JULY 2001 BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS

QUESTION 1

Anne and Bob Green were born and raised in Pennsylvania. The couple met and resided together as husband and wife for approximately ten (10) years before coming to Maryland. They had two children, Caroline, who is twelve, and David who is ten.

In 1998, Bob came to Maryland and found employment as a biochemist with an annual salary of $250,000. Anne and the children followed Bob and arrived later that same year.

They purchased a home in Roland Park in Baltimore City which is titled in their joint names as tenants by the entireties. At Bob's request, Anne, who has a bachelor's degree in education, did not seek employment, but stayed home to care for the children. The parties decided that the children would be home schooled until the eighth grade when they would enter private school. The estimated tuition for the private school was $25,000 per year, per child.

During December of 2000, Anne noticed that their relationship was beginning to change. Bob began staying out late with the explanation that he was working. The parties argued frequently, and Anne began to feel abandoned.

One evening after Bob had called to say he was working late, Anne happened to see him leaving a restaurant with another woman. She had no previous evidence that he had been unfaithful to her, but now believes that he is having an affair.

Anne has come to you for legal advice. She informs you that she wants to obtain a divorce and return to Pennsylvania with the children. She also informs you that they do not have a Marriage Certificate because they never participated in a marriage ceremony. However, she correctly states that common law marriages are valid in Pennsylvania.

What advice do you give Anne about her rights to obtain a divorce in Maryland and to legally move to Pennsylvania with the children? Include in your advice to Anne a discussion of the financial and property implications of a divorce.

REPRESENTATIVE ANSWER 1

(1) Is There a Valid Marriage? The State of Maryland does not recognize common law marriages. Common law marriages entered into in states that acknowledge such marriages, however, will be recognized under the Full Faith and Credit clause of the U.S. Constitution. Pennsylvania recognizes common law marriages. Anne and Bob lived together for 10 years. Although they may not have had a ceremony, they have clearly cohabited (have 2 children) and established an economic partnership. Furthermore, it appears that they hold each other out as husband and wife.

Divorce in Maryland. Both Anne and Bob currently live in Maryland and have lived there for 10 years, and so they satisfy the year residency requirement for divorces. Additionally, the reasons for the divorce arose in Maryland. Since the amount in controversy is likely to be over $25,000, Cir. Court will have jurisdiction.

Type of Divorce. Anne can pursue an absolute divorce based on desertion or adultery. In order to succeed on the grounds of desertion, she will be required to show that Bob has abandoned her for 12 months with the intention of leaving the marriage. Anne will have to show more than just frequent arguments or that Bob is working a lot. If her suspicions that Bob is cheating are true she may be better off pursuing an absolute divorce on those grounds. Evidence of adultery will include opportunity - that Bob had the time to be with another woman, probably more than just a sighting of him leaving a restaurant - and disposition circumstances that support this allegation - his claims that he's working late, but he's not really at work, perhaps evidence of phone calls or gifts to the other woman. Anne will need somebody to corroborate her story. She must also remember that adultery is a crime in Maryland and Bob will be able to plead the 5th - his right against self-incrimination.

(2) Who Will Get The Kids? Custody will depend on the best interests of the child. Since the two children are 12 and 10, the court will take their views under consideration. Usually, the primary care giver gets custody. Anne is likely to be considered the primary care giver since she stayed home with the kids while Bob worked. Her interest in leaving for Pennsylvania, however, affects the outcome. Again, it will depend on what the court determines to be in the best interests of the children. The court may grant Bob visitation rights and Anne legal, physical custody or maybe even joint custody if they can get along and Anne ultimately decides to stay in Maryland.

(3) Financial Implications. Anne should be entitled to alimony. And, the court will probably order alimony pendente lite during litigation. She stayed home so Bob could work and took care of the kids. Since she does have an education, however, the court may give her rehabilitative alimony - until she finds a job and gets back on her feet. If their lifestyles will be disproportionate, the court may still award permanent alimony.

(4) Property. Any property the couple attained after their marriage, like the house, will be partitioned. Whoever gets custody of the children will get to live there for 3 years as part of a transition period, but then it will be sold.

(5) Costs of Raising Children. Both parents will have to contribute to costs regarding raising the children according to their capabilities. Since Bob makes more, he will have to contribute more. This award may be modified according to the changing circumstances of the respective parents' financial situations.

REPRESENTATIVE ANSWER 2

(1) Obtaining a Divorce. In Maryland, common law marriages are not recognized. However, the Maryland courts generally will recognize a common-law marriage if the parties lived in a jurisdiction/state that does legally recognize it. Maryland does not have to recognize any marriage that is contrary to public policy. Anne's common-law marriage was valid in Pennsylvania and would most likely be considered a valid marriage here. The second issue is residency requirements. Maryland requests that either the circumstances giving rise to the divorce occur in Maryland or that the party be a resident for one year. Anne meets both.

First, I would discuss with Anne the difference between a fault and no fault divorce. She could secure a divorce in a shorter time based on fault. Adultery is one of the criteria under which she can seek a divorce. However, her case is basically her word against Bob's. But a judge could make the inference from the coming home late and Anne seeing him with a woman in a restaurant. If she could subpoena Bob's boss, supervisor or co-worker who may know whether or not he works late, that would help create a stronger inference.

Otherwise, Anne will have to seek a no-fault divorce requiring either a voluntary, agreed-upon separation from Bob for one-year (no cohabitation) or a non-voluntary separation for 2 years (no cohabitation).

(2) Move to Pennsylvania. If Bob does not object, Anne and the kids can return to Pennsylvania so long as Bob has a visitation schedule with the children. If Bob does not agree, Anne will most likely need to make a motion to allow her to have primary custody of the children and allow her to take them to Pennsylvania. The court will consider the best interests of the children in determining whether or not to grant Anne's motion. It will consider such factors as each party's relationship with the children, each party's age and health and each party's ability to care for them. While being a mother is not a dispositive factor, the court will place weight on the parent who has been the primary care giver. Anne has been a stay-at-home mother while Bob has been the main financial supporter of the family. The court will also probably look at whether Anne and the children have family in Pennsylvania.

(3) Financial Aspects. Pending a divorce and during the period of separation, Anne can seek pendente lite support for herself and the children. Generally, the parent who will primarily be caring for the children will be allowed to stay in the family home as that is usually in the children's best interests. As a part of the divorce, Anne can also seek primary custody, alimony and child support. Alimony is usually awarded as an aid to the non or lesser income earning spouse for a period of time necessary to get that spouse back on his/her feet. In Anne's case, she has been unemployed for nearly 3 years. It will take her a while to get another job. If Bob and Anne still want the children home-schooled, she will be unemployed for a while longer. Additionally, she and the children have become accustomed to a lifestyle that $250,000 per year can offer. While Anne and the kids are not necessarily entitled to exactly the same amenities, they should be able to obtain something comparable.

As to Anne and Bob's house, if Maryland recognizes their common-law marriage, then the court will probably honor their ownership as tenants by the entirety. Anne is entitled to one-half the value of the home in the form of a judgement or proceeds from a sale. If she stays in Maryland, she is likely to be awarded the home or possessions for up to 3 years as she will likely have custody. In any case, the value of the home may be balanced against the value of all of their other property such as retirement or investment accounts and distributed between Anne and Bob as equitably as possible.

Child support is determined by taking the gross monthly income of each spouse, adding them together and using a scaled chart comparing income and the number of children. Alimony, day care and health insurance are also factored in. If Bob insists that the children attend private school, then he will most likely be responsible for paying for that additionally. The child support will continue until the children reach 18, die, marry or emancipate.

QUESTION 2

As a newly licensed Maryland attorney, you meet with your very first client. She was injured in a motor vehicle accident and wishes you to handle her personal injury claim. After interviewing her, you determine that she was not at fault in the accident and that it was caused by the other driver. You also determine that both drivers have liability insurance and that your client's insurance has personal injury protection coverage which will pay medical bills and lost wages up to $5,000 without regard to fault.

You and your client execute a contingency fee agreement. The agreement establishes the fact of your representation, fees and costs to be charged to the client, and your appointment as attorney-in-fact for the client. It also authorizes you to receive settlement funds, pay medical providers and deposit any settlement funds collected into your escrow account until they are disbursed.

Your client also executes letters of protection prepared by you allowing you to collect and receive any and all medical reports and bills associated with her treatment from her medical providers and agreeing to pay those providers from the proceeds of any settlement. These letters are sent to all of the providers.

Your client incurs medical costs of $4500. The bills are forwarded to you with the provider's demands for payment. You present the bills to your client's insurer under the personal injury protection coverage and promptly receive a check made payable to your client in the amount of $4500. You have also received a check for the settlement proceeds of $15,000 made payable to you and your client, jointly.

You phone the client and inform her that you have the checks and that you intend to deposit them into your escrow account, deduct your fee, pay the outstanding medical bills and pay the balance to her. She advises you that she is having financial difficulties and instructs you to deduct your fee and send her the balance and not pay the medical bills, and that she will make her own arrangements to pay them.

What are the risks to you and your client if you agree with her demand? Explain fully.

REPRESENTATIVE ANSWER 1

(1) Duty of Loyalty. An attorney is an agent of his/her client and the first duty is that of loyalty to the client. However, part of that duty is to disclose and notify the process and obligations the client will be undertaking. Here, my client has been given full disclosure of the risks and process involved in the recovery of funds. She knows and has authorized me to receive finds on her behalf. She has been informed that I will deposit proceeds into my escrow account. She understands I will first pay providers, then will disburse the remaining funds to her. There are also letters of protection my client has signed to ensure that the medical providers get paid.

(2) Duty as a Surety. In obtaining my client's promise early in the case, to pay the medical providers, I am practically speaking and acting as a guarantee to the medical people that they will get paid. I now have an obligation to see to it that my client does what she promised to do.

(3) Conclusion. I must explain to my client that I cannot comply with her demand without making both her and me liable to the medical providers. I will review the documents she signed and explain the impact of her promise and my guaranty to pay the doctors. If she still insists on receiving the full amount, I would give her a full statement of costs, expenses, and disbursements, as agreed

to by the retainer agreements. I would suggest that she might wish to retain another attorney to advise her as to our dispute. I would let the providers know that there might be a delay in receiving their funds. If there was still no agreements, I would request intervention by a court-appointed mediator. The one thing I would not do is release the funds until I had some authoritative finding on the correct manner in which to proceed. In the meantime, the funds would remain in my escrow account until the matter was resolved.

I would try to help my client understand that by signing the letters of protection for the doctors, she had made them third-party beneficiaries of her agreement with me, and that she was obligated to honor her promise to pay them. Since they relied on both her promise and mine, since she knew about the process and agreed to it from the beginning. I could not agree with her proposal to release the funds to her without paying to doctors first.

REPRESENTATIVE ANSWER 2

The answer to this question depends to some extent on the exact nature of the notices sent to medical providers agreeing to pay them from the settlement. From the facts, it doesn't appear to be in the nature of a contract or surety by which I (the attorney) guaranteed payment. Rather, it seems it was just a notice of the pending litigation and an agreement to pay the providers from the settlement, if any.

There is no problem with the client recovering $15,000 in the settlement even though she has also recovered $4,500 from her insurance company. The rule is that a defendant is not entitled to an offset for any amounts already covered by the plaintiff's insurance. However, the insurance company may be subrogated to the rights of the plaintiff, meaning they will be entitled to a reimbursement from the settlement proceeds of any amounts paid out on plaintiff's behalf. The insurance company must be notified of the settlement.

The insurance check is made payable solely to the client, so she will have to indorse it before it can be deposited. The settlement check will have to be indorsed by both the attorney and the client. Overall, the attorney should comply with the client's request to send her the proceeds (after payment of fees). The client retains a significant amount of control over decisions regarding settlement of claims. The attorney should have the client indorse the checks, then deposit them into the escrow account, then write a check to the attorney's account for fees and costs. the client should be provided with a complete accounting of the settlement proceeds, and should be advised of her liability to pay her medical bills.

If a client makes a decision that the attorney feels is unconscionable (such as not paying her medical bills) the attorney should counsel the client as to the possible consequences (being sued, having her credit damaged, etc.) but should abide by her decision. Withdrawal is not really an option at this point because the case is over.

If failing to notify the insurance company and/or failing to pay the medical providers would constitute fraud then the attorney must not participate. This may subject the attorney to disciplinary sanctions. One option might be to file an impleader and deposit the money with the court so that the attorney doesn't get caught in a legal conflict between the client and her creditors.

Although the contingency fee agreement authorized the attorney to pay medical expenses, I think the client's verbal instructions to the contrary probably trump the agreement because the agreement was a mere authorization, not a binding agreement with regard to payment of medical expenses, so the client's withdrawal of that authorization is probably effective.

In conclusion, unless failure to pay the medical providers or notify the insurance company would constitute fraud, or some other crime, the attorney should follow the client's instructions. There is no way for the attorney to know that the client won't pay her bills. In fact, she promised to "make her own arrangements to pay them." The attorney should, however, counsel the client regarding the consequences of not paying her bills.

QUESTION 3

Able, Baker, Carr and Davis are fully licensed Maryland dentists practicing together as ABC, P.A. in La Plata, Maryland. Each owns one share of stock in the corporation but only A, B and C serve on its board of directors. Each dentist is experienced and well-respected and their practice is thriving. In May, 2001, Max Probity, the president of Probity, P.A., told Able that Probity, P.A. wished to open an office in La Plata and to that end, proposed that the two corporations combine operations. Probity, P.A. is a large dental practice which has multiple offices throughout Maryland.

Able discussed the matter with Baker, Carr and Davis. Baker and Carr were enthusiastic about the proposal but Davis was opposed. After further negotiations, Able signed a merger agreement whereby ABC, P.A. would merge into Probity, P.A. and the ABC shareholders would receive Probity stock in return for their ABC shares. The agreement also provided that Able would be named to Probity's Board of Directors with an annual fee of $25,000 in addition to her other compensation from the firm. Davis wrote a letter to the other shareholders explaining his objections; nonetheless the merger agreement was approved by Able, Baker and Carr as directors and shareholders. Davis voted against the merger at the shareholders' meeting.

Later that day, Davis consulted with you, a Maryland lawyer. Davis feels that Able has "sold out" for the chance to earn more money and that Baker and Carr are acting very foolishly. Davis believes the merger agreement is unfair because it grossly undervalues ABC, P.A.'s assets and that Probity, P.A. will not be profitable in the future because of heavy advertising expenses. He would like to file an immediate lawsuit on behalf of himself and or ABC, P.A. against Able, Baker and Carr for breach of their duties of care and loyalty. He asks you for your analysis and advice.

What advice would you give Dr. Davis? Explain your answer thoroughly.

REPRESENTATIVE ANSWER 1

I would advise Dr. Davis (D) that he may have some actions against ABC. P.A. and the directors and shareholders, but it is going to be an uphill battle to get anything other than the fair value of his shares under his appraisal rights.

(1) Breach of Duty - D may act on behalf of the corporation if he requests action by the corp and upon denial or inaction, may sue on behalf by naming it as a defendant. In this case, this may be unnecessary as it is unlikely Able (A), Baker (B), and Carr (C) will bring suit against themselves. D may derivatively sue A for unauthorized contract authority (breach of care) and for failing, along with B and C, to observe their duty of care to the corporation in agreeing on the merger. As directors, A, B, and C owed a duty to act in good faith, with a reasonable belief they were acting in the best interest of the corporation, using the standard of care a reasonably prudent person would under similar circumstances. Here, A may have breached this duty by signing an agreement to merge without board and 2/3 shareholder approval. However, by having a majority of the board of directors approve, along with 3 out of 4 shareholders, such action was most likely ratified.

Additionally, D can argue that by grossly undervaluing ABC, P.A., they breached their duty of care by accepting an unfair price, and failing to consider subsequent unprofitability as part of the merged corporation. However, the directors are shielded under the business judgment rule - where a court will not second guess the actions of the directors if the business decision was made in an informed manner, in good faith and supported by a reasonable basis. If A, B and C did their research, they may be shielded.

(2) Duty of Loyalty - D may also sue A for his breach of his duty of loyalty for waste and for acting as an interested party to the transaction. D can claim that by paying himself an additional $25,000 to be on Probity board of directors, he was acting in his own best interest and not that of the corporations. However, if the transaction is fair (which it may be since A is taking on extra duties), the transaction is shielded. Likewise, if the transaction is disclosed and approved by a majority of disinterested directors or shareholders, the taint of self-dealing may be removed. Here B and C approved the action, a majority of the disinterested Directors, therefore the transaction is probably valid.

(3) Right by Appraisal - D may sue directly to enforce his appraisal rights. Under a merger, director approval plus 2/3 of shareholder approval is necessary for the acquired (merged) entity to approve the transaction. Here, a majority of the board approved the merger, as well as 75% of the shareholders. However, by disseminating D reserved his appraisal rights and may demand that ABC, P.A. pay him for fair value for his shares. If they refuse, the court may decide the value upon D's filing of a suit.

Likewise, D may sue for dissolution, but this is unlikely because the ABC entity has merged with Probity and no longer exists. Therefore, appraisal is the only personal remedy.

REPRESENTATIVE ANSWER 2

Davis would bring a shareholders derivative action against A, B and C asserting several claims of actions. ABC is a close corp because according to the fact pattern, nothing has indicated that they are on a national stock exchange nor do they have at least 500 shares of stock. Each party, A, B, C and D own one share of stock a piece. Also in a close corporation the stockholders are usually the directors as they are here with A, B and C being the directors able to take action.

D would bring a cause of action against A, B, C by making a demand on the officers that they reevaluate their course of action. If the directors choose not to change their action, D would bring suit in MD Circuit Court. (The case would not be able to be settled without court authorization at that point).

The cause of action that D would bring is a breach of duty, breach of loyalty or right of appraisal.

(1) Breach of Duty. He would need to argue that the directors were not acting in good faith when dealing with the company. He would also claim that they were acting in malfeasance in that they were making a move for the company that would cause him to loose money. However, I would tell D that this is a difficult claim to prove because ABC would argue the Business Judgment Rule in that at the time of the transaction they believed they were making the best possible decision for the company. Maryland courts usually find this to be a winning, viable argument.

(2) Duty of Loyalty. ABC could do this in three ways. 1) Interested director transaction. How Able was offered $25,000 and a place on the directors with Probity, in addition to her own compensation with the firm. A would probably claim anyone because she told everyone about this transaction, that it was not a problem especially since everyone agreed.

D could also argue that as a stockholder in the company, that A was making an interested stockholders transaction. In this, a stockholder may not have interested stockholder/corp combination without 80% of the directors appearing and 2/3 of the stockholders and it cannot be within 5 years of becoming a stockholder. A would argue that 100% of the directors agreed to the transaction and that 3/4 of the stockholders agreed to the transaction so this should be okay. (Additionally we don't know how long she has been a stockholder).

Next D would argue that this is a merger, as such, is a fundamental corporate change and should not be approved unless there is a majority of the directors and at least 2/3 of the stockholders in agreement. ABC would argue that the majority of the Board has approved the merger and 3/4 of the directors have approved the merger so there is no cause of action here.

(3) Right by Appraisal. Here he would be bought out by the corporation if he does not agree with the changes that it has made. Here it is good that he dissented in writing within 24 hours. This will go towards evidence in court of his right to be bought out.

I would advise D that he probably does not have a very good claim, but he does have a right to appraisal and that is probably his best choice at the moment.

QUESTION 4

On June 1, 1999, Ma and Pa Kettle lent $100,000 to their son, Sonny, and his business partner, Partner. In return, Sonny and Partner executed and delivered a promissory note to the Kettles. The note read as follows:

> "For value received, we will pay the sum of $100,000 plus 10% annual interest to Ma and Pa Kettle on or before June 1, 2000."

The note was signed and dated by both Sonny and Partner. The loan proceeds were used by Sonny and Partner to fund their start-up Internet company.

The Internet venture soon failed. On December 1, 1999, Partner wrote the Kettles saying:

> "Sonny and I discussed your loan to us and we have agreed that each will be responsible for one-half of the amount due. Enclosed is my check for $50,000 plus one half of the interest now due."

Partner wrote the following on the "memo" portion of the check: "payment in full of my obligation under the note." The Kettles negotiated the check.

In May, 2000, Irene Ingenuous purchased the note for value and in good faith from the Kettles, who told her that no money had been paid on it. Ingenuous had no reason to doubt the Kettles's statement. As part of this transaction, the Kettles indorsed the note, without recourse, to Ingenuous. About the same time, Sonny moved to Australia and became destitute.

In July 2000, Ingenuous filed suit to collect $110,000 from Partner. In his response, Partner raised the following defenses:

1. The Kettles' acceptance of his payment in December released him from further liability;

2. When the note was signed the Kettles orally assured him that they would never transfer the note and, without that promise, he would not have signed the note; and

3. He has already paid $52,250.

How will the Court rule on his defenses? Explain your answer thoroughly.

REPRESENTATIVE ANSWER 1

Irene Ingenuous holds the coveted status in commercial paper law - that of a Holder in due course. Pursuant to §3-302 a holder in due course takes an instrument for value, in good faith, with no notice of the type contained in §3-302(a)(2). It should be noted that in order to be a holder one must have good title, which in this case would be possession of the note and in this case, the necessary indorsement. Irene took the note in good faith, for value without notice and she is by definition a holder. The underlying note must also be negotiable which this one is because it is indorsed to Ingenuous, is payable at a definite time and for a fixed amount.

Because Irene Ingenuous is in fact a holder in due course, it will be very difficult for defendant to succeed on her claim. This is because the only defenses which can be used against a holder in due course to defeat them is one of the real defenses. The real defenses include fraud in the factum, forgery, alteration, adjudicated incapacity, illegality, infancy, duress, discharge in insolvency, surety ship, and the statue of limitations has run.

As such, Partner will be held jointly and severally liable on the note pursuant to §3-116 unless he can assert one of the real defenses.

(1) Partner's first defense is that the Kettles' acceptance of payment released him from further liability. In essence, Partner is claiming the payment discharged him from liability on the note. This defense is a personal defense and as such cannot be used to defeat a holder in due course. Since Irene had no notice of the discharge, the instrument is still effective against partner. The court should rule that this defense is not applicable, not viable as to Irene's claim because it is not a real defense.

(2) Partner's second defense is also a personal defense. Only fraud in factum can be used as a basis for a defense in order to defeat the claim of a holder in due course. Fraud in the factum requires that the maker of the note did not understand or know the character or essential terms of the note. Clearly, Partner knew that he was signing a promissory note. Even if the Kettles orally promised him that they would never transfer the note and that was the only reason for Partner to sign the note, such actions only amount to fraud in the inducement. Fraud in the inducement is a personal defense and will not defeat a holder in due course. The court will not sustain this defense as a ground against Irene's claim.

(3) Lastly, Partner attempts to defend against the note on the basis that he has already paid ½ of its face value. Again, this is a personal defense. Although such a claim would survive as against the Kettles as it falls nicely into §3-311, the discharge of a note is not effective against a person who acquires the rights of a holder in due course. Because Irene is a holder in due course, it wouldn't matter if Partner could prove that he tendered a check to the Kettles in full satisfaction of the claim which was evidenced by his letter of 12/1/99 and that the claim was unliquidated. These actions do amount to discharge, but discharge is not a real defense.

If these were the only defenses asserted against Irene, the court should enter a verdict for Irene and order Partner to pay. He may be able to seek contribution from Sonny at a later time.

REPRESENTATIVE ANSWER 2

Let us take up Partners defenses in order.

(1) First, the check from December. Under §3-116 all makers or drawers, which includes partners, are jointly and severally liable. Both Sonny and Partner have responsibility to cover the note. Moreover under §3-311 for the "payment in full" memo to be effective the claim must be unliquidated or subject to a bonafide dispute. We have no such issue before us. Thus that defense is ineffective. Any indemnification or arrangements between Sonny and Partner do not bind third parties or change the responsibilities of a maker.

(2) Second, the oral agreement with the Kettles. The note is negotiable on its face and Ingenious is a holder in due course, having purchased the note in good faith, for value and without notice of any such agreement. This may be effective as an offset against the Kettles, but not against a holder in due course under §3-302. Furthermore it is not material who receives the $110,000 due under the note. Contracts are presumed freely assignable and parol evidence rules bar contradicting the plain face of the instrument to Ingenuous' detriment.

(3) The third defense is most interesting as it is undisputed that Partner did pay $52,250 to the Kettles. There is no real dispute that the Kettles misinformed Ingenuous. Also under §3-305(a)(2) the obligor has defenses as if against the original payee has the right to consider the $52,250 already paid except that 3-305(b) bars it.

I would rule against Partner on all three defenses but point out that he has potential claims against both Sonny (as a partner) and the Kettles (for the funds received).

§3-305(a)(3) is not available to Partner because this did not arise from the original transaction but rather out of subsequent ones.

QUESTION 5

Leslie entered into an agreement with Home Renewal, Inc., ("Home Renewal") a properly licensed Maryland builder, to construct a new house in Dorchester County, Maryland. The agreement was signed on December 15, 1999, and required Home Renewal to complete the work by June 15, 2000 at a cost of $400,000. The agreement specified that: 1) time was of the essence, and 2) all requests for time extensions and price increases must be submitted in writing by Home Renewal within 30 days of any event causing a delay or for any change that required an increase in the price of the work.

On June 1, 2000, Home Renewal sent a written request to Leslie for a 120 day time extension, claiming that Home Renewal's resources were over extended on other contracts in January and February 2000. Home Renewal also requested an additional $50,000.00 for extra labor and supplies to finish Leslie's house. Leslie denied both requests as unjustified and untimely.

On June 16, 2000, the house was only 75% complete, and Home Renewal had been paid $300,000 by Leslie. On that date, Leslie terminated the agreement with Home Renewal for breach of contract. Leslie hired and paid Oakley Contractors to complete the work.

Home Renewal sued Leslie in the Circuit Court for Dorchester County, seeking the recovery of $100,000 as final payment under the agreement and $50,000 for the extra labor and supplies provided to the house prior to termination.

Analyze the possibility of recovery by Home Renewal for (a) breach of contract (b) unjust enrichment and (c) quantum meruit.

REPRESENTATIVE ANSWER 1

Rights of the parties are determined under the common law of contracts.

(1) The contract between Leslie and Home Renewal indicated that time was of the essence and the completion date was to be June 15, 2000. Home Renewal did not make a timely request for an extension or an increased price. They made their requests on June 1, 2000 claiming over extended resources from January and February, 2000 contracts. This was not a timely request as the contract provided that the request be made within 30 days of the event causing delay.

Therefore, on June 16, 2000 when the house was not complete, Home Renewal was in breach of the contract. Leslie was justified in terminating her agreement with Home Renewal as they knew time was of the essence and they were the ones in breach, not Leslie:

(2) Home Renewal is also not likely to recover under an unjust enrichment theory. Unjust enrichment is when the party relies on the other in the absence of a contract and performs for the benefit of the other party. Unjust enrichment allows recovery by the party who performed to prevent an unfair – unjust enrichment to the other party who has done nothing. This would not apply here. Leslie and Home Renewal had a written contract. Home Renewal had been paid $300,000 which was 75% of the total agreed price and there was only 75% of the work completed. The Court is unlikely to find any unjust enrichment.

(3) Quantum meruit is a quasi-contract theory in which one party can seek to recover for his performance in the absence of a contract. On June 1st, Home Renewal was aware that Leslie did not agree to the time extension or price increase. They apparently continued to work until June 16, 2000 when Leslie terminated the agreement. They will not recover under quantum meruit. Leslie had to hire and pay Oakley Contractors to complete the work.

The purpose of contract damages is to place the non-breaching party in the same position that they would have been in had it not been for the breach. Home Renewal was the breaching party and not entitled to the $100,000 final payment or $50,000 extra labor costs.

REPRESENTATIVE ANSWER 2

(1) Home Renewal will fail in its claims for breach of contract, unjust enrichment and quantum meruit. Leslie rightfully terminated the contract on June 16, 2000 because the work was not completed, resulting in Home Renewal being in breach. Normally service contracts are allowed to be completed in a reasonable time after the date stated in the contract. However, this contract expressly stated that time was of the essence. Because Home Renewal was not completed with its work on June 15th and because time was of the essence, Home Renewal was in breach. Leslie never agreed to any time extension and the delay was caused by Home Renewal overextending itself on other contracts.

(2) Home Renewal cannot be excused from failing to complete its work on time. Home Renewal breached the contract first so Leslie is excused from her remaining performance, and could rightfully terminate the contract. Home Renewal's claim under the theory of unjust enrichment will also fail. Leslie has not been unjustly enriched. Leslie has paid three quarters of the contract price and three quarters of the work has been performed, as under the contract. Leslie has not been unjustly enriched, in fact Leslie may have suffered consequential damages as a result of Home Renewal failing to meet the deadline.

(3) Home Renewal's claim in quantum meruit will also fail. Quantum meruit is used by a court as an equitable remedy when no contract was formed, but the court finds a quasi-contract. In this case, Home Renewal and Leslie have an actual contract. The extensions and price increases suggested by Home Renewal were rejected by Leslie and there is nothing to warrant the court finding a quasi-contract. Therefore, along with its claims for breach of contract and unjust enrichment, Home Renewal's claim in quantum meruit will also fail.

QUESTION 6

On May 5, 1999, Pat entered the lobby of a motel in Garrett County, Maryland, and told the clerk that her bungalow was on fire. The clerk called the fire department. Inside the room, firefighters found the partially burned body of Pat's husband, Tony, in one of the beds, and a partially burned cigar near his body.

The suspicious nature of the fire caused officials to investigate Tony's death. The police learned the following: Pat, a nurse, and Tony, an architect, had been married for 10 years. Pat was bored with her marriage and became infatuated with Ned. Pat told some of her coworkers that she planned to kill Tony, make it look like an accident, and take his life insurance money to start a new life with Ned. Pat worked in an operating room at Garrett Hospital on April 29, 1999. Hospital records contained a statement that two bottles of a paralytic drug, which is used for certain heart/lung surgeries and leaves no trace in the body, were missing from the anesthesia cart at the end of Pat's shift on April 29, 1999.

Fire investigators determined that Tony was not a smoker, and that the fire was deliberately set. The local medical examiner, Dr. Scheiner, who has conducted hundreds of autopsies and testified in more than one hundred trials, conducted an autopsy on Tony's body. The autopsy showed that there was no soot in Tony's lungs, indicating that Tony was not breathing *before* the fire was set. Dr. Scheiner found no abnormalities in any vital organs in Tony's body. Chemical tests conducted on Tony's body did not reveal the presence of any poisons.

Pat was arrested for the first degree murder of Tony. Trial was held in the Circuit Court for Garrett County, Maryland.

During Pat's trial, the Court allowed testimony by the State's four witnesses, over the timely objections of defense counsel, as follows:

(a) Ned testified that Pat told him that "they will never be able to figure it out and that the drug I gave him is not traceable."
(b) The owner of a tobacco store testified that one of his clerks told him that the clerk sold a package of cigars to Pat in late April 1999.
(c) Trooper Jones testified that he reviewed a hospital record that showed on April 29, 1999, Pat worked in the operating room from which the bottles of a paralytic drug were missing.
(d) Dr. Scheiner testified that, in his expert opinion, Tony died of poisoning by an undetermined agent.

Did the Circuit Court correctly overrule each objection? Explain the reason for each answer.

REPRESENTATIVE ANSWER 1

Generally, all evidence that is relevant and reliable is admissible with a few exceptions.

(a) Ned's testimony is hearsay, which is an out of court statement offered to show the truth of a matter asserted. Pat made the statement to Ned out of court and it is being offered to show culpability that she gave Tony the drug. Although hearsay is generally inadmissible, this falls with in an exception as a statement of party opponent.

(b) The testimony of the tobacco store owner is also hearsay not within one of the recognized exceptions. Although the clerk can testify as to what she has personal knowledge of, the owner was not the one who sold the cigars to Pat. Thus, he cannot testify to the clerk's statements. The government can argue that the statement is evidence of a prior identification, but since the clerk does not appear to be available, based on the facts, it still lacks reliability.

(c) Although medical records may be admissible under the business record exception to the Hearsay rule that allows records taken in the regular course of business by one who has personal knowledge to be admissible because they are likely to be accurate. Thus, if the hospital regularly takes inventory of the carts after each shift, such a record would be admissible. However, this testimony is still hearsay because the police officer is not a hospital employee with knowledge. He is testifying as to what the record contained. Thus, the officer neither had personal knowledge of the accuracy of the record at the time it was made nor was he the custodian of the records.

(d) Experts are permitted to make opinions based on reliable scientific methods generally accepted in the field. These opinions, may not, however, pertain to an ultimate fact, such as that Pat killed Tony. Here, Dr. Scheiner is likely to qualify as an expert based on his experience in 100+ autopsies and the personal autopsy of Tony.

There are no facts to show the autopsy or chemical tests deviated from generally accepted principles. Thus, as an expert, Scheiner is permitted to testify as to those facts he has personal knowledge of 1) Tony was dead before the fire; 2) no abnormalities in vital organs to explain death; 3) no detectable poisons were revealed. Since Scheiner is available for cross-examination, Pat's attorney may question him regarding the accuracy of such testing and whether other causes are possible.

Thus, parts (a) and (d) were properly overruled but parts (b) and (c) are hearsay not with any exception.

REPRESENTATIVE ANSWER 2

Testimony (evidence) is relevant if it tends to make a fact in issue more or less probable than it would be without the evidence. The testimony of each of the state's four witnesses is relevant.

(a) Ned's testimony that Pat told him "they will never be able to figure it out and that the drug she gave him is not traceable" is hearsay. Hearsay is an out of court statement by the declarant offered in court to prove the truth of the matter asserted. Hearsay is generally not admissible unless it falls under a recognized exception. This statement by Pat would be characterized as an admission which is a statement offered against a party. It could also come in to evidence as a declaration against Pat's penal interest, but it requires that she be unavailable. Although she is available at trial, if she refuses to testify, then her refusal could constitute unavailability. This evidence was properly admitted.

(b) Owner of the tobacco Store's testimony that one of his clerk's told him that the clerk sold a package of cigars to Pat in late April 1999 is hearsay. It is a statement made by the clerk now being repeated by the owner. As it is hearsay, an out of court statement, repeated in court for the truth and there is no exception for this hearsay, the evidence was improperly admitted.

(c) Trooper Jones' testimony regarding the hospital record showed that on April 29, 1999, Pat worked in the operating room from which the bottles of a paralytic drug were missing is also hearsay. However, if the record were being admitted to prove its contents under the original writing rule (best evidence rule) the original must be produced unless a reasonable explanation is given for its absence.

It could also be admitted as a business record if it is proved to be properly authenticated by a records custodian and is deemed to be germane to the business of running the hospital or operating room. Absent production of the original, unless the trooper had first hand knowledge of the contents which cannot be gained simply from reading the document and there is no

reasonable explanation for its absence, the testimony was improperly admitted under the original writing rule. Likewise, if it was not properly authenticated as a business record exception to the hearsay rule it was improperly admitted.

(d) Dr. Scheiner's testimony was that of an expert witness. An expert can testify regarding his opinion if he is qualified by education or experience, the subject matter is appropriate to assist the jury and the expert has personal knowledge of the facts; such knowledge can come from the facts provided before or during trial or from independent documents relied on by the expert.

Here, Dr. Scheiner based his opinions on an autopsy he personally conducted on Tony's body. He must testify that he can say to a high degree of certainty or probability that the cause of Tony's death was due to poisoning of an undetermined agent. His opinion can't be based on mere guess work or speculation.

In Maryland, the judge determines if the subject matter is appropriate and an expert can sometimes be required to have obtained a Maryland license in his field.

Here, Dr. Scheiner is a medical examiner who has conducted hundreds of autopsies and testified in more than one hundred trials. It appears that he would qualify as an expert based on experience, and therefore, his testimony was properly admitted into evidence.

QUESTION 7

Andy made application to Bank for purchase money loan with which to buy improved property located in Wicomico County from Bill. Andy's written contract with Bill required that, at closing, Bill deliver to Andy, by deed, a good and marketable fee simple title to the property, free and clear of liens and encumbrances. Bank has asked you, a practicing attorney in Wicomico County, concentrating on real estate law, to examine the title and provide it with a certificate of good title.

In examining the land records, you find in the chain of title to the property two trust deeds describing Bill's property, both dated March 10, 1960; the first is from Clyde to Dan in fee simple, in trust, for the purpose of immediately reconveying it to Clyde & Wilda, his wife; the second from Dan to Clyde & Wilda recorded immediately after the first contains the following granting clause:

> "...does hereby give, grant, and convey to Clyde & Wilda, as tenants by the entireties for the term of their lives with full, absolute and unqualified power to sell, convey or otherwise dispose in their lifetime of the entire estate without the joinder in the deed of the hereinafter mentioned remaindermen, and immediately after their death to Sid & Donna, Clyde's children, as joint tenants."

The trustee deed also contained the following provision:

> "...to have and to hold the said lot of land so described and hereby intended to be conveyed, together with the rights and privileges thereunto belonging unto Clyde & Wilda, for the term of their natural lives, as tenants by the entireties, and immediately after their death to Sid and Donna as joint tenants, their heirs and assigns in fee simple forever."

The land records disclose a subsequent deed from Wilda to Bill which recites Clyde's prior death in 1996, and an examination of the records in the Register of Wills office shows that Clyde was also survived by Sid & Donna, his children by a prior marriage.

Under these facts would you advise Bank that Bill has a good and marketable title? Explain your conclusion fully.

REPRESENTATIVE ANSWER 1

My findings raise several potential issues of which I should inform the Bank before it makes its loan to Andy.

The first host deed conveys land from Clyde to Dan in fee simple, for purpose of immediate conveyance to Clyde & Wilma. First, I should be certain that Clyde's chain of title was clear at the time of this conveyance. Assuming that Clyde had a fee simple to convey, this trust deed is valid, as a conveyance to Dan for immediate re-conveyance to Clyde and Wilma. Although the conveyance does not indicate what form of fee should be conveyed to Clyde and Wilma, it can be inferred from the nature of the conveyance that Clyde intended to create a tenancy by the entirety. This raises no problems for title, yet.

Second Deed: The second host deed complies with the marketable provisions of the first deed in that Dan conveyed the property back to Clyde and Wilma on the same day, March 10, 1960. (note that for chain of title purposes, it would be helpful if the deeds indicated which one came first, but based on the grantor's intent evident in the first from Clyde to Dan, it would appear the deed from Dan to Clyde and Wilma followed it.)

Initial Contradictions: The second deed contains two apparently conflicting provisions. It provides in one part that the property being conveyed to Clyde and Wilma was a tenancy by the entireties for life with the power to sell without joinder of the remaindermen who are named as Clyde's children. The second provision provides for a conveyance "to have and to hold" to Clyde and Wilma for life, with the remainder to the children, Sid and Donna as joint tenants. The terms are consistent to the extent that the deed evidences an intent to grant a tenancy by the entireties for Clyde and Wilma's life, with the remainder to Sid and Donna as joint tenants. This is a valid conveyance. The provisions, however, are inconsistent on the question of whether Clyde and Wilma can transfer the property without joining Sid and Donna.

Grantor's intent: In interpreting a deed, the guiding principle is the grantor's intent. Further, conveyance language is given priority over "to have and to hold" language, and therefore a court is likely to give preference to the first provision, allowing for transfer without joinder of Sid and Donna. Additionally, specific language is preferred over general language, and a court is likely to give the "unqualified power to sell language" priority for this reason.

Counter: The remaindermen have a vested interest in the property, which cannot be waived by the deed's language. Clyde and Wilma only have life estates, and Sid and Donna must be joined in any conveyance of a fee simple; otherwise, the conveyance is only that of the life estate.

Conclusion: Interpretation of the deeds conflicting provisions by a court is likely to result in a finding that Wilda held the property as sole owner after Clyde died, obtaining his share through right of survivorship, and that she had the power (pursuant to the first clause of the second deed) to convey fee simple, without the remaindermen of Clyde & Wilma, even though she herself only held a life estate. Court's favor the free alien ability of land, so thus outcome is likely.

REPRESENTATIVE ANSWER 2

Bill's title is good and marketable.

On these facts, I feel confident advising the Bank that Bill has, and can therefore convey good and marketable title in fee simple, to Andy. As such, I see no impediment in the chain of title to approving a purchase money loan.

Clyde initially owned the property himself. Clyde conveyed the property to Dan through a Deed of Trust so that Dan could then reconvey the property to Clyde and Wilda as tenants by the entireties.

This straw man transaction was done in order that Clyde and Wilda would have the five unities of title necessary to hold property as tenants in common: (1) Time - both take at the same time; (2) Title - both take the same title; (3) Interest - both take the same interest; (4) Possession - both take possession; and the fifth unity of title is marriage. Only married people may hold property as tenants by the entireties.

After Dan conveyed the property, Clyde and Wilda held it as a tenancy by the entireties in fee simple.

There are two clauses in the grant from Dan to Clyde & Wilda that seem to be at odds with each other. In fact, the first clause appears to even be at odds with itself.

A court would construe the first clause as a fee simple grant to Clyde & Wilda because it says that they take with "full, absolute and unqualified power to sell, convey or otherwise dispose in their lifetime of the entire estate without the joinder in the deed of the "remaindermen." If, as

it appears at first blush, Clyde & Wilda were merely life tenants and would not have the right or power to convey the entire estate. For that reason, this clause would be construed such that the grant is in fee simple absolute.

The second clause is in conflict with the first clause. It clearly appears that Clyde intended to give his children from a prior marriage a remainder estate in the property. This attempt failed because the land was granted in fee simple to Clyde & Wilda as tenants by the entireties. Tenants by the entireties have a right of survivorship, meaning that when one tenant dies, the other takes the interest that the two together formerly held. Because Clyde and Wilda held the property in fee simple as tenants by the entireties, on Clyde's death Wilda thereafter held the property in fee simple.

Being the fee simple owner of the property, Wilda had every right to sell the property to whomever she chose, in this case, Bill.

Having no defects in title in his chain of ownership, Bill holds the property in fee simple and can convey good and marketable title to Andy.

QUESTION 8

On July 1, 1999, Bart moved to Howard County , Maryland to begin a new business. Bart entered into a lease with Arnold to lease Arnold's commercially zoned property to operate a business known as Bart's Tires and Lube. Arnold leased the property to Bart "as is" and in response to Bart's questions informed him that the premises were previously operated by Cheapgasco as a service station for a period of approximately 10 years.

Bart also purchased a home directly behind the former service station so that he could walk to work. The home was located in a residential subdivision which abutted the commercial strip along the highway.

Bart decided to employ a structural consultant to identity any problems he might have with an outbuilding he planned to construct on the commercial property. In the course of its study, the structural consultant reported a very strong "hydrocarbon odor" from water and soil samples taken from the property. Following the structural consultant's advice, Bart then ordered an environmental study which revealed hydrocarbon contamination of both the leased property and the home property Bart had recently purchased. Thus, Bart was unable to occupy the home because of the hydrocarbon contamination.

The Maryland Department of the Environment determined that the contamination was a violation of Maryland law and issued a Violation Notice to Cheapgasco and ordered it to perform a hydro geological study and subsequent remediation to remove the problem. Cheapgasco cooperated but the remediation was still ongoing one year after Bart began paying rent to Arnold. Meanwhile, Bart's bank withdrew its financing from the project, in part, because of the contamination of the property. Thus, Bart was unable to start his business and unable to occupy the home he had purchased.

Bart then filed suit against Cheapgasco for the contamination to the leased property as well as to the home property. His complaint contained, among other things, counts in "strict liability" and "negligence."

As an experienced Maryland practitioner in tort law, how would you defend Cheapgasco in this action? Explain fully.

REPRESENTATIVE ANSWER 1

(1) Strict Liability: To be strictly liable, the defendant's liability must arise from (1) a defective product, (2) an ultra hazardous activity, or (3) a wild animal. The only category which Bart could argue here is ultra hazardous activity (storage of gasoline).

I would defend first based on Bart's failure to make out a prima facie case of strict liability. In order for defendant to be liable, Bart must prove that it was engaged in an ultra hazardous activity, uncommon for the area, that could not be made safe through precautions. Here, I would say that the storage of gasoline may have some risks, but overall it is not an "ultra" hazardous substance. Additionally, gas stations are common in every community and the storage of gasoline can be made safe through precautions. Therefore, defendant is not strictly liable for the contamination.

If that doesn't work, I would argue that Bart assumed the risk (the only defense to strict liability) because he had actual knowledge of the former use of the land by defendant (Arnold told him) and being in the automotive business himself (tires & lube) he had knowledge of the risk of contamination. Armed with that knowledge, Bart nonetheless decided to lease the commercial premises "as is" and purchase a home without prior investigation or studies. Bart assumed the risk.

(2) Negligence: To prevail, Bart must prove that defendant (1) owed him a duty, (2) breached the duty, (3) the breach was the actual and proximate cause of harm, and (4) Bart suffered damages.

I would argue that defendant did not owe Bart a duty because he was a mere lessee of the land. This is not a strong argument because duties are owed to lessees as well, and Bart owned his home. I would also argue no breach of duty because defendant acted reasonably in maintaining its service station 10 years ago. Bart will argue that there was a per se breach of duty as evidenced by the Department of Environment violation notice. However, in Maryland, statutory violations are not determinative on this issue but are merely some evidence of breach if plaintiff satisfies the class of person/class of risk test (which Bart probably does because the statute was designed to protect people and property from such contamination).

There are no good arguments to be made on the causation of damages issue since the contamination is the "but for" and foreseeable proximate cause and Bart has suffered economic damages.

I would also defend the negligence claim based on statute of limitation (SOL) grounds. The general SOL period is 3 years. Defendant sold the property to Arnold 10 years ago. The cause of action accrued when Arnold discovered or should have discovered the damage. Arguably, he should have had the well tested long ago. Thus, the 3-year SOL has run and the lease to Bart does not start the period running again.

I would also defend based on assumption of risk (same argument as in strict liability), and contributory negligence which in Maryland is a complete bar to recovery.

REPRESENTATIVE ANSWER 2

(1) Strict Liability: I would argue on behalf of Cheapgasco that they are not strictly liable for the hydrocarbon contamination.

Running a service station, presumably with gasoline pumps, is not an ultra hazardous activity which would sound in strict liability. A service station is common place, found in many areas which are commercial and residential, and is a safe business made safer by the safety precautions in place (e.g., pump cutoffs to avoid explosions), thus it is not an ultra hazardous activity.

A service station nor its products are defective. Gasoline did not leave the refinery so dangerous as to be handled under strict liability theory. There is no inherent defect in any products at the service station that would result in a finding of strict liability. Cheapgasco is not strictly liable for damages Bart may have suffered.

(2) Negligence: I would argue that Bart will not meet his burden of showing (2) duty owed to Bart; (2) breach of that duty; (3) causation - that but for Cheapgasco's breach Bart would not be hurt (factual causation), and that it is fair to hold Cheapgasco liable (legal causation); and (4) that Bart suffered damages.

1. Duty owed to Bart: Cheapgasco owes no duty of reasonable care to Bart. Bart, a subsequent land occupier and a renter of a house in a neighboring community, is <u>not</u> a foreseeable plaintiff. If Bart is not a foreseeable plaintiff, Cheapgasco owed no duty to him. Bart and Cheapgasco have no relationship that would make it reasonable for Cheapgasco to owe Bart a duty. Bart came on to land after Cheapgasco and via Arnold, the land owner. Bart's residence in an abutting residential neighborhood after Cheapgasco left the area does not give rise to a duty of care owed to Bart. I would argue the court should dismiss the action because no duty of care is owed.

2. Breach: Cheapgasco didn't breach the duty of care. They operated their business in a normal fashion and have no idea how the land was contaminated. Violation of the Maryland Environmental Law is not negligence per se; it is only evidence of negligence. Further, Cheapgasco's cleanup is not an admission (subsequent remedial measures not admissible evidence to show negligence or feasibility of precautions).

3. Causation: Other service stations could have also contributed to the contamination.

4. Damages: Bart could have limited his damages (limit foreseeable consequences) by carefully inspecting the land. He took it "as is" and thus put himself at risk of loss. He assumed the risk of property leased "as is" and in the alternative, he was contributorily negligent by failing to inspect prior to signing the lease on his business and home properties.

I would also examine the statute of limitations for tort actions of this kind. I would hope it would be barred by the statute of limitations, but if not I would assert the defenses discussed above.

QUESTION 9

Al, fifteen years old, his adult brother, Bob and their friend Chris planned to break into Darla's residence in Prince George's County, Maryland. Al knocked on the door of the residence to make sure no one was home. After no one answered, all three broke into Darla's home and began searching for valuables to steal. While Al remained in the house, Bob and Chris went to the detached garage twenty yards away to continue their search.

Darla arrived home at that time. After Darla parked her car in the garage, Bob and Chris accosted her. Bob then raped her and strangled her to death. Bob then shot and killed Chris with the handgun he normally carried with him so that there would be no witness to his actions.

Al and Bob were subsequently arrested. You have been assigned as a public defender to represent Al, who has no prior record, with respect to the first degree murder indictment that has been returned against him in the Circuit Court for Prince George's County.

(A) What is Al's culpability for a conviction of first degree murder of Darla and Chris? Provide a thorough analysis.

(B) What Motion should you file initially in Al's defense to limit his exposure to incarceration?

REPRESENTATIVE ANSWER 1

(A) In Maryland, first degree murder is premeditated murder and homicide during the commission of a felony. Here, the indictment must be for felony murder, as Al clearly had not planned to murder Darla. All three had planned to break into Darla's home while Darla was not home.

As an accomplice co-conspirator of burglary (breaking and entering with intent to steal), Al may be convicted of any crime committed by co-felons occurring during the commission of the felony. Therefore, Al might be accused of first degree murder of Darla and Chris if burglary is a felony, even though the actual killings were done by Bob.

Al can defend by saying that rape and murder of Darla and the murder of Chris were beyond the scope of the crime as contemplated. Factors are going to show, this includes the fact that Al knocked to make sure Darla wasn't home, and that Bob and Chris were off in the garage. However, if Al knew that Bob normally carried a handgun with him, the prosecution will argue that the murders were not so far from contemplation. In this argument, Bob's killing of Darla was closer to being foreseeable than the murder of Chris.

On these facts, Al may escape culpability as to first degree murder unless the prosecution proves beyond reasonable doubt that the murders were reasonably contemplated scope of the burglary.

(B) I should file a motion to try Al as a minor to limit his exposure to incarceration. At fifteen years old, with no prior conviction should not be tried as an adult for his adult brother's uncontemplated crime of violence.

REPRESENTATIVE ANSWER 2

(A) *1.* Al′s culpability with respect to Darla for a conviction of first degree murder, the State must prove beyond a reasonable doubt that Al had the specific intent to deliberately kill Darla or that Al is guilty under the felony murder rules. Since there is no proof of any intent, felony murder is the only chance. It is probably not possible for Al to be convicted of felony murder of Darla. Al, Bob and Chris entered into a conspiracy to break into Darla's house. Because burglary is an infamous crime under felony murder rules, Al is guilty of any murder by a co-conspirator in furtherance of the crime. It is arguable that Al cannot be guilty of Darla's murder. The murder of Darla was not really in furtherance of the breaking into the house. Al′s intent was to burglarize the house, not a garage that was 20 feet away. Furthermore, it appears Bob shot Darla to keep her quiet about the rape, not to further the burglary. On the other hand, Al probably knew that his brother carried a handgun, and it is foreseeable in a burglary that a co-conspirator may kill the homeowner if the homeowner arrives. Al′s culpability here is definitely a jury question.

2. Murder of Chris: Al should not be guilty of Chris' murder. A conspirator is usually not guilty of the death of a co-conspirator shot by a victim or police during the commission of the crime. Here, however, Chris was shot by Bob, not Darla. However, the murder of Bob was not in furtherance of the burglary, but to keep him quiet about the rape and murder of Darla. Because Al did not conspire to rape/murder Darla, he did not have the requisite mental state to be guilty of Chris' death.

(B) I would immediately file a motion in the Circuit Court to have Al transferred and tried in Juvenile Court. Because of the age of Al and the seriousness of the charge, the Circuit Court has jurisdiction unless they decide to transfer to Juvenile Court. I would argue to the Circuit Court, that despite the seriousness of the charge, Al did not intend to do anything but burglarize an empty house. He is more properly tried in the Juvenile Court as he did not kill anyone, want to kill anyone, or foresee that anyone would be killed.

QUESTION 10

Abel is talking on his mobile phone while parked on the eastbound shoulder of Maryland Route 6, a public highway in Charles County, Maryland, next to a State Highway Administration sign which states: NO PARKING OR STANDING. Baker is traveling eastbound on Route 6 at a speed of 80 miles per hour. The posted speed limit at all points on Route 6 is 50 miles per hour. Charlie is traveling westbound on Route 6 and, while adjusting his radio, crosses the center line into the eastbound lane and into the path of Baker's vehicle, causing Baker to veer onto the shoulder where Baker's vehicle strike the rear of Abel's vehicle. Abel and Baker are both seriously injured.

Abel files a legally sufficient Complaint against Baker in the Circuit Court for Charles County seeking damages for his injuries from the collision and properly serves the Complaint.

What other pleadings and related papers (other than discovery) should be filed and served by Abel, Baker and Charlie, stating in your answer the purpose of each pleading and the time frame for the filing of each pleading? Assume that all process and service of process is sufficient and all service of process occurs in the State of Maryland.

REPRESENTATIVE ANSWER 1

Once Abel files a Complaint against Baker, Baker must file an Answer to the Complaint within thirty days. Under the facts of this case, Baker may want to assert a counterclaim against Abel for his own injuries arising out of Abel being improperly parked on the roadway. The counterclaim can be filed with the Answer, or within thirty days thereafter. If a counterclaim is filed, Abel will be required to file an Answer to the counterclaim.

Within thirty days of the Answer, Baker will also want to file a third party claim impleading Charlie, whose negligence was a contributory cause (if not the main cause) of the occurrence. Baker may also want to file a cross-claim against Charlie for his own injuries.

Once the third party claim is filed (and/or any subsequent cross-claim), Charlie will have thirty days to file an answer to the third party claim.

Once Charlie is impleaded, Plaintiff, Abel, will also want to file an amended Complaint to assert any cause of action Abel may wish to assert against Charlie. If Abel failed to assert this claim, he would not be able to file a subsequent action against Charlie arising out of this occurrence.

If Abel does file an amended complaint asserting his claims against Charlie, both Charlie and Baker will have fifteen days to file an answer to the amended complaint.

REPRESENTATIVE ANSWER 2

Baker (B) should file a counterclaim against Abel (A) asserting damages he suffered in the accident. This should be filed within thirty days of filing an answer. Abel should respond within seven days of service of counterclaim. Baker's answer to Abel's complaint should be filed within thirty days of receiving service of the complaint. Baker's answer should include all the defenses relevant under MD Annotated Code 2-323(f) and (g), especially contributory negligence. In addition, Baker may also want to file a preliminary motion to dismiss for failure to join a required party (Charlie) prior to filing the answer. Abel must file a response to the motion within fifteen days of service of the motion.

Baker may also wish to file a third party complaint against Charlie (C) alleging negligence. when Charlie was playing with his radio, he was not acting reasonably and is liable to Baker for all or part of Abel's claim against Baker (2-332(a)). Charlie should then file a response asserting defenses to Baker's claim and may counterclaim Baker if Charlie suffered injury (no facts to suggest this). This response to the third party complaint must be filed within thirty days of service of the

third party complaint. In addition, Abel must assert claims against Charlie as a third party arising out of the same transaction or risk having such claims waived (see 2-332(c)). Charlie's answer to the third party complaint may assert the same defenses against Abel, as the Plaintiff, that Baker can assert against A.

Since Maryland is a contributory negligence state, both Baker and Charlie should assert this affirmative defense in their answers.

In addition, Baker should file a cross-claim against Charlie for his (Baker's) injuries sustained in the accident in the event Baker's counterclaim against Abel fails.

All of these claims should be made in order to avoid claim preclusion (res judicata) and/or issue preclusion (collateral estoppel) problems.

QUESTION 11

A Maryland County duly enacted a law that permits adult uses only in industrial zones. "Adult Uses" are defined as "those whose primary purpose is the sale of titillating and tantalizing material of a sexual nature." All industrially zoned land within the County is concentrated in ten acres located in an isolated portion of the County.

All businesses must first secure a use and occupancy permit prior to operating. Adult uses also require a special permit prior to operating. These permits are routinely reviewed by the planning department, the Permits Department, the Health Department and the Fire Department. The review is usually completed within thirty days. Failure to obtain a use and occupancy permit and a special permit prior to operating may result in the imposition of a reasonable fine on the owner of the business as well as closure of the business.

The "Fun Stuff" movie rental store, a national chain, rented space in a strip shopping center on industrially zoned land in the County. It hired Harry Flynn to manage the store. Harry Flynn filed for a use and occupancy permit and a special permit on January 1, 2001, to operate an adult use in an industrial zone. On March 15, 2001, after pressure from headquarters to start making a profit, Harry Flynn opened the store without having received either permit. The Permit Department immediately served Fun Stuff and Harry Flynn with a violation notice that ordered the closing of the store until permits are issued.

On March 20, 2001, the County was granted a hearing on its request for an injunction by the Circuit Court for the County. Harry Flynn and an attorney from the County's Office of Law appeared at the hearing. The Court ruled in the County's favor and ordered Harry Flynn to cease operation until the store receives all necessary permits, and imposed a fine of $1,000. Flynn stated that he could not pay the fine and wished to appeal the Court's order. The court immediately detained Flynn until he could pay the fine. He remained in the local correctional facility until March 21, 2001, when he was able to pay the fine.

Flynn and the authorized representatives of the national chain contact you, a duly licensed Maryland attorney, and ask you to challenge the County's law, the fine and any other matter arising from the Court's hearing.

What legal challenges might you bring, and why? Discuss fully.

REPRESENTATIVE ANSWER 1

Flynn has standing because he has been fined. This case raises issues concerning the 1st Amendment as to the government's ability to regulate speech. The licensing scheme is overbroad and vague and substantially impairs substantive due process and the equal protection rights of citizens.

Flynn, pursuant to the statute, filed for a license that would permit his movie rental franchise to operate a Government does have the power to regulate obscene speech. Obscene speech is that which stimulates the prurient interest based on a community standard and which is without artistic, etc., merit to a rational person. It is unclear from the statute what is "titillating and tantalizing", but it clearly has nothing to do with obscenity. Accordingly, we will challenge the statute as vague and overbroad in that it does not present clear standards which provide a clear notice to Mr. Flynn (or the national chain) what it should do to comply other than wait for the license approval. When a statute is poorly crafted it can be held unenforceable and void, and an individual may go forward (i.e., no injunction is viable). This also raises the issue of prior restraint in that there is no situation here that warrants the imposition of these prior restraints on Flynn's business operation.

This law violates the Equal Protection provision because it unfairly discriminates against

Flynn in that his business is forced to situate itself in a gulag in the industrial zone because of the so-called adult use provision. Other similar video enterprises are not required to do so.

There is also a commerce clause challenge in that the restriction impacts on the national chain's business operations and unfairly burdens them and others like them.

The Due Process violation challenge could also be mounted since the statute is so vague and overbroad. Also, the process used to enforce the statute (jailing Flynn) was improper, and Flynn deserves the chance to appeal or have it reconsidered.

REPRESENTATIVE ANSWER 2

Fun Stuff can challenge the law on Equal Protection grounds. The clause is imputed to the states through the 14th Amendment. Fun Stuff will argue that the County law treats businesses with adult uses differently than other commercial businesses because it requires adult use businesses to obtain a special permit prior to operating. When analyzing a claim under Equal Protection I would first look to determine if the scrutiny standard is strict and here the only fundamental right would be free speech and Fun Stuff would have to argue that opening their store is a matter of free speech to sell video and magazine products and is protected. The legislation must be content specific on its face. Fun Stuff will argue that it is content based because it strictly regulates adult use material only. Fun Stuff will assert that the legislation is not narrowly tailored to reach a specific state interest and it is not the least restrictive means of addressing any state interest. The time, place and manner restrictions are sufficiently satisfied by requiring the adult use stores to operate in the industrially zoned areas concentrated on ten acres in an isolated portion of the County, however. If the Fun Stuff store cannot successfully argue a free speech violation, the court will apply the rational basis standard and the county need only show a rational basis for the requirements and the County will likely prevail. They will likely be able to assert some public policy reason to require special permits, such as the control of illicit sex acts or sexual offenses against women and children.

Fun Stuff may also challenge the statute on the 5th Amendment's Takings Clause because by closing the store the County is depriving Fun Stuff of the ability to make money and make full use of their property for which they obtained the lease. Here it says the permit review usually takes 30 days and it has taken almost 4 months. It is an unreasonable deprivation of property.

The fine can be challenged as a violation of the 8th Amendment because it is excessive. A $1,000 fine for 5 days of operation is excessive, especially since the store had already waited 3 ½ months for the permit to be processed. The County will likely assert that the fines are necessary to deter violation of the statute and that the statute clearly notifies businesses of the possible fine. The court will determine the reasonableness and here it seems excessive. The incarceration of Flynn is a violation of his rights. He should not be jailed for failure to pay a company debt. His due process rights were violated since he was not given a hearing to determine if he was personally liable. He was not given a 6th Amendment right to counsel prior to being sentenced.

QUESTION 12

In 1994, Trash Company, Inc. ("TCI") entered into an exclusive 10-year agreement with Montgomery County, Maryland, to engage in the pick up and disposal of all residential trash. Central to the terms and pricing of the agreement is that TCI deposit all trash in the Montgomery County landfill. TCI owns all of its trash trucks free and clear of any liens, and purchased them as a result of its 10-year contract with Montgomery County. TCI also has a contract to provide the same trash services for Fairfax County, Virginia. The trash that it hauls for Fairfax County is also deposited in the Montgomery County landfill.

Montgomery County environmentalists lobbied the Maryland General Assembly to stop landfills and require more recycling. The Maryland General Assembly decided to act. It first constructed a state-run recycling and incineration facility in Montgomery County. Next, it enacted a local law for Montgomery County that states in part as follows:

> Effective August 1, 2001, all residential trash in Montgomery County will either be recycled or burned in an incinerator. No trash originating outside of Montgomery County will be accepted. No trash, regardless of origin, will be deposited in a landfill.

Finally, the laws stated that only state-of the art environmentally sensitive trash trucks or personal vehicles will be allowed to access the State recycling and incineration facility.

The owner of TCI comes to you, an experienced Maryland attorney, and informs you that this legislation will put TCI out of business since it will cost over one million dollars to retrofit her trucks and she has nowhere to deposit the trash taken from Fairfax County. She asked that you challenge the law on her behalf.

What challenges might you raise on her behalf as to the validity of the law and why? Discuss fully.

REPRESENTATIVE ANSWER 1

The Commerce Clause of the U.S. Constitution delegates to Congress the sole authority to regulate interstate commerce, and the states may not substantially burden interstate commerce. Here, the law gives TCI standing to challenge its validity, since it was a state act that adversely affected its rights under the constitution. The law enacted here prevents the acceptance of trash originating outside of Montgomery County. This prevents any out of state trash, whether hauled by Marylanders or not, to be placed in the County incinerator. This may be seen as a facially discriminatory law since it does discriminate against out of state/county haulers who take trash into Maryland landfills.

Since it is most likely facially discriminatory, the law has to be necessary for a compelling governmental interest. Here, the governmental interest is to protect the county/state environment, but the law as written is most likely not necessary for that interest. The government also has to provide a least restrictive alternative, like charging more for the use of the incinerator. No alternatives were mentioned here. The one issue facing this challenge to the law is that the County may be acting as a market participant, and as such, may be exempt from scrutiny, since the recycling and incinerator facility here is state run.

TCI can also challenge the law based on an Equal Protection challenge, since the law restricts any vehicles that are not state of the art and environmentally sensitive. Here, it would cost TCI over one million dollars to fix the trucks. Additionally, she has "nowhere to deposit her trash from Fairfax County." The law must be substantially related to an important governmental interest to be constitutional. As such, an Equal Protection challenge may be successful since the law does not treat everyone equally.

TCI may additionally challenge the law as a violation of TCI's due process rights since it basically takes away TCI's right to participate in a business for profit without due process of the law. TCI would not be able to continue its business if it had to retrofit its trucks, and find another place to take its trash from Fairfax.

The Contracts Clause of the Constitution also prevents states from rescinding on their obligations by passing laws to allow them to escape that obligation. TCI had a contract with the County which held that "all trash be deposited in the landfill" and since the law was enacted after the contract it can't be retroactively applied to that contract. The contract is good until 2004. TCI has the right to continue until then.

REPRESENTATIVE ANSWER 2

Standing holds one must have injury and nexus. Here, TCI, a Maryland Company, will be hurt by the new law that holds that "no trash originating outside of Montgomery County will be accepted" in the new state run facility. Ripeness holds that an issue may not be brought if it is not an issue yet. Given that the law will become effective August 1, 2001 (a few days away), this case is ripe.

The Commerce Clause of the Constitution grants Congress sole authority to regulate interstate commerce and no state shall substantially burden interstate commerce. State law based on geography will be subject to strict scrutiny where the state has the burden of proof. Here the new Montgomery County law holds that the State bar trash originating from outside Montgomery County and holds no trash will be deposited in a landfill. Here, TCI would be hurt as it deposits all trash in a landfill and some of its trash comes from Fairfax County. This law must pass the strict scrutiny test holding it to be compelling for a necessary governmental interest and be the least restrictive/non-discriminatory alternative. Here, the only governmental interest is that of environmentalists' lobbying for more recycling. This is not a compelling, necessary governmental interest. Further, this law could have been achieved with a non-discriminatory less restrictive alternative such as tax breaks for those using Montgomery County's incinerator.

The Contracts Clause holds that no state shall interfere with the contracts of its citizens. Here, TCI has a contract with Montgomery County for 10 years to engage in the pick up and removal of trash in the County. This law would clearly be seen as contractual interference and a violation of the Contracts Clause.

Therefore, I would seek an injunction and declaratory judgment against the law.