**FEBRUARY 2007 MARYLAND BAR EXAMINATION**

**QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

## QUESTION 1

Winsome Ways is a boutique in New Market, Maryland that sells various accessories for women. Amy Brown is the sole owner and has two employees, Jack and Connie. Before leaving for a long vacation, Amy sends a form letter to her suppliers stating that while she is away on vacation Connie will manage the store and sign any required paperwork on behalf of the business. On the day before her departure, Amy instructs Connie that Connie will manage the store while Amy is away and sign paperwork for the business but that she may not purchase any new lines of merchandise from the suppliers or any other seller of merchandise.

A week into acting as manager, a salesperson from Jewels, a regular supplier, convinces Connie to purchase a line of jeweled eyeglass cases. Connie signs an agreement to purchase five of the eyeglass cases, and she agrees to purchase five eyeglass cases each month during the next twelve months.

The following day Jack is working at Winsome Ways alone while Connie takes a lunch break. A salesman, who works for Teapots, a regular supplier of teapots, convinces Jack to sign a contract committing Winsome Ways to the purchase of a number of expensive china teapots together with a two year contract for Winsome Ways to purchase the same type and number of pots every three months.

Amy returns from her vacation and learns of the new contracts. She calls Jewels and tells them to pick up the eyeglass cases and she calls Teapots and tells them not to deliver any teapots, as she will not accept them. Both Jewels and Teapots tell her that the contracts had been entered into with Winsome Ways and she will be held responsible.

**Amy comes to you, a Maryland lawyer, to obtain advice on whether she has any liability to Jewels and Teapots. What advice would you give to her and why?**

## REPRESENTATIVE ANSWER 1

Amy is most likely liable to Jewels, but she is not liable to Teapots.

1. Jewels

Amy did not ratify the contract with Jewels to purchase the eyeglass cases (she even asked Jewels to pick up the cases already delivered), so her liability will turn on whether Connie had the authority to enter into the contract. Connie did not have express authority. In fact, Amy

had specifically forbidden Connie from purchasing any new lines of merchandise from suppliers while Amy was gone. There was also no implied authority because Connie is a mere employee of Winsome Ways and there is no evidence that she had ever bought merchandise for the store before. There is, however, a good case for apparent authority. Amy sent a letter to all regular suppliers (and Jewels is a regular supplier) saying that while she was gone, Connie will manage the store and sign the required paperwork. She did not note in her letter that Connie was forbidden from buying new merchandise. Jewels therefore reasonably relied on this letter when it assumed that Connie had the authority to purchase the eyeglass cases. Amy might consider bringing an action against Connie for a breach of agency relationship as Connie was expressly forbidden from entering into any contracts for new lines of merchandise. The evidence seems to indicate that jeweled eyeglass cases are a new line of merchandise. If they are not, then Connie had express authority from Amy to purchase the cases and Amy is liable. Amy would then have no remedies available against Connie.

2. Teapots

Again, Amy did not ratify the contract with Teapots, so her liability will turn on whether Jack had the authority to enter into the contract. Jack had no express authority as there is no evidence that Amy entrusted Jack with any duties other than those of a salesperson. The fact that Amy sent out a letter specifically giving Connie the authority to sign for the business also cuts against any finding of express authority for Jack. As for implied authority, there is no evidence supporting the idea that Jack can bind by contract either Amy or Winsome Ways. He appears to be only a salesperson, not a manager. Finally, unlike the case with Connie, Amy has done nothing to give rise to a reasonable inference by a third party that Jack has authority to sign contracts for the business. She did not send out a letter like she did with Connie. Teapots was a regular supplier so they would have received the letter from Amy noting that only Connie had the authority to sign for the business. Because Teapots had no reason to believe that Jack had the authority to enter this contract (and in fact knew they should have dealt with Connie), Amy is not liable. If Amy were somehow found liable, she might also consider an action against Jack for breach of agency relationship as there is no evidence that Jack had the authority to enter into this contract.

## REPRESENTATIVE ANSWER 2

1. Jewels

Amy Brown (A) the sole owner of Winsome Ways, has two employees and has left for a long vacation. Prior to her departure, she sent a form letter to her suppliers stating that her employee, Connie (C) will “manage the store and sign any required paperwork on behalf of the business.” A has therefore formed an agency relationship with C—A is the principal and has granted C the ability to act on her behalf. A attempted to limit the scope of C’s agency by informing C that she could not purchase any new lines of merchandise from the suppliers or any other seller of merchandise. While a principal may limit the scope of the agency relationship, and

the extent of the agent's power, to be effective as against third parties, this limitation must be conveyed to the third party. C disregarded this limitation and purchased five eyeglass cases and agreed to continue purchasing five eyeglass cases each month. This agreement is between a current supplier (one who presumably received the form letter granting C the authority to act on A's behalf) for a new line of merchandise—jeweled eyeglass cases. C has acted outside of the scope of her actual authority by purchasing the new line of merchandise. However, A will be liable to Jewels because C has acted within the scope of her agency—as outlined in the letter sent to Jewels. A's letter should have specifically carried the restriction that C could not purchase new lines of merchandise from any suppliers or other sellers.

2. Teapots

A did not give Jack (J) any authority to act on her behalf while she was on vacation. Generally, employees do not have the authority to bind the company absent some special position in the company (i.e. president, vice president, etc.) or a grant of authority. J wrongfully purchased teapots and signed a two year contract committing Winsome to purchase the same number and type of teapots. Teapots (T) is a regular supplier, therefore it received the form letter and had notice that C would be responsible for the store while A was gone. T had no basis to ask J to enter into a binding two year contract. T will not be able to enforce this contract against A because there was no basis for its "belief" that J could act on behalf of A. As to teapots purchased, while again, even if J thinks he has authority but does not—in other words, it is not clear that A or C told J he couldn't enter contracts on behalf of Winsome or A, however, the supplier knew he could not and therefore could not rely on any representations made by J that he had authority.

As to the purchased teapots, if the employees regularly purchase such items on behalf of the store, then J may have implied authority, based on the course of conduct, to purchase these on behalf of Winsome. If, as seems more likely, A does the purchasing for Winsome, then A will be able to return the teapots already purchased and will have no liability for such teapots.

## QUESTION 2

In January 2007, enormous underground oil reserves were discovered in several counties of Maryland's Eastern Shore. The reserves were so large that virtually overnight, Maryland became the wealthiest state in the nation. In response to this oil discovery and the wealth it created, the Governor proposed the following legislation:

(a) The Maryland Currency Act. This statute creates new currency called the Maryland Dollar ("$M") that would be accepted as the official monetary unit for the State of Maryland. It also provided that United States currency would no longer be accepted in financial transactions within Maryland. A longstanding federal statute states that "United States coins and currency are legal tender for all debts, public charges, taxes, and dues." This means that all U.S. money, when tendered to a creditor, legally satisfies a debt to the extent of the amount (face value) tendered.

(b) The Oil Residence Act. To protect local oil explorers, this statute imposes residency and territorial licensing requirements on oil drilling and exploration in Maryland. The statute states that only individual residents of the Maryland County in which the reserves are located can obtain an exploration license, and oil exploration and drilling is limited to the county for which the license was issued.

**As a recently admitted attorney working for the Office of the Attorney General, you are asked by the Governor to give your opinion on the validity of the proposed legislation. What advice would you give? Explain your reasons**.

## ADDITIONAL FACTS

(c) Investigators from the Maryland Department of Natural Resources discovered that the Delaware State government was engaging in oil exploration by "side drilling" into the Maryland oil fields and then selling the "Maryland" oil on the open market. In response, Maryland files a lawsuit against the State of Delaware in the Circuit Court for Kent County, Maryland seeking injunctive relief and damages. The relief is promptly granted. The State of Delaware files a timely appeal to the Maryland Court of Special Appeals arguing that Maryland courts lack jurisdiction to hear the dispute.

**How should the Maryland Court of Special Appeals rule? Explain your reasons.**

## REPRESENTATIVE ANSWER 1

A) The validity of the MD Currency Act (MCA)

1) The Constitution of the United States explicitly gives the Federal Government the ability to coin and print money. The MCA is therefore unconstitutional for creating new currency call the Maryland Dollar. Doing so would be in direct conflict with the Federal

Government's exclusive power. No State can individually print and coin money without interfering with preemption and express federalism.

When a state law and a federal law expressly conflict, or are mutually expulsive, or if a State law attempts to govern in an area reserved or traditionally controlled by the Federal Government, the federal statute preempts the State law and the Federal law is controlling. Here the provision of the MCA which provides that MD will no longer accept U.S. currency to fulfill financial transactions is unconstitutional because it is in direct conflict with the federal statute which states that U.S. currency is legal tender for all debts. Therefore, that provision is also unconstitutional.

B) The Oil Reserve Act (ORA)

Burden on interstate commerce. First the ORA unduly burdens interstate commerce by imposing residency and territorial licensing requirements on oil drilling and exploration. Because it discriminates against out of staters it must meet strict scrutiny, must be narrowly tailored to fulfill a compelling purpose. It is clearly not the least restrictive way to protect local explorers and protecting local interest is not a compelling purpose.

Privileges and Immunities clause of Art. 4: The P/I clause states that when a state discriminates against individuals inhibits their economic abilities or civil liberties, the law must meet strict scrutiny, the analysis above is applicable.
The law fails.

Equal protection: The equal protection clause of the 14th Amendment applies if the law attempts to discriminate based on classifications; this law does so in two ways. (1) It draws a distinction between instate residents and out of state residents; (2) Between County residents and other county residents. It also restricts drilling to that resident's county. This impairs economic interest in drilling and therefore must only be rationally based on a legitimate reason. The law must be a reasonable way to fulfill that purpose. Here issuing licenses to locations of counties does appear reasonable to protect local exploration.

Substantive Due Process: 14th Amendment protects substantive due process rights to a liberty interest, right to drill is an economic liberty but it is not fundamental right, so rational based review is applied.

Based on this analysis, the ORA violated the dormant Commerce clause and the P/I clause of Article 4 and is thus unconstitutional as written, the government is not a market participate nor is there a compelling reason for the law.

(C) The Circuit Court of Kent County does not have jurisdiction to hear the law suit, so the Court of Special Appeals should overturn the Circuit Court and dismiss the suit. The

Constitutional grants exclusive jurisdiction to the Supreme Court to resolve suits between 2 states. Here, Delaware and Maryland.

## REPRESENTATIVE ANSWER 2

A. MD Currency Act

Under the supremacy clause. Federal law trumps state and local law. Here, a MD act creating new money and refusing to accept US currency contradicts the "longstanding federal statue…that US currency….settles all debts." Because of the contradictions in the state and federal statues, the federal statue would prevail and the MD statue would be found unconstitutional. Furthermore, Article I grants to the federal government the right to coin and print money. That authority is expressly given to the federal government. Therefore, MD's attempt to coin the money is not within its power or authority. This statue would be unconstitutional as a violation of Article I.

B. Oil Residence Act

Pursuant to the commerce clause of Article I, Congress has the sole authority to regulate interstate commerce and the individual states cannot unduly burden interstate commerce. Here, the act addresses oil drilling and exploration in MD because of the aggregate effects of oil drilling on interstate commerce, oil drilling/exploration is within interstate commerce. MD's residency requirement for licensing places an undue burden on interstate commerce, making it impossible for existing businesses to receive licenses, and is an unconstitutional violation of the commerce clause.

The dormant commerce clause, inherent in the commerce clause, prohibits a state from discriminating against out of state businesses absent a compelling state interest and no less restrictive means of achieving it. Here, MD requires residency in the county for oil licensing; discriminating against non resident persons/businesses. The acts purpose is to protect local explorer's an important state interest, however that may be achieved with additional fees or taxes on non residents not just on all out exclusion. Because there are less restrictive means, the act violates the commerce clause and fails.

Due process clause of the 5th Amendment applied to the states via the 14th Amendment, prohibits state action that discriminates against individuals. Here, the act treats residents and non resident businesses in MD differently. Since the discrimination involves an ordinary right, (not marriage, religion, etc.) the act is evaluated under rational review. Here, the states interest in protecting local oil explorers is legitimate. However, the exclusion of all others is not rationally/reasonably related to protecting that interest. The act violates due process and is unconstitutional.

The equal protection clauses of the 14th Amendment prohibits state action that treats similarly situated persons differently. Here Maryland residents and non residents are being

treated differently in their ability to drill for oil. For the same reasons discussed above in "due process" no rational relationship the act also violated equal protection.

C. The MD Court of Special Appeals should rule in favor of Delaware because Art II of the Constitution grants original jurisdiction to the Supreme Court of the U.S. for disputes between/among the states. Here, MD and Delaware are the parties and jurisdiction lies with the S. Court.

## QUESTION 3

Andrea, because of a job transfer, needed to sell her home in Harford County, Maryland. Because she had no success selling it herself she engaged Auctioneers Unlimited, LLC, to sell her property "as is."

A.U. prepared a contract giving A.U. " … the exclusive Right and Authority to Sell the property known as 102 River Road, Bel Air, Harford County, Maryland, and to retain a lien thereon to secure any commission due A U."

A. U. promised, for the commission of 10%, to secure a price of One Hundred Thousand Dollars ($100,000) or higher.

The contract also stated that "… A.U. shall provide all necessary forms and contracts to insure a high quality sale."

At the auction Barnes bid $105,000. Because the bid exceeded the minimum required, the bid was accepted and Barnes signed a contract of sale prepared by A.U.

A.U. was aware of Section 10-702(b)(i) of The Real Property Article which provides that "… a vendor of single family residential real property shall complete and deliver to each purchaser a written disclosure of the condition of the property or a written disclaimer on a form provided by the State Real Estate Commission." The Section further provides that any purchaser who does not receive the form on or before entering into the contract of sale may rescind the contract by giving notice to the Seller or the Seller's agent and may also demand return of any deposit.

A.U. did not provide the form but instead inserted into the purchase contract in bold letters that the property was sold "AS IS."

Barnes, before settlement, stated he wanted a price reduction because he was not satisfied with the condition of the garage which he claimed he did not have the opportunity to inspect and which he believed would costs $5,000 to repair. When his demand was not met he threatened to rescind the sales contract under Section 10-702 because he never received the disclosure or the disclaimer form required by the statute. Andrea stepped in and reduced the purchase price by $5,000 so she would not lose the sale.

Andrea then sued A. U. for the $5,000 alleging it breached its contractual agreement to provide all forms and contracts necessary to produce a high quality sale.

A.U. defended that it was not the vendor and was not required to produce the form. It further stated that the statement in bold type that the property was sold "AS IS" was the equivalent of the State form since it disclaims all warranties. It further claims that the contract term regarding forms is ambiguous.

**DISCUSS THE FOLLOWING:**

A. Barnes' position regarding his right to rescind.

B. The propriety of Andrea's unilateral reduction of the purchase price.

C. The merit of Andrea's suit against A.U.

D. A.U's interpretation of its contract with Andrea, the quoted statute, and the contract of sale with Barnes.

## REPRESENTATIVE ANSWER 1

A. Barnes position regarding his right to rescind.

Whether Barnes may rescind his sales contract or not depends on whether his purchase of the house "as is" somehow abrogates this statutory provision. In this case, Section 10-702(c)(i) does not mandate any type of warranty be provided. Instead, it only requires a written disclosure of the condition of the property or a written disclaimer of the condition of the property. Although purchasing the house "as is" might disclaim any implied warranties normally found in a sales contract, it does nothing to a disclosure statute such as the one at issue. Because this section of the Real Property Article also provides that purchasers not receiving the form are entitled to rescission Barnes does have a right to rescind as a result of A. U's failure to meet its statutory obligations.

B. The propriety of Andrea's unilateral reduction of the purchase price.

Whether Andrea was entitled to unilaterally reduce the purchase price turns on whether she had any rights under the sales contract. Andrea granted A. U. the exclusive right to sell her residence. And it does appear that the sales contract was between A. U. and Barnes. Andrea, however, was a third-party beneficiary to this contract. She further was aware of her benefit under this contract and therefore had rights under the contract (third-party beneficiary not aware of rights under contract and not relying on the expected benefit cannot enforce contract). Because she was the direct beneficiary of the sales contract and she effectively made A. U. her agent in the sale, she was entitled to reduce the purchase price.

C. The merits of Andrea's suit against A. U.

Andrea does have a suit against A. U. for breach in its agreement to produce a high quality sale. Although there might be some question about what providing forms for a high quality sale actually means, it is safe to say that complying with the statutory provisions required

of all residence sales would be necessary to meet this requirement. Because A. U. has failed to meet this requirement, it arguably breached. But this does not mean that Andrea is entitled to damages of $5,000. Even assuming that the house was worth $105,000, she would not be entitled to the full amount. Because she owed A. U. a 10% commission, she only would have been entitled to $4,500 for her expectation damages. Further, its not clear that her house was even worth $105,000 as the one buyer who bid that amount reduced his price after he saw the garage. Therefore, A. U. has a good claim that although it might have breached the agreement, her damages are arguably zero, especially considering Andrea reduced the purchase price.

D. A. U.'s interpretation of its contract with Andrea, the quoted statute, and the contract of the sales with Barnes.

First, A. U. claims that it was not the vendor. But the contract specifies that it had the "exclusive right" to sell the property and would provide all "necessary forms." A. U. was therefore clearly the proper vendor as it had the contractual right to sell the property and in fact did sell the property in accordance with this contractual right.

A.U.'s claim that because the property was sold "as is", it did not have to comply with the statute is also without merit. As noted above, the statute is a disclosure provision, not a warranty provision. Because the statute did not provide any warranties, a warranty disclaimer has no effect.

As for its contract of sales with Barnes, A. U.'s interpretation of the statute as "ambiguous" is problematic. "All necessary forms" is not ambiguous in this case. If a statute requires that a form be utilized, then it is necessary. Barnes might look to A. U.'s course of dealing with other customers or what the custom is in the real estate industry to make his case. "High quality sale" is arguably ambiguous, but because the contract clearly requires the form at issue, it does not affect A.U.'s liability under the statute. Barnes would therefore be entitled to rescission.

## REPRESENTATIVE ANSWER 2

A Barnes has an absolute right to rescind. Section 10-702(c)(i) expressly states that a buyer who did not receive a written disclosure of the property before or on entering into the contract has a right to rescind the contract by giving notice to the seller or seller's agent. In this case, the contract was formed at auction when Barnes won the auction with the highest bid. In order for A. U. to comply with the written disclosure requirement, it was then that they must have presented Barnes with the written disclosure statement, not later at settlement since the purpose of the statement is to make buyers aware of the condition of the home before they enter into a contract with the seller.

B. Andrea's unilateral reduction in price should be upheld. A modification of contracts in a nonsale of goods situation must be supported by consideration in order to be valid. In this case, Andrea's reduction of the purchase price should be upheld. As consideration, Barnes is agreeing

to waive his contractual right to void the contract for not receiving the necessary form under 10-702 which would have disclosed the damaged garage. Five thousand dollars is the price that it will cost Barnes to fix the garage so the modification represents this.

C. Andrea's suit against A. U. should succeed. Andrea entrusted A. U. to act as her agent for sale of her house. A. U. expressly promised to her that they would provide all forms and did not. As a result of their breach, Andrea was forced to lower the sale price by $5,000 to $100,000. The court may rule however that Andrea is only entitled to recover the amount of damages that she suffered as a result of A. U.'s breach. In this case, A. U. should still recover a commission of 10% of the contract price since the total sale remains over $100,000. Therefore, $5,000 would be too high of a recovery and she is more likely only due $500 (10% of the price reduction).

A. U.'s interpretation of its contract with Andrea is incorrect. Although auctioneers are often considered third parties who only enable a transaction to occur, in this case they were a vendor. A. U. had the responsibility of preparing all forms for the sale of the home. Additionally, they were receiving a commission for the sale of the home over $100,000 – a clear indication that they were acting as a vendor in this case. Thus, they were required to produce the form because they were a vendor, they expressly stated they would include all necessary forms, and the 10-702 statute requires either the seller or seller's vendor to provide the written disclosure form.

A. U.'s interpretation of the quoted statute is incorrect. The terms "as is" do not serve the same purpose of the 10-702 form. The 10-702 form is a statutory mandatory form that enables buyers to fully understand the condition of the home they are buying. This is especially important in the case of single-family homes where buyers are often less knowledgeable of fault conditions. The statement is not an expression of warranty but gives notice to the buyer of what conditions they should be aware of before purchasing the home. In contrast, the "as is" notifies a buyer that the seller is making no warranties as to the condition of the home. Thus, in this case, if the 10-702 form disclosed that the garage was faulty, the phrase "as is" would give them notice that Andrea will not be fixing the garage and the buyer must take the condition as they find it.

A. U. may argue that the contract term of the sale with Barnes is ambiguous since the home was purchased at auction as opposed in bilateral negotiations. This argument should fail. A contract is deemed entered into at auction when a bidder has the highest bid and thereby wins the auction. The fact that there were later settlement proceedings to take care of was typically only to take care of various administrative issues. As a result, the 10-702 notice was due to Barnes at the time of the auction – when the contract was in fact formed.

## QUESTION 4

Alphonse heard that Sgt. Gaston of the Waldorf (Maryland) Police Department wanted to talk to him about a string of burglaries. Alphonse went to the Waldorf Police Headquarters and asked for Gaston, who escorted Alphonse to an interview room. After several hours of questioning, Alphonse stood up and said, "I'm leaving." Gaston yelled, "Sit down! You're not going anywhere." Alphonse immediately sat back down. An hour later, Alphonse confessed to the burglaries. He was promptly properly charged and, after posting bail, Alphonse retained Pere Mehsonne to represent him. He told Mehsonne that he was never advised of his "Miranda rights" and confessed only after he was worn down. He admitted that, other than the facts stated above, he was not threatened or coerced into admitting the crimes.

At Alphonse's arraignment in Circuit Court, Sgt. Douwright of the Waldorf Police took Mehsonne aside. Douwright tells Mehsonne that he had filed a report with the State's Attorney stating that he was in the room during the interrogation and that he told Gaston to advise Alphonse of his rights, but Gaston said "I don't need to."

On the day after the arraignment the State's Attorney's office sent Mehsonne a letter stating that the office followed an "open file" discovery policy. A copy of Gaston's police report attached to the letter. Gaston's report stated only that Alphonse voluntarily confessed to the crimes. No copy of Douwright's report was included. Mehsonne decided to file no motions and surprise the State by calling Douwright as a witness for the defense.

During testimony by Gaston in a trial before a jury in the Circuit Court for Charles County, Assistant State's Attorney Gettham asks Gaston whether Alphonse made any statements to him. Mehsonne objects. The judge asks Mehsonne for his basis. Mehsonne states "Fifth Amendment. Maryland Rules." Gettham asks the Court to be heard on the objection.

**1. What arguments would you expect Gettham to make in support of overruling the objection?**

**2. How should the Judge rule and why?**

**REPRESENTATIVE GOOD ANSWERS**

A. Gettham argument.

Gettham's strongest argument is that Mehsonne failed to file a mandatory motion objecting to the unlawfully obtained admission as required by MD Rule 4-252(a)(4). This rule provides that if this type of objection is not made within 30 days of the appearance of counsel or the first appearance of the defendant (unless more recently discovered through discovery, see

rule 4-252(b)the defense is waived unless the court orders otherwise for good cause, see Rule 4-252(a). This motion must be made in writing unless otherwise directed, see Rule 4-252(e), so it is too late for Mehsonne to bring up the argument orally in court (it's not clear how much time passed between the arraignment and trial, but as Mehsonne decided to file no motions and "surprise" the state's attorney, it is safe to assume that he waited more than 30 days).

Gettham might also try to argue that Alphonse was not in custody because he voluntarily went to police headquarters, but this argument will fail for reasons noted below.

B. How should the judge rule?

This is a very close call, but I believe the judge should rule for Alphonse and sustain his objection, thereby keeping out the testimony. First, there must have been a Fifth Amendment violation – Alphonse must have been in custody and interrogated without either being have read his rights or not having waived his rights. In this case, although he voluntarily went to police headquarters, he was in custody after Gaston told him that he was not going anywhere (reasonable person would not feel free to leave). He was obviously interrogated as he was asked numerous questions about the crime that would reasonably elicit a response. And he was not read his Miranda rights. So there was a Fifth Amendment violation, but the question remains whether this is admissible.

There seems to be little doubt that Mehsonne waived any argument to keep out Alphonse's testimony because he failed to make a mandatory motion within 30 days as required by Rule 4-252(a)(4) & (b). The court, however, does not have to find waiver if there is good cause shown. In this case, Mehsonne should argue that the prosecutor has violated Rule 4-263(a)(2), which requires her to disclose any relevant material or information regarding the acquisition of a statement made by the defendant. In this case, the state's attorney violated this rule by failing to turn over Sgt. Douwright's report. If this were all we knew, it would be easy for the court to permit this objection. What makes this a closer call, however, is that Mehsonne knew about this report, though he did not receive it, and tried to "surprise" the state's attorney. Instead, he should have filed a motion to compel discovery under Rule 4-263(f); then filed a timely motion to suppress before the trial. So neither side is without fault. In this case, because the state did violate Alphonse's Fifth Amendment right and failed to meet its discovery obligations, I would grant Alphonse's objection to keep out his testimony because its collection violated the Fifth Amendment. The state's attorney can nonetheless still impeach Alphonse's testimony with this suppressed evidence under Rule 4-252(h)(2).

## REPRESENTATIVE ANSWER 2

A. Genttham would argue:

1. Sgt. Gaston did not need to give Miranda warnings to Alphonse because he came to the police station on his own free will. Gettham would argue that when Sgt. Gaston yelled at Alphonse to "sit down" and told him he "wasn't going anywhere." Gaston was asking Alphonse

to stay, but not requiring him to. Gettham would argue that Gaston had not seized Alphonse's person and he was free to leave at anytime; therefore voluntarily offered the confession.

2. Gettham would argue that Mehsonne should have filed a pretrial motion regarding the matter under Rule 4-252, 30 days after the initial appearance of Alphonse pursuant to rule 4-213. He would argue that Rule 4-252(a)(4) requires this regarding any unlawfully obtained admission, statement or confession. If the motion is not filed the matter is waived. Gettham could also argue the defense council's objection is not specific enough.

B. The Judge would rule:

1. Sgt. Gaston failed to give proper Miranda warnings to Alphonse. Although it is true that Alphonse voluntarily went to the police station and submitted to several hours of questioning, the confession was not obtained while he was there on his own free will. This is because after several hours of voluntarily submitted to questioning, Alphonse announced his intention to leave and was ordered to "sit down" and told he wasn't going anywhere. This amounted to a seizure of Alphonse's person. At that moment and thereafter Alphonse was in the custody of the police. It was after that point when Alphonse made his confession. He was not properly given Miranda when he was place into custody.

2. The prosecution should have turned over the confession, pursuant to Rule 4-263(a)(2), which requires the prosecution to disclose any statements made by defendant to state agent, which it intends to use at trial. It is not necessary for the defense to request this information. This applies even if the information was in possession of the police at the time. See 4-263(g). The duty to disclose is a continuing duty. See 4-263(h). This information should have been provided 25 days after the initial appearance of Alphonse pursuant to rule 4-213.

3. However, Mehsonne should have filed a mandatory pretrial motion, as explained above in Gettham's objection. This is because the basis of the motion was disclosed to him prior first by his client and then by officer Douwright, and not by the discovery. Defendant council knew about the problem and failed to file a pretrial motion, so that objection of Overruled. The Statement comes in.

## QUESTION 5

Recently, Mrs. Bernice Williams' husband died, and she required the assistance of a Maryland lawyer to represent the estate. Mr. Williams left the bulk of his estate to his wife and he directed that a bequest of $50,000 should be shared by his surviving descendants, if any.

Mrs. Williams and her daughters, Sarah and Jane, met with Carol Counsel ("Counsel") in Anne Arundel County, Maryland. Mrs. Williams was referred to Counsel by Jane. Jane was represented by Counsel in a contract action against her former employer and Counsel is assisting Jane currently in the preparation of Jane's estate planning documents. Jane told her mother that Counsel was an excellent lawyer and that Counsel would pay Jane the sum of $1,000 for referring the case to Counsel.

When Mrs. Williams, Sarah and Jane initially met with Counsel, Counsel explained that she specialized in estates and trust law and could easily handle everything. Mrs. Williams agreed to an acceptable fee arrangement with Counsel during the meeting. In addition, Counsel told Mrs. Williams, Sarah and Jane that each of them could tell Counsel anything and that Counsel would not disclose it to anyone.

During a later meeting only between Mrs. Williams and Counsel, Mrs. Williams revealed that Sarah was not her husband's daughter but was her daughter from her very short prior marriage that occurred when she was sixteen years old. Her late husband had raised but he had never adopted Sarah. Counsel advised Mrs. Williams that her husband's Will only provided for his children and that Sarah would not receive any money from his estate. Shortly thereafter, Counsel excused herself from the meeting to make a telephone call to Jane to let her know that she would be receiving the entire bequest from her father's estate.

Later that same day, Jane told Sarah that she would not receive any part of the $50,000 because her father was not Mr. Williams.

**Evaluate and discuss fully the possible ethical violations of Counsel.**

## REPRESENTATIVE ANSWER 1

Counsel has violated a number of professional rules in her representation of Mrs. Williams ("Williams"), Sarah, and Jane.

### Conflicts

1. Concurrent representation. Counsel is already Jane's lawyer and now has been asked to represent Sarah, Jane, and Mrs. Williams in the disposition of Mr. Williams' estate. Although Counsel may feel additional loyalty for Jane, she cannot prefer Jane in the representation. A lawyer cannot concurrently represent two parties whose interests are in conflict. Here, Sarah and Jane's interests directly conflict because Jane will get all of the

property if Sarah is not Mr. Williams' daughter. This may go to trial and Counsel could not represent both. Further, Counsel could not get them to waive the conflict because waiver is only permissible where a lawyer reasonably believes that her ability to represent each party will not be materially affected by the conflict—that is not the case here.

A lawyer owes his or her clients the duty of loyalty. She must act in the best interests of her clients, to the extent it does not conflict with the law or ethical duties, and must act competently and diligently. When embarking on joint representation, it is important to make the ground rules, and ethical rules and duties, clear to each client. Counsel should have made it clear to all three that, while the conversations they had with her are confidential as to the rest of the world, they are not confidential as to the other joint members of the representation.

2. Confidentiality. Lawyers owe the duty of confidentiality to their clients. This means that any information gained about their client, whether from the client or from others, may not be disclosed. That means that anything told to her, by any of the members, had to be shared with all (if it had any relevance to the representation). Counsel should also avoid meeting privately with some, but not all, of the clients being represented to avoid this problem. Lawyer had a duty to represent each of them equally and effectively and to withdraw or advise them to consult other attorneys when their interest because adverse.

When Mrs. Williams told Counsel that Sarah was not Mr. Williams' daughter, Counsel was required to disclose that to both Sarah and Jane because it affected the purpose of the representations. At that point, she should have advised them to seek advice from another attorney (each to seek their own attorney) because they are now in direct conflict. She had no right to tell Jane but not Sarah—this breaches her duty of loyalty to Sarah. Mrs. Williams will also feel that Counsel breached her duty of loyalty and confidentiality to her because Counsel did not accurately explain the confidentiality rules.

3. Referral. A lawyer may not obtain a referral fee from a non-lawyer. A lawyer may give another lawyer who refers a client a share in the fee, where such amount is based on the proportion of the other lawyer's assistance or involvement in the matter. Lawyers may also take part in legal group plans and may pay a fee to be part of a legal directory, but may not accept this type of referral fee. Counsel may be sanctioned for giving the referral fee to Jane.

4. Specialization. Although it may be unconstitutional, Maryland will not allow lawyers to include that they are specialists in a field. Counsel violated this rule because she informed her clients that she specializes in estates.

5. Fee. The fee arrangement and rate or method of determining the fee should be determined up front, and then it should be confirmed in writing along with the lawyer's understanding of the scope of the representation (representation may be limited in scope). Here, the parties agree on the fee, but there is no indication that the agreement was reduced to writing. Counsel violated her ethical duty to reduce the agreement to writing within a reasonable time.

## REPRESENTATIVE ANSWER 2

There are multiple violations of the Maryland Rules of Professional Conduct ("RPC").

1. Conflict of Interest. There is a conflict of interest when Counsel agreed to represent multiple beneficiaries of the same estate. Mrs. Williams, as the main beneficiary, could have a directly adverse interest with the other descendants of Mr. Williams. There is also a conflict because Jane is an existing client of Counsel. Counsel could have confidential information regarding Jane that could harm her or other clients in this matter; Counsel's existing obligation to Jane could materially interfere with the representation of the other clients.

Counsel cannot represent all these clients in the same matter unless: (i) Counsel reasonably believes she can adequately represent each of these clients; (ii) she fully explains the potential conflicts to these clients and informs them of the desirablility to seek individual representation; and (iii) each client gives informed consent in writing and signs a joint representation agreement. At any time a conflict arises, Counsel may still be required to withdraw.

2. Referral Fees to Non-lawyer. Counsel cannot pay any referral fee to a non-lawyer (here, Jane) because a sharing of profit with non-lawyer is in violation of RPC.

3. Improper Self-Designation of Specialist. Counsel violated RPC when she presented herself as "specialist" in trust and estate law. Except for a patent attorney, a lawyer should not hold herself out as a specialist in any area of law.

4. Unjustified Expectation. When Counsel promised that she "could easily handle everything," she was creating unjustified expectations in the clients, which is also a violation.

5. Fee Agreement and Joint Representation Agreement. The fee arrangement is preferably in writing signed by the clients, and as discussed above, a joint representation consent is required in this matter.

6. Attorney-Client Confidentiality. Counsel should not be communicating with one joint client alone without these other joint clients' knowledge. When Counsel told the clients that they could tell her anything, that was inaccurate. Due to the possibility of conflicts, she should have warned the clients of the potential harm of communication among them.

7. Withdrawal. By the time Counsel learned of the illegitimate status of Sarah, Counsel should have stopped the meeting and withdrawn from representing all these clients in the estate matter. Counsel had a duty to act in the best interest of her clients and should not unilaterally advise one client (Mrs. Williams or Jane) against another client (Sarah).

## QUESTION 6

Fred and Wilma, a Maryland couple, were divorced after a bitter separation. A year later Wilma properly brought suit against Fred in the Circuit Court for Baltimore City, over assets in a Swiss Bank account that she claimed Fred was hiding and which she claimed belonged to her.

At the divorce trial, Wilma testified that while they were married, Fred told her that he had stashed $500,000 in a Swiss Bank account which only the two of them knew about. Wilma also testified that Fred had stolen money from others on numerous occasions and was given a Probation Before Judgment ("PBJ") by the court for theft after the police caught him in "one of his scams."

During the trial, Barney, Wilma's new boyfriend, testified that he had secretly placed a tape recorder in the room which recorded Fred discussing the whereabouts of the money with Wilma in 2005. Barney testified that his brother, Reverend Slate, told him that Fred had confessed to committing theft during a religious confession session with Reverend Slate.

Wilma's attorney called Fred to the stand as a hostile witness and asked Fred, over his counsel's objections, about the Swiss Bank account and the PBJ for theft. After Fred denied both the secret account and the PBJ, Wilma's attorney sought to introduce the certified copy of Fred's PBJ. Wilma's attorney then subpoenaed Reverend Slate to come to court to testify as an impeachment witness.

During the trial Fred's lawyer made timely objections to all of the above testimony by Wilma and Barney as well as the admittance of PBJ documents.

**How should the court rule on each objection and why? Discuss fully.**

## REPRESENTATIVE ANSWER 1

$500,000 in a Swiss Bank account

The court will probably sustain the objection about the money in the Swiss account because communications were confidential and made while W and F were married. Thus, F can assert the privilege to prevent W from testifying about the money 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.

The recording

B will not be allowed to either testify about or introduce the recording of W and F because it is an illegal wire tap. F did not give his consent, and in Maryland all parties to the recording must consent.

Theft Confession

B's testimony regarding what his brother Rev Slate said F said, is double hearsay without any exceptions. Therefore, F's lawyer's objection will be granted. Also, Rev. Slate may choose to invoke his privilege as a clergy member in order to refuse to testify against F, but it is up to him.

Theft PBJ

W cannot testify about F's prior bad acts. However, F can be cross examined about the PBJ because it is a prior act that has to do with his credibility, even if it is not conviction. The judge will have to weigh the probative value of that evidence against the prejudice to F. W's lawyer is stuck with whatever F says. They cannot use extrinsic evidence of the prior bad act.

## REPRESENTATIVE ANSWER 2

The court will sustain Fred's lawyer's objection on Wilma's testimony about the money in the Swiss bank account because it is protected under the husband and wife privilege. Both Wilma and Fred can assert the privilege. It does not matter that they are no longer married. The privilege attaches if the statements were made in confidence during the marriage. This seems to be the case here, because only "the two of them knew about" the statement about the money.

The court will not allow Wilma to testify about thefts that Fred committed, because habit evidence is not admissible. However, Fred can be cross-examined about his prior acts that bear on his credibility like the theft PBJ, if the court finds after doing a balancing that it would not be too prejudicial to Fred. Wilma's lawyer will not be able to use extrinsic evidence like the PBJ documents to impeach Fred. They will be stuck with Fred's answer.

Barney has committed a crime by recording Fred without his permission. Barney will not be allowed to use the tape or testify about it in court because it is a crime! Objection sustained. Barney will also not be allowed to testify about Fred's confession to Rev State, because it is hearsay without any exception. Rev Slate may invoke the Priest Penitent privilege to avoid having to testify against Fred. Even if Rev Slate wants to testify against Fred, the court will probably sustain Fred's lawyer's objection because his testimony is extrinsic and not allowed to impeach Fred on his PBJ testimony.

## QUESTION 7

Husband and Wife were married in 1996 and have lived together in their home in Frostburg, Maryland, since that time. In early 2006, Husband began an intimate affair with a female co-worker. On January 1, 2007, Wife found a card from Husband's co-worker describing their relationship in graphic and unmistakable detail and confronted Husband. Husband acknowledged his infidelity and promised to remain faithful to Wife and their marriage vows. Husband and Wife resumed having sexual relations with each other. Wife, however, found she was suspicious and untrusting of Husband and asked him for a divorce in early February, 2007. Husband is willing to allow Wife to divorce him.

Wife seeks the legal services of Bob in obtaining an absolute divorce. Bob is a Maryland attorney who regularly practices family law. She advises Bob of the above recited facts except she tells Bob she has not had sexual relations with her Husband since she became aware of his infidelity. She does tell Bob, however, that she recently met her old high school sweetheart and had sexual relations with him, celebrating the end of her marriage to her Husband.

**Based on the above facts:**

(a) **Can the Wife currently maintain and prove grounds for an absolute divorce? Discuss fully**.

(b) **Does Husband have any defense(s) to Wife's possible complaint for absolute divorce?**

(c) **At trial, Wife testifies she has not had sexual relations with Husband since January 1, 2007, and denies, on cross examination, that she has had sexual relations with anyone else while married to husband. What should Bob do in light of Wife's testiomony.**

## REPRESENTATIVE ANSWER 1

A. Wife has grounds for divorce.

1. Adultery

Wife can assert, as grounds for the divorce, her husband's affair with the co-worker. Adultery arises when a spouse has sexual relations with one other than his wife. Adultery must be corroborated with independent evidence of opportunity and dispositions. Here, husband's affair was documented in graphic and unmistakable detail in the card wife found. Husband's admission of the affair completed the grounds for divorce, alleviating any additional need for further corroboration.

2. Husband's Defense

Condonation is a defense to fault based divorce. It arises in pertinent part when one spouse, with full knowledge of the other spouse's adulterous affair forgives the first spouse and resumes sexual relations.

There appears to be a likelihood of conflicting testimony on this point. Initially, it appears that Husband and Wife resumed sexual relations with each other. However, when Wife met with her attorney Bob, Wife told Bob she has not resumed sexual relations and based on information in subsection "c", it appears that this is how she will testify at trial.

Thus the application of the condonation defense depends on Wife's testimony. If she testifies that she resumed relations with her Husband, the defense will apply. If she testifies that she did not have relations the defense will apply only if Husband contradicts and the Court credits his testimony over Wife's

B. Recrimination may also be a defense available to Husband. This defense applies relative to those facts when a spouse engages in activity harmful to the marriage as revenge for the other's spouse's misconduct, there the defense might apply because Wife had sex with an ex-boyfriend to celebrate the end of her marriage. Note, however, that this is not an absolute divorce defense and the Court could still grant Wife's petition.

C. Bob has several duties with regard to the testimony offered by Wife, which Bob knows to be false or at least in conflict with her prior statement. A lawyer has a duty to refrain from sponsoring perjury and when a lawyer knows a witness has perjured herself, several duties arise.

First, Bob should request a sidebar with his client to confer with her about the testimony and offer her a chance to correct it. If she refuses to do so, Bob should tell Wife that if she does not correct the testimony he will withdraw. If she still refuses, Bob can withdraw. If withdrawal is impossible because they are in mid-trial, Bob should threaten to disclose Wife's perjury to the Court. If Wife still refuses, Bob should disclose the problem to the Court.

## REPRESENTATIVE ANSWER 2

A. Wife's grounds

Wife can prove grounds for an absolute divorce on the basis of Husband's adultery. She must show that he had the opportunity and the disposition to commit adultery, which is provable by showing that he worked with the other woman and using the graphic card as evidence. Adultery accusations need to be corroborated. The card will be sufficient corroboration because it describes the relationship unmistakably.

B. Husband's defenses.

Husband can argue the defense of condonation. He must show that Wife took him back with knowledge of the affair. Wife did take Husband back when he promised to remain faithful and she resumed sexual relations with him; thus, Husband has a good defense of condonation. However, it is not an absolute defense to his fault defense.

Husband also has the defense of recrimination or "unclean hands" because Wife has committed adultery by having sexual relations with her high school sweetheart. This will not be an absolute defense to his fault, especially since he engaged in an affair first, but it is a factor for the Court to consider.

C. Bob's Duty

Because Bob knows that Wife has perjured herself, he has a professional responsibility to tell her to correct her testimony.

If she will not correct it, he must withdraw from his representation of her.

If a Judge will not allow him to withdraw, he must threaten Wife that he will disclose her perjury to the Court.

If she still refuses to correct it, Bob's duty is to disclose the perjury to the Court because he has a duty of candor to the Court.

## QUESTION 8

In 2002, Farmer Kangaroo conveyed Astaland, a 2O parcel improved with a large mansion and a small farm home and located in Arundel County, Maryland, by deed to Nick and Nora as "joint tenants As agreed, Nora immediately moved onto the existing Astaland, while Nick continued to reside in Martini Estates, New York. Unbeknownst to Nick, immediately after moving on site, Nora leased 5 acres of Astaland to Mr. & Mrs. Thinman in January 2003, whereupon the Thinmans promptly moved into a small existing farm home nestled in the woods on said 5 parcel Mr. & Mrs. Thinman paid Nora $10,000 in annual rent to lease the 5 acres and the farm home.

Quite unexpectedly, Mr. Thinman died in December 2005. Mrs. Thinman continued to live in the farm home and on January 1, 2006, her lover, Mr. Bunyan moved into the farm home with her. Observing the heavily five acres, Bunyan promptly entered into the lumber business. Armed with his axe, Bunyan immediately cleared all of the trees on the 5 acres, chopping each tree into lumber, which he in turn sold for a total of $50,000.

A few months later, Nick was passing through Arundel County, stopped to check on Astaland, and was distraught to see 5 acres of formerly wooded land completely cleared. Seeing activity at the small farm home, he stopped in and discovered that Mrs. Thinman had been renting the farm home and the 5 acres for three (3) years. Bunyan also boasted to him about netting $50,000 from the sale of the lumber.

**Nick comes to you, a licensed Maryland attorney, to see what, if any, rights he has against Nora, Thinman or Bunyan. How would you advise him? Discuss fully.**

## REPRESENTATIVE ANSWER 1

Nick and Nora share a joint tenancy, which has a right of survivorship. The joint tenancy is created by grant, by Farmer Kangaroo, with four elements held at the same time. Time, title, interest and possession are the elements in a joint tenancy, the destruction of any of which would destroy the joint tenancy, and leave the tenants as tenants in common, with no right of survivorship.

The facts state that Nora, upon moving onto the property, promptly leased a portion of the property to the Thinmans in January 2003. By leasing a portion of the estate, Nora destroyed the joint tenancy by impinging on Nick's right to possession of the property as a whole, making them tenants in common.

Over three years passed, the lease at $10,000 a year was paid to Nora for an amount of $30,000. Nick may assert his rights, as a cotenant, to share in any rent or profit gained from the land by Nora.

Bunyan, as Thinman's lover, and beginning in 2006 a tenant of the five acre parcel cut all the trees down on the five acres. Under Landlord/Tenant law, a tenant has a duty not to commit affirmative or permissive waste on the land. By clear cutting the property, for which he was not granted a profit, Bunyan committed waste. Nick has an action against Bunyan, and Mrs.Thinman as the principal leaseholder under agency, to recover for the waste committed on the land. There are some exceptions to waste, such as prior use, for reasonable repairs, as to necessity, or by grant, but the facts do not suggest any of these apply, and Bunyan sold the lumber for profit. Nick may recover at least his share of the profit gleaned from the lumber sale.

Nick may take action against Nora to have the property separated, by partition, or sell his interest as tenant in common.

**REPRESENTATIVE ANSWER 2**

Nick and Nora acquired the property as joint tenants by deed from Kangaroo. Both Nora and Nick's interest were conveyed at the same time and in the same with rights for each with ½ share of the land. The facts do not state that Nick and Nora were married and no words of survivorship rights were stated so Nick and Nora will be viewed as tenants in common with a ½ interest in the land that does not automatically transfer to the other upon death.

Nick vs. Nora

Nora has a right to lease the land and keep any profits unless it doesn't interfere with Nick's interest in the land. It is conceivable that a court may allow Nora to keep the $10,000 in annual rent since she is renting only 5 of the 20 acres and especially if she is paying all the taxes and other expenses for upkeep of the land. She may however be liable to Nick for other damages discussed below.

Nick vs. Thinman

The Thinman's acquired a lease hold interest as a result of their agreement with Nora. As such, the Thinman's interest in the land terminates upon the termination of the lease. Therefore, Mrs. Thinman did not acquire any additional interest in the land upon her husband's death (no rights of survivorship). In addition, Mrs. Thinman (Mrs. T) and her lover Bunyan (B) are prevented from committing waste of the property and are liable for all damages to the land resulting form the waste. Bunyan's chopping of the trees for lumber may be considered waste, as he was not authorized to cut the lumber and the cutting was for profit and not for reasonable domestic use of the land. As such, Mrs. T and B are liable for damages and would have to pay the $50,000 to Nick and Nora.

I would advise Nick to seek an injunction enjoining Mrs. T and B from cutting any more timber. I would also advise him to sue them and also Nora if she negligently permitted the use, for $50,000 in damages and other damages as appropriate. I would further advise Nick to seek a partition of the land with ½ to Nora and ½ to him.

## QUESTION 9

On January 1, 2006, Phil's barn and milking parlor in Wicomico County, Maryland was severely damaged by fire. Investigation by the fire marshal's office determined that the fire was ignited by a short circuit in the barn's electrical system which had been completely rewired in November 2005 by Dave, a licensed electrician. Phil obtained a repair estimate from a qualified builder in the amount of $200,000.

On April 1, 2006, Phil, through his attorney, filed suit against Dave in the Circuit Court of Wicomico County seeking judgment against Dave in the amount of the estimated monetary loss.

Dave was property served with process on April 7, 2006. As of May 9, 2006, Dave had not filed any responsive pleading.

On May 15, 2006, Phil's attorney filed a motion with the court requesting a "judgment by default". On May 20, 2006, the court entered an "order of default" and on the same date, the clerk mailed to Dave's address a notice informing him of the date of the default order and advising him of the right to move to vacate the order within 30 days from its entry.

Dave failed to respond to the notice, and on June 30, 2006 after a hearing, the court directed the entry of judgment against Dave in the amount of $200,000. On July 7, 2006, Dave sought legal counsel.

**On the basis of these facts, what, if any action, can Dave's attorney take to avoid payment of the judgment as entered by the court?**

## REPRESENTATIVE ANSWER 1

Pursuant to Rule 2-613(d), the defendant may move to vacate the order of default within 30 days after its entry. The motion shall state the reasons for the failure to plead and the legal and factual basis for the defense to the claim. There, the clerk entered the order of default judgment on May 20, 2006. Dave had 30 days from the date of entry to move to vacate the order; Dave had until June 20, 2006 to vacate the order. Given that Dave has sought legal counsel on July 7, more than two weeks later than the 30-day period, Dave cannot properly file a motion to vacate this order.

Pursuant to Rule 2-613(f), if a motion was not filed under Section (d) above, as is the case with Dave, the court may, upon request, enter a judgment by default that includes a determination as to liability and all relief sought. However, the court must be satisfied that it has subject matter and personal jurisdiction and that the notice of subsection (c) of this rule was mailed. On these facts, Dave was properly served with process, the court had subject matter jurisdiction as it was a matter in controversy of greater than $25,000, the action was filed in the proper court – the county where the property is located and Dave failed to respond. Thus, the judgment by default is valid.

Pursuant to Rule 2-613(g), a default judgment entered in compliance with this rule is not subject to the revisory power under Rule 2-535 except as to the relief granted. Therefore, pursuant to Rule 2-535(a), Dave's attorney may file a motion within 30 days of the entry of the judgment to challenge the relief granted, but not the judgment itself. Because the judgment was entered on June 30, 2006, Dave may properly file under this Rule until July 30, 2006, challenging the $200,000 of relief granted to Phil. Dave's attorney must therefore make a good faith argument that the award was excessive or that the builder's valuation of the barn was uninformed if he seeks to have the judgment modified or reduced. However, the judgment against Dave will stand.

**REPRESENTATIVE ANSWER 2**

Dave would not be able to avoid payment of the judgment but can seek to have the amount of the relief granted reduced. Dave was properly served on April 7, 2007 pursuant to Rule 1-321 by serving the pleading on him at his last known address. Generally, a party has 30 days to answer a complaint. Dave did not answer the complaint within 30 days and Phil properly requested the court enter a default judgment on May 15, 2006 pursuant to 2-613(b). The court ordered default on May 20, 2006 by sending notice to Dave and giving him 30 days to reply pursuant to Rule 2-613(c). At that point Dave had 30 days to vacate the order of default in accordance with Rule 2-613(d). Since Dave did not submit such a motion to vacate, the court properly entered judgment against Dave on June 30, 2007.

The default judgment would not be subject to revision under Rule 2-535(a) because Rule 2-613(g) considers entry of judgment as a final judgment, and explicitly prohibits revising the judgment. However, Rule 2-613(g) does permit the court to use its revisory power "as to the relief granted." In other words, Dave is unable to revise the judgment against him that he owes Phil some amount of damages. But Dave can seek to revise the relief granted – which in this case is $200,000. Dave could argue that the estimate for the $200,000 was too high and submit evidence as to the fair market value of what the proper damages should be in the case. Thus, the judgment against Dave will remain but the amount of the judgment can be changed.

## QUESTION 10

Owings Mills, Maryland received 20 inches of snow one night. At 9 a.m. on the very next day, Oscar went to the grocery store to purchase some milk and bread. Oscar walked along the sidewalk, which had been shoveled, until he reached the stretch of sidewalk in the front of Maria's house which had not been shoveled. Because the snow on the sidewalk in front of Maria's house was piled high, Oscar decided to walk into the street.

As Oscar began to walk on the street, he slipped a little on some ice, but continued on. Then, suddenly, Oscar lost his footing on some ice on the street and fell. At the same instant, Elmo, who was driving a Sesame Company van 5 miles over the posted speed limit, was unable to stop and collided with Oscar injuring him.

Elmo was on his way to pick up his friend Dorothy to go skiing. Burt, the manager of Sesame Company, knew that Elmo had a habit of taking the company van out for personal use, and had repeatedly warned Elmo not to use company vehicles for personal use because it was against the written company policy. Elmo had a valid license and had never had an accident before.

**Analyze both the possible theories of liability that can be brought by Oscar and any defenses to those claims.**

## REPRESENTATIVE ANSWER 1

**Oscar v. Maria.**

Oscar may sue Maria because she did not shovel her sidewalk and everyone else's sidewalk was shoveled. Oscar will argue that this made him walk into the street. But Oscar's suit will probably not work because this was not the proximate cause of his injury—Elmo hitting Oscar with his car. Oscar did not fall on the sidewalk in front of Maria's house. He got hit by a car as he walked down the street (presumably after passing Maria's house). Maria will also argue that Oscar assumed the risk of getting hit when he walked into the street full of snow and ice.

**Oscar v. Elmo.**

Oscar will sue Elmo for hitting him with the car. Elmo will try to argue contributory negligence and assumption of risk which are a complete bar in Maryland. Elmo will argue that Oscar assumed the risk and was contrib. because he walked into a snowing street. He even slipped and almost fell. Oscar will counter that Elmo had the Last Clear Chance to avoid the accident if he was paying attention. The fact that Elmo was going 5 miles over the speed limit is not negligence per se, but is evidence of negligence.

**Oscar v. Sesame Co.**

Oscar will also try to sue Sesame under the theory of vicarious liability because Elmo was an employee driving a Sesame truck. However, Elmo appears to be on a frolic, not in the scope of his employment because he was going to go skiing with Dorothy. Thus, Oscar's suit against Sesame will probably not work. Also, Sesame can argue contrib. and assump of risk like Elmo, and Oscar can argue Last Clear Chance. Oscar will also Sesame directly for negligent entrustment. However, Elmo was told not to use the company car for personal use. Sesame even had a written company policy. Moreover, "Elmo had a valid license and had never had an accident before." Thus, there is probably no basis to sue Sesame, because they were not negligent in entrusting Elmo the car. But this is a question for the jury.

## REPRESENTATIVE ANSWER 2

Oscar can bring suit against Owings Mills and Maria for failing to shovel the snow. Both M and Owings Mills will defend by arguing that they did not have notice—enough time to remove the snow. This argument may be more problematic for Maria because it seems others on her block had already shoveled the snow. However, both will argue that the snow on the sidewalk did not cause Oscar's injuries. Rather, it was Elmo how hit Oscar with a van in the street. Both could also argue contrib. and assumption of risk because no one told Oscar to walk into the street when there was 20 inches of snow on the ground.

Oscar can sue Sesame (under vicarious liability) and Elmo for negligence because Elmo who was going 5 miles over the speed limit hit Oscar with the van. They will also ague contrib. and assumption of risk, but Oscar will argue that Elmo had the last clear chance to avoid hitting him.

Sesame will argue that it is not vicariously liable because Elmo was going to pick up Dorothy "to go skiing" when he hit Oscar. This is not furthering Sesame's business. Thus, Sesame will not be responsible. In fact, they warned Elmo not to use the van for personal use. Although Oscar might also bring a claim against Sesame for negligent entrustment, Sesame will argue that Elmo had a valid license and had never been in an accident before. Thus, his personal use of the van had nothing to do with him getting into accidents like the one with Oscar.

**FEBRUARY 2007**
**MULTISTATE PERFORMANCE TEST (MPT)**

**REPRESENTATIVE ANSWER 1**
[Letterhead]

DRAFT LETTER from Applicant
For review by Michael Simmons
Re: *Glickman v. Phoenix Cycles, Inc.*

February 27, 2007

Dear Ms. Snow:

As you know, we have been retained by George Glickman – former Vice President of Bicycle Marketing at Phoenix Cycles, Inc. ("Phoenix"). Mr. Glickman's rights under the FMLA were violated under Franklyn law when he was demoted upon his return to Phoenix on January 18, 2007, from FMLA leave. Mr. Glickman seeks to be restored to his former position or an adequate equivalent position.

Our client is willing to resolve this issue without litigation. However, we are confident that we would prevail at trial for the reasons outlined below. If litigated, Phoenix would be responsible for all potential relief – identified and discussed at the close of this letter.

**I. MR. GLICKMAN CAN ESTABLISH THE ELEMENTS FOR A PRIMA FACIE VIOLATION SINCE HE: WAS ENTITLED TO LEAVE; SUFFERED AN ADVERSE EMPLOYMENT DECISION; AND THERE IS A CAUSAL CONNECTION BETWEEN HIS TAKING LEAVE AND THE ADVERSE ACTION (SEE, RIDLEY V. SANTACROCE GEN'L HOSP. (15TH CIR. 2002))**

The FMLA, 29 U.S.C. § 2612, entitles an eligible employee to twelve work weeks of leave per year for, among other reasons, a "serious health condition" and "the placement of a son or daughter. . . for adoption." Mr. Glickman took a total of nine weeks leave to recover from a serious stroke and then to care for his newly-adopted child.

Upon return however, Mr. Glickman was demoted to coordinator. There is evidence that this demolition occurred because CEO John Pearsall was disappointed in Mr. Glockman's decision to be a father to his new baby, and because of "stress" caused by Mr. Glickman's justified absence.

Thus, Mr. Glickman can make out a prima facie case for an FMLA violation under 29 U.S.C. § 2614 and Ridley v. Santacroce Gen'l Hosp.

## II. MR. GLICKMAN SUFFERED FROM HIS DEMOTION, WHICH CARRIED WITH IT A SUBSTANTIAL, NOT DE MINIMIS, CHANGE FROM HIS PRIOR DUTIES AND STATUS.

Under § 2614(a)(1)(B), an employee who returns from FMLA leave must be granted a restoration of his former position or "an equivalent position [with] equal or substantially similar" conditions (Ridley). Here, Mr. Glickman was formerly Vice President, in charge of supervising market research, monitoring retailers, developing new products and presenting such to engineering. He also coordinated product reviews, seminars, ad shows, and supervised two marketing assistants and support staff.

Upon his return, Mr. Glickman suddenly held the title of "Coordinator", had lost a marking assistant and one staff member and had to report to Sue Cowen – recently promoted, and Mr. Glickman's former peer. He must submit marketing plans to her that he used to draft alone and Ms. Cowen is also in charge of Mr. Glickman's "Retro bike line."

While Mr. Glickman's pay and benefits are officially unchanged, Ms. Cowen is now in line for a $25,000 bonus promised Mr. Glickman.

This case is comparable to the 15th Circuit Court case, Ridley, in which the court held that a nurse was entitled to prevail on summary judgment against her employer – hospital when, upon return to work, her supervisory duties had been eliminated. The Court found that an "equivalent" position is one that is virtually identical not only in opportunities for pay and promotion (e.g., a $25,000 bonus), but in "privileges, perquisites, and status."

Here, Mr. Glickman has suffered a severe loss in status, and he does not hold a position that is virtually identical or substantially similar to his previous post.

## III. PHOENIX CANNOT PROVE THAT IT HAD "LEGITIMATE BUSINESS REASONS" FOR DEMOTING MR. GLICKMAN.

The Court in Ridley also held that an employee may only be demoted or terminated upon return for "legitimate business reasons" that are not causally connected to the leave. Mr. Glickman was told that it had been "discovered" during his absence that Phoenix was "overstaffed", and that "management consultants" had recommended changes affecting his job as Vice President.

However, the management report had been completed in June of 2005 --- a year and a half prior to this "discovered" problem. Moreover, the recommendation that marketing divisions be merged was accompanied by a recommendation that Phoenix first identify a manager with the experience and creativity to lead the new division. There is evidence that Sue Cowen is stressed by her new role. Mr. Glickman, who was not even given an opportunity to interview, is confident that he could have been this new manager.

In fact, on November 24, 2006, CEO Pearsall praised Mr. Glickman publicly in the "Franklin Business News" – attached.

## IV. WHILE FMLA PERMITS EMPLOYERS TO NOT REINSTATE HIGHLY COMPENSATED EMPLOYEES, THIS IS PERMITTED ONLY WHERE "SUBSTANTIAL AND GRIEVOUS ECONOMIC INJURY" IS THREATENED AND ADEQUATE NOTICE IS PROVIDED TO THE EMPLOYEE

Phoenix cannot assert that any "substantial and grievous" economic injury was avoided by the demotion of Mr. Glickman. Indeed, Mr. Glickman's salary and benefits remained unchanged. Moreover, if Mr. Pearsall seeks to rely on the management consultant's report, it should be noted that "complacency" – the worry expressed by consultants – does not rise to "substantial and grievous economic injury".

Instructive here is Jones v. Oakton School District, in which the 15th Circuit found such injury to exist where a public school faced contract liability and short funding in the face of reinstating a former principal. As the court said, a public entity like a school "cannot raise its prices to make up for the shortfall" that reinstatement would have caused. Phoenix clearly does not share this threat.

Moreover, under § 2614(b)(1)(B) of FMLA, an employee must receive notice of the intent of the employer to deny restoration. . . at the time the employer determines that such injury would occur."

Here, Mr. Glickman was notified on December 19, 2006, not that Phoenix intended to deny restoration, but that he would receive a telephone call to "discuss the matter" after Phoenix determined whether restoration was "feasible".

This is inadequate notice, and thus Phoenix cannot rely on this exception to FMLA to defend its actions.

Finally, the FMLA lists the possible relief to which employees who suffer an FMLA violation are entitled. These damages include wages, salary, benefits, or other compensation denied or lost to such employee by reason of the violation." Moreover, the wronged employee may be entitled to "liquidated damages equal to the sum" of the damages just described, as well as "equitable relief" – e.g., "employment, reinstatement, and promotion". There is a strong presumption in favor of liquidated damages, moreover – see Ridgley (An employer must prove that the violation was in good faith and that it reasonably believed its act did not violate FMLA).

Please do not hesitate to contact us to discuss this matter.

Sincerely,

## REPRESENTATIVE ANSWER 2

Ms. Regina Snow
Phoenix Cycles
2300 LeMond Parkway
Lawton, Franklin 33623

Dear Ms. Snow:

I am writing in response to your company's actions with regard to my client, George Glickman, following his nine (9) week absence under the Family and Medical Leave Act (FMLA).

### I. VIOLATION OF FMLA

To establish a prima facie case of a violation of FMLA, entitlement, an adverse employment decision and a causal connection must be shown. Mr. Glickman's (G) situation fulfills all three requirements.

#### a. Entitlement

The FMLA states that an employee is entitled to leave under FMLA of twelve (12) weeks within a twelve (12) month period, for serious health conditions and upon adoption or birth of a new son or daughter. Here, Mr. Glickman's stroke and subsequent adoption entitled him to the consecutive five (5) week and four (4) week leave periods, which Phoenix (P) properly approved.

#### b. Adverse Employment Decision

A party returning from leave is entitled to reinstatement to their prior position or one equivalent. An equivalent position is one with identical pay, benefits, conditions, substantially similar duties, authority and promotional and salary opportunities.

In the case of Ridley v. Santacroce General Hospital, the same salary but elimination of supervisory duties and change in hours equaled a substantial change. Here, Mr. G. lost status (working under a vice president with less experience than him, with no assistants or support staff to supervise), lost access to a 25K bonus, lost authority to develop marketing plans, but retained the same salary and benefits. Therefore, it is clear that Mr. G. suffered substantial changes to his position.

#### c. Causal Connection Between Leave and Changes

Finally, to prove a violation, plaintiff must show that his employment change was caused by the taking of the leave. The presence of a legitimate business reason for changes will sever the causal chain (Ridley).

In Ridley, projected lower admissions at the hospital and the requirement of a staff reduction in Ridley's unit were not adequate as a legitimate business reason where Ridley was the only staffer using a full twelve (12) week leave. Hers was the only position eliminated quickly after her return, and the unit thereafter returned to full staffing. Here, as in Ridley, the circumstances suggest that the business report is a sham hiding a direct relation (causation) between employment change and leave. Mr. G. noted that his supervisor, Pearsall, seemed irritated with G's priority on family. The report, which arguably supports the reorganization and suggesting consolidation of the marketing departments and a reduction in support staff, is eighteen (18) months old. In the interim (11/06), Pearsall praised G, giving "real credit to G for initiating" the project, stating he expected G to be a "significant part of the product launch" and stating his satisfaction with the then current organization that "enabled (Phoenix) to be a leader."

Thereafter, Pearsall enacted the changes that the report suggested; however, he failed to appoint the person with "most experience or creativity" (arguably G who was there longer and designed the bike) favoring Sue. Sue even confessed "stress" at the increased responsibilities. Further, G's staff was not cut as the report advised but merely transferred. Therefore, no legitimate business reason breaks the causal connection.

## II. EXEMPTION FOR HIGHEST PAID 10%

FMLA allows employers to refrain from reinstating the highest paid 10%, where necessary, to prevent substantial and grievous economic injury to the company, with notice to the employee. The instant situation must be distinguished from Jones v. Oakton School District where the necessary hiring of a permanent replacement and preexisting budget concerns prevented the school district from rehiring Principal Jones. Here, while G is one of the highest paid 10%, the company is profitable, one of the "industry's premier manufacturers" and the report was solicited proactively and not due to current financial difficulties. Sue was not hired/promoted because no reasonable alternative existed, and paying G does not result in an economic hardship as they are still paying the same amount and any shortfall could be made up in profits, as it could not in a school district (Jones).

For the foregoing reasons, it is clear that the hiring of Sue as Vice President of Combined Marketing will not render a substantial and grievous economic injury upon Phoenix upon G's reinstatement.

Therefore, the exemption for the highest paid 10% will not apply.

## III. DAMAGES

Upon determination of a violation of FMLA, the plaintiff may be entitled to lost wages, benefits, etc., liquidated damages and equitable relief.

### a. Lost Wages, Etc.

Due to the violation, G should be able to recover lost wages, though there may not be any benefits, his bonus, if reasonably certain to have been earned, or the value of a potential bonus.

### b. Liquidated Damages

The FMLA approves liquidated damages equal to the sum for lost wages, etc. Here, liquidated damages should be paid due to the nature (willful) of Phoenix's violation.

### c. Equitable Damages/Relief

The FMLA allows for equitable relief in the form of employment, reinstatement and promotion. Here, it seems clear that an opportunity for promotion was lost, and Mr. G. should be able to recoup that lost opportunity.

## IV. CONCLUSION

Under the circumstances described above, a court will find a violation and order relief and payment of damages as described. Therefore, to avoid litigation, Phoenix should reinstate Mr. Glickman to, at least, his former position.

Sincerely,