Maryland State Board of Law Examiners

BOARD'S ANALYSES FOR THE FEBRUARY 2015 MARYLAND GENERAL BAR EXAM

Notice: The General Bar Exam Board's Analysis consists of a discussion of the principal legal and factual issues raised by each question on the Maryland general bar essay test. It is prepared by the Board. The Board's Analysis is not a model answer, nor is it an exhaustive listing of all possible legal issues suggested by the facts of the question.

Board's Analysis for Maryland Essay No. 1

Al violated the following Maryland Lawyer Rules of Professional Conduct and the Maryland Rules of Procedure:

1. Rule 1.1 – Competency: Al's actions showed he was not competent in representing Bess in the divorce action as he failed to respond to discovery requests, failed to attend court ordered mediation and otherwise was neglectful of her case. He showed a lack of preparation.

2. Rule 1.3 – Diligence: Al failed to use due diligence in representing Bess, when he failed to respond to discovery and Motions for Sanctions. He also failed to perform services for which he was hired and failed to act with commitment and dedication.

3. Rule 1.4(a)(2) – Communication: Al did not keep Bess reasonably informed about the course of the litigation and misrepresented that he had matters under control when in fact he failed to appear at a scheduled mediation proceeding.

4. Rule 1.5(a) – Fees: Request for retainer of $30,000.00 appears unreasonable based on the length of time Al has been in the practice of law and the other factors listed in Rule 1.5(a).

5. Rule 1.15(a) – Safekeeping of Property: Al did not keep Bess' funds in an attorney trust account pursuant to Title 16, Chapter 600 of the Maryland Rules.

6. Rule 1.16(a)(3) – Declining or Terminating Representation: After Al abandoned the case, he refused to sign a Line withdrawing his appearance.

7. Rule 1.16(d) – Declining or Terminating Representation: Upon discharge by Bess, Al's representation was terminated. He failed to refund the unearned portion of the retainer to Bess.

8. Rule 8.4(a)(c)(d) – Misconduct: Al, exhibiting a dishonest or selfish motivation, refused to voluntarily return unearned fees, misrepresented facts and failed to show up for court mediation.

9. Maryland Rule of Procedure 16-603 – Failure to Maintain Attorney Trust Account: Al did not maintain an attorney trust account as required by the Maryland Rule 16-603.

10. Maryland Rule of Procedure 16-606.1 – Attorney Trust Account and Recordkeeping: Al did not keep records reflecting the deposit of the retainer, the withdrawals from the retainer and the balance due the client. *See Generally Attorney Grievance Commission v. Lewis*, 437 Md. 308 (2014).

Board's Analysis for Maryland Essay No. 2

Julie has several arguments in support of her position that Sharp's breached the contract for the sale of the Robi. They are as follows:

l. Julie will argue that she has the right to inspect the Robi at any reasonable place and time and in any reasonable manner before she is deemed to have accepted it. Md. Code Ann., Commercial (Comm.) Law, §2-513. In this case, Julie inspected the Robi at her home on the same day as delivery. She began her inspection by reading the operating manual, and then she proceeded to use the vacuum on the Robi, which functioned as expected. On further inspection of the Robi, Julie pushed the "mop" button on the remote, at which time the Robi operated uncontrollably, smoked, and caused substantial damages to Julie's property. She immediately stopped using the Robi, and the next morning, Julie called Sharp's Manager to describe the incident that occurred in detail, to demand return of her payment and compensation for damages caused by the Robi. A trier of fact is likely to determine that she reasonably and seasonably notified Sharp's Manager a reasonable time after delivery of the Robi. Md. Code Ann, Comm. Law, §2-602(1) and §2-606. Julie made a telephone call to the Manager of Sharp's to effect notification, and pursuant to Md. Code Ann, Comm. Law,§1-202(f), notification is effective if it is received by the organization when it is brought to the attention of the individual handling the subject transaction.

If Julie has been deemed to have accepted the Robi by the trier of fact because she refused to watch the demonstration of the Robi by the delivery person she may argue, in the alternative, her right to revoke her acceptance within a reasonable time after she discovered the nonconformity or defect, provided any change in the Robi was not caused by her. Md. Code Ann, Comm. Law, §§2-608 (2) and (3). Unless Sharp's can show improper handling of the Robi by Julie, she likely will be able to revoke her acceptance.

On rightful rejection or justifiable revocation of acceptance, Julie may cancel the contract and may purchase a substitute vacuum/mopping machine ("cover") and recover from Sharp's the difference in the cost of the cover and the price paid by Julie for the Robi, together with any incidental or consequential damages. Md. Code Ann, Comm. Law, §§2-711 and 2-712**.**

2. Julie may also argue, in the alternative, that she has accepted the Robi and given sufficient notification under **§2-607(3)(a)** to the Manager of Sharp's, as an agent or employee of Sharp's, that Robi is unmerchantable because it is not fit for the ordinary purposes for which such goods are used. Md. Code Ann, Comm. Law, §2-314(2)(c). Pursuant to Md. Code Ann, Comm. Law, §2-314(1), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller of the goods is a merchant with respect to goods of that kind. Clearly, Sharp's is a merchant in the business of selling the Robi. Therefore, the Robi must operate as represented in the sales agreement and operating manual, and conform to any promises made by Sharp's. Julie had a right to expect that when she touched the "mop" button on the remote, the Robi would operate as set forth in the operating manual and as described to her by the Manager at the time she entered into the sales agreement. The trier of fact will determine whether Julie misused the Robi or whether the Robi was defective.

Julie is likely to prevail in her claim of a breach of implied warranty of merchantability. Under Md. Code Ann, Comm. Law,§§ 2-714 (2) and (3)**,** her measure of damages is the difference of the value of the goods when they were accepted and the value as if they had been as warranted (effectively, in this case the amount that she paid for the Robi) plus any incidental and consequential damages as defined in Md. Code Ann, Comm. Law, §§2-715 (1) and (2) respectively. Since the damages were proximately resulting from the breach of the warranty, Julie's damages would include the injuries to Julie's dog, furnishings and other property.

3. Julie will argue that Sharp's and the Manager expressly promised that the Robi would operate to "do all your house work" and to "clean any carpet or floor", respectively. She will urge that Sharp's breached an express warranty under Md. Code Ann, Comm. Law, §§2-313 (1)(a) and (2) because no special words such as "warrant" or "guarantee" are required to create the warranty. Sharp's counsel may prevail if he or she argues that Sharp's and the Manager were merely giving their opinions or commendation of the Robi, which opinions and commendations do not create an express warranty. Md. Code Ann, Comm. Law, §2-313(2).

Board's Analysis for Maryland Essay No. 3

1. Able's sale to Douglas of the property that Able had inherited was proper. The facts do not indicate that there was anything in the Partnership agreement that prohibited Able from conducting business unrelated to the business of the Partnership. The property Able inherited was not partnership property, and Able was free to sell or convey it under any terms he desired. The fact that the Partnership subsequently happened to build houses on the property Able sold to Douglas is immaterial. The Partnership did not own the property on which it performed construction; the developers provided the building sites. Able's sale violated neither the duty of loyalty nor the duty of care that he owed the partnership. Md. Code Ann., Corporations and Associations ("CA") §9A-404.

2. Baker, as a limited partner, must employ a derivative action to enforce the Partnership's rights to damages for Douglas, LLC's breach of contract. Ordinarily, Baker first would be required to make a demand on Able, the general partner, to file the suit against Douglas, LLC. Given the familial relationship between Able and Douglas, Baker can likely forego making this demand, since it likely would be futile under the circumstances. Md. Code Ann., CA §10-1001.

Baker may also sue Able directly for breach of his fiduciary duties of care and loyalty to the partnership and his limited partner. Able acted as an agent of the partnership in contracting with Douglas, LLC. Able is therefore obligated to prudently manage the partnership's interest arising from the contract, and, consequently, is obligated to file a breach of contract action against Douglas, LLC if the default stands. Md. Code Ann., CA §9A-405 and §9A-404.

3. Although Douglas apparently mismanaged the cash on hand of Douglas, LLC, there is no evidence, on these facts, that he engaged in fraud. The Court of Appeals of Maryland has consistently declined to pierce the veil of the protections afforded the members of a limited liability company absent fraud. Consequently, Douglas cannot be held personally liable for the LLC's contractual default. The Partnership must seek to recover from the assets of Douglas, LLC. *Serio v. Baystate Props.,LLC*, 209 Md. App. 545, 60 A.3d 475 (Md. App. 2013).

Board's Analysis for Maryland Essay No. 4

Daniel has no standing to challenge the search of the automobile, as he is not the owner and has no reasonable expectation of privacy. *Butler v.* State, 46 Md. App. 317, 426 A.2d 773 (1980). This is in spite of the fact that the officer had no probable cause to search the car. Daniel, however, should argue that there were no indicia of knowledge on his part of the marijuana, as it was locked in the trunk of a car in which he was merely a passenger. As this would be a merits defense, it would be a matter of determination for the finder-of-fact. Since Daniel was not the object of the traffic stop, he could not legally be convicted of fleeing and eluding the police. Md. Code Ann., Transp. § 21-904 (2010).

Karen should successfully be able to challenge the search of her vehicle. She was stopped for speeding. There were no indicia of any drug-related activity. *See State v. James*, 87 Md. App. 39, 589 A.2d 81 (1991); *Barrow v. State*, 59 Md. App. 169, 474 A.2d 967 (1984); *Mobley v. State*, 270 Md. 76310 A.2d 803 (1973). Daniel having walked away did not provide probable cause to search the vehicle, particularly as he was not the owner. Karen did not flee, and arresting Daniel (the passenger and non-owner) also did not provide probable cause to search the vehicle, at which point the marijuana was discovered. As a result, Karen should be able to successfully challenge the search of the vehicle and have the evidence against her suppressed. She will, however, most likely be convicted of speeding.

Board's Analysis for Maryland Essay No. 5

A. Adams should file a request that a certified Notice of Lien of Judgment be transmitted for recording with the clerk of the circuit court for Cecil County to establish a lien on the real property located in that county (Md. Rule 3-621).

B. Adams can discover Burrs' assets by either or both of the following methods:

▪ immediately after the judgment is entered Adams can send interrogatories to Burr asking questions about his assets. Md. Rule 3-633. These can be sent by regular mail. Md. Rule 3-633(a).

▪ 30 days after the entry of final judgment Adams can request an order requiring appearance at an examination in aid of enforcement. Md. Rule 3-633(b). This order must be personally served on Burr.

C. Burr could have had the action dismissed or transferred for improper venue pursuant to Md. Rule 3-326(a) but did not raise that issue before or at the commencement of the trial; therefore, the venue issue was waived.

Burr could have filed a motion for new trial (Md. Rule 3-533) or a motion to alter or amend a judgment (Md. Rule 3-534) within ten days after the entry of the judgment. However, the 10-day time period has passed. Burr can still file a motion to revise (Md. Rule 3-535) within 30 days after entry of judgment. Burr should accompany the motion by an affidavit showing that he acted in good faith, with due diligence and has a meritorious defense. *Gross v. Gross*, 123 Md. App. 311, 718 A.2d 622 (1998). The basis for the motion include the fact that Adams signed the complaint. Adams is not an attorney. A limited liability company shall appear only by an attorney (Md. Rule 3-131(a)) as this matter exceeds the small claim jurisdiction and is, therefore, not within the exception stated in Md. Code Ann., Bus. Occ. and Prof., §10-206(a)(3). This may succeed in making Adams refile an amended complaint through counsel that could then be defended, including objecting to venue. *First Wholesale v. Donegal*, 143 Md. App. 24 (2000).

Burr can file an appeal to the Circuit Court for Baltimore County within 30 days of the entry of the judgment by filing a notice of appeal. (Md. Rule 7-104) The appeal would be on the record. [Md. Rule 7-102(b)(1)] as this is a civil action in which the amount in controversy is greater than $5,000.00. The time for filing a motion to revise and the time for filing an appeal both run concurrently from the date of judgment.

EXTRA CREDIT: If Burr files an appeal during the pendency of a motion to revise filed more than 10 days after judgment, the notice of appeal ousts the trial court of jurisdiction to decide the motion and the motion to revise cannot be decided unless the appeal is dismissed prior to hearing on the motion to revise. See *Tiller v. Elfenbein*, 205 Md. 14, 106 A.2d 42 (1954); Maryland Rules Commentary, p. 599 (4th Ed.).

Board's Analysis for Maryland Essay No. 6

PART A

1. County Bank's deed of trust was recorded in the Land Records of Prince George's County on July 31, 2007 and was on and after that date notice to Patuxent Bank of its existence and lien priority.

2. Patuxent Bank's claim of first lien priority is barred by laches because of its unreasonable delay in recording its refinance deed of trust. County Bank had no knowledge and had no notice of the refinance deed of trust until it was recorded in the Land Records of Prince George's County in 2011.

3. Patuxent Bank was negligent in failing to record its refinance deed of trust timely.

4. Tom's loan from Patuxent Bank was in the amount of $350,000 of which $255,000 was used to refinance and pay off the purchase money deed of trust. Consequently, the lien priority, if any, of Patuxent Bank would only be $255.000.

PART B

1. Patuxent Bank is entitled to be equitably subrogated to the first lien priority position of the purchase money deed of trust over County Bank's deed of trust to the extent of and in the amount refinanced. *See Fishman v. Murphy*, 433 Md. 534, 72 A.3d 185 (2013); *see G. E. Capital Mortgage Services, Inc. v. Levenson*, 338 Md. 227, 657 A.2d 1170 (1995).

2. By refinancing the purchase money loan, Patuxent Bank advanced money for the purpose of discharging that prior encumbrance secured by the purchase money deed of trust in reliance on Patuxent Bank obtaining security equivalent to the discharged purchase money deed of trust and maintaining for the refinanced loan secured by the refinance deed of trust the same first lien priority position as the purchase money deed of trust.

3. Patuxent Bank had no knowledge of County Bank's home equity line of credit loan. At the time of the July 21, 2007 real estate closing on Patuxent Bank's refinance loan, Tom had not gone to settlement on his home equity loan from County Bank.

4. If Patuxent Bank had not made the refinance loan to Tom, County Bank would have remained in second lien priority position behind the purchase money deed of trust. Therefore, with Patuxent Bank in first lien priority position by equitable subrogation, County Bank simply remains in second lien priority position. *See Bennett v. Westfall*, 186 Md. 148, 47 A.2d 358 (1946); *see Fishman v. Murphy*, 433 Md. 534, 72 A.3d 185 (2013)

5. The failure of Patuxent Bank to ever do a title search on the Shady Place property did not affect County Bank's lien priority position. The purchase money deed of trust had been refinanced on July 21, 2007 which was prior to Tom's July 28, 2007 closing with County Bank and prior to County Bank's recording of its deed of trust on July 31, 2007.

6. County Bank would be unjustly enriched by and would receive a windfall from the benefit of Patuxent Bank's discharge of the purchase money deed of trust and Patuxent Bank's failure to record its refinance deed of trust in a timely manner.

7. County Bank's deed of trust was recorded on July 31, 2007. The release of Friendly Bank's purchase money deed of trust was filed on August 20, 2007. Therefore, Friendly Bank's purchase money deed of trust was shown as in lien priority position over County Bank's deed of trust on July 31, 2007.

Board's Analysis for Maryland Essay No. 7

1. Possible suits Against T-Mart:

a. Tom's claim for assault/battery as a result of Officer Friendly punching Tom in the face. Tom will argue that Officer Friendly was acting as an agent of T-Mart or a dual agent of T-Mart and the County, and that Friendly had no reason to punch Tom in the face once he was tackled. As a result, Tom will assert that T-Mart as Friendly's principal is vicariously liable for Friendly's actions. Whether or not Tom will prevail on his vicarious claims will depend upon whether Friendly was acting as an agent of T-Mart within the scope of his duties as a security guard.

b. Customer's claim for negligence as a result of her slipping on a liquid on the store floor. In order for Customer to state a *prima facie* claim in negligence, she must allege facts demonstrating "(1) that the defendant was under a duty to protect the plaintiff from injury, (2) that the defendant breached that duty, (3) that the plaintiff suffered actual injury or loss, and (4) that the loss or injury proximately resulted from the defendant's breach of the duty." *Muthukumarana v. Montgomery Co.*, 370 Md. 447, 486, 805 A.2d 372, 395 (2002). Thus, Customer will need to show that T-Mart breached its duty to her because they knew or should have known of the existence of the defective condition (the liquid) on the floor. Customer will have to show that T-Mart knew of the existence of the liquid on the floor and failed to clean it up or notify customers of the dangers present on the floor. If Customer cannot show that T-Mart had actual knowledge of the liquid on the floor, Customer will need to show that the liquid had been on the floor for an unreasonably long time such that it provided T-Mart with constructive knowledge of the defective condition of the floor. T-Mart may attempt to defend by arguing that Customer was contributorily negligent because her running in the store contributed in some way to her injuries. If Customer is found by a trier of fact to be contributorily negligent, it will be a complete bar to her recovery from T-Mart.

2. Tom may file a claim against Howard County for the vicarious liability of Officer Friendly assaulting Tom because Friendly was an employee or duel employee of the County. Whether or not Tom will prevail on his vicarious claims will depend upon whether Friendly was acting as an agent of Howard County within the scope of his duties at the time of the assault and whether Officer Friendly had the legal authority to use that kind of force to arrest Tom.

3. Tom may also file a direct claim against Officer Friendly for assaulting him.

4. Jerry may bring a defamation slander claim against Customer for communicating to the public that he was "a low-life thief" and that "he tried to rob the store". The following are the elements necessary for Jerry to prove a case of defamation against Customer: "(1) that the defendant made a defamatory statement to a third person, (2) that the statement was false, (3) that the defendant was legally at fault in making the statement, and (4) that the plaintiff thereby suffered harm. A defamatory statement is one 'which tends to expose a person to public scorn, hatred, contempt or ridicule, thereby discouraging others in the community from having a good opinion of, or associating with, that person.'" *Offen v. Brenner*, 402 Md. 191, 935 A.2d 719 (2007), *quoting Smith v. Danielczyk*, 400 Md. 98, 115, 928 A.2d 795, 805 (2007). A statement which falsely charges a person with the commission of a crime is defamatory *per se* (*A. S. Abell Co. v. Barnes*,

258 Md. 56 (1970). Here, Jerry has been falsely accused of committing a crime. In defamation *per se* cases, the plaintiff does not have to prove actual damage in order to successfully litigate his case because the defamatory statements are enough to bring ruin to his reputation. In determining fault in a matter of defamation, private persons only have to prove that the person defaming them was negligent, failing to act with due care considering the circumstances.

Board's Analysis for Maryland Essay No. 8

Given his plan to purchase a permit and his already existing obligation to purchase a piece of real property, the hunter clearly has standing to challenge these provisions. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

The Privileges and Immunities Clause of the Federal Constitution protects out-of-staters from discrimination by in-state actors. U.S. Const. art. IV, § 2, cl. 1. The Supreme Court applies a two-part test – is the discrimination related to a fundamental right, and, if so, is the discrimination justified?

The ownership of property is a fundamental right, and there are no circumstances under which such discrimination could be justified. *Baldwin v. Fish and Game Commission of Montana*, 436 US 371 (1978). As was the case in *Baldwin*, the fee differential would be considered an economic means not unreasonably related to the preservation of a finite natural resource. *Id.* Bear hunting by non-residents is not a fundamental right of the type meant to be protected by the Privileges and Immunities Clause or the doctrine of substantive due process.

Furthermore, the provision with respect to property ownership, as applied in this instance, would violate the Contracts Clause of the Federal Constitution. U.S. Const. amend XIV, § 1. In addition, distinguishing between Marylanders and non-Marylanders would also invoke the Equal Protection Clause, and, upon application of the rational basis test, the statute would most likely be facially unconstitutional. *Id.*

Board's Analysis for Maryland Essay No. 9

Jones would likely have causes of action against Smith for Breach of Contract, Unjust Enrichment and Detrimental Reliance/Promissory Estoppel.

a. Breach of Contract: A contract is an agreement between two or more parties creating rights or obligations. The contract can be expressed or implied. *Caroline County v. Dashiell*, 358 Md. 83, 747 A.2d 600 (2000). An expressed contract is an agreement of the parties that is oral or written. An implied contract is an agreement created by conduct indicating the intentions of the parties to make an agreement.

Here Jones would allege that she entered into a contract by offering to pay for the Improvements in exchange for Smith's promise to add her name to the Deed. She would allege that there was an offer, Smith accepted that offer, consideration was the construction of the Improvements she performed, and that Smith breached the contract by failing to convey the property. Jones will contend that the lack of a written contract is irrelevant and that there was an implied contract based upon the conduct of the parties.

b. Unjust Enrichment: If there was no expressed contract, Jones will allege a claim of unjust enrichment. Unjust enrichment is established when: (1) the plaintiff confers a benefit upon the defendant; (2) the defendant knows or appreciates the benefit; and (3) the defendant's acceptance or retention of the benefit under the circumstances is such that it would be inequitable to allow the defendant to retain the benefit without the paying of value in return. *Bank of America v. Gibbons*, 173 Md. App. 261 (2007). Jones will allege these elements in that she paid for the Improvements that benefitted Smith and for Smith to keep the benefits after the sale of the House is inequitable.

c. Detrimental Reliance – Promissory Estoppel: Furthermore, if there was no contract, Jones will also allege a claim based upon detrimental reliance or promissory estoppel. Detrimental reliance occurs when: (1) there is a clear and definite promise; (2) where the promisor has a reasonable expectation that the offer will induce action or forbearance on the part of the promisee; (3) which does induce actual and reasonable action or forbearance by the promisee; and (4) causes a detriment which can only be avoided by the enforcement of the promise. *Pavel Enterprises, Inc. v. A.S. Johnson Company, Inc.*, 342 Md. 143 (1996). Here Jones will allege that even if there is no contract, she detrimentally relied on Smith's promise to convey title by paying for the Improvements.

For both detrimental reliance and unjust enrichment, Smith will counter that she complied with the terms of their expressed contract and as there was a contract, equitable remedies outside of a contract do not apply. *Caroline County v. Dashiell*, 358 Md. 83, 747 A.2d 600 (2000).

Smith would likely also raise the defenses of Statute of Frauds, Statute of Limitations and Laches.

a. Statute of Frauds: No action may be brought on a contract for the sale of land unless the contract or "some memorandum or note of it, is in writing and signed by the party to

be charged...." Md. Code Ann., Real Property § 5-104. To be enforceable the memorandum must be: (1) a writing (formal or informal); (2) signed by the party to be charged or by his agent; (3) naming each party to the contract with sufficient definiteness to identify him or his agent; (4) describing the land or other property to which the contract relates; and (5) setting forth the terms and conditions of all the promises constituting the contract made between the parties." *Beall v. Beall*, 291 Md. 224, 228-29, (1981). Thus, Smith will defend by arguing that the Statute of Frauds makes Jones' alleged agreement unenforceable.

In some instances, however, the Statute of Frauds can be satisfied by part performance or other acts of the parties that show the unequivocal existence of a contract. "In order for the acts of one party to transcend the bar of the Statute of Frauds, those acts generally must be of such character that " ' "the court shall, by reason of the act itself, without knowing whether there was an agreement or not, find the parties unequivocally in a position different from that which, according to their legal rights, they would be in if there were no contract." ' " *Unitas v. Temple*, 314 Md. 689, 709, (1989) (quoting *Dale v. Hamilton*, 5 Ha. 369, 381 (1846) as appearing in J. Pomeroy, Specific Performance of Contracts § 107, at 259 n. 2 (3d ed. 1926))." *Beall, supra (emphasis added).*

Jones will argue that her paying for the Improvements and sharing expenses related to the House constitute part performance of the Contract and that the ledger serves as a writing to support the Contract. However, the Statute of Frauds is not satisfied by part performance based upon acts that are equivocal as to the existence of a contract. *Mann v, White Marsh Properties*, 321 Md. 111 (1990). Smith will argue Jones' actions support either version of the agreement, thus, they are not unequivocal and that, Jones' acts still do not satisfy the Statute of Frauds.

b. Laches is an equitable remedy and applies when there is an unreasonable delay in the assertion of one's rights and that delay results in prejudice to the opposing party." *Frederick Road Ltd. Partnership v. Brown & Sturm,* 360 Md. 76 (2000). Smith will argue that Jones' delay in taking any action to ensure she was placed on title support the lack of agreement to convey title. She would also argue that it would be inequitable to defend this claim as she will have to rely upon incidents that occurred over 10 years prior.

c. Statute of Limitations: Maryland maintains a 3 year statute of limitations to enforce a contract. Md. Code Ann., Cts. & Jud. Proc., §5-101. Smith will argue that any action to enforce the agreement must have occurred prior to 2007, three years after her name was not added to title per their alleged agreement, or when she knew or should have known title was not conveyed.

Ultimately, the issue of whether there was an expressed or implied contract and the specific terms thereof will be questions for the fact finder at trial.

Board's Analysis for Maryland Essay No. 10

1. Barney's testimony about what Fred said to him is hearsay. Barney is attempting to testify to out of court statements allegedly made by Fred. However, pursuant to MRE 5-803(a), Fred's statements to Barney will come in as they are admissions of a party opponent. In Maryland, admissions are exceptions to the hearsay rule, not automatically "non-hearsay" as under the federal rules.

2. The proffered testimony by Wilma regarding Fred's confidential communications with her during their marriage about the Swiss account may not be admissible. Confidential communications during marriage are privileged under CJP § 9-105, and both parties hold that privilege, even if the statements were made while estranged. The question is, whether or not a seven year old is old enough to destroy the confidential nature of the privilege.

3. Slate's testimony regarding what Dr. Phyllis allegedly told him about what Fred told Dr. Phyllis about the Swiss bank account is hearsay within hearsay without any exception and is inadmissible.

4. Dr. Phyllis's testimony regarding communications Fred made to him about his assets is hearsay, but will likely be admitted as an admission by a party opponent if the court finds it relevant. There is no doctor-patient privilege in Maryland. Moreover, Dr. Phyllis is not testifying about any medical information that may be covered under state and federal health statutes.

5. The communications by Fred to Granite regarding Fred's assets cannot be disclosed pursuant to the Accountant-Client Privilege. Pursuant to CJP 9-110, an accountant cannot disclose any communication made to the accountant in the course of the accountant's services unless expressly permitted by the client. Here, Fred disclosed the communication in the course of Granite's accounting services.

6. MRE 5-608 governs two techniques that are available to impeach the credibility of a witness. One technique is that the credibility of a witness who has taken the stand such as Barney may be attacked by later calling a character witness, such as Betty, who is competent to testify to her opinion of the character of the primary witness for untruthfulness. *See* MRE 5-608(a). The qualifications of an impeachment character witness are essentially the same as under MRE 5-405. Thus, Betty must be a member of an appropriate community where the reputation of Barney's character for veracity is known or have a sufficient basis on which to have formed an opinion as to Barney's character. As Barney's ex-wife, Betty will likely qualify as a character witness.

7. However, pursuant to MRE 5-608 and 5-405 Betty cannot provide an opinion as to whether Barney is lying in the present case and may not testify to specific instances of untruthfulness unless it was an essential element of the case. Thus, Betty's statement that Barney was "clearly just trying to get money from hard working Fred because I left him for Fred," will be stricken.

8. In addition, although Fred's counsel could have asked Barney about his PBJ for theft under MRE 5-608(b) during cross-examination of Barney, he perhaps for tactical reasons did not. So, the lawyer opted to have Betty attack Barney's character for truthfulness generally. Under MRE 5-608(a) Betty will not be permitted to testify as to the PBJ or other specific examples of untruthfulness using the character witness technique.