JULY 2001 BAR EXAMINATION
BOARD'S ANALYSIS

QUESTION 1

Although a common-law marriage may not be created in Maryland, Maryland does recognize common-law marriages that are valid where contracted. However, proof that a common-law marriage existed in accordance with the laws of the jurisdiction recognizing that type of marriage is necessary before the marriage can be given legal effect in this state. Cases considering the elements of proof necessary to establish the common-law marriage require (a) that the parties intended to be married; (2) that they agreed to be married; (3) that they lived together for a substantial period; and (4) that they held themselves out to the community as husband and wife.

Therefore, since common-law marriage is valid in Pennsylvania, and since the parties intended to be married and agreed that they were, in fact, married, and held themselves out to the community as husband and wife, the marriage will be recognized in Maryland.

Having established that they are married and seeking a divorce, Anne should be advised concerning each of the following issues:

(1) Grounds for divorce;
(2) Child Custody and visitation;
(3) Child support;
(4) Use and possession of the family home and property;
(5) Alimony; and
(6) Marital Property.

Before she may take the children with her to Pennsylvania, she must first obtain an Order from the appropriate Circuit Court giving her custody. And, as long as her leaving does not impair Bob's rights of reasonable visitation, she may return to Pennsylvania and take the children with her.

Regarding the issue of alimony, she may obtain it whether she files for a limited or an absolute divorce. If she files for a limited divorce, the factors required to be proven are her need for alimony and Bob's ability to pay.

In this case, since she is unemployed, and since Bob makes a substantial salary, a court would award her a sum sufficient to allow her to continue to pay her current expenses until the matter of the absolute divorce is determined. The purpose of such alimony is to maintain the status quo.

In determining alimony at the trial of a Complaint for Absolute Divorce, the courts look to Subsection 11-106 of the Family Law Article of the Annotated Code of Maryland which sets out a list of factors which must be considered.

The first factor is the ability of the party seeking alimony to be wholly or partly self supporting. Although Anne has a college degree, she has never held a job and is currently unemployed. In addition, she may not have the necessary qualifications to teach in Maryland. Even if she returns to Pennsylvania, one must consider the parties' agreement to home school the children in making this determination.

Second, the time necessary for her to gain sufficient education and training to become self sufficient is also affected by her need to care for and home school the children.

The third factor is the duration of the marriage. The parties have been married about twelve years during which Anne made significant non-monetary contributions to the marriage by caring for the children, and during which she was unable to pursue a career of her own which is the fifth factor to be considered.

The sixth factor is the circumstances that contributed to the estrangement of the parties. Anne will insist that Bob was having an affair and this is the sole cause of the estrangement.

The seventh factor, the age of the parties, is not significant because their ages were not disclosed in the facts.

The eighth factor, the physical and mental condition of the parties, is not relevant because the facts do not indicate that either of them have any physical or mental conditions which must be considered.

The ninth factor, Bob's ability to pay, is significant. He makes a substantial salary, and it is only fair that a portion of it be used to maintain Anne and her standard of living.

The tenth factor, any agreement between the parties, is relevant because the parties apparently agreed that Anne would not work and would stay home with the children. As a result of this agreement, she is not able to be partially or wholly self sufficient.

The eleventh, and most important factor to be considered, is the financial needs and resources of the parties. The parties will be required to provide the court with financial statements which the court will use in making its determination.

In order to get full credit for this question, it is not necessary that the applicant address all of the factors to be considered, just that he or she recognize the most obvious ones.

QUESTION 2

Rule 1.15(b) requires that, upon receiving funds or other property in which a client or a third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or the agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

Therefore, you are required to notify not only your client, but also the medical providers to whom sums are owed, that you have the funds in your possession.

In this case, if you notify the medical providers and they insist upon payment, you must pay them or risk legal action against your client. They are the beneficiaries of your client's contract contained in the letters of protection sent to them.

In a personal injury matter, if the client has signed an authorization for the attorney to withhold sums from the settlement to pay the medical providers, the attorney has a duty to protect such third party claimants against wrongful interference by the client and may refuse to surrender the property to the client.

Rule 8.4 also provides that it is misconduct for a lawyer to engage in fraud or deceit. It may be argued that the payment of the funds received from the personal injury protection to the client without paying the medical bills constitutes such fraud or deceit as to subject the attorney to discipline as well as to personal liability.

Rule 1.2 of the Rules of Professional Conduct places the attorney in the untenable position of either disobeying the directions of his client or becoming personally liable for the funds. In such a situation, if the attorney cannot get the parties to agree upon the disposition of the funds, he should pay the funds into the registry of the court for the court to decide or submit the matter to mediation or arbitration.

Question 3

Even though ABC, P.A. is a professional association, the general rules of corporate law apply. Md. Anno. Code Corp. and Assoc. Article ("Code") § 5-134. As a shareholder of a corporation alleged harmed by the failure of its directors and officers to carry out their duties to the corporation, Davis has no cause of action in his own right. Instead, the cause of action would be a derivative one, *Danielwicz v. Arnold*, 137 Md. App. 601, 616, 769 A.2d 274 (2001). Under most circumstances, a demand to the Board to file suit must be made prior to filing a derivative action. The only exception is where such a demand would be clearly futile. Maryland courts have interpreted this exception very narrowly, on the grounds that, if nothing more, a demand will give the board an opportunity to reevaluate its position prior to litigation. *See Werbowsky v. Collomb*, 362 Md. 581, 607, 766 A. 2d 123 (2001); *Danielwicz v. Arnold*, 137 Md. App. at 629.

In Maryland a director is obligated to perform his or her duties in good faith, in a manner reasonably believed to be in the best interests of the corporation and with the care that an ordinarily prudent person in a like position would use under similar circumstances. Code § 2-405.1(a). The business judgment rule provides presumption that directors act in good faith and in best interests of corporation. *See e.g. Black v. Fox Hills North Community Assoc*., 90 Md. App. 75, 82, 599 A.2d 1228 (1992): *see also* Code §2-405(e). Davis will have a very difficult time meeting this burden of proof under these facts. In addition, even if the directors had breached duty to the corporation, the fact that the merger was ratified by the shareholders probably bars recovery. *Coffman v. Maryland Publishing Co.*, 167 Md. 275, 289, 173 A. 248 (1934).

The fact that Able stood to be named to Probity, PA's board of directors does not cause this to be an interested director transaction. *Wittman v. Crooke*, 120 Md. App. 369, 375, 707 A. 2d 422 (1998). Even if it were considered to be an interested director transaction, Able's disclosure of the agreement to the other Board members (as well as to Davis) coupled with the approval of the disinterested directors meets one of the Maryland statutory tests for interested director transactions. *See* Code 2-419.

As an objecting shareholder to a merger, Davis has the right to demand, and receive the fair value of his stock. Bus. Assoc. Article § 3-201 *et seq*. As part of the procedural requirements to obtain this remedy, the objecting shareholder must notify the corporation in writing prior to the date of the shareholder's meeting. Davis' letter to the shareholders probably constitutes such notice, although Maryland courts have held that there must be rigid compliance with the statute in order to successfully invoke the remedy. *E.g. Pink .v Cambridge Acquisition, Inc.*, 126 Md. App. 61, 75, 727 A.2d 414 (1999).

Question 4

The first defense: accord and satisfaction: Unless the note specifically provides otherwise, a co-maker's liability on a promissory note is joint and several. Md. Anno. Code Commercial Law Article § 3-116(a). Partner's agreement with Sonny does not bind the Kettles; so his partial payment constitutes accord and satisfaction only if it is a good faith compromise of a disputed claim. *Kimmel v. SAFECO Ins. Co.*, 116 Md. App 346, 357, 696 A.2d 482 (1997); Commercial Law Article § 3-311. A claim is disputed when it is "reasonably doubtful", *Wickman v. Kane*, 136 Md. App 554, 566, ___A. 2d ___ (2001), *cert. pending*. This test is an objective one. The unilateral assertion that a maker's liability is not joint and several does not meet this test. *Id*. Thus even if Partner genuinely believed that his payment of $50,000 plus interest discharged his liability, it does not.

2. The fact that Partner Section 3-206 Restrictive endorsements is not applicable because the writing adjacent to the "memo" section of the check is not an indorsement.

The second defense: fraud in the inducement: Ingenuous is a holder in due course. She took the note for value, in good faith, without notice of default or a defense. The defense of fraud advanced by Partner cannot be asserted against Ingenuous because it is fraud in the inducement, not fraud in the factum, Commercial Law Article §3-305(b) (drawing a distinction between the narrow defenses which can be asserted against a holder in due course as opposed to the broader class of defenses (including any defense which could be raised in a contract action) which can be asserted against one who is not a holder in due course.

The third defense: partial payment: Again, Ingenuous is a holder in due course. Only certain defenses can be asserted by an obligor against an HDC. Clearly, partial payment is generally a defense in a collection action to the extent payment is made. Md. Anno. Code Commercial Law Article Section 3-602. Section 3-305 sets out the rules for determining which defenses can be asserted against a holder as opposed to an HDC:

> **Defenses and claims in recoupment**.
>
> (a) Except as stated in subsection (b), the right to enforce the obligation of a party to pay an instrument is subject to the following:
>
> (1) A defense of the obligor based on (i) infancy of the obligor to the extent it is a defense to a simple contract, (ii) duress, lack of legal capacity, or illegality of the transaction which, under other law, nullifies the obligation of the obligor, (iii) fraud that induced the obligor to sign the instrument with neither knowledge nor reasonable opportunity to learn of its character or its essential terms, or (iv) discharge of the obligor in insolvency proceedings;
>
> (2) *A defense of the obligor stated in another section of this title* or a defense of the obligor that would be available if the person entitled to enforce the instrument were enforcing a right to payment under a simple contract . . . .
>
> (b) The right of a *holder in due course to enforce the obligation* of a party to pay the instrument *is subject to defenses of the obligor stated in subsection (a) (1), but is not subject to defenses of the obligor stated in subsection (a) (2)*. . . . .

The UCC provides that payment is a defense to an action to collect upon a note, **Section 3-602.** It is thus a defense "stated in another section of this title" and is not applicable to a holder in

due course pursuant to **Section 3-305 (b).** Partner's defense of partial payment cannot be asserted against Ingenuous.

EXTRACT SECTIONS FOR QUESTION 4

Annotated Code of Maryland, Commercial Law Article

Title 3. Negotiable Instruments: § 3-116, 3-204, 3-206, 3-302, 3-305, 3-311, 3-601, and 3-602.

Question 5

Home Renewal's chances of recovery are negligible with respect to the breach of contract claim. Since time was of the essence under the agreement, the time for performance must be strictly complied with by Home Renewal. Leslie insisted on strict compliance and did not waive her right to compliance by Home Renewal by permitting Home Renewal to continue to perform work on the house. Home Renewal's requests for time extensions and additional compensation were not sent to Leslie in a timely manner as required by the contract. Similarly, there was no justification given for Home Renewal's labor problem which caused the delay in construction, and for the substantial additional expenses for supplies. Consequently, Leslie's decision not to pay Home Renewal or to grant time extensions to Home Renewal are justified by the facts. Additionally, Leslie had to hire and pay another contractor to finish the work. Accordingly, the Court should enter judgment for Leslie on the breach of contract claim.

Leslie will also successfully defend against the quasi-contractual claims of unjust enrichment and quantum meruit. A party cannot prevail on quasi-contractual theories when an express written contract exists between the parties. There is an express written contract between Leslie and Home Renewal. Therefore, Home Renewal should fail under its quasi-contractual claims. They amount to nothing more than an attempt by Home Renewal to avoid the consequences of failing to file timely requests for extension of time and for additional payments, and to complete the work as required under the contract.

In *County Commissioners v. J. Roland Dashiell & Sons, Inc.*, 358 Md. 83, 747 A.2d. 600 (2000), the Court of Appeals analyzed the trial court's entry of summary judgment on contractual and quasi-contractual claims raised by a contractor against Caroline County, Maryland. With respect to raising quasi-contractual claims in a case where there is an express, written contract between the parties, the Court reviewed relevant provisions of the Restatement (Second) of Contracts and the law of other jurisdictions that had addressed the question, and it confirmed the interpretation employed by the Court of Special Appeals, as follows:

> The general rule is that no quasi-contractual claim can arise when a contract exists between the parties concerning the same subject matter on which the quasi-contractual claim rests. (Citations omitted.) The reason for this rule is not difficult to discern. When parties enter into a contract they assume certain risks with an expectation of a return. Sometimes, their expectations are not realized, but they discover that under the contract they have assumed the risk of having those expectations defeated. In desperation, they turn to quasi-contract for recovery. This the law will not allow.

Id. at 96,747 A.2d at 607.

QUESTION 6

The Circuit Court ruled correctly on objections (a) and (d) and incorrectly on objections (b) and (c), and the reasons for the rulings are, as follows:

(a) Ned's testimony was properly allowed. The statements that Pat made to Ned constitutes hearsay. However, the statement falls within the exception of statements of a party opponent. Pat's statement is admissible under Maryland Rule 5-803(a)(1), since it was Pat's own statement, and it was offered into evidence by her party opponent, the State. The Rule does not require the unavailability of the witness to permit the admission of a party opponent. Furthermore, the State could argue that the statement was admissible as a statement against Pat's interest as it would tend to subject her to criminal liability under Maryland Rule 5-804(b)(3). If Pat asserted her Fifth Amendment privilege not to testify, then she would be "unavailable" for purposes of the Rule, and her statement to Ned could be admitted through Ned's testimony under the Rule. *See, Kostelec v. State*, 112 Md. App. 656, 685 A.2d 1222 (1996). See Maryland Rules 5-801(c) and 5-802.

(b) The Court should not have permitted the owner of the tobacco store to testify about the clerk's statement. The owner's statement is inadmissible hearsay – an out of court statement offered to prove the truth of the matter asserted, i.e. that Pat bought cigars. The fact that Pat bought cigars and that a partially burned cigar was found near the burned body of Tony, a nonsmoker, was important circumstantial evidence that Pat caused the death of Tony. The State should have brought the clerk into court to testify about the sale of cigars. The State would also have had to establish that the cigars purchased by Pat were the same type of cigars as the one found near Tony's body to make the testimony relevant. It is conceivable that the Court could have admitted the statement under the "catch-all" exception to the hearsay rule found in Maryland Rule 5-804(B)(5) if the probative value of the statement outweighed its prejudice to the Defendant, if the statement was evidence of a material fact in the case, that it was probative, and that the admission of the statement best served the interests of justice. The State should not have attempted to use this exception unless the clerk was unavailable to testify through no fault of the State's. In addition, the State would have had to advise Pat prior to trial that the statement would be used so that Pat would have a fair opportunity to respond.

(c) The Court should not have permitted Trooper Jones to testify about the contents of the hospital records under Maryland Rule 5-803 (b)(6). Trooper Jones was not the custodian of the records and his testimony was hearsay. Furthermore, it was clear from the Trooper's testimony that he had no personal knowledge of the contents of the records. The contents of the records could have been admitted either through the testimony of the custodian of the records under Maryland Rule 5-803(b)(6), or as a self-authenticating business record under Maryland Rule 5-902(a)(11). In either case, the contents of the record could not have been admitted unless a proper foundation for admission of the record was first established.

(d) The Court properly admitted Dr. Scheiner's expert testimony. It is within the sound discretion of the Court to determine the admissibility of expert testimony. Maryland Rule 5-702 permits the Court to admit expert testimony that will assist the trier of fact to understand the evidence or to determine a fact in issue. In reaching the decision, the Court must first determine that the witness is qualified as an expert by training or experience, whether the expert's testimony is appropriate, and whether a sufficient factual basis exists to admit the expert's testimony. In this case, Dr. Scheiner was properly qualified as an expert witness by both training and experience. He is the local medical examiner, he is a doctor, he has conducted hundreds of autopsies, and he has been accepted by the Court as an expert in over one hundred other cases. His testimony as to cause of death is appropriate. He conducted the autopsy and ruled out asphyxiation and natural causes. His opinion as to cause of death is appropriate because it assists the trier of fact, in this case a jury, to determine whether or not Pat caused the death of Tony. Finally, the Court properly found that a sufficient factual basis existed to admit the evidence. Dr. Scheiner determined during the autopsy

that the fire did not cause Tony's death, since there was no soot in his lungs, which indicated that he was not breathing at the time that the fire was burning in the hotel room. Dr. Scheiner also ruled out other natural causes. While the autopsy did not reveal any poisons in Tony's body, the medical examiner was undoubtedly made aware of other facts in the case since he participated in the investigation of the death. Maryland Rule 5-703 permits an expert to base his expert opinion on facts perceived by him or made known to him by others. The facts are that the fire was set after Tony died and that Pat told Ned that she planned to kill her husband with an untraceable drug. Even without the extrinsic facts, the finding of a *post mortem* examination were consistent with death by unnatural causes and not by accident. *See Sippio v. State*, 350 Md. 633, 714 A.2d 864 (1998); *Hricko v. State*, 134 Md. App. 218, 759 A.2d 1107 (1999), cert. denied, 362 Md. 188, 763 A.2d 735 (2000).

Question 7

This question presents issues related to the creation of life estates, vested remainders subject to divestment in real estate. Also raises the question of whether or not a reservation of a right to dispose of real estate created by tenants by the entireties survives the death of one tenant.

Rules of construction are also involved, e.g., intention of the parties; reconciling conflicting granting and habendum clauses.

The grantor may convey a life estate in real property and at the same time convey a fee simple interest to a third party to be effective upon termination of the life estate. The interest of the grantee in this situation is that of remainderman; that is, an estate limited to take effect in possession immediately after the expiration of a prior estate (the life estate) created at the same time and by the same instrument. A grantor may reserve to himself an estate out of the land granted but may reserve a power, such as a power to sell, mortgage or otherwise encumber the land and it is not invalid for repugnancy.

A particular estate may be given to a first taker the power to dispose of the fee, and the remainder to a second taker, subject to be defeated by the exercise of the power and this creates a vested remainder subject to divestment.

The granting clause in the deed clearly would permit Clyde & Wilma to jointly exercise the power to sell. However, the power was not exercised before Clyde's death. The phrase "in their lifetime" which is in the granting clause raises the question whether or not the power to sell ends with the death of one of the tenants by the entireties. The power to sell is not expressly conferred on the survivor of Clyde & Wilma. However, the power to sell is coupled with an interest and, therefore, survives unless a contrary intent can be found. The life estate clearly contemplated Clyde & Wilma jointly and devolution to the survivor. This shows evidence of intent that the power of sale survive also.

Issues raised by conflicting granting and habendum clauses are resolved in favor of the granting clause in the absence of a clear contrary intent.

Literski v. Literski, 166 Md. 641; and Madler v. Gunther, 155 MD 43.
Roberts v. Roberts, 102 MD 131.

Question 8

Strict liability applies to abnormally dangerous activities. For the doctrine to apply, the activity must be abnormally dangerous in relation to the land on which it occurs. It must satisfy the following factors:

1. A high degree of risk of harm to persons, land, or chattels of others;
2. The likelihood the harm will be great;
3. Inability to eliminate the risk by the exercise of reasonable care;
4. Extent to which the activity is not a matter of common usage;
5. Inappropriateness of the activity to the place where the activity is carried on;
6. Extent to which its value to the community is outweighed by the dangerous attribute.

The Doctrine applies to harm to the person or property of another resulting from the abnormal activity. Here the claim of Bart is that his own property or at least that being leased by him is harmed by a previous occupier of the same property.

Here also, the previous activity which is said to be abnormally dangerous was being carried on in an appropriate place.

The Doctrine of Strict Liability places a heavy burden on users of the land. Thus, it has never been extended to one who has no ownership or even control over the land which is now occupied by another.

Subsequent users of the land can avoid the problem by taking precautions prior to purchasing or leasing the site. This is particularly true in this case where the lease placed Bart on notice that the property was being leased "as is," and by Bart's knowledge that it had been previously occupied and used as a service station.

The application of the Doctrine of Strict Liability requires harm to person or property. Since Bart claims only economic loss, he cannot come within the Doctrine.

A different outcome could result in Bart's claim that he is unable to occupy his residence which is on neighboring land. However, analysis of the same factors would be involved. In defending Cheapgasco, the logical arguments would include that the activity was being carried on in an appropriate place and that the activity is a matter of "common usage" and therefore not abnormally dangerous.

However, a stronger argument can be made for strict liability because (1) the injury may be beyond "economic loss;" and (2) it is injury to property of another.

Negligence requires:

1. The Defendant under the duty to protect the Plaintiff;
2. A breach of the duty by the Defendant;
3. Plaintiff suffering actual injury or loss;
4. The loss must proximately result from Defendant's breach of duty.

Here, even if Bart can show that Cheapgasco caused the problems on the leased land and that he suffered injury therefrom, he cannot state a cause of action unless he can show that Cheapgasco had a duty to avoid injury to Bart.

Here, there is no relationship between the parties which would make Bart's harm foreseeable to Cheapgasco.

Bart, by leasing "as is" a former service station property, knew or should have known about the possibility of contamination. Thus, if there is no duty, there is no negligence. In defending Cheapgasco with regard to the residence Bart purchased, it would be more difficulty to argue that the Defendant had no duty to protect the Plaintiff. However, Bart would have to prove that Cheapgasco breached its duty to him. Without additional facts proving the cause of the contamination of Bart's residential property, it would be difficult to sustain a negligence claim against Cheapgasco.

Question 9

(A) Al burglarized the house. He did not strangle Darla or shoot Chris, both homicides occurred in the detached garage.

Under *Article 27, Section 440* (statutory felony murder rule) the fact that Al was committing the felony of burglary creates proof of malice and premeditation sufficient to sustain a conviction for first degree murder for any killing consequent to the felony. Each person engaged in the commission of the criminal act bears responsibility for all consequences which naturally and necessarily flow from the act of each and every participant. It has long been established that under the felony murder doctrine a participating felon is guilty of murder when a homicide has been committed by a co-felon in furtherance of the underlying felony.

Al's response should be that there should be no criminal liability on his part when the homicides were the fresh and independent product of Bob's acts outside of or foreign to the common design of burglary. Al would assert there was no direct casual connection between the two homicides and the burglary felony, mere coincidence of time and place are insufficient. Darla died from strangulation following the rape, not the burglary.

Al would further argue that neither death was the natural probable consequence of the burglary and he could not have foreseen Bob would commit rape.

Likewise, Chris was an accomplice to the burglary. Al would argue that it was not foreseeable that Bob would kill Chris, a co-felon. Bob's killing of Chris was for a private purpose (no witnesses to Bob's involvement in rape), unrelated to the burglary.

The key to Al's culpability is the determination of a nexus between each killing and underlying burglary felony, beyond mere coincidence of time and place.

Actual foreseeability is not the test. There is a range of conduct that the law regards as implicitly foreseeable, whether or not the prospect of the conduct was ever actually anticipated. Al's culpability would be a jury issue. *See Munford vs. State, 19 Md. App. 640, 313 A.2d 563 (1974), St. vs. Watkins 357 Md. 258, 744 A2d 1 (2000) 2 W. LaFave & A. Scott, Substantive Criminal Law Sec. 7.5 at 212.*

(B) File a Motion to Waive Al's case back to the Juvenile Court pursuant to *Art. 27, Sec. 594 A* requiring a waiver investigation.

Question 10

Baker must file and serve an answer to Abel's complaint within 30 days after service of the Complaint on Baker. The answer may contain a general denial of liability but must assert any affirmative defense such as contributory negligence. Baker should also file a third-party complaint against Charlie, asserting, that if Baker is liable to Abel, then Charlie is liable to Baker for all or part of Abel's damages. Baker must file the third-party complaint within 30 days after the filing of Baker's answer to Abel's complaint and must serve on Charlie the third-party complaint, a summons and a copy of all pleadings, papers and notices filed in the case. Baker should also file a cross-claim against Charlie asserting that Charlie is liable for Baker's injuries. Baker should also file a counterclaim against Abel asserting that Abel is liable for Baker's injuries. The cross-claim and counter claim must also be filed within 30 days after the filing of Baker's answer to Abel's complaint.

Once Baker's third-party complaint against Charlie is filed and served on Charlie, Abel should promptly file an amended complaint adding Charlie as a defendant and asserting any claim that Abel has against Charlie arising out of the occurrence, specifically Charlie's liability directly to Abel for Abel's injuries.

Charlie must file an answer to Baker's third-party complaint within 30 days after service. This answer may contain a general denial of liability and may assert any defense that Baker has to Abel's claim and must assert any affirmative defense such as contributory negligence on the part of Abel. Charlie must also file an answer to Baker's cross-claim within 30 days after service. This answer may contain a general denial of liability but must assert any affirmative defense such as contributory negligence. Charlie must also file an answer to Abel's amended complaint within 30 days after service. This answer may contain a general denial of liability but must assert any affirmative defense such as contributory negligence. Charlie should also file a counterclaim against Abel asserting, that if Charlie is liable to Baker on Baker's cross-claim, then Abel is liable to Charlie for all or part of Baker's damages. Charlie must file this counterclaim within 30 days after the filing of Charlie's answer to Baker's cross-claim.

Abel must file an answer to Baker's counterclaim within 30 days after service. This answer may contain a general denial of liability but must assert any affirmative defense such as contributory negligence. Abel also must file an answer to Charlie's counterclaim within 30 days after service. This answer may contain a general denial of liability and may assert any defense that Charlie has to Baker's cross-claim and must assert any affirmative defense such as contributory negligence on the part of Baker.

Within 15 days after service of the last pleading filed by any party, any party may file a written demand for a jury trial.

EXTRACT SECTIONS FOR QUESTION 10

Annotate Code of Maryland, *Maryland Rules*

Title 2. CIVIL PROCEDURE - CIRCUIT COURT: Rules 2-301, 2-302, 2-303, 2-304, 2-305, 2-311, 2-321, 2-322, 2-323, 2-324, 2-325, 2-331, 2-332, 2-341, and 2-342.

QUESTION 11

The answer should first address whether the attorney may represent both the national chain and Flynn. Their positions are potentially adverse since Harry is an agent for the national chain and may have argued that the fine and any resulting imprisonment should have been imposed on the national chain.

The answer should next address whether each has standing to challenge the law, the imposition of the fine and the incarceration. From the facts it appears that each may have standing to challenge the law and fine, but Flynn alone may challenge his period of incarceration.

The constitutionality of the law may be attacked on several grounds. First, the definition of adult uses is vague and overbroad and, therefore, violative of due process requirements. It is not clear what material falls within the definition and arguably a lot of material may be of a sexual nature. Secondly, such material may be considered a form of speech under the First Amendment. As such, the County's law must be a reasonable time, place or manner restriction not directed at the content of said speech in order for it to be upheld. On its face, this law does not appear to regulate the content of the speech, but it still may not be reasonable if it is overbroad and vague. It may also be unreasonable to limit the amount of acreage on which such uses may be located or to allow the use only in an isolated portion of the County. It may be unreasonable to require an additional permit for adult uses, and unreasonable to review the permit application for 2 ½ months prior to issuance. Finally, the law may violate the equal protection guarantees provided in the Fourteenth Amendment since adult uses are required to obtain special permits not required of other uses and there does not appear to be a reasonable basis for the requirement.

Fun Stuff and Flynn may also wish to challenge the Court's decision to enjoin operation of the store and fine Flynn. The injunction may not have been reasonable for the reasons addressed above. The Eighth Amendment precludes the state from imposing cruel and unusual or excessive punishment. The fine in question may be considered excessive.

Moreover, it has been held that jailing a person for failure to pay a fine is violative of the Eighth Amendment. Flynn should therefore be successful in challenging the Court's decision to incarcerate him until the fine was paid.

QUESTION 12

The question was intended to generate brief discussion on the following areas of constitutional law: 1) the Contract Clause; 2) the Commerce Clause; 3) the Equal Protection Clause; 4) the Takings Clause.

The analysis may also address the issues of ripeness and standing. The legislation was effective August 1, 2001. Was the legislation ripe for TCI to challenge? Since TCI was in the middle of the ten-year contract that began in 1994 it would arguably suffer an immediate threat of harm, making the action ripe. Additionally, since TCI has a contract stake in the outcome of the legislation it may challenge the legislation.

Contract Clause

The Contract Clause of the Constitution states in part that states cannot enact laws that retroactively impair contract rights. If the contract between TCI and Montgomery County is considered a private contract, the legislation would be reviewed under the intermediate scrutiny standard and would be an invalid impairment upon the contract clause unless it: 1) serves an important and legitimate public interest and 2) is reasonably and narrowly tailored to promote the specific public interest. Did the Maryland General Assembly's legislation meet these criteria? If the contract is considered a public contract, the same test would be applied but strict scrutiny would be the standard.

Commerce Clause

The Commerce Clause of the Constitution regulates interstate commerce, and although the State of Maryland is permitted to enact regulations that regulate aspects of interstate commerce said regulations cannot unduly burden interstate commerce nor discriminate against commerce to protect local interest. With the enactment of this legislation, no trash from Virginia or any other state could enter into a Maryland landfill. However, the legislation also prevented Maryland trash from being deposited into a landfill as well. Thus, the legislation may not be the least restrictive alternative measure that could have been enacted.

In utilizing the balancing test to determine if the State is discriminating against interstate commerce or whether the state is protecting a legitimate governmental interest, one must question whether the state and local entity is operating as a market participant in which case the local entity may be able to discriminate to the benefits of its citizens.

5th Amendment Takings Clause

A discussion of the 5th Amendment Takings Clause would be applicable as well. This clause is applicable to State action via the 14th Amendment. The legislation may constitute a taking of TCI's property if it does not substantially advance a legitimate state interest, or if it denies economically viable use of its property.

Equal Protection

The Equal Protection Clause of the 14th Amendment is designed to make sure that the law treats people in the same class equally, and not differently from each other, absent some important governmental reason for disparate treatment. In the subject case, the issues are whether there is any basis for the State to provide owners of state-of-the-art environmentally sensitive vehicles an unfair or discriminatory advantage over those that do not own such a vehicle or to treat trash emanating outside of the County differently.