JULY 2010 MARYLAND BAR EXAMINATION
BOARD'S ANALYSIS

QUESTION 1

Developer argues that as the holder of the first recorded Deed, he is under no obligation to the Church as he was not on notice through the Land Records of the preexisting contract or subsequent deed. He will argue that every recorded deed or other instrument takes effect from its effective date as against the grantee of any deed executed and delivered subsequent to the effective date, unless the grantee of the subsequent deed has: (1) Accepted delivery of the deed or other instrument: (i) In good faith, (ii) Without constructive notice under § 3-202 (no possession by Church), and (iii) For a good and valuable consideration, and (2) Recorded the deed first. *Real Property §* 3-203.

The Church will correctly argue that even though its contract was never recorded, and its Deed was recorded second, it is entitled to priority over Developer. For the first recorded deed to be preferred, it is necessary that the Developer be in the position of a bona fide purchaser. The Church will argue that Developer, by having actual knowledge of the transaction is not a bona fide purchaser under the statute One who purchases real property wit actual knowledge of prior equities, is not protected as a bona fide purchaser, but such a purchaser takes the property subject to the known equities, which are enforceable against him to the same extent that they are enforceable against the vendor. *Grayson et vir v. Buffington et ux*., 233 Md. 340, 196 A.2d 893 (1964). See also, *Lewis v. Kippous*, 282 Md. 155, 383 A.2d 676 (1978).

The object of recording statutes is to protect purchasers from secret and unknown conveyances. They are not intended to protect subsequent purchasers with actual knowledge of a prior conveyance of the property purchased. *Id.*

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QUESTION 2

Maryland Code, Section 6-103, Crim. Pro. Article states that the date for trial in a criminal matter in a circuit court (1) shall be set within 30 days after the earlier of (i) the appearance of counsel or (ii) the first appearance of the defendant before the circuit court; and (2) may not be less than 180 days after the earlier of those events. On Motion of a party upon the court's initiative, for good cause shown, a court's administrative judge or designee of that judge may grant a change in the circuit court trial date. The same requirements have been implemented in Maryland Rule 4-271.

A. Trial date not initially set within 30 days of arraignment. Although the initial trial date of September 25, 2007 was more than 30 days after Defendant's arraignment, dismissal of the criminal charges on that ground is not warranted. Defendant did not object to the initial trial date, and, in any event dismissal of the criminal case is not an appropriate sanction for violation of the 30 day provision. *State v. Hicks,* 285, Md. 334, 335, 403 A.2d 368, 369 (1979).

B. Trial did not occur within 180 days of arraignment. In this case, the 180 day period for a trial expired 180 days after June 25, 2007. Two trial dates had been rescheduled prior to the expiration of the 180 days Hicks period. The court of Appeals has construed § 6-103 and Rule 4-271 to mean that "after a case has already been postponed beyond the 180 day period *** the dismissal sanction has no relevance to subsequent postponements of the trial unless the defendant's constitutional speedy trial right has been denied." *Farinholt v. State,* 299 Md. 32, 40, 472, A.2d 452, 456 (1984), quoted in *State v. Brown,* 355 Md. 89, 733 A.2d 1044, 1050 (1999)

C. Constitutional Right to Speedy Trial. The Court's interpretation of § 6-103 and Rule 4-271 "stands on a different legal footing than the Sixth Amendment's constitutional right to a speedy trial." *Hicks, supra,* 285 Md. At 320, 403 A.2d at 361-62, quoted in *Brown, supra,* 733 A.2d at 1054

The Sixth Amendment to the U.S. Constitution provides, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy … trial. Article 21 of the Maryland declaration of Rights provides: [t]hat in all criminal prosecutions, every man hath a right … speedy trial."

Barker v. Wingo, 407 U.S. 514, 92, S. Ct. 2182, 33 L. Ed. 2d 101 (1972) Established a four-factor balancing test to determine if a defendant has been denied a speedy trial. See, *State v. Kanneh,* 403 Md. 678, 994 A.2d 516 (2008):

I. Length of Delay. The Court of Appeals has held that a pre-trial delay if greater than one year and fourteen days was "presumptively prejudicial." *Epps v. State,* 276 Md. 96, 111, 345 A.2d 62, 72 (1975).

II. Reason for Delay. In analyzing the reasons for delay, the Court addresses "each postponement of the trial date in turn." *Kanneh, supra,* 977 A.2d at 523. In our case:

- September 25, 2007 postponement – trial judge unavailable; Defendant consents.

- December 12, 2007 postponement – unavailability of DNA test. Defendant objected. State not at fault. Good cause found.

- February 25, 2008 – judge unavailable. Defendant objected.

- March 5, 2008 – Despite Motion to Dismiss, trial rescheduled because prosecutor was ill.

The State does not appear to be at fault for any of the postponements. Defendant objected to three of the four postponements.

III. Assertion of Right to Speedy Trial. Defendant asserted his right on February 25, 2008, which postponed the case beyond 180 days. The right was reasserted by Motion to Dismiss, which was denied on March 5, 2008. Nevertheless, a delay of over 7 months ensued until the actual trial.

IV. Prejudice. Defendant has asserted prejudice, being incarcerated since February 2007 and being unavailable to assist in his defense by trying to locate an exculpatory witness.

Under these circumstances, the appellate court would be justified in holding that Defendant's Constitutional rights have been violated. However, since balancing the four *Barker v. Wingo* factors is subjective, an answer which arrives at an opposite conclusion may also attain full credit.

QUESTION 3

(1) The Uniform Commercial Code (the Commercial Law Article of the Annotated code of Maryland) has modified the common law rule that acceptance cannot vary or deviate from the terms of the offer. "A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms." § 2-207(1). In this case, American Micro's acceptance was not expressly made conditional on Baltimore Electronics' assent to the choice of law and judicial remedy provisions. Thus, a contract was formed.

The issue is whether the choice of laws, judicial remedy and venue provisions are part of the contract. "The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

(a) The offer expressly limits acceptance to the terms of the offer;
(b) They materially alter it; or
(c) Notification of objection to them has already been given or is given within a reasonable time after notice of them is received." § 2-207(2).

Both American and Baltimore are "merchants." § 2-104. Baltimore Electronics neither limited acceptance of its offer nor objected to the choice of laws, judicial remedy and materially alter the contract are "terms and conditions that go to the very heart of the bargain." Terms "limiting remedy in a reasonable manner" are not material alterations. *USEMCO Inc. v. Marbro Co., Inc*., 60MD. App. 361 (1984). However, while American Micro's choice of laws provision is an additional term that may or may not materially alter the contract, American Micro's judicial remedy and venue provisions are probably different provisions that constitute material alterations, and did not become part of the contract. Baltimore Electronics should be entitled to arbitration in Baltimore.

The fact that Baltimore's offer was sent by mail while American's acceptance was faxed is irrelevant. "an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances." § 2-207(1)(a).

(2) Where goods have been accepted. "The buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy." § 2-607(3)(a). The demand for arbitration may or may not constitute adequate notice depending on its content.

(3) If Baltimore Electronics gives notice as required, it may recover damages for any loss "resulting in the ordinary course of events from the seller's breach." § 2-714(1). "The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount." § 2-714(2). "In a proper case any incidental and consequential damages under the next section may also be recovered." § 2-714(3).

QUESTION 4

The applicant's answer should address the following provisions of the Maryland Rules and/or Maryland Courts and Judicial Proceedings Code Annotated:

1. Maryland Rule 5-407 would generally preclude admission of subsequent remedial measures, such as the updating of surgical instruments, to prove that Dentist was negligent. The evidence could be used for purposes of impeachment.

2. Dentist may admit the actual waiver of damage form, if relevant, since it is a business record and, therefore, admissible to prove the act, transaction, occurrence, or event. *See*, Maryland Courts and Judicial Proceedings Code Annotated, Sections 10-101 (b) and 10-104. Mere testimony from the dental staff, however, should be excluded as hearsay. In other words, the best evidence would be the form itself.

3. Section 5-411 of the Maryland Rules provides as follows:

   Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership. Or control, or bias or prejudice of a witness.

Since the sole purpose in seeking to introduce the lack of insurance is to show negligence this evidence should be disallowed.

4. The Dentist's comments to his wife would not be admitted due to the spousal privilege found in Section 9-105 of Maryland Courts & Judicial Proceedings Code Annotated that precludes one spouse from revealing any confidential communication between the two that occurred during their marriage. Under the facts Dentist and his wife were "estranged" but married, and were married at the time he revealed that he had botched the surgery. Accordingly, the wife may not disclose this conversation at trial.

5. Section 5-702 of the Maryland Rules provides that "[e]xpert testimony may be admitted … if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue." The expert witness testimony should be excluded as irrelevant since there does not appear to be a need for this particular level of expertise.

QUESTION 5

Advice to Dorothy on her desire to obtain visitation: I would point out:

1. The first issue is to recognize that Dorothy is not the biological grandparent, but, in fact, at best, is a psychological step-grandparent.

2. Maryland does not recognize de facto parenthood as a legal status (see Janice M. v. Margaret K., 404 Md. 661, 948 A.2d. 73 (2008).

3. Maryland does recognize that visitation rights can extend beyond biological and adoptive parents and grandparents (see, generally, Evans v. Evans, 302 Md. 344, 488 A.2d. 157 (1985) (non-adoptive step-mother given visitation)

4. Maryland Family Law Article 9-102, generally, controls petitions by grandparents for visitation, but, again, it is unlikely that Dorothy will be determined to be a grandparent, but she still has the potential for entitlement to third party visitation.

5. In Troxel v. Granville, 530 U.S. 57 (2000), the Supreme court stated that so long as a parent adequately cares for their child, that is, they are a fit and proper person, there is no reason for the State to inject itself into the private realm of the family or to question the ability of the parent to make the best decisions concerning the rearing of that parent's child. Under that Supreme Court decision, there is a presumption that a fit parent will act in the best interests of their child and that special weight must be given to the parent's own determination regarding that parent's fundamental constitutional right to make decisions regarding the rearing of the child. That case also holds that the Due Process Clause of the Constitution does not permit a State to infringe on this fundamental right simply because a Judge believes a better decision could be made.

A. Dorothy should be advised that she will have to show that Abby is either an unfit parent or that there are exceptional circumstances existing that permits the Court to infringe upon Abby's fundamental right to deny visitation. If she shows either, the presumption in favor of the parental decision is rebutted and the court will determine what is in Ben's best interest, but the court cannot entertain the best interest analysis until the presumption in favor of Abby's decision is rebutted by a demonstration of unfitness or exceptional circumstances, the Court must presume that the parent's decision concerning visitation is in the best interest of the child.

B. It is a weighty task for a third party to demonstrate exceptional circumstances which overcome a presumption that a parent acts in the best interest of his circumstances which overcome a presumption that a parent acts in the best interest of his or her child and which overcomes the constitutional right of a parent to raise his or her child (see McDermott v. Dougherty, 385 Md. 320, 869 A.2d 751 (2005).

C. The Court of Special Appeals in Aumiller v. Aumiller, 183 Md. App. 71, 959 A.2d. 849 (2008) stated that exceptional circumstances are determined on a case by case basis. They are not established through a rigid test, but rather by an analysis of all of

the factors before the Court in a particular case. The exceptional circumstances test is an inherently fact specific analysis that defies a generic definition regardless of whether the case concerns custody or visitation. The Court indicated that while the Court can not formulate a bright line definition or delineate all relevant factors, that might exist in a given case, it noted that Ross v. Hoffman factors may be relevant. The lack of visitation standing alone does not constitute exceptional circumstances. There must be evidence of harm that results or likely will result from the refusal to provide visitation.

D. In the instant case, the fact that the mother has the history of alcohol abuse and is immature and selfish, may impact on whether she is a fit parent. The facts suggest that she has had physical custody of the child since his birth and so it is unlikely that the Court would conclude that this is a situation where she is unfit and she likely would prevail on this prong.

E. With respect to exceptional circumstances, it certainly is important that the third party in this case provided work related daycare for almost six years, has had a meaningful relationship with the child, significant access in the past and that the strained relationship is based on the daughter's inappropriate reaction to the fact that her father left his assets to his wife instead of to his only child. The fact that the child has tried to contact Dorothy suggests that he, too, misses the nourishment of the bond that they had had, and may allow for a judicial finding of exceptional circumstances to allow for visitation. See also Koshko v. Haining, 398 Md. 404, 921 A.2d. 171 (2007); Brandenburg v. La Barre, #2080 September Term 2009 Court of Special Appeals (Opinion filed June 2, 2010).

As long as the issues addressed in this analysis are recognized in the applicant's answer, equal credit will be given even though an applicant may disagree on the chances of Dorothy's success.

QUESTION 6

All references to the Maryland Rules of Professional conduct (MRPC) are found under Maryland Rule 16-812.

MRPC 1.5(a)(7) requires that attorneys charge a "reasonable" fee, and one of the factors in this reasonableness determination is the experience of the attorney. $600 an hour is arguably excessive for an attorney just out of law school. The argument could be made, however, that his years of experience in the same general field justify such a fee.

MRPC 1.15(c) requires that a retainer be withdrawn only as it is earned, and accordingly, must be held in trust, separate from all other monies, until that point. A retainer remains the property of the client until that point. In re Printing Dimensions, Inc., 153 B.R. 715 (Bkrtcy. D. Md. 1993). McCoy obviously violated this when he withdrew and spent the money in anticipation of work which had not been done, and violated the trust in which the retainer was held.

MRPC 7.2(d) requires that the responsible attorney's name appear on any advertising material. McCoy ignored this provision in his written solicitation.

MRPC 7.3(c) requires that the envelope transmitting said advertising must say "advertising material" on the outside of the envelope. McCoy ignored this provision in his written solicitation.

MRPC 7.4(a) proscribes an attorney stating that they "specialize" in a particular field of law. McCoy stated that he specialized in government procurement law.

MRPC 7.1(b) prevents attorneys from implying in any way that they will achieve results by inappropriate means. McCoy's guarantee of results "one way or the other" arguably violates this provision, as it implies that he is not beyond using unlawful or inappropriate means.

MRPC 7.1(c) prevents attorneys from making statements comparing themselves to other attorneys unless they can be factually verified. McCoy has absolutely no basis whatsoever to state that he is better than every other attorney in his field.

MRPC 7.5 states that a firm may not operate under a name which implies a connection to a government agency. McCoy's firm name of "DOD Military Matters, LLC" clearly implies a connection with the Department of Defense. This purported connection is further reinforced by his office location.

QUESTION 7

Actions against Joe

Glinda may have several invasion of privacy actions against Joe. She may also file claims against him for false imprisonment and trespass.

A. Defamation

Glinda has a cause of action for defamation (slander) against Joe for the statements made to the orderly as she ran from the room. She can show that Joe's words were defamatory (the language adversely questioned her reputation and sanity); that the words were concerning her; that the words were published to a third person; and that the words were false. Glinda has a cause of action for defamation (libel) for Joe's statements on his blog since the words were defamatory (s/a), concerned her, were published to an untold number of people, and were false.

Since Glinda is a rock star, she is considered a public figure and will have to show actual malice on Joe's part before he can be held liable. In New York Times v. Sullivan, 376 U.S. 254 (1964) the Supreme Court noted that actual malice exists when the speaker knows that the statement is false or had a reckless disregard as to the truth or falsity of the statement. Under our facts, Glinda will easily meet the actual malice standard since the statements were patently false. She may have difficulty in proving damages for slander however, since there is no evidence that the publication to the orderly led to her cancelled tour. She will be successful in the libel action, however.

B. False Light

Glinda will first argue that Joe invaded her privacy by placing her in a false light when he posted the picture and the untrue statement on the internet. This tort has been defined as follows:

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy if the matter publicized is of a kind that … would be highly offensive to a reasonable person, and … is not of legitimate concern to the public.

Bliney v. Evening Star Newspaper Co., 43 Md. App. 560, 571 (1979)(quoting Section 652A (2)(c) of the Restatement of Torts (2d)) Joe took an unauthorized, unflattering photo of a woman who was trying to recover in a private rehabilitation center. He posted it on the internet and included an untrue statement. Thus, the communication was "publicized". His actions were not reasonable and there is no indication that Glinda consented to his actions. Glinda should be successful in this claim.

C. Intrusion Upon Seclusion

Glinda may also bring a claim for intrusion upon her seclusion. This tort is defined as the intentional intrusion upon the seclusion or solitude of another in a manner

that would be highly offensive to a reasonable person. Mitchell v. Baltimore Sun Co., 164 Md. App. 497, 883 A. 2d 1008 (2005); Furman v. Sheppard, 130 Md. App. 67, 744 A. 2d 583 (2000). Glinda was at the Rehabilitation Center for healing. She was there under an assumed name, indicating her wish to keep her treatment private. Joe intentionally intruded upon her privacy in an attempt to extort money from her. Thus, Glinda should be successful in this claim.

D. Trespass

The tort of trespass is defined as the intentional or negligent intrusion in someone's property without their consent. Royal Investment Group, LLC. v. Wang, 183 Md. App. 406 (2008); Mitchell v. Baltimore Sun Co., 164 Md. App. 497, 883 A. 2d 1008 (2005). Glinda had a possessory interest in her room and Joe entered without her consent. Thus, he should be liable for trespass.

E. False Imprisonment

Maryland courts have defined the tort of false imprisonment as "the deprivation of the liberty of another without his consent and without legal justification." Great Atlantic & Pacific Tea Co. v. Paul, 256 Md. 643, 654 (1970); Heron v. Strader, 361 Md. 258 (2000); State of Maryland v. Dett, 391 Md. 81 (2006). Joe locked Glinda within her room for at least 20 minutes, against her will. He should be liable for false imprisonment.

Action against the Town

Glinda may not be as successful in filing a claim against the Town as owner/operator of the Rehabilitation Center. The doctrine of governmental immunity applies to municipal corporations such as the Town. Godwin v. County Commissioners, 256 Md. 326, 397 A. 2nd 1027 (1970). This doctrine holds that the governmental entity may not be liable for torts committed in the exercise of a governmental, as opposed to a proprietary, function. If the operation of a rehabilitation center is a governmental function, the Town may be immune from any tort action brought by Glinda. While there is no litmus test available to determine whether a function is proprietary or governmental in nature, the Court has held "[w]here the act in question is sanctioned by legislative authority, is solely for the public benefit, with no profit or emolument to the municipality, and tends to benefit the public health and promote the welfare of the whole public, and has in it no element of private interest, it is governmental in its nature." E.Eyring Co. v. City of Baltimore, 253 Md. 380, 383 (1969). Under our facts there may be insufficient information to rule either way. Accordingly, the applicant will receive credit for raising the issue regardless of their conclusion as to its applicability.

Action against Dr. Killjoy

Under the facts, Doctor Killjoy appeared to have acted as a reasonably prudent doctor would. He was not acting to further his own interests but acted in furtherance of

his employer's interests. Thus, he can be found to have acted within the scope of his employment. Hopkins C. Co. v. Read Drug & C. Co., 124 Md. 210 (1914); Ennis v. Crenca, 322 Md. 285 (1991). Accordingly, if his confinement of Glinda to her room is found to be false imprisonment he will be indemnified by the Town pursuant to the provisions in the Local Government Tort Claims Act. *See* Maryland Courts and Judicial Proceedings Code Annotated, Section 5-301, *et. seq.* Under this Act, "a person may not execute against an employee on a judgment rendered for tortious acts or omissions committed by the employee within the scope of employment with a local government" unless the employee acted with ill will or improper motivation (i.e., "actual malice"). Maryland Courts and Judicial Proceedings Code Annotated, Section 5-302(b).

QUESTION 8

Manufacturer's Legal Theory: In the absence of fraud, officers and directors of a corporation are protected from personal liability for debts of the corporation. *A.B. Corp. V. Futrovsky*, 250 Md. 65, 267 A.2d 130 (1974). However, a corporation is not formed and does not come into existence until the charter documents are accepted for filing with the State Department of Assessments and Taxation (SDAT). Here, the articles of incorporation for A-1 Window Replacement, Inc. (A-1") were not accepted by SDAT because another corporation had a similar name. Therefore, even though Smith was holding himself out as an officer and agent of A-1, no such corporation existed. Without the protection of the corporate veil, Manufacturer, Inc. ("Manufacturer") can claim that Smith was acting in his individual capacity, and is therefore individually liable for the $25,000 debt. *Hill v. County Concrete*, 108 Md. App. 527, 672 A.2d 667 (1996). Credit will also be given for relevant and proper discussions of promoter liability.

First Defense: One way to provide an officer of a defectively incorporated association with the corporate attribute of limited liability is to use the defense of corporation by estoppel. *Cranson v. I.B.M. Corp*., 234 Md.477, 200 A.2d 33 (1964); *Hill*. Smith could argue that Manufacturer should be estopped from denying A-1's existence on the grounds that it would be inequitable to allow Manufacturer to deny A-1's existence because manufacturer has recognized and dealt with A-1 as a corporation. In effect, Smith could argue that Manufacturer admitted to the existence of A-1 as a corporate body by accepting payments in the form of checks signed by Smith, as President of A-1. As such, Manufacturer should be estopped from denying the corporate existence of A-1.

Second Defense: A second defense may be for Smith to claim that A-1 is a de facto corporation, and as such, operates to shield Smith from personal liability for the debts of A-1. *Cranson; Hill*. A de facto corporation may exist when the following three elements are met; (i) the existence of law authorizing incorporation; (ii) a good faith effort to incorporate under the existing law; and (iii) actual user or exercise of corporate powers. *Cranson* at 480; *Hill* at 536. Although Smith meets the first and third elements, whether he made a good faith effort to incorporate is questionable since he was informed by his attorney of the need to confirm the availability of the corporate name, yet immediately began acting as if A-1 already existed by opening a corporate checking account and by using corporate stationery and business cards. Finally, it is not clear that the doctrine of de facto corporation is recognized by Maryland courts. *Cranson* at *481; Hill* at *537*. The estoppel doctrine still may be applied even if one or more elements of a de facto corporation are missing. *Cranson* at *487*.

Likelihood of Success: Manufacturer is likely to succeed under a breach of contract theory against Smith. Smith's defenses should fail because he did not act in good faith. His attorney informed him that the articles of incorporation for A-1 were rejected by SDAT because the name was too similar to another corporation. Nevertheless for several months he continued to mislead Manufacturer and deal with manufacturer as though A-1 existed and he was A-1's President.

QUESTION 9

A-1 These facts suggest a conflict of interest for the attorney. Rule 1.7 of the Maryland Rules of Professional Conduct prohibits representation of a client if it will be directly adverse to another client. Here, Adam is a potential defendant in any suit brought by Ben and the attorney should decline dual representation. If the consultation with Adam and Ben results in the attorney obtaining information that would work to the disadvantage of either Adam or Ben he should decline to represent either of them per Rule 1.9.

B-1 No mandatory motions required under Rule2-322 are suggested by these facts. Permissive motion to dismiss for failure to state a claim upon which relief can be granted is optional as a preliminary motion or may be filed in the Answer to the Complaint. Rule 2-322(b).

Adam will be required to file an answer in accordance with Rule 2-321 and rule 2-323. The answer should include the affirmative defense of contributory negligence on these facts in accordance with Rule 2-232(g)(6). Adam should file a counterclaim against Carl per Rule 2-231 in conjunction with his answer, although a separate suit filed beyond 30 days from the date his answer is due is permissible. A counterclaim filed beyond the time for answering the complaint is open to a Motion to Strike for late filing. Rule 2-322(b). Adam is also required to file an information Report if the disagrees with anything contained in the Plaintiff's Information report or will file a counterclaim per Rule 2-323(h).

B-2 Answers to interrogatories filed with a complaint are due within 15 days after the date on which defendant's initial pleading or motion is required, whichever is later, per Rule 2-421. In this case within 45 days of service of the complaint.

C-1 The new information should prompt Carl's attorney to file an amended complaint bringing in Ben as a codefendant. This information indicates that Adam was the agent of Ben at the time of the accident. Amendments are permitted per Rule 3-341(a) and(c)(6) to add a party without the consent of the defendant. Carl may add a party without the consent of Adam or leave of court under these rules.

D-a Not if it's prepared in anticipation of litigation or for trial – it is a question of fact – if disputed the issue is decided by trial judge following an evidentiary hearing *Kelch v. Mass Transit*, 287 MD 223,411 A.2d 449(1980). Must be discoverable under 2-402(a).

D-b Yes, but only on showing that the material is discoverable under Rule 2-402(a).

D-c Yes, under Rule 2-401(b)

D-d Only experts expected to be called at trial without meeting. 2-4-2(c) requirements.

QUESTION 10

The Applicant should raise at least three (3) points in the Memo: 1) The term in bold type should raise the issue that this is a contract of adhesion since it's a take it or leave it matter for parents signing the Agreement to enroll or re-enroll their students in the school. 2) The language with regard to cancellation and the damages for cancellation after the given date should trigger the liquidated damage clause. Applicants will have to discuss whether it is a legitimate liquidated damages clause or whether it is, in fact a penalty. 3) Finally, the issue of a duty by Addison to mitigate damages is also raised.

Contracts of adhesion are not void per se. A Court will find a contract of adhesion unenforceable only if it is unconscionable. An unconscionable contract involves extreme unfairness made evident by 1) one party's lack of meaningful choice, and 2) contractual terms that unreasonably favor the other party. The Barnes' were not required to enroll their child at Addison School and there was an "escape clause" put into the Agreement for their benefit. Had they not wanted to enroll, they simply needed to let officials know before May 31, 2009 and they would have incurred no financial liability. Thus, there is no indication that this contract of adhesion should be unenforceable.

Liquidated damages have been defined as a specific sum stipulated to and agreed upon by the parties at the time they entered into a contract, to be paid to compensate for injuries in the event of a breach of that contract. Whether a contract provision is a penalty or a valid liquidated damages clause is a question of law. The burden of proof would be on the Barnes' as the breaching party and as the party seeking to invalidate the clause. The Court is to view the clause at the time of contract formation to judge the reasonableness of a liquidated damages provision. Liquidated damage clauses have three essential elements, to wit:

1. Providing clear and un-ambiguous terms for a certain sum.

2. The reasonableness of the compensation for the damages anticipated by the breach.

3. Intent of the parties (whether it was intended to be an agreed amount of damages in case of breach or a penalty.)

Since it is viewed at the time of contracting, and in light of the specific language stating that it would be difficult to determine actual damages, the clause should probably be upheld as a valid liquidated damages clause.

The larger question concerns whether, in the face of the valid liquidated damages clause, there is a duty to mitigate damages. Under normal contract law where one party breaches, the other party is required by the "avoidable consequences" rule of damages to make all reasonable efforts to minimize the loss. Mitigation of damages helps to determine the proper amount of damages resulting from a breach of contract. It is part of the law of court assessed damages.

Liquidated damages differ greatly from the concept of mitigation of damages. Where the parties to a contract have included a reasonable sum that stipulates damages in the event of breach, that sum replaces any determination of actual loss. Thus, once the court has determined that a liquidated damages clause is valid, it need not make further inquiry as to actual damages. Thus, the facts that the school did nothing to try to fill the space or the fact that it actually filled more spaces than budget projections called for, are irrelevant in as much as there is no duty to mitigate damages.