

JULY 2010

**OUT OF STATE ATTORNEY'S EXAM
QUESTIONS AND BOARD'S ANALYSIS**

QUESTION 1

(10 Points – 18 Minutes)

Barry, a Maryland lawyer, resides in Howard County, Maryland. Barry approaches his client and friend, Jules, a scientist who lives in Prince George's County, Maryland, because Jules has discovered a mechanism to create inexpensive clean energy from nuclear waste. Barry and Jules agreed orally that in exchange for legal services for a two year period related to the creation, marketing and sale of the patent, Jules would pay Barry 15% of all revenue from the sale of a patent for the mechanism, and royalties, if any, related to the license and use of the patent.

After four months, Jules called Barry to let him know that the United States Department of Energy had contacted him and that it wanted to provide him with a no interest loan to create the prototype, and if successful, to purchase all patent rights from Jules for \$10,000,000. Barry reviewed the loan agreement and sales contract before they were signed by Jules. Barry's review and revision took approximately 4 hours and Jules paid him his full hourly rate for the services rendered. Approximately two years later, Barry learns from a newspaper article that the Department of Energy consummated the loan and the purchase with Jules.

Barry files a complaint against Jules in the Circuit Court for Howard County, Maryland, demanding payment of \$1,500,000, which sum is equal to 15% of the sales price for the patent.

Jules comes to you requesting your advice as to his defenses to these claims. What advice would you give? What preliminary motion, if any, would you recommend? Explain your reasons fully.

BOARD'S ANALYSIS

Counsel for Jules should file a preliminary motion to dismiss for improper venue under MRCP Rule 2-322(a). If the motion to dismiss is not filed, the defense of improper venue will be deemed waived. The proper venue for the action filed by Barry is in the Circuit Court for Prince George's County, Maryland, where the defendant, Jules, resides.

In addition, counsel should assert the affirmative defense of the violation of the Statute of Frauds in any answer filed on behalf of Jules, since the oral contract between Jules and Barry for legal services could not be performed within one year of formation, MRCP Rule 2-323(g)(14); Section 6-201(a), Courts and Judicial Proceedings Articles ("CJP"); CJP, Section 5-901.

In addition, counsel should note that Barry has violated the rules governing the conduct of lawyers by failing to obtain a contingency fee agreement with Jules in writing.

See Maryland Layers' Rules of Professional Conduct ("MRPC") Rule 1.5(c). Further, Barry was paid his full hourly rate for all services performed by Barry at the time the service was rendered. Therefore, the charging of the contingency fee may be unreasonable in light of the facts of this matter.

QUESTION 2

(20 Points – 36 Minutes)

Joe, John and Mary, long time residents of Kent County, Maryland, inherited a small retail shopping center in Kent County, Maryland, from their mother and decided to own and operate it as a Maryland general partnership under the name of JJM partnership ("Seller").

Seller decided to sell the shopping center to XYZ Corporation, a newly-formed Maryland corporation ("Buyer") that has its only office in St. Mary's County, Maryland. Buyer delivered an earnest money deposit of \$5,000 to Broker, also a resident of Kent County, simultaneously with the execution of the contract by Buyer and Seller. Settlement did not occur by the date specified in the contract for settlement. Three days later, the Broker receives two letters. Buyer demands that the deposit must be returned to Buyer and Seller demands that the deposit is forfeited and it should be paid to Seller. Broker claims no right or interest in the deposit since the listing agreement provides a commission to Broker only upon the consummation of a sale.

The Broker seeks your advice on what to do with the deposit because Broker does not want to continue to hold it. Also, he wants your attorney's fees paid by the Buyer and Seller because he is getting nothing from all of his efforts.

- a. What legal action do you recommend to Broker? Explain your reasons.**
- b. In which Maryland court and county(ies) should the action be filed; and**
- c. Identify the defendants and state how you would obtain jurisdiction over those parties.**

BOARD'S ANALYSIS

(a) An interpleader action should be filed by Broker because Broker claims no interest in the deposit, Broker is merely a stakeholder subject to the claims of two adverse parties and the deposit consisting of \$5,000 is deemed property under the Maryland Rules of Civil Procedure ("MRCP") Rule 1-202(w).

(b) The interpleader action should be filed in the District Court of Maryland under MRCP Rule 3-221 (a) because the amount of money in controversy does not exceed \$5,000, exclusive of interest, costs and attorney's fees, if recoverable by law or contract. The Broker can request from the Court an award of his costs and reasonable attorney's fees from the property deposited with the Court pursuant to MRCP Rule 3-221(b)(6). In accordance with Section 6-201(b) of CJP the action may be filed in any county in which any one of the defendants can be sued, Kent County or St. Mary's County.

(c) Service of process must be made on the defendant Buyer, a corporation, by serving either its resident agent, president, secretary or treasurer under MRCP Rule 3-124(d) and on the defendant Seller, a general partnership, by serving any general partner under MRCP Rule 3-124(e). *See*, CJP, Rule 6-406.

The manner of providing service is contained in MRCP Rule 3-121, and counsel must accomplish service as set forth.

FACTS APPLICABLE TO QUESTIONS 3 THROUGH 7

Late in the evening on December 24, 2009, Joel and his 22 year old son, Harry, were returning to their residence in Bethesda, Maryland, from a holiday party, during which they each had a few beers and dinner. Joel was driving along Wisconsin Avenue in Bethesda which is located in Montgomery County, Maryland. Without warning, a dog ran into the street in front of Joel's car. To avoid hitting the dog, Joel swerved the car to the far right and immediately struck a telephone pole. Several minutes later, Montgomery County Police Officer John Goodeed ("Officer") was on his regular patrol and noticed Joel's car resting against the telephone pole. He approached the car and noticed that Joel was slumped over the steering wheel. He detected the smell of alcohol. Officer only attended to Harry who was bleeding and dazed. Forty minutes later, he called for back-up police assistance and called for an ambulance. Harry and Joel were transported to a hospital for treatment.

Harry was treated for a broken arm and a cut to his head, and he was released from the Hospital. Joel was kept in the Hospital for several days due to the serious permanent injuries that he sustained because of the delay in receiving immediate medical treatment.

The Officer is a resident of Frederick County, Maryland.

Joel consults with Sam Smart, a Maryland lawyer, about recovering damages for his permanent injuries and lost wages and for Harry's lost wages and expenses for medical treatment. Smart explains that their case would have substantial litigation expenses for expert witness fees, investigator fees, filing fees and other similar costs. Smart tells Joel that he would need to pay for those expenses in advance. Joel states he understood and signs a written fee agreement establishing a fee of forty percent (40%) of all amounts recovered for Joel and Harry.

Two days later, Joel sends a check to Smart for \$5,000. Smart deposits the check immediately into his operating account. Later that day, Smart hires an investigator. From the operating account, Smart gives the investigator a payment of \$1,000 towards his fee, pays Smart's office rent and pays the Maryland withholding taxes due on his office staff salaries.

QUESTION 3

(20 Points – 36 Minutes)

What issues are raised by the facts regarding Smart's agreement to represent Joel and Harry?

BOARD'S ANALYSIS

Since Harry was an adult at the time of the occurrence of the accident, Smart must consult with him regarding his representation of Harry's interests and obtain Harry's consent to the fee arrangements. If Joel is authorized to represent Harry's interests as his agent, Smart should have obtained evidence of the agency relationship.

Smart failed to advise Joel that Smart had an inherent conflict of interest in representing both the driver of the car, Joel, and the passenger, Harry. As Harry may have had claims against Joel for negligence, Harry should have been advised to obtain the advice of independent counsel, and if Joel and Harry wished to waive the conflict of interest and consent to their joint or common representation by Smart, that consent must be in writing and describe to Harry and Joel the material risks and the reasonably available alternatives to the proposed course of conduct by Smart. After which, Harry and Joel would have been able to give their respective informed consent to the waiver of the conflict of interest. MRPC Rule 1.7 (a) and Rule 1.0(f).

In addition, the amount of the contingent fee together with the payment of Smart's hourly rate must be reasonable in light of the criteria set forth in MRPC 1.5(a). If the contingent fee of 40% together with the hourly fees already paid to Smart fails to satisfy the criteria, then the fees would be unreasonable and in violation of the rules governing the conduct of lawyers in Maryland.

Smart improperly handled the check for the advance payment of litigation expenses when he failed to deposit the check into a separate trust account established in accordance with Maryland Rule 16-600, *et seq.* containing the requirements for attorney trust accounts. The misuse of the advance payment for litigation expenses by Smart is a violation of MRPC 1.15 in that he commingled client funds with funds belonging to him, he failed to segregate his clients' funds into a separate trust account thereby subjecting those funds to possible claims by Smart's creditors, and he otherwise failed to comply with Maryland Rule 16-607.

QUESTION 4

(10 Points – 18 Minutes)

Describe the preliminary procedural step that Smart must follow prior to filing a complaint that pursues a claim against Montgomery County, Maryland.

BOARD'S ANALYSIS

If Smart intends to pursue claims against Montgomery County, Maryland, for negligence under the local Government Tort Claims Act enacted under CJP, Section 5-301 *et seq.*, Smart must give notice of the claim for damages which are not liquidated within 180 days after the alleged injury to the County Executive in person or by certified mail, return receipt requested. *See* CJP, Section 5-304.

ADDITIONAL FACTS FOR QUESTION 5

Smart timely filed a complaint in the Circuit Court for Montgomery County, Maryland, on behalf of Joel and Harry. He failed to demand a jury trial when the complaint was prepared and filed. Later, he decided to demand a jury trial, and he filed his demand the day after the last answer was filed by the defendants. The defendants moved to strike the demand for a jury trial on the basis that Joel and Harry waived their rights because they failed to make the demand with the filing of the complaint.

QUESTION 5

(10 Points – 18 Minutes)

How should the Court rule on the Motion to Strike? Explain your answer.

BOARD'S ANALYSIS

The Court should deny the Motion to Strike because MRCP Rule 2-322(c) provides that the Court can strike the demand for a jury trial only if it is late or otherwise not in compliance with the Rules. A demand for jury trial can be filed anytime within 15 days after the service of the last pleading filed by any party directed to the issue. If the demand is not filed within that time, it is deemed waived under MRCP Rule 2-325(b).

ADDITIONAL FACTS FOR QUESTION 6

At trial, the lawyers for the defendants sought to introduce the following testimony or evidence, despite the timely objection by Smart:

- a. Testimony from Joel's neighbor that she heard from her sister that Joel was bowling regularly Friday nights even though he claims he cannot bowl due to his injuries.
- b. Officer John Goodeed's testimony that while at the scene, Joel told him he was fine and that the Officer should just take care of his son.
- c. A copy of all medical records of the Hospital for Joel and for Harry from December 24, 2009.
- d. On cross examination, the testimony of Joel that he was convicted for insurance fraud in 1982.

QUESTION 6

(20 Points – 36 Minutes)

**How should the trial court rule on each objection made by Smart?
Explain the reason for each ruling.**

BOARD'S ANALYSIS

1. Sustained. Joel's neighbor's testimony is hearsay under Maryland Rule 5-802.
2. Overruled. The statement is one made by a party opponent and it manifests Joel's belief in the truth of the statement. Maryland Rule 5-803(a). It also shows Joel's present existing state of mind or condition at the time of the event.
3. Sustained. The hospital records would be hearsay but they can be admitted as a business record exception provided the records are properly certified in accordance with Maryland Rule 5-902 (b)(1) and are kept in the course of regularly conducted business activity. Maryland Rule 5-803(b)(6) and CJP, Section 10-104.
4. Sustained. The testimony or admission by Joel that he was convicted for insurance fraud 27 years ago was not admissible under Maryland Rule 5-404(a)(1) and (b) because it was remote in time and the conviction would not prove that Joel was not telling the truth at the time the injuries were sustained. Therefore, the Court may rule that the probative value of the conviction does not outweigh the unfair prejudice to Joel. Maryland Rule 5-405 (b).

ADDITIONAL FACTS FOR QUESTION 7

A judgment was entered against the defendants in the amount of \$200,000 for Joel and \$40,000 for Harry. No appeal was entered by the parties. Smart received payment of the judgments from the defendants. Smart sends Joel a check in the amount of \$115,000 and Harry a check for \$21,000. Joel and Harry are shocked at the amount of the checks that were sent without explanation since Joel thought that he would receive \$120,000 plus any amount remaining from the prepaid litigation expenses and Harry would receive \$24,000. Joel and Harry asked Smart for the additional funds and an accounting for the litigation expenses. Smart ignored the requests from his clients. After four weeks, Joel wrote the Attorney Grievance Commission complaining about Smart. Over the next several weeks, Smart failed to respond to inquiries from the Attorney Grievance Commission.

QUESTION 7

(10 Points – 18 Minutes)

You are assistant bar counsel. Based on the facts contained in Questions 3 through 7, provide Bar Counsel with your recommendation as to the complaint and what action you would recommend should be taken against Smart. Explain your answer.

BOARD'S ANALYSIS

Given the professional misconduct of Smart with respect to the violation of the Maryland Lawyers' Rules of Professional Conduct; namely, Rules 1.5, 1.7 and 1.15, regarding the joint representation of Harry and Joel without disclosure of and informed consent to the conflicts of interest, his failure to obtain his contingency fee arrangements in writing, failure to account to the client for any expenses incurred, the use of Joel's advance payment for the expenses prior to Smart providing legal services, the mishandling of the escrow account required under Maryland law, his lack of regard for the authority of the Attorney Grievance Commission and Maryland Rules 16-601 *et seq.*, the matter should proceed in accordance with Md. Rule 16-701 *et seq.* for the discipline of attorneys. Rule 8.1 requires that a Maryland lawyer must cooperate with the investigation by the Attorney Grievance Commission