Maryland State Board of Law Examiners

FEBRUARY 2019 MARYLAND GENERAL BAR EXAM –
REPRESENTATIVE GOOD ANSWERS FOR THE BOARD'S WRITTEN TEST

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MARYLAND ESSAY QUESTION NO. 1

Representative Good Answer No. 1

The answer to this question will be decided in accordance with Maryland's real property law.

A) Peter should bring a cause of action to establish his easement by prescription.

An easement is a nonpossessory property interest that entitles the holder to do or not do something on another's land. When an easement entitles the holder to do something on another's land, it is affirmative; when it prohibits the holder from doing something on another's land, it is negative. Easements can be created by prescription, implication, necessity, or grant. An easement by prescription is created when the holder satisfies the elements of adverse possession--namely that the use of the land is continuous, open, actual, and hostile. Under Maryland law, the period to establish an easement by prescription is 20 years.

In this case, Peter had an express easement granted to him by Mary to use a portion of Parcel 22 for use as a driveway and ingress/egress by vehicles and pedestrians to Peter's Parcel 21. The easement was granted to him on March 19, 1994 when Mary sold Peter Parcel 21. In addition to the express easement, Peter also obtained an easement by prescription through his use of the short cut over Parcel 22, which was outside the bounds of the express easement. First, Peter's use of the short cut was continuous, as the facts indicate that he and his tenants used the short cut from the beginning of his ownership of Parcel 21 in March 1994. Second, Peter's use was open: it was not concealed from Mary or Peter, Mary's successor to Parcel 22, and it was discoverable by both of them. Third, Peter's use of the short cut was actual because it was exclusive. Peter himself used the easement on a regular basis, and he allowed his tenants to do so as well. Fourth, Peter's use of the short cut was hostile because it was adverse to Peter and Mary's rights in their land. Because Mary never told Peter not to use the short cut, and because Paul did not tell Peter not to use the short cut until April 2, 2017, well outside the 20 year period required to establish an easement by prescription in Maryland, Peter has obtained an easement by prescription.

B) Assuming that Peter sets forth a prima facie case for an easement by prescription, Paul will have to demonstrate that the disputed facts do not entitle Peter to a prescriptive easement through sufficient evidence. In this case, Paul should dispute the fact that Peter's use was not continuous or actual. However, neither of these arguments are likely to succeed.

To argue that Peter's use was not continuous, Paul should point to the fact that ownership of Parcel 22 transferred from Mary to Paul in 2003, and that the transfer of ownership disrupted Peter's continued use of the short cut and effectively "reset" the clock on obtaining a prescriptive easement. However, under Maryland law, a party can establish a prescriptive easement against successive land owners, and the continuous element will not be disrupted if the successive land owners were in privity. Here, Paul was in privity with Mary because he bought the land from her. Therefore, there is likely not sufficient evidence for Paul to assert that Peter's use of the short cut was not continuous.

To argue that Peter's use was not actual or exclusive, Paul should point to the fact that Peter did not use the short cut exclusively, and that he let his tenants used the short cut as well during the ten years that he rented out the property. However, this argument is also not likely to succeed, as the facts indicate that Peter himself used the short cut on a regular basis, even when renting out the home. The fact that his tenants also did so will not negate this element. Therefore, there is likely not sufficient evidence for Paul to assert that Peter's use of the short cut was not actual.

Accordingly, the court is likely to find that Peter has obtained an easement by prescription.

Representative Good Answer No. 2

A. Cause of Action - Easement By Prescription

Peter has a cause of action against Paul for an easement appurtenant by prescription in addition to the express easement he was already granted in writing at the time of the sale of the property. An easement appurtenant is one that grants a dominant estate the right to use a servient estate. An easement by prescription is analogous to adverse possession, and a prima facie case requires (1) continuous use for the statutory period; (2) open, notorious, and actual use; and (3) the use must be hostile or adverse to the interests of the owner. Peter has met the first element. The statutory period in Maryland is twenty years, and Peter has been using the short-cut since he purchased the property in 1994 until Paul objected to its use in 2017. Thus, he has been using the easement for 24 years, far exceeding the statutory period. The fact that Peter used the property as a rental for ten years does not have any impact on his claim. The relevant question is whether Peter acted as though he had a right to use the easement. By giving permission to his tenants, he acted as though he was entitled to use it. Thus, the fact that he had renters for 10 of the 24 years does not break the continuity of his easement by prescription. Furthermore, the sale of Parcel 22 from Mary to Paul in 2003 will not inhibit the continuous use requirement. Maryland permits tacking of the statutory period. Paul had notice of the express easement when he bought the property in 2003, and did nothing to stop Peter's use until 2017. The statutory period did not start anew when Paul moved in. The second element is also met. Paul may argue that Peter's mere use of the short-cut was insufficient to be open and notorious, because Paul was not present for most of the year due to renting out the parcel to tenants. However, Paul will not succeed in this argument. Just the fact that he had tenants does not mean the use was not open and notorious. This element is based on Peter's use, not Paul's frequency of visits to the parcel. The third element is also met because Peter was clearly acting adversely and with hostility to Paul's interests. Peter knew exactly which part of Parcel 22 the express easement covered, and yet chose to expand his use of the property anyways to include the short-cut. It doesn't matter that Peter did not expressly start objecting to the easement until 2017. The mere fact that Peter was trespassing on Pauls' land to use it as a shortcut is sufficient to prove that his use was adverse. Paul's later reaction only serves to strengthen this element. Since all elements are met Peter should have a valid claim of easement by prescription against Paul, and should be allowed to continue to use the parcel.

B. Paul's Burden of Proof

In order to overcome Peter's easement by prescription action, Paul must demonstrate by a preponderance of the evidence that the elements were not met. A preponderance of the evidence requires a showing tit is more likely than not that Peter hasn't met his burden of proving an easement by prescription. As already noted above, he may unsuccessfully try to argue that the use was not continuous due to Peter's renters or Paul's use of his own property as a rental, that the mere use of the path was not sufficiently open and notorious as to give Paul sufficient notice of Peter's use of the land, and that until 2017, Peter had his permission to use the shortcut, and

that it only became hostel when Paul started to object by placing obstacles in the path and no-trespassing signs. These arguments will likely fail, and Paul will not be able to prove by a

MARYLAND ESSAY QUESTION NO. 2

Representative Good Answer No. 1

I would advise Drake that he properly demanded reasonable assurances, that he is discharged from performance is Blake does not provide adequate assurances within a reasonable time, that Blake is unlikely to prevail under a theory of impracticability, and that he is entitled to damages.

A. Drake's Demand for Reasonable Assurances

Drake properly demanded reasonable assurances from Blake and is permanently from further performance is Blake does not provide such assurances within a reasonable time. Article 2 requires that a seller in a valid contract perform perfect tender of the relevant goods unless performance is excused. Article 2 allows a party in a sale of goods transaction canto demand reasonable assurances when a party has a reasonable belief that proper performance may not occur. The requesting party is excused from performance until and unless such assurances are received. In this case, Blake's statement that he was "cancelling" the contract provided Drake with sufficient concern about performance to demand assurances. Therefore, if Blake does not provide such assurances within a reasonable time or if Blake's statement two weeks ago was final, Drake does not have to perform under the contract and may sue immediately for damages.

B. Blake's Likely Claim of Impracticability

Blake is likely to argue that the unexpected drop market demand for widgets excuses his performance under the doctrine of impracticality. Performance may be excused for impracticality if no party assumed the risk that untimely manifested and such an event was unforeseeable at the time of contract formation. In this case, parties each necessarily assumed the risk that the market for widgets could change either in or against their favor. Furthermore, changes in market forces are inherently foreseeable. Therefore, Blake is unlikely to prevail on this theory.

A. Drake's Damages

Drake can recover the difference between $20,000 and the resale price of the goods and may also be entitled to lost profits. Compensatory damages seek to protect a non-breaching party's expectation interest of the other party's correct performance. Thus, damages seek to put the plaintiff in the position they would have been had the breaching party performed the contract as promised. In this case, a seller in Drake's position may sue for the difference between the contract price and the resale price of the goods. For example, if Drake subsequently sells the widgets for $15,000, he can recover $5,000. Drake may also be able to recover lost profits from Blake. Lost profits are available for high-volume sellers of inventory where recovery of the mere difference in resale price does not adequately compensate the plaintiff, because the subsequent resale of the goods would have been for other goods, but-for the buyer's breach. In this case, it appears that Drake may meet this requirement.

Representative Good Answer No. 2

The following contract dispute between Blake (B) and Drake (D) will be analyzed as follows under the MD Commercial Law Articles:

UCC article 2 governs a contract for the sale of goods, along with the MD commercial law articles. Here, the transaction involves the sale of 500 widgets, which are goods, thus the UCC will govern.

Formation of a contract requires offer, acceptance, and consideration. Here, B and D formed a "legally binding written contract" where "B agreed to purchase the 500 widgets" with the express understanding that B would pay D $20,000 for those widgets. Although there as not express provision regarding cancellation each contract between two merchants will have implied terms.

Under the implied obligations of good faith and fair dealing, merchants must conduct transactions in a way which includes providing reasonable notice in light of the circumstances. Here, while B has not defrauded D in any way though his statements about "cancelling the contract," suggesting he wishes to cancel the contract for 500 widgets with only "two weeks" notice is an unreasonable request, given D had "no intention" of cancelling the contract and was working toward getting the widgets ready for their "scheduled delivery date."

B will likely argue that since there has been the "sudden" and "unanticipated" impact in the market demand for widgets, providing only two weeks' notice was reasonable given how quickly the market changed, although generally Courts will not find shifts in the market as compelling grounds to enforce an improper contract cancellation, without a lawful excuse for nonperformance, and since market shifts is a known risk of market participation.

Where a party to a contract anticipates a breach a demand for adequate assurances from the purchaser is proper, particularly when the seller has reasonable grounds for insecurity. Here, D "immediately wrote to B" to "demand appropriate assurances" and to inform him he had no intent of cancelling the contract and was preparing for delivery as scheduled, given B's statements that "B was cancelling the contract due to a sudden and unanticipated drop in the market demand for widgets.

Failure to comply with a demand for adequate assurances that a seller requests constitutes a breach of contract. Here, if B does not apply with D's demand and provide 20,000 payment for the widgets to be delivered the breach has occurred.

Given the breach is likely to occur I will advise D sue B for a breach of contract, and exercise his duty to mitigate damages, which here would include seeking any outside interested buyers of the 500 widgets beyond B, to reduce the financial harms and impact of a breach from B.

Further, I advise seeking the following damages:

Seek resale damages. Here, resale damages would amount to monies earned from finding an outside buyer as discussed above.

See reliance damages. Here, since there has been a change in the market demand for the 500 widgets, D will have difficulty finding an alternative buyer, and because D has reasonably relied on B's performance of the contract terms leading to a likely breach, a court will likely find a legal detriment was suffered and reliance damages are warranted.

Expectancy damages. Here, expectancy damages will cover the $20,000 original contract place, to make D "whole" by putting D in the position D would have been in had a breach of contract not occurred.

Consequential damages and incidental damages as appropriate, if there has been any lost business or profits in waiting for B to comply with contract terms.

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MARYLAND ESSAY QUESTION NO. 3

Representative Good Answer No. 1

PART A

In Maryland, there are two types of divorce, limited and absolute. Limited divorce is a remedy that allows for the spouses to separate and allow for remedies such as monetary and child support while still legally remaining married, while an absolute divorce terminates the marriage.

Alice may file for either a limited or absolute divorce on the following grounds:

Cruelty and excessively vicious conduct (separate grounds, usually plead together) permit a spouse to file for divorce where there has been a showing of behavior by the opposing spouse that is cruel and/or vicious over a period of time. Here, Bob has began to drink alcohol and "become verbally abusive," which has now escalated to being "physically abusive," coupled with threats of throwing both Alice and their daughter Carol out of the house. Alice should be able to successfully initiate divorce proceedings on the grounds of cruelty and excessive vicious conduct.

Desertion is a ground for divorce and consists of both constructive and actual, both which require one year. Here, Bob has "moved out of their bedroom," but has not actually left the marital home. There is case law to support desertion where the spouses have lived in separate bedrooms for over a year; however, this requires a showing that there has been no sexual contact. Constructive desertion occurs where a spouse has made it impossible for the complaining spouse to cohabitate. Here, Alice may be able to argue that Bob has constructively evicted her and Carol through the continuous threats to throw them both out of the home, coupled with the verbal and physical abuse by Bob. Constructive eviction is further evidenced by Bob's comments that Alice is a "noncontributing freeloader" and Carol is "an albatross around his neck." However, as stated above, a year is required for this ground, thus Alice would need to wait until the summer under this ground.

A party can also file for divorce after one year of separation. As stated above, Alice and Bob are still living in the same marital home, despite the fact that Bob has moved out of the bedroom. Further, Bob has only been out of the bedroom since the summer of 2018, thus Alice would need to wait at least until the summer of this year to file, though it would be better if either her or Bob moved completely out of the home, a showing of no sexual relations may be sufficient under current case law.

PART B

Alice may be able to file for a protective order against Bob for herself and Carol given the verbal and physical abuse and the threats to kick them out of the home.

As stated above, Alice may file for immediate divorce on the grounds of cruelty and excessively vicious conduct.

In addition to immediately filing for divorce, Alice may also file for custody of Carol. In Maryland, there are two types of custody: legal and physical. Legal custody is generally joint between the parties. However, Alice would be able to file for sole physical custody of Carol. The court will determine custody issues in the best interest of the child. Here, Alice is a stay-at-home mom, and Carol has been diagnosed with severe autism, which likely

requires attention and care. Bob has a "stressful job," drinks alcohol often, and has become both physically and verbally abusive and threatening. Bob has further stated that Carol is "an albatross around his neck," further demonstrating that Bob should not have physical custody of Alice. A court would likely determine that it is in the best interests of Carol for Alice to have sole physical custody.

Alice is likely entitled to rehabilitative alimony, which is preserved for spouses to become self-supporting and get back on their feet. Here, Alice has a college degree, but quit her job to take care of Carol after she was diagnosed with severe autism. Further, Bob makes $200,000 a year, which he believed to be "sufficient to provide for the loves of his life."

Alice may also file for child support. Child support is for the child and is determined in the best interests of the child. Generally, child support is determined based on the guidelines, and if the income is above $15,000, the court has discretion to determine the amount.

Alice may also file for use and possession of the home, which a court will grant to the custodial parent for up to three years. Here, it would be in Carol's best interest to remain in her home and Alice is a stay-at-home mom, with no current salary. However, marital property is property, however titled, acquired during the marriage. A court will classify property, perform valuation, and then distribute based on a fair and equitable (not equal) basis. Bob's home was a "graduation gift," and gifts are not considered marital property. Further, Bob's home was purchased, in 2001, well before Alice and Bob married in 2011 and thus does not constitute martial property. Alice may have trouble obtaining use of the home since it is not marital property.

Representative Good Answer No. 2

A. Alice has several grounds to pursue against Bob to seek a divorce. Maryland has jurisdiction over the divorce proceedings and she should file in the circuit court in the county she resides in. The first ground Alice can pursue is constructive desertion. This means that while the offending party hasn't actually physically deserted Alice, his conduct makes living with him inhabitable, and there is no hope for reconciliation. Bob has been physically abusive to Alice and verbally abusive to Alice and Carol. He is developing a drinking problem, and he has stopped cohabitating with Alice, moved out of the marital bedroom, in the summer of 2018, more than 6 months ago. All of his behaviors meet conduct that would give Alice grounds to seek divorce based on constructive desertion.

Alice also has grounds based on cruelty. Like constructive desertion, grounds for cruelty are (no-wait), there is no one year waiting period like divorce based on one year separation. Bob has demonstrated the grounds for cruelty based on his abusive behavior to Alice and Carol. He gets drunk and verbally attacks both of them. He is physically abusive to Alice, possibly in Carol's presence. Carol suffers from severe autism, and yet he is verbally abusive to her as well, calling her "an albatross on his neck" and implying that she is a burden. Bob has also threatened on more than one occasion to throw Alice and Carol out of the home. Alice and Carol fear for their safety and this certainly meets the standards for cruelty.

Finally, Alice can also seek a divorce based on mutual consent grounds. Again, there is no waiting period. However, mutual consent requires that the parties submit a marital settlement agreement. Recently, Maryland amended the rules so that married couples with minor children can also seek divorce on mutual consent grounds. However. the parties have to agree on all terms, including what is marital property, how to value it and how to distribute it, based on each party's contributions to marriage. They will need to decide on the issue of alimony. Alice is a good candidate for indefinite alimony because of her education level, Bob encouraging her to quit her job, the likelihood that she will need to provide care to Carol for the rest of Carol's life, her previous income, and Bob's ability to provide alimony as well as support himself. Both parties will also need to decide

the issue of child custody and child support. If alimony is awarded, the Court will deduct that from a child support award for Carol. The Court will look at the best interest of the child standard in determining custody and support. Again, if the parties seek to move forward on mutual consent grounds, there can be no unresolved issues between them. They must both sign the marital agreement including custody provisions, and they must both appear at an uncontested divorce hearing. If Bob and Alice can't agree, she should proceed with divorce using the other two grounds.

B. Alice and Carol should consider going to court and seeking a temporary protective order against Bob. If it is after-hours, she can seek an interim order from the Court commissioner. Alice is a person eligible for relief because she is Bob's spouse and they share a child together. She can seek a protective order on the grounds that Bob has been physically abusive to her and verbally abusive to her and Carol as well as harassing them and threatening to remove them from the house. Alice is in fear of her safety, and a temporary protective order could provide her immediate relief.

Regardless of how the house is titled, the judge can order Bob to stay away from Alice and Carol at the family home and any other place Alice and Carol regularly go (ex., school, church). He can order Bob to surrender firearms, go to counseling for drug and alcohol addiction and he can order bob to provide temporary alimony and child support to Alice. He can also grant Alice temporary custody of Carol. A TPO is good for approximately a week. Alice can ask the judge to extend the order to a final protective order (FPO) for up to a year, while the divorce proceedings are underway. It doesn't matter if Bob doesn't have representation and he can contest the matter as the respondent, but based on the circumstances it is likely the judge would grant the FPO.

In the meantime, Alice can also file for a limited (pendente lite) divorce under constructive desertion and cruelty grounds. There is no requirement to file for limited divorce before absolute divorce, but it does provide Alice with temporary relief. For example, under both grounds, when a limited divorce is granted, the judge can issue Bob to pay Alice temporary alimony, temporary child support, award Alice temporary sole physical and legal custody of Carol, and grant Alice the use of family property including the family home (even though it was a gift from Bob's parents), the family vehicle, etc. Even if Bob doesn't reside in the family home for the time being, he can also be ordered to continue the upkeep of the family use home, including paying the mortgage, utilities, internet, etc. until the absolute divorce hearing. Whether Alice chooses to file a TPO or prepare documents for a limited divorce, I would advise her that both options provider her immediate relief from the Court.

MARYLAND ESSAY QUESTION NO. 4

Representative Good Answer No. 1

The common law governs contracts between non-merchant parties.

A contract is formed when there is a valid offer, valid consideration, and valid acceptance. Here, Alex's offer to purchase the car for $18,000 was valid because it was made to a particular person with specificity as to what would constitute acceptance. The $18,000 was valid consideration as Alex and Benjamin bargained over the money and it became a bargained-for exchange. Benjamin accepted Alex's offer of $18,000 in exchange for Benjamin providing him the 2013 Jeep. With valid offer, consideration, and acceptance, a contract was formed here.

A bilateral contract is formed when there is an exchange of promises. Here, Alex promised to pay Benjamin $18,000. Benjamin promised to provide Alex the 2013 Jeep. Both promises constitute a bilateral contract.

The terms of the contract were laid out in the agreement Alex was sent via e-mail. Here, Benjamin specified that he would receive the $18,000 via cashier's check for the 2013 Jeep. A modification to an agreement occurs

when the parties do not act in accordance with the terms of the agreement and there is either additional consideration provided for the modification, or the parties behave as those the modification has been ratified over time. Here, Benjamin ratified Alex's modification from cashier check to personal check when he accepted and tried to deposit the personal check for $18,000.

A breach of contract occurs when a term of the contract is not abided by, or performance is not carried out. Here, Alex breached the contract when he did not provide Benjamin the $18,000, as his personal check was returned for insufficient funds. Benjamin notified Alex of the breach when he texted Alex to either return the car or provide him with the money. Alex recognized the breach when he responded with a devil emoji.

Expectancy damages are damages that are caused due to the breach of a contract. Direct expectancy damages are damages that directly flow from said breach. Here, Benjamin has suffered $18,000 in direct expectancy damages as he has provided the car in exchange for $18,000 and has not received it. As such, Benjamin sue Alex and seek expectancy damages in the form of $18,000.

Even if a Court found that there was no valid formal contract between Alex and Benjamin, Benjamin can still seek a remedy under the theory of Quasi-Contract. A quasi-contract occurs where two parties behave as if they are in contract with one another and another party is unjustly enriched. Here, Alex was unjustly enriched as he obtained title to Benjamin's 2013 Jeep in exchange for nothing. In such a case, Benjamin is entitled to at least the fair market value of the 2013 Jeep, if not the agreed upon $18,000.

Representative Good Answer No. 2

[U] -The UCC will govern a transaction for a sale of goods, as in this instance.

[Formation] -A contract at minimum, requires offer, acceptance, and consideration. An advertisement is merely an invitation to a contract and not actually a contract in and of itself. Here, Benjamin's (B) ad for his 2013 Jeep for $20,000 is merely an invitation.

Alex's (A)'s text message that he would purchase the vehicle, constitutes a valid offer; and B's reply text that he would accept the $18,000 for the Jeep constitutes a valid acceptance. Moreover, B emailed A attaching a contract that outlined the payment terms of the contract -satisfying the Statute of Frauds, which requires a writing to be signed by the parties for a sale of goods over $500, as in this case.

[Terms] - B asked A to print the contract with the payment terms and bring a signed copy of the agreement along with the $18,000, via cashier's check, within 24 hours.

[Performance] -Performance of a contract must be done in a manner specified within the contract.

Time is of the essence clause. Typically, time is not of the essence, unless specified within the contract. Here, B specified that A was to print the agreement and bring the cashier's check to B's house "within 24 hours." A court may find that this was provided within the "email" to A, but not provided in the contract, and therefore *not* considered a "time is of the essence" clause. However, if a court finds that the "within 24 hours" language is sufficient, then it may be considered time is of the essence.

Nevertheless, A failed to show to B's house for several days, but continually told B that he would retrieve the Jeep "when he was available."

Waiver of a specific contract term occurs when there is a breach of a specified term, but an individual does not object to it. Here, A did not print a signed copy of the agreement and deliver the cashier's check to B's house within 24 hours. Because of this, the court may find that B waived this part of the provision of the "24 hour" time limit.

Waiver. See above. Here, B specified that A was to print the signed agreement and bring the money via cashier's check to B's house. When A finally showed up to B's house, unannounced, B handed A the keys and the signed title to the car and did not find out until later that day that the envelope contained A's "personal check" and not a "cashier's check" as specified within the contract. Because this was something that B could have easily found out by opening the envelope, B waived this provision of the contract as well.

[Breach] -Here, A breached the contract by delivering the funds to B after the specified time period, and via personal check and *not* a cashier's check as specified.

[Remedies] -Because the check was returned for insufficient funds and A was unresponsive, by just sending back a devil emoji when B demanded the car or the money, B may have a few options available for remedies since A signed the contract.

Fair Market Value. Here, B may seek the entire cost of the Jeep from A for the fair market value of the vehicle, which may be $20,000 as per the facts.

Contract price. Here, B may seek the value of the Jeep as specified within the contract, which was $18,000.

Expectancy damages are damages owed that the parties contracted for and are clear and unambiguous. Here, the contract specified that the agreement was for $18,000, which A was aware of. Therefore, B may seek recovery from A at this price.

MARYLAND ESSAY QUESTION NO. 5

Representative Good Answer No. 1

A. I would advise the judge to grant the Motion for Order of Default as to Kirk but deny it as to Elise.

Here, Kirk and Elise were properly served with summonses (and seemingly the complaint based on Elise filing an Answer). The time to respond to a Complaint and Summons is 30 days if one is served in state, 60 days if one is served out-of-state (i.e. out of Maryland) but in the United States, and 90 days if one is served outside of the United States.

Here, Kirk was served out-of-state in Virginia while Elise was served out of country in Quebec, Canada. They were served on the same day. Thus, Kirk had 60 days to file an Answer or otherwise respond to the Complaint while Elise had 90 days to file an Answer or otherwise respond to the Complaint. Because Kirk has yet to file an Answer or otherwise respond and at least 75 days have passed since he was served (as evidence by Elise filing an Answer 75 days after service), Kirk is in default and the Court should grant the motion. Conversely, Elise filed her Answer within 75 days, i.e. in less than the allowable 90 days, and thus the motion for default should be denied as to her.

B. The Court should analyze the Motion to Dismiss as a Motion for Summary Judgment and should deny the motion because there are genuine issues of material fact such that the Defendants are not entitled to judgment as a matter of law.

A court considers a motion to dismiss based on the adequacy of the Complaint. It does not consider facts or evidence, but rather whether the Complaint has sufficiently alleged a cause of action. When a motion labeled as a motion to dismiss seeks relief based on facts and evidence outside of the complaint, the court should consider the motion as a motion for summary judgment. A motion for summary judgment may be granted if, taking the evidence in favor of the nonmoving party, there is no genuine issue of material fact such that the moving party is entitled to judgment as a matter of law.

Here, the Defendants' motion to dismiss was supported with affidavits containing facts contrary to those set forth in the Complaint. Thus, there motion should be considered a motion for summary judgment. Because

they initially met their burden of producing evidence to entitle them to summary judgment, Claire was required to produce facts and evidence to show a genuine issue of material fact (or, because discovery has not been completed, she need to explain why she did not yet have such facts and why discovery would be likely to reveal them). She was not required to persuade, but merely to produce evidence of such genuine issues of material fact, and all inferences should be taken in her favor in considering the motion. Here, she provided affidavits to provide evidence of facts in contradiction to those presented by Defendants. As they are contrary and both parties claim they are entitled to relief based on those facts, it apparent that the facts are material. Accordingly, because there is a genuine issue (as evidenced by the conflicting affidavits) of material fact, the Court should deny the motion to dismiss (really, the motion for summary judgment).

Representative Good Answer No. 2

A. Court's ruling on the Motion for Order of Default:

Kirk: It appears as if the deadline has passed for Kirk to file his Answer, it is over 75 days at least, since Elise filed an answer within 75 days of being served, and all 3 Defendants were served on the same day. He was served in Fairfax County, Virginia, out of state, so he should have had 60 days to file an answer and he didn't do so. As the law clerk, I'd have to double check that all requirements were met to issue an Order of Default, such as making sure there is the correct affidavit and documentation showing that Kirk isn't in the military and would meet the Servicemembers Civil Relief Act. But since the deadline has passed, I'd advise the Court to grant the Motion.

Elise: Elise was properly served in Montreal, Quebec, Canada and she filed her Answer in the Circuit Court for Frederick County where Claire filed suit and she did so within the timeframe allowed. A defendant has 90 days to file an Answer or it is untimely. She filed it 75 days after being served and so it was timely and I'd advise the Court to deny the Motion.

B. Court's analysis and rule on the Motion: The judge needs to take four corners of the Complaint as true when considering a Motion to Dismiss. While the Defendants have supporting affidavits alleging facts in contradiction of those alleged in the Complaint, Claire in response also had affidavits claiming to verify the facts alleged in her Complaint. And this is not a Motion for Summary Judgment, but to use the framework of a MSJ, it appears that there is a genuine dispute here with the conflicting affidavits and again, the Court has to consider what the Plaintiff is alleging in the Complaint as true, so the Court should deny the Motion to Dismiss.

MARYLAND ESSAY QUESTION NO. 6

Representative Good Answer No. 1

A. A partnership is created when two or more people come together to make a business for profit. Here, Mike and Ike decided to go into business together where they would create video games for PCs and mobile devices. Mike pitched the business proposal to Ike and Ike liked the idea and agreed to go into business with Mike. The facts do not indicate any filings required to form a corporation or other business entity were filed with the State. The two have formed a partnership.

B. A dissociation occurs when a business partner chooses to no longer be a part of the business. Here, when Mike told Ike that it would take another year to deliver the finished product for sale Ike announced he was finished with the business and would no longer make payments, including Mike's salary. Once dissociation occurs, dissolution of the partnership could occur unless the remaining partners choose to continue the business. Here, Mike and Ike had no agreement as to any rules regarding the transfer of interest of ownership

rights so the sale of his interest in the business to his cousin Pat for 20,000 was valid. Pat and Mike decided to carry on the business so the dissolution of the partnership has not occurred.

C. Unless the partnership agreement states otherwise, partners in a partnership may legally bind the partnership to contracts. Here, Mike leased the computer servers from Sweet Serve. Although Ike was not in favor of the purchase and prefer using the company his friend owned to lease the servers, he did nothing to stop Mike from signing a lease with Sweet Serve on behalf of the partnership. Ike's non-activity constituted a ratification of the contract and both Ike and Mike are liable for the 60,000 lease.

Partners in a partnership are personally liable for the debts the partnership incurs. Under the exhaustion rule, when a company is collecting a debt from a partnership it must first exhaust all of the assets of the partnership. Here, the company does not have the money to pay sweet serve so Mike and Ike are jointly and severally liable for the 60,000 owed to Sweet Serve.

Partners that enter a partnership are not liable for debts that arose before they became a partner. The lease with Sweet Serve was signed and agreed to before Pat became involved with the partnership 3 months ago so he is not liable to Sweet Serve.

Representative Good Answer No. 2

A. Mike and Ike formed a partnership. Under Maryland law a partnership is an agreement between two or more parties to enter into a business for and to share profits. No writing is required to form a partnership. A partnership may be presumed from an intention of two people to act in a business to share profits. Here Ike and Mike agreed to go into business together. Mike had the idea for a computer game and Ike contributed capital. Generally, partners are not paid a salary for their work and under partnership the partners split the profits according to their contributions or an agreement otherwise as well as losses. Thus they formed a partnership.

B. Mike and Ike entered into a partnership to make a video game for two years. Ike's dissolution for the partnership maybe considered wrongful because he left the partnership before they agreed to finish the partnership. A partnership interest is transferable. However, the transferred partnership interest does not contain managerial rights just the right to share in profits and losses. Ike's effect of selling his interest to Pat removes Mike from the partnership but does not remove him from his liability from past partnership dept. Ike should file a notice of dissolution form the partnership with SDAT to put third patties on notice that he is no longer an agent of the partnership and to prevent liability from partnership debt, this notice insulates Ike from liability for partnership debt for debt from 3 months after he left the partnership. Furthermore, Ike's dissolution from the partnership does not end the partnership.

C. Ike and Mike are personally jointly and severally liable for $60,000 owed to Sweet Server and Pat's contribution to the partnership may be used to pay partnership debt. All partners of a partnership and personally liable for the debts of the partnership. Here, Pat entered into a contract for six computers with sweet servers. If the contract is signed by Mike as a partner or cites their partnership name this will be a valid presumption of a valid partnership debt. Furthermore incoming partners' capital contributions will be used to pay off partnership debt but they cannot be personally liable. In conclusion Sweet Serves can go after Ike, Mike and Pat for the debt.

Maryland State Board of Law Examiners

FEBRUARY 2019 MARYLAND GENERAL BAR EXAM –
REPRESENTATIVE GOOD ANSWERS FOR THE BOARD'S WRITTEN TEST

MARYLAND ESSAY QUESTION NO. 7

Representative Good Answer No. 1

As a result of the harmful contact Paul made with Dennis, Dennis can and should allege a civil action for the tort of Battery. Battery requires the following elements to be demonstrated: a voluntary act by the defendant resulting in harmful or offensive contact, an intent by the defendant to bring about the harmful and offensive contact, and causation. Dennis can likely make out a prima facie case for battery on the basis that Paul's voluntarily kicking of Dennis in the face was a harmful contact, as evidenced by the injuries Dennis sustained, that the defendant's threats of physical injury evidence an intent to bring about the harmful contact, and because Paul's contact with Dennis directly caused Dennis' injuries. Consequentially, Dennis has laid out a prima facie case for battery against Paul. Dennis could also pursue a cause of action for assault, which requires demonstrating that the defendant committed a voluntary act that created an immediate apprehension of bodily injury or harm, intent to create such an apprehension, and causation. In this case, Paul's repeated threats directed toward Paul and the other patrons could be construed as designed to create immediate apprehension. Typically, words alone do not suffice to satisfy assault, but threats may satisfy the elemental test when they allege immediate harm and particularly when combined with physical manifestations of intent to carry through with the threat; in this case, Paul was already resisting alongside his threats, and therefore it may be reasonable to conclude that they sufficed to create a reasonable apprehension of imminent bodily harm, and Paul clearly intended them to have this effect so as to induce Dennis and the patrons to leave him be. A prima facie case can thus be made out for assault as well.

Paul will likely assert two defenses: negligence on the part of the bar in overserving him, and intoxication as a defense to the specific intent of the battery and assault torts. Neither are likely to succeed, however. As to the first, in some jurisdictions, drinking establishments are liable for injuries caused by a patron that they knowingly overserved. However, Maryland has not adopted any dram shop acts such that would impose liability on the bar for overserving Paul, and therefore Paul's cannot allege contributory negligence from the bar as a defense to the intentional tort of battery. In addition, voluntary intoxication is not a defense to the intentional tort of battery in this context. For battery to be proved, the intent that must be demonstrated is the intent to cause the harmful contact. Although Paul was clearly inebriated, there is no evidence that he did not intend to make contact with Dennis, and indeed there is substantial circumstantial evidence via his repeated threats that he did so intend. The same applies to the intent to cause apprehension of harm, and therefore voluntary intoxication will not be a successful defense against the intentional torts of battery and assault.

Thus, as demonstrated above, Dennis should prevail in his action against Paul.

Yes, Aisha did violate the Maryland Rules of Professional Conduct. Under the RPC, Maryland attorneys have duties to prospective clients as well current and former clients, and this duty includes the duties of confidentiality and a duty not to represent a client with interests materially adverse to the prospective client if there is any chance that the attorney learned any information that could be damaging to the prospective clients case. Aisha's meetings with Paul disqualified her from representing Dennis in the same or substantially similar matter. Such a disqualification could indeed be waived by a knowing and signed waiver, but such waiver must come from the earlier prospective client, not the new client. Thus, Dennis' written waiver is immaterial. In order to represent Dennis, Aisha would have need to obtain Paul's waiver, not Dennis'. As a result, Aisha violated the Maryland Rules of Professional Conduct.

Maryland State Board of Law Examiners

FEBRUARY 2019 MARYLAND GENERAL BAR EXAM –
REPRESENTATIVE GOOD ANSWERS FOR THE BOARD'S WRITTEN TEST

Representative Good Answer No. 2

7A.

Battery

Dennis could pursue a cause of action for battery. Battery is an intentional tort that requires the defendant cause an offensive touching to the plaintiff's person. The touching must be one that a reasonable person would find offensive. Here, Dennis should allege that Paul's kicking him in the face was an offensive touching.

Assault

Dennis could also pursue a cause of action for assault. In Maryland, assault includes common law intent to frighten assault (i.e., placing the plaintiff in a reasonable apprehension, other than by mere words, of imminent bodily harm) and attempted battery. Dennis should allege that Paul's kick towards his face placed him in a reasonable apprehension of imminent bodily harm.

7B.

Assumption of the Risk

Paul could raise a defense of assumption of the risk against Dennis. Maryland recognizes both contributory negligence and assumption of the risk as absolute bars to recovery. In order to succeed, a defendant must show that plaintiff was aware of the risk, that an ordinary person would have understood the risk, and that plaintiff voluntarily assumed the risk anyway. Paul could assert that a reasonable person would have understood that his repeated threats and drunken state would likely lead to physical violence if pressed. Paul could further assert that Dennis, as a bartender, should have known the likelihood that Paul would resist, and that he continued regardless of the danger.

7C.

Dennis should prevail. It is unlikely that a court would be persuaded that Dennis assumed the risk of losing a tooth and breaking his nose by attempting to put Paul in the back seat. Additionally, any claim of self-defense by Paul would be defeated by the fact that he did not have a reasonable fear of bodily harm to himself. As such, Paul's offensive touch to Dennis's person would constitute a battery.

7D.

Aisha violated the Maryland Rules of Professional Conduct (RPC). A conflict of interest exists whenever a lawyer's responsibilities to one client are materially adverse to those of another client. When Aisha signed Dennis before withdrawing from Paul's case, she violated the RPC. Even had she withdrawn before signing Dennis, Aisha would still have violated the RPC. A lawyer may not represent a client whose interests are materially adverse to those of a former client in the same matter unless the former client gives his informed consent confirmed in writing. Here, Aisha obtained informed consent from Dennis, her new client, but not from Paul, her former client. Furthermore, even if she obtained a waiver from Paul, a lawyer may not use any confidential information obtained through representation of a former client in her representation of a future client. The facts do not

indicate what was discussed in the two meetings between Paul and Aisha, but it is unlikely that she would be able to refrain from using that information against Paul.

MARYLAND ESSAY QUESTION NO. 8

Representative Good Answer No. 1

The issue is whether the Jets have standing to assert a claim against the ordinance.

Per the US Constitution, a plaintiff is required to have standing in order to bring a cause of action in court. A plaintiff has standing if they have injury in fact, redressability and the courts are able to provide relief. Here, although the Jets are not technically a family of five, Jane is pregnant and they will become a family of five within the 3 years that the statute remains in effect and the fact that there is only four of them does not eliminate standing to challenge the moratorium on building and grading permits for residential dwellings on parcels of less than two acres. Furthermore, the Jet's recently obtained a one-acre parcel in the County on which to build their own home and the ordinance directly interferes with this right, therefore the Jets have standing to challenge moratorium portion of the ordinance. Once the baby is born and the Jets are subject to the $300 fee, they will have standing to challenge that part of the ordinance.

The first challenge I would bring against the County would be a cause of action for the violation of the Jet's substantive due process rights.

Under the substantive due process clause, an individual has standing to challenge the government's intrusion upon their fundamental or economic rights. The substantive due process clause is applied to the states via the 14th Amendment. A cause of action under substantive due process is appropriate here because the Jets' were deprived of an economic right by the enactment of the emergency ordinance because they are prohibited from building a home on land that they already own. Under this cause of action, since the loss was that of an economic right, the rational basis standard applies. When applying the rational basis standard, the plaintiff has the burden of proving that the government action is not rationally related to any legitimate government purpose. The rational basis standard is very difficult to overcome as it is a very high burden for the plaintiff to prove. Here, the County has experienced an influx of new residents and has enacted an emergency ordinance because the increase in population is the result of the increased cost of housing in neighboring jurisdictions. Here it appears that the legitimate government purpose for preventing the construction of homes within Suburbia Springs is because the cost of housing in neighboring jurisdictions has risen and caused an influx of new residents and the moratorium was intended to prevent damages incurred from the accelerated development of the County. Since the County's purpose of protecting its existing residents from detrimental overdevelopment is legitimate and imposing a temporary moratorium on building and grade permits is rationally related to that purpose, it is unlikely that the Jet's will be successful in their action.

The second challenge I would bring against the County would be a cause of action for the violation of the Jet's rights under the Equal Protection Clause.

The equal protection clause prevents the government from discriminating against similarly situated individuals. A cause of action under the equal protection clause is appropriate here because the ordinance treats families of different sizes, differently. Because the different treatment is not based on a suspect classification, the rational basis standard applies. When applying the rational basis standard, the plaintiff has the burden of proving that the government action is not rationally related to any legitimate government purpose. The rational

basis standard is very difficult to overcome as it is a very high burden for the plaintiff to prove. Here, the County has experienced an influx of new residents and has enacted an emergency ordinance because the increase in population is the result of the increased cost of housing in neighboring jurisdictions. Here it appears that the legitimate government purpose for preventing the construction of homes within Suburbia Springs is because the cost of housing in neighboring jurisdictions has risen and caused an influx of new residents and the moratorium was intended to prevent damages incurred from the accelerated development of the County. Since the County's purpose of protecting its existing residents from detrimental overdevelopment is legitimate and imposing a temporary moratorium on building and grade permits is rationally related to that purpose, it is unlikely that the Jet's will be successful in their action.

The final challenge I would bring against the County would be a cause of action for the violation of the Jet's procedural due process rights.

The procedural due process clause of the US Constitution prevents the deprivation of life, liberty or property by the government, without a proper notice and hearing. When evaluating the cause of action for procedural due process, the court will analyze: (1) the importance of the right at stake; (2) the adequacy of the current procedure in protecting that right; and (3) the importance and need for a new procedure.

Here, there is essentially no procedure in place regarding the deprivation of the Jet's property right because their right was lost by the enactment of an emergency ordinance. Arguably, the right to build a residential dwelling a lot smaller than two acres is an important right that is common within the US. Especially when individuals already own the land on which they plan to build and are left with little to no options because they cannot build and their property value is diminished as a result of the ordinance. The adequacy of the ordinance is not appropriate because it is a blanket prohibition that can deprive individuals who currently own land from developing it and significantly decreases the value of their land. The need for a new procedure is important to address the needs of individuals who already own land in the County on which they were planning to build but have not yet obtained a building permit.

Representative Good Answer No. 2

Standing. For a constitutional challenge to be valid, the plaintiff must have standing to bring the action. Standing requires an injury-in-fact and ripeness. George and Jane Jet are unable to build a home on the property gifted to them by Jane's parents. This is a real injury, and adjudication of this injury is ripe so long as the ordinance is in effect.

Taking. The Takings Clause of the United States Constitution states that the government cannot take the private property of a citizen without just compensation. This clause of the Fifth Amendment has been incorporated to the States through the Fourteenth Amendment. A regulatory taking occurs when the government enacts an ordinance that deprives an owner meaningful value of her land. The Supreme Court jurisprudence supports that the plaintiff must show a complete taking of the economic value of her land, rendering is valueless. If a regulatory taking has occurred, the government must provide just compensation, which is the fair market value of the property before the ordinance.

Here, the emergency ordinance prohibits the issuance of residential permits for a period of three years. The effect of this ordinance is to deprive George and Jane Jet of the opportunity to build a new home on their property. The government will argue that this does not make the property economically valueless as it is only

for three-years. A court should not find the length of the statute to be determinative, the ordinance still deprives the Jets of the opportunity to build on their land. Therefore, unless the ordinance is found unconstitutional, the Jet's should be paid the fair market value price for their property.

Equal Protection. An ordinance may be struck down as unconstitutional if it provides individuals equal protection of the law. This clause of the Fifth Amendment has been incorporated to the States through the Fourteenth Amendment. The court must determine if families of five or more residence are a suspect class. If not, the court must apply rational-basis scrutiny to the ordinance. Wherein, the Jet's must prove that the law is not rationally related to a legitimate government purpose. The purpose stated in the facts is to prevent a sudden surge in County population. The government notes that influx of population is due to an increase in the cost of housing in neighboring jurisdictions. The jets should argue that the ordinance is unfair to families of five. While they do not currently have a family of five, they have a third child on the way. The Jet's will argue that a $300 impact fee is not rationally related to the prevention of a sudden surge in population. The fee will likely have no effect on the population change. Therefore, the section of the ordinance that discriminates against families of five is likely unconstitutional. Since there is no severability clause, the entire ordinance should be found constitutional.

Substantive Due Process. People have a fundamental right to live with immediate family. This clause of the Fifth Amendment has been incorporated to the States through the Fourteenth Amendment. Any ordinance that effects a party's fundamental right must be reviewed with strict scrutiny. Wherein, the government has the burden of proving the ordinance is necessary for a compelling government purpose, and the law is narrowly tailored to achieving this purpose. The emergency ordinance can hardly be considered a compelling government interest. Furthermore, it is not narrowly tailored to achieve that governmental purpose. The population of the County can increase through the sale of abandoned structures, or homes not currently being used as a residence. Or, families can continue to grow and pay the annual impact fee. For these reasons, the emergency ordinance fails strict scrutiny and should be found unconstitutional.

MARYLAND ESSAY QUESTION NO. 9

Representative Good Answer No. 1

Admissibility of drugs and money found during Abigail's arrest

Under the 4th Amendment of the United States Constitution, a search and seizure of evidence must be made with warrant, based on probable cause and signed by a detached magistrate. A search and seizure may be constitutional if it falls within a warrant exception. This includes Automobile searches, consent to search, Evanescent evidence, Exigent circumstances (hot pursuit), Search Incident Arrest, Plain Sight, Emergency Aid and Stop and Frisk searches.

Abigail was driving with her left tail light broken. This is probable cause for the police officer to make a valid automobile stop. At that point the officer observed Bernard (B), the passenger, climb into the back seat, and generally move throughout the car. Due to the officer's experience, the fact that they were in a high crime area, and he believed that Abigail (A) and B looked to "fit the profile of drug dealers" he called a drug detection dog. Probable Cause is based on the totality of the circumstances. While the officer at this time was simply pulling A over for a broken tail light, his experience and observations are part of the totality of the circumstances in order to determine if the later search and seizure was constitutional. The officer saw B continue to move around the front seat of the car and then next toss something out of the passenger side window. When he asked B to step

out of the car B refused. At this point it is arguable whether the officer had the probable cause for an arrest of B. The seizure of B in handcuffs and searching his person is constitutional based on the search incident arrest warrant exception. The large knife found can be used against B in court. Next the officer searched the vehicle, which is also a constitutional search under the 4th amendment due to the automobile exception and the probable cause the officer had from the high crime area, B's movement, and B's throwing something out of the car.

A will argue that while the officer could search the car, he did not have probable cause in order to search her backpack and thus all the drugs, money and statement are inadmissible evidence due to an unconstitutional search and seizure under the fruit of the poisonous tree doctrine. Abigail will argue that under the Fruit of the Poisonous Tree doctrine any evidence subsequently found from an unconstitutional search is inadmissible and such a search applies here. A will argue that the police officer did not have the requisite probable cause to call the dog search since the call for the police dog was based on a stop for a broken tail light, movement in a car, and being in a high crime area and looking like a drug dealer. The dog was called before the officer saw B throw something out the window. A will have a strong argument that there was no probable cause for the dog search and thus no inevitable discovery. This means that the evidence (i.e. drugs, money and B's statements) is barred from court under the fruit of the poisonous tree doctrine. (Note under the 5th Amendment Miranda Rights A does not have to speak to officer once there is custody and interrogation).

The State will argue that the officer saw B go into the back seat of the car, and it is reasonable to assume that B put something in the backpack. The State will argue that the police officer, due to the totality of the circumstances and his experience as an officer had the probable cause to determine that there may be drugs in the backpack and that the search should fall under the search incident arrest or auto bile search exception. The State believes that the police officer suspected drugs and saw B go throughout the car. Furthermore, the State will argue that the officer did have the necessary probable cause to call the dog search. if the dog search is allowed because it is based on probable cause then a fruit of the poisonous tree exception may be the State's strongest argument. The evidence will be admissible if the State can prove that the evidence found would have been found anyways despite the illegal search by the police officer; this is called inevitable discovery.

Representative Good Answer No. 2

The 4th Amendment, as applied to the states through the 14th Amendment Incorporation Doctrine, prohibits the government from warrantless searches and seizures, with limited exceptions. Here, the cops pulled over Abigail's car and searched the car as well as the contents of her backpack.

To have standing under the 4th Amendment, there must be a state actor and a search or a seizure. Here, there was state actor through the actions police officers and Abigail has a reasonable expectation of privacy in her book bag.

A police can *stop* a vehicle for a traffic violation. Here, Abigail's taillight was out which allows for the police to pull her over.

The *pretextual stop rule* holds that where the cops have an ulterior motive, that does not negate the real reason for traffic stop. Here, Abigail did have a taillight out and the fact that her and Bernard fit the profile of drug dealers and were in a high crime area does negate the fact that the police has the right to pull her over the traffic violation nor the validity of any other subsequent actions.

The *duration* of the stop can last as long as reasonably necessary to effectuate the stop; it cannot last longer. Here, the police called other forces and the dogs after the made the stop. This did not add time as the other officers and dogs did not show up until the end of the incident; therefore no argument can be made by Abigail regarding the duration.

The police are allowed to ask an individual for identify information. Here, the policy asked Abigail for her driver's license and registration; this request is not a violation of her constitutional rights.

The *automobile exception* provides for a warrantless search of a car where the police have reasonable articulable suspicion that there is evidence. Here, Bernard's behavior, seeing him throw a bag, jumping from the seats would give the police the reasonable articulable suspicion that there was evidence of a crime in the car.

The *search pursuant to the automobile exception* provides that the police can search a container in the car which would be of a size to hold the evidence of the crime. Here, the police searched Abigail's backpack which was of the size that could hold the evidence.

The 5th Amendment Miranda warnings require that the police provided the Miranda warnings when they have an individual in custody and are interrogating them. Custody is where a reasonable person would not feel free to leave and interrogation is questions which would lead to incriminating responses. Here, Abigail would not feel free to leave as she was asked out of the car by the cops, more cops and a dog were called and Bernard had just been in tussle with the police. The policy blatantly asked who owned the drugs and the cash which are the types of questions which would elicit incriminating response. Therefore, the police violated Abigail's 5th Amendment Miranda rights.

Abigail would argue that not only were her Miranda rights violated and any evidence obtained in response should be suppressed as fruit of the poisonous tree but that Bernard's behavior would not be an appropriate to hold at there was a reasonable articulable suspicion that there was evidence in the car, as he was a passenger and she was entitled to privacy of her car. Furthermore as Bernard's statements were obtained in violation of Miranda and any evidence flowing from his statements regarding her culpability as to the drugs and money should also be suppressed.

The state would everything obtained, except for the statements from Bernard, was done based upon exceptions to the warrant requirement of the 4th Amendment and could be brought in.

The 6h Amendment provides an individual the right to counsel based on the crime. Here, while Abigail asked for her lawyer, which does not pertain to the 6h Amendment right to counsel and therefore there was not constitutional violation of her 6th Amendment.

Maryland State Board of Law Examiners

FEBRUARY 2019 MARYLAND GENERAL BAR EXAM –
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MARYLAND ESSAY QUESTION NO. 10

Representative Good Answer No. 1

A. Evidence

(1) The Prosecutor will offer photos as relevant evidence of Arthur's lifestyle as a drug dealer. He will likely use this evidence to question where Arthur got his money (particularly if he can show that Arthur does not have a legitimate job). He will say the photos were lawfully seized, meet the criteria of the best evidence rule, and cannot be challenged for their credibility as they are a truthful depiction of Arthur's assets.

However, I would argue that to begin, a foundation must be laid. Someone must indicate that the pictures are a fair and adequate representation Arthur's cars and money. If the prosecutor can do this I would argue that it was not relevant because it was not related to the crime itself. It had nothing to do with possession with intent to distribute. I would argue even if relevant, the probative value would be substantially outweighed by the prejudicial effect. It would lead the jury to believe that Arthur was a thug and a drug dealer. It would color their opinion of him. In addition, other evidence, such as bank account numbers could be used to get the same point across.

(2) The Prosecutor will argue that Arthur's silence is relevant evidence of his guilty conscious.

However, I would argue, that this is substantially prejudicial. A person's silence is not necessarily indicative of a guilty conscious, but is a decision to not talk to the police--which most attorneys recommend. In addition, I would need to do some more research as to when his Miranda Rights were read. His silence after his Miranda Rights were read was a valid use of his Fifth Amendment rights against self-incrimination. A prosecutor cannot use silence post-Miranda for impeachment or otherwise at trial.

(3) The Prosecutor will argue that the two prior convictions are relevant to Arthur's credibility. As Arthur has decided to testify, he has put his credibility in question and therefore can be impeached.

However, I would argue that these convictions go beyond impeaching Arthur and are more prejudicial than probative. While convictions are allowed in for impeachment under certain circumstances, the court must weigh whether the conviction will lead a jury to believe that a person acted in accordance with a particular character trait as opposed to considering the evidence in front of them. Convictions that are allowed in are generally crimes of treason, crimes false (ex. perjury), and common law felonies or if they are crimes that speak to a person's truthfulness. I would concede that both crimes were within 15 years, which is Maryland's presumptive cut-off date for allowing convictions.

(a) To begin, I would state that this does not qualify as a common law felony because it was only attempted murder. In addition, a violent crime does not speak to a person's truthfulness, but works to paint Arthur as a dangerous and evil man. By allowing the prosecutor to bring in such a serious charge who would be painting a picture of Arthur that has nothing to do with the current charges. The prejudicial value of an attempted murder charge would be extremely difficult to overcome. In addition, while 15 years is the general "cut-off" the crime did occur 12 years ago. The more time has passed, the less a court should consider its probative value.

(b) To begin, possession of cocaine is not a common law felony, crime false, or treason. It does not speak to Arthur's credibility because he can be telling the truth even if he did possess cocaine on a previous occasion. In

particular, I would highlight that this crime would have a big impact on the jury because it is so similar to the crime that he is accused of currently that they would simply believe he was acting in accord with a particular character trait.

B. Brother-in-Law

Opposing parties can be relatives and this fact does not necessarily have to be disclosed according to the Rules of Professional Conduct, however, in order to run a good practice, all attorneys should strive to be truthful with their clients. An important part of the attorney client relationship is trust and in order to build that trust, both parties must be open with one another.

Before concealing a fact from a client it is important to ask: Why am I concealing this fact? Additionally, it is important to consider that Arthur could find out about this relationship through other avenues. If he finds out from a friend or court personnel, it could have a deep impact on our attorney client relationship and at that point it might actually effect my ability to effectively represent him. Therefore, even if not required, I believe that Arthur has a "right" to know.

It is worth-noting that if I believe that it would impact my representation, that it might influence my strategy (such that there would be a possibility that I would be less effective) or that I would feel uncomfortable, I should end my representation.

Representative Good Answer No. 2

In general, evidence that is relevant and probative in helping the trier of fact determine whether or not a fact to a case is more or less likely to be true will be admissible, with limited exceptions.

(1) Photographs. In determining whether or not to admit the photographs, the courts will first analyze whether or not they are relevant. Here, Arthur is being charged with possession with intent to distribute cocaine; therefore photographs of him with expensive cars and a stack of cash may be relevant in helping the trier of fact decide whether or not his finances and ability to acquire the cash and cars is the result of the income he earns from distributing cocaine. Although evidence may be relevant, the court may not admit the evidence if they find that the probative value is substantially outweighed by the prejudicial value of the evidence. The judge hearing the case has high discretion in determining whether or not evidence should be admitted or not under this balancing test. Here, seeing pictures of Arthur with expensive cars and a stack of cash may be prejudicial to an extent, but it most likely won't be found overly prejudicial and if probative, will be admitted. The Prosecution will argue that the evidence goes to show how Arthur makes his income in being able to afford nice cars and to have stacks of cash through distributing cocaine. The defense will argue that, absent some other evidence with in the photos, a showing of the defendant with cars and money is irrelevant in showing whether or not the defendant distributed drugs as there is no evidence of drugs in the photographs themselves. The defense will likely succeed in their argument.

(2) The Fifth Amendment, as applied to the states through the due process clause of the 14th amendment protects persons from self-incrimination. Here, the Defense will argue that the fact that Arthur remained silent at the time of his arrest and refusal thereafter to answer any question can NOT be used against him because he was invoking his 5th Amendment right against self incrimination. The prosecution will argue that Arthurs silence

goes to show that he is likely guilty because if he was not guilty of any crime, he would have made statements saying so and advocating his innocence. The defense will succeed in their argument.

(3) A defendant can be Impeached by Prior Convictions if the prior conviction was a felony and within the past 15 years. Here, the prosecution will argue that this prior felony of attempted murder should be used to impeach Arthur as it shows that he has a criminal history and should not be trusted as a witness and since the felony occurred within 15 years it should be admitted. The defense will argue that attempt of murder is not a felony under which a defendant can be impeached with (such as murder itself) even though it was within the past 15 years. Furthermore, even if the evidence were admissible, the judge would use the balancing test and likely find that the evidence is highly more prejudicial than probative and not allow it to be admitted.

The defense will argue that the prior conviction for possession of cocaine in 2010 should not be admitted as possession is not an impeachable felony offense even though it was within the past 15 years (2010) and that it is being used to show propensity. The state will argue it should be admitted because it was within the past 15 years and that it's being used to show a common scheme or plan or method of operation or knowledge of how to distribute cocaine rather than for propensity reasons. The defense will likely succeed. The evidence is highly prejudicial.

B. Yes, Arthur has the right to know that the prosecutor is my brother in law because it could potentially bias my representation of Arthur. I have a duty to tell my clients if I am biased in a case that could affect my ability to fairly and adequately allow me to represent them under the Maryland Rules of Professional Conduct.

MULTISTATE PERFORMANCE TEST

Representative Good Answer No. 1

To: Litigation Supervisor

From: Applicant

Date: February 26, 2019

Re: Ashley Baker TRO Argument

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I. The standard for injunctive relief

The party seeking the extraordinary remedy of injunctive relief must demonstrate: (1) likelihood of success on the merits; (2) irreparable harm to the moving party if the injunction is refused, (3) that the benefits of injunctive relief outweigh the hardships to the non-moving party, and (4) that the issuance of a preliminary injunction serves the public interest. Ms. Baker can satisfy each of the above criteria and thus the Court must grant the relief requested.

II. Ms. Baker is likely to succeed on the merits because the State's punishment is disproportionate to the violations found, granting the injunction is within the public interest, and the community will suffer irreparable harm if the injunction is not granted.

In order to demonstrate likelihood of success on the merits, the moving party must only "demonstrate that his chances to succeed on at least one claim are better than negligible." Lang v. Lone; Smith v. Pratt. In Lang, a child who required a service animal was denied the ability to use the animal due to the school's concerns regarding faculty training, and the allergies of other students as well as other factors. Id. Despite these legitimate concerns,

the Lang's needed only demonstrate that there was a more than negligible chance that the removal of the boy from school and denial of his use of the service animal was a harm that would outweigh the potential harm of teachers untrained to deal with the animal and the possible allergic reactions of other students.

Here, the state's punishment of license revocation is unduly harsh based on the violations found, and as a result, there is a more than negligible chance that Ms. Baker will succeed on the merits of her case.. According to State requirements, written enrollment information must be collected from all parents; all staff must be subject to criminal background checks, and apprised of each child's allergies and nutritional needs. Further, the required teacher-child ratio is one to eight for two year olds, and one to ten for three year olds. See Franklin Admin. Code ("Code") sec. 3.06, 3.12, 3.13, 3.37. The state has several possible ways to enforce these requirements including civil fines up to $10,000. Franklin Child Care Center Act ("Act"). In fact, prior to issuing civil fines, the Act requires that after *critical* violations, and notice, the State may impose penalties beginning at $500. Revocation of a license is meant to be a last resort for chronic non-compliance.

Ms. Baker runs Little Tots Child Care Center in Evergreen Heights, Franklin. Ms. Baker acquired Little Tots Eight months ago, in July of 2018 from the previous owner. Little Tots has received three citations for violations of the Franklin Child Care Center Act since July of 2018. The violations have included the following: enrollment procedures, staff qualifications, staffing, and meals and nutrition. In the most recent notice these violations were minor. [Jan 23, 2019 Notice]. Five of 37 children were missing enrollment forms. One newly hired teacher and one long-time teacher whom she inherited had not submitted background check information out of all of her employees. Id. In one classroom, she had one additional child beyond the teacher-child ratio. One staff member expressed that she was not aware of one child's allergy. Id. These violations are minor, and the state's punishment of revocation--reserved for the most serious of violations--is unduly harsh.

Ms. Baker received these violations in large part due to the "growing pains" involved in improving services to her community, as well as in her efforts to make child care more affordable to families in the area. She has largely succeeded on both counts, and even within the citation documentation, her improvement and good faith attempt to rectify these violations is obvious.

Here, the state cannot demonstrate that it will suffer any harm whatsoever by being enjoined from revoking Ms. Baker's license to operate in order to give her additional time to comply with the requirements which she has thus far made a concerted effort to do. Should the state determine that punishment is necessary, there is a wide scale of fines that may be issued, and should be issued, prior to the revocation of a license. However, as demonstrated below, the harm to the community if the injunctive relief is denied will far exceed the harm to the state if the injunctive relief is granted.

III. Ms. Baker and her clients will suffer irreparable harm if the injunction is not granted because Ms. Baker will lose her livelihood, and because there is on other day care center that can meet the needs of the families served by Little Tots.

"An alleged injury is irreparable when the injured party cannot be adequately compensated by damages or when damages cannot be measured by any certain pecuniary standard." Lang. In Lang the Franklin Court of Appeal found that "no amount of monetary damages could substitute for providing Michael the education he needs." Id. The Court found that irreparable harm would result if one child was prevented from obtaining the education and care he needed. Id.

Here, the resulting harm should injunctive relief be denied more than satisfies this standard. If injunctive relief is denied, *thirty-seven children* will be denied the early education and care they require. Multiple parents have written letters indicating that there is no other affordable child care alternative in their neighborhood. Indeed, Ms. Baker has received government grants in order to provide such care, which she risks losing should her

license be revoked. Further, the harm of revoking her license extends beyond the affected children, though this interest alone should suffice; parents in the community would be forced to quit their jobs or take time off if the Center's license were revoked because injunctive relief was denied. Ms. Baker herself would also lose her source of income and her vocation because she will be unable to operate without the grants she has obtained.

IV. The benefits of granting the inunction outweigh the possible hardships to the State.

In balancing the hardships, the court must determine "whether greater injury would result from refusing to grant the relief sought than from granting it." Lang. In Lang, the Court found that the harm to the District if Michael were permitted to bring his service animal to school was minimal as the school already allowed service animals for students with vision impairments. That minimal harm included, "'expand[ing] its policy, prepar[ing] its staff for the presence of the animal, educat[ing] parents, and determin[ing] how to accommodate children with dog allergies." The Court conceded that these steps would cost time and money--"costs that may be substantial." Despite those costs, the court felt that the harm to Michael would be more significant if he were forced to miss school.

Here, the hardship to the state if the injunction is granted is minimal or nonexistent. The Code and the Act contemplate a variety of other means to enforce the standards put forth in each text. Indeed, the state should have first sought to fine Ms. Baker prior to entertaining the extraordinary option of revoking her license. If Ms. Baker's license is not revoked, the 'harm' to the Department consists of continuing to monitor her progress, and potentially imposing a fine in place of revocation. Essentially, the Department will have to continue doing its taxpayer-funded job by regulating the existing day care facilities in Franklin to ensure compliance. This is exactly what he agency is charged with doing, not shutting down each facility that encounters obstacles in its efforts to comply with the regulations set forth. The above paragraph details the barrage of harms that would result from the revocation of Ms. Baker's license. First, thirty-seven children without safe affordable day-care, with the "lucky" ones potentially left in the care of family members whom the state has no ability or duty to subject to background checks. In the most unfortunate cases, parents will be forced to leave their employment, which many cannot afford to do, compromising access to health benefits and secure housing. These harms are far and away greater than the 'harm' of enjoining the state to continue its mandate and to monitor Ms. Baker's facility for compliance.

V. The issuance of a preliminary injunction serves the public interest because Ms. Baker provides the only affordable and safe child care facility accessible to the families in her community.

The issuance of injunctive relief serves the public interest. In Lang, despite the potential issues that might arise from Michael's service animal being allowed to accompany him to school, the Franklin Court of Appeal found that "the injunction will serve *the statutory purposes* of the laws protecting disabled children by permitting the use of service animals in the classroom." Lang. Further, the Court posited that any harm to the other children would be outweighed by the "important educational lessons" provided to Michael's classmates and "for children throughout the school" in learning about the role of service animals in protecting people with disabilities. Id. The District argued that the public interest in proper use of judicial resources would be thwarted by the injunctive relief becuase the court would be required to monitor the District's compliance. This argument was rejected by the Court as an overstatement of the difficulty of enforcement: "if the District admits Michael, it will be in compliance with the injunction." Id.

Here, the revocation by the state of Ms. Baker's license to operate actually flies in the face of the goals of the very statute it seeks to enforce. The state is badly "missing the forest for the trees" at the expense of Ms. Baker and the community she serves. The Act states explicitly as its public policy goal in sec. 1:

"The legislature of Franklin finds... (b) there is a need for affordable, safe child care centers for the care of pre-school age children whose parents are employed. (c) There is a need for affordable and safe child care center for low-income parents in underserved and economically depressed communities. (d) By providing for affordable and safe child care centers, the State of Franklin encourages employment of parents who, without these child care centers, could not be employed."

Three out of four sections of the Act's policy and legislative purpose statement discuss the essential nature of affordable, safe child care centers to low income and working communities. The public interest has been set out by statute, and Ms. Baker has sought to provide affordable, safe child care for the underserved, low-income, working community of Evergreen Heights, Franklin. It would be a grave injustice and a frustration of the statutory purpose set out in the Act to allow the Department to revoke Ms. Baker's license.

To conclude, Ms. Baker can more than satisfy the requirements to be granted relief

Representative Good Answer No. 2

Body of the Argument

A preliminary injunction may be granted to preserve the status-quo pending a trial on the merits if the moving party demonstrates four factors: 1) the moving party is likely to succeed on the merits; 2) the moving party will suffer irreparable harm if the injunction is not granted; 3) the benefits of granting the injunction outweigh the possible hardships to the party opposing it; and 4) the issuance of the preliminary injunction serves the public interest. *Lang v. Long Pine School District*.

1. Ms. Baker's chances of succeeding on the merits of her claim for relief of revocation of her license are better than a mere possibility because there is a dispute over whether revocation of her license is a proper remedy.

To prove likelihood of success on the merits, the moving party need not meet the standard of proof required at trial. *Lang*. Rather, the moving party need only raise a fair question regarding the existence of the claimed right and the relief she will be entitled to if successful, and need only demonstrate that her chances to succeed on at least one of the claims are better than negligible. *Lang*; *Smith v. Pratt*. Put differently, if the moving party shows her chance of succeeding on a claim for relief is better than a mere possibility, the court should grant the motion for a preliminary injunction. *Lang*.

Here, Ms. Baker's chances of relief from the revocation of her license are better than a mere possibility because there is a valid dispute over whether the revocation of her license is the proper remedy. Under the Franklin Child Care Center Act (FCCCA) Section 3, if the operator of a child care center is in noncompliance with critical standards, the Director may, after notice, impose penalties that include but are not limited to a civil fine of at least $500 but not more than $10,000, or a revocation of the license. FCCCA Sec. 3(f). Under Section 3.01 of the Franklin Administrative Code (FAC), critical standards include Enrollment Procedures, Staff Qualifications, Staffing, Program, Structures and Safety, Meals and Nutrition, and Health. FAC Sec. 3.01.

In this case, the Franklin Department of Children and Families (FDCF) issued a notice of license revocation to Ms. Baker on February 22, 2019 following notices of deficiencies issued to her on July 16, 2018, October 19, 2018, and January 23, 2019. The first of these notices of deficiency was issued to Ms. Baker just 30 days after she opened Little Tots Child Care Center (LTCCC). The first notice in July identified critical violations in enrollment procedures, staff qualifications, and staffing. In that inspection, Ms. Baker was noted to be missing 37 enrollment forms, 4 staff background checks, and the staff ratios in the 2 and 3-year-old rooms exceeded what was allowed by statute. By Ms. Baker's next inspection in October, the number of enrollment violations had been cut in half from 37 to 16, she was missing background checks on three staff members (down from four),

and the staff ratio exceeded what was allowed by statute in only one of the rooms, Importantly, the staff ratio violation was minor--Ms. Baker was noted to have 9 children in the 2-year-old room with 1 staff member, while statute requires her to have 8 children in a 2-year-old room with 1 staff member. FAC Sec. 3.13(d). By Ms. Baker's third and final inspection in January, she was only missing 5 enrollment forms, was missing background checks from 2 employees, one of whom was hired by the previous owner of LTCC, had a lingering staff ratio issue in the 2-year-old room caused by an attendance overlap that would only last a week, and was noted to have no supervision in the food area.

Overall, the notices of deficiency indicate improvement and demonstrate Ms. Baker's attempts to comply with the statutory requirements for operating child care centers. She has taken steps after each notice to reduce the problems identified, and has made a commitment to working to achieve full compliance. Viewed against her efforts, there is a valid dispute as to whether revoking her license is the proper remedy. In *Lang*, the parents of a disabled child sought a preliminary injunction to allow the child to bring a service dog to school. *Lang*. There, the court found that there was a dispute about the accommodation needed and whether the service animal was a proper or necessary accommodation. *Id.* Accordingly, the court found that it was an issue to be decided on the merits, and that the parents had shown a fair question regarding the rights of their son and the likelihood of receiving a remedy at trial. *Id.* By analogy, there is a dispute as to whether revoking Ms. Baker's license is the proper remedy. Because her efforts to comply with the statute have raised a question as to her rights and the likelihood of receiving a remedy at trial if the court does not revoke her license, she has a chance of succeeding on the merits of her claim that is better than a mere possibility.

The FDCF will likely argue that it has the statutory power to revoke Ms. Baker's license, and that the statute gives it freedom to select from a fine or revocation of a license as set forth in FCCCA Sec. 3(f). It will likely point to the fact that Ms. Baker was given numerous opportunities over a period of several months to correct deficiencies, and that in the last inspection, a new violation regarding food safety was identified. FDCF will also likely point to the fact that Ms. Baker continually did not check the backgrounds of new employees, as identified in the October and January notices of deficiency. However, Ms. Baker has demonstrated more than a mere possibility that the revocation of her license is not the proper remedy by showing substantial improvement through her continued efforts to comply with the regulations. Therefore, she has demonstrated a likelihood of succeeding on the merits sufficient to satisfy this element.

2) Ms. Baker and the children and families who rely on her daycare center will suffer irreparable harm if her license is revoked.

Pursuant to *Lang*, an alleged harm or injury is irreparable when the injured party can't be compensated by damages or damages can't be measured by a certain standard. Here, if Ms. Baker is forced to close, she will be without income, will lose the federal grant given to her to subsidize the center, and will struggle to repay her business loans. Additionally, as noted in an email by Jacob Robbins, a parent who sends his children to LTCCC, to FDCF, working parents need LTCCC because it is affordable and open longer hours. If it closes, Mr. Robbins' wife will have to quit her job, compromising her health benefits and the family's ability to support themselves and their children. As Mr. Robbins puts it, they are not the only family in this predicament. LTCCC is the only low-income child care center within 15 miles of their home, and they have no other options.

FDCF will likely argue that Ms. Baker could be compensated with money damages to make up for lost income if she is eligible, and that the families can rely on their relatives to care for the children if LTCCC closes, as they have done in the past. However, this argument overlooks the value of the grant Ms. Baker received, which arguably cannot be quantified. Additionally, as Mr. Robbins noted, relying on relatives is an inferior option because relatives get sick and have their own obligations, leaving working parents to scramble for child care. Additionally, LTCCC provides a program that the relatives do not offer. Mr. Robbins noted that the program

helped one of his children overcome shyness. Accordingly, the injured parties, namely Ms. Baker and her clients, cannot be compensated by damages if LTCCC is forced to close. Therefore, they will suffer an irreparable injury of the license is revoked.

3) The benefits of allowing LTCCC to remain open outweigh the hardships.

The benefits to the community of LTCCC staying open outweigh the hardships to the community of allowing a center to stay open while violating regulations. As Mr. Robbins noted, if LTCCC closes, the children and families it serves will be without another option for affordable child care that accommodates the hours of working parents. FDCF may argue that the community will suffer hardships if the injunction were granted and LTCCC were allowed to stay open by creating the risk that unauthorized people pick up children, that staff are hired without background checks, that there are too few staff to supervise the children, or that the children will be exposed to known allergies without proper supervision. However, LTCCC is meeting a desperate need in its community for affordable child care with extended hours, and Ms. Baker is actively working to improve upon the notices of deficiencies. Accordingly, the balance of harms favors Ms. Baker and LTCCC.

4) Issuing a preliminary injunction to prevent Ms. Baker from losing her license serves the public interest in providing affordable child care to the community.

As FCCCA Sec. 1 notes, there is a need for affordable and safe child care centers for working parents, and that providing such centers encourages the employment of parents who could not otherwise be employed if the child care centers were not open. LTCCC serves exactly that public interest by providing affordable rates and extended hours.

FDCF may argue that the State has an obligation to ensure the safety and well-being of children under FCCCA Sec. 1, and that LTCCC's violations are evidence that it is not a safe center. Furthermore, FDCF may argue that the issuance of the injunction would impose upon it a continuing duty to supervise LTCC, relying on *Franklin Envt'l Prot. Agency v. Bronson Mfg.* as authority that courts should be reluctant to issue injunctions that transform the court into an ad hoc regulatory agency to supervise the actions of the parties. Neither of these arguments are compelling. First, as noted in *Lang*, when an injunction serves a statutory purpose, it serves the public interest. Second, the FDCF would be overstating the difficulty of continuing to supervise LTCC. If LTCCC complies with the regulations, as it has promised and endeavored to do, it will be in compliance with the statutes, and there will be no need for continued supervision by FDCF.

While FDCF may point to the fact that preliminary injunctions are an extreme measure, they are justified in this circumstance because the satisfaction of the four enumerated factors in *Lang* makes a preliminary injunction an appropriate remedy. Thus, because the four factors favor the issuance of a preliminary injunction, this court should issue a preliminary injunction to allow Ms. Baker to keep her license, and keep the doors of LTCCC open to the community it serves.