

REPRESENTATIVE GOOD ANSWERS FOR THE JULY 2018 MARYLAND OUT-OF-STATE ATTORNEYS' EXAM

NOTICE: These Representative Good Answers are provided to illustrate how actual examinees responded to the Maryland Out-of-State Attorneys' 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

If A&B appear at the initial appearance without an attorney, the judicial officer shall advise them of their right to an attorney. MR 4-213.1(c). However, a defendant has the right to an attorney at the initial appearance before a judicial officer. MR4-213.1(a). Commissioners appointments are approved by the Chief Judge. CJP 1-605(b)(2) and is considered a judicial officer. See also MR 4-102(f).

Question 2

After the denial of pretrial release, a defendant should be presented to District Court. MR 4-216.2(a). The District Court shall review to determine if the decision was in accordance with MR 4-216.1(c). Assuming the court finds that a bond will ensure appearance and given that victim is already dead (thus D poses no safety risk), B should be released. The District Court shall also give consideration to factors in MR 4-216.1(f). A defendant even charged with a crime punishable by death may be released. (CP 5-102) under the conditions listed in CP 5-201 unless the court determines the crime of violence. CP 5-202(i). The attorney should move to amend under MR 4-216.3(b).

Question 3

Atty should file a motion to dismiss for improper venue because prosecution for a crime shall be brought in district that includes the county where crime was committed. CP 4-201. Such a motion is a mandatory motion MR 2-322 and may be brought any time before trial. MR 4-252. This will likely not succeed because where the crime is near borders between counties; the county which arrest and prosecution of D is first issued as long as crime was committed at boundary and site of crime is so near that it's unclear where crime occurred. CP 4-201(g)(1). Even if it did, state could refile if PG county chose to. Proper venue is a defense or pleading that must be raised before trial or waived. Carter v. State. Relief = dismissal of charges.

Question 4

The prosecution should request joint trial based on MR 4-253(a), which allows any party to move for a joint trial. The court will consider whether either A or B will be prejudiced by a joinder. MR 4-253(c). Joinder is favored for judicial economy to save time and expense. Erman v. State 49 Md. App. 605 (1981). The factors considered are whether all offenses involve substantially same facts, evidence is same, event occurred about same place and time. Mason v. State, 12 Md. App 655 (1971). Since most of the evidence here would be admissible in each trial, the court may grant the prosecutor's motion. See, Johnson v. State, 38 Md. App 306 (1977). B's attorney may fight on grounds that evidence of A's flight may prejudice him.

Question 5

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A & B should move to dismiss the charges if evidence was dependent on their arrest. This was a warrantless arrest. It is not clear that cops had probable cause to believe crime committed. CP 2-202(b)-(c). They were stopped nearby the crime scene, but not in their car. However, it is likely cops can establish they had PC because they were near the dead body. MR 2-702.

UPPA

Under the UPPA, a D can move to set aside or correct sentence. CP 7-102. In order to do so, Ds must be able to demonstrate that it would be in the interest of justice. CP 7-104. This would include an unconstitutional sentence, lack of jurisdiction, sentence exceeds maximum allowed or error. CP 7-102(a). It is not clear what A & B have to support such a motion, but if they did, they would have to bring it within 10 years of sentence being imposed (CP 7-103(b)) and can only bring one such motion. CP 7-103.

Sentence Review

A & B are also entitled to a sentence review by a review panel if their sentence is more than 2 years and convicted in Circuit Court. CP 8-102. However, the filing of such a request does not affect the time allowed for appeal or motion for a new trial. MR 4-344(g); CP 8-104(a)(2). Application for review must be filed within 30 days of imposition of sentence. MR 4-344(a). A & B are sentenced to life, therefore they are eligible for sentence review.

Court's revisory powers to affect sentencing.

The sentencing court may also correct the sentence if it determines that it was illegal, a product of fraud, mistake or irregularity. MR 4-345(a)-(b). Again, unclear here what the grounds would be to support revision. A & B can move for revision within 90 days of imposition of sentence. MR 4-345(e).

Motion for new trial

A & B may also move for a new trial within 10 days of verdict. MR 4-331(a) or if they discover new evidence there may be additional time. MR 4-331.

Writ of Actual Innocence

A & B could also move for a writ of actual innocence at any time. MR 4-332(c).

Revisory Power on conviction

A&B can also move for the court to set aside their conviction as unjust or improper pursuant to its revisory powers. MR. 4-331(b). In the district court they'd have to do it within 90 days of sentence if appeal not perfected. MR 4-331(b)(A). In Circuit Court, within 90 days of sentence. MR 4-331(b)(B). After the 90 days, the court has revisory powers for fraud mistake or irregularity.

Appeal

A & B could appeal their convictions. An appeal must be filed within 30 days. CP7-109(a).

Habeas petition

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A & B may also try to file a habeas corpus petition to challenge the validity of their confinement. CP 7-107. If the sentence is set aside, rather than corrected, likely entitled to a new trial. State v. D'Onofrio. If the habeas petition is denied, they cannot appeal the denial. CP 7-107(b).

Question 6

H's attorney should file a motion to dismiss for failure to serve properly. Service is effected by delivering summons, complaint to the person or leaving a copy at the individual's house or usual place of abode with a person 18 years of age or older or by mailing certified mail marked restricted delivery. MR 2-121(a). Here, H was served at M's house. Although he has slept there for past six months, the fact that he doesn't receive mail there likely undermines the argument that M's house served as his "usual abode" or "dwelling house." However, the court may find that sleeping in one place for six months straight establishes a dwelling place or abode. The M is over 18 so if it is considered H's house, service would likely be proper. Insufficient service of process is a mandatory motion that must be filed before the answer or is waived. MR 2-322(a).

Question 7

A.

Two party consent

Maryland is a two-party consent state. CJP 10-402. H is proposing to record without W's consent in violation of the law. Illegally obtained audio or visual recordings are not admissible in court. CJP 10-405. However, H can still testify to what he heard and saw as long as he has personal knowledge of the events. MR 5-602.

Spousal privilege

The exchanges between H&W may be covered by the spousal privilege. The privilege covers confidential communications between spouses during marriage. CJP 9-105. H&W's separation likely is insufficient to undermine their status as spouses however there may be some question as to whether their communication is "confidential." If the children are there during exchanges, the privilege is broken, but if H & W had exchanges alone, the privilege is preserved. Also, if children are very young may not break the privilege. Master v. Master, 223 Md. 618 (1960). The spousal privilege must be waived by both H & W. H clearly wants to waive it, but if the verbal abuse is true, W likely will refuse to waive. If W were on trial for the crime of child abuse, H could be compelled to testify. CJP 9-106. But in a custody battle this would not be relevant. Thus, because spousal privilege attaches, unless W waives, H will not be able to testify regarding the conversations either.

B.

Rule 3.6 – Fairness – an attorney shall not knowingly disobey an obligation or use or allude to any matter that will not be supported by admissible evidence. MRPC 3.4. As explained above, the recording is illegal (CJP 10-402) and inadmissible (CJP 10-405).

Rule 4.1 – Truthfulness – an attorney shall not fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal act by a client. If H provided attorney with the recording, he would not be able to use it.

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Rule 4.4 – Respect for 3rd parties – Attorney shall not use methods of obtaining evidence he knows violates the rights of a person.

Rule 8.4 – Attorney shall not commit misconduct.

Rule 1.1 – Competence – Attorney should advise H of the illegality.

Rule 1.2 – cannot assist client with a criminal act

Question 8

A.

Discovery

Can request interrogatories. MR 2-421. Max number is 30. MR 2-421(a). Can also request production of documents. MR 2-422. Can also notice a deposition and ask W. MR 2-411. Deposition limited to 7 hours unless attorney gets leave of court. Id. Notice must be served at least 10 days before date of deposition. MR 2-412.

B.

If W fails to produce discovery, H's attorney must make a good faith effort to resolve. MR 2-431. If this effort fails, must file a certificate with date, time, circumstances of attempt. Id. Can then file for sanctions, MR 2-432(a), or compelling discovery, MR 2-432(b). The motion for sanctions or compelling discovery must be filed with reasonable promptness. MR 2-432(d). If court finds failure of discovery on W's part, can order any kind of remedies listed in MR 2-433.

Question 9

A. Attorney must file a motion to withdraw (assuming H doesn't have a new attorney – if he has new atty, he can file notice, MR 2-132(a)) accompanied by his written consent or atty's certificate that notice has been mailed at least 5 days prior informing client of withdrawal. MR 2-132(b). Unless in open court – appearance not stricken before time for motion expires. Id. Court may deny motion if it would cause undue delay, prejudice, or injustice. Id.

B. MRPC 4.1 requires that attorney be truthful and not knowingly make a false statement. Therefore, you must not submit evidence you know is false or solicit testimony that's false. May consider not putting husband on the stand if know will testify falsely. If already submitted false evidence – may have duty to correct. However, because of duty of confidentiality (MRPC 1.6) may not reveal without client's consent. See also CJP 9-108 (atty can't be compelled). The attorney may disclose the info in an effort to seek guidance regarding compliance with MRPC 1.6(4).

Question 10

I must file a complaint and summons for breach of contract. I must serve the complaint and summons on husband or give it to an 18+ year old in his dwelling or send it certified mail marked restricted delivery. MR 2-121(a), but not by me as I am a party in this action. Id. I could seek a declaratory judgment to speed up the process, CJP 3-403, which would give certainty to my rights. CJP 3-406. (This is assuming there is a contract between me and H.) Once I receive a judgment, I must get it indexed and recorded by Clerk. CJP 11-402(b); MR

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2-601(c). This will be a lien on the family home CJP 11-402; MR 2-621(a). Until a levy is made, the execution of the money judgment is not a lien on the car. CJP 11-403.

The money judgment will expire 12 years from the date of entry by MR 2-625, however at any time before it expires, I can file a notice of renewal. Id. Therefore, as long as I renew the judgment in a timely manner, I can continue to attempt to collect it.

MR 2-641(a) – can request the clerk issue a writ of execution directing sheriff to levy on property. May also request writ of garnishment that includes caption, \$, name and address of debtor and H. Serve the writ on H and follow procedures in MR 2-645. Can then direct bank to garnish from account. 2-645.1. H will have opportunity to answer.

If the judgment awards me possession of the house, can enforce. MR 2-647, but house likely worth more than I'm owed, so judge will probably not award to me.

REPRESENTATIVE GOOD ANSWER NO. 2

Question 1

Alexander (A) and Benjamin (B) are entitled to be represented by counsel at their initial appearance before the Court held under MDR 4-213. (See, e.g. MDR 4-213.1(a) [right to representation by attorney].) This right to counsel extends throughout the proceedings. See e.g., MDR 4-214. Based on the stated facts, it appears that A&B's initial appearance was held without them being advised of their right to counsel or counsel appearing on their behalf in violation of MDR 4-213(a).

Question 2

Criminal motions in Circuit Court are governed by MDR 4-252. This matter will likely be tried in circuit court because it is a felony. See e.g. CJP 4-302(a).

Because Benjamin (B) was denied pretrial release by a commissioner, and seemingly without the advisement of the right to and assistance of counsel in violation of MDR 4-213, I would seek review of that decision by a judge per MDR 4-216.2. The judge will then apply the same standards & fact found in MDR 4-216.1 to determine whether B is entitled to release. Those factors are found at MDR 4-216(g). Those factors include the nature and circumstances of the crime, B's prior criminal record and flight history, his family ties, his employment status, etc. See e.g. MDR 4-216(f)(2)(A)-(J). We don't have a lot of facts speaking to these factors, but B's apparent family ties and employment are in his favor. See also Crim Pro 5-102 [release available even for crime punishable by life imprisonment]. If B is charged for a crime within the district court's jurisdiction, I might also request a preliminary hearing per MDR 4-221.

I would also consider whether there are any facts to file a mandatory motion under MDR 4-252(a) such as for unlawful arrest, but we do not have enough facts to evaluate those motions.

Question 3

I could consider filing a motion for defect in the institution of the prosecution or defect in the charging document due to improper venue per MDR 4-252(a), assuming I am in the circuit court. (See MDR 4-251 for motions in the district court.) The motion would have to be filed within 30 days after appearance of counsel or the defendant's

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appearance under MDR 4-213. (See MDR 4-242(b).) I would seek dismissal of the charging document & release of the defendants. (See MDR 4-252(h).) The substantive bases for the motion would be Crim Pro 4-201(b), which states that if a person is feloniously stricken in one county, but dies in another county the prosecution shall be where the person was feloniously stricken. Here, it appears that the victim was injured and died in Prince George's County, which is therefore the proper venue. (But see e.g., Crim Pro 4-201(g) [crimes committed near border lines of county].) Also, Crim Pro 4-201(i) support the motion because it provides that a prosecution for murder should occur where the crime occurred, or if it cannot be determined where it occurred, in the county where the body is found. This again points to Prince George's County being the proper venue for prosecution.

Question 4

The prosecution should base this request on MDR 4-253(a), which allows for a joint trial of 2 or more defendants charged in separate charging documents if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Here Alexander and Benjamin together killed Calvin, so the prosecution has a strong argument for joinder under this rule.

Question 5

Post-trial/conviction remedies for Alexander (A) and Benjamin (B)

First A & B could move for a new trial within 10 days of the verdict per MDR 4-331(a). Second, they could seek to alter the judgment by invoking the court's revisory power within 90 days after the imposition of sentence per MDR 4-331(b). They could also invoke the court's revisory power at any time for fraud, mistake, or irregularity. (See e.g., MDR 4-331(b).)

If they discover new evidence to support their requested relief, they can file a motion within 1 year after imposition of sentence or receipt of an appellate mandate per MDR 4-331(c).

They could also seek sentence review per MDR 4-344 & Crim Pro 8-101 - 8-109 within 30 days after imposition of sentences. (MDR 4-344(a).) They could seek modification of their sentences from the trial court per MDR 4-345(e) within 90 days of imposition of the sentence. They could potentially seek en banc review per MDR 4-352 within 10 days after entry of judgment. (MDR 2-551(b).)

They also have 10 years to consider filing petitions under the Uniform Post Conviction Relief Act. (Crim Pro 7-101 et seq.; MDR 4-401 et seq.)

They could notice an appeal to the Court of Special Appeals within 30 days of conviction or sentence, per MDR 8-202(a) & CJP 12-301. (Note, a timely motion under MDR 4-331 would extend the time to notice an appeal per MDR 8-202(b).)

Question 6

Because this is an action for divorce, it appears the appropriate court would be a Circuit Court per MDR 9-201. Nonetheless corresponding district court rules are cited in this answer when appropriate. Normally, Husband (H) would have to file an answer to the complaint within 30 days of service per MDR 2-321(a). (See also, MDR 3-311 [motions in district court].) H will argue that service was not proper on his per MDR 2-121(a) (MDR 3-121 in district court) because it was not left with him personally & mistress's home is not his dwelling house or usual

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place of abode even if he has been sleeping there regularly as of late. Thus, Mistress could not accept service on his behalf.

Question 7

Part A

The audio recordings by husband (H) of wife (W) present a clear violation of CJP 10-402, which make it unlawful to willfully intercept, disclose, & use oral communications of another recorded without their consent. CJP 10-402(a)(1) -(3). Such evidence is not admissible at trial. CJP 10-405(a).

Visual recordings, however, are not directly controlled by the Maryland Wiretap and Electronic Surveillance Act See e.g. Ricks v. State 70 Md. App. 287, 520 A. 2d 1136 (1987) [found at Michies 2013 p. 470]. Nonetheless, because this is a single recording with audio and visual components & the audio components are not admissible, the entire recording should be inadmissible. See e.g., MDR 5-403 [relevant but prejudicial evidence excluded]. Note that wife's unauthorized recording of H & hacking his email should also be excluded as evidence under these rules.

Part B

MRPC 1.2(d) an attorney cannot counsel a client to engage in unlawful activity. Here, husband (H) has asked if he can unlawfully record wife. I cannot counsel him to do this, but I can inform him about the illegality and consequences of such conduct.

MRPC 3.3 – I also have a duty of candor to the court & cannot offer evidence I know was obtained illegally.

MRPC 3.4 & 4.4 – I also have to act fairly to the opposing party & respect the rights of third parties, which means I cannot counsel my client to (and must try to dissuade him from) violating his wife's privacy rights.

MRPC 1.16 – If my client persists in a course of illegal activity and tries to use my services to do so, I may consider withdrawing from the representation.

MRPC 8.4 – I cannot violate the rules of professional conduct or engage in criminal activity while representing H.

Question 8

Part A

A previously noted this matter appears to be in Circuit Court per MDR 9-201. To discover wife's (w) spending habits, husband (H) has multiple options. He can seek to take wife's deposition per MDR 2-411. He can also take her deposition using written questions per MDR 4-217. He can serve interrogatories per MDR 2-421. He likewise can seek to inspect designated documents per MDR 2-422. In addition, he can seek requests for admission of facts and genuineness of documents per MDR 2-424. (Note, only interrogatories are allowed in district court per MDR 3-421.)

Part B

If wife completely fails to respond to discovery, Husband (H) will first have to informally try to resolve the discovery dispute with W (via their attorneys) & husband will have to certify to the court his good faith attempts

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to resolve the dispute, including the date, time and content of those discussions per MDR 2-431. H can then move for immediate sanctions under MDR 2-432(a) for W's complete failure to respond to discovery as well as an order compelling discovery per MDR 2-432(b). Sanctions H can seek are found in MDR 2-433 and include such remedies as full dismissal of the action, refusing to allow W to support certain claims, & deeming certain matters admitted. (See MDR 2-433(a)(1)-3.)

Question 9

Part A

MDR 2-132 governs striking an attorney's appearance in the Circuit Court and MRPC 1.16 governs the attorneys' ethical obligations in withdrawing from representation. (See also 3-132 re withdrawing in the district court.) I will have to file a motion with the Court (unless I request to withdraw in open court) that either includes my client's consent or a certificate that I gave my client the requisite five-day notice & told him to find other counsel. Per MRPC 1.16, I must show an adequate basis for withdrawal, take steps to protect my client's interests, & seek permission from a tribunal to withdraw if necessary. MRPC 1.16(b)-(d).

Part B

If I am not allowed to withdraw, I must try to counsel H to reconsider testifying falsely. If H persists in his desire to testify falsely, my duty of candor to the tribunal requires me not to allow H to testify as I cannot offer false evidence to the tribunal per MRPC 3.3(a)(4). This also is not a criminal matter in which H has a constitutionally protected right to testify. If H somehow does offer false evidence to the Court, I will move to disclose the matter to the Court notwithstanding the duty of confidentiality set forth in MRPC 1.6. Per MRPC 3.3(d), I will have to disclose H's perjury in an ex parte proceeding to enable the tribunal to make an informed decision about how to proceed. I may also again seek to withdraw from the representation per MRPC 1.16.

R 2-532, Motion JNOV can be made 10 days of entry of judgment because D made a motion for judgment at the conclusion of the trial. R 2-532(a), (b); R 2-519.

R 2-533, Motion for new trial may be brought within 10 days of entry of judgment. R 2-533(a).

R 2-534 Motion to alter or amend judgment can be made (if the trial was a bench trial) 10 days after entry of judgment. R 2-524(a).

R 2-535 Motion to revise may be made 30 days after entry of judgment. R 2-535(a).

Question 10A

Per MDR 2-652, an attorney who complies with the Maryland Rules of Professional Conduct and has a common law retaining lien for legal services rendered may assert the lien by retaining the client's papers until the claim is satisfied. See MDR 2-652(a). Per MDR 2-652(c)(1), when a circuit court action has already been filed, as in this case, I can file a motion in that court and that court shall adjudicate the rights of the parties in relation to the lien, including my entitlement to a lien, any dispute as to the client's papers, & the amount of my claim for fees due.

Assuming the Court properly finds in my favor and that I am owed \$100,000 by husband, that money judgment would then constitute a lien on H's assets in the county of entry & in any county in which I have the judgment

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recorded. (MDR 2-621 & 2-623; CJP 11-402). I would then have 12 years to try and execute/collect on the money judgment (MDR 2-625; CJP 5-102(a)(3).) But I could seek a notice of renewal to extend that time per MDR 2-625.

As to H's specific property, I could seek garnishment of the funds held in the local credit union per MDR 2-645.1 and MDR 2-645.

To seek satisfaction of my money judgment out of H's home, I would have to seek a writ of execution & levy per MDR 2-641 & 2-642 & sale of the assets per 2-644. These same code sections also govern my ability to seek satisfaction of the money judgment from H's automobile. (But see CJP 11-403 [writ of execution on money judgment does not become a lien on personal property of defendant until an actual levy is made].)