

Maryland State Board of Law Examiners
**REPRESENTATIVE GOOD ANSWERS FOR THE JULY 2017 MARYLAND OUT OF STATE
ATTORNEYS' BAR EXAM**

NOTICE: These Representative Good Answers are provided to illustrate how actual examinees responded to the Maryland Out-of-State Attorneys' Bar Examination. The Representative Good Answers are not "average" passing answers nor are they necessarily "perfect" answers. Instead, these are the two (2) highest scoring overall exam responses for this session. These answers are transcribed from the hand-written answer books without any changes or corrections by the Board, other than to spelling and formatting for ease of reading.

Representative Good Answer No. 1

Question 1

Motions

The defendants should file a Motion to Dismiss based on lack of jurisdiction of the District Court. Rule 3-111.

Specifically, the Court lacks the ability to grant declarative or injunctive relief. See CJP §3-403; §4-402(c) (declaratory relief) and §4-402(a) (injunctive relief). Such claims must be brought in the Circuit Court.

The defendants should also file to dismiss the defamation claim, which arose from a publication in January 2015, based on the one-year statute of limitations in CJP §5-105. The breach of contract claim would be subject to a three-year statute of limitations. *Id.* at §5-101. It is unclear whether this claim would be timely.

Finally, Adams may not represent Alpha. Rule 3-131(a)(2). He is only able to represent himself, and does not appear to have any personal claims.

As for representing Caitlin along with the other Defendants, it would be necessary to discuss conflicts of interest under Md. Rule Prof. Conduct (MRPC) 1.7. There are obvious conflicts given Caitlin's potential claim for unpaid wages, and given that Betsy and Beta "pressured" their employee (Caitlin) to violate her non-compete agreement. While some conflicts may be cured by informed consent, in writing, under these circumstances Caitlin should have separate counsel. Counsel should also discuss conflicts arising out of concurrent representation of Betsy and Beta. However, given that Betsy is the owner, whose interest may align with Beta's, this potential conflict may not preclude representing both parties.

Question 2

The admissibility of the bills is governed by CJP §10-105. Under that provision, where there amount in controversy is within the jurisdiction of the District Court (e.g., up to \$30,000), see CJP §4-401(1), a paid bill for services may be admitted without testimony of the provider of goods or services, provided that notice is provided to the opposing party at least 60 days before trial. CJP §10-105(c). This Rule applies in Circuit Court as well, where the amount in controversy does not exceed \$30,000. Here, Alpha has provided the requisite notice. However, only the three paid invoices would be encompassed by the rule. The other four invoices would require authentication, either by a live witness, or other permissible means such as certification pursuant to Rule 5-902(b).

Question 3

Betsy's counsel should first object based on CJP §10-401 *et seq.* Given that the recording was made without Betsy's knowledge (and hence without her consent), the recording is an unlawful interception of audio communications. See CJP §10-402(c)(3) (consent of both parties to communication required). As such, the recording may not be introduced as evidence. *Id.* at §10-405(a). Indeed, Caitlin is subject to criminal prosecution

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for having made the recording and for having disseminated it to Alpha's attorney. Thus, the objection should be sustained.

This reasoning should also apply to the video portion of the recording. While video surveillance alone is not an interception of audio communications, see *Ricks v. State* 312 Md. 11 (1988), the video here would likely be deemed inadmissible in its entirety because the video is accompanied by a sound recording.

Finally, a hearsay objection could be made. However, the statement (if otherwise admissible) would likely be deemed a statement of a party opponent. Rule 5-803(a). It should be noted that Caitlin would be free to testify concerning the conversation at issue based on her independent recollection of the events.

Question 4

Larry Lawyer is likely obligated to disclose Betsy's perjury to the Court pursuant to MRPC 3.3 (Rule 19-303.3). That rule provides that an attorney may not fail to disclose a material fact to a tribunal to avoid assisting a crime or fraud by the client. Rule 3.3(a)(2). While Betsy is a former client, the Rule applies "to the conclusion of the proceeding." *Id.* at 3.3(b).

While the duty of confidentiality contained in Rule 1.6 continues to apply vis-à-vis confidential communications with former clients (Rule 1.9(c)), disclosure to the Court would likely be required given that this is not a criminal proceeding (Rule 3.3(e)).

Finally, the fact that Betsy signed the agreement would not be a "communication" subject to Rule 1.6.

Question 5

A) Larry Lawyer may be entitled to a lien on the files pursuant to Rule 2-652. This Rule provides that an attorney may retain files pending payment of amounts owed, to the extent possible under the Rules of Professional Conduct.

Here, Larry violated the Rules of Professional Conduct by failing to enter into his contingency agreement in writing, as required by Rule 1.5(c). Such an agreement should also have addressed the payment of expenses.

Based on these facts, while Larry violated the Rules by entering into a verbal contingency agreement, he would likely retain a common law lien over the files and would not be required to produce them to Betsy until his claim was satisfied.

B) Larry could assert his lien by serving written notice to Betsy by certified mail or by personal delivery, pursuant to Rule 2-652(b). Larry could also pursue an action for quantum meruit to recover the value of his services.

C) Given that Larry's contingency agreement did not comply with Rule 1.5(c), he will not likely be permitted to recover the contingent portion of his fee. He should, however, be permitted to recover his non-contingent fees and costs pursuant to his oral agreement with Betsy. While fee agreements should "preferably" be in writing (Rule 1.5(b)), a verbal agreement is not unlawful.

Question 6

A) Caitlin may bring her action only in the District Court for Anne Arundel County. The District Court has exclusive jurisdiction over contract claims where the amount in controversy does not exceed \$30,000. CJP

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§4-401(1). Venue would be appropriate for both Defendants in Anne Arundel County, where Betsy resides and works, and where Beta has its principal place of business. CJP 6-201(a).

Because Caitlin's claim does not exceed \$5,000, it could be treated as a small claim under CJP §4-405.

B) Interrogatories

In the District Court, a party is ordinarily entitled to serve up to fifteen interrogatories. Rule 3-421. However, as noted, Caitlin's claim would constitute a small claim. Under Rule 3-701, pretrial discovery is not permitted in small claim actions. Rule 3-701(e).

C) Caitlin is not entitled to a jury trial. Parties may demand trial by jury only when the amount in controversy exceeds \$15,000. CJP §4-402(e).

Question 7

A) Caitlin could bring her claim in either the District Court or Circuit Court. The District Court and Circuit Court have concurrent jurisdiction over claims where the amount in controversy exceeds \$5,000. CJP §4-402(d). Venue would be proper in the District or Circuit Court in the county in which, at the time of the incident, Betsy resided, was employed, carried on a regular business, or habitually engaged in a vocation. CJP §6-201(a).

B) Betsy would have the basis for a motion to dismiss Caitlin's assault claim. The statute of limitations for assault claims is one year. CJP §5-101. Thus, Betsy could file a motion to dismiss that claim pursuant to Rule 2-322(b) or a motion for summary judgment (Rule 2-501). In District Court, a motion could be filed under Rule 3-311.

Caitlin's remaining claims would be subject to the general three-year limitations period set forth in CJP 5-101. Betsy would not have grounds for any limitations defenses to those claims.

Question 8

A) Betsy can attempt to prevent Rev. Ray from testifying by invoking the ministerial privilege under CJP §9-111.

Assuming that Rev. Ray is a minister of the gospel or clergyman/priest in an established church, and assuming that Betsy made her confession in confidence and seeking spiritual advice or consolation, the privilege would apply. However, even if the privilege applied, Rev. Ray could elect to testify. Section 9-111 only prevents the minister from being compelled to testify. If Rev. Ray chose to testify voluntarily, the objection should be overruled. If the State compelled his testimony, the objection should likely (depending on the facts outlined above) be sustained.

Regardless of this ruling, Betsy could also object on hearsay grounds.

Betsy's statement was an out of court assertion being used to prove its truth. Rule 5-801(c); 802. This objection would likely be overruled, however, because the statement constituted a statement of a party opponent under Rule 5-803(a). As such, it would be admissible if used against Betsy.

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Representative Good Answer No. 2

Question 1

There are a number of challenges that can be raised via motion. First, the district court does not have subject matter jurisdiction in cases seeking declaratory judgment. CJP section 4-401 sets forth the cases in which the district court has exclusive civil jurisdiction. The district court would have jurisdiction over a breach of contract claim as long as the loss amount does not exceed \$30,000, exclusive of pre-judgment or post judgment interest, costs and attorney's fees. See CJP 4-401(1). However, the district court does not have jurisdiction to render a declaratory judgment. CJP 4-401(c). The district court also does not have equity jurisdiction. CJP 4-402(a). I would move to dismiss based on lack of jurisdiction because the district court does not have the jurisdiction to grant declaratory relief. I would also move to dismiss the defamation action based on the fact that it is outside the statute of limitations. Generally, the statute of limitations in a civil action is 3 years, meaning a civil action must be filed within 3 years of when it accrues. See CJP 5-101. However, pursuant to CJP 5-105, an action for assault, libel, or slander must be filed within one year of when it accrues. Assuming defamation falls under libel or slander, then Adams defamation claim filed 2 years later falls outside the limitations period.

In terms of issues to discuss with representing both Caitlin and Betsy, I would note that I would have a potential conflict of interest in representing both of them. Maryland Attorney's Rules of Professional Conduct (MRPC) 1.7 provides that an attorney shall not represent a client if representation involves a conflict of interest. A conflict arises if representation of one client is directly adverse to another client or when there is a significant risk that representation of one or more clients will be materially limited by the attorney's responsibilities to another client. Here, there is a potential conflict between Caitlin and Betsy because Betsy fired Caitlin for refusing to turn over confidential information about her former employer Alpha. Also, Caitlin could be a potential witness against Betsy for Alpha. It is possible that Caitlin would want to sue Betsy for nonpayment of \$4,500 in wages. Therefore, it is hard to see how Larry Lawyer can represent both Caitlin and Betsy without conflict.

There is also a potential issue with confidentiality of information because MRPC 1.6 provides that an attorney cannot reveal client's confidential information unless the client gives informed consent.

Question 2

CJP Section 10-105 governs the admissibility of bills for goods and services. CJP 10-105 provides that the section applies to actions in district court or actions in circuit court if the amount in controversy does not exceed the amount specified in CJP Section 4-401. CJP Section 4-401(1) states that the district court has exclusive original jurisdiction for contract claims not exceeding \$30,000, exclusive of interest, costs and attorney's fees.

Under 10-105(b), a paid bill for goods and services is admissible without testimony of the provider of the goods and services as evidence of the authenticity of the bill and fairness and reasonableness of the charges. Therefore, as an initial matter only the three paid invoices would be admissible without testimony from the bill provider and only to show authenticity of the bill and fairness and reasonableness of the charges.

Here, Alpha's counsel did meet the requirement of giving 60 days' notice before trial of intent to introduce the bills without testimony as required by CJP 10-105(c). However, it is not clear that Alpha's counsel met the other requirement of 10-105(c), which requires providing a copy of the bill and a list of the bills the party intends to introduce. CJP 10-105(c)(i). The section also requires filing a notice of service and a list of the bills with the court. CJP 10-105(c)(ii). If these latter requirements have been met, the court will likely allow admission of the

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paid bills, but not the unpaid bills and then the finder of fact can attach whatever weight to the paid bills that it deems appropriate. CJP 10-105(b)(ii).

Question 3

Caitlin's recording of Betsy without Betsy's consent violates Maryland Wiretap Statutes. CJP 10-402(a) provides that it is unlawful for any person to willfully intercept any live, oral or electronic communication or disclose or use such interceptions without one of the statutory exceptions applying, which none do in this case. CJP section 10-405 provides that whenever any oral communication has been intercepted, as was the case here when Caitlin recorded the conversation with Betsy, no part of the contents of the communication and no evidence derived therefrom may be received in evidence at trial, a hearing, or other proceeding before the court. CJP 10-405(a).

Alpha's counsel could possibly call Caitlin as a witness and ask her to testify as a witness from memory about what she recalls Betsy stated. Such testimony would be admissible under Maryland Rule 5-803 as a statement of a party opponent if offered by Alpha against Betsy and therefore would be excluded from the application of the hearsay rule. See Rule 5-803(a).

Question 4

MRPC 1.9 governs Larry Lawyer's duties to his former client, Betsy. Rule 1.9 provides that an attorney who formerly represented a client in a matter shall not thereafter use information relating to the representation of the client to the disadvantage of the former client except as the MRPC would permit or require with respect to a client. Rule 1.9(c) also prohibits the attorney from revealing information relating to the representation of a former client except when the MRPC permit or require the disclosure with respect to a client.

MRPC 1.6(a) provides that an attorney shall not reveal information relating to representation of a client unless the client gives consent, disclosure is impliedly authorized by the representation, or disclosure is permitted by Rule 1.6(b).

Rule 1.6(b) provides that an attorney may reveal information relating to the representation of a client (or in this case former client) to the extent the attorney reasonably believes necessary to prevent a client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests of another and in furtherance of which the client has used the attorney's services, see Rule 1.6(b)(2), or to prevent, mitigate, or rectify substantial injury to the financial interests of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the attorney's services.

Because Betsy is committing the crime of perjury in front of Larry Lawyer and such perjury relates to the representation of Betsy by Larry and could result in substantial injury to the financial interests of the companies involved in the settlement, it appears that Larry could reveal some information to the extent necessary to prevent, mitigate or rectify substantial injury to financial interests. See MRPC 1.6(3). It also seems that Larry would be entitled to bring to the attention of the court the false allegations about him not telling Betsy about the settlement and not showing her the agreement in order to defend himself and respond to an allegation in any proceeding regarding his representation of the client. MRPC 1.6(b)(5). It would be best for Larry to first try to persuade Betsy and her new attorney to take corrective action to obviate the need for his disclosure. If that fails, Larry might seek to try to bring this to the attention of the Court ex parte to get a ruling on the issue before broader disclosure. Larry has an independent duty of candor to the tribunal under MRPC 3.3. Under MRPC 3.3(a)(2), Larry cannot

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knowingly fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client. Here, Larry knows that Betsy is committing the crime of perjury and defrauding the court through her testimony that she was never told about a settlement and never saw or signed an agreement.

MRPC 3.3(d) provides that in an ex parte proceeding, an attorney shall inform the tribunal of all material facts known to the attorney, which will enable the tribunal to make an informed decision, whether or not the facts are adverse. Here, Larry should seek such an ex parte proceeding to inform the Court of Betsy's lies on the stand. It will then be up to the court to decide what to do with the information provided by Larry Lawyer.

Question 5

A. MRPC 1.16 governs Larry Lawyer's obligations upon the termination of his representation of Betsy. MRPC 1.16(d) provides that upon termination of the representation, an attorney shall take steps to the extent reasonably practicable to protect a client's interests, which includes surrendering papers and property to which the client is entitled. Pursuant to MRPC 1.16, Larry Lawyer is obligated to turn over the client files.

B. If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, Larry Lawyer must comply with the procedure when it is mandatory and should comply even if it is voluntary.

Otherwise, Larry Lawyer can file a suit in the appropriate court to could file (sic) a claim for breach of contract in district court or circuit court depending on the amount in controversy. Larry can seek an attachment before judgment of the property of Beta or Betsy to assure payment if he is successful in a suit for fees. Under CJP 3-302, Larry could seek an attachment against any property belonging to his debtor clients when he commences an action. CJP 2-308 also provides that a sheriff shall collect fees of an attorney when requested to do so, so Larry could seek the sheriff's help.

C. It is not clear that Larry is going to be able to recover any fees in this case. First, the contingent fee arrangement Larry entered into with Beta, Inc. and Betsy violates the Maryland Attorney's Rules of Professional Conduct. MRPC 1.5(c) provides that a fee may be contingent on the outcome of a matter for a civil case, but such agreement for a contingency fee must be in writing, signed by the client, and shall state the method by which the fee is to be determined, including the percentage to the attorney in the event of settlement, trial, or appeal, litigation expenses to be deducted and whether any expenses are to be deducted before or after the contingent fee is calculated. The agreement also has to clearly notify the client of what expenses they will be responsible for even if they do not prevail.

Also, Larry is prohibited by MRPC 1.5(d)(2) from entering into any contingent fee arrangement for a client in a criminal case, so to the extent the contingency agreement applies to Betsy's criminal case it violates the MRPC.

Question 6

A. Because the total amount in controversy is less than \$5,000 (it is \$4,500 in this case, Caitlin must bring the suit in district court pursuant to CJP Section 4-405.

B. Pursuant to Md. Rule 3-421 Caitlin will be allowed to serve a total of one set of not more than 15 interrogatories to be answered by the same party, unless the court orders otherwise.

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C. Caitlin cannot have her case tried by a jury. CJP Section 4-402(e) provides that in a civil action in which the amount in controversy does not exceed \$15,000, a party may not demand a jury trial. Here, the amount in controversy is \$4,500.

Question 7

A. Caitlin can bring suit in either district court or circuit court because the amount in controversy here exceeds \$5,000. This is a tort action in which Caitlin is seeking \$9,000 in damages. CJP 4-401(1) gives the district court jurisdiction over an action in tort where the damages claimed do not exceed \$30,000. CJP Section 4-402(d) gives the district courts and circuit courts concurrent jurisdiction over cases involving a tort where the amount in controversy is more than \$5,000 but not more than \$30,000.

B. Betsy has a basis for a dispositive motion for Caitlin's assault claim because Betsy (sic) has filed this claim outside the statute of limitations. CJP Section 5-105 provides that an action for assault shall be filed within one year from the date it accrues. Here the action was filed 2 years later. However, the action for trespass and intentional infliction of emotional distress are still timely. For these claims, there is a three-year statute of limitations. See CJP 5-101.

Question 8

A. Betsy's attorney can attempt to prevent Reverend Ray from testifying under CJP 9-111, which establishes the clergy/minister privilege. CJP section 9-111 provides that a minister of the gospel, clergyman, or priest of an established church of any denomination may not be compelled to testify on any matter in relation to any confession or communication made to him in confidence by a person seeking his spiritual advice or consultation.

Betsy's attorney could also try to argue that Betsy's out of court statement that is not being offered through Rev. Ray by the state is hearsay under Rule 5-801 because it is an out of court statement offered for the truth of the matter asserted.

B. The court will rule that Rev. Ray's privilege under 9-111 belongs to Rev. Ray and he can waive it. It is also not clear that the privilege would actually apply here because it is not clear that Betsy's statement made after church services was made to seek spiritual advice or consolation.

The court will also rule that Betsy's statements are not excluded by the hearsay rule because the state is offering statement of the defendant, a party opponent. Under Rule 5-803, the statements are statements of a party-opponent because they are statement of Betsy and being offered against her.