

**JULY 2007**

**OUT OF STATE ATTORNEYS' EXAM**

**QUESTIONS AND BOARD ANALYSIS**

**QUESTION NO. 1**

**(15 points - 27 Minutes)**

Joan Falls is employed by Prince George's County, Maryland as a crossing guard. The crossing guards are covered by an employment agreement that states, in relevant part, that all employee grievances arising from the agreement are subject to binding arbitration, and the arbitration must occur within 30 days of the action at issue.

On March 22, 2007, Joan passed an examination that qualified her for advancement within the agency. On June 25, 2007, she and other qualified applicants were told that they would not be promoted because management had decided to implement a new procedure, and they immediately filed a grievance in response. The next day, Ken Batlock, a Maryland attorney, was hired by the Crossing Guards Union to handle the grievance on behalf of Joan and the other qualified applicants.

On July 1, 2007, choosing not to request arbitration, Batlock filed a mandamus action against Prince George's County in the District Court of Maryland for Prince George's County and requested that the County be ordered to immediately hire Joan Falls and other qualified applicants. The request stated that there was no other relief available and was signed by Batlock. On that same date, Batlock mailed, via regular mail, a copy of the complaint to the Superintendent of Schools.

On July 2, 2007, the County Executive and County Council of Prince George's County asked you, their legal counsel, to proceed to arbitration and have the lawsuit dismissed.

**What would you do to accomplish their directive and why? Discuss fully.**

**BOARD'S ANALYSIS - QUESTION 1**

Counsel should make the following arguments in response to the mandamus:

The collective bargaining agreement by its express terms required arbitration of any grievances within 30 days of the action at issue. Under the facts the County could first argue that there has been no request for arbitration and accordingly the matter cannot be heard by a court of law.

A mandamus generally does not lie when other relief (such as arbitration) is available.

(See, Town of District Heights v. County Commissioners, 210 Md. 142, 122 A2d 489 (1956))

The District Court did not have jurisdiction to hear a mandamus action.

Myers v. Chief of Baltimore County Fire Bureau, 237 Md. 583, 207 A2d 467 (1965))

The complaint was not properly served. Rules 2-121 (Circuit Court) and 3-121 (District Court) required service by personal delivery to the person to be served, by leaving a copy at their dwelling house or usual place of abode, or by mailing by certified mail/restricted delivery. Batlock sent the complaint via regular mail in violation of this rule. Additionally, Batlock did not serve the proper party. Pursuant to Maryland Rule 2-124 (l). Batlock must serve the resident agent designated by the local entity or if it has no resident agent, service may be made by serving the chief executive or presiding officer of the County Council.

## QUESTION NO. 2

(15 Points - 27 Minutes)

Lee and his 14 year old son, Jerome, were driving north on Interstate 95 near Havre de Grace, Maryland. After much cajoling, Lee agreed to teach Jerome to drive. Jerome began to drive and he negligently swerved into the adjoining lane and was struck by Tommy Trucker.

A month later, Trucker filed suit against Lee and Jerome for negligence, seeking damages of \$100,000. The next day, Lee and Jerome went to see Attorney Adams, a Maryland attorney who advertised as the “Traffic Expert” on her website. Attorney Adams agreed to take their case for \$40,000, with an additional \$15,000 required if they had to go to trial. Lee immediately wrote a check for \$40,000. Later that day, Attorney Adams deposited the check into her trust account and immediately transferred \$15,000 into her operating account.

As the trial date approached, Lee became worried and decided to hire another attorney and wrote a letter to Attorney Adams asking that his money be returned and advising that Adams’ services would no longer be required. Adams did not respond.

**Lee notified Bar Counsel of these facts. What charges could Bar Counsel bring against Attorney Adams, and why?**

### BOARD’S ANALYSIS - QUESTION 2

Bar Counsel might bring charges for violations of the following Rules of Professional Conduct:

Rule 1.5 (Reasonableness of the fee) – The damages sought were only \$100,000 yet Attorney Adams was seeking as much as \$55,000 in payment for her services. Rule 1.5. Given the time and labor involved and the amount involved, it appears that the fee is excessive.

Rule 1.7 (Conflict of Interest) – It may have been negligence for Lee to allow Jerome to drive his vehicle; accordingly, it could result in a conflict of interest to represent both. Attorney Adams may have violated this rule by not informing both of the possible conflict and getting their consent to represent them.

Rule 1.15 (Safekeeping property) – Attorney Adams had a duty to place the \$15,000 in her trust account until such time as it was earned.

Rule 1.16 (Declining or Terminating Representation) – Once her services were terminated, Attorney Adams had a duty to turn over unearned monies and any other papers or property of her clients.

Rule 1.3 (Diligence) - Attorney Adams had a duty to act with reasonable diligence and promptness yet did nothing on her clients' behalves.

Rule 1.4 (Communication) – Attorney Adams did not respond to her clients' letter advising that her services were no longer needed.

Rule 7.4 (Communication of Fields of Practice) – A lawyer may not hold himself out as a specialist. Advertising as “The Traffic Expert” may violate this provision.

### QUESTION NO. 3

(15 Points - 27 Minutes)

The newly-elected County Executive for Charles County wanted to appoint Art Flute as director of the County's Office of Internal Audits. The Charles County Commissioners believed that Liza Hew would be a better candidate. They introduced legislation that required the director to reside within Charles County and to hold a graduate degree in management, knowing that Art Flute does not have such a degree and does not reside in the County.

One of the Commissioners stated during the March 1, 2007, committee hearing on the legislation, that the law was necessary to ensure "we don't hire any uncredentialed, sleazy carpet baggers." Art Flute was at the hearing and was aggrieved by the statement.

The next day his attorney went to the Circuit Court for Charles County and filed a defamation action against the Commissioners for the statements made and a request for a temporary restraining order (TRO) to enjoin them from enacting the legislation. The Court held an ex parte hearing on the TRO after Art's counsel stated that the Commissioners were not in session and delay would lead to irreparable harm.

At the conclusion of the hearing the court held on the record that the Commissioners "shall be enjoined from enacting any law that negatively impacts the livelihood of Art Flute until a decision is reached in the defamation action filed by Art Flute against the Charles County Commissioners."

**On what grounds may the Commissioners appeal the Court's actions? Discuss fully.**

### BOARD'S ANALYSIS - QUESTION 3

1. Md. Rule 15-504 sets forth the standards for the issuance of temporary restraining orders. This Section allows the issuance of a TRO without notice to the other parties "only if the applicant or the applicant's attorney certifies to the court in writing, and the court finds, that specified efforts commensurate with the circumstances have been made to give notice." The facts do not reveal that these steps were followed. Accordingly, I would petition the court to dissolve the TRO pursuant to Section 15-504(f) of the Maryland Rules.

2. The order is an interlocutory one since it does not finally resolve all issues. In Department of Transportation v. Armacost, 299 Md. 392, 404-405 (1984), the Court of Appeals enumerated the factors that must be found to exist before a court may issue an interlocutory injunction such as the one at issue:

As a general rule, the appropriateness of granting an interlocutory injunction is determined by examining four factors: (1) the likelihood that the Plaintiff will succeed on

the merits; (2) the 'balance of convenience' determined by whether greater injury would be done to the defendant by granting the injunction than would result from its refusal; (3) whether the Plaintiff will suffer irreparable injury unless the injunction is granted; and (4) the public interest.

Art Flute arguably cannot make a showing that he would succeed on the merits of the defamation action since statements made by the legislature when considering legislation are generally not subject to defamation actions. (Maryland Courts and Judicial Proceedings, Section 5-511) Assuming the Commissioner's statements could be found defamatory in nature, Art cannot meet prongs 2 through 4 since the law has not yet been enacted, the law could be vetoed by the Executive, and the Executive has not hired Art. For these reasons, it was premature to issue any type of injunction and I would request that the TRO be dissolved because there was no showing to support its issuance.

## **QUESTION NO. 4**

**(15 Points - 27 Minutes)**

Harry Hippie was convicted of a third-degree sex offense in July of 2006. He was sentenced to one year that was suspended and he was placed on supervised probation for one year. At the time of his sentence, Harry resided at “Alice’s Month- to-Month Rentals and Restaurant” located in Howard County, Maryland. Harry registered his address on the State’s Sex Offender’s registry, as required by law.

Over time, Alice became unhappy renting to Harry due to the company he kept. On May 1, 2007, she advised him that he had two weeks to move out of his apartment. On May 6, 2007, Alice and some friends removed Harry’s belongings while he was out and changed the locks. That same day, Harry’s probation officer stopped by “Alice’s Month-to-Month Rentals and Restaurant” to check on Harry and was informed by Alice that Harry no longer lived there and left no forwarding address.

On May 7, 2007, Harry came back to Alice and begged her to let him have his things and let him back in because he had nowhere else to go. Alice told him to beat it, and said “your Probation Officer is looking to have you locked up since he came by and I couldn’t tell him where you’re living!”

After wandering the streets for two nights, Harry stumbled into your law office and asked:

- a. In what court(s) may he file an action for unlawful distraint?**
- b. Is there a way to have his conviction expunged?**
- c. Can his Probation Officer have him arrested because he doesn’t live at Alice’s anymore?**

**As an attorney admitted to the Maryland Bar, what would you advise and why?**

### **BOARD’S ANALYSIS - QUESTION 4**

a. Two weeks’ notice may not have been sufficient on a month-to-month lease. Even if it is sufficient, Alice did not provide the full two weeks’ notice. Alice advised him that he had two weeks notice but evicted Harry and his belongings after only 5 days. Harry may be entitled to file an injunction with the District Court for Howard County since that court has exclusive jurisdiction to hear landlord-tenant matters within that County. Maryland Courts and Judicial Proceedings Code Annotated, Section 4-401.

b. Section 10-105 of Maryland Criminal Procedure Code Annotated allows a petitioner to request the expungement of a police record, court record or other record if:

- the person is acquitted;
- the charge is otherwise dismissed;
- a probation before judgment is entered, unless certain violations of the Transportation Article, Article 2 or Section 3-207( dismissal of certain assaults) of the Criminal Law occurred;
- a nolle prosequi or nolle prosequi with the requirement of drug or alcohol treatment is entered;
- the court indefinitely postpones the matter by placing it on the stet docket;
- the case is compromised under Section 3-207 of the Criminal Law;
- the charge is transferred to juvenile court under applicable provisions of law;
- the person is convicted of only one criminal act, and that act is not a crime of violence;
- and the person is granted a full and unconditional pardon by the Governor.

Harry's conviction does not appear to fall within categories 1-7, so his only recourse might be to seek a pardon from the Governor. However, a third-degree sexual offense is considered a sexually violent offense under Section 11-701 of the Maryland Criminal Procedure Code Annotated and could, therefore, be a crime of violence for which a pardon cannot be granted. If so, the conviction would stand.

c. Finally, Sections 11-710, et.seq., of the Maryland Criminal Procedure Code Annotated governs the registration of persons convicted of rape or sexual offenses. A registrant must send written notice of a change of address within seven days of said change. Section 11-706. However, only one day had passed when Alice notified the P.O. that Harry didn't live there anymore. Failure to give notice of an address change is a misdemeanor subject to imprisonment not exceeding 3 years or a fine not exceeding \$5,000 or both. Section 11-721. However, recent case law suggests that a homeless individual does not have a "residence" as defined in the law. *See, Twine v. State*, 910 A. 2d 1132 (2006). The case does not relieve Harry from his responsibility to register once he has an address but might protect him from prosecution while he is truly homeless.

## **PRELIMINARY FACTS FOR QUESTIONS NO. 5 AND NO. 6**

Harry Defendant was arrested and charged with attempted murder in Allegany County. He was brought before a District Court judge in Allegany County for a bail hearing. At the hearing, Harry's attorney provided proof that Harry was employed by Sand's Car Wash for an annual salary of \$12,000, that he was a high school graduate, that many of his family members resided in the County, and that he had no prior criminal record. The State was silent as to whether bail should be granted. However, due to the high profile of the case, the judge set bail in the amount of \$750,000.

### **QUESTION NO. 5**

**(10 Points - 18 Minutes)**

**Harry asked whether you, an attorney admitted to the Maryland Bar, can get his bail reconsidered. What steps would you take? Discuss fully.**

### **BOARD'S ANALYSIS - QUESTION 5**

In setting the amount of bail, the Judge should have considered the following factors set forth in Rule 4-216:

- The nature and circumstances of the offense charged
- The defendant's prior record of appearance at court proceedings or flight to avoid prosecution
- The defendant's family ties, employment status and history, financial resources, length of residence in the community
- The recommendation of the State's Attorney
- The danger of the defendant to himself, the alleged victim, another person, or the community

I would file a motion for reconsideration, pursuant to Rule 3-311, asking for a reduction in bond, since Harry has ties to the community, has no prior record, has a job and the State did not request bail. If the District Court is not inclined to grant the motion, I would petition the Court of Special Appeals for leave to appeal pursuant to Maryland Courts and Judicial Proceedings Code Annotated, Section 3-707.

## ADDITIONAL FACTS FOR QUESTION 6

There are very few prosecutors in Allegany County willing to risk their reputation on failing to gain a conviction against Harry, so a novice prosecutor, has been assigned to prosecute the case.

As the prosecutor plans her trial strategy, she decides to call the following witnesses to offer the following testimony:

- a. The defendant, who waived his right to remain silent during his arrest and made some incriminating statements, including an admission of guilt.
- b. The defendant's ex-wife to testify that during their marriage, Harry Defendant stated that he dreamed of randomly killing people. She indicated that Harry called her on the day of his arrest to say that he loved her always and that he almost fulfilled his dream.
- c. The defendant's jail mate, "Big" Ears, who shared a cell with Harry while both were awaiting trial, as to the conversation between Harry and his priest, Father Jones, which "Big" Ears overheard upon his unexpected return to the cell one day. "Big" Ears overheard Harry confess details of the crime to Father Jones.
- d. Father Jones, as to the nature of his jail cell conversation with Harry, since Father Jones has told you that he wishes to testify because he is concerned that Harry will kill someone if given the opportunity.

### QUESTION NO. 6

(15 Points - 27 Minutes)

**How should the court rule on any objection(s) to such testimony, and why?**

### BOARD'S ANALYSIS - QUESTION 6

- a. Harry may not be compelled to offer testimony in violation of his privilege against self-incrimination. Maryland Courts and Judicial Proceedings Code Annotated, Section 9-107.
- b. The ex-wife generally may not testify about confidential communications made by Harry during the marriage. Maryland Courts and Judicial Proceedings Code Annotated, Sections 9-105 and 9-106. However, the statements made about "fulfilling his dream" may be admitted as an exception to the hearsay rule since the two were not married at the time of utterance.
- c. Big Ears is not precluded from testifying simply because he was incarcerated. Maryland Courts and Judicial Proceedings Code Annotated, Section 9-101. The

- conversation between Harry and his priest is not protected since the clergy's privilege does not extend to matters overheard as indicated in the facts.
- d. The minister may not be compelled to testify on anything communicated to him in confidence by one seeking spiritual advice or consolation. Maryland Courts and Judicial Proceedings Code Annotated, Section 9-111. However, the privilege is Father Jones' and he may waive it.

## QUESTION NO. 7

(15 Points - 27 Minutes)

Lee O'Neill retained Attorney Brown, licensed to practice solely in the State of Maryland, to represent her in an action against a business partner for breach of contract. She did so due to Attorney Brown's assertion that "he could proceed quickly, did not need assistance, was well-versed in commercial transactions, and would get results." Ms. O'Neill related all pertinent facts and provided her business partner's work and home addresses.

Shortly thereafter, Brown filed a complaint for fraud and breach of contract against the business partner. He filed it in the State of Delaware, the business partner's place of residence. The complaint was signed by Brown and Attorney Green, a friend of Brown's admitted to practice in Delaware. Attorney Brown promised to split the fee paid by O'Neill with Attorney Green, but failed to do so. As a result, Attorney Green decided to let Brown handle the matter.

The complaint was dismissed a few months later for failure to serve the defendant. Notice of the dismissal was mailed to both attorneys. Ms. O'Neill called Attorney Brown weekly to ascertain the status of her case and was always advised that "things were under control". After a few months of this, she hired another attorney to handle the matter. This new attorney learned about the dismissal in Delaware and Brown's arrangement with Green and approached Bar Counsel with his concerns.

**What charges might Bar Counsel file based on the above facts?**

### BOARD'S ANALYSIS - QUESTION 7

Bar Counsel may bring charges for violations of the following Rules of Professional Conduct:

Rule 1.1. Competence – Attorney Brown acted incompetently when he accepted a case that required filing in a jurisdiction where he was not admitted to practice and when he failed to notify Ms. O'Neill that the matter had been dismissed. It is also incompetence for Attorney Brown to allow the dismissal due to failure to serve the defendant. Attorney Grievance Commission v. Finnesey, 283 Md. 541 (1978). This is especially egregious since the facts reveal that the attorney had the proper addresses with which to serve the defendant.

Rule 1.3. Diligence – Attorney Brown did not act with proper diligence when he failed to serve the defendant, for the same reasons noted above.

Rule 1.4. Communication – The attorney violated Rule 1.4 by not informing her of the need to bring on Attorney green, and for his failure to truthfully represent the progress of the case. He

also violated this rule when he failed to inform the client that the matter had been dismissed.  
Finnese, supra.

Rule 1.5. Fees - It is a violation of Rule 1.5 to divide fees between lawyers who are not in the same firm where the client is not informed and does not consent in writing.

Rule 5.5. Unauthorized Practice of Law – Attorney Brown was not admitted to practice in Delaware. He therefore, violated Rule 5.5(a).

Rule 8.4. Misconduct - Given the totality of the facts Bar Counsel could argue that Attorney Brown’s actions prejudiced the administration of justice in violation of

Rule 8.4(d). (“Failure to represent a client in an adequate manner and lying to a client constitute a violation of Rule 8.4(d)”. Attorney Grievance Commission v. Reinhardt, 391 Md. 209, 222 (2005))