

**July 1999 Maryland Out-of-State Attorneys Examination
Board's Analysis**

Common Fact Pattern for Questions I - IV

Moe, a licensed Maryland pharmacist, driving his pickup truck home after a night of drinking at the Dew Drop Inn, was involved in a two-car motor vehicle accident on Washington Street in Cumberland, Allegany County, Maryland. The driver of the other vehicle was seriously injured. Deputy Curley arrived on the accident scene. He smelled the odor of alcohol on Moe's breath and saw beer cans in the bed of the pickup and on the inside floor board. Deputy Curley arrested Moe for driving while intoxicated and driving under the influence of alcohol. Upon search of Moe's person, Deputy Curley found a film cannister that contained pills later determined to be Valium and amphetamines. Deputy Curley charged Moe with driving while intoxicated, driving under the influence of alcohol, and possession of controlled dangerous substance without a valid prescription in the District Court for Allegany County. Deputy Curley advised Moe of his rights to a chemical test for his blood, and Moe consented to a blood test which resulted in a blood alcohol reading in excess of the legal limit for intoxication. The blood test also reflected the presence of Valium. Moe was given a certified statement showing the analysis of the blood specimen.

Moe has retained you to represent him. He tells you he has been medicating himself. Starr is the prosecutor in the State's Attorney's Office for Allegany County assigned to prosecute the case. Starr has confirmed that Moe has a prior conviction for driving while intoxicated, which enhances his potential sentence, if convicted as a second offender. Starr has also received a chemical analysis report confirming the pills in the film cannister were controlled dangerous substances.

Question One

(5 pts. - 9 min)

- A. **What does Starr have to do to insure that Moe will be subject to the additional penalty if convicted of an alcohol-related driving offense?**

(8 pts. - 14 min)

- B. **What court papers do you have to file to be in a position to insure that the qualified medical persons who tested Moe's blood and the pills appear in court and to preclude the summary admission of the certified statements reflecting the chemical analyses in lieu of the testimony of the medical persons?**

Board Analysis

A. Pursuant to Maryland 4-245(b), Starr must serve a notice of the alleged prior conviction on Moe or you as his attorney before the acceptance of any plea of guilty, or at least five (5) days before trial in District Court. Pursuant to 4-245(d), a copy of the notice is to be filed with the clerk and presented to the court after the plea or conviction. Before sentencing and after Moe is given an opportunity to be heard, the court then determines whether Moe is a subsequent offender as specified in Starr's notice.

B. Pursuant to Courts and Judicial Proceedings Article, Section 10-04(c)(IV)(1), if you want the qualified medical person to be present to testify at Moe's trial as to the blood test results, you must notify the court and the State in writing at least twenty (20) days before trial. Then, under 10-304(c)(IV)(3), the statement is inadmissible without the testimony of the qualified medical person. If you want the toxicologist, you must actually subpoena him under 10-04(d)(2)(i) at least twenty (20) days before trial.

With reference to the chemical analysis of the controlled dangerous substance in the film canister, pursuant to Courts and Judicial Proceedings Article, Section 10-1003(a), you should make a written demand of Starr filed with the clerk of the court at least five (5) days prior to the trial requiring the presence of the chemist.

Question Two

(4 pts. - 7 min)

Moe is concerned about a possible civil suit and inquires as to whether a plea can be entered in the criminal case that will not act as an admission of liability in a future civil action against him.

What would you tell him?

Board Analysis

You should tell him that if the court approves, he could enter a nolo contendere plea pursuant to Maryland Rule 4-292(d) which would not be admissible in a subsequent civil proceeding as an admission of negligence (see also Maryland Rule 5-410(a)(2)).

Question Three

(7 pts. - 14 min)

You negotiate a plea bargain with Starr on Moe's behalf after Moe tells you he is prepared to plead guilty to driving under the influence of alcohol and possession of controlled dangerous substance without a valid prescription if the State will agree to enter

a nolle prosequi as to the driving while intoxicated charge and he is sure to receive a county jail work release sentence.

How could you attempt to accomplish this result for Moe under the Maryland Rules?

Board Analysis

You can negotiate the plea agreement with Starr pursuant to Maryland Rule 4-243 (a)(1) and the sentence agreement pursuant to Maryland Rule 4-243(a)(5).

You and Starr can then agree, pursuant to Rule 4-243(a)(6), that the plea and sentence bargain agreement will be submitted to a judge under 4-243(c).

Under 4-243(c), the judge can accept the plea and approve the agreement.

Question Four

(6 pts. - 10 min)

Assume Moe is found guilty of driving under the influence of alcohol and possession of controlled dangerous substance.

What additional responsibility does the judge have because Moe holds a state-issued pharmacy license?

Board Analysis

When a licensed Maryland pharmacist is convicted of a controlled dangerous substance violation, the judge under Maryland Rule 4-340 must determine:

- (a) Whether Moe has previously been convicted of a controlled dangerous substance offense after January 1, 1991 and if he has, then the court must direct the clerk to certify and report the current conviction to the licensing authority.
- (b) If no prior conviction, the judge must determine whether, prima facie, there is a relationship between the current conviction and the license using the factors recited in 4-340(e)(1 through 4). If a relationship exists, the court shall direct the clerk as related in (1) above.

COMMON FACT PATTERN FOR QUESTIONS 5-8

On June 23, 1999, Peter filed a Complaint in the Circuit Court for Howard County, Maryland, against the Three Thieves Partnership, a Maryland general partnership with its only office in Montgomery County, Maryland, and its general partners, Tom, Dick and Harry, alleging that the partnership had breached a written contract for the sale of land located in Howard County, Maryland, executed at the partnership office. Tom, Dick and Harry all live and work in Montgomery County, Maryland. The Complaint sought specific performance of the contract of sale and, alternatively, \$25,000 in damages for its breach. Peter also filed a demand for a trial by jury. On the same day a legally sufficient summons, with a copy of the Complaint and each exhibit attached, is issued for each defendant. The summons are returned for service to Larry, who is Peter's attorney. You are retained to represent all the defendants.

QUESTION 5

(15 Points 27 Minutes)

On June 24, 1999, as Tom is walking on the street in front of the partnership's office, Larry hands the summons and complaint for Tom to him. On the same date Peter hands the summons and complaint for Dick to him outside Dick's vacation home in Rehobeth Beach, Delaware. Larry mailed the summons and complaint for Harry by certified mail in an envelope addressed to Harry, at his post office box, marked "RESTRICTED DELIVERY - SHOW TO WHOM, DATE, ADDRESS OF DELIVERY". On June 24, 1999, Harry's wife picked up the envelope at the post office and signs her name to the receipt for the certified mailing, and leaves the envelope on Harry's dresser. Proofs of service filed reflecting the these facts.

On Friday, July 23, 1999, after the courts have closed, Tom, Dick and Harry come to your office and retain you to make timely responses to the Complaint and allege defective service of process.

Discuss the effectiveness of service on each defendant in this case. When must an initial responsive pleading or paper be filed by each defendant?

BOARD ANALYSIS

Service by an attorney in the proceeding is permissible [RULE 2-123(a)]; service on Tom is effective and he should file an answer [RULE 2-323]. Service by a party to the proceeding is not permissible [RULE 2-123(a)]; service on Dick is improper. Service by certified mail must be delivered to the individual [RULE 2-121(a)]; service on Harry is ineffective. An initial response is ordinarily due within thirty days of service of process. asserting insufficiency of service of process must be asserted in a motion to dismiss filed within that time and before an answer is filed. [RULE 2-321(a, e), RULE 2-322(a)]. Since the thirtieth day after service on Tom and Dick falls on a Saturday, the time in which to file an answer or preliminary motion is extended until Monday [RULE 1-203(a)]. Since Harry was served outside Maryland, his response is due sixty days after service of process [RULE 2-321(b)(1)].

Service upon a general partnership may be made by serving any partner. However, the summons and complaint for the partnership has not been served at all [RULE 2-124(d)].

QUESTION 6

(10 Points 18 Minutes)

After agreeing to represent Tom, Dick and Harry, and the partnership, you are delayed in court on the date that a response is due and cannot get from your office in Montgomery County to the Howard County Clerk's office before it closes.

- a) **Is Howard County an appropriate venue? Discuss.**
- b) **Can you file your response by use of a facsimile transmission?**

BOARD ANALYSIS

(a) Certain actions pertaining to an interest in land must be brought in the county where all or a portion of the land is located [MD. ANN. CODE COURTS & JUDICIAL PROCEEDINGS §6-203]. However, actions for specific performance of a contract to sell real property are personal [*Eastham v. Young*, 250 Md. 516, 243 A.2d 559 (1968)], and must be brought where the defendants reside, are employed or carry on a trade or business located [MD. ANN. CODE COURTS & JUDICIAL PROCEEDINGS §6-201]. Therefore, venue in Howard County may be inappropriate.

(b) A paper may not be filed by facsimile transmission to the Clerk. However, a photocopy of a paper transmitted by facsimile transmission to a third party may be filed by the third party so long as you retain the original paper in your file. [RULE 2-322(b)].

QUESTION 7

(10 Points 18 Minutes)

After you filed responses on behalf of the defendants, Tom died and Dick was adjudicated an incompetent. You promptly notify the plaintiff's attorney.

What, if any, action should be taken?

BOARD ANALYSIS

The proper person may be substituted for a party who dies or becomes incompetent. This is accomplished by a notice of substitution filed by any party, other person affected by the action, a successor

or representative of the party or by the court. If no substitution is made the court may dismiss the action or take such other action as justice may require. [RULE 2-241].

QUESTION 8

(15 Points 27 Minutes)

Prior to trial, the plaintiff filed a motion in limine to prevent the defendants from introducing evidence that toxic waste was buried on the property. The court denied the motion. At trial you present the evidence of the toxic waste without further objection.

When you next offered evidence of the cost that the plaintiff would have incurred in cleaning up the toxic waste had he acquired the property, the plaintiff's counsel stated "Same objection!" When the trial judge asked the plaintiff's counsel to state his grounds, he replied "Same grounds!" The trial judge replied "Overruled".

At the close of all the evidence the plaintiff's counsel made a motion for judgment, but stated no grounds. The trial judge denied the motion for judgment.

After the jury was instructed, the plaintiff's counsel objected to the instructions on the ground that the instructions were prejudicial to the plaintiff. The trial judge declined to give further instructions.

The jury returned a verdict of \$1.00 in favor of the plaintiff. The plaintiff's counsel filed a motion for judgment notwithstanding the verdict on the ground that the court improperly admitted the evidence of the toxic waste and a motion for a new trial on the issue of inadequate damages. The trial judge agreed that the evidence of the toxic waste should have been excluded but denied both motions.

Has the plaintiff preserved any of these issues for appellate review? Discuss.

BOARD ANALYSIS

The denial of a pre-trial motion in limine does not preserve an objection; the plaintiff's counsel was required to make an objection at trial at the time the evidence was offered [RULE 2-517; *Collier v. Eagle-Picher Industries*, 86 Md. App. 38, 585 A.2d 256, *cert. denied*, 323 Md. 33, 591 A.2d 249 (1991)]. Therefore, there may have been no proper objection to the evidence of toxic waste and cost, and the plaintiff's counsel was required to state his grounds when required by the court [RULE 2-517(c)]. Grounds for a motion for judgment must be stated with particularity [RULE 2-519(a)]. Objections to jury instructions must be stated with particularity [RULE 2-520(e)]. The grounds for a motion for judgment notwithstanding the verdict are limited to grounds stated in a proper motion for judgment at the close of all the evidence [RULE 2-532(a)]. Even though the plaintiff's counsel was correct in the identification of error, he was not permitted to raise this issue in this motion. Although the issue is preserved, a motion for a new trial is ordinarily not reviewable on appeal [RULE 2-533; *Brinand v. Denzik*, 226 Md. 287, 173 A.2d 203

(1961)]. The appellate court will likely affirm the judgment.

COMMON FACT PATTERN FOR QUESTIONS 9 AND 10

A judgment was obtained by Paradox Corp. against Able Smith on July 1, 1987 in the Circuit Court for Anne Arundel County, Maryland, and the judgment was indexed on that date in that county. At that time, Able owned several unimproved lots and one improved lot upon which a house was built (“the house”), all in Anne Arundel County, Maryland. Able was married to Jane Smith, and had one minor daughter, Mary Smith. Jane Smith was the Court-appointed guardian of Mary. In September 1988, Able conveyed the house to “Jane Smith, guardian and next friend of Mary Smith”. Able died in October 1998 (his estate continues to be probated in the Orphans’ Court for Anne Arundel County). Jane and Mary have lived in the house since Able’s death. On January 15, 1999, Paradox Corp. requested a writ of execution to have the Sheriff levy upon the property of Able to satisfy the money judgment with additional instructions that service on “Jane Smith, guardian and next friend of Mary Smith” be made at the time of the levy on the house and on Able’s estate. The writ was delivered to the Sheriff for Anne Arundel County on April 28, 1999. Jane Smith was served with the writ on April 29, 1999 which was the same date the writs were posted on the house and the writ served on the personal representative of Able’s estate. Jane responded by denying that she had any interest in the house. Upon receipt of her response, Paradox Corp. immediately filed an amended request for a writ of execution which added only “and Mary Smith, a minor”. The Sheriff of Anne Arundel County received the amended writ on July 3, 1999. Mary Smith was served with the amended writ on July 5, 1999. Mary claims the entire ownership of the house free from the judgment.

QUESTION 9

(16 Points 29 Minutes)

Based on the given facts, is there now a valid judgment in favor of Paradox, Inc. against the house on the improved lot? Discuss your answer in detail and provide your procedural arguments for Mary and for Paradox, Inc.

BOARD’S ANALYSIS

The Circuit Court will continue the lien of the judgment against the house on the improved lot.

Courts and Judicial Proceedings Article, Annotated Code of Maryland (as amended), section 5-102 (a) (3) - There is a 12-year statute of limitations on judgments.

Maryland Rule 2-625 - The facts do not state that Paradox availed itself of the renewal of the money judgment.

Maryland Rule 2-124 (b) requires that both the guardian and the individual must be served.

Maryland Rule 2-213 - Paradox intended to obtain a writ of execution against Mary. Mary was specifically named in the original writ even though the writ was through her guardian and next friend. Mary would argue misjoinder alleging the original writ did not include her. Paradox would argue that there was only a misnomer that was corrected by the amendment of the writ.

Maryland Rule 2-341 - Paradox, Inc. will argue that Maryland Rule 2-341 (c) (4) [correct misnomer of a party] and (c) (5) [correct misjoinder or nonjoinder of a party so long as one of the original plaintiffs and one of the original defendants remain as parties to the action] permit amendments freely when justice so permits.

Courts and Judicial Proceedings Article (as amended), section 5-102(a)(3) [Limitations] - Mary would argue that the amendment to the writ and the service of the amended writ occurred beyond the 12-year period of limitations and therefore limitations had run thereby preventing any relation back to the original writ. She may argue that she had no notice of the writ of execution until after the 12-year period had lapsed.

Paradox, Inc. would contend that the Sheriff had the writ in his possession, the house had been posted, and Jane had been served within the 12-year period. Additionally, a mere misnomer can be corrected by amendment even after the 12 year limitations period. A new party is not added. The name of the original party is merely being corrected. The original writ was served within the limitations period.

QUESTION 10

(4 Points 7 Minutes)

If you were contacted to represent Mary in her claim of ownership of the house free from the judgment, would you undertake that representation? Discuss your answer in detail.

BOARD'S ANALYSIS

Rule 3.1 of the Maryland Rules of Professional Conduct - A lawyer shall not bring a proceeding or assert an issue therein unless there is a basis for doing so that is not frivolous. If there is a surplus over the judgment amount, interest and costs at the sale of the house to satisfy the judgment, the claim of Mary may not be frivolous.