

REPRESENTATIVE GOOD ANSWERS FOR THE FEBRUARY 2018 MARYLAND OUT-OF-STATE ATTORNEYS' EXAM

NOTICE: These Representative Good Answers are provided to illustrate how actual examinees responded to the Maryland Out-of-State Attorneys' Examination. The Representative Good Answers are not "average" passing answers nor are they necessarily "perfect" answers. Instead, these are the two (2) highest scoring overall exam responses for this session. These answers are transcribed from the hand-written answer books without any changes or corrections by the Board, other than to spelling and formatting for ease of reading.

Representative Good Answer No. 1

Question 1

A) Pretrial Motions

Attorney Walter ("AW") should file pretrial motions in accordance with Rule 4-521/4-252*. AW should file motions to suppress/exclude evidence obtained by Officer Bob ("OB") in the search because the search was illegal. The officer would not have had probable cause for the traffic stop simply because Marcus ("M") was riding a light-colored bicycle. This is too broad of a description to make a stop, which sullies the search.

*Assuming the crimes (e.g., the assault charges) are felonies, the trial will be in circuit court, pursuant to CJP §4-302 (i.e., if not covered by CJP§4-301).

AW may also file a motion for discovery, pursuant to Rule 4-262/263* to obtain all evidence relevant to the search/seizure.

AW should also consult with M per MRPC Rule 1.2 and file a plea in accordance with M's wishes, pursuant to Rule 4-242.

Mandatory motions under 4-252 (i.e., the motion regarding the unlawful search/seizure) shall be filed within 30 days after the earlier of appearance of counsel or after the first appearance of M before the Court, pursuant to Rule 4-213(c), whichever is earlier. Here, the motions should be made within 30 days from M's appearance. If not made, these motions are waived. 4-251 motions are made before swearing the first witness and before E is received on the merits.

In Circuit Court, pleas shall be entered within 15 days from appearance of counsel or initial appearance of M, whichever is earlier. So, here, the plea should be entered 15 days AW's entry of appearance. In DC, pleas are entered at or before the call to trail per 2-242(b)(2).

Discovery should be provided by the State's Attorney within 30 days after appearance or M's initial appearance. Motions to compel discovery are due within 10 days after this 30-day period, per 4-262/263.

B) Preliminary Hearing

Per Rule 4-221, a defendant charged with a felony that is not within the jurisdiction of the District Court may request a preliminary hearing. The request should be made within 10 days of an initial appearance. Here, AW made the request two days after the initial appearance, so the request should be granted by the court. Assuming the charges of robbery with a deadly weapon, use of firearm, etc. are outside JD of the DC per CJP §4-302. If not in the JD of the CC, the request for hearing will be denied. However, Rule 4-221 lays out a number of ways the prosecution can prevent the hearing (the facts do not indicate any have been leveraged).

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Question 2

A) Pursuant to CJP §9-105, one spouse is not competent to disclose any confidential communication between the spouses occurring during marriage. Here, Daniel is now Marcus' ex-wife, but the testimony relates to a communication that occurred while they were married. Moreover, the testimony relates to a private conversation since no one else was present.

Still further, pursuant to CJP §9-106, the spouse of a person on trial for a crime may not be compelled to testify as an adverse witness subject to certain exceptions. Here, the exceptions do not apply. AW may argue for exclusion per CJP §9-105 and CJP §9-106.

B) Since Marcus' statement was made while he was married and was made with no one else present, the Court should sustain Attorney White's objection and not allow Danielle's testimony to be introduced. Also, Daniel should not be allowed to be compelled to testify as an adverse witness, pursuant to CJP §9-106.

Question 3

Pursuant to Rule 5-607, the credibility of a witness may be attacked by any party. Moreover, per Rule 5-613, a party may examine a witness about a prior written or oral statement. Thus, the Court should overrule Attorney Walter's objection and allow the impeachment.

Question 4

Rule 5-609 governs impeachment of a prior crime. Per 5-609(b), evidence of a crime is not admissible if more than 15 years has elapsed. Assuming Marcus' arrest occurred now (2/27/2018), both crimes are within this time frame (6/2004 is 14 years ago, 2012 is 6 years ago). However, per 5-609(a) crimes are only admissible if (1) the crime was infamous or relevant to credibility and (2) the probative value outweighs the danger of prejudice. Per 5-609(d) a nolo contender plea is treated the same as a conviction.

Part 1 of 5-609 test:

In Maryland, felony counterfeiting is likely a crime relevant to credibility. Possession of cocaine is unlikely to be considered relevant to credibility or infamous. In *State v. Wood*, 337 Md. 519 (1995), the court found distribution to be infamous, but it is unlikely that possession rises to the same level as distribution.

Part 2 of 5-609 test:

Under part 2, the probative value must outweigh the prejudice. For the counterfeiting, the probative value likely outweighs the prejudice since counterfeiting is relative to a person's honesty. However, the possession charge is probably more prejudicial than valuable; it will not have relevance to her statement that she was with Marcus. The counterfeiting conviction will.

In view of the foregoing, the Court will sustain Walter's objection with regards to the possession conviction, but overrule the objection to the counterfeiting charge. Of note, 5-404 is likely inapplicable here since other crimes, wrongs or acts committed by a 3rd party proffered by the D do not fall under the exclusionary provisions of 5-404. *Sessions v. State* 357 Md. 274 (2000).

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Question 5

Marcus has a number of options:

Motion for New Trial, per 4-331(a) – Pursuant to 4-331(a), Marcus may file a motion for a new trial within 10 days after the verdict.

Motion for Revisory Power, per 4-331(b) – Per 4-331(b), Marcus can request that the court set aside the verdict as unjust or improper and grant a new trial. This motion must be made within 90 days of imposition of sentence.

Motion for Review by 3-Judge Panel, per 4-334 – Within 30 days of imposition of a sentence, Marcus may request review of the sentence by a 3-judge panel.

Motion for Revisory Power, per 4-345 – Per 4-345, the court may correct an illegal sentence at any time. Moreover, per 3-345(e) Marcus may request review of the sentence on motion filed within 90 days.

Appeal – Per CJP 12-301, Marcus may appeal a final judgment. Per 8-202, an appeal should be filed within 30 days after entry of the judgment (to Ct of Sp App). If a 4-331(a) Motion is filed, Marcus will have 30 days after the latter of entry of judgment or entry withdrawing/denying the motion.

If the case is heard in District Court (which is unlikely due to jurisdictional requirements), Marcus may appeal to the Circuit Court within 30 days of entry, per Rule 7-104. The same extension applies if a 4-331 motion is filed.

As still another alternative, assuming Marcus has preserved his rights, Marcus may request an en banc review, per 4-352. However, en banc review may prevent traditional appeals.

Question 6

A) Venue - Per CJP §6-201, civil actions should be brought where a defendant resides, carries on regular business, is employed or habitually engages in a vocation. Since Faouzi (“F”) lives in St. Mary’s County and owns a business in Charles County, F may be sued in Charles or St. Mary’s county.

Court – Per CJP §4-401, the district court jurisdiction for tort matters (e.g., negligence) only extends to \$30,000. Thus, this suit should be brought in Circuit Court of Charles or St. Mary’s County because the claim is for \$100,000.

B) Per Rule 2-321, an answer to a complaint should be filed within 30 days of service when the Defendant is in state. Dewayne lives in Calvert County, so he has 30 days from service to respond to the Complaint. The answer should be filed with a response to the motion for summary judgment. Per Rule 2-311, a party can respond to a motion with 15 days or within a time frame allowed for the party’s initial pleading. Here, Dewayne may have 30 days because his initial pleading (answer) is not due until 30 days from service of the complaint.

C) Typically, matters of law are addressed via motions to dismiss and genuine disputes of fact are addressed via summary judgment proceedings. Consequently, F should contest the factual basis of the affidavit filed with the Motion for Summary Judgment with his own affidavit, pursuant to Rule 2-501. It is likely not possible to contest the summary judgment motion on facts alone (but may request the judge enter an order specifying facts not in dispute and proceed to trial, per 2-501(g)).

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Summary judgment procedure is not a substitute for trial, but merely a hearing to decide whether a trial is necessary. See, e.g., *Strickler Eng'g Corp. v. Seminar, Inc.*, 210 Md. 93 (1956). Moreover, mixed question of law and fact is not appropriate for resolution on summary judgment. *DiGrazia v. County Executive*, 288 Md. 437 (1998) (sic) Thus Faouzi should argue the legal basis with facts to argue the question at issue is a mixed fact and law question and thus not appropriate for summary judgment.

Question 7

A) Per Rule 2-421, a party may not serve more than 30 interrogatories to be answered by a party.

When proper interrogatories are served, the receiving party has 30 days or the initial pleading period plus 15 days to respond.

When no response is received to interrogatories, the parties should attempt, in good faith, to resolve the dispute, per 2-431. If the dispute cannot be resolved, Dewayne can seek certification by the court and file a motion to compel discovery pursuant to Rule 2-432. Motions are permitted when a party fails to answer interrogatories, under 2-432(b)(1)(D). A motion to compel discovery must include the content specified in 2-432(b)(2) and be filed with reasonable promptness, per 2-432(d). Immediate sanctions may also be available, per 2-432(a) and Rule 2-433. Dewayne should trim his interrogatories down to 30 before seeing assistance from the Court.

B) Since the 42 interrogatories do not comply with Rule 2-421, Faouzi may file a motion for protective order, per Rule 2-403. Faouzi could assert that 42 interrogatories constitute an undue burden.

If Faouzi changes his mind and no longer wants to resist answering all of the interrogatories, he could likely answer the first 30.

Question 8

Ministerial privilege is governed by CJP §9-111. Per CJP §9-111, "a minister of the gospel, clergyman, or priest of any established church of any denomination may not be called upon to testify on any matter in relation to any confession or communication made to him in confidence by a person seeking spiritual advice or consolation."

There are 3 keys to this rule:

- (1) the person must qualify as a minister, clergyman, etc.
- (2) the minister may not be compelled. The minister holds the privilege; and
- (3) the testimony at issue must have been while seeking spiritual advice/consolation to be privileged.

Here, we have facts about Father Somchai's affiliation, but the rule is applied liberally. The testimony at issue appears to have been occurred "while seeking spiritual guidance." However, Father Somchai can waive the privilege. Consequently, Faouzi cannot prevent Father Somchai from testifying. The Court should overrule and allow Father Somchai to choose whatever to testify about conversations with Marcus (a non-party).

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Question 9

A) Faouzi can make a number of motions:

Motion for New Trial per Rule 2-533 – This motion needs to be made within 10 days of entry of judgment.

Motion for JNOV, per Rule 2-532 – This motion needs to be made within 10 days after the verdict.

Motion for Exercise of Revisory Power per Rule 2-535 – Per Rule 2-535(a), a motion should be filed within 30 days of entry of judgment. Per Rule 2-535(b), a motion may be filed at any time to correct fraud, irregularity, or mistake.

Appeal – Per CJP §12-30 (sic), Faouzi may appeal a final judgment. Per Rule 8-202(a), an appeal should be filed within 30 days after entry of judgment.

Assuming Faouzi made proper objections, Faouzi could alternatively request en banc review, per Rule 2-551. The request must be filed within 10 days of entry of judgment.

B) JNOV restrictions – In making a motion for JNOV per Rule 2-532, Faouzi may only make the motion on the grounds advanced in support of the motion for judgment at the conclusion of trial.

Appeal restrictions – If Faouzi makes a motion pursuant to any of 2-523, 2-533, 2-534*, the time for filing an appeal with extend until 30 days after entry of a notice withdrawing the motion or an order denying the motion, per Rule 8-202(c). Moreover, if a 2-535 motion is filed within 10 days of judgment, the same extension applies. See Committee Note to Rule 8-202.

*2-534 Motions are typically only available in bench trials; the facts indicate this was a jury trial.

Moreover, if an en banc review is requested under 2-551, this request will prevent Faouzi from pursuing traditional appeals.

Question 10

A) Dewayne could raise complaints under the following Rules of the MRPC. Violations of any of these Rules constitutes misconduct pursuant to MRPC 8.4(a).

Rule 1.5

Per Rule 1.5(a), an attorney's fees must be reasonable. An 80% contingency fee is unreasonable. An attorney cannot earn a greater share than the client (see *Frido v. Frankel*, 375 Md. 501 (2003)). Rule 1.5(a) lays out additional factors that can also be considered to determine reasonableness.

Moreover, pursuant to Rule 1.5(c), contingency fees must be in writing and must state the method for distribution. The verbal agreement here violates this Rule.

Rule 7.1

Rule 7.1 prevents an attorney from creating an unjustified expectation about results. Here, the attorney guaranteed a recovery of at least \$100,000, in violation of the Rule.

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Moreover, Rule 1.7(c) prevents an attorney from comparing services with another attorney unless the comparison can be fairly substantiated. Here, the attorney boasted that he is “the best lawyer in southern Maryland” in violation of the Rule.

Rule 7.1(c) also prevents material misrepresentations. The guarantee and best lawyer boast may both be material misrepresentations.

Rule 7.2

Rule 7.2 governs advertising. Here, the attorney marketed his services as an expert. There is no indication that the attorney’s marketing is in compliance with the Rules and there may be a violation here.

Rule 7.4

Rule 7.4 allows an attorney to communicate a field of practice, but subject to 7.1. Marketing services as an expert (“jury profiling expert”) likely violates this Rule.

Rule 7.3

It is unclear from the facts if the attorney made direct contact with Dewayne to tell him he was the best lawyer in Southern Maryland. If he did, he may have violated Rule 7.3.

B) Per Rule 8.1(c), an attorney must respond to an inquiry from the Attorney Grievance Committee.

REPRESENTATIVE GOOD ANSWER NO. 2

Question No. 1A

Attorney Walter (“W”) should bring a motion to suppress the gun and \$120 in cash. The motion to suppress should be based on the illegal traffic stop and the illegal search incident to arrest. If brought in District Court, under R 4-251, there is no specific timeframe for the motion, but, if before trial, it must be determined at trial. R 4-251(b). Because W made a demand for jury trial, the District Court does not have jurisdiction. CJP 4-302(e). If the motion is heard in Circuit Court, W must bring a mandatory motion based on an unlawful search and seizure under R 4-252(a)(3) or the motion is waived. The motion must be brought within 30 days of the earlier of the appearance of counsel or the first appearance of defendant pursuant to Rule 4-213(c). R 4-252(b).

W should seek another bail review for D’s pretrial release. R 4-216, R 4-216.1, R 4-216.2; Crim Proc. 5-101, 5-201, 5-202.

Question 1B

Under R 4-221, if the defendant is charged with a felony not within the District Court’s jurisdiction and requests a preliminary hearing within 10 days after an initial appearance pursuant to R 4-213(a), the hearing shall be scheduled within 30 days after a timely request. R 4-221(a), (b). The request was timely made and therefore the hearing must be granted.

Question 2A

W should assert the spousal privilege in CJP 9-105, which states that a spouse is not competent to disclose any confidential communications between spouses during the marriage.

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Question 2B

The communication was made during the marriage while no one else was present. It does not matter that D is not married to M. The court should exclude D's testimony as M has not waived the privilege and sustain W's objection.

Question 3A

No. W's objection was not correct. Under R. 5-607, the credibility of a witness may be attacked by any party, including the party calling the witness. The court's ruling was proper.

Question 4

Under R 5-607, a witness's credibility can be attacked with evidence that the witness was convicted of a crime if: (1) the crime was infamous or relevant to credibility; (2) the court determines the probative value of admitting the evidence outweighs the danger of unfair prejudice to the witness or objecting party; and (3) the conviction occurred within 15 years. R 5-609(a), (b). A plea of nolo contendere is treated as a conviction. R 5-609(d). Infamous crimes include treason, felony theft, forgery and misdemeanors pertaining to dishonesty. Courts have held that distribution of controlled substances such as cocaine fall within crimes relevant to credibility. *State v. Giddens*, 355 Md. 205 (1994).

Because the possession of cocaine arguably falls under Giddens's holding and is within 15 years, the court should admit the evidence of the crime. Because felony counterfeiting is a form of forgery and a crime of dishonesty, it too is relevant to credibility, and the evidence of this crime should be admitted because it falls within the 15-year time period.

However, the question pertaining to whether M was represented by counsel should be stricken and the evidence excluded under R 5-401, 5-402 and too prejudicial under R 5-403. M has a constitutional right to representation by counsel and implying guilt from asserting this right is improper and highly prejudicial.

Question 5

R 4-324, Motion for judgment of acquittal can be brought at the close of the State's evidence and, in a jury trial at the close of all evidence.

R 4-331, Motion for new trial can be brought 10 days after the verdict. R 4-331(a).

R 4-331, Motion for revision of the judgment may be brought within 90 days after sentencing to set aside an unjust and improper verdict. R 4-331(b).

R 4-332, Writ of Actual Innocence can be brought at any time. R 4-332(c). The writ must assert that newly discovered evidence that could not be previously obtained creates significant possibility that the result would be different, R 4-332(d)(8) and defendant did not commit the crime, R 4-332(d)(9).

R 4-344, Sentencing review by a three-judge panel may be sought 30 days after imposition of sentence. R 4-344(a).

R 4-345, Motion to revise the sentence may be brought to correct an illegal sentence at any time and based in fraud, mistake, irregularity within 90 days after sentencing. R 4-345(a), R4-345(b).

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R 8-202, Appeal to Court of Special Appeals may be filed within 30 days after entry of judgment, R 8-202(a), or 30 days after withdrawal or disposition of a motion under R 4-331. R 8-202(b).

R 8-204, If appeal date is missed, leave to appeal to Court of Special Appeals may be sought.

Question 6A

Courts

D seeks \$100,000. This amount is outside the jurisdictional limits for District Court, which is \$30,000. CJP 4-401(1); CJP 4-405 (small claims jurisdictional amount is \$5,000). Thus, the case fits squarely within the jurisdictional limits of Circuit Court. CJP 1-501.

Counties

Under CJP 6-201, an individual may be sued in the county that he/she resides, carries on a regular business, is employed, or habitually engages in a vocation. CJP 6-201(a). Under CJP 6-202(8), a suit involving the tort of negligence may be brought in the county where the tort occurred.

Because the facts are silent about whether D includes M in the lawsuit, it is unclear if CJP 6-201(b)'s rule regarding multiple defendants applies, which is they can be sued in any county any one could if no single county exists. This rule is cumulative, not mutually exclusive. Nevertheless, CJP 6-201(b) does not seem to apply to this particular question.

D may sue F in St. Mary's County where he resides, and in Charles County where F operates his business and where the purported negligence of F occurred.

Question 6B

If F brings a preliminary motion it must be filed before the answer is filed. R 2-322(a), (b). The answer must be filed 30 days after the complaint is served. R 2-321(a), or if a preliminary motion is filed, 15 days after entry of the court's order, R 2-321(a) (reference to R 2-321(c)) & R 2-321(c). Under R 2-311, a response to the motion is due 15 days after being served or the time permitted under R 2-321(a). R 2-311(a).

If F files a preliminary motion, he will need to file his answer and response to summary judgment 15 days after entry of the court's order on F's motion. R 2-311(a), R 2-321(a), R 2-321(c).

If F does not want to file a preliminary motion, his answer and response are due 30 days after being served. R 2-321(a).

Question 6C

Because D's affidavits show a proper factual basis for recovery, F will need to file supporting affidavits with proper evidence contradicting D's evidence to dispute facts, unless D is able to assert a legal theory that trumps all factual matters.

Under R 2-501, summary judgment is proper where no genuine dispute of material fact exists and a party is entitled to judgment as a matter of law. R 2-501(a). To dispute the facts of a moving party, a response must identify material facts that are disputed and identify the evidence, admitting through affidavits, that dispute the fact. R 2-501(b). If F needs more time to gather this evidence he could seek a continuance under R 2-501(d).

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However, if F has a sound legal defense making all factual disputes irrelevant, he could oppose summary judgment simply based on the law and may wish to bring a motion to dismiss for failure to state a claim to put forth this legal argument. R 2-322(b).

Question 7A

D should make a good faith effort to resolve the dispute over discovery with F, even though D could immediately move for sanctions for F's complete failure to respond. R 2-431, R 2-432(a). D will want to show he made a good faith effort to resolve the matter to bolster his motion for the discovery under R 2-433. He will want to certify his good faith efforts under R 2-431.

Question 7B

F should object that only 30 interrogatories are permitted under R 2-421(a). F may oppose any motion for sanctions, may seek a protective order under R 2-403, or simply respond to the first 30 interrogatories and oppose responding to more than 30 interrogatories. R 2-403, 2-421.

Question 8

Under CJP 9-111, a priest may not be compelled to testify in any manner to a confession made to him by a person seeking his spiritual advice. This privilege is held by the priest. If M is able to show he made the confession while seeking spiritual advice, then a basis for the privilege exists. However, the court will inquire into whether Father Somchai waives the privilege, and, if he does, allow the Father to testify. If the Father doesn't waive the privilege, the father will not be made to testify. CJP 9-111; R 5-101(d). The court will inquire into the matter under the authority of 5-104(a), which provides that the court determines "the existence of a privilege."

Question 9A

R 2-532, Motion JNOV can be made 10 days of entry of judgment because D made a motion for judgment at the conclusion of the trial. R 2-532(a), (b); R 2-519.

R 2-533, Motion for new trial may be brought within 10 days of entry of judgment. R 2-533(a).

R 2-534 Motion to alter or amend judgment can be made (if the trial was a bench trial) 10 days after entry of judgment. R 2-524(a).

R 2-535 Motion to revise may be made 30 days after entry of judgment. R 2-535(a).

Question 9B

The restriction on the Motion JNOV under R 2-532(a) is that a motion for judgment just first be brought at the close of evidence. None of the other motions have this restriction.

Question 10A

RPC 1.5: A fee may be contingent on the outcome of a matter if the fee agreement is in writing, signed by the client and states the method by which the fee is to be determined, including a percentage that shall accrue to the attorney in the event of a settlement, trial or appeal; litigation and other expenses to be deducted

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from recovery; and whether such expenses are to be deducted before or after the contingency fee is calculated. RPC 1.5(c).

RPC 1.5(a) provides that fees must be reasonable, and this includes contingency fees. In re Merry-Go-Round Enters., 244 BR 327 (Bank D Md. 2000) (discussing reasonableness of contingency fees).

D's attorney violated RPC 1.5 by not having a written agreement signed by D as required by RPC 1.5(c) and by charging an unreasonable fee of 80%.

RPC 1.5, 1.15, R 19-403, 19-408, 19-410: The facts raise the issue about whether D's attorney followed the proper protocols regarding receipt of a client's funds; safeguarding those funds; maintaining them for proper distribution in an attorney trust account if and as required by RPC 1.15 and R 19-403, 19-408, and 19-410; and distributing them to D. If an investigation arises, this issue should be examined with regard to the \$8,000 D's attorney kept for himself.

RPC 7.1, 7.4: Under RPC 7.1, an attorney shall not make false or misleading statements about his services. An attorney cannot create unjustified expectations, hold himself out as a specialist or expert, and make comparisons that cannot be verified. RPC 7.1, 7.4. An attorney may state that he/she practices in a particular area and may state he/she is a member of the patent bar.

D's attorney violated these rules when he guaranteed D \$100,000, creating unjustified expectations; made an unverifiable comparison that he was the best attorney in Southern Maryland; and described himself as a juror profiling expert.

The violations of the above rules calls into question whether D's attorney is competent (RPC 1.1); is diligent (RPC 1.3); properly communicated with D (RPC 1.4); and followed rules regarding the termination of his relationship with D under RPC 1.16, especially regarding safekeeping of D's property, calling into question RPC 1.15 and RPC 1.16.

RPC 8.4: D's attorney violated this rule when violating the above rules.

Question 10B

Under RPC 8.1, it is a violation of the rules of professional conduct for an attorney to knowingly fail to respond to a lawful demand for information from disciplinary authority. D's attorney has an obligation to respond to an inquiry from the Attorney Grievance Commission.