FEBRUARY 2007

OUT OF STATE ATTORNEYS' EXAM

QUESTIONS AND BOARD ANALYSIS

PRELIMINARY FACTS FOR QUESTIONS 1 - 4

On June 1, 2006 Viola Victim was robbed at gunpoint.

On June 7, 2006, Officer Williams observed a car being operated in an erratic manner. Williams determined that the vehicle had been reported as stolen by Victim. Williams stopped the car, found Dave Defendant driving it and arrested him. That night, Williams prepared a police incident report describing these events. As a result of further investigation, Defendant was charged with armed robbery and use of a handgun in the commission of a felony or crime of violence.

On December 1, 2006, Dave Defendant was tried in Prince George's County Circuit Court on all charges.

The State's first witness was Victim. She testified that, at about 4 PM on June 1, she was approached by a man as she exited her car at her parents' home. Her assailant was wearing a mask. The man placed a gun against her mid-section and ordered her to give him her purse, cell phone and car keys. He then jumped into Victim's car and drove off.

In addition to Victim's testimony, the State introduced Victim's cell phone bill, which indicated that seven calls were placed from her cell phone to 301-555-1212 between 4:30 and midnight on June 1. The State also introduced telephone company records showing that 301-555-1212 was the telephone number of Defendant's relative Cal Cousin.

QUESTION 1

The State called Cousin. The following transpired:

> The State: Mr. Cousin, were you interviewed by Detective Jones about these calls that you received on June 1, 2006?
>
> Cousin: Yeah, he spoke to me but I didn't know anything about phone calls.
>
> The State: Well, didn't you tell Detective Jones that Defendant called you several times on June 1?
>
> Defense Counsel: Objection, the State is attempting to impeach its own witness.
>
> The Court: Overruled.
>
> Cousin: No, I never said that.

The State: And didn't you tell Detective Jones that Defendant told you he had just stolen a car?

Defense Counsel: Objection.

The State proffered that Detective Jones would testify that he had interviewed Cousin and that Cousin had told him that Defendant had made several calls to him on June 1 and had boasted of stealing a car during the conversations. The Court overruled the objection.

Were the Court's rulings on Defendant's objections correct? Explain your answer.

BOARD'S ANALYSIS - QUESTION 1

The Court's ruling on the first objection was correct. The common law rule that a party may not impeach its own witness has been abolished by the Maryland Rules of Evidence. MRE 5-607.

The Court's ruling on the second issue was incorrect. MRE 5-613 sets out the requirements for the use of extrinsic evidence of a prior inconsistent statement. Detective Jones' testimony as to his conversation with Cousin is admissible only if (a) the contents of the statement, the circumstances under which it was made and the person to whom it was made are disclosed to the

witness and (b) that the statement concerns a non-collateral matter. The proffer of Jones' testimony satisfies the first of these requirements but not the second. Jones' proposed testimony about Cousin's statement about Defendant's statement is not related to the reason why Cousin was called as a witness, namely to establish that the telephone calls were made by the Defendant. It is an attempt to introduce hearsay evidence in the guise of impeachment. *Bradley v. State*, 333 Md. 593, 604 (1994).

QUESTION NO. 2

In order to prove that Defendant was driving Victim's car after the robbery the State called Sergeant Supervisor. She testified that she was William's supervisor in 2006 and that the police report was prepared by Williams in the normal course of his duties. She further testified that Williams retired in August, 2006 and now resides in Hawaii. She testified that, as a result of a conversation which she had with Williams a month before trial, she attempted to obtain money to pay for his travel expenses from Hawaii to Maryland but was unsuccessful.

Can the State introduce Williams' police report? If so, how?

BOARD'S ANALYSIS -QUESTION 2

The report is inadmissible in this proceeding. Williams' report is hearsay and can admitted only under limited circumstances. MRE 5-803(b)(6) allows for the introduction of business records. Supervisor's testimony is sufficient to establish a basis for the introduction of the report as either a business record or a public record or report, MRE 5-803(b)(8). However, Subsection b(8) specifically provides that a record of matters observed by a law enforcement office is not admissible in a criminal proceeding against the accused. Williams is not an "unavailable declarant" under MRE 5-804(a) and, in any event, none of the exceptions which are available when the declarant is unavailable apply.

QUESTION NO. 3

Defendant's sole witness was Alice Alibi. She testified that she and Defendant went to Ocean City, Maryland on the morning of June 1, 2006, and did not return to Prince George's County until the next day. On cross-examination, the State's Attorney asked Alibi if she had ever been convicted of a crime. Defense counsel objected. The State's Attorney then proffered that Alibi had been convicted of theft of under $500 in 1990, possession of a controlled dangerous substance in 1999 and first degree assault in 2000. The first two crimes were misdemeanors; the third was a statutory felony.

How should the Court rule on the objection? Explain your answer.

BOARD'S ANALYSIS - QUESTION 3

MRE 5-609 controls impeachment of a witness by prior convictions. It sets out a three part test: (1) the crime must be an infamous crime or other crime relevant to the witness's credibility, (2) the court must consider whether the probative value of admitting the evidence outweighs the danger of unfair prejudice to the witness or the opposing party, and (3) a conviction may not be used for impeachment purposes if 15 years have elapsed since the date of the conviction.

Theft relates to credibility but the conviction occurred more that 15 years ago. It is inadmissible. Possession of a controlled dangerous substance is a misdemeanor and is not relevant to credibility. *Cason v. State*, 66 Md. App. 757, 773, 505 A. 2d 919 (1986). The issues raised by the conviction of felony assault are more difficult. Infamous crimes are treason, forgery, perjury and felonies at common law. *Prout v. State*, 311 Md. 348, 358-359; 535 A.2d 445 (1988). At common law, assaults were not felonies and thus are not infamous crimes. *Garitee v. Bond*, 102 Md. 379, 384-385, 62 A. 631 (1905). The objection should be sustained as to all three convictions. Alternately, if an examinee treats felony assault as an infamous crime, the trial court must engage in the balancing test to determine admissibility. Since the witness being impeached is not the defendant, there seems to be no reason why the evidence should not be introduced.

To receive substantial credit, it is not necessary to explain the nuances of the Maryland common law of assault and its subsequent statutory modifications. Instead, a successful examinee should be able to read and apply Rule 5-609 to the three separate crimes.

QUESTION NO. 4

Defendant was found guilty on all charges. On January 3, 2007, he was sentenced to 35 years incarceration.

What options does Defendant have to (a) overturn his conviction or (b) have a court reduce his sentence? What are the time limits within which he must act?

BOARD'S ANALYSIS - QUESTION 4

Defendant may file a motion for a new trial within 10 days of the date of verdict. Maryland Rule 4-331(a). He may file an order of appeal to the Court of Special Appeals within 30 days of the date of the verdict or within 30 days of the denial of his motion for a new trial. Maryland Rule 8-202(b). Finally, he has the right to file an appeal *en banc* pursuant to Maryland Rules 4-352 and 2-551 within 10 days of the date of the verdict. (Article 4, Section 22 of the Maryland Constitution, which provides for *en banc* appeals, was amended by Chapter 421 of the Acts of 2006, approved by the voters of the State on November 7, 2006. The amendments to Section 22 do not affect the analysis called for in this question.)

With regard to his sentence, Defendant may file a request within 30 days for a review of his sentence by a three judge panel pursuant to Maryland Rule 4-344. Filing such a motion does not extend the time frames for filing an appeal. *Id*. §§ (g). He also has the right to request a modification of his sentence under Maryland Rule 4-345. A motion based upon an illegal sentence may be made at any time, Maryland Rule 4-345(a); otherwise, the motion must be made within 90 days. *Id*, §§ (e).

PRELIMINARY FACTS FOR QUESTIONS 5 - 10

On the early morning of September 6, 2006, Paula Plaintiff and her husband ("Husband") had an argument in their residence located in an exclusive neighborhood of waterfront homes in Talbot County, Maryland. As a result, Husband left the house at 7:00 a.m. He called the Talbot County Police Department's emergency line and asked for a referral to a marriage counselor.

The police dispatcher told Husband that the only listing she had was for a suicide hot-line. Husband then stated that his wife had threatened suicide. After further conversation with Husband, the emergency dispatcher sent police officers to the Plaintiffs' home to investigate a possible suicidal person.

At approximately 7:30 a.m., Sergeant and Patrolman, two uniformed Talbot County police officers, arrived at the Plaintiff home. When the officers arrived, Plaintiff was visibly agitated and crying. She stated that she and her husband had had a “painful argument.” After additional conversation between the police officers and Plaintiff, Sergeant decided that the officers should take Plaintiff to the hospital for an emergency psychiatric evaluation. Plaintiff disagreed and resisted leaving her home. As a result, the officers handcuffed her before removing her from her home and transporting her to the nearest hospital. Several neighbors saw Plaintiff being taken handcuffed from her house and placed in the police car.

Once at the hospital, Plaintiff was evaluated by the hospital's attending psychiatrist, who determined that she was neither suicidal nor suffering from a mental disorder at that time. As a result, Plaintiff was released from the hospital shortly thereafter.

QUESTION NO. 5

Several weeks after the incident, Plaintiff consulted with Barbara Barrister of the law firm of Barrister & Solicitor, P.A., regarding a possible lawsuit against Husband, Talbot County, Sergeant and Patrolman. In addition to the facts related above, Plaintiff stated that she has separated from her husband and that she was more interested in "teaching them all a lesson" than a financial recovery. Barrister told Plaintiff that she specialized in cases of this type and that Plaintiff's case would be a difficult one. She said that she would represent Plaintiff for a fee of 50% of any recovery plus a $10,000 retainer. Plaintiff replied that, as far as she was concerned, Barrister could keep the entire recovery. The day after the meeting, Barrister sent Plaintiff a letter which read in pertinent part:

> You have requested that I represent you in a claim against Husband and Talbot County and its employees, agents and officials arising out of your detention occurring on May 6, 2006.
>
> As I have previously told you, I can make no promise or guarantee as to the outcome of this case.
>
> Based upon the facts you have given to me, I undertake the representation of you on a contingent fee basis. That is, I will be entitled to receive all of the proceeds received by you as a result of the above-described matter whether received as a result of voluntary settlement or judgment in your favor. In addition, you will pay me a retainer fee of $10,000. Your check is your acknowledgment of these terms and conditions . . . .

Plaintiff sent Barrister a check for $10,000, which Barrister deposited in her office account and used for office expenses over the next two months. Barrister is admitted to practice in Maryland.

What issues are raised by Barrister's agreement with Plaintiff and Barrister's handling of the check?

BOARD'S ANALYSIS - QUESTION 5

Barrister's conduct raises several issues:

First, MRPC 1.5(a) requires fees to be reasonable. As a general rule, the lawyer's stake in the proceeding should not exceed that of the client. *Atty. Griev. Comm'n v. Roberson*, 373 Md. 328, 818 A.2d 1059 (2003). Barrister's original contingency fee of 50%, together with a retainer of $10,000, violates that prohibition. The same is true of the contingency fee of 100% of the recovery.

Second, MRPC 1.5(c) provides that a contingent fee agreement must be in writing and signed by client. in addition, a contingency fee agreement must specifically address a number of items, e.g. whether and how litigation expenses will be paid; how appeals should be funded. Barrister's letter fails these requirements.

MRPC 1.15(c) requires that a retainer must be deposited in client trust account and withdrawn only as fees are earned or costs advanced "unless client gives informed consent, confirmed in writing." Barrister violated this rule.

QUESTION NO. 6

Barrister's factual investigations and legal research led her to conclude that Plaintiff should file suit against Husband, Sergeant, Patrolman and Talbot County for negligence, assault, battery, false imprisonment, defamation, intentional infliction of emotional distress and related torts. She learned that, in October, 2006, Sergeant resigned from the Talbot County Police Department and is a full-time graduate student at Towson University in Baltimore County. Sergeant resides in Anne Arundel County and Patrolman resides in Caroline County. The psychiatrist and the hospital emergency room personnel all reside in Talbot County. Barrister concluded that it would be in Plaintiff's best interests to file suit in Baltimore County and filed suit there. The attorneys for the defendants believe that it would be advantageous to transfer the case to Talbot County.

What steps can the defendants' attorneys take to transfer the case? How should the Court rule?

BOARD'S ANALYSIS - QUESTION 6

Maryland Annotated Code Courts and Judicial Proceedings Article Section 2-601(a) provides that a civil action may be brought in a county where the defendant resides, works, maintains a business or "habitually engages in a vocation." Section 6-201(b) provides that, where there is more than one defendant and no single venue is applicable to all, the suit may be brought in a county where any one of them could be sued or in the county where the cause of action arose. Sergeant's status as a student does not constitute engaging in a vocation. *Cf. Dodge Park Enterprises v. Welsh*, 237 Md. 570, 207 A. 2d 503 (1961) ("Regular business" and "habitual avocation" are synonymous terms). If Baltimore County is an improper venue, the case may be brought either in Anne Arundel, Talbot or Caroline Counties.

The lawyers for the Defendants should raise the issue in a preliminary motion, Maryland Rule 2-322. If they file an answer or other responsive pleading, the venue issue is waived.

Alternately, a court, invoking the doctrine of *forum non conveniens*, may, in its discretion, transfer a civil case in the interests of justice and the convenience of the parties. Here, the plaintiff is a resident of Talbot County, most or all of the fact witnesses, other than Sergeant, reside or work in Talbot County and the cause of action arose there. Transfer of the case under these circumstances would be appropriate. *Stidham v. Morris*, 161 Md. App. 562, 569 (2005); *Simmons v. Urquhart*, 101 Md. App. 85, 643 A. 2d 487 (1994), *rev'd on other grounds*, 339 Md. 1, 660 A.2d 412 (1995).

QUESTION NO. 7

The lawyers for Talbot County learned that Plaintiff has been treated since 2000 by Marcia Welby, M.D., a licensed psychiatrist in Maryland. They filed a notice of deposition, together with a subpoena *duces tecum*, upon Dr. Welby, seeking her records pertaining to any treatment provided by her to Plaintiff. Plaintiff would like to deny Talbot County access to those records, especially as they pertain to counseling provided by Dr. Welby to Plaintiff. Similarly, she does not wish Dr. Welby to testify about her counseling sessions with Plaintiff.

A. What actions should Barrister take to prevent (i) disclosure of Plaintiff's medical records and (ii) Dr. Welby's testifying about their counseling sessions? Upon what grounds would the action be based?

B. How will the Court rule?

BOARD'S ANALYSIS - QUESTION 7

A. In order to deny or limit discovery, Barrister must file a motion for a protective order pursuant to Maryland Rule 2-403(a). This rule allows a court, upon s showing of good cause, to order that certain discovery "not be had" or that the discovery "be limited to certain matters." At the time of filing the motion, Barrister must also file a certificate pursuant to Maryland Rule 2-431 certifying that she and opposing counsel have attempted to resolve the dispute and specifying the time, date and circumstances of such discussions.

B. Maryland has established by statute a limited psychiatrist/patient privilege. Courts and Judicial Proceedings Article Section 9-109(b) establishes a privilege against the unauthorized disclosure of communications relating to diagnosis or treatment of the patient; or any information that by its nature would show the existence of a medical record of the diagnosis or treatment of an emotional or mental disorder. However, Section 9-109(d)(3((i) provides that a patient waives the privilege when the patient puts his or her mental condition at issue as Plaintiff has done by suing for intentional infliction of emotional distress. The Court should issue an order denying the motion.

QUESTION NO. 8

In a response to an interrogatory, Plaintiff stated that during the early morning hours of May 6, she and Husband had a prolonged argument about the state of their marriage. Plaintiff further stated that, during the course of the argument, Husband threatened to "have her committed up in a mental hospital" and that at no time during the argument did she indicate that she was considering suicide. Husband filed a motion *in limine* to prohibit introduction of evidence regarding the parties' communications.

What arguments could be advanced in support of Husband's motion?

How should the Court rule?

BOARD'S ANALYSIS - QUESTION 8

Maryland recognizes the spousal privilege against the disclosure of confidential communications between spouses. Courts and Judicial Proceedings Article 9-105. However, the statute does not render a spouse incompetent to testify; instead, it establishes a privilege by one spouse to preclude disclosure of confidential communications by the other. *Brown v. State*, 359 Md. 180, 753 A.2d 84 (2000). Here, Plaintiff's proposed testimony as to what she said, or didn't say, to her Husband, is not subject to the privilege. Her proposed testimony as to Husband's statement is more problematic but Maryland recognizes that the privilege does not extend to statements which, by their nature, are destructive of marital harmony. *Harris v. State*, 37 Md. App. 180, 376 A.2d 1144 (1977):

> In this case it was the threat itself which wrought discord to the marriage, not the voluntary in-court disclosure thereof. Moreover, it is patent that the marital harmony, once damaged by the inter-spouse communication, is not miraculously resurrected by a rule of evidence. Accordingly, we hold that the spouse/incompetency rule does not encompass those communications which, as here, are destructive by themselves of the marital relationship.

The Court should deny the motion.

QUESTION NO. 9

After discovery was completed, Patrolman, Sergeant and Talbot County moved for summary judgment on the grounds of governmental immunity. The trial court entered an order granting the motions filed by Patrolman and Sergeant and an order denying Talbot County's motion. Barrister wishes to appeal the decision regarding Patrolman and Sergeant; Talbot County wishes to do the same for the trial court's denial of its motion.

Are the orders of the Circuit Court disposing of the motions for summary judgment appealable?

If either or both are not, what steps can be taken by Barrister and Talbot County to make the orders appealable?

How should the Court rule on these requests?

BOARD'S ANALYSIS - QUESTION 9

The order of the Circuit Court is not appealable because it is not a final judgment - it does not dispose of the claim against Husband, nor Talbot County. *See* Maryland Rule 2-601 and 2-602 and Courts and Judicial Proceedings Article 12-301. Courts and Judicial Proceedings Article Section 12-303 allows for interlocutory appeals under certain circumstances - none apply to the facts.

Maryland Rule 2-602(b) authorizes the Circuit Court to direct entry of a final judgment "as to one or more but fewer than all of the claims or parties" if the Court expressly determines that there is no just reason for delay. The Circuit Court could arguably enter such an order as to Patrolman and Sergeant as its order constitutes a full determination of Plaintiff's rights against them. The Court would err in entering such an order for the denial of the motion for summary judgment filed by Talbot County. *Dawkins v. Baltimore City Police Dept*., 376 Md. 53, 827 A.2d 115 (2003):

> The collateral order doctrine is based upon a judicially created fiction, under which certain interlocutory orders are considered to be final judgments, even though such orders clearly are not final judgments. The justification for the fiction is a perceived necessity, in "a very few ... extraordinary situations," for immediate appellate review. . . . . As a general rule, interlocutory trial court orders rejecting defenses of common law sovereign immunity, governmental immunity, public official immunity, statutory immunity, or any other type of immunity, are not appealable under the Maryland collateral order doctrine. Id. at 64 (Footnote omitted).

QUESTION NO. 10

Samuel Solicitor was admitted to practice law in Maryland in 1975. For the next 28 years, Solicitor worked as a member of the in-house legal staff of a business in Maryland. In 2002, Solicitor retired and decided to practice law privately in Maryland. He approached Barrister, a friend and neighbor, about joining her in her practice. Solicitor and Barrister agreed to practice law together and Barrister changed the name of her professional association from "Barrister, P.A." to "Barrister & Solicitor, P.A." Barrister remained the sole equity owner of the practice. The day-to-day operations of the office and bookkeeping functions were handled by Feckless. On January 2, 2003, Solicitor went to work for Barrister and Solicitor and spent his working hours over the next three years handling the firm's appellate work. Solicitor did not monitor the law firm's bank records, relying upon Barrister to perform those functions.

In 2005, Solicitor received a telephone call from Client, who told him that Barrister had settled Client's personal injury case two months previously but that the check for his settlement proceeds had been returned from his bank marked "Not Sufficient Funds." Solicitor spoke to Barrister who told him that Feckless had inadvertently deposited the check in the wrong account and that she would personally take care of the matter. Solicitor took no further action. In December, 2006, Solicitor learned that there is a significant overdraft in the firm's account. Feckless failed to maintain a separate account for the handling of client funds and instead, used one account as a repository for client funds as well as fees. Feckless also paid operating expenses from time to time from the account. Feckless did not keep accurate records of what money in the account represented fees versus clients' monies. Feckless claimed that he took these actions at Barrister's specific instructions; Barrister has denied this.

What, if any, professional responsibility issues are raised by Solicitor's role in this matter?

BOARD'S ANALYSIS - QUESTION 10

The law firm clearly has violated MRPC 1.15 by co-mingling client funds with firm funds. In addition, the firm has failed to follow the requirements of Maryland Rules 16-603 (obligation to maintain separate trust account), 16-604 (funds for clients must be deposited in trust accounts) and 16-604 (record keeping requirements for trust accounts).

Solicitor made no attempt to determine whether or not the firm was complying with the Rules of Professional Conduct and the Maryland rules pertaining to lawyer's trust accounts. This violates MRPC 5.1(a) (a partner, or similar supervisor, must make reasonable efforts to ensure that firm complies with rules of conduct. This responsibility extends to supervising non-lawyer assistants, MRPC 5.3. Solicitor's culpability is underscored by the fact that he was contacted by Client about a bounced check but made no effort to determine the cause of the problem other than to speak to Barrister one time. Solicitor's conduct could warrant professional discipline, including suspension or disbarment. *Attorney Grievance Comm'n v. Ficker*, 349 Md. 13, 706 A.2d 1045 (1998) (failure to supervise); *Attorney Grievance Comm'n v. Awuah*, 346 Md. 420; 697 A.2d 446 ((1997) (failure to maintain trust account).