

**FEBRUARY 2014 MARYLAND BAR EXAMINATION
QUESTIONS AND REPRESENTATIVE GOOD ANSWERS**

In order to assist the person 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. Extracts of statutory material and rules are not included.

2. The Representative Good Answer(s) consists of one or more actual answers to the essay question. 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 questions. The Representative Good Answers are not average passing answers nor are they necessarily answers which received a perfect score; they 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.

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QUESTION 1

Arthur and Judy are residents of Shadyside, Maryland. They dated each other in their senior year of high school and believed they would be together forever. However, by November, 2013, Judy decided she disliked Arthur and broke off the intimate relationship. A few weeks later, Arthur learned from Judy's friend, Carol, that Judy is four months pregnant with Arthur's child and intends to give Carol custody of Baby as soon as Baby is born.

Arthur is distraught over this news, as he still loves Judy. He found a night job that pays him a good annual salary in the hopes of convincing Judy to marry him, and to keep Baby. Despite his pleas, Judy informed Arthur that she has reached an agreement with Carol and will allow Carol to have custody of Baby in May, 2014, upon Baby's birth.

Arthur comes to you, a licensed Maryland attorney and asks:

- A. Whether Carol can be granted custody of Baby without his consent;**
- B. Whether he may be awarded custody of Baby;**
- C. Whether he can receive any support from Judy in the event he is successful;
and**
- D. If so, how the amount of support is determined.**

What would you advise? Discuss fully.

REPRESENTATIVE ANSWER NO. 1

A. Whether Carol can be granted custody of Baby without Arthur's consent

The question here is whether it is permissible for one parent to unilaterally terminate the parental rights of another parent. The general rule regarding child custody is that a biological parent is presumptively entitled to custody, absent a showing of unfitness or other extraordinary circumstances. Paternity can be established by a marital presumption, or by acknowledgment by the father.

Establishing Paternity

On these facts, though Arthur is not entitled to a presumption of paternity, he has held himself as the child's father, and there seems to be no dispute as the fatherhood. If necessary, if it is in the best interests of the child, the court may order a paternity test. Being that paternity is not in dispute, these facts likely do not require that step.

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Custody to Carol

While adoption in Maryland does not require going through a state agency, and a parent may waive in their parental rights, there is no ability for one parent to unilaterally terminate the rights of another parent in favor of a third party. Parental rights are fundamental, and there is a presumption in Maryland that the biological parents are the most suitable parent to raise a child. Nor are there factors to suggest that Arthur would be an unfit parent, as might be the case if there was an issue of neglect or abuse. Therefore, there are no grounds by which custody could be awarded to Carol, who has no parental rights, over Arthur who is asserting his. I would advise Arthur that Carol cannot obtain custody without his consent.

B. Custody of Baby

The issue here is whether Arthur is entitled to custody of the Baby. Custody includes both physical custody, and as well as legal custody, or the rights to make decisions in the child's life. Physical custody includes the rights to have the child present. Legal custody also includes making decisions regarding important decisions in the child's life, such as the child's educational decisions. In Maryland, there is no presumption of joint custody. Joint custody requires that it be in the best interests of the child, and the most important factor generally is the ability of the parents to cooperate and make joint child-rearing decisions together.

On these facts, there is nothing to suggest that joint custody would be proper. While Arthur wishes to marry Judy and raise the child with her, Judy appears to wish to be rid of the child and give the child to Carol. This suggests that Arthur would be the better choice for custody of the child, as Judy has affirmatively tried to abandon the child. Therefore, joint custody is unlikely.

In Maryland, custody of a child is judged on the best interests of the child standard. Factors will include the ability of the parent to raise the child in a healthy environment, the financial ability of the parties, the health of the parent, the type of support network the parent has access to, whether there are any issues of drug abuse, child abuse, or neglect, or any other factors the court deems necessary to determine custody.

Here, Arthur has gotten a night job that pays a good salary. He may be better financially able to support the child than Judy, because there are no facts to suggest what Judy's economic circumstances are. Furthermore, Arthur has taken an active interest in the child, and wants to raise the child. Judy could argue that Arthur only wants custody as a tool to get back together with her, but being Arthur is the only biological parent actively trying to raise the child, he may be the best parent to raise Baby.

The Child not-in-being

The last issue is that the child is not yet in being. Custody may be revisited if there is a material change in circumstances. Being that the child is not born yet, and Judy is four months pregnant, it may be premature to determine the issue of custody before Judy has a chance to have the child. It is quite possible she will change her mind regarding the child

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(or her relationship with Arthur) and we do not know what kind of support network she has, or if she could financially support the child once Baby is delivered. Therefore, it should be noted that there are additional issues regarding the child not yet being born.

I would advise Arthur that he likely can gain custody, but must demonstrate that to do so would be in the best interest of the child.

C. Whether Arthur can receive child support

If successful, Arthur would seek to receive child support from Judy, the non-custodial parent. The custodial parent is entitled to receive child support from the non-custodial parent in most circumstances. Child support is a right that belongs to the child, and is completely independent of any other rights, such as a visitation. There is no requirement of divorce or marriage to receive child support. Therefore, it is likely that Arthur can receive child support if successful.

I would advise Arthur that he can receive child support as there is no presumption that a father is not entitled to child support.

D. Child Support Calculations

Child support is calculated by a statutory formula which creates a shared income between the two parties. Income is defined broadly, and includes both monetary and non-monetary contributions. Any wages, benefits, rents, or other sources of income are included, up to a statutory cap set in Maryland. Then, the custodial parent is entitled to payment for an amount set by the court. This amount is generally used to maintain the child's standards of living.

Being that most-child support calculations are set after a divorce, in the case the court would have to determine the appropriate standard of living as if the two parties resided together, and then provide compensation from Judy to Arthur if he obtains custody. Child support payments are not deductible to the payer (Judy), but are deductible to the recipient (Arthur). Therefore, Arthur will be entitled to payment based on the income of the parties, which we know fairly little about other than Arthur's night job, and Judy will pay to Arthur some amount to maintain a standard of living for Baby.

REPRESENTATIVE ANSWER 2

A. Absent proving Arthur is unfit or a showing of Exceptional Circumstance. Carol cannot be granted custody of Baby without Arthur's consent.

I would first advise and reassure Arthur that Carol cannot be granted custody of Baby, if Baby is indeed his, without his consent absent a finding that he is unfit or a showing of exceptional circumstances. The United States Constitution protects parents' right to raise their natural children as they see fit and this presumption can only be overcome with a showing of unfitness. In addition, under Maryland law the natural parents of a child are presumed to be the best custodians of their children. In order to rebut this strongly founded

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presumption the custodial parent must either be proved to be unfit or there must be showing of exceptional circumstances. In order to determine if Arthur is the biological father of baby which triggers the aforementioned rights, Arthur would want to file a paternity action to determine if Baby is his biological child. In Maryland there is a presumption that children of parents who are married are their natural children. Here, Arthur and Judy are not married, although they have had a long-term relationship, and they recently separated. I would advise Arthur to file a paternity action to determine his and the Baby's status.

Next I would advise Arthur that Judy may relinquish her paternal rights to Carol, but may not do so if Arthur can prove paternity and absent a showing of unfitness or exceptional circumstances. Here, Judy may give up Baby for adoption in this case an open adoption, but she cannot do so without the consent of Arthur as prescribed by Maryland law. Arthur would want to assert his paternal rights to his child and contest any adoption or custody agreement Judy and Carol propose. I would file an action for custody on behalf of Arthur in the Circuit Court for the County in which Shadyside is located. In addition, I would send a letter to Judy explaining the law regarding her voluntarily giving up her rights to Baby and the required consent needed by Arthur. I would also recommend that she seek independent counsel separate from Carol for further advisement on her rights and obligations in this matter.

B. Arthur has a very good chance of being awarded custody of Baby.

I would first advise Arthur that since Baby is not born yet he must wait until baby is born to gain custody but may file before Baby is born, in the Circuit Court which has exclusive jurisdiction over marriage, custody and other domestic issues. In addition, I would advise Arthur that courts are reluctant to give custody of newborn baby from mother immediately absent a showing of exceptional circumstances. I would assure Arthur he has a good chance of success in gaining custody because Judy has agreed to give up her parental rights to her child to Carol which is effectively stating she does not want the child and that from the facts Arthur seems like a fit parent. He would essentially have to be proven unfit or Carol would have to show exceptional circumstances for him to be denied custody.

Under Maryland law, the standard for determining custody is the best interest of the child and the court looks at a variety of factors in deciding custody awards. I would explain to Arthur that there are two forms of custody, physical and legal; and that custody comes in two varieties, joint and sole. Physical custody is just what it sounds like, it would mean that Baby would live with Arthur and he would be the primary caretaker for baby. Legal custody refers to the legal and lifestyle decisions in raising the child. Here, I would advise Arthur to seek sole physical and legal custody of Baby that Judy would most likely be allowed Judy reasonable visitation, if he is awarded sole custody. In Maryland the preferred custody arrangement is joint custody which requires communication on the part of both parties. Here, Judy does not want custody of Baby and is attempting to relinquish her right to parent to Carol. The court looks at the best interest of the child and since here, Baby has not been born yet, the court would look at the best interest of child standard with respect to evaluating the parents. Factors the court considers are the financial situation of the parties, their stability, the relationship of the children with the parents, and abandonment. Here, Arthur found a night job that pays him a good salary to support Baby, but the job is at

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night and therefore he would require nighttime care for Baby which can be expensive. However this does mean that Arthur will be home during the day to care for Baby when she is awake is favorable toward him being awarded custody. There is no relationship with Baby yet but Judy does plan to abandon Baby by giving her up to Carol. The court will look at this as a factor for Arthur as Baby's other natural parent has declined her role. Overall Arthur will most likely be awarded custody.

Arthur may be able to receive support from Judy as determined by the child support guidelines.

Under Maryland law, the custodial parent with custody may receive child support for the child until they reach the age of majority or are 19 in their last year of high school. Here, Arthur would need to be awarded either sole or joint custody to request child support from Judy. However there may be an issue if Judy decides to terminate her parental rights. If Judy decides to terminate her parental rights to Baby which includes any legal right to custody, visitation, support, etc. then Arthur may not be able to receive support from Judy. Here, Judy is willing to give up Baby to Carol and however, Judy must do so officially in court.

The amount of support is determine by the child support guidelines

In Maryland, the child support guidelines are used to calculate the amount of support owed by each party. The guidelines take into account the number of children, the amount of support provided to the children by each parent, the income of each parent and proves a minimum amount of support of a parent must provide. Child support is calculated differently depending on whether the requesting parent has sole or joint custody, as determined by the schedule. Child support is determined by the exact amount of time the child spends with each parent calculated by the overnights the child has with each. The goal of child support is to ensure that both parents are contributing to their children and all the financial burden does not end up on one parent.

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QUESTION 2

Homeowner issued a personal check in the amount of \$5,000 (the “Check”) payable to Shady as payment for home improvements performed by Shady. Later that same day, Shady indorsed the Check and cashed it at City Liquors & Check Cashing (“City”).

Later that evening after cashing the Check, Shady contacted Homeowner claiming that he accidentally lost the Check and requested Homeowner issue a replacement check. Homeowner gave Shady a replacement check for \$5,000 (the “Replacement Check”). At the same time, Homeowner notified his bank to issue a stop payment (the “Stop Payment”) on the Check.

The next day, Shady endorsed and cashed the Replacement Check at City.

City was first made aware of the stop Payment of the Check when notified by its bank several days after cashing the Replacement Check. As a result of the Stop Payment, the Check was dishonored. City has not been paid for the Check. City paid Shady twice. The Replacement Check has been honored. City has filed a timely suit against Homeowner in the appropriate Maryland court to recover \$5,000 for the dishonored Check on the grounds that, regardless of the “Stop Payment,” City is a holder in due course.

At trial, the undisputed evidence showed that City operates a large check cashing business that cashes approximately 3,000 checks per week ranging in value from \$100 to \$100,000. The checks City cashes are from many sources including, but not limited to, government benefit payments, payroll checks, personal checks and general business checks. Shady was a known customer to City and he regularly cashed similar checks at City.

When Shady, presented the Check to City, City’s cashier examined the Check for defects, confirmed Shady’s identity, photographed him with the check and cashed the Check. City charged Shady a fee of 2% of the Check’s face value, which is reasonable and customary in the industry. The same procedures were followed with the Replacement Check.

City’s president further testified that there was nothing unusual about the amount on the Check in the course of its dealings with Shady. In fact, City had previously cashed an \$8,000 check written by Homeowner to Shady that was honored.

- (1) City should have contacted Homeowner prior to cashing the Check;
- (2) City should have been on notice of a defect in the Check by cashing the Replacement Check;
- (3) City was not operating in a commercially reasonable manner by extending immediate credit for the Check and the Replacement Check; and
- (4) The size and nature of the Check, together with a 2% fee charged for cashing the check, should have raised “red flags” as to possible defects in the Check.

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You are the law clerk to the trial judge who has asked you to discuss the validity of Homeowner's arguments under the Maryland Commercial Code and give your view on whether Homeowner is liable for the Check despite the Stop Payment.

REPRESENTATIVE ANSWER 1

Negotiable Instruments:

1) City should have contacted Homeowner prior to cashing the Check:

City was a Holder in due course and therefore had no reason to contact homeowner prior to cashing the check. Here, the instrument, when issued to City, did not bear any evidence to call its authenticity into question. In fact, City had cashed checks of even higher amounts from Homeowner to Shady. Also, City took the check for value, in good faith, without notice that any party has a defense or claim in recoupment.

2) City should have been on notice of a defect in the Check by cashing the Replacement Check:

Shady was a known customer to City and was not on notice of anything unusual as it had cashed checks from Homeowner, to Shady, of larger amounts in the past.

3) City was not operating in a commercially reasonable manner by extending immediate credit for the check and Replacement check.

City examined the checks defects and confirmed Shady's identity, as well as photographing him with the Check and Replacement Check. As this check was not a fraud, or in any way altered, City would have had no reason to assume that the check had a stop payment issued to it. Also, the suit was brought in a timely manner.

4) The size and nature of the Check, together with 2% fee charged for cashing the Check, should have raised "red flags" as to possible defects in the Check:

A \$5,000 check, given with consideration of 2% fee for cashing, which is customary in that industry, would have raised red flags if City was on notice that Shady may attempt to cash defective checks. Here, we have no evidence of this. However, the fact that Homeowner had issued Shady checks before, for large amounts, which were honored, makes City entitled to enforce the check in good faith.

Homeowner Liability:

Homeowner will be liable to city for the \$5,000 check because City is a holder in due course. Here, none of the defenses available in § 3-305 are available to Homeowner, as he issued both checks without fraud at the time he wrote them. Further, City has no way of knowing that Homeowner was told false information by Shady nor any reason to believe the

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Check was in anyway invalid. Homeowner will be liable to City for the \$5,000 check, but will likely be able to make a claim in recoupment against Shady.

REPRESENTATIVE ANSWER 2

For the reasons below, Homeowner will be liable to cash the check despite the nonpayment.

Before addressing each of Homeowner's individual arguments, some general principles must first be identified. Homeowner was the drawer on a negotiable instrument governed by sections 3 and 4 of the Maryland Commercial Code, which are concerned with establishing rules by which instruments may be made as negotiable as currency. The Check was a negotiable instrument, because it was a written, unconditional obligation to pay in currency a sum certain upon demand or at a fixed time. This negotiable instrument, in particular, was in the form of a draft to order: it was made out by Homeowner, the drawer, and instructed the bank as drawee to pay the sum of \$5,000 to Shady or to Shady's order. By indorsing the instrument to City and receiving payment of the \$5,000, Shady successfully negotiated the instrument as defined in Maryland Commercial code § 3-201 and 3-204, and was negotiated for value pursuant to § 3-303 because it was transferred to City in exchange for City's payment of \$5,000.

Under § 4-403, Homeowner as "any person authorized to draw on the account" was entitled to stop payment on the check, as long as he did so in a manner reasonably calculated to give the Bank reasonable opportunity to act before any demand for payment on the draft was made. Having received a lawful instruction to stop payment, the Bank incurs no liability by following that order. Therefore, City's only recourse is against Homeowner as the drawer of the instrument.

1: Contacting Homeowner Prior to Cashing the Check. Pursuant to § 3-202 and 3-204, an instrument made out to order is properly negotiated when the endorser signs the instrument and transfers it. That was accomplished here when Shady signed the check and gave it to City. The drawer of a draft plays no role in the subsequent negotiation of the instrument beyond its original issuance. Therefore, City was under no obligation to contact Homeowner prior to cashing the check, and City's failure to do so does not undermine Shady's effective negotiation of the instrument.

2: City Put on Notice. One who pays value for a negotiable instrument becomes a holder in due course, pursuant § 3-302 of the Maryland Commercial code, when that person takes the check in good faith, without notice that the instrument is overdue or has been dishonored or that another related instrument is overdue or has been dishonored, without notice of any forgery or material alteration of the instrument, and without notice of any contrary claims or valid defenses of the instrument. A holder in due course still subject to "real defenses" including material alteration, fraud in the instrument itself, duress, insolvency, incompetency, illegality, and infancy.

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Here, the only “real” defense Homeowner can raise to the enforcement of the instrument by city as a holder in due course is that Homeowner was fraudulently induced to stop payment on the check and issued the replacement check. However, in order to undermine City’s holder in due course status by showing that City had notice of dishonor or notice of fraud or other wrongdoing, Homeowner must show such knowledge at the time that the instrument was negotiated. Here, while City may arguably have had notice after the stop payment and at presentment of the replacement check, those factors were not present when the original check was negotiated. Therefore, City was not “on notice” of any irregularity with respect to the Check.

3 and 4: Operation in a Commercial Reasonable Manner. Despite City’s holder in due course status, City may nevertheless be unable to claim against the drawer of the draft if it did not exercise ordinary care in accepting the draft. However, there is nothing here to indicate that City deviated from ordinary circumstances and commercial practices in its negotiation of the instrument. City charged only the ordinary 2% fee, and followed all customary procedures in the area in which the negotiation took place, including photographing Shady with the check and asking for proof of identity. As a result, Homeowner will not be able to successfully argue that City was operating in a commercially unreasonable manner, or the City’s conduct in charging the 2% fee should have created the type of notice in cashing the check that would give rise to a lack of holder in due course status.

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QUESTION 3

Donna is a land surveyor who is employed by ARG, Inc., a civil engineering firm based in Greenbelt, Prince George's County, Maryland. Recently, Donna was directed by her supervisor to survey the remnants of a former trolley car line in order to determine the best potential layout of a pedestrian trail which a local government wished to place within the boundaries of the former trolley line.

Upon arriving at the survey site, Donna discovered that she was quite close to the backyards of several nearby residences. While surveying, she made a point to look in the rear windows of two different houses and took notes of her observations as to the residents and the houses themselves. She then used this information to informally label the houses on her draft survey plat. While she did not intend for the informal labels to remain when her final plat was submitted to the local government, thereby becoming a public record, she inadvertently neglected to delete the informal labels she had given the two houses in question. As a result, when the proposed trail route was publicized by the local government, it contained a survey plat which had two houses identified by their respective addresses and the statements "Meth Lab" and "Brothel."

The owners of the two houses have approached you, a Maryland lawyer, and asked whether they have any recourse for the publication of these objectionable labels, either against Donna or ARG, Inc. The owners are not concerned about the title to their respective properties, but are deeply troubled by potential damage to their reputations in the community.

What advice would you give the owners? Explain fully.

REPRESENTATIVE ANSWER 1

The owners have several causes of action they could pursue against Donna. First, they could bring a false light invasion of privacy claim. Under Maryland Law, a defendant is liable for a false light claim when he, in violating the plaintiff's reasonable expectation of privacy, has taken action to place the plaintiff in a light that would be "highly offensive" to an ordinary person, thereby causing damage. Here, Donna has violated the homeowners' expectation of privacy by looking in their back window, and in causing the plat to be published with names implying that criminal behavior goes on within, has placed the homeowners in a false light that would be highly offensive to an ordinary person. Therefore, the homeowners are likely to be able to make a case of false light invasion of privacy by Donna, provided that they can show damages. Reputational damage alone is not enough to make a false light case, so I would advise the homeowners to discover and emphasize the ways in which Donna's behavior had caused them economic or emotional harm.

Donna may raise the defense that the homeowners' expectations of privacy was unreasonable, as they were viewable through a window that itself could be seen from a trolley track (i.e. from a public space). Here, we would need more facts to determine q) how long it had been since the trolley line was used by the public and b) what measures the

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homeowners had taken to ensure that their house would remain private. Alternately, the homeowners could bring a defamation suit (specifically libel) against Donna. Under Maryland law, libel has taken place whenever a written defamatory statement about or concerning the plaintiff has been published. Here, the statement is clearly defamatory (concerning criminal behavior) and was published. Two questions remain then: was it “about or concerning” the homeowners? Yes, in that the implication is (at the very least) that these criminal activities are taking place in homes controlled by the homeowners. Under Maryland law, for a libel claim to succeed, the defendant must either intend the material to be published or the material was published recklessly. Here, the labeling of criminal activity on a document to be made public combined with the inattentive failure to remove the offensive names constitutes ignorance of an unjustifiable risk, therefore, recklessness. The advantage to a libel claim is that the plaintiff need not prove special damages, and general damages are presumed. Here, where the homeowners are primarily concerned with reputational damage, presumed damages help them make their claim.

ARG, Inc. is likely to be vicariously liable for either of these claims. Under Maryland law, a defendant employer is vicariously liable when a defendant employee commits the tort in the scope of their employment. Here, Donna is an employee, and her voyeuristic behavior and her reckless publication of the plat are both actions taken while she was performing her job for ARG. Therefore, her tort was committed in the scope of her employment and ARG will be vicariously liable for any act so committed.

REPRESENTATIVE ANSWER 2

The Maryland Rules of Professional Conduct govern lawyer’s conduct.

Conflict of interest. Lawyers must be way of representation of two clients whose positions may be materially adverse, unless the lawyer reasonably and subjectively believes that he can represent both effectively despite the conflict and both clients give their informed consent confirmed in writing. Here, the “owners of the two houses” have approached but their positions do not appear to be materially adverse because they are both seeking redress from similar circumstances and do not appear to be in conflict with one another. As a caution, I would obtain informed consent, confirmed in writing from both before proceeding.

Assuming the conflict has been effectively waived, I would recommend perusing the following courses of action.

OWNERS (O) V. DONNA (D)

Defamation is the false publication of a material fact that causes damages to a person’s reputation. Here, D labeled her final plat that was submitted to the local government for subsequent publication with the addresses of O titled “Meth Lab” and “Brothel” after looking in the rear windows.

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Defamation per se occurs when a person publishes a material fact accusing another of a crime. Here, D's labels referred to O's houses as "Meth Lab" and "Brothel", in effect accusing both of crimes.

Libel is defamation that occurs in writing. Here, D's labels were printed in the final plat's in the public record.

Private figures are those who are not otherwise famous or public. Here, there is no indication that O's are public figures. However, the information of the houses may be considered a matter of public concern because it regards the planned trail route built by the local government within the boundaries of a former trolley line. If so, O will have to prove reckless disregard for the truth or knowledge of falsity (actual malice).

Truth is an absolute defense to defamation. Here, if O's houses are in fact a "Meth Lab" and a "Brothel", D will not be liable for defamation.

False Light. If D's actions portrayed O's residences in a false light among the public, even if true, D may be liable in damages to O's reputation and having same published in the public record.

Intrusion Upon Seclusion. D may be liable to O's for intrusion upon seclusion when she "made a point to look in the rear windows of two different houses and took notes of her observations", invading O's privacy.

Negligence is a cause of action in tort and requires duty, breach, causation, and damages. Here, D inadvertently neglected to delete the informal labels she had made, breaching a duty not to publish those labels and directly causing any damages to O's or their reputations.

Intentional Infliction of Emotional Distress does not apply because D's actions were not "extreme and outrageous" and her disclosure was "Inadvertently" done.

Negligent Infliction of Emotional Distress is not a recognized cause of action in Maryland but similar damages may be recovered in one of the above actions.

O's should file the above actions against D.

OWNERS V. ARG, INC

Respondeat Superior holds an employer vicariously liable for the actions of their employees committed in the scope of their employment. Here, D is a land surveyor for ARG (A) and was directed by her supervisor to survey the remnants of a former trolley car line to determine the pedestrian walk layout.

Negligent Supervision is a cause of action against an employer for their failure to supervise an employee that they knew or should have known would be reckless in their conduct. Here, we do not have many facts that demonstrate notice to A that D would be

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negligent in her duties. Nonetheless, she behaved in an “Inadvertently” negligent way when she labeled the final plats the way she did.

A can argue that D was on a Frolic and Detour because she “made a point” to look in the rear windows when she was only directed to survey the trolley line.

If D is found not to have been negligent of any of the causes of action listed above, A cannot be found liable either.

I would advise O to pursue the causes of action listed above against Donna and ARG.

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QUESTION 4

Joe and Bette were married for 10 years. Problems ensued during the marriage and Joe and Bette suspected each other of engaging in extra-marital affairs. Joe, believing that he now had proof of Bette's extramarital affair, filed suit for divorce in the Circuit Court for Anne Arundel County, Maryland, on grounds of adultery.

At the hearing in the Circuit Court, Joe seeks to introduce the following evidence in his case in chief, over Bette's objection:

- 1) Testimony from Bette's ex-husband Mike, concerning her admission after their divorce that during their marriage she dated other men;
- 2) A video tape taken from a hidden recorder that Joe placed in the hallway outside of their bedroom showing a man leaving the bedroom on a date when Joe was out of town;
- 3) Testimony from Mary that she received an email from Bette in which Bette states that she is no longer in love with Joe;
- 4) Testimony from Bette's psychologist, subpoenaed by Joe, that Bette admitted to having had extra-marital affairs.

The Judge asks you, her law clerk, to research the law and recommend the proper ruling on these evidentiary matters. Please state what the rulings should be and why.

REPRESENTATIVE ANSWER 1

- (1) Bette's objection to her ex-husband's testimony should be overruled. Bette is undoubtedly objecting to the statement as hearsay. Hearsay is a statement made by an out-of-court declarant offered to prove the truth of the matter asserted. Here, the statement involves an out-of-court admission that Bette maintained extramarital affairs during the course of her marriage to Mike. Clearly it is being offered to prove that she did carry on those extramarital relationships. Joe could argue that the statement should be admitted as a statement against a party opponent (APO), as Bette is a party to the current case. In the case that a statement can be classified as an APO, the statement is considered non-hearsay and is therefore admissible. As such, Joe should be allowed to introduce Mike's testimony into evidence.
- (2) Bette's objection to the video tape should be overruled. The videotape is direct physical evidence that tends to support Joe's suspicions regarding Bette's infidelity. In order to admit the evidence, Joe the video must be authenticated and it must satisfy the best evidence rule. In regards to authentication, Joe must demonstrate that the video is what it purports to be and that he has knowledge of its contents. Joe will be able to satisfy this requirement by testifying that he made the recording himself, with his own hidden camera, in the home he shared with Bette. The best evidence rule applies to writings, which also include video evidence. The best evidence rule requires that the proponent of written evidence must show that it is the original source and not a secondary source. In this case, Joe can simply testify that the video is the original tape from the hidden camera, and that it was not altered or edited in

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any way. Barring any glaring discrepancies in his testimony, the court should allow the introduction of the video evidence.

- (3) The court should also overrule Bette's objection to Mary's testimony regarding the email from Bette. Again, Bette could argue that the email would qualify as hearsay, but Joe can again argue that because the statement in the email to Mary were written by Bette herself, the email would also qualify as an APO. As such, the email would be non-hearsay, and admissible against Bette. Bette could also argue that email be authenticated and satisfy the best evidence rule. Mary would have to testify that the email was in fact the one she received from Bette, and that she had knowledge of its contents. So long as Joe provides the court with a copy of the email, it would satisfy the best evidence rule, because printed copies of documents have been deemed as acceptable originals for the purposes of the best evidence rule, because printed copies of documents have been deemed as acceptable originals for the purposes of the best evidence rule. Again, so long as Mary's testimony is free from any issues, the email should be admitted.
- (4) Bette's objection to her psychologist's testimony should be sustained. Although Joe could once again argue that the statement was made directly by Bette, and would therefore qualify as an APO, the state of Maryland recognizes the physician-patient privilege which also extends to psychotherapists. Under the rule, Bette's admission to her psychologist was privileged and cannot be divulged. The rule is recognized for public policy reasons. The court wants to encourage people so seek help when necessary and to be candid with their therapists. Individuals would not be honest if they feared that their private admissions could then be used against them. It is clear Bette wanted her statement to be private, and it should remain so. The court should sustain the objection, and the psychologist's testimony should be disallowed.

REPRESENTATIVE ANSWER 2

- (1) Hearsay is an out of court statement, intended as an assertion, used to prove the truth of the matter asserted. Though hearsay is generally inadmissible, there are several exceptions to this prohibition. The rules of evidence regard admissions by a party to the case, made outside of the courtroom, as an exception to the hearsay rule. This is called the party admission doctrine, and accordingly, the testimony of Bette's ex-husband Mike as to her admission that she dated other men is properly admissible, since Mike is testifying in court and can be subject to cross-examination by Bette's attorney, increasing the testimony's indicia of reliability.

However, Bette could challenge the admission of such testimony as inadmissible character evidence, Character, or "propensity" evidence presented to prove that a party to case acted in a certain manner on this instance is generally inadmissible, since there is a potential of prejudice to that party. However, when character is at issue, character evidence may be properly admitted. Here, Joe is trying to prove that Bette's character is one that lends itself to an extra-marital affair, and thus should be properly admitted.

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- (2) This is admissible evidence as long as it can be authenticated. Authentication is when evidence is proven to be what the party presenting the evidence claims it is. In this case, there would need to be evidence to prove that the video tape is of the couple's home on the date Joe purports it to be. This could be achieved through cross examination of Bette and Joe.
- (3) The best evidence rule requires that when the contents of a document are at issue, the actual document itself should be presented as evidence (rather than a party's recollection or description of the document). Though there are exceptions to this rule, an email is a digital file that is likely capable of being retrieved, printed, and presented as evidence. Mary's testimony is therefore inadmissible as a violation of the best evidence rule unless the email can be proven to be unavailable.

If properly admitted, the email would fall under the state of mind exception to the hearsay rule. The email of what Mary said that Bette said would be hearsay, since it is an out of court statement intended to prove that Bette no longer loved Joe. However, statements describing a party's state of mind are an exception to the hearsay rule and are therefore admissible.

- (4) Certain privileges exist to protect the sanctity of special relationships. In this case, information Bette has disclosed to her psychologist is inadmissible as privileged information under the patient-psychotherapist exclusion. This evidence could also arguably be excluded under the public policy exclusion showing a defendant's sexual history.

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QUESTION 5

PART A

Able was critically injured while driving his new DDF automobile. He was rear-ended by a truck owned and operated by Baker. On impact, the driver's air bag did not engage on his DDF automobile and Able was propelled forward into the steering wheel and the windshield. The accident occurred in Laurel, Maryland; portions of Laurel are situated in Anne Arundel County, Maryland; Prince George's County, Maryland; and Howard County, Maryland.

Able sued Baker in the Circuit Court for Anne Arundel County, Maryland and requested a jury trial. After filing the suit and before obtaining service on Baker, Able changed attorneys. His new attorney prepared a more extensive statement of Able's claim and added the car manufacturer, DDF, as a defendant, claiming that the driver's air bag in Able's DDF automobile was defective. The original suit against Baker was voluntarily dismissed by Able by notice of dismissal. The suit for a jury trial on the claims of Able against Baker and of Able against DDF were filed in the Circuit Court for Prince George's County, Maryland. Service of process was issued against Baker and DDF, but before either of them was served, Able's attorney determined from further investigation that the accident had occurred in Howard County, Maryland, and that the suit should have been filed in Howard County as Able and Baker reside in that county and DDF does business in that county. His attorney is planning to file a notice of voluntary dismissal in the Prince George's County suit and re-file the suit in the Circuit Court for Howard County, Maryland.

A. Is the filing of a voluntary dismissal in the Prince George's County case prudent for Able on the given facts? State your analysis in detail and provide a discussion of any alternatives.

PART B

Assume that Able's case is now in the Circuit Court for Howard County, Maryland. Upon being served with process, DDF filed its answer and impleaded Correct Installation, LLC into the case as a third party defendant. DDF claimed that Correct Installation, LLC installed all the air bags on DDF automobiles and that if the installation of the driver's air bag on Able's car was defective, then Correct Installation, LLC was liable to DDF for the defective installation. The suit proceeded to trial by jury. At the close of Able's case, Baker moved for judgment. Able's attorney did not object to the motion. The judge heard Baker's motion and denied it. Baker then proceeded to put on his defense in the case. After completion by Baker of his case, Able presented rebuttal evidence. The case went to the jury. The jury verdict was in favor of Able and against Baker. At the appropriate time, Baker moved for a judgment notwithstanding the verdict (JNOV) and the trial judge granted it. Able wants to appeal the granting of the JNOV.

B. Does Able have any valid procedural grounds to challenge the trial judge's granting of Baker's JNOV? Explain fully.

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PART C

Assume that after the trial of his suit against Baker and DDF, Able files a separate action against Correct Installation, LLC in the Circuit Court for Howard County, Maryland for the defective installation of the driver's air bag on his DDF automobile and that the facts stated in Able's Complaint sufficiently allege a claim for relief against Correct Installation, LLC. You are the attorney for Correct Installation, LLC.

C. Are there grounds for a preliminary motion by Correct Installation, LLC to dismiss Able's Complaint? Discuss in detail.

REPRESENTATIVE ANSWER 1

PART A

Filing a voluntary dismissal in the Prince George's County case is not prudent for Able. Maryland rules provide for voluntary dismissal of claims without prejudice. However, a notice of dismissal operates as adjudication on the merits when filed by a party who has previously dismissed in any court an action based on or including the same claim. Here, Able would have to dismiss the Prince George's action by notice of dismissal filed with the court. This would be the second dismissal involving his claim against Baker, after the dismissal in Anne Arundel County. Thus, a dismissal of the present action would act as an adjudication of the merits of Able's claims and bar him from re-filing the suit in Howard County.

Able should file a motion requesting the Prince George's Circuit Court to transfer the case to the Howard County Circuit Court on the basis that it would be more convenient for the parties. Able can support this by pointing to Able and Baker's residency, the location of the accident, and the DDF's conducting business in Howard County. Alternatively, Able can wait until Baker files any preliminary motion. If Baker does not raise a venue defense, then it is waived and the case can stay in Prince George's Circuit Court. If Baker raises a venue defense in a preliminary motion, the Court will likely transfer the case to Howard County in the interest of justice since; otherwise, a dismissal would act as adjudication on the merits.

PART B

Able has valid procedural grounds for challenging the grant of Baker's JNOV. Rule 2-532 requires that, in a jury trial, a party may move for JNOV only if that party made a motion for judgment at the close of all evidence and only on grounds used in the earlier motion. Here, Baker only moved for judgment at the close of Able's case and failed to move for judgment at the close of all evidence. Thus, Baker could not make a valid JNOV after the jury verdict. The judge's grant of JNOV for Baker should be reversed.

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PART C

Correct Installation, Inc. has grounds to request dismissal of Able's complaint in a preliminary motion. Maryland Rule 2-332(c) requires a plaintiff to assert any claim against a third-party defendant arising out of the same transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff (i.e., the original defendant). If the plaintiff fails to assert such claims, he is barred from asserting such claims in a separate action instituted after the third-party defendant has been impleaded. Here, Able is the plaintiff and Correct Installation is the third-party defendant impleaded in the original suit and both the original suit and Able's new complaint relate to the same transaction of occurrence, namely Able's car accident with Baker in which Able argued his automobile was defective. Thus, Able cannot assert this transactionally related claim against Correct Installation in a separate action; he was required to assert it in the original litigation after DDF impleaded Correct Installation.

REPRESENTATIVE ANSWER 2

PART A

The filing of a voluntary dismissal by Able of the Prince George's County case is NOT prudent given the facts. Here, Able filed action 1 in Anne Arundel County and voluntarily dismissed it. The Able filed action 2 in prince George's County, and wants to voluntarily dismiss this action and file anew in Howard County, Maryland. However, if he does this, then this second notice of dismissal will operate as adjudication upon the merits. This is because Rule 2-506(c) provides that a dismissal is without prejudice except that a notice of dismissal operates as adjudication upon the merits when filed by a party who has previously dismissed in any court of any state an action based on or including the same claim. Able wants to file 3 actions based on the same claim and dismiss 2 of them. If he does this, he loses his personal injury claim against Baker and DDF forever, and will be barred from filing like he wants in Howard County.

Able's best course is to file a motion to change venue from Prince George's County to Howard County or bring a defense of improper venue. Under Rule 2-327(c), the Court can transfer any action to another circuit court where the action could have been brought if the transfer is for the convenience of the parties and severs the interests of justice. Here, the action could have initially been brought in Howard County because this is where the accident occurred. In addition, the transfer if for the convenience of the parties and serves the interests of justice because all parties either reside or do business in Howard County, Therefore, able should not dismiss the Prince George's County case, but instead should file a motion for change of venue.

PART B

Able does have valid procedural grounds to challenge the trial judge's granting of Baker's JNOV. Rule 2-532 provides that a party may move for JNOV only if that party

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made a motion for judgment at the close of all of the evidence and only on the grounds advanced in support of the earlier motion. Here, Baker moved for judgment at the close of Able's case. However, after Able finished his case, Baker put on his defense and Able presented rebuttal evidence. Therefore, Baker did not move for judgment at the close of ALL of the evidence. Therefore, Baker does not meet the necessary requirements to file a motion for judgment notwithstanding the verdict. Baker's JNOV is not proper and the Court should not have granted it.

PART C

Yes, there are grounds for a preliminary motion by Correct Installation, LLC to dismiss Able's complaint. Correct Installation was impleaded in the initial action as a third party defendant. As a result, Able cannot file anew complaint or action against them. Rule 2-332(c) provides that if the plaintiff, here Able, fails to assert a claim against a third party defendant, here Correct Installation, the plaintiff may not thereafter assert that claim in a separate action instituted after the third party defendant has been impleaded. As a result, there are grounds for a preliminary motion to dismiss by Correct Installation under rule 2-332(c), and the Court will grant the motion.

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QUESTION 6

The Maryland legislature has passed enabling legislation authorizing counties to enact the following: (1) A supplemental county tax on properties, (2) A sales tax of 1% on sales occurring within the County, and (3) Tax credits for contributions to school scholarship organizations (SSO's). SSO's use contributions to provide scholarships to students attending private schools, including religious schools.

The Harford County Council has implemented the supplemental property tax on all properties in the county with a specific exemption for churches, synagogues, houses of worship and hospitals. The council has imposed the 1% sales tax with a specific exemption from the tax on sales of religious materials sold by religious organizations

The council has provided for a dollar for dollar tax credit for contributions to SSO's.

Bob, a Harford County resident and taxpayer, is the owner of a small shop located in Harford County that sells greeting cards and various religious items. Bob has come to you, a Maryland attorney, wanting to challenge the following actions of the Harford County council on U.S. constitutional grounds.

- A. The supplemental property tax.**
- B. The 1% sales tax exemption**
- C. Tax credits for contributions to SSO's.**

How will you advise? Explain fully.

REPRESENTATIVE ANSWER 1

To begin, Bob must have standing to bring the lawsuit. Standing requires injury in fact, causation, and redressability. Bob definitely has standing with regards to the supplemental property tax and may have standing with regards to the exemption and the tax credits. As for the property tax, Bob has been injured because he is forced to pay the tax because he has property in Harford County. Harford County enacted the tax, so there is causation. If he is successful in his lawsuit, the tax will be stricken, so redressability is present. Therefore, Bob has standing for the property tax.

Standing is more complicated with regards to the sales tax exemption, but Bob may have standing. The Supreme Court has said that, while people generally do not have standing as taxpayers, under *Flast v. Cohen*, taxpayers have standing to challenge taxes in violation of the Establishment Clause. The County's granting an exemption for religious organizations selling religious materials will probably cause Bob's business to suffer. His customers purchasing religious materials will have to pay the sales tax, but when those customers buy religious materials from religious organizations, they will not have to do so. This might drive Bob out of the religious materials business. The County enacted the

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exemptions and contributions will be struck down if Bob is successful. Bob probably has standing with regards to the sales tax exemption.

Bob does not have standing for a challenge to the tax credit. It is unclear how, if at all, Bob has been injured by the County Council enacted a tax credit to school sponsorship organizations. Given that he has no injury, it is not necessary to analyze causation or redressability.

The property tax would be constitutional, if not for the exemption for churches, synagogues, houses of worship, and the like. Ad valorem property taxes are generally constitutional. However, the exemption for religious organizations may fail the Lemon test. Under the Lemon test, a law will violate the Establishment Clause if it does not have a secular purpose, its primary effect is neither to advance nor inhibit religion, and it promotes excessive entanglement with religion. Here, it looks like the purpose of the exemption on the property tax is not secular. Its primary effect is to advance religion. Broad tax exemptions for charitable organizations that include religious groups in the exemption are upheld as constitutional, but this exemption specifically excludes “churches, synagogues, [and] houses of worship” and only includes hospitals at the end. There is no mention of other charitable organizations. Therefore, this exemption will probably be struck down. However, the general supplemental property tax is constitutional, so it should be upheld without the exemption.

The sales tax exemption is similarly constitutional under the Lemon test above. The tax specifically exempts sales of religious materials sold by religious organizations. This exemption does not have a secular purpose. By exempting religious materials sold by religious organizations, the primary effect of the exemption is to advance religion. Therefore, the sales tax is unconstitutional, and Bob will win this suit.

Even if Bob did have standing to challenge the tax credits for contributions to SSO’s, they are probably constitutional. The Supreme Court has upheld a similar dollar for dollar tax credit for contributions to private schools, including when some are religious organizations, in the past. Bob would probably lose this challenge even if he had standing to address it.

REPRESENTATIVE ANSWER 2

This is a constitutional law question.

The first issue is whether Bob can properly challenge the county’s action to provide the supplemental property tax. Here, Bob has standing because he is directly affected as a retailer who has property in the county. Thus he can challenge the county’s actions. Under the US Constitution, there shall be no establishment of religion. Bob can challenge the county’s actions under equal protection because he is similarly situated as having property in the county but does not have an exemption. The state can enact laws that have a secular purpose and avoiding excessive entanglement with respect to religion. Here, the exemption is not only for churches but it is also for hospitals. Bob will have a hard time arguing that the state doesn’t have a secular purpose or has excessive entanglement because the law

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includes an exception for hospitals. It is well within the states discretion. As such, Bob may challenge the county's actions but would most likely fail.

The second issue is whether Bob can properly challenge the county's action to provide the sales tax exemption on the sale of religious materials sold by religious organizations. Here, Bob has standing because he is directly affected as a retailer who sales religious materials. Thus, he can challenge the county's actions. Under the US Constitution, there shall be no establishment of religion. The legislature cannot enact laws that establish or support a religion. However, the legislature may enact laws as long as there is a secular purpose and that the state avoids excessive entanglement in the issue. Here, the facts show that the tax exemption is only for religious materials sold by religious organization. There is no exemption for religious materials sold by non-religious organizations. Thus, in addition to an Establishment issue, Bob has an argument for Equal Protection. Because Bob, as a retailer, is similarly situated as religious organization to sell religious materials, there is per se discrimination. As such, Bob should argue that the discrimination shows both a lack of secular purpose and excessive entanglement. Because equal protection issues are judged against a strict scrutiny test, the state would have to show that it has a compelling state interest and that the law is narrowly tailored. Strict scrutiny most likely would fail in this instance. Thus, Bob will be able to challenge and most likely win against the county's actions to provide a tax exemption.

The final issue is whether Bob can properly challenge the county's action to provide tax credits for contributions to SSO's. In order to final a suit based upon US constitutional grounds, the plaintiff must have proper standing. Standing means that the case is ripe for consideration at the particular federal court, the case is not moot, and there is no political question. Here, the facts are silent on whether Bob is directly affected by the county's action to provide tax credits. Bob is a retailer and does not seem to have any affiliation with SSO's. Thus, he has no injury upon which the courts can redress. As such, Bob will not be able to challenge the constitutionality of the county's actions to provide tax credits.

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QUESTION 7

In late 2010, Landowner and Operator negotiated over the price and terms for the sale of Land-owner's 200 acre farm outside Cumberland in Allegany County, Maryland. Operator planned to operate a resort on the property by teaming with Developer, which would buy the property and construct the resort. Operator would, upon completion of construction, lease the finished resort from Developer and operate the resort.

In December 2010, Landowner, Developer, and Operator signed a Memorandum of Understanding (MOU) which laid out the plan described above. The MOU established, in principle, the terms for the contracts that were to follow.

In January 2011, Landowner and Developer signed a land sale contract in which Landowner agreed to sell the farm to Developer for \$1,000,000, with closing on July 1, 2011. Separately Developer and Operator signed a contract in January 2011 in which Developer agreed to complete construction of the resort in time for Operator to begin operations and make monthly lease payments starting in December, 2011.

In March 2011, Natural Gas Company offered to Pay Landowner \$200,000 a year for a term of five years for the rights to explore for and sell any natural gas it might discover on the farm. Landowner sent a letter to Developer dated April 1, 2011 informing Developer that she was terminating the contract to sell the farm in order to accept Natural Gas Company's offer. Landowner signed the lease with Natural Gas Company the same day.

Developer bought an alternate property in Allegany County and completed the resort there in December 2012. Operator opened the resort in December 2012. Developer can produce competent and admissible evidence in court to prove that the delay was solely attributable to the additional time required to find and acquire the alternate property and that it lost \$1,000,000 in anticipated profits it otherwise would have earned from December 2011 through November 2012 from the lease to Operator. Operator can prove, with competent and admissible evidence, that it suffered lost profits of \$7,500,000 because of the one year delay.

In January 2014, Developer filed suit against Landowner in the Circuit Court for Allegany County seeking \$7,500,000 in damages, comprised of the \$1,000,000 lost profits attributable to the delay in the resort project and \$6,500,000 in losses attributable to lost profits on other projects that developer had to defer because of the financing tied up in the resort project.

- A. Analyze whether specific performance would have been an appropriate remedy for Developer to seek. Explain why or why not.**
- B. Assuming Developer elects to seek damages for Landowner's breach and sues successfully, will Developer recover the full \$7,000,000 in damages claimed in his suit? If not, why not?**
- C. What potential action(s) does Operator have to recover its lost profits?**

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Explain your reasoning fully.

REPRESENTATIVE ANSWER 1

PART A

Specific performance would have been an appropriate, but less desirable, remedy for the Developer to seek. Typically, specific performance for a land contract is not appropriate where breaching seller subsequently sells the land to a bona fide purchaser. In this case, had the natural Gas Company purchased the land, specific performance would not be an appropriate remedy. Here, the Landowner still has title to the property and, although in breach, is capable of transferring title to the Developer if ordered by a court to provide specific performance. However, the Natural Gas Company would still have its lease interest in the land and the Developer would have to take title subject to that lease. The developer would not be able to proceed with its project without ejecting the natural Gas Company and being liable for wrongful eviction. Thus, the Developer could have sought specific performance of the land contract, but it would have then bought property which it could not immediately use.

PART B

The Developer is unlikely to recover the full \$7,700,000 in claimed damages. In Maryland, a recovering party is entitled to expectation damages from the breaching party. Here, the \$1,000,000 represents the lost profit that the Developer would have earned absent the delay resulting from the contract breach. The Developer is entitled to these damages to put in the position it would have been absent the contract breach. The remaining \$6,500,000 are consequential damages because they are unique to the Developer's situation and result from losses attributable to lost profits on other projects the Developer had to defer because of the financing tied up in the resort project. Under Maryland contract law, consequential damages are recoverable only if the breaching party knew about the potential consequential damages to result from a breach. Here, the Landowner did not know or have reason to know that his breach would result in consequential damages to the developer from other projects unrelated to the development of the Landowner's property. Thus, the Developer will be unable to recover these consequential damages.

PART C

The Operator has potential claims for its lost profits against Landowner for breach of contract and against the Natural Gas Company for tortious interference in business relations. The Operator could also seek recovery from the developer. Under contract law, a third party beneficiary can sue a breaching obligor for damages. Here, the Operator was not a third party beneficiary named in the contract between the Landowner and Developer. However, the earlier Memorandum of Understanding signed by the three parties put the Landowner on notice of the goal of the sale of his land. It would be helpful if the Operator could show that the terms of the memorandum were included or incorporated into the land sale contract between the Landowner and the Developer. Additionally, the Landowner negotiated

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directly with the Operator over the terms of the sale. Thus, the Operator can seek his expectation damages of lost profits from the Landowner.

The Operator could potentially have a claim against the Natural Gas Company. The Operator would have to show that the Natural Gas Company knew of both the land sale contract to the Developer and the Memorandum of Understanding regarding the development project. This is tenuous claim since it is not readily apparent whether the Natural Gas Company has such knowledge.

Finally, the Operator could pursue an action against the Developer for recovery of its lost profits. The Operator and Developer signed a contract in which the Developer agreed to complete construction of the resort in time for Operator to begin operations in December 2011. The Developer breached its contractual agreement. However, the Operator may be hesitant to pursue such an action since the two parties found an alternative property to develop and appear to be in a continuing business relationship.

REPRESENTATIVE ANSWER 2

A. At the time of the breach, when the Landowner signed the lease with the Gas Company, the Developer could have pursued a specific performance remedy. Traditionally, specific performance is not a favored remedy in Maryland. However, real estate transactions are one of the few places where specific performance is permitted. As such, Developer could have sought to enforce the contract that it had signed in January 2011. This could have been complicated if the Gas Company acquired its rights to the property in good faith. If Gas Company didn't have notice of the Landowner's deal with the Developer, then it could be considered a bona fide purchaser and would have its reliance interests protected

B. The Developer would likely not be able to recover the full \$7,500,000 damages. In Maryland, we give expectation damages and the expectation is no breach. This helps put the plaintiff in as good of a position as if there had been no breach. Here, once the Landowner repudiated the contract, the Developer had a duty to mitigate damages, which it did by seeking out a new deal. The extra delay in opening the resort and the provable lost profits would be recoverable by the Developer. As a result, the Developer could recover the \$1,000,000 in lost profits. However, the rest would likely be considered too speculative to be awarded. It would be difficult for the Developer to prove that it would have made a profit with the other deals that didn't go through as a result of the tied up financing. Therefore, a court would likely not grant the \$6,500,000 as being too speculative.

C. The Operator could try to recover its lost profits from the Developer, who could recover the damages from the Landowner. Even though the landowner caused the damages through its breach, the Operator and the Landowner are not in direct contract. There is the MOU, although that would be considered an agreement to agree and not a contract itself because it did not lay out material terms of the real estate deal. Nor would the Operator be considered a third-party beneficiary of the Landowner-Developer contract because the Operator was not named in the contract. The Operator could try to recover from the Developer, who was not able to perform on its contract of delivering a resort for the Operator to operate. The

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Developer, in addition to its damages above, would be able to recover the cost of the Operator's lost profits through consequential damages. Even though consequential damages are generally not allowed, here the Landowner would have been on notice about them as a result of the MOU, which would have notified the Landowner that there would be follow on damages in addition to simple expectation damages.

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QUESTION 8

Jane and Henry rose owned, as tenants y the entireties, a large parcel of land located in Talbot County, Maryland. They have four adult children. The land improved by a residence, and a barn, and the remainder of the land was devoted to farming (collectively, the “Property”). The ancestors of Jane Rose had owned the property for more than 100 years.

Attorney Smith, a Maryland lawyer, represented Henry and Jane Rose at the time they received their interest in the Property from Jane’s father. For many years thereafter, Attorney Smith represented Mr. and Mrs. Rose in all of their legal matters, including farm operation issues, as well as in the preparation of their Wills and other estate planning documents.

In February 2007, Jane and one of her daughters, Denise, went to see Attorney Smith for the purpose of conveying Jane’s interest in the Property to Denise. Jane executed and acknowledged a deed prepared by Attorney Smith, and he had it properly recorded among the land Records of Talbot County, Maryland (“2007 Deed”). Attorney Smith congratulated Denise as a new owner, and he advised Denise that he would continue to represent her interests in the Property. He invited Denise to call him if she ever needed additional assistance.

In 2008, Jane died. Henry was advised by Attorney Smith that henry owns solely the Property, and that he should proceed with the farm operations as he had in the past.

In 2012, Henry met with Attorney Smith to obtain advice on how he could continue to live on the Property as long as he is alive while ensuring that the Property stayed in the family. Attorney Smith recommended that henry sign and acknowledge a deed reserving to himself a life estate with the remainder to his and Jane’s four children, as joint tenants. Henry executed and acknowledged a deed prepared by Attorney Smith, and Attorney Smith had it properly recorded among the Land Records of Talbot County, Maryland (“2012 Deed”).

In 2013, Denise learns about the 2012 Deed signed by her father, and she immediately called Attorney Smith about her interest in the property. Attorney Smith refused to accept any telephone calls from Denise.

Denise comes to you, a Maryland lawyer, about her rights and the conduct of her lawyer, At-torney Smith.

- A. Discuss a validity of the 2007 Deed and the 2012 Deed**
- B. Discuss the conduct of Attorney Smith**

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REPRESENTATIVE GOOD ANSWER 1

A) The 2007 deed conveyed Jane's interest in her land to her daughter, Denise. However, because Henry and Jane owned the property as tenants by the entirety, the conveyance was not valid. As tenants by the entirety, both Henry and Jane had equal ownership in the property with the right of survivorship. This type of tenancy cannot be unilaterally transferred to another party. Therefore, Jane's attempt to convey her interest in the property to her daughter without Henry's consent is invalid. The 2012 Deed is valid because at the time of the conveyance, Henry had sole ownership of the property. When Jane died in 2008, Henry became sole owner of the property because of the right to survivorship. Therefore, his conveyance in 2012 was valid.

B) Attorney Smith has violated many of the Maryland rules of professional conduct including the following:

Conflict of interest: An attorney may not represent two clients whose interest are materially adverse. Additionally, an attorney may not represent a client when representation will be materially limited by obligations to another client, third party, or himself. Here, Attorney Smith represented Henry and Jane for many years. Thus, when Denise came to see Attorney Smith to represent her in the land conveyance, Attorney Smith should have advised her to seek independent counsel. Conveying Jane's interest to her daughter without the consent of Henry is in direct conflict with Henry's interest in the property. Additionally, he should not have told Denise that he would continue to represent her interests in the Property, as this is a direct conflict with Henry.

Duty to keep clients informed: Attorney Smith had a duty to return the calls from Denise. A lawyer must keep a client informed about the status of her case. Attorney Smith failed to do this when he did not return Denise's calls.

Competence: An attorney must competently represent his clients. Here, by making a conveyance to Denise that was not good, he failed to provide her with adequate representation.

Duty to be truthful: An attorney must be truthful in his or her dealings with clients. Here, Attorney told Denise he would continue to represent her interests in the land and to call him if she ever needed additional assistance. Later, he told Henry that he was the sole owner of the Property, knowing that he had helped Jane with the execution and recording of the Property. Thus, he was not honest in his dealing with either client and may be disciplined for his actions.

REPRESENTATIVE ANSWER 2

A. The 2007 Deed would not be valid. Under Maryland law, when two people hold land as tenants by the entirety, one of those holders cannot convey their portion of the interest without the knowledge and consent of the other interest holder. A tenancy by the entirety is an extremely protected form of land ownership. Here, the facts state that Jane and Henry held the Property as tenants by the entirety. The facts do not state that Henry was aware or

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consented to Jane's attempt to convey her interest in the Property to her daughter Denise in 2007. Thus, without Henry's consent, the 2007 conveyance and Deed to Denise would be invalid.

The 2012 Deed would be valid. Under Maryland law, when a one tenant in a tenancy by the entireties dies, the remaining tenant has sole ownership of the property. The remaining tenant can then do with the property as he wishes. Here, Jane died in 2008, leaving Henry as the sole owner of the property (because the 2007 Deed was invalid). The grant of the life estate to himself (although somewhat unusual) is valid, and the grant of the Property to his four children as joint tenants is valid, because it would ensure that the children took the property as joint tenants subject to the four unities they were given the property at the same time, in the same instrument, with the same interest, and with the ability to possess the whole. Thus, the 2012 Deed would be valid.

B. Attorney Smith violated many of the rules of professional conduct in this case:

First, Smith's representation of both Jane and Henry would not violate any rules, because before Feb. 2007, it seems that he represented them as co-clients, which would be fine considering that they were never adverse to one another in the matters that they came to Smith for.

Smith violated the rules of professional conduct when he represented both Jane and Denise in the 2007 Deed matter. Because Jane was conveying her interest to Denise, she was adverse to Denise, and thus Smith should not have represented both parties because it constituted a conflict of interest. Representing adverse parties is a conflict that cannot be waived. In addition, in the 2007 Deed matter, Smith should have been aware that Jane could not convey her interest to Denise because of the Maryland law of tenancy by the entireties, and he should have informed Jane of this. Additionally, because Henry was also his client, Smith should have informed Henry of Jane's plan to give her interest to Denise.

Because Smith had taken on Denise as a client, he had a duty to inform her that her 2007 Deed was not valid, especially when he was moving forward with the 2012 Deed. Additionally, because he had represented Denise previously with regard to the Property and had helped her to execute an invalid Deed. Executing another deed to Denise in 2012 is a conflict of interest. Smith should have let Denise know that the 2007 Deed was invalid and that she needed to secure independent counsel in dealing with the 2012 Deed.

Attorneys must always have open dialogue with their clients. By not discussing with Denise that the 2007 Deed was invalid, and by dodging her calls in 2013, Smith has not kept an open dialogue with Denise.

Thus, Attorney Smith violated many rules of professional conduct in this case.

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QUESTION 9

Susan and Tracey properly formed a Maryland corporation called “LTR Solutions, Inc.,” which was based in Montgomery County, Maryland and in which they each held equal ownership interests. At the initial shareholder meeting Susan and Tracey elected themselves as Directors of the corporation, and subsequently designated Susan as the President and Vice President of the corporation, and Tracey as its Secretary and Treasurer.

Following several years of steady business and increasing profits, Tracey called the annual meeting of the Board of Directors, which was to be held in Honolulu, Hawaii. Notice of the meeting was mailed to Susan two weeks before it was to take place. Susan received the Notice and was upset by the short timeframe associated with the meeting. She decided to register her protest in person by attending the meeting and then to remain in Hawaii for a brief vacation.

Tracey held the meeting as scheduled and Susan, although present, refused to participate on the basis that she had received inadequate notice. Tracey then moved and voted to remove Susan as President, Vice President, and a Director of the corporation and install her colleague Julio as a Director of LTR and its President. Susan chose not to participate in the vote. The meeting then adjourned with no further business being conducted.

Two weeks later, Julio began his tenure as President of LTR. Based upon his prior experience in a different industry, Julio immediately changed various aspects of LTR’s business strategy. As a result, LTR’s profits plummeted, and Susan’s ownership interest in LTR declined substantially in value.

Susan has come to you, a Maryland lawyer, and asked if there were any irregularities in the formation of the corporation or the conduct of its affairs, and whether she has any recourse against LTR, Tracey, or Julio.

What would you advise Susan? Explain fully.

REPRESENTATIVE ANSWER 1

I. LTR Solutions appears to be formed under the laws of Maryland without defect.

In order to form a valid corporation in Maryland, a company must sign and register its Articles of Incorporation with the Maryland State Department of Assessments and Taxations. The Department must accept the articles in order for *de jure* corporation to exist. Nothing in the fact pattern indicates that LTR Solutions was not a validly formed corporation in Maryland. In fact, the facts indicate the company was properly formed, thus making its formation and inception effective.

II. Susan’s work as President and Vice President was unlawful, indicating a possible irregularity in the formation of the corporation.

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In Maryland, stockholders elect the Directors of the corporation. It appears Tracey and Susan were the sole stockholders, and their election as directors were thus valid. However, one individual cannot serve as both President and Vice President of a corporation. Here, Tracey and Susan designated Susan as both President and Vice President. This irregularity calls into question the corporation's legal validity.

III. Tracey may have violated her duty of loyalty to the company by holding the meeting in Hawaii.

Directors have a duty of loyalty to act in the best interest of the stockholders and cannot act in self-interest. Courts will view director's decisions under the business judgment rule, which presumes that directors make decisions in good faith, reasonable relying on information it receives and does not know to be fraudulent, and in the best interest of stockholders. Courts greatly defer to businesses in allowing directors to exercise judgment under this rule.

The meeting of the Board of Directors in Honolulu might demonstrate that Tracey was not acting in the best interest of the corporation. As an entity incorporated in Maryland, nothing in the facts indicates Tracey had any valid business reason for meeting in Hawaii, and a meeting there could show that Tracey was using corporate funds to meet in a tropical location, a decision that demonstrates self-interest, and thus working to the detriment of the other stockholders. However, Susan as the only other stockholder in LTR seemed to assent to the meeting in Hawaii by attending, despite the fact she was attending in order to register her protest because she also intended to stay in Hawaii for a brief vacation. Accordingly, a court is unlikely to find that Tracey breached her duty of loyalty to the stockholders by traveling to Hawaii because Susan assented to the travel through her own conduct.

A corporation's board must hold annual meeting, and shareholders must be given a reasonable opportunity to attend the meetings, other in person or by proxy. The board must provide reasonable notice to stockholders and other directors for meetings. Here, Tracey provided Susan with two weeks notice for a board meeting in Hawaii. Because of Hawaii's great distance from Maryland, Susan could argue that Tracey breached her duty to the stockholders by selecting a meeting destination that was an unreasonable distance away from Maryland and provided an inadequate amount of time.

However, the court is again likely to find that Susan's attendance at the meeting negated her argument. In order to hold a meeting, a quorum must be present. A quorum requires a majority of directors be in attendance. Because there are only two directors, Susan could have not attended the meeting, making it that a quorum could not be achieved in Hawaii. Susan than could have brought action against Tracey for traveling to Hawaii using company funds without a valid business purpose.

IV. Susan may bring suit as a stockholder if she believes Tracey violated her duty of loyalty.

As a stockholder, Susan could have brought either a direct or derivative action against Tracey. In both actions, the stockholder must first go to the Directors and allow them to set-

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up an investigative committee to look into the possibly unauthorized action. If such a request is futile or the stockholder believes the board will act in bad faith, the stockholder can bring suit in court with investigation by the board. Here, such a request is likely futile because Tracey and Susan are the only board members, so the investigative committee would likely only consist of Tracey. Susan can then bring a direct action to reap any personal losses as a stockholder because of Tracey's actions or a derivative suit in the name of the company.

Tracey's removal of Susan as President, Vice President and Director was unlawful. Though an officer may be removed for cause by the board, Susan's conduct does not likely rise to the level that would allow her removal as President and Vice President. Moreover, a director may be voted out of office by stockholders or removed by the board for cause in a majority vote. Here, Tracey only represents 50 percent of the stockholders and board, and thus likely does not meet threshold for removing Susan.

Even if Susan was lawfully removed by Tracey, she is still a stockholder in the corporation. When Julio was brought on board as President, he immediately changed LTR's business strategy. Though officers are responsible for the day to day operations of a company, Julio's change of strategy could indicate a substantial change in direction for the company that might require approval by the directors or stockholders. We would need to look into the provisions of the Articles and the company bylaws for more information.

V. Julio

Julio's loss of profits could allow for Susan to initiate a direct or derivative suit as a stockholder. The requirements for both are discussed above. Again, courts would probably defer to Julio under the business judgment rule.

REPRESENTATIVE ANSWER 2

Formation of the corporation.

A corporation must consist of President, a Secretary and a Treasurer. There may be a Vice President of the corporation, but the Vice President must be a different person than the President. So, although they both elected Susan as Vice President and President it was not proper corporation formation and the choice should have been made for Susan to serve as one or the other.

Susan could file a complaint to invalidate LTR's corporation status, but the court will find that is a de facto corporation if it did not know prior to the complaint filed and if it is now attempting to fix the defect.

Irregularities in the corporation's affairs.

The board only consisted of the two of them, so there was a quorum since Susan decided to attend the meeting. At the board meeting Susan and Tracey each had one vote. Despite

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Susan's refusal to participate on the basis of inadequate notice, she was there so any decisions made would be valid and any recourse Susan may have had for inadequate notice were waived. Therefore, Julio's election to the position of President of LTR was valid and there is no recourse for that. After Julio began his tenure, LTR's profits plummeted. Julio had a fiduciary duty to conduct business in a way that is in the best interest of LTR and to have the skills necessary to fulfill the positions and make the decisions.

Susan's recourse.

The fact that Susan's interest in the company declined is another matter. Susan has standing as a shareholder and would be able to sue as a shareholder to enforce her rights or to claim that the board is not acting in the best interest of the company. The business judgment rule would be a defense because Julio's decisions and actions on behalf of the company benefited the company. The resulting decline in Susan's interest in the company is significant to show that he breached his fiduciary duty. Julio acted based on his prior experience in a different industry. So, Susan could possibly sue LTR for breach of the Director's fiduciary duty; since that prior experience did not translate over to this industry. However, if the court finds that the plummeting of the profits was not due to a lack of skill and knowledge, she will not succeed on a claim against LTR. She also would not be able to pierce the corporate veil and reach Julio as he was acting in his capacity and within his power and he did not abuse the corporate veil.

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QUESTION 10

PART A

On April 1, 2012, Charlie rented commercial retail space from Bill. The lease was for one year in a shopping center in Prince George's County, Maryland. After one year, the lease was month to month. Rent was due on the first of the month. Rent that was past due for a period of five days after the first day of the month constituted a default under the lease; allowing for termination of the lease.

Bill did not receive any rent from Charlie during the month of August 2013, despite repeated demands and lack of response to voice mail and email messages to Charlie. On September 1, 2013, Bill, believing the lease had expired, attempted to re-enter the premises but the locks had been changed. Bill drilled the locks and entered the property. Once inside, he observed multiple marijuana plants growing in pots. He called the police, describing what he observed. Bill, upon arrival of the police, consented to the police entering the rental space. The police could smell the "marijuana" from outside the open door. The marijuana and growing plants were seized by the police.

Charlie was arrested and charged with manufacturing marijuana. Charlie's attorney timely filed the mandatory motion to suppress the search for and seizure of the marijuana from the retail space.

A. As Prosecutor, what arguments do you anticipate being made by the defense and how would you respond?

PART B

Charlie was found guilty in a jury trial for manufacturing marijuana and later appeared before the trial Judge for sentencing. At the sentencing hearing, the Judge asked Charlie if he had anything to say and that what he said would be considered by the Court. In his remarks, Charlie exhibited no remorse and continued to maintain his innocence. He said the jury found the wrong person guilty. The Judge said to Charlie "if you had said you were willing to take responsibility for your actions I would have given you a more modest sentence." The Judge proceeded to impose a sentence of 4 years citing Charlie's lack of remorse. The sentence was in the middle of that recommended by the Maryland Sentencing Guidelines.

B. Discuss the propriety of the Court's sentence, and who should prevail if the Defendant appeals the sentence.

REPRESENTATIVE ANSWER 1

PART A

The defense will likely argue that her 4th amendment right to be free from unreasonable search and seizure had been violated. In particular, he would argue that

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because he had placed his own locks on the outside of the rental space, Bill had no right to engage in self-help and enter the premises. The defense will also argue that Bill had no right to consent to a search of the property he was renting and in possession of.

These arguments will fail for several reasons. The Supreme Court's analysis of the Fourth Amendment emphasizes whether a search and seizure is "reasonable." Although there is a general preference for a warrant in a search of private property, there are many exceptions. In this example, Charlie is particularly disadvantaged by the fact that this is a commercial property. The Supreme Court has held that one's privacy interests in a commercial space are less than in one's home. Furthermore, Bill was not a state actor. Even if his entry into the commercial space was wholly unlawful, he was not acting on behalf of the police. Thus, the Fourth Amendment and the exclusionary rule do not apply to him.

Charlie's best argument is that Bill could not properly consent to the search of the rental space. Generally it is true that a landlord cannot provide consent for the police to search a tenant's home, but here Bill had apparent authority to do so because he believed the lease had terminated and it was a commercial space. Even if it is later determined that the lease was still in effect and that Bill had no right to consent to such a search, his apparent authority was sufficient to justify the search by police.

It should be noted that, when the police arrived, there was sufficient probable cause to secure a warrant. Not only did they have Bill's statement that he could see marijuana plants, but they could also smell them. Although this evidence will not be suppressed, there is no reason why the police could not have made sure of their efforts by securing a warrant.

PART B

A sentence within the range recommended by the Maryland Sentencing Guidelines is presumptively reasonable. Thus, with nothing more, Charlie's sentence would not be disturbed. On these facts, however, Charlie will prevail if he appeals his case because the judge's statements during sentencing were improper. The Supreme Court has held that, although a judge can consider remorse when sentencing a defendant, he may not consider a lack of remorse. Such a distinction is due to a defendant's Fifth Amendment right against self-incrimination. At no point is a defendant required to admit to a crime, even after her conviction. In this case, the judge's statements are a clear indication that Charlie's unwillingness to inculcate him was held against him.

Furthermore, both Maryland and federal courts have held that a judge must sentence a defendant on an individualized basis, taking into account the crime, the particular facts of the crime, and defendant's personal history as contained in the presentence report. Any blanket policy announced by a judge that takes away this individual sentencing is an abuse of discretion. In this case, by telling Charlie that he would have received a lighter sentence by taking responsibility, the judge effectively admitted that he had abused his discretion.

On appeal, Charlie will prevail. His case should be remanded for a resentencing before a different judge. However, his victory will be short lived as he will likely be resented within the same range, perhaps even receiving the same sentence.

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REPRESENTATIVE ANSWER 2

PART A

As a prosecutor, I would expect that the defense would raise a violation of Charlie's Fourth Amendment right against unreasonable searches and seizures. The Fourth Amendment protects against warrantless searches and seizures unless the search falls into one of six exceptions to the warrant requirement, such as a search incident to a lawful arrest, automobile stop, or if the search is consented to by an appropriate party. Here, the first question is if Charlie had a reasonable expectation of privacy in a commercial retail space under the Fourth Amendment. While the Fourth Amendment has stated that a person has a reasonable expectation of privacy in his home, Charlie may not have a reasonable expectation of privacy in an area held out to the public. A commercial space may be found to be an area held out to the public because it is a shopping center, which in and of itself invites the public to enter. If the court determines that Charlie did not have a reasonable expectation of privacy in a retail space, the subsequent search would not violate his Fourth Amendment rights. However, if the court determines that Charlie did have a reasonable expectation of privacy, the validity of the search will depend on if Bill had the authority to consent to the search. The terms of the lease between Charlie and Bills state that past due rent for a period of five days after the first of the month would constitute a default under the lease and allow Bill to terminate the lease. The police may argue that bill had the authority to consent to the search because he was the landlord and he believed that the lease had been terminated. However, the defense will likely argue that Bill did not have the authority to consent to the search because he had to drill the locks to enter the premises. In Maryland, if a tenant abandons the lease, a landlord has the right to enter the premises and re-let the property to mitigate damages. Consequently, Bill may have had the requisite authority to consent to the search.

The defense may also argue that Bills' entrance onto the property was a violation of Charlie's 4th Amendment rights. However, the Fourth amendment only protects against unreasonable searches and seizures by the government, an act by a private person, like Bill, would not violate Charlie's 4th Amendment right.

The defense may also argue that the police had sufficient probable cause to obtain a warrant prior to entering the retail space. If the police could smell the marijuana from outside the open door, they could have waited to obtain a warrant prior to entering the premises without consent from the appropriate party. The plants and drugs were not in danger of being destroyed and Bill lacked the authority to give consent. The police should have waited until they obtained a warrant to enter the rental space and their failure to do so, violated Charlie's 4th amendment rights. However, if the police reasonably believed that Bill had the authority to consent to the search, the fruits of the search will not be suppressed under the exclusionary rule.

PART B

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The court's sentence may have violated Charlie's 5th Amendment right against self-incrimination. A defendant has the presumption of innocence until proven otherwise and is not required to admit guilt at any time, even at a sentencing hearing. Charlie has the right under the 5th Amendment to refuse to answer if the answer would give grounds that could incriminate him. Here, the Judge asked Charlie to admit guilt to receive a lesser sentence, which would violate his 5th Amendment rights.

Further, a judge is not permitted to comment to the credibility of a defendant or a witness during trial. The trial judge's comment on Charlie's innocence, or lack thereof, was not proper. However, given that the Judge's sentence fell in the middle range recommended by the Maryland Sentencing guidelines, Charlie will likely not prevail in an appeal. The Court may consider a range of factors in determining a proper sentence, which may include the defendant's remorse. As long as the judge gives a reasonable explanation for the sentence and it stays in the guidelines it will not be overturned on appeal.

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