

JULY 2004

OUT-OF-STATE ATTORNEYS' EXAMINATION

QUESTIONS AND BOARD'S ANALYSIS

PRELIMINARY FACTS FOR QUESTIONS 1 THROUGH 10

Jeff and John Walker own Twin Peaks, Inc., an environmental consulting firm in Baltimore County, Maryland. Slihm Shaddie also owns an environmental consulting firm, Shaddie Dealings, Inc. Although, both companies are located in Baltimore County, they actively do business throughout the entire state. John and Jeff have worked very hard to make Twin Peaks into one of Maryland's most respectable and profitable environmental consulting firms. Twin Peaks requires all of its employees to sign a contract with a restrictive covenant assuring that they will not disclose any of Twin Peaks' confidential information or solicit any of Twin Peaks' customers. Twin Peaks has consistently been more profitable than Shaddie Dealings for the past six years.

One year, after being promised more money by Slihm, Maria leaves Twin Peaks to work for Shaddie Dealings. Slihm immediately presses Maria for information about Twin Peaks that he believes will give him an edge in capturing the market. Maria recalls that there was once an incident at Twin Peaks where Twin Peaks did not report a chemical spill to the government which occurred at one of its job sites, but instead had cleaned up the spill without incident and kept reports of the spill in its internal confidential records. Both Maria and Slihm know that companies are only required to report spills of a certain level, and that although very close, it is doubtful that the Twin Peaks spill actually reached the required reporting level. Slihm also presses Maria for information on Twin Peaks' clients. After Maria refused to disclose Twin Peaks' confidential client list, Slihm fires Maria without paying her the \$4,500 owed her as salary.

Before Maria leaves the building on September 20, 2003, Slihm breaks into Maria's briefcase and makes photocopies of Twin Peaks' confidential client list. Slihm then disseminates a pamphlet to all of Shaddie and Twin Peaks' customers, stating "Shaddie is a Firm That You Can Trust. Some of Our Competitors, Like Twin Peaks, Don't Report Chemical Spills to the Government."

Jeff and John decide to represent themselves and file suit on behalf of Twin Peaks in the District Court for Baltimore County against Slihm, Shaddie Dealings, Inc. and Maria, for injunctive and declaratory relief, defamation and breach of contract. Slihm in attempt to keep Maria on his side hires Larry Lawyer for legal consultation and representation for Slihm, the company and Maria, in connection with the Twin Peaks suit.

QUESTION 1

Discuss the basis of any motions that Larry Lawyer would file in defending the Twin Peaks suit. What issues would Larry Lawyer discuss with Maria and Slihm regarding his representation of them?

BOARD'S ANALYSIS – QUESTION 1

Rule 2-131(a)(2) expressly states that an entity must be represented by counsel. Any filings or proceedings will be deemed a nullity where a corporation is not represented by an attorney admitted to practice law in Maryland. *Turkey Point Property Owners' Ass'n v. Anderson*, 106 Md. App. 710, 666 A.2d 904 (1995).

Rule 1.7 provides that (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless: (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and; (2) each client consents after consultation; or (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation. (c) The consultation required by paragraphs (a) and (b) shall include explanation of the implications of the common representation and any limitations resulting from the lawyer's responsibilities to another, or from the lawyer's own interests, as well as the advantages and risks involved. Because there is a direct unwaiverable conflict Larry Lawyer cannot represent both Slihm and Maria.

Pursuant to CJP § 4-402 the District Court does not have jurisdiction over equity matters such as declaratory actions or injunctions of this nature.

QUESTION 2

Assume that John and Jeff hire Marcellus to represent Twin Peaks, Inc. against Maria, Slihm and Shaddie Dealings, Inc. Marcellus decides to file two separate actions—one against Maria for breach of the contract's restrictive covenant and the other against Slihm and Shaddie Dealings, Inc. He intends to file an amended complaint for \$1.2 million in the Slihm/Shaddie suit and adds claims for false light and intentional interference with business advantage. Finally, Marcellus intends to file a motion for a temporary restraining order to prevent Shaddie Dealings from continuing to distribute the pamphlets while the case is being decided.

What must Marcellus do procedurally to assure that his client's motion for a temporary restraining order is heard by the court? Explain your answer fully.

BOARD'S ANALYSIS – QUESTION 2

Because the action was improperly filed in the District Court counsel will need to file an action in the Circuit Court to hear the injunctive and declaratory claims pursuant to CJP §§ 4-401 and 4-402. They must also comply with Rules 15-502 – 15-504 for filing a TRO.

QUESTION 3

Assume that on January 21, 2004, Maria files her own suit against Slihm and Shaddie Dealings, Inc. solely to recover the \$4,500 in salary owed her. She intends to propound interrogatories on Slihm and requests a trial by jury.

- A. In what court(s) can Maria bring suit?**
- B. How many interrogatories is Maria allowed under the Maryland Rules and**

can she have her case tried by a jury? Why? Explain your answer fully.

BOARD'S ANALYSIS – QUESTION 3

Maria's claim is a small claim (under \$5,000) and must be filed in the District Court. CJP § 4-402(e). As such, pursuant to Rule 3-701(e) she is not entitled to any discovery. She is also not entitled to a trial by jury. CJP § 4-402(e).

QUESTION 4

At the trial between Twin Peaks and Shaddie Dealings, the Judge informs the parties that she will impanel a jury of seven (six jurors and one alternate). During the trial Slihm testifies that he has nothing but the deepest admiration for Twin Peaks. On cross-examination, Twin Peaks' attorney attempts to introduce into evidence a yellow 1" x 1" memo sticky, that contains a note from Slihm to Maria that reads "I have always wanted to run Twin Peaks out of business." In addition, Twin Peaks' attorney tries to offer Slihm's 15 year old conviction for possession of a controlled dangerous substance with intent to distribute into evidence. An objection is made by Slihm's attorney as to both evidentiary matters.

A. How many preemptory and cause challenges does each party have? Explain fully.

B. How should the court rule as to each evidentiary issue and why? Explain your answer fully.

BOARD'S ANALYSIS – QUESTION 4

Pursuant to Rule 2-512 each party will have a total of 5 preemptory challenges (4 plus one for the alternate).

Pursuant to Rule 5-613, Slihm may be impeached by the prior recorded statement, but the note may not be offered into evidence unless he denies its existence.

Pursuant to Rules 5-608 and 5-609, if Slihm's conviction bears on his credibility and is not more than 15 years old, it may be admissible. *See State v. Woodland*, 337 Md. 519 (1995); *State v. Giddens*, 335 Md. 205 (1994). The Court will weigh the probative value of the evidence against its prejudicial effects.

QUESTION 5

Unbeknownst to Slihm, Maria recorded her telephone conversation with Slihm, wherein Slihm stated that he planned to lie on the stand about having Twin Peaks' confidential client list. Maria mails the tape to Twin Peaks' attorney who then attempts to offer it into evidence. Slihm's attorney objects.

What grounds would Slihm's counsel have to make an objection as to this evidence and how should the court rule as to this issue and why? Explain your answer fully.

BOARD'S ANALYSIS – QUESTION 5

Pursuant to CJP §§ 10-402 the recording is in violation of Maryland's Wiretap statute because it was obtained without the consent of both parties to the conversation. Pursuant to 10-405, the illegally obtained evidence is not admissible.

QUESTION 6

Twin Peaks wins at trial and recovers \$1.2 million in compensatory and punitive damages against Shaddie Dealings. The court also grants Twin Peaks a permanent injunction. The judgment is entered on January 23, 2004, and 10 days later Shaddie Dealings' attorney files a motion for a new trial. Thereafter, the court denies Shaddie Dealings' motion 25 days later. On the same date as the court's denial, Shaddie Dealings notes an appeal. In response, Twin Peaks' counsel files a motion to strike the appeal as untimely.

How should the court rule and why? Explain your answer fully.

BOARD'S ANALYSIS – QUESTION 6

Slihm's motion for a new trial was timely filed within 10 days of the judgment. Therefore, the time for noting an appeal was stayed until 10 days after the motion for a new trial is ruled upon. Rule 8-202(c).

QUESTION 7

Assume that the only copy of the contract between Twin Peaks and Maria is destroyed in a fire. At a trial between Twin Peaks and Maria for breach of the contract's restrictive covenant, Twin Peaks' counsel attempts to offer into evidence a copy of a similar contract and the testimony of Jeff to explain the restrictive covenant entered into by Maria.

What are the grounds of any objections you anticipate Slihm's attorney will raise and how should the court rule on those objections? Explain your answer fully.

BOARD'S ANALYSIS – QUESTION 7

If no original or copy of the contract can be found, a similar contract may be permitted with the testimony of Jeff, unless the original was destroyed in bad faith. Rules 5-1002, 5-1003, and 5-1004.

QUESTION 8

Maria is also successful in her litigation against Shaddie Dealings. Assume that the district court enters a judgment in her favor for the \$4,500 owed in unpaid wages. Shaddie Dealings timely notes an appeal from Maria's judgment.

- A. What court will hear this appeal and what will be the standard of review?**
- B. What procedural steps must Shaddie Dealings take as the appellant after noting**

the appeal to assure that the appeal is properly heard by the court?

BOARD'S ANALYSIS – QUESTION 8

Pursuant to Rule 7-102 an appeal of a matter over \$2,500 shall be heard in Circuit Court on the record made in District Court. However, under CJP 12-401(f), unless the amount in controversy exceeds \$5,000, the matter shall be heard *de novo*. Thus, if the appeal of Maria's \$4,500 judgment is heard on the record, Shaddie Dealings must comply with Rules 7-103 and 7-104 in filing the appeal.

QUESTION 9

While walking out of the courthouse in Baltimore County, Maria is shoved down the steps by Slihm. Assume two years later that Maria sues Slihm for \$9,000 for assault, intentional infliction of emotional distress and trespass to personal property for breaking her briefcase.

In what Maryland court(s), can Maria bring her suit? Does Slihm have the basis for a dispositive motion on any of Maria's claims? Explain your answer fully.

BOARD'S ANALYSIS – QUESTION 9

Maria may bring this action in any District or Circuit Court in any county that Shaddie Dealing does business or maintains a principal office. CJP § 4-401 and 4-402 (the Circuit Court has concurrent jurisdiction over any tort action over \$5,000). One year statute of limitations for assault CJP § 5-105.

QUESTION 10

Slihm is being prosecuted for his assault on Maria. With no one else around and in the privacy of their home, Slihm brags to his wife that he in fact pushed Maria, and that he would kill his wife if she said anything about it. The prosecutor subpoenas Slihm's wife to testify against Slihm at the criminal trial.

Under what legal basis(es) can Slihm's attorney attempt to prevent Slihm's wife from testifying? How will the court rule on this issue and why? Explain your answer fully.

BOARD'S ANALYSIS – QUESTION 10

Slihm may seek to prohibit his wife from testifying about his statement that he in fact pushed Maria, because the communication was confidential and protected under CJP § 9-105. The assaultive communication by Slihm towards his wife was not relevant to the case with Maria and will be precluded. An argument can be made that the communication was not privileged because it was destructive of the marital relationship. Regardless, Slihm's wife could use the statement against Slihm in any case she brought against him. Further, pursuant to CJP § 9-106, his wife may refuse to testify against her husband by asserting her spousal privilege.