

## **FEBRUARY 2012 MARYLAND BAR EXAMINATION QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

In order to assist the person wishing to prepare for the essay portion of the Maryland Bar Examination or to review their examination, the State Board of Law Examiners prepares a Board's Analysis and selects Representative good Answers for each essay question given in each examination. The Board's Analysis and the Representative Good Answers are intended to illustrate to potential examinees ways in which essay questions are analyzed by the board and answered by persons actually taking the examination. This material consists of three parts.

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

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

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

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**QUESTION 1**

On March 1, 2011, Harry was driving from his home in Calvert County, Maryland, to his workplace when his car was struck by a vehicle operated by Derick, who was intoxicated. The collision occurred in St. Mary's County, Maryland. Harry was transported to a shock trauma facility in Prince George's County, Maryland, where he remained conscious until the following day, and then lapsed into a coma. On March 5, 2011, Harry died as the result of injuries received in the collision.

At the time of his death, Harry had been married to Wanda for sixteen years. Harry and Wanda had one child, Carla, who was fifteen years old at the time of Harry's death. Wanda's child from a prior marriage, Charlie, who was seventeen at the time of Harry's death, also had resided with Harry and Wanda since their marriage. Harry also had another child, Curt, from a prior non-marital relationship, who was seventeen years old at the time of Harry's death. Harry had regularly paid child support to Curt's mother.

- (a) What civil action(s), if any, may be brought on account of Harry's injuries and death, and by whom?
- (b) When must any such action(s) be commenced?

**REPRESENTATIVE ANSWER 1**

A.

Derick may be sued by Harry's estate for his negligence and by his wife and children for wrongful death (which is based upon that negligence).

The facts suggest that Derick was negligent when he struck Harry's vehicle while driving intoxicated. A defendant is negligent if he owed a duty of care to the plaintiff, he breached that duty, his breach actually and proximately caused injury to the plaintiff, and that resulted in damages. That Derick was intoxicated while driving is a strong indication that he will be found to be negligent, breaching his duty of care of a reasonable driver, which actually and proximately caused Harry's injuries. Because tort actions (except for defamation) survive a potential plaintiff's death in Maryland, Harry's estate may sue Derick for his medical expenses and pain and suffering incurred after the accident.

In Maryland, a defendant who wrongly causes the death of another may be sued for wrongful death. If Derick's negligence is established, then under §3-901(e) Derick is liable for causing the wrongful death of Harry. Pursuant to §3-904, Maryland allows primary beneficiaries of a decedent to maintain an action for wrongful death, which includes the decedent's wife and children. In the event that there is more than one primary beneficiary, damages are proportioned among the beneficiaries according to the injury each beneficiary suffers resulting from the wrongful death.

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Wanda may sue Derick for wrongful death. As his wife, she is a primary beneficiary of Harry under § 3-904.

Carla may also sue Derick for wrongful death, because she is Harry's child, and is also a primary beneficiary.

Curt may also sue Derick for wrongful death, because he is also Harry's child. That Curt was illegitimate is not relevant to his determination as Harry's child under § 3-901(b). The facts suggest that Harry acknowledged Curt to be his son; if he did so openly and notoriously, then Curt may maintain an action per § 3-904(h)(2)(ii).

Charlie will likely not be able to sue Derick for wrongful death. Though he seemed to have maintained a parent/child-type relationship with Harry, he was not biologically related to Harry. Though he was dependent upon Derick for the majority of his life, this would only qualify him as a secondary beneficiary under § 3-904(b), and he may therefore only maintain a cause of action against Derick if there are no primary beneficiaries. Unless Harry adopted Charlie, Charlie may not maintain a cause of action.

B.

The statute of limitations in Maryland for torts is three years. Therefore, an action for negligence arising out of the car accident (e.t., one brought by Harry's estate) must be brought by March 1, 2014.

The cause of action for wrongful death accrued on Harry's death, however, and therefore may be brought by March 5, 2014, pursuant to § 3-904 (g).

**REPRESENTATIVE ANSWER 2**

A.

The following civil actions may be brought against Derick:

A wrongful death action may be brought by the spouse, parent or child of a deceased person. Here, Harry was "married to Wanda for sixteen years." And had "one child" together, "Carla". As such, both Wanda and Carla may bring a wrongful death action.

A child from outside of a marriage may bring a wrongful death action provided that they either have been judicially determined to be the child of the father, or if the person has otherwise acknowledged that the child is theirs. Here, Curt is a child from a "previous non-marital relationship" to whom Harry "regularly paid child support" open and notoriously. As such, Curt has a cause of action against Derick for wrongful death as well.

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A child of a spouse that has not been officially adopted by a party may only bring a wrongful death claim provided there are no statutory beneficiaries and they are substantially dependent on the deceased for support. Here, although Charlie “resided with Harry and Wanda,” he was “Wanda’s child from a prior marriage.” Because Wanda, Carla, and Curt are able to claim wrongful death, Charlie will not be able to initiate a wrongful death action on his behalf.

A survival action may be brought by the estate of the deceased, through its personal representative, for damages that occurred prior to the death of the party. Here, Harry “was transported to a shock trauma facility,” where he “remained conscious” for a day before “lapsing into a coma .” Harry’s estate may recover damages including pain and suffering and medical expenses from prior to Harry’s death.

B.

Both a wrongful death and survival actions must be brought within the three year statute of limitations for each claim. Here, the survival action accrued on March 1, 2011, and a claim must be brought prior to March 1, 2014. The wrongful death action accrued on March 15, 2011, and the claim must be brought prior to March 5, 2014. The forgoing applies to Wanda.

A person under a disability extends that time for filing a claim. Here, Carla is “fifteen years old” as of Harry’s death, and Curt is seventeen as of his death. Each will have three years upon reaching their 18<sup>th</sup> birthday to initiate a wrongful death action against Derick. However, it is best that their actions be brought concurrently with Wanda.

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**QUESTION 2**

Attorney Adam is newly admitted to the bar. He opened his office as a sole practitioner and paid for an advertisement in the local phone book to attract clients. He also distributed fliers around town stating he will provide a gift card to any person who referred a client who actually retains Adam as counsel.

The ad in the phone book stated that Adam studied employment law in law school and has completed internships with the State Department of Labor. The ad stated that this experience is “invaluable” and gives him a “definite” edge in employment law cases.

On Tuesday, Adam’s first consultation is with Beth. Beth had a dispute with a co-worker at Store, her place of employment, and was terminated. She believes this was an illegal termination and wants Adam’s help. Beth is unemployed now and has very limited income. She blames the co-worker, who was also fired. Adam obtained all the necessary information, set up a payment plan for Beth and agreed to take her case against Store.

Adam had a consultation later that same day with Cynthia. She is the co-worker from Store with whom Beth had the dispute. Cynthia is from a wealthy family and informed Adam that she could write him a blank check to resolve this matter and get her job back. She believes this was a wrongful termination. Cynthia blames Beth for everything. Adam obtained all the necessary information from Cynthia and agreed to take the case against Store. Adam told her that his internship with the Department of Labor had given him some good “connections” and that he would be able to get her job back for her.

Cynthia paid Adam a three thousand dollar (\$3,000) retainer which he immediately deposited in his attorney trust account and decided to start work on the case on Monday. The next day, prior to doing any work on the case, Adam realized that he was late on his rent and electric and wrote a check to “Cash” out of his trust account and paid his past due bills.

A month later, Beth found that Adam was representing Cynthia and she became very upset. Beth then contacted the Attorney Grievance Commission. The Commission, in addressing Beth’s complaint, decided to review all Adam’s actions mentioned in the facts presented.

**What concerns, if any, may the Attorney Grievance Commission raise regarding Adam’s conduct? Analyze fully.**

**REPRESENTATIVE ANSWER 1**

Adam has violated a number of the rules of the Maryland Rules of Professional Conduct and is likely subject to an adverse action, including a disciplinary action, a suspension, or debarment. Below are various concerns likely to be raised by the Attorney Grievance Commission regarding Adam's conduct.

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(1) Under the Maryland Rules of Professional Conduct, attorney advertisements must be truthful. An attorney may not make claims promising a particular action, without disclaiming that individual results will vary. Moreover, an attorney may not make comparisons to other attorneys in his statements. Here, Adam's advertisement in the phone book may be violative of the rules as it describes him as being "invaluable" and giving him a definite "edge" in employment law cases. This may be construed by the Commission as unnecessarily comparing himself to other attorneys. Adam is permitted under the rules to mention his background, including that he studied employment law in law school, so long as he does not hold himself out as a specialist.

(2) The Maryland Rules also prohibit in-person solicitation of legal services, except to close family and close professional/personal contacts (and even this is limited by the mental state of the potential client.) Here, Adam is in violation of the rules against in-person solicitation by handing out fliers around town.

(3) A Maryland lawyer may not offer financial incentives for referrals. Here, Adam's flyers, in addition to violating the rule against in-person solicitation, violate the Maryland Rule against the provision of compensation for referrals.

(4) Under the Maryland Rules a lawyer is generally not permitted to pay a client's expenses, except in the case of a contingency fee or an indigent client. Here, however, Adam's agreement to set up a payment plan for Beth is likely agreeable with the Commission and is not violative of any rules.

(5) Upon meeting with Beth, Adam already owed Beth a duty of client confidentiality and a duty of loyalty. Moreover, upon agreeing to take Beth's case, Beth became Adam's client. Thus, in even contacting Cynthia, Adam has violated the Maryland rule against contact with an unrepresented third party. A Maryland attorney in contacting a third party may not act disinterested and the only communication he may have is to advise the third party to seek independent counsel. While Beth's case may ultimately be against the store and not against Cynthia, her firing was a direct result of a dispute with Cynthia. As such, Cynthia is certainly an adverse party and Adam may not have any contact with her.

(6) Under Maryland law, a lawyer owes a prospective, current, and former client the duty of confidentiality. Adam may have violated his duty of confidentiality in speaking with Cynthia and discussing his conversation with Beth. While we do not know from the facts, if Adam disclosed any of his conversation with Beth in his conversation with Cynthia, he has violated his duty of confidentiality to Beth.

(7) Adam's promise to Cynthia that he will "be able to get her job back" reflects poorly on his character as it is a promise he is certainly unable to keep. A lawyer may not make such untruthful representations to a client. This extends to advertisements, where a lawyer must disclaim in any "promise" that individual results will vary.

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(8) A Maryland lawyer may agree to represent two clients with a potential conflict if (a) he reasonably believes he could provide competent legal representation; (b) the interests of one

client are not adverse to another; (c) he advises both clients to seek independent counsel; and (d) both clients agree in writing to the representation. However, where the client's interests are adverse or where the representation of one client would be limited by the attorney's relationship with another client, a third party, or his personal interests, he may not take that representation. Here, Beth and Cynthia were involved in a conflict that resulted in the termination of both of their jobs. The conflict was the cause and proximate cause of their firing, as we are led to believe in the facts. As such, Adam will be unable to provide competent legal representation to both Beth and Cynthia.

(9) Finally, Maryland law prohibits the comingling of client funds and personal funds, and requires that a client trust account meet certain standards. Adam was correct in depositing the entirety of Cynthia's retainer into the client trust account. Under normal circumstances, he may withdraw from the retainer amount after that work is actually completed. Here, Adam has made a cash disbursement from his client trust account for personal expenses. This violates the rules of professional conduct. A Maryland lawyer may not take a cash disbursement from a client trust account.

**REPRESENTATIVE ANSWER 2**

The Md Rules of Professional Conduct (RPC) will govern Adams actions as reviewed by the Attorney Grievance Committee.

Competence. The RPC requires an attorney to have a minimal level of competence in order to take on a clients case. Here, A was "newly admitted to the bar" and while this does not necessarily mean he was incompetent, there may be a question as to his ability to competently represent clients. His experience with the State Department of Labor may help inform any decision regarding competence.

Advertisements. The RPC prohibit an attorney from stating that they are "specialized" in any way, however attorneys may include in the ads an area of practice. Here, A stated that his experience with the Dept. of Labor "gives him a definite edge in employment cases. This is perilously close to claiming a specialization which would violate the RPC.

Referrals. Attorneys are prohibited by the RPC from giving compensation in return for referrals. Here, A delivered flyers that stated "he will provide a gift card to any person who referred a client who actually retains Adam as counsel." This clearly violates the RPC.

B's Fees. The RPC states that Attorney's fees must be reasonable under the circumstances. Here, B has "very limited income" but A "set up a payment plan" for her. Without more information it is impossible to tell if the fees were reasonable, however simply because B had very limited income does not prevent A from taking her on and charging reasonable fees.

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Duty of Loyalty. An attorney owes fiduciary duties to his/her client's. Here, A takes on B as a client who "blames a co-worker" for her wrongful termination and agrees to take on her case.

Later that same day A meets with the co-worker C "who blames B for everything." Taking on this type of clearly adverse case violates A's duty of loyalty to B.

Conflict of Interest. The RPC prohibit an attorney from taking on two or more clients whose interests are or may become adverse in the same or future cases. Here, as stated above A has taken on two clients whose interests are or probably will become adverse. This conflict of interests violates the RPC. He should have declined to hear C's information as soon as he became aware of the conflict and encouraged her to seek independent counsel.

Guarantee. The RPC prohibits an attorney from making guarantees of success to clients. Here, A stated to C that his "good connections" at the Dept. of Labor would ensure that C "would be able to get her job back." This guarantee violates the RPC.

Duty of Candor to C. The action described above in the guarantee section may also violate the duty of candor since it is dishonest to guarantee an outcome in a case.

Mixing Funds. The RPC requires that an attorney may not collect fees until he/she has performed the work. In the case of a retainer the funds must be kept separate from attorney funds and only accessed when earned. Here, A placed C's money in his attorney trust account and then accessed them the next day in order to pay for his own rent. This action violates the RPC.



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**QUESTION 3**

While driving her marked police car in Glen Burnie, Maryland, Officer Patterson observed a vehicle driving at a high rate of speed. Officer Patterson activated her emergency equipment and pulled the vehicle over. The vehicle was owned and driven by Curlie. Larry was in the front passenger seat while Moe was in the backseat. Officer Patterson informed Curlie that she had stopped the vehicle for speeding and then asked Curlie for her license and registration, with which Curlie complied.

While Officer Patterson ran a license check, her partner, Officer Donald, a trained canine officer ordered everyone out of the car. Then Officer Donald and his certified drug detection dog, Fido, began scanning the vehicle. At that point, Moe began to run away. Officer Donald and Fido pursued Moe down the street and eventually tackled him two blocks away. At that point Fido made a positive alert as to Moe's person, however, when Officer Donald searched Moe he could not find any drugs. Officer Donald then handcuffed Moe and told him that he was "not under arrest at this time" and that he had handcuffed Moe for both the officer and Moe's safety. Before Officer Donald, Fido and Moe returned to the scene of the traffic stop, Officer Patterson searched the car and recovered a clear bag which contained numerous vials of suspected crack cocaine under the front passenger seat.

Officer Patterson informed Officer Donald of her discovery and then told Larry, Moe and Curlie that they were all under arrest for possession of a controlled dangerous substance and possession with the intent to distribute a controlled dangerous substance. At that point, Larry yelled out "that stuff isn't mine—its Moe's!" In response, Moe yelled at Larry by saying "you fool, they found nothing on me, now I'm going to do time because of your big mouth!" Moe was then charged with possession of a controlled dangerous substance and possession with the intent to distribute a controlled dangerous substance.

You are the Assistant State's Attorney assigned to analyze the case. Moe's attorney has filed a motion to suppress all evidence obtained from the scene. **Discuss fully how you believe the Court will rule on each issue?**

**REPRESENTATIVE ANSWER 1**

The stop of C by Officer P was a lawful stop and not pretextual because Officer P "observed C's vehicle driving at a high rate of speed." Even in a routine traffic stop, a police officer can get everyone including the passengers out of the vehicle. A scan by a police dog during a traffic stop is lawful as long as it is not unreasonably long. It appears from the facts that Officer D and his dog began scanning the car as soon as Officer P was checking C's license. So the stop will likely be deemed o.k.

At the time M ran away, there was no probable cause of any wrongdoing by anyone including M. M running away did NOT give the officers probable cause because M was a passenger in the car, there was no indication that he had in fact done something wrong, and because he could have been running away because he was afraid of dogs or needed to go to the bathroom or some other

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valid reason. There was no basis for D to stop M. While officers may do a terry stop and frisk for officer's safety, there was no indication that M had done anything to make D fear him.

It did not matter that D said that M was "not under arrest" because it is likely that M felt he was not free to leave having just been tackled by D and handcuffed. While police need to give arrested people the Miranda rights, no one was interrogating M or L at the time they blurted out the statements. Thus, M and L cannot claim that their 5<sup>th</sup> amend rights have been violated. Also, M has no standing to claim 4<sup>th</sup> amend rights for L.

I think the judge will allow all the drugs found in C's car because M has no standing to object to the search of C's car. The judge will likely find that all the evidence against M is suppressed due to "fruit of the poison tree" rule because he should not have been arrested by D in the first place when he started running.

**REPRESENTATIVE ANSWER 2**

Traffic stop

Police may make a stop of a vehicle when it violates the traffic laws. Here, it appears that Patterson properly stopped Curlie's car because she "observed a vehicle driving at a high rate of speed." The law allows police to scan a vehicle for drugs so long as it doesn't unnecessarily prolong the purpose of the traffic stop. Here, it appears that the Officer Donald and his K-9 scanned the car at the same time as Patterson was dealing with the traffic stop. The court will likely find that the stop is a valid traffic stop

Search of the car

The 4<sup>th</sup> Amend protects against unlawful searches and seizures. In order to search Curlie's car, Patterson needed a warrant or probable cause to search under the automobile exception. Here, Patterson had neither. Although the law states that a K-9 sniff is probable cause that there are drugs, the dog did not finish sniffing Curlie's car because Donald and the dog stopped to chase after Moe who started to run down the street. In fact, the dog never finished sniffing drugs. The facts state that Patterson just searched the car on her own before Donald and the dog came back to the scene. Thus, the search of the car is unlawful. However, here, the judge will allow the drugs against Moe because Moe does not have standing to object to the search of Curlie's car.

Moe's statements

The 5<sup>th</sup> Amend protects against self-incrimination. Whenever police have someone in custody they must give the person the Miranda warnings. Here, Moe was in custody even though Donald said he wasn't because Moe was handcuffed and not free to leave. However, Donald did not compel any statements from Moe. Moe was responding to Larry when he yelled "that stuff isn't mine—its Moe's!" Both Larry and Moe's statements were voluntary not compelled and the 5<sup>th</sup> Amend does not apply. The court will, however, find that Moe's statement that "they found nothing on me, now I'm going to do time because of your big mouth!" will be suppressed because the police's arrest of Moe was unlawful because they did not have probable cause to arrest Moe. The Supreme Court held that you can get passengers out of the car, but you cannot detain them unless you have reasonable suspicion that they have done something. The police did

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not have reasonable suspicion that Moe did anything so they will not be able to use his statement against him.

**QUESTION 4**

Freddy, a three year old orphan, is a resident at Orphan's Home ("Home"), a private orphanage in Howard County, Maryland. Home entered into a Foster Care Placement Contract ("Contract") with Alice and David, her husband. Under the Contract, Alice and David promised "to receive a foster child into their home and to be responsible to meet his or her physical, social and emotional needs." The Home paid a stipend to Alice and David for Freddy's care. The Home permitted Alice and David (and others at the discretion of Alice and David) to drive Freddy in their motor vehicle. Their permission was subject to the requirement of having a valid, appropriate driver's license and the minimum insurance coverage under Maryland's insurance law. Alice and David were asked to complete a short questionnaire and indicated on the questionnaire that they had a valid appropriate license and the minimum insurance required under Maryland law. The Home made no further inquiry. In fact, David's license to drive was restricted to "employment only" as a result of multiple violations of the Maryland motor vehicle law.

At various times, the Home was active in supervising Freddy's care. For example, shortly after Freddy's placement, the Home learned that Alice and David were using inappropriate disciplinary methods. Because the methods violated State Regulations and the Contract with Home, representatives of the Home met with Alice and David and counseled them on proper disciplinary methods.

In December of 2010, David, an employee of Nightwatchman Company, was driving Freddy home from day care in his company owned "take home" vehicle. David's son, Thomas was in the back seat with Freddy. David was not on duty at the time, nor was he responding to any emergency or other request from his employer. During the trip home, David was momentarily distracted when Freddy bit Thomas on the arm. David glanced in the rear view mirror to see what was happening, crossed the center line and hit an oncoming car. Thomas and David were both severely injured as a result of the accident. A Guardian Ad Litem was appointed to represent Freddy and on Freddy's behalf sued David, the home, and Nightwatchman Company, as a result of the accident in which Freddy was injured.

**Examine fully the liability that David, the Home, and Nightwatchman Company may have for Freddy's injury.**

**REPRESENTATIVE ANSWER 1**

Negligence requires duty, breach, causation, and damages. Here, the Guardian ad litem is entitled to bring an action under negligence on Freddy's behalf under a negligence theory against the defendants as discussed below.

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David:

Negligence is defined above. David owed a duty to Freddy to drive carefully under the circumstances. David breached his duty when he crossed the center line when he was looking to see what happened and hit the oncoming car, but David is likely to defend by arguing that he was driving reasonable under the circumstances because he was distracted by Freddy biting his son, Thomas, in the back seat.

David may try to argue contributory negligence because Freddy bit Thomas' arm which distracted him, but will not be successful because Thomas was 3 years old and is judged according to a reasonable child, and is unlikely to be found to be contributorily negligent based upon that standard.

It seems that David is likely to be found liable for Freddy's injuries.

Home:

Negligence is defined above. Home owed a duty to Freddy because of the special relationship they had with him based upon their supervision of his care, and the fact that they were active in supervising his care, and were aware of problems that Alice and David had in caring for Freddy.

It does NOT seem that Home violated its duty in such away that caused Freddy's damages in the car accident. It could be argued that they had a duty to further supervise the care because of the knowledge of the problems with David and Alice, and should have discovered David's prior violations and restricted license, and not allowed David to drive Freddy, but this seems too attenuated to be a proximate cause of Freddy's injuries.

So, Home is likely to not be liable for Freddy's injuries.

Nightwatchman Company:

Under respondeat superior, an employer can be held vicariously liable for the torts of an employee committed within the scope of employment.

A frolic is a substantial deviation from the scope of the employee's duties. Here, it is unlikely that the Nightwatchman Company will be held liable for Freddy's injuries because David was driving home and was not on duty, despite being in a company "take home" vehicle.

David will be found to be acting outside the scope of employment, and the Nightwatchman Company will not be found vacariously liable.

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Damages:

Freddy's guardian ad litem will be able to recover compensatory damages for the injuries sustained in the car accident from whoever is found liable.

Punitive damages are not applicable here because there was no extreme and outrageous conduct.

Freddy may be able to seek contribution or indemnification from Home, but is not likely to be successful.

**REPRESENTATIVE ANSWER 2**

Negligence requires a finding of duty breach causation and damages.

David

Negligence. David owed Freddy a duty to drive carefully and pay attention. This duty was breached when he was momentarily distracted and crossed a center line while driving causing an accident.

Nightwatchmen-

Respondeat Superior holds that an employer is responsible for the actions of their employees committed in the scope of their employment. Here, the facts state that David was an employee of Nightwatchmen. In the scope of employment is determined according to whether the action was for the purpose of furthering the employer's goals and interests. Here, David driving home from work was not within his scope of employment even though, the car was a take home company car. As a result, Nightwatchman may not be liable to Freddy for David's negligence.

However, court have found that in case of some types of intentional torts, committed by the employee, the employer may be found liable for the employee's torts even if the tort was committed outside the scope of employment.

Home

Respondeat superior states that an employer may be liable for the torts of the employee when acts are conducted in the scope of employment. However an employer is not vicariously liable for the torts committed by independent contractors. An independent contractor is determined by the level of authority and control the "employer" has over the "independent contractor". Less control by the "employer" would typically result in an independent contractor. Here, Alice and David entered into an agreement with Home, to provide care for Freddy and meet his needs." Home permitted Alice and David to drive Freddy, as could other at Alice and Freddy's discretion, and home required that A and D have a driver's license. Home also paid A and D a stipend for Freddy's care. Home also at time supervised Freddy's care. Here, because A and D

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had a majority of control over Freddy, and Home merely supervised at times, A and D would be independent contractors and H would not be liable.

Negligent supervision can be found where an employer negligently supervises. Here, Home can be sued for trusting A and D with Freddy's supervision. However this might not stand because Home did supervise Freddy and A and D from time to time, did require a proper driver's license, and minimum insurance coverage.

Negligent entrustment can be found where there is a negligent giving of trust to a party. Here, although Home had a questionnaire that to prove that A and D had valid driver's licenses, minimum insurance coverage, and did check in on Freddy, Home made no further inquiries into David's license to drive and failed to discover that his license was restricted to employment only as a result of the multiple violations of the Maryland Motor vehicle law.

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**QUESTION 5**

Shane is an engineer working in Ocean City, Worcester County, Maryland. In April 2010, he was hired by Rich to design a windmill energy system to be installed on land Rich owns next to his Ocean City Boardwalk business. Shane completed the design in a timely manner and the windmill was installed in accordance with the design specifications and local zoning requirements. Rich then paid Shane pursuant to their contract.

Six months after the installation of the windmill, a hurricane hit Ocean City. During the storm, the windmill collapsed onto Rich's business, causing extensive damage to the structure itself and breaking Rich's leg. Rich filed a negligence suit against Shane in the Circuit Court for Worcester County, seeking recovery for the damage to his business premises, lost profits while his business was closed for repairs, and medical expenses related to his broken leg.

During his testimony in a bench trial in February 2012, Rich recounts the details of a conversation he had with Shane approximately one month after the suit was filed. Rich testifies that Shane offered to settle the matter for \$20,000, and he rejected Shane's offer. Following the introduction of his medical records and accompanying bills, Rich also introduces evidence of the fact that Shane paid the portion of his hospital bill which was not covered by Rich's health insurance. Rich had not asked Shane to do this, and only became aware that it had been done upon leaving the hospital. Finally, after introducing the design plans for the windmill, Rich introduces evidence that approximately two months after the windmill collapsed, Shane designed another windmill of similar size, description, and purpose, but changed the stability and storm-related features of the design.

During Rich's cross-examination, Shane's attorney asks whether Rich was convicted in June 1995 in the District Court for Worcester County, Maryland, of malicious destruction of property having a value of less than \$500, and whether Rich pleaded *nolo contendere* to possession with intent to distribute methamphetamine in the Circuit Court for Frederick County, Maryland, in May 2009.

During Shane's testimony, the police report from the windmill-collapse incident is offered and introduced into evidence. The report contains the following observation from the responding police officer, "A neighboring property owner stated that Rich appeared not to notice that the windmill was falling towards him because Rich was sending a text message on his cell phone and drinking a beer while driving a golf cart." On cross examination, Rich's attorney asks Shane, "Well, I suppose you don't care about the quality of your designs because you've got insurance, don't you?"

**Identify any potential evidentiary objections either party should have made, what the appropriate ruling would have been, and the basis for the ruling.**

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**REPRESENTATIVE ANSWER 1**

Generally, offers of settlement and attached statements are inadmissible to prove liability. Maryland however has a special exception for settlement offers and guilty pleas. However, in this case, Shane's verbal settlement offer of 20,000 would be highly prejudicial to the court and would mostly follow the course of the federal rule which prohibits its inclusion.

Generally, offers to pay medical bills are inadmissible as evidence. Related statements generally are admissible and can be severed from the offer. Evidence that Shane paid the medical bills for Rich is inadmissible to prove guilt. The highly prejudicial nature of the evidence makes it irrelevant to the case at hand.

Subsequent remedial measure are inadmissible as evidence. The reason behind this is not to discourage businesses from making products safer by threat of litigation. Thus, the evidence that Shane built another windmill with new safety features would be inadmissible to prove that he was negligent in his previous design.

Prior Convictions are only admissible to impeach if they are infamous crimes that have occurred within the last fifteen years. The conviction must be from a final judgment or nolo contendere. In this case, the malicious destruction of property would not come in because it is too distant and does not fall within the absolute fifteen year requirement. The drug charge from 2009 will be admissible as evidence because drug distribution is considered an infamous crime under Maryland law and it occurred within the 15 year limitation.

Generally, police reports are inadmissible as exceptions to hearsay. Hearsay is defined as an out of court statement offered for the truth of the matter asserted. Both the police report and the statement it contains constitutes hearsay. So not only will the police report have to be admitted via a hearsay exception, but the statement will as well. Police reports do not fall into the public record or business record exceptions. Therefore, the statement by the neighbor will have to be admitted using other methods. The neighbor would most likely have to testify concerning the events as an eyewitness because the statement does not fall into any exception to the hearsay rule.

Liability insurance cannot be admitted to prove fault. The statement by the prosecution should have been objected to because it is irrelevant to consider the existence of liability insurance when determining guilt. It is highly prejudicial to introduce its existence as evidence of fault concerning the crime charged. The opposing counsel should have raised an objection.

**REPRESENTATIVE ANSWER 2**

Generally, all evidence is admissible in the Courts discretion if relevant, with limited exceptions.

Hearsay-are out of court statements offered in court for the truth of the matter asserted. Here, Rich seeks to offer into evidence a conversation between him and Shane regarding settlement a month after the suit was filed. This is hearsay, however, an exception may apply.



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Offers to Settle/Compromise-

Shane's attorney should object to Rich's testimony to which he recounts "the details of a conversation he had with Shane approximately one month after the suit was filed... Shane offered to settle the matter for \$20,000 and he rejected the offer."

Simply because the offer was rejected, does not mean it can come in to show that Shane was liable or guilty in any way.

There is a public policy reason that wants to encourage settlement and offers of compromise and prevent such offers to be used against a party at trial.

This objection by Shane's attorney should be sustained.

Paying Medical Bills-

Similarly, an offer to pay medical expenses cannot be used against a party later to show liability or guilt. However, sometimes if there is a statement of fact attached to the payment of bills, that statement can be used factually. Here, Shane paid a portion of the medical expenses for Rich, which was not covered by Rich's insurance. Rich only became aware of this when he was leaving the hospital. Thus, the act of paying the medical bills cannot be used against Shane.

Shane's attorney should object to the testimony and the objection should be sustained.

Subsequent Remedial Measures-are another exception the hearsay rule, which prohibits a party from testifying to remedial measures taken subsequent to an injury/act.

Here, Rich introduces evidence that two months after the windmill collapsed, Shane designed another windmill of similar size and purpose, but changed the stability and storm related features. The public policy reason is to encourage safety precautionary measures taken after an injury occurs and not to hold those measures against a party to show guilt. Thus, Shane's attorney should object to Rich's testimony and the objection will be sustained.

Impeachment by prior bad acts can be used in a trial if the crime is a crime of dishonesty or inherently dangerous felony. The crime had to of happened within 15 years and a number of factors are taken into consideration such as the nature of the crime, if there was incarceration, how long, how closely related was the prior crime to the one charged.

The malicious destruction crime should not be admitted into evidence because it left a loss of less than \$500 and was not a crime of dishonesty or felony. It also occurred in 1995 which is more than 15 years old.

Additionally, it may prejudice the jury .

The nolo plea to possession of meth in May 2009 may be admitted because although it is a plea, it is within the allotted time frame and satisfies the other requirements for bringing such crimes into evidence.

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However, Rich's attorney may fear that this will prejudice the jury and not be probative.

The court should admit the meth possession from 2009 and should suppress the 1995 conviction.

The police report is hearsay- it is offered for the truth of the matter asserted.

Public records exception may apply because a police report is kept in the ordinary course of business and made by agencies all the time such as police departments. Such reports were made by an officer on duty who was investigating the incident.

Rich's attorney will say that the report will prejudice the jury-because it may show that he is careless by "riding his golf car on a cell phone drinking beer."

However, it may be argued that it is hearsay within hearsay because it was not going to the officer's personal knowledge, but rather, "a neighboring property owner said..."

The report may be inadmissible evidence.

The insurance remark made by Rich to Shane is admissible to show that a party who has insurance is guilty or careless. It cannot be used against him and this evidence will be suppressed.

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**QUESTION 6**

In 2005, John, David and Sarah formed properly a Maryland limited liability company (“LLC”) to own and operate an apartment project located in Talbot County, Maryland. Each of them owned an equal interest in the LLC, and David was designated to serve as the managing member. The operating agreement provided that all funds received by the LLC must be held in a federally insured bank account, and annually, those funds must either be distributed to the members in accordance with their member interests or continue to be held as reserve funds for shortfalls in operating expenses and repairs.

To acquire the apartment project, the LLC borrowed funds from Federal Bank. David signed the Loan Agreement for the applicant and borrower LLC, as the managing member, and he completed a personal financial information statement for the guarantor of the loan. On the last page of the Loan Agreement, he signed his name twice on the signature lines; once for the applicant borrower LLC, as managing member and once for the guarantor, as managing member, as follows:

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David, managing member for LLC, applicant

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David, managing member, guarantor

In 2006, David, as managing member, decided to invest the funds earned by LLC with Manmade Financial (“Manmade”). Each year, David would commingle LLC reserve funds together with the operating revenues and invest them both with Manmade. David received a commission of 3% of the profits earned annually by the Manmade account, which commissions he deposited into his personal bank account.

On April 26, 2011, it was discovered that the profits contained in the Manmade account were fictitious, and David reported to John and Sarah that all of the reserve funds for the LLC were lost, as well as that year’s current operating revenues and all anticipated distributions. There were no funds available to pay the upcoming loan payments to Federal Bank, and on May 11, 2011, Federal Bank demanded repayment of the loan from the LLC and from David personally as guarantor.

Distressed at the turn of events, David meets with you, a Maryland lawyer.

**What advice would you give to David regarding his possible liability to the other members, John and Sarah, the LLC and Federal Bank? Explain your reasoning fully.**

**REPRESENTATIVE ANSWER 1**

In general, members of an LLC are shielded from personal liability for the debts and obligations of the LLC incurred by the LLC. An agent or employee of the LLC or member acting within the scope of their authority or in the usual course of business on behalf of the LLC will be so

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shielded. However, a member of manager will be liable to the LLC/members and for breach of fiduciary duties to the LLC and members in their agency capacity or for their tortious acts.

D liability to LLC, J and S

D was a member of the LLC and an agent of the LLC. As such D owed fiduciary duties of care, loyalty, information and obedience to the LLC and also to the other members, J and S. D was also an employee of the LLC as managing member and was an agent in this respect as well. D breached his fiduciary duty of care and loyalty by acting in a manner adverse to the interests of the LLC and J and S. For example, he commingled funds of the LLC and Manmade in violation of the operating agreement's requirements. D also paid himself a commission of 3% from the profits in the Manmade account, which were profits in part of the LLC as well, in violation of his duty of loyalty. Part of these profits should have been reserves for the LLC's shortfalls in operating expenses and repairs and also for distributions to J and S, the other members, in accordance with the operating agreement. D was also paying himself fictitious profits from Manmade, so was in essence lying about the profits of the LLC as well and depleted the LLC's reserves in violation of his fiduciary duties and the operating agreement. D lost all of the LLC's reserve funds, operating revenues and anticipated distributions. D also arguably breached his duty of care by investing in Manmade as it turned out to be a bust, unless he exercised reasonable diligence in making this investment. Lastly, D breached his duty of obedience and information to the LLC and J and S, as he did not follow the rules of his employment and agency, and failed to inform the members of his investment decisions and that it was turning south until it was far too late to remedy the situation.

D will be liable to the LLC for damages relating to the losses suffered by the LLC from D's breach of his fiduciary duties and his breach of the operating agreement, which was a contract between the members of the LLC and the LLC. D will also be liable to J and S in their capacity as members for any distributions they should have rightfully received under the operating agreement but for D's violations.

Note that while MD does not by statute provide for member fiduciary duties of care similar to a corporation, these duties may be imposed on the member's and managers of an LLC by the operating agreement. There is no evidence that the operating agreement so provided, but as discussed, D will be liable on agency principles.

D liability to FB

As D breached his fiduciary duties as described above, he will not benefit from the LLC's limited liability protections. As such he will be personally liable to FB for the repayment of the loan as the LLC is now insolvent. D will also be personally liable to the FB as guarantor of the loan. It is acceptable that D signed the loan both as managing member and guarantor of the loan. A member may guarantee a loan to the LLC in his personal capacity in which case he will not be shielded from personal liability for the loan obligations. In any case, D would be liable even without this guarantee, as explained above. His breach of the duties discussed above was the cause of the LLC's insolvency and inability to pay its loan to FB and FB can recover from D,

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either because of this breach or because of his guarantee. J and S will not be liable to FB and will be protected by limited liability unless there is some evidence of wrongdoing or breach of fiduciary duties on their part.

**REPRESENTATIVE ANSWER 2**

The question here relates to David's personal liability to John, Sarah, the LLC, and the Bank. This is a question about an LLC, a structure in which the Members of the LLC have limited liability - they are not personally responsible for the obligations of the LLC, barring extenuating circumstances, which will be discussed further below.

John and Sarah/the LLC.

Violation of the Operating Agreement: Through his actions, David violated the terms of the Operating Agreement. This Agreement stated that the funds received by the LLC were to be held in a federally insured bank account, and which funds should be annually distributed or held as reserve funds for operating expenses. In investing the funds with Manmade instead of doing the above, and failing to properly retain the funds for making distributions or covering shortfalls, David committed a breach of contract by breaching the Operating Agreement. For this breach, David may be held personally liable for any harm foreseeably caused by the breach to the LLC.

Violation of Member Rights: In a corporate entity, Members may bring a direct action against an individual for his violation of their rights as Members. This can include interference with voting actions, or improperly interfering with distributions. Here, in improperly maintaining the funds, David interfered with the Members' rights to direct the funds of the LLC and to receive distributions pursuant to the Operating Agreement. Although it is generally true that one does not have a right to a distribution, here it is provided for under the terms of the binding Operating Agreement. Thus, John and Sarah may directly sue David in his capacity as managing member for interference with their distribution and voting rights.

Violation of Duties of Care and Loyalty/Self-Dealing: On behalf of the LLC, John and Sarah may maintain a derivative action for self-dealing/conflict of interest transaction, and violations of David's duties of care and loyalty. The damages obtained under this derivative action would go back to the corporation, minus any reasonable litigation expenses.

A conflict of interest transaction is one in which the action is one that would have needed Board approval, and which benefits the individual undertaking the transaction personally. The only way around such a transaction is the Shelter Rule. Either the transaction must be fully disclosed and approved of by a majority of disinterested members (or here, since there are only two other members, they must both approve), or it must be otherwise fair and reasonable. It was not disclosed up front, thus there is a burden on David to show it was fair and reasonable. Since he took a commission off the profits and there was no benefit since the profits were illusory, David would likely have a hard time showing the decision was fair and reasonable. Thus, this constitutes a conflict of interest transaction and John and/or Sarah may sue David on behalf of

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the LLC since they were both Members at the time of the transaction and at the time of suit, with recovery going to the LLC.

Furthermore, David breached his duties of care and loyalty. The duty of care requires a Member to use the skill of an ordinary prudent person in a like situation and similar circumstances in taking actions. Since his actions violated the operating agreement and were not reasonable as they were risky, and involved the improper commingling of funds, David violated his duty of care to the LLC and to John and Sarah. Furthermore, there is a duty of loyalty which requires that one put the corporate entity first above one's own interests and not interfere with the corporate entity's business prospects/expectancies. Here, David's actions put himself first in gaining him a profit off the investment with Manmade, and furthermore led to the LLC's insolvency (since they could not pay off the mortgage as it came due and did not have sufficient assets to pay off that liability). Thus, David violated his duty of loyalty to the LLC and to John and Sarah, and may be held liable.

The Bank.

The question of David's liability to the Bank is one of agency. An agency relationship is one in which the principal and agent have a fiduciary relationship - the principal manifests assent to the agent's actions on his behalf, and the agent consents to the control of the principal and agrees to act on the principle's behalf and for his welfare. When David signed the borrowing agreement, the LLC was a disclosed principle. Thus, generally, only the LLC can be liable. However, there is a question to whether his signing as guarantor - even though it is in his capacity as "managing member" - constituted an agreement to take on personal liability for the loan. Since he had already signed on behalf of the LLC, the Bank may be able to argue that the second signature was in his personal capacity and he provided a personal financial information statement. However, David would likely argue that, since he did so in his capacity as managing member and is shielded from liability under the LLC structure. The Bank would likely win out because the difference in the signature line captions and the provision of a personal financial statement bears an intent to be personal guarantor, and thus the Bank likely can recover from David personally.

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**QUESTION 7**

In February 2011, John purchased an antique Ford Mustang automobile which required a substantial amount of work to restore it to its original condition. John took the Mustang to Buddy's Auto Repair in Terrapin Run, Caroline County, Maryland. Buddy told John that he had extensive experience in restoring antique Mustangs and, based upon this claimed experience, John signed a contract under which Buddy would restore the car on a time and materials basis. Buddy estimated that the work would take approximately nine months and would cost approximately \$15,000. John paid \$2,000 as an advance for the first portion of the work to be performed.

In August 2011, John went to Buddy's shop to inspect the anticipated progress. John discovered that the car had been completely disassembled, the existing paint removed, and the parts allowed to sit outside and rust. No restoration work had been done. John immediately removed the Mustang from Buddy's possession and, upon further investigation, discovered that Buddy had no antique automobile restoration experience whatsoever. John then received estimates which indicate that it will cost at least \$5,000 to repair the damage to the Mustang caused by Buddy. Buddy, claiming that John prevented him from properly finishing the work, has refused to return John's deposit and demanded an additional \$1,000 for work that was done before John retrieved the Mustang.

**John has come to you, a licensed Maryland attorney, and asked for an analysis of any potential claims he or Buddy might possess against one another. How would you advise John? Explain fully.**

**REPRESENTATIVE ANSWER 1**

First, this is a contract for services and therefore dictated by the common law. Under Maryland common law a valid contract is formed when there is a valid offer and acceptance and consideration is offered in exchange. Consideration is the bargained for exchange of a legal detriment or benefit. Here Buddy and John negotiated a contract where Buddy would restore John's antique mustang in exchange for the approximate cost of \$15,000. A valid common law contract must contain a price or a way of determining price at the time of completion. Here an approximate price was stated and John paid \$2,000 in advance for the first portion of the work. There is also no Statute of Frauds claims as the contract was put in writing and signed by John the person to be charged. In addition both parties must have the capacity to contract meaning that they are of legal age and not under duress or coercion and are neither insane nor is the contract unconscionable. Here, neither party suffers from the incapacity to contract. However, there was a material problem with the contract in that Buddy materially misrepresented his abilities. Buddy made false statements of material fact prior to the contract and John used this misrepresentation to make his decision and detrimentally relied upon Buddy's experience. Therefore, while a valid contract was formed it was based on a material falsehood. This is a unilateral mistake as only John did not know of the falsity while Buddy did. Since this unilateral mistake was based on a material falsehood, it would give John a claim to void the contract and grounds to collect

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damages from Buddy. John could collect damages for the repairs to the Mustang in the amount of 5,000. In addition, John may have a claim for any actual damage done to his property while at Buddy's shop the rusted parts, if they were not included in the cost of repairs.

Since the contract was void from the beginning, as it was based on a material falsehood, Buddy's claims that John prevented him from completing the work are unfounded and he is not entitled to any additional recovery. However, so long as Buddy can prove actual damages or costs in the work that was performed, if not offset by the damages then he can recover for the actual work that was performed. Punitive damages are not awarded in contract disputes as the purpose is to restore the plaintiff and not to punish the defendant. However, in addition to contract claims John could raise tort claims and gain punitive damages under a tort claim for misrepresentation or fraud, where there was a material statement of fraudulent fact which was made for the purpose of inducing the hearer to act and reasonable reliance was foreseeable and reasonable reliance occurred and there were damages as a result. Here John would have valid tort claims against Buddy in addition to his contract dispute.

However, if the fact finder determines that the unilateral breach was not based on a material falsehood or misrepresentation, then the breach does not invalidate the contract. While John is still entitled to damages, Buddy would also be entitled to damages as John's actions were an additional breach of the valid contract. A unilateral mistake in general does not void a contract unlike a mutual mistake would. However, here the mistake was based on misrepresentation and not on a genuine mistake or misunderstanding.

**REPRESENTATIVE ANSWER 2**

It is clear that Buddy and John had a contract with one another. Buddy agreed to restore John's Mustang and John agreed to pay Buddy to do so and John signed a contract stipulating that Buddy would complete the work in nine months and would cost approximately \$15,000.00. John is now asking for potential claims he or Buddy might possess against one another.

I would advise John that he likely has a couple of claims against Buddy and warn him that Buddy may have some claims against him. First, John may be able to sue for rescission of the contract because of Buddy's fraud. The overwhelming reason for John's agreeing to the contract terms was because John relied on the alleged experience and expertise that Buddy had in restoring antique Mustang cars (which is what Buddy told him). While Buddy's assertions of expertise were not in writing, it seems clear that a Court would likely allow evidence of the oral conversation to show Buddy's fraud, especially since the terms do not alter or change any of the material terms of the integrated contract language.

Second, John also likely has a breach of contract claim. The terms of the contract indicate that the work will take about nine months and six months later when John went to inspect the progress, the car had been disassembled, stripped of its paint and the parts were outside rusting - no restoration work had even begun. This suggests that Buddy was not complying with the terms of the contract as explained. At a minimum, John would likely have a right to a guarantee from Buddy that he would begin restoration work immediately and perhaps even have the Court



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hold that the initial agreement was only partially integrated and allow both parties to further stipulate to terms necessary to achieving satisfactory resolution of the contract. If the Court does hold that Buddy breached, John may be entitled to money damages, likely expectation damages - the amount needed to restore him to the position he was in prior to the breach. This would likely be the amount of \$5,000+, the amount needed to repair the damage to the car caused by Buddy.

John may also be able to assert a negligence claim against Buddy, suggesting that Buddy had a duty to keep his car in decent shape - at least keep the parts free from outside exposure to the elements - and by leaving the parts outside to rust, Buddy breached that duty (a reasonable person would not leave antique car parts in his/her protection outside to rust) and therefore proximately caused any injury to those parts (but-for his leaving the parts outside, the car parts would not have rusted). If John is able to make a satisfactory claim of negligence, Buddy could be held liable for any damage to the car.

Finally, John may also be able to assert a Conversion claim against Buddy - suggesting that Buddy's transformation of his vehicle makes the vehicle unusable and is contrary to contractual intent and/or went far beyond the purview of the permission granted him. As such, Buddy may have to replace the vehicle altogether. However, I would advise John that this would be unlikely.

Buddy also may have potential claims. First, Buddy could sue John for breach of contract. The contract held that he had until November, at a minimum, to finish the restoration work. In fact, the contract did not stipulate a set end time period and Buddy simply offered John an "estimation" that the work would be finished in nine months. Buddy could suggest that John acted hastily by ending the contract before the time had expired, proving breach. Buddy had until at least November to complete performance. Buddy may sue for specific performance, then, indicating that he has already performed a substantial amount of work on the vehicle however courts are generally unlikely to enforce a contract for specific performance because of the judicial inadequacies of enforcement - but Maryland Courts are more likely than most to allow specific performance as a likely outcome of such a proceeding. Buddy could also simply ask for expectation damages - the amount needed to restore him to the position he was in prior to the breach. Here, Buddy has already indicated that he was out an additional \$1,000 for work done prior to John's retrieval of the Mustang.

Buddy could also sue for trespass since John entered his land and retrieved property from it. While the property did belong to John, if the property is in the care and possession of a third party and that third party has the legal right to possess it temporarily, the owner of the property may not enter the land and take that property without permission, which is what John did here.

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**QUESTION 8**

Alex and Beatrice, lifelong residents of Charles County, Maryland were married on December 1, 1994 at the Charles County Courthouse in La Plata. No children were born of the marriage. Alex and Beatrice were both lawyers at the time of their marriage. Alex has worked as a sole practitioner. Beatrice worked for another law firm as an associate. Alex and Beatrice grew apart emotionally, and Alex left the marital home in January 2010. In January 2012, he contacts you, a Maryland lawyer experienced in family law matters, to assist him in obtaining a divorce. He informs you:

1. That in 2010, Beatrice was terminated by her employer law firm and that she filed an employment discrimination suit seeking damages for lost wages, salary, compensatory, consequential and punitive damages and joint loss of consortium. He tells you that she recently settled that claim for \$550,000.00.

2. He has a race car that is not titled that he and his father purchased just before he and Beatrice were married. The car was a joint restoration effort of Alex and his father during the marriage, and they divided the costs of restoration.

3. He has a boat that his friend has allowed him to use over the last two years. At his friend's insistence, he titled it in his name so that the friend would have no liability while he uses it.

4. He had 100 shares of stock in County Bank that he had before marriage that because of stock splits and stock dividends during the marriage, now total 250 shares.

5. He has personal household goods and furnishings acquired during the marriage currently at the former family residence occupied by his wife.

6. In his solo law practice, he has two pending contingent fee cases on which he has expended about 100 hours which may generate a significant fee if he wins and/or settles the cases.

7. He has a \$2,000 security deposit on his current rental residence which he paid from his earnings as a lawyer.

8. He had a good year practicing law in 2011 and saved \$50,000 which he put into a Certificate of Deposit in his sister's name in anticipation of potential domestic litigation.

**A. Is he eligible for a divorce? Explain your answer.**

**B. How would the Court characterize each of the assets which he discussed with you as being marital or non-marital.**

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**REPRESENTATIVE ANSWER 1**

A. Yes, Alex is eligible for a divorce. There are two types of no-fault divorce grounds in the State of Maryland that Alex may be eligible for at this time. The first ground involves a one year mutual and voluntary separation of the parties. The parties must live separate and apart for at least one year without cohabitation or the chance of reconciliation. However, there is not enough information provided to infer whether their separation was mutual and voluntary, though it does say that "Alex and Beatrice grew emotionally apart." The second no-fault ground has historically been a two year separation in Maryland without the requirement that the separation be mutual and voluntary. However in October 2011, the law changed in Maryland and decreased the two year separation to one year. Since Alex left the home in January 2010 and it is now January 2012, Alex would be eligible for the "new" one year separation (without the mutual and voluntary component) provided that Alex and Beatrice have lived separate and apart for at least one year without cohabitation, even for just one night, and with no hope of reconciliation. Alex may also have constructive desertion claim; however, there is not enough information in this fact pattern to determine whether such a claim exists as a result of the emotional distance between he and his wife.

B.

1. Personal injury lawsuits are typically non-marital. So Beatrice's settlement of \$550,000 would be non-marital. However, Alex may have rights to the loss of consortium claim that would have been filed on his behalf. There may also be an argument that portions of the settlement relating to loss wages and salary would be marital because income generated during a marriage is marital property.

2. Alex purchased the race car before he was married, so it would technically be classified as non-marital. However, Beatrice will argue that any appreciation in the value of the race car during the marriage should be considered marital because of the efforts and financial assistance that Alex put into the race car during the marriage. Thus, the court may find that any appreciation in the value of the race car as it relates to Alex's interest in the race car, is marital.

3. Property obtained during the marriage is generally marital property unless it fits into an exception. Gifts from Third parties are non-marital. Therefore, in order to keep Court from characterizing the boat as marital, Alex would need to show that it was a gift from a third party and thus non-marital.

4. As long as Alex did nothing through research or his own efforts to increase the value of the stock, the Court should characterize the stocks as non-marital. While the stocks did in fact appreciate during the marriage, it was not a result of anything that Alex did but rather a direct result of market forces and should thus be labeled as non-marital.

5. The personal household goods and furnishings were acquired during the marriage and thus the Court will characterize them as marital property.

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6. Income generated during the marriage is the typical example of marital property. Alex generated this income during the marriage through the 100 hours of work which he put into the cases. As such the court will most likely find that at the very least a portion of the contingency fees are marital. It may also depend when the cases are paid out and if the divorce litigation is still on going at that time.

7. Income generated during the marriage is marital property and thus the \$2000 security deposit would be classified as marital property.

8. Beatrice may be able to make an argument that this is dissipation and that the \$50,000 was marital property. Despite being separated since 2010, the parties were still married in 2011 and their incomes would be considered marital property. If it is found that Alex dissipated the \$50,000, it will be treated as marital property.

**REPRESENTATIVE ANSWER 2**

A. Alex is eligible for divorce. Under Maryland Law (as of October), separation for a year (without co-habitation) whether voluntary or involuntary is enough to be able to be granted a divorce on a no fault ground. Prior to October, a one year separation had to be voluntary and a two year separation needed to be involuntary in order to get a divorce. The language "grew emotionally apart" could be an indicator for other fault based grounds, but without further facts regarding the cause of the emotional separation it is unclear if any other ground would be available.

B. Marital property is all earnings made during the marriage and all property jointly titled and all things directly traceable to purchase with marital funds. (there are some exceptions regarding pre-marital items, gifts from outside parties, and certain other earnings). For a divorce, a judge determines what marital property is and then divides it according to equitable distribution.

1. Beatrice's law suit settlement - marital property because it was earned during the marriage, even though it was after the separation (a fact the judge may factor for equitable distribution) it was still during the marriage. Lost wages, salary, and his consortium are definitely due him because these are all payments for earnings (which would have been marital property), but the part of the award (if you can tell on a breakdown of the settlement claim) that goes to punitive damages would not be marital property.

2. race car - non-marital property but some marital; bought prior to marriage with his father, the improvements done during the marriage (presumably paid for with marital property) should be calculated into the marital property.

3. boat - non-marital; given to him as a "gift" so his friend could avoid liability, it is a gift from a third party so it is not marital property

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4. County Bank stocks - non-marital; while the assets did grow from 100 to 250 during the marriage it was due to splits and dividends and no "work" or "effort" was applied by the husband or wife, therefore it is non-marital (unlike the race car increase in value, because it was worked on during the marriage)

5. household - marital; all of these goods and furnishings are in the home were acquired during the marriage and therefore acquired during the marriage

6. pending contingent fee cases - marital; similar to the law suit settlement, all of the work for the cases was done during the marriage and therefore marital property, but again, the judge can see the separation as a factor in the equitable distribution

7. security deposit - marital, he paid for the security deposits with his earnings from his law firm

8. CD in sister's name - marital; even though he put it in his sister's name, the facts still show it as his money earned during the marriage, if it was a true gift, then it would have no longer been his money.

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**QUESTION 9**

Alice and Bob, an unmarried couple, purchased a house together in June 2007 in Baltimore County, Maryland. By agreement, they owned the house as joint tenants in fee simple, and the deed was properly prepared, executed, and recorded to reflect their agreement.

The house they purchased included two separate living units (collectively, "House"). Charlie rented one unit ("Unit") from Alice and Bob beginning in July 2007. Alice and Bob occupied the other unit. The arrangement worked out so well, that Alice and Bob offered Charlie a ten year lease when the initial term ended in June 2008. Charlie signed a rental agreement with them on June 30, 2008 for a ten year lease term which began July 1, 2008, and he properly recorded the lease in the land records of Baltimore County on July 1, 2008.

In March 2009, Bob moved out after a dispute with Alice. Bob continued to pay his half of the monthly mortgage payment for the House. Alice refused to forward Bob his share of Charlie's monthly rent.

In December 2010, Deirdra, a business partner of Bob, obtained a judgment against Bob in the Circuit Court in Baltimore County, Maryland, in an amount that was roughly twice the market value of the House that Bob co-owned with Alice.

- A. May Bob recover his share of the rent after March 2009?**
- B. What action(s) must Deirdra take to enforce her judgment against Bob's interest in the House?**
- C. Will Charlie be able to continue to occupy the Unit he rents after Deirdra's action(s) is complete?**

**Explain your reasoning fully.**

**REPRESENTATIVE ANSWER 1**

(a) Yes, Bob will be able to recover his share of the rent after March 2009 for the following reasons:

Joint Tenancy Creation

In June 2007, Alice and Bob acquired a joint tenancy. In Maryland, there is a presumption against joint tenancies, however this presumption can be overcome by express language signifying the conveyance as "to joint tenants." Here, there was an express agreement that did just that. Because the 4 unities of title, time, possession, and identity are present, and because there is a clear manifestation of the parties to treat the co-tenancy as a joint tenancy, there was a valid creation of a joint tenancy under Maryland Law

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No Severance of JT in July 2007

Generally, in Maryland, a joint tenancy can be severed if one party decides to lease his undivided 1/2 interest in the property. However, there was no severance of the joint tenancy here because here, both parties agreed to lease the property, not just one party. Thus, there was no severance in July 2007 when the joint tenancy leased the premises to Charlie.

Moving out in March 2009

Bob's moving out did not necessarily sever the joint tenancy. The facts do not indicate that any of the four unities were broken -- he still jointly owned title and still had a right to possess his 1/2 interest in the property, as evidenced by the fact that he continued to pay half of the monthly mortgage payment for the House. Maryland, a Title IX, follows the minority of jurisdictions that consider a mortgage on a property by one party a severance -- but not if both parties are paying the mortgage. Thus, the mortgage does not constitute a severance and Bob continued to pay the mortgage. Alice's actions of withholding Bob's share of Charlie's monthly rent was improper. Bob had a right to 1/2 the rent.

(b) To enforce her judgment, Deirdra must file a writ of attachment on the property and then subsequently execute that writ of attachment in order for there to be a lien on Bob's 1/2 interest in the property. In Maryland, a judgment against one co-tenant, which turns into a lien against the jointly owned property, successfully severs the joint tenancy. However, it does not sever the joint tenancy until execution of the writ of attachment by the Sheriff.

(c) Yes, Charlie will be able to continue to occupy the Unit he rents after Deirdra's actions are complete. Importantly, Charlie recorded his ten-year rental agreement on July 1, 2008, thus putting all subsequent possible creditors -- and the rest of the world -- on record notice of his interest in the property. Maryland is a race-notice jurisdiction, in which subsequent creditors who take an interest in a property for value do so free of all claims only if they have no notice, and are the first to record their interest. Here, Deirdra fails both prongs of the test -- she was on notice because Charlie recorded, and she did not record her interest before Charlie because the facts indicate that he did so two years prior to when Deirdra obtained a judgment in 2010. Charlie should be able to rely on the integrity of the lease agreement he made with the original policies, and for that reason he will be allowed to live there even after the lien creditor, Deirdra, severs the joint tenancy (as discussed above in b). After severance of the joint tenancy, Deirdra and Alice will be tenants in common who jointly own the property, and Alice will have to respect the contract previously entered into by Charlie and Alice.

**REPRESENTATIVE ANSWER 2**

**A. Bob Can Recover His Share of the Rent**

Bob has a right to his half of the rent after March 2009 because he and Alice are tenants in common, and tenants in common owe a duty to account. Here, Bob and Alice originally took the property as joint tenants with rights to survivorship. A joint tenancy requires the four unities to be in place: 1) time, 2) title, 3) possession, and 4) interest. Their interests must be formed at

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the same time, must be on the same title, they must both have a right to possess the whole, and they must have equal interests. When Bob and Alice gave Charlie his 10 year lease, they severed the possession unity, and thus severed the joint tenancy. By granting Charlie a lease, Bob and Alice no longer had a right to possess the entire property because Charlie now has a property interest in his "unit." Therefore, the joint tenancy was severed.

When a joint tenancy is severed, a tenancy in common is formed. Tenants in common owe several duties to co-tenants, one of which is the duty to account. When Bob moved out, Alice still had a duty to account to him, which means that she needed to give him his share of the rent being received from the property. Because they purchased as joint tenants, which requires equal interests, those equal one half interests carried over to the tenancy in common. Therefore, Alice must give Bob one half of the rent received from Charlie since he still owns one half of the property.

**B. Deirdra Can Levy Bob's Interest in the Property**

To enforce her judgment, Deirdra can levy Bob's one-half interest in the property that he co-owns with Alice. The first step in levying property is to record the judgment in the circuit court in the county where the real property is located. Because Deirdra received the judgment in the circuit court for Baltimore County, this is already taken care of. Deirdra must then file a request for a Writ of Execution to Levy the property with the circuit court. Once the court issues the writ, it must then be served on Bob. Once it is served on Bob, there must be a notice of sale (publication), and then a commercially reasonable foreclosure sale. Generally, these sales will be done by the Sheriff on the courthouse steps of the county where the property is located. Any proceeds of the sale will first go to Deirdra, and the buyer will take the property subject to Bob's mortgage on the property, and as a co-tenant of Alice.

Because Bob's interest in the house will only satisfy approximate one quarter of the judgment (house was worth a total of one half of the judgment, and Bob's interest was only one half), Deirdra will then have to seek out other property owned by Bob to satisfy the rest of the judgment. If he owns property in other counties, she can have the judgment recorded in those other counties.

**C. Charlie Can Continue to Occupy the Unit**

Charlie's interest in the property runs with the land, and he therefore will be able to continue to occupy the unit even after Deirdra levies the property and sells it at foreclosure sale. A lease is a possessory property interest that runs with the land, and is enforceable against any future purchasers with notice thereof. Charlie's lease was recorded, thus putting any buyer at foreclosure sale on notice of his interest. Therefore, even a bona fide purchaser would take subject to Charlie's leasehold interest.



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**QUESTION 10**

Lewis Latimer owns an electric power systems company, the Latimer Inc., in Holbrook Maryland. The Latimer Inc. uses a computer that controls its check-writing machine which was programmed to cause a check to be issued to Supplier Co. which is owed money monthly by the Latimer Inc. for services. The address of Supplier Co. was programmed into the computer by Latimer. Ernie Employee was a clerk at the Latimer Inc. Employee changed the address of Supplier Co. in the computer data bank to his own address. As a result, the next check produced by the check-writing machine for \$285,000 was mailed to Employee's address. After receipt of the check at his home, Employee endorsed the check in the name of Supplier Co., and then deposited it into an account at ABC Bank which Employee had opened in the name "Supplier Co." The check was later honored by the Latimer Inc.'s bank, Boswell Bank. Employee then withdrew \$285,000 from his account and left town leaving a balance of \$5.

Upset over what has transpired, Latimer comes to you, a Maryland attorney to advise him regarding the recovery of the company's money.

**Give a detailed analysis of any civil redress Latimer Inc. may have under Maryland Commercial and Common Law.**

**REPRESENTATIVE GOOD ANSWER 1**

I would advise L that he has a very clear action against Employee for conversion or otherwise under common law to recover the money that he fraudulently took from the company because it is clear from the facts that he was not authorized by the company to change the address of a company check to his own address and the check should have been for Supply Co. not Employee. The problem is that the facts state that "Employee withdrew the \$285k from the account and left town". So, first L will have to find him.

I would also advise L that he may have a cause of action against his bank, but that the outcome will be much more uncertain. First, whether Latimer Inc. can recover against either bank depends on if Employee was authorized to control the check operations of the company as defined in Section 3-405. The facts state that Employee was a clerk. There are no other facts. It is unlikely that a mere clerk would have authority over checks. Moreover, "Responsibility" does not include authority that merely allows an employee to have access to instruments or blank or incomplete instruments. It only appears that Employee had access to the checks which is not enough. Under Section 3-404, if Employee is not authorized to control the checks, then the check is not properly payable against Latimer Inc. but is only payable against the thief—Employee. So, I would argue that Boswell Bank must re-credit the Latimer Inc. account because the check was not properly payable for Latimer Inc. Boswell Bank might then be able to go after ABC Bank for failure of presentment warranties.

I would advise L that the banks can argue under Sections 3-406 and 1-303 that L's negligence contributed to Employee being able to alter the address and forge the endorsement of the check. While L can argue that Boswell Bank is also negligent because it should have known that

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amounts and address of checks written to Supply Co by Latimer Inc., that argument is fairly weak. L can also argue that ABC Bank is negligent because it did not get the articles of incorporation from SDAT which would have shown the correct address for Supply Co. I would advise L that even if the banks are negligent, the court will compare the negligence of the parties in determining what recovery Latimer Inc. is entitled to.

**REPRESENTATIVE GOOD ANSWER 2**

These facts relate to a negotiable instrument as they involve a check drawn by Latimer, Inc. Latimer Inc. may bring the following claims.

Latimer Inc. v. Ernie Employee

Conversion is exercising wrongful dominion and control over property of another without permission of the owner. Here, Ernie “was a clerk at Latimer, Inc.” and he “changed the address of Supplier, Co. in the computer data bank” of Latimer, Inc. who routinely writes monthly payment to Supplier Co. When he had the check sent to his address to obtain access to the payment, Ernie committed conversion by exercising wrongful control over the check that did not belong to him.

Latimer, Inc. v. Boswell Bank

Latimer Inc. will want to bring a claim against its bank, Boswell Bank for paying the item to Ernie instead of properly paying to Supplier Co.

A fictitious payee is one who impersonates the payee of an instrument when they are not truly the intended beneficiary of the payment. (3-404). Here, Ernie was an impostor when he endorsed the check as Supplier Co. because he did not intend the check to be paid to Supplier Co. and was not the Supplier Co. Latimer intended to pay the money to. Where there is a fictitious payee the endorsement will only be effective against the payee if the payee, Latimer, gave authority to the employee "to supply information determining the names or addresses of payees of instruments to be issued in the name of the employer". (3-405). Here, Ernie was given access to change "the address of Supplier Co." and therefore he had authority over the checks. Thus, the responsibility of this action will rest with Latimer, Inc.

The bank that pays a fraudulently endorsed instrument, if it was done in good faith, will have the endorsement remain effective as long as the drawee bank exercised ordinary care in negotiating the instrument (3-405). Here, the check in the name of Supplier Co. was deposited in a bank account “at ABC Bank which [Ernie] had opened in the name of Supplier Co.” demonstrating that Boswell Bank negotiated the instrument in good faith. Latimer, Inc. is precluded from asserting the forgery against Boswell Bank because they acted in good faith and because they provided Ernie will responsibility over the checks.

Latimer, Inc. v. ABC Bank

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Latimer, Inc. we'll have no claim against ABC Bank because as with Boswell Bank, Latimer gave responsibility to Ernie over the checks and because they acted in good faith when allowing Ernie to deposit the check into an account bearing the same name as the instrument was made payable to. The facts did not indicate any way that ABC Bank would know that the check was not properly endorsed by Latimer, Inc. Accordingly, the bank exercised ordinary care in the transaction. Similarly, Latimer, Inc. will not be able to assert any presentment warranties because the item was not altered or forged and there is no knowledge that the signature was forged as required by Section 3-417.