

FEBRUARY 2012

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

**PRELIMINARY FACTS APPLICABLE TO
QUESTIONS 1 THROUGH 9**
(Reading Time – 5 Minutes)

Pete sold \$20,000 worth of auto parts on open account to Auto Parts City, LLC, a new business owned by Donna and Dave in Montgomery County, Maryland. Donna and Dave, a married couple, promised in writing at the time of the sale on December 1, 2008, that they jointly and severally, would unconditionally guarantee payment of the company's account. After several months, Dave and Donna clashed over the business decisions. Dave drove off to "start a new life" in Las Vegas, leaving Donna to deal with their store and its creditors.

Unable to continue Auto Parts City, LLC, Donna closed the store and moved from Montgomery to Howard County, Maryland, where she took a job and established her permanent residence. During the ensuing months, Donna made sporadic payments totaling \$5,000 to Pete, on account of the past due indebtedness. The last payment was made on July 1, 2011.

On June 1, 2012, Pete retains Lawyer, his Maryland attorney, to file suit against Donna and Dave for \$15,000, which Pete claims is due and owing.

QUESTION 1

(10 Points – 20 Minutes)

- A. In which Maryland court and in which venue may Lawyer choose to file Pete's Complaint? Explain the reasons for your answer.**
- B. Identify the pleading and supporting papers which Lawyer should file with Pete's Complaint to seek summary judgment in favor of Pete.**

BOARD'S ANALYSIS – QUESTION 1

1. As the amount in controversy exceeds \$5,000 exclusive of interest, costs and attorney's fees, Lawyer may elect to file suit in the District Court or in Circuit Court, a court of general jurisdiction. C.J. Art. 4-402(d)(1)(i). The \$30,000 "exclusive jurisdiction" of the District Court does not apply to an action in contract. C.J. Art. 4-401(1).

Since a jury trial is not permitted in a civil action in which the amount in controversy does not exceed \$15,000, it is probable that Lawyer would choose to file Pete's complaint in the District Court, as there is limited discovery and a faster trial calendar.

Venue is governed by C.J. Art § 6-201 and § 6-202. This is a case of multiple defendants: Donna who resides and is employed in Howard County; and Dave who is a non-resident. § 6-202(ii) states that in the action for damages against a non-resident individual “maybe brought in any county in the State”. There is no single venue applicable to both Donna and Dave under § 6-201(a). Consequently, under § 6-201(b), all may be sued in a county in which any one of them could be sued, or in a county where the cause of action arose.

In *Wilde v. Swanson*, 341 Md. 80, 548 A.2d 837 (1988), the Court of Appeals held that § 6-201 and § 6-202 are “cumulative, not mutually exclusive”. Consequently, Lawyer could file Pete’s Complaint in any County in the State, as Dave could be served in any such venue.

Venue is determined at the time the lawsuit is filed, not when the cause of action arose. [cite authority].

2. Lawyer should file a Motion for Summary Judgment (or, in the District Court, a demand for Judgment on Affidavit) stating that there is no dispute of material fact and that Pete is entitled to judgment as a matter of law. The Motion must be supported by copies of the purchase order and payment record showing the balance due, and should include Pete’s affidavit, based on personal knowledge, that the account stated is true and correct. Md. Rule 2-501 (Circuit Court); Md. Rule 3-306(District Court).

QUESTION 2

(15 Points – 25 Minutes)

Assume Pete’s Complaint, accompanied by pleading and supporting papers for summary judgment, is filed in an appropriate Maryland court.

Donna’s residence and employment address are known to Pete.

A. What methods may Lawyer use to serve the initial lawsuit on Donna? Explain your answer.

Dave’s whereabouts are unknown to Pete and Lawyer, although they strongly suspect that Donna knows Dave’s current address.

B. What procedures, if any, should Lawyer use to obtain information from Donna about Dave’s current address? Explain your answer.

Dave’s whereabouts remain unknown.

C. What, if anything, can Lawyer do to validly obtain personal jurisdiction over Dave? Explain your answer.

BOARD'S ANALYSIS – QUESTION 2

1. Donna may be personally served by private process or by sheriff, or by certified mail pursuant to Rule 2-121 (Circuit Court) or 3-121 (District Court). C.J. 6-312(c) states that service by delivery to defendant is valid if copies of the summons and complaint are left at defendant's dwelling house or abode with a person of suitable age and discretion.

2(a) Lawyer may direct discovery (e.g. interrogatories) to Donna, requesting her to disclose Dave's last known address and/or to produce written communications to or from Dave that relates to the claims or defenses in the lawsuit on which disclose Dave's address. Md. Rule 2-421; 3-421. Donna may claim that communications between her and Dave are privileged because they are still lawfully married. [CJ 9-105]. However, she may not assert a privilege in view of the fact that she is severally responsible for the entire debt and may be pleased to see Dave joined in the suit.

2(b) Unless and until Dave is served with process, the Maryland court will not have personal jurisdiction. Md. Rule 2-121(c) and 3-121(c) allow, in certain circumstances, that "the court may order any other means of service that it deems appropriate in the circumstances and reasonably calculated to give actual notice". However, since Dave's whereabouts are unknown, it is unlikely that a court would allow an alternative method, such as publication or posting, absent an affidavit reflecting that Plaintiff has made reasonable efforts to locate Dave's whereabouts.

QUESTION 3

(5 Points – 10 Minutes)

Pete's legally sufficient Complaint and papers seeking summary judgment have been filed in an appropriate Maryland court and have been properly served on Donna. She retains Barrister, a Maryland lawyer, to represent her. Donna tells Barrister that shortly before the store closed, Salesperson, who worked for Pete, took back \$5,000 worth of auto supplies for credit on the account. Therefore, Donna claims Pete is not owed \$15,000 as he claims.

Identify the pleadings and supporting documents Barrister should initially file on behalf of Donna. Explain our answer.

BOARD'S ANALYSIS – QUESTION 3

In Circuit Court, since the lawsuit has been properly filed and served on Donna and is legally sufficient, there are no apparent mandatory or permissive preliminary motions which should be filed on Donna's behalf. Md. Rule-322.

Barrister's initial filings:

1. Barrister should file an Answer, which may include a General Denial of liability (Md. Rule 2-323) and should include as affirmative defenses under Rule 2-323(g): payment and

statute of limitations. Barrister should also respond to motion for summary judgment, showing by affidavit of Donna, that there is dispute of material fact.

2. Barrister may also file a cross-claim against Dave, seeking contribution for one-half of any sums found to be due from Donna. Md. Rule 2-331(b).

3. A jury trial is not available because the claim does not exceed \$15,000 minimum required for a jury trial.

4. In Circuit Court, Barrister must also file a Response to Pete's motion for summary judgment. The response must be supported by Donna's affidavit, based on personal knowledge, specifying the return of \$5,000 worth of auto parts and the failure of Pete to allow a credit for the return of this merchandise.

In District Court, Donna's Notice of Intent to Defend and Statement of Defense will raise the issue. An affidavit is not required.

QUESTION 4

(5 Points – 10 Minutes)

At trial, Pete identifies a photocopy of the written guaranty with signatures of Donna and Dave as guarantors.

Lawyer: What happened to the original of this document?

Pete: I don't know. I searched my files thoroughly, but I could not locate the original.

Lawyer offers the guaranty as evidence. Barrister objects.

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

BOARD'S ANALYSIS – QUESTION 4

The photocopy is a "duplicate" defined by Rule 5-1001(d). A duplicate is admissible unless a genuine question is raised as to the authenticity of the original, or it would be unfair to admit the duplicate. Rule 5-1003. Moreover, if the original has been lost, a photocopy may be introduced unless the original was lost in bad faith. Rule 5-1004(a). For these reasons, the Court should overrule Barrister's objection and admit the photocopy of the guaranty as evidence.

QUESTION 5

(5 Points – 10 Minutes)

At trial, Pete introduces sufficient evidence to prove the initial simple contract debt of \$20,000 in December 2008, and the receipt of \$5,000 in partial payments, the last made in July 2010.

On Donna's behalf, Barrister moves for judgment at the end of Pete's case-in-chief, on the ground that the action was not filed within the applicable statute of limitations.

How should the court rule on Donna's motion? Explain your answer.

BOARD'S ANALYSIS – QUESTION 5

C.J. Art. § 5-101 provides a general three year statute of limitations for a civil action. This statute applies because the contract was a simple contract, not a specialty (which carries a 12-year statute of limitations).

Although Pete's suit was filed more than three years after the debt was incurred, it is well-settled that part payment of principal is considered as an "acknowledgement" of the debt, removing the bar of the statute of limitations. *McMahan v. Dorchester Fertilizer Co.*, 184 Md. 155, 40 A.2d 313 (1944).

Further, unless the defense of statute of limitations was asserted affirmatively in Donna's Answer, it is deemed waived. Maryland Rule 323(g). *Brooks v. State*, 85 Md.App. 355, 584 A.2d 82 (1991)

QUESTION 6

(15 Points – 25 Minutes)

On November 3, 2011, Defendant was charged by the State's Attorney for Baltimore City in District Court with misdemeanor theft (theft of less than \$1,000), a crime which carries by statute a maximum penalty of incarceration for 18 months. Defendant engaged the services of Attorney. Defendant, with Attorney's advice, prayed a jury trial.

At trial, Attorney moved for a judgment of acquittal at the close of the State's case, which the Court promptly denied. Defendant was thereupon called to the stand to testify in his own behalf. Attorney then rested for the defense, and did not renew his motion for judgment of acquittal.

Prior to closing arguments the trial judge held a conference in chambers in the presence of the court reporter to review jury instructions. Upon hearing the proposed instructions, Attorney objected to the judge's proposed instruction on intent, which objection the court reporter duly recorded.

The judge instructed the jury as she had originally proposed at the conference. Being of the opinion that he had adequately noted his objection on the record in chambers, Attorney did not object to the instructions as given.

The jury found Defendant guilty as charged. On December 3, 2011, Defendant was sentenced by the judge to two years in the custody of the Department of Corrections.

On March 15, 2012, Defendant discharged Attorney and noted an appeal *pro se* of his conviction to the Court of Special Appeals. Defendant assigned as error the Court's denial of his motion for judgment of acquittal, and the failure of the trial court to instruct the jury properly on intent. The transcript of testimony has been prepared, and all steps have been taken to perfect Defendant's appeal.

Today, you have been appointed to represent Defendant on his appeal, and have been informed that appellant's brief is due on September 15, 2012. You immediately file with the trial court a motion to modify sentence.

**A. Advise the Defendant regarding the merits of his issues on appeal.
Explain your answer.**

B. What ruling do you expect the trial judge to make regarding your motion to modify sentence? Explain your answer.

BOARD'S ANALYSIS – QUESTION 6

(1) Merits on Appeal: The appeal lacks merit.

a. Judgment of Acquittal: a motion for judgment of acquittal challenges the sufficiency of the evidence to convict. In this criminal action, tried before a jury, the appellate court can review the sufficiency of the evidence only if there is a denial of a motion for judgment of acquittal at the close of all the evidence. *Barnes v. State*, 31 Md.App. 25. Maryland rule 4-324(c) provides, where as her Defendant offered evidence after the denial of his motion, the defendant withdraws the motion. There having been no renewal of the motion at the close of all of the evidence, the issue of sufficiency of the evidence has not been properly preserved for appeal.

b. Objections to Instructions: Rule 4-325(e) requires that objection to instructions must be made on the record promptly after the court instructs the jury in order to assign as error the giving or failure to give instructions. Defendant's attorney did not preserve this issue on appeal, not having noted his objection after the court instructed the jury. This issue was not properly preserved for appeal.

The Court of Special Appeals will dismiss the appeal because of failure to preserve the issues raised on appeal.

(2) Defendant's Sentence: The court has imposed a sentence upon Defendant in excess of that provided by the statute. Under ordinary circumstances, the court has revisory power over a sentence upon a motion filed within 90 days after its imposition in the Circuit Court, whether or not an appeal has been filed. Md. Rule 4-345(b)(2). That period of time has expired. However, the sentence imposed is illegal, and the court may

correct an illegal sentence at any time. Maryland Rule 4-345(a). The court will correct Defendant's illegal sentence.

QUESTION 7

(15 Points – 25 Minutes)

Albert, Barbara, Connie and Dan are public school teachers employed by the Board of Education of a Maryland County. The County Board of Education employs 800 permanent teachers in its school system. These four have been selected by their fellow teachers to seek legal representation to prevent the School Board from instituting its program for the random drug screening of teachers scheduled to begin September 1, 2012.

The written program for drug screening describes random testing of teachers "as frequently as each school principal deems appropriate." Analysis of specimens is to be performed by a private lab. There is no opportunity or mechanism for teachers to challenge the lab's positive drug analysis. Each teacher will be charged \$25 per year to cover the costs of analysis. A positive analysis for an illegal controlled dangerous substance will be grounds for immediate dismissal. The teachers contend that the provisions of the drug screening program are in breach of their individual contracts of employment and an invasion of their right to privacy.

Albert, Barbara, Connie and Dan have retained you to represent the County school teachers.

What effective and efficient action can you file in which Maryland court to protect the rights of the public school teachers of this County? Explain.

BOARD'S ANALYSIS – QUESTION 7

The most efficient and effective action to protect the rights of County teachers is a class action in the Circuit Court for the County seeking declaratory and injunctive relief.

This matter meets all of the prerequisites of Maryland Rule 2-231(a): numerosity, common questions of law and fact common to the class; the claims and defenses of the representative parties are typical of the class; and the parties, having been selected by the class, will fairly and adequately protect the class interests. Furthermore, the School Board has acted or refused to act on grounds generally applicable to the class, thereby making final injunctive and declaratory relief appropriate to the class as a whole, as required by Md. Rule 2-231(b) (2).

Although the separate monetary claims of individual members of the class (\$25 per year) do not meet the jurisdictional amount required for Circuit Court action, the Annotated Code of Maryland, Courts and Judicial Proceeding Article, § 4-402(d) (1) (ii) permits the aggregation of the separate claims to meet the minimum amount in controversy required for Circuit Court jurisdiction. Moreover, the District Court does not have jurisdiction to render declaratory judgment. § 4-402(c). For Circuit Court jurisdiction in declaring rights, see Annotated Code of Md. Courts and Judicial Proceedings Article, § 3-403.

Because the implementation of the county's random drug screening program is imminent, temporary and permanent injunctive relief should be sought pursuant to Md. Rule 15-501 *et seq.*

PRELIMINARY FACTS APPLICABLE TO QUESTIONS 8 AND 9

ABC, a Maryland corporation, refused to complete a contract entered into between ABC and Client, a resident of Montgomery County, Maryland. At the suggestion of a friend, Client telephoned Lawyer, an attorney admitted to practice law in Washington, D.C., but not in the State of Maryland, to discuss his problems concerning the contract. In the course of their telephone conversation, on January 2, 2012, Lawyer agreed to represent Client and, if negotiations proved unfruitful, to file suit on Client's behalf against ABC alleging breach of contract and claiming damages of \$200,000. Lawyer advised Client that his case was very strong, and informed Client that he would charge a contingent fee equal to one-half of any recovery. The telephone conversation concluded with Client agreeing to the fee as described by Lawyer. Client promptly forwarded all necessary documents to Lawyer.

Negotiations proved unfruitful. Client authorized Lawyer to file a complaint in Montgomery County Circuit Court against ABC.

QUESTION 8

(15 Points – 25 Minutes)

What steps should Lawyer take to lawfully represent Client in this action?

BOARD'S ANALYSIS – QUESTION 8

Lawyer should clearly advise client that Lawyer is not licensed to practice law in Maryland and that he would have to associate with Maryland counsel in order to file the lawsuit.

Rule Governing Admission to Bar 14. An out-of-state attorney must be admitted to practice for limited purpose of appearing and participating in the action as co-counsel with a Maryland attorney of record. Therefore, Lawyer must associate himself with Maryland counsel in the action on behalf of ABC.

Any out-of-state attorney who is admitted *pro hac vice* "is subject to the Maryland Lawyers Rules of Professional Conduct". RGA Rule 14(d).

The Maryland lawyer (co-counsel) must "actively participate in the action. RPC 5.5(c)(1). The fee-sharing provisions of Rule RPC 1.5(b) must be complied with.

QUESTION 9

(15 Points – 25 Minutes)

Lawyer files a legally sufficient complaint on behalf of Client in Montgomery County, Maryland. In preparation for trial, Lawyer incurred \$3,000 in out-of-pocket costs to take depositions of ABC's officers and agents.

Just prior to trial, Lawyer with Client's consent settled the action for the sum of \$150,000.

A check in the amount of \$150,000 was mailed to Lawyer by ABC's counsel, payable to Client and Lawyer. Lawyer had Client endorse the check upon receipt of it, and Lawyer endorsed the check, depositing it in his general operating account. After the check cleared, Lawyer drew a check on his operating account, payable to client in the amount of \$72,000, and left in his operating account his fee of \$75,000 and \$3,000 for the cost of the deposition.

Client is outraged because he believes he should have received \$75,000 free and clear. He writes to the Attorney Grievance Commission of Maryland complaining about Lawyer's unwillingness to forward him an additional \$3,000.

You are Assistant Bar Counsel of the Grievance Commission.

What violations of the Maryland Rules of Professional Conduct are raised by these facts? Explain.

BOARD'S ANALYSIS – QUESTION 9

Bar Counsel may charge Lawyer with violations of the following Rules of Professional Conduct?

Rule 1.5(a) - 50% contingent fee for strong case may be unreasonable. Amount in controversy is \$200,000, so fee may (or may not) far exceed actual time spent.

(b) – Contingent fee arrangement shall be in writing and shall specify whether expenses are deducted before or after the contingent fee is calculated. Written fee agreement must “clearly notify the client of any expenses for which client is responsible whether or not client is prevailing party.”

At conclusion of matter, Lawyer shall provide client with a written statement showing how settlement funds were disbursed.

Rule 1.15(a) – Settlement funds may not be co-mingled in Lawyer's general account.

Rule 5.5. – Lawyer is not admitted to practice in Maryland. He/she has clearly violated Rule 5.5 by prosecuting a lawsuit in Montgomery County Circuit Court.

Maryland Rule 1-311. Pleading must be signed by attorney admitted to practice in Maryland.