

Maryland State Board of Law Examiners
JULY 2016 MARYLAND GENERAL BAR EXAM –
REPRESENTATIVE GOOD ANSWERS FOR THE BOARD’S WRITTEN TEST

NOTICE: These Representative Good Answers are provided to illustrate how actual examinees responded to the Maryland essay questions and the Multistate Performance Test (MPT). The Representative Good Answers are not “average” passing answers nor are they necessarily “perfect” answers. Instead, they are responses which, in the Board’s view, illustrate successful answers written by applicants who passed the Maryland General Bar Examination. These answers are reproduced without any changes or corrections by the Board, other than to spelling and formatting for ease of reading.

MARYLAND ESSAY QUESTION NO. 1

Representative Good Answer No. 1

A. Broke should file a Motion to Dismiss for failure to state a claim upon which relief can be granted and lack of personal jurisdiction. The success of this motion will depend on whether Sloppy's owners will successfully leverage either the de facto corporation defense or corporation by estoppel equitable defense.

In Maryland, a corporation is a separate legal entity that enjoys the same privileges and obligations as an individual including the right to sue and be sued. When a corporation is administratively dissolved, it is no longer a legal entity and becomes a legal nullity. It thus loses its ability to sue in Maryland courts. However, when there is a forfeiture by the state of Maryland, a corporation has 60 days to remedy the problem before its charter is revoked. Thereafter, the owners of the corporation must file Articles of Revival to have the charter reinstated.

Here, Sloppy's charter was revoked in 2012. Thereafter it was no longer a legal entity recognized under Maryland law and thus is not a party that may bring suit to defend its rights. This suit was filed on behalf of Sloppy on January 2, 2016. One day later the expiration of the statute of limitations occurred. While the forfeiture was discovered three weeks later and the corporation successfully filed and were permitted to revive the corporate charter, when the statute of limitations for this claim passed, Sloppy was still a non-entity. Thus, Broke may argue that there was no actual suit when it was filed as there was no entity that could so file a suit. Hence, there is no claim for relief to be granted because it is barred by the statute of limitations. Alternatively, Broke can argue that there is no personal jurisdiction over one of the parties here because there is no party over which to have personal jurisdiction.

While a strong claim, it may be defeated if Sloppy's owners successfully leverage either the de facto corporation defense or the corporation by estoppel defense. Both of these are used when a corporation fails to incorporate and its owners attempt to enforce contracts made against third parties. In order for party to successful use the de facto corporation defense, it must show that there is a relevant incorporation statute, there was a colorable, good faith attempt to comply and the corporation availed itself of corporate privileges. This defense has an unclear basis in Maryland but has not been affirmatively rejected by state courts. Corporation by estoppel is an equitable defense used by owners of an entity. Corporation by estoppel requires that a third party do business with an entity it knows to be holding itself out as a corporation and do business in reliance on that holding out. The owners of the non-incorporated entity must make a good faith effort to comply with the statute and must in good faith engage in business with the third party (i.e. without notice of the incorporation error).

Here, the de facto corporation defense and corporation by estoppel defense will hinge on whether a court will determine a colorable good faith attempt to comply with the incorporation requirements are met. The forfeiture occurred in 2012. Sloppy did not discover the forfeiture until 2016--four years later. Assuming that SDAT sent appropriate notification of the forfeiture to Sloppy, its negligence in discovering the forfeiture throughout such an extended amount of time will work against it and likely defeat these defenses. If a court determines that there

Maryland State Board of Law Examiners
JULY 2016 MARYLAND GENERAL BAR EXAM –
REPRESENTATIVE GOOD ANSWERS FOR THE BOARD’S WRITTEN TEST

was a good faith attempt, the strongest argument will be for corporation by estoppel as it has the clearest basis in Maryland if it can be shown that Broke knew that Sloppy was a corporation when it made the Note. More facts are required to determine when the Note was in fact made.

B. Bob is unlikely to be personally liable for the Contract. When a corporation’s charter is revoked by forfeiture it is no longer a legal entity. Thus, any individual who enters into contracts on behalf of the corporation after its charter is revoked is personally liable on that contract obligation. Thereafter, if the corporation's charter is revived/reinstated, the corporation becomes liable on any pre-revival contracts entered into by its agents.

Here, Bob was Sloppy's president. He is likely authorized to enter into contracts on behalf of the corporation. However, he entered into this contract after forfeiture took place and thus was personally liable up until the charter was revived on January 22 or about that time. The breach of contract suit was not brought until March 2016 after revival had taken place and therefore, Sloppy is now liable for that pre-revival contract entered into by Bob.

While in the case of a promoter that enters into contracts prior to incorporation remains personally liable until a novation occurs, a novation is not required when a corporation's charter is revived and reinstated.

Representative Good Answer No. 2

A. A corporation that has been forfeited may not sue to collect on a debt during the time in which the corporation is forfeited. Broke may seek a motion to dismiss for failure to state a claim upon which relief can be granted because at the time when Sloppy filed a lawsuit, on Jan. 2, 2016, Sloppy was no longer in good standing. If Sloppy is not in good standing, then they cannot bring a lawsuit to recover. However, if a corporation discovers the forfeiture and files the appropriate Articles of Revival and successfully revives its charter, as Sloppy did here, then all actions related to the corporation that the corporation took during the time of forfeiture will be fully enforceable.

Broke may, however, be successful on a motion to dismiss because the statute of limitations had passed before Sloppy was revived and thus once they became revived again, they would be barred from bringing an action to against Broke because the statute of limitations had passed.

Thus, the court should grant the Motion to Dismiss because at the time Sloppy revived the corporation, the sol

B. This question involves agency and authority. A president of a corporation has actual authority to act on behalf of a Corporation and as long as the Corporation is in good standing, the actions of the President as an agent for the Corporation will bind the Corporation. However, if the Corporation is not in good standing and the President makes a contract on behalf of the Corporation, the Contract is not enforceable except upon the filing of articles of revival and successfully reviving the corporation. Only once the corporation is revived may the corporation become liable for contracts entered into during the time of forfeiture by an agent of the corporation. Here, Bob is the president of the corporation and as such has actual authority to act on behalf of the corporation. Because the Corporation revived its charter in March 2016, the president, Bob will not be personally liable for the lawsuits regarding the contracts that were entered into by him in 2014, as agent for Sloppy during the time of forfeiture. Once revived, Sloppy is liable for a breach of contract that was entered into by the President, Bob, as agent for Sloppy. Bob is not personally liable.

Maryland State Board of Law Examiners
JULY 2016 MARYLAND GENERAL BAR EXAM –
REPRESENTATIVE GOOD ANSWERS FOR THE BOARD'S WRITTEN TEST

MARYLAND ESSAY QUESTION NO. 2

Representative Good Answer No. 1

A. Big Bank may not enforce its security interest against Furniture Store's inventory, but may enforce against furniture store's account balance.

A.1. Inventory

Because it is goods not in the possession of the secured party, but in the possession of a buyer in the ordinary course of business, Big Bank may not enforce its security interest against Furniture Store's inventory obtained from Manufacturer.

Under § 1-201(b)(35), a security interest is "an interest in personal property or fixtures that secures payment or performance of an obligation." A party obtains a security interest in property when the owner of the property uses the property as collateral to secure a loan from the party obtaining the security interest. A security interest is generally recorded in a filing statement registered with the State Department of Taxation and Revenue (or, for fixtures, at the local office where land deeds are recorded), so that a party considering purchasing the property can know that it is subject to the security interest. Filing a statement in this way is one way of perfecting a security interest; possession of the property generally perfects the interest, as well. Under § 9-320, where a security interest exists in goods not in the possession of the secured party, a buyer in the ordinary course of business takes free of a security interest created by the buyer's seller, even if the interest is perfected and the buyer knows of the interest. Under §1-201(b)(9), a buyer in the ordinary course of business buys "in good faith, without knowledge that the sale violates the rights of another person in the goods, and in the ordinary course from a person [...] in the business of selling goods of that kind."

Here, Big Bank had a security interest against Manufacturer's inventory, and that interest would survive even as the inventory is transferred to a third party. However, Furniture Store is a buyer in the ordinary course of business, since it bought the furniture from Manufacturer, who is in the business of making and selling furniture. Accordingly, regardless of the perfection of the interest or of Furniture Store's knowledge of it, Furniture Store took free of the interest when it purchased the goods from Manufacturer. Thus Big Bank may not enforce its interest against Furniture Store's inventory.

Therefore, Big Bank may not enforce its security interest against Furniture Store's inventory obtained from Manufacturer.

A.2. Accounts owing

Because Furniture Store is an account debtor to Manufacturer, Big Bank may enforce its interest against Furniture Store's debt to Manufacturer.

Under § 9-607, in the event of default, a secured party may notify an account debtor to make payment to it, and may generally exercise the rights of the creditor with respect to the debt.

Here, Manufacturer has a security interest against Manufacturer's accounts receivable, including the balance owed by Furniture Store to Manufacturer. Since Manufacturer has defaulted on its loan, Big Bank can enforce its security interest in Manufacturer's accounts receivable, requiring Furniture Store to make payments to it on the account.

Maryland State Board of Law Examiners
JULY 2016 MARYLAND GENERAL BAR EXAM –
REPRESENTATIVE GOOD ANSWERS FOR THE BOARD’S WRITTEN TEST

B. Big Bank would have to have filed a filing statement to enforce against the equipment sold to dealer.

B.1. Dealer is not a buyer in the ordinary course of business.

Dealer is not a buyer in the ordinary course of business.

As above, under §1-201(b)(9), a buyer in the ordinary course of business buys "in good faith, without knowledge that the sale violates the rights of another person in the goods, and in the ordinary course from a person [...] in the business of selling goods of that kind."

Here, Manufacturer is in the business of making and selling furniture, and not in the business of selling manufacturing equipment. While Dealer is in the business of buying and selling such equipment, §1-201(b)(9) requires that the seller be acting in the ordinary course of business in order for the buyer to qualify as a buyer in the ordinary course of business. Therefore, Dealer is not a buyer in the ordinary course of business.

B.2. Big Bank will only be able to enforce its interest against the equipment if it has filed a filing statement perfecting its interest.

Big Bank would have to perfect its interest to enforce against the equipment sold to Dealer.

Where the buyer is not a buyer in the ordinary course of business, it takes subject to a security interest. If the security interest has not been perfected prior to the sale, however, the sale will not be subject to the security interest.

Here, we do not know if Big Bank has filed a filing statement. We know that it is not in possession of the equipment.

Therefore, Big Bank will only be able to enforce its interest against the equipment if it has filed a filing statement perfecting its interest.

Representative Good Answer No. 2

Title 9 of the Maryland Uniform Commercial Code governs this dispute.

A. Advise to Furniture Store (FS)

A security interest is an interest in personal property or fixtures that secures payment of a debt or performance of an obligation, regardless of form. §1-201 (35). A perfected security interest gives notice to third parties and generally grants priority to the first perfected secured party. Here, Big Bank (BB) has a "perfected security interest in Manufacturer's (M) inventory, accounts receivable, and equipment'.

A buyer in ordinary course of business (BOCB) is a buyer who "buys in good faith, without knowledge that the sale violates rights of another . . . and in the ordinary course from a person . . . in the business of selling goods in that kind. §1-201 (9).

Here, M is a seller in the "business of making and selling furniture". FS is "in the business of selling furniture at retail. Therefore, FS is a buyer in the ordinary course of business. Id.

A BOCB "takes free of a security interest created by the buyer's seller [(here, M)], even if the security interest is perfected and the buyer knows of its existence. Therefore, FS's bought and possessed '\$50,000 worth of furniture purchased from M", is not subject to the security interest possessed by BB.

Maryland State Board of Law Examiners
JULY 2016 MARYLAND GENERAL BAR EXAM –
REPRESENTATIVE GOOD ANSWERS FOR THE BOARD’S WRITTEN TEST

Owners of a security interest in inventory are presumed to have rights to the proceeds of the inventory after sale. BB therefor has rights to the "\$25,000 [which] has been paid" by FS, and may collect this from M since M has "default[ed] on its loan from BB". "[A] secured party . . . may take any proceeds to which the secured party is entitled". §9-607(a)(2)

BB also has an interest and may collect from FS the \$25,000 "remain[ing]" "due and owing" from FS to M. ""[A] secured party . . . may enforce the obligations of an account debtor . . ." §9-607(a)(3)

B. Advice to Dealer

Generally, once a security interest attaches (value given by creditor, debtor has rights in collateral, and an agreement exists) to personal property of another, the security interest follows the property, even if the property is sold to a third party, here Dealer (D).

An exception exists for buyers in ordinary course of business (BOCB). A BOCB is a buyer who "buys in good faith, without knowledge that the sale violates rights of another . . . and in the ordinary course from a person . . . in the business of selling goods in that kind. §1-201 (9).

Here, while D is "in the business of buying and selling used equipment", M is not in such business, rather, they are in the business of making and selling furniture. Therefore, D is not a BOCB.

As D is not a BOCB, D takes the equipment subject to BB's security interest. BB may enforce its security interest against D, in addition or in lieu of collecting the proceeds of the sale of the equipment to D, as discussed above.

BB may enforce the security interest in the equipment against D upon M's default.

Maryland State Board of Law Examiners
JULY 2016 MARYLAND GENERAL BAR EXAM –
REPRESENTATIVE GOOD ANSWERS FOR THE BOARD’S WRITTEN TEST

MARYLAND ESSAY NO. 3

Representative Good Answer No. 1

PART A

Marital property, is property acquired during the marriage, however titled, unless it is a gift to one spouse or was purchased using funds directly traceable to a gift. Here, in 2006, prior to marriage, Harold (H) was injured in an accident and was awarded \$500,000 for his injuries. In 2008, H and W were married. Right after the marriage, they purchased a house for \$400,000, using H's accident money to pay for it in full, and the house was titled to H only. At this time, despite the fact that the house was purchased during marriage, because the funds used to purchase the house were directly traceable to H's accident money, which was acquired before marriage and is non-marital property, and the house is titled to H only, the house is non-marital property.

A home titled as tenants by the entirety will be considered marital property between the spouses. Here, in 2010, H and W changed the ownership status of the house to tenant by the entireties, which makes it marital property, despite the fact that it was purchased using H's accident funds. The couple borrowed \$300,000 as a home equity loan against the house and the monthly house payment was made from their joint checking account.

In 2015, the couple decided to get a divorce, and at this time, the house will be considered marital property.

PART B

Marital property. See above. Here, H and W borrowed \$300,000 as a home equity loan against their house now titled as tenants by the entirety (marital property), and subsequently put \$287,000 of that money (the couple received a check for \$287,000), along with \$13,000 from their joint-savings into an account with the Grow Your Money investment firm. The account was titled to H only.

However, marital property is all property acquired during the marriage, however titled. Despite the fact that this account was titled to H only, the account was formed using money that is all marital property, and as a result, the Grow your Money Investment account is marital property.

PART C

Marital property. See above. Here, W made \$3,800 per month at her nursing job, which she started three years before the marriage. W has a pension from her job as a nurse, which will be subject to equitable distribution because it is marital property, and has accrued during the marriage.

While marital property, after classified, is valued, and then subject to equitable distribution at the time of divorce, pensions and retirement benefits will be distributed on an "if, as and when" basis if a QDRO is filed by the opposing spouse. Here, W's pension is marital property and was acquired during the marriage, so if a QDRO filed by H, it will be distributed on an "if, as and when" basis.

As to how much is subject to division, the distribution will be equitable basis. The court will look at many factors in deciding equitable distribution, such as the fact the parties were only married for seven years, that W made \$3800 a month at her nursing job three years prior to the marriage, H has a social security disability payment of \$2,500 per month, he received \$500,000 for his injuries, and failed to list his pension in discovery responses (as did W). This will likely lead to W keeping most of her pension.

Maryland State Board of Law Examiners
JULY 2016 MARYLAND GENERAL BAR EXAM –
REPRESENTATIVE GOOD ANSWERS FOR THE BOARD’S WRITTEN TEST

Part D

This part is governed by the Maryland Rules of Professional conduct.

Lawyers have a duty of honesty. Here, W has a pension from her job as a nurse, but told her attorney she did not want H to get any of her pension and the attorney recommended that W did not have to list her pension in discovery responses, which is dishonest, and a violation of this rule.

Candor to the tribunal. See above.

Lawyers have a may not impeded an opposing party's investigation. Here, the lawyer recommending W not list her pension has marital property, and advise W not to discuss the pension with H, may be a violation because it impedes the investigation of the opposing party.

Lawyers owe their clients a duty of competent representation. Here, the lawyer’s advice that because H did not list his pension as marital property, so W did not either, is not sound or competent advice, and thus is a violation.

Rule 8.4 is a rule against general misconduct. Here, for all of the above violations, the lawyer has also violated rule 8.4

Representative Good Answer No. 2

A. Status of House

In 2008, H purchased the house solely in his name with the proceeds of his own personal settlement. This would seem to indicate that the home is owned solely by H at that time. However, H&W married shortly before the purchase and despite the initial indications that it was the separate property of H, it was used as the family home. In 2010 they changed the ownership status from solely H to H&W as tenants by the entireties. This is a status of ownership only offered to married couples and clearly shows the house is jointly owned.

Additionally, H & W jointly took out a home equity loan and received the proceeds by check payable to them both for \$287,000.

Finally, until W filed for divorce they continued to use the home as the marital home and make mortgage payments from their joint account. This is clear marital property from 2010 until the time of the divorce.

B. Status of Grow Your Money

There is a presumption in MD that things acquired by a couple during marriage, and that use marital funds for purchase, are marital property. Here, even though Grow-Your-Money (GYM) was titled only to H, it was completely funded with marital funds, namely a 287,000 check proceeds jointly written to H&W, and \$13,000 from a joint account.

Based on the MD presumption and the money tracing back to a marital funds origin, this is (and likely always was marital property at divorce.

C. Equitable Distribution of W’s Pension

Because W and H have been married less than 10 years, H’s claims on W’s pension may be limited. However, as a general rule, pension proceeds if earned during marriage, are marital property subject to equitable distribution.

Maryland State Board of Law Examiners
JULY 2016 MARYLAND GENERAL BAR EXAM –
REPRESENTATIVE GOOD ANSWERS FOR THE BOARD’S WRITTEN TEST

Therefore, when W retires (not at the divorce) and she begins to receive her pension, a portion of those proceeds are to be distributed to H as his portion of marital property. Unless H&W by separate agreement agreed otherwise.

D. The Attorney’s Ethics Violation

W’s attorney violated his duty of honesty by encouraging his client to withhold information about the pension when she is not allowed to do so.

Further, if he was unaware of the fact that all property needed to be listed in the discovery responses, then he has violated the duty of competence. He is not necessarily required to know offhand, but certainly has a duty to investigate and report correct information to his client.

Further, he has violated his duty of candor to the court by filing knowingly false documents with court, as well.

Maryland State Board of Law Examiners
JULY 2016 MARYLAND GENERAL BAR EXAM –
REPRESENTATIVE GOOD ANSWERS FOR THE BOARD’S WRITTEN TEST

MARYLAND ESSAY QUESTION NO. 4

Representative Good Answer No. 1

Lightco. The owner can bring a strict liability action against Lightco for a design defect. In Maryland, strict products liability requires the following elements: (1) commercial supplier; (2) defect in the design of the product; (3) defect existed when it left the control of the defendant; and (4) plaintiff was using it in a foreseeable way. The plaintiff must also show that there is a safer, economical alternative design which the defendant failed to use.

Here, Owner can argue that Lightco is strictly liable for the damages caused by the fire, which originated in the light fixture. The TP device did not blink like it was supposed to when the light fixture gets too hot. Lightco is a commercial supplier because they manufacture these fixtures. The plaintiff will rely on his expert to provide evidence that the location of the TP in the fixture was a defective design, which allowed the fixture to overheat without any warning blinking. The owner must also show that there is a safer alternative design which is economical and the defendant knew about, but failed to use.

Lightco will defend that there is no safer, economical design that Lightco could have used instead of the TP. They will also defend that it was the faulty insulation - an intervening cause - which caused the fire, not the TP's failure to detect overheating.

Genco: Owner can try to seek recovery from Genco under a vicarious liability theory for its agent's negligence. Negligence requires a plaintiff to prove the following: (1) defendant owed plaintiff a duty; (2) defendant breached that duty; (3) causation (proximate and actual); and (4) damages. Under agency law, a principal is liable for the negligent torts of its agents if committed within the scope of the employment relationship. A person is an agent if he is subject to control by the principal. A principal may be liable for the torts of his employees, but he is not liable for the torts of independent contractors.

Here, Owner will argue that Genco is liable because Genco was the contractor in charge of the renovation at Owner's house. Genco hired a subcontractor, Insulateco, to install the fixture (at issue here). The issue is whether Insulateco is an agent of Genco. Owner will argue that because Genco hired Insulateco and directed it to install the fixture, it is the principal and therefore liable for negligence of Insulateco.

Genco will defend that Insulateco is not its agent and therefore it is not liable for Insulateco's negligent torts. Instead, Insulateco was an independent contractor. A party that employs an independent contractor only liable for the independent contractor's torts in limited situations (none present here).

Insulateco: Owner will argue that Insulateco is liable for negligence. Negligence requires a plaintiff to prove the following: (1) defendant owed plaintiff a duty; (2) defendant breached that duty; (3) causation (proximate and actual); and (4) damages. Generally, the duty is to exercise the care that a reasonably prudent person would exercise under similar circumstances.

Here, Owner will argue that Insulateco breached its duty of ordinary care by installing the insulation too close to the fixture. A reasonably prudent person would have made sure that the insulation was not too close to a lighting fixture. The fixture had a big warning on it that said not to install insulation within 3 inches. Here, the insulation was too close and thus Insulateco breached its duty. That breached was the actual cause because but for the insulation being too close to the fixture, the fire would not have started. It was the proximate cause because it was a foreseeable consequence that insulation would catch fire because the fixture itself warned of that. Owner suffered damages because a fire broke out.

Maryland State Board of Law Examiners
JULY 2016 MARYLAND GENERAL BAR EXAM –
REPRESENTATIVE GOOD ANSWERS FOR THE BOARD’S WRITTEN TEST

Insulateco will argue that even if it were negligent, Genco is liable because Insulateco is Genco's agent. See rule above for agent liability.

They will also argue that the defective TP was an intervening cause and therefore it is not liable.

Representative Good Answer No. 2

(1) Claims against Lightco

Owner can seek recovery against Lightco on a strict products liability theory. To be successful, Owner must prove that (1) there was a defect in the product, (2) it was defective at the time it left Lightco's control, and (3) it caused damage to Owner when used foreseeably. The defect alleged here is a design defect. When a product malfunctions, Maryland courts apply the risk-utility test to determine whether the design is defective. The test asks whether the risk of the harm outweighs the utility of the product; to succeed, a plaintiff must show that there is a reasonable alternative design that would alleviate the risk and maintain the utility of the product.

Owner will likely be able to satisfy these elements. The alleged design defect is that the TP is located in an improper place in the light fixture, and that the fixture therefore overheated without any warning blinking. Presumably, this could be fixed simply by locating the TP elsewhere in the fixture; if so, this is a reasonable alternative design, and the fixture is defective under the risk utility test. This defect originated from the product's original assembly, and therefore existed when it left Lightco's control. Finally, this failure likely did cause the harm, by failing to warn the owner.

Lightco will argue that the product was not used foreseeably, in that insulation was placed too close to the fixture in violation of the warning. However, some variation from intended use is still foreseeable. In any case, the purpose of the TP was precisely to warn users of an overheating fixture; Lightco cannot successfully argue that improper insulation resulting in overheating should excuse a design defect in a component whose purpose was to warn of such overheating. If the faulty insulation did cause the TP to malfunction (rather than the TP's placement in the fixture), that is an issue for the trier of fact to decide.

Owner may also have a negligence claim against Lightco for negligent design, but since that claim would be much more difficult to prove, strict liability is the preferred cause of action

(2) Claims against Genco

Owner can also seek recovery from Genco in strict products liability, resulting from the same design defect discussed above. It does not matter that Genco was not at fault with regard to the design; it is the essence of strict liability that fault is not required. (However, if found liable for strict liability, Genco could seek indemnification from Lightco).

Genco does not have the benefit of the sealed-container defense, which will allow the retailer of a defective product to escape strict liability where the product arrived in a sealed container and was sold in that same container, and the seller had no part in the design/specifications of the product. Here, the product was not sold in a sealed container, but was installed in Owner's home.

Genco may also be liable in negligence with regard to Insulateco's performance. Although Genco is not vicariously liable for Insulateco's negligence (see below) since Insulateco is an independent contractor rather than an employee, Genco could be directly negligent in hiring/selecting Insulateco for the job. More facts would be required to evaluate this claim.

Maryland State Board of Law Examiners
JULY 2016 MARYLAND GENERAL BAR EXAM –
REPRESENTATIVE GOOD ANSWERS FOR THE BOARD’S WRITTEN TEST

(3) Claims against Insulateco

Insulateco is likely negligent for installing insulation too close to the fixture. Negligence requires duty, breach, causation, and damages; all of these are likely satisfied here. As an insulation contractor, Insulateco is held to the standard of care of other such businesses, which presumably know not to insulate hot light fixtures too tightly. Moreover, the warning on the fixture put Insulateco on notice of these requirements. If the too-close insulation caused the fire--as the fire marshal indicated--Insulateco will be liable for negligence.

Maryland State Board of Law Examiners
JULY 2016 MARYLAND GENERAL BAR EXAM –
REPRESENTATIVE GOOD ANSWERS FOR THE BOARD’S WRITTEN TEST

MARYLAND ESSAY QUESTION NO. 5

Representative Good Answer No. 1

A. Millary should file the following motions in response to the civil complaint:

Preliminary Motion

Millary should file a motion to dismiss before she files an answer, otherwise they are deemed waived, claiming lack of personal jurisdiction and improper venue. She should claim that the Circuit Court in Montgomery County does not have personal jurisdiction over her because she resides in Howard County, the incident took place in Baltimore City, and the complaint stems from the campaign that also takes place in Baltimore City. The Court in Montgomery County lacks personal jurisdiction over Millary, she is not domiciled there, she has no significant contacts there, nor did she purposely avail herself to the jurisdiction of the Court.

Millary should also claim improper venue for forum non convenience in Montgomery County, this is due to the fact that the cause of action took place in Baltimore City and none of the parties to the suit reside or have contacts with Montgomery County. The Court should dismiss the suit for lack of personal jurisdiction and forum non convenience.

Additionally, Millary should claim dismissal under failure to state a claim upon which relief can be granted, either in the preliminary motion to dismiss or in her answer if she chooses to file one. The Court should dismiss the claim for failure to state a claim upon which relief can be granted.

If the Court does not dismiss the suit, Millary should file a motion for more definite statement before her answer. She should also file an answer if all her previous motions fail, in response to the civil complaint which should assert any negative and affirmative defenses, and any general denials in specified causes.

B. I would advise Millary that she should make sure that she responded to the interrogatories, production of documents, and requests for admissions. I would remind her that she needs to respond to requests for admissions as well within 15 days after the date on which that party's initial pleading or motion is required, whichever is later (Rule 2-424); if she fails to respond within the time limit they will be deemed as admitted.

Regarding the sanctions that Ronald filed, I would advise Millary that she should not worry about it because a party sanctions are only imposed by the court for certain specific instances, and Ronald not being satisfied with her responses is not one of them. Sanctions are appropriate without first obtaining an order compelling discovery if a party fails to testify or appear for their deposition, or if they fail to serve a response to interrogatories (Rule 2-432(a)). If Ronald asks the court to compel discovery, it will only be granted after a showing that Ronald gave Millary reasonable notice and she failed to answer a question in a deposition, failed to answer an interrogatory, or failed to comply with a request for production (Rule 2-432 (b)). Here, Millary did not fail to respond or comply with the requests, she timely gave everything to Ronald, thus his requests for sanctions will be futile because the court will not grant them.

Furthermore, a dispute pertaining to discovery does not need to be considered by the court unless the attorney seeking action by the court has filed a certificate describing in good faith attempts to discuss with the opposing attorney the resolution of the dispute and certifying that they are unable to reach agreement on the disputed issues. Here, neither Ronald nor his attorney have tried to ask Millary for clarification or for more in-depth answers, thus there has not been a good faith attempt to reach an agreement on the disputed issues.

Maryland State Board of Law Examiners
JULY 2016 MARYLAND GENERAL BAR EXAM –
REPRESENTATIVE GOOD ANSWERS FOR THE BOARD’S WRITTEN TEST

C. Since Millary failed to respond to Ronald's requests for admissions I would advise her to file a motion explaining why she had the inability to admit, deny, or explain an averment on the ground that to do so would tend to reveal private information about her medical history. Due to the fact that Millary has not responded within 30 days after service of the request or within 15 days after the date on which her initial pleading or motion is required, whichever is later, she will need to petition the Court that her lack of admissions had no substantial importance, which is the case here because her medical history has no substance in the suit here. She could also claim that she had reasonable grounds to expect to prevail on the matter and that she had good reason for failure to admit, that she found the admissions so vulgar and offensive that she could not respond.

Representative Good Answer No. 2

A.

Millary should file the following responses:

Motion for a more definite statement

Under Rule 2-322(d), a defendant may file a preliminary motion for a more definite statement if a pleading is so vague or ambiguous that a party cannot reasonably frame an answer. Here, the civil complaint was a jumble of campaign catchphrases and personal attacks on Millary's character and poor fashion taste, and vaguely alluded to "an assault on my person in the form of an excessive handgrip, and grievous emotional and physical harm." Because the complaint was not very clear or precise as to what happened, she may seek a more definite statement before answering.

Motion to dismiss for improper venue.

Under Rule 2-322(a), a party may file a motion to dismiss for improper venue. Here, Plaintiff, Ronald Burgundy is a Baltimore County resident and Millary is a Howard County resident. The civil complaint was filed in Montgomery County. In Maryland, venue is proper where the defendant is a resident, works, or routinely conducts vocation. Here, Millary is a Howard county resident and the facts do not suggest that she works or is involved in vocation in Montgomery county, therefore venue is improper.

Motion to dismiss for failure to state a claim upon which relief can be granted.

This filing may also be filed under Rule 2-322(b). Because the complaint does not state what really happened and only vaguely alludes to an assault and emotional and physical harm, it does not state grounds for relief.

Answer

Under Rule 2-321, a party shall file an answer to an original complaint within 30 days after being served. Here, Millary must file an answer where she must address each claim in the complaint and assert all affirmative defenses.

B.

Millary should not be concerned about Ronald's motion for sanctions.

Under Rule 2-431, a dispute pertaining to discovery need not be considered by the court unless the attorney seeking action by the court has filed a certificate describing the good faith attempts to discuss with the opposing

Maryland State Board of Law Examiners
JULY 2016 MARYLAND GENERAL BAR EXAM –
REPRESENTATIVE GOOD ANSWERS FOR THE BOARD’S WRITTEN TEST

attorney the resolution of the dispute and certifying that they are unable to reach agreement on the disputed issues. The certificate shall include the date, time, and circumstances of each discussion or attempted discussion. Here, the court is likely to find that Ronald's terse email stating that he was not pleased with her responses is insufficient to be considered an attempt by him to resolve the dispute. Also, under rule 2-432, a party may only move for immediate sanctions without first obtaining an order compelling discovery if a party or person designated to testify fails to appear or fails to serve discovery responses after proper service. Here, because Millary properly responded and Ronald did not obtain an order compelling discovery responses, immediate sanctions are unavailable and the court is likely to deny Ronald's motion for sanctions.

C.

Rule 2-424, each matter of which an admission is requested shall be deemed admitted unless, within 30 days after service the party serves a response signed by the party or the party's attorney. Here, because more than 30 days have passed since she received Ronald's requests, they will be deemed admitted.

Under Rule 2-403, a party, on motion, may seek a protective order asking that confidential information not be disclosed or be disclosed only in a designated way. Here, Millary could have asked the court to place a protective order on her medical history information.

Maryland State Board of Law Examiners
JULY 2016 MARYLAND GENERAL BAR EXAM –
REPRESENTATIVE GOOD ANSWERS FOR THE BOARD'S WRITTEN TEST

MARYLAND ESSAY QUESTION NO. 6

Representative Good Answer No. 1

Carl's first argument is to attack the original creation of the easement in 1985. The deed of conveyance included the easement, but the easement was not identified with certainty. The easement only gave a general, un-located 25-foot-wide easement from the Washington Avenue lot to Bill's lot. Express easements must provide enough information that they can be easily identifiable. This easement was too vague, and due to the failure to describe the placement of the 25 foot wide easement, it is impossible to ascertain where an easement might exist. To enforce such an uncertain easement would give the owner of Lot 2 the ability to choose at a later time which portion of Lot 1 they wanted to make use of and would be wholly inequitable.

If this argument does not succeed, Carl can then argue that the easement was abandoned. An express easement can usually not be abandoned through inaction, but rather the inaction must be accompanied by words expressing the desire to abandon the easement. There was no affirmative statement made by any owner of Lot 2 in regards to abandoning the easement. However, the easement was not used for an extended period of time, and was in fact never used. Perhaps the reason it was never used, is that it was not identified. In addition, Carl can rely on an estoppel argument. After a period of over 5 years, Carl relied on the non-use of the easement and built a fence along the property line and planted a row of trees along the property line. Carl also constructed a building that would be jeopardized by an easement that could be created on any portion of his property.

If all else fails, Carl can also argue that the easement fails because it was adversely possessed. The statutory period for adverse possession is 20 years in Maryland. He can argue that he openly, notoriously possessed the easement (with hostility) during his ownership from 1990-2016. He also may argue that he should be able to tack on the period of time that Al owned the property and did not use the easement in order to reach the 20 year statutory period.

David may argue that if the Court does not find an express easement, they may find an implied easement so that his lot may access Charles Street directly through Carl's lot. This is not a strong argument. An implied easement by necessity requires a showing that the easement is strictly necessary, not just convenient. David cannot show this because he is not landlocked without the access over Carl's lot. An implied easement by implication requires that the use of the easement be continuous throughout the time period when the lot was split. The easement has never been used, so this is clearly not met.

So, in summary, Carl's best argument is to attack the original express easement for lack of clarity regarding the location of the easement.

Representative Good Answer No. 2

Carl is seeking to avoid the use of the easement by David, the owner of the Washington Avenue lot. To avoid the easement, Carl will need to show that the easement is no longer valid.

An easement is the right of one property (the dominant estate) to make use of a particular part of another (servient estate). Easements may be created and destroyed in many different ways, though unlike a license, they pass along with the land rather than with the owner. The lot in question was created by Al in 1985 when he divided his lot into two. At the time of the division, he created an express easement to a "general un-located 25 foot wide easement" from one lot to the other. This easement was recorded with the deed of conveyance. Shortly after the

Maryland State Board of Law Examiners
JULY 2016 MARYLAND GENERAL BAR EXAM –
REPRESENTATIVE GOOD ANSWERS FOR THE BOARD’S WRITTEN TEST

conveyance, Al leased the lot to Carl, who built a fence across the entire boundary of the lot. In 1990, Carl purchased the lot, and has since placed a building on the lot, as well as other improvements.

Carl has four defenses to the easement: abandonment, estoppel, the non-existence of the easement, and adverse possession. In order to show that the easement was abandoned, Carl would need to show that the owner of the other lot intentionally abandoned their right to the easement. Mere lack of use is not enough to establish abandonment. Typical examples would include destruction of property on the easement, affirmatively releasing the servient estate, or some other action. Here, the lack of use is combined with the failure to assert any interest in the land for a period of 32 years. Although lack of use would not in itself show abandonment, the sheer amount of time that has passed, combined with the failure to assert any interest in the land after Carl put up a fence, planted a row of trees, and otherwise improved the land indicates an intent to abandon the easement. Any owner with an expectation of maintaining their interest would surely have protested the building of a fence that would prevent them from using the land, or taken some other action. The circumstances in this case are so clear that abandonment can be readily determined.

The argument of estoppel can also be made. Although typically used to create an easement, here the argument could be reversed to prevent Carl from being required to tear down fencing, trees, and other improvements as the result of the easement. Estoppel is meant to prevent a party from unjustly gaining a benefit for imposing a detriment on another party. Here, if the argument of abandonment were to fail, there would certainly be a case to be made for defensive estoppel.

The language of the easement could potentially prevent it from being enforceable. The easement grants "a general un-located 25 foot wide easement" across the lot. The language of the easement is so vague that it cannot be readily determined what the easement covers. As such, Carl could argue that the easement did not follow with the land, as it is too vague for definition. Holding otherwise would prove an unjust detriment to Carl.

Finally, the argument could be made that adverse possession resulted in the dissolution of the easement. In order to succeed in a claim of adverse possession, the party must show that their use of the land was exclusive, continuous, hostile, open and notorious, that there was possession, and that the land was held for a period of 20 years. From the fencing in, it is clear that the use was exclusive. Carl has been the owner for the entire period continuously. His use of the land was open and notorious, and continued for more than 20 years. The only question here is if the land would qualify as having been used in a "hostile" manner. Although typically one cannot adversely possess their own land, for the purposes to be considered here, the land possessed was that of the easement. It is uncertain if this argument would succeed, but it would be worth attempting.

Overall, Carl has a series of defenses against the easement which could be presented, and should be safe in the possession of the land free of intrusion by David.

Maryland State Board of Law Examiners
JULY 2016 MARYLAND GENERAL BAR EXAM –
REPRESENTATIVE GOOD ANSWERS FOR THE BOARD’S WRITTEN TEST

MARYLAND ESSAY QUESTION NO. 7

Representative Good Answer No. 1

A.

The typical measure of damages in a breach of contract action is expectancy or "benefit of the bargain" damages. Expectancy damages are measured by the value the non-breaching party would have received if the breaching party had performed the contract, minus what the plaintiff actually received. Here, Baker was supposed to receive the "Better Widgets" business, and Abel's management for two years. In return, Baker would pay \$1 million to Abel. Better Widgets is currently valued at \$1.5 million, and would be \$2 million after two years of Abel's management. Thus, Baker's net gain would be \$1 million under their agreement. Instead, Baker has received nothing under his agreement with Able. Therefore, Baker can seek \$1 million in expectancy damages.

However, when expectancy damages are difficult to calculate, the court may choose to order reliance damages instead. Reliance damages are calculated to put the plaintiff back in the position he would have been in if the contract had never been made. Here, it is arguable that it would be difficult to calculate Baker's expectancy damages, because it is hard to calculate the value of a business over a two-year period with changing market conditions (as evidenced by the increase in value because of the Pentagon order). However, it does not appear that Baker has spent any money performing the agreement to date. Therefore, he probably does not have an recoverable reliance damages.

Finally, a plaintiff can seek specific performance in a breach of contract action when money damages would be inadequate. Baker has a good case that money damages would be inadequate here because of the difficulty in calculating any expectancy damages or the value of the business over the next two years and beyond. Therefore, Baker can ask the court to order Abel to perform the contract and sell Better Widgets in exchange for \$1 million. However, Baker will not be able to enforce the part of the contract that requires Abel to manage the store for two years. Courts do not grant specific performance for services contracts because it is tantamount to involuntary servitude. Thus, Baker will be limited to money damages for that part of the agreement.

B.

Abel can raise Statute of Frauds, violation of public policy, misrepresentation, unilateral mistake, and mutual mistake as defenses to Baker's breach of contract claim.

The Statute of Frauds requires certain contracts to be in writing and signed by the party to be charged (i.e. the defendant) in order to be enforceable in court. One type of contract that is subject to the Statute of Frauds is contracts that are not capable of being performed within a year. Abel's promise to manage the store for two years therefore falls within this category and must be in writing, signed by Abel, in order to be enforceable. The facts state that Abel and Baker's agreement was oral, so this promise is unenforceable as a violation of the Statute of Frauds. However, the part of the agreement regarding the sale of Better Widgets is not subject to the Statute of Frauds.

Regarding the covenant not to manufacture widgets in the United States for 20 years, Abel can argue that such a covenant violates public policy. Covenants not to compete are enforceable to the extent that they are reasonable. Primary factors in determining whether such a covenant is reasonable are geographic scope and duration. The entire country is almost certainly an unreasonable limitation on the manufacturing of widgets, as is a 20-year duration. Therefore, the covenant not to compete should be invalidated as violative of public policy.

Maryland State Board of Law Examiners
JULY 2016 MARYLAND GENERAL BAR EXAM –
REPRESENTATIVE GOOD ANSWERS FOR THE BOARD’S WRITTEN TEST

Abel can also argue that Baker engaged in misrepresentation that induced him to enter into the agreement, and therefore the contract is voidable by Abel. In order for a contract to be voidable due to misrepresentation, the defendant must have made a false statement of material fact that the plaintiff relied on in agreeing to the contract. Here, Baker made a false statement regarding his net worth. However, it is unclear whether this statement was material and whether Abel actually relied on it in making the agreement to sell Better Widgets. If the misrepresentation did not in fact induce Abel, then it is not a grounds to void the contract.

Abel can also argue the defenses of unilateral mistake, regarding the Pentagon's order, and mutual mistake, regarding the new competitor. One party's mistake as to an essential term or assumption of an agreement will not be a defense unless the other party was aware of the mistake and had a duty to inform the mistaken party. Here, even though Baker knew of the Pentagon's order, he had no duty to disclose this information to Abel, because Abel likely could have gotten the information himself with proper research. In contrast, mutual mistake will be a grounds for voiding a contract if the mistake regards the identity rather than the value of the contract. Here, although neither party knew about the new competitor and its potential effect on the value of Better Widgets, this was not a mistake as to identity, and therefore will not be grounds for voiding the contract.

C.

The new competitor will make it extremely difficult to value Baker's damages under the agreement because it will be impossible to know the value of Better Widgets when a new competitor arrives on the scene.

Representative Good Answer No. 2

Here, we know that a contract may exist, or may not, depending on interpretation. Because this is not a sale of goods under article 2, it is dealt with by the common law of Maryland. Under that law, to form a contract, you must have an offer, acceptance, and binding consideration. Here, Abel and Baker had an oral agreement. Abel offered to sell Better Widgets to Baker for \$1 million in 30 days, Baker accepted this. Abel's promise to sell was met with Baker's promise to pay. Therefore, an offer was formed. Though the statute of frauds requires a writing for certain kinds of sales, that does not apply here. This is not a marriage, land sale agreement, term of years lease, suretyship agreement, or service not capable of being performed in a year. However, the agreement between Abel and Baker for Abel to manage Better Widgets for 2 years in return for Baker's promise not to open Best Widgets may be construed as either a part of the original contract that would place it into the statute of frauds, or a separate contract entirely (a promise for a promise, offer and acceptance). Should it be a part of the whole contract, there is no contract. Should it be construed separately, there is the former, but not the latter. The parol evidence rule would bar from introduction contemporaneous oral agreements to any written integration, but there is no writing of the sale here, so that does not apply. This analysis assumes that at least the basic sale contract exists.

Where a contract exists -- unless there is a valid defense against its formation, or argument that it should be rescinded -- if it is breached, the non-breaching party will enjoy expectation damages -- damages that seek to put the non-breaching party in the place that it would be if the breach that it had not occurred.

A. Baker may seek specific performance of the sale of Better Widgets, and in the alternative, expectation damages.

First, Baker may petition the court to compel Abel to provide him with specific performance. Baker will maintain that there was a valid contract in place, and that Abel's withdrawal is a breach. Since this occurred before the 30 day period, this looks to be an anticipatory breach, where Baker is clear that Abel is unwilling to perform, and

Maryland State Board of Law Examiners
JULY 2016 MARYLAND GENERAL BAR EXAM –
REPRESENTATIVE GOOD ANSWERS FOR THE BOARD’S WRITTEN TEST

Baker may immediately bring suit. If a court were to find that Abel is in fact in breach, and that Abel had no viable defenses or counterclaims the court may compel specific performance. However, a slight wrinkle is involved -- Abel's continued management for two years after the sale of Better Widgets seems to be a nullity, if there is even a contract in the first place (and, even if Able were somehow construed as having to manage per the contract, the court would not impose such servitude upon him).

The court may well issue expectation damages to Baker as a result of the breach. Without the management of Abel, it would be an immediate net of \$0.5 million. The court would have to do a present value analysis in order to determine the companies' worth moving forward without Abel's management.

B. Abel can raise the defenses of unilateral mistake, and the factual defense of fraud in the factum.

Abel may raise unilateral mistake because he did not know about the Pentagon decision, but Baker did. There was clearly a mistake of material fact on Abel's part about the value of the Pentagon order of the widgets, and but for that lack of knowledge, he would have never entered into the deal. The question here is whether Abel had assumed the risk in this situation. If he had, then he would have to live with the bad deal that he had made. Chances are, Abel did assume the risk here, because he was in a better position than Baker to learn about a widget order from his own company than Baker was. Therefore, this probably will not succeed.

However, Abel will succeed in a fraud in the factum defense. Abel was induced by Baker's financial statement. The statement was patently fraudulent, showing that Baker's net worth was \$2 million dollars, when he was in fact bankrupt. This statement was material, because it gave Abel the impression that Baker had a lot of leverage in possibly opening up Best Widgets and running Abel into the ground. When a fraudulent material statement is put forth in contractual negotiations, and that material statement is an essential part of the bargain, a court will not allow the fraudulent party to profit from its wrongdoing. Therefore, even though there may have been a contract in the first place, it will be rescinded on this basis.

C. The prospective new competitor has little significance.

This is a situation of mutual mistake. There, neither party knows of the material fact that, if either party knew about, would result in neither party doing the deal. The onus here is on any moving party that might move to rescind, and whether that party bears the risk of not knowing. It is possible that neither party truly bears the risk, in which case the court will not likely intervene. Neither Abel nor Baker know what the effect will be on the value of Better Widgets, so it is unclear who might move to rescind based on this information. It is likely that a new competitor will decrease profits by virtue of increased competition, therefore making Better Widgets a less attractive business concern. So, Baker may move to rescind after all based on this, but unless he can show that Able truly bore the risk here, such an event is unlikely.

Maryland State Board of Law Examiners
JULY 2016 MARYLAND GENERAL BAR EXAM –
REPRESENTATIVE GOOD ANSWERS FOR THE BOARD’S WRITTEN TEST

MARYLAND ESSAY QUESTION NO. 8

Representative Good Answer No. 1

Generally, evidence is admissible if it is relevant. Evidence is relevant if it offers any probative value in determining if a fact is more or less likely. However, certain evidence is inadmissible as an exception to relevance for various reasons under the Evidence Rules. The following analysis details the objections offered in Defendant's trial.

Girlfriend's Proffered Testimony

The Court should rule that Girlfriend's testimony as to the attempted shooting of Victor is admissible. Girlfriend's testimony of Victor's knowledge of Defendant is admissible. Girlfriend's testimony as to the content of the argument is admissible, and not hearsay.

The previous shooting attempt is relevant, girlfriend is competent to testify, and she is not offering hearsay. Although girlfriend is only able to give a general description, it is still a description and is probative. Prosecution may argue that the testimony is more prejudicial than probative and should be excluded under 403. However, it is unlikely that the court would grant a motion on this grounds, as it is more likely that the testimony will be offered and the jury will be giving limiting instructions. It is rare that evidence is excluded under 403. Girlfriend can also testify as to the relationship between the parties, as it goes to motive, which is probative in the case following the same analysis. Girlfriend is competent to testify as to her experience, and her testimony as to Victor's history is probative in that it offer motive and history. It is based on her actual experience, and is not hearsay. The same is true for her knowledge of Victor's relationship with the Defendant.

Girlfriend's testimony about the argument is admissible as well. Prosecution will object as both hearsay and overly prejudicial. It is unlikely to be either and is admissible. Hearsay is an out of court statement offered for the truth of the matter. Here, although Girlfriend is attempting to testify as to an out of court statement, she is not attempting to admit this statement for the truth as to the debt, but rather for motive. This makes this statement not hearsay, and it is admissible. Further, it is not overly prejudicial.

Ballistics Evidence

The ballistics evidence is admissible, so long as the prosecution can prove reasonable chain of custody. The evidence is real evidence, and relevant and probative. It is offered to show that the October shooting was likely related to the November shooting, which is circumstantial evidence but admissible. Chain of custody is crucial in real evidence admittance.

Objection to Victor's Identification

Victor's identification should be admitted as an exception to the hearsay exclusion as a dying declaration. Although the "statement" is hearsay, an out of court statement offered in court for the truth offered for the truth of the matter, it is admissible as an exception to the hearsay exclusionary rule. The dying declaration exception allows for hearsay to be admitted where the declarant was under a reasonable belief of impending death, makes a statement regarding the cause of the death, and is now unavailable. He was under belief of imminent death, and made a "statement" which can include physical communications, to provide information as to the cause of his death, and is now unavailable due to his death. Although he had been told he was dying 48 hours earlier, this is still within a reasonable time frame and nothing indicates that his belief had changed. Further, this is admissible only in a homicide case, which this is. Since Maryland does not recognize the common law one year rule, the fact that Victor died much later is irrelevant.

Maryland State Board of Law Examiners
JULY 2016 MARYLAND GENERAL BAR EXAM –
REPRESENTATIVE GOOD ANSWERS FOR THE BOARD’S WRITTEN TEST

Representative Good Answer No. 2

(1) The court should overrule the defense counsel's objection as to the admission of the girlfriend's testimony.

There are three separate statements proffered, and each one should be admitted by the court. I will analyze them in a different order than that presented by the State but in an order that highlights the rationales for admitting the statements.

First, the girlfriend stated that Victor knew the Defendant. This is admissible only if it was information within the girlfriend's personal knowledge. In other words, the admissibility of this statement turns on how the girlfriend knew that Victor knew the defendant. If the girlfriend knew because she had observed them interact, then this testimony is admissible. If, however, the girlfriend only knew this because Victor told her, then it would be hearsay testimony not within any exception and it would be inadmissible. Because the facts suggest it was within her personal knowledge, this statement is admissible.

Second, the girlfriend stated that she saw a gunman aim and fire a gun at Victor in October, 2013 (just a month or so before the November 22 shooting). This testimony is well within her personal knowledge--the question is whether the testimony is relevant to the current proceeding against the defendant. The girlfriend also gives a description of the gunman--if this description appears to describe the defendant, then the relevancy of the statement increases. This evidence is essentially being admitted as an admissible form of character evidence (which is generally inadmissible) to show that the defendant acted with a common motive, intent, scheme or plan (exceptions to the general rule that character evidence is inadmissible). Here, her statement, when combined with the other evidence presented, suggests that the defendant's intent was to kill Victor--the defendant tried on two occasions to shoot Victor.

The relevancy of the second statement, and its admissibility as character evidence to show motive or intent, is highlighted with the third statement--that the defendant and Victor had argued several times prior to the October shooting. The relevancy of this statement hinges on how close in time the arguments were to the shooting.

Each of the girlfriend's statements is admissible.

(2) Following the logic of admitting the girlfriend's statements, the ballistics evidence from the October and November shootings are also admissible. The combined evidence of the girlfriend's testimony and the ballistics evidence suggests that a single person fired the same gun on two separate occasions at Victor--this suggests a motive behind the killing, quite possibly the arguments testified to by the girlfriend. The ballistics evidence is relevant to proving the motive for the killing, and to proving the identity of the killer (linking the November shooter to the October shooter and vice versa).

(3) The final piece of the puzzle--the piece which would further cement the relevancy and admissibility of the above evidence--is Victor's identification of the defendant as his shooter.

Victor's identification of the defendant is hearsay, since Victor died and is not testifying at trial (the ID is being offered for its truth). It was not an excited utterance since Victor was not still under the stress of the shooting (the ID happened on the 26th when the shooting was on the 22), nor was it a present sense impression Victor was not describing events as they happened.

However, Victor's testimony can be considered a dying declaration. Victor is no longer available for trial since he is dead, meeting the unavailability requirement. Next, Victor believed that he could die at any moment when

Maryland State Board of Law Examiners
JULY 2016 MARYLAND GENERAL BAR EXAM –
REPRESENTATIVE GOOD ANSWERS FOR THE BOARD’S WRITTEN TEST

he made the identifying statement and he was making a statement about the cause of his death. The identification (though not falling under the statements of identification exception since Victor is no longer available to testify), is admissible as a dying declaration.

Maryland State Board of Law Examiners
JULY 2016 MARYLAND GENERAL BAR EXAM –
REPRESENTATIVE GOOD ANSWERS FOR THE BOARD’S WRITTEN TEST

MARYLAND ESSAY QUESTION NO. 9

Representative Good Answer No. 1

A. Equal Protection

Evans has standing to challenge the law because he suffered a concrete injury (loss of money) caused by the law, and the injury is redressable by a court. The 11th Amendment prevents Evans from suing state directly, so he should sue to enjoin a proper official. Evans can challenge the law under the Equal Protection (EP) Clause of the 14th Amendment but probably will not be successful. The EP Clause requires that state provide equal protection of the law to all persons. When a law makes a classification or treats some people differently, it may be challenged under the EP Clause. Here, MD’s tax law applies to nonresidents and sports businesses making a classification. However the law does not affect a fundamental right (sports activities) like privacy or engage in a suspect classification (non-residents or athletes) like race. Therefore, it’s subject only to rational basis review. Evans must show that the law is not rationally related to a legitimate government interest. This is a difficult burden to meet. Maryland has a legitimate interest in taxing activities and raising revenue. This law seems reasonably related to taxing an activity occurring in Maryland. There seems to be no equal protection violation.

B. Due Process Clause Claim

Evans can challenge the tax law under the Due Process (D.P.) Clause of the 14th Amendment, but this will also not likely be successful, but it could. The D.P. Clause requires the states to not deprive a person of life, liberty, and property without due process, which also means that laws must be rational and not arbitrary. A law unrelated to fundamental rights must only pass rational basis review (described earlier). Laws relating to taxing economic activities are not fundamental rights. Thus Evans must show that MD has no legitimate interest in taxing him or made the law irrationally. I already established MD has an interest in revenue earned in its borders; however, Evans may argue the formula is not rationally related because it taxes all wages earned by an athlete at a 3% rate allocable to the number of games played in Maryland proportional to annual games. Because Evans wages are based on many activities such as recruiting and interviews, not just games, the taxing formula may be arbitrary or irrational. Again, this is still a hard burden for Evans to satisfy under rational basis review, so the court is likely to uphold the law on these grounds.

C. Commerce Clause Claim

Evans most successful claim is that the taxing law violates the Commerce Clause, particularly the Dormant Commerce Clause. Congress has the power to regulate interstate commerce, and when states enact a taxing law that affects interstate commerce, absent Congressional authorization, it may be void under the Commerce Clause. Here the law taxes non-residents acting in interstate commerce to do sports activities. To be valid, the law must be (1) non-discriminatory against non-residents, (2) fairly apportioned according to activity performed in State; (3) reasonably related to the benefits and services provided by the state to the taxed individual, and (4) there must be a nexus between the state and the activity or individual taxed.

Here, the law only taxes non-residents for activities performed in or attributable to Maryland, satisfying the nexus requirement. The law only applies to non-residents, but does not seem to discriminate against them. Instead, the law seems directed to making sure the state is reimbursed for services. The law could be found to be related to the services Md. provides by allowing teams to come play in facilities in the state and use state roads to travel. However, the law is likely to fail on apportionment grounds. The 3% tax rate allocable to the number of games played annually by the team seems to be fairly apportioned but it’s not since the tax rate applies to all wages.

Maryland State Board of Law Examiners
JULY 2016 MARYLAND GENERAL BAR EXAM –
REPRESENTATIVE GOOD ANSWERS FOR THE BOARD’S WRITTEN TEST

Evans’ wages are based on the soccer games he plays, but also all the other services he provides, such as recruiting, marketing meetings, doing service projects, giving interviews, and attending practice. He was taxed 3% of 5% of his income because he played 1 out of 20 games in Maryland, but 5% of his wages/income was not derived from that Maryland game. The tax scheme is not fairly apportioned to estimate the actual wages earned by Evans or other similar athletes, and therefore it violates the Dormant Commerce Clause.

Representative Good Answer No. 2

First, I would note that Evans does in fact have standing to challenge this law. In order to have standing, an individual must have suffered a harm that was caused by the government action and the court must be able to redress this harm. Taxpayers always have standing to challenge their personal tax liability.

A. The Equal protection clause of the fourteenth amendment, applicable to states, assures equal protection under the law for all people. States cannot implement laws that apply differently to different people. Therefore, Evans can challenge this law stating that it discriminates against non-MD residents. Because neither residency nor professional athletes are a suspect class, laws that discriminate are judged using the rational basis test. The burden of proving a lack of a rational basis is the challenger. Therefore, in order to prove this law as unconstitutional, Evans must prove that it is not rationally related to any legitimate government interest. The rational basis test is very hard to overcome, as almost any justification for a law can be found to be a legitimate interest. Here, MD will probably assert that professional athletes use MD resources and fields while they are here playing games, that they draw crowds, for which MD has to expend money to manage, and that raising revenue to help ameliorate the economic effects their business activities have on the state meets the rational basis test.

B. The Due Process Clause, applicable to the states through the fourteenth amendment provides that no law shall be imposed that is not at least rationally related to a government interest. When suspect classes, such as race, national origin, and ethnicity are implicated by a law, the law will be judged on a stricter standard, that of strict scrutiny. If it is a quasi-suspect class such as gender and legitimacy it will be judged on an intermediate level of scrutiny. However, here, as with equal protection, there is no suspect class at issue and therefore, a rational basis test will be applied. Evans will have to show that applying this tax is not rationally related to a legitimate government interest. Evans will argue that the law does not pass the rational basis test because it is overly broad and vague. Laws are overly broad and vague when they do not give notice to those who it affects and when it is overly inclusive. Evans may be able to argue that the law is overbroad in the way it allocates the tax. Although it is based on games played in MD, the tax ends up including wages received from activities that are wholly performed outside of MD.

C. The commerce clause allows the federal government to tax the instrumentalities and channels of interstate commerce, as well as intrastate activity that, in the aggregate, has a substantial effect on interstate commerce. Where the commerce clause is silent and the federal government has not acted, a state may regulate or tax intrastate economic activity. A state can impose a tax, as is done here, as long as there is some relation between the activity being taxed and the state and the tax does not discriminate against out-of-state residents absent an important government interest or unduly burden interstate commerce, and is proportional to the activities occurrence in the state. Although the tax is apportioned properly, only taxing the games professional athletes play in MD, it discriminates against out of state residents without justification. There is no substantial state interest that is being protected or met by taxing only non-residence. Further, given that the law taxes Evan's activities and services that are performed outside of MD, it also violates the commerce clause by trying to regulate wholly out

Maryland State Board of Law Examiners
JULY 2016 MARYLAND GENERAL BAR EXAM –
REPRESENTATIVE GOOD ANSWERS FOR THE BOARD’S WRITTEN TEST

of state activity. Therefore, Evans can successfully challenge this law as a violation of the dormant commerce clause.

Maryland State Board of Law Examiners
JULY 2016 MARYLAND GENERAL BAR EXAM –
REPRESENTATIVE GOOD ANSWERS FOR THE BOARD'S WRITTEN TEST

MARYLAND ESSAY QUESTION NO. 10

Representative Good Answer No. 1

1) Larry's objections to suppress evidence

Unreasonable Seizure: The first issue is whether there is a lawful search or seizure. The fourth amendment protects people from unreasonable searches and seizures. For there to be a seizure, a defendant must feel like he is not able to leave. Stopping someone is a seizure. An officer may make a brief stop or a "terry stop" if the officer has reasonable suspicion that the person committed a crime, or is about to commit a crime. Reasonable suspicion must be based on articulable specific facts, beyond a hunch. Here the officer had reasonable suspicion to stop Larry. Although high-crime neighborhood is not enough, it is a factor. Combined with dispersing quickly and riding his bike in a sketchy way. Because there is a reasonable suspicion, the initial stop of turning on the sirens is not unreasonable.

Additionally, threatening to use a Taser can also amount to excessive force, which is a type of seizure. Since he did not actually use it, and was running from the police, this is not likely unreasonable.

Once he say Larry throw something, he definitely had reasonable suspicion to make a stop.

Unreasonable search: The second issue is whether there was an unreasonable search in violation of the 4th amendment and applied to the states through the 14th amendment. A search is only where the defendant had an expectation of privacy. The officer upon a lawful stop may do a pat down to check for weapons. However, it must be on the outside. If there was an arrest, than can do a full search and go into the person's pockets. Here, he reached into the pockets to do a search. He found evidence. Thus, Larry will be able to argue this evidence should be suppressed. Larry will also argue that this led to him going inside to get the rest of the heroin, and is therefore the fruit of the poisonous tree.

Additionally, the search in Moe's home was unreasonable. Going into the home will usually require a warrant, unless there is an exception, such as where the officer has probable cause to believe evidence will be destroyed. Here, the officer went into the house without a warrant, and did not even knock. There is a reasonable expectation in privacy. Thus, the search of home violated Moe's 4th amendment (see below for why Larry has no standing).

Fifth Amendment: The right against self-incrimination includes providing the defendant with a Miranda warning. A Miranda warning requires the police to tell them about their right not to self-incriminate and their right to an attorney. Miranda kicks in when there is 1) interrogation, and 2) custody. Here there was custody, because he was arrested. However, there was no interrogation. He was not questioned by the officer. He volunteered to tell Moe what happened, and the police did not even tell Moe to ask questions. Nor was there a violation against Moe, because there was no custody, since he was not arrested, came there by his own choice, and a reasonable person would feel free to leave.

Sixth Amendment: The sixth amendment right to counsel does not apply, because 6th amendment right to counsel does not kick in until the defendant is arraigned or charged.

2) Courts rulings on suppression of evidence:

The court will suppress evidence that is obtained from an unlawful search or seizure directly, or if it was the fruit of the poisonous tree, unless there is an exception, such as inevitable discovery.

Maryland State Board of Law Examiners
JULY 2016 MARYLAND GENERAL BAR EXAM –
REPRESENTATIVE GOOD ANSWERS FOR THE BOARD’S WRITTEN TEST

The court will rule that the seizure was reasonable, given that the officer had a reasonable suspicion based on articulable facts. (see above)

The court will rule that the search of the pocket violated fourth amendment right from unreasonable searches, because cannot search a defendant's pockets without an arrest, unless given consent. After the pat-down there was no evidence of a gun, and thus there cannot be any more searches.

The court will not suppress the evidence from Moe's house. In order to suppress evidence, defendant must have standing. In other words, it must be that the police violated your rights, where you had an expectation of privacy. Larry does not have an expectation of privacy in Moe's home, therefore there is not standing. Further, it is not the fruit of the poisonous tree, which is evidence found indirectly from a fourth amendment violation. Here, the officer saw him throw something in the home before the officer performed the illegal search. Thus, it is not the poisonous fruit.

Lastly, as explained above, because there was no interrogation, there is no Fifth Amendment Miranda warning issue. The statement was made voluntarily to a friend. No questions were asked by the police. Again, even if any of Moe's rights were violated in this communication, Larry would not have standing to challenge it. Thus, the statement is admissible. However, in order to satisfy the confrontation clause, Moe will have to testify at trial.

Representative Good Answer No. 2

There are three issues at play here. They are the vial of heroin, the bag thrown into Moe's apartment, and the statement that Larry made to Moe after he had been arrested. The vial of heroin is inadmissible, but the bag and the statement will both be admitted by the court. Arguments for and against each issue are below:

1. Vial of Heroin

A. Argument to suppress: The vial of heroin was found based upon an illegal stop and an illegal search. Officer Curly did not have probable cause to stop Larry, did not have cause to frisk him for weapons after he said that he had none on him, and Curly did not have probable cause to reach into his pocket to find the heroin. Larry's lawyer will probably try to argue that because Curly's search of Larry was a violation of the 4th Amendment the arrest stemming from that search was improper because the arrest and everything that followed was fruit of the poisonous tree. This will probably not be a successful argument, however because of the bag in Moe's apartment.

B. Court ruling: The vial of heroin is inadmissible for the reasons stated above. While Officer Curly's stop of Larry was proper, and the frisk for weapons was permitted, the search deep into his pockets was not. The Court has ruled that a stop and frisk is okay if there is reasonable suspicion to do so. In frisking for weapons, if Curly had found what was clearly some kind of contraband then that would probably be admissible. Here, however, Curly reached deep into Larry's pocket. That is a 4th Amendment violation.

2. Bag

A. Argument to suppress: The bag that officer Curly removed from Moe's apartment was based on an illegal search. Larry's lawyer will argue that Curly violated Moe's 4th Amendment right to be free of searches without a warrant because Curly went into his apartment to retrieve the bag. Curly did so without a warrant and without permission from Moe. Curly's lawyer will anticipate a counter-argument by the state and further argue that an exception to the warrant requirement - concern that the evidence would be lost - permitted entry into the apartment.

Maryland State Board of Law Examiners
JULY 2016 MARYLAND GENERAL BAR EXAM –
REPRESENTATIVE GOOD ANSWERS FOR THE BOARD’S WRITTEN TEST

B. Court ruling: The Court will admit the bag. It was recovered as separate from the vial and therefore does not have the fruit of the poisonous tree taint that the other evidence does. While Curly may have violated Moe's 4th Amendment right by entering his apartment without a warrant, Larry cannot invoke Moe's rights. Larry by his own volition threw the bag into Moe's apartment and therefore it was proper for Curly to retrieve it.

3. Statement

A. Argument to suppress: The statement that Larry made to Moe is inadmissible because Larry was not read his Miranda rights. Larry's lawyer will argue that in order for a statement made by Larry to be admissible, after Larry was arrested, he must voluntarily and knowingly waive his right to counsel. He had not done so, and therefore his statement is inadmissible. This argument will not be successful.

B. Court ruling: The court will admit Larry's statements. Miranda rights must be read to someone in custody when he is in custody and is being interrogated. In this case, the police were not interrogating Larry and thus did not have to read him his rights. When Larry talked to Moe, Moe was not acting as an agent of the police. It is possible that when Curly stopped Moe and asked what Larry had said that was improper conduct toward Moe, but again, the possible violation of Moe's rights does not bear on the admissibility of evidence against Larry.

Maryland State Board of Law Examiners
JULY 2016 MARYLAND GENERAL BAR EXAM –
REPRESENTATIVE GOOD ANSWERS FOR THE BOARD’S WRITTEN TEST

MULTISTATE PERFORMANCE TEST

Representative Good Answer No. 1

Memorandum

To: Della Gregson, Partner

From: Examinee

Date: July 26, 2016

Re: Barbra Whirley Matter

I. Discussion

The following are the options for each of the unrepaired conditions to Ms. Whirley's house she is renting.

A. Leaky Toilet in Second Bathroom

1. Is Ms. Whirley entitled to a remedy?

Franklin code §540 provides that "the leasor of a building intended for human occupation must put it in a condition for occupation and repair all subsequent conditions that render it untenable". This is referred to as the implied warranty of tenantability (Burk v. Harris). Franklin Code §541 defines untenable as a dwelling that lacks "plumbing and gas facilities... maintained in good working order".

The case of Burk v. Harris furthers this concept of untenability by stating that a tenant is not entitled to a "reduction in rent for minor violations that do not materially affect a tenant's health and safety" (Burk v. Harris, citing Gordan v. Centralia Properties). In order for there to be a breach of tenantability there needs to be a substantial breach, "not merely cosmetic defects or matter of convenience but affect Tenant's health and safety" (Burk v. Harris). Further, "a dwelling is untenable for human occupancy if it lacks effective plumbing maintained in good working order"

Ms. Whirley's dwelling was rendered untenable since it lacks plumbing maintained in good working order, which is a substantial condition, "not merely cosmetic". The Harris case determined that plumbing problems constitute substantial conditions. The toilet in Ms. Whirley's house leaked for several month, as she outlines the problem progressing through her emails to landlord. This is a plumbing problem that rises to the level of substantial, meaning the property is untenable. The problem of the leaky toilet should have been fixed by the landlord and Ms. Whirley entitled to a remedy.

2. What is Ms. Whirley's remedy?

Franklin Code §542 provides that if a landlord neglects to repair conditions that render premises untenable within a reasonable time after receiving written notice from tenant of the conditions, for each condition, the tenant may:

- 1) if cost of repairs does not exceed one month's rent of the premises, make repairs and deduct from rent when due
- 2) if cost of repairs does exceed one month's rent, make repairs and sue the landlord for the cost of repairs

Maryland State Board of Law Examiners
JULY 2016 MARYLAND GENERAL BAR EXAM –
REPRESENTATIVE GOOD ANSWERS FOR THE BOARD’S WRITTEN TEST

3) vacate the premises

4) withhold portion of rent until landlord makes relevant repairs, except that the tenant may only withhold an appropriate portion of the rent if the conditions substantially threaten the tenant's health safety.

A reasonable time is determined by Franklin code §542, and is 30 days after notification. Ms. Whirley does not want to vacate the premises. She notified the Landlord of the leak on February 19, 2016. As of May 26, 2016 the toilet had not been repaired, which is more than the allotted 30 days.

Ms. Whirley can get the toilet fixed herself and then deduct the cost from her rent since it does not exceed the amount of her rent. The cost of the repair was estimated at \$200 by the repairman Ms. Whirley contacted separately, which is less than her \$1,200 rent. Ms. Whirley can also withhold a portion of the rent, which is reasonable, until the landlord makes the repairs since the leaking toilet threatens Ms. Whirley's health and safety.

B. Outdoor Sprinkler

Nowhere in the Franklin code nor the relevant case law is issues with yard maintenance determined to make a dwelling untenantable. In the residential lease agreement between Ms. Whirley and her landlord yard maintenance is the responsibility of the tenant and it provides that the "tenant will water the yard at reasonable and appropriate times and will, at tenants expense, maintain the yard ". The repair of the sprinkler system is Ms. Whirley's responsibility. She may choose to continue to use the sprinkler system, in which she must repair the system, or she can maintain the lawn by watering by hand, as she has been doing. She does not have a remedy against the landlord for the repair of the sprinkler system.

C. Carpet Damage and smell caused by gap in door frame

1. Is Ms. Whirley entitled to a remedy?

Franklin code §540 provides that "the leasor of a building intended for human occupation must put it in a condition for occupation and repair all subsequent conditions that render it untenantable". This is referred to as the implied warranty of tenantability (Burk v. Harris). Franklin Code §541 defines untenantable as a dwelling that lacks "effective waterproofing and weather protection ... including unbroken windows and doors".

The case of Burk v. Harris furthers this concept of untenantability by stating that a tenant is not entitled to a "reduction in rent for minor violations that do not materially affect a tenant's health and safety" (Burk v. Harris, citing Gordan v. Centralia Properties). In order for there to be a breach of tenantability there needs to be a substantial breach, "not merely cosmetic defects or matter of convenience but affect Tenant's health and safety" (Burk v. Harris). Further, "a dwelling is untenantable for human occupancy if it... "lacks effective waterproofing and weather protections of roof and exterior walls".

Ms. Whirley's rental lease agreement provides additional obligations to consider. Tenants have a general responsibilities to keep property clean and not leave windows or doors in an open position during inclement weather." Similarly Franklin Code §543 provides that there is no duty to repair on the part of the landlord if the tenant violated an affirmative obligation, such as the obligation "not to permit any person or animal on the premises to destroy, deface, damage, impair, or remove any part of the dwelling unit or the facilities, equipment, or appurtenances thereto."

The question then becomes who is responsible for the damage to the carpet caused by the sliding glass window not properly fitting in the door frame. If the sliding glass door is a problem caused by Ms. Whirley herself or one

Maryland State Board of Law Examiners
JULY 2016 MARYLAND GENERAL BAR EXAM –
REPRESENTATIVE GOOD ANSWERS FOR THE BOARD'S WRITTEN TEST

of her guest and she then failed to fix the problem, hence leaving the door open during inclement weather then the landlord is not liable for the damages and does not have a duty to fix the carpet and sliding glass door. But if the problem was caused by the landlord, which is more likely since Ms. Whirley could not budge the door at all, then the problem, which made the property untenantable since it is a problem with water proofing and caused mold, which effects the health of the tenant, is the responsibility of the landlord.

Ms. Whirley's dwelling was rendered untenantable since it was not waterproofed, which is a substantial condition, "not merely cosmetic". The Harris case determined that lack of waterproofing of exterior walls constitute substantial conditions. The improper door frame allowing water to enter the premises causing mold should have been fixed by the landlord and is entitled to a remedy.

2. What is Ms. Whirley's remedy?

Franklin Code §542 provides that if a landlord neglects to repair conditions that render premises untenantable within a reasonable time after receiving written notice from tenant of the conditions, for each condition, the tenant may:

- 1) if cost of repairs does not exceed one month's rent of the premises, make repairs and deduct from rent when due
- 2) if cost of repairs does exceed one month's rent, make repairs and sue the landlord for the cost of repairs
- 3) vacate the premises
- 4) withhold portion of rent until landlord makes relevant repairs, except that the tenant may only withhold an appropriate portion of the rent if the conditions substantially threaten the tenant's health safety.

The land lord was notified of the problem on May 26, 2016 and has surpassed his 30 days to make repairs.

Ms. Whirley can get the sliding glass door and the carpet fixed herself and then sue the landlord for the cost of repairs since the repairs exceed the amount of her rent. The cost of the repair was estimated at \$1,800 by the repairman Ms. Whirley contacted separately, which is less than her \$1,200 rent. Ms. Whirley can also withhold rent until landlord agrees to pay.

Another remedy Ms. Whirley can use is to get a reduction in rent measured by the difference between fair rental value of the premises if they had been as warranted and the fair rental value as they were during occupancy in unsafe or unsanitary condition (Burk v. Harris). Since the damages cause her 3rd bedroom to be uninhabitable she can pay rent for a two bedroom opposed to a three bedroom. The rent for a three bedroom was 1,200, while the rent for the two bedroom was 1,000. Ms. Whirley can get a reduction of rent of \$200 for the timeframe in which the home was untenable.

There is no remedy to recover all the rent paid pursuant to lease, only those remedies provided in §542 (Shea v. Willowbrook).

Damage to laundry room baseboard and wall caused by dog

The residential agreement between Ms. Whirley and Landlord provided that "Tenant is responsible and liable for any damage or required cleaning to the premises caused by any unauthorized animal..." This alone would make it appear that since Ms. Whirley's dog was authorized she should not be responsible for the damage caused by her dog. But Franklin code §543 provides that there is no duty to repair on the part of the landlord if the tenant

Maryland State Board of Law Examiners
JULY 2016 MARYLAND GENERAL BAR EXAM –
REPRESENTATIVE GOOD ANSWERS FOR THE BOARD'S WRITTEN TEST

violated an affirmative obligation, such as the obligation "not to permit any person or animal on the premises to destroy, deface, damage, impair, or remove any part of the dwelling unit or the facilities, equipment, or appurtenances thereto." Since the damage was caused by Ms. Whirley's dog and she had the affirmative obligation to prevent said damage the landlord is not responsible and Ms. Whirley would need to bear to cost of repair.

Conclusion

The landlord should be responsibility for the cost of repair to the toilet and the sliding glass door and carpet damage since he breach the warranty of tenantability. Ms. Whirley is responsible under the lease agreement for lawn maintenance so should bear the cost of repair of the sprinkler system. She also is responsible for the damage caused by her dog under Franklin code she had an affirmative duty to prevent said damage.

Representative Good Answer No. 2

I. Leaky Toilet

After living in her rental home for two months, Whirley ("W") noticed that one of her toilets had begun to leak. She notified her landlord, Spears ("S"), that month, and five months later S has not repaired the toilet.

The lease agreement and Franklin law determine who - between the landlord or the tenant - has the duty to make repairs in a rental unit. The lease agreement suggests that, generally, repairs are the duty of the landlord. (LP14(A)(12)). But the duty to repair in other parts of the lease assign it to the tenant elsewhere, so this particular paragraph may be interpreted to only require written notice. Under Franklin law, landlords are required to make repairs to defects that render a rental property "untenable." FCC 540. And lists faulty plumbing as an example defect of tenantability. FCC 541(2). Case law indicates that a leaky shower suffices as substantial enough to render an untenable defect. *Burke v. Harris*. Franklin law also requires that the tenant deliver notice to the landlord in a reasonable time (FCC 542), and gives the landlord 30 days - excepting particular circumstances requiring sooner repair - to make such repairs before the tenant is presumably entitled to take remedial action. FCC 542(c). If the cost of the repair is less than a single month's rent, the tenant make deduct such cost from the next due rental payment. FCC 542(a)(1).

If a leaky shower is considered by the Supreme Court to be substantial enough a defect, where the water is presumably draining as soon as it falls, than a leaky toilet where the tenant has to bucket the water herself would seemingly qualify as faulty plumbing within the statute. Although it is unclear how many showers the tenant in the case had available, W has two toilets, so a faulty one may not render the whole house untenable, but it is the toilet most accessible to guests and she is still burdened with mopping up the leaked water. It appears that W gave timely notice of the issue, having noticed it in February and emailing S about it at the end of the month; and having 5 months passed since then, W is entitled to take remedial action. Since the cost of repair was quoted at \$200 - less than her monthly rent - W could have the repair performed and deduct the cost from her next month's payment.

It appears to fall upon S to repair the toilet, and W is empowered to make the repair herself and deduct the cost from her next month's rent payment.

II. Sprinkler

The sprinkler system that had been keeping the lawn watered is no longer functioning, and W would like S to repair it.

Maryland State Board of Law Examiners
JULY 2016 MARYLAND GENERAL BAR EXAM –
REPRESENTATIVE GOOD ANSWERS FOR THE BOARD’S WRITTEN TEST

The discussion supra of tenantability law covers here and below. The lease agreement assigns yard maintenance to the tenant at the tenant's expense. LP14(B).

A faulty lawn sprinkler does not appear to fall within the realm of faulty plumbing imagined by the statutory example of tenantability. Indeed, W's use of the lawn seems to have been not impacted at all. The only additional burden of watering the grass is explicitly assigned to her by the lease agreement. Since she did notify S about the issue and it appears to not have been broken by her own fault, it would be unlikely that S could hold her responsible for the repair at the end of the lease agreement.

As such, W has no obvious recourse but to pay the cost to repair the sprinkler herself, or continue to water the grass via hose.

III. Guest Room

The exterior door in the bedroom that W has been using as a guest room is allowing outdoor moisture into the room and is molding the carpeting, causing a stench that renders the room unusable.

Effective waterproofing is listed as an example defect under FCC 541. If the cost to repair exceeds a single month's rent, the tenant may make the repair herself - assuming she is empowered to do so (see supra) - and sue the landlord for the costs. FCC 542(a)(2). Or, the tenant may withhold a reasonable amount of the rent until the landlord makes the repairs. FCC 542(a)(4). *Burke v. Harris* held that a leaky roof and window were acceptably substantial as to make an untenable defect.

A leaky exterior door - one that does not even fit within its prescribed molding - would seem to make an untenable defect under the statutory definition and following *Burke v. Harris*. And as the repair has gone undone for two months, she could take remedial action. Here, she could have the door repaired and sue S for the cost - since the \$1800 quote is more than she pays in rent per month - or she could withhold a reasonable amount from her rent until the repairs are made. The most reasonable amount to withhold - since the stench has rendered the room practically unusable for any purpose - would be the difference in market cost of a 3-bedroom and a 2-bedroom, which in her neighborhood is a \$200 difference. W's only barrier to recovery is the issue of timely notice. By the time she emailed S regarding the problem, mold was already visibly growing. If it is shown that the gap between the door and its jam was noticeable without unreasonable inspection and the smell of mold would have preceded its visibility, W may not have delivered notice within a reasonable time, which under *Shea v. Willowbrook* would suggest that she would not be able to recover the full cost of repair, as notice serves to mitigate the damage. However, her actions to place plastic over the gap may be viewed as mitigating and favor a larger recovery.

The leaky door is apparently an untenable defect for which S is responsible, and the delay in making the repair does empower W to take remedial action. However, the timing of W's notice to S may inhibit her ability to recover the full cost of the repair should she choose to have it performed herself.

IV. Dog damage

W's authorized dog chewed through some baseboard in house, and W seeks to have S pay for the repair.

The lease agreement makes the tenant liable for damage caused by unauthorized pets (LP8). And statutory law burdens the tenant with the repairs for damages caused by animals. FCC 543(3).

Maryland State Board of Law Examiners
JULY 2016 MARYLAND GENERAL BAR EXAM –
REPRESENTATIVE GOOD ANSWERS FOR THE BOARD’S WRITTEN TEST

Without the language of the Pet Addendum yet available to suggest otherwise, W is responsible for the cost of the damage done by her dog, authorized or not. W could have the repairs done herself, or simply leave the damage there and allow S to repair it at the end of her final lease and deduct the cost from her \$1200 security deposit. LP 9.

V. Vacating the property

Although at this time W has indicated her desire to stay, statutory law and her lease would arguably permit her to vacate the property, terminate the lease, and defend against an eviction suit. LP 11, FCC 542(a)(3). This would depend on the court finding that the leaky toilet, the leaky door, or both combined create a substantial enough defect.