

**FEBRUARY 2011 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

In order to assist the person wishing to prepare for the essay portion of the Maryland Bar Examination or to review their examination, the State Board of Law Examiners prepares a Board's Analysis and selects Representative good Answers for each essay question given in each examination. The Board's Analysis and the Representative Good Answers are intended to illustrate to potential examinees ways in which essay questions are analyzed by the board and answered by persons actually taking the examination. This material consists of three parts.

1. Essay Question is a reprint of the question as it appeared on the examination. Extracts of statutory material and rules are not included.

2. The Representative Good Answer(s) consist of one or more actual answers to the essay question. They are reproduced without any changes or corrections by the Board, other than spelling. The Representative Good Answers are provided to illustrate how actual examinees responded to the question. The Representative Good Answers are not average passing answers nor are they necessarily answers which received a perfect score; they are responses which in the Board's view, illustrate successful answers.

3. The Board's Analysis consists of a discussion of the principal legal and factual issues raised by a question. 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.

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QUESTION 1

On January 2, 2009, Paul was retained by Signs, Inc. of Baltimore to act as its sales agent to represent it in the Baltimore area. Signs, Inc. manufactures signs for retail establishments and sells or rents them to its customers. It was orally agreed that Paul would be paid \$300 per month servicing old accounts and a commission of 15% on all sales made by him after January 2, 2009.

After Paul requested that the agreement be put in writing, Sign's president sent a letter to Paul on March 29, 2009, which reflected the terms noted above. In addition, Paul was to be furnished weekly with copies of all bills and a statement of sale made to customers obtained by him. Each month thereafter, Paul was sent written records of sales made by Paul and the amount of commission due him for the preceding month.

In June 2009, Paul sought to enter into a new contract which would give him a commission on all sales in the Baltimore area whether or not he obtained the customer. His employer rejected Paul's proposal.

Signs, Inc. thereafter paid to Paul a partial commission on sales made by him in July, August, and September, 2009. Signs, Inc. provided no explanation for the partial commission.

Paul rejected the October check representing the partial payment for that month and demanded the full amount of commission through October. In response, on November 1, 2009, Signs, Inc. sent Paul a formal written notice of termination of the written agreement.

Paul filed suit against Signs, Inc. seeking to recover commissions not paid from July through October arguing that his relationship with Signs, Inc. did not end until he received the letter of termination.

Signs, Inc. claims the relationship ended in June when Paul's request for a new contract was rejected.

Which party is correct? Explain fully.

REPRESENTATIVE ANSWER 1

Signs Inc. must pay Paul the commissions not paid from July through October because the employment contract did not terminate until Signs, Inc. informed Paul of the termination by letter on November 1.

Since this contract is a contract for services, it is governed by Maryland common law.

In this case, there was a valid employment contract. Paul accepted the salary of \$300 per month servicing old accounts as well as a 15% commission on all sales made after January 2, 2009. These terms, which are clearly evidenced by the written agreement, were validly

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negotiated between the parties and agreed upon. There was a definite meeting of the minds between the parties, and a valid employment contract arose reflecting the negotiated terms.

Signs, Inc. cannot claim the affirmative defense of the Statute of Frauds. In this case, the employment contract did not have a definite term and therefore could be completed within one year. As such, it does not fall within the Statute of Frauds. Even if it did, there is a sufficient writing to evidence the material terms of the contracts signed by the party to be charged.

Under Maryland law, an agency agreement is not terminated until there is clear notice of the termination. Here, Signs, Inc. gave no notice of termination to Paul. Paul's action of attempting to renegotiate the contract was not an offer to rescind the contract, and did not have the effect of immediate termination. Modifications under the common law are permitted if supported by consideration, and Paul's request to change the terms of the commission was not an offer for rescission. Therefore, the contract remained valid after Paul's attempt to modify was rejected by Signs, Inc.

Signs, Inc. will argue that Paul's request to enter into a new contract which would give him a commission on all sales in the Baltimore area regardless of whether he ultimately obtained the customer was an offer of rescission, which they rejected by a clear refusal to agree to the new terms. However, a Maryland court would find that Paul's attempt to negotiate a different salary was merely an offer to modify, which was rejected. The offer to modify did not affect the underlying contract.

A court would also take into account the fact that Signs, Inc. paid a partial commission for three months after the June 2009 offer for modification. In Maryland, an accord and satisfaction may occur where there is a partial payment of a disputed debt. However, in this case, there is no evidence that Signs, Inc. intended the partial payment to serve as payment in full of a disputed debt. Signs, Inc. did not issue the check with "payment in full" marked on it, and did not express that it was an attempt at settlement. Therefore, Signs, Inc. cannot claim that the partial payment satisfied the debt due and owing to Paul, as evidenced by the written contract terms.

Signs may also attempt to argue the defense of laches, claiming that Paul unreasonably delayed in responding to the lowered payments and asserting a claim. However, this will not be accepted by a Maryland court because the delay was only three months, and there is no evidence Signs, Inc. was harmed by the delay.

Because there was a valid employment contract that did not terminate until Signs, Inc. sent notice of termination by letter on November 1, Signs, Inc. must pay Paul the remainder of the commissions.

REPRESENTATIVE ANSWER 2

Paul's suit rests on the argument that the oral contract effective 1/02/2009, which was ratified in writing as of 3/29/2009, by the president of Signs, Inc. (Signs), was never terminated. Paul's argument in support of this position is that his mere inquiry into whether a new contract

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would be accepted/considered/negotiated by Signs does not serve to nullify the existing contract nor does it serve as a counter offer since Paul had already accepted the contract offer made by Signs on 1/02/2009. Paul's position is supported by the fact that he orally agreed to the terms of the original contract stating he would be paid "\$300 per month servicing old accounts and a commission of 15% on all sales made by him after 1/02/2009." In addition, Paul requested that the oral agreement be reduced to writing and on 3/29/2009, Sign's president comported with Paul's request by enumerating the terms and conditions of the oral agreement.

A contract was formed when Sign's made an offer to Paul and Paul accepted the offer. Furthermore, Paul conformed with the contract provisions by carrying out his duties under the contract. In addition, Signs provided Paul payment for the services rendered in accordance with contract provisions and confirmed those provisions in writing. The contract was honored by both parties up until July of 2009. At this point, it seems that Signs construed Paul's "inquiry" and "request to be paid commission on all sales", as a termination of the 1/02/2009 contract. However, Signs rejected Paul's proposal/inquiry and as such the original contract remained in force with no alterations. Therefore, Signs breached the 1/02/2009 contract by failing to pay Paul in accordance with the contract provisions for 7, 8, & 9 of 2009. Furthermore, Signs did not notify Paul that it was terminating the 1/2/2009 contract until 11/01/2009 which was after Paul had demanded performance on the 1/02/2009 contract (full payment of salary & commissions for 7, 8, & 9 of 2009).

In light of the above referenced facts and as a matter of contract law, Signs is in breach of the 1/2/2009 contract and must pay Paul the monies that he is contractually due up until the date of 11/01/2009 when it terminated the contract.

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QUESTION 2

Dave became involved in an argument in a bar in Lexington Park, in St. Mary's County, Maryland, and struck Vic with a pool cue. Dave was arrested and charged with attempted murder. Immediately after Dave's arrest, Dave's attorney arranged for Dave to be examined at the detention center by Dr. Winters, a neurologist who has read extensively about psychiatry and taken a continuing education course on forensic psychiatry. During a fifteen-minute examination Dave told Dr. Winters that he does not know what came over him and that he did not mean to kill Vic. As the result of Dr. Winters' interest in forensic psychiatry, Dr. Winters had devised a scientific test to determine a person's state of mind based on observation of a rate of blinking of the eyes and changes in voice tone.

At trial in the Circuit Court for St. Mary's County, Dave's attorney calls Dr. Winters as a witness and proffers that Dr. Winters will testify that it is his opinion, based on Dave's statements and Dr. Winters' observations of Dave's eyes and voice during the examination, that Dave was not "faking it" during the examination; and that Dave did not intend to kill Vic at the time he struck Vic with the pool cue.

The State's Attorney objects to Dr. Winters testifying and to each element of Dr. Winters' testimony.

How should the court rule on each of the State's objections? What should be the basis of the court's rulings? Discuss fully.

REPRESENTATIVE ANSWER 1

Governing Law

The issues presented here are governed by the Maryland Rules of Evidence

All Evidence

Generally, to be admissible all evidence must be competent, material and relevant to be admitted by the Court and not fall foul of any of the exclusionary rules.

Expert Testimony

If it would help the trier of fact to understand a subject which would require expert knowledge, then the use of an expert witness is allowed. Here, as the area involves "Psychiatry" an expert witness would be proper. However, there are a number of problems with Dr. Winter being an "expert" in this field.

Expert must be qualified

In order for an expert to be "qualified" to testify, it must be proven that the doctor has the requisite skill, training and knowledge required in the field. Here, Dr. Winters is a Neurologist

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and not a Psychiatrist. Dr. Winters “extensive reading” is not sufficient to qualify him as an expert in the field of Psychiatry, nor in the field of Forensic Psychiatry.

Must be established scientific tests

The tests administered must be recognized in the medical community (*See Frye test*), and not any newly procured test that has not been tested within the medical field. The new test given by Winter is not admissible or will not be considered reliable by the Court.

Objection 1 – Dr. Winters testimony as to Expert Opinion

Objection – Sustained

Ground – The Dr. is not qualified to testify as an expert in this field. Further, the test used is not reliable.

As Dr. Winter is not a qualified Psychiatrist (Forensic or otherwise) his expert testimony is not admissible and the objection will be certainly sustained.

Objection 2 – Dr. Winters findings of a reliable mental condition

Objection – Sustained

Ground – The test used to establish such a finding is not proven to be reliable and is not recognized in the medical community.

Dr. Winter wants to testify to his findings that were “observed” while conducting his personal test for mental culpability. Dr. Winter’s findings that Dave was not “faking it” are not admissible for the reasons outlined above.

Objection 3 – Dr. Winters findings of a legal fact

Objection – Sustained

Ground – Medical Experts are not to testify on an ultimate decision of legal fact which is the role of the trier of fact. Here, testimony that Dave lacked the “intention” to kill Vic is crucial to a finding of attempted murder (being a specific intent crime) and, as such, is reserved for the jury to decide in this instance.

Conclusion

All the objections offered by the States Attorney will be sustained in this instance.

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REPRESENTATIVE ANSWER 2

All evidence is presumed to be admissible if relevant not excluded by any other rules of evidence.

Hearsay is an out of court statement, offered in court to prove the truth of the matter asserted. Hearsay is inadmissible unless it falls within one of the recognized exceptions. Here, Dave's attorney is trying to get Dave's statements into evidence to prove that he did not satisfy the mens rea portion of murder. That statement goes to the truth of the matter as stated. As such, it is hearsay and is inadmissible unless it fits within an exception.

Medical Treatment exception allows hearsay if it was obtained in the course of treatment and was pathologically germane to the treatment. Here, Dave sees Dr. Winters for a "fifteen minute exam" and the statement was not germane to any type of treatment Dave may receive, therefore the medical treatment exception does not apply, and Dave's statement should be excluded.

An expert witness is competent to testify if he has specialized knowledge that would assist a jury in reaching its conclusion. The expert must only testify as to a topic he is versed on. Here, Dr. Winters, a neurologist is attempting to testify as to forensic psychiatry. Dr. Winters has only "read extensively" and "taken a continuing education course on forensic psychiatry." It is unlikely that such minimal training would be able to qualify him as an expert in the field. Therefore, his testimony should be excluded.

A test that is to be offered by an expert in their testimony must be generally accepted in the field that they are to testify to. Here, Dr. Winters' test, developed due to his interest in forensic psychiatry, does not appear to be scientifically based (since it measures a "rate of blinking") or accepted among the psychiatric community. As such, the Court should rule that the doctor's "test" is inadmissible since it is not generally accepted.

An expert may not make a concluding opinion about an ultimate issue, since that is the function of a trier of fact. Here, Dr. Winters is planning to testify that Dave "did not intend to kill Vic when he struck him." This conclusion goes to the ultimate issue, and as such, should be left to the jury to decide.

For the reasons stated above, the Court should exclude Dr. Winters from testifying.

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QUESTION 3

The Montgomery County Council decided to enact legislation to address an increase in teenage gang participation and gang violence at the local high schools. The Council held a hearing on the proposed legislation. Tom Teen and his parents attended the hearing and were amazed when Councilmember Smith pointed to Tom and declared “those kinds of teens need to be punished; when they get together they always wreak havoc!” The Council then duly enacted the following law:

Three or more students wearing gang colors who gather on school property, after being warned by any school official to disperse, will be in violation of this law, and will be subject to immediate expulsion and a civil fine of \$3,500.

Tom Teen, a student enrolled in a Montgomery County public high school, and his parents come to you, a licensed Maryland attorney, and ask whether they can challenge the law, and whether Councilmember Smith can be sued individually for his statements.

What would you advise? Discuss fully.

REPRESENTATIVE ANSWER 1

Challenging the law

Standing is required to challenge a law. The plaintiff must have suffered actual harm or imminent harm and it is fairly traceable to the government. Here, Tom Teen has not been caught in violation of this law, thus he has not been actually harmed, but the law restricts his ability to wear certain colors, associate with certain people on school property, and express himself. Thus, he is in immediate risk of violating the law restricting all of these rights of his. Also, Councilmember Smith pointed directly at Tom and said “those kids”, which may have been specifically referring to Tom and his friends.

The 1st Amendment right to assemble limits the government’s ability to control who people can associate with and assemble together with. Here, the law prohibits three or more students from wearing gang colors who gather on school property after being warned by school officials to disperse. This limits the right to assemble with whom you would like to at school because if you do you could be expelled. The right to assemble is a fundamental right, thus the law must pass the strict scrutiny test. Strict scrutiny provides that the government has the burden to prove that a law is necessary to serve a compelling government interest. Here, the purpose of the law is to decrease teen gang participation and gang violence at the local high schools. The law is narrowly tailored to only those wearing gang colors and gathering in groups of three or more. The law’s purpose regarding gang violence is a very compelling government interest. The law may not be found necessary to achieve this compelling interest because there are less restrictive means to achieve the same interest such as not permitting any gang colors to be worn in school, instead of restricting assembly rights.

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Vagueness is at issue when the government passes a law that regulates freedom of expression, and the government cannot make a law that a reasonably intelligent person would not know what was prohibited when gathering at school in groups of 3 or more. Not every person will know what gang colors are.

First Amendment freedom of expression is also infringed by restricting the right to wear colors to school that are gang colors but the law would pass a rational basis test because it is rationally related to serve a legitimate government interest as the students simply can't wear gang colors and gather and stay there after being told to disperse.

The 8th Amendment may be violated because it prohibits government from imposing cruel and unusual punishment. Here, if someone violates the law they will be expelled immediately and have a civil fine of \$3,500. This is cruel and excessive.

The 14th Amendment Due Process Clause may also be violated as the law infringes on an individual's right to liberty. Here, students may not gather in particular colors at school, and if they do are warned to disperse and do not, they would be expelled and fined.

Councilmember Smith

Defamation is a cause of action Smith could be sued for, but it requires a false statement of fact about the plaintiff that was understood by a third party, published, and affected their reputation. Here the statement by Smith was "those kinds of teens need to be punished" thus not a statement of fact, that did not mention Tom by name, and was only an opinion not meant to be directed directly at Tom. Legislative privilege also applies generally to legislators who are speaking on the "floor" during a council session, such as this hearing on the proposed legislation, where council members are not liable for what they say on the floor if it is negligent.

Thus, I would advise Tom and his parents to challenge the law, but not bring an action against Smith.

REPRESENTATIVE ANSWER 2

Professional Responsibility:

Conflict of interest rules state that a lawyer may not represent two clients whose interests are materially adverse or if joint representation will substantially impair the lawyer's ability to represent both clients competently and diligently. Here both Tom and his parents have come to my office and want to challenge the statute. It appears that their interests do not conflict at this time, but nevertheless I will inform of the conflict and encourage them to seek outside counsel on the matter before commencing representation. Assuming everything is okay, here is my advice:

Challenging the statute:

Standing to challenge the statute requires actual imminent harm traceable to the government.

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Here, Tom has standing since he is an enrolled student in the Montgomery County Public School and the statute specifically states “three or more students.” His parents however may not be directly harmed. State action is satisfied because there is a statute “duly enacted by the council.”

1st Amendment Freedom of Association/Expression Clause (as applied through the 14th Amendment’s Due Process Clause) prohibits the government from punishing a person’s expressions and private associations. Here the statute provides that three or more students who wear gang colors and gather on school property shall be subject to expulsion and a civil fine. This inhibits the right to freely associate with those they choose, a fundamental right. Fundamental rights are subject to strict scrutiny. Strict scrutiny requires the law to be narrowly tailored to serve an important governmental interest. Here the interest in curtailing teenage gang participation might be a compelling one, but subjecting students to expulsion is in no way the least alternative means of achieving this result. A suspension or a counseling program would be better.

The Equal Protection Clause of the 14th Amendment prevents the government from discriminating on the basis of certain classifications. Here, the statute punishes 3 or more students who gather but does not punish less than 3 students. Gathering on school property is not a fundamental right and therefore subject to rational review. Rational review requires the law to be rationally related to a legitimate interest. Here, although curtailing gang violence is a legitimate interest, no showing has been made that expelling 3 or more kids who gather at school will lower gang participation.

Due process is implicated here also. Although expulsion results after a warning by the school officials to disperse, no notice or opportunity to be heard is present.

Vagueness rules dictate that a statute must put a reasonable person on notice as to what laws are prohibited. Here the statute punishes those who wear “gang colors” and who gather on school property yet makes no attempt to define what items are prohibited or what constitutes “gathering”.

The law is also overbroad. Again, here the statute encompassing “gang colors” and those who “gather” on school property is expansively overbroad.

Immediate expulsion from school and a fine of \$3,500 is cruel and unusual punishment.

Conclusion:

Since the law appears to violate the fundamental right to free expression, and is so overbroad and vague it cannot even survive a rational basis review, it will likely be held unconstitutional.

Suing Smith individually:

Smith is a legislator whose comments were made during the course of a legislative session on the council floor. Legislative immunity will bar any action against him. Furthermore, no showing

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by Tom has been made that he was harmed in any way by the statements. The suit will not succeed.

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QUESTION 4

Hansel and Gretel own and operate a canine obedience training center. While Hansel was conducting a public demonstration of command and restraint techniques with several of their dogs at River Park in Anne Arundel County, Maryland, Friendly, one of their dogs in the demonstration, abruptly lunged forward, breaking his leash into two pieces, and bit a spectator, Mary, five times on her arm and leg. Mary was rushed to the Anne Arundel Medical Center. Twenty five stitches were administered to Mary to close the wounds from the dog bites.

Mary brought suit against Hansel and Gretel in the Circuit Court for Anne Arundel County, Maryland, for negligence in conducting the demonstration without appropriate safeguards for dog restraints to prevent dog attacks. She sought compensatory damages of \$50,000 and she elected a jury trial. The Circuit Court did not issue a scheduling order in the case.

Twenty eight days before the trial, the Washington News Journal reported that there had been a number of recent incidents of dog restraint failures and attacks as a result of leashes broken in two and which involved the brand of leash upon which Friendly had been tethered at the time of the attack. The newspaper article identified the leash manufacturer as a Maryland company located in Baltimore, Maryland.

Mary's position is to bring the leash manufacturer into the case so that the matter can be tried at one time. The position of Hansel and Gretel is to go forward with the trial in eleven days.

a. What procedural method is available to Mary to bring the leash manufacturer into the case as a party at this time? Discuss in detail Mary's arguments in support of and the arguments of Hansel and Gretel against bringing the leash manufacturer into the case at this time.

Additional Facts

The case was tried before a jury. At the close of all the evidence, counsel for Hansel and Gretel made a motion for judgment. The motion was denied. The jury returned a verdict for Mary for \$175,000 against Hansel and Gretel.

b. As a result of the jury verdict rendered against them and based on the given facts, what post judgment motion(s) are available to Hansel and Gretel in the Circuit Court case? Discuss in detail.

c. What impact, if any, would the filing of the post judgment motion(s) available to Hansel and Gretel have on any appeal of the judgment by Hansel and Gretel? Discuss in detail.

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d. As a result of the jury verdict and based on the given facts, what post judgment motion(s) should Mary's counsel make and within what time should the motion(s) be made? Discuss in detail.

REPRESENTATIVE ANSWER 1

(a) Bringing the leash manufacturer into the case. Mary can make a motion to amend the pleadings under Md. Rule 2-341 (c)(6) to include the leash manufacturer as a necessary party. The leash manufacturer may be seen as a necessary party under Rule 2-211(a) (2) because if, in fact, the causation of the injury to Mary was not the negligence of Hansel and Gretel, but the product failure of leash manufacturer, then failure to include them as a party would impair Mary's ability to get relief for her injuries. If Mary adds the manufacturer, she will need to serve them with a copy of the complaint and all pleadings previously filed in the order.

There are several hurdles. Where there is not a scheduling order, Rule 2-341 (a) requires such amendment to be filed at least 30 days prior to trial; it is currently 11 days prior to trial. Under 341 (b), leave of court is required. In addition, an amendment to join parties certainly varies the case in a material respect. As a result, whether Hansel and Gretel file a motion to strike within 15 days or do not, they will be treated as opposing the motion.

Mary's argument in support of the motion to bring in the leash manufacturer would be as follows: (1) the absence of the leash manufacturer would be prejudicial to Mary's interest as a party, as she may not be able to receive the relief she needs by having the "wrong" defendant only; (2) the news article which showed the leash manufacturer's potential negligence and causation only came out 28 days before the trial; and (3) the manufacturer is in Baltimore and is a Maryland company; the court would have personal jurisdiction and be able to join them as a party.

Hansel and Gretel's arguments in response would be that (1) it is only eleven days before trial and materially changing the case at this point would be prejudicial; (2) as the potentially harming instrumentality, Mary's counsel should have added the leash company earlier and not waited for the newspaper to provide information; and (3) that if the case were simply dismissed without prejudice for nonjoinder, Mary could re-file with all appropriate parties.

(b) Hansel and Gretel should make a motion for judgment notwithstanding the verdict under Rule 2-532(a), since they preserved that right by making a motion for judgment at the close of evidence at the end of plaintiff's case. They should also make a motion for a new trial, or a motion to amend or alter the verdict – especially because the claimed damages were \$50,000 and the actual damages were \$175,000. These motions should be made within 10 days of the judgment in the Circuit Court case.

(c) If Hansel and Gretel file post-verdict motions, they are not required to file for appeal until 30 days after the judge denies the motion for a new trial. This is an extension of the general rule which states that a notice of appeal must be filed within 30 days of entry of the judgment. They would then file a notice of appeal in the circuit court and, because the action originated in the

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circuit court, pursue their appeal in the Court of Special Appeals. If the post-verdict motions for jnov or for a new trial succeed, no appeal would be required.

(d) Mary's counsel should file a motion to amend the pleadings to include a greater damages pleading of \$175,000 under 2-341; although leave of court will be required, it may be that additional facts came out during trial which would make such amendment in the interest of justice. This should be filed immediately following the verdict. Mary's counsel should also oppose any motions filed by Hansel and Gretel.

REPRESENTATIVE ANSWER 2

a. Mary may seek leave of the court to join the leash manufacturer into the case. Joinder is required under Civil Procedure – Circuit Court Rule 2-211 when a person who is subject to service of process, if absent, will mean that (a) complete relief cannot be accorded among those already parties, or that (b) the disposition of the action may impair or impede the person's ability to protect a claimed interest relating to the subject of the action. Mary will argue that the leash manufacturer is a necessary party based upon her need for complete relief, which she may be unable to receive from a judgment against only Hansel and Gretel. Mary may also argue that she must be allowed to join the leash manufacturer for fear that her later claim against the leash manufacturer will be precluded based upon res judicata, which requires that all claims by a party pertaining to a particular transaction or occurrence be brought in one suit by that party, even though the defendants would be different, because Hansel and Gretel are in privity of contract with the leash manufacturer, and this is sufficient to establish the "same party" requirements for res judicata to apply. This will be considered by the court, as required under 2-211 (c) , which states that in considering necessary parties to join to a case, the court must consider prejudice to existing parties by a necessary party's absence.

Because the trial is less than 30 days away, Mary must seek leave of court, under Rule 2-341(b). Under 2-341(c), an amendment may change the pleading to (5) correct misjoinder or nonjoinder of a party so long as one of the original plaintiffs and one of the original defendants remain as parties to the action, and (6) add a party or parties. This rule also states that amendments shall be freely allowed when justice so permits, which means it is in the discretion of the court to determine whether Mary should be permitted to join the leash manufacturer less than 30 days before trial.

Hansel and Gretel will argue that the trial is 30 days away and that it is unfair to them to delay it any further so that Mary may join an additional defendant. They will also argue that the leash manufacturer is not a necessary party to the case, in that complete relief may be accorded to Mary as against Hansel and Gretel, without any need for the leash manufacturer (and that then Hansel and Gretel may seek indemnification or contribution from the leash manufacturer). Hansel and Gretel will also argue that res judicata is inapplicable in any future case by Mary

against the leash manufacturer, as the lease manufacturer's product defect liability is separate and distinct, and is not a claim that will be litigated in any manner, in the case against Hansel and Gretel.

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b. Hansel and Gretel may seek a motion for judgment notwithstanding the verdict, under Rule 2-532. They may do so because they made a motion for judgment at the close of all of the evidence. They must make this motion within 10 days after entry of judgment, and it will be limited to the grounds they raised in support of their motion for judgment. They should also seek a revisory action by the court under Rule 2-535, as the amount awarded against them is larger than the amount sought by Mary in her complaint. Hansel and Gretel should request that the court revise the judgment, as a remittitur, to lower the amount awarded against them to the amount actually sought by Mary in her complaint.

c. If Hansel and Gretel file a motion for judgment notwithstanding the verdict; which they lose, then they have 30 days after entry of the order denying their motion for judgment notwithstanding the verdict to file their notice of appeal, under Rule 8-202(c).

d. Mary's counsel should not file any post judgment motions. Mary only sought \$50,000, but was awarded \$175,000. Maryland courts will consider motions for remittitur, lowering a judgment amount if it is above that which is sought – but that is not a motion Mary's counsel would want to bring, as the award is beneficial to his client.

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QUESTION 5

Landlord owns an office building in Baltimore, Maryland, and provided five-year commercial leases to her tenants. In 2006, she leased an office to Tenant Smith. Tenant Smith's lease noted that "he shall only operate a medical office, shall not compete with other tenants, and shall not sublet any portion of his premises." In 2007, Landlord leased an office to Tenant Jones. Tenant Jones' lease stated that "he shall only operate a law office, and shall not sublet any portion of his premises."

After two years, Tenant Smith decided to rent a portion of his office to his sister to start her law practice. Thereafter, Sister mailed her portion of the rent directly to Landlord. Sister decided to concentrate in criminal law, primarily representing those that she considered to be falsely accused. Tenant Jones' clients increasingly complained about the unsavory characters milling around in the building, and a few clients terminated their services with Tenant Jones citing fear for their safety. On September 22, 2010, Tenant Jones called Landlord and complained about Sister's law practice, and threatened to break his lease if Landlord did not do something about it.

Two months passed without any change. Frustrated, Tenant Jones made a unilateral decision to withhold 10% of his rent from Landlord. The next month Tenant Jones moved out without notice to Landlord. Landlord immediately leased the premises to a fledgling yoga studio for a period of five years and agreed to waive the first year's rent.

On January 31, 2011, Landlord sent a demand letter to Tenant Jones requesting all arrears, including the monthly rent since the time that Tenant Jones abandoned his lease. On that same date, Landlord sent a notice of termination to Tenant Smith citing his breach of the terms of his lease.

Landlord comes to your Maryland law firm and asks whether she can legally terminate Smith's lease, and recover unpaid rent from Jones. The Senior Partner has asked you to review the common law and prepare a memorandum addressing Landlord's requests. Discuss fully.

REPRESENTATIVE ANSWER 1

To: Senior Partner

From: Applicant Associate

RE: The Common Law and Landlord's Request

In Maryland, a commercial tenant is bound by the terms of the lease. However, if a tenant breaches a provision against subcontracting and the landlord consents, the provision is considered waived. In this case the lease with Smith stated "no subcontracts". However, Smith subcontracted to Sister. The Landlord knew of the unsavory characters milling around the building due to the Sister's criminal law practice, but accepted the rent that was paid directly to

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him from Sister. Thus, the lease was breached, but the Landlord waived and accepted the subtenant.

In Maryland, constructive eviction exists when a tenant is unable to use or enjoy their property as initially agreed. Moreover, the Landlord also has a duty to make the property safe in the common areas. In this case, the Sister's law practice made the common areas unsafe and Jones lost clients because they cited their fear for their safety. Jones made Landlord aware of this fact and threatened to break the lease if nothing was done. The Landlord did not do anything about this for two months. Thus the tenant has a valid argument of constructive eviction by Landlord.

In Maryland, for a commercial lease, the Landlord is not required to mitigate the damages of a broken lease. In this case, the tenant reduced his fee by 10%. This could have been held in "rent escrow" to show good faith of the tenant. However, it was simply withheld and it is arguably owed. The tenant should have terminated his lease at that time. He should have surrendered the property to the Landlord.

The Landlord did mitigate damages by leasing to the yoga studio and agreeing to waive the first year's rent. This was not necessary, but the Landlord will not be able to collect double rent.

In conclusion, Landlord may not have the authority to terminate Tenant Smith nor recover any unpaid rent from Tenant Jones believed to have accrued after he vacated the premises.

REPRESENTATIVE ANSWER 2

To: Senior Partner

From: Applicant

RE: Landlord v. Smith; Landlord v. Jones

Landlord has commercial tenancy for years leases with both Smith and Jones because the terms are stated as 5-year leases. In Maryland, under a tenancy for years, most parties must give notice before terminating the lease.

Landlord v. Smith

Landlord's lease with Smith began in 2006. The lease's natural termination date would be in 2011. It is unclear as to the actual start date of the lease. Non-sublet clauses are permissible in leases in Maryland. Smith violated the lease by subletting a portion of his premises to his Sister. However, the facts indicate that Landlord accepted payment of rent directly from the Sister. This acceptance could constitute a waiver of this provision by Landlord.

Landlord cannot terminate because of Smith's breach of the no-sublet clause since she accepted rent payment and failed to take earlier action regarding the sublessee.

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Landlord v. Jones

Landlords owe a duty of quiet enjoyment to their tenants. The Landlord also has duty to maintain common areas and keep them safe. Where a Landlord breaches these duties his action or inactions can amount to a constructive eviction. A tenant must show that because of the Landlord's failure to keep the premises safe, he was unable to use his premises. Even where there is constructive eviction the tenant must notify the Landlord immediately, leave, and if the Landlord fails to remedy in a reasonable time, the tenant is constructively evicted.

Though there were "unsavory characters" milling about the building, there is not indication that the premises were unsafe. It was also two years before Jones complained to Landlord about Sister's clients in the building. Jones also acted improperly in his unilateral decision to withhold rent. The 10% reduction was based on his frustration after waiting for two months. The proper action would at least have been to put the 10% withheld into a trust account with the court to hold until resolution of the dispute.

Jones abandoned the lease before its termination, but Landlord did mitigate (though not required in a commercial setting). Landlord can recover for the rent in arrears only. Though Landlord waived the first year's rent to the next tenant, this was a voluntary decision and she cannot hold Jones responsible for this amount.

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QUESTION 6

Homeowner called Ace Painting Company, a licensed Maryland home improvement contractor, to arrange to have the exterior of her house painted because she wanted to sell her house and needed the trim on the brick house painted immediately.

On June 7, 2010, Ace, sole proprietor of Ace Painting Company, met Homeowner at her house to evaluate the painting job. After looking over the house, Ace told Homeowner that he could complete the painting job within three days. He said that he would do the painting job for a total cost of \$3,000. Ace stated that he would use Wonder Paint. Homeowner selected a unique color of Wonder Paint, and she told Ace to start work on the job the morning of June 10, 2010.

The next afternoon, June 8, Homeowner sent an email to Ace indicating that she had changed her mind and that she wanted him to use a specific, high quality paint for her house, which she acknowledged in the email was twice as expensive as the Wonder Paint. Earlier in the day, Ace had arranged to have the Wonder Paint for Homeowner's job mixed at the hardware store. He accepted the mixed Wonder Paint and paid \$400 for it before he read the Homeowner's email. He could not return the paint because of its unique color.

At 7 p.m. on the evening of June 9, Homeowner unexpectedly received an offer, and she immediately signed a contract for the sale of her house. She had only an office telephone number for Ace so she called promptly and left a message on the answering machine that she no longer needed the paint job.

At 7 a.m. on June 10, Ace arrived at Homeowner's house and unloaded the paint, supplies, and his equipment, and he prepared to begin painting. He had not checked his telephone messages at the office, so Ace was unaware that Homeowner wanted to cancel the paint job. Homeowner came out of her house when she saw Ace setting up. She told him that she had left a message and that she no longer needed the paint job. She noticed that the Wonder Paint was not the brand she had specified in her email dated June 8. Homeowner then told Ace that she would not pay him anything because he had not done any work, he had purchased the wrong paint, and she no longer needed the paint job.

Ace wants to sue Homeowner for the money he believes she owes him.

**What rights and damages, if any, does Ace have against Homeowner?
Explain your answer fully.**

REPRESENTATIVE ANSWER 1

Ace has the right to the full cost of the contract. The contract between Ace and Homeowner is a common law contract for services. Although there is some sale of goods in the contract, the most important part of the contract is the service of painting Homeowner's house, thus it is under common law. This contract is a bilateral contract because there is no evidence that Ace could only accept the offer from Homeowner by actually painting the house. Thus, the

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contract was formed on June 7. This contract is not barred by the statute of frauds because it was not a contract for the sale of goods for over \$500, and the services could be done within one year.

Homeowner breached the bilateral services contract on June 9th, when she called to say she no longer needed the paint job, and on June 10th, when she communicated to Ace directly that she did not need the paint job. When such a breach occurs, the breaching party owes the non-breaching party the expected cost of the contract. It does not matter that Ace merely prepared to paint the house because this contract was bilateral. A bilateral contract may not be unilaterally rescinded.

Homeowner's request for a change in the brand of paint is not part of the contract. This is because change in the term of a services contract may only occur if it is supported by consideration. Here, the twice-as-expensive higher-quality paint was not supported by consideration. Therefore, no change in the contract occurred. Furthermore, this change could potentially place the contract within the statute of frauds because the goods would cost more than \$500. This is unlikely, though, since the contract is not divided between services and goods.

Ace may seek the entire amount of the contract from Homeowner, which amounts to \$3,000.

Moreover, Ace foreseeably and detrimentally relied on the contract when he bought Wonder Paint for \$400. This invokes a quasi-contract equitable recovery for Ace. Ace detrimentally paid \$400 for a unique color that cannot be returned. Therefore, even if Ace was not entitled to the entire amount of the contract, he would at least be entitled to recovery for this paint.

REPRESENTATIVE ANSWER 2

Ace may pursue an action against Homeowner for breach of contract and seek recovery for the damages incurred resulting from his preparation for the painting job.

At issue is whether Ace and the Homeowner entered into an enforceable contract for services on June 7, 2010.

Under Maryland law, under the Statute of Frauds, a contract for services or performance is enforceable without a writing if it may be completed within one year.

Here, the oral contract between Ace and Homeowner is enforceable because it was a contract for services or performance and the work was expected to be completed within one year.

At issue is whether Homeowner's email regarding the high quality paint constituted a modification of the original contract.

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Under Maryland law, in a contract for services, a modification must be supported by new consideration. Under the preexisting duty rule, where a party has a preexisting duty to perform, any modification of the duties of the parties must be supported by new consideration.

Here, Homeowner sought to modify the terms of the contract, specifically the type of paint to be used on the paint job, but did not offer new consideration. Ace also never agreed to the modification of the contract, and as such, Ace cannot be held liable for using Wonder Paint as opposed to a specific, high quality paint. Homeowner and Ace did not modify the contract in any way because there was no acceptance of the modification, and there was no new consideration to support any modification. Ace cannot be considered to be in breach of the original contract because there was no modification, and as such, the parties are bound to the terms of the original contract.

At issue is whether Homeowner could repudiate the contract prior to Ace's commencing the painting job.

Under Maryland law, where the performance of both parties is executory, and one party repudiates the contract prior to performance, the other party may treat the repudiation as a breach and sue for damages.

Here, Ace may treat the Homeowner's statement that she no longer needed the paint job as an anticipatory repudiation. Ace had not yet started painting the house, and as such, his duty and the duty of the Homeowner to pay for the paint job were executory. As such, Ace may treat the repudiation by the Homeowner as a breach of the contract and pursue an action for damages.

At issue is what damages Ace may recover from the Homeowner.

Under Maryland law, Ace may recover compensatory and any other incidental damages for the paint he purchased, the supplies he may have purchased, the equipment he may have purchased, and any other expenses associated with preparation for the painting job. Ace may also recover the profits he would have made on the painting job because the Homeowner breached the contract, and he was deprived of other painting opportunities because he was preparing for and was ready to start painting her home. Ace may also recover expectation damages because he relied on her promise to pay him for the paint job.

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QUESTION 7

On May 1, 2010, Wendy and Susan, recently admitted members of the Maryland Bar, formed a law practice together in a small Maryland community.

On May 15, John met with Wendy to obtain legal advice related to recovering damages against Tires For All, a retail store that sells car products and related accessories. John had been injured while shopping at Tires For All. John signed a medical record release form, and he gave Wendy a check to cover the cost of his medical records. Wendy deposited the check into the firm's operating business account. During the meeting, John agreed to pay all additional expenses to pursue the claim against Tires For All and to pay a contingency fee to Wendy and her firm of fifty percent (50%) of any recovery.

After some thought, Wendy realized neither she nor Susan had sufficient experience to handle John's claim. Wendy contacted Paul, a retired attorney, who had concentrated his practice in personal injury actions. Paul agreed to handle John's claim on the basis that he receive forty percent (40%) of any fee received by Wendy.

On June 2, Tires For All contacted Susan because it planned to merge with All Cars, Inc., one of Susan's former clients. Tires For All explained that it needed Susan's legal assistance with negotiating and consummating the merger because she understood the business. Susan agreed to undertake the representation, and she began working immediately on the merger documents.

By July 3, Paul was able to negotiate a settlement of the claim for John. Since Paul was told that Wendy would be the only one to communicate with John, he called Wendy to report the proposed settlement. Wendy advised John of the terms of the settlement and about Paul's role in representing John's interests. John was surprised to learn about Paul's involvement, and he asked for a few days to think over whether he would accept the settlement.

Later that day, John read in the local newspaper about the proposed merger and Susan's representation of Tires For All. John started to have second thoughts about the proposed settlement because of the merger and the manner in which Wendy had represented his interests. He decides to obtain separate legal advice as to whether he should accept the proposed offer to settle his claim given all of the matters that have come to light recently.

What professional conduct issues are raised by the actions of Susan, Wendy and Paul? Discuss fully.

REPRESENTATIVE ANSWER 1

This Issue is governed by the Maryland Rules of Professional Conduct (RPC).

An attorney has a duty of competence to have enough knowledge to be able to competently represent a client. Here, "Wendy and Susan are recently admitted members of the

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bar” so they may violate that duty but it was a good idea for Wendy to seek help when she realized she didn’t have sufficient experience.

All fees must be reasonable and must be communicated to the client preferably in writing. Here, John agreed to pay expenses and to pay a contingency fee of 50% of recovery which would be excessive for a new lawyer in violation of RPC.

Contingency fees are taken dependant on whether the lawyer wins or loses and must be in writing, clearly communicated, and an accounting must be given to the client. Here, a contingency fee would be an acceptable form of payment in a negligence case and “John agreed to pay a contingency fee” but there was no writing or explanation to the client in violation of RPC.

Fees must be put in a separate account such as an escrow account. Here, Wendy deposited John’s check into the firms operating business account in violation of RPC.

Fees may be split equally or on some other basis between two attorneys if the client is informed, the basis is reasonable, and the way to split it is agreed upon. Here, “Paul agreed to handle John’s claim on the basis that he receive 40% of any fee” but later “John was surprised to hear of Paul’s involvement” which means that he was not consulted/did not agree in violation of RPC.

A lawyer may not represent two clients if a conflict of interest exists unless the lawyer can reasonably decide that he can competently represent both clients and gets informed consent from both clients. Here, “Tires for All contacted Susan because it planned to merge with All Cars, one of Susan’s former clients” creating a conflict of interest.

Conflict within a law firm. Here, Tires for All wanted assistance negotiating and consummating the merger because she understood the business. However, a conflict exists because Wendy is representing John in a suit against Tires for All and Susan is in that firm thus the conflict is imputed upon her. Susan should not represent Tires for All and is in breach when “she began working immediately on merger documents”.

A lawyer has a duty of honesty. Here, John was surprised to learn of Paul’s involvement which means Wendy didn’t tell him about in violation of RPC.

A lawyer has a duty of confidentiality. While an attorney can consult with others in the firm for help for competence, John did not know that Paul was working on the case and Wendy may have disclosed more information than necessary to be held with her competence issues in possible violation of RPC.

An overseeing attorney (Paul in this case) has a duty to make sure that the lawyers under him are complying with RPC. Here, Wendy made several violations which means Paul violated as well.

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Attorneys have a duty of loyalty to their clients. By lying to John and misrepresenting what was going on, Wendy and Paul violated RPC.

All attorneys should be reported to the Attorney Grievance Commission.

REPRESENTATIVE ANSWER 2

1) John's check: The check given by John to Wendy to cover the cost of his medical records must go into the client's trust account and not the firm's general account. Client's money must be kept apart from the law firm's money and there should be no co-mingling of funds.

2) John's contingency fee: The contingency fee in John's case is likely unreasonable. While Maryland courts have recognized a contingency fee of up to 50% in complex cases, John's case appears to be a less complex personal injury claim. Contingency fees are allowed, however they must be reasonable. In determining whether or not a contingency fee is reasonable, the court considers the time involved in the case, the complexity of the case, any time constraints, and the experience required. Therefore, a 50% contingency fee, plus John's paying of expenses is likely unreasonable.

3) Wendy's competence: Generally, a lawyer must provide competent and diligent representation for her clients. A lawyer may become competent through research and by associating with other lawyers. Thus, Wendy reasonably believed she could be competent, she was permitted to take the case.

4) Wendy associating with Paul: Lawyers are permitted to associate with other lawyers in representation of a client. However, the client must consent in writing and the overall fee to the client must be reasonable. As discussed, the 50% contingency fee was probably not reasonable in this case. Importantly, John had no knowledge that another lawyer (Paul) was working on his case. Thus, Wendy and Paul violated the rules of Professional Conduct by not informing John that Paul would be working on the case and obtaining his written consent.

5) Susan conflict of interest: Susan's working for All Cars Inc. in their merger with Tires For All creates a potential conflict of interest problem. Under the Rules of Professional Conduct, a conflict of interest arises between two clients when (i) the representation of one client is directly adverse to the other, or (ii) representation of one client would materially limit representation of another. Generally, if a conflict exists as to one member of a firm, the conflict is imputed on the entire firm (unless screened). If a conflict exists, both clients must be informed and consent in writing to the representation. Additionally, the conflict can only be waived by a lawyer if they reasonably believe they can provide competent and diligent representation to both affected clients.

Even though the subject matters involved in the cases are different (transactional work v. personal injury claim), it appears that the clients interests are directly adverse. As such, Susan may not be able to waive the conflict presented.

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Here, it appears that Susan may have been screened, since the facts state that Wendy would be the only one to communicate about John. However, screening is generally only valid if a new lawyer is entering the firm or a lawyer that dealt with a potential client.

6) **Paul's status to act as a lawyer:** Paul is a retired lawyer. In order to represent a client, a lawyer must be in good standing with the bar. It is unclear if Paul has maintained his professional membership and therefore is qualified to act in John's interest in settlement negotiations.

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QUESTION 8

On August 1, 2010, Al was driving his car at 11:00 p.m. on Route 301 in Bowie, Maryland. His friend, Bill, was a passenger in the front seat. Al made a turn without using a turn signal. Trooper Charles was traveling behind Al and promptly pulled the car over for a traffic stop. Trooper Charles approached the car. He observed that Bill appeared nervous and was shaking. Trooper Charles called for a K9 unit. Within five minutes, Trooper David and his certified K9 partner (police dog) arrived on the scene. The police dog was ordered by Trooper David to scan the vehicle. Al and Bill were still in the vehicle. The police dog barked indicating a positive alert for the presence of drugs at the front passenger's side door.

Trooper Charles removed Bill from the car and patted him down for weapons. As he did so, he noticed that Bill was shaking quite a bit. He asked Bill why he was shaking and Bill said that it was cold out. The outside temperature was 80 degrees.

During the pat down, Trooper Charles noticed that there was something large that felt to him like a bag of something in Bill's inner thigh area. He did not believe it was a gun or a knife. No weapons were found in the pat down.

Trooper Charles placed Bill on the curb and searched the vehicle finding marijuana residue in the middle console of the vehicle. The Trooper then handcuffed Bill and transported him to the police station for a strip search. As a result of the strip search, a large quantity of marijuana in a clear plastic baggie was found in Bill's inner thigh area.

Bill has been charged in the Circuit Court for Prince George's County with possession with intent to distribute marijuana.

- a. What Motion(s) should be filed on Bill's behalf and when?**
- b. What arguments would be made on Bill's behalf in support of the Motion(s)?**
- c. What responses would you anticipate on the part of the State to those arguments?**
- d. How should the Court rule and why?**

REPRESENTATIVE ANSWER 1

4th Amendment

The 4th Amendment (applied to states through 14th amendment) prohibits warrantless searches and seizures by the government, with limited exceptions. Here, Trooper Charles, acting on

behalf of the government, and without a warrant, searched Bill, searched Al's car, and seized the marijuana in Bill's possession, all without a warrant, but exceptions apply.

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Standing

A party has standing to challenge a warrantless search or seizure where a state actor searched or seized, and where the party challenging the same had a reasonable expectation of privacy. Here, Bill does not have standing to challenge any search or resulting seizure of Al's car or of Al's possessions (not applicable here), because the car is Al's and Bill has no expectation of privacy on behalf of the car, but Bill does have reasonable expectation of privacy of his own person, and he was subjected ultimately to a strip search and to a seizure of the marijuana on his person, thus giving him standing on that issue.

Traffic Stop

Police may perform a traffic stop if a vehicle violation has occurred in their presence. Here, the traffic stop was legal because Trooper Charles (C) observed Al making a turn without using his signal.

Automobile Exception/Stop and Frisk

Limited warrantless searches are permitted during a traffic stop if the police have a reasonable articulable suspicion that a crime has been committed. Here, after stopping the vehicle, C noticed that Bill appeared "nervous and shaking," although it was 80 degrees outside. This in and of itself may not have constituted sufficient Reasonable Articulable suspicion to order additional searches, especially as most parties become nervous during even a routine traffic stop, but officers are permitted to order a K-9 search of the perimeter of a vehicle during a routine traffic stop.

With reasonable articulable suspicion of a crime, or with suspicion of possession of a deadly weapon, police may stop individuals and perform and a limited "pat-down" for weapons to protect themselves. If such limited pat-down (frisk) yields suspicion of additional contraband, the stop and frisk may ripen into a more thorough search, even a strip search as necessary, and with appropriate probable cause.

K-9 Search

K-9 searches of the perimeter of a vehicle are permitted during a traffic stop. Here, the K-9 (certified) "barked indicating a positive alert for the presence of drugs." This "positive alert" elevated the officer's reasonable articulable suspicion of a crime to probable cause of crime, thus permitting further search.

Miranda Warnings

5th Amendment Miranda warnings do not apply here as Bill was not in custody when C inquired "why he was shaking."

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Search Pursuant to Lawful Arrest/Warrantless Arrest Exception

Upon discovering marijuana residue in the vehicle, and noticing “a bag of something in Bill’s inner thigh area, C had cause to arrest Bill for possession of marijuana and thereafter perform a more thorough search under either the pursuant to lawful arrest exception (because residue was found in the vehicle where Bill was a passenger), or under the warrantless arrest exception (because they are in public and a crime has taken place). The strip search at the station was appropriate as C performed the search in accordance with these warrant exceptions, and as he had probable cause (as discussed above) to believe Bill had possession of illegal substance.

A. Considering this above discussion (but notwithstanding the conclusions), Bill should file motions to suppress the evidence of the seized bag of marijuana, according to the exclusionary rule, and the “fruit of the poisonous tree” doctrine. Bill should also file a motion to dismiss and a motion for discovery.

B. Bill will argue that C had no probable cause to initiate the K-9 search on Bill’s mere shakiness and nervousness, thus all subsequent searches were not lawful. Bill will also argue that traffic stops and resulting legal searches (stop-frisk, etc.) must be limited in time and must not take longer than necessary to effectuate the purpose of the stop. Here, Bill will argue that calling for a K-9 unit was inappropriate because it consumed additional time.

C. The State will argue that the searches were appropriate (see above), and therefore the evidence of the bag of marijuana should not be suppressed, and the case should not be dismissed. They will counter Bill’s K-9 argument with the fact that it only took 5 minutes for the K-9 to arrive.

D. The Court will rule that the charge stands, and that the evidence will not be suppressed, according to the above analysis, holding that each level of warrantless search was appropriate under the respective exceptions, as explained above.

REPRESENTATIVE ANSWER 2

a. Bill or Bill’s attorney should file a 4-252 Motion to Suppress the marijuana. A motion to suppress illegally seized evidence is a mandatory motion under Rule 4-252. This motion must be filed within 30 days of the earlier of 1) Bill’s initial appearance in the Circuit Court or 2) when Bill’s attorney enters his/her appearance, unless the Court finds good cause to allow after that time.

b. Bill’s Arguments

1. Bill will argue that the stop of the vehicle was 1) illegal and 2) the stop was an illegal seizure because it took too long to call in the K-9 unit, and all fruits of the stop must be suppressed.

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2. Bill will argue the Terry frisk of Bill was illegal because, even assuming arguendo that the Trooper had a reasonable suspicion (given the response from the K9), the Trooper did not ask questions of Bill before the Terry frisk.

3. Bill will argue that the marijuana inside the vehicle was illegally seized and the marijuana was the basis for Bill's arrest and therefore must be suppressed.

4. Bill will argue there was not probable cause to arrest him. Therefore, since the arrest was unlawful, the strip search and finding the large quantity of marijuana was illegal.

c. State's Responses to Bill's Arguments (numbered respectively with Bill's Argument numbering)

1. The State will respond that the stop of the vehicle was legal because the driver of the vehicle, Al, failed to obey the traffic law of using a turn signal when making a turn. The State will argue the stop itself as not an illegal seizure because it only took five minutes for the K9 unit to arrive, and five minutes is not an unreasonable amount of time for a traffic stop. Furthermore, the State will argue that Bill does not have standing to challenge the legality of the vehicle's stop. Presumably, the car belonged to Al (someone other than Bill), therefore, Bill does not have standing as the owner of the car, and passengers do not have standing under Maryland law to challenge the legality of the stop.

2. The State will respond that this was not a Terry frisk, and the Trooper had probable cause at this point to search the vehicle and occupants.

3. The State will again respond that Bill does not have standing to challenge the marijuana residue found inside the car. Furthermore, even if there were standing, the marijuana residue found was legally seized. The State will argue that because there is a lesser expectation of privacy in vehicles, when a vehicle is lawfully stopped (in this case for violating a traffic law), the Trooper may order the occupants out of the vehicle. A trooper may search the vehicle if an arrestee is not secured.

4. The State will respond that there was probable cause to arrest Bill. As a passenger of the car, Bill had control/possession of the marijuana residue area. That is sufficient to establish probable cause to arrest Bill.

d. Court's Rulings

The Court should agree with all of the State's arguments and deny the motion to suppress the evidence. The Court should find that Bill does not have standing to assert the stop of the vehicle was illegal; that there was probable cause to arrest Bill from the legally used K9, leading to the finding of marijuana in the vehicle which served as probable cause to arrest Bill; that the strip search of Bill at the police station was legal because Bill had been lawfully arrested. Therefore, the Court should deny the motion to suppress the evidence.

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QUESTION 9

On March 15, 2010, a spectacular fire destroyed the No-Tell Motel (“Motel”) in Baltimore County, Maryland. The fire was caused by Motel’s improper storage of flammable cleaning supplies and resulted in numerous injuries to people on and about the property.

Paramedics arrived at the scene and found Lucky, who was injured in the fire. While the Paramedics were properly treating and transporting Lucky to the hospital, their ambulance collided with another vehicle that was negligently operated by Dave.

Lucky’s injuries from the fire were compounded by the collision that was caused by Dave’s negligence.

Lucky properly and timely files a lawsuit seeking damages against Motel and Dave alleging that their respective negligence caused his injuries.

a. To what extent, if any, can Motel and Dave be held liable for Lucky’s injuries? Explain your answer.

Additional Facts

While attempting to put out the fire, Fred a Baltimore County fireman, was rendered paralyzed when he fell down a staircase. He could not see the staircase due to the large amount of smoke in the building. Fireman Fred brings a lawsuit against Motel claiming that Motel’s negligence caused his injury.

b. To what extent, if any, can Motel be found liable for Fireman Fred’s injuries? Explain your reasons.

REPRESENTATIVE ANSWER 1

a. Motel and Dave’s Liability for Lucky’s Injuries

Negligence

A defendant will be held liable in negligence for the breach of a duty owed which proximately causes injury. Here, Motel owed a duty to the public of keeping its surroundings and building safe. Motel breached that duty by improperly storing flammable cleaning supplies that ultimately caused a fire which proximately caused Lucky’s injury. Therefore, Motel will be found liable for Lucky’s injuries in negligence.

Also, Dave owes a duty to the public of driving safely. Dave breached that duty by negligently operating his vehicle. Dave’s breach of this duty proximately “compounded” Lucky’s injuries from the fire. Therefore, Dave will also be liable for Lucky’s injuries.

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Joint Tortfeasors

When two or more tortfeasors are the cause of the Plaintiff's injuries to the extent that the injury cannot be calculated to each party, each party is equally liable for the Plaintiff's damages. Here, the facts do not state to what extent Motel's negligence caused Lucky's injuries compared to Dave. Therefore, both Dave and Motel will be jointly and severability liable for Plaintiff's damages in negligence.

b. Fireman Fred's Injuries

Assumption of Risk/Duty of Fireman

A defendant to negligence may raise the defense of assumption of risk to avoid liability. An assumption of risk defense is a valid defense if the injured party 1) knew of the dangers of his acts and voluntarily took on the challenge/risk of injury. Typically, a tortfeasor is liable for all of the resulting, foreseeable injuries that result from his/her negligence. However, a fireman has a duty to, and is paid to, put out fires. Fireman may present an argument stating that but for Motel's negligence he would not have sustained his injuries. However, due to the known nature of a fireman he knows the risk, assumes the risk of injury and voluntarily takes on the work anyway. Therefore, Fireman Fred would be unsuccessful in his claim against Motel for injuries sustained.

REPRESENTATIVE ANSWER 2

(a) Both Dave and Motel can be held liable for Lucky's injuries. Both Dave and Motel's negligence were substantial factors in Lucky's injuries. Courts hold that a party will be liable for all foreseeable injuries resulting. The Motel negligently stored the flammable cleaning supplies. Motel is liable to all foreseeable injuries stemming from its negligence. It is foreseeable that when the ambulance was driving Lucky, who was injured as a result of Motel's negligence, could get in an accident which would cause further injuries. But for Motel's negligence, Lucky would have been injured in the ambulance and fire. Also, Motel is liable for the compounded injuries caused by Dave because this also is foreseeable. Dave's negligence is not an intervening and superseding cause to result in non-liability.

Dave is also negligent because but for his negligent driving Lucky's injuries would not have been exasperated. You take a plaintiff as you find him. Here, Lucky was already injured. That fact was irrelevant and both Dave and Motel will be jointly liable for his injuries.

(b) Motel will probably not be found liable for Fred's injuries. MD has adopted the firefighter's rule in which a rescuer in a professional capacity, e.g. fireman, cannot hold a party liable for resulting injuries. Also, MD had adopted the assumption of risk doctrine which will bar recovery when one voluntarily assumes a known risk. Here, Fred was injured as a result of trying to put out the fire caused by Motel's negligence. But for the Motel, Fred would not have been injured. However, because Fred was injured in the course of a professional rescue, his recovery will be barred.

**FEBRUARY 2011 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

QUESTION 10

Father and Mother were married in Maryland in 1999 where they continue to reside. They had one child, Daughter, born in 2000. Difference arose between the parties, and they separated and entered into a valid separation agreement in May of 2008. The agreement stated that Mother and Father are fit and proper parents. It further provided that Mother and Father shall have joint legal custody of Daughter with Aunt and Uncle having primary residential custody. Mother had Daughter for visitation every other weekend from Friday until Sunday and Father had the same visitation schedule on remaining weekends.

In 2008 when the parties entered into the agreement, Father's employment kept him traveling so he was unable to care for Daughter. At that time, Mother was unable to take Daughter because she was having problems with substance abuse, and she was living in a studio apartment close to Aunt and Uncle.

Mother and Father were divorced in May of 2009, and the separation agreement was incorporated by reference into the judgment of divorce.

Daughter is doing reasonably well in school and has no health issues. There are no complaints concerning the housing or care provided by Aunt and Uncle.

Mother has a history of problems with substance abuse, and she recently completed a rehabilitation program. Mother continues to use alcohol socially.

Mother recently started working. Her hours are 9 a.m. to 5 p.m. Mother has moved to suitable housing one hour from Aunt and Uncle's residence, in the next county. Mother's residence is one and one half hours from Father's residence. Daughter would have to change schools in the event she lived with Mother.

Mother comes to you, a Maryland attorney, and she wants to file a Complaint to Modify Custody requesting that she be awarded primary residential custody of Daughter.

Father, Aunt and Uncle want to keep the current custody arrangement.

Assuming, on behalf of Mother, you initiate the proper proceeding in the appropriate Circuit Court:

a. What finding will the court have to make to warrant change in residential custody? Discuss fully.

b. What factors will the court consider in determining whether to modify the current custody arrangement? Discuss fully.

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REPRESENTATIVE ANSWER 1

Part A

In a custody issues modifications hearings may be had whenever there is a material change in circumstances. Here, Mother (M) is requesting a modification in the custody agreement based on the fact that she has received help for her substance abuse problems, by completing a rehabilitation program. She has started working full time and is now living in “suitable housing”. A modification hearing will be held.

In custody matters the standard in MD is the best interest of the child when any changes in custody are brought before the court. Here the court will have to find that changing the current living situation of the child, with aunt and uncle, to living fully with the mother, and an hour and a half away from father, is in the best interest of the child.

Part B

The court will have to weigh all of the factors concerning the child’s current living situation against her interests if she were to move far away; the best interest of the child is the only standard.

The Court will look to the May 2008 agreement stating that both biological parents are “fit and proper parents” in favor of Mother. But the court will also weigh that Daughter is doing “reasonably well in school” and has no “health issues” living with Aunt and Uncle. The Court will also look to the current custody arrangement, which both parents agreed to, in which Father receives visitation with Daughter every other weekend due to his hectic work schedule. The Court will have to weigh the “one and one half hour” travel distance of the Mother’s house from Father in determining if that would bear negatively on Daughter and will it result in Daughter no longer being able to visit with Father. The Court will also look to whether changing schools is in the best interest of Daughter. The Court will also factor in Mother’s sobriety and her continued social use of alcohol and whether that would affect negatively on Daughter. As equally important, the Court will have to weigh whether changing the custody arrangements at all will negatively affect Daughter.

REPRESENTATIVE ANSWER 2

Based on the facts the courts would have to find that there has been a material change in circumstances to warrant a change in residential custody. Although there has been a separation agreement that includes terms of the residential custody agreement by Mother and Father for Daughter, custody is determined by the Court. The Court uses a standard called the best interest of the child to determine residential custody decisions. In the present case, since residential custody has already been determined, the parties are seeking to modify existing custody arrangement. To modify, the Court has to find that there has been a material change in circumstances, and then the Court will have to find that a change in residential custody will be in the best interest of the child. Here the Court will find that Mother’s completion of a drug rehabilitation program and the fact that Mother is working and has suitable housing is a material

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change in circumstance. However, whether a change in residential custody is the best interest of the child would have to be determined next.

The Court considers factors in determining whether to modify current custody arrangement. The factors are: Is there a relationship between Daughter and Mother? How long has Daughter lived with Mother? Whether Daughter would like to live with Mother? Whether Mother can sustain her new life style off of drugs? Whether Mother has been able to comply with her visitation schedule? What effect the change in residential custody would have on Daughter? Whether Father, who has joint legal custody of Daughter, supports the transition? What effect it would have on Daughter's education and well being? And whether Mother can afford to financially support Daughter and herself? Based on these factors, the Court will find that in the current residential custody Daughter is doing reasonably well in school and has no health issues and that she has no complaints about the care provided by Aunt and Uncle. The Court will also find that if the residential custody is granted, Daughter would have to change schools. Here it is unclear how old Daughter is and what effect it would have on her. The Court would find that Daughter lived with her parents from when she was born in 2000 until 2008 when she was given to Aunt and Uncle because Mother and Father were unfit parents. The Court would also have to determine whether Daughter being an hour away from Aunt and Uncle and an hour and a half away from Father would be in Daughter's best interest.