

MARYLAND STATE BOARD OF LAW EXAMINERS
July 2013 Out of State Attorneys' Exam Questions and Board Analysis

FACTS FOR QUESTIONS 1 THROUGH 4

On March 15, 2012, Officers Abe and Barry, of the Police Department for Montgomery County, Maryland, observed a man obstructing traffic by stepping into the street and aggressively asking motorists for money. The Officers approached the man and asked for identification. The man said his name was John Jones and attempted to swing at Officer Abe's face. At this point, the Officers properly and lawfully arrested John. The Officers escorted John and placed him into the back of their squad car.

Several minutes into the transport, John started to scream that he had been stung. He then said that he needed help as he was allergic to bee stings. Officer Abe looked at John in the rear view mirror, smirked at his partner officer Barry, and stated that John looked fine to him. John started screaming and said that he could feel his arm swelling and that the handcuffs were getting tight. Officer Barry asked if he wanted medical assistance. John said, "Yes, take me to a hospital now!" Abe told him they would get him help at the station. John groaned loudly, and then, he became quiet.

Both Officers, were trained in first aid by the Police Department to be able to respond properly to an injured party, but an officer was not permitted to provide any medication. An officer had a duty to call an ambulance, if the officer determined that one was needed.

At the police station, Officer Abe opened the door to extricate John from the car. John was slumped over. The Officers observed that John's face and arm were swollen and he did not seem to be breathing. Officer Barry ran into the station for help and 911 was called. An ambulance transported John to Montgomery Memorial Hospital. John was seriously ill and he sustained permanent injuries as a result of the bee sting. He was hospitalized until November 12, 2012, and did not make any formal complaints about his injuries.

On December 15, 2012, John contacts you a member of the Maryland Bar and asks you to file suit against those responsible for his injuries and damages in the amount of \$175,000. You enter into a proper engagement agreement with John Jones.

QUESTION 1

(10 Points – 18 Minutes)

What causes of action does John have under the Facts, and against whom? Are there any procedural steps John must take to preserve any of his claims?

Board Analysis - John may maintain actions in tort for negligence and gross negligence against Officers Abe and Barry for failing to transport John to the police station safely and for failing to call an ambulance and provide medical attention upon John sustaining the bee sting. Officers Abe and Barry were negligent in their duty to care for John as required by the training protocol. Their inaction was the proximate cause of the injuries sustained by John. John sustained injuries and significant damages in the aggregate amount of \$175,000 from their failure to fulfill their duty. In addition, John may maintain an action for gross negligence if he can prove that the Officers acted with malice. Since Officers Barry and Abe are employees for the Police Department of Montgomery County, Maryland, John should file his actions against Officers Barry and Abe, individually, and make a claim against Montgomery County, Maryland and the Officers, as employees, under the Local Government Tort Claims Act, Md. Code Ann., Cts. & Jud. Proc. Art., Sections 5-301, et seq. (2013 Repl. Vol.)("LGTCA"). All future references to the Courts and Judicial Proceedings Article will be "CJP". To make a claim under the LGTCA, John must give notice of the claim to the County Executive of Montgomery County, Maryland within 180 days after the injury in accordance with the procedures set forth in Section 5-304 of CJP.

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QUESTION 2

(5 Points – 9 Minutes)

In what Maryland court would you file your action?

Board Analysis - The Circuit Court for Montgomery County, Maryland is the court of proper jurisdiction to hear the case since the amount in controversy is in excess of \$30,000. CJP Section 4-402(d)(1)(i).

QUESTION 3

(5 Points – 9 Minutes)

How would you obtain service of process on the defendant(s)?

Board Analysis - Service of process on the individual Officers should be made in accordance with Md. Rule 2-123(a), and service of process on Montgomery County, Maryland should be made in accordance with Md. Rule 2-124(1). In this case, it is the County Executive.

QUESTION 4

(15 Points – 27 Minutes)

What statutory defense(s) may the defendant(s) raise? Explain the grounds.

Board Analysis - Notice of the claim against the Officers and Montgomery County, Maryland must be given by John in accordance with Section 5-304 of CJP, and compliance with the notice requirement is a condition precedent to maintaining an action directly against a local government's employees acting within the scope of their employment and the local government. Since the County did not receive notice of the claim, Montgomery County will raise the defense of governmental immunity, and seek a dismissal of any complaint filed. John has an affirmative obligation to properly plead as a condition precedent compliance with the notice requirement. Md. Rules 2-303(b) and 2-304(b). Failure to give proper notice under LGTCA may be fatal to the case against the County. He may overcome the motion to dismiss if he can show that his failure to satisfy the notice requirement and diligently prosecute his claim was for good cause. It is within the court's discretion to waive the notice requirement. Section 5-304 of CJP. However, the court must refrain from allowing a waiver of the notice requirement if the count is able to show that its defense has been prejudiced. Hansen v. City of Laurel, Maryland, 420 Md. 670 25 A.3rd 122 (2011).

With respect to the individual claims against the Officers, the Officers will plead the defense of public official immunity. Bradshaw v. Prince George's County, Maryland et al., 284 Md. 294, 396 A.2d 255 (1979). However, if John is able to prove at trial that the Officer(s) intentionally acted with actual malice, then such Officer(s) would be individually liable for the damages sustained by John. LGTCA Section 5-302(b)(2)(i). Leake et al. v. Johnson, Jr. et al. 204 Md. App. 387, 40 A3rd 1127 (2012) Houghton v. Forrest, 412 Md. 578, 989 A. 2d 223 (2010).

ADDITIONAL FACTS FOR QUESTION 5

Joe Black, a member of the Maryland Bar for more than 20 years, concentrates his practice in litigation involving police officers, and he has agreed to represent jointly Officers Abe and Barry in any

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matter arising from the bee sting injury to John Jones. They each agree to pay him an hourly fee of \$400 for the time he spends on their matter. They each deliver to him a retainer of \$3,200. Mr. Black tells Officers Abe and Barry that the retainers are not refundable.

Prior to the taking of any depositions, Officer Abe tells Joe Black that Officer Barry turned around and told John to stop complaining. At that time, Officer Barry commented that John was slumped over and he hoped that the jerk would get what he deserved. Joe Black makes a note in his file for future use. He does not question Officer Barry about those facts until they are raised by the plaintiff's counsel during Officer Abe's deposition.

Shortly thereafter, Officer Barry complained to Joe Black that he "threw him under the bus" during the deposition, and fired him. He demanded a return of the retainer. Joe Black refuses to return the remaining balance of the retainer. Officer Barry contacts Bar Counsel to complain about Joe Black's conduct and failure to return the retainer.

QUESTION 5
(10 Points – 18 Minutes)

As Bar Counsel, provide your evaluation of the professional conduct of Joe Black under the facts presented. Support your evaluation with references to any violations of the Maryland Lawyers' Rules of Professional Conduct ("MRPC")

Board Analysis - Joe Black was an experienced Maryland attorney, and should have recognized that a conflict of interest, as defined by MRPC 1.7 (a) and (b), arises when undertaking to represent jointly the Officers either because the representation of one of the Officers will be directly adverse to the other or because there is a significant risk that the representation of one of the Officers would be materially limited by the lawyer's responsibilities to the other Officer. Based on the facts, it was possible that one of the Officers may reveal facts intended to be given in confidence to Joe Black that could be used to the disadvantage of the other Officer. Joe Black neither explained these risks nor did he suggest any alternatives to the representation as required under Rule 1.7 (b) (4) and obtain from his clients written informed consent. In light of the existence of the conflict of interest, it is doubtful that Joe Black was able to comply with Rules 1.1 (Competence), 1.2 (Scope of Representation), 1.3 (Diligence), Rule 1.4 (Communication) and rule 1.6 (Confidentiality and Information).

With regard to the fee arrangements with the Officers, Rule 1.5 permits Joe Black to charge a reasonable fee for legal services he performs for his clients. The factors set forth in rule 1.5 should be considered in determining whether Mr. Black's fee is reasonable.

However, the position of Mr. Black that the retainer is non-refundable is not correct. Pursuant to Rule 1.15(c), Mr. Black must hold the two retainers in accordance with Title 16 Chapter 600 of the Maryland Rules unless the Officers give informed consent, in writing, to a different arrangement. Since written informed consent was not procured from the Officers by Joe Black, he must deposit all fees paid in advance by the Officers into a client trust account, and he may withdraw those funds for his benefit only as the fees are earned or expenses paid.

FACTS FOR QUESTIONS 6 THROUGH 9

In December of 2012, Wendy was licensed to practice law in the State of Maryland. She opened her own law office as a sole practitioner on January 2, 2013. She immediately advertised for clients in

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newspapers in general circulation across the State of Maryland. Her advertisements provide, "Call Wendy to handle Any Lawsuit I win, and I will charge you less for my services than any other lawyer."

After reading one of Wendy's advertisements, Mr. May contacted Wendy after he received a citation properly served on him by an Animal Control Officer employed by Howard County, Maryland. The citation was for his dog running at large and having unwanted contact. Mr. May was furious because the citation was accompanied by an affidavit written by his unfriendly neighbor. When served, Mr. May asked Officer Barker if he saw the incident that is referenced. The Officer responded "No, sir. You are being cited based on the Affidavit of the complaining witness received by my Department."

Wendy met with Mr. May on February 12, 2013, to represent him at the trial on the citation set for June 28, 2013. They agreed that she would charge him for services at the hourly rate of \$600. He provided a retainer of \$2,400 cash. Later that day, Wendy delivered \$2,000 cash to her landlord for her overdue rent, and she deposited the rest of the retainer into her general operating account.

Despite several telephone calls from Mr. May prior to the trial date, Wendy did not speak with him until the morning of trial. Mr. May told Wendy that she owes him \$1,900 because John Smith, another Maryland lawyer, only charges a fixed fee of \$500 for similar cases. In addition, Mr. May complained that she did not return his calls. The trial commenced in District Court for Howard County, Maryland. The Officer was not present. The complaining witness was the only available witness.

Assume, for the purpose of this question only, the following ordinance is in effect for Howard County, Maryland, which is a charter county:

"1. It shall be a public nuisance and a civil offense in Howard County, Maryland, for a dog to be permitted to run at large unless the dog is controlled by leash or similar restraining device.

2. It shall be a public nuisance and a civil offense in Howard County, Maryland, for a dog to have unwanted contact...

...the above violations are deemed civil offenses and each violation is subject to a fine of no more than \$500."

At the conclusion of the trial, Mr. May was found guilty. He wants to appeal so he can have a trial by jury and he wants to file a complaint with Bar Counsel regarding Wendy's conduct.

After trial, Mr. May filed a complaint with Bar Counsel regarding Wendy's conduct.

Based solely on the above facts:

QUESTION 6
(5 Points – 9 Minutes)

Should the District Court trial have proceeded without Officer Barker Present?

Board Analysis - The complaining witness has the right to testify only as to his or her personal knowledge. An affidavit also is based on personal knowledge as described in Md. Rule 1-304. Under these facts, the officer does not possess personal knowledge, but the citation was issued based on the affidavit of the complaining witness. Therefore, the trial should proceed with the testimony of the

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complaining witness as to the facts, based on the witness' personal knowledge, supporting the issuance of the citation.

QUESTION 7
(5 Points – 9 Minutes)

Is Mr. May entitled to request a jury trial?

Board Analysis - Under Section 4-401(10)(iv) of CJP, the District Court has exclusive original civil jurisdiction of this matter, and under Section 4-402(e)(1) of CJP, Mr. May is not entitled to demand a jury trial. Under the statute, the maximum fine for each citation is \$500 and there is no criminal penalty imposed. To obtain a jury trial, the amount in controversy must exceed \$15,000. The amount in controversy in this matter is \$500.

QUESTION 8
(10 Points – 18 Minutes)

What procedure should Mr. May follow to preserve his right to appeal? To what court must Mr. May appeal? What is the standard of review on appeal?

Board Analysis - Since the citation is a municipal infraction of Howard County, Maryland, Mr. May has the right to file a notice of appeal with the clerk of the District Court for Howard County, Maryland within 30 days after entry of the judgment in the District Court. Section 12-401 (e)(1) and Md. Rules 7-103 and 7-104. Appellate review will occur in the Circuit Court for Howard County, Maryland, and the Circuit Court will hear the case de novo under Section 12-401 (f) of CJP.

QUESTION 9
(20 Points – 36 Minutes)

You are Assistant Bar Counsel, and Bar Counsel asked you to prepare a brief listing of Wendy's violations of the Maryland Lawyers' Rules of Professional Conduct ("MRPC") and the factual bases in support of each violation for his review and consideration. What violations would you cite and what factual bases would you state in support of those violations?

The following is a list of the Maryland Lawyers' Rules of Professional Conduct ("Rules or "Rule", as the case may be) violated by Wendy and the factual bases supporting the violations:

Rule 7.1(a) through (c) Communication Concerning a Lawyer's services; Wendy made false or misleading communication about her services in her advertisement. She creates an unjustified expectation of the outcome of her services by stating that she will win. Finally, she compares her fees with the fees of other lawyers which she certainly cannot substantiate.

Rule 7.2 Advertising; Wendy must comply with the specific requirements of this rule in advertising her service in the newspaper. Her advertisement does not say that she is the lawyer responsible for its content.

Rule 1.5(a) Fees; Wendy's hourly rate is unreasonably high for the citation case, since she is a newly licensed lawyer and she does not have extensive experience.

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Rule 1.15 (c) Safekeeping Property; Wendy used client funds for her own benefit when she used Mr. May's cash to pay her rent before she performed any services for Mr. May. She is required to deposit all unearned fees into an attorney trust account, including the remaining cash which Mr. May gave to Wendy as part of the retainer. See also, Chapter 600 of the Md. Rules.

Rule 1.1 Competence; Wendy did not exercise the thoroughness and preparation reasonably necessary for the representation.

Rule 1.3 Diligence; Wendy did not act with reasonable diligence when she failed to timely respond to the calls of her client and otherwise prepare her case.

Rule 1.4 Communication; Wendy did not communicate with Mr. May prior to trial and/or return his phone calls. It was necessary that she explain the trial process to Mr. May.

Rule 8.4 (a) through (d) Misconduct; As a result of Wendy's violation of the Rules, she committed professional misconduct.

Md. Rule 16-604 Trust Accounts; Wendy was required to deposit the cash given to her by Mr. May for the retainer into an attorney trust account in an approved financial institution.

FACTS FOR QUESTION 10

Randy has been incarcerated since January 11, 1996. His sentencing occurred after Randy was tried and convicted by a jury of first degree rape, attempted robbery with a dangerous weapon and burglary. Randy was represented by John Lawyer, a member of the Maryland Bar. The rape victim, Ms. X worked as a caretaker for the elderly. Based on evidence presented, it became clear that Randy was the serial rapist that had been terrorizing an elderly community in Frederick County, Maryland. A week after conviction, but before sentencing, Randy agreed to plead guilty, on the record after a waiver of a jury trial, to three additional rapes with facts similar to those of Ms. X. Randy was represented by John Lawyer. The terms of the plea agreement were that (i) Randy would waive any appellate relief in the case where Ms. X was the victim, (ii) Randy would receive no more than two consecutive life sentences, and (iii) the state would not prosecute Randy for other crimes that had occurred at the same time frame and in the same community. The Judge accepted and approved the plea agreement.

On February 15, 1996, Randy appeared before the same Judge, who sentenced Randy to the two consecutive life terms and concurrent terms of life plus 100 years. Randy, after being advised of all of his rights, including appellate rights, chose not to appeal the sentence.

On March 22, 2013, Randy filed a petition for post-conviction relief alleging ineffective assistance of counsel.

QUESTION 10

(15 Points – 27 Minutes)

Based on the facts, what is the basis for Randy's allegation of ineffective assistance of counsel, and what argument in response do you expect to be made by the State?

Board Analysis - Randy will argue that he was denied the effective assistance of counsel because his counsel failed to object when he was sentenced to a term of years in excess of the sentences contained in his plea agreement that had been accepted and approved by the Judge. Md. Rule 4-423(c)(4).

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The State will argue to dismiss the post-conviction petition because the time for filing the petition has expired as set forth under Section 7-1039b)(1) of the Criminal Procedure Article. Randy was required to file the petition within 10 years after the date that the sentence was imposed, unless he can prove that he was unable to file timely due to an extraordinary cause. The State will argue that Randy has not shown and is unable to show that any extraordinary cause exists for his failure to file timely the petition. Also, the State will argue that Randy received effective assistance of counsel because Randy was advised of his rights prior to his agreement to plead guilty and prior to his decision not to appeal the sentence that was in excess of the sentence set forth in the plea agreement.

ADDITIONAL FACTS

Assume Randy was successful on his petition for post-conviction relief, and as a result, he was granted a new trial. While incarcerated awaiting the new trial, Randy's priest, Father Ben, came to visit him for the purpose of providing him with spiritual guidance, hearing confession and prayer. Randy confided to father Ben that his post-conviction proceedings were all just a ruse so that he could get out of jail, and that he enjoyed every one of his rapes. At the new trial, the State calls Father Ben to testify about his conversations with Randy. Defense counsel objects.

How should the Court rule? Explain your reasons.

Board Analysis - Father Ben may not be compelled to testify under Md. Rule 5-101(d) as all lawful privileges shall be respected by the Court. In Section 9-111 of CJP, the clergy person, including a priest, is granted the privilege against being compelled to testify on any matter in relation to any confession or communication made to that clergy in confidence by a person seeking spiritual guidance, Father Ben cannot be compelled to testify as to the content of the information revealed by Randy. The clergy person privilege belongs to Father Ben and it can not be asserted by Randy's lawyer. Father Ben may assert the privilege. Therefore, the defense counsel's objection is overruled.