

JULY 2011

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

**PRELIMINARY FACTS APPLICABLE TO
QUESTIONS 1 THROUGH 5**

Just after 11:30 p.m. on Halloween night, Chad was robbed at knifepoint while tending bar in downtown Frederick, Maryland. Chad suffered a minor injury when the assailant, who had stolen \$600 in cash, attempted to shove Chad down behind the bar before fleeing the scene, and the knife grazed Chad's midsection. Chad maintained his footing and observed the assailant drive away in a small, white car. Chad immediately reported this incident and the description of the car to the police. While the assailant was wearing a Halloween mask, Chad reported that light blonde hair was visible around the edges of the mask.

Early the next morning, Officer Kris of the Frederick City Police observed a small, white car driving in downtown Frederick. Officer Kris was unable to see through the tinted driver's side window, so he conducted a traffic stop because he felt this car might have been the vehicle which drove away from the scene of the earlier robbery. During the course of the stop, Officer Kris noticed that the driver, who identified himself as Dan, had light blonde hair. In addition, Officer Kris noticed a large amount of cash in Dan's wallet while he was in the course of retrieving his identification, and a Halloween mask lying on the passenger seat. When asked about the cash and the mask, Dan replied that he had just been paid by his employer and had attended a Halloween party that evening. Officer Kris placed Dan under arrest and charged him with robbery with a deadly weapon, first and second degree assault, and carrying a weapon openly and with the intent to injure.

Upon his search of Dan's car incident to the arrest, Officer Kris located a knife in the glove compartment. The cash in Dan's wallet totaled \$580.

Dan appeared the next morning in the District Court of Maryland for Frederick County for a bond review. Two days later, Dan hired Alex as his attorney. Attorney Alex immediately entered his appearance and filed a request for a preliminary hearing and a jury trial demand.

QUESTION 1

(10 Points – 18 Minutes)

Discuss the basis of any pretrial motions that Attorney Alex should file on Dan's behalf and the timeframe for filing said motions. (Five Points)

BOARD'S ANALYSIS – QUESTION 1

The validity of the traffic stop should be challenged per Maryland Rule 4-252(a)(3) mandatory motion (unlawful search and seizure), based upon Officer Kris lacking specific probable cause to stop the vehicle, as stopping all small, white cars would arguably be impermissibly broad. The stop, however, would pass constitutional muster under established Maryland law. *See Michaels v. State*, 234 A.2d 772, 2 Md. App. 424 (1967), *cert. denied*, 244 Md. 732 (1968).

Said motion must be filed within 30 days of the earlier of Attorney Alex's entry of appearance or Dan's first appearance in circuit court. (Md. Rule 4-252(b)).

How should the court rule on the request for a preliminary hearing? (Five Points)

Under Maryland Rule 4-221(a), Dan is entitled to a preliminary hearing upon timely request. The court has no discretion to deny this request.

QUESTION 2

(10 Points – 18 Minutes)

Following the denial of any pre-trial motions filed by Attorney Alex and the satisfactory completion of all pre-trial procedures and requirements, trial properly commenced in the Circuit Court for Frederick County. The State sought to introduce the testimony of Megan, Dan's ex-wife, and proffered upon Attorney Alex's objection that her testimony would show that while they were still married, Dan had told Megan of his plan to rob the bar on a busy night when he believed there would be a large amount of cash on hand, and that Halloween would be ideal because walking around in a mask, and even carrying a knife, would not arouse suspicion. The State's Attorney also proffered that no one else was present when this conversation took place between Dan and Megan.

On what basis(es) should Attorney Alex argue for the exclusion of this testimony? (Five Points)

BOARD'S ANALYSIS-QUESTION 2

Attorney Alex should argue for the exclusion of the testimony based upon the spousal privilege contained in Section 9-105 of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland. Md. Code Ann., Cts. & Jud. Proc. § 9-105 (2002).

How should the court rule? (Five Points)

Attorney Alex can demonstrate that Dan and Megan were married at the time of the conversation, that the statement was made to Megan within the confidential bounds of that marriage, with no one else present, and with the expectation that it would go no further than the two spouses having the conversation; therefore, the court should properly exclude any of Megan's testimony related to marital conversations with Dan, as Megan is not considered competent to testify in this regard. *Matthews v. State*, 89 Md. App. 488 (1991).

QUESTION 3

(5 Points – 9 Minutes)

The State called Tony, who hosted a Halloween party Dan had attended on the evening in question. The following colloquy occurred:

The State: Were you interviewed by Officer Kris about any money you received from Dan on the night of the party?

Tony: Yeah, we talked about the party, but he didn't ask about any money.

The State: You didn't tell Officer Kris that Dan had given you twenty dollars to help pay for the costs of the party?

Atty Alex: Objection, your Honor, the State is impeaching its own witness.

The Court: Overruled.

Tony: I never said anything like that.

The State: And you never told Officer Kris that Dan told you immediately after he arrived at the party that he was very nervous and needed a drink in order to calm down?

Atty Alex: Same objection, your Honor.

The State proffered that Officer Kris would testify that Tony made such a statement. Once again, the court overruled the objection.

Were the court's rulings on Attorney Alex's objections correct? Explain your answer.

BOARD'S ANALYSIS-QUESTION 3

Pursuant to Maryland Rule 5-607, the credibility of a witness may be attacked by any party, including the party calling the witness. Md. Rule 5-607. In addition, a witness may be asked about prior statements provided that the statement at issue is disclosed and the witness is given an opportunity to explain or deny the statement in question. Md. Rule 5-613.

QUESTION 4

(10 Points – 18 Minutes)

Dan's sole witness was Jay. Jay testified that Dan had been with him the entire evening in question at various bars in Frederick, and then at Tony's Halloween party. On cross-examination, and based upon a search of appropriate public records, the State asked Jay whether he had been convicted of malicious destruction of property in July 2009, whether he had been convicted of possession with intent to distribute marijuana in August 2004, and, assuming he had been convicted in both instances, whether he had been represented by counsel in each proceeding. Attorney Alex objected on relevance and foundation grounds and the State proffered that Jay had pleaded *nolo contendere* to malicious destruction of property, a misdemeanor, in 2009, and was convicted following a bench trial of possession with intent to distribute marijuana, a felony, in 2004.

How should the court rule on Alex's objection? Explain your answer.

BOARD'S ANALYSIS-QUESTION 4

This issue is governed by Maryland Rule 5-509. Both convictions are within the fifteen-year time limit established by the Rule for admission on credibility grounds. Md. Rule 5-509(b).

Malicious destruction of property is neither an "infamous" crime nor "relevant to the witness's credibility." Md. Rule 5-609(a). As a result, evidence of this conviction would be inadmissible.

Possession with intent to distribute has been held by the Court of Appeals to be an "infamous" crime, and, therefore, admission of evidence of this conviction is properly admissible as it bears on Jay's credibility. *State v. Woodland*, 357 Md. 519 (1995).

QUESTION 5

(10 Points-18 Minutes)

Dan was found guilty of robbery with a deadly weapon and second degree assault and sentenced to six years' incarceration.

What options does Dan possess to either overturn his conviction or reduce his

BOARD'S ANALYSIS-QUESTION 5

Dan may file a motion for a new trial within ten days of the verdict. Md. Rule 4-331(a). Dan may also file for the judgment to be set aside as unjust or improper within ninety days of the date of sentencing. Md. Rule 4-331(b).

Dan may file for a review (three-judge panel) of the sentence within thirty days of the date of imposition of sentence. Md. Rule 4-344. He may also file for a modification of sentence within ninety days of the imposition of sentence. Md. Rule 4-345.

Dan may also file an appeal to the Court of Special Appeals within thirty days of the imposition of sentence. Md. Code Ann., Cts. & Jud. Proc. 12-301 (2002); Md. Rule 8-202(a); *Miller v. State*, 1 Md. App. 653, 232 A.2d 548 (1967); *Stewart v. State*, 282 Md. 557, 386 A.2d 1206 (1978); *Jones v. State*, 298 Md. 634, 471 A.2d 1055 (1983); *Ridgeway v. State*, 140 Md. App. 49, 779 A.2d 1031 (2001). In the event that a motion for new trial is filed pursuant to Maryland Rule 4-331(a), the notice of appeal must be filed within thirty days after the later of the imposition of sentence or entry of a notice withdrawing the motion for new trial, or an order denying the motion. Md. Rule 8-202(b).

PRELIMINARY FACTS APPLICABLE TO QUESTIONS 6 THROUGH 10

During the course of the investigation into the robbery, it was revealed that Dan had borrowed the knife used in the robbery from Sean, a friend of his who owns a cutlery store in neighboring Washington County, Maryland. Following Dan's incarceration, Chad filed suit seeking \$100,000 in damages against Sean for, among other things, negligent entrustment of the knife in question. Sean lives in Frederick County, Maryland and Chad lives in Montgomery County, Maryland.

QUESTION 6

(15 Points – 27 Minutes)

A. In what county(ies) and which court(s) may Chad file his Complaint against Sean? (Five Points)

BOARD'S ANALYSIS QUESTION 6

Venue would be proper in Frederick County, as Sean lives there. Md. Code Ann., Cts. & Jud. Proc. §§ 6-201 (2002). Venue would also be proper in Washington County, as Sean carries on regular business there. Md. Code Ann. Cts. & Jud. Proc. §6-201(a)(2002). The amount in question places the matter squarely within the jurisdiction of the circuit court. Md. Code Ann. Cts. & Jud. Proc. §§ 1-501, 4-401(2002).

Chad filed both a Complaint and a Motion for Summary Judgment in the court of proper jurisdiction and venue, and his Motion for Summary Judgment was supported by affidavits which provided a proper factual basis for recovery under a theory of negligent entrustment. The Complaint, Summons, and Motion for Summary Judgment were all served on Sean in a proper and timely fashion.

B. Within what timeframe must Sean respond to the Complaint and the Motion for Summary Judgment? (Five Points)

An answer to the complaint and a response to the motion must be filed within thirty days of service on Sean. Md. Rule 2-311(b).

C. Is it possible for Sean to avoid the entry of summary judgment against him by exclusively contesting the legal basis of the case against him in his response to the Motion? Explain fully. (Five Points)

Yes.

A response to a motion which is based upon facts not contained in the record must be supported by affidavit(s). Md. Rule 2-311(d). In order to demonstrate the existence of a material fact in contravention of the affidavits supporting Chad's Motion for Summary Judgment, Sean will need counter-affidavits in support of his response; otherwise the only facts in the record will be those in support of Chad's Motion, making summary judgment in his favor much more likely. Ordinarily, an argument based exclusively on the law would properly be submitted as a motion to dismiss pursuant to Maryland Rule 2-322(b) (failure to state a claim upon which relief can be granted), which proceeds under the assumption that even if the facts as alleged in the complaint are true, the plaintiff simply is not entitled to relief under the law.

North American Specialty Insurance Co. v. Boston Medical Group, 170 Md. App. 128 (2006). However, in the event that the facts provide a basis for recovery but the applicable law does not, this should be raised in the response to the Motion in order to avoid the entry of summary judgment against Sean.

QUESTION 7

(10 Points – 18 Minutes)

Summary judgment was denied and discovery commenced. Chad served thirty-five interrogatories on Sean. Sean did not answer the interrogatories within thirty days.

A. What should Chad do in order to secure an answer to the interrogatories? (Five Points)

BOARD'S ANALYSIS QUESTIONS 7

Chad could file for a motion to compel discovery pursuant to Maryland Rule 2-432(b)(1)(D) in order to attempt to secure an answer to the interrogatories, or, pursuant to Maryland Rule 2-432(a)(b) he could move immediately for sanctions under Maryland Rule 2-433. Md. Rules 2-432, 433. A certification of a good-faith effort to resolve the dispute must be included in any such filing. Md. Rule 2-431.

b. How could Sean defend against any such efforts to compel an answer? (Five Points)

Sean could defend his failure to answer under the auspices of Maryland Rule 2-421, which limits the number of interrogatories to thirty per party, and could file for a protective order (instead of filing answers to the interrogatories) seeking to limit the number of interrogatories based upon the undue burden standard of Maryland Rule 2-403(a). Md. Rules 2-403(a), 2-421. Another permissible response would be to answer the first thirty interrogatories.

QUESTION 8

(5 Points – 9 Minutes)

During discovery Dan and Attorney Alex discussed the fact that Attorney Alex's name was listed on Sean's witness list. Dan reminded Attorney Alex that he had not and would not waive the attorney/client privilege. The matter proceeds to a jury trial and Chad calls Attorney Alex as a witness and inquires as to the substance of his conversations with Dan relating to the knife used in the robbery. Sean objects and asserts that Dan's conversations with Attorney Alex are privileged.

How should the Court rule and why?

BOARDS' ANALYSIS QUESTION 8

Dan's conversations with Attorney Alex are privileged under the auspices of Section 9-108 of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland. Md. Code Ann. Cts & Jud. Proc. S 9-108 (2002).

QUESTION 9

(10 Points – 18 Minutes)

At the conclusion of the trial, Sean makes a motion for judgment, which is denied. The jury finds in favor of Chad and awards him \$1000 in damages.

A. What motion(s) can Sean file in an effort to overturn this result and in what timeframe must said motion(s) be filed? (Five Points)

BOARD'S ANALYSIS QUESTION 9

Sean can file a motion for judgment notwithstanding the verdict (JNOV) pursuant to Maryland Rule 2-532 within ten days of the date of the verdict, a motion for a new trial pursuant to Maryland Rule 2-533 within ten days of the entry of judgment, or a motion to amend or alter the judgment pursuant to Maryland Rule 2-534 within ten days of the entry of judgment. Md. Rules 2-532, 533, 534.

B. Are there any restrictions on Sean's ability to make such motions? (Five Points)

The Motion for JNOV may only be made if Sean made a motion for judgment at the close of all the evidence in the trial. Md. Rule 2-532. There are no such restrictions on the motion for a new trial or the motion to amend or alter the judgment.

QUESTION 10

(15 Points – 27 Minutes)

The \$1000 jury verdict stands. Chad's attorney, pursuant to their verbal agreement for a three-quarters contingency fee, keeps \$750. Chad is very frustrated by this result, particularly since his attorney guaranteed him a recovery of at least \$5,000, marketed his services as a "civil jury trial expert", and told Chad that he was "the best lawyer west of the Chesapeake."

A. What potential professional conduct complaints might Chad raise with the Attorney Grievance Commission? Explain fully. (Ten Points)

BOARD'S ANALYSIS QUESTION 10

Contingency fee agreements must be in writing. M.R.P.C. 1.5(c) (all references to the M.R.P.C. are found under Maryland Rule 16-812).

A “three-quarters to the attorney” contingency fee is prima facie excessive and unethical. M.R.P.C. 1.5(a); *Attorney Grievance Commission of Maryland v. Korotki*, 318 Md. 646 (1990).

Maryland attorneys are not permitted to make any guarantees with respect to outcomes, nor are they permitted to advertise as specialists or compare their services to other attorneys’ services, unless such comparisons can be factually verified. M.R.P.C. 7.1(b) and (c), 7.4. There is no way to verify the statement that someone is “the best lawyer west of the Chesapeake.”

b.Chad’s attorney feels that Chad’s complaints against him are baseless. Is the attorney obligated to respond to a related inquiry from the Attorney Grievance Commission? (Five Points)

BOARD'S ANALYSIS QUESTION 10

An attorney is absolutely obligated to respond. M.R.P.C. 8.1(b).