 4-401 provides that the Bank may charge Lisa's account only for properly payable items. Lisa's signature is forged. Is such a check "properly payable"? Section 3-401 provides that a person is not liable on a check unless the person signed the check or the signature on the check is made by an agent of the person. Lisa's signature was forged and Bart did not have the authority to sign her name as agent. Thus, the check is not properly payable and the Bank is required by Section 4-401 to reimburse Lisa.

However, Bank has a very viable defense. UCC 4-406 requires Lisa to exercise due care in examining her bank statements and to notify the Bank of unauthorized payments. Bart had been forging Lisa's name on checks for several months and Lisa failed to examine her statements. If the Bank can prove Lisa should have detected Bart's earlier defalcations and failed to do so, it will successfully defend Lisa's action.

## **EXTRACT SECTIONS FOR QUESTION 9**

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

#### **TITLE 1. GENERAL PROVISIONS: §1-201**

#### **TITLE 3. NEGOTIABLE INSTRUMENTS: §3-103, 3-104, 3-105, 3-203, 3-301, 3-110, 3-401, 3-403, 3-406, and 3-420**

#### **TITLE 4. BANK DEPOSITS AND COLLECTIONS: §4-401**

## QUESTION 10

Ajax's duties and obligations to ABC LLC are governed by common law and the Maryland statutory law of limited liability companies. There is no inherent bar to Ajax conducting business with the company. Md. Anno. Code Corp. & Assoc. Article Section 4A-405. On the other hand, Ajax is an agent for the company, Section 4A-401.

There are two approaches to evaluate Ajax's actions. The first is to apply analogous rules of corporate law to the limited liability company context. Courts have held corporate governance concepts are applicable to limited liability companies. See *Froelich v. Senior Campus Living LLC*, 355 F.3d 802, 810 (4<sup>th</sup> Cir. 2004) (applying business judgment rule to limited liability company dispute). Under this approach, Ajax's deal with ABC LLC will be analyzed as an interested director transaction. Md. Anno. Code Corporations and Associations Article Section 2-419 allows such transactions if there is disclosure and consent or if the transaction is fair and reasonable to the company. There was neither disclosure nor consent but purchasing the building for \$600,000 may have been fair and reasonable for the company. However, the remedy for a violation of Section 2-419 is voiding the transaction. Cf. *Independent Distributors v. Katz*, 99 Md. App. 441, 456 (1994). Since the practice is flourishing at its current location, the efficacy of such an action is questionable.

Ajax violated the business opportunity doctrine by not informing the company of the existence of the building before he bought it himself. The corporate opportunity doctrine precludes officers and directors of corporations from diverting to themselves opportunities which, in fairness, ought to belong to the corporation. *Maryland Metals v. Metzner*, 282 Md. 31, 45 (1978). Here Ajax should have presented the opportunity to purchase the property to the company. Had he done so, the company would have purchased it for \$100,000 less than it eventually paid. The business judgment rule, codified as Section 2-405.1, is not available to Ajax as a defense because the business judgment rule applies to claims that a corporate officer breached his or her duty of care to the corporation. A claim involving the business opportunity doctrine involves the duty of loyalty, not care. *Katz, supra*, at 461.

Alternately, Ajax's actions can be evaluated against the more rigorous standards of the common law duties of an agent to its principal. The result is the same. At common law, an agent owes a fiduciary duty to its principal, *King v. Bankerd*, 303 Md. 98 (1985), including duties of loyalty, *Maryland Credit Finance Corp. v. Hagerty*, 216 Md. 83 (1958), and to disclose to the principal material information, *Unsatisfied Claim and Judgment Fund v. Fortney*, 264 Md. 246 (1972). Each member owes a fiduciary duty to the company as a whole. Ajax has clearly breached both duties to the company.

In any event, any action against Ajax would be a derivative one on behalf of the company as a whole. Carr will have to request that the other members authorize the filing of an action against Ajax unless the demand would clearly be futile, which is probably the case here. See Md. Anno. Code Corporations and Associations Article § 4A-801 *et seq.*

## QUESTION 11

As counsel for the hospital I anticipate that Joe's estate will bring causes of action against the Hospital sounding in tort for negligence and strict liability.

The theory of strict liability provides that one who sells a product in a defective condition unreasonably dangerous to the user is subject to liability for the resulting harm if the seller is engaged in the business of selling such a product and the product reaches the user in the condition in which it was sold. AC and S Inc., v. Abate, 121 Md. App. 590 (1996) The facts reveal that Jones, Inc. was in the business of making and selling vaccines, the ones sold to the Hospital were sealed by Jones' Inc., and they appeared to be discolored (indicia of contamination). Joe was vaccinated and died shortly thereafter. While the estate may bring this action against Jones' Inc., it may also bring it against the Hospital as the distributors of the vaccine.

The estate could bring a cause of action against the Hospital and Dr. Smith for negligence. The estate must prove that: (1) the Hospital had a duty to protect Joe from injury; (2) the Hospital breached that duty; (3) Joe suffered actual injury or loss; and (4) Joe's injury was the proximate result of the Hospital's breach. The Hospital has a duty to its patients/invitees. Dr. Smith knew or should have known something was amiss with the vaccine, yet he chose to administer the vaccines. His action led to Joe's demise. He did not act as a reasonable vaccination control officer should have. The hospital is also liable under the theory of respondeat superior if Dr. Smith's tortious conduct occurred within the scope of his employment (i.e. in furtherance of the hospital's business and authorized by the hospital.) Larsen v. Chinwuba, 377 Md. 92 (2002) This test is clearly met under the facts since the Doctor was the vaccination control officer and was at work inoculating patients. The best defense might be that the vaccines came in prepackaged, sealed bottles, were accompanied by a signed certificate of freshness and authenticity, and were delivered to the hospital by the manufacturer. It was, therefore, reasonable for Dr. Smith to rely on this certification and the hospital should be able to recover from Jones, Inc. if it is sued.

Finally, the estate could bring an action against the Hospital for its negligence that led to the stampede. The Hospital was aware of the problems that could arise when it offered vaccines, since it had experienced problems in the past. It had a duty to act reasonably and breached it by hiring an insufficient number of security guards and having no plan in place to limit the number in line for the vaccine. It was foreseeable that pushing and shoving, and injury, would result.

The Hospital's defense will center upon the lack of proof as to what caused Joe's death given the inconclusive autopsy results and the fact that a negligible number of vaccine recipients became ill. This will not be a bar to recovery, however, if the estate shows that Joe was well prior to the stampede and inoculation and it brings a complaint pleading both causes of action.

## QUESTION 12

### Trina's recourse against Mike:

Trina could request that the State's Attorney file charges against Mike for first degree assault for grabbing her arm and threatening her. It was an unpermitted intentional touching and the menacing words spoken put her in fear of imminent harm.

Trina could also ask the State to file charges against Mike for false imprisonment. A deprivation of her liberty occurred when he blocked her access from the elevator and he had no legal justification for doing so.

Trina could also request that the State file charges against Mike for subornation of perjury because he paid Gene to make false statements. Mike could also be charged with perjury for his deliberate lies under oath.

Trina could also sue Mike civilly for the torts of assault, battery and false imprisonment, for the reasons noted above.

Trina may not be able to bring a defamation claim for Mike and Gene's statements in court because witnesses generally are immune from suit for statements made during trial. The comments caught by the news station, however, were defamatory, repeatedly published, and led to the immediate consequence of Trina's not being allowed to dance. As a public figure, Trina would have to show that Mike acted with actual malice or intentional disregard for the truth..

### Trina's recourse against the news station:

Trina may not fair well against the news station for its decision to publish the fracas. Generally one who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other. The right of privacy is invaded by an unreasonable intrusion upon the seclusion of another; appropriation of another's name or likeness; unreasonable publicity given another's private life; or unreasonably placing another in a false light before the public. Lawrence v. A.S. Abell Co., 299 Md. 697, 701-702 (1984) A public argument involving a famous dancer may qualify as a newsworthy event, and not an attempt to invade Trina's privacy.

### Mike's recourse against Trina:

Mike may not be able to bring an action for slander/defamation against Trina. At common law the slander must be communicated and any slander arguably committed was spoken in Hungarian to presumably English-only speakers. If a court disagrees, however, Trina may be liable for calling Mike "syphilitic" since accusations of loathsome disease are slanderous per se. The comments made by Trina in English were arguably true, and an honest expression of her

opinion, so Mike should not be able to file a claim against her for these statements. Montgomery Ward v. Cliser, 267 Md. 406, n.1 (1973).