

**FEBRUARY 2008**

**OUT OF STATE ATTORNEYS' EXAM**

**QUESTION NO.1**

**(10 Points – 17 Minutes)**

Amorosa Showboat was employed as a manager with Triumph Enterprises, Inc. (“TEI”). The company managers had control over the company cash register. Edward Employer, the president of TEI noticed that since Amorosa was hired, money had been missing from the company register. Employer intentionally left \$7,000 in the register when Amorosa started her shift. After Amorosa’s shift was over he checked the register and saw that the \$7,000 was missing. Suspecting that it was Amorosa who had stolen the money, Employer called Officer Handy, a Harford County police officer.

Officer Handy agreed with Employer’s conclusion that “Amorosa was the only person who could have taken the money.” Officer Handy stopped Amorosa as she was leaving the office and handed her a citation charging her with felony theft and then arrested her. Other employees at the company overheard the commotion and watched as Amorosa was escorted into the police cruiser.

Amorosa appeared in district court for a bond review. Fifteen days later, Amorosa retained Larry Litigator as her lawyer who immediately entered his appearance and filed a request for a preliminary hearing. Larry Litigator also immediately requested a trial by jury.

- A. Discuss the basis of any pretrial motions that Larry Litigator would file in defending Amorosa on the criminal charges against her.**
- B. How should the court rule on the request for preliminary hearing?**

**BOARD’S ANALYSIS - QUESTION 1**

**A. Pre-trial charging - Criminal Procedure Title 4**

A police officer may only charge by citation for malicious destruction, disturbing the peace, disorderly conduct, or theft under \$500.00. Crim Pro 4-101. (e.g. A stole \$700 from his employer). An attorney may move to dismiss the citation at trial as this type of charging document is deficient in charging felony theft for which Amorosa was charged.

B. Preliminary hearing – Crim Pro 4-103

Defendant must request a preliminary hearing within 10 days after initial appearance. If not, his right to a preliminary hearing is waived. Defendant is only entitled to the preliminary hearing for felonies which are not within the jurisdiction of the District Court. Here, Amorosa did not file a request for preliminary hearing within 10 days of her initial appearance, so she has waived it. Also, felony theft is concurrently within the jurisdictions of the District and Circuit courts.

## **ADDITIONAL FACTS FOR QUESTIONS FOR 2 THROUGH 8**

Six months after Amorosa was arrested, she was tried in the Circuit Court for Harford County. At the criminal trial, the prosecutors called Donald, Amorosa's ex-husband to testify against her. The prosecutor proffered that Donald would testify that while they were married Donald confronted Amorosa about all the new items she had bought and she confided in him that she was making more than her salary at TEI. Larry Litigator timely objected to Donald's proffered testimony.

### **QUESTION NO. 2**

**(10 Points – 17 Minutes)**

**Under what legal basis(es) can Larry Litigator attempt to prevent Donald's proffered testimony? How will the court rule on this issue and why? Explain your answer fully.**

### **BOARD'S ANALYSIS - QUESTION 2**

The testimony regarding Amorosa's confidential communications during her marriage to Donald about the extra money is not admissible. Confidential communications during marriage are privileged under CJP § 9-105, and both parties hold that privilege. It does not matter that Donald is no longer married to Amorosa because the statements were made while they were married.

## **ADDITIONAL FACTS FOR QUESTIONS FOR 3 THROUGH 8**

The jury found Amorosa not guilty of all the charges against her. Two years after Amorosa's arrest, Larry Litigator filed a civil lawsuit at her request against Officer Handy and Harford County for malicious prosecution, false arrest and assault. Assume that one day after Amorosa was arrested, she filed a written grievance with the director of Harford County Police's Internal Affairs Division about the actions of Officer Handy.

### **QUESTION NO. 3**

**(10 Points – 22 Minutes)**

**What, if any, preliminary pretrial motions should Officer Handy and Harford County file?**

### **BOARD'S ANALYSIS - QUESTION 3**

CJP § 5-304(b) states that suit may not be brought against a local government or its employees unless notice of the claim is given within 180 days after the injury. CJP 5-304(c)(2) states that notice on Harford County must be hand-delivered or delivered by certified mail to the County Attorney. Here, there was no notice sent to the County Attorney within 180 days. Rather, the complaint was filed 2 years later and the grievance, which probably would not in any event constitute notice of a claim, was sent to the Police's Internal Affairs Division—not the County Attorney. In addition, CJP 5-105 calls for a one year statute of limitations on assault claims. Therefore, Amorosa's assault claim would have been dismissed for that reason as well as the failure to give 180 days notice.

## **ADDITIONAL FACTS FOR QUESTIONS FOR 4 THROUGH 8**

Along with her suit against the police and the county, Amorosa also requested that Larry Litigator file a separate civil lawsuit against TEI for malicious prosecution, defamation and false light. Larry Litigator and Amorosa agreed orally that as a fee for his representation of Amorosa in the civil case against TEI, Larry Litigator would be entitled to a fee of 1/3 of any judgment or settlement recovered in the case against TEI.

### **QUESTION NO. 4**

**(10 Points – 17 Minutes)**

**What, if any, preliminary dispositive motions should counsel for TEI file? Explain fully.**

### **BOARD'S ANALYSIS - QUESTION 4**

CJP 5-105 requires any suit for defamation to be filed within one year. Thus, Amorosa's claim for defamation filed 2 years after the incident will be barred. The claims for false light and malicious prosecution will not be barred as they are given a 3 year statute of limitations under CJP 5-101.

## **ADDITIONAL FACTS FOR QUESTIONS FOR 5 THROUGH 8**

At the civil trial between Amorosa and TEI, Linda, another manager of TEI, testified that she suspected that Amorosa was up to no good so she secretly placed a pen recording device in Amorosa's pocket. Linda testified that she later retrieved the device, which had recorded Amorosa stating to an unidentified person that she had been charged with theft before but now she is too smart to ever be caught by TEI. TEI's attorney also attempted to offer the tape into evidence. Amorosa's attorney timely objected to the testimony and the tape.

### **QUESTION NO. 5**

**(10 Points – 17 Minutes)**

**What grounds would Amorosa's counsel have to object to the evidence and how should the court rule as to each issue and why? Explain your answer fully.**

### **BOARD'S ANALYSIS – QUESTION 5**

CJP § 10-402 requires that both parties to a recording must consent to it in order for it to be lawful unless the recording falls within one of the enumerated exceptions not applicable here. The recording was an illegal wire tap of Amorosa's statements because it was made without her consent. Thus, the communications are inadmissible either through the tape or through testimony. CJP 10-§401, 10-§402 and 10-§405.

## **ADDITIONAL FACTS FOR QUESTIONS FOR 6 THROUGH 8**

During the civil trial, Amorosa testified that she did not need TEI's money. On cross-examination, TEI's attorney attempted to introduce into evidence a hand written note by Amorosa on the back of a discarded utility bill dated three days prior to the theft of the \$7,000 that read "I need to get some more money quick. Remember to wipe register after taking \$!" In addition, TEI's attorney tried to offer Amorosa's 15 year old Probation Before Judgment finding for the crime of theft. A timely objection was made by Amorosa's attorney as to these evidentiary matters.

### **QUESTION NO. 6**

**(20 Points – 29 Minutes)**

**How should the court rule as to each evidentiary issue and why? What factors should the court consider?**

### **BOARD'S ANALYSIS – QUESTION 6**

Pursuant to Rule 5-613, Amorosa may be impeached by the prior recorded statement, but the note may not be offered into evidence unless she denies its existence. Any witness can be cross-examined regarding their prior bad acts which bear on their credibility pursuant to Rule 5-608(b). *See Ogburn v. State*, 71 Md. App. 496, 526 A.2d 614, cert. denied, 311 Md. 145, 532 A.2d 1372 (1987). Rule 5-608(b) represents an exception to the general prohibition embodied in Rule 5-404 against using evidence of character to show propensity. *See P. W. Grimm, Impeachment and Rehabilitation Under the Maryland Rules of Evidence: An Attorney's Guide*, 24 U. Balt. L. Rev. 95, 117 (1994). Rule 5-608(b), by its plain language, permits any witness to be cross-examined about his or her prior acts not evidenced by a criminal conviction (including a probation before judgment) that are probative of untruthfulness. *See Md. Rule 5-608(b); see also A. D. Hornstein, The New Maryland Rules of Evidence: Survey, Analysis and Critique*, 54 Md. L. Rev. 1032, 1057-58 (1995). Upon objection, however, the proponent of the inquiry must establish a "reasonable factual basis" that the alleged conduct occurred. Even evidence that falls within the guidelines of 5-608(b) may be excluded pursuant to Rule 5-403 if it is over 15 years old or its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

## **ADDITIONAL FACTS FOR QUESTIONS FOR 7 THROUGH 8**

While the jury in the TEI matter was deliberating, Amorosa and TEI, through their counsel agreed to settle the matter for \$75,000. The attorneys had their respective clients execute a written settlement agreement. A day later, after talking with a friend from North Carolina who advised Amorosa that she could get more money, Amorosa informed Larry Litigator that she did not want to go through with the deal. After Larry informed her that it was too late to withdraw on the agreement, Amorosa fired Larry Lawyer and retained Dim Whitty to represent her. During the hearing in the Circuit Court on TEI's motion to enforce the settlement, Amorosa testified that her previous lawyer never told her about a settlement and that she had never seen the settlement agreement before and had not signed it. Larry Litigator is present in the courtroom during Amorosa's testimony.

### **QUESTION NO. 7**

**(10 Points – 22 Minutes)**

**What is the basis of any action Larry should take in response to Amorosa's testimony? Explain your answer fully.**

### **BOARD'S ANALYSIS – QUESTION 7**

Pursuant to Maryland Rules of Professional Conduct 3.3, Larry Lawyer is obligated to inform the Court that the settlement agreement he negotiated was in fact executed by Amorosa notwithstanding MRPC 1.6. He is required to inform the court in an *ex parte* proceeding that he is aware that Amorosa actually executed the settlement agreement, contrary to her testimony in court.



## **ADDITIONAL FACTS FOR QUESTION 8**

After terminating Larry's services, Amorosa refused to reimburse him for certain costs related to her criminal case. Amorosa requested that Larry turn over both her criminal and civil case files to her new counsel for use in her ongoing suits against TEI, Harford County and Officer Handy. Assume that the Circuit Court grants TEI's motion to enforce the settlement. Larry fears that Amorosa may refuse to pay him his fees and expenses from the \$75,000 settlement.

### **QUESTION NO. 8**

**(20 Points – 29 Minutes)**

- A. Is Larry obligated to turn over his files?**
- B. What steps can Larry take to assure payment of his fees and costs and what is his likelihood of success of recovery?**

**Explain your answers fully.**

### **BOARD'S ANALYSIS – QUESTION 8**

Under Rule 2-652(a) Larry Lawyer may assert a retaining lien for legal services rendered to Amorosa by retaining the file until his claim for fees is satisfied. This common law lien is only available so long as the lawyer has the file. If, however, there are documents that are time sensitive and critical to Amorosa's continued litigation in Larry's possession, then he must make arrangements to provide her with copies of those critical documents.

Under Rule 2-652(b) Larry Lawyer may assert his statutory lien for fees by serving notice upon Amorosa and then filing a motion pursuant to Rule 2-652(c). However, Larry is prohibited here from getting a contingency fee from Amorosa because he failed to comply with Maryland Rules of Professional Conduct 1.5(c) in that his contingency arrangement with Amorosa was not in writing as required. He would only be entitled to a *quantum meruit* claim for fees.