

**ATTORNEYS' EXAM  
FEBRUARY 2000  
BOARD ANALYSES**

**QUESTION I**

(a) Victor's counsel should file Motions to Dismiss under Maryland Rules 2-322 (a) and (b). Motions under Rule 2-322 (a) are mandatory, and must be filed before the answer is filed. The mandatory motions would be based on 2-322 (a) (2) and (a) (4) – improper venue and insufficiency of service of process. Venue is improper because while Victor is a resident of St. Mary's County and the accident occurred in Kent County, the Complaint was filed in Baltimore County. Md. Cts. & Jud. Proc. Code Ann. § 6-201 (a) provides that generally, “a civil action shall be brought in a county where the defendant resides, carries on a regular business, is employed, or habitually engages in a vocation.” The facts do not indicate that Victor has any contacts with any County other than St. Mary's County. The suit should have been filed in St. Mary's County. Section 6-202 (8) of the Md. Cts. & Jud. Proc. Code Ann. also permits the filing of a tort action in the County where the cause of action arose; the accident occurred in Kent County, so the action could also have been filed there. With respect to the adequacy of service issue, the facts state that Victor was served by first class mail. Maryland Rule 2-121 (a) requires that service by “delivering to the person to be served...or by mailing to the person to be served...by certified mail requesting: ‘Restricted Delivery – show to whom, date, address of delivery’” copies of the summons, complaint, and other papers filed. Delivery to Victor by first class mail was insufficient under the Rule. Victor should prevail on both motions. Venue should be transferred to either Kent County or St. Mary's County, and Lawyer Smart should have to effect service properly under the Rules.

There is also basis for a motion under Rule 2-322 (b) (2) – failure to state a claim under which relief can be granted. In this case, the facts indicate that Ralph's claim was untimely filed. The accident occurred in November 1995; the action was filed in November 1999, four years later. Md. Cts. & Jud. Proc. Code Ann. § 5-101 provides that “[a] civil action at law shall be filed within three years from the date it accrues...” If the limitations defense is apparent on the face of the Complaint, it may be raised by a Motion to Dismiss for failure to state a claim under which relief can be granted. The claim filed on Donny's behalf does not appear to be barred by limitations. Donny was 14 when the cause of action accrued (the date of the accident). He remained under a disability until he attained majority when he turned 18 in November 1998. Section 5-201 (a) of the Md. Cts. & Jud. Proc. Code Ann. provides that the statute of limitations is extended for minors while they are under a disability. The statute is extended for minors for “the lesser of three years or the applicable period of limitations after the date the disability is removed.” In this case, the limitations period for Donny's cause of action would run until November 2001, which is three years following the time that Donny's disability was removed by his attaining the age of majority.

(b) The Court should grant the motions. The venue is improper for the reasons set out in the answer to part (a), above, and service was not proper under the methods set out in Rule 2-121 (a). Service is easily cured by either effecting service as provided in the Rules, or by asking Victor's counsel to accept service on his behalf. Venue can be cured by transferring the action to the proper venue, probably the County where Victor

lives, unless Victor is willing to waive that, too. Both of these motions were mandatory and had to be raised initially or waived.

(c) Victor can raise the substantive defense indicated by the facts, the limitations defense, both by Motion to Dismiss under Maryland Rule 2-322 (b) (2), and in a Motion for Summary Judgment under Maryland Rule 2-501. The defense should be obvious from the face of the Complaint if the date of the accident is stated in the Complaint. There is no discovery rule issue in this case; both Ralph and Donny knew they were injured at the time of the accident. The clock started running immediately.

In his answer, Victor should raise the affirmative defenses of contributory negligence, statute of limitations if not raised by motion and equitable defenses, if any. He should also raise the negative defenses of the capacity of Donny to sue. See Rule 2-323. If additional affirmative defenses become apparent during the course of discovery, the Answer should be amended to include those defenses prior to the time that the case is submitted to the jury and in accordance with the Rules governing the amendment of pleadings.

## QUESTION II

(a) Barbara should file a Motion for Protective Order under Maryland Rule 2-403 (a). The “good cause” that may be shown in the Motion is that the form of the discovery request was improper, and the time within which the documents were to have been produced was too short. Since neither the hospital nor the doctors were parties to the action, notice of a deposition at which documents were to be produced had to be served with a subpoena, not notice alone, under Rule 2-412 (c), and that subpoena had to be served “at least 30 days before the date of the deposition.” See Rule 2-422. In this case, both the form and the time were deficient. There may be an issue as to waiver under Rule 2-412 (e), which provides that “[a]ny objection to the form of the notice for taking a deposition is waived unless promptly served in writing.” Barbara may argue, however, that she promptly notified Lawyer Smart in writing as soon as she had knowledge of the “Notices” directed to the hospital and the doctors. Barbara can also seek protection from the Court based on the inconvenience caused by scheduling the deposition in Baltimore County, Maryland. Rule 2-413(a) requires that nonparty residents of the State be deposed in the jurisdiction where they live, reside or regularly conduct business. Presumably, the hospital is a corporate resident of Maryland located in Kent County. Accordingly, Kent County is where the hospital is amenable to deposition. The individual doctors are also nonparty residents of the State who live and work in Kent County. It is improper to try to compel them to come to Baltimore County to be deposed.

(b) The Court should grant Barbara’s Motion for Protective Order. The deponents are nonparty residents; they should be served subpoenas for depositions and not notices, which are served on parties only. Furthermore, the Rule provides that a minimum of thirty (30) days notice is required when the deponent is required to produce records at a deposition. Finally, the deponents are all residents [corporate and individual] of Kent County. The notices are attempting to compel them to come to Baltimore County for their depositions. The resident nonparty deponents can only be deposed where they live, work, or conduct business. The nonparties do not appear to have any such connection with Baltimore County.

(c) Generally, the copies of the records should be admissible. See Rule 2-510(h). Also, the parties can stipulate as to the admissibility prior to trial. If not, the copies are admissible under Md. Cts. & Jud. Proc. §10-103 (b) unless there is a genuine question as to the authenticity of the original from which the copies were made, or “it would be unfair to admit the duplicate in lieu of the original.” In this case, there is no indication that the authenticity of the originals has been or will be called into question so the copies should be admitted. It should also be noted that, under Maryland Rule 10-102 (a) that “introduction of a reproduced record, enlargement or facsimile does not preclude admission of the original.”

In this case, the contents of the records may be called into question as authenticity does not address relevance or hearsay. In addition, the costs of treatment may require testimony regarding the costs as being “fair and reasonable.” See Rule 5-803 (Hearsay Exceptions) and 5-401 (Relevancy).

### QUESTION III

Post trial motions are provided for in Maryland Rules 2-532 (Motion for Judgment Notwithstanding the Verdict); 2-533 (Motion for New Trial); 2-534 (Motion to Alter or Amend a Judgment); and 2-535 (Motion for the Court to Exercise its Revisory Power over the Judgment). A Motion for Judgment Notwithstanding the Verdict (“JNOV”) may be filed in cases decided by a jury when the movant made a motion for judgment at the close of all evidence, and can only be advanced on the grounds previously stated to the Court. The Motion must be filed within 10 days after the entry of judgment on the verdict, or within 10 days after the discharge of the jury if no verdict is returned. A JNOV may be joined with a Motion for New Trial. Failure to file a JNOV does not affect the appealability of the Court’s ruling on the earlier Motion for entry of judgment made at the close of evidence.

A motion under Maryland Rule 2-533 must also be filed within 10 days of the entry of judgment notwithstanding the verdict under Maryland Rule 2-532.

A Motion to Alter or Amend the judgment under Rule 2-534 would not be available in this case, because the case was tried by a jury.

In addition to the other post trial motions, the Circuit Court exercises revisory power over judgments and can revise a judgment for a period of 30 days after judgment has been entered for the reasons set out in Rule 2-535.

In this case, appropriate motions would be a Motion for Judgment Notwithstanding the Verdict; the facts indicate that motions for judgment were made at appropriate times and denied by the Court. A Motion for New Trial under Maryland Rule 2-533 can also be filed. The Court should grant the Motion with respect to the limitations issue in Ralph’s case. A motion raising the venue issue may be appropriate, although the filing of this motion does not toll the time for filing a notice of appeal.

(b) In lieu of an appeal, a party may elect to file for in banc review under Maryland Rule 2-551 if it is "permitted by the Maryland Constitution." In banc review precludes further review by the appellate

courts for the party who petitions for in banc review. It is more likely that the parties would choose to file an appeal with the appellate courts. In order to secure an appeal, Victor will have to file a notice of appeal with the trial court (Rule 8-201 (a)) within thirty (30) days of entry of final judgment. The right of appeal from final judgments entered in circuit courts is stated in Md. Cts. & Jud. Proc. Code Ann. §12-301. Jurisdiction of the Court of Special Appeals is stated in Md. Cts. & Jud. Proc. Code Ann. §12-308 (..."[T]he Court of Special Appeals has exclusive initial appellate jurisdiction over any reviewable judgment, decree, order or other actions of a circuit court..." Title 8 of the Rules governs review in both levels of the appellate courts in Maryland, direct appeal to the Court of Special Appeals, and certiorari in the Court of Appeals. Appeals to the Court of Special Appeals are of right; review by the Court of Appeals is by petition except in certain special cases (e.g., automatic review of death penalty cases), and is discretionary with that Court.

Enforcement of money judgments is automatically stayed for a period of 10 days after entry (Maryland Rule 2-632 (a)); the trial court also has discretion to stay enforcement of money judgments under terms and conditions set by the court to secure the party who won the judgment while post trial motions are pending upon motion by the party seeking post trial relief (Maryland Rule 2-632 (b)). On appeal, an appellant may stay enforcement of a money judgment by posting a supersedeas bond as provided in Maryland Rules 8-422 and 8-423. The bond must be posted with the trial court, and may be filed at any time before the judgment is satisfied. Enforcement is stayed only from the date that the bond is posted. In those cases where a money judgment is entered against an insured party who was defended by an insurer under the terms of an insurance policy, enforcement of the judgment is stayed during the appeal to the extent of the insurance coverage. (Maryland Rule 8-424).

(c) A timely notice of appeal must be filed within 30 days of entry of the judgment in the trial court, or within 30 days after the movant withdraws a post trial motion or the trial court rules on any timely motions made by a party under Maryland Rules 2-532, 2-533, or 2-534. (Maryland Rule 8-202 (a), (c)). If one of the parties petitioned for in banc review under Maryland Rule 2-551, the opposing party may file an appeal under these rules within 30 days of entry of the in banc panel's decision. A judgment is entered when it is written by the Clerk of the Circuit Court on the file jacket, on a docket within the file, or in a docket book according to the practice of the trial court. (Maryland Rules 2-601 (b), 8-202 (f)). A supersedeas bond may be filed with the trial court at any time prior to enforcement of the judgment, and stays enforcement of the judgment only from the date that it is filed.

#### QUESTION IV

There is an issue here as to Lawyer Smart's ethical and legal responsibilities. When Ralph initially met with Lawyer Smart, it does not appear that Lawyer Smart advised Ralph that there was a limitation on the time within which Ralph had to file his claim. It appears that Lawyer Smart merely sent Ralph away until he finished receiving medical treatment for his injuries, with no further guidance than that Ralph should come back to him at some later date. That raises both a professional responsibility issue for Lawyer Smart as well as exposes him to liability for professional malpractice if Ralph's claim is dismissed and Ralph can prove that he suffered damage from the professional inactions of Lawyer Smart because he would have prevailed at trial on the merits of the case if it had been timely filed.

In addition, the grounds for objection to Lawyer Smart's fees are based upon Rule 1.5 of the Maryland Rules of Professional Conduct. A contingent fee must be in writing and the aggregate fees must be reasonable based upon the standard contained in the Rule.

#### QUESTION V

Maryland Rule 4-252(d) provides that a motion asserting the failure of the charging document to show jurisdiction in the court may be raised and determined at any time. Pursuant to Md. Cts. & Jud. Proc. Code Ann. § 4-301 (b) (2), the District Court has exclusive original jurisdiction over criminal cases in which the person charged is at least 18 years of age and is charged with a violation of Md. Ann. Code Article 27, §§342-344, regardless of whether the charge is a felony or a misdemeanor; however, §4-302(d)(ii) provides for concurrent jurisdiction in the Circuit Court and the District Court in cases where felony theft is charged. Since one of the charges against Sam is felony theft, jurisdiction in the Circuit Court is proper as to all the charges against him. The Court should deny the motion to dismiss as to Sam. In juvenile matters, the Circuit Court sits as a juvenile court, (Md. Cts. & Jud. Proc. Code Ann. §§3-801 (I) and 3-804 (a) (I)), and the juvenile petition against Johnny was properly filed in the Circuit Court.

#### QUESTION VI

Since this is a juvenile matter, the Court's actions are governed by the requirements of Maryland Rule 11-106 (b), which governs the right to counsel in juvenile proceedings. That Rule requires the Court to conduct an inquiry to determine, after appropriate questioning in open court and on the record, that the respondent or his parent understands the allegations, potential dispositions, and the role of counsel through all phases of the case enumerated in § 11-106 (b). Included are understanding the nature of the allegations; the right to counsel without charge if the party is financially unable to obtain counsel; the assistance which may be provided by counsel in defending against the charges; and a party's rights at the hearing and the assistance counsel may provide at the disposition stage. The Judge did not conduct the required inquiry; therefore, the waiver of counsel was not effective. Molly's failure to engage counsel prior to the adjudicatory hearing was not a "waiver by inaction," a type of waiver that is not permissible in juvenile proceedings. In re Christopher T., 129 Md. App. 28 (1999).

#### QUESTION VII

(a) Lawyer Fox must not undertake to represent Johnny. Rule 1.7 of the Rules of Professional Conduct provides that a lawyer shall not represent a client if the representation will be directly adverse to another client. Johnny and his mother disclosed to Lawyer Fox information that is exculpatory to Johnny and detrimental to Sam. The two defendants clearly have interests adverse to each other. Rule 1.6 (a) provides that a lawyer shall not reveal information relating to representation of a client unless the client consents after consultation. The information protected under the Rule includes revelations made to a lawyer by a person seeking to engage the lawyer's services and the revelations are protected even if the lawyer does not undertake representation.

(b) Lawyer Fox must not allow Sam to give perjured testimony. If he knows that perjured testimony will be given, Lawyer Fox must withdraw from the case if Sam insists on taking the stand and Sam intends to give false testimony. Rules 1.16 and 3.3 of the Rules of Professional Conduct govern the conduct of Lawyer Fox with respect to either withdrawing from the case if permitted to do so by the Court, or representing Sam if the Court requires Lawyer Fox to do so in light of Sam's revelation that he intends to make false statements to the Court.