

**FEBRUARY 2013**  
**OUT OF STATE ATTORNEYS' EXAM**  
**QUESTIONS AND BOARD ANALYSIS**

**PRELIMINARY FACTS APPLICABLE TO**  
**QUESTIONS 1 THROUGH 3**

On December 31, 2008, Al borrowed \$20,000 from Bob and gave Bob a promissory note which provided for four annual payments of \$5,000 each together with interest at the rate of 6% per annum on the unpaid balance. The first payment was due December 31, 2009. On January 20, 2010, 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, January 22, 2013, the day after Martin Luther King's Birthday holiday, 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 January 25, 2013. On January 28, 2013, Al died. Carl has been appointed Personal Representative of Al's estate in the Orphan's 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 as witnesses Al's lawyer, Tom, and Al's Certified Public Accountant, Dick, to prove the loans and the terms of the note. (The absence of the original note does not bar the cause of action.) Bob also wants to call as a witness 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 February 26, 2013, Carl retains you, a licensed Maryland attorney, to represent Al's estate in this matter.

**QUESTION 1**

*(10 Points – 20 Minutes)*

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

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.

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(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 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.

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**QUESTION 2**

*(12 Points – 20 Minutes)*

**What statutory evidentiary objections will be available to Carl with respect to the proposed testimony of Tom, Dick and Harry? Explain fully.**

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.

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**QUESTION 3**  
*(11 Points – 20 Minutes)*

**What defense(s) are available to Carl if all of Bob's evidence is admitted? Explain fully.**

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

If the promissory note is proved, the instrument was under seal, and the action has been commenced within twelve years of the date any cause of action accrued, recovery is not 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 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 January 20, 2013. 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).

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**QUESTION 4**  
*(35 Points – 60 Minutes)*

Al, a 17 year-old Prince George's County, Maryland, high school student, took a handgun belonging to his father that his father kept at his residence for protection. He brought the gun to school and put it in his locker. Ben, his classmate, saw Al put the handgun in the locker and told the principal. The principal approached Al and took him to the locker and told him to open it, which he did. The principal recovered the gun and gave it to the police and suspended Al from school. The police questioned Al who admitted bringing the gun to school.

The State's Attorney presented the case to the Grand Jury which returned a two-count indictment in the Circuit Court for Prince George's County, Maryland. Al was charged with possession of a handgun on school property in violation of Criminal Law Section 4-102(c), a misdemeanor exposing him to three years in jail, and with possession of a regulated firearm by a person under the age of 21 in violation of Public Safety Article 5-133(d), which is a misdemeanor exposing him to five years in jail. You have been appointed by the Public Defender to represent Al.

**A. Does the Circuit Court for Prince George's County have jurisdiction over the case? Explain your answer fully. (7 Points)**

Although Al is a juvenile, a Juvenile Court does not have original jurisdiction under Courts and Judicial Proceedings Section 3-8-03(d)(4)(IX) because Al is 17 and the regulated firearm charge must be heard in the adult Court. The matter could be heard, at the State's Attorney's election, in either the district Court or Circuit Court for Prince George's County, because the Courts have concurrent jurisdiction. Since the State's Attorney presented the matter to the Grand jury and an indictment was returned, it would be appropriate to hear it in the Circuit Court for Prince George's County.

**B. What initial filings, pleadings and/or motions should you file on Al's behalf? Explain fully. (14 Points)**

1. Enter Appearance in writing within five days of appointment. Maryland Rule 4-214(a).
2. Plea of Not Guilty. Maryland Rule 2-242.
3. Election of Jury Trial. Maryland Rule 4-311.
4. Motion for Discovery and Inspection. Maryland Rule 4-263.
5. Motion to suppress the search of Al's locker and seizure of the weapon by the principal. Maryland Rule 4-252(a)(3).

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6. Motion to suppress the statement given by Al to the police. Maryland Rule 4-252(a)(4).

7. Motion to transfer case to Juvenile Court pursuant to Criminal Procedures Article 4-202 under Maryland Rule 4-252(c) which must be filed within thirty days of appearance of Counsel or of the Defendant before the court whichever first occurs.

**C. Assume you negotiate a plea of guilty in the Circuit Court to possession of a handgun on school property and the presiding Judge sentences Al to 26 months in the Division of Corrections which upsets Al and his parents. They ask you what can be done now to ameliorate what has occurred. State your response in detail giving the timeline for each proposed action and whether it should be pursued on behalf of the client. (9 Points)**

1. Request leave to appeal to the Court of Appeals – not a matter of right as there was a plea of guilty. Can only challenge the legality of the sentence, competency of counsel and integrity and voluntariness of the plea. Must be done within thirty days of date of sentence pursuant to Maryland Rule 8-204. Probably has little merit.

2. Request a review of sentence by Three-Judge Panel pursuant to Maryland Rule 4-344 within thirty days of imposition of sentence. The panel can increase the sentence as well as decrease it so there is some risk involved in pursuing this remedy.

3. File a Motion to Modify Sentence by the Sentencing Judge pursuant to Maryland Rule 4-345(e) within 90 days of the date of sentencing. The Circuit Court Judge cannot increase the sentence. He can leave it the same or reduce it so there is no risk involved, and this option should be aggressively pursued.

**D. Assume during the course of your representation of Al, he told you that he had previously used the gun to successfully rob a liquor store of \$5,000 four months prior to his arrest on the gun charge. What obligation do you have as to this information? Explain fully. (5 Points)**

Pursuant to the Maryland Lawyers' Rule of Professional Conduct, Rule 1.6, you are not allowed to reveal this information given you in confidence and you have no duty to inform authorities as this was a completed crime. See also *Attorney Grievance Commission v. Rohrback* 323 Md. 79, 591.A.2d 488 (1991).

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**QUESTION 5**  
*(22 Points – 40 Minutes)*

On July 3, 2012, by written agreement, Melody retained Clarence, a member of the Maryland Bar, on a one-third contingency fee basis to represent her in her claim for personal injuries she sustained in an automobile accident which occurred in June 2012 in Waldorf, Charles County, Maryland.

On August 4, 2012, Clarence settled the claim for \$30,000. He received the settlement check on September 1, 2012, and deposited it in his trust account which was labeled IOLTA at the suggestion of the bank employee who had set up the bank account for him (herein the

“IOLTA account”). On September 7, 2012, Clarence received Personal Injury Protection (PIP) funds from Melody’s insurance provider in the amount of \$4,000 to be held in trust to pay designated unpaid medical providers. These funds were deposited in the IOLTA account on September 10, 2012. Clarence informed Melody of these deposits.

The disbursement of two-thirds of the \$30,000 settlement proceeds was made to Melody on September 14, 2012, and Clarence took his one-third contingency fee from the settlement proceeds at that same time.

On September 23, 2012, Melody informed Clarence that she believed that the medical providers had already been paid. She told Clarence not to pay the PIP funds to the medical providers.

On September 30, 2012, in need of money, Clarence withdrew \$2,000 from the IOLTA account by check payable to cash. On October 7, 2012, Melody told Clarence that the unpaid medical providers should be paid. As there were insufficient funds in the IOLTA account to pay those medical expenses, Clarence deposited into the IOLTA account \$2,000 which was a fee which he had received from another client in a different matter. He then paid the medical providers.

The medical providers have complained to the Office of Bar Counsel for Maryland about Clarence’s late payments to them. Bar Counsel has notified Clarence of those complaints.

**Based on the given facts, has Clarence violated any Maryland Lawyer’s Rules of Professional Conduct and/or any Maryland Rules of Procedure during his representation of Melody? Explain and discuss in detail.**

Clarence has violated the following Maryland lawyers’ rules of Professional Conduct and Maryland Rules of Procedure.

Violations by Clarence:

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Rule 1.5. Fees. Maryland Lawyers' Rules of Professional Conduct.

Clarence did not charge reasonable fees because he took his one-third contingency fee and an additional \$2,000 for his personal use. He failed to inform Melody of this withdrawal of the additional \$2,000.

Rule 1.15. Safekeeping Property. Maryland Lawyers' Rules of Professional Conduct.

Section (a). Clarence used funds designated for third persons, the unpaid medical providers, from the IOLTA account for personal use. His deposit of \$2,000 from a fee earned in a different matter for a different client to cover the insufficient funds in the IOLTA account was a commingling of his personal funds in the IOLTA account.

Section (d) Clarence could not pay the medical providers without the infusion of the \$2,000 from his personal funds because of his own unauthorized acts. Clarence had the obligation to promptly pay to the medical providers the funds to which they were entitled.

Melody had at one time thought the medical expenses had already been paid. However, at the subsequent time she told Clarence that medical expenses should be paid, there were insufficient funds in the IOLTA account because of the \$2,000 unauthorized withdrawal by Clarence.

Rule 1.3. Diligence. Maryland Lawyers' Rules of Professional Conduct.

Clarence did not "act with reasonable diligence and promptness" in representing Melody. His unauthorized withdrawal of the \$2,000 resulted in insufficient funds to pay the medical providers.

Rule 16-606. Name and Designation of Account. Maryland Rules of Procedure.

Clarence did not designate his trust account as "Attorney Trust Account", "Attorney Escrow Account", or "Clients' Funds Account" as required. His designation of his trust account as "IOLTA" was not in compliance with this rule.

Rule 16-609. Prohibited Transactions. Maryland Rules of Procedure.

Section a. Clarence made an unauthorized withdrawal for his personal use from the IOLTA account.

Section b. All disbursements from an attorney trust account are required to be made by check or electronic transfer. A check on an attorney trust account may not be drawn to cash.

Rule 8.4. Misconduct. Maryland Lawyers' Rules of Professional Conduct.



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Section (c). Clarence misappropriated funds from the IOLTA account when he took \$2,000 for personal use from it. Section (c) states that it is professional misconduct to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation.” Melody had no knowledge of his actions.

Section (a). The misappropriation of funds by Clarence was knowingly done by him as he needed money and took it from the IOLTA account in violation of the Maryland Lawyers’ Rules of Professional Conduct.

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**QUESTION 6**  
*(10 Points – 20 Minutes)*

Tom is just starting his law practice as a sole practitioner in Maryland. He has been offered an office space sharing arrangement by a firm of five attorneys in Annapolis, Maryland, as an attorney not affiliated with the firm. The proposal to him includes the following conditions: (1) Only the firm's name would be used at the entrance way and at the reception area. (2) He would be able to leave his professional card in the reception area along with those of the firm's attorneys. (3) The shared office telephone system utilizes the general response for incoming calls of "Law Offices". He would be assigned an extension number on the telephone system. (4) The clerical staff and word processing staff of the firm are available for use by him at an agreed hourly rate at pre-arranged times. (5) There is a single facsimile line which is shared in the office.

**What Maryland Lawyer's Rules of Professional Conduct should Tom consider as a sole practitioner before accepting these conditions? Explain and discuss in detail.**

Tom should consider the following Maryland Lawyers' Rules of Professional Conduct as a sole practitioner.

Rule 1.6. Confidentiality of Information. Maryland Lawyers' rules of Professional Conduct.

Section (a). "A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b) [the disclosures in (b) are not pertinent to the given facts]."

Tom should consider the effect of the potential sharing of the clerical staff and word processing staff as well as the shared single facsimile line as they possibly could impact on the confidentiality of the information of Tom's clients.

Rule 7.1. Communications Concerning a Lawyer's Services. Maryland Lawyers' Rules of Professional Conduct.

"A lawyer shall not make a false or misleading communication about the lawyer or the lawyers' services. A communication is false or misleading if it:

(a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading\*\*\*".

Rule 7.5. Firm Names and Letterheads. Maryland Lawyers' Rules of Professional Conduct.

"(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact."

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Tom should consider the impression that may be derived that he is a member of the firm from only the firm's name on the entrance way and in the reception area; the presence of his professional card in the reception area; the shared facsimile single facsimile line, and the potential for use of the shared clerical staff and word processing staff.

The shared telephone office system utilizing the general response for incoming calls of "Law Offices" is appropriate for his status as a sole practitioner.