

FEBRUARY 2006
OUT OF STATE ATTORNEYS' EXAM
QUESTIONS AND BOARD ANALYSIS

QUESTION 1

(15 points – 27 Minutes)

Paula, maker and beneficiary, has sued Dan, Trustee, in a Maryland circuit court for breach of trust, fraud, and self-dealing in connection with Dan's handling of investment funds and other assets under a written revocable trust agreement. Paula initially consulted with her personal attorney, Counselor, concerning the case. Counselor interviewed Paula and other persons with knowledge of the facts, reviewed books of account, trustee's reports and other documents in Paula's possession, examined bank and public records and notified Dan of the termination of the trust agreement at Paula's request.

Based upon the foregoing, Counselor concluded that Paula had a good cause of action against Dan. Counselor prepared a typed "summary" of the facts, his findings, conclusions and recommendations. He did not do trial work and referred Paula to Barrister who agreed to file suit against Dan. Among the documents and other materials that Counselor forwarded to Barrister was his "summary" noted above. In answers to Interrogatories, Barrister disclosed Counselor as a potential fact witness and Dan's attorney noted his deposition. While waiting to give his sworn deposition, Counselor refreshed his recollection of certain dates, times and other data by reviewing his "summary". Dan's attorney observed Counselor looking at a file and, during the taking of the deposition seeks to have Counselor's "summary and file materials" identified and made a part of the deposition as an exhibit. Barrister refuses to permit the production.

- a. Can Barrister's position in refusing to permit the production of the summary as an exhibit be sustained? If so, on what basis?**

ADDITIONAL FACTS FOR PARTS B & C

Dan's attorney also deposed Realtor who is identified by Paula as an expert to be called at trial to testify as to the fair market value of certain land. Her written appraisal was provided to Dan's attorney during discovery.

During the deposition Realtor had in her possession a file that contained notes, drawings, calculations and other data accumulated by the witness during the preparation of her appraisal and opinion of value. Dan's attorney wants to look at the file, read the material in it and have the contents introduced as a deposition exhibit.

- a. Is there a valid basis for Paula's attorney to refuse to permit production of the material? Explain in full.**

- b. How should counsel for Paula and Dan proceed to resolve the foregoing issues during the discovery phase of litigation?**

BOARD'S ANALYSIS – QUESTION 1

(a) Barrister's refusal to permit the production of the summary can be sustained on the following grounds:

1. In noting Counselor's deposition, Dan's attorney did not take proper steps to obtain production of documents as provided for in Rule 2-412(c). As a nonparty, Counselor's records would have to be obtained by subpoena and include a designation of the materials to be produced. The subpoena must be attached to or included in the notice of deposition.

Under Rule 2-415(c) any party may inspect and copy documents and other tangible things produced by a deponent. In this case the deponent did not produce the summary in response to any request or subpoena. Nor did deponent use the summary or other documents to refresh his recollection while testifying which would have permitted Dan's attorney to inspect the documents and introduce them for the purpose of impeaching the witness under Rule 5-612. Counselor merely looked at his file prior to his deposition.

2. The facts indicate that Counselor was Paula's attorney at the time of the preparation of the summary and the prior investigation. Even if Dan's attorney's demand to see and introduce the material was otherwise proper, Paula could assert privilege at least to that part of Counselor's file material characterized as attorney work product under CJ 9-107 (attorney-client privilege). In addition it appears from the facts that much of the investigative material collected by Counselor during his representation of Paula would be readily available to opposing counsel and would impose no undue hardship on Dan and therefore would not be discoverable under Rule 2-402.

Rule 2-402 (e) permits discovery of documents or other tangible things prepared in anticipation of litigation at trial by or for another party or by or for that party's representative (including attorneys) only upon a showing that the material is discoverable (any relevant matters involved in the action if it is reasonably calculated to lead to discovery of admissible evidence).

Documents or other tangible things prepared in anticipation of litigation by another party (Paula/attorney) can only be obtained upon a showing that the materials are discoverable and that there is substantial need for the materials in preparation of the case and the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. If the showing is made, the court must protect against disclosure of mental impressions, conclusions, opinions and legal theories of any attorney and other representatives of a party. A motion to compel discovery would not be successful under these facts because Dan's attorney failed to file a request for production of documents under Rule 2-241. See Rule 2-432(b)(e).

(b) Realtor is an expert expected to be called at trial. As such, Dan's attorney is entitled to the written report made by Realtor and can obtain further discovery by deposition or otherwise of the findings and opinions to which the expert is expected to testify at trial per Rule 2-402(a) and (c). Dan's attorney is already in possession of Realtor's written appraisal. He may obtain additional discovery during the deposition of the findings and opinion of Realtor. However, in the absence of facts indicating that Realtor refreshed her memory or otherwise made use of the file contents, Dan's attorney is not entitled to see the file contents or admit them as exhibits. The facts indicate only that Realtor had the file in her possession.

The file material sought by Dan's attorney was not "produced" by Realtor and is not within the purview of Rule 2-415 which permits any party to inspect and copy documents and other tangible things produced by a deponent.

Prior to seeking intervention by the court, counsel for both parties should make good faith efforts to resolve discovery issues without court involvement. In particular, if Paula is asserting privilege, she should identify the nature of the privilege claimed.

QUESTION NO. 2

(15 Points – 27 Minutes)

Weber's car was stopped by police in Delmar, Delaware. The town of Delmar straddles the Maryland-Delaware line and its police have jurisdiction in both of the states. Weber was arrested for driving while his license was revoked. After his arrest he was taken to the Delmar police station which was located in the Maryland side of the town and searched during processing. The search resulted in the recovery of a quantity of cocaine and Weber was charged with the possession of cocaine in the District Court of Maryland for Wicomico County.

When Weber appeared in the District Court he prayed a jury as he had not retained an attorney and did not wish to proceed without one. Weber was represented by attorney Anderson when the case was forwarded to the Circuit Court for Wicomico County, Maryland.

Anderson timely filed discovery on Weber's behalf in the circuit court pursuant to Maryland Rule 4-263 using a "long form" discovery containing 37 questions. Anderson at the same time as filing the discovery filed a motion to suppress the evidence obtained during the search of Weber as unlawful under the Maryland rules. This was the only motion which filed before the trial.

The State filed a response to the request for discovery answering only the following three questions: 1) whether the State had any material or information that tended to negate or mitigate Weber's guilt or punishment as to the offenses charged, 2) providing a copy of a document which contained the substance of a statement made by Weber, and 3) providing to attorney Anderson a copy of the laboratory analysis of the alleged cocaine. Anderson files a Motion to Compel discovery claiming that the State should have provided answers to all of the questions in his long form discovery in this case. This motion was denied by the court.

The circuit court denied the motion to suppress the search of Weber and its results – the cocaine.

As the trial begins Anderson raises the issue of jurisdiction of the court to even hear the case and moves to dismiss the charges for lack of jurisdiction. This motion is denied by the court, as it was a mandatory motion not timely filed. Weber is convicted of possession of cocaine. A timely appeal is noted to the Maryland Court of Special Appeals.

- a. On appeal should the trial court’s ruling on the Motion to Compel Discovery be maintained or reversed?**
- b. On appeal should the trial court’s denial of the Motion to Dismiss for lack of jurisdiction on the basis that it was not timely filed be upheld or reversed?**
- c. Was there jurisdiction to charge Weber in Maryland with the charge of possession of cocaine?**
- d. On appeal Anderson attacks the circuit court’s ruling on the motion to suppress. Should that ruling be upheld or reversed?**

BOARD’S ANALYSIS – QUESTION 2

The trial court’s ruling denying the Motion to Compel should be upheld. Maryland Rule 4-311(b)(2) provides that after a jury trial is prayed in a criminal action and the charges are then transferred to the circuit court that “pretrial procedures shall be governed by the rules in this Title applicable to the District Court.”

The trial court’s ruling on the Motion to Dismiss for lack of jurisdiction should be reversed. A motion challenging the jurisdiction of the trial court is not a mandatory motion under Maryland

Rule 4-252 which needs to be made within the time frame of that rule. Under Maryland Rule 4-252(d) a motion asserting lack of jurisdiction may be raised and determined at any time.

The circuit court should have ruled that there was no jurisdiction in Maryland for the charge against Weber for possessing cocaine. Although Weber was lawfully arrested and in the custody of the Delmar police, and the police could lawfully search him incident to his arrest on the Delaware driving while revoked charge, he was not voluntarily in Maryland and had no intention of committing any crime in Maryland. As there was no criminal intent on Weber's part to possess drugs in Maryland, or for that matter any intent on his part to be in Maryland, there was no nexus of his criminal activity to Maryland. But for the police transporting him into Maryland no criminal act would have occurred in Maryland.

The ruling on the lack of jurisdiction makes this question moot, although if the Delmar police were to charge Weber in Delaware the search would undoubtedly be a lawful search incident to his proper arrest in Delaware on the motor vehicle charge there.

QUESTION NO. 3

(15 Points – 27 Minutes)

Patrick is a resident of Cecil County, Maryland. He and his wife own a home in Elkton where they own and operate a flower shop. They also own a summer home on the Delaware Bay at Cedar Creek, Delaware.

On June 6, 2003, while at the summer home, Patrick suffered severe burns to his hands and face when a portable generator he had started caught fire and exploded. The generator was manufactured by XL Mfg. Co. of Moline, Illinois and was sold to Patrick and installed on June 1, 2003 by Dover Supply Co., Dover Delaware.

XL Mfg. Co. has a resident agent in Maryland and Dover Supply Co. regularly sells and installs products in Maryland.

After a year of hospitalization, surgery and physical therapy, Patrick was discharged from medical care.

Attempts by Patrick to negotiate a settlement with XL Mfg. Co. and Dover Supply were unsuccessful and. on December 1, 2004, Patrick retained the services of Attorney Able of Elkton who is admitted to practice in Maryland and Delaware.

Investigation of the accident by an expert hired by Able determined that the fire was caused by failure to properly install a clamp on the hose from the gasoline line to the carburetor of the generator permitting fuel to drip onto the engine muffler and ignite.

Able filed a complaint against XL Mfg. Co. and Dover Supply, Inc. in the appropriate trial court in Delaware on June 8, 2005 alleging negligence and breach of warranty by both manufacturer and seller. Service was obtained on both defendants on June 15, 2005. Both defendants filed preliminary motions seeking dismissal of the complaint based on Delaware's 2-year statute of limitations. On July 28, 2005, the trial judge entered an order dismissing the complaint as untimely filed.

What, if any, action can Patrick's attorney take to revive his client's cause of action?

BOARD'S ANALYSIS – QUESTION 3

Patrick and his wife are residents of Cecil County, Maryland. They can institute suit in Maryland for the following reasons:

1. Residence in Maryland.
2. Both XL Mfg. Co. and Dover Supply Co. can be sued in Cecil County. XL Mfg. Co. has a Maryland resident agent.
3. Dover Supply, Inc. is amenable to suit in Maryland because it regularly does business in Maryland. CJ 6-103(4),

Personal jurisdiction exists with respect to a foreign corporation if service of process is validly effected upon the resident agent in Maryland and at least one of the jurisdictional criteria in CJ 6-103(b) is shown to exist.

XL Mfg. Co. can be served with process through its resident agent.

Where there is more than one defendant and no single venue is applicable to all defendants, all may be sued in a county where any one of them could be sued.

CJ 6-201 & 6-202.

Dover Supply, Inc. can be sued in Cecil County because it carries on a regular business there. Also, under CJ 6-202(3), a corporation with no principal place of business in Maryland may be sued where the Plaintiff resides.

Rule 2-101(b) provides that suit must be filed in Maryland within 30 days of the dismissal of suit in Delaware. This provision applies only in favor of a Maryland resident in product liability cases. CJ 5-115(b).

QUESTION NO. 4

(15 Points – 27 Minutes)

Arnold is newly admitted to the Maryland Bar and has rented office space in a building in Silver Spring, Maryland and is operating as a sole practitioner. Brenda, an experienced Maryland practitioner rents the office across the hall from Arnold and has directed a few clients to him to try to help him out as a beginning lawyer. Arnold is desirous of attracting more clients so that he can “pay the rent.”

Arnold created an Internet domain name as follows: www.greatestlawyer.com. When the domain name was accessed the following appeared: “To win your case, call 1-800-WINNERS. You win, we win or there is no fee!”

Arnold was listening to the news on the radio and heard the report of a collision between two transit buses in the lower end of the county. He immediately set out to the scene of the accident to investigate how it happened.

Arnold stopped at a local restaurant for lunch and overheard several customers discussing the accident. He engaged them in conversation and discovered that they had been on board one of the buses.

Arnold identified himself as an attorney and handed each one a new business card and told some of them he would like to represent them. He obtained names, addresses, and telephone numbers for a number of the victims.

Victoria, one of the victims, accepted Arnold’s offer to employ him. Because she had lost her luggage in the accident, Arnold offered her a loan of \$500. When she accepted his offer, he drew a check from his trust account payable to cash and handed it to Victoria.

When Arnold returned to his office he stopped in to see Brenda to tell her about the accident and his new potential clients. Brenda had been concerned about Arnold's practice and after hearing his latest venture, asked if she could candidly discuss with him the matters which concerned her.

What issues might she raise with him and on what basis?

BOARD'S ANALYSIS – QUESTION 4

Both the domain name and the message violate Rule 7.1 regarding communications concerning a lawyer's services. A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, is likely to create an unjustified expectation about results the lawyer can achieve or compares the lawyer's services with other lawyers' services. The domain name is certainly misleading, particularly the contrived name "greatest lawyer." The message violates 7.1(b) in that it is likely to create an unjustified expectation about results the lawyer can achieve and probably violates 7.1(c) as well. 7.1(c) provides that a communication is false or misleading if it compares the lawyer's services with other lawyers' services unless the comparison can be factually substantiated.

Additionally, Rule 7.2 requires an attorney advertising his services to include the name of at least one lawyer responsible for the content of the ad. Rule 7.2(b). Additionally, Rule 7.2(e) requires that an advertisement or communication indicating that no fee will be charged in the absence of recovery shall also disclose whether the client will be liable for any expenses.

The contact with prospective clients following the bus collision violates Rule 7.3 which states that a lawyer shall not in person, live telephone, or real time electronic contact, or solicit professional

employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted, (1) is a lawyer; or (2) has a family, close personal, or prior professional relationship with the lawyer. Nothing in these facts indicates that the exceptions apply.

Rule 16-609 provides: "An attorney or a law firm may not borrow or pledge any funds required by these Rules to be deposited in an attorney trust account, obtain remuneration from the financial institution for depositing any funds in the account, or use any funds for any unauthorized purpose. An instrument drawn on an attorney trust account may not be drawn payable to cash or to bearer." The use of the trust account violates the Rule against borrowing trust funds, and using any funds for any unauthorized purpose. It also violates the Rule in that an instrument drawn on a trust account may not be drawn payable to cash or bearer.

QUESTION NO. 5

(10 points – 18 Minutes)

Ace operates a small snow plowing business located just over the Garrett County line in Pennsylvania. He services various customers from Pennsylvania and from Garrett County, Maryland. On December 15, 2005, Ace's employee, Willy, was plowing Harry Homeowner's driveway in rural Garrett County. Willy, upon backing down Harry's driveway after completing his snow plowing, accidentally struck and knocked down a portion of Harry's wall with the end of the snow plow. A portion of the wall collapsed and crushed Harry's mailbox. Willy headed back to Pennsylvania and did not report his "accident" either to Harry or to Ace. Harry, upon returning home from work, discovered the damage. Harry later determined that the accident had been observed by Elston who is the father of Harry's next door neighbor and whom his neighbor had brought home from the Garrett County Nursing Home for an overnight visit. Elston is 82 years of age and is in poor health.

The total damages to the wall and mailbox are \$15,500. Harry wants to file suit in the District Court for Garrett County in order to get a judgment against Ace as soon as possible. He is also very concerned that his only eyewitness is a nursing home resident in poor health. He would also like to get as much information about Ace, his employee, and the snow plowing business as quickly as he can.

- a. Can he obtain service on Ace?**
- b. How should Harry's attorney proceed to best accomplish Harry's stated objectives?**

BOARD'S ANALYSIS – QUESTION 5

Harry is permitted to file suit in the District Court of Maryland for Garrett County and will be able to obtain jurisdiction over Ace under CJ Section 6-103(b). Willy is an agent of Ace and it is clear that Ace is subject to jurisdiction under 6-103(b) Harry could make arguments that 6-103(b)(1) and (2) are all applicable under the circumstances. Under Maryland Rule 3-431 he would want to perpetuate the testimony of Elston, his elderly neighbor” ...by deposition upon oral examination or written questions.” The deposition would be taken in accordance with Chapter 400 Title 2 of the Maryland Rules of Procedure. As to Ace and his employee, Willy, pursuant to Maryland Rule 3-421(b) a party may serve written interrogatories directed to any other party. Thus, Harry could serve one set of fifteen interrogatories to be answered by Ace. He would need leave of court to file more. The interrogatories could be served with the filing of the complaint and would have to be answered by Ace within fifteen days after service or within five days after the date on which Ace’s Notice of Intention to Defend is required, whichever is later.

QUESTION NO. 6
(10 Points – 18 Minutes)

Alan, a resident of Howard County, Maryland, purchased a mobile home from Best Mobile Homes and financed by Easy Finance Company, both of which are also located in Howard County, Maryland.

Alan signed a security agreement and promissory note with Easy Finance which properly filed a financing statement covering the mobile home. The promissory note was in the amount of \$35,000.

Alan moved the mobile home to a vacation lot in Carroll County which he rented yearround. He placed elaborate “skirting” around the mobile home unit to make it more attractive and to cover the wheels.

Alan defaulted on his payments, still owing \$31,000 to Easy Finance Company, which desired immediate possession of the mobile home.

- a. What kind of civil proceeding can Easy file to obtain immediate possession?**
- b. In which county should Easy proceed?**
- c. Can Easy proceed to get judgment for \$31,000 in the same action?**
- d. In which court can Easy’s judgment be rendered? Why?**

BOARD’S ANALYSIS – QUESTION 6

a. Easy, in claiming the right to immediate possession of the personal property, may file an Action of Replevin under Maryland Rule 12-601. The Action must be filed in the District Court as it has exclusive jurisdiction over actions of replevin regardless of the amount in controversy. Section 4-401(ii).

b. Section 6-201(a) provides that a civil action shall be brought in a county where the defendant resides, carries on a regular business, is employed, or habitually engages in business. Section 6-202(iv) provides that in addition to the venue provided in Section 6-201 replevin may be brought in the county where the property sought to be recovered is located.

c. Rule 12-601(h) provides that after the issue of the right to possession before judgment is determined the action shall proceed as an action for recovery of property after judgment under Rule 12-602. This is an action in Detinue.

d. Even though the claim was originally filed in the District Court, the claim for judgment exceeds the monetary jurisdiction of the District Court. Rule 12-601(h) provides that the Clerk shall transmit the record to the Circuit Court. This is necessary in this case because under Section 4-401(i), Courts Article, damages claimed exceed the jurisdictional amount of the District Court.

QUESTION NO. 7

(20 Points – 36 Minutes)

On December 24, 2005, Jennifer was unloading Christmas presents from her car when her estranged husband Robert approached her. Robert pulled a chef's knife and Jennifer went to the ground in fear. Robert lifted her when she would not get to her feet and dragged her down the street towards his vehicle. Overcome with fear Jennifer was unable to walk and fell to the ground again. Robert said, "Come with me or I'll do it right here." Robert pushed Jennifer into his car and told her to undress and lie down on the back floor of his vehicle. Before Robert entered the car Jennifer exited and ran down the street. She flagged down a passing car and got in and exclaimed to the driver, "Help me. Please, help me. My husband is trying to rape me. Can you please take me to the police station."

Upon arriving at the police station Jennifer reported the incident and told police that one month earlier, on November 23, 2005, that Robert had raped her in their home. Jennifer reported that on November 22, 2005, after a long conversation about their "shaky" marriage she told her husband that the marriage was over. When she awoke the next morning Robert entered the bedroom where Jennifer had slept and locked the door. Robert displayed a handgun which he held to her head. Robert then demanded that she have intercourse with him and told her that if she did she wouldn't get hurt; she complied. Jennifer did not report this to the police at the time, but did apply for and obtain an *ex parte* protective order two days later.

At trial the court permitted, over objection, Jennifer's co-worker, Joy, to testify that Jennifer took the Monday following November 23, 2005, off from work to obtain the protective order. Joy also testified that Jennifer told her that Robert had raped her.

Robert was charged with attempted rape, kidnaping, false imprisonment, second degree assault, carrying a weapon openly with intent to injure and violation of an *ex parte* order with respect to the incident on November 23, 2005. Robert's attorney filed a motion to suppress asking the court to rule that evidence concerning the November 23, 2005 incident was inadmissible.

a. What ruling should the court make on the admissibility of evidence concerning the November 23, 2005 incident? Why?

ADDITIONAL FACTS FOR QUESTION 7

Defense counsel in his opening statement to the jury stated that the victim was a very disturbed woman and she has problems with the truth.” Further, during the trial defense counsel had attacked Jennifer’s credibility both directly and through other witnesses.

Joy, the victim’s co-worker, testified at the trial supporting Jennifer’s testimony that she had been raped on November 23, 2005. Robert’s attorney objected to the admissibility of the testimony arguing that the victim had a motive to fabricate the allegation of the rape in speaking with Joy and therefore that Joy’s testimony was a repetition of that fabrication.

- b. Should the co-worker’s testimony be admitted or excluded? Why?**

BOARD’S ANALYSIS – QUESTION 7

- a. What ruling should the court make on the admissibility of evidence concerning the November 23, 2005 incident? Why?**

The evidence is admissible pursuant to Maryland Rule 5-404(b) to show the Defendant, Robert’s, intent to commit rape under the sexual propensity exception noted in *Vogel v. State*, 315 Md. 458 (1989).

Under Rule 5-404(b) other crimes evidence is admissible, not to prove the character of the defendant but in order to show action in conformity with that character. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake.

The similarity of the facts between the two incidents – Robert’s threats involving the use of a weapon (a gun in November and a knife in December) and his comment in December to “come with me or, I’ll do it right here.” – showed a propensity for sexual assault. The use of a weapon fits into one or more of the exceptions for which such other crimes evidence would be admissible.

- b. Should the co-worker’s testimony be admitted or excluded? Why?**

The statement is admissible first under Maryland Rule 5-802.1(d) as a prompt complaint of a sexual assault.

The statement to Joy was also admissible under Maryland Rule 5-802.1(b) as it was consistent with the declarant, Jennifer's, testimony and was offered after there was an explicit or implicit charge that the declarant had fabricated her testimony.