JULY 2002 BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS

QUESTION 1

Ace was driving his car on Route 5 in Prince George's County near a high crime area and an "open air drug market". Bob was a passenger in the front seat of Ace's vehicle. Ace ran a stop sign, in full view of Charles, a K-9 police officer for Prince George's County, who was maintaining surveillance of the area. Charles put on his emergency equipment and effected the traffic stop of Ace.

While Charles was issuing his traffic citation to Ace, Charles ordered his trained, unleashed, and certified cocaine sniffing K-9 drug dog to do a perimeter search of Ace's vehicle. The dog indicated a positive reaction to the presence of drugs. Charles ordered Ace and Bob to get out of the vehicle. Charles searched the car and found a duffel bag on the floor behind the driver's seat with Ace's nametag on it. Charles opened the duffel bag and found it contained a large amount of cocaine.

Charles turned his attention to Bob. Charles removed a fanny pack from Bob's waist and found that it also contained cocaine.

Charles arrested Ace and Bob and indictments for narcotics violations are pending against Ace and Bob in the Circuit Court for Prince George's County, Maryland.

a. State the arguments the State's Attorney would make to establish the admissibility against Ace of the cocaine found in the duffel bag.

b. State the arguments Bob's counsel would make to suppress the cocaine recovered from the "fanny pack".

REPRESENTATIVE ANSWER 1

(a) The State's Attorney will argue that although there was state action and a search and seizure that those actions were reasonable and hence the cocaine should be admissible.

First, the stop of the vehicle was appropriate and based on probable cause as Ace ran a stop sign, a violation of traffic laws.

Second, a dog sniff does not constitute a search. Therefore, the fact that the dog reacted positively to the presence of drugs that it smelled from outside the vehicle will not give Ace reason to suppress the evidence. The positive reaction then gave Charles probable cause to believe drugs were present.

Third, a police officer, even in a routine traffic stop, is permitted to order the occupants of a vehicle out of the vehicle. Accordingly, this was not a seizure.

Fourth, the search of the passenger compartment and the duffel bag were also reasonable. Based upon probable cause, and the fact that automobiles are mobile and, therefore, create exigent circumstances and a need to search Charles was permitted to search any area where drugs could reasonably be contained. This included the duffel bag, as it is and was perfectly reasonable to conclude that drugs could be contained therein. For these reasons, the cocaine found in the duffel bag should be admissible. They should be admissible against Ace because the bag, from all appearances, belonged to him. It was in his vehicle, in close proximity to him (behind the driver's seat) and bore a tag with his name on it.

(b) Bob's counsel would argue that Bob had a reasonable expectation of privacy in his bag. The contents of the bag were obscured and not visible to the public and it was on his person.

Although the stop of the vehicle was reasonable and the search of the vehicle was reasonable, the search of Bob was not.

The dog sniff indicated drugs were in the vehicle. However, Charles had already found drugs prior to his search of Bob; therefore, he no longer had probable cause to search Bob. Furthermore, Charles did not place Bob under arrest and, therefore, did not have cause to search him or his wingspan. Also, the facts do not indicate that Charles had reason to believe either Charles or Ace were armed. Therefore, Charles had no reason to perform any type of patdown. Here, Charles simply removed the pack and searched it without probable cause. Therefore, the contents of the pack should be suppressed as violations of the Fourth Amendment.

REPRESENTATIVE ANSWER 2

Part (a)

Searches and seizures of persons and property must adhere to the 4th Amendment found in the U.S. Constitution. The 4th Amendment is applicable to the states through the 14th Amendment. The stop, search, and seizure of the cocaine of Ace, his passenger, and Ace's car must adhere to these requirements in order to be admissible in court as evidence against Ace or his passenger. Generally, evidence obtained in an illegal search or as part of an illegal arrest and any evidence, which is found as a consequence of the finding the original evidence will be inadmissible (the so-called "fruit of the poisonous tree" doctrine). Generally, the 4h Amendment holds that citizens have a right to be free from searches and seizures by the state in places where they have an expectation of privacy. In order to protect these rights, the Court has effectuated rules, which require officers of the state to have probable cause for arrest, search and seizure; and in some cases, to acquire a warrant from a judge to effectuate such searches that might invade one's privacy.

1. A police officer must have probable cause to stop a vehicle:

Charles had probable cause to stop Ace's car because he ran a stop sign. Once police have probable cause to stop the car and the dog detected the presence of drugs, Charles had probable cause to search the vehicle.

2. Dog search not unreasonable because did not invade privacy:

The dog search of Ace's car was not unreasonable given the dog searched the perimeter of the car only. Once the dog detected the possible presence of drugs, Charles had probable cause to search Ace's car. The use of such a dog in a high drug crime area would not be found to be unusual or illegal, especially since such dogs have a very high record for reliability.

3. Car Search:

Moreover, the Supreme Court has found that police officers may ask legally-stopped occupants of stopped cars to get out of the vehicles: Officers can search the passenger compartment of vehicles including closed containers, such as glove boxes or duffel bags. The Court carved out this exception to the usual rule that would require a warrant because of the mobile nature of automobiles and the potential for the evidence to be moved. The fact that the duffel bag had Ace's name on it connects Ace to the bag.

Ace was legally stopped and the car legally searched; therefore, the search fits the automobile exception to the need for officers to obtain a warrant, and therefore the duffel bag and its contents can be used as evidence against Ace.

Part (b)

Bob's fanny pack was attached to Bob, not in the automobile compartment, making its search fall outside the automobile exception to the need for obtaining a warrant. Moreover, the bag was not searched until after Bob was arrested making it unlikely that Charles could claim that the search of the fanny pack was a "search incident to a lawful arrest." Moreover, even if the fanny pack is found to be a search incident to arrest, given the duffel bag in which cocaine was found had Ace's name on it and the car was Ace's car, Charles did not have probable cause to arrest Bob, making Bob's arrest illegal and making any evidence found as an incident to that arrest inadmissible as evidence against Bob.

Bob did have an expectation of privacy in the fanny pack attached to his person and Charles did not have a warrant or any exception to the need for warrant, making the search and seizure of that fanny pack illegal unconstitutional and inadmissible as evidence.

QUESTION 2

Jane sought treatment from her dentist, Dr. Brush, in Annapolis, Anne Arundel County, Maryland, to correct a loose bottom denture. Dr. Brush's solution for Jane's problem was to surgically place two dental implants in the lower portion of her jaw and then adjust the placement of the lower denture fixture. Dr. Brush placed the implants at an angle which resulted in a painful fit in the adjustment of her lower denture fixture. Jane next went to a dental surgeon, Dr. Floss. She told Dr. Floss about the implants placed by Dr. Brush, the pain in the lower denture adjustment, and occasional difficulties in eating and speaking normally Dr. Floss examined Jane's dental implants and the denture placement. At the end of the examination, Jane asked Dr. Floss if he would support her in a negligence claim arising from the improper placement of the dental implants. Dr. Floss stated that the placement of the implants was not unusual and that her pain would end and her occasional difficulties in eating and speaking would be corrected with the proper adjustment of the lower denture fixture. Dr. Floss further advised Jane that he could not support her in a negligence claim but would accept her as a patient if she wanted further consultation and treatment.

Assume that all appropriate procedures prior to filing suit have been followed and that Jane thereafter timely filed a suit for dental malpractice against Dr. Brush in the Circuit Court for Anne Arundel County; Maryland, requesting a jury trial.

Jane did not designate Dr. Floss as an expert witness in any of her discovery responses in the Circuit Court malpractice case. However, defense counsel in his discovery responses in the case has designated Dr. Floss as expert witness who is expected to testify for the defense about his medical evaluation of Jane and Jane's statements to him. Assume that Jane's counsel files a motion in limine to prevent Dr. Floss from being an expert for the defense.

a. Based on these given facts, will the trial judge allow Dr. Floss to testify as an expert for the defense at trial and to relate the information received from Jane? State your reasons in detail.

ADDITIONAL FACTS

Assume that several months prior to the designation by the defense of Dr. Floss as a expert for the defense, Jane's attorney made a telephone call to Dr. Floss and discussed Jane's case and several of her legal theories of the case. In the course of the conversation, Dr. Floss stated that he would have to research the specific points raised by Jane's attorney. Dr. Floss subsequently sent Jane's attorney a bill for the telephone discussion and for his research on the points they discussed.

b. Based on these additional facts, would the ruling of the trial judge regarding the testimony of Dr. Floss as an expert at trial for the defense change? State your reasons in detail.

REPRESENTATIVE ANSWER 1

(a) The trial judge will probably allow Dr. Floss to testify as an expert for the defense. In Maryland, the judge has discretion whether to allow expert testimony in a case. Generally, four factors are looked at to decide if such testimony is appropriate. (1) It must be helpful to the trier of fact (relevant and reliable). Here the info Dr. Floss has would be helpful because he could provide information about Jane's condition, which is at issue here. (2) Dr. Floss must qualify as an expert. In Maryland, he must be licensed to have the ability to be licensed in this state. Dr. Floss probably is licensed if he is practicing. (3) The expert must be reasonably sure that his conclusions are correct and dependable. Therefore, Dr. Floss must state this in his testimony/deposition. (4) The expert's testimony must be based on reliable and relevant facts. Here, Dr. Floss' testimony is based on his actual examination of Jane.

Most of the statements by Jane will also likely be admissible. First, there is no doctor-patient privilege in Maryland; therefore, Dr. Floss' testimony cannot be stopped because of a privilege.

Hearsay is generally not allowed in, unless an exception applies. Hearsay is an out of court statement offered in court for its truth.

Jane's statements about her condition, her pain, etc. will be allowed in because they fall under the hearsay exception – statements made for the purpose of medical diagnosis. In addition, Jane's statements would be admissible as admissions by party-opponent; which is another exception to the hearsay rule. All of Jane's statements would be allowed in; therefore, as long as they are relevant (tend to make a fact in issue more likely than not). However, Jane's statements to Dr. Floss about the lawsuit are probably not relevant.

(b) The work done by Dr. Floss in response to the attorney's inquiry will probably not be admissible under the work product exception. Under this exception, any material that is prepared in anticipation of trial is privileged unless the opposing side can show that they have a substantial need for it and cannot get it without undue hardship. However, if the work contains the attorney's opinions of theory, it will probably be protected no matter what.

This is protected work product (Dr. Floss' research for the attorney). Dr. Brush would have to argue that the work product protection should be waived.

However, all of Jane's statements to Dr. Floss discussed in (a) will probably still be admissible. These statements do not fall under the work product exception because they were not part of Dr. Floss' preparation in anticipation of trial.

REPRESENTATIVE ANSWER 2

Relevant evidence is any evidence that is material and not excluded by other rules of evidence. Here, Dr. Floss' testimony is relevant to determine Dr. Brush's negligence as to Jane.

A. Expert testimony must be by a proper person, on the proper subject with the proper opinion. Here, Dr. Floss is a (dentist) doctor, testifying about "dental malpractice" and his opinion is about Dr. Brush's treatment of Jane. Dr. Floss is admissible as an expert witness.

Hearsay is an out of court statement offered for its truth. It is not admissible unless under an exception.

Hearing Dr. Floss' testimony about what Jane told him would be hearsay.

Medical diagnosis is an exception to hearsay. Here, Jane told Dr. Floss about "pain in lower….difficult eating…" for the purpose Jane's medical diagnosis statement admissible.

Dr. Floss' statements to Jane would be hearsay. However, they qualify under medical diagnosis exception. "Placement of implants not unusual...difficulties with eating …would be connected" These statements are admissible.

Statement by party opponent exception. Applies to statements made by Jane to Dr. Floss since Dr. Floss is an expert for the defense.

B. Attorney/client privilege applies to communications between attorney and client or between an attorney and third party on behalf of the client. Here, Jane's attorney discussed Jane's legal theories with Dr. Floss. Dr. Floss conducted "research…" on behalf of Jane's attorney and Dr. Floss billed Jane's attorney for the "telephone call" and "research". Dr. Floss was a thirty party, working on behalf of Jane's attorney so the info and telephone call are privileged because it was in anticipation of litigation.

Attorney work product. It is privileged.

Dr. Floss could be an expert for the defense but not testify to anything obtained for Jane's attorney.

No doctor/patient privilege in Maryland.

Question No. 3

On February 2, 1990, Tom, a widower and resident of Allegany County, Maryland, executed a deed prepared by his attorney, Adam, conveying his 150 acre farm to his children, Doris, Ella and Fred. The deed was fully compliant with applicable law as to form, content and execution.

On June 4, 1997 Tom signed a will prepared by attorney Ben, in which Tom devised and bequeathed all of his estate to "those of my children who survive me, share and share alike". The will was properly executed and witnessed.

Tom died on May 7, 2002. His daughter, Doris, has engaged you, a Maryland attorney, to assist in the administration of his estate. She delivers to you photocopies of his will and the 1990 deed, both of which were given to her by Tom a week before his death because of her designation as personal representative in the will. She advises you that the original will and deed are in Tom's safe deposit box at Local Bank. The copy of the deed shows no evidence of having been recorded and your subsequent examination of the county land records confirms that it had not. During your initial meeting with Doris she confirms that the named grantees in the deed are living.

Several days later Doris delivers to you the original will and deed retrieved from Tom's safe deposit box.

Except for a modest savings account payable on death to Doris, and a $10,000 life insurance policy payable to the "surviving children of the insured", the farm, which is immediately adjacent to an upscale residential area and much coveted by developers, appears to be Tom's only asset.

While administration of Tom's estate is pending, you are contacted by Sam who claims to be an adult son of Tom and Mary, a woman with whom Tom had a personal relationship following his wife's death but had not married. Sam produces a 1978 birth certificate which identifies Tom as Sam's father. He also produces an affidavit by Tom dated 1985 acknowledging Sam as his child. He requests and receives from you a copy of Tom's will.

Doris acknowledges that within the community Tom was believed to be the father of Sam but neither Tom nor his children had a personal relationship with him. She does not want you to take any action which could give Sam an interest in the farm. She and her siblings also want the deed recorded.

Under the circumstances, what is your obligation to Tom's estate, his identified heirs and Sam, if any? Identify the facts which support your conclusions.

REPRESENTATIVE ANSWER 1

This question poses a touchy legal question as to whether a validly executed but unrecorded deed can trump or be trumped by an equally lawfully executed will. The legal

determination is made more complex by the fact that Maryland follows the warranty rule does not hold title until a deed is actually recorded.

I interpret this question to be asking something very different and that is what my obligations as an attorney are to Tom's estate, his identified heirs and Sam.

The key fact here is that I was actually retained by Doris to assist her in her duties as administrator of the estate. As such, my principal duty is to her in that role and not to Sam or any other potential beneficiary.

The RPC contains significant guidance on this issue. My representation and judgment is to be conducted for the sole benefit of my client. Indeed, it is a conflict of interest if I allow my personal interest, the interest of the third party to interfere with my judgment. In addition, the ethics code says that I am to abide by the decisions of my client as to the objectives of the representation.

The greatest challenge on this count is Doris' opposition to giving Sam an interest in the farm. Is such a request part of her personal interest or does it instead represent the good faith effort of an estate administrator to effectuate the intent of the decedent.

My solution to this is to advise Doris to seek independent counsel. Her effort to have the deed recorded is clearly part of her personal interest rather than her duties as administrator. Because of my duties to the estate itself, it is probably best if the actual recording of the deed, which may serve to cut off Sam's rights, is not done by me as it would conflict with my duties to the estate as a whole. Thus, the recording is best left, perhaps to Attorney Adam who executed the deed in 1990.

A final fact which suggests that I should be careful about conflicts between the deed and the will is that both were kept in a single deposit box. Thus, Tom surely had not forgotten to deliver the deed or otherwise wanted to attempt to revoke the deed by nondelivery since he kept them together and delivered them to Doris together a week before his death.

While Doris and her siblings appear to have a common interest in having the deed recorded, I would advise each of them to obtain separate counsel to protect their interests. Sam's interest is clearly opposed to those of Tom's children and he clearly needs to have his own attorney.

REPRESENTATIVE ANSWER #2

My first obligation to the estate, the identified heirs and to Sam is to clarify representation. According to the facts, I was retained to assist in the administration of the estate. Although Doris, an identified heir, hired me, my duty is to the estate. Because of this I would advise Sam and the identified heirs, including Doris, to obtain independent counsel. I advised them that I represent the interest of the estate of Tom. It would be a conflict of interest under the RPC to represent the identified heirs or Sam because their interests appear to be directly adverse

to those of the estate. It would not be reasonable to attempt to represent all of these parties concurrently because of the obvious conflicts. Sam is likely to have a claim against the estate under the will because of the clause "those of my children who survive me, share and share alike." Sam will seek to establish Tom's paternity and dispute valid delivery of the deed because it was not recorded and that there was no present intention to deliver because the conveyance was not communicated to the children except to Doris a week prior to Tom's death and the deed was never recorded. On the other hand, Doris, Ella and Fred will oppose Sam's claim. Doris has also informed you not to take any action which could give Sam an interest in the farm. To follow Doris' instructions under these facts may also put me in the position of abetting a fraudulent act which would violate the RPC also.

As attorney to the estate, I would file an action to quiet title to determine whether the conveyance was valid and whether the land is included or excluded from the estate. Additionally, I would have to determine potential heirs. This would include determining that Sam has produced evidence to identify himself as an heir, or if the estate would need a judicial determination of paternity.

If Doris' interest in the estate prevents her from being unbiased, perhaps I should ask that a more neutral administrator be appointed.

Question 4

You are a Maryland attorney, representing Anna in a suit seeking monetary damages in the Circuit Court for Washington County against a health insurance company known as Healthy Coverage Assured (HCA) which has refused to pay for medical expenses Anna contends are covered under the policy;

a. In preparing for trial you timely serve a set of thirty interrogatories on HCA and Bill, the appropriate person at HCA, responds to the questions. Bill, on behalf of HCA, timely files the answers but refuses to answer two questions of the thirty and answers nonresponsively to a third question.

What procedure should you follow to obtain the answers? Explain fully.

b. Bill truthfully answers Interrogatory No. 1. Doug, an officer of HCA, in preparation for trial, reviews Bill's answers. Doug is aware of additional information which, had it been known by Bill at the time he answered the interrogatories should have been included with the answer to Interrogatory No. 1. The interrogatories when propounded were not expressly made continuing.

Must HCA supplement its response to Interrogatory No.1? Explain.

c. You also wish to depose Chuck the former Claims Manager with HCA who initially denied Anna's claim. He is now retired and resides in New Jersey. Neither he nor HCA will cooperate in making Chuck available for a deposition.

What procedures, if any, are available for you to require Chuck to appear for a deposition?

d. Assume after proper notice to opposing counsel, Chuck was deposed. Chuck says Anna's claim should have been covered under the policy and should not have been denied. You desire to offer the deposition testimony as part of your case in chief. Opposing counsel object.

How should the Court rule?

e. HCA notes the deposition of Darrell, a co-employee with whom Anna had a brief affair unbeknownst to her husband. Anna tells you that Darrell could not possibly have information relevant to her claim.

What, if any, motion might you file on Anna's behalf in this regard? Explain.

REPRESENTATIVE ANSWER 1

(a) Bill's Interrogatories

Before taking any further steps, I need to be sure to make a good faith effort to obtain this information from Bill. Discovery is a party-driven process and is not meant to involve the court unless necessary. The fact THAT Bill refuses to answer two questions and is nonresponsive to a third questions suggests to me that further efforts on my part will not lead anywhere. Under 2-431, I just first file a certificate describing the good faith attempts made by me in discussing with the opposing attorney some resolution to this problem. I should include the date, time and circumstances of each discussion. Having filed the certificate, and upon reasonable notice to other parties and all persons affected, I may now file a motion to compel discovery. Under 2-432(2)(b), Bill's refusal to answer is a ground for compelling discovery, namely, the failure of a deponent to answer a question in a written Interrogatory.

(b) Interrogatory No. 1

HCA must supplement its response to Interrogatory #1. Although the interrogatories were not expressly made continuing, Maryland Rules make clear that there is a duty to supplement information given in the course of discovery at all times.

(c) Deposition of Chuck

A nonresident who is not a party to the case may nevertheless be subpoenaed for a deposition under 2-413. Because Bill lives in New Jersey, I can require him to attend a deposition outside of Maryland in accordance with the law of the place where the deposition is held, i.e., New Jersey. This is the practice as set forth in 2-413(2). (I am assuming that Chuck will be served with his subpoena in New Jersey).

(d) Opposing counsel's Objection

If opposing counsel was present and had notice the court will likely allow the testimony in as part of the case in chief as the testimony is relevant and Chuck is out of state and unavailable. The testimony could come in under the former testimony exception to hearsay. The opposing party was given a chance to fully develop Chuck's testimony in the deposition and it should therefore be admissible.

(e) Anna's Motion

I would file a motion for a protective order under 2-403. I am entitled to protect against the deposition of Darrell as it would cause undue embarrassment and appears to be of no relevance to the case. I believe the protective order will be granted.

REPRESENTATIVE ANSWER #2

a. Pursuant to Maryland Civil Rules §2-421 parties may serve written interrogatories (no more than 30) and the party to whom they are directed must answer with all information available to the party. HCA's responses to the interrogatories I, as Anna's attorney, have sent out. Therefore, I will first discuss this with opposing counsel and attempt to get HCA to answer the two unanswered and one nonresponsive question within a reasonable amount of time. If, after discussing this with him, I am unable to procure an answer from HCA on these three interrogatories, I will then file a certificate with the court pursuant to §2-432 of the Maryland Rules, setting forth my attempt to resolve this issue. The certificate will be specific as to the time, date and manner of discussions I had with opposing counsel.

After filing the certificate, I will also file a motion to compel discovery pursuant to §2-432(b)(D).

However, under Maryland Rules., pursuant to §2-432, I am also entitled to immediate sanctions without first obtaining an order compelling discovery because HCA has failed to answer the interrogatories. So it is important to file for both immediate sanctions as well as file a motion to compel so that the court can order HCA to respond.

b. Yes, HCA must supplement pursuant to Maryland Rule §2-421 which requires answers to include "all information available to the party directly or through agents, representatives or attorneys." Because this information was known by Doug (an officer) it must be supplemented.

c. I can subpoena Chuck to be deposed; however, I must conduct that deposition in New Jersey, his State of residence and such deposition will be in accordance with the laws of New Jersey, pursuant to §2-413(2).

d. The court should overrule the objection. Pursuant to §2-419(3) a deposition of a nonparty witness such as Chuck may be used by any party for any purpose so long as the opposing party was represented, present or had notice of the deposition in question because Chuck is out of State and therefore would be found to be unavailable. Therefore, as long as HCA has notice of Chuck's deposition, whether or not they attended, his deposition can be used in my case in chief.

e. I could file a motion for a protective order pursuant to §2-403 requesting that Darrell not be deposed because of embarrassment to Anna, setting forth in my motion that the deposition of Darrell is not relevant to the case and only sought to embarrass Anna. In the alternative, I could request if the court insists on Darrell being deposed that a protective order be issued limiting the scope of the deposition to certain relevant matters.

Question 5

The Howard Youth Hockey Club, Inc. (the "Club") is a private, non-profit organization which sponsors recreational hockey leagues in Howard County, Maryland. Its activities are held exclusively at the County Skating Rink, a public recreational facility owned by the County and supported by County taxes. The Club leases rink time from the County at a rate substantially less than that which the County charges other users. When it is using the rink, the Club's volunteers operate a snack bar located at the facility and the sale proceeds are paid to the Club. The Club offers free skating clinics for County residents and allows any County resident to participate in its programs at a reduced rate. The County itself offers no recreational hockey program but several other groups use the skating rink. In addition, the rink is open to the public for skating several hours each week.

The 2000 - 2001 hockey season was marred by several fights among players and spectators. In response, the Club's Board of Directors adopted two rules for future seasons. First, it required opposing coaches to gather both teams together prior to games and lead a non-denominational prayer as follows:

> "Almighty God, we ask you to give us the gift of good sportsmanship for this game. We promise you and each other to do our best to skate well and play fair today."

Second, the Board adopted a rule that stated that any adult involved in a physical or verbal confrontation with any person at a Club event would be subject to a ban from all future Club events for a period to be determined by the Board.

On the first day of the Summer hockey season, July 1, 2002, Allan Atheist, a seventeen year old who has played Club hockey for ten years, objected to participating in the pre-game prayer saying that he did not believe in God. His coach suspended him.

Also on the first day, Lenny Loud, an adult whose daughter plays for a Club team, became involved in a verbal argument with a referee after a game. The Club Board met with the referee and the coaches of the two teams and decided to ban Lenny for the remainder of the season. At the Board's request, the County Parks director has written to Lenny telling him that he will be subject to arrest for trespassing if he enters the County Skating Rink during a Club event for the remainder of the season.

Allan and Lenny wish to challenge the actions and policies described above. What arguments might they raise? How would a court analyze these contentions? Explain your answer thoroughly.

Representative Good Answer 1.

Only state actions are subject to constitutional scrutiny. Here, the hockey club is private, however, it enjoys a number of benefits of the County, such as use of the county rink at

substantially reduced rates with use of county taxes, free clinics for county residents and reduced rates; also, the public uses the facility. Because the county is so involved in the club (beyond mere licensure or use of premises) then the club's actions may be state action by the county.

A party must have standing to challenge a regulation. Here, Allan is a player who has been suspended for refusing to pray. Lenny has been banned from the rink where his daughter plays; so both have standing.

The First Amendment prohibits government endorsement of religion through the establishment clause. A government action is unconstitutional under the Lemon test if it has a religious purpose without a secular one, its primary effect advances religion, and it is excessively entangled with religion. Here, a prayer, even though non-denominational, may have a secular purpose of promoting sportsmanship and may have that effect, it is excessively entangled by addressing "almighty God."

The first amendment also prohibits the restriction of protected speech.

This includes a prohibition from forcing persons to speak or adopt beliefs they may not hold. It is therefore unconstitutional to force Allan to recite the prayer, so the prayer rule may not be used to suspend him and is unconstitutional.

Incitements to violence are not protected speech, also fighting words. Lenny's verbal argument is not an incitement or fighting words, so it is still protected speech.

Protected speech that is content-based may not be regulated unless it is narrowly tailored to serve a compelling government interest and it is the least restrictive. Here the rule of arguments may serve a compelling interest on reducing violence associated with sports, but the ban on "all physical, or verbal confrontation" is not narrowly tailored.

Statutes regarding speech may not be over broad; here the regulation bans "any adult" in a physical or verbal confrontation with "any person," and is thus over broad.

Due process: person can not be deprived of right without due process. Here, Lenny deprived of right to attend daughters games; not a fundamental right; subject to rational review; will survive.

May be cruel and unusual punishment to ban for whole season.

Representative Good Answer No. 2

<u>Establishment Clause - Allan</u>

The constitution provides under the First Amendment that government may not help religion pursuant to the Establishment Clause ("EC")

State action is necessary to implicate the EC. State action can be applied to private functions and organizations if the State 1) encourages the activity, 2) is excessively entangled in the activity, 3) or it is a company town. Here, although the club is a "private, non-profit organization," the county permits it to use the County skating rink at a lowered fee. The skating rink is owned by the county, supported by company taxes. The club also offers free skating clinics to the public and allows residents to participate in programs at a reduced rate. From these facts, the club's functions amount to state action since the County is leasing the premises and encouraging attendance and use.

Allan must have standing to bring an EC action. Typically, tax payers have standing in EC violations. Here, Allan is an atheist and was suspended from the hockey team for not participating in the pre-game prayer. He has suffered an actual injury which is redressable to the government.

EC challenges will be analyzed under the Lemon Test: 1) is the primary purpose of the rule secular? 2) is the primary effect of the rule inhibit or advance religion? 3) is there excessive state entanglement? Here, the rule that non-denominational prayer be said before games was implemented in response to fights. The prayer, however, states "Almighty God" which furthers religion. Although the primary purpose of the law is secular (less fighting), its primary effect is to advance religion. There does not seem to be excessive state entanglement since the employees are volunteers and there are no other facts.

Allan also has a first amendment right not to speak. Forcing a person to say a prayer violates this right.

Freedom of Speech-Lenny Loud

Assuming state action (see prior), a law prohibiting speech must not be vague or over broad. Vague is when a person of reasonable intelligence must guess at its meaning. Over broad means that protected and unprotected speech is affected. Here, the rule states that any adult involved in a "verbal confrontation" will be banned. "Verbal confrontation" is not clearly defined and may fail for this reason.

Lenny has standing because he is an adult who was banned from attending his daughter's games.

A regulation of speech that is content-neutral must have reasonable time, place, manner restrictions. This means that the rule has other available means for communication, is narrowly tailored and serves a substantial government interest. Assuming that the rule doesn't fail for vagueness or overbreadth, the rule seems reasonable because it is substantially related to reducing fights, and only prohibits "fighting words" a form of unprotected speech.

Procedural due process

Cannot deprive person of life, liberty, property interests without notice and hearing. Lenny banned from all games (may be a priority interest) without a hearing. Unconstitutional.

Question 6

ABC, Inc. is a Maryland corporation in the business of manufacturing aerospace equipment. The corporation has issued 100 shares of stock: Able owns 70 shares, Baker 10 shares, Carla 10 shares and Davis 10 shares. Able, Baker and Carla are the directors. Able is the president of the corporation; Baker and Carla are not officers and take no role in the day-to-day operations of the corporation. Davis is not a director and takes no active role in the corporation.

Throughout the 1990's, the corporation was profitable. In 1999, Able arranged for a loan from First Bank for $5,000,000 to purchase additional manufacturing equipment. The loan documents, which were signed by Able as president of the corporation, provided, among other things, that the corporation would not pay a dividend without First Bank's approval during the term of the loan which was seven years. The loan arrangements and the loan documents were approved by the full board during a regular meeting but neither Baker nor Carla read the loan documents. Instead, they relied on Able's good judgment and written reports from the corporation's lawyer and accountant that the loan documents were "standard" for transactions of that nature and in the best interests of the company. Neither Able, Baker nor Carla personally guaranteed the loan.

In January of 2002, at a regular Board meeting, Able informed Baker and Carla that the corporation had $600,000 in cash and hadn't paid a dividend for several years. He requested that they declare a dividend of $500,000. Able also stated that, if they declared the dividend, "money would be tight" for several months but he was anticipating strong sales in the next several months which would greatly improve the corporation's financial position. Baker and Carla objected to the size of the proposed dividend. Able insisted, telling them that, since he owned 70% of the shares of the company, he could outvote them. Carla then said "Well, if that's the case, have it your own way but I will abstain." Baker voted against the proposed dividend. No one from the Board spoke to either the company's accountant or its lawyer about this matter. The next day, Able ordered the company's bookkeeper to write him a dividend check for $350,000 and similar checks for $50,000 to each of Baker, Carla and Davis.

A downturn in the economy has caused demand for ABC's other products to slump badly. By June of 2002, ABC, Inc. was without funds and was in default on the loan to First Bank. The amount due is $4,000,000. ABC, Inc. has many other creditors.

First Bank has retained you, a Maryland lawyer, to recover as much money as possible from Able, Baker, Carla and Davis. Based on these facts, what legal theories would you use against each defendant? What are the likely outcomes?

Representative Good Answer No. 1

As the attorney for First Bank, I would first look into the possibility of suing ABC, Inc. The contract for the loan was signed by Able in his capacity as President of the corporation in which he had the apparent authority to contract regarding this matter. It appears as though First Bank retained a PMSI in equipment and may have certain property rights against other creditors, if it

complied with certain UCC requirements. However, the corporation is insolvent. First Bank may wish to petition the court for insolvency as a creditor of the corporation and collect whatever monies it can that way. Otherwise, First Bank may have to sue the individual shareholders.

Able

If Able lacked the authority to enter into the loan with the bank, he may be liable under breach of warranty of authority. Able probably had the authority to enter into this contract.

Able may also have breached his duties of care and loyalty. As a director, Able is required to act in good faith, with the belief that his acts are within the best interest of the corporation and with the care that an ordinarily prudent person would have used under similar circumstances. There is a rebuttable presumption that a director complied with the above statute (Business Judgement Rule). It is clear that Able made an improper dividend distribution. Although distributions are within the discretion of the Board, he had already agreed to not make any dividend distribution without obtaining approval from my client. In addition, it appears as though the distribution may have made the corporation insolvent, thus hampering my client's chances of recovery. Lastly, the directors, NOT the shareholders vote for distributions, so this distribution did not get passed by a majority of the Board.

First Bank may be successful in piercing the corporate veil to reach Able as a shareholder if the court finds a need to either prevent fraud or enforce a paramount equity. While it is clear that Able breached his duties of care and loyalty to the corporation, he did not appear to owe the same fiduciary duties to my client. Considering all the facts, it does not appear that Able used the corporation as his alter-ego and the court will probably not pierce the corporate veil for that reason.

Baker & Carla

As Directors, Baker and Carla owed the same duties of care and loyalty as Able. Neither party voted for the improper distribution and expressed their dissent. However, their opposition to the proposed dividend was not noted is writing and given to the corporation. However, they will probably not be personally liable for the reasons that Able will not be.

Davis

Davis is not a director. He breached no duty of care or loyalty to the corporation. Even if the court decides to pierce the corporate veil, he will not likely be held personally liable.

In conclusion, the improper distribution was such that made it incredibly difficult for my client to get paid on his loan. While this is not "Fair", it probably does not reach the level of fraud or a paramount equity that would allow the court to disregard the idea that the owners (or shareholders) of a corporation should bear no personal liability for the corporation's actions and allow the court to pierce the corporate veil.

Representative Good Answer No. 2.

Generally, the officers, director and shareholder/owner of a corporation have no personal liability for a corporation's debt. However, these parties may be liable if 1st Bank is able to "pierce the corporate veil." This hasn't happened often in MD, and only happens to prevent fraud or in light of paramount equities.

If 1st Bank went after A on a piercing the corporate veil theory to prevent fraud, they could argue that A engineered the payment of dividends knowing that it violated the loan agreement with 1st Bank, and was likely to cause ABC to have financial problems, and that he did this for his own personal gain. This could amount to fraud. He also tried to bully C & B into voting for the measure, by telling them that he could outvote them because he had more shares. I think this might be fraud-I do not think he gets to vote based on his percent of shares, since they are all officers (D, also a shareholder, isn't voting. This isn't a vote based on shareholding.) So A wouldn't have been able to outvote B&C and both of them were against it. They'd have had 2-1 majority. He intentionally misled them.

However, these violations of his duties to ABC Corp may not be sufficient for 1st Bank to recover against him.

1st Bank is suing as a creditor, not as a shareholder of ABC to get A to pay for his violation of duties.

1st Bank could argue that A is liable since he signed as an agent on behalf of ABC. Agents are not normally liable for the debts of the principal, unless the principal is partially or wholly undisclosed, or the agent is acting outside the scope of authority. Here ABC was disclosed as the principal, and A clearly had the actual and apparent authority, as president and majority stockholder and a director, to sign on ABC's behalf. This argument is not likely to succeed.

B&C both violated their duties as fiduciaries of the corporation by failing to use due care-reading the loan agreement - and to investigate A's assertions about his ability to outvote them, and not opposing the dividends. They were interested parties though they voted against the dividend payment, they did benefit from it. They have as directors duties of care and loyalty in ABC and these were violated (see above)

1st Bank could argue that these violations amounted to fraud, or at least weigh on the side that it would go against a paramount equity not to allow piercing of the corporate veil by 1st Bank, since they violated their duties and gained from it. But B&C could argue the business judgment rule - that any decision made in good faith by directors will be assured to be ok, though may have had consequences. They did not have actual knowledge of the loan agreement and maybe it was ok for them to rely on A and the corporate attorney to advise them on the loan agreement. They have a good defense that 1. They relied reasonably in signing the loan agreement and 2. Was misled by A about the dividend, but did try to stop the dividend payment. But I think there was a clear violation of their fiduciary duties in failing to further investigate A's

claims about the voting, and to discuss the dividend payment with the corporate accountant and lawyer. So they maybe liable by piercing the corporate veil as it would go against a paramount equity to allow them to benefit from their failure to fulfill their fiduciary duties.

1st Bank has no good arguments against D since D was neither a director nor an officer and had no say in the decision. Though D did benefit from the dividend payment, he is only a shareholder, not usually liable for corporate debts, and no evidence shows that he breached any duty or committed any fraud.

1st Bank's only theory against D is piercing the corporate veil and it is unlikely to work. Their greatest chance of success is with A, who 1. Got the largest payout, 2. Engineered the payout in violation of the loan agreement knowingly, 3. Misled the other directors and 4. Had the greatest responsibility as president and director.

They have some chance of success against B&C, who benefitted from violations of their duties, but did not do so knowingly or in bad faith as A did, and were not officers and didn't know about day-to-day operations.

QUESTION 7

Bart owned a fifty-five (55) acre cattle farm in Washington County, Maryland. Running through his farm, was a stream known as "Wagners Run". Wagners Run in turn, after it entered Bart's land, was fed by a large underground limestone spring. For years, Bart and his family had raised cattle on their land, and the livestock utilized the stream.

Charlie owned another tract about one mile downstream from Bart. Charlie had used Wagners run for many years by creating a dam on his property and piping the water from the pond that was formed to irrigate his commercial Christmas tree farm located on an adjacent tract of land he owned and not directly serviced by a stream. Charlie also raised cattle, which utilized the water on land directly serviced by Wagners Run.

Bart decided that a vineyard would be a more profitable use of his land than cattle, and he built a pond and irrigation system on his property by damming Wagners run. The pond spillover followed the old streambed, although at a much-reduced rate of flow. The reduced flow caused grave problems with Charlie's irrigation system and during periods of drought, the flow of water was so low that his irrigation system was inoperable. There still was sufficient water for Charlie's cattle.

Davis, whose farm was also touched by Wagners Run, was on the opposite side of the stream from Charlie's. Davis raised llamas and the water from Wagners Run had the desired alkaline quality to maintain these animals. Bart, however, decided to cap the spring on his land to use the water to supply his house. This changed the chemical makeup of the water flowing downstream causing Davis' llamas to become infertile.

Do Charlie and/or Davis have any recourse against Bart? Explain fully.

REPRESENTATIVE ANSWER 1

Charlie v. Bart

Charlie may have a cause of action against Bart. Here, Wagners Run is utilized by both Charlie and Bart. After Wagners Run enters Bart's land and it also goes downstream and crosses Charlie's land.

Charlie has been utilizing Wagners Run for many years by creating a dam on his property and piping the water from the pond that was formed to irrigate his property and his commercial Christmas tree farm, located on an adjacent tract of land he owned and not directly serviced by the stream. Charlie may have a problem with this because the commercial Christmas tree farm is not directly serviced by the stream. However, Charlie may be successful in arguing that Bart's "capping" the spring on his land will harm his cattle, which utilize the water which is on land directly serviced by Wagners Run. He will have a very difficult argument for the commercial

Christmas tree farm because again that tract of land is not directly serviced by the stream. He may be more successful on his other argument.

David v. Bart

Davis will have a valid argument because his farm also is touched by Wagners Run, he is on the opposite side of the stream from Charlie's. Davis raised llamas and the water from Wagners Run had the desired alkaline quality to maintain these animals. Davis will be able to argue that Bart's "capping" the spring on his land to use the water to supply his house thus changing the chemical makeup of the water flowing downstream and causing Davis' llamas to become infertile. Again, Bart should not be allowed to cap water from Wagners Run creating problems for his neighbors who also utilize the water flowing downstream. Land which is directly serviced/utilized by the stream should not be capped by one person thereby not allowing others to have the same benefit of the stream.

Both Charlie and Davis should ask for TRO or injunction since land is unique, seeking that Bart refrain from capping the spring on his land whereby causing irreparable harm to Charlie and Davis.

REPRESENTATIVE ANSWER 2

Bart is a riparian land owner because his property abuts a stream. The stream is fed by a large underground limestone spring (percolating waters).

Charlie v. Bart

Charlie would not likely have a cause of action against Bart with regard to the Christmas tree farm. The farm is located on an adjacent tract of land and is not directly serviced by the stream (Charlie created an irrigation system so that the farm tract would have access to water. Bart as riparian owner has a right to use (capture) the water in a reasonable manner as long as his use is not to the detriment of those downstream. His use of the water for the vineyard, although disrupting the flow to the tree farm (commercial venture), is not actionable. In addition, Charlie still has sufficient water for his cattle which are presumably for domestic purposes. Of course, Bart also may use all the water the he needs for domestic purposes.

Davis v. Bart

Davis is also a riparian land owner. Bart is the owner of a large underground limestone spring (percolating waters) that feed the stream that supplies Davis' water. Davis would likely have a cause of action against Bart because his cap on the spring directly resulted in a change in the quality of the water that flowed into the stream; although as owner of percolating waters, Bart would argue that he has a right to use (capture) the water as he saw fit – particularly since he capped the water for house use (domestic purpose).

QUESTION 8

Auto Supplies, Inc., a Maryland corporation, operates five retail auto supply stores in various locations in the State of Maryland.

Auto Supplies stocks batteries as part of its inventory. Auto Supplies placed an order with Batterymaster, Inc. to purchase 1,000 batteries each month at a fixed price for 12 consecutive months beginning May 1, 2002. Auto Supplies agreed to pay for each shipment within 30 days of delivery. Batterymaster accepted the purchase order.

On June 1, 2002, Batterymaster delivered its first shipment of 1,000 batteries to Auto Supplies, and invoiced Auto Supplies for $15,000. Batterymaster had sufficient inventory on hand to fulfill the balance of the contract. It is now July 15, 2002 and Auto Supplies has not paid Batterymaster, nor responded to repeated payment requests.

a) Batterymaster consults you, a Maryland attorney. Advise Batterymaster as to its rights and remedies against Auto Supplies, Inc. Explain fully.

b) Which rights and remedies would you advise Batterymaster to pursue at this time? Explain your reasons.

REPRESENTATIVE ANSWER 1

a) The parties have entered into a valid installment contract for goods, assuming that the agreement is in writing, per the statute of frauds. With an installment contract, the Seller may sue for the price stated in the contract for the goods that have been delivered once that price becomes due (§ 2-709). In addition, the Seller can demand assurance from the buyer that future payments will be made seasonably (§ 2-609) if Seller has reasonable grounds for insecurity about Buyers' intention or ability to perform. Here, Auto Supplies has not paid the first installment payment and has not responded to repeated requests for payment. Therefore, it would be reasonable for Batterymaster to be insecure as to the likelihood of Auto Supplies making payment, since ordinary commercial standards would require the Buyer to at least respond and make some attempt to explain the delay "payment". After receipt of such a demand for assurance, Auto Supplies must reply with adequate assurances within thirty days or their silence will be deemed repudiation.

b) I would recommend that Batterymaster make such a request for assurances, suspend further shipments until receiving those assurances, and then if assurance is not forthcoming with thirty days, read the contract as repudiated and sue for damages. Damages due to Batterymaster will include: (1) payment for the batteries already shipped, (2) incidental damages associated with the request for assurance, and (3) lost profits because Batterymaster will likely be able to resell the batteries subject to the contract with Auto Supplies, but will lose volume, and thus profits, as the result of the repudiation (§ 2-708).

REPRESENTATIVE ANSWER 2

A. Rights and Remedies against Auto Supplies:

A valid contract has been formed between Auto Supplies and Batterymaster (BM). BM shipped the goods on June 1 and Auto accepted, thus triggering their duty to pay within 30 days of delivery. This they failed to do.

As counsel for BM, I would advise them that they should sue Auto for the price since Auto has failed to tender payment.

In this case, BM would receive the price of the goods accepted ($15,000) and any incidental damages that BM might suffer in connection with Auto's breach.

Since this is an installment contract, BM could seek adequate assurance that Auto will hold up their end of the contract and tender payment of the goods.

Also, if BM has an unlimited supply and a limited demand for these batteries, they could be a lost volume Seller and could recover for the loss of the sale to the Auto Supplies store.

Finally, in general BM would be correct in withholding the delivery of the rest of the goods that they were to deliver to Auto Supplies. (2-703)

BM would also be entitled to identify the goods to the contract under 2-704, since he has sufficient inventory at his store.

B. As BM's attorney, I would advise them to seek action for the price of the already delivered goods. I would also advise them to seek adequate assurance that Auto Supplies intends to fulfil its end of the 12 month contract.

If all this fails and Auto Supplies remains in breach, then BM can sue for total breach of contract.

Auto Supplies could argue that BM was first at fault by not supplying the batteries until June 1 instead of May 1 like the contract said. However, by accepting the goods on June 1 and still not responding by July 15, BM can argue that Auto Supplies reinstated the contract under (2-612-(3)).

QUESTION 9

Jim Smith was late for a breakfast date with Sara Sally, Jim's girlfriend. He left his office and decided to take a short cut through a Glenn Burnie, Maryland, residential neighborhood.

As he was southbound on a residential street, he noticed a group of elementary school children standing at a bus stop. The bus stop was on the east side of the street near the far end of the block. Jim observed a school bus turn from a street south of the bus stop and head toward him.

At the same time, Rita Jones, age 8, darted from the front steps of her home on the west side of the street and into the southbound lane of traffic, waving toward the bus and not paying attention to the other traffic on the street.

At the time, Jim was using his cell phone to speak with Cecil, a client of his employer, and not paying close attention to his driving. He was driving about 40 miles per hour, exceeding the posted speed limit of 15 miles per hour during school hours, in his haste to meet Sara Sally.

When Jim noticed Rita, he was about 20 feet away from her. He applied his brakes, but was unable to stop before striking her, and she was fatally injured. Naturally, Rita's parents were very upset.

At the time of the accident, Jim was driving a company car provided for his use by his employer. However, his employer was unaware that Jim's license had been suspended for 6 months.

What causes of action can be filed? Against whom? What defenses would you expect to be raised? Discuss fully.

REPRESENTATIVE ANSWER 1

Rita's parents could file wrongful death action against Jim & his employer vicariously and negligent entrustment cause of action against Jim's employer.

Wrongful Death Action Against Jim

Jim had a duty to drive safely on the public roads and use care of an ordinary prudent person. Jim breached that duty where he drove his car at 40 mph in a 15 mph zone in a residential neighborhood in the morning and an apparent school day and was engaged in a cellular phone conversation. Jim's breach was the actual proximate cause of Rita's death, as Jim's car struck Rita who darted in the street, and resulted in fatal injuries. Moreover, Rita's parents have suffered severe damages as a result of Jim's conduct, namely the loss and services of their daughter and their pain and suffering.

Jim would likely raise as a defense Rita's contributory negligence. In MD, a child's standard of care is based on a similar child of like age, education, health and experience. It would likely be found that Rita's conduct on that morning, waiting for the bus with other school children, would not rise to unreasonable conduct and thus not contributory negligence.
Even if a court were to deem Rita's conduct as unreasonable, Rita's parents could likely show that Jim had the last clear chance to avoid the accident since he saw Rita 20 feet away and could have avoided the accident prior to this had he not been engaged in the phone conversation and preoccupied by his lateness for lunch.

Parents v. Employer (Wrongful Death)

Parents could assert same cause of action against Jim's employer because he was driving his employer's car under vicarious liability.

The employer would raise the same contributory negligence defense as could Jim, as well as no liability because Jim's conduct was beyond the scope of employment. The employer could argue that Jim was on a frolic or a substantial deviation from work at the time of the fatal injury and thus removes the employer from vicarious liability.

Parents could counter employer's argument by raising argument that in MD where an employer requires an employee to drive car to work and use it during the course of the day, the employer may be liable for injuries that occur while employee is driving to and from work.

Employer would counter argue that Jim was not on his way home, but was going to meet Sara and thus removes the employer's liability.

Parents v. Employer (Negligent Entrustment)

Parents could also raise a cause of action for negligent entrustment against the employer for permitting Jim to drive the company car with a suspended license. This cause of action is not under vicarious liability theory but seeks to hold the employer liable for his own negligence.

The employer has a duty to hire and entrust persons who are properly licensed to drive their vehicles. The employer breached this duty by allowing Jim to drive the car for six months without a valid license. This breach was an actual cause and proximate cause to Rita's death and her parents' damages.

Employer would likely counter argue that Jim's negligence was a superceding cause and that Jim would have been negligent even if he had not been driving the company car.

REPRESENTATIVE ANSWER 2

Claims can be filed against Jim and his employer for negligence (wrongful death).

Jim: The tort of negligence requires Rita's parents for Rita and themselves, wrongful death – to establish a duty of Jim, his breach, causation and damages. Driving a car, Jim had a duty to act as a reasonable person. He breached this by chatting on the phone while driving, distractedly thinking of Sally, and driving far in excess of the speed limit even after he noticed the bus and bus stop. The speeding is not negligence per se, but as a statutory is evidence of negligence – hitting children is prevented by following the law. Obviously, the car striking Rita caused her death.

Employer: Jim's employer is liable for Jim's tort if he was in the scope of employment when driving. He was in a company car and talking with a client (Cecil) to further the purposes of the employer, so although he was on the way to a personal lunch on a shortcut it was not a frolic but part of his job.

Jim's employer is negligent for entrusting the car to Jim. A reasonable employer would have known about the license suspension by investigating. The duty was breached by giving him the license. The employer may argue that this negligence was not the proximate cause of the injury, but bad driving is a foreseeable type of damage from negligent entrustment of the vehicle. If Rita's parents recovers from the employer it may seek indemnification from Jim.

Defenses: Jim and Jim's employer will assert that Rita was contributory negligent and recovery should be banned. They will probably not succeed because running to catch a school bus in a 15 mph zone is not negligence for a reasonable 8 year old. Also, Jim was being negligent when Rita dashed into the street – he had the last clear chance to notice her before only 20 feet away and to properly brake. Rita also will not be banned from recovery because of assumption of risk. She did not see Jim's car, nor should she be expected to notice a speeding car in the school zone. There was no voluntary knowing assumption of risk that might bar recovery.

Although parents are foreseeably emotionally affected they are not in the zone of danger for negligent infliction of emotional distress.

QUESTION 10

Tom and Jeri, both graduates of the University of Maryland, married in 1997. They purchased a waterfront home in Talbot County, Maryland. Jeri worked as a social worker for less than one year until she became pregnant with the couple's only child. The couple agreed that Jeri would stay home and care for their daughter.

In October of 1998, Tom started his own company, Megabucks, Inc. During the first two years, the company's revenues did not meet Tom's expectations or allow him to pay the family's bills. He began to drink heavily and, as a result, verbally abused Jeri on a regular basis. Tom refused to have sexual relations with her. They have not been intimate since June of 2001. Tom refused to attend counseling and spent most of his time away from home.

Suspicious that Tom was having an affair, Jeri followed him from work on June 13, 2002. He went to the home of Roxanne Roadrunner, his secretary, where he remained until 4:00 a.m. Jeri demanded that Tom move out of the marital home. He refused to move out. Since she couldn't take it anymore, Jeri took their daughter and fled to her parent's home in northern Virginia the next day. She decided that, if Tom would not leave the marital home, she would live in Virginia and start a new life.

Megabucks has done well during the past year, allowing Tom to receive a salary of $25,000 per month. He has not offered Jeri any money toward her support or the support of the child. All of their assets, with the exception of the Megabucks stock, are jointly titled. The megabucks stock is titled solely in Tom's name.

Jeri has decided that their marriage is not salvageable. She comes to your office to discuss their domestic situation. She wants to know her rights in obtaining a divorce and related relief in Maryland.

You are a Maryland attorney. What advice would you give her? Discuss fully.

REPRESENTATIVE ANSWER 1

Maryland has jurisdiction because T is a resident.

Jeri's Divorce:

I will tell J that she has several options available to her:

ABSOLUTE DIVORCE:

(a) Fault Based: J can obtain a fault based absolute divorce from T on the grounds of cruelty (verbal abuse, no sex) and/or adultery. There is sufficient evidence to establish both grounds: T verbally abuses J, has strayed away from home and J saw him entering another woman's home, only to come out early the next morning. T had the opportunity and predisposition to commit adultery (a criminal offense in Maryland carrying a $10.00 fine).

(b) No Fault: J may also try to obtain a no-fault divorce. If she believes the marriage cannot be saved, and T wants to separate as well, they must live apart for 1 year (i.e. no sex). If T does not want a divorce, they must remain separated for 2 years. The advantages to a no fault divorce are primarily financial and emotional = less confrontation, less money because no litigation, etc.

LIMITED DIVORCE:

I will also tell J about the limited divorce (i.e. legal separation) available to her, however, she will probably not want it because she says her marriage is not salvageable. A limited divorce is good for people who, for religious reasons (or whatever) do not want divorce. Problem is, though, that you remain legally married and cannot remarry.

Based on the above, I would advocate either a fault based divorce (because of T's abuse and adultery) or a no fault based divorce with 1 year separation.

PROPERTY

Here J would be entitled to ½ the value of the marital property: i.e. the Talbot Co. home, all other assets and probably even Megabucks stock because it was acquired during the marriage (even though it's in T's name). Even thought Tom refused to move out, J is entitled in MD to have 3 year possession of the home after divorce to ease the transition into working and because of their only child. J would be able to get a court order granting her 3 year possession of the house.

J could also probably receive alimony Pendente Lite during their separation w/temporary alimony awarded upon divorce, for her to receive until she is financially able to support herself (rehabilitative alimony). Facts indicate that she only worked 1 year until she had her child (i.e. no skills) and T makes quite a lot of $ now to maintain them (J and her daughter) in their current status.

CHILD SUPPORT/CUSTODY

J will receive child support payments Pendente Lite and then child support payments for her daughter until 18. J will receive an amount for her daughter based on the income of T (because J is not working). J will also likely receive custody of their daughter. Although not a default decision, courts usually award custody to the primary care giver, here, that is J. Facts show she stayed home to take care of their daughter. In determining these 2 issues, the court will use the best interests of the child standard, looking at such factors as: the age of the child, the child's wishes and what the parents want and can provide.

Based on the above I would tell J that she has a right to receive $ for herself and her daughter, use of the marital home for 3 years and custody should she decide to file for divorce. I will tell her that there are no guarantees but these are her rights according to MD law.

REPRESENTATIVE ANSWER 2

Although it looks like Jeri wants an absolute divorce, I would counsel her also on limited divorce.

- ABSOLUTE DIVORCE
  - FAULT
  - ADULTERY: IF TOM IS HAVING AN AFFAIR, JERI CAN CLAIM ADULTERY BY SHOWING OPPORTUNITY AND DISPOSITION AS WELL AS CORROBORATING HER TESTIMONY. THIS LOOKS LIKE HER STRONGEST GROUNDS.
  - CRUELTY: JERI CAN CLAIM THE VERBAL ABUSE ON A REGULAR BASIS IS ADEQUATE GROUNDS. THIS IS A WEAKER ARGUMENT BECAUSE IT IS NOT PHYSICAL VIOLENCE NOR SEVERE.
  - DESERTION: JERI CAN CLAIM TOM S SPENDING MOST OF HIS TIME AWAY FROM HOME CONSTITUTES DESERTION. HOWEVER, SINCE TOM REFUSED TO MOVE OUT, THERE IS SOME INDICATION THAT HE HAS NOT BROKEN COMPLETELY FROM THE MARRIAGE.

  - NO FAULT:

SEPARATION: ALTHOUGH THEY HAVE HAD NO SEX SINCE JUNE, 2001, THEY WERE NOT ENTIRELY SEPARATED NOR WAS THE MARRIAGE IRREVOCABLY BROKEN.

- LIMITED DIVORCE:

CRUELTY: SAME GROUNDS AS ABSOLUTE.

NO FAULT: THERE IS NO INDICATION OF A MUTUAL AGREEMENT TO SEPARATE.

- ALIMONY:

PENDENTE LITE (PL): JERI IS ENTITLED TO PL DURING THE DIVORCE BASED ON HER NEED, TOM S ABILITY TO PAY, AND A DESIRE TO MAINTAIN THE STATUS QUO. TOM CLEARLY HAS THE ABILITY TO PAY AND JERI IS NOT WORKING.

  - REHABILITATIVE (R) OR PERMANENT (P): JERI IS ENTITLED TO R IN ORDER TO FURTHER JOB TRAINING OR LOOK FOR WORK. COURTS ARE LOATHE TO GIVE P UNLESS THERE IS EVIDENCE SHE CANNOT BE SELF-SUFFICIENT AND THERE ISN T IN THIS CASE.

- ASSETS:

  JERI IS ENTITLED TO HER FAIR SHARE OF THE MARITAL ASSETS, INCLUDING TOM S SALARY DURING MARRIAGE BASED ON NON-ECONOMIC CONTRIBUTIONS, LIKE CARING FOR THE KIDS; THE REASONS FOR DIVORCE, AND OTHER ECONOMIC INVESTMENTS DURING MARRIAGE.

- HOME:

  JERI CAN GAIN POSSESSION OF THE HOME FOR UP TO 3 YEARS, IF SHE GETS HER DAUGHTER, IT BECOMES HELD AS TENANTS IN COMMON AT DIVORCE.

- CUSTODY:

  CUSTODY IS BASED ON THE BEST INTERESTS OF THE CHILD. THE COURT WILL LOOK AT THE CHILD S AND PARENT S DESIRES; WHO THE PRIMARY CARE GIVER IS, AND IF ADULTERY WOULD HAVE A DETRIMENTAL EFFECT. TOM WILL GAIN VISITATION RIGHTS.

- CHILD SUPPORT:

  JERI AND TOM WILL PAY BASED ON THE INCOME SHARES METHOD OR BY COURT DISCRETION IF TOM S INCOME IS MORE THAN $120,000.

QUESTION 11

Dudley's Dance Studio ("Studio") is owned and operated by Dudley. It has locations in Montgomery and Howard Counties, Maryland. In January 2001, Dudley hired Newman as an employee, and told Newman that he had a permanent back injury so he could no longer teach any classes. Newman and Dudley signed the Studio's standard employment agreement ("Agreement"). The Agreement provided that the Studio would pay Newman a commission of 10% of the price ("Commission") of each dance lesson for which new students register and pay.

Two months after he started working at the Studio, Newman approached Betty at the Rockville post office and encouraged her to take swing dance lessons from Dudley, a prominent dance instructor. He told Betty that Dudley would have her on the dance floor looking like a professional by the time of her wedding in June 2003. Newman told Betty that each lesson would cost $30, so Betty gave Newman a check for $300 to partially pay for 48 lessons. The balance due for the 48 lessons was $1,140. Betty was told by Newman that the lessons could be taken no more frequently than twice per month over the next two years. Further, Newman told her that she would have two free lessons to try out the Studio before her lessons started and that Dudley would not be at those two lessons because he was on vacation.

At the end of the third class, Betty asked Newman when Dudley would begin teaching the classes. Newman informed Betty that Dudley no longer taught dance classes because he has a permanent back injury. Betty told Newman that if Dudley wasn't coming to class, then neither was she. Betty demanded her money back.

Dudley claimed he should be paid the remaining balance due for Betty's lessons because he turned away other interested students to accommodate Betty. Newman demanded that Dudley pay him the Commission due on Betty's 48 lessons. Dudley countered that Newman should reimburse him for any losses he sustained as a result of Betty's demand for a return of her payments and her unwillingness to continue her dance instruction at the Studio.

Discuss the claims that could be filed by and evaluate the likelihood of success of each of the following: (a) Betty v. Dudley; (b) Dudley v. Betty; (c) Dudley v. Newman; and (d) Newman v. Dudley. Include in your analysis any defenses to the claims that might be raised by the parties.

REPRESENTATIVE ANSWER 1

A) Betty v. Dudley

Betty will argue that Newman, an agent of Dudley, fraudulently misrepresented that Dudley would conduct her dance lessons. To prove fraudulent or negligent misrepresentations, Betty must show that that fact was material and relied upon. Because Newman used Dudley's reputation as a "prominent dance instructor" when he knew that he was injured indicates that the misrepresentation was material. Whether Betty relied upon that statement would be a question of fact. Betty would then argue that because Newman was acting within the scope of his

employment, Dudley is liable for the acts of his employee. It should be noted that Betty would be entitled to damages and not specific enforcement (a court would not force Dudley to dance!).

B) Dudley v. Betty

Dudley may seek to enforce the agreement made by his agent on behalf of Dudley with Betty. Dudley will show that Newman gave Betty an offer which she accepted and consideration was given ($300). However, Betty will argue that because there is no writing of the agreement, no contract is enforceable against her. When performance of a contract takes more than one year, the statute of frauds requires that a writing be made and be signed by the party to be charged. Here we have no such agreement. Because the contract could only be performed in 2 years, Betty has a good statue of frauds defense.

C. Dudley v. Newman

Dudley will make a claim that Newman should indemnify him for any loss he sustained. This appears to be a strong claim given that Dudley appears not to have made any fraudulent statements to Betty.

D. Newman v. Dudley

It appears that Newman is trying to enforce the "Agreement" between himself and Dudley when he began work. However, the Agreement requires payment of the 10% commission for each dance lesson a new student "registers and pays." Because Betty has only paid for 10 lessons ($300), Newman may have been only entitled to $30. Payment for the lessons by the student appears to be a condition to Newman's receipt of a commission. However, Newman will recover nothing due to his conduct.

REPRESENTATIVE ANSWER 2

Betty v. Dudley

Betty can sue Dudley for the return of her $300 and rescission of the contract on the basis of Newman's fraud and Dudley's vicarious liability for Newman. She would not have agreed to pay the money if she had known that Dudley would not teach, she reasonably relied on Newman's statements that she would be taught by Dudley, and she suffered damages in the form of the $300 deposit.

Dudley will argue that he is not liable for Newman's fraud because Newman was acting outside the scope of his employment when he did so. Dudley expressly told Newman that he could no longer teach, and by telling Betty otherwise, Newman committed an intentional tort for which employers are not ordinarily liable. However, this tort was committed with the purpose of advancing the studio by enlarging its membership, thus Dudley will be held vicariously liable.

Betty may also sue for damages suffered if she is not able to learn to dance in time for her wedding. This is not as good a claim because the damages are ill defined and perhaps nonexistent.

Dudley v. Betty

Dudley can sue Betty based on breach of contract because of her failure to pay the balance due and damages suffered as a consequence of turning away other interested students. Dudley can argue that a contract was formed when she agreed to pay Newman $30 a lesson for 48 lessons and her failure to do so on demand constitutes anticipatory repudiation and breach.

Betty can argue that the contract is void under the statute of frauds as a service contract not capable of being performed within a year – she is limited to only 2 lessons per month and the oral contract was for 48 lessons. Dudley might argue part performance by Betty, who paid $300, and by Newman, who taught 3 lessons. However, this argument would be good only to the extent of the part performance – payment of $300 is only consistent with a contract for 10 lessons. Thus, Dudley will not recover the balance of payment due because the contract was not written and didn't satisfy the statute of frauds.

Betty can also argue that having Dudley as a teacher was a condition precedent to the contract – Betty contracted to learn from Dudley, a prominent dance instructor breached the contract thereby releasing her of her obligations. Note this is also an argument Betty can use against Dudley for recovery of the $300. This is a strong argument and Dudley will lose any claim against Betty.

Dudley v. Newman

1) Dudley can sue Newman for indemnification for any money paid by him to Betty because Newman breached his Employment Agreement. If Betty wins those claims, Dudley is entitled to be indemnified by Newman.

2) Dudley can also sue for breach of fiduciary duty owed to Dudley as Dudley's agent. This cause of action can include damages for losses sustained as a result of Newman's breach. Dudley will likely win on this argument – Newman breached a duty of care by lying to Betty to induce her to take lessons from the studio, and Dudley suffered losses therefrom.

Newman v. Dudley

Newman may attempt to sue Dudley on breach of the employment contract for failure to pay 10% commission. He will likely argue that the commission is not dependent on whether the students were obtained lawfully.

This is very weak argument. Any money brought in by Newman will be lost as a result of his fraudulent statements and his consequent breach of fiduciary duties. Newman's liability in this matter cuts off his claim for commission.

QUESTION 12

Chad, a Maryland resident, hired Image Counts, Inc. ("ICI"), a Baltimore City public relations firm, to arrange for his transition from professional basketball player to candidate for Mayor of the City of Accident, in Garrett County, Maryland. ICI and Chad entered into a written agreement that provided for Chad to pay to ICI a fixed fee plus reimbursement for all expenses incurred by ICI on Chad's behalf. ICI advised Chad to hold a press conference and reception at Accident's finest restaurant on August 17, 2001, and to hire a band to write a campaign song and to play at the reception. Chad does not want his candidacy known until that date. ICI agreed to keep Chad's plans confidential until the date of the press conference. Since Chad was busy completing his last season, Chad and ICI also agreed that ICI would enter into all contracts for the press conference and the reception; provided however, the total cost for the restaurant and the band could not exceed $15,000. To assist ICI with making its arrangements, Chad gave ICI an advance for expenses in the amount of $1,500.

After discussing the confidential nature of the event and without disclosing Chad's name, ICI solicited contracts from Lipsink, the band, to write the song and to play at the reception for a fee of $5,000, and from La Grande Cheese, the restaurant, to host 250 guests for a price of $15,000. ICI requested that Chad review both of the contracts prior to execution by ICI. Chad told ICI that all details were in its hands and that ICI was authorized to proceed. ICI signed the contracts and gave a deposit of ten per cent (10%) of the contract prices to both the band and the restaurant to reserve August 17, 2001, and to begin work under their respective contracts. Both contracts provided that either party could cancel the contract no later than July 17, 2001.

On the evening of August 5, 2001, Chad called ICI and stated that he was abandoning his quest for elected office to actively pursue a broadcasting career. Chad demanded an immediate return of the advance of $1,500.

On August 6, 2001, ICI informed La Grande Cheese and Lipsink that the press conference and reception were cancelled, that the music was not needed and that the contracts were terminated. The band and the restaurant each stated that it intended to file suit against ICI for payment in full. ICI retained Lawyer Goode to advise ICI on possible defenses against Chad's demand for return of the advance and to pay the band and the restaurant under the terms of their respective contracts.

Discuss (i) ICI's liability for and defenses against the potential claims of Chad, the band and the restaurant, and (ii) any claims that ICI, the band, and the restaurant may have against Chad. Please fully explain your answer.

REPRESENTATIVE ANSWER 1

ICI was acting as Chad's agent in obtaining contracts for the August 17 event. The Agreement between these two parties explains that ICI must enter into contracts on behalf of Chad because of Chad's confidentiality requirement. Chad will not be entitled to a refund of the $1,500 because ICI had already commenced performance according to the Agreement. Additionally, Chad may be liable to Band and Restaurant or indemnify ICI because Chad was an undisclosed principal because of the nature of the deal. ICI had express authority to enter into contracts for Chad.

As for ICI's liability to the band, and the restaurant, it was acting for a partially disclosed principal. That is, both the band and the restaurant probably knew that ICI was working on behalf of someone else. Accordingly, Chad is primarily liable for these contracts whether they will receive payment in full depends on a number of factors, the Le Grande Cheese may be able to get the business from other customers. Lipsink, if it has already written the song, and cannot rebook for August 17, the band may be entitled to the entire rate of the contract, including those mitigating actions the parties may take to reduce their damages.

ICI may sue for the flat fee and any expenses it incurs as a result of entering into contracts for Chad. It may even be able to recover the additional $5,000 as Chad seemed to authorize this and ICI may have implied authority. ICI had apparent authority (to Lipsink and La Grande Cheese) to enter into contracts on behalf of Chad because Image Counts is clearly working for someone else, even though not known to the band and the restaurant, Chad will be held liable under the circumstances.

REPRESENTATIVE ANSWER 2

PART A.

Chad v. ICI

When an agent violates the express conditions set upon the agency, it is liable to the principal for the breach of agency/contract and any other attendant financial consequences.

As an agent, ICI may be liable to the principal, Chad, for exceeding the scope of its authority in negotiating the contracts with Band and Restaurant. Chad expressly conditioned ICI's negotiations and payments to the Band and Restaurant not to exceed 15K. Instead, ICI negotiated and agreed, on behalf of an unknown principal, to pay Band and Restaurant a sum of about 20K. Therefore, ICI is liable to Chad for 5K, if Chad has to pay the exceeded amount to Band and Restaurant. However, a principal may change the express conditions of agency by later agreement. Here, ICI offered to show Chad the details of the contracts so that Chad would be put on notice that they totaled 20K. Chad refused stating that "all the details were in ICI's hands and that ICI was authorized to proceed" on the 20K contracts. Chad effectively modified express conditions by implication and authorized ICI to spend 20K. Therefore, ICI may defend against Chad's arguments that ICI breached the agency that only 15K be spent.

Band and Restaurant v. ICI

ICI, as agent, represented Chad to the Band and Restaurant in a manner that kept the principal confidential. When third parties enter into contract agreements where the agent does not disclose the principal, the agent is liable on the contract. Therefore, ICI has little defense to the claims of Band and Restaurant should they sue it for breach. While it was the principal; Chad, who cancelled the agency and the contracts made by ICI, ICI is liable for engaging in an agency contract with Band and Restaurant in a manner that did not disclose the identity of the principal. Therefore, ICI is a primary source of liability to them.

PART B.

ICI v. Chad

Chad is liable to ICI on the agency contract for the representation fee and the cost of spent expenses. Since Chad terminated the contract, Chad is liable for the fixed fee. As for expenses paid by ICI in the scope of its authorized agency, Chad is liable to ICI for them as well.

ICI expended funds to secure the contractual commitments of Band and Restaurant on behalf of Chad. While the expenses for these commitments were originally limited to 15K, Chad later modified that express condition by stating to ICI that "all the details were in [ICI's] hands and that ICI was authorized to proceed." Therefore, the expenditure of the 20K was an authorized act. At the very least it was an impliedly authorized act of ICI to act on behalf Chad. ICI only paid a 10% deposit to the Band and Restaurant. Chad is liable for that amount to ICI. ICI is likely to have to pay the full amount plus other damages to Band and Restaurant. As the principal, if ICI is made to pay them, Chad is liable for those amounts too. Chad is also liable to ICI for the other consequences ICI financially suffers under other contract theories of liability. Chad cannot claim that he owes 5K less to ICI because ICI exceeded the scope of its authority. Chad expressly and/or impliedly authorized ICI to spend the extra 5K.

Band and Restaurant v. Chad

As the principal, Chad is liable to Band and Restaurant for the contracts of his agent, ICI, when either agent or principal breach. Because ICI acted expressly and/or impliedly (both equally valid vehicles of principal authorizations to an agent) on the behalf of Chad, Chad retains primary liability to the Band and the Restaurant not only for the contract price but any other contracts-law recognized damages appertaining to the breach. The principal retains liability for the breach of authorized contracts entered into and on its behalf by an agent.