FEBRUARY 2007 BAR EXAMINATION

BOARD'S ANALYSIS

QUESTION 1

To determine whether Amy Brown has liability under the contracts with Jewels and Teapots, an analysis of the facts as applied to the principles of agency law must occur.

Prior to Amy leaving on an extended vacation, she expressly authorizes Connie to act as her agent to "manage the store and sign any required paperwork." Amy confirms her express authorization by sending written notice to her suppliers. However, Amy fails to include in the notice the oral limitation on Connie's authority that she may not order "any new lines of merchandise from suppliers or from any other seller of merchandise." The failure to convey the limitation is fatal to Amy's defense of liability under the contract with Jewels.

Connie acted outside the scope of her actual authority when she purchased the eyeglass cases. However, Amy held out and cloaked Connie with apparent authority, as her manager, with its attendant customary duties and responsibilities, to be able to contract with Jewels on behalf of Winsome Ways. Consequently, Jewels had a reasonable basis to conclude that Connie was authorized to order the eyeglass cases. Although she did not ratify the contract, Amy, as a disclosed principal, will be personally liable for breach of the contract because Amy is operating her business as a sole proprietorship. To offset her losses, Amy may seek indemnification from Connie for the damages she sustains.

With respect to the Teapots contract, the trier of fact will determine whether Teapots had notice of Connie's authorization to act as manager in Amy's absence, and in the past, whether Jack has been permitted to sign contracts for merchandise as part of his customary duties.

Based on the facts, Amy did not grant Jack actual authority to order merchandise nor did Amy hold him out as having the apparent authority to do so. Consequently, there is no reasonable basis described upon which Teapots could rely as support that Jack had any authority to sign the contract. Instead, it would be reasonable for the salesman to inquire about the authority of a sales clerk to sign an order for expensive merchandise. Finally, Amy did not ratify the contract on return from her vacation.

Amy should not be liable under the Teapots contract, and Jack should indemnify Amy for any losses she may have sustained.

QUESTION 2

Maryland Currency Act

Article I Section 8 states Congress has the power to coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures. The power "to coin money" and "regulate the value thereof' has been broadly construed to authorize regulation of every phase of the subject of currency. *McCulloch v. Maryland, 17 US. (4 Wheat.) 316 (1819)*. Congress may restrain the circulation of notes not issued under its own authority *Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533 (1869).* Congress may also abrogate the clauses in private contracts calling for payment in gold coin, even though such contracts were executed before the legislation was passed. *Norman v. Baltimore & O.R. Co., 294 U.S. 240* (1935). Thus, the statute is clearly preempted by federal law as the Federal Government has sole power to regulate currency.

The Oil Residence Act

> Section I of the Fourteenth Amendment provides in part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

When a governmental classification is attacked on equal protection grounds, the classification is reviewed under the "rational basis" test. Generally under that test, a court will not overturn the classification unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that the court can only conclude that the governmental actions were irrational. A statutory classification reviewed under the rational basis standard enjoys a strong presumption of constitutionality and will be invalidated only if the classification is clearly arbitrary.

Where, however, a statutory classification burdens a suspect class or impinges upon a fundamental right, the classification is subject to strict scrutiny. Such statutes will be upheld under the equal protection guarantees only if it is shown that they are suitably tailored to serve a compelling state interest.

Finally, there are classifications which have been subjected to a higher degree of scrutiny than the traditional rational basis test, but which have not been deemed to involve suspect classes or fundamental rights and thus have not been subjected to the strict scrutiny test. Included among these have been classifications based on gender, discrimination against illegal aliens with regard to a free public education, and a classification under which certain persons were denied the right to practice for compensation the profession for which they were qualified and licensed.

This statute is likely unconstitutional under the equal protection clause. Because the counties could not issue licenses to nonresidents, oil drillers and explorers could not cross county lines to pursue their trade, and residents of the non-oil counties in Maryland were effectively foreclosed from all commercial oil activities in the state

In *Mayor and City Council of Havre de Grace v. Johnson, 143 Md. 601, 123 A. 65* (1923), the city of Havre de Grace enacted a local ordinance which required an individual to establish city residency for a minimum of six months before he or she could operate a car for hire within the city limits. The city claimed that the ordinance was enacted to remove congestion from the streets and to reduce the large number of "irresponsible drivers" of cars for hire. The Court found no true relationship between the stated object of the legislation and the distinction between resident drivers and nonresident drivers, and we declared the ordinance invalid. There was so little relation between the classification and its proffered justification, in fact, that the classification raised questions about the true goal of the ordinance. By effectively conferring a monopoly upon residents of the city, Havre de Grace unconstitutionally infringed on the right of nonresidents to ply their trade within the city limits.

Although a distinction between residents of different counties may be valid for some purposes, an otherwise legitimate classification of residents that may be made for many purposes cannot be made if it affects a right which, as citizens of this State, they enjoy equally. *Bruce v. Director, Chesapeake Bay Affairs, 261 Md. 585, 276A.2d 200* (1971).

Here, the territorial licensing restrictions unconstitutionally discriminated among the residents of the counties of the State, with and without oil. The law has no real and substantial relation to the object of the legislation, and unconstitutionally infringed on the right of commercial oil drillers and explorers to ply their trade throughout the state. *Havre de Grace v. Johnson*, *supra*, and *Bruce, supra*, concerned territorial restrictions on economic activity that tended to favor residents of one county over another. Both were determined to violate equal protection guarantees.

In areas of economic regulation, Maryland Courts have been particularly distrustful of classifications which are based solely on geography, i.e., treating residents of one county or city differently from residents of the remainder of the State. Although the Court has not expressly stated so, it is evident that elements of Article 24 equal protection jurisprudence are analogous to those found in the Commerce Clause and the Privileges and Immunities Clause of Article IV, Section 2 of the United States Constitution. The two federal clauses are similar: both originated in the so-called "states' relations" article of the Articles of Confederation, and both are concerned with a limitation on states' abilities to give economic preferences to their own citizens. See Laurence H. Tribe, American Constitutional Law, § 6-35, at 536 (2d ed. 1988). Article 24's guarantee of equal protection of the laws is concerned, *inter alia*, with limiting counties' abilities to give economic preferences to their own citizens. *See, e.g., Havre de Grace v. Johnson, supra*. Just as the Privileges and Immunities Clause frowns on arbitrary distinctions among citizens of different states, particularly in the area of economic regulation, the concept of equal protection of the laws found in Article 24 frowns on arbitrary distinctions among citizens of different counties within Maryland.

There is no rational distinction between oil drillers from different counties. The power of the legislature to restrict the application of statutes to localities cannot be used to deprive the

citizens of one part of the state of the rights and privileges that they enjoy in common with the citizens of all other parts of the state, unless there is some difference between the conditions in the territory selected and the conditions in the territory not affected by the statute sufficient to afford some basis, however slight, for classification. *Verzi v. Baltimore County 333 Md. 411; 635 A.2d 967,* (1994).

3. Delaware is correct. Under Article III, Section 2 of the U.S. Constitution, the Supreme Court has original and exclusive jurisdiction over disputes between states. Typically, the disputes between states coming to the Court involve conflicting property claims. Two recent examples include Louisiana v. Mississippi (decided in October 1995) and Nebraska v. Wyoming (decided in May 1995).

QUESTION 3

Barnes can rescind the Contract. A.U. admitted that it did not provide the form required by Section 10-702, Real Property Article, Annotated Code of Maryland. This code provision clearly requires a "vendor" to provide a buyer with the standardized Disclosure or Disclaimer form. The disclaimer used by A.U. did not comply with the statutory language, nor was it on the required form. A. U. 's argument that it was not the "vendor" is without merit because it undertook the obligation to sell the property in its contract with Andrea. Because A. U. did not provide the required disclosure form, Barnes had the statutory right to rescind the contract. Wile Andreas, as seller was obligated under the statute to provide the standardized form, A. U. assumed Andrea's obligation when it specifically contracted to provide all necessary form and provide a quality sale.

The court should also find that Andrea acted properly in accepting a reduced purchase price as she was mitigating her damages. While A. U. had the exclusive right to sell the property, the contract provision does not preclude the property owner from acting in his or her own behalf. It simply means that Andrea could not engage any other agent to sell the property.

The contract in question specified the terms of each party's obligation. Andrea granted A. U. the exclusive right to sell the property and A. U. agreed to provide all necessary forms to produce a "high quality sale", which, at a minimum, would obligate A. U. to comply with the requirements of Code Section 10-702.

By entering into the contract with Andrea, A. U. became her agent and assumed the vendor's responsibilities under the statute.

QUESTION 4

A defendant must be advised of his "Miranda" rights prior to custodial interrogation. When Alphonse voluntarily came to the police station, he was not in custody. When Gaston told Alphonse that he was not "going anywhere," a reasonable person would conclude that his freedom of movement had been restrained, and any further question would be custodial interrogation.

Whether a statement is voluntary or coerced is a matter to be ultimately determined by the trier of fact. However, the court must make an initial determination that the statement is not inadmissible as a matter of law, either because the defendant was not advised of his "Miranda" rights or because the statement was involuntary as a matter of law. Here, a failure to advise the defendant of his "Miranda" rights, even in the absence of coercion, would render the statement inadmissible.

The State was obligated to disclose, without request, any relevant information regarding the acquisition of Alphonse's statement. Rule 4-263(a). The State may have been required to provide more detailed information than was contained in Gaston's report regarding the manner in which the statement was obtained. The State certainly failed to meet its obligation when it did not provide Douwright's report.

Mehsonne might have filed a request for discovery "of all reports of each oral statement" and, if necessary, a motion to compel discovery. Rule 4-263(c, f).

Mehsonne, on behalf of Alphonse, was required to file a mandatory motion to raise the matter of "an unlawfully obtained admission, statement or confession" within 30 days after Alphonse's first appearance before the Circuit Court or Mehsonne's entry of an appearance in the Circuit Court, whichever first occurred, or within 5 days of receipt of discovery furnishing the basis of the motion. Any such objections, "if not so raised are waived unless the court, for good cause shown, orders otherwise." Rule 4-252(a). Mehsonne may have caused a waiver of Alphonse's right to object to the admissibility of the statement.

On the other hand, the State's duty of disclosure is a continuing one. Rule 4-263(h). "If at any time during the proceedings the court finds that a party has failed to comply with [the Rule governing discovery], the court may ... prohibit the party from introducing in evidence the matter not disclosed ... or enter any other order appropriate under the circumstances." Rule 4-263(i). Since Mehsonne knew about the failure to advise Alphonse of his "Miranda" rights and refrained from exercising Alphonse's procedural rights as a matter of trial strategy, it is doubtful that the judge will sustain Mehsonne's objection or grant Alphonse any other relief.

QUESTION 5

At the outset of the proposed representation, it was incumbent upon Counsel to identify her client or clients, the scope of the representation and the manner of communication among the clients during the proposed representation. See Maryland Lawyers' Rules of Professional Conduct ("Rules" or individually, "Rule") Rules 1.2 and 1.4. Counsel should have recognized that she was asked to represent four clients; namely, (i) Mrs. Williams (ii) the personal representative of the estate (iii) Jane and (iv) Sarah.

Counsel should have disclosed to Mrs. Williams and Sarah that she had previously represented and was currently representing Jane in matters that were not related to the administration of the estate of Mr. Williams. Rule 1.7 mandates that Counsel may not undertake to represent a client or clients if the representation involves a conflict of interest. Since Counsel represents Jane, Counsel must obtain informed consent from Mrs. Williams, Sarah and Jane prior to undertaking to represent them concurrently in their interest in the estate of Mr. Williams. Any informed consent from the three prospective clients must address whether representation by Counsel of Sarah and Mrs. Williams may be materially limited by Counsel's representation of Jane or whether the proposed representation of any one of them is directly adverse to any of the other of them. The informed consent must be in writing and contain adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. In addition, it is preferable that any fee arrangement with the clients also be in writing.

In undertaking the representation, Counsel acted in violation of Rule 7.4 in that she held herself out as a specialist in estates and trust law. A lawyer may communicate that he or she does or does not practice in a particular field of law, subject to the requirements of Rule 7.1, but a lawyer may not publicly communicate that he or she is a specialist.

With regard to the payment of $1,000 to Jane for her referral, Counsel violated Rule 7.2 (c). It is prohibited that a lawyer shall not give anything of value to a person for recommending the lawyer's services except in certain very limited circumstances that do not apply to the facts contained in the question.

Finally, Counsel breached her obligations to Mrs. Williams regarding the handling of the confidential information under Rule 1.6 and improperly agreed that she would not disclose any confidential information "to anyone." It was incumbent on Counsel to properly describe the limitations on confidentiality under the Rules and to advise her clients, Mrs. Williams, Jane and Sarah, that information revealed by any of them would be disclosed to the other of them in the proposed concurrent representation, unless each gave their respective informed consent to nondisclosure. At the time that Counsel was presented with the conflict of interest regarding the entitlements of Sarah and Jane under the Will of Mr. Williams, Counsel should have advised each party to seek the advice of independent counsel and withdrawn from the representation.

QUESTION 6

1. The testimony regarding Fred's confidential communications during their marriage about the account is not admissible. Confidential communications during marriage are privileged under CJP § 9-105, and both parties hold that privilege.

2. Any witness can be cross-examined regarding their prior bad acts which bear on their credibility pursuant to Rule -508(b). *See Ogburn v. State, 71 Md. App. 496, 526 A.2d 614, cert. denied, 311 Md. 145, 532 A.2d 1372 (1987).* Rule 5-608(b) represents an exception to the general prohibition, embodied in Rule 5-404, against using evidence of character to show propensity. *See* P. W. Grimm, *Impeachment and Rehabilitation Under the Maryland Rules of Evidence: An Attorney's Guide*, 24 U. Balt. L. Rev. 95, 117 (1994). Rule 5-608(b), by its plain language, permits any witness to be cross-examined about his or her prior acts not evidenced by a criminal conviction that are probative of untruthfulness. *See* Md. Rule 5-608(b); *see also* A. D. Hornstein, *The New Maryland Rules of Evidence: Survey, Analysis and Critique*, 54 Md. L. Rev. 1032, 1057-58 (1995). Upon objection, however, the proponent of the inquiry must establish a "reasonable factual basis" that the alleged conduct occurred. Even evidence that falls within the guidelines of 5-608(b) may be excluded pursuant to Rule 5-403 if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

3. The recording is an illegal wire tap of Fred's statements, and thus, renders the communications inadmissible either through the tape or through testimony. CJP 10-§101, 10-§102 and 10-§105.

4. Barney's testimony about his brother's statements is hearsay without an exception and is inadmissible.

5. Barney's brother may not be compelled to testify against Fred. CJP 9-111.

6. Wilma's counsel is bound by Fred's response regarding his PBJ because, according to Rule 5-608(b), the conduct may not be proved by extrinsic evidence. *See Pantazes v. State*, 376 Md. 661 (2003); *see also* Rule 5-608(b). This limitation is a safeguard intended to avoid dangers such as undue consumption of trial time, confusion of the issues, and unfair surprise. *See Pantazes v. State*, 376 Md. 661**.**

QUESTION 7

(A) Husband has committed adultery; he has admitted it to Wife. However, she cannot obtain an absolute divorce solely on her uncorroborated testimony or admission of her Husband. (Md. Code, Family Law Section 7-101(b)) Corroboration is necessary to prevent collusion. She has some corroboration of her Husband's admission based on the CARD. She can legitimately maintain a complaint for absolute divorce based upon Husband's adultery. She has no other grounds for an absolute divorce under the recited facts at this time.

(B) (1) Wife has condoned Husband's adultery by resuming marital relations with Husband and continuing cohabitation. Condonation is basically an affirmative defense. It is however, not an absolute bar, to a decree of absolute divorce on the ground of adultery, but is a factor to be considered by the Court in determining whether a divorce should be granted (Md. Code, Family Law 7-103(d)).

(2) Under the legal doctrine of recrimination one spouse is not entitled to a divorce from the other when the spouse seeking a divorce has been guilty of conduct which would entitle a spouse to a divorce. Under Maryland law recrimination is not a bar to either party obtaining an absolute divorce on the ground of adultery, but it is a factor to be considered by the Court in a case involving the ground of adultery (Md. Code, Family Law Section 7-103(b)). The Husband could raise both condonation and recrimination but the facts suggest he is not opposed to the divorce.

(C) Wife told Bob she was sexually involved with her old boyfriend and has now denied it in response to a question on cross examination. Since recrimination is a factor to be considered by the Court in a case involving the ground of adultery, her testimony is known to Bob to be false as to a potentially material fact. Rule 3.3 of the Maryland Rules of Professional Conduct requires that Bob take reasonable remedial measures including remonstrating with his client to correct the testimony and upon failure of the client to correct the false testimony, to possibly withdraw from the case or lastly, to notify the Court of the situation. See Maryland Lawyer Rules of Professional Conduct, Rule 3.3 (Conduct Toward the Tribunal (3.3 (a) (4) (Comment #12)) (Her denial of sexual relations with her Husband subsequent to January 1, 2007 is consistent with what she told Bob even though it is also a falsehood but it is not known by Bob to be false).

QUESTION 8

The 1999 deed conveyed Astaland to Nick and Nora as "joint tenants." While joint tenancies are viewed with disfavor and there is a presumption against joint tenancies in Maryland, they are nonetheless permitted in Maryland. MD. Code. Ann., Real Prop. 2-117. Alexander v. Boyer, 253 Md. 511, 253 A.2d 359 (1969). Whether the tenancy created is a joint tenancy depends on the clear manifestation of the parties, the intention of the grantor must be so clearly expressed as to leave no doubt of the intention to create a joint tenancy. The Court need look no further than the deed, and the words "as joint tenants" without reference to rights of survivorship can suffice. Downing v. Downing, 326 Md. 468, 606 A.2d 208 (1992).

Here, the deed specifies "as joint tenants" and the four unities of time, title, interest and possession exist, so we can assume there is a valid joint tenancy. As such, Nick can file suit against Nora for his proportionate share of the $30,000 in rent that she received from the Thinmans over the three year period. A joint tenant who receives rent from a third party for the use and enjoyment of the property is accountable to any cotenant for that portion of the rent over and above his proportionate share. Md. Code Ann., Real Prop. 14-106. Moreover, Nick has an action against Thinman and Bunyan for Waste. They will be liable for actual damage to the property. Nora will be liable, as well, for permitting the waste. R.P. 14-102. This will include Nick's share of the $50,000 Bunyan collected for the sale of lumber which was not his to sell. Nick could also bring an action for conversion against Bunyan for his wrongful taking of the trees.

Also, Nora's lease of property to the Thinmans destroys the unity of interest, thereby effecting a severance. Alexander v. Boyer, 253 Md. 517 (1929). Once severance occurs the joint tenants then become tenants in common.

QUESTION 9

Because Dave was in default for failure to appear, he is not entitled to service of any "pleading or other paper" after service of the original pleading (Complaint). Rule 1.321(b).

His initial answer or motion was due not later than May 8, 2006. He was in default as of that date. Thus, the request for a judgment by default need not be "served." However, under Rule 2-613 (Default Judgment), the Clerk of Court is directed to mail a notice to a defaulting party advising him/her that the order of default has been entered and of the right to move to vacate the order within 30 days of its entry. The order of default was entered on May 20, 2006. Dave failed to file a motion on or before June 21, 2006.

The court could still consider a motion to vacate the order of default after June 21, 2006 under Rule 2-602(a) because an order of default is an interlocutory order and subject to revision at any time before entry of judgment. This avenue was closed to Dave on June 30, 2006 when judgment was entered.

Rule 2-534 provides that in an action decided by the court, on motion filed within 10 days after entry of judgment, the court may open the judgment to alter or amend it to inter alia enter a new judgment. This motion may be joined with a motion for a new trial.

This relief is not available to Dave because the action was not decided by the court but by default.

Rule 2-535 authorizes the court within 30 days after entry of judgment (on motion) to exercise revisory powers and control over the judgment. It incorporates Rule 2-534 in nonjury cases. However, Rule 2-613, which deals specifically with default judgments, precludes reopening the issue of liability.

Under Rule 2-613(g), Dave's attorney can utilize Rule 2-535(a) to contest the amount of the judgment against Dave if a motion is filed within 30 days after entry of judgment. On these facts, the motion must be filed on or before July 30, 2006.

QUESTION 10

Applicant Should Discuss:

The possible Negligence of Maria. Defenses of lack of notice and causation. Negligence of Elmo. Defenses of Contributory negligence and assumption of risk, and counter-defense of Last Clear Chance. Direct negligence against Sesame Company based on negligent entrustment. Defenses of lack of causation and any negligence on entrustment of vehicle. Vicarious negligence of Sesame Company. Defense that Elmo was not in scope of employment, assumption of risks and contributory negligence.

Acceptable addition response may include: Possible negligence of Owings Mills or County. Defenses of lack of notice and causation, contributory negligence and assumption of risk.