JULY 2002 BAR EXAMINATION

BOARD'S ANALYSIS

QUESTION 1

A. Arguments by the State for admissibility of cocaine from duffel bag against Ace:

1. Ace was legitimately stopped for an observed minor motor vehicle violation - running the stop sign. Even if Charles' true reason for stopping Ace was his interest in investigating whether Ace was involved in other criminal activity in the area of the open air drug market, this stop is allowed under the 4th Amendment. See Whren v. U.S., 517 U.S. 806, 116 S. Ct. 1767 (1996). The motivation or purpose of the officer who makes the valid traffic stop is immaterial.

2. During the period of permissible detention for the issuance of the traffic citation, the perimeter search of Ace's car by the drug dog was proper and timely, occurring before the processing of the traffic stop had been completed. See Pryor v. State, 122 Md.App. 671 (1998) (footnote 6 at Page 681); State v. Funkhouser, 140 Md.App. 696, 782 A.2d 387 (2001).

3. Charles needed no further justification beyond a valid traffic stop to order Ace and Bob out of the car. See Pennsylvania v. Mimms, 434 U.S. 106, 98 S.Ct. 330 (1997).

4. Continued detention of Ace and Bob was justified by the drug alert.

5. The smelling of the exterior surface of the car is not a search within the contemplation of the 4th Amendment and therefore it needs no legal justification. See U.S. v. Place, 462 U.S. 696, 707, 103 S.Ct. 2637 (1983). The only thing that needs justification is the detention of Ace's car for enough time so that it would be in a place to be sniffed. See Gadson v. State, 341 Md. 1, 668 A.2d 22 (1995). The dog was on the scene and no additional detention time was needed.

6. When a qualified dog signals to its handler that narcotics are in the vehicle, that is *ipso facto* probable cause to justify a Warrantless Carroll Doctrine Search of the vehicle. See Walkes v. State, 364 Md. 354, 774 A.2d 420 (2001).

7. The unconsented to search of the car by Charles, without a warrant, and the seizure of the duffel bag with Ace's nametag began after the K-9 alert, which came within minutes of the initial stop. The processing of the traffic violation justified the initial detention and the K-9 alert. There was probable cause to justify a Warrantless Carroll Doctrine Search. In summary, the traffic stop was objectively reasonable; the processing of the traffic violation was still in progress when the dog alerted to the car; subsequent warrantless search of the vehicle was reasonable; the warrantless search produced the duffel bag with contraband.

8. Police officers with probable cause to search a car may inspect passenger's belongings found in the car that are capable of concealing the object of the search. See Wyoming v. Houghton, 526 U.S. 295, 119 S.Ct. 1297 (1999).

9. Closed containers in cars can be searched without a warrant because of their presence within the vehicle. If the police have probable cause to search a lawfully stopped car, then they can conduct a warrantless search of any container found inside the car that may conceal the object of the search. See generally U.S. v. Ross, 456 U.S. 798, 102 S.Ct. 2157. The drugs in the duffel bag should be found admissible in the State's case against Ace.

B. Arguments Bob's Counsel would make to suppress the cocaine recovered from the "fanny pack" taken from Bob's waist:

1. Bob was not in the car at the time of the car's search under the Carroll Doctrine. He was outside of the car.

2. The "fanny pack" strapped around Bob's waist was a part of his outer clothing and was a part of his person.

3. The search of Bob's person cannot be justified under the Carroll Doctrine search of the car. The "fanny pack" was taken during an unconsented to and warrantless search of and seizure from Bob's person. While it is arguable that the dog alert gave the police probable cause to arrest Bob, he was a passenger in the vehicle who was not otherwise identified with the duffel bag. A positive cocaine alert to an automobile in and of itself does not provide probable cause to arrest or search a passenger. See Wallace v. State, #2393 September Term 2001.

4. Bob's winning argument is that he had not been arrested when the search occurred. A search incident to a lawful arrest is an exception to the warrant requirement. It authorizes a full-blown search of the person for the purpose of discovery of evidence (unlike a frisk of a stop and frisk, which only authorizes a pat-down of clothing surface for a limited purpose of detecting the presence of a weapon). It is arguable that Bob had never been arrested prior to the search.

5. The probable cause to believe that a person was carrying evidence does not justify a warrantless search of a person.

6. The fact that the police had probable cause for a lawful arrest of a person does not, in and of itself, justify a warrantless search of that person. The search, again, must be incident to the arrest itself.

7. Here no arrest was made until after the seizure by Charles of the "fanny pack" with the cocaine in it.

8. An actual arrest, and not the right to arrest, is the indispensable prerequisite for a warrantless search incident to a lawful arrest. See Boulder v. State, 276 Md. 511, 350 A.2d 130 (1976).

9. Bob's attorney can successfully argue that this was an arrest incident to a search and therefore a bad search and seizure. The search and arrest were not sufficiently or essentially

contemporaneous.

10. The seizing and searching of the "fanny pack" was not a consequence or incident of a decision to arrest Bob. The arrest of Bob was a consequence of what was found in the search of the "fanny pack" notwithstanding that Charles may have had an alternative and independent basis for arresting Bob.

BOARD'S ANALYSIS

QUESTION 2

A. The motion in limine will be denied. The trial judge will allow Dr. Floss to testify as an expert for the defense at trial and to relate the information received from Jane.

1. Jane has placed her dental/medical condition at issue in this civil action. Any right to privacy as a patient as to this condition has been waived.

2. Although he had been originally consulted by Jane for a dental/medical evaluation and possible treatment, Dr. Floss would not be violating any physician-patient relationship by testifying as an expert witness for the defense because there is no physician-patient privilege in Maryland. *Butler-Tulio v. Scroggins*, 139 Md. App. 122, 135, 774 A.2d. 1209 (2001).

3. Inapplicable on these facts are Maryland's limited patient-psychiatrist privilege and patient-psychologist privilege (Courts and Judicial Proceedings Article, section 9-109).

4. Jane's statements against her interest to Dr. Floss would not be excluded as hearsay, whether or not Jane is at trial, because defense would offer them as statements against her. For example, her statements of only occasional difficulties in eating and speaking normally and possibly her apparent search for an expert who would support her negligence claim against Dr. Brush would be admissible under this theory. Maryland Rule 5-803 (a) (1).

5. It is arguable whether Dr. Floss was a physician treating Jane because he simply made a dental/medical evaluation and left open the possibilities of further consultation and treatment. The given facts only discuss one visit by Jane. If Dr. Floss were a treating physician, Maryland Rule 5-803 (b) (4) allows, as an exception to the hearsay rule, Jane's statements for the purposes of dental/medical diagnosis or treatment.

6. Dr. Floss, whether or not the treating physician, has no fiduciary duty to Jane to refuse to testify for the defense about the medical condition raised by Jane in this case. *Scroggins*, 139 Md. App. at 138-139.

B. Even with the additional facts, the trial judge will allow Dr. Floss to testify at trial as a defense expert and to relate the information received from Jane.

1. Jane never retained or designated Dr. Floss as an expert in the case. However, Jane's counsel may argue that Dr. Floss' billing for research done on specific points discussed with Jane's counsel was a retainer.

2. There was no confidential relationship established in the telephone conversation between Jane's attorney and Dr. Floss.

3. The facts do not state whether any confidential information was provided by Jane's

attorney to Dr. Floss. If confidential information had been provided, there still was no establishment of a confidential relationship with Dr. Floss.

4. There is no *ex parte* prohibition against defense counsel discussing the case with Dr. Floss. Jane placed her dental/medical condition at issue. Maryland Rule of Professional Conduct 4.2 bars only such *ex parte* communication between a lawyer and a party represented by another lawyer without the consent of the other lawyer or without authorization by law or court order for such communication.

POINTS AND AUTHORITIES

Butler-Tulio v. Scroggins, 139 Md. App. 122, 135, 138-139, (and generally), 774 A.2d. 1209 (2001).

Courts and Judicial Proceedings Article, section 9-109.

Maryland Rule 5-803 (a) (1).

Maryland Rule 5-803 (b) (4).

Maryland Rule of Professional Conduct 4.2.

BOARD'S ANALYSIS

QUESTION 3

This question raises issues of the attorney's responsibility under the Maryland Rules of Professional Conduct when, after accepting employment, subsequent events raise potential conflicts of interest.

At the time Doris retained you, the information made available to you did not suggest that you could not represent Doris as personal representative and as a beneficiary in Tom's will. Rule 1.7 permits such representation if the attorney reasonably believes that it will not adversely affect the relationship with other clients. The interest of the estate and that of Doris and her siblings are not in conflict.

The farm would pass to the named devisees in Tom's will as tenants in common, or the original deed could be recorded with the same result. Based on Doris' information, "Doris, Ella and Fred" and "those of my children who survive me" are the same. You could represent the estate and Tom's children after consultation and consent.

The discovery of Sam as a possible child of Tom creates a clear conflict of interest for you under Rule 1.7, both with respect to your representation of the estate and of Doris, Ella and Fred.

Doris' expressed objective that Sam not take an interest in the farm and that the deed be recorded in view of Sam's claims are not proper objectives for you to pursue as attorney for Tom's estate. As such you must carry out the directives of Tom's will, including, in this case, a judicial determination as to whether or not Sam is one of Tom's children. Recording the deed after being contacted by Sam appears to violate RPC 1.2(d) which prohibits assisting a client in conduct which the attorney reasonably believes would be fraudulent. If Doris persists in this course, Rule 1.16 would require you to withdraw from representing the estate and of Doris, Ella and Fred, individually.

Your responsibility at this stage is to advise all parties to retain separate counsel to represent their respective interests. Rule 4.3. Sam is entitled to a copy of the will and he should be advised of the existence of the unrecorded deed under Rule 1.6(a) & (b).

The interests of Doris, Ella and Fred, individually, are not in conflict. Doris' obligation as a personal representative appears to be in conflict with her personal interest in establishing the deed as a valid transfer of title so that the farm is not an asset of Tom's estate in which Sam would potentially share.

Counsel for Doris, Ella and Fred would argue that Tom's intention was to exclude Sam from any interest in the farm. He had acknowledged Sam as his child 12 years before making his will and had given a copy of the deed and his will to Doris a week prior to his death; that the fair inferences to be drawn from these facts are (1) that Tom intended to exclude Sam by executing a deed with knowledge of Sam's relationship, and (2) that by delivery of a copy of the deed to Doris with the

will shortly before his death, Tom intended by that act to deliver the deed to Doris for the benefit of the named grantees. Further, that had Tom intended to give Sam an interest by will, he would not have performed a meaningless act – giving the copy of the deed to Doris.

Determination of issues surrounding the effectiveness of delivery of a copy of the deed; Tom's intentions; proof of paternity; and interpretation of the will are beyond the authority of a personal representative and would be resolved by an appropriate judicial proceeding.

An applicant received equal credit whether he/she advocated for Doris' position individually or as personal representative.

BOARD'S ANALYSIS

QUESTION 4

A. Interrogatories to parties are controlled by Rule 2-421 of the Maryland Rules of Procedure. Maryland Rule 2-432(b)(1)(D) provides that a discovering party, upon reasonable notice to other parties and all persons affected, may move for an order compelling discovery if a party fails to answer an interrogatory submitted under Rule 2-421. Maryland Rule 2-431 provides that a dispute pertaining to discovery need not be considered by the Court unless the attorney seeking action has filed a certificate describing good faith attempts to discuss a resolution of the dispute with the opposing attorney. Thus, the conditions of 2-432 including the date, time and circumstances of each discussion or attempted discussion should be included in the certificate

Rule 2-433 provides the sanctions available for the refusal to respond.

B. Rule 2-401(e) states that, except in case of a deposition, a party who has responded to a request or order for discovery and obtains further material information before trial must supplement the response promptly. Thus, if the information obtained by Doug is "material" HCA must promptly supplement its response to Interrogatory No. 1. This is so irrespective of whether the answers are expressly made continuing by provision added to them. Parre v. Rodrique, 256 Md. 204 (1969).

C. Chuck cannot be required to attend a deposition in Maryland unless he is served a subpoena in Maryland. Rule 2-413(a)(1). Maryland Rules authorize you to require Chuck to attend a deposition in another state in accordance with the law of the place where the deposition is held. Consequently, you would have to refer to New Jersey for the procedures to require Chuck to appear for a deposition in that state. Rule 2-413(a)(2). The deposition will be taken in accordance with the procedures prescribed by Maryland Rule 2-415.

D. If the opposing party was present when Chuck's deposition was taken or had due notice thereof, Chuck's deposition may be used for any purpose against the Defendant if the Court finds that Chuck is out of state. Rule 2-419(3)(B). Since these conditions are met the trial judge should overrule the objection of defense counsel.

E. Under Maryland Rule 2-403 a party may file a motion and for good cause shown the Court may enter any order that justice requires to protect a party or person from annoyance or embarrassment. If the purpose of calling Darrell to testify is simply to annoy or embarrass Anna, a protective order would be appropriate. Should the Court believe that Darrell has relevant information or rule that deposing counsel is permitted to pursue relevant information, the Court could under Rule 2-403(a)(5) provide that certain matters not be inquired into or that the scope of discovery be limited to certain matters or that (6) the discovery be conducted with no one present except the persons designated by the Court.

EXTRACT SECTIONS FOR QUESTION 4

TITLE 2. CIVIL PROCEDURE – CIRCUIT COURT: Rule 2-401; Rule 2-402; Rule 2-403; Rule 2-413; Rule 2-415; Rule 2-419; Rule 2-421; Rule 2-431; Rule 2-432; Rule 2-433

BOARD'S ANALYSIS

QUESTION 5

Question 5 asks for the applicant to identify and analyze constitutional law issues arising out of the operation of a youth sports league with some affiliation to a local government. The primary emphasis in grading is on issue identification.

As a preliminary matter, both Lenny and Allan have standing to file suit against the Howard Youth Hockey Club, Inc. (the "Club"). Each has suffered a direct injury arising out of the enforcement of the Club's rules. As a minor, Allan's suit will have to be brought by his parents or guardian.

The Constitution is not applicable to private organizations. Thus, one issue is whether the Club is a state agent as that doctrine has been developed in a long line of Supreme Court decisions beginning with *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

The test has been articulated by the Court as follows:

> Conduct allegedly causing the deprivation of a constitutional right protected against infringement by a State must be fairly attributable to the State. In determining the question of "fair attribution," (a) the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by it or by a person for whom it is responsible, and (b) the party charged with the deprivation must be a person who may fairly be said to be a state actor, either because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982).

It is clear that the mere use of the County recreational facility does not *per se* render the Club a state agent. *Gilmore v. City of Montgomery*, 417 U.S. 556 (1974).

Factors raised by these facts bear on whether the Club is a state agent are: the reduced rink rentals; the fact that the County allows the Club to use its snack bar facilities to raise money; and, most importantly, that the County Parks director banned Lout from the skating facility at the Club's request for a violation of a Club rule.

If the Club is deemed to be a state agent, the provisions of the Constitution apply to it. *Burton v. Wilmington Parking Authority, supra.* The mandatory prayer before each game violates the Establishment Clause of the First Amendment, even if its purpose is to reduce violence as opposed to inculcating religion. *Lee v. Weisman*, 505 U.S. 577 (1992). The Supreme Court applies a three part test to determine whether a law violates the Establishment Clause:

1. the regulation must serve a secular legislative purpose;

2. the regulation's primary effect must be one that neither advances nor inhibits religion; and

3. the regulation must not foster an excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602 (1971*).*

Here, the prayer requirement serves a secular purpose, i.e. minimizing violence, but its call to "Almighty God" clearly advances religion. Thus the rule would fail the *Lemon* test if the Club were deemed to be a state actor.

In addition, Allan can argue that requiring him to recite a prayer at odds with his own religious beliefs violates his rights under the Free Exercise Clause of the First Amendment. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940):

> The constitutional inhibition of legislation on the subject of religion . . . forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law.

Lenny should raise the argument that the Club rule against "verbal confrontations" is vague and overbroad. The two doctrines are related. First, the overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when "judged in relation to the statute's plainly legitimate sweep." *Chicago v. Morales,* 527 U.S. 41, 52 (1999) quoting *Broadrick* v. *Oklahoma*, 413 U.S. 601, 612-615 (1973). A regulation is vague when it is not worded precisely enough to give fair warning that contemplated action would violate the regulation. *See e.g. Lanzetta v. New Jersey,* 306 U.S. 451 (1939).

While a local government agency clearly has an interest in maintaining decorum and order, especially at public facilities, and avoiding violence at youth recreational activities, a ban on "verbal confrontations" would cover a broad variety of interactions between adults, many of which would not normally be likely to lead to violence. Thus the rule is overbroad. The regulation is also vague because it gives no real indication of what is, and is not, prohibited.

Lenny also can argue that the Board's action in banning him from the ice rink for the season without affording him an opportunity to present his version of events violates the Due Process Clause of the Fourteenth Amendment. Lenny has a liberty interest in watching his child participate in sporting events. Courts employ a balancing test to determine whether a hearing should be held and the extent and formality of the hearing. *Mathews v. Eldridge,* 424 U.S. 319 (1976).

BOARD'S ANALYSIS

QUESTION 6

Question 6 asks for the applicant to identify and analyze principles of corporate law arising out of a fact pattern involving gross misconduct by corporate officials. The facts raise two separate groups of issues: first, are Able and the other individuals liable and, second, does First Bank have the standing to enforce the liabilities? The emphasis in grading was on issue identification.

The note to First Bank is in the name of the corporation. Although Able signed the note, he did so in his capacity as president of the corporation. He is not personally liable on the note because of his signature. Neither Baker nor Carla have any liability arising out of the note itself. Their liability, if it exists at all, arises out of their conduct pertaining to the dividend in 2002.

No dividend was properly authorized. Dividends may be declared only by action of the board of directors. Md. Anno. Code Corporations and Associations Article (hereafter "Code") § 2-309(a). On a board of directors, each director has one vote and the affirmative vote of the directors present is necessary to carry an action. Code § 2-408. In this case, Able voted for the dividend, Baker voted against it and Carla abstained. The dividend was thus not validly authorized. Able's instructions to the bookkeeper to issue the dividends was unauthorized and improper. As such, the three directors are jointly and severally liable unless they have a defense. Code 2-312(a).

The defense which might be available to the directors is the business judgment rule, codified in Maryland in Code 2-405.1 which reads in pertinent part:

> (a) *In general.* —— A director shall perform his duties as a director, including his duties as a member of a committee of the board on which he serves: (1) In good faith; (2) In a manner he reasonably believes to be in the best interests of the corporation; and (3) With the care that an ordinarily prudent person in a like position would use under similar circumstances.
>
> (b) *Reliance on information from others.* —— (1) In performing his duties, a director is entitled to rely on any information, opinion, report, or statement, including any financial statement or other financial data, prepared or presented by: (i) An officer or employee of the corporation whom the director reasonably believes to be reliable and competent in the matters presented; (ii) A lawyer, certified public accountant, or other person, as to a matter which the director reasonably believes to be within the person's professional or expert competence; or (iii) A committee of the board on which the director does not serve, as to a matter within its designated authority, if the director reasonably believes the committee to merit confidence. (2) A director is not acting in good faith if he has any knowledge concerning the matter in question which would cause such reliance to be unwarranted.

Did Able, Baker and Carla act "[w]ith the care that an ordinarily prudent person in a like position would use under similar circumstances"?

Able clearly did not. It is not prudent to authorize a dividend which would cause the corporation to violate the terms of a multi-million dollar loan. It is clearly a violation of Able's duties to order the dividend paid despite the fact that the Board never approved it. Even if Able believed his majority stock interest gave him the right to dictate to the Board, it was not prudent of him to act on this assumption without checking with the corporation's legal counsel.

Baker and Carla also did not meet the required standard of care for directors. They should have known that declaring a dividend would constitute a breach of the Corporation's agreement with First Bank. Even though they did not personally review the loan documents prior to approving them, knowledge of the terms would be imputed to them as directors. Similarly, their failure to do anything about Able's actions in having the dividend checks issued despite the Board's refusal to authorize the dividend constitutes a failure on their part to discharge their duties as directors.

Maryland law prohibits a corporation from making a distribution when the distribution would result in the corporation's not being able to pay its indebtedness in the normal course of business. Code §2-311(a). The Code specifically provides that a director who approves a distribution in violation of the standard of care set out in §3-405.1 is personally liable to the corporation for the amount of the excessive distribution. The actions, and failures to act, by Able, Baker and Carla indicate that they will not be afforded the protection of the business judgment rule.

As a shareholder, Davis is not liable for the repayment of his portion of the dividend unless he knew that the dividend was illegally issued. Code §2-312(b).

The liability of the directors for misconduct is to the corporation, not its creditors, *Lerner v. Lerner Corp*., 122 Md. 1, 711, A.2d 233 (1998). Since ABC, Inc. is now insolvent, First Bank should petition a court to dissolve the corporation. Code 3-413. If the petition is successful, the court would appoint a receiver who could enforce the corporation's rights against the directors on behalf of the creditors.

First Bank could attempt to "pierce the corporate veil" to hold the shareholders directly liable for the corporation's obligation. This is allowed to prevent fraud or to enforce a paramount equity. This is a very difficult task in Maryland. *See Damazo v. Wahby*, 259 Md. 627 (1971). The facts of this case do not suggest fraud; arguably the gross dereliction by the directors could give rise to a "paramount equity." *See* J. Hanks *Maryland Corporation Law* §4.18 (1995).

BOARD'S ANALYSIS

QUESTION 7

Each riparian owner is entitled to the reasonable use the waters of Wagners Run for domestic, agricultural and manufacturing purposes. Normally, in a contest between an upper riparian landowner (Bart) and a lower riparian landowner (Charlie), the test of the reasonableness of the upper riparian landowner's use is whether or not his use results in denying an equally beneficial use to the lower owner. However, the use of both the upper and lower owners must be for the riparian land. Here, the cattle raising efforts of Charlie on his riparian land are not affected by Bart's change in his operation and the creation of the dam. The effect on Charlie is on his use of the water on non-riparian land. Thus, Charlie has no cause of action against Bart.

An underground stream flowing in a permanent and defined channel is governed by the rules of riparian rights. Finley v. Teeterstone, Inc. 251 Md. 128, 248A.3d 1061 (1968). When the underground water does not flow in well-defined channels, it is "percolating waters", which may be diverted or capped without legal liability to downstream owners. In this case, the waters are stated to be a "large underground limestone spring", and is subject to riparian rights.

Davis may well have a cause of action against Bart for altering the quality of the water of the underground spring. The owner of land, which is the situs of a spring, is entitled to its use for household, agriculture or manufacturing purposes as any riparian owner.

However, as here, where the underground spring flowed off of his land via Wagners Run, by capping the spring, he has changed the quality of the water available to the lower riparian owner on land bordering Wagners Run. The lower owner is not only entitled to have the underground stream to continue to flow in its well-defined direction, but to have it remain unchanged as to quality. Jessup & Moore Paper Co. v. Zeiter, 180 Md. 395, 24A2d 788 (1942). Again, in measuring the change, it is a question of reasonableness and where Davis' reasonable use of the water has been materially affected by Bart's capping of the spring, he may seek damages and an injunction to return the underground spring waters to their normal flow into Wagners Run. Kelly v. Nagle, 150 Md. 125.

NOTE: Substantial credit was given to Answers which concluded that the underground stream is percolating waters.

BOARD'S ANALYSIS

QUESTION 8

(a) Section §2-703 of Commercial Law Article sets forth an index of Seller's remedies for Buyer's breach.

(1) Clearly, Batterymaster has a right to bring an action for the price of the 1,000 batteries which were delivered and accepted by Auto Supplies. §2-709.

(2) In addition, Batterymaster may recover incidental damages under §2-710, but at this point no incidental damages have been incurred, based on the stated facts.

(3) Batterymaster also has a right to demand adequate assurance of due performance by Auto Supplies and withhold further delivery of batteries until such assurance is received. §2-609. Between Merchants, "adequate assurance" is determined according to commercial standards §2-609(2). Under this standard, Batterymaster would be justified in not only requiring payment for goods delivered, but also insisting on C.O.D. or similar terms for future deliveries under the contract.

(4) If Auto Supplies, after receiving the demand for adequate assurance of its future performance (i.e. payment), fails to supply adequate assurance, it will be deemed to have repudiated the entire contract. §2-609(4). At that point, Batterymaster can exercise its rights for a repudiation. §2-708. Those rights include cancellation of the balance of the contract, §2-703(f) or identifying the remaining 11,000 batteries to the contract, (§2-704), and then seeking damages from Auto Supplies based on the difference between the prevailing price at the time of repudiation and the contract price, together with any incidental damages §2-708, 2-723. If the prevailing market price of the batteries is higher than the contract prices, Batterymaster may recover the profit it would have made had Auto Supplies fully performed §2-708(2).

(b) At this time, I would advise Batterymaster to demand in writing adequate assurance of performance by Auto Supplies, and to suspend delivery of future batteries. If adequate assurance is not provided, Batterymaster would then decide to either; (1) cancel the balance of the contract and sue Auto Supplies for the 1,000 batteries already delivered; or (2) identify the 11,000 remaining batteries to the contract, and sue for the profit which Batterymaster would have made on the entire contract.

EXTRACT SECTIONS FOR QUESTION 8

Annotated Code of Maryland, Commercial Law Article

Title 2. SALES: §2-106; §2-609; §2-610; § 2-612; §2-703; §2-704; §2-708; §2-709; §2-710; §2-723

BOARD'S ANALYSIS

QUESTION 9

The parents of Rita may file a wrongful death action under Crts. & Jud. Proc. § 3-901 to 3-904, against Jim individually. Jim, as the driver of a motor vehicle, owed a duty of reasonable care to Rita in the operation of his vehicle. Operating his vehicle at an excessive speed (speed over posted limit) and not paying attention to the events at hand due to the use of his cell phone, constitutes a breach of his duty of care. Although not per se negligence, violation of the posted speed limit is also prima facie evidence of the breach of Jim's duty of care, as well as his failure to note the existence of young children waiting for a school bus during school hours. Jim's haste and carelessness were the proximate cause of Rita's death.

Jim will defend by asserting the defense of contributory negligence. In Maryland, contributory negligence is a complete bar to a plaintiff's recovery. As a minor child, Rita would have a duty of care to walk the streets as an ordinary pedestrian child of like age, education and intelligence. Applying the rules of negligence, but to that of a pedestrian child of Rita's age, Jim will argue that Rita's failure to use the crosswalk and suddenly running into the street without paying attention to traffic was negligence on her part and that such negligence contributed to the accident and her death. Rita's parents will attempt to counter Jim's contributory negligence defense by arguing that Jim had the last clear chance to avoid the accident if he were paying attention. The standard "last clear chance" instruction suggested by the Maryland Civil Pattern Jury Instructions, is that "[a] plaintiff who is contributorily negligent may nevertheless recover if he [or she] is in a situation of helpless peril and thereafter the defendant had a fresh opportunity of which he [or she] was aware to avoid injury to the plaintiff and failed to do so."

Rita's parents may also file a wrongful death action against Jim's employer for its vicarious liability of the acts of its agent, Jim. Jim was driving the company vehicle, during business hours, as indicated by the fact that he left his office in an effort to meet his date for breakfast. In addition, Smith was conducting his employer's business by using his cell phone to speak with Cecil, a client of his employer.

Because Rita's parents' wrongful death claim against Jim's employer is based on its vicarious liability, both Jim's employer and Rita's parents' will have the same defenses and counter-arguments as between Rita's parents and Jim individually. In addition to those defenses raised by Jim, Jim's employer will argue that even if Rita was not contributorily negligent, Jim was not acting within the scope of his employment at the time of the accident because he was on his way to meet his girlfriend for breakfast. Rita's parents, however, will most likely counter this by arguing that although Jim was meeting his girlfriend, he was on the phone doing company business in the company car. Jim's employer can bring a cross-claim against Jim for indemnification or contribution.

Maryland, also recognizes the tort of negligent entrustment. The tort of negligent entrustment imposes liability on a party that negligently entrusts chattel, such as an automobile, to another party. The key element of the entruster's negligence is his or her knowledge about the entrustee's lack of abilities or propensities that pose a foreseeable harm. Thus, Rita's parents could

also argue that Jim's employer was itself negligent in entrusting Jim to drive the company vehicle, when they should have known that Jim's license was suspended for six months. Therefore, as a result of Jim's employer's negligence in entrusting Jim with the use of its company vehicle, Rita was fatally injured.

In terms of the negligent entrustment claim, Jim's employer will argue that it was unaware of the fact that Jim's license had been suspended for six months and thus cannot be held to negligently have entrusted him with the use of the company vehicle. Rita's parents will counter this by arguing that the employer's failure to check Jim's driving record for six months, is evidence of the employer's negligence in learning about Jim's inability to drive without posing a risk to others like Rita.

The issues regarding Jim, his employer and Rita's negligence are questions for the trier of fact to determine.

BOARD'S ANALYSIS

QUESTION 10

In order to have subject matter jurisdiction over an action for divorce, either the grounds for divorce must have occurred in Maryland or one of the parties must have lived in Maryland for one year. Md. Code Ann., Fam. Law 7-101(a). Maryland would have subject matterjurisdiction over Jeri's divorce from Tom because Tom resides in Maryland and because one or more of the possible grounds for the divorce occurred in Maryland.

Counsel should advise Jeri of the difference between a limited divorce (legal separation) and an absolute divorce. Because Tom and Jeri have not voluntarily lived separate and apart for a year, you should discuss the grounds for divorce to determine whether other grounds exists for either an absolute or limited divorce. In terms of a limited divorce, counsel should determine whether there is sufficient evidence of cruelty of treatment, excessive vicious conduct or desertion. In addition to cruelty and excessive vicious conduct, Jeri may attempt to pursue adultery as a grounds for an absolute divorce. She will have to prove that Tom had both the disposition and opportunity to commit adultery by remaining at his secretary Roxanne's home until 4:00 a.m. Without any displays of affection between Tom and Roxanne, Jeri's limited observations on June 13, 2002, standing alone, may be insufficient evidence to prove adultery. Jeri may also claim that Tom constructively deserted her as he refused to have marital relations with her for a year.

Counsel should discuss the issues regarding child custody, visitation and child support. Counsel should explain to Jeri the difference between legal custody and physical custody. Because Jeri has been supporting her daughter by herself, she should be advised that the court may award her *pendente lite* child support during the proceedings until permanent child support can be awarded. Since the decisions are based upon the best interests of the child, the determination of these issues is the same whether she is pursuing a limited divorce or an absolute divorce. Counsel should advise Jeri of the likelihood that the court will award her and her daughter use and possession of the marital home and family use personal property for a period of up to three years following the date of a limited or absolute divorce.

Due to the disparity in their income and the fact that the COUPLE AGREED THAT JERI WOULD STAY HOME AND CARE FOR THEIR DAUGHTER, Jeri should be advised about support for herself. This may be in the form of temporary (*pendente lite*) alimony, rehabilitative alimony or permanent alimony. Counsel should discuss what the court will consider in determining each.

Md. Code Ann., Fam. Law § 8-201(e) defines "marital property," as property regardless of how it is titled, which is acquired by both or either of the parties during the marriage. Jeri should be advised as to what property will be considered marital property subject to division by the court and the value of the marital property. Jeri should also be advised about the factors which the court will consider in determining the amount, if any, of a marital award to either party. The parties will have to file a statement listing all property owned by one or both of them. The value of the Megabucks stock although titled solely in Tom's name, may be part of a monetary award. If possible, counsel should attempt to get Jeri and Tom, through his counsel, to enter into a separation and property settlement agreement as to all of the issues in order to save money and decrease any

acrimony which may exist between them.

BOARD'S ANALYSIS

QUESTION 11

a.) Betty v. Dudley

Betty can sue Dudley's Dance Studio, Inc. for rescission of the contract she made with the Studio for swing dance lessons. Betty should be successful; she should be able to recover the entire $300.00 that she paid to the studio. Betty formed a contract with Newman, the agent for the fully disclosed principal, Dudley's Dance Studio, Inc. for swing dance lessons to be taught to her by Dudley, a prominent dance instructor. Newman knew at the time that he sold the dance lesson package to Betty that Dudley could no longer teach, but he stated that Dudley would have her dancing like a professional by the time of her wedding more than two years later. Betty had no way of knowing at that time that Dudley would not be her teacher. Betty paid a deposit for lessons, took two free lessons that were offered to her by Newman as part of the package for the dance lessons, and promptly stated her position that there was no valid contract in place and demanded return of the consideration that she paid for dance lessons with Dudley as soon as she was informed that Dudley would not be teaching any classes. There was never any meeting of the minds, since Betty believed until immediately after the third lesson that Dudley himself would be her teacher, and the facts indicate that the fact that Dudley himself would teach her was a significant inducement to her to take the lessons. Newman's pointed representation that Dudley would have her dancing like a professional, and Betty's prompt renunciation of the contract when she learned the true facts demonstrate that the parties never successfully formed a valid contract, and Betty is entitled to a return of the money she paid for lessons with Dudley himself.

b.) Dudley v. Betty

Dudley could sue Betty for breach of contract because she refused to perform under the contract for 48 swing dance lessons over a two-year period by paying for the remaining lessons. Dudley could seek specific performance to compel Betty to complete their contract, or sue for damages for the remaining $1,140 due under the contract. Dudley would attempt to prove to the Court that he changed his position to his detriment by providing classrooms and instructors for the classes that Betty was to take under the terms of the contract she made with Newman. Dudley will not succeed in either claim against Betty.

A court would not grant specific performance, since it cannot compel Betty to take dance lessons. Furthermore, Betty could raise the defense of unclean hands, since Dudley's agent actively misrepresented facts to her to induce her to enter into the contract. Similarly, Dudley will not be successful in his attempt to recover damages from Betty because Betty will argue that her oral contract with Dudley is unenforceable because it was a contract that could not be performed within one year. Betty's statute of frauds defense pursuant to Section 5-901, Courts and Judicial Proceedings, Annotated Code of Maryland, will be successful, and Dudley neither will be able to collect the balance due under the contract, nor will he also be entitled to retain the deposit of $300.

c.) Dudley v. Newman

Dudley will sue Newman for indemnification for any damages that Betty is able to collect against Dudley's Dance Studio, Inc. Betty's claims against Dudley's Dance Studio and Dudley are based on Newman's misrepresentations to Betty at the time that he approached her in the post office and convinced her to take swing dance lessons. Dudley fully disclosed to Newman his inability to teach at the time that he hired Newman; Newman wrongfully represented to Betty that Dudley would be her teacher. Newman never tried to market the Studio to Betty on its own merits, and Betty was disappointed when the facts that Newman represented to her did not come to pass. Any claims that Betty has against Dudley and the Studio are based on Newman's wrongful acts and his abuse of his agency authority. Dudley is entitled to compensation from Newman for any damages that he or the Studio incur in any of Betty's actions against the Studio for breach of the contract for dance lessons.

d.) Newman v. Dudley

Newman is not entitled to the payment of any commissions under his contract with Dudley's Dance Studio, Inc. The contract states that Newman will be paid a commission for any dance lessons for which students *register and pay*. Arguably, Betty neither registered nor paid for dance lessons, since she never signed an application or a contract for dance lessons and she paid a deposit, which will most likely be returned to her. If the deposit she paid is returned to her with no further obligation for her to pay for dance lessons, then Newman will not be entitled to the payment of commission. Newman's claims for phantom commissions will not succeed.

BOARD'S ANALYSIS

QUESTION 12

ICI entered into a written agreement with Chad for the purpose of creating an agency relationship between them. Under the terms of the agreement, ICI had actual authority to enter into contracts with the restaurant and the band on behalf of Chad. ICI was expressly authorized to apply the $1,500 given by Chad to ICI for use as a deposit on those contracts. Therefore, Chad will not obtain reimbursement from ICI for the $1,500 deposit unless it is determined by a court that ICI exceeded the scope of its authority. ICI will contend that it acted within the scope of its authority because it requested that Chad review and approve the contracts before ICI signed them and that Chad's failure to do so was evidence of Chad's acquiescence or ratification. However, Chad will maintain that he did not ratify the contracts because those contracts contained prices that were greater than $15,000 in the aggregate. Consequently, Chad will maintain that ICI did not follow Chad's instructions, and that Chad is not liable for the damages that the band and restaurant sustained as a result of the cancellation of the event.

The band and the restaurant were each advised by ICI that it was making arrangements for the August 17th event on behalf of a prominent individual who did not want his identity disclosed. Chad had given ICI actual authority to enter into the contracts. Chad as either an undisclosed or a partially disclosed principal is liable to third parties on simple executory contracts entered into on his behalf by his agent where the agent is acting with actual or apparent authority. Hospelhorn v. Poe, 174 Md. 242, 198 A. 582(1938). Therefore, the restaurant and the band may pursue their respective claims and proceed to judgment against the agent, ICI, and the undisclosed or partially disclosed principal, Chad. However, each claimant is entitled to only one satisfaction. Grinder, et al. v. Bryans Road Building and Supply Co., Inc. , 290 Md. 687, 432 A2d 453 (1981).

If ICI is found liable to the restaurant and the band, ICI may seek exoneration from Chad for any amounts that it pays to the band and the restaurant. In addition, ICI has the right to pursue its remedies under its agreement with Chad for reimbursement of all costs advanced on Chad's behalf and for the payment of any fee earned under the agreement.

If the band and the restaurant are successful in their respective claims against Chad, Chad, as principal, may seek indemnification from ICI, its agent. The court will determine whether the actions of the agent were within the scope of its authority and whether any of the agent's actions were ratified by the principal. To the extent that the agent exceeded the scope of its authority, it will be responsible for indemnification of the principal.