

FEBRUARY 2010

**OUT OF STATE ATTORNEY'S EXAM
QUESTIONS AND BOARD'S ANALYSIS**

FACTS APPLICABLE TO QUESTIONS 1 AND 2

For thirty years, Jim has resided in the Town of Issue, Maryland, adjacent to an apparently abandoned undeveloped parcel. Over the years, Jim landscaped the undeveloped parcel along with his own property, and performed all necessary maintenance for the land. On April 10, 2009, Jim consulted Mike Smith, a newly-admitted Maryland lawyer, to determine what rights, if any, he had in the adjacent parcel and whether he could convey that property to his son. Mike Smith informed Jim that he should file a suit to quiet title to the parcel by claiming adverse possession.

Mike Smith asked Jim who owned the undeveloped parcel and Jim replied that he had "no idea". Mike Smith agreed to represent Jim for a flat fee of \$35,000. On July 13, 2009, Mike Smith filed an action on behalf of Jim to quiet title pursuant to Maryland Real Property Code Annotated Section 14-108 (which requires that any person who appears of record, or claims to have a hostile outstanding right, be made a defendant in the proceedings). Mike Smith served notice by publication based on his affidavit that "he made a good faith effort to search the title and no other persons appear to have an interest in the property." The Circuit Court entered a final judgment in Jim's favor on September 30, 2009.

The Town learned of the judgment on January 1, 2010, and immediately asked its counsel, Learned Heart, to do whatever she could to reverse the judgment since the parcel had been legally deeded to the Town in 2000 and said deed was recorded and properly indexed in the Land Records.

QUESTION 1

(10 Points – 18 Minutes)

How can the Town defeat the judgment?

BOARD'S ANALYSIS

Maryland Rule 2-122(a) permits service by posting or publication in an in rem or quasi in rem action "when the plaintiff has shown by affidavit that the whereabouts of the defendant are unknown and that reasonable efforts have been made in good faith to locate the defendant . . .".

Maryland Rule 2-535(b) allows the Court to exercise its revisory power and control over a judgment, on motion of any party, in case of fraud, mistake or irregularity. Arguably, a showing of fraud may be made by the Town since Jim did not complete the affidavit and Mike Smith made no attempt to ascertain ownership of the parcel and to serve the Town.

However, the Town was not a party to the action. Accordingly, Learned Heart will need to file a Motion to Intervene in the action, pursuant to Maryland Rule 2-214, and to request that the judgment be set aside.

ADDITIONAL FACTS APPLICABLE TO QUESTION 2

Jim contacted Bar Counsel and related all of the above facts concerning the action filed by Mike Smith. Bar Counsel opened a file and contacted Mike Smith and requested him to provide a written response. No response was received.

Bar Counsel had its investigator seek copies of Mike Smith's operating and trust account bank statements. The investigator reported that no trust account existed.

QUESTION 2

(15 Points – 27 Minutes)

Under these facts, what charges would you file if you were Bar Counsel?

BOARD'S ANALYSIS

The answer should address the following Rules of Professional Conduct:

- Is Smith competent, given his failure to discover the owner of the adjacent parcel? Rule 1.1
- Was Smith diligent in determining the owner of the adjacent parcel? Rule 1.3
- Is the fee reasonable for a new attorney? Rule 1.5
- Was Smith candid to the Court given the facts in question? Rule 3.3
- Was Smith guilty of fraud and therefore committed professional misconduct under Rule 8.4?
- Did Smith violate Rule 16-603 (Duty to maintain one or more attorney trust accounts)?
- Did Smith violate Rule 8.1(b) which mandates that a Lawyer shall not knowingly fail to respond to a lawful demand from Bar Counsel?

QUESTION 3

(15 Points – 27 Minutes)

On August 17, 2009, John was hired by Dee's Day Care, Inc. to drive its bus and pick up students from the local elementary school and transport them to Dee's Day Care, Inc. after school. Dee's Day Care agreed to pay John \$500 per month and did so for two months. However, Dee's began experiencing financial difficulties and did not pay John in November 2009. On December 5, 2010, John resigned and filed a pro se suit in the District Court for breach of contract, seeking damages in the amount of \$500. The complaint included an affidavit and supporting documentation. Dee's owner was properly served the following week but never answered the complaint. The matter was set for trial on February 18, 2010.

On January 30, 2010, John had a massive heart attack and died. His wife, Judy, believed it was brought on by the stress caused by Dee's Day Care, Inc. Judy was named

the Personal Representative of the estate. On February 18, 2010, Judy appeared at the call of the case prepared to proceed on John's behalf. She also asked the court if she could amend the complaint in court to increase the damages by \$22,000 to include monies spent to hospitalize and bury John. Dee's owner did appear in court on that date and asked to be allowed to present a counterclaim in court for damages against John's estate alleging that John was involved in an accident in their truck on his last day of employment that resulted in \$35,000 in damage.

- a. Can Judy proceed on John's behalf?
- b. Can Judy amend the complaint and increase the amount of damages sought?
- c. Can Dee's Day Care proceed on the day of trial with their counterclaim?

BOARD'S ANALYSIS

- a. Judy may proceed on John's behalf since Maryland Rules 3-201 and 3-202 permit the personal representative to bring an action on the deceased's behalf. However, she must first seek leave of court to amend the pleading and request that the Plaintiff be changed to name her as personal representative of John's estate. Maryland Rule 3-341.
- b. Judy may be able to increase the damages to include monies spent to hospitalize and bury John since these are part of an action by the estate. She should, however, seek an amendment by leave of court to add herself as a party, as noted above. Maryland Rule 3-341.
- c. Dee's Day Care, Inc. may bring a counterclaim pursuant to Maryland Rule 3-331. However, Judy will object since it was brought more than 30 days after the time for filing its answer. Maryland Rule 3-331(d). Most importantly, the amount
- d. sought would remove its claim from the jurisdiction of the District Court. (Maryland Courts and Judicial Proceedings Code Annotated, Sections 4-401 and 4-405) Maryland Rule 3-331(f) expressly precludes a party from filing a counterclaim that exceeds the monetary jurisdiction of the court.
- e. Dee's Day Care, Inc. can't proceed at trial as a corporation because corporations must be represented by a lawyer. Maryland Rule 3-131.

QUESTION 4

(10 Points – 18 Minutes)

On November 22, 2009, Roberto was driving his 2009 Maserati on Capital Boulevard in Howard County, Maryland, and was rear-ended by a van driven by Otis. Roberto's car was totaled as a result, and he was taken by ambulance to the hospital, where he stayed for three days.

Upon his release from the hospital, Roberto learned that Otis worked for

Mayberry, LLC., a Maryland company. He decides to sue Otis and Mayberry, LLC. for negligence. He drafts a complaint and files it in the District Court for Howard County. Roberto asks his 17 year old brother, Opie, to serve the complaint on Otis "and his boss" at Mayberry's headquarters in Howard County.

Opie arrives at headquarters on January 2, 2010, and asked for "the person in charge." Bea, the administrative assistant, came out to talk to Opie and he handed her two copies of the complaint, asking that she give one to Otis and the other to "the person in charge." Bea told Opie that the LLC's resident agent's office was in Montgomery County and she couldn't accept on her behalf.

Bea informs Opie that Otis no longer worked for Mayberry, LLC., but said she would send the papers to Otis at his last known address.

On February 10, 2010, at trial, Mayberry did not appear and judgment was entered on Roberto's behalf.

a. Can Bea accept service for Otis? Please explain.

ADDITIONAL FACTS

On February 10, 2010, the managing partner of Mayberry, LLC. comes to you, a licensed Maryland attorney, and asks how they can challenge the judgment.

b. How would you advise the managing partner? Explain your answer.

BOARD'S ANALYSIS

- a. Pursuant to Maryland Rule 3-121(a), Bea is not authorized to accept service.
- b. Mayberry can file a motion to revise the judgment pursuant to Rule 3-535, arguing fraud, mistake or irregularity as a result of the following:
 1. A 17 year old is not authorized to serve process. Maryland Rule 3-123
 2. Bea cannot accept service for the LLC, as the Rule provides that a good faith effort must be made to serve the resident agent. Maryland Rule 3-124(h).

QUESTION 5

(15 Points – 27 Minutes)

The Local Alcohol Beverage Administrative Board in Montgomery County, Maryland, granted a liquor license to an establishment that the neighborhood community association believes will encourage criminal activity. Mr. Jones, President of the Community Association, comes to you on February 1, 2010 and indicated that the final approval was given by the Local Board on January 10, 2010, despite vigorous opposition testimony given at the hearing by members of the community association.

a. What type of legal action, if any, can you take on their behalf to

overturn the decision, and what pleadings must you file?

b. What steps could you take to prevent the local establishment from opening?

c. What advice could you give your client concerning the possibility of providing additional testimony during the hearing on appeal?

BOARD'S ANALYSIS

The answer should address the following provisions of the Maryland Rules:

Maryland Rule 7-203 Time for Filing an Administrative Appeal – the appeal must be noted no later than 30 days after the decision

Maryland Rule 7-202 addresses the method of securing judicial review

Maryland Rule 7-205 Stays to Administrative Appeals – If you wish to enjoin the action pending appeal, you must request a stay pursuant to this section, and must do so in addition to noting the appeal.

Maryland Rule 7-208 – generally precludes the admission of any additional evidence.

QUESTION 6

(10 Points – 18 Minutes)

The Smith family moved to a new home in Calvert County, Maryland. Their next door neighbor, Earl Jones, took an instant dislike to Mr. Smith. Earl Jones was a 20-year employee of the Calvert County Police Department and worked as a civilian in its records department.

One morning Earl decided to illegally access the Department's files to record a fictitious open warrant for Mr. Smith's arrest. On October 1, 2008, Mr. Smith was pulled over by a Calvert County police officer for driving in excess of the posted speed limit. When the police officer checked Mr. Smith's record he saw the open warrant and placed him under arrest. Mr. Smith was detained for approximately 48 hours before his wife could secure his release.

The Smiths hired an attorney. On September 5, 2009 they filed suit against Calvert County and the police officer for negligence and requested \$150,000 in compensatory damages and \$1 million in punitive damages.

You are the County Attorney for Calvert County.

a. What procedural defenses does the County have to the complaint?

b. Do you represent the police officer and/or Earl Jones?

Discuss fully.

BOARD'S ANALYSIS

The answer should address the following provisions of the Courts and Judicial Proceedings Article ("CJ"):

1. CJ § 5-303 Limitation on the amount of damages

§ 5-303. Liability of government; defenses

(a) Limitation on liability. --

(1) Subject to paragraph (2) of this subsection, the liability of a local government may not exceed \$ 200,000 per an individual claim, and \$ 500,000 per total claims that arise from the same occurrence for damages resulting from tortious acts or omissions, or liability arising under subsection (b) of this section and indemnification under subsection (c) of this section.

(2) The limits on liability provided under paragraph (1) of this subsection do not include interest accrued on a judgment.

(b) When government liable. --

(1) Except as provided in subsection (c) of this section, a local government shall be liable for any judgment against its employee for damages resulting from tortious acts or omissions committed by the employee within the scope of employment with the local government.

(2) A local government may not assert governmental or sovereign immunity to avoid the duty to defend or indemnify an employee established in this subsection.

(c) Punitive damages; indemnification. --

(1) A local government may not be liable for punitive damages.

(2) (i) Subject to subsection (a) of this section and except as provided in subparagraph (ii) of this paragraph, a local government may indemnify an employee for a judgment for punitive damages entered against the employee.

(ii) A local government may not indemnify a law enforcement officer for a judgment for punitive damages if the law enforcement officer has been found guilty under as a result of the act or omission giving rise to the judgment, if the act or omission would constitute a felony under the laws of this State.

(3) A local government may not enter into an agreement that requires indemnification for an act or omission of an employee that may result in liability for punitive damages.

(d) Defenses not waived. -- Notwithstanding the provisions of subsection (b) of

this section, this subtitle does not waive any common law or statutory defense or immunity in existence as of June 30, 1987, and possessed by an employee of a local government.

(e) Defenses available to government. -- A local government may assert on its own behalf any common law or statutory defense or immunity in existence as of June 30, 1987, and possessed by its employee for whose tortious act or omission the claim against the local government is premised and a local government may only be held liable to the extent that a judgment could have been rendered against such an employee under this subtitle.

CJ § 5-304 Requirement of 180 days' notice to the County

§ 5-304. Actions for unliquidated damages

(a) Scope. -- This section does not apply to an action against a nonprofit corporation described in § 5-301(d)(23), (24), (25), (26), or (28) of this subtitle or its employees.

(b) Notice required. --

(1) Except as provided in subsections (a) and (d) of this section, an action for unliquidated damages may not be brought against a local government or its employees unless the notice of the claim required by this section is given within 180 days after the injury.

(2) The notice shall be in writing and shall state the time, place, and cause of the injury.

(c) (1) The notice required under this section shall be given in person or by certified mail, return receipt requested, bearing a postmark from the United States Postal Service, by the claimant or the representative of the claimant.

(2) Except as otherwise provided, if the defendant local government is a county, the notice required under this section shall be given to the county commissioners or county council of the defendant local government.

(3) If the defendant local government is:

(i) Baltimore City, the notice shall be given to the City Solicitor;

(ii) Howard County or Montgomery County, the notice shall be given to the County Executive; and

(iii) In Anne Arundel County, Baltimore County, Harford County, or Prince George's County, the notice shall be given to the county solicitor or county attorney.

(4) For any other local government, the notice shall be given to the corporate authorities of the defendant local government.

(d) Waiver of notice requirement. -- Notwithstanding the other provisions of this section, unless the defendant can affirmatively show that its defense has been prejudiced by lack of required notice, upon motion and for good cause shown the court may entertain the suit even though the required notice was not given.

2. CJ § 5-301 Definition of actual malice

§ 5-301. Definitions

(a) In general. -- In this subtitle the following words have the meanings indicated.

(b) Actual malice. -- "Actual malice" means ill will or improper motivation.

CJ § 5-302 Ability to represent an employee if there is not actual malice. The police officer may be represented but Earl acted intentionally and should not be covered.

§ 5-302. Nature and extent of legal representation

(a) Government to provide legal defense to employees. -- Each local government shall provide for its employees a legal defense in any action that alleges damages resulting from tortious acts or omissions committed by an employee within the scope of employment with the local government.

(b) Immunity; exceptions. --

(1) Except as provided in paragraph (2) of this subsection, a person may not execute against an employee on a judgment rendered for tortious acts or omissions committed by the employee within the scope of employment with a local government.

(2) (i) An employee shall be fully liable for all damages awarded in an action in which it is found that the employee acted with actual malice.

(ii) In such circumstances the judgment may be executed against the employee and the local government may seek indemnification for any sums it is required to pay under § 5-303(b)(1) of this subtitle.

(c) Effect of Workers' Compensation Act. -- If the injury sustained is compensable under the Maryland Workers' Compensation Act, an employee may not sue a fellow employee for tortious acts or omissions committed within the scope of employment.

(d) Cooperation by employee. --

(1) The rights and immunities granted to an employee are contingent on the employee's cooperation in the defense of any action.

(2) If the employee does not cooperate, the employee forfeits any and all rights and immunities accruing to the employee under subsection (b) of this section.

QUESTION 7
(10 Points – 18 Minutes)

Plaintiff sued Defendant as a result of an automobile accident that occurred in Oxon Hill, Maryland, and sought damages in the amount of \$45,000. As attorney for the Plaintiff, you are in the Circuit Court for Prince George's County, in a motion's hearing to compel discovery concerning the following matters:

- a. The written statement the Defendant provided to the police;
- b. Your request that Defendant submit to a deposition 10 days after the filing of the complaint;
- c. Defendant's refusal to answer questions 31-35 of the interrogatories.

How should the court rule on Defendant's objections to these requests for discovery, Why?

BOARD'S ANALYSIS

The answer should address the following provisions of the Maryland Rules:

Maryland Rule 2-402(f) Party's or witness' own statement – Defendant must produce

Maryland Rule 2-411 Deposition, Right to take – It is too early, so leave of Court is required

Maryland Rule 2-421- Limited to 30 interrogatories

QUESTION 8
(15 Points – 27 Minutes)

John and Bill broke into a townhouse in Charles County, Maryland, and pilfered \$1,000, a brand new laptop, and an MP3 player. As they were exiting the home, an eight (8) year old girl in the neighbor's yard saw them and greeted Bill, whom she recognized as the neighborhood ice cream vendor.

John and Bill hurriedly drove to John's house where they discovered John's disgruntled wife at his doorstep. She screamed at him that she knew he was up to no good since he was hanging with his partner-in-crime, Bill. John replied, "If you want me to buy things for you, I've got to do what I've got to do!"

Bill left the two of them and went to a nearby college to sell the laptop. He convinced a freshman to purchase it for \$200. Just as they were completing the sale, a graduate student came by and said "Aren't you the guy who sold some stolen printers to my frat brother a few years ago?" He then flagged down a campus police officer and Bill ran off leaving the laptop behind.

The Charles County Sheriff's Department investigated the townhouse theft and legally arrested John and Bill. While awaiting release on bond, they were detained in the Charles County lockup. Bill struck up a conversation with a fellow detainee, Paul, (a convicted perjurer) and bragged that "they might have him on the laptop, but they'll never find out about the other stuff!"

The two were tried separately for theft, breaking and entering and conspiracy. At Bill's trial, the State's Attorney for Charles County sought to introduce the following evidence in its case in chief over Bill's strenuous objection:

- a. The testimony from the eight-year old that she saw Bill, the ice cream vendor, leaving the townhouse;
- b. The testimony of John's wife that John told her that he and Bill often sold stolen computer equipment to students at the local colleges, as well as the statement John made about buying her things;
- c. Paul's conversation with Bill while detained.
- d. The testimony of the graduate student that he thought Bill was the guy who had sold stolen printers to his frat brothers in the past.

As Judge, how would you rule on the objections? Explain your answers.

BOARD'S ANALYSIS

- a. There is no per se age limit for witnesses that testify in criminal trials, so the 8-year old's testimony will be admitted if she's a competent witness. Courts and Judicial Proceedings Article "CJ" § 9-103. Overruled.
- b. CJ § 9-105 – Confidential Communications Occurring During Marriage. One spouse is not competent to disclose any confidential communication between the spouses occurring during their marriage. Sustained.

However, John's statement about "buying" things for his wife was made in front of Bill and is, therefore, not privileged. Bill may still object to the statement on relevancy grounds. Sustained.

- c. Paul is a perjurer. His statement may be excluded on those grounds. CJ § 9-104. Sustained.
- d. The graduate student's testimony may not be relevant if he only "thinks" Bill is the guy. CJ § 5-401. Additionally, evidence of other crimes, wrongs or acts is generally not admissible to show action in conformity there with. Maryland Rule 5-104(b). Sustained