FEBRUARY 1999 MARYLAND BAR EXAMINATION
BOARD'S ANALYSIS

Part A - Question I

1. Conspiracy - Conspiracy is a combination by two or more persons to accomplish a criminal or unlawful act, or to do a lawful act by criminal or unlawful means. Quaglione v. State, 15 Md. App. 571, 292 A.2d 785 (1972).

2. Unauthorized Use Art. 27, Subsection 349; Tr. Subsection 14-102. Taking or driving vehicle without consent of owner.

3. Tr. Subsection 14-103 Possession of motor vehicle master key.

4. Art. 27, Subsection 286. Unlawful possession of a controlled dangerous substance in sufficient quantity to reasonably indicate an intent to distribute.

5. Art. 27, Subsection 287. Unlawful possession of a controlled dangerous substance.

6. Art. 27, Subsection 342 Theft.

Part A - Question II

(a) A search incident to a lawful arrest is usually justified so long as the arrest is justified, and the evidence so obtained is admissible. But, when an arrest is unlawful in the beginning, a search incidental to that arrest violates the arrested person's rights, and evidence so obtained is inadmissable. A lawful arrest is made if the police officer has reasonable cause to believe that a crime has been committed and that the defendant committed it. Probable cause for an arrest exists when the facts and circumstances within the arresting officer's knowledge, and of which he has reasonable and trustworthy information, are sufficient in themselves to warrant a person of reasonable caution in believing that an offense has been committed and that the person arrested has committed the offense.

The only information known to the officers is that a necklace valued at $75,000.00 was missing, that Innis, Tommy and George were in the store and Tommy and George were looking at the necklaces. There is no information to suggest that Innis had anything to do with the necklaces. Therefore, there was insufficient evidence to arrest him for the theft.

Therefore, the first motion to file is a motion to suppress the evidence based upon an unlawful

arrest.

Innis' statement was also the result of the unreasonable search and seizure and should be suppressed. A confession stemming from custodial interrogation of the defendant is not admissible unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. Custodial interrogation means questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. Innis' statements are subject to scrutiny under the Fifth Amendment privilege against self-incrimination. The police officer/security guards were obligated to give Innis his Miranda warnings before beginning any custodial interrogation. If Innis' counsel can show that he was in custody and that his statement was a product of an interrogation initiated without the proper warnings, and that, considering the totality of the circumstances, it was not voluntarily made, it should be suppressed.

Therefore, the second motion to file is a motion to suppress Innis' statement.

Even if the arrest was unlawful and Innis' statement improperly obtained, does the exclusionary rule apply? The exclusionary rule would be invoked only if it is first determined that the search of Innis and the subsequent seizure of the necklace from George was illegal. The state will contend that the exclusionary rule does not apply because the search was conducted by private security guards and not agents of the state. While the exclusionary rule does not apply to a search by private individuals acting on their own behalf, it does apply to searches by government officials. Here, the security guards were police officers and therefore, there is state action.

Was the search justified? The Fourth Amendment to the Constitution, binding on the states through the Fourteenth Amendment Due Process Clause, prohibits unreasonable searches and seizures. A warrantless search is unreasonable unless there is some special justification shown. Absent such justification, the exclusionary rule would apply and the evidence obtained as a result of the search would be inadmissable. Because the necklace was not in plain view, the only argument that can be made is that there was some exigent circumstance which justified the search. The state would contend that the fact that the jewelry was discovered missing shortly after the men left the store , and the immediate capture of the suspects justified their attempts to locate it.

This argument must fail as the jewelry was not in plain view, and that all that the security guards had was a suspicion that the three men were responsible for the theft of the necklace. It could just as easily have been any of the other patrons.

Therefore, the third motion to file is a motion to suppress the evidence as the result of an unreasonable search and seizure.

(b) It is a general rule that, unless the illegal search and seizure infringed upon the accused's own personal rights, he has no standing to prevent the admission of evidence unlawfully obtained. For an accused to have standing, he must assert some interest in the property seized or the premises searched. Therefore, Innis has no standing to object to the search of George's pockets.

Part A - Question III

Rules Of Professional Conduct, Rule 3.8. Special responsibilities of a prosecutor.

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as a right to a preliminary hearing;

(d) Make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

I would make a complaint to the State's Attorney and to the Attorney Grievance Commission.

Part B - Question I

Altec's initial proposal was not sufficiently definite and certain to constitute an offer. While it described the equipment and quoted a price, it specifically provided that any sale would be subject to terms and conditions to be later disclosed, and therefore, it was not susceptible to being converted into a contract of sale by an acceptance. It did not say "Altec offers" for sale but rather Altec "proposes" to offer for sale the described equipment. It was no more than a quotation or an invitation to enter into negotiations with further action on the part of Altec being required before it could be bound by the contract.

Buildem's order on the other hand did constitute an offer to buy for $100,000 Altec's stand-by electric generating system meeting Garrett County's plans and specifications contingent upon Buildem being awarded the contract by the County, and also contingent upon the County's approval of the equipment.

A determination must be made as to whether Altec's acknowledgment that it had received the order and accepted it was an acceptance of Buildem's offer and, if so, what effect should be given to the Standard Terms and Conditions attached to the order acknowledgment form.

The Uniform Commercial Code (Title 2) provides that a written confirmation sent within a reasonable time operates as an acceptance even though it states additional terms from those offered, unless acceptance is expressly made conditional on assent to the additional terms.

The language used by Altec did not use this language but did state that its acceptance was "subject to" the Standard Terms and Conditions. If the language used is treated as being essentially the same as provided in the statute, there was no acceptance and thus no written contract. If the writings do not establish a contract because Altec's acceptance of Buildem's order was expressly condition upon the additional terms to which Buildem did not assent, then the contract for sale established by conduct does not include the additional terms because the writings between the parties did not agree on them.

If the expression "subject to" used by Altec is not deemed to be the equivalent of "expressly made condition on assent to the additional or different terms", the Standard Terms and Conditions would be construed merely as a proposal for additions to the contract. While there is no indication that Buildem gave notice of objection to the Standard Terms and Conditions, it is clear that they materially altered the offer and would not become part of the contract.

Unless there is some commercially sound (and fair) basis to say that the failure to object within a reasonable time amounted to acceptance, the limitations contained in Altec's confirmation should not be applied because inclusion of the standard conditions not only materially alter the contract but are contrary to Buildem's building deadline and provisions for liquidated damages in the event of delay. On these facts, the Court has correctly awarded the liquidated damages provided, however, that the Court finds that the liquidated damages are a reasonable measure of the County's loss and do not amount to a penalty.

Part B - Question II

G signed this note as an accommodation party or guarantor with respect to the obligation of another (A & B Trucking). 3-205 CL Art. G is obligated to pay the instrument in the capacity in which he signed it. 3-410 CL Art.

G's obligation to pay the amount due on the note to the persons entitled to enforcement (the Bank) arises only after unsatisfied execution of a judgment against the accommodated party, his insolvency or it is apparent that payment cannot be obtained from him.

The issue here involves discharge of the obligation of an accommodation party (guarantor) on the note when the person entitled to enforce impairs the value of the collateral. Section 3-605 of CL Article addresses the issues raised in this fact pattern and provide that if a person entitled to enforce the note impairs the value of the interest in collateral, the obligation of the guarantor is discharged to the extent of the impairment. Section 9-207 CL Art. requires a secured party to use reasonable care to preserve collateral in his possession. Under these facts, it would appear that Merchants Bank failed to exercise reasonable care to preserve the collateral in his possession when it surrendered possession of the title to the Mac Tractor to H and made no provision to insure its return. Per section 3-605 this would be an unjustifiable impairment of the collateral. Accordingly, G is discharged to the extent of the value of the impairment. In this case, $11,000. G remains liable for the balance of the unpaid note above the impaired value.

Part C - Question I

Lisa should not be able to prevail in the quiet title action for several reasons. Maryland law requires that the party claiming title to real property through adverse possession must show that he or she has been in actual, open, notorious, hostile, exclusive, and continuous possession of the land claimed for a period of 20 years under either color of title or claim of right. In this case, Lisa will be unable to establish several elements of her claim.

Tacking is permissible to show continuous adverse use of property by a claimant and her predecessors; it is not necessary that the claimant be the sole adverse user of the claimed property for the entire statutory period. Although Violet kept a garden on part of Parcel C, her affidavit states that she abandoned her use of Parcel C in October 1978. She marked the boundary line with the pine trees and she did not convey the property in question to Lisa in 1979. Acme will show that it continued to exercise its control of the property and paid the taxes on the property as its record title owner. Therefore, Acme will argue that Lisa had neither color of title nor claim of right.

Acme will also argue that Lisa's use of Parcel C was not hostile, but rather it was permissive. Acme was advised of Lisa's use of the property in 1980, and Acme told the mowing contractor to inform Lisa that it would permit Lisa to continue to use the property until it wished to develop it. Lisa may argue that the permissive nature of the use was not established since it was not communicated directly to her by an agent of Acme. Acme will prevail on this issue as well. At best, Lisa may have had a license to use the subject property, which license Acme chose to revoke.

Lisa could show that her use was open and notorious, since she grew a garden which was visible to everyone who looked at the property, as were the boat, boat trailer and the shed. Lisa would also probably be able to establish that her use of the 15 foot strip of Parcel C was exclusive and no other persons had concurrent or equivalent rights to use that property. However, her claim will fail nonetheless as each of the elements of adverse possession must be proven.

Part C - Question II

The memorandum should address the standard of care and loyalty required of directors, rules governing director transactions, grounds for removal of directors and the rights of the shareholders and corporation to seek remedies against Max and Elvis.

Solo, either in its own right or through its shareholders in a derivative action brought in the name of the corporation, should sue Max and Elvis for an accounting and for money damages resulting from (i) Elvis' usurpation of a corporate opportunity, and (ii) Max's commission gained from Elvis through bad faith and a breach of loyalty which are owed by Max and Elvis as directors of Solo.

Under the corporate opportunity doctrine, Max and Elvis are precluded from diverting to

themselves those opportunities which in fairness should belong to the corporation. Maryland Metals, Inc. v. Metzner 282 Md. 31, 382 A.2d 564 (1978); Independent Distributors, Inc. v. Katz 99 Md. App. 441, 637 A.2d 886 cert denied 335 Md. 697, 646 A.2d 363 (1994). Therefore, all profits and benefits of the Food Haven lease which accrued to both Max (in the form of commission) and Elvis (as rents) should be disgorged in favor of Solo.

Max and Elvis will argue that the corporation could not meet the rigors of the interest or expectancy test which focuses on whether the corporation could realistically expect to seize and develop the opportunity. In fact, they will each maintain that there is no evidence that Food Haven was interested in leasing Solo's vacant space at the retail center. In addition, they will maintain that neither Max nor Elvis breached the standard of care. While that standard of care may not have been breached at the time of the actions of the Board, certainly, the duty of loyalty owed by the directors was breached. Section 2-405.1; Section 2-419; Independent Distributors, Inc. v. Katz, supra.

In addition, the stockholders may wish to seek the removal of Max and Elvis as directors, with or without cause, by an affirmative vote of a majority of votes to be cast for the election of directors unless the charter provides for a different requirement or unless there are limitations on removal of directors without cause as mandated by the charter or under the laws of Maryland. The facts are not sufficient to determine whether the directors can be removed without cause because it is not disclosed whether the charter provides for cumulative voting or elections of directors by class.

The memorandum should also address the issue of whether the partner and the firm may act as counsel to Solo or any of the individual shareholders or directors because to do so may be in violation of the Rules of Professional Conduct due to a conflict of interest. Rule 1.7.

Part D - Question I

A. Potential civil claims:

1. Civil claim for malicious prosecution. Elements of this tort are:

(a) A criminal proceeding instituted or continued by a Defendant against the Plaintiff.

(b) Termination of the proceeding in favor of the Plaintiff.

(c) Absence of probable cause for the proceeding

(d) Malice as a primary purpose of instituting the proceeding other than that of bringing an offender to justice. (If a criminal charge is initiated without probable cause, the existence of malice can be inferred.)

2. Civil claim for false arrest. Elements of this tort are:

(a) Defendant is arrested.

(b) Arrest is without legal justification.

3. Civil claim for false imprisonment. Elements of this tort are:

(a) Intentional restriction of Plaintiff's freedom of movement.

(b) Plaintiff must be aware of the restriction.

(c) Plaintiff must not consent.

(d) It must be without legal justification or authority.

B. The civil claims can be brought against Chuck and Easy Mart, his employer, as Chuck was acting as agent for Easy Mart. It is also possible civil claims could be brought against Dan, although malicious prosecution suits against lawyers are viewed with disfavor (Cottuian vs. Cottuian, 56 Md. App. 413, 468 A.2nd 131 (1983). This is true because of the attorney's professional duty to represent his client zealously.

C. Evaluation of Potential Defenses of Defendants.

1. The Defendants generally will maintain the action against the Plaintiff was taken with probable cause, i.e., that there was a reasonable ground of suspicion supported by circumstances sufficiently strong

in themselves to warrant a cautious person in believing that Plaintiff was guilty. Usually a dishonored check and a failure to make it good should constitute probable cause. The focus, however, is on the facts known to and genuinely believed by the party initiating or continuing the prosecution. The knowledge includes that which could or should have been obtained in an investigation by a responsible person. Plaintiff would have a good rebuttal that Chuck failed to investigate thoroughly the explanation attempted by Amy before charging her and therefore there was no probable cause.

2. Chuck may argue lack of responsibility for malicious prosecution if he acted in good faith on the advice of Dan, corporate counsel but Chuck would have to show he had made full, honest and fair disclosure of all material facts relative to the charge that was made. See generally, Kennedy vs. Crouch, 191 Md. App. 580, 62 and 582 (1948), Laws v. Thompson, 78 Md. App. 665, 554 A.2d 1264 (1989). Dan will argue that the facts, as reported to him by Chuck, would have led a competent attorney to consider recommending charges be filed.

3. The potential defendants will all maintain as a defense to the false arrest and false imprisonment claims that the arrest was effected pursuant to a valid arrest warrant. (See, Shipp vs. Autoville Ltd., 23 Md. App. 555, 570, 328 A.2nd 349 (1974). If it can be shown that Chuck gave false information as opposed to mistaken information to the District Court Commissioner, then there would be no defense of "legal justification". (If Becky can be located, she could face civil liability for possibly conversion.)

Part D - Question II

Sykes, as agent, owed Oliver, his principal, the duty to act only as authorized. The purchase by Sykes was not authorized since Oliver's account could not afford the purchase. The purchase should not have been made.

Oliver promptly, positively and unequivocally repudiated the Edsel purchase when he told Sykes that the money from his account that was used for the Edsel stock purchase should be immediately returned to his account. He has the right to the immediate return of his money.

There was no ratification of the sale by Oliver. Sykes told Oliver of the alternatives as a result of the purchase, but failed to inform Oliver of his right to get his money back immediately. Ratification occurs only when Oliver, with full knowledge of the facts, manifests his intention to adopt the unauthorized transaction.

Ratification is not inferred from receipt of benefits unless there is full knowledge of the facts of the transaction. The cashing of the dividend check by Oliver would provide Sykes and Dickens Investment, Inc. with an argument that Oliver received the benefit of the purchase. However, based on the given facts,

Sykes and Dickens Investments, Inc. still have not told Oliver of his right to the immediate return of his money.

Points and authorities: Huppman v. Tighe, 100 Md. App. 655, 642 A.2d 309 (1994).

Part D - Question III

A) Under the doctrine of respondent superior an employer is liable for torts committed by its employee when committed in the course of employment.

Harry can recover from Tom if Tom was acting in the course of employment at the time of the collision. Whether Tom was in the course of employment depends on whether this deviation was slight or substantial. This is determined by the time and place of the deviation, its extent in relation to the prescribed route, whether its motivation was in part to serve the employer, and whether it is a usual sort of deviation for an employee with such a job.

In this case Tom was on a personal errand and was not acting in the furtherance of Alpha's business. Harry cannot recover from Alpha.

Dick was an independent contractor and there is generally NO LIABILITY for the negligent acts of independent contractors.

Harry cannot recover from Omega.

B) Dick's contributory negligence bars his recovery from Tom.

C) A lawyer may not represent a client if the representation of that client will be directly adverse to another client or will be materially limited by the lawyer's responsibilities to another client. Rule 1.7.

Here, Alpha will be able to stay in business if you prove Tom was not acting in the course of his employment. However, your successful defense of Alpha will mean that Tom will have no insurance coverage and must pay Harry out of his own funds. Here your representation of Tom would be limited by your responsibilities to Alpha.

You may not represent Tom.

A lawyer shall not accept compensation for representing a client from one other than the client unless the client consents and there is no interference with the lawyer's independence of professional judgment or with the attorney-client relationship. Here, there is no consent by Tom and there is interference with your independence in the representation of Tom.

You cannot comply with Alpha's request.

Part E - Question I

1. It can be argued that Patty lacks standing to file for divorce in Maryland because the "cause for divorce" has occurred outside of Maryland and Patty has not resided in Maryland for at least one year. Code, Family Law Article §7-101.

The contrary can also be argued: That the two-year separation occurred in Maryland. There appears to be no Maryland case on point.

2. Maryland court lacks in personal jurisdiction over David. See §6-103.1 of Courts Article. The Maryland Court cannot enter a judgment against David for alimony, child support or a judgment for marital property, since the separation did not occur in Maryland and there is no agreement as to these matters. The court has jurisdiction to render the divorce (in rem).

3. Venue. Suit for divorce against non-resident must be brought in Courts where Plaintiff resides §6-202(1) and Rule 9-201. The action must be brought in Howard County.

Extra: David's attorney should enter an appearance. Rule 2-131, and can assert any defense in accordance with the Maryland Rules. These would include a mandatory preliminary motion challenging lack of jurisdiction over person or a permissive motion challenging improper venue, Rule 2-322(a), or lack of jurisdiction over the subject matter, Rule 2-322(b).

Part E - Question II

(a) Maryland Rule 9-207(c) and (d) govern the Master's findings and exceptions thereto in a domestic relations case. Exceptions must be filed by David within five (5) days after recommendations are placed in the record or served. The exceptions must set forth the matters excepted to; in this case, that the Master used David's gross income in basing alimony and child support and that there was no jurisdiction. Because David is self-employed and receives royalties, the Master should have used "actual income" which is gross receipts from the business less ordinary and necessary expenses required to produce income. Md. Family Law Code §12-201(c)(2). Exceptions must be filed within five (5) days from the day after the recommendations are placed on the record, therefore, they must be filed by the next Monday. Maryland Rule 1-201.

(b) Maryland Rule 9-203(f) is mandatory. A financial statement must be filed. If David does not respond at all, the Court may rule that he will be bound by Patty's Pre-Trial Statement.

(c) David's objection should be sustained. Statements made in the course of mediation are not admissible unless the party and their counsel agree otherwise in writing. Maryland Rule 9-205(f).

(d) It is not too late for David to appeal the denial of his preliminary motions. the Circuit Court's rulings

on those motions were not final orders, and therefore, not immediately appealable. Maryland Rule 8-202.

Part F - Question I

Generally, the County may enact any law within its police powers (i.e., in furtherance of the public health, safety, morals, convenience or welfare) or within powers delegated by the General Assembly. However, the law may not violate the United States Constitution or other provisions of law.

The law enacted by Baltimore County may indeed violate the Commerce Clause because it denies out-of-state competitors access to the local recycling market and its sole purpose is local economic protectionism See, C&A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 390 (1994); Philadelphia v. New Jersey, 437 U.S. 617 (1978).

The law is also subject to challenge as a violation of the Fourteenth Amendment's procedural due process provision because it is so vague and/or overbroad ("recyclable" is an undefined term) as to not place potential violators on notice as to what is being prohibited. See, Winters v. New York, 333 U.S. 507 (1948). The law may be challenged as a violation of the equal protection clause of the Fourteenth Amendment since in-County recyclables, and the County-owned recycling facility, are being favored over other recycling facilities and there is no rational basis for the discrimination. The law may be an impermissible violation of the Eighth Amendment since the penalty is excessive - all seized properties, regardless of value, become the property of the County. For the same reason, it arguably is a taking of property without compensation, and therefore a violation of the Fifth Amendment. Finally, the law may violate Article 1, Section 19 of the United States Constitution since it impairs any contracts which Recycling R Us may have to purchase, sell or otherwise use recyclables generated within the County.

There may be a conflict in representing both entities since Recycling R Us may find the law acceptable if it is amended to allow any in-County facility to handle in-County recyclables while Use Again would prefer that the entire law be invalidated. However, under the facts, Use Again may not have standing to challenge the legality of the law since it does not currently own or operate a facility in the County, nor do business which would be adversely impacted by the law.

Part F - Question II

As Counsel for the defense, I would ask the judge to apprise Mrs. Kehoe of her privilege against revealing any testimony regarding conversations with her husband concerning the legislation. See, Maryland Courts and Judicial Proceedings Code Annotated, Section 9-105; Coleman v. State, 281 Md. 538, 380 A.2d 49 (1977).

Assuming Mrs. Kehoe does not wish to assert her privilege, I would further argue that the testimony is irrelevant since it is generally held that the motives of the legislative body are not a subject for inquiry in a suit challenging the validity of said legislation. Baltimore v. State, 15 Md. 376 (1860); La Tourette v. McMaster, 248 U.S. 465 (1919); Rast v. Van Deman & Lewis, 240 U.S. 342 (1916). Moreover, the statements by Mr. Kehoe may be inadmissible hearsay.

b. I would object to any testimony from the Associate County Attorney regarding conversations with the County Council in executive session. The Council is her client. Maryland follows the common law and grants the client a privilege against disclosure of communications with their attorneys. Maryland Courts and Judicial Proceedings Code Annotated, Section 9-108. Again, as discussed above, I would argue that the testimony is irrelevant since the motives of individual councilpersons are not a subject for inquiry when addressing the legality of the law enacted.

c. Finally, I would argue that the County employee's testimony is inadmissible because it is irrelevant. Maryland Rule 5-402. Whether a law meets the stated purpose is, arguably, irrelevant in an action addressing the constitutionality of said law since the propriety of legislation is not a factor in determining its validity. Queenside Hills Realty Co. v. Saxl, 328 U.S. 80 (1946). Moreover, I would challenge the employee's competency to present such evidence. The facts do not indicate that he had any basis for knowing the financial position of the facility.