

FEBRUARY 2011

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

**PRELIMINARY FACTS APPLICABLE TO
QUESTIONS 1 THROUGH 10**

(Reading Time - 10 Minutes)

Victor entered into a written agreement with Builder, Inc. to construct an addition to Victor's home located in Prince George's County, Maryland. Bob is the sole stock holder of Builder, Inc., a properly licensed Maryland contractor, which has its principal office located in Charles County, Maryland, although Builder, Inc. has conducted improvement projects in Montgomery and Frederick Counties. Bob resides in Howard County, Maryland. As part of the repairs to Victor's home, Builder Inc. used High Stress Floor Joists which Builder, Inc. purchased from Supply Co. Builder, Inc. uses High Stress Floor Joists from Supply Co. in all of its improvement projects. Supply Co., a North Carolina corporation, has one office which is located in High Point, North Carolina.

Following the completion of Builder Inc.'s work, Victor and Bob got into a bitter dispute over Builder, Inc.'s work. Victor contended that the costs were too high and that the work had not been done in a workmanlike manner. Part of the dispute centered on Victor's reading of an internet article describing High Stress Floor Joists as inferior in quality to other types of floor joists. As Bob stormed out of Victor's house, he shouted to Victor "you better get out of my way mister!" Victor jumped out of the way to avoid contact with Bob's shoulder as he passed.

Victor filed a civil lawsuit against Bob and Builder, Inc. for \$30,000 claiming assault, breach of contract and negligence. Builder, Inc., in turn, filed a separate suit against Victor seeking \$25,000 in damages, and injunctive and declaratory relief. Thirty-five days after Builder filed its answer to the civil suit by Victor, Builder filed a third party action against Supply Co. for negligence, seeking \$35,000 in damages.

QUESTION 1

(10 Points - 17 Minutes)

A. What Maryland court(s), if any, has subject matter jurisdiction over each party's action and why?

B. In what venue(s), if any, can each party be sued and why?

BOARD'S ANALYSIS - QUESTION 1

a. Pursuant to Courts and Judicial Proceedings Article 4-401(1) and Article 4-402(d)(1)(i), Victor's claims for assault, breach of contract and negligence may be brought in either the District Court or Circuit Court because the \$30,000 amount in controversy exceeds the

\$5,000 exclusive of prejudgment or post judgment interest, costs and attorney's fees required for Circuit Court, but does not exceed the \$30,000 jurisdictional limitation for District Court.

Builder's suit against Victor which includes an action for declaratory and injunctive relief must be brought in the Circuit Court. Although Builder's claim for \$25,000 in damages could by itself have been brought in the District Court, pursuant to Courts and Judicial Proceedings Article 4-402(a), (c) and (d)(2), the District Court lacks the equity jurisdiction to hear Builder's declaratory and injunctive matters as it relates to the facts of the given question.

Pursuant to CJP Article 4-402(d)(1)(i), Builder's 3rd party action for negligence against Supply Co can be brought only in the Circuit Court because the \$35,000 amount in controversy exceeds \$30,000. Therefore, if Builder is sued by Victor in District Court, the case would have to be transferred to Circuit Court.

b. Pursuant to CJP § 6-103(b), a Maryland court can exercise personal jurisdiction over any of the parties. This includes Supply Co. who, pursuant to CJP § 6-103(b)(2), (3) or (4) supplies goods or manufactured products to Builder for all Builder's projects in Maryland or because it has allegedly caused tortious damages in Maryland.

Pursuant to CJP 6-201(b), because there are multiple defendants (Builder and Bob), they can be sued where any one of them could be sued pursuant to CJP 6-201(a). Thus, Bob and Builder may be sued in Prince George's County where the work was being performed and the alleged assault occurred, Charles County where Builder has a principal office, in Montgomery or Fredrick Counties where Builder carries on a regular business and in Howard County where Bob resides.

Victor can only be sued in Prince George's County where he resides and where the work was being performed CJP 6-201(a).

Because Supply Co. is a third-party defendant its third-party action will continue in the same venue as the initial action.

QUESTION 2

(10 Points – 17 Minutes)

Which of the defendants can file an initial procedural motion regarding the complaint against them? Analyze the requirements and likely success of such a procedural motion filed by that party.

BOARD'S ANALYSIS – QUESTION 2

Pursuant to Rule 2-332(e), Supply Co, as a third-party defendant (or Victor as another party) may file, within 15 days of service of Builder's claim, a motion to strike that third party complaint because it was filed more than 30 days after the filing of Builder's answer. After filing such a motion, Supply Co's time for responding to the third-party claim by Builder is extended until 15 days after entry of the court's order on the motion. The court shall grant the

motion unless there is a showing that the late filing of the third-party claim does not prejudice other parties to the action.

It is conceivable that Supply Co. could file a motion to dismiss based upon lack of personal jurisdiction, however, such a motion would likely be unsuccessful. Pursuant to CJP § 6-103(b), a Maryland court can exercise personal jurisdiction over any of the parties. This includes Supply Co. who, pursuant to CJP § 6-103(b)(2), (3) or (4) supplies goods or manufactured products to Builder for all Builder's projects in Maryland or because it has allegedly caused tortious damages in Maryland.

QUESTION 3

(10 Points – 17 Minutes)

Attorney Uno and Attorney Dos agree to represent Victor in his civil suit against Bob on a contingency fee arrangement. They each have their own law offices but agree to split the contingency fee, each attorney receiving 50% of the attorneys' fees recovered. Because they are new lawyers, they consult with you a Maryland attorney to advise them regarding their fee arrangements with the client.

Describe in detail the legal advice you would provide in response to Uno and Dos's arrangements with the client.

BOARD'S ANALYSIS – QUESTION 3

Pursuant to MRPC 1.5 (c) a fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by law such as in a criminal case. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be responsible whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter, and, if there is a recovery, showing the remittance to the client and the method of its determination.

Pursuant to 1.5(e), a division of a fee between lawyers who are not in the same firm may be made only if: (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation; (2) the client agrees to the joint representation and the agreement is confirmed in writing; and (3) the total fee is reasonable.

QUESTION 4

(10 Points – 17 Minutes)

In connection with Builder Inc.'s civil suit against Victor, Builder Inc.'s counsel provided Victor's counsel with notice 60 days before the trial that she intended to introduce 9 bills

received by Builder Inc. from subcontractors in connection with the work performed on Victor's house without the testimony of the bill providers. Assume Builder Inc. has already paid 5 of the bills and that the subcontractors have been threatening to sue Builder, Inc. if it does not pay the 4 remaining bills which are now several months overdue. Victor's lawyer objects to the introduction of the bills.

How will the Court rule on the admission of the bills without testimony from the bill providers? Explain your answers fully.

BOARD'S ANALYSIS – QUESTION 4

Pursuant to Courts and Judicial Proceedings Article 10-105, so long as the amount in controversy in the litigation is not over \$30,000, a paid bill for goods or services is admissible without the testimony of the provider of the goods or services as evidence of the authenticity of the bill for goods or services provided and the fairness and reasonableness of the charges of the provider of the goods or services, if: (a) The bill is admitted on testimony, by the party or any other person with personal knowledge, (b) the bills sought to be admitted are already paid by the admitting party, (c) notice was served on the opposing party of the intent to introduce the bills without the support of the testimony of the provider of the goods or services that were billed, a list that identifies each bill, and a copy of the bill. Because only 5 of the bills were already paid, only those bills can be admitted without calling the subcontractors.

The 4 unpaid bills cannot be admitted under this section. Absent admittance pursuant to 10-105, none of the bills can be admitted without calling the subcontractors who completed the work to authenticate the bills and testify regarding reasonableness under the given facts because the facts make no reference to certified business records or other facts that would give rise to admittance of the documents without calling the subcontractors.

QUESTION 5

(10 Points – 17 Minutes)

Assume that Victor wins at trial and recovers \$30,000 in compensatory damages against Bob and Builder, Inc. The judgment is entered on January 23, 2010, and 10 days later Bob and Builder, Inc. filed a motion for a new trial. Thirty days later the court denies Bob and Builder, Inc.'s motion. Two days after the court's denial, Bob and Builder, Inc. note an appeal. In response, Victor's 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 5

Pursuant to either Rules 3-533 and 7-104(c) or 2-533 and 8-202(c), Bob and Builder's motion for a new trial was timely filed within 10 days of the adverse judgment. Therefore, the time for noting an appeal was stayed until 30 days after the motion for a new trial is ruled upon. Thus, because they filed their notice of appeal 2 days after the court's ruling, their appeal is timely and the motion to strike the appeal will be denied.

QUESTION 6

(10 Points – 17 Minutes)

During the January 2011 criminal trial of Bob in the Charles County Maryland District Court, Victor testified that he had been quietly nursing a beer when he was shoved and punched by Bob. On cross examination, Bob's criminal defense lawyer asked Victor whether he had ever been convicted of a crime. The Assistant State's Attorney timely objected. Bob's lawyer then proffered to the Court that Victor had been convicted of two crimes: possession of dangerous weapons in 2003 and theft in 1990. Bob's lawyer then proffered that the evidence was relevant to show Victor's violent character and lack of credibility. All of the convictions were misdemeanors.

How will the Court rule on each evidentiary matter? Explain your answers fully.

BOARD'S ANALYSIS – QUESTION 6

Pursuant to MRE 5-404 when evidence of other crimes, wrongs, or acts committed by a witness is proffered by a *criminal defendant*, as Bob, the risks of prejudice against the defendant normally are not present. Thus, such evidence does not fall under the exclusionary provision of MRE 5-404. Rather, if the evidence is relevant to the existence or non-existence of some fact pertinent to Bob, as the criminal defendant's defense, it will be allowed. *See Sessoms v. State*, 357 Md. 274, 291 (2000). Here, the Court will have to decide whether Victor's conviction for possession of a dangerous weapon (which could be almost anything) is relevant to Bob's defense that he did not assault Victor.

MRE 5-609 sets out a several part analysis regarding the admissibility of prior crimes to attack credibility. First, the crime must be an infamous one or "[an]other crime relevant to the witnesses' credibility" and the Court must determine that the probative value outweighs the danger of unfair prejudice to the witness or objecting party. MRE 5-609(a). Second, the conviction must have occurred within 15 years. MRE 5-609(b). In Maryland, infamous crimes are treason, felony theft, perjury, forgery and the so-called *crimen falsi*, i.e. misdemeanors involving dishonesty. Possession of a weapon does not involve dishonesty and, since it is a misdemeanor, does not constitute an infamous crime. While theft is an infamous crime, Victor was convicted of that misdemeanor back in 1990, outside of the 15 year limit set out in MRE 5-609(b). Thus, these convictions will not come in under MRE 5-609.

QUESTION 7

(10 Points – 17 Minutes)

Assume that at the criminal trial, Rolley was called by the State to testify that she confronted Bob about the incident with Victor and that she possessed a tape upon which she secretly recorded Bob's statements to her: "I wasn't going to let Victor get away with ripping me off without pay-back." Bob's attorney objects to Rolley's testimony and the entry of the tape into evidence.

How will the Court rule on each evidentiary matter? Explain your answers fully.

BOARD'S ANALYSIS - QUESTION 7

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. Thus, pursuant to 10-405, the illegally obtained recording will not be admissible nor can there be testimony about making the recording. However, Rolley's testimony regarding the statements made to her by Bob will be admissible as an admission by Bob pursuant to Rule 5-803(a). Thus, Rolley can testify to what she personally heard Bob say—despite that fact that those same statements are also the subject of an illegal recordation.

QUESTION 8

(10 Points – 17 Minutes)

Spud, an eyewitness, was called by the State to testify against Bob in the criminal case. Spud testified that he could not recall who started the fight. This statement varied from his earlier testimony at a deposition in a civil case. The Assistant State's Attorney then asked Spud if he had ever made a statement which contradicted his last answer. Bob's attorney timely objected to the question on the grounds that: (1) the State was attempting to impeach its own witness and (2) the Assistant State's Attorney had to disclose the contents of any such prior statement before asking the witness questions about it.

How should the Court rule on the objections? Explain fully.

BOARD'S ANALYSIS – QUESTION 8

Pursuant to Rule 5-607, the credibility of a witness may be attacked by any party, including the party calling the witness. Pursuant to Rule 5-613, the State may examine Spud about the prior statement without disclosing its contents at that time, provided that before the end of the examination: (1) the statement, if written, is disclosed to the witness and the parties, or if the statement is oral, the contents of the statement and the circumstances under which it was made, including the persons to whom it was made, are disclosed to the witness and (2) the witness is given an opportunity to explain or deny it.

QUESTION 9

(10 Points – 17 Minutes)

Four years before the criminal trial, Bob bragged to his then wife, Wendy, while they were both home alone one evening watching the Hoper Winley Show, that he had in fact pushed Victor, and that he would kill her if she said anything about it. Wendy has since divorced Bob and has nothing more to do with him. At the criminal trial, the prosecutor served a valid subpoena on Wendy to testify against Bob regarding his statements to her four years ago. Bob's lawyer objects to Wendy's proffered testimony.

How will the court rule on this issue and why? Explain your answer fully.

BOARD'S ANALYSIS - QUESTION 9

Bob may seek to prohibit Wendy from testifying about his statement to her that he in fact pushed Victor, because the communication was confidential and protected under CJP § 9-105 in that it happened during the marriage. The assaultive portion of the communication by Bob towards his ex-wife is not relevant to the criminal case involving Victor and will be precluded. It does not matter that Wendy is no longer married to Bob, pursuant to CJP § 9-105 both Wendy and Bob hold the privilege for confidential communications that occurred while they were married. Wendy cannot, however, simply refuse to testify pursuant to CJP § 9-106, because she is no longer married to Bob and no longer has the right to assert the criminal defendant spouse privilege. Wendy could use the assaultive statement against Bob in any case she has against him.

QUESTION 10

(10 Points – 17 Minutes)

At the conclusion of the criminal trial, Bob is found not guilty by the jury. Bob then comes to you, a Maryland attorney, and requests that you have the assault charge for which he was found not guilty and a charge of malicious destruction of property which was entered *nolle prosequi* by the State just prior to the trial, immediately expunged from his record so that he can sue the arresting police officer.

Describe in detail the legal advice you would provide in response to your client's requests.

BOARD'S ANALYSIS – QUESTION 10

Pursuant to Crim. Pro. § 10-105, Bob may file a petition listing relevant facts for expungement of both charges against him because: (1) he was acquitted of the assault charge; and (2) the State entered the malicious destruction charge *nolle prosequi*. Bob shall file a petition in the court in which the proceeding began, but may do so within 3 years after the acquittal or entry of the *nolle prosequi*, unless Bob files with the petition a written general waiver and release of all his tort claims arising from the charge. As a result, Bob would have to forgo either his desire to have his record expunged within 3 years or his desire to bring a suit against the officer immediately.