

**JULY 2012**

**OUT OF STATE ATTORNEYS' EXAM  
QUESTIONS AND BOARD ANALYSIS**

**PRELIMINARY FACTS APPLICABLE TO  
QUESTIONS 1 AND 2**

*(Reading Time – 10 Minutes)*

John and Mary, both 25 year old single professionals, met on a Friday morning while separately vacationing at the Best Waterfront hotel, in Ocean City, Maryland. They were both seen drinking together at the hotel bar around 5:00 p.m., both seen upstairs in the corridor of the hotel room around 10:00 p.m., and around 12:00 a.m., John was spotted on the beach in a bathing suit. On Saturday morning at 7:00 a.m., a local fisherman noticed a nude body in the ocean, who turned out to be Mary.

While investigating the death, the police spoke with John who said that he did not know how Mary died. John said that the last time he saw Mary was Saturday night around 10:00 p.m. when they decided to go for a late night swim in the ocean. John said that she appeared to be swept by an undertow that separated the two, and he assumed she must have been swept further down the beach. John indicated that he did not try to find Mary because he had not known her that long, and he assumed that she just decided to leave the beach and go back to her room.

An autopsy determined that Mary had drowned, and that she had ingested alcohol and other toxics, one of which is commonly known as the “date rape drug”. No other outward marks or bruises were apparent on Mary, but semen was found in her body. The time of death and the length of time the semen had been in the body had both occurred within a 12-hour period before 7:00 a.m. Saturday.

A warrantless search of John’s room by the police led to the discovery of Mary’s purse, the contents of which included both a bottle of birth control pills and a bottle of date rape pills. Mary’s fingerprints were on the bottle with the birth control pills and no fingerprints were on the bottle of date rape pills. A search of Mary’s room produced nothing out of the ordinary except for Mary’s clothes, including a bathing suit.

John, an employed Maryland resident, with no previous criminal record was arrested and charged with the murder of Mary. John appeared at the bail hearing without counsel, and was denied bail by a District Court Judge who did not inform John of his right to be represented by counsel.

**QUESTION 1**

*(10 Points – 20 Minutes)*

**John thereupon hires you, a licensed Maryland attorney, to defend him in this matter. Are there grounds for a motion to reconsider the denial of bail? Discuss fully.**

## **BOARD'S ANALYSIS – QUESTION 1**

There are grounds to support a motion to reconsider the denial of bail. Pursuant to Maryland Rule 4-215(a)(2), the District Court had a duty to advise John of “the right to counsel and of the importance of assistance of counsel” and did not. In relieving the possibility of bail, the Court should have determined that John was eligible for bail pursuant to Sections 5-102, 5-201 and 5-202 of Maryland Criminal Procedure Code Annotated.

Finally, the Court should have reviewed the provisions of Maryland Rule 4-216(a) (Pretrial Release) – Duties of Judicial Officer. These provisions suggest that some form of bail should have been granted since John is a resident, has a job, and has no criminal record.

## **ADDITIONAL FACTS FOR QUESTION 2**

The case proceeds to trial. The Prosecutor attempts to introduce the following evidence:

1. Testimony of John’s pastor that John confessed that he didn’t mean to hurt Mary.
2. Testimony of John’s high school friend Ralph that he and John had spoken about using the date rape drug one time on their female English teacher when they were in high school, but they never did.
3. Testimony of Farmer’s Almanac expert Peter, who said that according to the Almanac, there were no high tides on Friday night.
4. Testimony from Mike, the witness that saw John at 12:00 a.m. Saturday morning that he did not see anyone else with John.
5. Testimony from Alfred, a fingerprint expert who testified that the bottle and cap on the date rape drug are made of a material that would clearly show visible finger or palm prints unless the prints were somehow wiped clean.

## **QUESTION 2**

*(10 Points – 20 Minutes)*

**How should the court rule on objections to each of the five items? Explain fully.**

## BOARD'S ANALYSIS – QUESTION 2

1. The Court should overrule the objection if the pastor is not being compelled to testify. Although Section 9-111 of the Maryland Courts and Judicial Proceedings Code Annotated notes that the communication between John and his pastor is privileged, the pastor may waive it.
2. The Court should sustain the objection. Pursuant to Maryland Rule 5-404(b), evidence of other bad acts is not admissible to show propensity to commit the crime John is challenging.
3. The Court should sustain the objection. The Farmer's Almanac is only a publication of weather. The best evidence would be the actual high tide reading from this appropriate Government source. The Court could take judicial notice of this information, rendering any expert testimony of this unnecessary and therefore inadmissible under Maryland Rule 5-702.
4. The Court should overrule the objection. Mike's testimony is generally admissible under Maryland Rule 5-601 if he has personal knowledge as provided under Maryland Rule 5-602.
5. The Court should overrule the objection of Alfred if qualified as an expert witness and if there is sufficient basis to support his testimony. Maryland Rule 5-702.

## QUESTION 3

*(15 Points – 25 Minutes)*

Get Gas, Inc. filed an application with the County Council in Prince George's County, Maryland, to operate a gas station within the County. The Citizens for Status Quo is an organization in the County that is opposed to the request. Ms. Nimby, a member of the organization, appeared at the hearing held by the Council on May 2, 2012, and signed up as a person of record. She did not testify or submit any evidence. At the conclusion of the hearing, a council member pointed at Ms. Nimby and said "It's too bad that crazy, lying tree huggers are always trying to stop good development," just before he moved for approval of the application. Ms. Nimby was embarrassed by the comment and noticed that several person in the audience looked in her direction and laughed.

On May 16, 2012, Ms. Nimby received a copy of the Council's order of approval. The order included a note that all who appear at the hearing or request in writing to be so, are parties of record, and any party aggrieved by the decision may appeal to the Circuit Court for Prince George's County.

On June 13, 2012, Ms. Nimby and the Executive Board of the Citizens for Status Quo came to you, a licensed Maryland attorney, and asked:

1. Whether the Council's decision may be appealed;
2. Whether Get Gas, Inc. can be precluded from going forward pending any appeal;

3. Whether the Citizens for Status Quo may introduce evidence of the negative impact that gas stations have on established communities located within a three mile radius of the use; and
4. Whether the council member may be sued by Ms. Nimby for the statement made prior to the Council's vote.

**What would you advise?**

### **BOARD'S ANALYSIS - QUESTION 3**

There does not appear to be a conflict in representing both the organization and Ms. Nimby, especially since the organization may not have standing to appeal.

1. Any appeal must be noted within 30 days of the receipt of the Council's order. Maryland Rule 7-203(a). Accordingly, there are only two days left to note the appeal. Ms. Nimby is the only person that appeared at the hearing. She arguably perfected her right to appeal by attending and being aggrieved by the decision. (*See, County Council v. Billings*, No. 46, Sept. Term 2010) However, a mere member cannot represent an organization's interest at the hearing, and nothing in the facts indicate that the organization became a person of record at the Council's hearing. Accordingly, the organization cannot petition for review under Rule 7-202, since it was not a party to the proceeding.
2. An appeal does not automatically stay the Council's action. If a party wishes to stop the gas station from moving forward it should request a stay pursuant to Maryland Rule 7-205.
3. Neither the Citizens for Status Quo (assuming the organization can show standing), nor Ms. Nimby may introduce the evidence of the effect gas stations may have on a community, since new evidence may not be introduced upon appeal "unless permitted by law." Maryland Rule 7-208(c). The facts do not suggest there is such a law upon which they may rely, so any appeal is based on the record developed below.
4. Finally, Ms. Nimby may not be able to bring suit against the council member for his comments at the hearing. Assuming *arguendo* such comments are found to be defamatory, Section 5-501 of the Maryland State Courts and Judicial Proceedings Code Annotated grants immunity to a county councilman against any civil or criminal actions brought for words spoken at a council meeting.

## **QUESTION 4**

*(15 Points – 25 Minutes)*

On November 4, 1998, a jury in Prince George’s County, Maryland, found Defendant guilty of murdering his ex-girlfriend. At the trial, the State’s Attorney introduced a knife with blood on it and convinced the jury that the blood belonged to Defendant and the victim, despite Defendant’s adamant testimony that the knife was not his. Defendant’s attorney did not have the blood tested through a DNA analysis, although Defendant asked that he do so. Defendant was sentenced to 35 years in prison. All proper appeals were disposed of.

**On March 15, 2012, Defendant hired you, a duly licensed Maryland attorney, and asked if you could secure a new trial and have his conviction overturned.**

- a. What must you file before you can secure a new trial for Defendant?**
- b. Where is the action filed?**
- c. What are the grounds for the action?**

**Discuss fully.**

### **BOARD ANALYSIS - QUESTION 4**

You may file a petition for post-conviction review to require DNA testing pursuant to Section 8-201 of the Maryland Criminal Procedure Code Annotated. The petition must be filed in the criminal action in the circuit court where the charging document was filed. (Maryland Rule 4-703(b)).

The State is required to preserve evidence that it has reason to know contains DNA material (defined to include blood) for at least the term of Defendant’s conviction. (Maryland Criminal Procedure Code Annotated, Section 8-201(i)). Defendant may petition the court to have the blood retested. The petition must include the criteria set forth in Maryland Rule 4-704.

The court may grant the petition if it finds, among other things, “a reasonable probability exists that the DNA testing has the scientific potential to produce exculpatory or mitigating evidence relevant to a claim of wrongful conviction or sentencing.” (Maryland Criminal Procedure Code Annotated, Section 8-201(c)).

If the test results produce exculpatory or mitigating evidence pertinent to Defendant’s claim of wrongful conviction the Court may order a new trial. (Maryland Rule 4-711(b)). Another ground for new trial would be incompetency ineffective assistance of prior counsel.

## **QUESTION 5**

*(20 Points – 25 Minutes)*

On March 10, 2009, Mrs. M and her 15 year-old Son (“Son”) were shopping for his birthday in Overpriced Store in Issue, Maryland. Mrs. M noticed Security Guard following Son. Mrs. M was unaware that Son had previously been caught stealing items from Overpriced Store. Due to that history, Security Guard had a reasonable suspicion that Son was shoplifting again.

Security Guard followed Son for a few minutes and saw him bend down and stealthily place his hand in his pocket. Just as Security Guard approached Son with the intent to question him, Mrs. M ran toward him and fell over a “wet floor” sign. Son then ran toward the entrance and collided with Customer, knocking her to the ground and dislocating her shoulder. At that point an expensive watch fell out of Son’s pocket and Security Guard immediately detained Son. Although the watch was later determined to belong to the store, no charges were ever filed against Son.

On February 13, 2012, Customer filed a negligence action against Overpriced Store for the injuries she incurred therein. Customer had her 17 year-old daughter serve a copy of the complaint and summons on the resident agent for Overpriced Store.

On March 30, 2012, Son filed a false imprisonment action against Security guard and Overpriced Store, and Son served a copy of the complaint and summons on the resident agent for Overpriced Store. On the same date, Mrs. M filed a negligence action against Security Guard and Overpriced Store, and Son served a copy of the complaint and summons on the resident agent for Overpriced Store. For the sake of convenience, she had Son also serve a copy of her complaint and summons on the resident agent for Overpriced Store.

**As counsel for Overpriced Store:**

- 1. What preliminary motions as to each case might you file, and why?**
- 2. What defenses as to each case might you raise in any answer filed, and why?**

### **BOARD’S ANALYSIS - QUESTION 5**

**1. Preliminary Motions**

Pursuant to Maryland Rule 2-322 (a) a motion to dismiss citing insufficiency of service of process must be filed prior to filing an answer to the complaint. I will file one in Customer’s action since her daughter was not of age to be a process server. Maryland Rule 2-123(a). Customer will be able to re-serve O.P. store, however, since the statute of limitations has not run against her.

In response to Customer's actions, I would also raise the defense of failure to join Son as a party, since any harm to customer is directly attributable to Son. Maryland Rule 2-211. This may be raised by motions before an answer is filed. Maryland Rule 2-322.

Similarly, I must file a motion in Son's case because a party may not serve process. Maryland Rule 2-123(a).

## 2. Defenses

### Against Mrs. M:

In response to Mrs. M's action I would raise the defense of failure to meet the statute of limitations, pursuant to Maryland Rule 2-323(g). This type of civil action must be brought within 3 years from the date of the alleged negligence. Maryland Courts and Judicial Proceedings Code Annotated, Section 5-101. The event occurred on March 10, 2009 but Mrs. M did not file until nearly 3 years and 3 weeks later.

I would also raise the defense of contributory negligence since Mrs. M. decided to run toward Security Guard and did not see the sign that a reasonable person would have seen. Maryland Courts and Judicial Proceedings Code Annotated, Section 5-101. Maryland Rule 2-323(g).

### Against Son:

In response to Son's action I would not raise the defense of statute of limitations since Son was a minor at the time of the event. He is, therefore, considered "a person under a disability", and the statute is tolled "within the lesser of three years ... after the date the disability is removed." Maryland Courts and Judicial Proceedings Code Annotated, Section 5-201.

However, I would raise the defense of merchant immunity under Maryland Rule 2-323(g). This defense is set forth in Section 5-402(a) of Maryland Courts and Judicial Proceedings Code Annotated, which provides as follows:

A merchant or an agent or employee of the merchant who detains or causes the arrest of any person shall not be held civilly liable for detention, slander, malicious prosecution, false imprisonment, or false arrest of the person detained or arrested, whether the detention or arrest takes place by the merchant or by his agent or employee, if in detaining or in causing the arrest of the person, the merchant or the agent or employee of the merchant had, at the time of the detention or arrest, probable cause to believe that the person committed the crime of "theft" as prohibited by Section 7-104 of the Criminal Law Article, of property of the merchant from the premises of the merchant.

## QUESTION 6

(15 Points – 25 Minutes)

Mike is the proprietor of a business called Deuce, and after four years in business, he decided that he wants to bring in a partner, Jane. Mike has never utilized an attorney in his previous business dealings but he and Jane decided that it is probably best to use an attorney as the firm's counsel. Mike and Jane go to Larry Lawyer ("Larry") because of his Internet ad where he promises you "satisfaction in your personal and business needs".

Jan and Mike ask Larry to prepare the partnership agreement and employee manual for Deuce. The business needs the documents within 10 days since their partnership is to begin at that time and a multi-year, multimillion dollar government contract is pending. Though Larry's clients are generally individuals and not businesses, Larry has been a practicing lawyer for 10 years and knows that he can call upon his attorney colleague Matthew, who is a business attorney, to help him prepare the documents.

Larry tells Jane and Mike that his hourly rate is \$150 per hour. However, because time is of the essence and he would need to totally focus on this legal matter, he would charge \$150 per hour, plus 2% interest in the business. Larry and Jane agree to the \$150 per hour and percentage and sign a retainer agreement and leave a \$2,000 retainer. Matthew prepares the documents for Larry and Larry pays him \$600 which is \$150 per hour for the 4 hours it took Matthew to prepare the partnership agreement and the employee manual. Larry takes the remaining money and pays himself for his efforts.

Mike and Jane begin to experience philosophical differences at work, and Jane calls Larry for his legal advice as to how to end the partnership agreement, which he duly provided. Thereafter, Larry did not return Jane's calls over a 2-month period which infuriated Jane and caused her to file a complaint with the Attorney Grievance Commission. Bar Counsel reviews the complaint.

**What ethical violation(s), if any, may Larry Lawyer have committed? Explain fully.**

## BOARD ANALYSIS - QUESTION 6

The answer should address the following Rules of Professional Conduct:

**Rule 1.4 Communication** – Matthew should have promptly returned Jane's call.

**Rule 1.5(e) Division of Fees between Lawyers** – Matthew had to get Mike and Jane's written consent to the joint representation.

**Rule 1.7 Conflict of Interest** – although Larry may claim he was the lawyer for the business entity, he failed to specify that in the beginning, and he gave legal advice to Jane which may have been against Mike’s interests.

**Rule 1.8 – Conflict of Interest** – Larry had to follow all of the steps in the Rule prior to entering into a business transaction with Mike and Jane.

**Rule 7.1 Communication concerning a lawyer’s services** -- the advertisement creates an unjustified expectation about the results Larry can achieve.

**Rule 8.4 Misconduct** – A lawyer shall not violate the Rules of Professional Conduct.

**QUESTION 7**  
**(15 Points – 25 Minutes)**

Jane Frye (“Jane”) hired Lawyer to represent her in a divorce proceeding against her husband, Boots Frye, for a flat fee of \$10,000. As part of their separation agreement, Jane was to sign the marital home over to Boots via a quitclaim deed. Jane changed her mind and asked Lawyer to do what he could to get her out of the agreement. Frustrated by Jane’s indecision, Lawyer signed her name to the quitclaim deed. Lawyer set up a meeting with Boots and his attorney and stated that Jane “wanted to get all this behind her”. Lawyer showed the quitclaim deed to Boots and his attorney and said he would record the deed in land records. However, Lawyer did not record the deed.

A few weeks later when he was attempting to refinance the home Boots Frye learned that the deed had not been filed. He immediately called Jane and informed her that “her trick wouldn’t work” and he would sue her if she didn’t file the deed. Over the next few days Jane called Lawyer’s office several times but was always told that he was in court and would get back with her. During this period Lawyer had his administrative assistant file the quitclaim deed in land records. Afterwards he called Boots Frye to let him know “all is well” and to request that he not contact Jane about the matter “because it riles her.” Of course, Boots immediately called Jane to let her know how helpful her lawyer was.

**Incensed, Jane comes to you, Bar Counsel, and asks that you sanction Lawyer. After a thorough investigation in which you learn all of the above facts, what charges would you bring, and why?**

## BOARD'S ANALYSIS - QUESTION 7

The answer should address the following Rules of Professional Conduct.

**Rule 1.2** - Lawyer shall abide by a client's decision concerning the objectives of representation. Jane did not want the sale of the marital home to go forward.

**Rule 1.4** – Lawyer shall keep a client reasonably informed. Lawyer didn't return her calls or tell her any of the things he was doing.

**Rule 1.5** – A lawyer shall not charge or collect an unreasonable fee. The \$10,000 fee may have been unreasonable given the limited and illegal work performed.

**Rule 4.1** – Lawyer shall not knowingly make a false statement of material fact to a third person. Lawyer submitted a false document leading Boots and his attorney into believing the Jane had executed the quitclaim deed. He also made a false statement that he would file the deed.

**Rule 4.2** – Lawyer shall generally not communicate about the subject of the representation with a person who the lawyer knows is represented in the matter by counsel. Lawyer called Boots to inform him that the false deed had been filed, in violation of this rule.

**Rule 5.3** –A Lawyer has a responsibility regarding a non-lawyer assistant, to ensure that their conduct also comports with the rules of professional responsibility. Lawyer violated this when he knowingly allowed his assistant to file the quitclaim deed.

**Rule 8.4** – It is professional misconduct for a lawyer to violate the Rules of Professional Conduct or knowingly assist another to do so or to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. Lawyer clearly committed fraud and was untruthful and had his assistant participate in a dishonest act.