

**July 1998 Maryland Out-of-State Attorney's Bar Examination
Board's Analysis**

Question I

- A. Contact P's attorney to determine whether or not P will consent to the disclosure of the records.
- B. Rule 2-403 provides that on motion, a party or of a person from whom discovery is sought may seek protective order.

Question II

- A. Allege facts by affidavit that the delay was not caused by any act or omission of the employer or its attorney. For example, failure to pay for transcript on time or directions to the agency to delay preparation of the transcript.
- B. Under Rule 7-206(d) obtain and attach to the response an affidavit of the stenographer setting forth the fact that the delay was caused by the Commission or one of its agents.

Question III

Conclusory denials will not defeat the motion. Barber v Eastern Korling Co., 108 Md. App. 659 (1996); Hill v. Lewis, 21 Md. App. 121 (1974).

Statement that D has a valid defense will not defeat motion. Frush v. Brooks, 204 Md. 315 (1954).

Failure factually to contradict facts recited in movant's affidavit constitute an admission of these facts for purposes of the motion. Roe v. Nat'l Bank, 32 Md. App. 1 (1976).

Affidavit to the best of affiant's knowledge, information and belief,

is not in accord with the rule. Fletcher v. Flourney, 198 Md. 53 (1951).

Must be made on personal knowledge. Philips v. Herro, 215 Md. 223 (1957).

Question IV

Rule 9.207 d - within five days after recommendations are placed on the record or served pursuant to this rule, a party may file exceptions with the clerk.

Rule 1-203 c - Computation of Time: Service by mail, a recipient gets an additional three days. Under this rule H did not receive the notice until April 16, 1998 (a Thursday).

Five days computation starts on Friday, April 17, 1998.

Rule 1-203 (a) - If period of time is seven days or less, intermediate Saturdays, Sundays and holidays are not counted.

Husband's last date to file, counting Friday, April 17, excluded, and excluding Saturday and Sunday, intermediate days, gives H until Thursday, April 23, 1998 to file his exceptions.

The court ruling is incorrect. H's filing on April 23, 1998 was timely.

Question V

Section 6-104 CJ Article -

- (a) If a court finds that in the interest of substantial justice an action should be heard in another forum, the court may stay or dismiss the action on any conditions it considers just.
- (b) The party who instituted the District Court case may file a motion in District Court to remove the action to the Circuit Court for

consolidation with the pending Circuit Court case.

Rule 3-325(a)

(1) A plaintiff whose claim is within the exclusive jurisdiction of the District Court may elect a jury trial by filing with the complaint a separate written demand.

(2) If the defendant elects a jury trial he may do so by filing a separate written demand within ten days after the time for filing a notice of intention to defend.

Rule 3-325(b)

Failure of a party to file the demand as provided in Section (a) of this rule constitutes a waiver of trial by jury of the action for all purposes including trial on appeal.

Where a party in one case fails to request a jury trial within the time prescribed he cannot obtain indirectly by consolidation with a second case that which he had already waived. Fallon v. Agency Rent-A-Car Sys. 268 MD 585.

Question VI

The facts indicate that the Complaint was filed against a deceased person and a nonexistent legal entity (Personal Representative not appointed in Maryland).

To raise these issues, a motion to dismiss should be filed under Rule 2-322(a) raising lack of jurisdiction over the person of Dayton. Suit against a party who is deceased at the time of filing is a nullity. There is also an obvious insufficiency of service of process since a deceased person cannot be served with process. This could be pleaded but is probably not necessary because of the obvious lack of jurisdiction over the person.

Suit against a Personal Representative is appropriate under these facts, but Wilma has not been designated as Personal Representative and suit against her in that capacity should also be dismissed under Rule 2-322. The Circuit Court has no authority to force Wilma to act as a Personal Representative. Pleader should also include the negative defense as provided for in Rule 2-323(f) denying the legal existence of a party (1) and the authority of Wilma to be sued in a representative capacity (3). This is permissible under 2-322(f) “may join... any other motion then available...”.

The motion itself would not have to be filed until thirty days after service of process since the defendant was served in Maryland per 2-311(b)(1).

Filing of the motion to dismiss would extend the time for filing the answer for fifteen days after entry of the Court’s Order on the motion per 2-321(c).

Answers to Interrogatories are not required per 2-421(b) until fifteen days after the date on which Wilma’s initial pleading is required. In this case, fifteen days after the Court rules on the motion to dismiss since neither a motion or answer is “required” until thirty days after service of process. If the Court grants the motion to dismiss as to either Dayton or Wilma, no answers to interrogatories would be necessary by the dismissed Defendant. Since Dayton is deceased and a personal representative does not exist, the interrogatories could probably be ignored. The better course would be to move for a protective order under 2-403.

The Court should dismiss the suit against both named Defendants at this point. However, P’s amended complaint was filed in Montgomery County before the Court ruled on Wilma’s motion to dismiss. Under 2-341, an amendment may be filed to “add a party or parties” and would appear to authorize P’s amendment which brings Wilma in as an individual t/a Superior Video.

Preliminarily, Wilma should raise the following:

Motion to dismiss under 2-322(a)(2) - improper venue. The facts alleged that Wilma operated the store in Anne Arundel County, not Montgomery County. Under 6-103, Court's Article, Section (b)(4) the Maryland Court may exercise personal jurisdiction over Wilma as one who regularly does business in this State. However, under 6-201, venue of the action is in the county where the Defendant carries on a regular business. In this case, Anne Arundel County. The additional venue provision of CJ 6-202(11) which permits an addition for damages against a nonresident to be brought in any county in this state applies to causes of action which arise in the state. (Alcarese v. Stinger, 197 MD 236) To avoid waiver, Wilma should also include lack of jurisdiction over the person under 2-322(a)(1). However, for purposes of this motion, the Court would probably assume the truth of the allegations and deny it on that basis. If Wilma is required to file an answer, she should file a general denial as well as failure to state a claim and any applicable affirmative or negative defenses under 2-323.

P can now file another set of Interrogatories because Wilma is a separate party. Under Rule 2-421(a) a party may serve "...written interrogatories to any other party." Wilma's time here is reduced to fifteen days after ruling on the dismissal motion since she was served in Maryland.

The Court at this point should dismiss P's suit against Dayton and Wilma as personal representative for the reasons set forth above.

The Court should grant the motion regarding venue. However, in lieu of dismissal the Court would now transfer the case from Montgomery County to Anne Arundel County, the site of proper venue.

The appeal from the Circuit Court decision upholding the Orphans' Court ruling is an appealable order. While Plaintiff's purpose in seeking a Personal Representative in Maryland is related to the tort action, it is a separate and distinct proceeding.

Substitution of parties is covered in Rule 2-241. The Rule applies when the status of a party who was properly joined in an action changes

by reason of death, dissolution if a corporation, or other reason specified in the Rule that occurs after the initiation of the action.

In this case the initial complaint against Wilma as Personal Representative was dismissed by the Circuit Court for Montgomery County. Therefore, there is no Personal Representative for which the recently appointed Virginia Personal Representative could be substituted.

Under these circumstances a motion to strike should be filed within fifteen days after service of the notice of substitution.

With respect to the second amended complaint, Wilma could file a motion to strike if there are reasons why the Court should not allow the amendment. Otherwise, Wilma should file an answer to the second amended complaint with the appropriate defenses.

With respect to an order for substitution, Rule 2-241(c) requires that an objection to substitution be filed within fifteen days after service of the notice.

If Wilma wants to contest any facts or allegations in the second amended complaint she should file an additional answer within the time remaining to answer the original pleading or within fifteen days after service of the amendment, whichever is later. If Wilma does not file an additional answer, the answer previously filed is treated as the answer to the Amended Complaint.

If the appointment of the Personal Representative in Virginia is legally accomplished, that personal representative would have the same rights to sue and be sued in Maryland as a personal representative appointed in this State. It would appear that if the appointment in Virginia is regular, the appeal from the Circuit Court's refusal to appoint a personal representative in Maryland would be moot since there cannot be two personal representatives acting at the same time. A motion to dismiss the appeal in the Court of Special Appeals would be appropriate.

Question VII

Rule 4-261 provides the taking of the deposition of a witness by agreement or order of court and for the procedures to be followed. Rule 4-261(g) permits either the witness or a party to move for a protective order. Rule 4-261 provides that the taking of a deposition in criminal cases controlled by Rules 2-401(f), 2-414, 2-415, 2-416, 2-417(b) (c).

Rule 2-416 provides for a video or audio taped deposition, with or without a stenographic record.

Rule 2-417 allows for the taking of a deposition on the written questions thirty days after service of notice to the opposing party.

Rule 1.6 of Rules of Professional Conduct section (b) — a lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

1: to prevent the client from committing a criminal fraudulent act; and

2: to rectify the consequences of a client's criminal fraudulent act in the furtherance of which the lawyer's services were used;

Rule 1.16 Lawyer shall withdraw from representation of a client (1) if the representation would result in the violation of the rules of professional conduct or other law.

A lawyer may withdraw from representing a client if withdrawal can be accomplished without materially adverse effect on the interest of the client or if: (1) the client persists in the course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent; (2) the client has used the lawyer's services to perpetrate a crime or fraud and (3) a client insists of pursuing an objective that the lawyer considers repugnant or imprudent.

When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the

representation.

Rule 3.3 - A lawyer shall not knowingly fail to disclose material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client.

Offer evidence that the lawyers knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take remedial measures.

A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

However, a lawyer for an accused in a criminal case need not disclose that the accused intends to testify falsely or has testified falsely if the lawyer reasonably believes that the disclosure would jeopardize any constitutional right of the accused.

See the comments to Rule 3.3