

**JULY 2008**

**OUT OF STATE ATTORNEYS' EXAM**

**FACTS APPLICABLE TO QUESTIONS 1 AND 2**

On March 1, 1997, Craig Creditor obtained a Judgment in the District Court of Maryland for Baltimore County against Dave Deadbeat for \$15,000 (the "Judgment").

Craig discovered that Debtor may have an account at Westover State Bank (the "Bank"). On May 1, 2008, Craig seeks to enforce the Judgment and pursuant to Maryland Rule 3-645 filed a Writ of Garnishment of Property (the "Writ") to be served on the Bank's Baltimore County branch.

Westover State Bank is properly served with the Writ and files a timely response indicating that it holds two (2) accounts bearing Deadbeat's name that combined have enough to satisfy the Judgment. The Bank's answer indicates that account 1 is owned solely by Deadbeat, was opened on September 1, 2006, and has a balance of \$5,000. The Bank further indicates that account 2 is owned by Deadbeat and his wife, was opened on April 1, 2007 and has a balance of \$10,000.

The source of the funds in account 2 was Deadbeat's gambling winnings.

**QUESTION 1**

*(9 Points - 15 Minutes)*

**Absent Bankruptcy or Receivership, what steps, if any, can Deadbeat take to prevent Creditor from receiving the funds in these two accounts? Explain fully.**

**ADDITIONAL FACTS FOR QUESTION 2**

It is now July, 2008. Creditor learns that Deadbeat owns real property in Howard County, Maryland, which he is attempting to sell. Creditor still is owed money on his judgment.

**QUESTION 2**

*(9 Points - 15 Minutes)*

**a. What, if anything, can Creditor do to insure continuation of the judgment for the foreseeable future?**

**b. What, if anything, can Creditor do to collect the judgment from the sale proceeds payable to Deadbeat?**

## **BOARD'S ANALYSIS – QUESTION 1**

Deadbeat must timely file a Notice of Exemption from Execution pursuant to CJP 11-504(b) (5) to enforce his right to exempt up to \$6,000 worth of cash from Execution. He will also argue and that regardless of the amounts, account 2 is exempt, as it is jointly owned with his wife.

Deadbeat will receive his exemption on account 1 for the full \$5,000. Account 2 is not exempt from execution as it was opened after the date of the Judgment, the funds are fully traceable to Deadbeat and are not being held in Trust with his spouse. See, CJP 11-603 and, Maryland National Bank v. Pearce 329 Md. 602, 620 A.2d 941 (1993). Deadbeat will, however be able to use the remaining \$1,000 of exemptions on that account. Thus, Creditor will receive \$9,000 (\$15,000 in the combined accounts less Deadbeat's \$6,000 exemption).

## **BOARD'S ANALYSIS – QUESTION 2**

Judgment liens are valid for 12 years, thus, the judgment line will expire March 1, 2009. CJP 5-102. Creditor can prevent this by filing a Motion to Renew Judgment pursuant to Maryland Rule 3-625 at any time before the expiration of the 12 year time period. In order to perfect the lien against property in Howard County, Creditor must request the Clerk of the District Court in Baltimore County to transmit a Certified Notice of Lien of Judgment to the Howard County Circuit Court. Upon recording in the Howard County Circuit Court, the judgment will constitute a lien on Deadbeat's property in Howard County. Maryland Rule 3-621(c).

### FACTS APPLICABLE TO QUESTION 3

In July, 2007, a local real estate broker referred a client to you. The client was Purchaser, Inc., a Virginia corporation. Purchaser's President, Gloria, instructed you to prepare a contract to purchase a small apartment building, located in Montgomery County, from Seller Family Partnership ("SFP"), a Maryland general partnership. SFP consists of Mary Wayne and her two adult sons, Robin and Bruce. The Contract was signed by all parties. The contract provided for a \$50,000 deposit to be held by you as Escrow Agent. Purchaser, Inc., paid the Deposit which you properly placed in your escrow account. Settlement did not occur within the time specified by the contract. SFP's attorney has written to you, demanding that the deposit money be forfeited to SFP. On behalf of Purchaser, Inc. Gloria has instructed you not to pay the Deposit to SFP. The contract is silent about the disposition of the deposit. Months later, the dispute over the Deposit has not been resolved, and Gloria demands that you return the Deposit to Purchaser, Inc.

Purchaser, Inc. maintains its only office in Norfolk, Virginia, where all of its officers and directors also reside. Purchaser, Inc. does no business in Maryland and is not registered to do business in this State. Mary Wayne lives in Prince George's County, Maryland. Robin and Bruce both work for an international relief organization and currently are on assignment in Afghanistan.

**a. What legal action can you institute in Maryland to resolve the dispute about the deposit? Explain.**

**b. In which Maryland Court(s) could you institute such action? Explain.**

**c. What steps, if any, can you take to obtain personal jurisdiction over the necessary parties? Explain.**

**d. Can you represent Purchaser, Inc. in the dispute about the Deposit? Explain.**

### BOARD'S ANALYSIS – QUESTION 3

**a.** The appropriate legal action is an "interpleader." Since there are two adverse claimants, Purchaser, Inc. and SFP, each of which claims to be entitled to the deposit. Maryland Rules 2-221 and 3-221 expressly authorize an action for interpleader in a case where a stakeholder, such as you, is or may be subjected to one of several claims involving the same property. The \$50,000 deposit falls within the broad definition of "property," under Rule 1-202(v).

A Complaint seeking a Declaratory Judgment also may serve to raise the same issues; however, since you claim no interest in the fund, an interpleader action is more appropriate, and would allow you to obtain an award of attorney's fees.

**b.** The interpleader must be filed in a Circuit Court in Maryland, pursuant to Rule 2-221, because the amount in controversy is \$50,000, exclusive of interest and costs. Sections 4-401 and 4-402 of the Courts and Judicial Proceedings Article prescribe that the District Court and the Circuit Court have concurrent jurisdiction where the amount in controversy does not exceed \$25,000.

As to venue, §6-201(a) of the Courts and Judicial Proceedings Article, provides the general venue rule that a civil action shall be brought where the defendant “carries on a regular business.” SFP carries on a regular business in Montgomery County where its apartment building is located. As a non-resident corporation, with no principal place of business in Maryland, Purchaser, Inc. can be sued in any Maryland county. §6-202(c). Consequently, there is a single venue applicable to all Defendants. Montgomery County is that venue, and suit, therefore must be filed in the Circuit Court for Montgomery County.

Partial credit will be given for answers which apply other sections of the venue statutes in a reasoned way.

**c.** As to service of process, Purchaser, Inc. is a Virginia corporation and has no resident agent in Maryland. Because Purchaser, Inc. does no business in Maryland (contracting to purchase a building would not qualify as “doing business”), it is not required to register with the State Department of Assessments & Taxation or to have a resident agent in Maryland. Therefore, service of process must be made outside of Maryland (presumably, in Virginia) on a resident agent there, or on the President (Gloria), or the Secretary or Treasurer of Purchaser, Inc. Rule 2-124(c). Service may be made by personal service, certified mail or in the manner prescribed by the court or prescribed by the laws of Virginia if reasonably calculated to give actual notice. Rule 2-121(w).

As to SFP Partnership, the current Maryland Rule 2-124(e) provides for the method of serving a general partnership, when sued in its group name, “by serving any general partner”. Mary Wayne is available to be served in Maryland by personal service or by certified mail. Rules 2-121 and 2-122.

(Partial credit also will be given for reasoned discussions on the long-arm statutes and of ways in which to serve the partners in Afghanistan).

**d.** You may not represent Purchaser, Inc. in the dispute over the deposit, unless SFP Partnership and Purchaser, Inc. consent in writing. MRPC Rule 1.15(e) recognizes that third parties may have lawful claims against specific funds in your custody. As Escrow Agent, you have assumed a duty to safeguard the Deposit against wrongful interference by Purchaser, Inc. When there are substantial grounds for dispute as to the person entitled to the funds, you may file an action to have a court resolve the dispute. Comment (e)

Rule 1.7(a) (2) provide as a general principal, that “a conflict of interest exists if there is a significant risk that the representatives of a client will be materially limited by a lawyer’s

responsibilities to another client . . . or third person.\*\*\*” Rule 1.7(b) allows you to represent Purchaser, Inc. (a client) under most circumstances where each affected client gives informed consent in writing. Attorneys who act as Escrow Agents often obtain written consent of all parties to represent his or her client in the event of a future dispute concerning disposition of a deposit. See Comment 22.

**FACTS APPLICABLE TO QUESTIONS 4, 5, 6 AND 7**

Ms. D., the operator of a day care center, has recently been indicted in the Circuit Court for Baltimore City. She was charged with first and second degree sexual offenses, allegedly committed against a 4-year old child who attended the center.

You have entered your appearance today as Ms. D's attorney.

The indictment charged generally that the acts of sexual abuse were committed between September, 2006 and June, 2007, at the day care center in Baltimore City, on a minor under the age of 18 years.

**QUESTION 4**

*(5 points, 10 minutes)*

**What action can you take to protect Ms. D from a lack of specificity in the charging document?**

**QUESTION 5**

*(10 points, 18 minutes)*

**What actions, if any, can you take to:**

**a. discover file notes of the City Department of Social Services, which investigated the alleged sexual abuse?**

**b. discover the substance of inculpatory oral statements which Ms. D. may have made to former employees of the day care center who are State's witnesses?**

**ADDITIONAL FACTS FOR QUESTION 6**

You learn that one of the Center's former employees, who possibly will be a State's witness, made a tape recording of a telephone call from Ms. D to that employee without Mrs. D's consent.

**QUESTION 6**

*(5 points, 10 minutes)*

**Can you obtain a copy of the tape recording prior to trial? Explain.**

### **ADDITIONAL FACTS FOR QUESTION 7**

Assume that the tape recording includes an admission by Ms. D. that she committed unlawful sexual acts on the child.

### **QUESTION 7**

*(15 points, 30 minutes)*

**a. How can you challenge the State’s use of the tape recording as evidence against Ms. D.? Explain.**

**b. Will the challenge be successful? Explain.**

**c. Can you successfully prevent the employee from testifying from memory as to what Ms. D. said during the recorded conversation? Explain.**

### **BOARD’S ANALYSIS – QUESTION 4**

Rule 4-202(c) requires that a charging document (which includes an indictment – Rule 4-102(a)) state “with reasonable particularity, the time” the offense occurred. The indictment charges that the acts of sexual abuse were committed “between September, 2006 and June, 2007” “on a minor under the age of 18 years.” If Defendant wants more specificity as to the time of the offense or the age of the victim, he may:

(1) Move to dismiss the indictment because of a “defect” in the charging document. Rule 4-252(a) (2). This Motion would be unlikely to succeed because the time of the alleged offense, although broad, would probably be found to be reasonably specific.

(2) File demand for a bill of particulars, pursuant to Rule 4-241. The demand probably would be granted to require the State to specify, with more particularity, the time(s) the alleged acts of sexual abuse occurred if the State is able to do so and the age of the victim. See Tapscott v. State, 343 Md. 650, 684 A.2d 439 (1995).

### **BOARD’S ANALYSIS – QUESTION 5**

**a.** Discovery in a criminal case is governed by Rule 4-263. Under Rule 4-263(a) the State’s Attorney is required to furnish to the defendant without request:

“(1) Any material or information tending to negate or mitigate the guilt or punishment of the defendant as to the offense charged.”

Under the subsection (a), the State’s Attorney must produce the file notes of the State Agency which investigated the case if they contain any exculpatory information. Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L. Ed. 2d 215 (1963); United States v. Agurs, 427,

U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976). The Baltimore City Department of Social Services arguably would constitute a State agency under this Rule.

Under Rule 4-263 (b), the Defendant may request: (4) written reports or statements in connection with the action by each expert consulted by the State, including the results of our physical or mental examination, and (5) documents...that the State intends to use at the hearing or trial.”

Rule 4-263 (g) extends the State’s Attorney’s duties under the Rule to material information in the possession or control of “others who have participated in the investigation....and also either regularly report, or with reference to the particular action have reported, to the Office of the State’s Attorney.” Consequently, if the Department of Social Services regularly reports child abuse investigations to the State’s Attorney, or reported to the State’s Attorney. In this case, the Department’s investigation notes may be discoverable by Motion filed within the time prescribed by Rule 4-263 (e).

Rule 4-264 entitles a party to move for “the issuance of a subpoena commanding a person to produce....designated documents....” This Rule provides another method of obtaining the file notes, if they are relevant to the action, and not otherwise privileged.

**b.** Rule 4-263 does not provide for discovery of inculpatory statement, made by the Defendant to State’s witnesses, unless the witness is an “agent of the State.” Rule 4-263 (b) (2). Consequently, statements made by Defendant to former employees of the day care center would not be discoverable.

See Craig v. State, 76 Md. App. 250, 544 A.2d 784 (1985) reversed on other grounds, 560 A.2d 1190 (1989).

### **BOARD’S ANALYSIS – QUESTION 6**

You may request the wiretaps under Rule 4-263, or subpoena them pursuant to Rule 4-264.

### **BOARD’S ANALYSIS – QUESTION 7**

**a.** A Motion to suppress evidence because of unlawfully obtained wire communications can be filed. Rule 4-252(a)(3) or (a)(4).

**b.** The taped conversations were unlawfully intercepted by the employee since Mrs. D did not consent to the taping. §10-402(a), Court and Judicial Proceedings Article. The facts do not indicate that the employee was acting under the prior direction and under the supervision of an investigative or law enforcement officer; therefore, the exception under §10-402(c)(2) does

not apply. The contents of the unlawfully intercepted telephone call are not admissible at trial. §10-405, Courts and Judicial Proceedings Article.

c. No. Despite the inadmissibility of the contents of an unlawfully obtained wire tap, the employee can testify from memory about the conversation between him and Mrs. D.. Aud. v. State 72 Md. App. 408, 531 A.2d 706 (1987). The hearsay rule would not apply to the extent that the conversation constitutes an admission by the defendant. Rule 5-803(a)(1).

## **FACTS APPLICABLE TO QUESTIONS 8, 9, AND 10**

Peter Parker, a prospective client, responded to your internet website, which advertised “No Recovery, No Fee” for personal injury claims. Peter had been treated in Maryland by a licensed chiropractor, Dr. Strong, for lower back pain, and his treatment caused a ruptured disk in Peter’s back. Peter has incurred medical bills and loss of wages of \$50,000 so far, and he has sustained a 20% permanent disability to his back. Peter, who installs computer equipment, performed a computer installation for Strong, and he owes Peter \$4,000 for it. You are an attorney, licensed to practice law in Maryland. Peter has retained you to file suite on his behalf.

### **QUESTION 8**

*(6 points, 10 minutes)*

**You have prepared the necessary pleadings. With whom are you required to file these pleadings? Explain fully.**

### **ADDITIONAL FACTS FOR QUESTION 9**

You prepare a summary of Peter’s case and upload it to your website. The summary states: “I have filed suit against Dr. Strong for his egregious treatment of my client, Peter Parker. Strong negligently crippled Peter. This fine man will suffer agonies for the rest of his life. However, I fully expect that we will be able to recover millions.” Dr. Strong visits your website, downloads your summary and sends it to the Attorney Grievance Commission.

### **QUESTION 9**

*(12 points, 20 minutes)*

**Have you acted ethically in regard to publishing the summary on your website? Explain.**

### **ADDITIONAL FACTS FOR QUESTION 10**

Peter’s medical malpractice case was tried on April 1, 2008. He was awarded \$100,000.00 for medical expenses; \$250,000.00 for lost earnings, and \$500,000.00 for pain and suffering. Defense counsel moved that the award be reduced.

### **QUESTION 10**

*(5 points, 10 minutes)*

**Must that motion be granted? Explain.**

### **BOARD'S ANALYSIS – QUESTION 8**

You must file two complaints. Peter's claim for his back injury falls within the Health Care Malpractice Claims Act, because it is an "injury arising or resulting from the rendering or failure to render health care," Md. Cts. And Jud. Proc. §3-2A-01(f), and Strong, a chiropractor, is a "health care provider." §3-2A-01 (e). That claim must be filed with the Director of the Health Care Alternative Dispute Resolution Office. §3-2A-04. Peter seeks damages of more than \$5,000, the limit of the concurrent jurisdiction of the District Court. §4-402 (d); §3-2A-02(2). You can waive arbitration unilaterally and file a complaint in Circuit Court, but the claim must first be filed administratively.

Peter's claim for the \$4,000 debt is not a medical injury and must be filed in the District Court. Because the amount in controversy does not exceed \$5,000, the District has exclusive jurisdiction. §4-402(d).

### **BOARD'S ANALYSIS – QUESTION 9**

Rule 7.2 governs advertising. Rule 7.2(e) states that an advertisement "indicating that no fee will be charged in the absence of a recovery shall also disclose whether the client will be liable for any expenses." Your website content fails to conform to the rule.

Rule 3.6 governs trial publicity and forbids statements which are expected to be disseminated publicly and are substantially likely to prejudice an adjudication proceeding. Such statements include those referring to civil matters triable to a jury.

### **BOARD'S ANALYSIS – QUESTION 10**

No. Md. Cts. And Jud. Proc. §11-108(b)(2)(i) establishes a cap of \$500,000.00 on non-economic damages for causes of action arising after October 1, 1994. The limitation increases by \$15,000 on October of each year. Since Peter's cause of action arose in 2006, the award of \$500,000 is below the statutory cap. Damages for pain and suffering are "non-economic damages" under §11-108(a) (1) and the cap applies.