

**JULY 2005**

**OUT OF STATE ATTORNEYS' EXAM**

**QUESTIONS AND BOARD'S ANALYSIS**

**PRELIMINARY FACTS FOR QUESTIONS 1 THROUGH 3**

On April 1, 2002, Al borrowed \$20,000 from Bob and gave Bob a promissory note which provided for 4 quarterly payments of \$5,000 each together with interest at the rate of 6% per annum on the unpaid balance. The first payment was due July 1, 2002. On July 3, 2002, Al borrowed an additional \$5,000 from Bob on a handshake without any express agreement as to when the loan would be repaid. Al made no payments to Bob.

On Tuesday, July 5, 2005, Bob filed a complaint against Al, in the Circuit Court for Charles County, Maryland, alleging in a single count the facts (as set forth in the first paragraph, above) and asking for judgment in the amount of \$25,000 and interest. Bob filed an affidavit of service reciting that he, Bob, taped a copy of the complaint and summons to the front door of Al's residence in Charles County on July 5, 2005. On July 7, 2005, Al died. Carl has been appointed personal representative of Al's estate in the Orphans' Court for Charles County, Maryland. Bob has filed a proper notice of substitution of Carl, Personal Representative of Al, as the defendant in the case brought against Al in the Circuit Court. Bob cannot find the promissory note, but wants to testify himself and to call Al's lawyer, Tom, and Al's certified public accountant, Dick, to prove the loans and the terms of the note. Bob also wants to call Al's best friend, Harry, to see if they discussed the loans. Harry is also the minister at Al's church. In fact, Al discussed the legal and tax consequences of the non-payment with Tom and Dick, and sought advice from Harry about what he should do about the loans.

On August 4, 2005, Carl retains you to represent Al's estate in this matter.

### **QUESTION 1**

(10 Points 18 minutes)

**What timely response to the complaint, if any, should Carl file?**

#### **BOARD'S ANALYSIS -- QUESTION 1**

Carl should file a mandatory motion to dismiss the complaint on the grounds of insufficiency of service of process pursuant to Rule 2-322(a).

A mandatory motion to dismiss must be filed before an answer. An answer must be filed within thirty days after being served unless a preliminary motion is filed, in which case the time for filing an answer is extended to fifteen days after determination of the motion.

(Although an insufficiency of service of process may be functionally a lack of service, and the time for filing of an answer may have never commenced to run, it would be prudent, if not necessary, to file the motion today).

Service may be made on an individual by leaving a copy of the summons and complaint at the individual's dwelling house with a resident of suitable age and discretion. Rule 2-121(a)(3). Leaving the papers taped to the front door is insufficient. Service may not be made by a party to the action. Rule 2-123.

Carl may also file a motion to strike pursuant to Rule 2-322 (e). Each loan is a separate cause of action. "Each cause of action must be set forth in a separately numbered count." Rule 2-303(a). A party may move to strike in its entirety any pleading "not in compliance with these rules." That motion must be filed before responding to the pleading.

The cause of action on the separate transaction of the \$5,000 loan would ordinarily be

within the exclusive jurisdiction of the District Court. However, claims of the same plaintiff against the same defendant may be aggregated for the purpose of determining jurisdiction in the Circuit Court. Courts & Judicial Proceedings 4-401(1); 4-402(d); 4-405.

## QUESTION 2

(12 Points, 22 Minutes)

**What statutory evidentiary objections will be available to Carl?**

### BOARD'S ANALYSIS -- QUESTION 2

Bob's testimony should be barred under the "dead man's statute." Courts & Judicial Proceedings 9-116. A party to a proceeding against a personal representative may not testify as to any transaction with or statement made by the dead person unless called to testify by the opposite party or unless the testimony of the dead person regarding the same transaction or statement is already in evidence.

The testimony of Tom is barred by the attorney-client privilege, which prohibits the disclosure of the substance of a communication made in confidence by a client to his attorney for the purpose of obtaining legal advice and which survives the death of the client. Courts & Judicial Proceedings 9-108; *Levitsky v. Prince George's County*, 50 Md. App. 484, 439 A.2d 600 (1982); *Beckett v. State*, 31 Md. App. 85, 355 A.2d 515 (1976).

The testimony of Dick is barred since a certified public accountant may not disclose in a state civil judicial proceeding any information derived from a client in rendering professional service unless expressly permitted by the client or the personal representative of the client. Courts & Judicial Proceedings 9-110(b).

Whether Harry's testimony is barred depends on whether Al's conversation with Harry constituted a communication made to Harry in confidence while Al was seeking Harry's spiritual advice or consolation. If so, then the conversation between Al and Harry is privileged. Courts & Judicial Proceedings 9-111.

### QUESTION 3

(8 Points, 14 Minutes)

**What defenses are available to Carl if all of Bob's evidence is admitted?**

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

Carl may raise a defense of limitations to part of the claim.

If the promissory note is proved, and the instrument was under seal, the action has been commenced within twelve years of the date any cause of action accrued and no recovery is barred. Courts & Judicial Proceedings 5-102(a). If the note was not under seal, the action must have been filed within three years of the date that it accrued. Courts & Judicial Proceedings 5-101.

The \$20,000 loan was an installment loan. A separate cause of action arises on each installment on the date that such installment is due. The action was filed more than three years after the date on which the first installment was due, but within three years of the dates on which the remaining installments were due. *Avery v. Weitz*, 44 Md. App. 152, 407 A.2d 769 (1979).

The \$5,000 loan was a demand obligation. Limitations run from the date of a loan payable on demand. *Mudd v. Harper*, 1 Md. 110 (1851); *Boyd v. Bowen*, 145 Md. App. 635, 806 A.2d 314 (2002). The three year period in which to commence an action would have ended on July 2, 2005. However, when the last day for the doing of an act required by a statute, including commencement of an action, falls on a Saturday, Sunday or holiday, the time for the performance of the act is extended to the next day which is not a Saturday, Sunday or holiday. art. 1, sec. 36; Rule 1-203; *Mason v. Bd. Of Education*, 143 Md. App. 507, 795 A.2d 211 (2002).

## **PRELIMINARY FACTS FOR QUESTION 4**

Jane, an adult, wanted to hire Sterling, a Maryland attorney, to represent her in a custody case in the Circuit Court for St. Mary's County, Maryland. With her mother and Sterling present, Jane signed Sterling's retainer agreement in his Maryland office and Jane's mother drew a check on her account payable to Sterling for the retainer. Sterling deposited the check in his attorney trust account and undertook the representation. He withdrew his fee as it was earned and billed. The custody case is ongoing and there remains an unused portion of the retainer in the attorney trust account. Jane and her mother have disagreed about the handling of the custody matter and Jane's mother has demanded that Sterling withdraw from the case and return the unused portion of the retainer to her. Jane has confirmed to Sterling that she wants him to continue his representation in the matter and she is happy with his services.

### **QUESTION 4**

(9 Points - 16 Minutes)

**May Sterling continue his representation? Discuss fully and include in the discussion who is entitled to the unused portion of the retainer.**

### **BOARD'S ANALYSIS -- QUESTION 4**

Jane hired Sterling to represent her in the custody suit. Sterling accepted the retainer for his representation upon Jane's signing of the retainer agreement. Jane is Sterling's client. He is accountable to Jane for the retainer funds and not to Jane's mother. Under the given facts, there were no representations that Jane's mother would have any control over the custody case or the retainer funds. Sterling should hold the unused portion of the retainer in his attorney trust account in accordance with the terms of the retainer agreement. Although the retainer was

paid by some one other than the client, Jane knew it and at least impliedly consented to it. The acceptance of the payment did not interfere with Sterling's professional judgment or with his attorney-client relationship with Jane or with the confidentiality of information relating to his representation. MRPC 1.6 [Confidentiality of information]. Under the given facts, there was no conflict. MRPC 1.8 (f) [Conflict of interest: prohibited transactions].

## QUESTION 5

(10 Points - 18 Minutes)

Tom, Dick and Harry have entered into a partnership to practice law in Bowie, Maryland. Buster, a client of the firm, asked Harry to handle a dispute Buster had with his Maryland automobile mechanic, Vin, involving the restoration of Buster's vintage 1965 Corvette. Harry and Buster agreed that the fee arrangement for Harry's legal services would be on an hourly basis and they agreed on the hourly rate. Harry asked for a retainer of \$3,000, but Buster never responded. Harry sent Buster a retainer agreement, but Buster never signed it. Buster deposited \$17,000 with Harry because Buster believed that \$17,000 would settle the dispute with Vin and wanted the funds to be available for a quick settlement. Buster so informed Harry. Harry deposited the \$17,000 in the firm's attorney trust account and immediately withdrew \$3,000 from that account and used those funds for his own personal purposes.

Harry began negotiations directly with Vin which lasted over several months. Harry knew that Vin was represented by an attorney, but Harry told Vin that it would be less expensive if Vin dealt directly with Harry. When the negotiations with Vin failed, Buster requested the return of the \$17,000. At the time of the request, there was \$14,000 in Buster's escrow account with the firm. Harry returned \$14,000 to Buster with the explanation that he had deducted his attorney's fees from the attorney trust account even though Harry had never sent Buster a statement of professional services rendered. Buster was incensed at Harry and he complained to the other firm partners, Tom and Dick.

**Did Harry do anything wrong ? Explain in detail.**



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

The \$17,000 received from Buster to hold in trust was for the possible settlement of the case and Buster so informed Harry. Harry's withdrawal of the \$3,000 from the attorney trust account for his own personal use amounted to intentional misappropriation and misuse of trust funds. Harry did not render a statement for professional services rendered or otherwise account in any way for the \$3,000 withdrawal. Buster did not consent to the withdrawal. Harry violated MRPC 1.15 (a) [Safekeeping property]; 8.4 (b) [Misconduct - commit a criminal act adversely reflecting on the attorney's honesty, trustworthiness or fitness as a lawyer]; 8.4 (c) [Misconduct - engage in conduct involving dishonesty, fraud, deceit or misrepresentation]; 8.4 (d) [Misconduct - engage in conduct that is prejudicial to the administration of justice].

Harry communicated with Vin directly when he knew that Vin was represented by an attorney. Under the given facts, there was no consent by Vin's attorney and there was no legal authority or court order for the direct contact. Harry violated MRPC 4.2 (a) [Communication with person represented by counsel].

## QUESTION 6

(10 Points - 18 Minutes)

Tom and Dick confronted their partner, Harry, about his actions immediately upon Buster's complaint about Harry. Harry admitted the withdrawal of the \$3,000 for his personal use. He explained that the sum was his estimate of the attorney's fees he earned in the case. He paid Buster the \$3,000. Buster accepted the \$3,000, discharged Harry as his attorney, and said he was satisfied. He made no further complaints about Harry to any one.

Tom and Dick reviewed other deposits of clients' funds by Harry into the law firm's accounts. On three occasions Harry had deposited checks from the clients' insurers, payable to the client and Harry as the attorney, directly into the law firm's general operating account and then disbursed funds to the clients and took the fees within 30 days.

Harry's position on his own activities as stated has been "no harm, no foul".

**a. What responsibilities, if any, do Tom and Dick have regarding Harry's conduct? Answer in detail.**

Assume that Tom and Dick decided to do nothing about Harry's conduct. Buster called Tom and stated that he wanted to report Harry to the Maryland Attorney Grievance Commission because of the \$3,000 withdrawal. Tom told Buster that what Harry did was wrong, but Buster would be over reacting if he reported Harry to the Maryland Attorney Grievance Commission.

**b. What responsibilities, if any, does Tom have in giving advice to Buster?**  
**Explain fully.**

## BOARD'S ANALYSIS -- QUESTION 6

a. As partners of Harry in the law firm, Tom and Dick must make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the rules of professional conduct. MRPC 5.1 [Responsibilities of a partner or supervisory lawyer].

Although Harry made financial restitution with Buster, he still converted clients funds to his own personal use. Considering Harry's explanation that he considered the amount taken as his fee earned in Buster's case, any fee he received, once earned and billed, should be deposited as fees to the law firm.

The depositing of the checks from the clients' insurers into the firm's general operating account was a prohibited commingling of funds even though funds were thereafter disbursed to the clients.

Tom and Dick have actual knowledge that Harry committed these violations of MRPC 1.15 (a) and (c) [Safeguarding property]. These acts of Harry and his attitude expressed in his "no harm, no foul" statement reflect on his honesty, trustworthiness, or fitness in other respects as a lawyer. Tom and Dick have an obligation to report Harry's actions to the Maryland Attorney Grievance Commission. MRPC 8.3(a) [Reporting professional misconduct] The failure of Tom and Dick to report Harry may be a violation by them of the Maryland Rules of Professional Conduct if that failure is determined to be a cover up of Harry's actions because Harry is an attorney and a partner in the law firm. MRPC 8.4 [Misconduct].

b. Buster had discharged Harry and under the given facts was not represented by counsel. Tom's advice to him implied that Tom was disinterested in the matter when, in fact,

Tom together with Dick had an obligation to report Harry to the Maryland Attorney Grievance Commission but decided to do nothing. Tom violated MRPC 4.3 [Dealing with unrepresented person] and was attempting to thwart the reporting of Harry's conduct to the Maryland Attorney Grievance Commission which also was a violation. MRPC 8.4 (a) [Misconduct].

## QUESTION 7

(10 Points - 18 Minutes)

Abe and Betty had a child out of wedlock while they lived together in California in 1999. At the time of the child's birth, Abe signed an Affidavit legally acknowledging his paternity. In 2003, Betty moved to Montgomery County, Maryland with the parties' child. In January, 2005, Betty moved to Charles County, Maryland. Betty resists Abe's efforts to participate in the parenting of the child. Abe while still living in California contacts Charles, a lawyer in Montgomery County, Maryland for assistance. Charles drafted, signed and filed a Complaint with no attachments in the Circuit Court for Montgomery County requesting that Abe be granted joint legal custody, reasonable visitation and that child support be established. Charles properly effected service on Betty in Charles County, Maryland. Betty has come to you to represent her. She asks you what initial pleading(s) can be filed on her behalf.

**What response would you give her? State the basis(es) for the pleading(s) to be filed?**

### BOARD ANALYSIS -- QUESTION 7

Pursuant to Maryland Rule 2-322, a Motion to Dismiss could be filed alleging improper venue. Venue is in Charles County under Courts & Judicial Sections 6-201 and 6-202(5) where mother and child reside.

Under Maryland Rule 9-201, Charles should have filed a Financial Statement under Affidavit (9-202(f)) with his Complaint and that deficiency can also be raised by a Motion to Dismiss.

Finally, under Maryland Rule 9-202, Abe, as a party, is required to personally sign a pleading filed on his behalf. A Complaint is a pleading under Md. Rule 1-202(s).

## QUESTION 8

(10 Points - 18 Minutes)

On February 15, 2005, Bob was charged with attempted first degree murder, first degree assault and second degree assault in connection with a beating he inflicted upon Charles who had attempted to take indecent liberties with Bob's younger sister. On May 15, 2005, Bob was acquitted of attempted first degree murder and first degree assault, but was convicted of second degree assault. He was given credit for the time that he had spent in jail between the service of the charging document and the trial, and the balance of his sentence was suspended. At sentencing the Judge said he might consider probation before judgment at a later date under Criminal Procedures Section 6-220 which states: "when a Defendant is found guilty of a crime, a Court may stay the entry of judgment and place Defendant on probation, and upon fulfillment of the conditions of probation, discharge the Defendant without a conviction".

Since his release from jail, Bob has been trying to gain employment, but his job applications have been turned down. Prospective employers have indicated that he has been turned down due to his prior criminal record.

Bob approaches you and asks whether anything can be done to clear up his criminal record.

**What steps could you take on his behalf? Assess the likelihood of success.**

### BOARD ANALYSIS -- QUESTION 8

File a Motion to Reconsider Sentence within 90 days of May 15, 2005 under Maryland Rule 4-345(b) and seek a probation before judgment disposition, pursuant to Criminal Procedure Section 6-220, which would remove the singular conviction for second degree assault

If you are successful in getting a probation before judgment disposition, you would be in a

position to file a Petition for Expungement under Maryland Rule 4-504 and Criminal Procedure Section 10-105(a)(3).

Even if you are not successful in getting the conviction for assault expunged, you could file a Petition on Bob's behalf to expunge the criminal charging documents for attempted first degree murder and first degree assault based on the acquittals. Under the Rules, if the State's Attorney does not file an objection (10-105(d)(2)) or fails to file an Answer to the Petition for Expungement, the Court is required to expunge that record. (Md. Rule 4-505(d)).

The State's Attorney will have the right to object to the Expungement based on provisions of Criminal Procedure, Section 10-107, that all these charges are in the same unit or set of facts. He is ineligible for Expungement on the more serious charges where he received acquittals because he was convicted of second degree assault.

If the second degree assault conviction is not stricken, there is no ability to expunge that record.

## QUESTION 9

(15 Points - 28 Minutes)

Larry and Moe became involved in a bar room fight with Curley in Allegany County, Maryland. As a result of the altercation, Curley died of a brain hemorrhage caused by head injuries sustained during the fight. The grand jury recently returned separate indictments against Larry and Moe for first degree murder. As Assistant State's Attorney for Allegany County, Maryland, you have been assigned to prosecute the case. Your review of criminal investigators' reports suggests that items on which blood and hair were located were retrieved from the victim and Defendants' clothing. You want to solicit scientific testing of Larry and Moe's blood and hair by the police lab.

**a. Discuss how you can obtain blood and hair samples.**

As the prosecuting attorney you have determined that your time can be more effectively spent by trying Larry and Moe at the same time.

**b. How can you accomplish this result and what can Larry and Moe assert to resist the State's effort?**

Larry is concerned that because Curley was the son of the County Administrator for Allegany County that he will not be able to obtain a fair trial in the County and would like the case heard in Queen Anne's County, where he grew up.

**c. Under what circumstances, if any, does Larry have the right to change the venue of his prosecution?**

### BOARD ANALYSIS -- QUESTION 9

Pursuant to Maryland Rule 4-263 (d)(1), the State's Attorney can file a written request that the Defendants' each permit the taking of samples of their blood and hair. The request shall be made



by the State's Attorney within fifteen (15) days after the earlier of the appearance of Larry and Moe's counsel or the first appearance of the Defendant before the Circuit Court pursuant to Maryland Rule 4-213. Once Larry and Moe are properly served they are required to furnish the discovery within 10 days after service.

Assistant State's Attorney can file a Motion for Joint Trial of Larry and Moe pursuant to Maryland Rule 4-233. He can allege Larry and Moe have participated in the same acts constituting the offenses charged. Larry and/or Moe could assert prejudice by the joinder for trial under Maryland Rule 4-253(c) to resist the State's efforts.

Under Maryland Rule 4-254(b), if the prosecution files a Notice of Intention to Seek the Death Penalty, Larry has the absolute right of removal by filing a suggestion under his personal oath that he cannot have a fair and impartial trial in Allegany County, but the County Administrative Judge for Allegany County will have the right to designate the County to which the case is removed.

If Larry is not eligible for the death penalty then Larry will not have an absolute right of removal, but must convince the Court that the suggestion is true, or that there is reasonable grounds for it. Under this circumstance removal is within the sound discretion of the Court.

## QUESTION 10

(6 Points - 10 Minutes)

Bentley is a Maryland lawyer who has been engaged in the practice of law for over 20 years as a sole general practitioner in Cumberland, Maryland. Laslo has been a friend of Bentley's during the 20 years. Bentley and Laslo have visited each other socially and Bentley has allowed Laslo to board his valuable show horse on Bentley's farm for many years. Bentley has handled the few legal matters Laslo has had over the years.

Laslo told Bentley that he was going to be hospitalized for heart surgery and that he wanted to make a Will designating Bentley as his Personal Representative and leave his show horse to Bentley's only son, Bo, with the balance of his Estate going to his local church where he had worshiped over the years.

Bentley asked his longtime secretary, Midge to prepare the Will and take it to the hospital for Laslo's review and execution. She did so, and Midge and a nurse witnessed Laslo's execution of the Will.

**Comment on Bentley's conduct as described under the facts.**

### BOARD ANALYSIS -- QUESTION 10

Rules of Professional Conduct 1.8(c) and 8.4. 1.8(c) states that a lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as a child, any substantial gift from the client, including a testamentary gift unless the client is represented by independent counsel.

8.4 – It is professional misconduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct or to do so through the acts of another.

(See Attorney Grievance Commission of Maryland v. Brooke, 375 Md. 155 (2003))