Maryland State Board of Law Examiners

JULY 2015 MARYLAND GENERAL BAR EXAM – REPRESENTATIVE GOOD ANSWERS FOR THE BOARD'S WRITTEN TEST

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MARYLAND ESSAY QUESTION NO. 1

Representative Good Answer No. 1

For the reasons discussed in more detail below, I would advise Triple A that it is may be entitled to access over Carol's property, but will likely not be entitled access over Bart's or Donna's parcels. I would also advise that further development of facts is needed to provide a confident conclusion.

A. Triple A Timber is entitled to access

The question here is whether Triple A has some sort of easement over the property of Carol, Bart, or Donna. There are three ways to create an easement: (1) expressly; (2) by implication; or (3) by prescription. An express easement requires a signed writing. There is no evidence of such a writing here, so that is not an option. There are two types of implied easements: prior use easements and easements by necessity. A prior use easement requires that (1) there was common ownership of two or more parcels and the common parcel was severed; (2) that there was prior use of one of the parcels by the other; and (3) that it is reasonably necessary for that use to continue. An easement by necessity is formed when (1) there was common ownership of two or more parcels and the common parcel was severed and (2) there is strict necessity for one parcel to use the other (typically a case where one is landlocked). An easement by necessity terminates when the necessity ends.

Here, there was common ownership of the parcels now owned by Triple A, Bart, and Carol in 1918. This common ownership was severed for the sale to Bart's uncle and the sale to Carol's mother. This fulfills the first prong for implied easements of prior use and necessity. However, Triple A will likely not be able to establish an easement by prior use since there is no evidence that there was prior use of Bart or Carol's plots at the time of severance--indeed, none of the parties are aware of prior roadways across either Bart's property or Carol's property.

However, Triple A's best argument for access is that it has an implied easement by necessity. At the time of the sale to Bart's uncle, no easement by necessity arose because Jones still held Carol's plot and could access the public road through that parcel. However, at the time of the sale to Carol's mother, the plot that remained in Jones's hands was landlocked. Thus, Triple A has a strong argument that an easement by necessity was formed at the time of the sale to Carol's mother. The only problem with this claim is that there may not have been "strict necessity" at the time of the sale to Carol's mother. The facts note that there was some evidence of "access" from Triple A's parcel to the road over Donna's parcel, from when the land was being operated in the 1930s and 1940s. Thus, if Bart and Carol can prove that Triple A's successor in interest had access to Donna's parcel after both Carol and Bart's plots were sold off, they can show that strict necessity ended. But we would need more facts to determine exactly the nature of this "access" over Donna's land to be sure.

Thus, the facts indicate that Triple A has a strong claim for an easement by necessity, but further inquiry is needed to determine whether strict necessity ended when Triple A's successor in interest had access to Donna's land.

B. Bart's Alternative Claims

1. Access over Donna's property

Triple A can't have access to Donna's property by an implied easement by necessity or prior use because there was no common ownership of Donna and Triple A's property. There is also no evidence of an express easement. Thus, to be entitled to access Donna's property, Triple A would have to prove an easement by prescription or estoppel. An easement by prescription would be established if the successor in interest to Triple A's land used Donna's land openly, notoriously, and continuously for 20 years in a way that was hostile to her interests (i.e., without her permission). An easement by estoppel would be formed if Donna gave the successor in interest permission to use the land and the successor in interest reasonably relied on that permission to his detriment.

There isn't enough evidence to confidently state that Triple A is entitled to access over Donna's land. We don't have evidence of any permission by Donna or any detrimental reliance. It is possible that an easement by prescription formed when the successor in interest was using the land during the timbering in the 1930s and the gardening in the 1940s, but we would need to know whether Donna gave permission and whether this use was continuous.

Thus, Triple A likely isn't entitled to access over Donna's land.

2. Access over Carol's property.

For the reasons discussed above, Triple A's best argument is that it is entitled to access to Carol's property by an easement by necessity. However, if the necessity ended by having access to Donna's parcel, it can't be restarted now just because the necessity arose again. Thus, it will be key for Triple A to prove that the strict necessity to use Carol's property never ended.

Representative Good Answer No. 2

1. Triple can argue that it is entitled to access to the public road because it had an easement by necessity. An easement is a nonpossessory property interest in land. An easement appurtenant is a type of easement that involves a dominant and servient landowner. One way an easement can be created is expressly by granting the easement in the deed. Another way in which an easement can be created is by necessity. This occurs when one landowner is landlocked and the only way the landowner can make reasonable use of his or her land is through another person's land. Frequently his occurs when a landowner sells parcels of the land and once divided certain parcels become landlocked. The landlocked landowner is then entitled to a easement to pass through the other parcels of land to get to the roadway. Easements run with the land, so even when the parcels are sold to new owners, the servient landowners is still burdened by the easement and the dominant landowner is still benefitted by the easement.

Here, Triple A, Bart, and Carol all own land that was once part of a single tract. There is no mention of the easement in the deeds in the chain of title for any of the properties, so the easement was not created by deed. However, when Jones sold parcels of the tract, thereby making himself landlocked, he was granted an easement by necessity. Although the parcels of land have passed to new owners, the easement runs with the land and the parties are still bound by the easement.

2.a. Bart argues that access should be over Donna's land. Easement by necessity requires that both parcels of land were originally part of one tract. However, here there is no evidence that the original tract of land included Donna's land. Therefore, Triple A Timber can argue that there is no easement created over Donna's land.

2.b. Bart has a good argument for easement granted access over the parcel belonging to Carol. The easement by necessity is created when the original owner became landlocked. Jones first conveyed the parcel to Bart's Uncle on May 1 1920. When the parcel was conveyed, Jones still had access over the part of the property that is now Carol's parcel. Jones did not become landlocked until he sold Carol's parcel in 1925. Therefore, the easement by necessity was created when he sold that piece of land and Donna's parcel became the servient land and the easement was between Jones and Carol. The easement runs with the land and so now binds Triple A and Carol.

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MARYLAND ESSAY QUESTION NO. 2

Representative Good Answer No. 1

a. Negligence is unreasonable conduct under the circumstances. Here, David was negligent when he ran the red light, struck Abel's car, and ultimately caused Abel's death.

Negligence per se is not recognized as a separate claim under MD law, but violation of a statute is considered evidence of negligence. Here, David's running a red light is evidence of negligence.

A survival action can be brought on a decedent's behalf by his estate. Here, Abel's estate can sue David for negligence that caused Abel's death. The estate can seek economic damages for damage done to Abel's car, his medical bills, and any lost wages. The estate can also seek non-economic damages (subject to a statutory cap) for Abel's pain and suffering as evidenced by him "groaning continuously" in the hospital for eight days before he died. The estate could also seek punitive damages, but those are unlikely to be awarded absent intentional conduct by David, which is not suggested here.

A wrongful death action can be brought by a decedent's spouse, parents, and children by statute in MD. Here, Paula, Bill, and Carla can bring a wrongful death action against David for death of Abel. All can seek economic damages for loss of David's wages ($100,000 annual salary), and non-economic damages for their pain and suffering. Additionally, Paula can seek damages for loss of consortium as a result of Abel's death.

b. Advertising. An attorney's advertising must be truthful. Here. Larry's advertisement stating "Practice limited to Decedent's Estates" does not violate any rules of professional conduct.

Specialization. It is a violation for an attorney to tell a potential client that he "specializes" in a particular field of law. Here, Larry violated this rule when he stated he "specializes" in estate administration.

Mentorship and Duty of Competence. A newly minted attorney is allowed to take on cases in an unfamiliar area of law, provided that he obtains a competent mentor, is competent to handle the case, and also obtains the clients consent confirmed in writing regarding the mentor relationship. Here, Larry obtain Paula's oral consent, but did not appear to obtain her consent in writing. Any fee-sharing between Marvin and Larry would also need to be confirmed in writing by Paula.

Furthermore, although Marvin assured Larry that he was "highly experienced" in personal injury law, Larry had a duty to perform due diligence to investigate and confirm whether or not Marvin's statements were true. Larry failed to do so, and did not discover that Marvin's entire legal experience consisted of only being an assistant State's Attorney in the Child Support Division, which is unrelated to personal injury law.

Larry also failed to perform his duty of competence, when he did not investigate and correct Marvin's claim that the statute of limitations is 12 years in MD, which is untrue.

Conflict of Interest. Here, Larry agreed to both to administer the estate and represent Larry's family/estate in the personal injury suit for the accident. There does not appear to be a conflict of interest as the interests of the

estate and the family are related, but nevertheless, Larry should get each family's members consent confirmed in writing.

Duty of diligence/competence. A lawyer must be competent in his efforts and communicate with his client promptly of the status of the case. Here, Larry's efforts for four years consisted of "inactivity and numerous unreturned phone calls." He violated these duties, and may also be liable for malpractice if the statute of limitations has run for the personal injury suit.

Representative Good Answer No. 2

A - Claims against David

1) Survival action

There are several causes of action which Paula and Carla may bring against David. Paula, in her capacity as Personal Representative of Abel's estate, would be entitled to bring a survival action against David. A survival action allows a decedent's estate to recover any claim which the decedent would be entitled to recover were the decedent still alive.

Specifically, Abel's estate could bring a negligence claim against Abel. Negligence exists where the defendant owes a duty to the plaintiff, the defendant breaches that duty, the defendant's breach is both the cause in fact and proximate cause of the injury to the plaintiff, and the plaintiff suffers damages. Here, David owed a duty to Abel as a fellow driver on the road. David owed a duty to follow traffic laws and exercise ordinary care in the operation of his vehicle. He did not do so, because he ran a red light and ran into Abel. He has therefore breached his duty of care. The breach of that care caused Abel's injuries, as the accident is what injured him. This is the cause in fact. Proximate cause deals with whether the type of harm suffered by the plaintiff would have been foreseeable to the defendant. Certainly it would have been foreseeable to David that he could hurt someone if he did not drive carefully and follow the law. Thus, proximate cause exists. The damages here are obvious as well: Abel died, apparently in great agony. Abel's estate may be able to recover damages related to Abel's pain and suffering, as well as his medical expenses, lost wages, and any other relevant damages. Punitive damages (intended to punish the defendant are unlikely, as they are usually reserved for the most egregious cases and this is a relatively simple car accident.

Maryland also requires that in order to prevail on a claim of negligence, the plaintiff must not have contributed in any way to his/her own harm. This is called contributory negligence, which is an absolute bar to recovery in Maryland. However, the facts state that Abel was "proceeding lawfully," and there is nothing to suggest negligence on his part.

Note that Abel's estate would need to establish each element by the preponderance of the evidence. The concept of negligence per se arises when a defendant has violated some statute which is intended to apply to the defendant in order to prevent the sort of harm that the plaintiff suffered. These elements exist here, as David ran a red light which caused injury/death to Abel. Traffic laws exist to prevent auto accidents. However, negligence per se is only evidence of negligence, not negligence itself, so Abel's estate still needs to establish each element of the negligence claim.

The statute of limitations on this claim began to run the day of the accident. Therefore, Paula has three years from that date to assert this claim.

2) Causes of action against David - wrongful death

In her individual capacity, Paula may bring an action against David for wrongful death. A wrongful death claim may be brought by a spouse or child when the defendant has acted in some legally wrongful way (such as negligently) to bring about the victim's death. Importantly, the claim for wrongful death arises out of the plaintiff's relationship to the victim. The plaintiff must suffer damages as a result of the victim's death due to that relationship.

As established, David wrongfully (negligently) caused Abel's death. Paula, as Abel's wife, has a special relationship to Abel. Paula would have a claim for loss of consortium. David's negligence deprived her of the support and affection of her husband, as well as any sort of marital relations and his lost wages. She would therefore be able to bring a wrongful death action against David. The statute of limitations began to run on the date of Abel's death, so she should bring her claim within three years of that date.

Carla would also be able to bring an action for wrongful death against David. As David's child, she has lost the support of her father. She is still a minor, so she would have been entitled to support from him until she is 18. This is important because it explains why her 22-year-old brother Bill would not have a claim for wrongful death against David. Bill is over the age of majority, so he would not be entitled to support from Abel. While both of them possibly had a meaningful relationship with their father, only Carla may bring a wrongful death action as her damages have a stronger basis in law.

Because Carla is a minor, she would need to bring her claim through her representative (which would be her mother, Paula). The statute of limitations normally tolls when an individual is under a legal disability such as minority. However, all wrongful death claims should be brought at the same time. Paula's wrongful death claim would expire three years after Abel's death because of the statute of limitations, and Carla would still be a minor then because she is 14. Therefore, her claim should be brought now, along with Paula's claim.

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MARYLAND ESSAY NO. 3

Representative Good Answer No. 1

A) Overrule.

Ordinarily, hearsay evidence is inadmissible in Maryland. Hearsay is an out-of-court statement offered for the truth of the matter asserted. Here, Lori is offering the out-of-court statements contained in these records so that she can rely on the truth of what they assert - namely, who owns title to the disputed parcel.

There is an exception to the ban on hearsay, however, for public records. Both the regional planning and zoning authority and the agency that maintains Land Records of Montgomery are government agencies that maintain land records for public inspection. If these records are duly certified, the court should admit these records as public records.

B) Overrule.

As above, these documents would ordinarily be considered hearsay and be inadmissible as such, because Lori seeks to introduce their out-of-court statements for the truth of the matter they assert - that is, the deaths and marriages of previous heirs to the property. Again, however, these documents can come in under exceptions to the rule against hearsay.

The State Department of Health records are public records, because they are maintained by a state agent and are freely reviewable by the public. The death records can therefore be admitted as hearsay within the public records exception.

The church records fall into the hearsay exception for church records of family history, because they pertain to marriage. The marriage records can therefore be admitted as hearsay within the church records exception.

C) Overrule.

The Land Patents are also hearsay, because they contain statements that were made out-of-court, and are now being admitted for the truth of the matter they assert, that being the ownership of certain land. For that reason, they would be ordinarily be inadmissible.

These Patents can nevertheless be admitted as ancient documents. When a document is over 20 years old, it is an ancient record that can be admitted as evidence, even though it contains hearsay. Since these documents are from the time of the independence of the United States, they are well over 20 years old, and thus can come be admitted as hearsay within the ancient documents exception.

D) Overrule.

Testimony from neighbors about other people's understandings of ownership in property is hearsay, because it contains out-of-court statements (from those other people in the community) and is being offered for the truth of the matter asserted, that is, the true ownership interests in the property.

The court should nevertheless admit this testimony, because it falls within the hearsay exception for community opinion of land boundaries.

E) Overrule.

This statement would ordinarily be hearsay, because people's statements about the reputation of someone in the community would ordinarily be hearsay, as they are out-of-court statements offered for the truth of the matter they assert. These statements can nonetheless be admitted under the hearsay exception for testimony about reputation in the community.

This statement might also be subject to challenge as character evidence. Character evidence is inadmissible in a civil case to prove propensity to act in conformity with that trait. Evidence of a character for untruthfulness is admissible, however, to impeach a witness. Since this testimony impeaches the truthfulness of a testifying witness, it is admissible.

F) Sustain.

If a statement contains hearsay within hearsay, each instance of hearsay must come wihin an exception to the rule against hearsay. In this case, whether each statement contains hearsay depends on why each statement is being offered.

The first possible instance of hearsay is the neighbors' repetition of the individual's out-of-court statement, if the neighbors were offering this statement for the truth of the matter the individual asserted. It seems that the neighbors were attesting to the truth of his statements, based on these facts (it is unclear why else they would repeat them or why their repetition would be offered here). If instead the neighbors were offering the individual's statements for their falsity, then the neighbor's repetition would not be hearsay.

The second possible instance of hearsay is, at trial, the community member's repetition of the neighbors' out-of-court statements for the truth of the matter asserted, which seems to be merely that the individual made certain statements, or perhaps that he lied to them. Since the community member is offering these statements to prove that what the neighbors asserted was true, this is certainly hearsay, and makes the testimony inadmissible hearsay.

Representative Good Answer No. 2

PART A: Objection Overruled and Evidence Admitted

Relevance evidence is relevant if it has any tendency to make a fact more or less probable than it would be without that evidence and the fact is of consequence in determining the action. Here, the proffered evidence is relevant.

Hearsay is an out of court statement offered for the truth of the matter asserted in that statement and is generally inadmissible unless an exception applies. Here, the proffered evidence is hearsay.

Under the Public Record Exception hearsay evidence may be admitted if is a matter of public record keep by the government. . Here, the regional planning and zoning authority records and the recordation of the subdivision are likely public records within the exception.

Authentication. Evidence may be admitted with evidence that they are what they purport to be. Here, the evidence is likely to be self-authenticating.

PART B: Objection Overruled and Evidence Admitted

Relevance evidence is relevant if it has any tendency to make a fact more or less probable than it would be without that evidence and the fact is of consequence in determining the action. Here, the proffered evidence is relevant to the ownership of the property.

Hearsay (see Above. Here, the death and marriage records are hearsay.

Certificates of Vital Statistics are admissible under the vital statistics exception. Here, the death record are vital statistics.

Certificates of Birth, Marriage are admissible if from a church or certifying board. Here, the church records of the marriage records would be admissible.

Authentication. See above

PART C: Objection Overruled and Evidence Admitted

Relevance evidence is relevant if it has any tendency to make a fact more or less probable than it would be without that evidence and the fact is of consequence in determining the action. Here, land patents may be relevant depending on the nature of the dispute.

Hearsay. See Above. Here, the land patents are hearsay.

Ancient Records exception will allow hearsay evidence for ancient documents with a sufficient indicia of reliability. Here the land patents from the Independence of the US may qualify as ancient records.

Best Evidence Rule (Requirement for an Original Writing). Under the Best evidence rule an original of a document may be required if a person wishes to admit the document, however, when the original is not available a copy will suffice as the original. Here, the copy of the land patents should be accepted by the court.

PART D: Objection Overruled and Evidence Admitted

Relevance. See above.

Witnesses are presumed competent and Testimony from a lay witness must be based on personal knowledge Here, the neighbors must have personal knowledge of the common local understanding.

Opinion testimony by a lay witness is allowed as long as it is an area of general understanding that does not require specialized knowledge and it is helpful to the jury. Here, the neighbors who may face similar ownership interests may have sufficient knowledge and this may not be a specialized area.

PART E: Objection Overruled and Evidence Admitted

Relevance. See Above. Here the witness' character for truthfulness is relevant.

Character evidence is generally inadmissible to show conformity but may be admissible to impeach the witness's character for truthfulness after the witness testifies. During direct examination this evidence is admissible by opinion or reputation only. Here, the proffered testimony is testimony that one of the witness's has a reputation for being unreliable and untruthful. As this goes to the reliability and truthfulness of the witness, the evidence should be admitted.

PART F: Objection Sustained and Evidence should be evaluated statement by statement and Excluded or admitted in accordance with the rules.

Relevance. see above. Statements may not be relevant depending.

Hearsay with hearsay can only be admitted when both instances of hearsay is admissible. Here, while some of the statements may be offered for its impeachment value, others of the statements may be hearsay not within an exception. Therefore the evidence should be evaluated statement by statement and Excluded or admitted in accordance with the rules.

It should also evaluated for cumulativeness and prejudice

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MARYLAND ESSAY QUESTION NO. 4

Representative Good Answer No. 1

Although a conflict may arise when representing two persons, there does not seem to be an issue in representing Tom (T) and Susan (S), although their informed written consent to the representation would be an appropriate precautionary step.

Prince George's County Circuit Court will have jurisdiction over this matter.

A parent's fundamental right to the care custody and control of his or her child is protected by a presumption that the parent is fit to care for the child. Another parent is due reasonable visitation for their children unless there are reasonable grounds to believe that the parent has abused or neglect the child. However, for third party custody or visitation, the third party must prove, by clear and convincing evidence, that the parent is either unfit to care for the child, or that there are exceptional circumstances that would give rise to granting custody or visitation to the third party. Here, although Whitney (W) has not adopted to the children, George (G) will still be presumed to be fit to care for both Alan (A) and Fern (F). The children did spend the weekend at T and S' house once a month, S would send presents to the children for birthdays and holidays, she would try to call them regularly, and S would babysit A and F every Monday afternoon until G refused to let the children see S and T anymore; however, this will not be enough to show that G is unfit to raise the children.

This presumption will be difficult to rebut because A and F's preschool teachers told S that G was doing a very good job parenting the children, evidence of fitness as a parent. Although W has not adopted A and F, this will not work to divulge G of sole legal and physical custody.

In regard to custody and visitation of A, A's teacher told S that he never talks about his grandparents and does not seem to remember Debra (D). S and T may assert that remembering one's mother is an exceptional circumstance, however it has been held that once a child has forgotten a parent or blocked out a difficult memory, it would be more detrimental to the child to bring back up that difficult memory or experience back up. Reestablishing a connection with D through interaction with T and S will not be enough to show exceptional circumstances in order to rebut the presumption of G's fitness.

In regard to custody and visitation of F, F's teacher told S that F talks about S on occasion. In fact, F cried recently when the school had grandparents' day and told his teacher that he was sad because S was not there. This close attachment to S may be evidence to show an exceptional circumstance. If that is the case, the court will hold a hearing and consider the best interest of the child in granting custody and visitation. These factors would include aspects about the children, such as attachment to grandparents, lack of memory of grandparents, and other similar considerations. A court would also consider aspects of the parents, such as their ability to care for their children. However a court would not likely reach this analysis because there is not enough to rebut the presumption of fitness.

Ultimately, S and T will not be able to force G to grant visitation of A and F to S and T. I would advise that S and T to try and speak with G to come to some sort of terms that would allow S and T to visit with A and F, but there is no way to compel G to comply.

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Representative Good Answer No. 2

As an attorney, I would advise Tom and Susan that it is a very difficult burden to overcome when seeking third-party visitation rights, but that, given the circumstances, it's possible that a judge will allow third-party visitation. When determining third-party rights, there is a constitutional presumption that custody belongs with the biological parents and that it is in the best interest of the child. In order to rebut this presumption, a third-party must pass a two-part test in Maryland. First, the third-party must show that the biological parent is unfit and/or that there is an exceptional circumstance that warrants the third-party's rights. Only if the first part of the test is met can the court then look to the best interest of the child standard to make a determination. Here, Tom and Susan are not seeking custody of Fern and Alan, they are simply seeking visitation. Still, the standard must be met when awarding any rights to a third-party over the objection of a biological parent.

Unfit Parent and/or Exceptional Circumstances

For a court to even consider awarding any visitation rights to a third-party, the party must show either that the biological parent is unfit or that there are exceptional circumstances. Exceptional circumstances can include one parent moving out of state, or a parent dying. In this case, it does not seem likely that Tom and Susan will be able to meet the burden to show that George is an unfit parent. First, the preschool teachers said that he was doing a good job parenting the children. This is not enough to rebut the presumption of fitness. The only option would be for Tom and Susan to show that exceptional circumstances exist. In the given situation, it is likely that they could meet this part of the test with the death of Debra. The death of a parent can be considered an exceptional circumstance. While not dispositive, it is likely enough to rebut the presumption and move to the second part of the test.

Best Interest of the Child(ren)

If the first part of the test is met, in this case through evidence of an exceptional circumstance such as Debra's death, only then may the court look at the best interest of the child standard. There are a variety of factors that the court can look to in making this determination, although the list is not all-inclusive. The court should look at things such as the role the third-party has played in the children's lives until this point; Did they assume parenting-like responsibilities?; Did the children have an emotional bond or connection with the third-party that would be harmed by not seeing the third-party; and did the third-party provide any financial support to the children during their lives. Again, the court has discretion to consider additional factors, if it is in the best interest of the child. There is evidence in Tom and Susan's favor that could support a court's finding that visitation is in the best interest of the children. First, prior to Debra's death, they saw the children frequently. Additionally, Susan babysat both children every afternoon. That means she watched Fern every Monday for three years and Alan every Monday for one year. On each of the Mondays that she watched Fern, Susan also picked Fern up from preschool. She had a good relationship with her teachers. Moreover, the children would spend the weekend at Tom and Susan's home at least once a month. All of these factors are supportive of Tom and Susan playing a significant role in the lives of the children up until their mother's death. In addition, it is evidence that they performed some of the traditional parenting roles, and created emotional bonds with the children such that it would be a detriment to the children to withhold contact. Furthermore, they continued to send birthday presents and call the children over the past year, which shows they are willing to provide financial support to the children and truly do want to continue their relationships with their grandchildren.

Working against Susan and Tom is that Alan's teacher told Susan that he never talks about his grandparents and doesn't seem to remember his mother. Moreover, they didn't spend as much time in Alan's life as they did in Fern's, because he was only 1 year old when his mother died. The fact that Fern cried on grandparents' day and said she was sad because she missed her Grandma Susan is helpful to Tom and Susan. It provides more evidence of the special emotional bond that has been created between Fern and her grandparents. Although there is no direct or circumstantial evidence that Alan created a bond with his grandparents, it is nonetheless in his best interests to maintain relationships with his biological grandparents as he grows older. It is not clear what kind of relationship Whitney has with the children, but she has not adopted them yet (it has been a year), so it is unclear if she ever intends to do so.

Since Tom and Susan are only looking visitation and not custody, it seems likely that the court would allow for third-party visitation under these circumstances. First, there is an exceptional circumstance, in that the children's biological mother has died, and these are the only grandchildren of Tom and Susan. And second, it is in the best interest of the children. It is important for children to maintain relationships with their grandparents, especially when a parent dies. There is no evidence that the children's lives would be upended in any way by allowing visitation. Presumably, the grandparents live nearby, since they used to pick Fern up from school every week.

I would advise Tom and Susan that we should move forward with securing visitation with the children.

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MARYLAND ESSAY QUESTION NO. 5

Representative Good Answer No. 1

Alpha Corp

Alpha can argue that Kappa Corp. breached the express terms of contract. Here there was a clear contract, and the terms indicated that "shipments are deemed accepted unless notice to the contrary is provided within 10 days of delivery," and that "payment was due within one month of delivery." In this instance Kappa Corp received the goods and had reasonable opportunity and time to inspect the goods prior to acceptance. The mere fact that Kappa Corp. did in fact only open one of the 20 boxes would be irrelevant under the contractual terms between Alpha and Kappa. Based on the language Alpha Corp. can take the position that return a month after did not constitute proper rejection under their contract and refusal to pay the price was a breach of that contract.

In addition to the express contractual terms between Kappa Corp. and Alpha Corp. Section §2-606 of the UCC states that acceptance of goods occurs when the buyer after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of nonconformity. Additionally, acceptance of a part of any commercial unit is acceptance of that entire unit. Here, Alpha Corp will claim they produced 200 widgets in accordance with the contract. Upon delivery Kappa Corp's shipment supervisor visually inspected one box and signed off the shipment for the entire delivery. By not notifying Alpha Corp within the time laid out in the contract, ten days, there was an acceptance of the entire commercial shipment under UCC §2-606.

Section 2-607 of the UCC establishes that acceptance of goods by buyer preclude rejection of the goods accepted and a buyer is required to pay the contract rate for any goods accepted. Here, Alpha will claim that by not notifying within the contractually obligated ten day window, there was an effective acceptance and therefore a corresponding liability to pay the contract price. The subsequent rejection and revocation of the acceptance may subject Kappa to liability.

Under UCC §2-703 if Kappa wrongfully revokes acceptance, Alpha would be entitled to recover damages for no acceptance under §2-708 and in some instances recover the price under 2-709

Kappa Corp.

Kappa Corp. will take the position that they are not liable to Alpha Corp. for the price of the widgets and instead claim they are entitled to damages for the defective goods. Although, they did not follow the procedure within the contacts of notification of rejection within 10 days, because the defect was internal and was a result of a significant deviation from industry standards, they will likely argue that rightfully revoked acceptance. Although under UCC 2-607 acceptance cannot be revoked if acceptance was made with knowledge of a nonconformity, here acceptance does not itself preclude Kappa from seeking another remedy provided for under the U.C.C for the nonconformity. Because, the defect could not have been discovered even with an inspection, Kappa can take the position that acceptance was not made knowingly with the defect.

Under §2-608 of the UCC the buyer may revoke his acceptance of a lot or commercial unit whose nonconformity substantially impairs its value if he has accepted it. This is true in situations where acceptance

was made due to the difficulty of discovery before acceptance of the defect. Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for revocation and before any substantial change in condition of the goods not caused by defects. Here, again the defect was hidden and the defect posed a significant safety risk clearly impairing the value of the good. Kappa will take the position this defect was proper grounds for revocation and since it was made within 30 days it was within a reasonable time.

Section 2-711 governs remedies for buyers and here it states that when a buyer properly revokes acceptance the buyer may cancel or in addition recover so much of the price as has been paid. Since nothing has been paid at this current time Kappa could not recover anything that he paid. However, Kappa will likely argue that they will be entitled to cover costs to purchase replacements.

Representative Good Answer No. 2

Alpha Corp. is likely not entitled to payment for the shipped widgets under the contract with Kappa Corp. However, Alpha Corp. can argue in good faith that it is entitled to payment.

The issue here is whether Kappa Corp. accepted the widgets, and whether Kappa Corp. validly rejected the goods, or revoked the acceptance of the widgets.

Alpha Corp. may argue that Kappa Corp. accepted the widgets when they received the widgets and did not notify Alpha Corp. within 10 days that they were not accepting the widgets, as required by the contract. In addition, Alpha Corp. will argue that under UCC §§ 2-606(1)(b), (2), Kappa Corp. accepted the goods when it failed to make an effective rejection after Kappa Corp. had a reasonable opportunity to inspect the widgets, and did inspect one box of widgets. Alpha Corp. will argue that based on Kappa Corp's acceptance of the widgets, it is now required to pay the contract rate for the goods accepted (UCC § 2-607(1)). Alpha Corp. will also argue that Kappa Corp. did not notify Alpha Corp. within a reasonable time after discovery of the defect, and therefore Kappa Corp. is barred from any remedy (UCC §2-607). Finally, Alpha Corp. will argue that Kappa Corp. did not notify Alpha Corp. of a revocation of acceptance in reasonable time, and therefore is barred from revoking acceptance. For these reasons, Alpha Corp. will argue that it is entitled to payment for the shipped widgets under the contract.

Kappa Corp. will argue that its notification to Alpha Corp. that the widgets were defective and dangerous was timely, and constitutes a rejection of the goods. Kappa notified Alpha Corp. one month after delivery that the widgets were defective. Kappa will argue that this notification satisfies UCC §2-607(3)(a) because he notified Alpha in a reasonable time after discovery of the breach that Kappa Corp. is rejecting the goods. In addition, Kappa Corp. will argue that even if the rejection was insufficient, the notification of defective widgets constitutes a valid revocation of acceptance. Under UCC § 2-608(1)(b) , a buyer may revoke his acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to him if he has accepted it, and the acceptance was reasonably induced by the difficulty of discovery before acceptance. Here, the widgets had an internal defect that caused them to unexpectedly stop working. This defect is difficult to discovery, and likely would not be discovered until the widgets were placed into the stream of commerce and consumers began to use them. Here, Kappa Corp. placed the widgets for sale and within one month had discovered the defect. It is likely that a court would find the revocation by Kappa Corp. one month after the widgets had been delivered to be a reasonable time, and a valid revocation.

Finally, Kappa Corp. will argue that under UCC § 2-711, it is entitled to cancel the contract and cover for the breach. Kappa will be entitled to recover the difference in the contract price with Alpha Corp. and the cover price.

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MARYLAND ESSAY QUESTION NO. 6

Representative Good Answer No. 1

I would advise David (D) of the following civil actions that he could bring against Linda (L)

Defamation: Defamation is the publication of facts to a third party which are either knowingly false or made with a reckless disregard for their truth with cause damages. Any statements which are defamatory per se presume damages.

Here, the statement "My dad is a jerk. He doesn't love me and he abuses me. That's why I prefer my mom. If you see my Dad, tell him he's a no-account deadbeat" and the second "similar statement" are defamatory. It was published as libel because it was written over the internet on L's Facebook page in a permanent form where third parties could see if. Also, this statement was asserted as a fact. Further, as D is a private figure, he must only prove negligence in making the statement. Here, there is no reason why L would make the statement other than to defame D and there is no evidence L had any basis in fact for making the statement.

Finally, these statements are defamatory per se as they speak of criminal conduct, child abuse, and therefore, damages are presumed.

False light: false light is making statements regarding another, regardless of their truth, with either knowledge or reckless disregard for the light which it would place the other person in. Here, L in making these statements on her Facebook page, regardless of whether these statements are true, L placed D in a false light to all those who viewed the page.

Publication of Private facts- publication of private facts is where one makes a public statement regarding facts about a person's life, regardless of their truth, which are objectively offensive and of no public concern. Here, a reasonable person would be offended by accusations of child abuse and neglect and further, these accusations are not of public concern as there is no evidence D is a public figure or that the public would be concerned with D's actions.

Intentional infliction of emotional distress (IIED): IIED is intentional or reckless conduct that is extreme or outrageous which causes emotional distress. Here, through 2 Facebook posts which claim D was a bad father and abused his child, L acted in a reckless manner. Further, making such unsubstantiated claims over a social media platform is extreme and outrageous. Finally, this conduct caused damages. As the days without his son dragged on, D was "unable to sleep or eat properly," "sank into a serious depression and was hospitalized" and eventually "lost his job."

IIED in Maryland requires an "emotional crippling, which is an extremely high standard to meet. However, given the above facts, I feel D has a cause of action for IIED.

Negligence: Negligence is the breach of a duty which causes damages. One has a duty to act reasonably under the circumstances. Here, L acted unreasonably by keeping Matt (M) for nearly 6 months when she was permitted to have him for a weekend camping trip, posting two defamatory comments on her Facebook page

regarding D, lying to D when she assured him Matt would be returned by Monday and then refusing to respond to D's attempts to contact her regarding the whereabouts of their child.

Further, his actions led to M's disappearance, which caused all of the damages described above.

While there is no cause of action for negligent infliction of emotional distress in Maryland, any emotional damage caused by negligence may be obtained in a negligence action if IIED is unavailable.

Breach of custody arrangement: Here, upon their divorce, D was awarded custody and was likely awarded custody either by agreement or court decree. D could sue L for breaching this agreement or decree by keeping Matt for longer than she was permitted to, provided the agreement was not merged into the court's judgment.

D may also be able to bring any claims on Matt's be held against Linda as his guardian, however, it is unclear what, if any, causes of action Matt would have against L.

Representative Good Answer No. 2

Defamation

David can consider suing Linda for defamation. In Maryland, a successful defamation suit requires that the plaintiff prove (1) a defamatory statement of fact or opinion based in fact identifying the plaintiff, (2) publication of the statement, (3) damages, (4) falsity, and (5) fault.

David will likely be able to succeed in showing that the statement was defamatory. A statement is defamatory when in injures one's reputation. It must be a statement and identify the plaintiff. Here, the statement on Linda's Facebook page noting that David abuses his son is a statement of fact that would injure David's reputation. It can reasonably be understood to identify David because it was accompanied by a picture of Matt and David. The statement that David is a jerk is likely opinion and thus not defamatory.

David will establish publication. Even if David's boss is the only person to have seen Linda's post, publication only requires the statement being told to one other person than the speaker, which is clearly satisfied here. He will also have to prove that the statement was in fact made by Linda, as she claims it was a hacker, but a factfinder may be entitled to presume that Linda is the one who posted the statements based on the contentious divorce, and because another similar post appeared days later. Linda would have taken precautions against hackers if hackers had in fact made the first post, so a factfinder may reasonably find that she in fact made at least the second statement.

There are no presumed damages for slander in Maryland, so David will have to establish damages in the instant case.

There is no indication here that David abuses his son, but David will have to prove falsity.

With respect to fault, because David is a private citizen and this is a private matter, he will have to prove at minimum that Linda was negligent in the post. If she in fact did not change her security to prevent hackers

from posting to her Facebook page, negligence may be found for the second post. The factfinder may also find malice if it finds she intentionally made the false statements in the first post, thus clearly surpassing the requirement of negligence to succeed in a defamation action.

False Light

David may also consider bringing a claim under violation of privacy for false light. False light requires proof of widespread publication, regarding a material falsehood that is offensive to the ordinary person. Here, a post on Facebook is likely widespread publication, but it would be important to identify whether only a few people were able to see the post before determining whether this prong is met. Assuming the statement is a falsehood, it is material because whether one abuses their child is a sensitive matter, and would similarly be offensive to any ordinary person.

Intentional Infliction of Emotional Distress

David may also sue Linda for intentional infliction of emotional distress (IIED). IIED requires that the plaintiff show the defendant acted intentionally or recklessly, exhibited extreme and outrageous conduct that goes beyond all bounds of common decency, and that the plaintiff suffered severe emotional distress. Physical manifestations need not be shown.

Here, David will attempt to show that even if Linda did not intentionally try to cause David severe damage, she at least acted recklessly when she posted that he was a jerk, did not love his son, and abused his son. This claim would be strengthened if the factfinder determines that Linda made both statements, because David contacted her after he saw the first post to tell her about it. If Linda posted a second similar post in spite of this knowledge, she will likely be found to be reckless. David may also claim that not bringing Matt back as promised and requiring a police hunt to ensue is similarly acting with recklessness toward his emotional distress.

Extreme and outrageous conduct is a rather high threshold, however David may be successful because claiming that someone abuses their child is an outrageous statement - if made knowing that it was false - and likely goes beyond all bounds of decency. Calling David a jerk likely does not meet the threshold, but posting these comments as if they were coming from David and Linda's son may make the statements more extreme and outrageous. Furthermore, not returning a child to his or her parent as promised and when legal visitation is done would also be extreme and outrageous, as it would cause someone to think their child had been kidnapped.

Finally, David will succeed in showing severe emotional distress because he was thereafter unable to sleep or eat, became depressed, was hospitalized, and lost his job. He will be able to recover for these damages.

Petition for Termination of Visitation or Supervised Visitation

Finally, I would advise David to petition for termination of Linda's visitation, or at least supervised visitation. A court may reconsider a visitation agreement if there are material changes in circumstances, and based on the best interests of the child. While David can argue that it is not in Matt's best interest to continue visitation with his mother because she seems to speak poorly of David and may speak this way to Matt, and because she did not bring Matt to David when she was legally required to do so, there is a presumption that it is

in a child's best interest to maintain contact with his or her parent, particularly if the parent is trying to improve. While there is no indication whether Linda is trying any rehabilitative measures, it may be in his best interest to maintain some form of contact with her. Thus, pursuing supervised visitation may be the best course, because a similar incident may be avoided in the future while not compromising and potentially healthy bonding time between Matt and his mother.

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MARYLAND ESSAY QUESTION NO. 7

Representative Good Answer No. 1

The recovery of heroin from Drew's vehicle was the fruit of an unlawful search in violation of the Fourth Amendment, and we should file a Motion to Suppress the evidence.

The Fourth Amendment provides for the right of the people to be secure in their person's, houses, papers, and effects against unreasonable searches and seizures. This Amendment applies to the states through the 14th Amendment. To be reasonable under the Fourth Amendment, a search of a vehicle, without a warrant, must be based on probable cause. A mere stop, on the other hand, need only be supported by reasonable suspicion, which is a lesser standard. If a search is made without probable cause or a stop conducted without reasonable suspicion, any evidence obtained as a result of those constitutional violations will be suppressed as fruits of the unlawful activity. Here, reasonable suspicion that criminal activity was afoot must have existed for the police to stop Drew's vehicle. This means that the police must be able to point to articulable facts demonstrating a reasonable suspicion that a crime was being committed by Drew. This is not as high of a standard as probable cause and the facts here may be sufficient to establish reasonable suspicion. The fact that Alex was a known drug dealer who had been arrested with heroin on him in the past and Alex got into Drew's vehicle with a briefcase, rode around the block, got out and walked away could perhaps create a suspicion in a reasonable officer's mind that something criminal was going on (e.g. a drug deal). This means that the stop may have been legal. However, probable cause is a higher standard than reasonable suspicion and it does not seem that the facts here are sufficient to warrant a search of Drew's vehicle. First of all, Alex may have been a known drug dealer, but that does not implicate Drew in any way. The police had no knowledge of who Drew was or whether he was involved with drugs or other illegal activity in any way. Next, getting into a vehicle with a briefcase and riding around the block, while slightly suspicious, does not necessarily mean it is probable that a crime is being committed. This is especially true given the fact that Alex got out of the car with the very briefcase he entered the car with. If he did not have the briefcase after a short drive it may suggest a probability that he handed it off during a drug deal and would provide probable cause to search the vehicle. Alex, however, kept the briefcase and there is no suggestion that evidence of a crime would be found in Drew's vehicle. It is, after all, not illegal for someone to carry a briefcase around and meet up with friends in a public location. When Deputy Brady asked Drew to get out of the car, he was well within his rights, as officers may ask all occupants to exit the vehicle during a traffic stop. However, Brady needed probable cause, absent consent or another exception, to search Drew's car. Probable cause must have existed at the time of the search. It does not matter that they fond heroin in a rubbermaid container just as they did with Alex in the earlier incident. Brady needed to have probable cause of a crime being committed by Drew, which he arguably did not have under these facts. Because Drew's vehicle falls within confines the Fourth Amendment and cannot be subject to a search without a warrant absent probable cause (or other exceptions such as consent, incident to arrest, etc.), if probable cause was lacking, any evidence recovered as a result of the illegal search would be excluded under the exclusionary rule as the fruit of the unlawful search. We should file a motion to suppress the evidence of the heroin, as it was only obtained as the result of an unlawful search, not based on probable cause, which violated Drew's Fourth Amendment rights as the owner of the vehicle.

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Representative Good Answer No. 2

Issue One: Legality of the Stop

An officer may stop and briefly detain a person if they have reasonable suspicion that a crime has occurred. This is commonly known as a Terry stop. Traffic stops, such as the one that occurred here, are examples of a Terry stop. The stop of Drew's vehicle was valid because Deputy Brady had reasonable suspicion that a crime had occurred. This was indicated by Drew's subsequent meeting with Alex. There is likely no basis for challenging the stop in this case.

Issue Two: Legality of the search of Drew's vehicle

In this case, there may be a basis for challenging the legality of the search that led to the seizure of the heroin. The search and seizure here was conducted by Deputy Brady, a government agent. This implicates Drew's Fourth Amendment rights against unreasonable search and seizure. The search was of Drew's vehicle, a place in which he had a reasonable expectation of privacy. The search here was seemingly conducted without a warrant. Generally, if a search is conducted of a constitutionally protected area without a warrant, the search must satisfy an exception to the general warrant requirement to be constitutional.

An officer may conduct a search of a vehicle without a warrant if consent is given to the search. Here, there is no indication that Drew gave consent to a search. Deputy Brady merely instructed Drew to get out of his vehicle and identify himself, which he did. Deputy Brady did not, however, ask Drew for his consent to search the vehicle. The consent exception to the warrant requirement would not apply.

There is also an exception to the warrant requirement for an automobile search where the officer has probable cause to believe a crime has occurred or there is evidence inside the vehicle pertaining to a crime. Probable cause may be found where the officer believes that there is a fair probability that evidence of a crime is present. Here, a challenge could be made to Deputy Brady's search of the vehicle and subsequent recovery of the heroin on the basis that he lacked probable cause. The challenge, however, would likely be unsuccessful. Here, Deputy Brady witnessed Alex, a known drug dealer, get into Drew's car and disappear. The two subsequently reappeared, with Alex still in possession of the briefcase, and Drew drove away. Based on Deputy Brady's knowledge of Alex's involvement with narcotics distribution, and the presence of a briefcase which could reasonably contain drugs, Deputy Brady had cause to believe that Alex may have distributed some of the heroin to Drew. In other words, Deputy Brady had reason to believe that there was a fair probability that there was evidence of a crime (narcotics) in Drew's vehicle. When Deputy Brady stopped Drew, he had probable cause to search Drew's vehicle believing it contained evidence of a crime, thereby justifying his search of a constitutionally protected area without a warrant. Although the search was performed without Drew's consent, Deputy Brady's search of the vehicle would likely be upheld as constitutional under the Fourth Amendment because Deputy Brady had probable cause to search the vehicle.

Issue Three: Initial steps

If there is a good faith belief that an argument can be made that the search and seizure was unconstitutional under the Fourth Amendment, a motion should be made to suppress the discovery of the heroin. Under the exclusionary rule, unconstitutionally obtained evidence may not be used against the defendant in the prosecution's case in chief. Accordingly, under the "fruit of the poisonous tree" doctrine, any evidence that is discovered as a result of an unconstitutional arrest or search ("derivative evidence") is not admissible. Here, if the search of Drew's vehicle was unconstitutional, the subsequently discovered heroin would be excluded from evidence. This would essentially defeat all charges against Drew. This would be done through a motion to suppress. As discussed, however, the chances of succeeding on the challenge to the search are slim and the subsequently discovered heroin would likely be admitted.

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MARYLAND ESSAY QUESTION NO. 8

Representative Good Answer No. 1

Bob v. Samuel

Authority

Whether Samuel is bound to the contract created by Walter depends on whether Walter had the authority to create contracts. An agent may bind a principal to a contract only if he had authority to do so. Authority may be actual or apparent; actual authority may be express or implied. Here, there was no actual authority for Walter to bind Samuel to a contract in the facts. Such authority may be given in the terms of Walter's employment contract. There is no conduct between Bob and Samuel to suggest that Samuel behaved in a way that Bob would reasonably interpret as granting Walter the authority to contract. In fact, Samuel had already rejected Bob's offer to buy the dog houses. It seems from these facts, then, that Bob was attempting to go behind Samuel's back and create a contract that Samuel did not want. Thus, there is likely no apparent authority.

Whether there is implied actual authority depends on whether Walter reasonably believed he had the authority to sell the dog houses. There is no evidence to suggest one way or the other based on Walter's responsibilities because he is merely a "part-time helper," though it is unclear what he actually helps with. If he typically sells the dog houses for Samuel, then it seems that he would be capable of forming a contract to sell sixty houses to Bob. However, it seems Walter lacked actual authority to contract with Bob. Thus, Samuel would not be liable for the contract.

Statute of Frauds

These facts create a statute of frauds issue. The Statute of Frauds is a defense to contract formation for the sale of goods for $500 or more. To satisfy the statute of frauds, the party seeking to enforce the contract must present a writing signed by the party to be charged. Here, Walter made an oral contract with Bob to sell sixty dog houses for $150 each, which totals $9,000 and therefore falls within the statute. Because neither Samuel nor Walter signed a written contract, it is barred by the statute of frauds.

Estoppel

A party can avoid the statute of frauds defense if there has been part performance, or a tender of goods, or acceptance of payment. Because none of those are present in this case, Bob cannot overcome this defense and will not succeed in his suit against Samuel.

Samuel v. Andrew

Offer and Acceptance

To constitute a valid contract, there must be an offer and acceptance for consideration. An offer can be unilateral or bilateral; if unlateral, acceptance must be in the form of performance. A bilateral contract can be accepted through performance or a promise to perform. Here, Samuel must argue that Andrew's letter on Oct. 23 constituted an offer to buy sixty dog houses for $100 each. However, the letter states merely that he intends to buy dog houses once he can secure financing. A valid offer for the sale of goods must include a quantity and a price (though a lack of price will not void the offer). An offer is revocable until accepted. Since Samuel did not

respond to this offer at any point, Samuel cannot claim that he accepted the offer. Thus, he cannot claim a valid contract existed between himself and Andrew.

Estoppel

Samuel can claim estoppel. Estoppel is available as an alternative to consideration if the defendant made a promise that he knew or should have known would reasonably induce reliance, actually did induce reliance by the plaintiff, and the plaintiff relied to his detriment. Samuel can claim that even if he did not accept Andrew's offer (or it was not a valid offer) that it was a promise to purchase 60 dog houses. Samuel then relied on that to his detriment by refusing to sell to Bob for a higher price. However, it was not reasonable for Andrew to have expected Samuel to rely on the supposed promise because he never heard anything back from Samuel after mailing his initial letter. It is not common for a merchant to refuse to sell his product because another individual has expressed an interest in buying the goods. Because Samuel's reliance on Andrew's promise was not reasonable, he cannot recover under this theory. Thus, he has no valid claim against Andrew.

Representative Good Answer No. 2

A. Bob v. Samuel

The issue is whether Bob and Samuel had a binding contract. The rule is that an agent may form a contract on behalf of the principal when they have apparent authority. Apparent authority occurs when a third party has reason to believe that the agent has the power from the principal to enter into contracts on their behalf. A contract will become binding if the agent ratifies it later on. Here, Walter was a part-time helper of Samuel's who was not given express or implied authority to enter into a contract as far as the facts demonstrate. Further, Bob first spoke with Samuel, the principal, and was previously aware that there were only 20 dog houses available for sale. When Bob went in a second time, he did not have good reason to believe that Samuel had authority to sell more than 20 dog houses, due to the principal previously telling Bob that there were only 20 for sale. Without any apparent authority to Bob, the third party, that Walter had the power to enter into a contract on behalf of Samuel, it is unlikely that a binding contract was formed. Further, Samuel did not later ratify the contract, but instead refused to sell Bob more than 20 dog houses when Bob came in 3 days later. In conclusion, Bob and Samuel did not have a binding contract, so Bob's suit will be unsuccessful.

B. Samuel v. Andrew

The issue is whether Samuel can recover under promissory estoppel. The rule is that promissory estoppel is available when there has been a clear and definite promise, reliance on that promise would be foreseeable, there was actual reliance and the party relying suffered to their detriment. Here, Andrew made a clear promise that he would purchase 60 dog houses from Samuel. It would be foreseeable that Samuel would then put those 60 dog houses aside because he only had 80 built at that time. Samuel did rely on that promise because he refused to sell the 60 houses to Bob. Samuel then suffered to his own detriment as a result of this reliance because Andrew breached the contract by purchasing dog houses elsewhere and Bob no longer need to buy the dog houses because he also got them elsewhere. As a result, Samuel did not make any sale and suffered by failing to sell any of his dog houses. This means that he could potentially recover for his detrimental reliance. In conclusion, Samuel can recover under promissory estoppel.

The next issue is whether Andrew and Samuel had a binding contract. The rule is that a contract is made by a offer, consideration and acceptance. Here, Samuel will argue that he was offering the dog houses and that Andrew's letter was acceptance and binding on the date it was mailed (according to the Mailbox Rule which states

that acceptance if effective upon dispatch of the letter). If that is the case then the two parties had a binding contract and Andrew was bound to perform by paying for the doghouses, which he failed to do and, thus, breached. In conclusion, the parties had a binding contract.

The next issue is whether Andrew can defend against breach of contract under the Statute of Frauds. The rule is that a contract for goods over $500 must be in writing. Here, the contract was for goods totaling $6,000. This means that it would be governed by the statute of frauds and a signed writing is required to enforce the contract against the breaching party. Andrew and Samuel did not have a written contract for the 60 dog houses. Andrew will argue that their contract is enforceable without a writing signed by Andrew. In conclusion, it is likely that Andrew may be able to successfully defend against the breached contract using a statute of frauds defense.

The next issue is whether Samuel can obtain damages for the breach. The rule is that expectation damages may be granted in order to put the victim party where they would have been but for the breach. Here, Samuel would have sold 60 houses for $100 each, so he would have made a $6,000 profit. It is possible that he could attempt to recover these damages from Andrew. Further, Samuel could have sold the 60 houses to Bob for $150 apiece, so he may argue that he is entitled to that lost profit. In conclusion, it is likely that Samuel may be able to obtain damages for the breach.

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MARYLAND ESSAY QUESTION NO. 9

Representative Good Answer No. 1

My arguments for CLUB would be grounded in constitutional claims. A constitutional claim requires state action and the claimant to have standing. Here, state action is present because the conduct in question is an ordinance by the Town of Nimby. CLUB is a proper plaintiff because the execution of the statute has resulted in it not being able to open a club in Nimby.

Free Speech

Under the 1st Amendment, as applied to the states through the 14 amendment, prevents the government from infringing on people's right to free speech.

Low-Level Speech: Conduct can be considered speech under the constitution. And nude dancing, while partially protected, is speech but does not enjoy full protection. It is considered low level speech. States may impose regulations on nudity and nude dancing if the regulations relate to the safety and well-being of the community. For example, a statute may impose restrictions on where the nude clubs can be located or at what time of day they can be open. Here, the statute burdens this low level speech by requiring nude clubs to submit a floor plan, a safety plan, and a parking plan to the Zoning Administrator. Although the purpose of the ordinance is justified: to further public safety, there seems to be no relation between the dangers of nude dancing and the ordinance.

Further, the requirement that the "chief of security" has to have graduated from the state of Maryland with a degree in Criminal Justice bears no relation to the purpose of the statute. Therefore, that provision should be found unconstitutional

Vagueness: A statute is unconstitutionally vague is a reasonable person will not be able to tell what conduct is permissible under the statute. Here, the businesses affected are those that offer "titillating" performances. I would argue that this does not give CLUB or anyone else sufficient notice because titillating is not defined. It does not matter that CLUB's conduct will most likely fall within the statute.

Overbroad: a statute can be unconstitutional if it limits a substantial amount of protected speech as well as unprotected speech. Here, "titillating" might encompass more than just nude dancing and therefore may encompass protected speech.

Prior Restraint: There is a heavy presumption that there is a constitutional violation when the government prohibits speech or expressive conduct before it occurs. Here, CLUB has not yet opened and is already prohibited from opening its business and could only do so from permission from the Zoning Board. Therefore, the statute might be a violation on this ground.

Due Process Violation: The Due Process Clause of the 14 Amendment states that a company or individual is afforded due process before a liberty or property interest is taken from them. Here, the CLUB abided by the requirements of the statute and submitted the fee. It went to the Zoning Admins after rejection to determine what was wrong with the plans. The admins stated that, while although they abided by the requirements of the statute,

they would not be able to open a club in Nimby based on the characteristics of their business. This was a summary dismissal of their business and thus in violation of the DPC.

Equal Protection: Based on the 14th Amendment, a state must afford equal protection to all citizens. Here, the CLUB researched the Town laws and discovered that no other businesses within Nimby were required to submit all three plans to the Zoning Administrator. This is a discriminatory practice. But because it is not discrimination based on a suspect class, it must only meet the rational basis test. Therefore, the statute must be rationally related to further a legitimate state interest. The interest here is to "further public safety and welfare of [Nimby] residents. This is a legitimate interest. However, the requirements in the statute, including the floor plans, the $5,000 fee, and the requirement are not rationally related to that interest. In other words the ordinance is not rationally related to the purpose served to justify discriminating against nude dance clubs. Therefore, it could be found unconstitutional on this ground.

As counsel for CLUB, I would seek an injunction against the ordinance and a declaratory judgment declaring the ordinance unconstitutional
.

Representative Good Answer No. 2

There are multiple grounds on which to challenge this law. This law implicates both the First Amendment's Free Speech Clause and the Fourteenth Amendment's Equal Protection Clause. Nude dancing is expressive activity given protection by the Free Speech Clause. Moreover, the local law at issue here is both likely to be found arbitrary because it treats a single type of business differently from others, implicating the Equal Protection Clause, and it is being applied in an arbitrarily discriminatory manner, again implicating the Equal Protection Clause. The last sentence of the law may also be challenged separately as arbitrary under the Equal Protection Clause.

The strongest challenge most likely to win is the Free Speech Clause challenge. The Supreme Court has extended First Amendment protection to nude dancing. However, recognizing the health and safety issues that tend to follow nude dancing establishments, the Court has permitted local zoning ordinances to be imposed that govern where such establishments may be built. Such ordinances must be unrelated to the suppression of speech. Here, the Town of Nimby's law is clearly related to the suppression of speech. No other type of business is subjected to the exacting standards and hefty fee imposed on nude dancing establishments. The standards do not even relate to the location of such clubs, instead merely heavily regulating their building and parking safety. Moreover, it was hastily enacted because the town found out that CLUB wanted to open a nude dancing establishment in Nimby. The law itself is therefore clearly targeted at such establishments to suppress them. Moreover, the town Zoning Administrator is not even following the law, instead apparently using the law as a pretext to reject any plans CLUB offered to build a nude dancing establishment anywhere in the city. The Administrator even said that CLUB is not the type of business needed in Nimby, adding only after that that the plans did not sufficiently protect the town's citizens. Thus, the law and its enforcement are both subject to First Amendment challenge, and CLUB would likely succeed in such a challenge.

The discriminatory face of the law and the Zoning Administrator's discriminatory application of the law to CLUB both are also subject to challenge on Equal Protection Clause grounds. Such a challenge is fairly difficult because there is no suspect classification at issue, which means that the court would apply a hyper-deferential

rational basis test to determine whether the law violates the Equal Protection Clause. Under the rational basis test, the court would try to discern whether here is any even hypothetically conceivable rational basis on which the law might have been passed that was not motivated by discrimination. This is a heavy burden for CLUB to bear (and quite unnecessary given its potential First Amendment challenge). Nonetheless, CLUB does have at least a plausible argument that the law here discriminates arbitrarily. The town has given no evidence that there is any special additional need to require nude dancing establishments, and none others, to provide a floor plan, a safety plan, and a parking plan, and to pay $5,000 on top of that. The City can argue that it is not required to enact such protective laws for every business all at once, but instead that it is entitled to regulate a piece at a time. This rationale has been accepted by federal courts, including the Supreme Court (Williamson v. Lee Optical comes to mind). Given the timing of this restriction, however, CLUB has a stronger argument than most that this was an arbitrarily targeted law intended to discriminate against it, rather than a law genuinely concerned with the safety and health of CLUB's employees or customers or the town's residents. Moreover, the law was also being enforced apparently discriminatorily. The Zoning Administrator, when explaining his rejection to CLUB, said that he didn't think CLUB's business was the type Nimby needs. The Town could counter this accusation of discrimination by pointing out that the Zoning Administrator also said the plans CLUB submitted did not sufficiently protect the citizens of Nimby. Given how deferential the rational basis test is, this might succeed, although the court would probably want more than just a conclusory statement from the Zoning Administrator regarding why he thought CLUB's plans were insufficient.

The same arbitrariness that could justify an attack on Equal Protection Clause grounds also would justify a similar attack on Due Process grounds. A similar analysis would apply since there is no fundamental right at stake (aside from the First Amendment rights already analyzed above), with the court applying a hyper-deferential rational basis test to determine if there is any conceivable rationale for the law in question that is not simply to arbitrarily deny due process. Again, CLUB has a stronger argument than most that this is an arbitrary denial of their rights to due process and equal protection.

Finally, CLUB can attack the last sentence of the law as violating both the Equal Protection Clause and potentially the Privileges and Immunities Clause of Art. IV because of its arbitrary requirement that CLUB's safety chief be educated in Maryland and obtain specifically a degree in Criminal Justice. There would be an issue of standing to bring suit, since it would really have to be the safety chief that filed suit rather than CLUB itself. If standing is affirmed for CLUB based on its close alliance of interests with its own employee safety chief, the Equal Protection Clause challenge would follow similar rational basis grounds as outlined above. There appears to be no real rational basis since criminal justice degrees from non-Maryland institutions are not inherently different from or inferior to those granted by Maryland institutions. As for the Privileges and Immunities Clause challenge, the law would probably be struck down since it interferes with the security chief's fundamental right to earn a living.

Maryland State Board of Law Examiners

JULY 2015 MARYLAND GENERAL BAR EXAM –
REPRESENTATIVE GOOD ANSWERS FOR THE BOARD'S WRITTEN TEST

MARYLAND ESSAY QUESTION NO. 10

Representative Good Answer No. 1

1. Sue's Testimony About Victor's Statements: Allow the testimony.

Sue's statements that Victor told her "Let's go hawking, I want to get some money," are allowed. Though they are hearsay--out of court statements offered for the truth of the matter asserted--they were made by a party opponent, the defendant, Lex, and thus fall within a hearsay exception. The court should allow this testimony.

Sue's statement interpreting Victor's statements--that they meant "let's go out and find someone to rob"--are also admissible as proper lay testimony. Sue directly heard the statements and, because Lex is charged with conspiracy, these statements are relevant as to whether the two had reached an impermissible agreement to pursue an illegal end or activity. Sue has personal knowledge about what it means to "go hawking," and she can speak to what Lex's statement meant to her, which is relevant for the conspiracy.

2. Bystander's Testimony & Video: Exclude the video, allow direct evidence about what bystander saw.

Bystander is permitted to speak to what she witnessed directly: that she saw Lex saying "We got that loser!," that she saw spit leaving Lex's mouth and striking Victor, and that she was scared and hid behind a tree. The bystander was a direct witness to these activities, and can testify to her own perceptions and what she witnessed. The actual video, though, is likely inadmissible. Maryland prohibits the admission into evidence of such video surveillance unless the recorded party knew and gave permission to be recorded. The prosecution can argue that Bystander lacked the intent to create the video--it accidentally happened while she was recording birds on her phone--but the video may not be allowed into evidence based on Maryland's rules against non-consensual recording.

3. Jerry's Testimony About What Sue Said: Exclude the hearsay within hearsay

Jerry can testify that sue handed him Victor's credit card: this is relevant evidence to whether Victor was robbed by Sue and, according to Sue, Lex. Jerry's testimony about what Sue said appears to be hearsay, though, and as such, must fall within a hearsay exception to be admissible: Jerry is attempting to testify to something that Sue said out of court, which itself referenced something that Lex said out of court. Sue is not a party opponent in this trial because it is Lex that is on trial. Therefore, there is no hearsay exception to this statement, and the statement is inadmissible at the first level of hearsay. The second level of hearsay, what Sue communicated about what Lex said, would fall within the party opponent exception and would be admissible, if it was not contained within an additional level of hearsay.

4. Rev. Ray's Statements: Admit, as the Rev. Run has waived any penitent-clergy privilege.

Generally, there is a penitent-clergy privilege for certain statements. However, this privilege is generally held by clergy, and prevents the compelled disclosure of information given to them by a penitent. Here, it appears that Rev. Run is willing to testify and is not being improperly compelled. Lex's statement to him, therefore, is not privileged, and Rev. Run can testify about Lex's statements because those statements fall within a hearsay exception: as already noted, Lex is a party opponent.

5. Lex's Statements in Defense: Admit.

Criminal defendants have the constitutional right to testify in their own defense. Lex is allowed to deny the robbery, and he is allowed to assert that spitting on Victor was an accident. These matters are highly relevant, as an accident would negate the mens rea necessary to be found guilty of assault. Further, Lex has personal knowledge of his own intent at the time of the alleged crime. One issue is that Lex is making these statements based on the admission of the video tape into evidence. Lex, though, has been sworn and has a duty to tell the truth, even when in defense of himself.

As a side note, this kind of testimony could potentially raise professional responsibility issues for his attorney: attorneys are not allowed to put on witnesses that they know will lie in their testimony, and are not able to solicit untruthful testimony. The question does not call for a deeper evaluation of this issue, however.

6. Matthew's Statements

This is likely impermissible character evidence: it is suggesting that Lex has a propensity for armed robbery and that, with Matthey's robbery, he acted in conformity with this propensity. Because of the similarity of the two incidents, it is also highly likely that a jury would be swayed to accept Lex's guilt in this instance based on his prior conduct, and not based on an affirmative, separate showing at this trial that Lex committed the crimes with which he is charged.

The prosecution could argue that Matthew's statements are not offered as impermissible character evidence, but are offered to identify Lex based on a modus operandi. Typically, character evidence is admissible as non-propensity evidence, that is, to show identity, lack of mistake, intent, common scheme or plan, or motive. Here, identity is not at issue: Lex has now admitted (this is a rebuttal witness) that he was at the scene. However, Lex has put at issue the question of mistake--he has asserted that he mistakenly spit at Victor--and the prosecution can argue that the prior incident of spitting should be allowed into evidence.

The court should weigh these issues, and, if it admits the evidence, provide a jury instruction that the evidence is only being admitted to show lack of mistake, and not for impermissible propensity purposes.

Representative Good Answer No. 2

All evidence is admissible at the discretion of the judge if relevant and not barred by any other rules. Relevance is defined as making a fact more or less probable.

Sue's testimony

Sue testified as to a statement made by Lex and regarding its criminal meaning. Hearsay is an out-of-court statement being offered for its truth, and is usually inadmissible unless an exception applies. Here, Lex's statement "let's go hawking, I want to get some money", while hearsay, is covered by the statement of a party opponent exception. Objection overruled. As 'hawking' is a vague term that can have several meanings, it was proper for Sue to testify as to what she thought it meant. This testimony would be offered for its effect on the perceiver and is not hearsay. Objection overruled.

Bystander's testimony

Bystander recorded Lex while he was out in public, and where he had no reasonable expectation of privacy. Therefore, her recording of Lex's statement "we got that loser" (which is hearsay - see above for definition) is a statement of a party opponent and admissible. As the tape has been authenticated by the person who took it, and it is clearly relevant to prove that Lex was there at the time, it should be admitted. Objections overruled.

Jerry's testimony

Jerry is testifying to something that Sue told her Lex said, which makes it hearsay within hearsay. While the statement by a party opponent exception covers Lex's statement (like the ones above), it does not cover Sue, as she is not the one on trial. However, it is a statement against interest, as it shows that Lex did steal the card and wanted to get money from it. At the time of Jerry's testimony, Lex is still 'unavailable' as the prosecution's case has not yet finished and they do not know whether or not he will testify. That exception clears the second hurdle. Objection overruled.

Rev. Ray's testimony

The Reverend has testified that Lex confessed to him, and that is hearsay. However, despite the statement by a party opponent exception, the testimony is still covered under the priest-penitent privilege. This privilege is held by the confessing party, and unless waived by him (no facts state either way), it cannot be used against Lex. Objection sustained.

Lex's testimony

The facts state that Lex properly waived his 5th amendment right. He is free to admit or deny on the stand any fact that he likes, though he is open to impeachment on cross-examination. His testimony, that he was only asking Victor for the time, is hearsay, regardless of the fact that he himself said it. As no exception covers it, it will not be allowed in. Objection sustained.

Matthew's testimony

The state has called Matthew to offer character evidence against Lex, which is normally inadmissible. However, there is an exception when specific acts of conduct are used, namely the MIMIC exceptions. Here, the 'common scheme or plan' part of the MIMIC rule will apply. Matthew can testify that he was robbed after Victor asked him for the time (again, hearsay, but statement of party opponent), then spat on him and said "That's what you get capitalist pig". That same conduct and phrasing is enough to evince a common plan in terms of 'signature elements', and will be allowed. Objection overruled.

Maryland State Board of Law Examiners

JULY 2015 MARYLAND GENERAL BAR EXAM –
REPRESENTATIVE GOOD ANSWERS FOR THE BOARD'S WRITTEN TEST

MULTISTATE PERFORMANCE TEST

Representative Good Answer No. 1

Dear Mr. Gurvin (MG)

We have fully analyzed your case and with this letter, we provide you with advice regarding the assessment of the likely outcome of litigation against Franklin Aces (FA) professional football team, the recovery you might realize if you prevail, your goal in pressing the claim and whether you should accept the offer.

1) Assessment of the likely outcome of litigation

You would first have to copyright your logo in order to be able to bring suit.(17 U.S.,C. 411) Copyright protects original works of authorship (17 U.S.C 102). Original works of authorship have been defined as a "personal reaction of an individual upon nature" (Bleisten). Additionally, original works have been defined as "the work independently created by the author . . . that possesses at least some minimal degree of creativity." (Feist Publications) The level of creativity may be low. According to the copyright regulations, applications for familiar symbols or designs, mere variations of typographic ornamentation, or works consisting of information that is common property may not be copyrighted. (202.1)

In the Oakland Arrows case, which is similar to yours, the Arrows were unable to get copyright for their design of their design of a triangle (similar to a stylized A) on an image of an arrowhead all with the colors of the US flag because the court found that the simple multicolored triangle was a familiar symbol with a mere variation of coloring lacking in enough originality of authorship in design to merit copyright protection. Here, Monica Dean in her affidavit states that she had seen "many versions" of the image used in the logo, none of which were protected by copyright. This statement supports a finding that the designs used in your logo are common place and may not qualify as original in order to warrant copyright. Similar to Oakland Arrows, the court will likely find that your design of the hand holding four cards fanned out, represents familiar symbols, consists of common property with no original authorship, and merely represents a variation of the typographic ornamentation. Therefore, it is unlikely that you would be able to copyright your design.

To determine whether FA infringed on your design, the court will asses if 1) the works are substantially similar, and 2) whether the alleged infringer had access to the copyrighted work. (Savia) Here, it is established that though the outline of the hand is somewhat different, the FA logo included in the press release is otherwise identical to your sketch thereby satisfying the first element. However, proving access will be challenging. In Fisher v. Dillingham, the court found that a songwriter who kept up with current music must have heard and had access to a popular song that he was accused of infringing. The court relies on circumstantial evidence to infer infringement because it is rare that direct evidence would be available. (Savia)

This case is different from yours because your sketch of your logo was only shared with your boss, and with DL through a fax you sent to him. Additionally, there is no evidence that your logo was ever published or made available. DL's statement states that he likely placed the fax in the trash after receiving it. Monica Dean, the hired commercial artist, had offices on the 5th floor while, DL's office was on the 2nd floor. Her only contact with Authority was through her occasional lunch with a friend in the transportation office. She has never met DL. There is no direct evidence of infringement, additionally, the available facts do not support an inference of infringement based on the circumstantial evidence.

Your case is more similar to Savia because there is no direct or circumstantial evidence that FA had access to your logo. In Savia, the court held that a young song writer had no access to a motion picture soundtrack recording, only included in the closing credits of an NC-17 limited viewership movie that only aired in a single theater for three weeks, that wasn't commercially recorded or released and therefore found no infringement.

2) The recovery you might realize if you prevail

In evaluating damages, the court will first check to see if the logo has been copyrighted (Herman). Copyrighting the logo confers significant benefits and is required before you can bring a lawsuit on the basis of copyright infringement. (17 U.S.,C. 411) If the item has been copyrighted, then you would be entitled to statutory damages, an in the court's discretion, costs, including attorney's fees. However, in your case, you have not copyrighted the material and therefore statutory damages and costs would not apply. To bring a suit I would recommend that you copyright the logo. Additionally, FA has only used the logo so far in their press release and therefore has not realized any profits from the logo. Though the press release states that they expect that fans would be able to purchase FA gear next year (2016). Had FA sold gear with the logo, there would be profits from the infringement which could be awarded, however, there are no profits from the press release that may be awarded.

If the item has not been copyrighted before the act of infringement occurs, then the damages will be limited to actual damages and the infringers profits (Herman). Here, you are a janitor, though you state that you are also an amateur artist with no real training. This case is similar to the Herman case, because Herman was an amateur author and had no track record of payments for his work. Because you also have no track record of payments, we are unable to submit any evidence of your logo's worth. The court will likely look to discovery, to determine how much an artist like you would make for the logo. In discovery, they will find that the professional artists, Monica Dean, was being paid $10,000 to design the logo. They will also find that your September 25, 2014 fax to Daniel Luce only requested "some tickets to the games in the new stadium." Therefore, since you are an amateur artist with no basis for proving costs, if the court finds that FA infringed on your logo, the court would likely award you between $1000 and $5,000.

3) Your goal in pressing your claim

If you decide to press your claim, your goal would be to establish that FA had access to your logo. In Bright Tunes, even though the defendant claimed that he did not consciously copy the infringed song, the court found that he had "unconsciously copied it" and was therefore liable for infringement. We will need more facts to establish that Monica somehow unconsciously copied your logo. Daniel Luca states that he doesn't actually remember what he did with your fax, though he thinks he threw it in the trash. Therefore it is possible that your design was not actually placed in the trash and somehow either Monica one of the "dozen others" that she worked with on the design had access to it. I would recommend that you get statements from the "dozen others" that worked with Monica to determine if they had access.

4) Whether you should accept the offer and why

Based on the facts, we recommend that you accept the offer for the following reasons:

a) Your original demand when submitting your design was tickets to the game in the new stadium. Accordingly, FA has offered you season tickets in a prime location to all home games for the team's first season, valued at $5000.
b) As an amateur, there is nothing to support how much you would receive for your services. As a comparison, Monica Dean's firm, the commercial artist, only received $10,000 for designing the logo. If you win, the court will likely find that an amateur service is not worth the same as a professional service. Therefore it is unlikely that you would get up to $10,000. The odds are better to accept the tickets valued at $5000.
c) It will be difficult to prove that Monica had access to your design in order to support the charge of infringement.
d) It will be challenging to prove originality to get a copyright for your design. (See discussion above) and Pro ball will argue that the logo is not copyrightable. In addition there are several versions of your logo that have not been copyrighted.
e) This is FA's only and final offer. If you turn it down and choose to litigate, you risk getting nothing.

Please let us know if you have additional questions.

Sincerely,

Examinee

Representative Good Answer No. 2

You reached out to Eileen Lee for legal advice concerning a claim that you might have against the Franklin Aces professional football team. You have asked us to evaluate the likelihood of success should you decide to litigate your claim against the team and our recommendation as to whether you should litigate or accept the settlement offer that the team has already made to you.

Based on our evaluation of the facts and the relevant law, we think that it is in your best interest to accept the settlement. While the choice of whether to accept a settlement rests entirely within the client under the rules of professional responsibility, we advise you that accepting the settlement would be the most beneficial course of action for you to take. First, it is important to think about your goals in this case. Second, it would be challenging for you to succeed in copyrighting your logo. Third, it would be difficult to prove that your logo was infringed. Fourth, your recovery would likely be limited to $10,000. Fifth, proceeding with a lawsuit is expensive, time-consuming, and can be prolonged, and it would likely be far easier for you to accept the settlement. This letter explains how we reached our recommendation.

1. Your goals

It seems that your goals in pressing the claim are to receive recognition for your work and money. You noted in your letter to Mr. Luce that you would be "honored" if the team would consider the logo but that you would not want anything from them, "except maybe some tickets to games in the new stadium." Thus, it is important to remember that initially you were excited about the prospect of receiving tickets to the games.

2. It would be difficult for your work to become copyrighted.

In order to succeed on a copyright infringement case, a copyright must first be registered with the US Copyright Office. 17 USC § 411. The copyright standard is that copyright "protects original works of art." 17 USC § 102. Courts have struggled with defining precisely what this standard means, but have noted that a work can be copyrighted if it was "independently created by the author" and "possesses at least some minimal degree of creativity." Fesit Publications Inc. There are regulations, or rules, based on the Copyright statute, that help to further explain this standard. Most applicable in your case is that works are not subject to copyright if they are "familiar symbols or designs, [or] mere variations of typographic ornamentation, lettering or coloring." 37 CFR 202.1. A work that is a familiar symbol or design is "not enough originality of authorship" to get copyright protection.

The case of Oakland Arrows Soccer Club, Inc. v. Cordova (1998) presents a similar circumstance to your case. In that case, the Oakland Arrows professional soccer club developed a new logo and wanted to register it. The logo contained a red, white, and blue triangle. The Copyright Office rejected the application and did not allow the symbol to get copyright protection because it found that the triangle was a '"familiar symbol," with "mere variation of coloring.'" Oakland.

Here, it is likely that a court would similarly find that your logo was a "familiar symbol" that should not get copyright protection. As you stated, your logo was a hand "holding the four aces from a deck of cards fanned out like you hold cards." The ProBall logo has an outline of a hand that is slightly different but is otherwise identical. The General Counsel of ProBall called the images of playing cards "familiar designs." The designer of the logo, Monica Dean, noted that she had seen "many versions of that image, including many on clip art collections and on the Internet" and from which she "drew inspiration." It is likely that a court would also note that an image of a deck of cards fanned out is a "familiar symbol" that many people have seen. If the image is posted on the internet and widely accessible, it would be likely that a court would find that the work should be copyrighted because it may not find that there is "enough originality" to merit protection. Oakland. Thus, like the logo in Oakland, it would be challenging for your logo to receive copyright protection.

3. It would be difficult to succeed on a claim of copyright infringement.

However, if a court were to grant your logo copyright protection, you would then need to succeed on a copyright infringement case to get recovery. Courts apply a two-prong test to determine if a copyright has been infringed. First, they ask if the works are "substantially similar," and second, they look to see if the alleged infringer "had access to the copyrighted works." There must be "plausible" evidence that someone had access to the work. Savia.

Here, it is clear that your logo is substantially similar to the logo of the ProBall team. The outline of the land is "somewhat different" but is "otherwise identical" to your sketch, based on the descriptions provided to us. Thus, the main question is whether the team had access to your logo.

There are several cases that are instructive and similar to your case. In Fred Fisher Inc. v Dillingham, the court found that there was copyright infringement because the songwriter being sued kept up with "current popular

music" and so must have "had access to it." In Bright Tunes Music Corp. the court found that George Harrison of the Beatles did not consciously copy a song but had access to it so was also liable. In Savia, the case most applicable, the court reviewed a claim brought by a songwriter Savia who asserted that another songwriter Malcolm copied the melody of her song. The court found that Malcom did not have access to the work because the song was released to the public in a limited run in a movie, and was not available for him to see as he was a 4 year old child and the movie was rated NC-17.

In your case, it seems unlikely that ProBall and the designer of the sketch had access to your work. You noted that you faxed your sketch to Daniel Luce at the Franklin Sports Authority with a note. You noted that you drew your design about 10 months ago from your interview with Ms. Lee, which was on June 29, 2015. Mr. Luce notes that Franklin Sports Authority is "entirely separate" from ProBall, the owner of the Franklin Aces football team, and are not under common ownership at all. Mr. Luce noted that he thinks he discarded the note because they had already retained FowardDesigns to design the log. While ProBall has a suite of officers in the same building of the Franklin City Sports Complex, those offices were on the fifth floor while Mr. Luce's office and the fax machine were on the second floor. Mr. Luce said he had no contact with anyone working for ForwardDesigns besides "occasional greetings." Besides occasional meetings with executives of ProBall inc to cooperate details, no one from the Franklin Sports Authority has had any dealings with ProBall representatives. Further, Monica Dean stated that he had an office on the fifth floor and had no contact with any employees of the Franklin Sports Authority other than with a personal friend who works in the Authority's transportation office. She never met Daniel Luce. She also notes that she does not recall seeing any sketches of any idea created by anyone else prior to creating her design.

Your case appears similar to Savia, where the court could not find that Malcolm had access to a song. Here, it just does not seem likely that ProBall and the design team led by Ms. Dean did have access to your logo. While it is possible that someone found the fax in the garbage, or that Ms. Dean's friend saw the design and spoke about it to her, there is no clear evidence supporting this fact. The court in Savia noted that "without a scintilla of evidence to justify that conclusion," it could not credit "such mere speculation." Savia. Thus, without any "plausible' evidence that Ms. Dean had access to you work, it is unlikely that a court would find that she had access, and it would likely not find copyright infringement.

4. Your expected recovery from the case if you were to prevail

If you were to succeed on a claim of copyright infringement, your likely recovery would be limited to your actual damages and the infringer, ProBall Inc,'s, profits. The case of Herman v. Nova, Inc. (2009) is very similar to your case and explains that a person who brings a claim of copyright infringement and is successful but has not yet registered his copyright can only recover actual damages and the profit obtained by the infringer. This measure is based off of the Copyright statute, 17 USC §§ 412, 504(b). In Herman, an amateur author submitted a screenplay to Nova, a motion picture producer, and Nova then used the screenplay as the basis for its own work which it announced was going to become a movie. Herman saw the announcement of the future movie and sued Nova for copyright infringement. He won the claim. There, the court based damages on Nova's profits, which were zero as the movie had not been released, and Herman's actual damages.

Here, your claim alleges that the copyright infringement has already taken place but you have not yet registered the design with the US Copyright Office. Thus, this is the appropriate measure that a court would apply to determine the damages that you can recover. The Franklin Aces football team has not yet made its new merchandise with the new logo and uniforms available for sale. In the press release dated May 28, 2015 announcing the new logo, the release stated that the team "expect[s] that our fans will be able to purchase their Franklin Aces gear next year" as only later in 2015 would it begin discussions with various merchandise manufacturers. Since the clothing is not yet for sale, the team has not yet made any profits off of the logo. Thus, your recovery would be limited to only your actual damages.

In Herman, the court calculated actual damages of an amateur author whose uncopyrighted screenplay had been infringed. The Court noted that because Herman was an amateur author there was no "track record of payments for his work" and so no evidence as to the screenplay's worth. Based on evidence from discovery, the copyright infringer, and witnesses, the court found that the range of payment that a producer would make for the type of screenplay was between $15,000 and $50,000, and the court awarded the "upper end" of damages to Herman. Here, in your case, the commercial artist and designer for FowardDesigns, Monica Dean, noted that her firm was paid $10,000 for its services in designing the new logo for Franklin. Thus, a court in your case, if it were to find that your logo was infringed, would likely award you $10,000.

5. Other considerations.

Besides the chance of succeeding on the case and your recovery, it is also important to consider whether it makes sense to pursue litigation. Litigation is expensive, and as we noted we unfortunately cannot continue to provide representation beyond advising you on whether to accept the settlement. Your litigation fees might end up exceeding any recovery you make from the case. Further, litigation can be very time-consuming and protracted, and could potentially cause you to miss work. It can also be emotionally draining. Thus, it is important to consider that not only may you have difficulty in winning the case, but that it would be an expensive pursuit and cause much effort on your part. Further, you have stated that you are "more than a big fan" of football, and the team is offering you a season ticket in a prime location to all home games for the team's first season, the value of which is $5,000. This offer may gave you much more enjoyment than proceeding with litigation.