Maryland State Board of Law Examiners

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

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MARYLAND ESSAY QUESTION NO. 1

Representative Good Answer No. 1

This Matter is addressed under the MD Rules of Professional Responsibility.

Al violated the following duties to his client, Bess.

Duty of Communication - a lawyer must communicate regularly with his client and provide details about the status of the representation. Here, despite Bess requests for updates, he ignored her requests for status updates.

Duty of Information - a lawyer must be responsive to a client's request for information and keep them informed of the status of the matter. Here, despite Bess' request for a record of the receipt and deposit of the *(sic)* retainer and the disbursement from her retainer, he failed to provide her will such information.

Duty of Competency - a lawyer is to provide competent representation of matter they undertake. Here, Al's failure to respond to discovery requests, the motion for sanctions, taking a rather excessive retainers, and placing the retainer in the operating account although it had not yet been earned was not a competent action.

Duty of Diligence - a lawyer has a duty to act promptly to requests for information and meet filing deadlines. Here, Al failed to meet the discovery deadline, respond to the motion for sanctions, appear at scheduled mediation proceeding as well as respond to his clients request for information was a breach of his duty of diligence.

Duty of Honesty - a lawyer must be forthright with his client in his representation. Here, Al told Bess that everything was under control despite the fact he had failed to respond to discovery requests and respond to a motion for sanctions.

Duty of Safekeeping - a lawyer must ensure the safekeeping of his client's property. Here, because the retainer was not yet earned, it should have been placed in a separate trust account for Bess and not in the firm's operating account. In addition, he should keep records of the expenditures against the retainer and notify the client when draw downs are made against the account. Finally, he must return any unearned portion of the retainer.

Duty to Withdraw - a lawyer must remember that the client is in control of the relationship and the lawyer has a duty to withdraw when the client no longer wants the continue *(sic)* that relationship. Here, when Bess retained new counsel and the counsel contacted Al, he breached his duty when he refused to sign the Line withdrawing his appearance.

Fee - a lawyer a duty to charge reasonable fees based on his experience and the duration and serious of the matter. Here, taking a $30,000 for a divorce matter and he has been a lawyer for only three years seems rather excessive and unreasonable.

General Misconduct - a lawyer must not commit acts of dishonesty, fraud, misrepresentation, or deceit. See above.

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Representative Good Answer No. 2

Al, in his representation of his client, Bess, violated the following Maryland Rules of Professional Conduct:

(1) Duty of Diligence / Zealous Representation: Here, Al violated the rules by violating his duty of diligence in a number of ways including his "failure to provide responses to written discovery", his failure to file "written opposition or response to the Motions for Sanctions" and his failure to "appear at a scheduled mediation proceeding".

(2) Duty of Candor to Client: An attorney has a duty of candor (to be truthful) to his client. Here, Al violated his duty of candor to Bess by telling her "he had everything under control" because he didn't -- he failed to provide written responses and failed to appear at scheduled appearances, all of which had negative effects on Bess's case.

(3) Duty to Communicate: An attorney has a duty to keep constant communication with his client in order to keep the client informed and updated about their case. Here, Al violated his duty of communication to Bess when he "ignored" Bess's "request for status updates".

(4) Best Interest of Client: An attorney has a duty to act within the best interest of the client. Here, Al violated the rules when he "refused" Bess's attorney's request to "withdrawal" as Bess's attorney.

(5) Duty to Keep Records: An attorney has a duty to keep records of their client's representation, including records of fees paid. Here, Al violated the rules by failing to records of Bess's "receipt and deposit of her retainer and disbursements".

(6) Attorney Fees: An attorney must return any unearned fees paid to them by their client. Here, Al violated the rules by ignoring and failing to return the portion of Bess's "unearned retainer".

Also, Al's firm should have more than one bank account. Al should have put Bess's retainer in a separate account.

Also, a retainer of $30,000 for a divorce case may be unreasonable.

Also, contingency fees for family law cases are not allowed.

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MARYLAND ESSAY QUESTION NO. 2

Representative Good Answer No. 1

Julie has a case for breach of express warranty, implied warranty and rightful rejection.

An express warranty is defined as "any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise." (§2-313). Here, Julie went to Sharp's and asked the manager "Does the Robi really do what the ad states, and is it easy to operate?" The manager replied "Yes, the Robi cleans any type of carpet and floor." This is an affirmation that the Robi will clean floors effectively made by the seller to the buyer. After the manager's response, Julie was then convinced of the Robi's abilities and then purchased the cleaner for $999. This exchange created the express contract.

A warranty that goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. (§2-314). Here, Julie went to an appliance store that had specifically advertised the Robi. She spoke with the manager who seemed knowledgeable on the subject, and purchased the Robi. This exchange created an implied warranty that the Robi was fit for ordinary purposes for which it is used.

A rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller. (§2-602). Julie received the Robi, took her dogs for a walk, came home, read the operating manual and immediately began to use the Robi. After it malfunctioned she alerted Sharp's the next day of the incident. Waiting overnight should not disqualify Julie from bringing a successful claim that she rejected the Robi in a reasonable amount of time. After a long day, Julie probably did not even begin to use the Robi until later into the evening when Sharp's might have already been closed.

After bringing up these claims, Julie also has a case for remedies against Sharp's for breach of express and implied warranty.

Where the buyer has accepted goods and given notification of 2-607 he may recover damages for any nonconformity of tender the loss resulting in the ordinary course of events from the seller's breach (§2-714). Consequential damages resulting from the seller's breach include injury to person or property proximately resulting from any breach of warranty (§2-715b). Julie should argue that the manager's express and implied warranty was broken when the Robi malfunctioned and that because of the malfunction her dog was injured and her floor and some furnishings were damaged.

Representative Good Answer No. 2

Julie has several arguments to support a claim under the UCC.

Express Warranty

Under UCC 2-213, an express warranty is any affirmation of fact or promise made by the seller to the buyer that which relates to the basis of the bargain. However, an affirmation of the value of goods or a statement purporting to be merely the seller's opinion is not an express warranty (2-313(2)). Here, Julie referenced the advertisement and asked if the Robi did what was stated, and the manager affirmatively responded "Yes, Robi cleans any type of carpet and floor!" This response is an affirmation of fact that the Robi will vacuum Julie's carpet and mop Julie's floor. While Julie was satisfied with the carpet vacuuming, the mopping of the floor caused the Robi to

smoke and blow up. Thus the Robi did not clean "any type of floor" as the manager affirmatively said, and thus breached the express warranty of merchantability. Julie has a good likelihood of success on this argument.

Implied Warranty of Merchantability

UCC 2-314, a warranty that the goods are merchantable is implied in every contract for the sale of goods, if the seller is merchant. Here, Julie purchased the Robi from Sharp's Appliance store (a merchant.) After she brought it home, read the manual and used it for the ordinary purpose of vacuuming her floor with dog hair and trying to mop, the Robi began to smoke and lose control. Thus there is a breach of implied warranty of Merchantability for the Robi. However, Julie did refuse to take a demonstration, as offered by Joe, the employee. He noted this, which may try to be argued as a waiver of the Implied Warranty of Merchantability. However, this will fail, because Julie did read the manual before operating the Robi, so it can be inferred that she knew the ordinary use. Hence, Julie has a strong likelihood of success to get back her money for the Robi based on this argument.

Damages

Damages in Maryland are based on putting the non-breaching party in the position they would have been had the contract been fully performed. This is based on the expectation that neither party to a contract will breach the contract. Here, Sharp has breached the Implied Warranty of Merchantability and the Express warranty.

Under UCC 2-714, where a buyer has accepted goods, and given notification (2-607 Notice of Breach), he may recover the as damages for any nonconformity of tender the loss resulting in the ordinary course of events form the seller's breach as determined in any manner. Here, Julie accepted the goods at her door. She inspected the Robi and used it to vacuumed, then it broke. She notified the manager of Sharp the next morning. She requested the refund price. She again, is likely to succeed for the price of the Robi of $999.00.

The UCC 2-714(2) states, that if special circumstances show proximate damages of a different amount, a party may recover consequential damages. UCC 2-715(b) consequential damages resulting known at the time by the seller and the seller's breach include injury to person or property proximately resulting from any breach of warranty. Here, the Robi lost control. That loss of control was the proximate (foreseeable) cause that it would damage the floor and hit her dog. Moreover, the Robi was delivered by Joe to her home, assembled and tested therein. Joe is an employee of Sharp, and thus it should be argued that Sharp, through Joe, had reason to know that Julie's dog may be injured by the Robi along with the floor and furnishings. Thus, Julie should be able to recover the $12,300.00 on this argument.

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MARYLAND ESSAY NO. 3

Representative Good Answer No. 2

Part A. The issue is whether Able violated a duty to the Partnership in selling his inherited property to Douglas LLC.

A general partner in a limited partnership has a duty of loyalty to the limited partnership in his operation of the business. In conducting the partnership's business, the general partner may not exploit the partnership for his own personal gain. A general partner would violate this duty if he usurped a business opportunity from the partnership for his own personal gain. However, a general partner's personal property is his own to do with what he likes.

Here, Able, the general partner of the Partnership, has a duty of loyalty to the limited partnership. In conducting any business relating to residential construction it would be improper for Able to exploit any business opportunities for his own personal gain. However, Able inherited the plot of land completely separate and apart from the business of the Partnership. The land was never part of the partnership assets and Able was free to dispose of it in any manner he chose. While he sold the property to a third party for similar uses to what the Partnership would do with it, he was doing so in his personal capacity. Had he gone out and acquired property to then sell to a third party other than the Partnership, his conduct may have violated the duty. However, the property came to him in a nonbusiness manner and was purely personal. The Partnership could not have been said to have any interest in it or his inheritance of the property.

Accordingly, Able did not violate the duty of loyalty to the Partnership in making a personal sale of inherited assets.

Part B. The issue is what steps Baker must take to pursue her rights and remedies in this situation.

Limited partners in a limited partnership cannot sue on behalf of the partnership like all general partners could in a general partnership - only general partners of a limited partnership can do so. However, limited partners may be able to sue derivatively on behalf of the limited partnership on account of a breach of fiduciary duty by the general partners, which includes a duty of care of duty of loyalty, or other failure by the board to act. Prior to suing derivatively, the limited partner must make a demand on the general partner for the relief sought unless such attempts would be clearly futile and of no purpose.

Here, Baker may be able to sue derivatively on behalf of the corporation either (a) against Able for a breach of his duties of care and loyalty in failing to sue and seeking a remedy of Able pursing the claim or (b) against Douglas LLC directly to enforce the Partnership's contract rights. Prior to commencing either suit, Baker must make a demand on Able for the relief she seeks - that is a lawsuit against Douglas LLC for breach of contract. Baker could assert that a formal demand is futile at this point because she has already communicated with Able her position and given him an opportunity to file suit himself and he refuses. After having made a formal demand or asserting that demand is futile, Baker could pursue these claims on behalf of the Limited Partnership. Any damages recovered would go to the Partnership (for distribution in accordance with the partnership agreement) and Baker, if successful, could also obtain reimbursement for the expenses and costs (including attorney's fees) to be taken out of any award recovered for the Partnership.

Therefore, Baker may sue derivatively on behalf of the Partnership, provided she first makes a demand on Able for action or successfully argues that demand would be futile under these circumstances.

Part C. The issue is whether Douglas can be held personally liable for the breach of contract.

Members of a limited liability company are typically not liable for the debts, contracts or other liabilities of the limited liability company unless such company is engaged in illegal or unethical conduct. Limited circumstances may exist to find members personally liable, such as if the member personally caused a tort or was personally bound by a contract or under a "piercing the veil" theory. A court will only pierce the veil in Maryland to enforce a paramount equity or prevent fraud. The court must then find that grounds exist to pierce the veil after considering the following factors: (1) whether the members co-mingled personal and company assets in conducting business, (2) whether the company disregarded corporate formalities, (3) whether the company was undercapitalized and (4) whether the company engaged in any fraud or illegal conduct.

Here, there are no facts to suggest Douglas personally guaranteed the contract between the Partnership and Douglas LLC ("LLC"); therefore, he will not be personally liable under the construction contract unless a court finds grounds to pierce the veil to get personal liability of him as a member. The facts suggest, however, that Douglas observed the corporate formalities in operating the LLC and did not comingle personal funds. There are no facts from which to suggest the LLC had an overall undercapitalization problem or that Douglas used the LLC to engage in fraudulent or illegal conduct (though there was rumor that he may have engaged in questionable activities with other entities with which he was involved). Finally, the claim is a run of the mill breach of contract and there are no special facts on which to find the need to enforce some paramount equity or fraud being committed by Douglas that would warrant piercing the veil.

Given all of the foregoing, it is unlikely that Douglas could be held personally liable for the breach of contract by the LLC.

Representative Good Answer No. 2

A limited partnership is a partnership (2+people intending to do business for a profit) where there is a general partner, here Able (A) involved the up close management and a limited partner, here (B), who is shielded from liability, acting mainly as a source of funds.

A. NO VIOLATION SELLING PROPERTY

A did not violate any obligations to the P by selling the property to his brother because the property was A's alone (inherited) and not P property. The intent of the parties controls whether property is P property and here there is no indication either A or B intended the property be P property before A sold it.

B. FIDUCIARY DUTY OF LOYALTY

As a general partner, A is an agent of the partnership (P) and owes it a fiduciary duty of loyalty. A breached that duty by engaging in self-dealing by (after selling the property personally to D) working with his brother Douglas (D) and his LLC to build residences on the property.

The conflict becomes clear when A refuses as general partner to sue the LLC because it is his brother's company. The LLC is solvent and thus the P could recover for the 6th installment.

To enforce his rights, B can bring a direct and derivative suit. A direct suit is to enforce his rights as a partner, that A breached his fiduciary duty as B's agent. Agents must act for the benefit of their Principles, and here A, by not suing the LLC is failing to do so.

The derivative suit is on behalf of the P. B will either have to make a demand on A that there was a violation of loyalty or show that A is so conflicted that it would be futile to bring a demand, in which case B can bring suit

directly. The burden will be on B to prove that A has a conflict which materially undermines his ability to manage the P and thus undermines the P.

Once B proves the conflict, A can either show safe harbor - that the transaction was approved by the majority of partners (which would shift the burden back to B), which he cannot, or that is was reasonable and fair, (which would allow A to win), which he cannot also because the P's survival as a functioning entity is being undermined by failing to sue the LLC and receive payment due from a solvent entity, the LLC. B should prevail in both his direct and derivative suits against A.

C. D CANNOT BE HELD PERSONALLY LIABLE

An LLC is a hybrid of that allows for the close control of a partnership while offering the limited liability of a corporation. As such, D cannot be held personally liable unless it can be proven that there was fraud or in service of a paramount equity, that is that D basically used the LLC as an alter ego by undercapitalization, failing to keep corporate formalities, intermingling of personal and LLC funds - that is piercing the corporate veil. This standard is extraordinarily hard to overcome in MD, because the courts want to preserve the security of limited liability for businesses and is applied in extreme cases only. Here, the facts state that D complied with all formalities of operating the LLC, there was a dedicated and not intermingled account for dealing with the construction, and all payments were from the LLC, not D.

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MARYLAND ESSAY QUESTION NO. 4

Representative Good Answer No. 1

The Fourth Amendment provides a right to be free from unreasonable searches and seizures. Individuals have a reasonable expectation of privacy with respect to their persons and vehicle. Generally, lawful a search may be conducted a warrant based on probable cause and issued by a neutral magistrate or with an individual's consent. However, there are several exceptions outlined below.

Traffic Stop

Karen and Daniel may challenge the traffic stop in their motion suppress. To conduct a lawful traffic stop, an officer must have a reasonable suspicion that a crime has been committed. Karen's speeding at 82 miles per hour in a 65 mile-per-hour zone is sufficient to give the Maryland State Police officer reasonable suspicion to make the stop. Therefore, the stop was lawful. As a result, Karen is likely to be convicted of speeding.

Daniel's Exit from the Vehicle

A traffic stop is not considered a seizure for Fourth Amendment purposes. Passengers in a vehicle are free to exit and walk away from the stopped vehicle at any time. If an officer can articulate a valid reason for detaining and questioning a passenger, then they might be subject to a Terry stop. However, there was no articulable reason to detain Daniel. There is no indication the officer had probable cause to detain him. He was merely a passenger in the vehicle. Only Karen was subject to detention. Therefore, the apprehension and arrest of Daniel was unlawful. He cannot be convicted of fleeing and eluding the police.

Officer's Search of the Car

Under the automobile exception, a search may also be conducted incident to a lawful traffic stop if an officer has probable cause to believe an automobile contains an instrument of crime. Here, there was a lawful traffic stop, as stated above. However, there is no indication that the officer had probable cause to believe the vehicle contained an instrument of crime. Nor was there any justification to search the vehicle for a dangerous weapon, which would have only permitted the officer to lawfully search the passenger compartment of the vehicle, not the trunk. While automobile searches incident to a lawful arrest are also permissible, Daniel's arrest was not lawful and Karen was not arrested for any crime prior to the arrest. Therefore, the search of the vehicle was unlawful.

Because the search was unlawful, Karen will argue that the evidence discovered as a result must be suppressed under the exclusionary rule. All evidence flowing from the search is considered to be the fruit of a poisonous tree and therefore may be suppressed as to Karen. Therefore, the marijuana found in the trunk may not be used as evidence to convict Karen of either possession or distribution.

Daniel, however, will not succeed in excluding the evidence of marijuana as to him. While a vehicle owner has a reasonable expectation of privacy in their vehicle, passengers have no reasonable expectation of privacy in the vehicle of another. Therefore, Daniel is likely to be convicted of possession and intent to distribute based on the amount of marijuana (twenty pounds) found in the trunk, notwithstanding the illegality of the search.

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Representative Good Answer No. 2

KAREN

In order for 4th Amendment protections to attach, there must be state action, standing, and a search or seizure must have occurred. Here, Karen's car was searched.

State action. Karen was stopped for speeding by the Maryland State Police.

Standing. In order to have standing, one must have a reasonable expectation of privacy in the place searched or in the item seized. Here, Karen's vehicle was searched, which she owned and was driving at the time of the stop.

4th Amendment Search and Seizure Clause. Prohibits warrantless governmental searches and seizures, unless subject to an exception. Here, Karen's car was searched without a warrant.

Valid stop. The officer must have reasonable articulable suspicion to conduct a traffic stop. Here, Karen was driving 82 miles per hour in a 65 mile per hour zone. She was properly issued a citation for speeding.

Automobile Exception. Allows a search of a vehicle based on probable cause. Here, there is no probable cause to support the search of Karen's trunk, which resulted in the recovery of 20 pounds of marijuana. This search was illegal.

Fruit of the poisonous tree. Where the search was illegal, the evidence obtained as a result should be suppressed as well as Karen's arrest.

Karen will likely be convicted of speeding, but acquitted of possession with the intent to distribute.

DANIEL

State action. Daniel was a passenger in the vehicle that was stopped by the Maryland State Police.

Standing. See above. Daniel will have standing in his person, but he will not have standing on any items recovered from the vehicle, which was owned by Karen.

4th Amendment Search and Seizure Clause. See above. Here, Daniel was seized by the police for fleeing and eluding.

Valid Stop. See above.

Warrantless Arrest Exception. A warrantless arrest must be supported by probable cause. Here, Daniel simply exited the car and attempted to walk away when the police apprehended him and placed him under arrest for fleeing and eluding. A passenger in a vehicle may walk away, where circumstances do not permit an inference of even reasonable articulable suspicion for criminality on his part. This arrest was illegal.

Fruit of the poisonous tree. Where Daniel's arrest was illegal, all evidence obtained as a result of it should be suppressed.

Here, Daniel will not be convicted of fleeing and eluding the police, but the evidence of the marijuana may be properly brought against him since he has no reasonable expectation of privacy in Karen's vehicle, and he may be convicted of possession with the intent to distribute. This is not likely however, since the marijuana was found in the trunk of Karen's vehicle and not in an area within his reach.

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MARYLAND ESSAY QUESTION NO. 5

Representative Good Answer No. 1

A. To Obtain a Lien, Adams (A) should take the following steps

To obtain a lien based on a money judgement from Baltimore City, the creditor-plaintiff must record and index the judgement based on Rule 3-601(d). 3-621. The lien constitutes a lien from the date of entry or the date of recording if received in another county. Id.

Outside of Baltimore City, the creditor-plaintiff may file a request for a certified Notice of Lien of Judgement to be transmitted to the clerk of the circuit court and the clerk of the district court where the debtor owns assets. Id. The Notice of Lien must contain the names of the parties, the name of the court, the date and amount of judgement. Id. The lien exists from the date the Notice of Lien is recorded in the circuit court, and must be recorded and indexed. Id.

A obtained his judgement in Baltimore County, not Baltimore City. Accordingly, A should file a request for a certified Notice of Lien of Judgement, the clerk will in 24 hour transmit the Notice to the District Court and Circuit Court for Cecil County.

B. A can use the following discovery methods to satisfy the judgement

Pursuant to R. 3-633, a judgement creditor can use interrogatories and examination before a judge to satisfy a judgement. Interrogatories may be served on the judgement debtor after 30 days. The examination before a judge must be requested by the judgement creditor at least 30 days after the entry of a judgement. Id. The judge of the court that issued the judgement can issue an order requiring the judgement debtor, or any other person whom the court is satisfied by affidavit or other proof has: (1) knowledge of the debtor's assets, or (2) knowledge of concealment, fraudulent transfer, or withholding of assets. Id.

The order must specify when, where, and before whom the examination will be held. Id. Subsequent examinations may only be held for good cause. Id.

C. Burr can petition the court for a new trial, or move to alter the judgement, or appeal

Any person may file a motion for a new trial within 10 days of entry of the judgement. 3-533. This motion is not available to B, because the judgement was entered on February 1, and it is now February 14. However, he can argue that there is good cause for his non-appearance at the original trial (such as lack of notice), and the court may give his case special consideration.

Similarly, any party may file a motion to alter or amend the judgement within 10 days of its entry. 3-534. However, B waited too long, and would similarly be barred from filing this motion unless he shows good cause. He may be able to show lack of notice if he can challenge the service.

The court may also consider opening the case within 30 days of the entry of judgement if B can show Fraud, Irregularity, Mistake, Newly Discovered Evidence, or a Clerical mistake. Here, B would have a high bar. It is unlikely that the court will reopen his case based on the facts.

Finally, B could appeal for a trial de novo on the legal findings, and assert improper venue. Unfortunately, the appeal will be heard on the record of his default because it is a civil action in which the amount in controversy exceeds $5000 exclusive of costs and attorney's fees. 7-102.

If B surmounts this obstacle, he has a good argument that venue was improper. Venue is improper, and a court may transfer or dismiss the action in if there is a more convenient forum for the parties and the claims. Here, nothing happened in Baltimore County: B lives and works in Cecil County, he owns property in Cecil, and the work was does in Cecil County. If B gets the case reopened or appealed, he can likely defend based on improper venue.

Representative Good Answer No. 2

A. Lien of Judgment

Pursuant to Rule 3-621, generally, a money judgment constitutes a lien in the amount of the judgment and post judgment interest on the judgment debtor's interest in land located in a county. If Burred owned land in Baltimore City, then Adams would only need to make sure the judgment is recorded and indexed pursuant to Rule 3-601(1). However, because Burr's property is in Cecil County, Rule 3-621(c) applies.

First, A must file with the clerk of Baltimore City a request that a certified Notice of Lien of Judgment be transmitted for recording the clerk of the Circuit Court for Cecil County. The clerk for Baltimore County must, within 24 hours of the request, transmit the Notice of Lien to the Circuit court for Cecil County and a certified copy of the judgment to the District Court of Cecil County. Once the Notice of Lien is recorded and indexed in the Circuit Court of Cecil County, the judgement constitutes a lien from the date of that recording. See Rule 6-21(d)(3)

B. Discovery Options

Pursuant to Rule 3-633 a judgment creditor (Adams) may obtain discovery to aid enforcement of a money judgment by using interrogatories or by examination before a judge or an examiner. A request for an examination before a judge or an examiner may not be filed earlier than 30 days after the entry of a money judgment. The court will prepare an order requiring the debtor or any person the court is satisfied by affidavit that the person has property of the debtor to appear. This order may be served by in hand service, by leaving with a person of suitable age at the person's known residence or by certified mail, return receipt requested. Interrogatories may be served immediately after receiving the judgement and may be sent by mail to the known address of the debtor with a certificate of service.

C. Judgement Overturned

Pursuant to Rule 7-102, Burr is not able to receive a de novo appeal because Rule 7-102(b)(1) provides that a civil action which exceeds $5,000 shall be heard on the record of the district court. Thus, because the claim is for $15,000, a de novo appeal in the circuit court is not applicable.

Additionally, because Burr did not come to my office until February 14, thirteen days after the date the judgment was entered, I would not be able to file a motion to amend or alter a judgment because those motions must be filed within ten days of the entry of judgment.

Therefore, the only rule left is Rule 3-535, the court's revisory power. A court may revise a judgment within 30 days of the judgment if it could exercise power under the motion to alter/amend. Here the court's authority is discretionary. It is possible that a court might revise the judgment under this provision due to the fact that Adams, a non-attorney, represented the LLC, which is prohibited by state law. Additionally, the court might decide to revise the judgment because it was not the proper venue since Burr, the defendant, lived and worked in Cecil County and the crux of events underlying the dispute also occurred in Cecil County.

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MARYLAND ESSAY QUESTION NO. 6

Representative Good Answer No. 1

A: County Bank ("C-Bank") should have priority over Patuxent Bank ("P-Bank"), primarily because Maryland is a race notice state, and C-Bank was the first to record their lien. In accordance with Maryland law, a conveyance of a land interest for value will be invalid against a purchaser for value and without notice thereof, whosoever first records. Therefore, the first bona fide purchaser (one who purchases for value, in good faith and without notice of any other purchaser) will prevail over other subsequent purchaser if they are the first to record. Moreover, recording provides notice to all other potential lien holders that one has a lien. Here, P-Bank failed to record and therefore failed to give notice to any other subsequent purchaser of the right to the land, and their priority. Moreover, C-Bank was able to record on time, and because the lien held by Friendly Bank has been discharged, C-Bank is now first in priority.

B: Tom initially obtained a purchase-money deed from Friendly Bank ("F-Bank") which granted the rights of a purchase money mortgagor. A purchase money mortgage is created when the debtor attains a mortgage for the purchase of property which is used as collateral for the mortgage, making the creditor the purchase money mortgagor ("PMM"). A PMM has a superior claim to the collateral (the home) than all other creditors, whether or not they record. Here, F-Bank was the PMM and had a superior claim. Moreover, they were also the first to record, thus properly perfecting their seniority right.

A refinancing deed of trust, wherein the previous lien is discharged in its entirety, will allow the refinancer-creditor the ability to step into the shoes of the previous creditor. Here, P-Bank executed a refinancing deed, allowing Tom to completely discharge his mortgage with F-Bank. As such, P-Bank is now able to step into the shoes of F-Bank and become a PMM with superior rights to all later creditors.

Representative Good Answer No. 2

(A) County Bank's argument for first priority,

Lien priority is determined by several factors, including the type of lien, time of attachment, and time of notice. County Bank's lien was formed and attached to the Shady Place property on July 28, 2007, the date of the execution of the deed of trust. The attachment was effective because there was value (consideration) given on both sides in a bargained for exchange and the execution of a document creating the lien. That lien was perfected and thus ahead in priority to any other subsequent liens when it was recorded in the Land Records for Prince George's County on July 31, 2007. While the date of attachment was later than the date Patuxent Bank's lien attached (July 21, 2007), Patuxent had not yet recorded its lien and therefore had not perfected. A perfected lien creditor is superior to all other creditors except other perfect lien creditors and certain purchase money creditors (such as friendly's lien) coming before it. This outcome is justified because County had no notice of Patuxent's lien. The purpose of recording a lien and thus perfecting it is to put other potential creditor's on notice of its existence. Under this reasoning then it makes sense that County's lien would have priority. County may not have made the loan if it had known that its lien would be secondary to that of Patuxent's.

(B) Patuxent Bank's argument for First Priority

As described above, Patuxent's lien was attached on July 21, 2007, the date of the execution of the refinance. However, while this was before the attachment of County Bank's lien, Patuxent failed to perfect its lien until April 1, 2011. Since County perfected first, it would seem that its lien would take priority. However, Patuxent still has

a card to play because its lien was the result of a refinance of a purchase money security interest. Friendly's initial purchase money security interest undoubtedly held first priority when it was created (barring any title defects to which the facts are silent). When Tom borrowed from Patuxent to refinance that initial loan, Patuxent effectively stepped into the shoes of Friendly and took its lien priority. This outcome is also fair and equitable under the same theory of notice as alluded to above. Patuxent presumably would not have issued the loan if it was unable to take first priority and stand in the shoes of friendly. As to County, there is really no harm done. While they would of course want to know the priority of their lien in determining whether to make the loan, at the time they made it they had notice of the Friendly lien. Therefore, it would not be unfair or unequitable to force county to be the second lien since that is what they thought they would be anyway.

There is one caveat with this argument, however. The refinance by Patuxent only paid off the friendly lien in the amount of $255,000. The remaining $95,000 is an additional loan and could /should be treated as an home equity loan, Therefore, the likely outcome of this action is that Patuxent will have a first priority lien in the amount of $255,000 because its refinancing was used to pay of Friendly's first priority lien. Next, County will have a second priority lien of $100,000 since, even though its lien attached after Patuxent's, it was perfected first. Finally, the remaining $95,000 of Patuxent's loan will constitute the third priority lien. Of course, as an aside, if the value of the property is below the total value of these loans ($450,000) some of them may end up becoming unsecured in a foreclosure or bankruptcy proceeding.

Maryland State Board of Law Examiners

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MARYLAND ESSAY QUESTION NO. 7

Representative Good Answer No. 1

The following civil cases of action may be filed:

Tom v. Officer Friendly

An assault occurred because Officer Friendly intentionally caused a reasonable apprehension of imminent bodily harm in Tom and Jerry when he pointed his handgun at them. A battery occurred when Officer Friendly caused an intentional contact to Tom's person by striking him twice on the face with his first. Tom will likely recover because Officer Friendly has no defenses: there was no self-defense and there was no consent. There was also no need for him to use force after he had tackled Tom when he tried to escape. Therefore, Tom should succeed as to battery. Tom and Jerry will likely not be successful as to assault because Officer Friendly thought they had a gun.

If Tom and Jerry sue Officer Friendly, they should also sue the store since Officer Friendly was acting as a security guard (in furtherance of official duties - so probably successful). They could also try to sue Howard County since Officer Friendly was a state employee (but not in furtherance of official duties, on his own - so probably not successful).

Jerry v. Officer Friendly

Jerry will likely not be successful against Officer Friendly for assault or false imprisonment because he thought Tom and Jerry had a gun.

Customer v. TMart

Customer will allege that TMart was negligent in failing to clean up the liquid that had spilled on the store floor. Customer will allege that TMart had a duty to all its customers (as invitees) to exercise reasonable care as to the maintenance of the property (and cleaning spills) and that TMart breached that duty when its conduct fell short of that which is required. Customer will allege that TMart's breach of duty was the causation of her wrist injury: "but for" TMart's failure to clean the spill on the floor, Customer would not have slipped (actual cause/cause in fact) and customer will argue that it was foreseeable that if liquid was spilled on the floor, a customer could have slipped (proximate/legal cause). Customer will assert, that, at minimum, TMart should have put up a "Caution: Wet Floor' sign. TMart, will counter argue, that Customer was contributorily negligent because she was running through the store. In Maryland, contributory negligence is an absolute bar to relief. If TMart argues that Customer was contributorily negligent and is successful, the only way Customer can still recover is if she alleges that TMart had the last clear chance to avoid the injury (which she probably won't be able to do).

Jerry v. Customer

Defamation is a defamatory statement made by D about P that is published, and harmful to P's reputation. Here, Customer shouting to a crowd of people that Jerry "is a low-life thief; he tried to rob the store" is certainly defamatory. It was published when it was yelled into a crowd and it was harmful to P's reputation as evidenced by the fact that Jerry was fired from his job. In Maryland, it is important to note that fault and falsity must also be alleged and that the plaintiff, Jerry, has the burden of proving them. Here, since Jerry did not actually try to rob the store, the statement is certainly false. Additionally, there is fault because Customer shouted the statement with negligent regard as to the statement's truth (since Jerry is not a public figure or official, the actual malice standard does not apply).

Jerry will likely be able to prevail on this claim because Customer has no defenses. There was no truth to what she said and she did not have an absolute or qualified privilege. In terms of damages, this is slander per se (because it was spoken - slander) and it involves an allegation that Jerry committed a crime so he does not have to prove special damages.

Jerry v. Reporter

Defamation, as delineated above, is also present here. Here, the Reporter reprinted the defamatory statement about P in the newspaper and it was harmful to Jerry's reputation. Here, the statement is libel because it is written. Since we are in MD, Jerry has to prove fault and falsity. Here, again, the statement is false. As to fault, the reporter did act with reckless disregard as to whether the statement was true or not. Even if the report wanted to cover the news, there is still some type of journalistic integrity that is involved in reporting and the reporter could have easily taken steps to verify whether Jerry actually tried to rob the store. Since Reporter was right there, she could have asked the mangers. A reasonable reporter in her situation probably would have and since she didn't, a court likely would find that she acted with reckless disregard as to the truth of the statement.

Representative Good Answer No. 2

Tom v Officer Friendly – Battery

The tort of Battery is an intentional tort where a defendant unlawfully touches plaintiff.

Officer Friendly ran after Tom and Jerry, tackled Tom and struck Tom twice in the face with his fist. This constitutes a battery against Tom. The defense of self-defense is available where defendant reasonably uses enough force to defend himself. Officer Friendly could argue that he reasonably believed that T & J had hand guns and needed to detain them. But that is a defense to false imprisonment. Here, Officer Friendly's actions in striking Tom in the face after he had detained him will likely be found unreasonable.

Tom T-Mart– Vicarious Liability

An employer may be vicariously liable for the intentional torts of an employee if intentional tort was within the scope of the employees duties and foreseeable.

Officer Friendly was a security guard, there for it is foreseeable that he was engaged in rough physical contact with customers or others. Furthermore, Friendly was trying to assist T-Mart by preventing the robbery of the store. Therefore, I think it was within the scope of his employment and he was furthering T-Mart's interests. TMart will be liable if Friendly is found liable.

Tom & Jerry v Friendly – False Imprisonment

False Imprisonment is an intentional tort whereby plaintiff is confined to an area without any reasonable expectation that he can leave.

Friendly handcuffed T & J and took them into the store for questioning. T& J were confined to area within the area and were not permitted to leave. The Shop keeper defense is available in response to the false imprisonment if defendant reasonable suspicion that crime was afoot and for a reasonable period of time. Friendly believed T&J were going to rob the store and thought they were armed with guns and when he found out that they only held paint guns he released them.

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Customer v TMart – Negligence

Negligence is where a defendant owed a duty of care to plaintiff, that duty was breached, the breach was the cause in fact of the foreseeable injury and damages. An invitee is a person who is on another's land to provide an economic benefit to the land owner. A land owner owes an invitee a duty to inspect and make sure the premises are safe under MD law.

Customer who regularly shops at T-Mark slipped on the liquid in the store. T-Mark had a duty to clean up any liquid on the floor that it found by checking. If TMart knew the liquid was there or could have found it by conducting a reasonable search, it will be liable for the injuries from Customer's injuries to her wrist. Also, TMart may defend by claiming that Customer was contributorily negligent by running through the store.

Jerry v Customer – defamation

Defamation is a cause of action where defendant communicates a false statement to 3rd parties. In MD damages must be proven unless they are pre se damages. If the statement involves a private figure on a private matter, no malice is required only negligence. Here, Customer shouted "Jerry is a low life thief, he tried to rob the store" to a crowd of people. As a result Jerry was fired from his job.

Jerry v Reporter – defamation

The same standard would apply to the Reporter as to Customer. Here, Reporter communicated a story to the world without doing any due diligence. The story turned out to be false. That seems negligent, and Reporter could also be liable to Jerry for the loss of his job.

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MARYLAND ESSAY QUESTION NO. 8

Representative Good Answer No. 1

State immunity

Generally, states are immune from suits. This applies to suits that seek monetary damages. States are not immune from suits that seek injunctions.

A. Hunting License

In order to bring a constitutional challenge, a person must first have standing. In order to have standing, the person must have an identifiable interest that can be redressed by the court ruling on the merits of the claim. First, the PA resident will have to show that he has standing to challenge MD's law. In an attempt to challenge the law regarding hunting licenses, the man may face difficulty in showing that he has standing to sue because has not yet suffered an injury capable of redressability because he has not yet attempted to purchase the bear license. Assuming that the man can show standing, the merits of his claim are below.

The privileges and immunities clause prohibits states from treating residents of other states differently than the state's own citizens based solely on residency. This prohibition prevents a state from limiting a person's fundamental rights, including the ability to travel, gain employment, or buy property solely because of where the person is domiciled. This clause also prohibits a state from taxing people differently based on where they live (i.e. commuter tax). However, states are permitted to treat people differently (i.e. charge different prices) for things that are purely recreational.

The MD legislature is attempting to charge more for bear hunting licenses. Obtaining a hunting license is purely recreational. Statutes that charge more for out of state licenses have previously been upheld by the Supreme Court. This cause of action is likely to fail.

B. Real Property.

The PA resident has a better chance at showing standing to challenge the second law. The man has contracted to purchase land in Garrett County, one of the counties in the new law. The new law would prevent the man from closing on the sale of the property, which is an injury that could be redressed by the court hearing this claim.

The privileges and immunities clause prohibits states from treating residents of other states differently than the state's own citizens based solely on residency. This prohibition prevents a state from limiting a person's fundamental rights, including the ability to travel, gain employment, or buy property solely because of where the person is domiciled. This clause also prohibits a state from taxing people differently based on where they live (i.e. commuter tax).

The second new law enacted by the MD General Assembly prohibits any person who has not been a resident of MD for the past 10 years from purchasing land in 3 particular counties including Garrett County. By failing to allow residents of other states the opportunity to buy land in certain areas of MD, the General Assembly is violating the Privileges and Immunities clause of the US Constitution. This prohibition would stop people from buying land and could potentially stop people from moving to and working in MD. This statute will likely be struck down.

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Representative Good Answer No. 2

As resident's attorney, I would advise him of the following Constitutional issues the two new laws implicate, and their likelihood of being found invalid.

Hunting Permit

The first issue I would need to advise resident of is the issue of standing and whether there is a justiciable claim. Under Art. III a court only has the power to hear cases or controversies. This requires a plaintiff to have standing to bring the claim in order to avoid adjudication of political questions. Art. III Standing requires a showing by the plaintiff of 1) actual or imminent harm, 2) fairly traceable to the government action, and 3) is likely redressable by adjudication. Here, the biggest problem resident faces is meeting the issue of actual or imminent harm as he has not yet purchased the license, but merely "planned" to. However, the court may nevertheless allow the claim to proceed on the grounds that the cost has caused him to abstain from purchasing the license.

The second issue is whether the resident has a Constitutional claim based on a residential license. Under the Privileges and Immunities Clause, a state may not pass legislation that discriminates against out-of-state citizens, denying them fundamental rights within their state merely on the basis of residency. However, the Supreme Court has held that while this protection applies to professional licenses, it does not apply to recreational ones. Here, the license in question is a hunting license, and is therefore recreational. Accordingly, in order to have this law invalidated, resident has the burden of showing that the stated purpose of "preserving the State's natural resources" is not rationally related to the increased fees for non-Marylanders to obtain the hunting permits for black bears in Maryland. As such, it is unlikely that resident can prevail on this issue.

Real Property Acquisition

While resident may not be able to challenge the validity of the permit under the Privilege and Immunities Clause, it is likely that he will be able to do so on the legislation banning acquisition of real property. As stated, under the Privileges and Immunities Clause, a state may not pass legislation that discriminates against out-of-state citizens, denying them fundamental rights within their state merely on the basis of residency. Since the right to own property is a fundamental right, and since this law discriminates on its face against in-state and out-of state residents, the state will have the burden of proof to show that the facial discrimination is necessary to achieve a compelling government purpose for which there is no other alternative than the restriction imposed. It is unlikely that the state will be able to prevail. First, achieving the purpose of preserving the State's natural resources may be achieved in many different ways--there is no causal nexus describing why non-Marylanders, acquiring property is any more of a burden on preservation than Marylanders with 10 years of residency. Nor is there evidence supporting how acquisition of property in these counties affects natural resource preservation. Similarly, the 10 year requirement appears to be wholly arbitrary. Accordingly, this law will likely be invalidated as impressively protectionist.

Resident may also be able to bring a claim against the state for a violation of the Contracts Clause. The Contracts Clause provides that a state action may not interfere with existing contracts by making their performance impossible or impractical. Here, resident has contracted to purchase a piece of property, but may be unable to complete the sale because of the new legislation.

Additionally, there may be a Substantive Due Process claim under the 14th Amendment against this law for being overbroad and vague. A law is void for vagueness when it does not give a person of ordinary intelligence reasonable notice of what conduct is being prohibited. Here, the law merely states that "acquisition" of real

property is banned. There is no indication of what type of acquisition the law bans (i.e. by sale, judgment, or inheritance). Similarly, if the law seeks to ban ALL acquisitions, this is likely overbroad. Furthermore, as the conduct involves the fundamental right to property, it will likely be invalidated under the strict scrutiny test, which requires the government to show that it is narrowly tailored for a compelling government purpose. Under these facts, it will not be able to do so.

Finally, resident may assert an Equal Protection claim under the 14th Amendment, but it would not be advisable as the classification made is not a suspect one, and the government would likely prevail under a rational basis analysis.

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MARYLAND ESSAY QUESTION NO. 9

Representative Good Answer No. 1

Jones faces a significant problem because under the Statute of Frauds, a contract for the sale of real estate, or for a lease for more than a year must be reduced to writing in order to be enforceable. The facts of this case indicate that Smith orally agreed to make Jones a co-owner of the house if she would pay for the improvements needed to the house necessary for her to reside there.

Jones could first argue that she has maintained co-tenancy by part performance and this is therefore enforceable. Despite not having a contract written, part performance can occur in the transfer of real estate absent a contract if two of the three factors are met:

1) Title has passed

2) Offeror has entered into the premises

3) Offer has invested money or made substantial improvements

The facts indicate that Jones had spent $100,000 on improvements to upgrade the kitchen and construct an addition to the house with an additional bedroom and bathroom. She also lived there from 2004-2014. Based upon this, two of the three factors for part performance for the transfer of real estate are satisfied. This is most likely Jones' strongest argument as to why she should be granted title to the house as a co-tenant. Smith would counter that their conversation was not intended for her to be a co-owner of the house since the term "necessary" is vague and it is therefore unenforceable. Smith could also argue that this was an illusory promise because there was not adequate consideration since the term necessary is not definite enough to constitute a bargained for exchange.

Jones may also claim that she detrimentally relied on Smith's inducements and based on quantum-merit/quasi contract principles, Smith must grant her title in co-tenancy. Jones would argue that Smith made a statement that he knew Jones would rely on and would induce her action, that Jones did in fact rely on this statement and induce action, and suffered damages as a result of this statement (has no ownership rights in the House). Smith could argue that this was an illusory statement and not intended to be a bargained for exchange for Jones' repairs. Furthermore, Smith may counter that Jones did not suffer damages in reliance on his statements since she was able to live in his house for 10 years.

A final claim that Jones would have is that Smith was unjustly enriched by her investments and it would be inequitable to leave her with nothing. Jones must show that she conferred a benefit upon Smith, that Smith accepted this benefit without any action or attempt to return or compensate Jones, and that he was unjust enriched as a result of this benefit. Smith has been unjustly enriched since the value of his house from the improvements has increased by $100,000. Smith has little defense, if any to this claim, except that he was not unjustly enriched since Jones could live in his house for 10 years.

Representative Good Answer No. 2

Jones Argument:

Jones will argue that there was a contract here as there was an offer by smith to put her name on the lease, there was acceptance by her per her performance of improving the home and there was consideration (bargained for exchange).

Where there is no enforceable contract and someone detrimentally relies on an agreement made, the court may award damages for detrimental reliance. Here, Jones will say that even if there was not an enforceable contract, as it was not reduced to writing, she spent "100,000" on the improvements to upgrade the kitchen and construct an addition to the house with an additional bedroom and bathroom. She detrimentally relied on the agreement with Smith and made these improvements. Furthermore, she will bring up the fact that landlord and tenants would not have a shared expenses ledger. That the shared expenses ledger is proof that they are tenants in common.

Jones will argue that Smith fraudulently induced her to make the changes and that but for the misrepresentation that she would be added to the contract she would not have made the improvements. She will say that she would not have made such substantial and permanent changes. She will argue that Smith induced her to make such changes so that he would benefit substantially from a subsequent sale of the house.

Unjust enrichment: in the absence of a contract, the court will award the value of the benefit conferred to avoid unjust enrichment. Here, because Smith would be unjustly enriched due to the changes that Jones made to the property. Jones will argue that she should be awarded the increased value of the home as a result of the changes she made to the house. She will argue that she should be awarded the value of the benefit to Jones - the costs that she recorded in the shared expenses ledger.

Smith defense:

Here Smith will say that he is not liable because the statute of fraud is implicated. A land sales contract must be in writing for it to take effect. Here, Smith orally agreed to make Jones Co-owner of the house if she would pay for improvements. "this agreement was never reduced to writing and Smith did not add Jones' name as a co-owner of the House."

Smith will also argue that the agreement was rather for a lease and that they agreed that if Jones paid for improvements, should could reside in the House rent-free so long as Smith owned the House. As he no longer owns the house, Jones may not live in the house. As proof of this, he will show that he did not collect rent from her as a result. He will say that they were also sharing expenses because that was part of the term of the lease and that sharing was not contingent on any agreement to subsequently put her on the title.

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MARYLAND ESSAY QUESTION NO. 10

Representative Good Answer No. 1

1. Statement of a party opponent (Fred's statement to Barney). Here, the evidence will be allowed because Fred is an opponent of Barney in the case and his statement is an admission which is an exception to the hearsay rule.

2. Marital communication – here, this evidence of Fred's statement was made confidentially to Wilma while they were married. Unless the presence of their seven-year-old daughter can break the privilege, the statement will not be allowed in because it is a confidential marital communication which both the husband and wife hold. It does not matter that they are no longer married.

3. Hearsay - here, Slates testimony will not be allowed because it is an out-of-court statement offered to prove a fact without any exception to the hearsay rule.

4. Doc - patient privilege. Here, Maryland does not recognize a doctor-patient privilege. If they were such a privilege the doctor statement still would not come in because the statement made to her was not regarding medical treatment or diagnosis. The statements were admissions which are exceptions to hearsay rule and will be allowed into evidence.

5. Accountant privilege. Here, Fred will be able to assert an accountant privilege to stop the testimony of the statements made to his accountant for the purpose of accounting services.

6. Community reputation. Here, the testimony of Betty will be allowed in to impeach Barney's reputation for truthfulness because Betty should be aware of that reputation in the community because she was married to him.

7. Betty's testimony that Barney was clearly trying to get money from Fred will not be allowed because it is lay opinion testimony that will not aid the factfinder and it is prejudicial.

8. Bad acts - here, Barney may be cross examined on his prior bad acts (the PBJ), however, the other side will be stuck with Barney's answer. They will not be able to use extrinsic evidence to impeach Barney.

Representative Good Answer No. 2

1. Barney testimony that "Fred told me that he had taken some money because he thought that I did not do anything to earn the money" be allowed into evidence over Fred's objection because even though it is hearsay, it is a statement of an opponent which is an admission. In Maryland, admissions are exceptions to the hearsay rule not just magically non-hearsay.

2. Wilma's testimony about what Fred confided in her while they were still married will probably not come in because it is confidential marital communication. In Maryland separation does not stop the marriage. So Wilma was still married to Fred at the time. The court will consider whether a small child like that will dissolve the privilege. I think the court will rule that the privilege is not broken by a child.

3. Slate's statements are straight hearsay without any exception and the objection will be upheld.

4. There is not doctor/patient privilege in Maryland, so the doctor will have to testify unless there is some other law that prevents him from doing so. The doctor will probably still have to testify because the statements were not about medical treatment any way.

5. While Maryland does not have a doctor/patient privilege, it does have an accountant-client privilege which prevents an accountant from testifying about information he received while serving as an account. Here, the facts tell us that Granite was definitely providing accounting services, to the objection will be upheld.

6. Betty was Barney's wife so she will know what his reputation for truthfulness is in the community. A witness who has knowledge of a party's reputation for truthfulness can testify as to what that reputation is.

7. Betty cannot use specific examples of Barney's reputation for untruthfulness. She cannot give her opinion on what she thinks Barney is trying to do in this case. So her opinion about Barney in this case will not be allowed.

8. A witness' reputation for truthfulness is always relevant. If the PBJ is less than 15 years ago, Fred can impeach Barney with it. But the court will have to decide whether the probative value is greater than the prejudice that can occur. Fred cannot provide specific facts about the convictions or any other bad acts.

MULTISTATE PERFORMANCE TEST

Representative Good Answer No. 2

MEMORANDUM

To: Esther Barbour

From: Examinee

Date: February 24, 2015

Re: Daniel Harrison matter

In an inverse condemnation action, a claimant can raise any one of four theories. Mr. Harrison will be able to make a colorable claim under the partial regulatory taking theory or the substantial advancement theory. He will not be able to make a colorable claim under the total regulatory taking theory, although this memo discusses that theory in the interest of thoroughness. He cannot make any claim under a theory of governmental exaction. All theories rest on the Fifth Amendment to the United States Constitution, as incorporated against Franklin by the Fourteenth Amendment, and Article 1, Section 13 of the Franklin Constitution.

As a preliminary matter, Mr. Harrison's claim is entirely unaffected by the fact that the zoning ordinance was already in effect when he took the land. (Newpark Ltd. v. City of Plymouth, Franklin Court of Appeal (2007) (hereinafter Newpark).)

Although the facts provide slightly more support for a substantial advancement claim, that theory is of questionable legal validity in the Franklin courts. Therefore, this memorandum concludes that Mr. Harrison's strongest theory is the partial regulatory taking theory, and accordingly begins its analysis there.

A. Partial Regulatory Taking

1. The Law

A partial regulatory taking is a taking that in essence goes "too far" and constitutes an unreasonable interference wth the property owner's use and enjoyment of his property. (Venture Homes, Ltd. v. City of Red Bluff, Franklin Court of Appeals 2010 (hereinafter Venture)). (It differs from the total regulatory taking theory discussed below in that it need not drive the economic value of the property down to absolute zero.) Venture gives the elements of an inverse condemnation claim based on the partial regulatory taking theory.

As a threshold matter, the regulation must diminish the property's value. Venture.

Assuming that threshold requirement is satisfied, the court analyzes partial regulatory takings claims under a flexible, fact-sensitive factor test that examines (1) the regulation's economic impact, (2) the extent of the regulation's interference with the owner's reasonable, investment-based expectations, and (3) the character of the government action. Venture. The point of this analysis is to discover whether the regulation is equivalent to a taking, such that fairness and justice require the government to compensate the owner--it is not that the government may underwrite the normal risks associated with real estate development. Venture.

As to the first factor, a Franklin court has found that a 4% reduction in a property's value is insufficient impact to find a partial regulatory taking, and that such a low diminution will always or almost always be too low. Venture.

Under the second factor, an owner's reasonable expectations are set by the property's current and permitted uses. Venture. The law mandates consideration of both current and permitted uses but offers no guidelines as to a conflict between the two. Venture. In dicta in a total regulatory takings case, the Franklin Court of Appeal suggested that the historical uses of the land were of critical importance in partial regulatory takings cases. Newpark.

The third factor, the character of the government action, carries the least weight. Venture. It asks whether there has been disproportionate harm in rezoning. If the rezoning was general and in the public interest, the government is likely to prevail; if targeted at the property owner in service of private interests, the owner is likely to prevail on this point. Venture. But even making a good showing on this point, an owner who cannot show the other two elements may be unable to defeat summary judgment. Venture.

2. Factual Analysis

The threshold requirement of diminution of the property's value is met, as the following discussion indicates. The economic impact of the regulation is severe. The property has been appraised at $200,000 ($20,000 an acre). That appraisal assumed the land could be used for industrial purposes. The only valuation of the land for non-industrial purposes is from Mr. Harrison's broker, who estimates its value at a few hundred dollars an acre. In addition, other bids on the land during the sale that Mr. Harrison bought it at were between ~$20 and $90,000, but it's likely they, too, didn't anticipate being unable to use the land for industrial uses, and now that it's clear the city intends to enforce the existing zoning over the zoning board's recommendation, Mr. Harrison will be unable to re-sell for so much. While the city suggested he explore churches, clinics, or a day-care center, the remote location of the tract makes those unfeasible in the eyes of both Mr. Harrison and his real estate agent.

The extent of the regulation's interference with Mr. Harrison's reasonable, investment-backed expectations hinges on whether the courts will give more weight to the property's existing, apparent uses or to its uses permitted under the zoning ordinance. The historical uses were clear: from 1978 to 2014 the property was used as an armory. Even when the land was zoned residential in 1994, the land was used as an armory thereafter. For that reason, Mr. Harrison thought the land grandfathered in when he bought it, as the other buyers probably did as well, since his winning bid was only about 20% higher than the next-highest bid. However, the tract was zoned residential, and Mr. Harrison was aware of that--and assumed, without the benefit of legal counsel, that the zoning ordinance simply didn't apply to the tract. Mr. Harrison was therefore not taken totally unawares. In addition, the city couldn't have zoned the federal government out of business even if it had tried--it lacks the power. However, since he (and, apparently, many others) believed the zoning ordinance not to apply, and since the historical use (which Franklin courts have suggested is of critical importance) was clearly industrial, Mr. Harrison's case on this point is probably stronger than the City's, although not by much.

The character of the government action probably weighs more heavily in favor of the government than of Mr. Harrison. The zoning ordinance was enacted in 1994, so it certainly wasn't targeted against Mr. Harrison. Nor is

there, on these facts, any non-public interest served by the City's denial of Mr. Harrison's request to rezone. These factors weigh against Mr. Harrison; on his side is the fact that the City seems to have had little affirmative reason to deny his application over the zoning board's recommendation. However, Mr. Harrison's objections to the government's actions are probably more suited to a claim under the substantial advancement theory than under a partial taking theory. The substantial advancement theory is discussed next.

3. Conclusion: Likelihood of Success

Mr. Harrison can demonstrate a severe economic impact and an interference with his reasonable, use-informed expectations in the land. He cannot demonstrate that his expectations in the land were reasonable in light of the land's permitted uses, although the use-informed expectations are probably more relevant. And the government action here is perplexing, but probably not targeted against Mr. Harrison. On these facts, I estimate that Mr. Harrison's chances of prevailing on this theory are a little less than even.

B. Substantial Advancement

1. The Law

Under the substantial advancement theory of inverse condemnation claims (set out in Venture), a zoning ordinance that deprives a property owner of the value of his property and does not thereby substantially advance a legitimate government interest allows the aggrieved property owner to force the government to purchase his property for its fair market value absent the regulation. Venture. The requirement of substantial advancement is a higher requirement than in mere rational basis review, but a court need not examine the government's actual purpose, only its stated one.

The legal validity of this theory is questionable. On the federal level it has been extinguished by the Lingle case, cited in Venture and in Newpark. And the Franklin Supreme Court has not decided whether the Franklin Constitution permits such a claim. Venture, Newpark. What the Franklin courts have made clear, however, is that as a general matter the differences between the Franklin and United States constitutional provisions on takings are minor semantic differences, and that the interpretation of the two provisions is largely identical. Newpark. For that reason, it seems more likely than not that when the Franklin Supreme Court does consider the issue of the substantial advancement theory, it will agree with the United States Supreme Court in Lingle and rule that no such theory is available to inverse condemnation plaintiffs.

2. Factual Analysis

The zoning board actually recommended re-zoning, a fact which weighs in favor of Mr. Harrison, before the City Council rejected it. Their one stated concern was the land's proximity to the park, although it is unclear how the truck company's use would be different from the prior vehicle storage use. And the land around the tract is not residential, and has seen little growth. On these facts, the City hasn't stated a purpose explicitly, although the City is not required to do so--a court will accept as legitimate whatever purpose it claims at trial. It is likely to claim that its actions are grounded in concern for the safety of those playing in the nearby park and baseball field. However, even accepting that purpose, the government's actions must substantially advance it--and it doesn't appear that stopping a use that has been in existence since 1978 will substantially advance the city's claimed safety concerns.

3. Conclusion: Likelihood of Success

If the substantial advancement theory retains its validity under Franklin law, I estimate that Mr. Harrison will more likely than not prevail under this theory. However, I think it more likely than not that the Franklin Supreme Court, if and when it rules, will find that the theory is no longer valid.

C. Total Regulatory Taking

1. The Law

The Franklin Courts have adopted an exceedingly strict approach to total regulatory takings, set out in Newpark. Under their interpretation of Supreme Court law, a total taking claim is only appropriate when the regulation leaves the property with zero economic value--and zero means zero. Newpark. The regulation must be so severe that it amounts, in essence, to a functional deprivation of the land. The Franklin courts have admitted that this high bar will almost never be cleared. Newpark.

2. Factual Analysis

As the foregoing discussion on the partial regulatory takings theory demonstrates, Mr. Harrison's land retains some value. As such, he cannot prevail on a total regulatory takings challenge. If the land truly is worth only a few hundred dollars an acre, Mr. Harrison will suffer a catastrophic loss, to be sure. But Franklin courts are not concerned, in a total regulatory taking analysis, with the extent of the loss but rather with the current value of the property. Because the economic impact in this case is so severe, Mr. Harrison may wish to bring the claim anyway, and it possible that the Franklin courts will find that zero actually means a reduction of almost 90%. But success on this claim is only possible if Mr. Harrison produces an appraisal that assesses the value of the property at zero.

3. Conclusion: Likelihood of Success

Mr. Harrison will probably not prevail on this claim.

D. Conclusion

The remedy in an inverse condemnation action is that the government will purchase the land for its fair value--the value it would have had absent the government's actions. Mr. Harrison is ineligible for compensation under a total regulatory taking theory, but he has a colorable claim for compensation under either a substantial advancement or particular regulatory taking theory.

Representative Good Answer No. 2

MEMORANDUM

To: Esther Barbour

From: Kathryn Finley

Date: February 24, 2015

Re: Daniel Harrison Matter

Introduction

There are four inverse condemnation theories available under the Takings Clause of the Fifth Amendment and Article 1, section 13 of the Franklin Constitution. Franklin Courts have held that the state prohibition against taking without just compensation is comparable to the Takings Clause of the Fifth Amendment of the U.S. Constitution, and have thus applied federal law when considering State takings questions. I have referenced those cases where relevant below. I have discussed all four theories in turn below and analyzed whether Harrison might succeed against the City on each. In brief, we have a strong argument that there has been a partial regulatory taking. The "substantial advancement" theory is also helpful for our case.

Maryland State Board of Law Examiners

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

Total Regulatory Taking

The first inverse condemnation theory is a total regulatory taking. A total regulatory taking occurs when a regulation deprives a property of all economic value. This is a very high bar and we are unlikely to prevail on this theory. The Franklin Court of Appeal considered this type of taking in the 2007 case *Newpark Ltd v. City of Plymouth*, in which a developer sued the city after its denial of a rezoning application for property he had acquired there. In that case, as here, the developer was aware at the time of closing on the property that there was a specific zoning restriction in effect. Similarly, as with Mr. Harrison, the developer in *Newpark* applied for a zoning change, which was denied. The basis of the *Newpark* developer's takings claim was that under the zoning restriction, the property he had purchased was worth significantly less (up to $22,000 less per acre) than it would have been without the zoning restriction. The developer argued that property was rendered valueless as a result of the city's denial of its rezoning application.

The *Newpark Ltd* facts are similar to those in our case, because Harrison purchased the Tract for $10,00 per acre and would likely be able to prove through expert testimony at trial that the land would be worth $20,000 per acre if leased to a truck-driving school and only $5000 per acre if developed residentially (which may not be economically feasible) or perhaps only several hundred dollars per acre if left undeveloped.

As an initial matter it is worth noting that the *Newpark* court found that the fact that the zoning restriction had already been enacted when the developer bought the property did not bar it from bringing a takings action, regardless of whether there was notice to the developer. In our case, Mr. Harrison bought the Tract with notice that it was under an R-1 (single-family) zoning ordinance, even though he thought that the zoning ordinance would not be enforced. This will not bar him from mounting a takings claim.

However, the *Newpark* Court, applying Supreme Court jurisprudence as set out in *Lucas v. South Carolina Coastal Commission*, rejected Newpark's arguments and held that a total regulatory taking will only be found where the land has actually been rendered valueless. In *Lucas*, the owner could still "picnic, camp or live on the land in a mobile trailer" and thus the property was held still to have value. Similarly, in *Newpark*, the Court concluded that the property retained "residual uses" and thus its value was not eliminated and there had not been a total regulatory taking. Given that the City's zoning ordinance in our case does not completely eliminate the property's value, Harrison would be unlikely to prevail on this theory.

Partial Regulatory Taking

The second inverse condemnation theory is a partial regulatory taking. As discussed in *Venture Homes Ltd*, although there is no bright-line test for determining whether a partial regulatory taking has occurred, a factual inquiry will look at (i) the economic impact of the regulation, (ii) the extent to which the regulation interferes with the property owner's reasonably investment-backed expectations and (iii) the character of the government action.

Economic impact of the regulation

Here, the economic impact of the zoning ordinance on Harrison is severe. If leased to a truck-training school, the land is worth $200,000 according to the appraisal of January 9, 2015. Conversely, given Mr. Harrison's conversations over email with the real estate agent, there appear to be real questions concerning whether it would even be economically feasible to develop it for single-family residential purposes, given its distance from the business district and the costs of improving the land and demolishing the existing buildings. Unlike in *Venture Homes*, where there was found to be only a 4% diminution of value in the land as a result of the state regulation, here the City's zoning ordinance deprives the property of the majority of its value. It is wholly possible that the

zoning regulation may reduce the land's value from $20,000 per acre down to several hundred dollars per acre, if it ends up being unfeasible to develop residentially. (Harrison believes other commercial uses are not feasible.) Thus, there is a strong argument under this prong that the zoning ordinance unreasonably interferes with Harrison's property.

Interference with investment-backed expectations

Next, courts will consider the extent to which the regulation interferes with the owner's reasonable investment-backed expectations. In the *Sheffield* case, the Franklin Supreme Court held that existing and permitted uses of a property constitute the "primary expectation" for landowners for purposes of this inquiry. Here, it is true that the R-1 zoning has been in place since 1994. However, given that the land was used as an armory and vehicle storage building from 1978-2014, Harrison has an argument that it was reasonable to believe that the Tract was grandfathered in and not subject to the 1994 ordinance. Moreover, the fact that the other bids ranged from $20,000 - $88,000 will help his argument that other bidders had the same reasonable belief. Our best argument under this prong is that Harrison's expectation of using the property commercially was reasonable and moreover that it is not reasonable to use the land as a single-family development as it has not ever been used for that purpose and has low value for this purpose. We have a reasonable argument for this prong.

Character of the Government Action

The purpose of this factor is to determine whether a regulation disproportionately harms a particularly property. Courts will look at whether the regulation is general or specific. Here, the zoning restriction is general, which weighs against Harrison.

However, because the other two factors are on our side, there is a significant chance Harrison may prevail on a partial regulatory takings claim.

Land-Use Exaction

A land-use exaction taking occurs when governmental approval is conditioned on a requirement that the property owner take some action that is not proportionate to the projected impact of the proposed development. Here, government approval was withheld altogether, so there is no land-use exaction claim.

"Substantial Advancement" Test

The substantial advancement test has been rejected by the U.S. Supreme Court in *Lingle v Chevron*, but has not yet been addressed by the Franklin Courts. Assuming the test is valid in Franklin, to prevail one must show that the ordinance at issue does not "substantially advance" the legitimate state interest sought to be achieved. Here, the state interest appears to be to preserve the environment around the city park, although there is not much evidence of this purpose. This is something to look into further, because we may have a good argument that the restriction against commercial use does not substantially advance a legitimate state interest. Given the uncertainty of the state of the law, while we will definitely want to raise this claim we don't want to rely on this alone.

Conclusion

For the reasons discussed above, Harrison has a strong partial regulatory takings claim against the City. He should also raise an argument under the "substantial advancement" test.