

**JULY 2012 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

In order to assist those applicants wishing to prepare for the essay portion of the Maryland Bar Examination or to review their examination, the State Board of Law Examiners prepares a Board's Analysis and selects Representative Good Answers for each essay question given in each examination. The Board's Analysis and the Representative Good Answers are intended to illustrate to potential examinees ways in which essay questions are analyzed by the Board and answered by persons actually taking the examination. This material consists of three parts:

1. Essay Question is a reprint of the question as it appeared on the examination. It precedes the Representative Good Answers. Extracts of statutory material and rules are not included.

2. The Representative Good Answers consists of two actual answers to the essay question from the exam. They are reproduced without any changes or corrections by the Board, other than spelling. The Representative Good Answers are provided to illustrate how actual examinees responded to the question. The Representative Good Answers are neither average passing answers nor necessarily answers which received a perfect score. Representative Good Answers are responses which, in the Board's view, illustrate successful answers.

3. The Board's Analysis consists of a discussion of the principal legal and factual issues raised by a question. It is prepared by the Board. The Board's Analysis is not a model answer nor is it an exhaustive listing of all possible legal issues suggested by the facts of the question.

**JULY 2012 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

QUESTION 1

Steve and Bob are neighbors on adjoining pieces of improved real property in Kent County, Maryland. In early 2010, Steve decided to construct a large detached garage and workshop in a wooded area on what he believed, based upon an unclear deed description, was the eastern edge of his property. Approximately halfway through the construction, Bob was hiking in the woods when he discovered what Steve was doing and realized that the new building was actually located entirely on Bob's side of the property line. Bob confirmed this with a check of the local land records, including his own deed and a recorded subdivision plat, but then went on vacation for several weeks and never mentioned anything to Steve about his discovery. Upon his return from vacation, and with Steve's construction being completed, Bob sold his property to Amanda and moved out of the area. Prior to Amanda making an offer on the property, Bob told her simply "[t]he garage and workshop are on my land. I'm not sure what Steve thought he was doing." After the sale, and upon discovering Steve in what she believed to be her garage and workshop, Amanda immediately demanded that he vacate the building and posted "No Trespassing" signs on and around the premises.

Steve comes to you, a licensed Maryland attorney, seeking advice as to what his and Amanda's respective rights are in this situation.

What would you advise Steve? Explain fully.

REPRESENTATIVE ANSWER 1

Steve's Rights

Although Steve was a trespasser on Bob's land at the time he began construction of the detached garage and workshop, his mistake was an honest and good faith belief based on an "unclear deed description." That means that he entered and began making improvements to the land under Color of Title to the land. There is no indication that he remained there for a length of time sufficient to acquire it by adverse possession; however, he may have acquired rights to the land through Estoppel. Bob, the owner of the land on which Steve constructed his garage, discovered the trespass to his land "approximately halfway through construction." At that point, Bob could have, and should have, notified Steve of the error in order to protect his claim or right. However, Bob failed to give notice to Steve or complain. Steve justifiably relied on Bob's omission to his detriment, so he may be able to argue that he acquired that parcel of land and Bob is estopped from now claiming his interest. A reasonable person in Bob's circumstances, with actual knowledge of a trespasser's improvement on his land, would have demanded that Steve cease and vacate the property. His failure to do so and subsequent sale to Amanda with a representation indicating the garage and workshop were on his land make him liable for the loss Steve will incur if forced to abandon his garage and workshop.

However, since Bob's recorded deed and a recorded subdivision plat in the local land records provided Steve, and other third parties, with Inquiry Notice as to the boundaries of the property, Steve will probably be unable to successfully assert the detrimental reliance argument. The

**JULY 2012 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

doctrine of unjust enrichment will allow Steve to recoup his expenses based on a good faith mistake under Color of Title because of Bob's knowing failure to assert his rights at a reasonable time.

Amanda's Rights

Amanda had both actual and constructive notice of the dispute *prior to making an offer on the property* because Bob told her "the garage and workshop are on my land. I'm not sure what Steve thought he was doing." Thus, she was not a bona fide purchaser, although she did purchase the land for value. Amanda probably has a right to evict Steve from her land, or, alternatively, may seek from Bob reimbursement for the price of the property as represented with the garage and workshop less the value of the property without it, if the court determines that Steve is entitled to the parcel on which he made those improvements.

Steve's actions may also constitute a private nuisance as his actions clearly substantially and unreasonably interfere with Bob/Amanda's use of or enjoyment of the property. However, Steve's use is likely reasonable since the utility to him outweighs the interference with the property. The resolution of this dispute will depend on who has legal right to the parcel on which Steve's garage and workshop are located.

I would advise Steve to seek a declaratory judgment to determine the ownership rights of the disputed parcel, and Amanda may seek an action in ejectment.

REPRESENTATIVE ANSWER 2

A) Steve's Rights

1) No Adverse Possession

As a preliminary matter, I would advise Steve that he cannot make out a claim for adverse possession of the portion of Amanda's property upon which he built his garage and workshop. In Maryland, Steve would be able to claim ownership over this disputed portion of Amanda's property if his possession had been continuous for 20 years, open and notorious, actual, hostile, and exclusive. Most of these elements are satisfied because Steve's construction of buildings was readily apparent to Bob (who saw it while hiking). However, Steve did not possess the property adversely for the required statutory period, because he only began to construct the buildings in 2010. Moreover, Amanda immediately excluded Steve from the property when she took possession by posting signs and demanding that he vacate. Therefore, Steve should know that he cannot recover under property law principles.

2) No Contract Formed

Steve should know that he has no rights under contract law. The formation of a contract requires an offer, acceptance, and the exchange of consideration. In Maryland, consideration is defined as a bargained-legal detriment or benefit. Here, there was no offer or acceptance, or exchange of consideration between Steve and Bob. Steve constructed the improvement on Bob under the

**JULY 2012 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

mistaken belief that he was improving his own property. Therefore, Steve is precluded from recovering on a traditional contract theory.

3) Quasi-Contract

Steve's best chance for recovery is on a "quasi-contract" theory. Quasi-contract doctrine is an equitable remedy that can be imposed by the courts when no contract formed, but when the circumstances and justice require the court to award damages as though a contract had formed. Here, there are several facts that would support an argument for enforcing Steve's argument. Steve had good faith belief that he was constructing the improvements on his own property. Bob also had notice that Steve was building the improvements, and Bob was aware that Steve was mistakenly improving Bob's own property. Fairness would require Bob to inform Steve of his mistake, rather than benefit from it. On the other hand, there are also facts undermining Steve's quasi-contract claim. Bob was aware of the property line because he checked the local land records. These same records were also available to Steve. On this basis, a court may find that equity does not require Bob to compensate Steve for his mistake. Because of their focus on fairness, the applicability of equitable remedies can be somewhat subjective.

Note that Steve can also bring these actions against Amanda directly, because she is not a bona fide purchaser for value (see analysis below).

B) Amanda's Rights

1) Amanda has a right to keep the property. As discussed above, Steve does not have a valid adverse possession claim to the property, so Steve has no right to take physical possession.

2) Not Bona Fide Purchaser

Amanda is not a bona fide purchaser for value (BFP). In Maryland, a bona fide purchaser for value takes title to property free of all competing claims and personal defenses. To become a BFP, a transferee must take the property for value, in good faith, and without notice of any claims or defenses. Here, Amanda was told before making an offer for the property that Steve built the garage and workshop improvements. This should be sufficient to constitute "notice" of competing claims on the property, even if--as discussed above--those claims are ultimately unsuccessful. Bob did not disclose to Amanda *when* Steve built the property, so she had no reason to believe that Steve's claim was invalid. Therefore, Amanda is not a BFP and can be sued by Steve. Whether or not those suits will be successful, is another matter. (See analysis above)

3) Breach of Warranties

Amanda may be able to sue Bob for breach of warranty. Regardless of what kind of deed was used to convey the property from Bob to Amanda (i.e., quitclaim or general warranty deed), Bob would necessarily have warrantied that he had marketable title to convey. This warranty promises the transferee that there are no competing claims or other encumbrances on the property. In Maryland, this warranty is breached if another party has an adverse possession claim, so the warranty of marketable title is likely not breached. The facts do not disclose what kind of deed was used, so we also don't know whether Amanda is entitled to damages against Bob for other breaches of warranty.

**JULY 2012 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

QUESTION 2

Paul Plumber owns Plumbing Co., a plumbing company in Harford County, Maryland. Erin Employee works for the company as a plumbing apprentice. Plumbing apprentices are not allowed to use company trucks for personal use, but may take the trucks to and from home and company work sites. However, Erin has used company trucks for personal purposes on a number of occasions. Paul has repeatedly warned her that if he catches her using the trucks for personal use again, she would be fired.

Erin decided to make some extra money by doing some plumbing work for Robby Resident who lives on 1234 Small Street, in Harford County. Paul Plumber knows nothing about this work. In order to fix Robby Resident's plumbing issues, Erin used tools from the Plumbing Co. truck to open the water vault in front of a vacant lot on Small Street to gain access to the problem pipes. Robby, happy that the problem was resolved paid Erin \$400 by check made out to "Erin Employee", which Erin deposited in her account at ABC Bank. Two hours later, Nancy Neighbor returned from work to her home at 1236 Small Street. While walking down the street to get her mail, Nancy fell after stepping on an unsecured water vault cover in front of the same vacant lot on Small Street where Erin did the plumbing work, fracturing her ankle. Several neighbors told Nancy that they saw someone drive up with a Plumbing Co. truck and remove the water vault cover earlier that day where Nancy fell. Plumber finds out about the incident and then fires Erin.

Plumber comes to you, a Maryland attorney, seeking advice about any potential civil claims that can be brought against Plumbing Co. and any defenses to such claims. Discuss fully.

REPRESENTATIVE GOOD ANSWER 1

There are potential civil claims that can be brought against Plumbing Co. on theories of agency and direct liability in the form of negligent entrustment. There are several defenses that can be raised in defense of the agency liability claims. As a preliminary matter the Court will have to determine if Erin acted negligently.

Negligence requires the following elements: 1) a duty owed to the plaintiff, 2) a breach of that duty, 3) causation (direct and proximate), and 4) an injury. Here, Erin owed a duty to secure the water vault after tampering with it for the repair work she was doing. She failed to do so and breached the duty. Nancy, a person living in the residential area where Erin left the unsecured water vault was foreseeable- it does not matter that the lot was vacant; it was in a residential neighborhood. Finally, the injury is the fractured ankle. Although Erin will try to say that the Nancy was not foreseeable because it was a vacant lot, this is weak because it was done in a residential neighborhood and it is likely that somebody would walk through it.

Agency Liability

Agency liability means that a principal is responsible for the actions of an agent that are done within the scope of employment. The employee-employer relationship is the most

**JULY 2012 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

typical agency relationship. Here, Plumbing Co. would be considered the principal and Erin Employee would be considered the agent. Erin's official title is the "plumbing apprentice." The agency relationship exists.

Second, for Plumbing Co. to be liable for the actions of Erin, the actions of Erin must be done within the scope of employment. Within the scope of employment means just that, work that is done in the course of the work that the agent is authorized to do. The Court will have to look to the facts to determine this analysis. Here, Erin has decided to make some extra money by doing some plumbing for Robby Resident. Paul, and Plumbing Co. are unaware of this. In fact, Erin's use of the agency relationship to syphon off clients and profit directly is a breach of the duty of loyalty that she owes to her employer. She sought to be paid outside of the scope of employment as the check made out to "Erin Employee" suggests. Erin deposited this check into her account at ABC Bank.

The liability will then depend on whether there is actual or apparent authority. There does not appear to be knowledge by Plumbing Co., so it is unlikely the court will find actual authority. However, a case can be made for apparent authority. Apparent authority exists when the third party believes that the agent is acting on behalf of the principal. Nancy, arrived at her home 2 hours after Erin, and the company truck had left. There was no relationship between Nancy and the Plumbing Co. or Erin. Here, the third party was informed that the company removed the vault. However, the third party never acted directly with the Erin so this will likely be insufficient to establish liability through apparent authority.

As a final matter, the fact that Plumber immediately fired Erin shows that she was not acting within the scope of employment. For these reasons, Plumbing Co. is not likely to be held liable under a theory of agency liability, also known as respondeat superior.

Negligent Entrustment

Finally, the Company may be held liable on a theory of negligent entrustment. Negligent entrustment exists when a person in authority entrusts a person within their authority negligently with something. Here, Erin had on numerous occasions used the company trucks for personal purposes. Instead, Paul allowed Erin to use not only the company vehicle but also the tools of the company. It was likely that Erin would use personally any company equipment entrusted to her. Nancy will argue that Plumbing Co. was negligent in entrusting Erin to use the company truck and tools to do negligent work. However, Paul may argue that the entrustment of the truck to Nancy was not connected in any way to the negligent conduct of Erin that caused Nancy to fall.

REPRESENTATIVE GOOD ANSWER 2

POSSIBLE CLAIMS

Neighbor v. Plumbing Co -- direct negligence

Even though Neighbor was injured by a water vault cover left unsecured by Erin Employee, the Plumbing Company can be held directly liable for her injury if it was negligent in its supervision of Employee. To make a prima facie case for direct negligence, Neighbor would have to

**JULY 2012 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

establish that Company owed a duty to control or supervise Employee adequately and that by letting her use the company truck even though it has knowledge that she uses it on personal business, the Company breached this duty of supervision. Neighbor would then have to show that this negligent supervision of Employee was both a direct and proximate cause of the fractured ankle Neighbor suffered. In order to show causation, Neighbor would have to establish both that but for the negligent supervision, Employee would not have left the water cover open that tripped Neighbor, and that Neighbor's fractured ankle is a foreseeable harm from Employer's negligent supervision.

In the alternative, Neighbor could argue that Employer's duty was to keep the tools secured in such a way that Employee could not use them without supervision, and that its breach of this duty gave the Employee the opportunity to do unsupervised plumbing work as an apprentice.

Employer's best defense against a direct negligence claim from Neighbor is that there is no proximate causation. If the theory of negligence is around Employer letting Employee use the company truck even with knowledge that she takes it for personal use, Employer can argue that Employee's decision to do unauthorized plumbing work is a superseding event; the harm Neighbor suffered didn't come from the truck itself, but from the work Employee did after using the truck.

If Neighbor argues instead that Employer should have kept the tools locked up so Employee could not do unsupervised plumbing work, Employer could argue that there is a lack of breach of duty at all. Employer is not required to take the best possible action, just a reasonable action, and Employer could establish that it's a reasonable company practice to allow Employees access to tools. There are no facts to indicate that Employee negligently used tools before or that she did so on a side job. Therefore it is more likely that Employer would prevail on the claim.

Neighbor v. Plumbing Co -- third party negligence for respondeat superior

In the alternative, Neighbor could establish that Employee's conduct was negligent, and that Employer is responsible for that negligence under a respondeat superior theory because Employee was acting as a servant of Employer and in the scope of her employment.

To show that Employee acted negligently, Neighbor would have to make a prima facie case that Employee had a duty to adequately secure the water vault after working on it, that she breached this duty by not leaving the cover adequately secured. Next, Neighbor would have to show that this breach of leaving the cover unsecured was the direct and proximate cause of Neighbor tripping on the cover and fracturing her ankle. From the facts, Neighbor could easily establish this negligence case. Employee did have a duty to secure the site, and left the water vault cover unsecured. A walkerby tripping over the cover is the type of foreseeable plaintiff and foreseeable harm that can happen from such negligence. There is no information that Employee would have a case that Neighbor was contributory negligent. However, to hold Employer responsible, Neighbor would then have to establish respondeat superior, which is a showing that

**JULY 2012 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

Employee committed her negligence while she was acting as Employer's servant or employee and in the scope of her employment.

Here, Employer can argue that Employee was on a frolic and not acting in the scope of her employment. She arranged to do the work completely without the knowledge of Employer, and was paid directly for the work as an individual, not as an employee of the company. This is a strong argument.

It would not be an argument that Employer fired Employee after hearing about the incident, because the respondeat superior claim is analyzed as of the time of the incident, and at that time Employee still worked for Employer. Employer is most likely to prevail on either a direct negligence claim or a third party negligence claim.

**JULY 2012 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

QUESTION 3

PART A

Evers is a licensed attorney in Maryland. His office is in Anne Arundel County, Maryland.

On March 2, 2012, Evers received a telephone call from Chance who was seeking counsel to represent him in a case involving a multi-car collision on Route 301 in Prince George's County, Maryland, which had occurred on January 30, 2012. Evers did not know Chance. This was the first contact between them. Chance related to Evers the facts of the collision and the personal injuries and damages that Chance sustained as a result of the collision. Evers declined to take Chance's case.

On May 1, 2012, Evers was contacted by his long-time client, Tinker. Tinker told Evers that he had been involved in the multi-car collision on January 30, 2012, and had been sued in the Circuit Court for Prince George's County, Maryland, by Chance, one of the plaintiffs in that case. Tinker urged Evers to represent him in the case.

Is Evers precluded from representing Tinker in the Circuit Court case? Discuss in detail and define any terms in your response.

PART B

Evers rents his office space from Landlord. His lease contained provisions for periodic repairs to be made by Evers, as tenant. He was notified by Landlord that he had to make fourteen repairs. Evers refused to make all of the repairs demanded by the Landlord. The Landlord obtained counsel who filed suit against Evers on May 7, 2012, in the District Court of Maryland for Anne Arundel County. After being served with the complaint in that case, Evers retained counsel to represent him in the suit. He tendered his rent, but it was returned with a cover letter from the Landlord's attorney directly to Evers. Subsequently, Evers sent a letter indicating his name and address directly to the Landlord. In that letter, Evers complained of the actions which the Landlord had taken and he threatened to commence a suit against the Landlord.

Based on the given facts, has Evers violated any professional conduct rules in the District Court case filed against him by the Landlord? Discuss fully.

PART C

Evers began experiencing a decrease in his monthly income from his law practice and an increase in his expenses for maintaining his professional liability insurance and employment of his law office staff. His remedy for recoupment of these expenses was to add to his statement(s) for professional services for each of his clients an equal percentage of the increased cost of these

**JULY 2012 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

expenses as a part of his billing for his legal representation of each of his clients. His retainer agreements with his clients stated that he would provide monthly itemized statements for his professional services at the agreed hourly rate for time expended and expenses advanced.

On the given facts, did Evers violate professional conduct rules in passing these expenses on to his clients in this manner? Discuss fully.

REPRESENTATIVE ANSWER 1

PART A

Evers is precluded from representing Tinker in this case because of conflict of interest between a present and prospective client if the interests between the two are materially adverse, it is in a substantially similar, or the same matter, and if Evers received significantly harmful information from the prospective client. In this situation the matter that Chance sought Evers representation in is exactly the same as the one Tinker now wants his representation in. The interests of Chance and Tinker are clearly adverse to one another, they are on opposite sides of a litigation. The key to this conflict of interest is if Evers received significantly harmful information from Chance. From the facts it doesn't seem that Chance divulged any harmful information, he simply recounted the injuries he sustained and discussed the basic facts of the case, which are probably available to the public anyway. Perhaps the personal injury information could harm Chance's interest because the Tinker's attorney would know the true extent of his injuries but without more it doesn't seem like this a significant harmful information. Evers would most likely not be precluded from representing Tinker in this case. Even if the information as significantly harmful and he was precluded, Evers would still be allowed to represent Tinker if he could get the information written consent of both Chance and Tinker.

PART B

If Evers is in violation of any rules of professional misconduct it is most likely because he directly communicated with a person whom he knew to be represented by counsel without the informing or getting permission of their counsel. If Evers was representing a client in this action against the landlord, acting in his role as an attorney, then his letter to the landlord would most certainly be a violation of the rule because his receipt of the letter from landlord's attorney put him on notice that landlord had representation. However, Evers is not acting in his role as an attorney. He is engaging in communication with another party in the suit with whom he has both a contractual relationship and a landlord-tenant relationship with. If Evers was representing himself it might be more likely that he would be acting as an attorney but in this case he is represented by counsel and is merely acting as a private party. The bar against communicating with unrepresented clients doesn't apply in this situation and Evers has not violated this rule.

**JULY 2012 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

PART C

Evers may have violated a duty to communicate with his clients and to keep them informed of any changes in his fee charges. The retainer agreements by themselves seem fine and the fact that Evers wishes to increase his fees for legal services is by itself allowable so long as its not clearly excessive. However, Evers must communicate the increases to his clients and get their informed consent to continue with the representation. Furthermore, the fees charged can't be misleading; meaning Evers can't bury his increased charges by creating some separate category. If he wants to increase his hourly rate, which is required to be disclosed every month by the retainer, then he is free to do so. The retainer agreement doesn't allow him to tack on some additional expenditure category. Liability insurance and employment costs are not proper to be considered under the advance expenses category. In order to properly pass on these fee increases to the client Evers should raise his hourly rate and get the informed consent of the client to continue at that rate.

REPRESENTATIVE ANSWER 2

PART A

Conflict of Interest: An attorney should avoid representing a client whose interest is materially adverse to the interests of the other clients unless the attorney reasonably believes that she can provide for a competent representation due to the conflict and seeks the informed consent, confirmed in writing from all affected clients. Here, there is case between Chance ("C") and Tinker ("T") pending in the Circuit Court, indicating that C's interests and T's interests are directly conflict. When direct conflict exists, an attorney cannot represent both.

Prospective Client is one that consults with an attorney regarding the possibility of forming a lawyer-client relationship. Here, while Evers ("E"), after a consultation, "declined" to take C's case. C is E's prospective client.

Conflict between a prospective client and a current client exists when an attorney gets information from the prospective clients that could be harmful to such client's interests. Here, C is E's prospective client and during the initial conversation, C told E the facts of the collision, the personal injuries and damages that C sustained as a result of the collision. These facts can be used by E in his defense of T's case because C and T has involvement in same transaction. Therefore, E should decline to represent T.

PART B

**JULY 2012 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

Contact with a person represented by counsel. An attorney should avoid contact with a person that is represented by a counsel even if it is the person who initiates the contact, without the consent of the other counsel. Here, knowing that the landlord obtained counsel in the suit (because E was served with the complaint which presumably has the landlord's attorney's name on it). E sent a letter "directly" to the landlord, which raised such issue.

Represented persons can communicate between themselves. However, an exception to the above rule is that the represented persons can communicate. Even though E is an attorney, he retained an attorney to represent him in this case and thus becomes a client. Then E is permitted to communicate with landlord directly.

Therefore, E did not violate any professional rules in this situation.

PART C

Attorney's fees must be reasonable, clearly communicated to the client and preferred in writing. Here, passing law firm expenses unrelated to client's representation renders the fees unreasonable. Further, nowhere in the retainer agreement mentioned that E is going to charge clients an equal percentage of the increased cost of the law office expenses. Instead, it simply stated that the fees will be "agreed hourly rate" for time expended and expenses.

Informed consent requires an attorney discuss the nature of the consent and the implications of the continued representation. Here, when E and clients reached an "agreed" hourly rate, no fact indicates that E has discussed fully with the client the hourly rate will include the percentage of the increased law firm expenses. Therefore, even if clients "agreed" upon the attorney fees, it violates the informed consent rule.

Duty of Information requires an attorney to disclose any information that may be of importance to the clients. Here, failure to disclose to the clients the passing expenses subject to such violation because a reasonable client will consider such information is important.

**JULY 2012 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

QUESTION 4

Paul and Donna were married in 2008. They do not have any children but soon after the marriage they purchased a Newfoundland puppy, named Bruno. Paul and Donna have shared care of Bruno, and both adore him. Paul has worked for the State of Maryland since 1990 and earns approximately \$40,000 per year. He has accrued a pension which began just before the parties were married. Donna has worked part-time for a local catering service earning \$15,000 per year. She has no pension benefits. While on the job in 2010, Donna suffered an injury to her left knee for which she filed a worker's compensation claim. She had surgery and has subsequently reached maximum medical improvement. Donna has been compensated for lost wages and all of her medical bills have been paid. She is eligible for a disability award to compensate her for the loss of full function of her knee. She has not yet had a hearing on the matter, but knows she will receive monetary compensation.

Recently, Paul discovered that Donna has had a number of affairs with various men within the last six months. The private investigator he hired has proof of at least three different encounters with three different men during that time. He has the names and addresses of all the men in case they need to be subpoenaed to court.

Paul retains you, a licensed attorney in Maryland, to file for divorce. Paul tells you that he "definitely wants" the following:

1. Custody of Bruno;
2. To pay no alimony;
3. To keep his pension; and
4. One-half of Donna's future workers' compensation award.

As the attorney for Paul, advise him what the court is most likely to do regarding each of the four issues above. Explain fully.

REPRESENTATIVE GOOD ANSWER 1

1. Custody

Bruno, a dog, will be treated like property in the divorce action, because he was acquired during the marriage in a joint purchase by the couple, he will be analyzed as "marital property." A court will not take a look at Bruno's best interests, because he is not a child. Instead, the court will make a regular property distribution of all the marital assets, by awarding percentages to each of the spouses based on non-marital assets, contributions to marital property, means, income-earning potential, age, health, and other equitable factors. The spouse in whose name property is titled will pay a check for the difference of the aggregate amount to the non-titled spouse. What the court will not do is enter into an analysis of which spouse gets which item. If Bruno was not titled in either spouse's name, and they cannot agree on how to share him, the court may award sale and division of the proceeds among the spouses. Thus, I would strongly recommend that Paul come to some sort of understanding with Donna regarding time shared with Bruno.

**JULY 2012 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

2. Alimony

Alimony is based on the same factors as property distribution, as mentioned above, but also considers the circumstances leading up to the divorce and the ability of the spouses to become independent and self-sufficient. To this end, I would encourage Paul to immediately file for absolute divorce, based on Donna's adultery, and to emphasize this as a key factor in their divorce. Paul should also prepare to face such adverse factors as his higher relative income and Donna's physical impairments. Additionally, Paul should tell me if there was any conduct on his part that motivated or condoned Donna's affairs. If Paul and Donna cohabitated after the affairs, immediate divorce will not be available due to condonation. If Paul had his own affairs, he cannot file for absolute divorce based on recrimination.

If Paul can file for divorce, and is made to pay alimony, he can likely expect to pay pendent lite alimony, to sustain Donna while litigation is pending. Permanent alimony is seldom awarded in Maryland, and Paul can defend against a request for such an award by emphasizing that Donna will not permanently be incapable of self-sufficiency, and that their relative income and lifestyles will not be unconscionably disproportionate. Most likely, rehabilitative alimony will be awarded. If in favor of Donna, it will be reduced by the extent to which Paul can emphasize the effects of the adultery, and Donna's self-sufficiency.

3. Pension

Paul will be able to retain the assets from the amount of the pension that he accrued before the marriage. However, the assets accrued during the marriage were actively earned. Even though it is a benefit conferred by the employer, it is attributable to Paul's work activities. These activities are presumed to be at the expense of other contributions Paul could have made to the marriage, and are also presumed to be facilitated by the non-earning spouse. Thus, the pension contributions and proceeds from during the marriage will be distributed as marital property.

4. Future Workers Compensation Award

Donna's worker's compensation award is one of the exceptions to the classification of money earned during the marriage as "marital property." Similar to a tort judgment, it is the independent property of the spouse and is not subject to distribution.

REPRESENTATIVE ANSWER 2

A court may award Paul custody of Bruno if Paul is willing to forego other marital property to acquire the dog. The court will likely mitigate, if not eliminate, Paul's obligation to pay alimony. Paul will also be able to keep his pension, but he will be unable to recover any of Donna's future worker's compensation award.

I. Custody of Bruno

**JULY 2012 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

Paul may be able to obtain custody of Bruno if he is willing to concede other marital property to Donna as part of the divorce.

Upon divorce, the divorcing parties' property is divided under a scheme of equitable distribution. This occurs in three stages: first, the husband's separate property is given to the husband; second, the wife's separate property is given to the wife; and third, the marital property is divided equitably between the divorcing spouses as the interests of fairness require in light of all relevant circumstances. A party's separate property includes (1) any property the party owned before the marriage, (2) any property the party acquired title to by gift or inheritance during the marriage in their name alone, (3) any passive (but not actively-created) appreciation in value of these first two items, and (4) tort judgments and worker's compensation benefits received during the marriage. All other property is considered marital property and divided equitably by the court.

Here, Bruno will be considered marital property. He was bought after the marriage, and does not fall into any of the categories of separate property that would belong either to Paul or Donna. As such, Bruno must be distributed equitably along with the rest of the marital property. While it is ultimately up to the court as to how the issue of Bruno's custody should be disposed of, the court is likelier to award custody of him to Paul if Paul makes concessions to Donna as to some of the marital property. I might suggest to him that, since custody of Bruno is clearly going to be a hotly contested issue-they both adore him-he might want to concede to Donna larger and more significant pieces of the marital property, such as the marital residence, any cars, and other such pieces of property in order to obtain custody of Bruno.

II Payment of Alimony

Paul will likely be able to avoid, much, if not all, of his obligation to pay post-judgment alimony.

Maryland Circuit Courts are authorized to award two forms of alimony. Temporary alimony is awarded at the onset of a case on a need-driven basis alone. If a spouse can show economic need, no matter the likelihood of their success in the case, they will be awarded temporary alimony.

A court awards post-judgment alimony between the parties as fairness and justice dictate, considering all relevant circumstances. The court is required to consider any economic disparity between the divorcing parties. It is also required to consider whether, and to what extent, there is fault underlying the divorce.

Here, Paul may convince the court to mitigate his responsibility to pay alimony. First, if Donna can show need at the outset of the case, Paul cannot avoid any obligation to pay temporary alimony to her.

But, Paul is likelier concerned about his post-judgment alimony obligations. The court will certainly consider the fact that his yearly income is more than twice that of Donna; as such, it may find that he has a baseline obligation to pay her alimony. However, Paul is bringing this

**JULY 2012 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

divorce suit based on at least three, and possibly other, instances of Donna's adultery. I will advise Paul that it is essential that we bring each of these instances, and any information we can find about other of her affairs, to the attention of the court. These may convince the court that Donna's fault was such that fairness dictates that she not profit from Paul's alimony at the conclusion of this case. If we present this evidence of fault, I am confident that Paul's alimony obligation might be substantially mitigated, if not altogether eliminated, by the court.

III. Paul's Pension

Paul will keep his pension. Relevant to this issue is the classification of types of separate property discussed in section I above. Paul's pension began just before the parties were married. As such, it is squarely within the category of his separate property, because it was acquired by him before his marriage. Donna will have no claim to it.

IV. Donna's Worker's Compensation Award

Paul will be unable to acquire any of Donna's worker's compensation award. Again relevant is the classification of separate property in part I. Donna's worker's compensation award is set to be made in the future; as such, it may be awarded after the divorce and not subject to any of the divorce decree at all. If it is awarded before the divorce, it is still a worker's compensation judgment benefitting only one spouse, and so is the separate property of that spouse under Maryland law. Paul will not be able to take any portion of it either way.

**JULY 2012 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

QUESTION 5

Jay organized two entities to conduct investment business, to wit: (1) Alpha, a general partnership; and (2) Bravo, LLC. Peterman, LLC (“Peterman”) invested in both of these businesses. Peterman became a general partner in Alpha and a member of Bravo. Peterman held a minority position in both businesses. Jay was the actual managing member of both Alpha and Bravo. On July 16, 2011, Peterman, without notice to Alpha or Bravo, filed a complaint against Alpha and Bravo and Jay personally. The Complaint alleged that, beginning in 2005, Jay unilaterally and unlawfully took money from Alpha and Bravo and spent it.

Peterman’s Complaint was filed derivatively on behalf of both Alpha and Bravo. Jay filed a Motion to Dismiss alleging (1) in a general partnership, a partner cannot, as a matter of law, file a derivative action on behalf of the partnership; and (2) that while derivative claims on behalf of an LLC are available, Peterman failed to make a good faith demand on Bravo that it act directly to correct the alleged wrong.

a. You are a law clerk to the circuit court judge assigned to the *Peterman v. Jay* case and have been asked by your judge whether Peterman, LLC can bring derivative claims for loss occasioned by Jay’s actions on behalf of the two entities, Alpha general partnership and Bravo, LLC? Explain fully.

b. Is there any other way Peterman, LLC can sue Alpha or Bravo, LLC? Explain fully.

c. After being assigned by the judge to answer the above question as to both Alpha and Bravo, you learn that Peterman LLC’s rights to do business in the State of Maryland were forfeited on December 1, 2010, due to failure to file a tangible personal property tax report. How would this affect Peterman’s ability to file a claim against Alpha and Bravo? Explain fully.

REPRESENTATIVE ANSWER 1

PART A:

MEMORANDUM

To: Circuit Court Judge

From: Applicant

Re: *Peterman v. Jay*

Date: 7/24/2012

**JULY 2012 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

You have asked me to research issues related to the case *Peterman v. Jay*. Specifically, you have asked whether Peterman LLC can bring derivative claims based on Jay's alleged embezzlement of funds from both Alpha, a general partnership, and Bravo LLC, and limited liability company. Derivative suits allow shareholders to sue for damage done to the company as a whole by a director or officer's alleged misconduct. Such suits are generally filed by shareholders against corporations. Whether they are available against Alpha and Bravo LLC will be discussed below.

1. Alpha

A derivative suit is not likely available against Alpha, a general partnership. A general partnership is a combination of two or more persons who enter business for the purpose of making a profit. General partnerships do not have shareholders or stock. Rather, the partners make capital contributions and likely manage the affairs of the business. Partners are personally liable for the obligations of the partnership and are both fiduciaries and agents of the partnership. Because it is not a shareholder, but rather a co-partner and "owner" of Alpha, Peterman LLC cannot likely file a shareholder derivative suit for harm to Alpha allegedly caused by Jay. Rather, Peterman LLC should sue Jay directly in its capacity as a general partner for Jay's breaches of duty to the partnership.

2. Bravo LLC

Assuming derivative suits are available against LLCs, as the parties have apparently stipulated here, to properly file such a suit the shareholder must first file a demand on the board of directors (or in the case of an LLC, the members). The board/members must then investigate the matter and determine whether to proceed to address the shareholder's claims. The derivative suit may proceed only if the board/members decide not to address the matter. There are exceptions to the demand requirement, however. These exceptions include: (1) when a demand on the board/members would be futile; and (2) when the time required for a demand on the board would cause irreparable harm to the company. Here, Jay allegedly, unilaterally and unlawfully took money from Bravo LLC and spent it. Peterman LLC would likely claim that to make a demand on Jay would provide him with opportunity to either take more money or to hide his actions. Further, because Jay is a member of Bravo LLC, Peterman LLC could claim that a demand would be futile because Jay would not investigate or act against himself. Thus, Peterman LLC could potentially maintain a derivative suit against Bravo LLC even without making a demand on its members.

Part B:

Peterman LLC has other options to sue Alpha or Bravo LLC. Shareholders, partners, and members may sue directly when fiduciary duties have been breached. As a general partner of Alpha, and as a member of Bravo LLC, Jay owed a duty of loyalty to the companies. The duty of loyalty prohibits, among other things, self-dealing. Self-dealing is the receipt of an improper personal benefit from the business. Here, Jay allegedly took money from the companies unilaterally and unlawfully. The receipt of money would be wrongful self-dealing and a breach of the duty of loyalty.

**JULY 2012 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

Jay was also an agent of both Alpha and Bravo LLC. Thus, he owed both entities a duty of care. The duty of care requires agents to act for the best interests of the principal in the manner of an ordinarily prudent person under the circumstances. An ordinarily prudent person would not reasonably believe that the unilateral and unlawful taking of money from the principal is in the principal's best interests. Thus, Peterman LLC could likely sue for breach of fiduciary duties.

It seems, however, that Peterman LLC's best course of action would be to sue Jay personally as a partner, agent, and fiduciary, rather than the entities themselves.

Part C:

Peterman LLC would not likely be able to maintain a suit against Alpha and Bravo. A forfeiture occurs when a business entity fails to pay taxes or fees or file the proper reports and documents with the state. When forfeiture occurs, the entity's legal status is terminated. Incident to a business entity's legal status is its ability to sue or be sued in the courts. As of December 1, 2010, Peterman LLC is no longer a legal entity and therefore, has no status to commence a suit against Alpha and Bravo. Peterman LLC's members may be able to maintain suits for their own damages due to Jay's unlawful dealings, but Peterman LLC would not likely be allowed to maintain a suit.

REPRESENTATIVE ANSWER 2

a. Alpha – The case against Alpha should be dismissed because derivative suits may not be filed on behalf of a partnership, and Peterman should go after Jay individually for any alleged wrongs committed in his capacity as general partner.

Bravo – I would inform the judge that derivative claims may be filed on behalf of an LLC to enforce the interest of the LLC as long as the claim is being made with the interest of the LLC in mind, and that typically the rule is that there must be an attempt to make a good faith demand on the LLC to correct the wrong before bringing suit. However, such an obligation to make a good faith attempted demand is waived where such a demand would be futile or would be likely to cause cover-up of the underlying cause. In this case Peterman has a good argument that such an attempt would be futile, especially if Jay is the one who does all the managing, and controls all the books. Jay may be uncooperative and would potentially be able to destroy evidence or have no good come of the attempt by Peterson.

b. Peterman may also be able to bring a direct suit against Alpha or Bravo for the wrongs if he could show a wrong that was specific to him. Since Peterson LLC invested in the partnership of Alpha if that money is not being used for the benefit of the partnership but rather for the good of the partner then Peterson may be able to bring a direct suit against both Alpha and Jay in his individual capacity since partners do not have individual immunity for the actions of the partnership.

c. This would affect Peterman's ability to file suit against Alpha and Bravo because since the LLC forfeited their right to business in Maryland the LLC is not recognized and therefore cannot

**JULY 2012 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

sue or be sued and thus would not have the legal capacity to bring the claim against A and B. Essentially by forfeiting their corporate charter through failure to file their taxes Peterman's LLC fails to exist as entity with a legal capacity. Since they have no legal capacity the LLC has no capacity in which to sue to maintain its rights as investor of Alpha and Bravo.

**JULY 2012 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

QUESTION 6

Harry Homeowner (“Homeowner”) contracted General Construction Company (“GCC”), a properly licensed Maryland corporation, to build an addition on his home in Baltimore, County, Maryland (the “Addition”). The contract included the installation of heating and air conditioning systems to service the Addition.

GCC entered into a subcontract with H&A Corporation (“H&A”), a properly licensed Maryland corporation, to select and install the heating and air conditioning systems for the Addition.

After the Addition was completed, Homeowner contacted GCC several times complaining of problems with the heating and air conditioning systems. GCC notified H&A of the complaints, but H&A took no action to correct the problems. Homeowner has paid all money due under the contract with GCC.

Homeowner has brought suit against GCC in the District Court of Maryland for Baltimore County seeking \$16,000 in damages representing his costs incurred to repair the defective heating and air conditioning systems.

Bob Builder, the president of GCC, comes to you, a Maryland lawyer, regarding the action against GCC. He tells you that after he was served with the Complaint, he tried to contact H&A and has discovered that H&A no longer has a Resident Agent as required by Maryland law.

A. What pleadings and other actions are available for GCC to file to protect its rights and when will they be due?

B. Discuss ways service can be obtained on H&A and when a responsive pleading will be due after service.

REPRESENTATIVE ANSWER 1

A. Since suit was filed in District court, which properly has jurisdiction over the case, GCC should file a notice of intention to defend under Rule 3-307(a) within 15 days after service of the complaint. If GCC does not file the notice on time, the court may determine liability and assess damages based on ex parte proof by the plaintiff, unless the defendant appears and the court is satisfied that the defendant may have a claim (3-307(e)).

Additionally, GCC may wish to seek a trial by jury. GCC has the right to seek a jury trial because the amount in controversy, exclusive of attorney’s fees, exceeds \$15,000 (4-402 (e)). To preserve this right, GCC must file a separate written demand for a jury trial within ten days after the time for filing a notice of intention to defend, or 25 days after service of the complaint (3-325(a) (2)).

**JULY 2012 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

Last, GCC should file a third-party claim against H&A Corporation under Rule 3-332. This third-party claim must be filed at any time before ten days of the scheduled trial date. If GCC waits until within the ten day time period, it will only be able to file the third-party claim with the consent of the plaintiff or by order of the court. (3-332(e)).

B. Service. There are numerous ways that H&A could be served with notice of a third-party complaint by GCC. Since H&A is a corporation, service can be made by serving its resident agent, president, secretary, or treasurer. (3-124(d)). Since H&A no longer has a resident agent as required by the state of Maryland, service may be made by serving the manager, any director, assistant secretary or assistant treasurer, or any other person expressly or impliedly authorized to receive service of process. (3-124(d)).

Alternatively, service may be made on H& A by serving the State Department of Assessments and Taxation. Because H&A is required by statute to have a resident agent, service on SDAT is effective to serve the corporation as long as GCC serves two copies of the summons, complaint, and all other papers filed with it, along with the requisite fee, upon SDAT. (3-124(o)).

Responsive Pleading. H&A, as a third party defendant, must file a notice of intention to defend pursuant to Rule 3-307(b) (1). However, if service is completed on the State Department of Assessments and Taxation or outside the state, the third party defendant has sixty days after service of the complaint to file the notice of intention to defend. H&A can assert any defenses against the third-party plaintiff, or any claims against the plaintiff arising out of the transaction or occurrence that is the subject matter of the original claim between the plaintiff and the third-party plaintiff (3-332(b)). Additionally, if the third-party defendant (H&A) seeks a trial by jury, it must file a separate written demand within ten days after the time its filing of a notice of intention to defend is due.

RESPONSIVE ANSWER 2

A. GCC should file a notice of intention to defend and should implead H&A as a third-party defendant. It should also consider filing a demand for a jury trial.

In a Maryland District Court, under Rule 3-307, a defendant shall file a notice of intention to defend – the equivalent of an answer in Circuit Court. The notice should include any explanations or defenses on GCC’s part and must be filed and served within 15 days after service of the complaint on GCC (through its President, Bob), assuming that Bob was served within the state of Maryland.

GCC should also implead H&A as a third party defendant, because H&A may be liable to GCC for all or part of Homeowner’s claim against GCC. Under Rule 3-333, GCC should implead H&A by serving on it a summons and complaint, along “with a copy of all pleadings, scheduling notices, court orders, and other papers previously filed in the action.” It may do so “at any time before ten days of the scheduled trial date,” without seeking a court order or Homeowner’s consent. As GCC’s counsel, however, I would advise it to file the third-party complaint without delay.

**JULY 2012 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

Finally, I would advise GCC to consider filing a demand for a jury trial under Rule 3-325(a) (2). Such a demand would be due within ten days after the due date of the notice of intention to defend (that is, 25 days from service of the complaint). The minimum amount in controversy for a jury demand is \$15,000, under § 4-402(e) (1); the \$16,000 amount in controversy here surpasses that threshold. A demand for jury trial will cause the case to be transferred to the Circuit Court under § 4-402(e) (2). GCC might consider seeking a jury trial as a strategic matter, if it concludes that the discover devices and other procedures available in Circuit Court would be advantageous to its defense against Homeowner or its third-party claim against H&A.

B. Under Rule 3-1249d), service on H&A could ordinarily be made by serving its resident agent, president, secretary, or treasurer. Because H&A does not have a resident agent, service on H&A can also be accomplished by serving its manager, any director, vice president, assistant secretary, assistant treasurer, or any other person expressly or impliedly authorized to receive service of process. Alternatively, because H&A no longer has a resident agent, Rule 3-124(o) permits substitute service to be made upon the corporation by serving two copies of the summons, complaint, and other papers filed with it (and a fee) upon the State Department of Assessments and Taxation.

If H&A is served within Maryland by service upon one of the officers or employees identified above, any responsive pleading is due within 15 days after the service of the third-party complaint under Rule 3-307(b) (1). If it is served outside Maryland, or by service upon the SDAT, its responsive pleading is not due for 60 days, under Rule 3-307(b) (2).

**JULY 2012 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

QUESTION 7

Carrie is an apprentice with Construction Co., a widgets company in Baltimore City, Maryland. Construction Co. apprentices are not allowed to work on their own, and are only allowed to assist a licensed master widget worker of the company. Carrie has repeatedly been warned that it is against company policy to use the company vehicles or equipment for personal purposes. Carrie decided to make some extra money by doing some widget work for Sam Smith who lives on 1234 Small Street, in Baltimore City. Construction Co. management knows nothing about this unauthorized work. In order to fix Sam's widget issues, Carrie used tools from the Construction Co. truck to open the manhole on the street in order to gain access to the problem widgets. Sam paid Carrie \$1,000 by check for the work. Two hours later, Ned Neighbor went for his daily jog down the street and fell after stepping on the unsecured manhole cover where Carrie had been working earlier. Several neighbors told Ned that they saw someone drive up with a Construction Co. truck and remove the manhole cover in the location where Ned fell earlier that day. Carrie was fired upon Construction Co. finding out about her involvement in the accident.

At a trial in a Maryland Circuit Court by Ned against Construction Co. only, an attempt is made to introduce the following evidence and, in each instance, there is a timely objection:

1. During cross examination by Construction Co.'s lawyer, Carrie is asked about her conviction 11 years ago for armed robbery.
2. Ned's lawyer calls Sam Smith to the stand to testify about Carrie's statement that "Construction Co. allows its employees to do on the spot work after hours under its construction license."
3. On direct examination Sam Smith testified that he believed he made the check payable to "Construction Co." for the work. On cross-examination he is asked by Construction Co.'s lawyer whether he in fact made the check payable to "Carrie" for the work that was done. Sam testified that he never wrote such a check. Construction Co.'s lawyer then immediately attempted to offer the check into evidence signed by Sam Smith and made payable to "Carrie."
4. Ned's lawyer calls Ned to testify that two neighbors told her that Construction Co. had someone working on the block who removed the manhole cover earlier in the day.
5. Ned's lawyer proffers to read into evidence Construction Co.'s answers to interrogatories as to whether or not Construction Co. has liability insurance for the accident caused by Carrie's employment.

You are the judge presiding over the trial. What positions do you believe each party will take as to why each evidentiary matter should be admitted or not? Explain fully how you will rule on each matter.

**JULY 2012 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

REPRESENTATIVE GOOD ANSWER 1

1)

Carrie will argue that the conviction is inadmissible because it is not relevant to make any factor more or less likely in the case. Construction Co's lawyer will argue that it is a conviction that is less than 15 years old and it being presented to impeach Carrie on her truthfulness because it involves an infamous crime--robbery. I would likely rule that this conviction should not be admitted or allowed for impeachment purposes because it is more prejudicial than probative and will tend to confuse the issues for the jury. Also the conviction although within 15 years is still very old. It is highly prejudicial to her as a witness because it is the record of a violent crime from many years ago.

2)

Ned will argue that this is admissible as the admission of a party opponent vicariously by Construction Co. by its agent Carrie. Construction Co. will argue that because Carrie was not working as an agent of the company at the time the statement is hearsay not within any exception. Carrie was not able to bind the company with such an admission because she was not working in the scope of her employment when she spoke. An admission of this kind must be offered by the opposing party against the party who spoke. It was clear that Carrie was not in the scope of her employment when she was working on Sam's widgets; she was directly disobeying her employer's express orders and working against her authority with the company. I would not allow the testimony because it is hearsay.

3)

Ned will argue that this extrinsic evidence is inadmissible to impeach. Construction Co. will argue that extrinsic evidence of a prior inconsistent statement is admissible when the witness has been confronted with the statement and has had an opportunity to answer and defend. The extrinsic evidence here—the check is not collateral because the issue central to the case is whether Construction Co. was responsible for the work that was being done. I will allow the check to enter, if Construction Co. properly confronts Sam with the check.

4)

I would not allow this testimony because it is inadmissible hearsay with no exception. Ned cannot testify about the statements made by the Neighbors who are not a party in the case.

5)

Evidence of liability insurance is not admissible to show liability. It is not relevant to any issue in the case. Ned might argue that it is being offered to show ownership of Carrie, but that is not the issue in this case. The issue is was Carrie working for the Employee at the time of the accident. I would not allow this in because it does not appear to be offered for any other permissible purpose like showing that Construction co. has control over the instrumentalities.

**JULY 2012 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

REPRESENTATIVE GOOD ANSWER 2

1. Carrie's armed robbery conviction

Criminal convictions may be admitted to impeach any witness, as long as the appropriate evidentiary finding is made. Carrie is a witness in a civil case, not a criminal defendant. The crime in question is one that involves dishonestly—theft. Civil witnesses may have convictions for crimes of dishonesty admitted against them when the conviction is more than 15 years old when the probative value of the conviction substantially outweighs the prejudicial effect. Ned will claim that Carrie's conviction should be allowed in to impeach her testimony, as it is highly probative as to why she should not be trusted as a witness. Construction Co. will claim that the prejudicial effect is too great because the crime is a very old violent crime. As the judge, I will rule that the conviction should not be admitted. The probative value is slight because it is an old conviction, and the prejudicial effect against a person convicted of armed robbery is likely great.

2. Sam's testimony about Carrie's statement

Sam's testimony will be hearsay because if it is an out-of-court statement offered to show the truth of the matter asserted: that Carrie had the authority from Construction Co. to perform the work. As such, Sam will need a hearsay exception because the statement is offered for the truth of the matter asserted. A statement is an exception to hearsay if it is an admission by a party-opponent. Here, Construction Co. is the party opponent, not Carrie, and so Sam will have to show that Carrie is an agent or authorized speaker for Construction Co. before the statement will be admitted as a party admission. In many ways, this is the claim at issue in the case. In ruling whether Carrie was authorized to make the statement, I may not look only at the statement itself for evidence of authority. Rather I must look to other evidence as well. Since there is evidence that Carrie was employed by Construction Co. at the time and provided access to its equipment and vehicles, I would assume she could testify to the policies regarding the use of those things. I would admit the statement as a party admission.

3. Check to Carrie

The check made out to Carrie may be offered against Sam to impeach him as a prior inconsistent statement. A prior inconsistent statement may not be proved by extrinsic evidence unless it involves something that is not collateral to the issues in the case. Here the check which verifies that Sam wrote the check to Carrie and not Construction Co. is the main issue of the case. Also, the witness must be given a chance to explain or deny the inconsistent statement before extrinsic evidence is offered. Here, Sam was not given this opportunity before the check was put in evidence. I will rule that the check may not be offered into evidence to impeach Sam because he was not given a chance to explain or deny it.

4. Ned's testimony of the two neighbor's statement

The statement of the two neighbors is hearsay because it was offered for the truth of the matter asserted. Whether or not Construction Co. was working on the block is a statement that is offered

**JULY 2012 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

for its truth, as Construction Co.'s work is the subject of the suit. The hearsay exceptions for present sense impression or then-existing mental state do not apply because the neighbors were describing something that happened earlier in the day, not describing the present conditions. No other hearsay exception applies here, so I will rule that the statements should not be admitted.

5. Evidence of liability insurance

Evidence of liability insurance may not be offered to show proof of fault or the amount of a claim, but may be offered to show some disputed fact like ownership or control. Here, there is no question that Carrie was employed by Construction Co., the question is whether her acts were in the scope of her employment. If Ned could show that the answers show that Carrie was in the scope of her employment at the time, they may be admitted. In the unlikely case that Ned can prove that the insurance information was needed to show control, I would offer a limiting instruction to the jury explaining what purposes the evidence of liability insurance may be used. Otherwise, I would rule that the insurance information should not be admitted.

**JULY 2012 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

QUESTION 8

Smith (“Smith”) owned Blackacre Farms (the “Farm”), a large parcel of real estate in Baltimore County, Maryland. Smith leased the Farm to Jones (“Jones”) who, pursuant to a lease agreement (the “Lease”), operated the Farm as his primary livelihood and hoped to do so for the rest of his life.

The Lease contained a clause stating, in pertinent part, “In the event Smith receives an offer to purchase the Farm, and decides to accept the same, he shall first offer the Farm to Jones, for the price and on the terms of the intended sale, and Jones shall have thirty (30) days from the date of such offer in which to accept or reject the same.” (the “Right of First Refusal”).

On March 1, 2012, Smith received an offer from Buyer to purchase the Farm for \$1,000,000 (“Buyer’s Offer”) with Settlement to occur on April 20, 2012. At Smith’s request, Buyer’s Offer contained an addendum (the “Addendum”) stating:

- “1. This contract is subject to Jones’ Right of First Refusal;
2. Buyer agrees that she will not operate a farm on the property.”

On March 2, 2012, Smith wrote a letter to Jones notifying him that he had accepted Buyer’s Offer contingent upon Jones’ failure to exercise his Right of First Refusal. Attached to the letter was a copy of Buyer’s Offer and the Addendum.

On March 20, 2012, Jones executed and delivered to Smith an "Agreement of Sale," which purported to exercise his Right of First Refusal ("Jones’ Offer"). Jones’ Offer matched all the terms of Buyer’s Offer, except that it omitted the prohibition against farming included in Addendum.

On April 1, 2012, Buyer presented a new offer to Smith increasing the purchase price to \$1,200,000 (the “Second Offer”). The following day Smith notified Jones of the Second Offer reflecting the higher price and requested advice as to whether Jones would exercise his Right of First Refusal and meet the increased sale price of the Second Offer.

On April 20, 2012, Jones responded that, because he previously had exercised his Right of First Refusal, a binding contract had been formed and Smith had no authority to make or accept additional offers to sell the Farm.

The next day, Smith advised Jones in writing that Jones’ Offer was not an effective exercise of his Right of First Refusal and that the Second offer was accepted.

Jones files a lawsuit in the Circuit Court for Baltimore County alleging the above facts that seeks specific performance to compel Smith to honor the terms of Jones’ Offer and sell him the Farm.

**JULY 2012 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

The judge has come to you as a law clerk and recently admitted attorney to brief before trial the following issues:

- a. What contractual defenses will Smith raise to argue the Right of First Refusal was not properly exercised?**

- b. Whether Jones' exercise of his Right of First Refusal was effective? Explain fully.**

REPRESENTATIVE ANSWER 1

Because this question is about a contract for the sale of land, it is governed by the common law of contracts.

A contract must contain an offer, acceptance, and bargained-for consideration by both parties. Here, there was a valid lease between Smith and Jones that included a Right of First Refusal as long as Jones accepts “for the price and on the terms of the intended sale” within 30 days of the offer.

When Smith “received an offer from Buyer to purchase the Farm for \$1,000,000,” the lease made it necessary for him to show the offer to Jones. He notified Jones of the offer and said he was accepting it “contingent upon Jones’ failure to exercise his right of first refusal.”

Although Jones “executed and delivered to Smith an Agreement of Sale,” it failed to include the terms in the Addendum that was part of the original offer.

PART A

Under the common law of contracts, when the acceptance does not mirror the offer, it is considered a counter offer that may be rejected. As such, Smith can argue that this was not a proper exercise of his Right of First Refusal and reject the counter-offer.

Additionally, Jones’ lease states that he can only “accept the same” offer as was made to Smith. Since the offer made to Smith included the addendum, Jones’ offer must also include the addendum. As such, this was an improper invocation of his right of first refusal and a breach of the lease agreement.

PART B

Jones’ exercise of his Right of Refusal was effective. Since it was just a partial breach of the terms of his contract and the settlement was to occur “on April 20, 2012,” Jones still had the opportunity to fix the offer to include the addendum. Smith should have told him that the offer would only be accepted with the addendum before accepting “additional offers to sell the farm.”

**JULY 2012 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

Additionally, since the terms of the addendum were “at Smith’s request,” Jones can assert that this offer was a fraudulent way of removing Jones from the property and taking away his “primary livelihood” of farming. As such, the contract between Smith and Buyer would be invalid.

REPRESENTATIVE ANSWER 2

TO: JUDGE

FROM: Applicant Attorney

RE: Jones v. Smith

After reviewing the information provided regarding the right of first refusal, it appears that Jones did not properly exercise his right of first refusal and it was not effective. As a contract relating to an interest in property, this issue will be governed by the law of contracts.

a. Contractual Defenses Smith will Raise to Argue that the Right of First Refusal was not Properly Exercised:

Under contract law, a right of first refusal gives a party an opportunity to match or meet an offer for a piece of land or interest that a party has. It is essentially an option contract, giving the offeree the ability to accept the contract under the same terms and conditions as that another party has already offered to meet.

In this case, the lease agreement between Smith and Jones, contained a right of first refusal, as provided in the documents, in the event that Smith receives an offer for the purchase of the farm, he must first offer the Farm at the same price and the same terms as Jones, the person currently leasing the property. Furthermore, Jones has 30 days to accept. This agreement is in writing and is effective and enforceable under contract law. Accordingly, when Smith got the offer from buyer to purchase the Farm for \$1,000,000, the contract contained a requirement that Jones be given a right to first refusal. Jones, received a letter from Smith, and attempted to exercise the right of first refusal by forwarding to Smith an Agreement of Sale.

There is one major issue that Smith will raise with Jones’ attempt to exercise his right of first refusal. Jones, letter, purporting to accept the contract/right of first refusal, omitted the prohibition against farming in the addendum. Under Contract Law, the offeror has the power to create the terms of acceptance. When an offeree, under common law, purports to accept a contract under different terms than the ones offered by the offeror, such conduct will be an effective rejection of the original contract, and operate as a counter offer.

In this case, Jones, right of first refusal gives him the ability to accept the offer that is being made by potential buyer. Here, the agreement between buyer and Smith contained the addendum which stated that the buyer agrees that she will not operate a farm on the property.

**JULY 2012 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

Accordingly, when Jones was made the same offer with the option to accept, he had to exercise those same terms. Therefore, by omitting the language, Jones effectively rejected the offer and made a counter offer.

Smith will also, argue, that even if Jones made an effective acceptance of the first offer, he was entitled to accept/consider the Buyer's second offer. There appears to be nothing in the language of the contract that would prevent Smith from accepting, and considering additional offers from potential buyers.

b. Whether Jones' exercise was Effective.

As discussed above, Jones' first rejection of the language operated as a counter offer and was not an acceptance. However, if that was not an effective acceptance, then Smith should have accepted the first offer of \$1,000,000 from the buyer. However, Smith appeared to treat it as an acceptance, and considered a higher offer. He should be estopped from such conduct. Moreover, it is unclear whether Smith included the farming restrictions in the contract himself, or they were actually requested by the buyer. A right of first refusal should be exercised and utilized in good faith. As provided in the facts Jones used the Farm land as his primary livelihood and hoped to do so for the rest of his life. Smith should not be permitted to frustrate the purpose of the right of first refusal by incorporating language into the contract that he knows will make it impossible for Jones to exercise his right. We should obtain more information regarding this provision. Accordingly, Jones' exercise of his right of first refusal was not effective because he did not comply with the same standards of the original offer. However, if the provision was put in to frustrate the right and make it not exercisable it should not be enforced

**JULY 2012 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

QUESTION 9

The State of Maryland, in an effort to provide an economic boost to the Maryland tourism industry, recently enacted legislation decreeing that “No billboard of any kind shall be erected advertising, recommending, endorsing, or otherwise promoting in any way any town located on or within 25 miles of the Atlantic coast of the United States of America, other than Ocean City, Maryland. Any such violation of this provision shall be punishable by a civil penalty not to exceed \$10,000 and/or 15 days in jail. This provision shall be applied retroactively to January 1 of the current calendar year.”

On February 1, 2012, Dan erected a billboard on a piece of real property he owns along Interstate 95 in Cecil County, Maryland, encouraging people to visit the town of Hilton Head Island, South Carolina, which is located on the Atlantic coast. On March 1, 2012, the billboard ordinance was signed into law by Maryland’s Governor. On April 1, 2012, Dan was issued a citation by the Maryland State Police charging him with a violation of the billboard ordinance and imposing the maximum financial penalty applicable for a violation of the billboard ordinance. In accordance with the procedures outlined on the citation, Dan immediately requested a hearing.

Dan has engaged you, a licensed Maryland attorney, to defend him at the hearing.

What arguments would you make to the court on his behalf? Explain fully.

REPRESENTATIVE ANSWER 1

To bring an action against the state, a party needs standing, which means that there is fairly traceable injury from a state action, with possible redress for that injury.

Here, Dan was issued a citation by the Maryland Police, charging him with a violation of the billboard ordinance and imposing the maximum financial penalty applicable for a violation of that ordinance.

Thus, Dan is injured by the Maryland statute. He has standing to challenge the ordinance.

Under the 1st/14th Amendments, the government may only prohibit content-based, fully-protected speech under strict scrutiny examination. This means that the government needs a compelling interest to prohibit such speech, without a less prohibitive option available to the government. Statutes limiting speech cannot be too broad, under 1st Amendment examination.

Here, the Maryland legislation decrees that “No billboard of any kind shall be erected advertising, recommending, endorsing, or promoting in any way any town located on or within 25 miles of the Atlantic coast.”

This is a prohibition on content-based speech, because it is dealing with speech that promotes certain towns. Hence, the Court will examine the ordinance under strict scrutiny.

**JULY 2012 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

Maryland's reason for prohibiting the speech--"to provide an economic boost to the Maryland" tourism industry, is not a compelling reason to prohibit speech, and there are less burdensome ways to obtain this goal, such as increased funding to advertise the Maryland tourism industry.

Hence, Dan should argue that this ordinance does not withstand strict scrutiny examination.

A Court will rule for Dan on this point.

Also, this ordinance therefore relates to speech covering too wide of any area--any town within 25 miles of the coast, and it covers too many types of speech--advertising, recommending, endorsing.

Thus, Dan should argue that the ordinance is overly broad, and thus violates that First Amendment principle.

A Court will rule for Dan on this point.

Under the Commerce Clause, Congress regulates interstate commerce. Under Dormant Commerce Clause interpretation, a state may not pass a facially-discriminatory statute, against out-of-state business interests, unless that statute withstands strict scrutiny examination.

Strict scrutiny means that there is a very important local interest to pass the facially-discriminatory statute, without a less-burdensome alternative available.

Here, the ordinance prohibits the advertisement for tourism to all places, except Ocean City Maryland. Thus, it is facially-discriminatory against out-of-state tourist locations. Indeed, Dan's billboard ad had promoted tourism to South Carolina. Hence, the Maryland ordinance requires strict scrutiny examination, under the Dormant Commerce Clause.

Maryland's reason for the statute, to promote local tourism, are not an important enough local interest in order to justify a facially-discriminatory statute. Also, there are less burdensome ways to promote Maryland tourism, such as increased funding to advertise the Maryland tourism industry.

Hence, Dan should argue that this ordinance violates the Dormant Commerce Clause.

A Court will rule for Dan on this point.

Under the Equal Protection Clause, (5th/14th Amendments) a government may discriminate against a non-suspect class of people, if the statute in question is rationally related to a legitimate government interest.

The statute discriminates against non-Maryland tourism businesses. Here, Dan has such a business interest, but he is not in a suspect class of people. Hence, rational-review applies.

Maryland's interest, local tourism is legitimate, and its statute is reasonably related to such an interest.

Hence, a Court will rule against Dan on Equal Protection argument.

Under the 8th Amendment, government may not impose a cruel and unusual punishment.

**JULY 2012 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

Here, the ordinance allows a punishment of a fine up to \$10,000 and /or 15 days in jail.

And, in fact, the State Police imposed the maximum fine on Dan.

Therefore, Dan should argue that this fine is excessive—he is charged an exuberant fine for simply putting up a billboard ad promoting tourism to South Carolina. Dan should argue that the ordinance therefore violates the 8th Amendment, because it charges Dan a cruel and unusual punishment.

Under the 5th/14th Amendment, a government may not pass an ex post facto law, meaning that it may not pass a law that makes a person guilty of violation of an ordinance, if that person's action occurred before the ordinance made those actions illegal.

Here, Dan erected a billboard on February 1, 2012. The billboard ordinance was signed into law afterward, on March 1, 2012, and the Police issued the citation on April 1, 2012.

Hence, Dan should argue that the ordinance is an ex post facto law, as applied to Dan's violation.

On the basis of the arguments above, Dan should seek declaratory relief, and an injunction that the state ordinance is illegal, and that Dan's fine is vacated.

REPRESENTATIVE ANSWER 2

1) Standing

As a preliminary matter, Dan meets the requirements of standing necessary to challenge this law. Standing requires a plaintiff to show (1) injuries, (2) causation, and (3) redressability. Dan has been injured by the law and by the government's enforcement, and his injuries can be remedied by overturning this law.

2) Free Speech & Commercial Speech

My first argument on Dan's behalf is based on the 1st Amendment's Free Speech Clause. The 1st Amendment initially applied only to the federal government, but was incorporated against the federal government by means of the Due Process Clause of the 14th Amendment.

The 1st Amendment prohibits interference with citizens' right to free speech. When state laws interfere with this fundamental right, and whenever the law restricts speech on the basis of content, that law is analyzed under the strict scrutiny standard. This standard requires the state to prove the law is narrowly tailored to achieve a compelling government interest. Here, the only apparent reason for the Maryland law is to achieve the "boost" of economic protectionism. This is not a compelling state interest, and so the law should fall. Moreover, there is no tailoring whatsoever; the law imposes a blanket restriction on all non-Ocean City ads. Therefore, even if the government had a compelling interest, the law would fall.

The government may attempt to defend on the grounds that this law is merely a regulation of commercial speech, because the law is limited to billboard advertisements. With respect to commercial speech, the government may ban untruthful advertising, but any limitation on

**JULY 2012 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

truthful ads must be narrowly tailored to a substantial government interest. This test is less rigorous than strict scrutiny, but the law would still fail this test. The government's interest in protectionism is not substantial (see above), and its restriction has no tailoring.

3) Ex Post Facto Law

My second argument would be that this is an ex post facto law. The Constitution (through the Ex Post Facto Clause) prohibits the passage of any law that retroactively imposes criminal liability. Here, Dan's advertisement went up in February, when the billboard was legal. When Maryland passed its law on March 1, it made Dan's **prior** act of erecting the billboard, as well as any other citizens' billboards back to January 1, illegal. Therefore, Maryland's law had a retroactive effect and is a violation of the Ex Post Facto Clause.

4) Contracts Clause

I would also argue that Maryland's law is a violation of the Contracts Clause. The Contracts Clause prohibits the passage of laws that interfere with existing contractual relationships absent some overriding government emergency. Here, Dan and other advertisers presumably had contracts related to their advertising, which is now illegal. As discussed above, this law is not supported by any government emergency. Therefore, Maryland's laws violated Dan's rights under the Contracts Clause.

5) Cruel & Unusual Punishment

My fifth argument on Dan's behalf would be that this law is a violation of the 8th Amendment's prohibition on cruel and unusual punishment. Like the 1st Amendment, the 8th applies to the states by way of incorporation through the Due Process Clause of the 14th.

The constitutional prohibition on cruel and unusual punishment prohibits punishments that are unfairly or unreasonably disproportionate to the charged offense. Here, even if the law was legitimate, Dan was subjected to a \$10,000 fine, which seems extremely excessive in relation to the crime charged. However, to better determine the legitimacy of this argument, it would be good to know how much Dan profited by these advertisements.

6) I would also challenge this law as a violation of the (Dormant) Commerce Clause. The Commerce Clause gives the US Congress plenary power to regulate interstate commerce. Supreme Court jurisprudence has read into this provision a doctrine that prohibits states from passing laws that "unduly burden" or discriminate against interstate commerce. Moreover, if the state has no legitimate health and safety purpose for its law—i.e., if the law is purely protectionist—the state's law is automatically void. Here, as discussed above, the facts suggest there is no legitimate purpose for this law. Because the law targets all out-of-state advertisements to the exclusive benefit of Ocean City, MD, it is a protectionist law that impermissibly discriminates against out-of-state advertisers. There is no obvious health or safety rationale that could be used to excuse this law and, even if there was, the law would still only be permissible if it was the least intrusive means of achieving that legitimate state purpose. Here, there is simply no way that this law is the least intrusive means to achieving any state interest.

**JULY 2012 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

7) Equal Protection Clause

There is a potential argument to be made that this law violates the Equal Protection Clause of the 14th Amendment, which prohibits discrimination. Here, the law plainly discriminates against non-Ocean-City advertisers. Unfortunately for Dan, however, the standard of review for an EPC claim is determined by whether the victim of discrimination is part of a suspect class. Here, the victim is non-Ocean-City advertisers. This is not a “protected class” and so discriminatory law would be upheld under the EPC unless Dan could prove that the discrimination is not rationally related to a legitimate government purpose. Even though this is perhaps Dan’s weakest argument, it could still succeed due to the fact that Maryland’s economic protectionism is not a legitimate government purpose.

8) Procedural Due Process

My final challenge on Dan’s behalf arises directly out of the Due Process Clause of the 14th Amendment. The Due Process Clause protects citizens’ rights to both substantive and procedural due process. Here, Dan’s procedural due process rights were violated when he was subjected to a \$10,000 fine without prior notice and a hearing. To deprive a citizen of their property, the due process clause requires that citizen to be provided with notice and opportunity for a hearing. Dan was cited and fined on April 1 and “in accordance with the procedures outlined on the citation” Dan immediately requested a hearing. The state can only deny a prior hearing if, upon balancing the state’s interests against the citizen’s interests, it is found that there is a need for penalty to be imposed immediately. Here, the state has no clear need to fine Dan without a prior hearing. In contrast, Dan is being fined \$10,000, which to most individuals, is a very drastic penalty that could have immediate ramifications. Therefore, the state does not have a legitimate basis for denying a prior hearing for that reason the law is unconstitutional.

**JULY 2012 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

QUESTION 10

During the evening of June 7, 2012, Abel approached a silver 2012 Ford Focus stopped at a gas station in Prince George's County which was driven and owned by Bob. Abel pulled a handgun from his pocket, pointed it at Bob and told him to give him his money and watch. Bob complied.

Abel then told Bob to get out of his car. Bob refused to do so and grabbed a billy club he had in the vehicle. Abel fatally shot Bob and pulled him from the vehicle, got in the vehicle and drove away.

The gas station attendant observed the incident and called 911 to report it and gave a description of the car. The police arrived on the scene and sent out a police broadcast identifying the car and tag number. Officer Dave, in a marked police car, was on the lookout for the 2012 Ford Focus. He spotted the vehicle driven by Abel. Officer Dave tried to stop the vehicle using his lights and sirens. Abel took off and after a high speed chase Abel rammed the Ford into Officer Dave's police vehicle disabling both vehicles.

Officer Dave removed Abel from the Ford Focus, handcuffed and searched him. The officer recovered a marijuana cigarette and rolling papers from Abel's shirt pocket and a loaded handgun in his pants pocket.

You are an Assistant State's Attorney for Prince George's County and have been asked to prepare a proposed indictment against Abel.

List the criminal charges you would place in the indictment against Abel reciting the factual basis for each criminal charge. Ignore any traffic offenses.

REPRESENTATIVE ANSWER 1

Count 1 – 1st Degree Murder

On or about the 7th day of June, 2012, Abel intentionally and with premeditation caused the death of Bob at the gas Station in Prince George's County, Maryland, in violation of the Maryland Rules.

Abel shot and killed Bob. Abel watched Bob pull out the billy club in the vehicle. Abel could have had a moment to reflect on what he was doing, and even a slight moment is sufficient for premeditation. There will not be any self-defense because Abel was the first aggressor and initiated the offense.

**JULY 2012 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

Count 2 – Felony Murder

On or about the 7th day of June, 2012, Abel while in furtherance of any of the following offenses; armed robbery, robbery, armed carjacking, vehicle theft, caused the death of Bob at the gas Station in Prince George’s County, Maryland, in violation of the Maryland Rules.

Abel was committing one of the several felony offenses that would be the basis for felony murder. When Abel caused the death of Bob during the course of those enumerated felonies, this creates a factual basis for felony murder.

Count 3 – Attempted Murder

On or about the 7th Day of June, 2012, Abel attempted to cause the death of Officer Dave while driving in his 2012 Ford Focus in Prince George’s County, Maryland in violation of the Maryland Rules.

Abel purposefully drove his vehicle into the vehicle of Officer Dave during a high speed chase. A vehicle at high speeds can be a very dangerous weapon. It could be shown that Abel was attempting to kill Officer Dave when he decided to ram his car into the officer.

Count 4 – 1st Degree Assault – Handgun

On or about the 7th day of June, 2012, Abel intentionally and recklessly committed assault with a handgun of Bob at the gas station in Prince George’s County, Maryland in violation of the Maryland Rules.

A 1st degree assault is any assault that involves the use of a handgun. When Abel tried to pull Bob out of the car and then brandished the weapon and shot Bob, this would meet the elements for 1st degree assault.

Count 5 – 1st Degree Assault – Serious Physical Injury

On or about the 7th day of June 2012, Abel intentionally and recklessly committed assault resulting in serious physical injury of Bob at the gas station in Prince George’s County, Maryland, in violation of the Maryland Rules.

Count 6 – 2nd Degree Assault

On or about the 7th day of June, 2012, Abel intentionally and recklessly committed assault of Bob at the gas station in Prince George’s County, Maryland in violation of the Maryland Rules.

Abel assaulted Bob when he pointed the gun at him, when he shot the gun and it hit Bob.

**JULY 2012 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

Count 7 – Armed Carjacking

On or about the 7th day of June, 2012, Abel took the vehicle of Bob without permission while utilizing a handgun at the gas station in Prince George’s County, Maryland in violation of the Maryland Rules.

Abel pulled a gun on Bob as he attempted to pull him out of the vehicle. Bob was shot, and Abel successfully drove away in the car.

Count 8 – Armed Robbery

On or about the 7th day of June, 2012, Abel with intent to steal utilized used force and a handgun against Bob at the gas station in prince George’s County, Maryland in violation of the Maryland Rules

When Abel pulled the gun on Bob initially, we do not know whether Abel intended to take the car or not. We know he intended to steal something. A jury may end up finding that Abel did not intend to steal the car, but the he intended to take something else from Bob, which would be an armed robbery rather than an armed carjacking.

Count 9 – 1st Degree Assault – Deadly Weapon or Dangerous Instrument

On or about the 7th day of June, 2012, Abel intentionally and recklessly committed assault on Officer Dave by utilizing his vehicle as a deadly weapon or dangerous instrument in Prince George’s County, Maryland in violation of the Maryland Rules.

Abel successfully rammed Officer Dave’s vehicle. The vehicle was being used as a battering ram, and potential for Dave being hurt were significant. This would be an assault.

Count 10 – Possession of Controlled Dangerous Substance

On or about the 7th day of June, 2012, Abel possessed a controlled dangerous substance, to wit, marijuana, in Prince George’s County, Maryland in violation of the Maryland Rules.

Abel was found in possession of a marijuana cigarette in his pocket.

Count 11 – Possession of Controlled Dangerous Substance – Paraphernalia

On or about the 7th day of June, 2012, Abel possessed paraphernalia with intent to use with a controlled dangerous substance, to wit, rolling papers, in Prince George’s County, Maryland in violation of the Maryland Rules.

Able was found in possession of rolling papers in his pocket.

**JULY 2012 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

Count 12 – Possession of Firearm during the commission of a Dangerous Felony

On or about the 7th day of June, 2012, Abel possessed a handgun in the course of Counts 1 – 5 or Counts 7 - 9, in Prince George’s County, Maryland in violation of the Maryland Rules.

Abel had a handgun in his possession, and he used that handgun while committing several dangerous felonies.

Count 13 - Unlawful Possession of a Handgun

On or about the 7th day of June, 2012, Abel possessed a handgun in Prince George’s County, Maryland in violation of the Maryland Public Safety Articles.

The Maryland Public Safety Articles prevent a person from possessing a handgun unless certain exceptions apply. Abel had a handgun in his possession and none of those apply.

Many of these offenses would merge into each other. The greater offense could be charged, and the State’s Attorney could rely on less included instructions, or all potential offenses would be indicted at the discretion of the State’s Attorney. Many of these are related to each other. In a best case scenario, Abel could be found guilty of Murder of Bob, Armed Carjacking of Bob, Attempted Murder of Dave, Unlawful Possession of a Firearm, Possession of Controlled Dangerous Substance and Possession of Controlled Dangerous Substances – Paraphernalia.

REPRESENTATIVE ANSWER 2

Abel (A) may be charged with the following crimes:

Handgun violation. A person may not possess or use a handgun in public without a permit. A handgun is a firearm that uses a powder explosive. Here, A “pulled a handgun from his pocket and pointed it at Bob” later, Officer Dave “recovered a loaded handgun” from A’s pocket as part of a lawful search incident to arrest

Use of a deadly weapon in the commission of a crime of violence. A person may not use a deadly weapon in the commission of a crime of violence. Here, A committed a first degree assault on Bob (discussed below) using a handgun (discussed above).

Reckless endangerment. Reckless endangerment exists when a person engages in conduct that they know or should know is highly likely to result in serious bodily injury. Here, A, used a handgun in a public place to commit a robbery. He committed the crime again in his high speed chase with Officer Dave, and again when he rammed Officer Dave’s car.

**JULY 2012 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

Robbery with a dangerous weapon. Robbery requires the intentional taking and carrying away of the property of another with the specific intent to do so, and with the use of a deadly weapon. Here, A, took and carried Bob's money and watch, and later his car.

Robbery may be charged on the same facts above, but does not require the use of a dangerous weapon.

Theft is the intentional taking and carrying away of the property of another with the specific intent to do so. Here, A, took and carried Bob's money and watch, and later his car.

Car jacking is intentionally taking possession of another's car by force. Here, A, forced Bob from the car by fatally shooting him, getting in the vehicle, and driving away.

Murder in the second degree is intentionally causing the death of another without premeditation and deliberation. Here, A, shot Bob after Bob went after A with a billy club.

Voluntary manslaughter can occur either when someone acts with reckless disregard for the serious bodily injury that might ensue from their actions, or when they have an imperfect defense to murder. Here, A, acted with reckless disregard for Bob when he shot him. Also, A, acted in imperfect self-defense: although he can claim to be acting in defense from Bob who had a billy club, he responded with a greater amount of force than was required, and he also initiated the conflict to begin with.

Felony murder. When a defendant causes the death of another while committing a dangerous crime, such as robbery or assault, they can be charged with felony murder. Here, A, killed Bob while committing a robbery with a deadly weapon, a first degree assault, and a car jacking.

Assault in the first degree. This crime requires intentionally placing someone in the immediate apprehension of danger through the use of threat of violence, using of a deadly weapon. Here, A, used a handgun to assault Bob, which placed Bob in immediate apprehension of danger, since Bob grabbed a billy club to defend himself.

Assault in the second degree. The same facts above support a charge of second degree assault, which have the same elements as first degree without the use of a deadly weapon requirement. A can be charged with a second assault when he rammed Officer Dave's car; if the car is regarded as a "deadly weapon," he could be charged with first degree assault for this instance as well.

Possession of a controlled dangerous substance. A person may not possess a controlled dangerous substance. Here, marijuana is such a substance and A possessed a marijuana cigarette, which was lawfully discovered in a search incident to arrest.

Attempt. All of the above crimes may be properly charged as attempts, except for Assault, which is a general intent crime.