

**JULY 2006**

**OUT OF STATE ATTORNEY'S EXAM**

**QUESTION NO. 1**

**(25 Points - 45 Minutes)**

On May 15, 2006, the Anne Arundel County Council enacted legislation that required all owners of boat trailers who reside in the County to pay an annual tax of \$500 per trailer beginning on July 1, 2006. The purpose of the tax is to raise funds to improve public boating facilities and promote tourism in the County.

Tom and Nanette are two county residents, who are not lawyers, are individual members of the County Inlet Boat Owners Association, an unincorporated association. On June 1, 2005, they filed a class action *pro se* suit challenging the new law in the District Court for Anne Arundel County on behalf of themselves, the Association, and all other boat enthusiasts in Maryland who enjoy Anne Arundel's waterways. Tom and Nanette file their lawsuit solely against Council Member Prudent, who sponsored the bill, and ask the Court to enjoin the County from collecting the tax and to enter a judgment declaring the law to be unconstitutional. Since they are not lawyers and they want to make sure they get speedy relief, Tom and Nanette also file an identical action in the Circuit Court for Anne Arundel County on the same day that they filed the District Court action. Tom and Nanette hand a copy of their complaints to Council Member Prudent at his place of business, and Council Member Prudent faxes the complaints to the Office of the County Attorney.

You represent Anne Arundel County in the lawsuits.

- A. What preliminary motions will you file in the District Court action? How should the Court rule and why?**
- B. What preliminary motions will you file in the Circuit Court action? How should the Court rule and why?**

**BOARD'S ANALYSIS - QUESTION 1**

A) District Court Action

In the District Court action, a motion to dismiss should be filed under Maryland Rule 3-311. The case should be dismissed for several reasons.

First, the District Court does not have the jurisdiction over Declaratory Judgment actions.

Md. Ann. Code Cts. and Jud. Proc. Article (“CJP”) § 3-403 excludes the District Court as a court of general jurisdiction for Declaratory Judgment matters. Furthermore, CJP § 4-402 (c) expressly states that District Courts do not have jurisdiction over Declaratory Judgment matters. The only other courts of general jurisdiction are the Circuit Courts [CJP § 1-501]. The matter should have been filed in the Circuit Court.

Second, the Plaintiffs failed to serve the County. Since they have challenged the validity of a statute, the Plaintiffs were required to make Anne Arundel County a party to the action [CJP § 3-405 (b)] and to serve the Attorney General with a copy of the lawsuit to allow him to intervene or submit his views in writing under CJP § 3-405 (c). The facts indicate that the County was not made a party and that the Attorney General was not served; therefore, the matter should be dismissed.

Third, since neither Tom nor Nanette are attorneys they cannot represent anyone other than themselves. Maryland Rule 16-701 (a) defines an attorney as someone admitted to the Court of Appeals of Maryland, and someone who engages in the practice of law in Maryland subject to the disciplinary processes applicable to lawyers. Since Tom and Nanette are not lawyers, they cannot represent others before the Court.

B) In the Circuit Court action, a motion to dismiss should be filed under Maryland Rules 2-311 and 2-322. Although jurisdiction is proper in the Circuit Court, there are other grounds to dismiss the case under preliminary motions.

First, certain mandatory motions must be filed not later than 30 days following service of the Complaint and prior to the filing of an answer [Maryland Rule 2-322(a)]. The mandatory motion that should be filed in this matter is a motion to dismiss for insufficient service of process. In this case, the process [initial complaint and summons] was not served under any of the methods specified under Maryland Rule 2-121(a), and was invalid because it was served by parties to the action [Maryland Rule 2-123].

In addition to the insufficiency of service, there are issue and party problems that should be raised in a permissive motion to dismiss under Maryland Rule 2-322 (b) (2) and (3). This Motion can be filed at any time, and could be included in the mandatory motion to dismiss filed based on insufficiency of service of process. Under these facts, Tom and Nanette have not filed a complaint upon which relief can be granted because they have not alleged that their rights are affected by the statute [CJP § 3-406]. Additionally, two necessary parties—the County and the Attorney General, who are required to be served under CJP § 3-405 (b) and (c), have never been properly served.

Even assuming that the service of process was correct, that the necessary parties were properly served, and that a cause of action was competently pled, Tom and Nanette would still not be able to represent anyone but themselves in front of the Court since neither of them is a lawyer. Accordingly, the Court should also dismiss the class action complaint and permit Tom

and Nanette to refile only on their own behalf.

**NOTE: A DISCREPANCY IN THE FACT PATTERN EXISTS BETWEEN THE DATE THAT THE LAW WAS PASSED AND THE DATE THAT THE LAWSUIT WAS FILED. CREDIT WAS NEITHER GIVEN FOR IDENTIFYING THE DISCRPENY NOR IN FAILING TO DO SO.**

## QUESTION NO. 2

(20 Points – 35 Minutes)

On July 5, 2005, Hector and Elaine are arrested for theft over \$500.00. The next day, they met with Jerry Bright, a Maryland lawyer. During their meeting, Elaine told Jerry and Hector that (i) she stole a fur coat, a pocket watch and a diamond bracelet from her employer's home because she needed the money to pay her rent; (ii) Hector was only a close friend who had driven her to the house; and (iii) Hector did not know anything about what had happened. Hector nodded in agreement to all of Elaine's statements.

At the conclusion of the meeting, Jerry told Hector and Elaine that he would represent both of them provided that they paid his fees that would be charged on the basis of an hourly rate of \$500 for any time Jerry provided any services plus 10% of the sales price of the stolen items that Elaine had identified. In addition, Jerry demanded an advance payment of \$5000 from each of them. Since Elaine did not have any money, Hector agreed to pay her share of the advance payment. Jerry, Hector and Elaine agreed that he would begin to work on their case as soon as Hector's check cleared his bank account. Jerry deposited Hector's check into his firm's operating account. Two days later, Jerry withdrew all of the advance payment to pay his office rent, office staff salaries and his mortgage payment.

Two weeks later, Jerry met with Hector and Elaine to discuss a plea agreement which Jerry had arranged with the state's attorney assigned to the case. Jerry told them that he had previously represented Elaine on another criminal matter and that she was presently on parole. He explained that if she were convicted of the charge, Elaine would go to jail. Therefore, Jerry told Hector that he would have to plead guilty since the charge was his first offense and he would get off without any jail time as he expected the Judge to grant probation before judgment. Later, Jerry arranged to have all charges dropped against Elaine based on Hector's guilty plea.

Hector pleads guilty as agreed. The Judge rejects the State's recommendation of probation before judgment, and sentences Hector to prison. Shortly after his conviction, Hector contacts you, the Maryland lawyer, to complain about Jerry and the manner in which Jerry handled Hector's case. After ascertaining that the facts above are accurate, you determined that Jerry may have committed several ethical violations of the Maryland Lawyers' Rules of Professional Conduct ("Rules").

- A. What violations of the Rules do you believe Jerry has committed?**
- B. Do you have an obligation to report the violations to the Attorney Grievance Commission? Explain your answers fully.**

## BOARD'S ANALYSES - QUESTION 2

Under the facts, Jerry Bright, a Maryland lawyer, should have considered carefully whether he could ethically represent both Hector and Elaine, co-defendants, in the criminal case. Rule 1.7 (a) of the Maryland Lawyers' Rules of Professional Conduct ("MLRPC"), requires analysis as to whether Jerry has a conflict of interest under Rule MLRPC 1.7. It is under very limited special circumstances that any lawyer would be permitted ethically to represent codefendants in a criminal case. In most cases, the conflict of interest cannot be waived. Based on these facts, Jerry should have agreed to represent only Elaine, since she was a former client and he owed her a duty of loyalty in advance of the current criminal matter. See, Lettley v. State, 358 Md. 26, 746 A.2d 392 (2000).

In making arrangements with Elaine and Hector for his fees, Jerry violated MLRPC 1.5 in several respects. First, Jerry may only charge a fee that is reasonable under the circumstances. Consideration should be given to each of the 8 factors contained in MLRPC 1.5(a). It is questionable whether Jerry's hourly rate of \$500 is reasonable unless Jerry can show that he possessed the skill, knowledge and reputation, among other factors, to justify a rate at this high level. Even if he meets the burden, nonetheless, he is in violation of MLRPC 1.5(d)(2) for making a fee arrangement containing a contingency fee component. Under that Rule, Jerry is prohibited from entering into a contingent fee for representing a defendant in a criminal case. Finally, under MLRPC 1.5 (b), the scope of the representation and the fee arrangement should have been clearly communicated to Hector and Elaine, preferably in writing, before undertaking the representation, or within a reasonable time thereafter. The facts do not reveal that Jerry complied with this requirement.

As a Maryland lawyer, Jerry is charged also with the ethical responsibility of safekeeping his clients' property, to separate it from his property under MLRPC 1.15 (a), and to otherwise handle the property in accordance with the requirements of Title 16, Chapter 1600 of the Maryland Rules. He violated MLRPC 1.15 (a) when he deposited the advance payments into his operating account. He commingled his funds with the funds belonging to Hector and Elaine when MLRPC 1.15 (a) and (c) required him to keep Hector and Elaine's funds segregated until he earned the fees. By withdrawing the advance payments before those fees were earned, he misappropriated his clients' funds for the payment of his personal and office expenses. His conduct in this regard would be found to reflect negatively on the profession and to render him unfit to practice law.

Hector's payment of Elaine's portion of the advance payment to Jerry is ethically permissible under MLRPC 1.8(f) provided Jerry makes adequate disclosures to Hector and Elaine and he obtains their informed consent to the payment by Hector. Jerry failed to comply with the requirements of MLRPC 1.8(f).

With regard to the aggregate plea agreement that Jerry negotiated for Hector and Elaine, Jerry failed to adhere to the requirements of MLRPC 1.8 (g) in that he did not make full

disclosure to his clients prior to concluding the agreement. He did not adhere to his responsibilities to Hector but rather favored his other client, Elaine, in obtaining the most favorable disposition for her.

As counsel to Hector, I am required to report the results of my investigation under MLRPC 8.3 to the Attorney Grievance Commission of Maryland because the facts revealed several substantial questions as to Jerry's honesty and fitness to practice law. See also MLRPC 8.4. However, I would not be required to disclose any information otherwise protected by MLRPC 1.6 or under attorney-client privilege as codified in CJP § 9-108.

### QUESTION NO. 3

(15 Points – 25 Minutes)

On October 31, 2004, Jay, an 18 year old resident of Calvert County, Maryland, is lawfully stopped and arrested for possession of stolen property – stolen license plates from a Calvert County car dealership. During a lawful search incident to arrest, Jay is found to have in his possession 16 one ounce bags of marijuana. On November 3, 2004, a three count information was filed against Jay in the Circuit Court for Calvert County. Count I charged Jay with theft of property worth less than \$500. Count II charged Jay with possession of marijuana. Count III charged Jay with possession with intent to distribute marijuana. At his trial on February 3, 2005, Jay pled guilty to the charge of possession of marijuana, and entered an Alford plea to the theft count. The State entered a *nolle prosequi* on the record to the charge of possession with intent to distribute. Jay was sentenced to 60 days incarceration, and 6 months of supervised probation, during which time he was required to complete a drug abuse rehabilitation program. Jay served his time and successfully completed his probationary period.

On June 19, 2006, Jay filed a Petition for Expungement of Records and a General Waiver and Release with the Circuit Court for Calvert County, which was served on the State's Attorney's Office on June 22, 2006, along with Jay's request for an expedited hearing. In his papers, Jay informed the Court that he was requesting expungement of the nol prossed possession with intent to distribute charge so that he will be eligible for military service. The matter is scheduled for hearing on June 26, 2006, and, without the State's Attorney's presence, the Court grants the requested relief.

You are an assistant State's Attorney in the Calvert County State's Attorney's Office. On June 27, 2006, the matter is assigned to you with instructions to oppose the Petition. You learn of the Court's June 26, 2006 actions in the course of reviewing the Court file to prepare your opposition.

**A. On what grounds would you move to vacate the Court's order?**

Assume the additional fact that the Circuit Court for Calvert County denied the State's motion and request for relief, without a hearing.

**B. What should you pursue to obtain the requested relief?**

### BOARD'S ANALYSIS - QUESTION 3

A motion requesting the Court to vacate its order of expungement should be filed for two reasons. First, under the relevant provisions of the Maryland Criminal Procedure Article, Jay

was not entitled to expungement of his criminal record. Second, under these facts, the State was denied its right to file an objection and to participate in the hearing.

The eligibility for the remedy of expungement is set forth in Md. Code Ann. Crim. Proc. §10-105 (a) (2001; 2005 Supp.). A person is eligible for expungement if that person was acquitted; the charge was dismissed; a probation before judgment was entered; a *nolle prosequi* was entered by the State; the Court stets the charges; the case is compromised under Article 3-207 of the Criminal Law article (the facts do not indicate that this is the case); the matter was transferred to juvenile court; or the person was convicted of only one criminal act and granted a full and unconditional pardon by the Governor.

Jay is clearly not entitled to expungement, since he was not acquitted; the charges were not dismissed; probation before judgment was not entered; two of the charges were not disposed of by *nolle prosequi*; the charges were not steted; the case was not compromised under §3-207 of the Criminal Law article; the case was not transferred to the juvenile court; and there was not a conviction on a single criminal act because Jay pled guilty to two criminal acts arising out of the same transaction [Md. Code Ann. Crim. Proc. §10-107 (a) and (b)].

Under Md. Code Ann. Crim. Proc. §10-105 (d) (1) and (2), the State has 30 days to file an objection to the petition for expungement, and it should have been afforded a hearing under Rule 4-506(b) of the Maryland Rules. In this case, the relief was granted long before the statutory period allowing the State to object had expired. Similarly, under Md. Code Ann. Crim. Proc. §10-105 (e), the Court is required to hold a hearing on the request for expungement if the State files an objection within 30 days after the petition is served on the State. The State was served on June 22, 2006, and a hearing was held and the relief granted on June 26, 2006. The State was not afforded its opportunity to oppose the petition and for a hearing on the matter as required under the statute.

For the reasons stated above, that the Petitioner was not entitled to expungement under the law and the State was not given a chance to respond or to participate in the hearing, the Court should grant the relief requested by the State. The order of expungement should be vacated since the defendant was not entitled to the relief. The Court should entertain the State's motion, since the State was not permitted to participate in the process as required by law.

Since the order of the Court granting the expungement of Jay's records is a final judgment under Rule 4-508(b), the Assistant State's Attorney has the right under Rule 4-509(a) to file a notice of appeal with the clerk of the Circuit Court for Calvert County and he must serve a copy of the notice on the opposing party or attorney. The Appeal would be heard by the Court of Special Appeals under CJ-12-308 and the procedures set forth in Title 8 of the Maryland Rules.



## QUESTION NO. 4

(20 Points – 40 Minutes)

Beverly and George have a history of marital difficulties. On advice of her private counsel, Beverly had obtained a domestic violence order against George in December 2005.

On February 20, 2006, Baltimore County, Maryland police officers Peters and Thompson respond to a domestic violence call in Reisterstown at the home of George and Beverly. George and Beverly have been married for 10 years and have 4 children. When the police arrive, they find Beverly bruised and bleeding, and George suffering from a bullet wound. Both are screaming at each other. The officers ask their 8 year old, Cindy Lou, what happened, and she tells the police officers that, “Daddy hit Mommy again, so she shot him.” Officer Thompson asks Beverly if this is true; Beverly states that if George ever hits her again, she’ll kill him. The officers transport George and Beverly to County Hospital for treatment, and then take them to police headquarters where both refuse to talk. The officers charge both George and Beverly with assault, and Beverly with assault with a deadly weapon

At George’s criminal trial, the State sought to introduce the following evidence:

- 1) An envelope from his latest paycheck showing that he has violated the domestic violence order by continuing to live at the house;
- 2) The officer’s testimony regarding Cindy Lou’s statement that “Daddy hit Mommy again”;
- 3) A photocopy of Beverly’s hospital records from February 20, 2006; and
- 4) A photocopy of George’s criminal record showing conviction for driving while intoxicated on January 12, 1989.

**Defense counsel made a timely objection to each of the above. How should the Court rule and why?**

### BOARD’S ANALYSIS - QUESTION 4

- 1) The envelope should be not admitted. It is hearsay being offered to prove the truth of the matter asserted – i.e. that George is living at the house in violation of the domestic violence order. It is hearsay not subject to any exception, and should be excluded. See CJP § 10-204, Maryland Rule 5-801 and 5-802. See Bernadyn v. State, 390 Md. 1, 887 A.2d 602 (2005)
- 2) Cindy Lou’s statement should not be admitted as an exception to the hearsay rule. It is not an excited utterance, since she responded to a question by the police officer and did not volunteer the statement. [Maryland Rule 5-803 (b)(2)]. It is not a present sense

impression because it was not a contemporaneous recitation of events as they were experienced, but a statement elicited in a conversation after the events had occurred. The statement is not automatically unreliable because of Cindy Lou's age [CJP § 9-103]. Because the statement is hearsay not subject to any exception, there are grounds on which the Court can rely to exclude the testimony.

- 3) The photocopy of hospital records should not be admitted unless certified. If properly certified, official records kept in the normal course of business are admissible as exceptions to the hearsay rule. See CJP § 10-104 and Maryland Rule 5-803 (6).
- 4) The criminal record is not admissible against George because under Maryland Rule 5-609(b), evidence of a conviction is not admissible if more than 15 years has elapsed since the date of the conviction. The conviction for driving while intoxicated is not admissible since it is more than 17 years old. If the conviction were less than 15 years old and relevant to the crimes for which George is being tried, a certified official governmental record evidencing the conviction would be admissible as an exception to the hearsay rule under CJP § 10-204 and Maryland Rule 5-803 (8).

**QUESTION NO. 5**

**(5 Points – 5 Minutes)**

The week before trial, the State amends its witness list to include Wally, George and Beverly's next door neighbor, and state that Wally will testify about George's drug use, alcoholism and abusive behavior. Defense counsel learns through his private detective that Wally has a lengthy criminal record, and has been convicted of forgery in 1982, drug possession in 1986, perjury in 1990, and possession of stolen goods in 2002.

**Can defense counsel use this information to disqualify or impeach Wally's testimony?**

**BOARD'S ANALYSIS - QUESTION 5**

The State is prohibited under CJP § 9-104 from presenting the testimony of a convicted perjurer as a witness at a trial. A convicted perjurer has already demonstrated that his word is inherently untrustworthy and not worthy of belief, so the witness will be barred from testifying. The bar is absolute and cannot be cured by the passage of time.

## QUESTION NO. 6

**(15 Points – 30 Minutes)**

Joan and Sam Smith live in Washington County, Maryland and operate a successful coffee shop there. In September 2005, Joan and Sam met with Joan's sister, Ellen Smart, a lawyer admitted to practice solely in Pennsylvania, over dinner one evening at Joan and Sam's home. She advises them: (i) to form a Maryland limited liability Company for the coffee shop ("LLC") (ii) to issue the member interests 52% for Joan and 48% for Sam (iii) to designate Joan as the sole manager for the LLC since Sam was a part-time accountant at the local bank and (iv) to leave the member interests to the other of them in the last wills and testaments that Ellen would simultaneously prepare. To provide all of the legal services that they discussed, Ellen told Joan and Sam that her fee would be charged on the basis of \$500 per hour plus 15% of all revenue generated by the LLC for a period of 6 months from the date of formation of the LLC. During the meeting, Ellen requested that her fees be secured so Joan and Sam sign a promissory note and a deed of trust secured by their residence. The legal services were completed prior to the end of October 2005.

Joan became increasingly unhappy in her marriage to Sam. In February 2006, Joan decided that she wanted a divorce. She called her sister, Ellen Smart, who advised her: (i) to withdraw all monies contained in the joint bank accounts (ii) change all the locks on the residence doors and on the coffee shop doors and prohibit Sam from entry and (iii) sign the property settlement agreement that Ellen would prepare for Joan, and then she should deliver it to Sam for his signature.

Sam was furious and disgusted that Joan acted without discussing her feelings with him. He was even more disgusted with Ellen. Consequently, he files a complaint with the Attorney Grievance Commission of Maryland ("AGC"). Ellen and Joan do not respond to any of the communications directed to them by the AGC.

You are an assistant bar counsel for the AGC and you have confirmed the above facts independently.

**What are the grounds for disciplinary action against Ellen? Explain your answer fully.**

### BOARD'S ANALYSIS - QUESTION 6

Pursuant to MLRPC 8.5 (a) (2), Ellen is subject to the disciplinary authority of Maryland even though she is not a member of the Maryland bar because she provided legal services to Joan and Sam as well as the LLC in Maryland in violation of MLRPC 5.5 (a). MLRPC 5.5 (a) prohibits a lawyer from practicing law in a jurisdiction in violation of the regulation of the legal

profession in that jurisdiction. Since she did so without the supervision of a Maryland lawyer, she cannot rely on the exceptions provided under MLRPC Rule 5.5 (c) as a defense to her actions.

In meeting with both Joan and Sam, Ellen Smart violated her ethical duties to refrain from representing clients if the representation involves a conflict of interest. In this case, Ellen violated both MLRPC 1.7 (a)(1) and (2) because she represented Joan, her sister, as well as Sam, her brother-in-law, in matters where the interests of one client are directly adverse to another and where there is a significant risk that the representation of the clients will be materially limited by the lawyer's responsibilities to another client or by the personal interest of the lawyer. Ellen's conduct and representation of Sam and Joan required *at a minimum* that Ellen obtain the informed consent of both clients and that the consent was confirmed in writing prior to undertaking to provide services related to the formation of the LLC and the preparation of their wills. Continued representation of Joan required that Ellen meet the ethical requirements of MLRPC 1.7(b), which she could not do because she could not reasonably believe she could provide competent and diligent representation to both of them under the circumstances, not the least of which is the presumption that she would naturally favor her sister.

Additionally, Ellen's fees are not reasonable. Her hourly rate might be reasonable if the factors set forth in MLRPC 1.5 (a) are satisfied. However, the facts reveal that Ellen merely told Sam and Joan about the fee arrangement and that she did not disclose the fee arrangement in writing as is the preferred mode of communication under MLRPC 1.5 (b). Ellen's acquisition of an interest in the revenue of the LLC, as part of her fee, is permissible provided the fee arrangement complies with the requirements of MLRPC 1.8, including, among other requirements, the informed consent of her clients and an opportunity for them to seek the advice of independent counsel.

Since Ellen violated several ethical obligations contained in the Maryland Lawyers' Rules of Professional Conduct, she was also in violation of MLRPC 8.4 (a) (violation of the MLRPC is professional misconduct) and (d) (engaging in conduct that is prejudicial to the administration of justice). A final, serious transgression under the MLRPC was that Ellen failed to respond to the demands for information from the disciplinary authority under MLRPC 8.1 (b). For all of these violations, Ellen is subject to the authority of the AGC and can be disciplined under the MLRPC because the harm caused by her actions, as an unlicensed practitioner, occurred in Maryland. *See*, MLRPC 8.5.