

FEBRUARY 2001

OUT-OF-STATE ATTORNEY'S EXAMINATION

QUESTIONS AND BOARD ANALYSIS

Facts Applicable to Question I & II

On February 12, 2000 at 10:00 p.m., Chad Pitt was driving northbound on Interstate 95 near Baltimore along with his passenger Opal Sinfrey. Pitt's vehicle passed a car driven by Bryan Webb. Webb immediately contacted the police on his cell phone and said Pitt was driving in excess of 100 miles per hour and crossed the center line. Shortly after Webb's call, Pitt's car crashed into the center wall of the Interstate. Officer Meenly arrived at the scene and found Pitt wandering in the median, and Sinfrey screaming at the top of her lungs "I told you not to drink and drive. I can't believe you did the same thing Gail told me you did when you had your last accident! I'm going to wring your neck when we get home!" Officer Meenly immediately called for an ambulance to transport both to the University of Maryland Shock Trauma Unit in Baltimore. While there, a sample of Pitt's blood was taken at 2:00 a.m. for a toxicology screen. Pitt was treated and released. Sinfrey died two days later as a result of her injuries. Pitt was subsequently charged with driving while intoxicated, driving at an unreasonable speed, homicide by motor vehicle while under the influence of alcohol and reckless driving.

On March 16, 2000, Linda Lawyer entered her appearance on behalf of Chad Pitt. On December 5, 2000, the matter was called for trial before the circuit court for Baltimore City. The State called Officer Meenly who related Ms. Sinfrey's statement at the scene of the accident. Next, the state called Bryan Webb. When asked how fast Pitt was driving when first spotted by Webb, he responded "I'm not 100% sure, but I know it was in excess of 100 miles per hour." Finally, the State introduced the toxicology report from the University of Maryland Medical System that indicated that the blood specimen was taken on February 13 at 2:00 a.m., that testing was completed on April 15 at 3:00 p.m., and that Pitt had a blood alcohol level above the legal limit. Attached to the front of the report was a cover letter signed by the Custodian of Records for the medical system that read as follows:

"This is to certify that the enclosed medical records are a complete reproduction of the medical records pertaining to Chad Pitt, which are created and kept during the normal course of business. To the best of my knowledge, these are the complete medical records of this patient."

Linda made no objections. At the close of the State's case, the defense rested. Chad Pitt was ultimately convicted on all charges. He comes to your office and asks that you be a Monday morning quarterback and discuss what you might have done differently. You are an attorney admitted to practice in Maryland.

QUESTION I

On the day of the trial, what motion would you have filed to have the matter dismissed, and why?

BOARD'S ANALYSIS

If I had been the attorney of record I would have made a motion to dismiss for the State's failure to prosecute the matter within 180 days of the entrance of appearance by Linda Lawyer, as required by Maryland Rule 4-271. The facts fail to reveal any good cause for the delay. Accordingly, the court could sanction the State by granting the motion. Leonard v. State, 46 Md. App. 631, 421 A.2d 85 (1980).

QUESTION II

What, if any, objections would you have raised during the trial? Discuss fully.

BOARD'S ANALYSIS

As attorney for Pitt, I would have raised the following objections to the testimony and evidence presented by the State:

I would have moved to exclude Officer Meenly's testimony regarding Ms. Sinfrey's statement since it was hearsay as defined in Maryland Rule 5-802. The State may counter that Ms. Sinfrey's statement was an excited utterance, and therefore an exception to the hearsay rule under Maryland Rule 5-803(b)(2). However, this section applies when the declarant is available; since Sinfrey died it should be inapplicable. Assuming, arguendo, this section is applicable, it may still be inadmissible since the statement must be more than the result of, or caused by, the startling event. State v. Harrell, 348 Md. 69, 702 A.2d 723 (1997). Moreover, this exception to the hearsay rule should not cover the hearsay within hearsay (Gail's statement), and there is no applicable exception for said statement. The State may also argue that Sinfrey's statement should come in as a statement under belief of impending death pursuant to Maryland Rule 5-804(b)(2). This argument should fail since the declarant must believe that her death is imminent.

I would also have objected to the admission of Bryan Webb's statement concerning the speed of Pitt's car which should not have been admitted since the opinion of a lay witness must be "rationally based on the perception of the witness and ... helpful to a clear understanding of the witness's testimony or the determination of a fact in issue." Maryland Rule 5-701. Webb stated that he wasn't sure and there was no foundation for his belief as to the speed of the vehicle.

Finally, I would have argued that the toxicology report prepared by the University of Maryland Medical System should be excluded. Although it is an admissible business record under Maryland Rule 5-803(b)(6) the State sought to introduce it as a self-authenticating document under Maryland Rule 5-902. That Rule requires the document to be under oath, subject to the penalty of perjury. Moreover, the toxicology report itself fails to specify when it was made and by whom, thereby failing the prerequisites set forth in Rule 5-902(a)(11).

Facts Applicable to Questions III Thru V

Eric Staples was admitted to the Maryland Bar in 1999 and decided to open a solo practice in Morningside, Maryland. In order to drum up business, he placed the following advertisement in a local newspaper - "Have you been injured by those paid to heal - your doctors? If so, see me, the Medical Lawyer, and I'll ensure that you get paid." Phyllis Peay has been permanently incontinent since she underwent a surgical procedure performed by Dr. No and Dr. Strangelove. After reading Staples' ad, she went to see him for a consultation. Staples advised Peay that her case was a sure winner. He stated that he would need \$25,000 to pay for expert witnesses and similar costs, and that he would be paid one-half of any recovery. The two shook hands on the agreement and Peay paid a cash retainer of \$2,000. Staples immediately placed the retainer in his personal account.

Unsure of his ability to handle Peay's case, Staples called a friend who was admitted to practice in Maryland in 1995 and asked if he would like to be co-counsel in the case in exchange for one-half of the fee. The friend agreed to do so. Both names appear on all pleadings ultimately filed in the case.

QUESTION III

As Bar Counsel, what violations of the Maryland Rules of Professional Conduct might you file?

BOARD'S ANALYSIS

As Bar Counsel I might seek charges for the following violations:

- Rule 16-604 of the Maryland Rules requires all funds received and accepted by an attorney to be deposited in an attorney trust account in an approved financial institution. Staples would be in violation of this rule since he deposited Pea's moneys in his personal account.
- Rule 1.15 of the Rules of Professional Conduct requires an attorney to keep a client's property separate from his own. Again, Staples would be in violation of this rule for placing the retainer in his personal account.

- Rule 1.5(a) of the Maryland Rules of Professional Conduct states that a lawyer's fee must be reasonable. Some of the factors to consider in assessing the reasonableness of the fee is the lawyer's experience. Since Staples has no experience the one-half contingency and other moneys may be excessive.
- Rule 1.5(c) of the Maryland Rules of Professional Conduct mandates that a contingent fee be in writing. Staples is in violation of this rule since he "shook" on the agreement and did not reduce it to writing.
- Rule 1.5(e) of the Maryland Rules of Professional Conduct provides that any division of fee must be approved by the client. Both Staples and his friend are in violation of this rule since they did not seek Peay's consent. For the same reason, Staples and his friend have likely violated Rule 1.4 which requires a lawyer to keep his client reasonably informed about the case.
- Rule 7.1 of the Maryland Rules of Professional Conduct state that a lawyer is prohibited from making a false or misleading communication that is likely to create an unjustified expectation about results the lawyer can achieve. Staples may have violated this rule by calling himself the Medical Lawyer and by proclaiming Peay's case to be a sure winner.

Additional Facts Applicable to Question IV

Shortly after agreeing to handle the matter, Staples and friend file a medical malpractice action against Dr. No and Dr. Strangelove in the Circuit Court for Prince George's County, Maryland. Service on both doctors was accomplished by having Peay leave a copy of the complaint with the receptionist at the doctors' office, in Greenbelt, Maryland.

QUESTION IV

As counsel for Doctors No and Strangelove, what challenge might you bring to the action?

BOARD'S ANALYSIS

I would file a motion to dismiss for failure to submit to arbitration per Courts and Judicial Proceedings Code Annotated, Sections 3-2A-02 et. seq.

Additionally I would seek a dismissal for insufficiency of process under Rule 2-322 since service may not be accomplished by a party to the action (Rule 2-123) and arguably may not be accomplished by serving the receptionist at their place of employment (Rule 2-121(a)).

Additional Facts Applicable to Question V

Assume the matter was ultimately tried in the circuit court. The jury found both doctors jointly liable and awarded \$2,000,000 in damages. Doctor No's insurer paid \$1,500,000 and Dr. Strangelove's insurer paid \$500,000 in damages.

QUESTION V

How may Dr. No recover the monies paid in excess of his pro-rata share of the judgment?

BOARD'S ANALYSIS

Rule 2-614 of the Maryland Rules allows a defendant to seek contribution from his codefendant:

If in a single action a judgment is entered jointly against more than one defendant, the court upon motion may enter an appropriate judgment for one of the defendants against the another defendant if (a) the moving defendant has discharged the judgment by payment or has paid more than a pro rata share of the judgment and (b) the moving defendant has a right to contribution or to recovery over from the other defendant.

There is no requirement that a cross-claim be filed. Lerman v. Heeman, 347 Md. 439, 701 A.2d 426(1997). Accordingly, Dr. No could petition the court to have Dr. Strangelove pay his pro-rata share of the award.

Facts Applicable to Question VI

The reputed mob family, the Altos, has now taken up residency in the State of Maryland. They have continued their reign of terror over illegal gambling and other vices.

The mob boss is Tony Alto, and he has been declared Maryland public enemy #1. Your boss, the Attorney General for the State of Maryland, says that all criminal prosecution against Tony Alto has been unsuccessful. But since some of the Altos' illegal activities involve tobacco products, the Attorney General has asked you to pursue a statutory civil claim against Tony Alto for the illegal selling and receiving of tobacco products throughout the counties in Maryland. It is a high publicity case, and the only witnesses you have subpoenaed are the ones listed below. Each has been granted immunity from any criminal prosecution.

1. Carmella Alto is the estranged wife. She is more than pleased to testify about the tobacco stored in the family garage that Tony told her was taken from a truck hijack.

2. Tony's uncle, Junior Alto, is currently in the Maryland State Prison. Uncle Junior was the head of the Alto family until Tony manipulated a situation which led to the

conviction of Junior Alto. During Junior's trial, he denied involvement in the theft for which he was charged, but he was convicted of theft and perjury. Uncle Junior has personal knowledge of the highjacking of the truck full of tobacco, and there is nothing he would like to do more than to testify about Tony's involvement in the tobacco business.

3. Tony had been seeing a therapist, Dr. Melfi. During their weekly sessions, Tony confided in Dr. Melfi that his greatest source of income is derived from his tobacco business. Tony no longer sees Dr. Melfi and hasn't seen her in almost a year.

4. Slyvio Contee is Tony Alto's accountant. He is believed to be the key witness against Tony since Slyvio knows about the monies directly attributable to the illegal sale of the tobacco within the State of Maryland. Slyvio has never witnessed any illegality and he only knows about the tobacco heist because Tony Alto tells him as Tony brings the money to Slyvio to deposit.

5. Arnie Bucco is the spiritual counselor for Tony Alto. Though not an ordained minister, Arnie and Tony went through high school together and Arnie's nickname is "The Priest" because of the celibate lifestyle he has chosen to live. Arnie is a college graduate with a degree in religious studies. He is currently the director of the widows and orphans home in Elkton, Maryland, and whenever Tony needs spiritual counseling, he goes to Arnie. Arnie keeps everything Tony says in confidence.

QUESTION VI

Discuss fully any objections that may be raised to the testimony presented by these witnesses.

BOARD'S ANALYSIS

- 1. Although Carmella is Tony's estranged wife she is still subject to the provisions of Section 9-105 of the Courts and Judicial Proceedings Article which hold that one spouse is not competent to disclose any confidential communication between the spouses that occurred during their marriage. Accordingly, Tony would object to the breach of this privilege if Carmella testifies.**
- 2. Junior Alto is a convicted perjurer. His testimony should, therefore, be precluded pursuant to Section 9-104 of the Courts and Judicial Proceedings Article.**
- 3. Dr. Melfi's testimony may be precluded under Sections 9-109 or 9-109.1 of the Courts and Judicial Proceedings Article if she is a psychiatrist or psychologist or a psychiatric-mental health nursing specialist. If she is merely a "therapist" her testimony may be admissible.**
- 4. As Tony's accountant, Slyvio Contee's testimony may be protected under Section 9-110 of the Courts and Judicial Proceedings Article. Although this privilege does not extend to**

criminal cases and criminal charges, the facts indicate that this is a civil action; thus, the privilege can apply.

5. Pursuant to Section 9-111 of the Courts and Judicial Proceedings Article, “[a] minister of the gospel, clergyman, or priest of an established church of any denomination may not be compelled to testify on any matter in relation to any confession or communication made to him in confidence by a person seeking his spiritual advice or consolation.” This category is quite broad. Accordingly, Arnie Bucco’s testimony may be precluded on these grounds.

Facts Applicable to Questions VII & VIII

Get-Rich.com is the latest in the long line of dot.com businesses based in Maryland. Get-Rich.com is the brainchild of Mega Bucks, who owns the company and all of the assets in his individual name. Mega Bucks operates Get-Rich.com out of his home in Baltimore, Maryland. His home contains top of the line computer equipment with a current value of over \$50,000.

Recognizing that business was booming, Mega Bucks hired Mary Young, a recent college graduate, to assist in the business. Mary lives in Prince George’s County, Maryland, and works out of her house on her personally owned \$2,000 computer. Mary’s computer is linked to Mega Buck’s computer on the company network.

Mary worked hard for a year and all went well until December 2000. During December 2000, Mary did not receive any of the three (3) \$8,000 pay checks she was due to receive as her salary. When she contacted Mega Bucks, he said that business had taken a turn for the worse, and he intended to sell everything and relocate to California. Mary comes to you, the local attorney in Prince George’s County, Maryland, and asks you to file suit. You promptly file suit in the District Court in Prince George’s County, Maryland, for breach of contract, attorneys fees, interest and penalties.

QUESTION VII

Prior to trial, what action might you file to ensure that Mary can recover her money?

BOARD’S ANALYSIS

Mary should file an Attachment Before Judgment against Mega Bucks pursuant to Rule 2-115. The request has to be accompanied by an affidavit and said request may be made ex parte.

In order for the Attachment Before Judgment to be granted, Mary has to make sure that her complaint sets forth a prima facie case for entitlement of the attachment pursuant to Court & Judicial Proceedings § 3-302, 303 and 304.

QUESTION VIII

What jurisdictional issues might you expect Mega Buck's attorney to raise to any action filed on Mary's behalf?

BOARD'S ANALYSIS

Subject matter jurisdiction may be an issue raised by Mega Buck's attorney. Which Court, the Circuit Court or the District Court has the power to adjudicate this dispute? Three checks for \$8,000 totaling \$24,000, is less than the maximum jurisdictional limit of \$25,000 for the District Court and therefore the District Court can have jurisdiction. However, Mary asked for interest and attorneys' fees which collectively exceed the \$25,000 limit. Nevertheless, pursuant to Courts & Judicial Proceedings § 4-401(1), the District Court has original jurisdiction and also has concurrent jurisdiction with the Circuit Court pursuant to Courts & Judicial Proceedings § 4-402(c).

Personal Jurisdiction is an issue that may be raised by Mega Bucks as he perhaps claims domicile in California. However, personal jurisdiction exists over a person or business like GetRich.com if the principal place of business is the State of Maryland. Courts & Judicial Proceeding § 6-102. Also, personal jurisdiction lies under the Long Arm statute if Mega Bucks is domiciled in California but business is conducted in Maryland, or contracted in Maryland. Courts & Judicial Proceeding - § 6-103.

Finally, venue determines the proper Court in which the cause of action may be brought. Courts & Judicial Proceedings §§ 6-201 and 6-202 define permitted venue. Since Mary was conducting business on behalf of Mega Bucks and GetRich.com in Prince George's County and resided in Prince George's County, whether suit is brought in the District Court or the Circuit Court, venue in Prince George's County is appropriate.

Facts Applicable To Questions IX and X

On May 12, 1998, Lucy & Ricky rushed their 7 year old son, Little Ricky, who was suffering from an apparent asthma attack, to Mediocrity Hospital in Calvert County, Maryland. Under the care of Dr. Goode, Chief Pediatrician at Mediocrity, Little Ricky was stabilized. Dr. Goode kept Little Ricky overnight for observation, under the care of the newest resident physician at Mediocrity, Dr. Ima Novice, nephew and namesake of Ima Veteran, President & CEO of Mediocrity. Dr. Novice tended to Little Ricky during the night and prescribed medication to be administered by Nurse Nancy, who diligently followed Dr. Novice's instructions in administering the prescribed medication to Little Ricky. For no immediately apparent reason, Little Ricky expired during the night, at approximately 2:35 a.m.

At 6 a.m. Lucy & Ricky phoned Mediocrity to see what time Little Ricky would be discharged so they could bring him home. They were told by Dr. Novice that he couldn't be discharged until the afternoon because he was still awaiting test results. Figuring that they would wait with their son for the test results, Lucy & Ricky arrived at the hospital anyway at 10 a.m. Upon their arrival, Nurse Nancy rushed out and said that Little Ricky was having an unexpected seizure and that Dr. Novice was in the room attempting to stabilize him. About 15 minutes later, Dr. Novice came to the waiting area and informed Lucy & Ricky that their son had just expired from the seizure. Dr. Novice then signed the death certificate indicating that Little Ricky died at 10:15 a.m. on May 13, 1998 and certified asthma-induced seizure as the cause of death.

In February 1999, Lucy & Ricky hired Attagirl Finch who, in turn, filed a medical malpractice lawsuit on their behalf against Mediocrity Hospital and Dr. Novice in September, 2000, in the Circuit Court for Calvert County. Mediocrity Hospital and Dr. Novice hired Attorney Adam to represent them.

Additional Facts Applicable To Question IX

Finch submits Interrogatories to Attorney Adam requesting the names of all the physicians Adam expects to call at trial, the subject matter on which they are expected to testify, the substance of their opinions and a general summary of the basis of said opinions. In his Response to Interrogatories, Adam provides said names and the subject matter on which each physician is expected to speak, but states the plaintiff is not entitled to the additional information in the State of Maryland.

QUESTION IX

Is Finch entitled to the additional information requested? Why or why not? Please explain fully.

BOARD'S ANALYSIS

Maryland Rule 2-402(e)(1) provides that a party may through interrogatories discover the identity of each expert witness that another party expects to call at trial, the subject matter on which the expert is expected to testify, the substance of the findings and opinion to which the expert is expected to testify, and a summary of the grounds for each opinion. The party is also entitled to any written report made by the expert concerning those findings and opinion. If the physicians that Mediocrity Hospital intends to call are indeed expert witnesses, Finch is entitled to all of the requested information.

Additional Facts Applicable To Question X

Finch learns from the Response to Interrogatories that one of the physicians that Attorney Adam intends to call as an expert is Dr. Badd, who lives and practices medicine in Montgomery County. Finch seeks to depose Dr. Badd at Finch's Howard County office and to examine the reports and/or records on which Dr. Badd bases his opinion. Adam and Dr. Badd refused to cooperate with Finch regarding scheduling the deposition and the examination of the reports.

QUESTION X

What recourse, if any, does Finch have to enforce said deposition?

BOARD'S ANALYSIS

Finch must first have served the appropriate notice of deposition as required by Rule 2-412. Pursuant to Maryland Rule 2-413(a), a non-party Maryland resident "may be required to attend a deposition in this State only in the county in which the person resides or is employed or engaged in business, or at any other convenient place fixed by order of court." Thus, before Finch may depose Dr. Badd at Finch's Howard County office, she must seek an order of court. Of course, it is best that she resolve the conflict by speaking to Mediocrity's attorney before resorting to court action, since Rule 2-431 requires that she file a certificate describing the good faith attempts she has made to settle the discovery dispute prior to seeking a court order.