

JULY 2003 BAR EXAMINATION

BOARD'S ANALYSIS

QUESTION 1

The question involves the issue of a dual agency relationship between Earl Gordon & Blair, Inc., its employee-agent, Billy Ray, and the fiduciary-agent duty owed to Reel Deal. "Agency is the fiduciary relationship which results from the manifestation of consent by one person [the principal] to another [the agent] that the other shall act on his behalf and be subject to his control and consent by the other to so act." Restatement (second) of Agency § 1. The duties an agent owes to his or her principal are well established. An agent has "a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency." Restatement (second) of Agency § 387. The powers of the agent are to be exercised for the benefit of the principal only, and not of the agent or of third parties. *Insurance Company of North America v. Miller*, II, 362 Md. 361 (2001). Thus, agents must avoid placing themselves in a position where his or her own interests or those of a third party may conflict with the interest of their client or other principal.

Here, Billy Ray was a financial advisor for Reel Deal. In this capacity he owed Reel Deal a fiduciary duty as an agent. Reel Deal trusted Billy Ray's advice in this capacity and believed that Billy Ray would perform in Reel Deal's best interest. At all times Billy Ray was acting in his capacity as an officer of Earl Gordon & Blair. Thus, Reel Deal can maintain a cause of action against EGB under a vicarious liability theory for negligence as a result of Billy Ray's failure to inform Reel Deal about the "significant customer relations problems" of Catch All and the better rates offered by Best Bank. Reel Deal may also sue EGB for breach of fiduciary duty or breach of contract for advising Reel Deal to use National Bank when Billy Ray may have had a conflict of interest with National Bank in that he may have been motivated in having his clients merge and use National Bank so that he could get a commission on the loan. Billy Ray also breached his fiduciary responsibility by failing to inform Reel Deal of Catch All's "significant customer relations problems," despite knowing of these problems.

Under certain circumstances, an officer of a corporation may also be held personally liable for torts of the corporation in which the officer was personally involved, even though performed in the name of the corporation. Thus, the personal liability of the EGB's employee, Billy Ray, is also at issue.

Both EGB and Billy Ray may assert that Reel Deal was contributorily negligent for not conducting its own due diligence and looking into Catch All's customer relations issues.

QUESTION 2

Each piece of legislation runs afoul of various provisions of the United States Constitution. Though there are distinctions in the analysis among the provisions, as a threshold, all three components are attempts to limit the right to free speech guaranteed by the First Amendment, and made applicable to the States via the Fourteenth Amendment.

Legislation #1

As a threshold matter, this piece of legislation may be challenged as an unconstitutionally vague and overbroad prior restraint on speech. It is vague because the terms “canvassing” and “town property” are not defined. This is particularly significant since “town property” may consist of public streets and parks, traditionally recognized by the Supreme Court as public fora historically associated with the exercise of First Amendment rights. But “town property” may also consist of a government building or school where reasonable time, place and manner restrictions are more likely to be upheld. Here, there is no such definition of “town property” so the statute may be found void for vagueness. Additionally, the statute is overbroad in that it applies to “any person” promoting “any cause”, thereby restricting substantially more speech than necessary.

The permit requirement is a prior restraint. Prior restraints may be upheld if the limitation is a reasonable time, place or manner restriction. A valid government time, place or manner restriction must be:

- A. Content – neutral
- B. Narrowly tailored to serve a significant government interest and
- C. Leave open alternative channels of communication.

Additionally, a time, place, manner regulation/permit scheme must have defined standards and cannot grant unfettered discretion to officials.

Legislation #1 is not a reasonable time, place and manner restriction since there is no indication that there are alternative channels of communication available and there is no evidence of defined standards to be followed in determining whether to issue the permit, thereby giving the Town unfettered discretion. Many legitimate non-profit corporations solicit persons in order to carry out their charitable purposes. The Supreme Court has invalidated laws that have required religious groups such as Jehovah’s Witnesses to seek a permit before soliciting door-to-door because the issuance of a license depended on the exercise of discretion by a City official. Cantwell v. Connecticut, 310 U.S. 296 (1940); Watchtower Bible & Tract Society v. Village of Stratton, 536 U.S. 150 (2002)

The legislation is also not a neutral time, place and manner restriction since the facts indicate that it was enacted to inhibit expression deemed unpopular by the Town of Conservative. Here, there is no significant government interest, because the facts indicate that the “outside agitators” merely “hand out literature and conduct peaceful sit ins”. It appears that

it is their “opposition to prayer at the Town’s public meetings” that the Town Commissioners are attempting to suppress, thus the restriction is not truly content-neutral, nor does it promote a legitimate government interest. For the aforesaid reasons, this statute is void on its face and unconstitutional.

Legislation #2

Once again, this statute may run afoul of the void for vagueness doctrine in that “canvassing” and “town property” are not defined. The statute is also overbroad because it prohibits canvassing for “any reason”. Thus, it is an unconstitutional restriction of the First Amendment right to Freedom of Speech.

This statute also violates the Fourteenth Amendment Equal Protection Clause because it discriminates between residents and non-residents. Only non-residents are flatly prohibited from canvassing. Further still, the disparate treatment of non-residents may infringe on their fundamental right to travel and may violate the Privileges and Immunities clause of Article IV. The Privileges and Immunities Clause provides that the citizens of each state shall be entitled to the Privileges and Immunities of citizens in the several states and, as such, prohibits states from discriminating against non-residents where fundamental rights are concerned. Here, the non-residents’ fundamental rights to freedom of speech, freedom of assembly and freedom of travel are unduly curtailed by this legislation. The prohibition on non-residents from canvassing “for any reason” also likely places an undue burden on Interstate Commerce, in violation of the Commerce Clause, as well.

Legislation #3

Again, this component is vague and overbroad, for the reason cited above. It is also a violation of the First Amendment rights to Freedom of Speech and Freedom of Assembly. The Town can lawfully enact a time, place, manner restriction prohibiting canvassing on private property, as it is not a public forum, but may not do so in a discriminatory manner. Prohibiting only those persons “not affiliated with civic or religious organizations” is not only a violation of the Equal Protection Clause, because it discriminates against non-religious and non-civic organizations, but clearly runs afoul of the Establishment clause of the First Amendment which prohibits laws respecting the establishment of religion.

To be valid under the Establishment Clause, the law must

- (a) Have a secular purpose
- (b) Have a primary effect that neither advances nor inhibits religion
- (c) Does not produce excessive entanglement with religion

By favoring religious organizations, the purpose here is not secular and it advances religion. Also, “sit-ins” are symbolic conduct and thus, a form of protected speech under the First Amendment. To prohibit on “town property” is a suppression of free speech and because only

certain groups are discriminated against, it violates the 14th Amendment Equal Protection Clause and the Freedom of Assembly.

Penalty

Finally, the \$50,000 fine for any violation of the statute is excessive, in violation of the Eighth Amendment prohibition on excessive punishment.

QUESTION 3

Under Section 3-301 of the Maryland Uniform Commercial Code, at the point Earl obtained possession of the check, he became the holder of the check. Under Section 3-301 Earl, as holder, is the “person entitled to enforce the check” even though he is in wrongful possession of it.

Under Section 4-205 of the Maryland Uniform Commercial Code a depository bank may become holder of a check deposited to the account of a customer if the customer was a holder, whether or not the customer endorses the check. Thus, Best Baltimore Bank became a holder of the check and entitled to enforce the check. Accordingly, there is no breach of warranty under Section 3-417 or 4-208 by Best Baltimore Bank because it was entitled to enforce the check when it was forwarded for payment to Carroll County National Bank unless Best Baltimore Bank knew about the forgery of Teresa’s signature by Earl. Neither Carroll County National Bank nor Fresh Air, Inc. have any action against Best Baltimore Bank.

Although Supplier Co. is an actual entity, under Section 3-110, Earl, despite being a thief, is a holder and, thus, the person whose intent determines to whom the check is payable. Here, Earl did not intend Supplier Co. to have any interest in the check. Under Section 4-401, a bank may charge against the account of a customer when it is properly payable, *i.e.*, authorized by the customer. Thus, because Fresh Air, Inc. did not authorize Earl to keep the check for himself or to sign Teresa’s signature, the check was not properly payable and is not chargeable to Fresh Air, Inc.’s account, insomuch as any unauthorized signature is ineffective as the signature of the person whose name is signed under Section 3-403(a). Therefore, Fresh Air, Inc.’s bank, Carroll County National Bank, will have to re-credit Fresh Air, Inc.’s account in the amount of \$10,000.00.

Under Section 4-208, Carroll County National Bank can go after Earl on his warranty that he had no knowledge that the signature on the check was unauthorized. Also, Fresh Air, Inc. may go after Earl for conversion of the stolen check and the money from its account.

Because the debt owed Supplier Co. has never been paid, Fresh Air, Inc. must still make payment to Supplier Co. for the services it rendered.

EXTRACT SECTIONS FOR QUESTION 3

Annotated Code of Maryland, Commercial Law Article

TITLE 3. NEGOTIABLE INSTRUMENTS: §3-110, §3-301, §3-403, §3-404

TITLE 4. BANK DEPOSITS AND COLLECTIONS: §4-205, §4-208, §4-401

QUESTION 4

These facts are designed to address the enforceability of an exculpatory clause contained in a membership agreement between a health club and its patron, and whether the issue appropriately can be determined by a Motion for Summary Judgment.

An exculpatory clause generally will be given effect if it is clear and unambiguous in stating that its intended purpose is to relieve one party (Superfit) from liability for the consequences of its negligent conduct toward the other party (Alice).

Exculpatory provisions in a contract, even though clear and unambiguous will not be enforced if (a) the harmful conduct of the protected party is willful, wanton, reckless or the result of gross negligence; (b) the bargaining power of one party is so greatly unequal as to put the party at the mercy of the others' negligence, and (c) the transaction giving rise to the exculpatory provision involves the public interest and giving effect to it would violate public policy.

Under these facts the trial court would likely find for Superfit on the merits of its defense. It does not appear that the conduct of Superfit and its employee was wanton, reckless or grossly negligent. Unequal bargaining power alone is insufficient to show a public policy violation which requires that a decisive bargaining advantage be coupled with a service deemed essential to the public as a whole. The service of a fitness or health club does not meet this test.

While the court may ultimately uphold the exculpatory provision and find in favor of Superfit on these facts, it should deny Superfit's Motion for Summary Judgment. The question of the degree of Superfit's negligence is a genuine issue of fact, which precludes summary judgment. The court cannot assume that the conduct of Superfit and its employee was simple negligence, gross negligence, willful, wanton or reckless. The degree of its culpability is a material issue of fact.

Summary judgment is only appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

QUESTION 5

Stubbs, as a licensed certified public accountant and member of DCB, is individually liable to the Bank for the negligence he committed in issuing the incorrect and incomplete financial statement and opinion. Maryland law provides that an individual who renders a licensed professional service in Maryland as an employee or member of a Maryland limited liability company is liable for any negligent or wrongful acts or omissions in which the individual personally participated. Stubbs supervised the services rendered to Norn, Inc. (“Norn”) in the preparation of the financial statement and issuance of the opinion. Consequently, Stubbs will be personally liable. See, Md. Code Ann. Corps. & Ass’ns. §4A-301.1.

Check, a licensed certified public accountant, assisted with the preparation of the financial statement and opinion, may be personally liable to the Bank to the extent that damages were caused by his negligence.

An individual who renders a professional service in Maryland as an employee of a Maryland limited liability company is not liable for negligent or wrongful acts or omissions of another employee or member of the limited liability company unless the employee is negligent in appointing, supervising, or cooperating with the other employee or member. Other than the appointment of Stubbs by DCB to handle the work assignment for Norn, no other member supervised or cooperated with Stubbs or Check in providing the accounting services related to the preparation of the defective financial statement or opinion. Unless it can be proved by the Bank that DCB's selection or appointment of Stubbs was negligent, the other DCB members are not personally liable to the Bank. See, Md. Code Ann. Corps. & Ass’ns. § 4A-301.1(a)(2).

DCB accepted the work assignment and adopted the financial statement and opinion for use by Norn. Consequently, DCB is liable for the acts of its employees or agents who perform professional services within the scope of their authority or apparent authority. See, § 4A-301.1(b). If it can be shown that either Stubbs or Check failed to perform the services (i) within the scope of their respective authority and (ii) within the requisite standards of care, then DCB may be entitled to indemnification for its losses.

QUESTION 6

Respondeat Superior

Respondeat Superior will enable Big Bucks to bring an action against Small Fry for the actions of an employee acting within the scope of employment.

Defamation

Big Bucks's cause of action against Small Fry for defamation is barred because a suit for defamation must be brought within one year of the date the action accrues. Section 5-105 of the Courts Article.

Tortious Interference with Contractual Relations

A party who intentionally induces a party to breach a contract without legal justification is liable in tort to the injured contracting party. *Orfanos v. Athenian, Inc.*, 66 Md. App. 507, 505 A.2d 131 (1986). To establish a cause of action for tortious interference the following elements must be shown:

1. Existence of a contract;
2. Defendants' knowledge of the existence of the contract;
3. Intentional and improper conduct that induces a third party to breach the contract;
4. Third party's subsequent breach of the contract; and
5. Damages resulting from the breach.

Stannard v. McCool, 198 Md. 609, 84 A.2d 862 (1951); *Orfanos v. Atenian, Inc.*, supra.

Small Fry was aware of the employment contract between Buffet and Big Bucks. The actions of Small Fry were intentional and improper and were directed at the contractual relations of Big Bucks. Buffet breached his contract and Big Bucks can show actual damages resulting from the breach.

Damages

If Big Bucks can show its \$500,000 loss is directly attributable to Buffet's investors leaving, it will be entitled to recover the \$500,000 reduced by expenses it would have expended to generate these revenues. From these facts Big Bucks saved the \$200,000 it would have paid as Buffet's salary, reducing Big Bucks potential recovery to \$300,000.

Punitive damages are recoverable upon proof of actual malice when compensatory damages are awarded. Actual malice is conduct influenced or motivated by hatred, spite or with intent to deliberately injure the Plaintiff.

These facts do not support a finding of actual malice sufficient for a recovery of punitive damages.

In Maryland, implied malice is not sufficient to support an award of punitive damages for tortious interference with contract. See *Alexander v. Evander*, 336 Md. 635, 650A 2d 260; 268-69 (1994), and cases cited therein: "The Maryland rule is that malice in the sense of deliberate and improper violation of a known right, that is, absence of legal justification, will support an action and permit recovery of compensatory damages for deprivation of known contractual rights but that actual malice must be shown to support punitive damages." *Damazo v. Waltby*, 259 Md. 638, 270 A. 2d 819 (1970).

See Schaefer v. Miller, 322 Md. 297, 587 A.2d 491, 501 (1991) discussing “disallowance of punitive damages based on implied malice in tort actions for interference with economic relations.”

QUESTION 7

Robbery is the taking and carrying away of the personal property of another (or of which he has possession or custody) from his person or in his immediate presence by violence or by putting him in fear with intent to permanently deprive him of the property. *Williams v. State*, 7 Md. App. 683, 256 A.2d 776 (1969). Where there is no putting in fear, there must be actual violence. Sufficient force must be used to overcome resistance. Clark & Marshall, *A Treatise on the Law of Crimes* §12.13 (7th ed., 1967). It is not robbery to suddenly snatch property from another when there is no resistance and no more force than is necessary to the mere act of snatching. *Cooper v. State*, 9 Md. App. 478, 265 A.2d 569 (1970). If Larry used no more force than necessary to snatch the briefcase, he is not guilty of robbery.

Possession is the exercise of control or dominion over a thing by a person. Knowledge of the presence of the substance is necessary to constitute possession. *Dawkins v. State*, 313 Md. 638, 547 A.2d 1041 (1988). While Larry exercised control over the briefcase, there is no evidence that Larry was aware of its contents.

Mistake of fact is an honest and reasonable belief in the existence of circumstances, which if true, would make the act with which the defendant is charged an innocent act. Mistake of fact is ordinarily a defense when the mistake was not due to the defendant's negligence. Mistake of fact eliminates criminal intent required for a criminal act.

Mistake of fact is not a defense to a violation of a criminal statute enacted in the exercise of police power to punish a prohibited act without regard to criminal intent (*mala prohibita*).

However, the prohibition against possession of controlled dangerous substances is not a mere "public welfare offense" or regulatory law. Knowledge of the general character or illicit nature of the substance is an element of the offense. *Dawkins v. State, supra*. Larry's belief that the salt-shaker contained salt, rather than cocaine, may be a defense.

QUESTION 8

a.) The Court should not require Celia to testify against Alfie. In a criminal matter, the spouse of a defendant can invoke the privilege under Md. Ann. Code Cts. & Jud. Proc. §9-106 to refuse to testify against his or her spouse. The motivation for the marriage and the timing of the marriage are irrelevant; the spouse's right to invoke the privilege is absolute. See, *Hagez v. State*, 110 Md. App. 194, 676 A.2d 992 (1996) and *State v. Walker*, 345 Md. 293, 691 A.2d 1341 (1997). Although §9-105 of the Cts. & Jud. Proc. Article only protects confidential communications made between spouses *during* a marriage, §9-106 makes no such distinction, and serves as an absolute bar to compelling the testimony of spouses during a criminal trial. Furthermore, prior statements of a spouse, whether or not the person was married to the defendant at the time the statements were made, cannot be admitted into evidence under the exceptional circumstances provisions of Md. Rule 5-804 (b) (5). For purposes of the Rule, the spouse is not "unavailable" because the spousal privilege has been invoked. *State v. Walker*, *supra*.

b.) The crumpled copy of her marriage certificate is admissible. If the document is under seal, it is a self-authenticating document under Md. Rule 5-902(a)(i), and can be admitted into evidence without further testimony or documentation. If the document is not under seal, further authenticating testimony will be required before it can be admitted into evidence. Md. Rules 5-902 and 5-1005. The state may object that the document is cumulative and unnecessary because Celia has already testified that she married Alfie. See, Md. Rule 5-403.

Similarly, a defense objection based on the Best Evidence Rule will be overruled by the Court. The Maryland Rules permit the introduction of photocopies or "duplicate originals" in lieu of the original document since photocopies are inherently reliable. Unless defense counsel challenges the contents of the duplicate, and the facts do not indicate that such a challenge was made, the Court will permit Celia to offer the photocopied document and will accept it. Md. Rules 5-1002, 5-1003; Md. Cts. & Jud. Proc. Code Ann. §10-103 (a) (4). See *State v. Brown*, 129 Md. App. 517, 743 A.2d 262 (1999).

c.) The gun shop owner's testimony is inadmissible as hearsay. The facts don't indicate that the owner is testifying from records that were kept at the time of the sale of the gun to A. If the owner were testifying about records, the records themselves would be admissible under Md. Cts. & Jud. Proc. Code Ann. § 10-101. The hearsay testimony of the gun shop owner based on the testimony of Alfie's brother should not be allowed.

d.) Whether or not Alfie is a good father is not relevant to the issue of whether he committed the robberies. Being a good father would not make it more or less likely that Alfie committed the robberies. See, Md. Rules 5-402 and 5-404. "Evidence that is not relevant is not admissible." (Md. Rule 5-402). In addition, the character of the defendant may not have been called into question at the time the brother's testimony is offered. It is in the discretion of the trial judge to allow defendant to introduce evidence of good character until the defendant testifies. (Md. Rule 5-608).

QUESTION 9

1. Tom has filed a small claim case in the District Court of Maryland. A Notice of Intention to Defend in the small claim case should be filed for Jerry. Courts and Judicial Proceedings Article, section 4-405; Maryland Rule 3-307 (a).

2. The District Court can not decide Jerry's claim of \$27,500 because the claim exceeds the monetary jurisdictional limit for both small claims and for regular civil claims. The monetary limit for small claims may not exceed \$2,500 exclusive of interest, costs, and attorney's fees. Courts and Judicial Proceedings Article, section 4-405. For regular civil cases, the monetary limit may not exceed \$25,000 exclusive of prejudgment or post judgment interest, costs, and attorney's fees. Courts and Judicial Proceedings Article, section 4-401 (1).

3. If Jerry lowered the amount of his claim to conform to the statutory limits of the small claim or regular civil claim jurisdictional limits, he could file his reduced claim in the District Court case as a counterclaim.

4. Being prohibited from filing his \$27,500 claim in the District Court because the claim exceeds the monetary jurisdictional limit of that Court, a motion for a stay of the District Court case should be filed on behalf of Jerry requesting a period of time to permit Jerry to commence an action in the Circuit Court on his claim. Maryland Rule 3-331 (f).

5. An action in Circuit Court should be filed on behalf of Jerry against Tom on the \$27,500 claim.

6. The depositions would be taken in the Circuit Court case as depositions upon oral examination are permitted in that Court. Maryland Rule 2-401 (a) and Maryland Rule 2-411.

7. There is no discovery available in a small claim case in District Court. Maryland Rule 3-701 (e).

8. In order to take a deposition upon oral examination in a regular civil District Court case, a written stipulation filed in the case is required. Therefore, Jerry would need Tom's agreement to take the depositions. Maryland Rule 3-401 (a).

EXTRACT SECTIONS FOR QUESTION

Annotated Code of Maryland, Maryland Rules

TITLE 2. CIVIL PROCEDURE -- CIRCUIT COURT: Rule 2-401, Rule 2-411

TITLE 3. CIVIL PROCEDURE -- DISTRICT COURT: Rule 3-307, Rule 3-331, Rule 3-401, Rule 3-701

Annotated Code of Maryland, Courts and Judicial Proceedings article

TITLE 4. DISTRICT COURT -- JURISDICTION: §4-401, §4-405

QUESTION 10

This question involves the existence, use and partial relocation of an easement or right of way. While easements are normally strictly construed, Maryland courts will allow change in the use of a right of way or easement as long as it does not create an unreasonable burden on the servient estate. The test is whether the change is so substantial as to result in the creation of a different servitude from that which was intended and previously existed. The test is especially applied where there is no specific language regarding the scope of the easement. While the property owner has the right to the beneficial use of his/her property, the same does not necessarily extend to the granted right of way or easement.

One of the issues raised by these facts is whether or not the use of the easement for hauling timber is an unreasonable burden on the servient estate and beyond the scope of the easement granted. Normally, a right of way cannot be used for the purpose and benefit beyond the land conveyed by the deed that created it. There is no indication from the facts that the right of way was ever intended to serve more than the 50 acres originally conveyed by Albert to Bernard.

It is unlikely that a court would allow the increased burden on the servient estate caused by the timbering operation on land adjacent to the property Bernard acquired from Albert. However, considering the fact that timbering operations on the 50-acre tract would be of limited duration, the court may permit it. It is Bernard's responsibility to maintain the easement in any case, and the court would direct that any damage done to the easement or the servient estate be paid by Bernard.

The second issue involves that portion of the original right of way which was relocated to access Tree Line Lane. A prescriptive easement arises when a party makes an open, notorious, exclusive and hostile adverse use of property under claim of right for the statutory period. Albert argues that he did not see Bernard use the relocated portion of the easement until such time as the gate was installed and he gave Albert a key as a courtesy. He further argues that since the relocated portion of the access to Highway 7 was not part of the original grant of right of way, giving of the key denoted permission to use the right of way and could be withdrawn at any time.

There is no need for Albert to see Bernard actually use the right of way for his use to be adverse. The facts show that Bernard used the relocated access for a period in excess of 20 years prior to the installation of the gate, and that his use was open, notorious, and hostile under claim of right for the required statutory period. Bernard thus acquired a prescriptive easement over the relocated portion of the original easement. The court would likely hold that Bernard had a right to use the relocated portion of the property consistent with his original grant of an easement from Albert.

Also, Bernard might be able to claim that the new portion is an easement by implication because it arose/was related to the original easement, created at the time of the division of the property and for the use and enjoyment of Bernard's land.

QUESTION 11

The answer should address violations of the following Maryland Rules of Professional Conduct:

1. Rule 1.1 Competence – This rule generally requires all lawyers to represent their clients in a competent manner, and notes that this “requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” The facts indicate that Stan is not versed in commercial transactions and has done nothing to become knowledgeable in this area other than enter into a partnership with a non-lawyer, discussed further below. Accordingly, Stan has not shown the requisite competence required by this rule.
2. Rule 1.3 Diligence – This rule mandates that lawyers act with reasonable diligence and promptness in their representation of a client. Again, the facts indicate that Stan made no attempt to become conversant in the law and has not done anything to accomplish the sale of Mary’s business.
3. Rule 1.4 Communication – This rule provides that a lawyer “keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.” Stan has ignored all of Mary’s phone calls and has provided no information concerning the status of her sale.
4. Rule 1.5 Fees – This rule requires that the attorney’s fee be reasonable. In determining reasonableness one may consider the time and labor required, the novelty and difficulty of the questions involved, the likelihood that the client’s matter will preclude other employment, the customary fee for like work in the locality, the amount involved and the results obtained, the experience and ability of the lawyer, and whether the fee is fixed or contingent. The facts indicate that Stan imposed a flat fee and a contingent percentage if certain results are achieved. These two combined are arguably unreasonable since Stan has no expertise in the area of law and has not done any work. This Rule also precludes a division of fee between lawyers that are not in the same firm unless the division is in proportion to the work done or the client agrees to joint representation, the client is advised of and does not object to the participation of all the lawyers involved, and the total fee is reasonable. Stan has brought Paul in and agreed to forfeit the hourly amount he is charging Mary, but neither attorney has received Mary’s consent. Moreover, the facts don’t clarify whether the fee is reasonable if charged by Paul. Therefore, this Rule has been violated.
5. Rule 1.6 Confidentiality – This Rule generally precludes an attorney from revealing information relating to the representation of the client unless the client consents after consultation. Stan has been on the lecture route discussing Mary’s case without benefit of her consent. Accordingly he has breached this Rule.
6. Rule 5.4 Professional Independence of a Lawyer – This Rule prohibits a lawyer from forming a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law, nor may they partner if the nonlawyer has the right to direct or control the professional judgment of said lawyer. The facts indicate that Stan is relying on the expertise of his real-estate agent partner to become conversant in this area of the law. This would be a violation of Rule 5.4.

7. Rule 7.1 Communications Concerning a Lawyer's Services – This Rule states that a lawyer shall not make a false or misleading communication concerning his services. It clarifies that a communication is false or misleading if it contains a material misrepresentation of fact , creates an unjustified expectation about results that the lawyer may achieve, or compares the lawyer's services to other lawyer's services in a manner that cannot be substantiated. Stan's advertisement may run afoul of this rule since he claims to be the most talented attorney who specializes in all legal needs (a clear misrepresentation and an unsubstantiated comparison to other attorneys).

QUESTION 12

A. The Court may decree an absolute divorce on the ground of voluntary separation if the parties voluntarily have lived separate and apart without cohabitation for 12 months without interruption before the filing of the application for divorce, and there is no reasonable expectation of reconciliation. FL §7-103(a)(3). Since Bob's application for divorce was filed 11 months after the voluntary separation, he is not entitled to the relief on that ground. See *Smith v. Smith*, 257 Md. 266, 762 A.2d 762, 763-64 (1970). However, the adultery ground is preserved despite Bob's waiver of such grounds in the Separation Agreement. Such waiver is void as against public policy. *McClellan v. McClellan* 52 Md App. 525, 451A.2d 334 (1982);

B. In an action for divorce, venue is proper either in the County where the Plaintiff or Defendant resides. Courts Art. §6-201 and 6-202. Since Bob resides in Harford County, his divorce action is properly filed there.

C. As for child support, the Court may modify the provision of the agreement with respect to the care, custody, education or support of any minor child of the spouses, if the modification would be in the best interest of the child. FL §8-103(a). The Court may modify child support upon a showing of a "material change in circumstances," FL §12-104(a) retroactively to the time a Petition for Modification was filed. *Fainberg v. Rosen*, 12 Md App. 359, 278 A;2d 630 (1971); FL §12-104(b). Bob's loss of employment would constitute a "material change in circumstances", which would trigger application of the statutory child support guidelines FL §12-202 to 12-204.

As for alimony, the Court may modify any provision of the Settlement Agreement with respect to alimony unless there is a provision that specifically states that alimony is not subject to any court modification. FL §8-103(c)(2). Here, the parties' Separation Agreement states that it is non-modifiable by any court, unless Bob's employment is voluntarily terminated. Since this condition left the door open for court modification, the Court can give effect to this exception and may modify Bob's alimony obligation pursuant to §8-103(c)(2).

D. A Circuit Court cannot require Bob to provide support for Charles beyond his 18th birthday, the age of majority. An exception applies where the parties' agree on support beyond age 18, and the agreement has been incorporated in a divorce judgment. *Kirby v. Kirby*, 129 Md App. 212 (1999). This is not the case under the stated facts. Note: Effective October 1, 2002, allows a Court to give support up to age 19 if a child is still in high school. The amendment is inapplicable because Charles is a college student.