

FEBRUARY 2014
OUT OF STATE ATTORNEYS' EXAM
QUESTIONS AND BOARD'S ANALYSIS

PRELIMINARY FACTS FOR QUESTIONS 1 THROUGH 7

Barry is a resident of Baltimore County, Maryland, who regularly works in Anne Arundel County. He owns a ferocious large dog named Bruno. Barry likes to scare pedestrians as they walk by him by allowing Bruno to chase them. One day, Victor and Sam encounter Barry walking Bruno around the waterfront in Howard County, Maryland. Victor is a resident of Prince George's County and Sam is a resident of Charles County, Maryland. Intending to scare Victor and Sam, Barry released Bruno and yelled out "get them, Bruno!" Victor and Sam, fearing Bruno, ran down the paved walkway as fast as they could until they both tripped over a badly cracked portion of the walkway. As a result of the fall, Victor and Sam were injured. The walkway is owned and maintained by the Howard County government.

Victor mailed a letter by regular mail addressed to an Assistant Howard County Attorney whom he met once at a school fundraiser, demanding \$35,000 for his injuries. The Assistant County Attorney to whom the letter was addressed works in the contracts division of the Howard County Attorney's Office. That letter was received by the assistant County Attorney 60 days after the incident. Not knowing what to do with the letter, the Assistant County Attorney placed the letter in his file cabinet. One hundred-eighty-two days after the incident, Sam hand-delivered a letter to the Howard County Executive demanding payment of \$30,000 for his injuries. Two years after the incident, and not hearing anything from Howard County, both Victor and Sam want to file civil lawsuits against Howard County for negligence. Believing Barry caused their injuries, they also want to sue Barry for negligence, assault and battery. Victor seeks \$35,000 in damages and Sam seeks \$30,000.

QUESTION 1
(20 Points)

A. What Maryland court(s), if any, has subject matter jurisdiction over plaintiff's actions individually or as co-plaintiffs, and why?

Pursuant to Courts and Judicial Proceedings Article ("CJP") 4-401(1) and Article 4-402(d)(1)(i), Sam's claims against the County and Barry 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.

Pursuant to CJP 4-402(d)(1)(i), Victor's claims against Barry and the County can be brought only in the Circuit Court because the \$35,000 amount in controversy exceeds the \$30,000 jurisdictional limit of District Court.

FEBRUARY 2014
OUT OF STATE ATTORNEYS' EXAM

If they wish to file suit as co-plaintiffs, the case would have to be brought in Circuit Court, not because the amounts in controversy are combined (which is not permissible), but because one of the co-plaintiffs' claims exceed the jurisdictional limit of the District Court.

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

If Sam and Victor sue Barry and the County together, pursuant to CJP 6-201(b), multiple defendants can be sued where any one of them could be sued pursuant to CJP 6-201(a). Thus, the County and Barry may be sued in Baltimore County where Barry resides, Anne Arundel County where Barry works, or in Howard County because that is where the incident occurred and where the County carries on its regular business. If Barry and the County are sued separately, then pursuant to CJP 6-201(a), the County can only be sued in Howard County. However, Barry can be sued in the same locations as stated earlier, because even though he does not live or work in Howard County, pursuant to 6-202(8), he may be sued where the action arose—Howard County.

QUESTION 2
(15 Points)

Analyze the likely success of any statutory defenses you anticipate the County will raise to the claims asserted by Sam and Victor against it. Explain your answers fully.

Pursuant to CJP sections 5-304 (b)(1) and (c)(3)(ii), the notices should have been personally served or sent by certified mail to the Howard County Executive within 180 days of the incident. Victor's notice although within 180 days, was sent by regular mail to an Assistant County Attorney in the contracts section, not the County Executive as required by CJP section 5-304(c)(3)(ii). Although proper notice was not properly provided, if Victor can show good cause through a motion for his failure to provide the notice to the right person pursuant to CJP section 5-304(d), the court may entertain his suit, unless the County can affirmatively show that its defense has been prejudiced by lack of the required notice.

Sam's notice, while it was served on the correct person in the correct manner, was not done so within 180 days as required and is untimely. Thus, Sam can only maintain suit against the County if he can establish good cause for his failure by filing a motion pursuant to CJP section 5-304(d), unless the County can affirmatively show that its defense has been prejudiced by lack of the required notice.

If Victor and Sam cannot establish good cause in their motions for their failure to give timely proper notice, then their lawsuits will be dismissed against the County whether or not the County's defense has been prejudiced.

FEBRUARY 2014
OUT OF STATE ATTORNEYS' EXAM

QUESTION 3
(5 Points)

Victor and Sam have indeed filed a civil action against Barry for negligence, assault and battery. Barry's attorney has moved to dismiss all of the claims asserted against him on statutory grounds.

How will the court rule on Barry's motion? Explain.

Pursuant to CJP 5-105, a civil action for assault must be brought within 1 year of the cause of action. Here, two years have already gone by before Sam and Victor brought the claim of assault against Barry, and therefore, the assault claim will be barred by limitations. The statute of limitations for civil battery¹ and negligence, however, are not specifically provided, and therefore, fall under the general three year limitations set forth in CJP 5-101. Those claims are timely.

QUESTION 4
(10 Points)

In Victor and Sam's civil action against Barry, their counsel, Lisa Lawyer, provided Barry's counsel with written notice 60 days before the trial that she intends to introduce medical records and invoices in connection with the damages Sam and Victor are claiming from their injuries without the testimony of the medical providers or the custodian of the records. The notice, which was also filed with the court, listed and contained a copy of the medical records. Barry's attorney objects to the introduction of the records at trial.

How will the Court rule on the admittance of the medical records without testimony from the medical provider? Explain your answer fully.

Pursuant to CJP 10-104 (c), so long as the amount in controversy in the litigation does not exceed the \$30,000 jurisdictional limit of the District Court, a party may introduce a writing or record of a health care provider without the support of the health care provider's testimony, if notice is provided to the other side 60 days before the beginning of the trial. The notice must contain a list that identifies each writing or record, and a copy of the writing or record. Here, Lawyer provided notice regarding her intent to introduce his medical bills and records in a timely manner. However, Victor seeks \$35,000 in damages in case which exceeds the jurisdictional limitation of the District Court. Pursuant to CJP 10-104 (c), he will not be allowed to offer the records without calling appropriate witnesses or certifications to admit the records, unless he caps his damages at \$30,000. Sam's medical records can be offered into evidence without the need of a testifying medical provider because he only seeks \$30,000 in damages.

FEBRUARY 2014
OUT OF STATE ATTORNEYS' EXAM

QUESTION 5
(10 Points)

Wanting to get “good hard evidence” against Barry, Sam waited outside Barry’s house with a hidden recording device. When Barry came out to get the mail, Sam asked Barry why did he “do it.” Sam then secretly recorded Barry state “because it amuses me to see wimps like you and your friend run from my dog Bruno—he’s a beast.” Barry then told Sam that he better get away from his property before he got Bruno. During the trial between Sam and Barry, Lisa Lawyer attempts to get Sam to testify about making a recording of Barry, and then get the statements made by Barry on the secret recording into evidence. Barry’s lawyer timely objects to the admittance of Barry’s statements and any mention of the recording.

A. How should the Court rule as to the statements made by Barry and the recording?

B. Is there any concern that Lawyer should have regarding the use of the statements?

Explain your answers fully.

Pursuant to CJP 10-402, Sam’s recording of Barry is in violation of Maryland’s Wiretap statute because it was obtained without the consent of both parties to the conversation. Indeed, pursuant to CJP 10-402(b), Sam and Lawyer may be subject to criminal prosecution in connection with the making and/or attempted use of the unlawful recording. Thus, pursuant to CJP 10-405, the illegally obtained recording will not be admissible nor will Sam be able to testify to making the illegal recording. However, Sam can testify regarding the statements which were made to him directly by Barry, which will be admissible as an admission by Barry pursuant to Rule 5-803(a). In doing so, Sam may not mention the recording. Finally, in addition to criminal charges, Lawyer’s attempted use of the recording violates the Rules of Professional Conduct.

QUESTION 6
(10 Points)

Two years before the trial, Barry bragged to his then wife, Kim, while they were both home alone one evening having dinner together, that he had “Bruno chase two wimps down the street until they fell.” Barry told Kim that he would “get her” if she said anything about it. Kim has since divorced Barry and has nothing more to do with him. At the civil trial between Sam, Victor and Barry, Lisa Lawyer called Kim to testify against Barry regarding his statements to her two years ago. Barry’s lawyer objects to Kim’s proffered testimony.

How will the Court rule on this issue and why? Explain your answers fully.

Barry may seek to prohibit Kim from testifying about his statement to her that he had Bruno chase two guys (presumably Victor and Sam), because the communication was confidential and protected under CJP 9-105. The assaultive communication by Barry towards his

FEBRUARY 2014
OUT OF STATE ATTORNEYS' EXAM

then wife is not relevant to the civil case involving Victor and Sam, and will be precluded. It does not matter that Kim is no longer married to Barry, because pursuant to CJP 9-105 both Kim and Barry hold the privilege for confidential communications that occurred while they were married.

ADDITIONAL FACTS FOR QUESTION 7

Prior to retaining Lisa Lawyer as their attorney, Sam and Victor met with her to discuss her representing them in the civil action against Howard County and Barry. Lisa Lawyer had just been sworn into the Maryland Bar a month earlier. She was excited to get Sam and Victor as her first actual clients. She advised Sam and Victor that taking on the county was no small feat. As a result, Lawyer said that she would handle the case on a contingency fee and verbally told them that if there was a settlement her fee would be 40% of the recovery, and if the matter went to trial, her fee would be 50%. Victor wanted a jury trial, but Sam thought that a court trial would take less time and money. After Sam and Victor left Lisa's Lawyer's office, she thought it might make sense to run her representation of Sam and Victor by a more experienced attorney. She contacts you, a Maryland attorney, to seek legal advice as to whether she has done everything properly with regard to her arrangement with Sam and Victor.

QUESTION 7
(10 Points)

Based on the above information, what advice or instruction would you provide Lawyer? Explain your answers fully.

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. A contingent fee agreement, however, 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. Because Lawyer only conveyed the arrangement verbally, she is not in compliance with any of the requirements of MRPC 1.5(c).

Even had the fee agreement been in writing, pursuant to MRPC 1.5(a), a lawyer shall not make any fee arrangement that is unreasonable. Lawyer's 40/50% arrangement for recovery in connection with these routine tort actions is likely not reasonable especially given Lawyer's relatively untested skill and inexperience. Lawyer should also discuss the differences in trial strategy with her clients and explain in writing that she may have to file their suits separately unless they provide written informed consent to proceed as one case in either district or circuit court. *See* MRPC 1.4, 1.7(a)(2) and (b)(4).

**FEBRUARY 2014
OUT OF STATE ATTORNEYS' EXAM**

FACTS FOR QUESTION 8

Linda and Sonya come to you, a Maryland attorney, in connection with a bistro they own in Charles County. The bistro has a large garden and lawn area in the back which they rent out for weddings and other gatherings. However, Conner Contractor has very recently stored his construction equipment and large vehicles in the garden area. When Linda and Sonya asked contractor to remove his equipment and vehicles, he refused arguing that he owns the last one-third of the garden area. Linda and Sonya have a wedding scheduled to be held in the garden in seven days by Matt Moneyman who is a very wealthy businessman who routinely uses the bistro for his business events. They have advised you that the unsightly equipment and large construction vehicles will prevent the wedding from taking place, and that a cancellation of the wedding at this late date would cause their business to suffer immediate, substantial and irreparable injury. They want to have Contractor's things removed immediately and they want the court to make it clear that they own the entire garden area.

QUESTION 8
(20 Points)

A. What actions are available under the Maryland law to address Sonya and Linda's dilemma?

B. What court(s), if any, has subject matter jurisdiction over the action?

C. What are the requirements under Maryland law for any action you would file to address Sonya and Linda's dilemma?

Explain your answers fully.

Pursuant to the Maryland Uniform Declaratory Judgments Act, CJP 3-401 - 3-415, Sonya and Linda can obtain relief from uncertainty with respect to the ownership of the garden and have those rights declared by the court. Pursuant to CJP 3-406 and 4-402(a) and (c), the circuit court has jurisdiction over declaratory actions. In addition, because Sonya and Linda have a substantial immediate need to prevent Contractor from storing his things in the garden, Lawyer can file on their behalf an injunction pursuant to Rule 15-501 (preliminary and permanent injunctions). In order to immediately get the court to order the temporary removal of the equipment and vehicles, Lawyer should file for a temporary restraining order pursuant to Rule 15-501(c). Rule 15-503 requires that in order for a court to grant a temporary restraining order and a preliminary injunction, a bond must be filed in an amount approved by the court for the payment of any damages, if any, which Contractor may be entitled as a result of the injunction. In order to have the temporary restraining order granted, Sonya and Linda must demonstrate through an affidavit specific facts that show an immediate, substantial, and irreparable harm will result if immediate action is not taken by the court to preserve the *status quo* until a full adversary hearing can be held on the merits. See Rule 15-504. Pursuant to CJP 4-402(a), the

FEBRUARY 2014
OUT OF STATE ATTORNEYS' EXAM

District Court lacks the equity jurisdiction to hear the injunctive matters as it relates to the facts of the given question. Therefore, Lawyer must file this action in circuit court.

¹ “A battery occurs when one intends a harmful or offensive contact with another without that person's consent.” *Nelson v. Carroll*, 355 Md. 593, 735 A.2d 1096, 1099 (Md. 1999). “The intent element of battery requires not a specific desire to bring about a certain result, but rather a general intent to unlawfully invade another's physical well-being through a harmful or offensive contact or an apprehension of such a contact.” *Id.* at 1101. The offensive (non-consensual) touching need not be direct. *Northfield Insurance Co. v. Boxley*, 215 F. Supp. 2d 656 (2002). The tort encompasses the setting in motion of events which lead to the physical impact of another person. *See Cont'l Cas. Co. v. Mirabile*, 52 Md. App. 387, 449 A.2d 1176 (1982); *Ghassemieh v. Schafer*, 52 Md. App. 31, 447 A.2d 84 (1982); *Nelson*, 355 Md. 593, 735 A.2d 1096 (if one commits an assault, and in the course of committing the assault the other person is physically impacted, the intent element of battery may be supplied by the intent element of the assault) (also, pointing out that negligence and battery are not mutually exclusive).