

FEBRUARY 2005
OUT-OF-STATE ATTORNEYS' EXAMINATION
QUESTIONS AND BOARD'S ANALYSIS

PRELIMINARY FACTS FOR QUESTIONS 1 THROUGH 4

The intersection of U.S. 1 and State Route 108 is located in Howard County, Maryland and is controlled by an automated traffic signal.

At 8:35 a.m. on October 1, 2004, Allan, an employee of Howard County, while operating a county vehicle west on Route 108 in the course of employment, collided with an automobile owned and operated by Bill, who was proceeding north on U.S. 1. Bill lost control of his vehicle and struck a telephone pole. Claire, a medical student and professional golfer, who was a passenger in Bill's car, was seriously and permanently injured as a result of the collision.

You are a lawyer admitted to practice in Maryland.

QUESTION 1

(10 points 18 minutes)

A. Claire's roommate is your friend. She tells you about the accident and suggests you contact Claire about representing her. You telephone Claire at the hospital, and ask if you can visit her to discuss her potential case. Although she has never met you, Claire readily agrees, and you visit her the next day. Claire tells you that on October 1, 2004, she was on her way to medical school in Bill's car, and that Bill was talking on his cell phone and drinking coffee as he approached the intersection where the accident occurred. She does not remember anything that happened after that. She asks that you represent her, and you agree to do so. Claire orally agrees to pay you a fee equal to one-third of any recovery by settlement and 40 percent of any recovery if the case is tried. You agree to pay all litigation costs.

Have you complied with the Rules of Professional Conduct with respect to obtaining Claire as a client or the fee agreement with her? Explain fully.

B. Three weeks after you undertake the representation, your spouse, Sandy, an associate at the

firm of Lovem and Leevem, describes to you an interesting personal injury case on which she is working which took place in Howard County on October 1, 2004. You find that Lovem and Leevem are representing Bill in his claims against Allan and Howard County.

What potential problems, if any, does this pose for you and Sandy? Explain fully.

BOARD'S ANALYSIS – QUESTION 1.

- A. You have failed to comply with the Rules of Professional Conduct in several respects:
1. Your telephone call to Claire violates Rule 7.3, in that the call constitutes personal contact with someone who is not a close friend, relative or former client. Moreover, since Claire is hospitalized, her reasonable judgment about employing an attorney may be impaired.
 2. Your oral contingent fee agreement violates Rule 1.5 (c).
 3. The amount of the contingent fee may be questioned, but appears reasonable, and would probably be ok if it had been agreed to in writing.
 4. Your agreement to pay litigation costs is permissible. Rule 1.8 (e) (1).
- B. You and Sandy, husband and wife cannot represent clients with conflicting interests. Rule 1.8(i). However, other lawyers in the Lovem and Leevem firms are not prohibited from representing Bill because the conflict represented by you and your spouse is not imputed to other members of Sandy's firm. Comment Rule 1.8.

QUESTION 2

(10 Points 18 Minutes)

As Claire's attorney, you have filed a legally sufficient Complaint against Bill, Allan and Howard County. Discovery has been completed as to all parties and witnesses, and the case is being tried in the Circuit Court for Howard County before a jury. You have called Allan to the stand in your case in chief, and ask the following questions:

Q: What color was the traffic signal for you as you approached the intersection of State Route 108 and U.S. 1?

A: The light was green.

Q: Now Mr. Allan, do you recall my taking your deposition in February of 2004?

A: Yes.

Q: To that same question you answered...

Page 215... "The light was yellow...."

Allan's Counsel: Objection.

At the conference of all counsel at the bench, Allan's lawyer objects that you are using Allan's deposition improperly, and that you are impeaching your own witness.

What arguments do you make and how should the judge rule on this objection? Explain fully.

BOARD'S ANALYSIS – QUESTION 2

(1) Use of the Deposition: Md. Rule 2-419(a) (1) permits the use of a deposition for the purposes of contradicting or impeaching the testimony of a deponent as witness.

(2) Impeaching own Witness: Md. Rule 5-607 provides for the attacking of the credibility of a witness, including by the party calling the witness.

Therefore I expect counsel's objections to be overruled.

QUESTION 3

(20 Points 36 Minutes)

After instructions by the judge and argument by counsel, the jury retired. After deliberation, the jury renders a special verdict finding Howard County and Bill jointly and severally liable. Claire is awarded damages, by the jury in the following amounts, totaling \$1,500,000.

Past Medical Expenses:	\$100,000
Future Medical Expenses:	\$ 50,000
Past Loss of Earnings	\$ -0-
Future Loss of Earnings:	\$500,000
Non-Economic Damages, including damages for past pain and suffering, future pain and suffering, physical impairment:	\$850,000

Bill is insured by a policy of liability insurance of \$1,000,000 for any individual claim.

Claire asks you what amounts she will be able to recover, and from whom. Advise Claire.

BOARD'S ANALYSIS – QUESTION 3

The Annotated Code of Maryland, Courts and Judicial Proceedings, Title 11, §11-108 places a cap on “non-economic damages” for personal injury. The award for non-economic damages may not exceed \$500,000, increased by \$15,000/ year beginning on October 1, 1995, based on the date the cause of action accrued. Since Claire’s accident occurred on October 1, 2004, her non-economic damages are limited to \$500,000, plus \$150,000 (October 1, 1995 – October 1, 2004). §11-108 (b) (2). Claire also is entitled to her economic damages:

(1) Past Medical Expenses:	\$100,000
(2) Future Medical Expenses:	\$ 50,000
(3) Future Loss of Earnings:	<u>\$500,000</u>
Total Economic Loss:	\$650,000 plus

(4) Non Economic Damages-Limit: \$650,000
Total Damages: \$1,300,000.

The Annotated Code, Courts and Judicial Proceedings, Title 5, Subtitle 4, Local Government Tort Claims Act, §5-303 limits the liability of local government to \$200,000 per an individual claim. Therefore Howard County will be required to contribute \$200,000. Because the County and Bill are jointly and severally liable, we will be able to obtain the \$1,000,000 policy limits from Bill's insurer, and look to Bill for the \$100,000 excess above policy limits.

QUESTION 4

(10 Points 18 Minutes)

A. A final judgment has been entered in Claire's favor against Howard County and Bill. The time for appeal has expired and you expect to receive payment of the judgment within 30 days. Claire tells you she's in desperate need of funds and asks you to advance \$5,000 to her until the payment is received.

You want to help Claire. May you advance \$5,000 to her?

B. You receive a check from Bill's insurance company on account of the judgment. The check is made payable to the order of Claire and you, as her attorney.

Consistent with the applicable Rules, what do you do with the check?

BOARD'S ANALYSIS – QUESTION 4.

A. Even though the litigation is concluded, the lawyer's representation is continuing. Consequently, an advance to one client by the lawyer probably would violate Rule 1.8 (d) and 1.8 (j).

B. Rule 1.15 (b) requires you to promptly notify Claire of your receipt of the funds, and to account to her. Claire should be asked to endorse the check and it should be deposited in your trust account, as required by Rule 1.15 (a).

Rule 16-604 has a similar requirement.

QUESTION 5

(15 Points 27 Minutes)

On June 3, 2004, Donald was charged by the State's Attorney for Baltimore County with misdemeanor theft (theft of less than \$500), a crime which carries by statute a maximum penalty of incarceration for 18 months and a \$500 fine. Donald demanded a jury trial, and engaged the services of Marsha Swamp, a Maryland attorney who has tried two other criminal cases during the course of her career at the bar. The case went to trial.

At the close of the State's case, Swamp moved for a judgment of acquittal on the ground that the State's evidence was insufficient. The trial judge denied the motion. Donald was then called to the stand to testify in his own behalf. Swamp then rested for the defense, and did not renew her motion for acquittal.

Prior to closing arguments and jury instructions the trial judge held a conference in chambers to review jury instructions in the presence of the court reporter. Upon hearing the proposed instructions, Swamp objected to the judge's proposed instruction on intent, which objection the Court reporter duly recorded. The judge said he would give the instruction despite Swamp's objection.

The judge instructed the jury as he had originally proposed at the chambers conference. Swamp voiced no objections to the instructions as given.

The jury found Donald guilty as charged. On September 3, 2004, Donald was sentenced by the judge to two years in custody of the Department of Corrections.

On October 1, 2004, Swamp noted an appeal of Donald's conviction to the Court of Special Appeals. The transcript of testimony has been prepared, and all steps have been taken to perfect Donald's appeal. Swamp no longer represents Donald.

On February 22, 2005, you are appointed to represent Donald on his appeal, and have been informed that appellant's brief is due on March 25, 2005.

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A file memo from Swamp lists two potential errors for appeal: (1) the evidence was insufficient to convict; and (2) the trial court incorrectly instructed the jury on the issue of intent.

Evaluate the likelihood of success on these two appeal issues.

II

You immediately file with the trial court a motion to modify sentence.

What ruling do you expect the trial judge to make regarding your motion to modify sentence? Explain.

BOARD'S ANALYSIS – QUESTION 5

Appellate Court should affirm Donald's convictions:

Since Swamp's Motion for Judgment of Acquittal at the close of evidence offered by the State was not granted, the presentation of evidence in Donald's case acts as withdrawal of the motion for acquittal. Since the motion was not renewed at the close of all evidence, the Court of Special Appeals is precluded from reviewing the sufficiency of the evidence. Rule 4-324. Md. Rules.

Pursuant to Rule 4-325, Donald cannot assign as error the giving or failure to give an instruction unless Swamp objected on the record promptly after the court instructs the jury. Swamp's objection to instructions in chambers prior to the charge to the jury served no purpose.

The judge should modify Donald's sentence. Normally the court has revisory power over a sentence for a period of 90 days. Rule 4-345(b). However when sentence is illegal, the court may correct it at any time. 4-345(a). Thus, although over 90 days has passed since Donald's sentence, the judge's imposition of a two year period of incarceration exceeds the maximum statutory period of 18 months and is therefore illegal and subject to be corrected at any time.

The trial court is not divested of jurisdiction to modify an illegal sentence even though an appeal is pending. State v. Wadlow, 93 Md. App. 260, 64 A.2d 1091 (1992), modified, 335 Md. 122, 642 A.2d 213 (1994).

QUESTION 6

(10 Points 18 Minutes)

An irate Betty Boop visits your office and angrily shows you a recent bill for Satcom Cable service. The monthly charge for service is \$50. Because Betty's prior payment was received 2 days after the due date, Satcom imposed a \$20 "late fee". To keep her service from being cut off, Betty paid the bill. Betty complains that a \$20 late fee for a \$50 bill is "outrageous".

You verify, through a telephone call to Satcom's business office, that Satcom has been charging a \$20 "late fee" to its many thousands of customers for over a year. Your legal research convinces you that the late fee is illegal under Maryland law.

Betty Boop asks if there is anything, you can do to stop Satcom from charging late fees in the future and make Satcom refund late fees collected from Betty and other customers.

What effective and efficient action can you institute to accomplish Betty's objectives?

BOARD'S ANALYSIS – QUESTION 6

The most effective and efficient action to take to enforce the rights of Betty Boop and other Satcom customers would be to file a class action in the appropriate circuit court seeking money damages and injunctive relief.

Maryland Rule 2-231(a) permits suit by representative parties on behalf of a class given numerosity, common questions of law or fact, the claims of the representative parties are typical of the claims of the class, and the representative parties will fairly and adequately protect the interests of the class. All prerequisites to a class action are met here.

The jurisdictional amount for the Circuit Court is reached because §4-402(a) of the Courts and Judicial Proceedings Article permits the aggregations of claims in class actions. I would seek in addition to refunds for the class (money damages), permanent injunctive relief pursuant to Maryland Rule 15-501, et seq.

QUESTIONS 7 and 8

COMMON FACTS

On September 1, 2004, Adam, a resident of Montgomery County, while driving his automobile, was involved in a collision with Beth, a resident of Prince George's County. As a result of the collision, Adam's automobile struck a parked van owned by Paul. The accident occurred in Anne Arundel County, where Paul is a resident. The damage to Paul's van is \$9,000. Paul has no collision insurance. Paul retains you, a Maryland lawyer, to sue Adam and Beth for Paul's \$9,000 property damage claim.

QUESTION 7

(15 Points 27 Minutes)

- A. Which Maryland courts have subject matter jurisdiction over Paul's cause of action? Explain.**
- B. In which Maryland counties may suit be brought? Explain.**
- C. Can Paul obtain a jury trial? Explain.**

BOARD'S ANALYSIS – QUESTION 7

A. Under CJP 4-402(d), a plaintiff may elect to file suit in the District Court or in a trial court of general jurisdiction, if the amount in controversy exceeds \$5,000, exclusive of interest, costs, and attorney's fees if attorney's fees are recoverable by law or contract.

Thus, as Paul's claim is for \$9,000 P may bring a cause of action in either the District or Circuit Court.

B. Venue is governed by CJP §6-201. The general rule is that a civil action shall be brought in a county where the defendant resides, carries on a regular business, is employed, or habitually engages in a vocation. If there is more than one defendant, and there is no single venue applicable to all defendants all may be sued in a county in which any one of them could be sued, or in the county where the cause of action arose.

Here, Paul may bring a cause of action in Anne Arundel, Montgomery or Prince George's County.

The 2 possible defendants are residents of Prince George's and Montgomery County. Therefore, as they reside there, the action can be brought in either county.

Paul can also bring suit in Anne Arundel County, as that is where the cause of action arose.

C. In a civil action in which the amount in controversy exceeds \$10,000, exclusive of attorney's fees if attorney's fees are recoverable by law or contract, a party may demand a jury trial.

As Paul's damages are below \$10,000, there is no right to a jury trial.

CJP §4-402(e)(2)

QUESTION 8

(10 Points 18 Minutes)

As a result of the automobile accident, Adam was treated at the emergency room of the local hospital, and had a follow up visit with his regular physician. Adam had minor injuries, causing him to miss two days of work. Adam's medical bills and lost wages total \$1,000.

Beth's insurance company has admitted liability and has paid for the cost of repairing Adam's car. The insurer has offered to pay Adam an additional \$3,000 for his personal injuries. Adam does not want to settle for \$3,000 and engages you, a Maryland attorney, to file suit against Beth. Based on your experience with similar cases, you advise Adam that, his personal injury claim is worth between \$5,000 and \$7,500.

From a procedural and evidentiary standpoint, what is the most cost effective way to bring suit on Adam's behalf?

BOARD ANALYSIS – QUESTION 8

The most cost effective way to bring suit on Adam's behalf would be to file in the District Court for \$10,000 in damages.

The District Court has exclusive original jurisdiction for an action in tort if damages claimed do not exceed \$25,000 exclusive of interest costs. Section 4-401 of the Courts Article. However, Defendant would have a right to pray a jury trial if the amount in controversy exceeded \$10,000 Section 4-402(e) of the Courts Article. This right is not available to the Defendant if the amount claimed is \$10,000 or less.

Keeping the amount in controversy below \$25,000 allows Adam's medical records and bills to be admissible without the necessity of having the health care provider testify, saving the expense of the expert testimony. This is accomplished by complying with Section 10-104 and Section 10-105 of the Courts Article. An alternative method of authenticating medical records is available by compliance with Md. Rule 3-510(h). This Rule does not make the records admissible, it just authenticates them without live testimony.

Adam's action should be filed in District Court requesting \$10,000 in damages. This will assure the trial will be heard in District Court without a jury and allow the introduction of medical records and bills without the health care provider's testimony.