

Maryland State Board of Law Examiners  
**JULY 2018 MARYLAND GENERAL BAR EXAM –**  
**REPRESENTATIVE GOOD ANSWERS FOR THE BOARD’S WRITTEN TEST**

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

**MARYLAND ESSAY QUESTION NO. 1**

**Representative Good Answer No. 1**

Nick may be able to recover on a claim of negligence in Maryland if a jury finds that the truck driver had the last clear chance to avoid the collision. At issue, is whether Nick's contributory negligence or assumption of risk contributed to his injury. In order to bring a claim for negligence, Nick must show that the truck driver owed him a duty, the truck driver breached the duty, but for the breach Nick would not have been injured, that Nick's injury was a foreseeable result of the truck driver's breach, and that Nick was actually injured or suffered damages. A driver owes a duty to all those who may foreseeably be injured if the driver fails to exercise reasonable care. In this case, Nick was a cyclist on the road on which the truck driver was driving. It is foreseeable that negligent acts by a truck driver would pose a risk to pedestrians and cyclists on the road. The truck driver breached his duty when he was operating the vehicle in a distracted manner. The truck driver owed a duty of reasonable care. A reasonable truck driver would not have driven his truck while distracted. By doing so, the driver breached his duty of reasonable care to the cyclist and all others on the road at the time. But for, the truck driver's distracted driving he would have had time to brake and avoid the cyclist. Thus, the truck driver's distracted driving was the actual cause of the accident. Further, injury to a cyclist is a direct and foreseeable result of truck driver's failure to pay attention to the road. Finally, Nick sustained injuries and therefore meets the damages requirement for a negligence cause of action. Nick therefore has a prima facie case for negligence.

However, Nick will likely not be barred from recovery under an assumption of risk theory. A plaintiff who is aware of and understands the risks of his conduct and voluntarily proceeds in the face of that risk will be barred from recovery in Maryland. Here, Nick observed the truck approaching in the lane he was about to enter. He was aware that a collision could potentially result. But the facts state that Nick believed he had adequate time and space to pass. Thus, he failed to acknowledge and understand the risk. Assumption of risk therefore would not be a defense in this case.

The issue of contributory negligence is a close one, but Nick will likely be able to recover as the truck driver had the last clear chance to avoid the accident. Maryland bars recovery in negligence suits if the plaintiff was contributorily negligent. Here, Nick owed a duty of care to others on the road to operate his bicycle as an ordinarily prudent person would under similar circumstances. Here, Nick left the safety of the bike lane entered into a normal traffic lane as a truck was bearing down on him. A reasonably prudent person would have waited for the truck to pass before attempting to pass the slower cyclist. But for his failure to wait for the truck to pass, he was injured. Additionally, his injury was a foreseeable result of his decision to enter the normal traffic lane as the truck was approaching. His negligence thus contributed to his injury. However, the state of Maryland recognizes the last clear chance defense. Contributory negligence will not bar recovery where the defendant had the last clear chance to avoid the injury. Here, the truck driver appears to have had the last clear chance to avoid the accident. Nick's negligent act preceded the defendant truck driver's failure to brake in time. Had the truck driver not been distracted, he may have been able to stop if he had not been distracted. However, the

Maryland State Board of Law Examiners  
**JULY 2018 MARYLAND GENERAL BAR EXAM –**  
**REPRESENTATIVE GOOD ANSWERS FOR THE BOARD’S WRITTEN TEST**

issue is a close one and would likely be left to a jury to decide whether the driver could have avoided the accident after Nick veered into the travel lane. There are insufficient facts to determine that at this time.

**Representative Good Answer No. 2**

I would advise Nick that he bring a negligence action against the truck driver and that he has a strong likelihood of success on his claims because the truck driver had the last clear chance to avoid the accident. I would also disclose the statute of limitations to Nick, which is 3 years from the date of the accident. He has plenty of time to bring suit.

Nick should bring a negligence suit claiming that the driver negligently struck Nick

To succeed on a negligence action, Nick must demonstrate that the truck driver owed a duty to Nick; that the driver breached that duty; that that breach caused the accident; and that Nick suffered damages as a result. First, Nick can show that the truck driver owed a duty to Nick because Maryland follows the Cardozo theory for duties. That is, a defendant owes a duty of reasonable care to all foreseeable plaintiffs. Here, Nick was a foreseeable plaintiff because a truck driver owes a duty of reasonable care to anyone that shares the road, including other drivers, bikers, and pedestrians. The truck driver breached that duty when he drove "distracted." All drivers have a duty to drive in a reasonably safe manner and operating such a heavy piece of machinery on a busy public street while distracted should be seen as a breach. Nick can also show both proximate and actual causation. For proximate cause, it was foreseeable that a biker would switch lanes into the street in order to pass a slower biker. The driver will likely defend this and contend that it was not foreseeable since the street had a dedicated bike lane. This is a question for the trier of fact, but ultimately, it will likely be found to be foreseeable. The driver's negligence also actually caused the accident; if the driver was not distracted, he would have noticed Nick switch lanes and he would have had ample time to apply the brakes. Finally, Nick sustained injuries which satisfies the damages element. Nick may recover for his injuries in addition to any damage that his bike sustained. He may also seek any consequential economic damages since economic damages are allowed when the plaintiff suffers physical harm as well.

The truck driver will likely defend the suit by contending that Nick was contributorily negligent

In Maryland, contributory negligence is a complete bar to recovery. That is, even if Nick was just slightly negligent in switching lanes, he would be precluded from recovering. Because Nick was incorrect about the amount of time he had to switch lanes, a trier of fact could conclude that he was negligent in his own right. The truck driver could also argue negligence per se if the county has an ordinance requiring bikers to stay in bike lanes. This would not be conclusive but it would raise a presumption of a breached duty. However, I would advise Nick that he has a very strong case against contributory negligence since the truck driver had ample time to apply the brakes but he failed to. The last clear chance doctrine provides a defense to contributory negligence. Since the driver had the last chance to avoid hitting Nick and he would have avoided Nick had he not been distracted, Nick should still be able to recover.

The driver might also raise the boulevard rule which states that fellow drivers must yield to the driver with the right of way. Since the truck driver had the right of way, Nick's failure to yield could result in a finding of proximate cause. However, the boulevard rule would not be a great defense here since the driver still had the last clear chance to avoid Nick.

Maryland State Board of Law Examiners  
**JULY 2018 MARYLAND GENERAL BAR EXAM –**  
**REPRESENTATIVE GOOD ANSWERS FOR THE BOARD’S WRITTEN TEST**

The truck driver might also raise an assumption of risk defense

Assumption of risk is also a complete bar to recovery. The truck driver could argue that Nick assumed the risk of being hit when he moved from the bike lane into a busy car lane on a public street. For this to be a defense, Nick must have actually known of the risks and assumed them anyway. While this is a strong defense since Nick should have known that he could have been hit by passing a trucker, the driver still had the last clear chance to avoid him, so the last clear chance doctrine should still allow Nick to recover.

I would advise Nick not to bring any assault, battery, or trespass to chattels claims since the truck driver did not act intentionally

To succeed on an intentional tort, Nick must show that the truck driver intentionally hit Nick. Since the evidence indicates that the truck driver hit Nick due to being distracted, Nick will not be able to show that the driver acted with a requisite level of intent sufficient to hold him liable for an intentional tort. However, if Nick truly wants to move forward with an intentional tort cause of action, I would advise Nick that, unlike with a negligence claim, he has one year to bring suit. The statute of limitations for intentional torts is one year, as opposed to three.

**MARYLAND ESSAY QUESTION NO. 2**

**Representative Good Answer No. 1**

A check is a negotiable instrument. Pursuant to section 4-207. A customer that transfers an item and receives a settlement or other consideration warrants to the transferee that the person is entitled to enforce the check, that all signatures on the item are authentic and authorized, the item has not been altered, and that the item is not subject to a defense or claim or any insolvency proceedings.

**Kappa Co.’s (KC) Rights**

Kappa can bring a claim against Jewel (J) for fraud or illegality. Jewel had already been sent a check which she cashed. J knew exactly how much of a refund was due to her from Kappa Co., Kappa already sent the money which she cashed. When she received the second Check, she should have contacted Kappa co. and returned the check. By taking a check, she knew or should've have known was issued by mistake, she was not a holder in due course because she took with knowledge that the check may have been subject to a claim or defense. Because she's not a holder in due course. Kappa's claim of fraud which is a real defense, can be used against her. Kappa can bring a claim against Jewel for conversion because she interfered with their property interest illegally when she cashed the second check with knowledge that it could've been a mistake. However, Kappa may be liable to QC because it was a Holder in Due Course (HDIC). Kappa's payment department was negligent in issuing a second check and will have to suffer the consequences.

**Jewel Ivy Rights (J)**

Jewel can claim that she had the right to cash the check because it did not appear altered however, this argument will fail. She had already cashed the first refund they sent her so when she received the second check she should've made more inquiry to return the check. She fraudulently took the check Quick Cash instead of a bank. The facts do not suggest how she negotiated the first refund check however, it is found that she deposited

Maryland State Board of Law Examiners  
**JULY 2018 MARYLAND GENERAL BAR EXAM –**  
**REPRESENTATIVE GOOD ANSWERS FOR THE BOARD’S WRITTEN TEST**

that check in a bank rather than taking it to a check cashing location, that can point to the fact that she knew that the check was a mistake and that's why she took it to Quick Cash. By transferring the check to QC, Jewel breached her warranty that the check would not be subject to any claim or defense because she knew or should have known that the check was issued by mistake. Jewel had no right to the check whatsoever.

Quick Cash (QC)

QC has rights to recoup the funds from Kappa because it took the check from Jewel without knowledge of any irregularities or claims to the check. Even though QC did not use its electronic check verification system, it is still a HDIC because it took the check from Jewel in good faith. Quick cash has no recourse against the Bank because the bank is not obligated to cash a check that has been stopped. The bank followed its policies and stopped the check once it received notice. The bank was also allowed to charge his account because the customer authorized it by depositing the check which later bounced.

**Representative Good Answer No. 2**

This essay is organized by each party's liabilities. A discussion of rights for each party is weaved into the analysis.

Kappa Co.

Kappa Co. is not liable for the payment of the second check to Maryland Bank. Generally, an entity who issues a negotiable instrument is liable for the payment of that instrument, even if the entity issued the instrument negligently. However, the entity who issued the instrument may submit a stop-payment order to the payor bank. Commercial Law § 4-403. A written stop-payment order must be delivered with sufficient time to provide the payor bank with a reasonable time to act on the order, and the stop-payment order is effective for six months. Id. Here, Kappa Co. issued a stop-payment order on July 10. This order was received by the payor bank, Maryland Bank, with sufficient time to enable the Bank to refuse payment. Indeed, the Bank did refuse payment. As such, Kappa Co. is not liable to the bank for any payment.

Kappa Co. could potentially be liable to Jewell Ivy for the second check. An entity who issues a negotiable instrument may assert defenses against those seeking payment. When the party seeking payment is not a holder in due course, the issuer may assert defenses that are available under contracts law. Commercial Law § 3-305(a)(2). A party is a holder in due course if the party is a holder who took the instrument for value, in good faith, and without notice of any reason to suspect that the instrument is not payable. § 3-302. Here, Jewell is not a holder in due course. Jewell did not pay value for the instrument. Though Jewell had paid Kappa for widgets, Kappa had already returned the value to Jewell. Jewell also had notice that Kappa should not have sent the check and would likely issue a stop-payment order. Indeed, this may be why Jewell took the second check to a check cashing company, rather than the bank. Because Jewell is not a holder in due course, Kappa can assert contracts defenses against Jewell. Kappa can assert that Kappa had already fulfilled its obligation to Jewell by issuing the first check. This would be sufficient to prevent Kappa from paying Jewell on the check.

Kappa Co. is liable to QuickCash. QuickCash is a holder in due course, notwithstanding the fact that QuickCash received the check from a person who is not a holder in due course. QuickCash had no reason to suspect that the check would be dishonored or that there were defenses. Nothing about the transaction appeared unusual to QuickCash. Though QuickCash did not verify the check, QuickCash had no duty to research the check. As between QuickCash, who accepted a facially valid check, and Kappa, who negligently issued a

Maryland State Board of Law Examiners  
**JULY 2018 MARYLAND GENERAL BAR EXAM –**  
**REPRESENTATIVE GOOD ANSWERS FOR THE BOARD’S WRITTEN TEST**

check, Kappa must bear the loss. Thus, QuickCash could recover for the value of the check and losses against Kappa.

Jewell Ivy

Jewell is liable for \$1030 to QuickCash. When a transferor transfers an item for consideration, the transferor warrants that there are no defenses against the instrument and that the warrantor can enforce the item. § 4-207(a). If the item is then dishonored, the transferor is obligated to pay the amount due on the item and any losses caused, so long as the warrantor is given notice within thirty days. § 4-207. A party is a transferor if the party delivers the instrument to another person for the purpose of giving that person the right to enforce the instrument. § 3-203.

Here, Jewell was a transferor. Jewell delivered the check to QuickCash in order to allow QuickCash to enforce the check. Jewell received consideration of \$990 for the check. Thus, Jewell made warranties to QuickCash. Jewell warranted that Jewell was entitled to enforce the check and that there were no defenses against the check. Thus, Jewell is liable for the value of the check and any losses caused by the check being dishonored. QuickCash should be sure to provide Jewell with notice within 30 days of the time the check was dishonored in order to use this right.

Jewell is secondarily liable to Deposit Bank. QuickCash is primarily liable, as noted below. If Deposit Bank had been unable to withdraw the funds from QuickCash, Deposit Bank would have been able to seek the funds from Jewell.

QuickCash

QuickCash is liable to Deposit Bank for the value of the check. QuickCash is a transferor, as QuickCash delivered the check to Deposit Bank for the purposes of allowing Deposit Bank to enforce the check. As a transferor, QuickCash made the same warranties that Jewell had made to QuickCash. As such, QuickCash was liable to Deposit Bank for the value of the check and for any losses caused.

Deposit Bank has the right to charge a fee for providing a dishonorable check. Banks may impose such policies on customers, so long as the customer has notice of the policy. Thus, QuickCash is liable to Deposit Bank for the \$30.

Maryland Bank

Maryland Bank is not liable to any of the parties. Maryland Bank acted within its rights to refuse to pay on the check after receiving the stop-payment order, as noted in the first paragraph on Kappa Co. See also Commercial Law § 4-403.

Maryland State Board of Law Examiners  
**JULY 2018 MARYLAND GENERAL BAR EXAM –**  
**REPRESENTATIVE GOOD ANSWERS FOR THE BOARD’S WRITTEN TEST**

**MARYLAND ESSAY QUESTION NO. 3**

**Representative Good Answer No. 1**

1. Claim against the Hospital

Peter will have a successful claim for breach of contract against the Hospital. Peter was offered the position by Donna, on a hospital lettered that included objective words of intent to provide and provide. Thus, a valid offer existed which Peter promptly accepted. The facts state that Peter did not receive the requisite documents specified in the offer, or whether any valid consideration was provided. However, consideration can be presumed by reliance by the plaintiff it is reasonable and significant. Here, Peter had resigned his prior position and will sustain substantial financial losses as a result of the breach. Thus, this is valid to constitute that a contract was formed and a breach occurred.

The Hospital will argue that Donna did not have the authority to bind the hospital in such contracts and that the prior approval had been refused. However, the Hospital will still be held liable because an agency relationship existed. Agency is established by a manifest of intent by the principal, control of the agency's action, the agency acting on behalf of the principal, and a manifestation of assent by the agent. Agency can be actual, implied or apparent. Here, Peter can successfully argue that Donna had sufficient agency to bind the Hospital in contracts. Apparent authority exists when the third-party acts to represent the agent has the authority to bind the principal in contracts. Here, Donna's use of the letterhead of the Hospital, the detail of the offer, and the position Donna held as VP of human resources, could lend a third party to believe that she had the authority to bind the principal. Thus, this argument is unlikely to be persuasive.

Peter may be able to obtain expectation damages, or reliance damages, but not both. Expectation damages seek to place you in the position you have been if the contract had been performed as planned. Here, the offer provided for \$400,000 over the next 5 years, equal to \$2,000,000. The court may conclude this measure of damages is too exorbitant and instead award reliance damages, which would include the financial loss suffered by Peter from the time he left his job up until the time he secures a new job. Specific performance is an extraordinary remedy and will probably not be awarded in this case

2. Claims against the University

Peter will not likely have a claim against the University to secure a tenured teaching position there. While Donna likely had the authority to bind the hospital, she did not have the authority to bind the University because the facts suggests she was VP of the Hospital, but not the University. While her statements do suggest a tenured teaching position is included in the offer, it is unlikely that the university will be required to specific performance to provide the position to Peter because the University has its own process for selecting professors to be tenured. Thus, Peter will not have any claim for damages against the university.

**Representative Good Answer No. 2**

Hospital

The issue is whether Donna had apparent authority to offer the Deputy Chief Surgeon position to Peter. Under agency laws, an agent may bind its principal, not only if it has the express authority to bind the principal, but also if it has the apparent authority to do so as well. In evaluating whether an agent has apparent authority, Maryland law looks to whether a third party would have reasonably believed that the agent had the authority

Maryland State Board of Law Examiners  
**JULY 2018 MARYLAND GENERAL BAR EXAM –**  
**REPRESENTATIVE GOOD ANSWERS FOR THE BOARD’S WRITTEN TEST**

to take the actions which subsequently bound the company. In this case, Peter was in negotiations with Donna in her role as Vice President of Human Resources at the Hospital. As VP of HR, Peter would reasonably believe that Donna had the authority to make offers related to the hospital. Donna's communication with Peter was on Hospital letterhead, evidencing the agency relationship between Donna and the Hospital. From this relationship, Peter believed that he had accepted a job offer. This belief was reasonable because of the position Donna held as well as the letterhead.

As such, Peter may recover damages sustained for the repudiation of the employment contract. The question remains as to the extent of his damages. He may reasonably be able to recover the amount of damages equal to his detrimental reliance and previous substantial loss. He may also be able to recover for expectation damages, but the calculation of expectation damages would include any mitigating efforts Peter would reasonably have had to take in reduce the amount of damages. This means that the court would look to what other opportunities Peter should reasonably have investigated and taken (if offered) after sustaining the financial loss. The Hospital would argue that it would be a windfall for Peter to receive the \$2 million promised to him from Donna, because Peter would be able to procure another surgery job that pays too. For example, if Peter were able to find a job that would pay \$1.5 million over the course of five years, the Hospital would then only have to pay the \$500,000 difference.

The Hospital would argue that because Donna did not have the authority to bind the Hospital it is not liable on the contract. The Hospital would say that Donna did not perform a detour, but a frolic. The detour/frolic doctrine holds that if an agent performs an action that is far outside of her agency’s scope, then the principal should not be bound. The Hospital would note that Donna offered more than she was allowed to under her authority as VP of HR, and knowingly did so. As such, Donna far exceeded the scope of her authority and did not bind the Hospital. Peter would successfully argue that the apparent authority doctrine goes to what a third person would reasonably believe from the circumstances. Peter was reasonable in his belief that he received an offer, and nothing in the offer indicated that the employment choice would need to go to any further person or body in order to ultimately make the offer. It is not a frolic for an HR employee to make employment offers.

The Hospital may be able to recover from Donna for exceeding the scope of her employment in the amount of damages it sustained from Peter's suit.

#### University

The issue is whether Peter should have reasonably believed that Donna could bind the University. Under the apparent authority doctrine, it is not reasonable for Peter to believe that Donna could bind the University. The offer from Donna only indicated that it was highly likely that the University would hire him. Because the University is a completely separate entity, it is not reasonable to believe that an agent of the Hospital could bind the University. Peter may argue that, because of the close connection between the Hospital and the University, Peter could have believed that Donna could bind the University as well. However, Peter's argument misses the key question to the apparent authority doctrine. The question is not whether the third party subjectively believed, but rather, whether the third party reasonably believed. An objective evaluation of Donna's authority would show that she was not an agent of the University. As such, Peter will likely not be able to recover from the University.

Maryland State Board of Law Examiners  
**JULY 2018 MARYLAND GENERAL BAR EXAM –**  
**REPRESENTATIVE GOOD ANSWERS FOR THE BOARD'S WRITTEN TEST**

**MARYLAND ESSAY QUESTION NO. 4**

**Representative Good Answer No. 1**

To begin with, it appears that Al and Barb entered into a valid marriage as they were both over the age of consent when they married. There do not seem to be any facts that would lead to a valid annulment.

A. Barb has several causes of action for Absolute Divorce, and will likely be successful in achieving her goal.

1. Barb will likely be successful if she sues for absolute divorce on the basis of adultery.

In Maryland, a party can obtain an absolute divorce when the other party has committed adultery. Because adultery is hard to prove, Maryland allows plaintiffs to prove motive and opportunity to commit adultery - and need not provide actual proof of adultery - to show by a preponderance of the evidence that adultery took place. Here, there is more than enough evidence to prove that Al cheated on her with her best friend. There is lots of evidence of motive or intent to do so: Al moved out of their marital bedroom and ceased to have intimate relations with Barb and refused her advances and yet purchased male sexual performance supplements and pills, he sent and received flirtatious communications with Barb's best friend, and when Barb confronted him, he "took the Fifth." The evidence also shows that he had opportunity to engage in an affair: the communications with Barb's best friend in addition to the flight itinerary and spa resort reservations for one room with a king-sized bed likely provide enough evidence for the court to grant Barb an absolute divorce under an adultery theory.

2. Barb may be successful if she sues for absolute divorce on the basis of desertion.

Another potential means to seek absolute divorce in Maryland is under a claim of desertion. Although Barb's claim here would not be a traditional desertion claim as Al did not leave the house or disappear entirely, Barb could argue that he abandoned the relationship 12 months ago when he moved out of their marital bedroom against her wishes and refused to engage with her as a married spouse would. His affair, moreover, could indicate his intent to permanently abandon the relationship and desert Barb. Although a weaker cause of action than her adultery one, Barb would maybe win on this claim given Al's constructive desertion.

3. Barb will likely be unsuccessful if she sues for absolute divorce on the basis of separation for 12 months.

Another route to obtain an absolute divorce in Maryland is through the physical separation of a couple for 12 months. This avenue may be more difficult for Barb as they continued to live in the same house and Barb continued to attempt to revive their marriage and engage Al in marital relations. This was not a case where there was a mutual separation and the couple was waiting it out until they could get an absolute divorce. If Barb were unsuccessful on her first two causes of action for absolute divorce, she may be able to use separation as a last resort as 12 months did pass with them living in separate rooms and they were, for all intents and purposes, emotionally separated.

**B. Al's Potential Defenses**

Unfortunately for Al, he likely does not have many strong defenses under these circumstances. Al could argue that he is not engaging in an affair - but that would likely fail given the circumstantial evidence. He could argue that he did not desert Barb as he has remained in the home with her and might provide other spousal support functions other than marital relations. This might be a winning argument but more fact development



Maryland State Board of Law Examiners  
**JULY 2018 MARYLAND GENERAL BAR EXAM –**  
**REPRESENTATIVE GOOD ANSWERS FOR THE BOARD’S WRITTEN TEST**

would be needed. Finally, he could argue convincingly that they have not been separated as their actions do not demonstrate they both made the intentional decision to partition their lives and live separately.

As for Barb's claims to indefinite alimony, Al would struggle with defenses given the equitable circumstances, particularly the multiple sclerosis Barb is suffering from. He could forfeit the home they live in to her and then prove that she does not need more than her \$30,000 to provide for herself given the absence of children and with a roof over her head. Regardless, Al would likely not fare well in raising these potential defenses.

C. Barb will likely be able to obtain indefinite alimony.

Maryland provides for three types of alimony: pendent lite, rehabilitative, and indefinite. Barb likely has a good case for indefinite alimony as she has multiple sclerosis and currently earns \$30,000 a year with little chance of advancement. When considering whether to grant indefinite alimony, courts consider a host of factors including the length of the marriage, the incomes, potential incomes, age, and education of the parties, any unique circumstances, etc. Here, the fact that they have been married for 25 years and Barb has a high school degree and limited income generating possibilities (and will likely see those decrease as the Multiple Sclerosis progresses) while Al is healthy, college-educated, and a high earner would likely lead a court to grant her indefinite alimony as she would need the income to maintain her current lifestyle. The fact that Al has a high income and is proportionally much higher than Barb's would also lead a court to equitably balance the situation by providing Barb with a permanent source of income as it would likely not cause undue hardship on Al. She would also likely be entitled to alimony while the suit is pending - pendent lite alimony.

One additional consideration: Although Al's infidelity, on its own, cannot result in a higher alimony payment or property distribution to Barb, it can be considered as a factor in Maryland if it contributed to the separation. When considering their relationship through the lens of equity, the court can consider whether his adulterous actions were detrimental to Barb or their household financially or emotionally. Here, because Al was cheating on Barb with her best friend, refused her attempts to repair the relationship, and spent their marital money on his affair, a court could take his infidelity into consideration when determining property and alimony decisions.

**Representative Good Answer No. 2**

Introduction

Barb likely has grounds for absolute divorce based on Al's adultery and refusal to engage in sexual relations, leading to constructive abandonment. Al may be able to raise a defense that Barb consented to his infidelity by her failure to object immediately when the signs of his infidelity became apparent, or on the grounds that she has forgiven him and consented to live with him. Al may also deny that the infidelity occurred, although such a claim would likely be unsuccessful because of the circumstantial evidence. Finally, although indefinite alimony is generally disfavored, Barb may have sufficient grounds to claim indefinite alimony because of the permanent, unconscionable disparity in the standard of living that would result through failure to grant indefinite alimony.

Absolute Divorce

Absolute divorce is a permanent divorce that permits the parties to remarry. Absolute divorce can be granted on various fault or no-fault grounds, including adultery cruelty, voluntary abandonment, separation/limited divorce lasting a year or more, cruelty, or abuse.

Maryland State Board of Law Examiners  
**JULY 2018 MARYLAND GENERAL BAR EXAM –**  
**REPRESENTATIVE GOOD ANSWERS FOR THE BOARD’S WRITTEN TEST**

1. Adultery

Barb's strongest case for an absolute, fault-based divorce is based on Al's marital infidelity. Direct evidence of Al's infidelity is not required in order to prove adultery. Circumstantial evidence is sufficient, if the party seeking divorce proves inclination and opportunity. Al apparently was inclined toward adultery because he ceased engaging in sexual relations with Barb and showed sexual interest in her friend. Specifically, Al refused to engage in sexual relations with Barb and moved out of her bedroom against her wishes. Barb located flirtatious communications between her husband and her best friend, as well as pills and supplements associated with male sexual performance. Since her husband was not sexually active in his relationship with her, the fact that he was taking these supplements and pills is some evidence that he was sexually active outside the marriage. Additionally, Al had the opportunity to engage in an extra-marital affair, since Barb found evidence of a flight itinerary in which her husband and her best friend were passengers and reserved a single room with a king-sized bed. This circumstantial evidence of her husband's affair is thus likely sufficient to constitute proof of marital infidelity and thus to constitute grounds for a fault-based divorce.

2. Unjustified Refusal to Engage in Sexual Relations/Constructive Abandonment

Abandonment that lasts for at least one year is also grounds for a fault-based divorce in Maryland. Although Al did not actually leave the house, he ceased living with Barb as her husband, since he moved out of the marital bedroom and refused to engage in sexual relations with her. His refusal to live with her as her husband and engage in sexual relations likely constitutes a constructive abandonment that meets the requirements for a fault-based divorce, since it has lasted for a full year.

3. Limited Divorce for One Year

If these avenues for pursuing absolute divorce fail, Barb has grounds to pursue a no-fault, limited divorce, by proving irreconcilable differences (that they can no longer live together harmoniously as husband and wife and are unable to reconcile their differences), or by moving out of the marital residence and thus showing separation. (There is no minimum time limit for separation before filing for limited divorce.) Once the couple has lived apart for one year, she would then be able to file for absolute divorce based on a finding of voluntary separation for a period of one year.

4. Other grounds

Barb may also wish to consider claiming cruelty or abuse, but more information would be needed to determine whether these are viable claims. It is unlikely that Al's adultery and disinterested separating himself from meaningful interactions with Barb rise to the level of cruelty or physical or emotional abuse, but additional information would be helpful in determining whether these grounds should be ruled out.

Defenses

1. No direct evidence of adultery

Although Al will likely try to contest the fact that the adultery actually occurred, and will argue that there is no direct evidence to prove it, this defense is ultimately unlikely to be successful because, as discussed above, the circumstantial evidence is sufficient. Although the Fifth Amendment does not apply to Barb's conversation with Al, Al will be able to claim the Fifth Amendment to avoid directly testifying about adultery, since adultery

Maryland State Board of Law Examiners  
**JULY 2018 MARYLAND GENERAL BAR EXAM –**  
**REPRESENTATIVE GOOD ANSWERS FOR THE BOARD’S WRITTEN TEST**

is a crime in Maryland. However, notwithstanding the absence of direct testimony that the adultery occurred, as discussed above, there is ample circumstantial evidence to suggest that the marital infidelity did occur, and a challenge of the sufficiency of the evidence is unlikely to be successful.

## 2. Consent/Forgiveness

Al may argue that Barb consented to his affair with her best friend, or that she subsequently forgave him. Specifically, he may argue that the fact that he moved out of their marital bedroom made it obvious that he was engaging in an affair with someone else, and the fact that Barb failed to object immediately showed that she was actually permitting it to occur. Alternatively, Al may argue that the delay in bringing the action shows that she consented to the actions, or that she forgave him by continuing to live with him after discovery. (The facts provide no evidence that she immediately moved out, for instance.) These arguments are unlikely to be successful. Although the affair may have been going on for some time, Barb likely did not know of it until recently (apparently after the November 1 trip). Barb showed no evidence of affirmatively approving of the affair or forgiving Al, and any delay in taking action is likely not substantial enough to prevent her from having grounds for divorce based on the affair. Additionally, although Barb apparently has continued to live with Al, there is no evidence that they have resumed marital sexual relations, and thus no evidence that Barb wishes to resume a normal marital relationship with Al after discovering his affair.

## 3. Procedural Protections

Al may wish to raise procedural defenses, but is unlikely to be able to successfully assert procedural defenses against Barb. Specifically, although she was "snooping around," which likely would constitute a Fourth Amendment search if engaged in by the police (and thus would require a warrant), Barb's search is not subject to suppression under the exclusionary rule, since it is a search by a private party, while the Fourth Amendment only protects against government action. Additionally, as discussed above, although the Fifth Amendment likely will protect Al from having to testify directly about his affair, since this would be incriminating evidence, it does not guard him against introduction of the circumstantial evidence demonstrating an affair.

## Indefinite Alimony

Barb likely has a good claim for indefinite alimony against Al. In Maryland, indefinite alimony is disfavored. Instead, courts prefer to award temporary alimony, allowing the divorced party to get back on his or her feet and become self-supporting. However, indefinite alimony is available in some limited cases, such as where one party is disabled or unlikely to ever become self-supporting, and denying indefinite alimony would likely result in an unconscionable disparity in the standard of living between the two parties. Here, where there are no minor children, having enough resources to care for the minor children or living in the marital residence for the sake of stability for the children will not be factors in the determination. However, the court will consider factors such as education/training (and the ability to obtain more), earning capacity, age, and length of the marriage. In this case, the parties married at a young age, before Barb was able to get substantial education and experience. At age 21, Barb had a high school degree but no other education. Additionally, Barb has suffered from Multiple Sclerosis throughout their marriage. Consequently, although she works at the county library and earns \$30,000 per year, she has "little chance of advancement." Barb's poor health and lack of ability to earn more than \$30,000 per year make it unlikely that she would be able to attain to a similar standard of living as what would be enjoyed by Al, her husband of twenty-five years. Al is a college graduate, who is in good health, works as an engineer, and earns \$125,000 per year. Al is likely to be able to continue to earn a similar amount

Maryland State Board of Law Examiners  
**JULY 2018 MARYLAND GENERAL BAR EXAM –**  
**REPRESENTATIVE GOOD ANSWERS FOR THE BOARD’S WRITTEN TEST**

and will be very comfortable after their divorce, while Barb would be left with few prospects going forward. Additionally, a court would consider fault in allocating alimony, and the fact that Barb is likely to be able to prove a fault-based divorce because of Al's marital infidelity and/or constructive abandonment would make the court more likely to consider indefinite alimony benefitting Barb, the party who was not at fault.

Conclusion

In sum, Barb is likely to be successful in a cause for absolute divorce based on fault, and any defenses Al would have are unlikely to be successful. Because temporary alimony would be unlikely to allow Barb an opportunity to become self-supporting to enjoy a standard of living anywhere close to Al's standard of living, the court would be likely to consider granting indefinite alimony, even though it is generally disfavored.

**MARYLAND ESSAY QUESTION NO. 5**

**Representative Good Answer No. 1**

Double jeopardy is not implicated because this is a paternity (civil) action.

Child support is the right of the child and the State has an interest in the child support based on the welfare benefits received by I. The Circuit Court has jurisdiction over this suit.

Statute of limitations could be an issue here. MD has a general statute of limitations of 3 years. Here, the state is filing the same action against H 10 years after the original claim of paternity. Because of the interest involved and the best interest of the child standard this may not be an issue.

Under the duty of candor to the court and to parties a party may not file frivolous claims. Here, despite the fact that I refused to cooperate on two separate actions involving paternity, the state has continued to pursue H as the father. The State here has a duty not to harass H with suits if the paternity cannot be proven.

Harvey will argue on the basis of res judicata/claim preclusion which bars a claim if the parties are the same or in privity based on the same claims and facts, the case was adjudicated on the merits, and there is a final judgment. Here, the first cause of action was dismissed "without prejudice" meaning that the action could be brought again with sufficient evidence etc. and the second cause of action was dismissed. There was no prejudicial language on the second dismissal and therefore it is assumed that the case was dismissed without prejudice. Although the parties are identical as required by res judicata, there is no final judgment on the merits of the case. A final judgment requires that the action be appealable and that there was no alternative ruling. Here, both cases were dismissed by the court before trial based on the lack of cooperation by I and are therefore not barred by res judicata. Dismissal of an action is not a final judgment of the case.

Voluntary dismissal is not a valid argument to get the claims dismissed. Here the claims were not voluntarily dismissed. The State was the plaintiff and neither case was dismissed based on motion by the court. Additionally, a party cannot voluntarily dismiss a suit once the other party has filed an answer. In order to voluntarily dismiss after the opposing party has filed an answer the party must file a motion to the court to voluntarily dismiss the case. Here, there are no facts that the State voluntarily dismissed the case. Harvey answered the complaint in both 2007 and 2014 and requested discovery. There are no facts stating that the

Maryland State Board of Law Examiners  
**JULY 2018 MARYLAND GENERAL BAR EXAM –**  
**REPRESENTATIVE GOOD ANSWERS FOR THE BOARD’S WRITTEN TEST**

State filed a motion to the court to voluntarily dismiss the case. The court's dismissal of the claims does not constitute a voluntary dismissal.

There is no argument for issue preclusion because there was no litigation on the issue. Issue preclusion is not a complete bar.

The court will rule in favor of the State based on the fact that the cases were not voluntarily dismissed.

**Representative Good Answer No. 2**

The Circuit Court should decide in favor of the State of Maryland

In a civil action, a plaintiff is entitled to one voluntary dismissal, as long as the voluntary dismissal which will result in dismissal without prejudice as long as the request is made before the defendant files an answer or with leave of the court and before substantial preparation for trial has been taken. After the first voluntary dismissal, or upon request for a voluntary dismissal after substantial efforts have been invested in the case, a court will enter an order of dismissal with prejudice.

Here, however, the State of Maryland did not request the dismissal, so the above rule will not apply.

Harvey will argue that the second order of dismissal should be interpreted as a dismissal with prejudice. However, because the court did not intentionally dismiss with prejudice, and the rule regarding voluntary dismissals will not apply, the court will interpret the second order as dismissal without prejudice.

**MARYLAND ESSAY QUESTION NO. 6**

**Representative Good Answer No. 1**

Danny will have several arguments on appeal

Burden of Proof - in a criminal trial the state is required to prove beyond a reasonable doubt that Defendant committed the elements of the requisite crime.

Robbery - is the trespassory taking and carrying away of the person property of another by force or threat of force. In this case Danny approached the cash register and said, "you know why I am here". Charlie then immediately put all the cash on the counter. Danny then picked up the cash and exited the store. Even if Charlie's ID of Danny is upheld there and all the facts as stated above are proven there is not enough evidence to prove beyond a reasonable doubt that Danny committed all the elements of robbery.

Trespassory taking - the cashier put the money on the table and Danny simply took it and walked away. Since Danny only said, "you know why I am here" and nothing else, the cashier engaged in confusing behavior by taking out all the money and putting it on the counter in front of Danny.

Threat of Force - since Danny did not use actual force State must show beyond a reasonable doubt that Danny used a threat of force. In this case Danny walked up to the register and said, "you know why I am here". This statement alone cannot prove beyond a reasonable doubt that Danny was threatening force. There are many possibilities as to why Danny was in the liquor store standing at the counter, most simply he could have been there to buy liquor. Danny made no threats of physical violence or behaved in a way which would have made the cashier feel that the use of force was imminent leading him to part with his property. Thus, even if Danny did end up taking the cashier's money he did not use threats of force to make him part with the money thus not committing a robbery

Maryland State Board of Law Examiners  
**JULY 2018 MARYLAND GENERAL BAR EXAM –**  
**REPRESENTATIVE GOOD ANSWERS FOR THE BOARD’S WRITTEN TEST**

No reasonable jury could find beyond a reasonable doubt that Danny committed a robbery as the essential elements were not proven, while at best the State could prove a theft in the form of larceny there is simply no threat of force to prove robbery.

Due Process clause of the Constitution provides Defendant the right to a fair trial and the opportunity to defend himself. In this case the government committed several violations of Danny’s rights.

Impermissible Photo ID - police officers may not show a potential witness photographs or conduct a lineup which are overly suggestive that one particular individual is the person who committed the crime. In this case, Irving the responding officer knew Danny was a suspect in previous occurrences showed Charlie a photo of Danny and Charlie said, "that’s the guy I have seen him around before". By showing C the photo of Danny the officer overstepped what police are allowed to do with a photo array. The officer only showed Charlie the picture of Danny, leading Charlie to make the inference that Danny was in fact the person that robbed the store. Since he was only showed one photo Charlie did not truly make an independent identification of Danny as the single photo was too suggestive, but instead came to the conclusion by being shown an impermissible photo. Charlie's subsequent identifications of D are now impermissible because they have been tainted by the original ID in which the police influenced Charlies ID. Danny’s attorney also made a timely objection which was overruled by the judge. This evidentiary ruling was incorrect and had a significant impact on the result of the case.

Defendant's right to Defend himself - A defendant is granted the opportunity under the Constitution to defend himself at trial. As a result of this right, the State is required to provide discovery and the evidence to be used against the Defendant so he may mount a defense and raise any issues. In this case the State's Attorney did not provide Danny's attorney with the evidence in order for him to file a timely motion to suppress the ID or prepare a defense that addressed the basis of Charlies ID (which was the impermissible showing of the single photograph). Danny's attorney was unable to adequately prepare Danny's defense since the state withheld essential evidence until during the trial. Danny was denied his right to defend himself and adequately prepare for the case brought against him since essential evidence was withheld.

Danny has all the grounds for appeal listed above. Danny’s attorney followed the correct procedures in bringing his objections and request for judgment. As a result, Danny should be able to appeal the court’s ruling.

**Representative Good Answer No. 2**

Danny has several grounds for appeal: not proving all elements beyond a reasonable doubt, a prejudicial out-of-court identification procedure, a discovery violation, and a potentially impermissible in-court identification.

1. The elements of robbery were not proven beyond a reasonable doubt.

On appeal Danny can argue that robbery was not proven beyond a reasonable doubt. Robbery requires a trespassory taking by force or the threat of force that puts the victim in fear. The facts as described at the least do not show evidence of fear. Danny was not armed, did not simulate possession of a weapon, and did not threaten Charlie. Charlie might "know why [he's here]." But it is unclear whether Charlie was in fear over even an implied threat. In order to find such a threat, it is possible that a jury could infer that the presence of two conspirators, a store empty but for Danny, and the common-sense assumption that Charlie would not have surrendered the money but for some amount of fear. Without testimony to that effect, however, it is unclear that Danny's force or threat or Charlie's fear was sufficient to support a robbery conviction. Obviously, that is not needed to find Danny guilty of the lesser-included offense of theft, but Danny would probably rather have that conviction than a robbery conviction.

Maryland State Board of Law Examiners  
**JULY 2018 MARYLAND GENERAL BAR EXAM –**  
**REPRESENTATIVE GOOD ANSWERS FOR THE BOARD’S WRITTEN TEST**

2. A prejudicial out-of-court identification procedure was used.

Danny can also argue that a prejudicial out-of-court identification procedure was used. The use of a single photograph is prejudicial. Although sometimes police employ the use of a show-up, where a single suspect, recently captured, is shown to the victim, where a photograph will be used there is no reason an array could not be shown, with other photographs that might resemble the suspect. Showing a single photograph, therefore, seems per se prejudicial.

3. A discovery violation occurred.

Danny can argue that a discovery violation occurred. Statements by the complaining witness and the details of an identification procedure should be disclosed pretrial. Irving's investigative report, containing both Charlie's statement and the previously unknown single photograph identification, should have been handed over in advance of trial. Danny's counsel was therefore deprived of the opportunity to move to suppress the identification as well as to formulate trial strategy and investigate due to the untimely disclosure.

4. The in-court identification was tainted by the prejudicial out-of-court identification.

Danny can argue that an in-court identification should not have been possible without an independent basis from the prejudicial out-of-court identification. If an independent basis for an improper out-of-court identification does not exist, the witness should not be allowed an in-court identification either. Here, the out-of-court identification might have been prejudicial. However, Charlie's statement that he's "seen him around before" means an independent basis may well exist. There is a nexus with the discovery violation, because had Danny's counsel known earlier about the identification, he could have probed to discover whether Charlie really did know Danny previously. Therefore, the in-court identification should arguably be thrown out.

**MARYLAND ESSAY QUESTION NO. 7**

**Representative Good Answer No. 1**

Ownership between two persons based on conflicting deeds is determined by the Maryland Recording Statute and here, "through a survey and deed chain, [Alice] has superior record title to the disputed parcel" this is further supported by the fact that Alice has been paying the taxes on the property. Because this is the case, Alice is deemed the owner of the parcel, unless Bonnie has taken ownership through some other means.

One way to acquire title to property that is held by another is through adverse possession which requires the adverse possessor to have open, continuous, exclusive, adverse, notorious, use of the parcel for the statutory period which is 20 years in Maryland.

The open and notorious uses require that the use would be of the type that would give notice to the owner that the parcel was being used. Here, Bonnie and her family told Alice that they were the owners of the property and used the property for logging, cutting firewood, removing stone to maintain a roadway, giving other permission to use the parcel for hunting, and did all this in a fashion which caused Alice to hear chainsaws and gunshot while there. It is not necessary for the owner to observe the use first hand for the use to be open and notorious.

Maryland State Board of Law Examiners  
**JULY 2018 MARYLAND GENERAL BAR EXAM –**  
**REPRESENTATIVE GOOD ANSWERS FOR THE BOARD’S WRITTEN TEST**

Continuous use does not require that the adverse possessor remain on the land 24/7 but merely that they use it as a reasonable owner would. Here, the parcel in dispute "consists of undeveloped woodland, a spring, and stone deposits" which Bonnie and her family used for firewood and maintaining a roadway which is what a reasonable owner could be expected to do.

For use to be exclusive the owner or anyone else may not use the land as an owner would during the statutory period. Here, it has been established that Alice made visits to the disputed parcel and had once walked the property line with Bonnie's late husband.

Adverse use is use that is without permission of the owner. Here, Alice never gave permission to Bonnie or her family to use the disputed parcel of land despite knowing that Bonnie was using it based on Bonnie's statements that the property line was the old fence and hearing chainsaws and shooting on the parcel. Bonnie even wrote to Alice requesting that they confirm the boundary line so that she could have the property logged but Alice did not respond to the letter.

The statutory period for adverse possession in Maryland is 20 years. Here, Alice purchased the property and gained superior record title in 1976, Bonnie then used the land until Alice visited and filed suit in 2017, 41 years later which more than satisfies the statutory period in Maryland. The running of the statutory period ends upon eviction or permission however, neither occurred in this case.

Adverse possession permits the party asserting it to receiving title to the part being used. Adverse possession where the land is erroneously described in the adverse possessor's deed provides ownership of the entire parcel named in the deed. Here, Bonnie's deed names the entire parcel in dispute and therefore, if she wins an adverse possession action she would gain title to the entire 8 acres.

A possessor does not gain title through adverse possession until they have filed a suit to quiet title and received a deed. Here, Bonnie has filed a counterclaim for ownership of the parcel.

Alice will prevail in this action because she has ownership of the parcel based on superior record title and Bonnie's adverse possession of the parcel although satisfying all other elements of adverse possession, was not exclusive due to Alice's visits to the disputed parcel.

**Representative Good Answer No. 2**

Bonnie should prevail. Although Alice was the rightful owner of the parcel, by way of a survey and chain deed, Bonnie now has a claim to it. It is irrelevant that Alice's deed stated "180 acres more or less," because this defect can be cured by simply evaluating the land, and so her original title to the eight acres more or less is good. In Maryland, the statute of limitations for an action for possession is 20 years. Therefore, the required time for adverse possession is 20 years. In order to establish adverse possession, the adverse possessor must show that their possession was for 20 years, was continuous, open and notorious, actual, exclusive, and hostile. Here, it appears that Bonnie has satisfied all requirements to win her counterclaim for ownership of the property. Although I

In order for possession to be continuous, the adverse possessor must have occupied the property as a reasonable owner would have for the required time period. This need not be actual continuous possession, for example, someone adversely possessing a summer cottage need only use it in the summer for 20 years, as a reasonable owner would have.



Maryland State Board of Law Examiners  
**JULY 2018 MARYLAND GENERAL BAR EXAM –**  
**REPRESENTATIVE GOOD ANSWERS FOR THE BOARD’S WRITTEN TEST**

Here, it appears Bonnie has satisfied continuous possession. Bonnie and her family farmed on her land for almost 60 years, and has cut firewood on the disputed parcel over the years and removed stones from it to maintain the roadway on the other parts of her property. Bonnie also sold timber from the property to Clarence in 2016, which shows a furthered continuous use. The facts indicate that Bonnie's family kept horses on the disputed parcel, but only to Alice purchasing her property. This only lasted for 18 years, from 1958 to 1976, and so this will not aid Bonnie's claim.

In order for possession to be open and notorious, the adverse possessor must be open to the public and the actual owner that they are possessing the land. They must not occupy the land in secrecy.

Here, it is clear that Bonnie and her family occupied the land open and notoriously. Bonnie told Alice that the old fence was the boundary line and thus the disputed parcel was Bonnie's at the time of Alice's purchase. Bonnie's husband told Alice that the fence line was the boundary. Alice will argue that when she visited the property, she never observed anyone on the disputed parcel. However, given that Alice only visited 5 to 7 times per year, it is likely that she just saw the land when it happened to not be in use by Bonnie. This does not meet that she was not open and notorious in claiming the land. Alice would also state that she did not respond to the letter indicating that Bonnie had rightful possession, however, she did receive the letter and was on notice.

In order for possession to be actual, the adverse possessor needs to actually possess the land in some manner, not just state a claim to it.

The facts indicate that Bonnie cut firewood and removed stones from the property, as well as gave people permission to hunt on it. Alice would argue that this was not actual possession, but mere crossing on to the land in order to improve it. She would also state that the family ceased to have horses on the disputed parcel when she bought it, and thus they lacked actual possession for the 20 years. Bonnie is likely to win because her and her family actually used the land over the last 60 years.

In order for possession to be exclusive, the adverse possessor must only use the property themselves and not allow others to occupy it. If the possessor takes actions that are consistent with ownership in allowing others on the land, for a social gathering for example, possession will still be exclusive.

Here, Bonnie and her family had been using the property as an owner would for the required time. Although they have allowed others to enter the land and cut timber as well as hunt on the land, these uses are consistent with what an actual owner would do. Alice would argue that it was Bonnie's family, not Bonnie, that had been using the land over the years. However, Bonnie was a part of the family and so had also been using the land for the requisite time. Alice would argue that allowing others on the land destroyed exclusivity, however, as mentioned above, this argument will fail and Bonnie will satisfy exclusivity.

In order for possession to be hostile, it must be against what the true owner would desire. It does not matter that the original owner does not know of the adverse possessor's taking.

Here, it is clear that Alice would not have wanted Bonnie and her family to use the land. This is evidenced by her filing an action after seeing the timber had been cut. Furthermore, the firewood they took, as well as the hunting they allowed are hostile to Alice.

Given that Bonnie appears to have satisfied all of the requirements for adverse possession, she will prevail.

Maryland State Board of Law Examiners  
**JULY 2018 MARYLAND GENERAL BAR EXAM –**  
**REPRESENTATIVE GOOD ANSWERS FOR THE BOARD’S WRITTEN TEST**

**MARYLAND ESSAY QUESTION NO. 8**

**Representative Good Answer No. 1**

To have standing to challenge a statute a person or entity must have actual or imminent harm fairly traceable to the government. Here, the church has actual harm as it is being prohibited from advertising its location and the times of its worship services, signs which it wishes to leave up every day of the week and it is fairly traceable to the government as the City of Carol, Maryland enacted the ordinance.

The First Amendment as incorporated to the states through the 14th Amendment limit's the government's ability to regulate speech and depends on the type of speech regulated and the location in which the attempted regulation occurs. Here, the parts of the regulation that discriminates between advertising real estate, fundraising, political signs, churches and/or religious functions is content based as it depends on the language of the sign. The ordinance limiting all signs to a 20-foot maximum is content neutral. As the ordinance applies ostensibly to the entire town it is a public forum.

A content based restriction of speech in a public forum is subject to strict scrutiny. The law must be necessary and the least restrictive alternative for a compelling government interest. Here, the parts of the regulation that discriminates based on content will fail this strict scrutiny because the purpose to "prevent clutter and beautify the city" is not a compelling government interest and there are plenty of less restrictive means to beautify the city and prevent clutter. As a result, the law is unconstitutional.

The ordinance limiting all signs to a 20-foot maximum is content neutral in a public forum and is subject to time, place, and manner restrictions. Time place and manner restrictions require the law to be narrowly tailored to an important government interest, and leave alternative means to communicate. Here, the requirement limiting all signs to 20 feet tall for the purpose of preventing clutter and beautifying the city is not narrowly tailored as it prohibits 20 feet tall signs everywhere, and in combination with the other regulations does not leave alternative means to communicate. As a result, this portion of the statute is also likely unconstitutional.

The 1st Amendment's overbreadth doctrine applies when a law prohibits both protected and unprotected speech and requires the law not prohibit more speech than necessary. Here, the law violates this doctrine because it prohibits a substantial amount of protected speech unnecessarily.

A statute will be unconstitutionally vague if a person of common intelligence does not have notice of what is prohibited. Here, it is unclear what is covered by "religious functions" or "fundraising" possibly violating this clause.

The Free Exercise clause of the First Amendment as incorporated to the states through the 14th amendment limit's the government's ability to inhibit religion. Here, signs advertising churches and/or religious functions may be displayed only on Sundays and within one thousand feet of a religious institution or facility implicating the clause. Strict Scrutiny under the free exercise clause requires the regulation to be necessary for a compelling government interest. Here, the interest of preventing clutter and beautifying the city is not a compelling government interest and as such the law will be found unconstitutional under the free exercise clause.

The equal protection clause of the 14th Amendment limit's the government's ability to discriminate. Here, the government is discriminating between real estate advertisers, fundraisers, political groups who wish

Maryland State Board of Law Examiners  
**JULY 2018 MARYLAND GENERAL BAR EXAM –**  
**REPRESENTATIVE GOOD ANSWERS FOR THE BOARD’S WRITTEN TEST**

to advertise and religious institutions and as a result the clause is implicated. The discrimination is based on the fundamental right to free speech and as a result strict scrutiny applies. Strict scrutiny under the equal protection clause requires the law to be necessary to a compelling government interest. Here, the law will fail as stated in the previous paragraph.

The due process clause of the 14th Amendment limit's the government's ability to regulate against fundamental rights. Here, the government is preventing different groups from exercising their first amendment rights and as such strict scrutiny applies. The law will fail under strict scrutiny as above.

Prior restraints are presumed unconstitutional. Here, the banning of all fundraising signs before they are erected is a prior restraint, and as such will be found unconstitutional.

The 8th Amendment's Cruel and Unusual punishment clause as incorporated to the states through the 14th Amendment prohibits punishments that are disproportional to the crime. Here, the government is confiscating the allegedly offending signs and proscribing civil penalties for exercising protected first amendment rights. As a result, the law will likely be found unconstitutional.

For all the reasons above, I would advise the church that the law is likely to be found unconstitutional if challenged. They should move for a declaratory judgment determining the law to be unconstitutional and an injunction preventing it from being enforced.

**Representative Good Answer No. 2**

I would advise them that right now their conduct is illegal, but they have a strong claim to strike down the Constitutionality of the Law under the first amendment.

Standing: A party has standing if they have suffered or will suffer immediate harm, reasonably related to government policy and capable of judicial redress. Here, the church is likely to suffer imminent harm from the governmental policy. The city of Carol is a state actor so it is subject to the 1st amendment incorporated to the states through the 14th Amendment.

The 1st Amendment limits the government’s ability to compel or restrict expression. The ordinance limits expression by restricting signs. The sign ordinance is applicable in the entire city of Carol, so it affects speech in a public forum, where views were traditionally expressed. Reasonable time, place, manner restrictions are constitutional in a public forum if it furthers a substantial government interest, are narrowly tailored and leaves open ample alternative channels of communication. Preventing clutter and beautifying the city is a legitimate government interest and a case can be made that it is even a substantial one. However, the ordinance is content based, not content neutral. A content based restriction is one that discriminates based on the message being expressed. Here, signs advertising real estate are unrestricted, but signs advertising religious functions are allowed only on Sunday. Content based restrictions are subject to strict scrutiny, the government must provide a compelling justification for the ordinance and prove that it is as narrowly tailored as possible to achieve the interest. Clearing the street from clutter is not a compelling interest.

The ordinance is also overbroad. Anybody has standing to challenge an overbroad statute because it denies the listener the ability to be exposed to new ideas. A law is overbroad when it restricts a substantial amount of protected speech. The outright ban on fundraising signs. and limitations on political signs to be a certain size and only allowed at certain times of the year is overbroad.

Maryland State Board of Law Examiners  
**JULY 2018 MARYLAND GENERAL BAR EXAM –**  
**REPRESENTATIVE GOOD ANSWERS FOR THE BOARD’S WRITTEN TEST**

The ordinance which allows advertising real estate signs to be posted all year long, but religious signs only posted on Sunday's violates the free exercise clause of the First Amendment incorporated to the States via the 14th Amendment. This ordinance is not generally applicable and targets religions differently than other organizations. The government cannot coerce religious practice, by making harder for churches to advertise. This unconstitutionally burdens religion.

Additionally, the law discriminates between the religious and non-religious which implicates the 14th Amendment equal protection clause. Religion is a suspect class so the government would need to meet the extremely high burden of strict scrutiny. Again, preventing clutter is not a compelling interest nor is the law narrowly tailored.

The due process clause incorporated to the states through the 14th amendment protects against the arbitrary government interference with a person's property. Confiscating the signs and enforcing civil penalties without notice and a hearing would implicate the clause.

The law is likely to be struck down. However, I would advise the church to keep the sign under twenty feet tall. That part of the ordinance does not discriminate based on content and is very likely to be seen as narrowly tailored protecting a substantial state interest and leaving open other means of communication. The limit to the size of signs is reasonable and applies to all signs regardless of the message expressed.

**MARYLAND ESSAY QUESTION NO. 9**

**Representative Good Answer No. 1**

A. Newby has failed to comply with Maryland Rules of Professional Conduct regarding advertising, contingency fees, fee agreements, and payment of clients' expenses

1. Newby's advertisement does not include his full name, phone number, and mailing address, it misrepresents his level of expertise and area of specialty, and it promises high recoveries to all clients

A lawyer's advertisement must include the responsible attorney's full name, phone number, and mailing address. If it were a paper solicitation, it would have to be in an envelope marked clearly as advertising material, but that provision does not apply here. A broad entreaty to "email Newby" is not sufficient identification of the responsible attorney, or his law offices. While an attorney may guarantee the best quality of service, or that he will do everything he can for his client, he may not expressly or impliedly guarantee recoveries, nor substantial recoveries. Newby's brief statement of "high recoveries" is not an acceptable form of advertisement, nor would it be acceptable for him to cite past examples of clients who have gained high recoveries as indicative of the level of success all clients will achieve. Newby also has misrepresented his level of expertise by referring to himself as an "experienced lawyer," whereas he is in actuality a newly admitted attorney. An attorney may not misrepresent their level of expertise, specialty, or ability in a particular field to clients, in an advertisement or otherwise. Attorneys owe a duty of honesty to potential and current clients. While it may be acceptable that Newby has specified "injury victims" because if he is holding himself out as a personal injury lawyer, the term is quite broad, as evidenced by his first client, Victim. Victim was left paralyzed by a botched back surgery, which is more likely categorized as a medical malpractice case than a personal injury case. If Newby is going to hold himself out as a specialist, he must have actually specialized in that area, and if he takes a client outside that

Maryland State Board of Law Examiners  
**JULY 2018 MARYLAND GENERAL BAR EXAM –**  
**REPRESENTATIVE GOOD ANSWERS FOR THE BOARD’S WRITTEN TEST**

area, he must be reasonably certain that his skills are sufficient to adequately represent that client. A plea for "injury victims," however, is not specific enough, nor are these ads targeted enough, to constitute solicitation.

2. Newby's contingency fee agreement should have been in writing, signed by the client with full and informed consent

While attorneys are permitted to enter into contingency fee arrangements, the contingency fee must be reasonable, and the agreement must be in writing, signed by the client after the client has given full and informed consent. There is no indication that Newby gave Victim enough information for her to give informed consent, and their agreement was not reduced to writing, nor was it signed by either party. Additionally, the reasonableness of fees is predicated in part on the attorney's level of expertise and specialization. Where Newby is a brand-new lawyer with no expertise or specialty to speak of, 20% seems a bit exorbitant for a contingency fee agreement, and may be found unreasonable. It is proper to promise to reimburse fees and costs for a client, but that agreement must also be in writing and signed by the client.

3. Newby may not pay for Victim's personal expenses

While attorneys are permitted to perform pro bono work, work for contingency fees, or agree to cover costs and fees in a lawsuit, they may not pay for their client's personal expenses, including medical expenses and household expenses. Newby's promise to advance expenses, including for medical bills and household expenses is improper and may be grounds for sanctions.

B. Newby may not accept Grizzly's referral fee of 25% of the legal fee

Attorneys are not permitted to accept or charge referral fees to other attorneys in order to obtain clients. Newby may have a claim to some portion of the final award, in order to reimburse him for work he has already done on behalf of the client, but it does not appear that he has done much of anything for Victim yet. If he did transfer the entire case to Grizzly at this point, he likely would not be entitled to any fees.

C. Newby and Grizzly may proceed as co-counsel if it is in the best interests of the client, or they may establish an agreement to refer clients to each other, without fees

If it is in the best interests of the client, Newby and Grizzly may proceed as co-counsel on the case, with the informed written consent of the client. However, if Grizzly does not want to work with Newby, there is nothing Newby can do to force or compel him to do so. If they were to work together, they would have to ensure that there are no conflicts of interest between the two attorneys, and that they could together adequately represent Victim's interests. Alternatively, they may make an agreement to reciprocally refer clients to one another, for example Grizzly would refer clients with personal injury claims to Newby and Newby would refer clients with medical malpractice claims to Grizzly, but no fee could be made contingent upon those referrals. Finally, it is not a violation of attorney-client privilege or confidentiality rules for Newby to have asked me for advice; lawyers are allowed to disclose communications from clients, and other information about clients, to other attorneys in the course of seeking advice regarding compliance with the Maryland Rules of Professional Conduct.

Maryland State Board of Law Examiners  
**JULY 2018 MARYLAND GENERAL BAR EXAM –**  
**REPRESENTATIVE GOOD ANSWERS FOR THE BOARD’S WRITTEN TEST**

**Representative Good Answer No. 2**

A. Newby's Violations of Professional Conduct

The Rules of Professional Conduct prohibit certain conduct and requiring the disclosure of certain information. As relevant here, and as discussed below, Newby has likely violated prohibitions on false or misleading advertisements, the failure to include disclaimers in advertisements, the failure to commit to writing a contingency fee, and impermissibly advancing expenses of Victim.

First, a lawyer may not sponsor false or misleading advertisements. Here, Newby, a newly admitted Maryland attorney, falsely and misleadingly advertises himself as an "experienced lawyer," which is false. Further, Newby advertises himself as obtaining high recoveries (objectionable for multiple reasons), something unlikely given that he has just been admitted. Whether or not Newby's claim of low fees, where he later offers a 20% contingent fee, is misleading would depend on prevailing norms in the area for the type and complexity of the case, Newby's skill, and contingency arrangements entered into by other attorneys. Thus, Newby has violated this rule in multiple ways.

Second, advertisement, if touting a lawyer's results, must include a disclaimer indicating that past results (even if true) do not guarantee future performance. Here, Newby claims to earn high recoveries, without qualification or disclaimers, violating this rule.

Third, retainer agreements, including contingency fees must be committed to writing, with a clear explanation of how the fee will be calculated (before or after expenses), and who will be responsible for costs if the plaintiff does not recover. Here, Newby violated this rule by agreeing orally to a contingency fee. Thus, despite the oral discussion of who would cover costs and expenses, Newby violated this rule.

Fourth, a lawyer may not advance the costs of litigation unless a client is indigent, and there, may only do so as necessary to allow the continuation of the representation. Here, Newby pays for all of Victim's medical bills and household expenses, thus violating the rule by: (1) advancing all expenses, including those never permitted under the Maryland Rules of professional conduct, and (2) advancing court costs without a finding that Victim was indigent. While Victim is out of work, it is unclear whether that renders him indigent. Thus, Newby also violated this rule.

B. Newby Cannot Likely Accept Newby's Offer

The Maryland Rules of Professional Conduct also prohibit a lawyer from accepting a referral fee. While lawyers from different fees may share fees with the written, informed consent of a client based proportionately on the respective work done by the lawyers, here Grizzly offered to pay Newby a 25% referral fee and take over the entire case - i.e. to do so not based on the amount of work, but based solely on referring the case to Grizzly. Furthermore, Newby has not obtained Victim's informed consent. Thus, and as discussed further below, Newby cannot accept Grizzly's offer as made.

C. How Newby and Grizzly Can Move Forward with Representing the Victim in Compliance with the Rules of Professional Conduct

While doing so would not excuse Newby's past violations of the Rules of Professional Conduct, Newby and Grizzly could move forward with the representation of victim by:

Maryland State Board of Law Examiners  
**JULY 2018 MARYLAND GENERAL BAR EXAM –**  
**REPRESENTATIVE GOOD ANSWERS FOR THE BOARD’S WRITTEN TEST**

- (1) obtaining Victim's written informed consent to representation by both lawyers, including disclosure of the fee splitting (and perhaps advising Victim to obtain advice from independent counsel);
- (2) signing a written retainer agreement, including the contingency fee, and an explanation of who is responsible for expenses if Victim does not recover, and whether the fee is before or after costs and expenses;
- (3) correcting Newby's past misrepresentations to Victim about his experience and recoveries; and,
- (4) discontinuing the practice of advancing medical bills and household expenses.

**MARYLAND ESSAY QUESTION NO. 10**

**Representative Good Answer No. 1**

Generally, all evidence is admissible, in the discretion of the court, if relevant and not excluded by other evidentiary rules. Here, all of the evidence deals with the missing trophy and/or the credibility of each witness and are therefore relevant.

#1 - James Lannister

The hearsay rule excludes out of court statements offered for their truth, with limited exceptions. Here, the statements made by the two neighbors that they saw the lion trophy in the Starks' car is inadmissible hearsay, and no exceptions apply. Therefore, Starks objection to the statements should be sustained.

#2 - Bob Baratheon - statements by Reverend Tully

The hearsay rule. See above. The statements made by Tully are hearsay because although it is a question, it asserts a fact that "the missing trophy is in your hands." Therefore, it is inadmissible, unless an exception applies.

The Present Sense Impression exception permits the admission of statements made describing an event that are made during or immediately after the event. Here, Tully's statement "Is that the missing trophy in your hands?" is describing Suzy's possession of the trophy, while she is possessing it. Therefore, the exception applies and the objection should be overruled.

The Excited Utterance Exception permits the admission of a statement made describing a startling event while under the impression of the startling event. Here, Tully "gaspd and said loudly" while describing Suzy's possession of the trophy. Therefore, the excited utterance exception also applies.

Lannister objection overruled.

#3 - Bob Baratheon - 12-year-old robbery conviction

Impeachment evidence is admissible to discredit a witness. Here, the evidence of the conviction may be used for impeachment purposes.

Impeachment by prior conviction of crime is admissible for a final, adult conviction for a crime of dishonesty or serious felony, that is no older than 15 years old from time of conviction and the probative value is not outweighed by the danger of unfair prejudice. Here, Bob was never "convicted" of the robbery crime so the impeachment evidence is not admissible under this rule.

Maryland State Board of Law Examiners  
**JULY 2018 MARYLAND GENERAL BAR EXAM –**  
**REPRESENTATIVE GOOD ANSWERS FOR THE BOARD’S WRITTEN TEST**

Impeachment by "Prior Bad Acts" allows, on cross-examination, questions about specific instances of conduct that reflects poorly on a witness's character for truthfulness. Here, on cross-examination of Bob, the lawyer may question him about the robbery charge to impeach by prior bad acts. However, no extrinsic evidence is permitted and the lawyer is stuck with whatever answer is given.

#4 - Reverend Tully

Clergy privilege allows a clergy member to refuse to testify as to confidential communications received from another when acting in his role of spiritual advisor. Here, Tully received the statements from Suzy while hearing a confession and therefore because he is the holder of the privilege he can refuse to testify.

Starks may argue that the communications were not confidential because Bob overheard the conversation and 3rd parties can destroy privilege. However, Bob did not overhear Suzy's statements therefore, everything that Suzy said to Tully is protected by Clergy Privilege. Therefore, Tully cannot be compelled to testify.

#5 - Recording

Intentional Recording of Oral Communications without all party consent are unlawful and not admissible. Here, the oral statements and the recording are therefore not admissible.

Video recordings are not subject to the same rules. Therefore, the video of Suzy holding the trophy are admissible.

Hearsay rule. See above. Here, the statements made by Suzy would be inadmissible hearsay unless an exception applies.

Statement of a party opponent exception permits statements made by a party if offered by the opposing party. Here, the statements by Suzy are admissible.

#6 - 11-year-old felony conviction

Impeachment by prior conviction of crime. See above. Here, the conviction is a final adult conviction that is less than 15 years old and is both a felony and a crime of dishonesty. Therefore, it is admissible for impeachment purposes.

**Representative Good Answer No. 2**

Generally

Evidence is generally admissible at the discretion of the trial court if it is relevant and is not barred by other rules of evidence. Evidence is relevant if it tends to make a fact at issue more or less likely. Here, all the proffered evidence relates to the missing golden lion bowling trophy, and therefore is all relevant. Lay witnesses who have direct firsthand knowledge of something are permitted to testify about it.

Evidence 1

Hearsay is an out of court statement introduced in court and made for the truth of the matter asserted, and is generally inadmissible with some exceptions. Here, James Lannister testifies in court that another party told him outside of court they saw the trophy. This is classic hearsay and no exceptions apply, and therefore I should sustain the objection and not permit the testimonial evidence.



Maryland State Board of Law Examiners  
**JULY 2018 MARYLAND GENERAL BAR EXAM –**  
**REPRESENTATIVE GOOD ANSWERS FOR THE BOARD'S WRITTEN TEST**

Evidence 2

See hearsay definition above. Bob Baratheon's testimony that he overheard Reverend Tully's exclamation "is that the missing trophy?" is hearsay. Here, Baratheon seeks to repeat the statement of another heard out of court for the truth of who has the trophy. Therefore, the statement is hearsay and inadmissible, unless an exception applies. Here, the Present Sense Impression Hearsay Exception applies. The Present Sense Impression hearsay exception allows states made concerning an event the exclaimant is observing at the time, and are usually excited. In this case, Reverend Tully "gasped," and asked, "is that the missing trophy," clearly viewing it at the time. Therefore, the statement was made while Rev. Tully was observing the event - Suzy holding the trophy - and would be admissible. I would overrule the objection and permit the testimonial evidence.

As for religious confession privilege which is implicated here, see below.

Evidence 3

This evidence is attempting to introduce Bob Baratheon's charge of robbery from 12 years ago by the Lannisters during cross-examination. This is character evidence used to impeach Mr. Baratheon. Impeachment is a method of causing the jury to question a witness' reliability or believability by attacking their character, and is only allowed after a witness has testified. Here, the Lannisters are attempting to use a prior crime against Mr. Baratheon as impeachment character evidence. Generally, evidence of prior crimes committed by a witness are not allowed in Maryland if it has been 15 years since the conviction. However, since Mr. Baratheon was not acquitted, it is cross examination, and he is a witness, it will be allowed. Objection overruled.

Evidence 4

Exceptions to relevant evidence being admitted include those that are protected by privilege, such as lawyer-client, doctor-patient, and religious privileges. Here, the Starks' lawyer subpoenaed Rev. Tully to compel him to testify regarding the statement Suzy Lannister made to him during her religious confession session. The religious confession is protected under Maryland law, but may only be asserted by the hearer of the evidence (in this case, Rev. Tully). The facts indicate that the Starks lawyer seeks to "compel" Rev. Tully to testify - indicating he does not wish to - and therefore an objection should be sustained if Rev. Tully asserts his religious privilege. Objection sustained.

Evidence 5

The evidence proffered here is the matters on the recording made by Edward and the videotape itself. In Maryland, participants in a conversation must consent to being recorded and therefore evidence of them being recorded without their consent is completely inadmissible. Thus, the audio on the tape is inadmissible and will not be admitted whatsoever. However, the video is not barred by this rule and should be admitted. If the video can be shown without the audio, it should be introduced as evidence and admitted. The video shows Suzy holding the trophy and is incredibly important evidence for the Lannisters.

Additionally, Edward's testimony about any statements made would be hearsay, but would fall under the present sense impression or statement of a party opponent exception (see above for present sense impression definition). When Edward saw Suzy holding the trophy he had firsthand knowledge of the event and could testify and it would not be hearsay. Suzy's statements, on the other hand, would be hearsay, but would be introduced on the party opponent exception, which allows into evidence admissions by the opposing party

Maryland State Board of Law Examiners  
**JULY 2018 MARYLAND GENERAL BAR EXAM –**  
**REPRESENTATIVE GOOD ANSWERS FOR THE BOARD’S WRITTEN TEST**

introduced by the other party. Here, Suzy admitted to stealing the trophy herself. Objection sustained in part and overruled in part.

Evidence 5

See prior crimes definition and issues above. Here, Edward was convicted of the crime, it was less than 15 years ago, and it was a crime of moral turpitude, and therefore it will be admitted. Objection overruled.

**MULTISTATE PERFORMANCE TEST**

**Representative Good Answer No. 1**

**STATE'S BRIEF IN RESPONSE TO DEFENDANT'S MOTION FOR A NEW TRIAL**

The State requests this Court to deny Defendant's Motion for a New Trial and offers the following arguments in support:

**ARGUMENT**

**I. The Prosecution Did Not Violate *Brady* by Failing to Disclose Defendant's New Wife's "Recanting" Statement Because Defendant Asked Her to Recant and it Would Not Have Changed the Outcome.**

Under *Brady v. Maryland*, the prosecution may not suppress any exculpatory evidence. The Supreme Court enumerated three components to a *Brady* violation: "(1) the evidence must be favorable to the defendant; (2) the government must have suppressed the evidence, either willfully or unintentionally; and (3) the evidence must be material."

With regards to the first requirement, the recantation of the only eye witness would be favorable to the defendant as under *Giglio v. United States* because it could impeach a prosecution witness. However, while making the statement, Defendant's new wife admitted to Detective Mark Jones that "He just told me to tell you that he didn't do it," thus indicating it was at Defendant's request that Reed made the statement, and making the recantation's credibility highly suspect. Additionally, she told Detective Jones that "her husband had told her that she would not have to testify in court because they were now married" and as such, the statement was clearly improperly motivated and no reasonable jury could find this statement to be a credible recantation thus indicating that there is no "reasonable probability that the result of the trial would have been different" had this recantation been admitted, thus failing to satisfy the third *Brady* prong of materiality. See *Haddon* ("A neutral fact-finder who learned [of this evidence] would be less likely to believe that [the defendant] committed the crime.").

For the second prong, the prosecution may not suppress evidence in their, or investigating officers', possession, regardless of whether they are aware of it. *State v. Capp* ("Evidence can be in the 'possession' of the government even if the evidence is unknown to the prosecutor"); see also *Kyles v. Whitley* (Evidence in the investigating police department's possession, or another government agency involved with the investigation and prosecution of the case is considered to be in the possession of the government). Here, the investigating officer and police department failed to provide the prosecution with Reed's recantation. However, under *Haddon v. State*, as cited by Defendant, this requires that "the defense would have had no reason to believe that there were conflicting statements to police that were not in the prosecution's file." Defense counsel in this situation would have had numerous reasons to believe that Sarah Reed had given conflicting statements, as would Defendant, because Defendant specifically asked his new wife to recant her statement to police, thus putting both Defendant and his wife on notice of her recantation. Additionally, with due diligence, namely, speaking with Defendant and his wife about statements she made to the police, this information should have

Maryland State Board of Law Examiners  
**JULY 2018 MARYLAND GENERAL BAR EXAM –**  
**REPRESENTATIVE GOOD ANSWERS FOR THE BOARD’S WRITTEN TEST**

reasonably come to light, and as such, there was no *Brady* violation. See *State v. Capp*. Thus, Defendant's argument that the "open file" policy of the prosecutor's office made defense counsel less aware of the possibility of undisclosed exculpatory evidence is unpersuasive and unavailing, because it is not "especially unlikely that counsel would have suspected that additional impeaching evidence was being withheld" because defense counsel was not relieved of his duty of due diligence by the "open file" policy. *Strickler*.

Additionally, even if this was considered a *Brady* violation, Defendant is not entitled to relief under Franklin Rule of Criminal Procedure 33 because the defendant would not be "prejudiced by that error". In order to prove that failure to disclose this information was material, its introduction at trial would create "a reasonable probability that the result of the trial would have been different." *Haddon*.

**II. The Prosecution Did Not Violate *Brady* by Failing to Disclose Statements Made by the Victim to a Treating EMT Because Defense Counsel Failed to Exercise Due Diligence to Discover the Information and Knowledge of Government Hospital Employees is Not Imputed to the Prosecution Unless They Were Involved in the Investigation or Prosecution of Defendant.**

Under *State v. Capp*, the Franklin Court of Appeal determined that "it would stretch the law too far to charge the government with possession of all records of all government agencies regardless of whether those agencies had any part in the prosecution of the case." Additionally, "[i]f a government agency was not involved" in those processes, "its records are not subject to disclosure under *Brady*." Finally, the Court specifically determined that "[t]he role of a hospital is to treat patients, not to investigate crime." As such, *Capp* is directly applicable to this case. Here, Gil Womack testified that he was an EMT working for a hospital when Mr. Trumbull stated "I don't know exactly what happened or who shot me, but that rat Henry Hale thinks I owe him money. This is all his fault." Mr. Womack also testified that he "wasn't even called as a witness" in the case, and as such, was not "in any way involved in the prosecution or investigation of the attempted murder of Mr. Trumbull." As such, this is not a *Brady* violation, despite the materiality of Mr. Trumbull's statement, and Defendant is not entitled for any relief on this matter.

Even if this was considered a *Brady* violation, even though the prosecution is not responsible for the records of all government agencies, Defendant would not be entitled to relief because defense counsel failed to exercise due diligence in discovering this information before trial. Mr. Womack testified that "[i]f Mr. Hale's attorney had asked to speak to [him] before trial," that he would "have voluntarily spoken to him" and told him "exactly" the statement he testified to. As such, under FRCP 33, Defendant is not entitled to a new trial because of defense counsel's lack of due diligence. See *Capp* ("[A] prosecutor is not required to furnish a defendant with *Brady* material if that material is fully available to the defense through the exercise of due diligence."). Thus, the Defendant was not prejudiced by the prosecution's error, but his own defense attorney's error.

**III. Defendant Was Not Prejudiced by Admission of Reed's Hearsay Statements Because He Purposefully Made Her Unavailable to Testify by "Quickly" Marrying Her Before Trial.**

Under Franklin Rule of Evidence 804(a), a "declarant is considered to be unavailable as a witness if the declarant . . . is exempted from testifying . . . because the court rules that a privilege applies." Here, Under Franklin Criminal Statute Section 9-707, "[o]ne spouse cannot be compelled to give testimony against his or her spouse who is a defendant in a criminal trial" is they are "married at the time the privileged is asserted" by the defendant. Here, Defendant Hale and the only eye-witness to the attempted murder, Sarah Reed, were married two months after the incident, on August 25, 2017. As such, under normal circumstances, Defendant would be able to assert his spousal privilege under this rule.

Maryland State Board of Law Examiners  
**JULY 2018 MARYLAND GENERAL BAR EXAM –**  
**REPRESENTATIVE GOOD ANSWERS FOR THE BOARD’S WRITTEN TEST**

However, FRE 804(b)(6) provides that "[a] statement offered against a party that wrongfully caused . . . the declarant's unavailability as a witness, and did so intending that result" is not excluded by the rule against hearsay if the declarant is unavailable. Here, there is no doubt that Defendant purposefully married Sarah Reed in order to keep her from testifying as the State's key witness.

Under *State v. Preston*, the Franklin Court of Appeal emphasized that Rule 804(b) requires "that the conduct causing the unavailability be wrongful; it does not require that the conduct be criminal." Additionally, that court determined that "[a] court's finding of wrongful causation must be rooted in facts establishing that a significant motivation for the defendant's entering into the marriage was to prevent his or her spouse from testifying." Here, Defendant engaged in wrongful conduct in order to prevent Reed from testifying against him. This is clearly illustrated by comparing the facts of the present case to the facts of the case cited by Defendant. In *Preston*, the defendant and his later wife were engaged well before the trial, had set a date for their wedding, and "[t]heir marriage appear[ed] to have occurred in the normal course of events." In the present case, Defendant and Reed married on August 25, 2017, following a proposal on July 25, 2017 (just over a month after the attempted murder), after Defendant told Reed that "he wanted to marry [her] quickly, before the trial started" and indicated that "it would be hard for [them] to stay together if [she] testified against him," thus threatening to leave her if she testified. As such, Defendant wrongfully caused Reed's unavailability, and it was not a violation of the rule against hearsay to admit her prior statements implicating Defendant in the shooting of Mr. Trumbull.

Additionally, even if this was regarded as a violation of the rule against hearsay, there is no reasonable probability that not admitting this testimony would have changed the outcome of the trial. Under FRCP 33, neither the requirement that "an error during or prior to trial violated a state . . . statute or rule" nor that "the defendant was prejudiced by that error" were satisfied. As such, this was not a violation of the rule against hearsay under FRE 804, and Defendant is not entitled to relief for this matter. Thus, this Court should deny Defendant's Motion for a New Trial.

For the forgoing reasons, the State requests this Court deny Defendant's Motion for a New Trial.

**Representative Good Answer No. 2**

TO: DA Packard

FROM: Examinee

DATE: July 24, 2018

RE: Motion for New Trial in *State v. Hale*

III. Legal Argument

I. The Prosecution Did Not Violate Brady When It Failed to Disclose Reed's Recantation to Detective Jones Because Reed's Statement Was Not Material.

In *Brady*, the Court held that the Prosecution cannot suppress any exculpatory evidence from the defense. The Court further held that there are three components to a *Brady* violation: (1) the evidence must be favorable to the defense, (2) the government must have suppressed the evidence, and (3) the evidence must be material. *Strickland*.

In *Giglio*, the Court held that evidence will be found favorable to the defense even if it just serves to impeach a witness's credibility. In the present case, the Court can find that Reed's recantation was favorable to be used as impeachment of her statements properly admitted under Rule 804 (to be discussed in section III of

Maryland State Board of Law Examiners  
**JULY 2018 MARYLAND GENERAL BAR EXAM –**  
**REPRESENTATIVE GOOD ANSWERS FOR THE BOARD’S WRITTEN TEST**

this argument). The jury may find that her statements to the Detective after the incident make her less trustworthy as a witness. Further, the defense could have used these statements to provide more doubt as to whether or not the defendant committed the crime that he was charged with if the defense were able to admit the statements substantively. As such, Reed's recantation to the Detective was favorable.

Next, under both Haddon and Capp, the State suppressed Reed's statement. First the Haddon court emphasizes that under Brady, it does not matter whether or not the suppression was intentional, it only matters that the evidence was in the prosecutors (or detective's) possession and was not disclosed to the defense. In the present case it is clear that the detective never informed the prosecutor that Reed went to his office and stated, "he just told me to tell you that he didn't do it." Because this statement was likely favorable to the defense for impeachment purposes, the prosecution suppressed it by not disclosing it despite the prosecutor, herself, not having access to it.

Finally, defense's argument fails because Reed's statement to the detective was not material. Materiality is determined as a whole, not piece-by-piece. Haddon. For evidence to be material, there must be a reasonable probability that the result would have been different if the jury was shown the evidence. Kyles. Looking at Reed's statement alone, it is unlikely that her seemingly forced, vague statement to the Detective would have made the difference between a guilty and not guilty verdict. The defense argues that this statement's suppression along with Victim's statement (discussed in the next section) would be material. However, because the Victim's statement was not in the possession of the government, it was not in violation of Brady to not disclose it to the defense--and thus should not be complied with Reed's statement for materiality purposes.

Thus, because Reed's statement to the Detective was not material, the prosecution's inadvertent lack of disclosure to the defense was not in violation of Brady, and Defendant should not be granted a new trial.

II. The Prosecution Did Not Violate Brady When It Failed to Disclose Victim's Conflicting Statement Because It Was Not in Possession of the EMT's Records.

Secondly, the defense argues that the prosecution violated Brady when they failed to disclose Victim's statement to the EMT, Gil Womack. As stated in the previous section, there are three components to a Brady violation: (1) the evidence must be favorable to the defense, (2) the government must have suppressed the evidence, and (3) the evidence must be material. Strickland. The Victim's statement to the EMT when he stated, "I don't know...who shot me," is clearly favorable to the defense and would be material--however, the prosecution did not suppress the evidence. Thus, the prosecution did not violate Brady.

The court in Capp found that one must first look to whether or not the prosecution actually or constructively possessed the evidence, because with no possession the prosecution cannot suppress the evidence. The court held, "it would stretch the law too far to charge the government with possession of all records of all government agencies," and limits "possession" of evidence to government agencies involved in the investigation or prosecution of a case. Kyles, Capp. In Capp, the court held that hospital records were not in the possession of the prosecution because (1) the role of a hospital is to treat patients not investigate crimes and (2) the records were fully available to either the prosecution or the defense via subpoena.

Here, the Victim's statement was made to an EMT when he was being treated directly after the indecent. Because the statement was made to an EMT, not a police officer, this court should find that it is substantially similar to any statements made to a doctor or nurse during treatment in the hospital.

Thus, because the statement to EMT Womack by the Victim was made (1) for the purposes of being treated and (2) the EMT or his records were fully available to the prosecution or the defense via proper subpoena, the statements made by the Victim were not in possession of the prosecution and thus not

Maryland State Board of Law Examiners  
**JULY 2018 MARYLAND GENERAL BAR EXAM –**  
**REPRESENTATIVE GOOD ANSWERS FOR THE BOARD’S WRITTEN TEST**

suppressed. Therefore, the prosecution did not violate Brady when they failed to disclose the Victim’s statement to the defense, thus because there was no violation of Brady the defendant should not be granted a new trial.

III. The Prosecution's Introduction of Reed's Statements at Trial Were Not in Violation of Rule 804, Because Defendant Wrongfully Made Reed Unavailable by Marrying Her.

Rule 804 allows hearsay statements into evidence if a declarant is made unavailable because privilege applies and the statement is being offered against the party that wrongfully caused the declarant's unavailability.

In Preston, the court held that in order for a new trial to be granted based on erroneous 804 evidence, the trial court must have admitted the statement clearly erroneously and the statement must have prejudiced the defendant, such that there was a reasonable probability that the jury would not have convicted him without the evidence.

In Preston, the court did find admission of a new wife's hearsay statements under Rule 804 to be clearly erroneous because the court found that the defendant (who the statement was used against) did not wrongfully make the witness unavailable by marrying her. In Preston, the court decided as such because at the time of the alleged crime the defendant and witness were already engaged and had already picked a wedding date. Further, they did not change the wedding date to make it possible for the defendant to assert spousal privilege.

In this case however, the defendant and Reed were not engaged at the time of the attempted murder. While Reed stated that her and the defendant had been dating for four years, they were not engaged and he wanted them to get married "quickly before the trial started." Additionally, he threatened to leave her if she decided to testify against him. Thus, unlike Preston, the defendant clearly married Reed only so that he could assert spousal privilege and prevent her from testifying.

Thus, because the court properly admitted Reed's hearsay statements under Rule 804, there is no need to decide whether they prejudiced the defendant because they were properly admissible as evidence.

In conclusion, because the State did not violate Brady by failing to provide exculpatory evidence or prejudice the Defendant by admitting Reed's hearsay statements in under Rule 804, the Defendant should not be granted a new trial and his conviction for attempted murder should stand.