

JULY 2001

OUT-OF-STATE ATTORNEYS' EXAMINATION

QUESTIONS AND BOARD'S ANALYSIS

Facts Applicable to Questions I, II and III

Husband was rushed to Mercenary Hospital on March 1, 2001 after he accidentally drove his car into a tree. He died at the hospital several days later as a result of his injuries. Husband left surviving him his Wife; five minor children; a debt to Mercenary of \$12,000; and no assets.

On the day of Husband's funeral, Ann Allheart, credit manager for the hospital, visited Wife at her home and, after a long discussion, persuaded Wife that she had a legal obligation to pay Husband's indebtedness to the hospital. At Allheart's request, Wife signed a Confessed Judgment note, in the amount of \$12,000 payable in monthly installments of \$1,000 to Mercenary.

After the funeral, Wife felt that she had been pressured to sign the Note and made no payment to Mercenary.

On June 4, 2001, Mercenary's attorney had a judgment by confession entered in favor of Mercenary against Wife in the appropriate District Court by filing a Statement of Claim, attaching a copy of the Note signed by Wife, and an affidavit stating the amount due under the Note. Wife was properly served with summons on June 16, 2001 notifying her of the entry of Judgment.

On July 10, 2001, Wife consults you, a Maryland attorney, about the judgment against her. She complains she never agreed to be responsible for her Husband's hospital bill until Allheart pressured her into signing the Note on the day of the funeral. Wife wants a jury to determine her responsibility to Mercenary Hospital.

QUESTION I

What actions would you take on Wife's behalf concerning the confessed judgment? Discuss fully.

BOARD'S ANALYSIS

The judgment by confession does not become final until thirty (30) days after Wife is served – July 16, 2001 – rather than thirty (30) days after the judgment was entered. Rule 3-611. Therefore, I can file a motion on Wife's behalf before July 16, 2001 to vacate or open the judgment. The Motion must show a sufficient legal and factual basis for the defense, setting forth the facts upon which Wife relies. If no Motion to vacate or open is made, the judgment will stand to the same extent as a judgment absolute entered after trial. Rule 3-611.

Several avenues of defense are open to Wife: a lack of consideration, if the note is not under seal, and fraud and duress, defenses which could be pleaded in Circuit Court pursuant to Rule 2-323(g) (7) and (g) (9). Further, the judgment by confession is defective and can be set aside because it lacks the Certification required by Rule 3-611 (f) [instrument not executed by Buyer under Retail Installment Sales Contract]. A motion setting forth these defenses having been filed, the court should vacate or open the judgment and permit Wife to file a responsive pleading. Rule 3-611 (d).

QUESTION II

Explain what would you do to try to obtain a jury trial. Will Wife be successful in obtaining a jury trial?

BOARD'S ANALYSIS

Wife can obtain a jury trial by authority of Section 4-402(e) of the Courts Article, as the amount in controversy exceeds \$10,000. The Rule is not specific as to the time in which to file a demand for jury trial, following the vacating of a judgement by confession. To avoid any problems the demands should be filed within the time to file a responsive pleading. Rule 3-611(d) and Rule 3-325. Upon a timely demand for a jury trial, the record will be transmitted to the Circuit Court. Rule 3-325(d).

QUESTION III

Before her marriage, Wife had inherited a diamond necklace and ring valued at \$50,000. Wife suggests that she give this jewelry to you to hold for her until her financial problem with Mercenary Hospital is solved.

What advice do you give Wife?

BOARD'S ANALYSIS

The Rules of Professional Conduct , Rule 1.2 (d), prohibits a lawyer from assisting a client in conduct that the lawyer knows to be fraudulent. At this time and under these circumstances, your assisting Wife in safekeeping her jewelry could well be a fraud upon creditors. Rule 1.2 (d) authorizes you to discuss the legal consequences of Wife's proposed action, but you should not assist Wife in any conduct which you know to be fraudulent.

Further, in the event the hospital's judgment against Wife becomes final, the facts relating to the Wife's transferring possession of her jewelry to you would be discoverable in proceedings to aid in enforcement of the judgment. See Rule 2-633 (Circuit Court) and Rule 3-633 (District Court). The jewelry in your possession could then be subject to garnishment. See Rule 2-645 (Circuit Court) and Rule 3-645 (District Court).

QUESTION IV

On May 30, 2000, B, a resident of Dover, Delaware, while driving his automobile was involved in a collision with an automobile driven by A, a resident of Talbot County, Maryland, at the intersection of Route 50 and High Street in Salisbury, Wicomico County, Maryland. The accident was investigated by the State Police, and summonses issued to both drivers to appear in District Court on September 15, 2000. A's automobile was damaged, the estimate of repair being \$4,000.

A's attorney filed a legally sufficient complaint against B in the Circuit Court for Talbot County, claiming damages in the sum of \$8,000, and electing a jury trial. After having been unsuccessful in serving B by certified mail at his home, A instructed the Sheriff to serve B at the District Court hearing on September 15; this the Sheriff did.

B then retained counsel who filed a preliminary motion alleging:

- (a) Lack of jurisdiction over the person;
- (b) Insufficiency or illegality of service of process;
- (c) Improper venue;
- (d) Lack of jurisdiction over the subject matter;
- (e) Inability of plaintiff to obtain a jury trial.

A copy of the Motion was properly served on A's counsel.

What disposition should the Judge make of each of the five grounds of B's Motion? Discuss fully.

BOARD'S ANALYSIS

a. Insufficiency or Illegality of Service of Process and Lack of Personal Jurisdiction

The Annotated Code of Maryland, Courts and Judicial Proceedings Article §9-304 (a) provides that during such time a non-resident is in this State for the purpose of testifying as a witness, or for prosecuting or defending an action, he or she shall not be subject to service of process. See Rule 2-124 (h). B, clearly a non-resident, was served contrary to this rule while in this State to defend against his traffic charges. This illegal service is not sufficient to give the court personal jurisdiction over B.

b. Venue

Since B is a non-resident, he cannot raise the issue of venue. Courts Article § 6-202 (11). Venue is proper in any Maryland county.

c. Lack of Jurisdiction over the Subject Matter

The Circuit Courts and District Courts of Maryland have concurrent original jurisdiction in a tort action where the damages claimed exceed \$2,500, and are less than \$25,000. Code Sec. 4-401

(1) and 4-402(d)(1) of Courts Article. A plaintiff may elect to file suit in the Circuit Court if the amount in controversy exceeds \$2,500. Sec. 4-402(d)(1), Courts Article. Although the claim for damages in this case is less than \$25,000, since A has filed suit in the Circuit Court, the court has subject matter jurisdiction of the case.

d. Inability of plaintiff to obtain a jury trial

The jury trial demand should be stricken. A jury trial in a civil action is available when the amount in controversy exceeds \$10,000, exclusive of attorney's fees. Section 4-402 (e) of Courts Article.

Facts Applicable to Questions V and VI

P retains Lawyer, a senior partner and chief of the litigation section of Law Firm, a 50-lawyer Baltimore law firm, to represent him in his civil claim against D for injuries and damages P sustained as a result of an alleged assault and battery.

D has been properly served with a legally sufficient complaint filed in the Circuit Court for Baltimore City, where D resides, claiming \$75,000 compensatory and punitive damages. D requests that you, a Maryland attorney, represent him in his defense to plaintiff's suit. D tells you that he did threaten and strike P without justification, but vigorously disputes P's damage claim. Your spouse, Chris, is a partner in the tax department of Law Firm, which represents P.

QUESTION V

You instruct your associate attorney, whom you supervise, to prepare and file a general denial in response to Plaintiff's complaint, to be signed by you and her as attorneys. Your associate raises what she perceives to be problems concerning your instruction: (i) the propriety of filing a general denial, (ii) her own exposure to discipline concerning her compliance with your instructions; and (iii) the fact that your spouse is a partner in the opposing Law Firm.

Upon reviewing the facts, what resolution of the problems do you make? Explain fully.

BOARD'S ANALYSIS

1. The fact that my spouse Chris is a member of Law Firm representing a party adverse to my client D presents a potential problem. Rule 1.8 (i) of the Rules of Professional Conduct prohibits spouses from representing clients whose interests are directly adverse. However, the comment to the Rule makes it clear that the disqualification is personal, i.e. to Chris and to me, and is not imputed to the firms. For this reason, there is no conflict in this instance. The fact that Chris is not in the litigation section of Law Firm provides some safeguard to the requirement of confidentiality set forth in Rule 1.6 of the Rules; nevertheless care must be taken to assure confidentiality. This representation, therefore, is not a violation of the Rules of Professional Conduct.

2. D has the right to defend the proceeding as to require that every element of P's case be established. P must establish the assault and battery, and the damages he claims as a result. The fact that D committed the assault and battery does not preclude P having to establish that fact by proper evidence. He must further establish by proper evidence the damages he claims to have suffered. Maryland Rule 2-323 (d) permits D to answer by a general denial of liability this action in tort which claims money damages only. See also Rule 3.1 of the Rules of Professional Conduct (Meritorious Claims and Contentions).

3. My associate is a subordinate lawyer; I am the supervising lawyer. Rule 5.2 of the Rules of Professional Conduct applies. The resolutions of the ethical problems set out in (1) and (2) above are the correct resolutions; they are clearly at least reasonable resolutions. Rule 5.2 (b) protects the subordinate lawyer who acts in accordance with supervisory lawyer's reasonable resolution of an arguable question of professional duty. My associate is therefore not exposed to discipline for following my instructions in this instance.

QUESTION VI

In preparation for the defense of D in P's claim for damages, your clerk proposes that you file Interrogatories, which include the following discovery:

(1) State the name and address of each person whom you intend to call as a witness to establish P's claim.

(2) Attach hereto any and all statements made by D concerning the incident alleged in your claim, whether written, signed or adopted by D; and any stenographic, mechanical or electronic or other recording or transcript of any oral statement made by D.

Explain to your clerk the propriety of these proposed interrogatories.

BOARD'S ANALYSIS

1. Maryland Rule 2-402 governs the scope of discovery in the Circuit Courts. To ask for the names of persons P will call as witnesses at trial requires an assessment by P's lawyer of those witnesses favorable to P's case, and, would require the disclosure of mental impressions, conclusions and opinions of P's attorney. In short, this request infringes upon P's attorney's work product protected by Rule 2-402 (c). We are entitled to know the identity of persons having knowledge of discoverable matter pursuant to Rule 2-402 (a). This request should not be made. A proper request would be as stated in Form No. 3 – General Interrogatory No. 1.

2. Rule 2-402 (d) permits the discovery and requires the production of prior written statements signed, adopted or approved by D, or contemporaneously recorded oral statements whether recorded stenographically or by other means. The Interrogatory request is not in strict accordance with Rule 2-402(d) and is over broad. Subject to this objection, any statement which falls within the scope of the rule should be produced.

QUESTION VII

On January 5, 2001, Dilbert was operating a motor vehicle northbound on Interstate 95 in Harford County, Maryland. Trooper Smith of the Maryland State Police observed Dilbert's vehicle weaving. At 7:20pm, Dilbert was stopped for failing to stay in the designated lane.

Upon approaching the vehicle, Trooper Smith detected the strong odor of alcohol. He asked Dilbert if he had been drinking. Dilbert responded "a few beers." Trooper Smith requested Dilbert to exit the vehicle and perform field sobriety tests. Dilbert performed poorly on the tests. At 7:45 pm Dilbert was placed under arrest and transported to the barracks for a breath test.

The barracks were extremely busy that evening. At 9:40 pm, Trooper Smith, who was tired of waiting, took Dilbert to a new testing station that had not yet been used. Although Trooper Smith had never given the test before, he was familiar with the procedure as he had observed the test administered over 100 times. Trooper Smith administered the breath test to Dilbert. The result of the test indicated a blood alcohol content of 0.11. The State charged Dilbert with the crime of driving while intoxicated.

At trial, through the testimony of Trooper Smith, the State's Attorney moves to place the results of the breath test into evidence. You, a Maryland attorney, object on behalf fo Dilbert.

State all the grounds for your objection. Evaluate the chance of success on each ground.

BOARD'S ANALYSIS

The test result should not be admitted into evidence as the specimen was not collected within two (2) hours of Dilbert being apprehended. CJ 10-303 (a)(2). Apprehended is the functional equivalent of stop or detain. Dilbert was stopped at 7:20 pm and not given the test until 9:45 pm. The time of arrest is not relevant.

A second ground for the objection is that Trooper Smith is not a qualified technician. CJ 10-304 (a)(3). Additionally, the arresting officer is not allowed to administer the test, even if qualified. CJ 10-304 (b)(2)

Lastly, the new testing station that had not yet been used. This raises the question of whether the equipment had proper approval from the toxicologist. The results of the breath test should not be allowed without a statement signed by the toxicologist certifying the equipment used in the test has been approved. CJ 10-304 (d)

Facts Applicable to Questions VIII and IX

P was seriously injured on September 1, 1999, when he was struck by an automobile negligently driven by D. P sued D in the appropriate Maryland Circuit Court on February 1, 2000. After a jury trial, a judgment was entered in P's favor against D on December 31, 2000 in the amount of \$1,000,000. Although he was reputed to be a wealthy man, D had only \$100,000 of automobile liability insurance, which sum D's insurance company promptly paid to P, without prejudice to P's rights to recover the balance of the judgment.

P retains you, a Maryland attorney, to enforce the judgment against D. In response to post-judgment discovery, D discloses that in October, 1999, before P's suit was filed, D transferred substantially all of his assets to an irrevocable trust, established under the law of Maryland, for the benefit of D's wife and children. D further states that he employed a licensed certified public accounting firm, Cheatem & Howe, to assist in arranging the irrevocable trust as part of D's estate planning.

QUESTION VIII

You want to obtain and review all of the files and records of Cheatem & Howe pertaining to the irrevocable trust.

- 1. What procedural steps do you take to obtain these materials?**
- 2. What objection(s) will you likely encounter? Evaluate the validity of such objection(s)?**

BOARD'S ANALYSIS

1. The procedure to obtain and review files and records is governed by Rule 2-633. You must request the Circuit Court to issue an order and summons requiring Cheatem & Howe to appear for examination under oath before a judge or examiner. You must submit an affidavit or other proof that it is probable that the CPA firm has knowledge of D's concealment or fraudulent transfer of his assets.
2. You should anticipate that either D or Cheatem & Howe will object that the affidavit or other "proof" is insufficient to establish that it is "probable" that the CPA firm's files and records disclose knowledge of D's concealment or fraudulent transfer of his assets. It is likely this objection will not be successful, as the purpose of Rule 2-633 is to permit a full examination into the assets of the debtor. Clinton Petro. Servs., Inc. v. Norris, 271 Md. 665, 319 A.2d 304 (1974).

You should anticipate that D will object on the ground that the files and records pertaining to the irrevocable trust are privileged, and cannot be disclosed by the licensed CPA's without D's consent. The Accountants' Privilege in §9-110(b)(2) of the Courts Article covers, "Any information that the licensed certified public accountant or firm in rendering professional service derives from a client who employs the licensed [CPA] firm."

The objection may limit production of documents to those files and records pertaining to the trust which were derived from D. However, other documents which were not "derived from D" or are D's material may not be subject to disclosure.

QUESTION IX

You have learned that D maintains a brokerage account with a national firm, which has an office in Baltimore, Maryland.

1. As P's attorney, what procedural steps do you take to enforce P's judgment against the securities and cash in the brokerage account? Explain fully.

2. From what date does post-judgment interest accrue and at what rate of interest?

BOARD'S ANALYSIS

1. Plaintiff may garnish D's property in the hands of a third person (the brokerage firm), following the procedures set forth in Rule 2-645. These procedures consist of:

a. Filing a request to serve a writ of garnishment.

b. Serving the writ on the brokerage firm's resident agent or officer as required by Rule 2-124(c). See Rule 2-645(d).

c. You also may serve Interrogatories on the garnishee to discover the nature and extent of D's assets held by the firm. Rule 2-645(h).

2. Plaintiff is entitled to collect post-judgment interest on his judgment at the rate of 10% per annum from the date the judgment is entered, Rule 2-604(b); Section 11-107(a) of the Courts Article.