

**FEBRUARY 2004**

**OUT-OF-STATE ATTORNEYS' EXAMINATION**

**QUESTIONS AND BOARD'S ANALYSIS**

**PRELIMINARY FACTS FOR QUESTIONS 1 THROUGH 6**

Simon Spendthrift, a resident of Carroll County, Maryland, uses his Clover Department Store ("Clover") credit card to purchase new backyard furniture, and a television at the Carroll County store. Clover's credit card agreement provided, in part, that Simon would be responsible for interest on his unpaid charges in the amount of 14% per annum and attorneys fees if Clover must file suit to collect Simon's debt.

Simon, who works in Frederick County, Maryland, makes two payments on his credit account, and then stops making payments to Clover. Simon does not respond to several letters from Clover demanding payment of the outstanding balance of \$8,659.62.

Six months after Simon makes the second payment on his credit account, Clover files suit for breach of contract against Simon in the District Court of Maryland for Frederick County, the County in which Clover maintains its principal offices in Maryland. Clover claims damages of \$8,659.62 plus interest and attorneys' fees. Clover hires Tim Tenacious, a Carroll County process server to serve the summons and complaint on Simon at his residence. Tim attempts to serve Simon at his home in Carroll County three times. Simon refuses to open the door to Tim. Clover attempts service by certified mail, return receipt requested to his post office box address. The summons was unclaimed by Simon, and a timely return was filed by Clover with the Court indicating that service had not been made on Simon.

Another summons was issued by the District Court. Based on the difficulties in serving the summons, Clover filed a motion requesting substituted service of Process, which motion was granted by the District Court. Pursuant to the Court's order, Clover serves Simon by sending a copy of the summons and complaint to his residence by first class mail with postage prepaid, and by having Tim nail a copy of the summons and complaint to Simon's front door. Clover failed to file the return of proof of service timely.

Simon, who represents himself, files a motion to dismiss the complaint.

**QUESTION 1**

**What are the bases of Simon's motion? How should the Court rule on Simon's motion? Explain your answer fully.**

**BOARD'S ANALYSIS - QUESTION 1**

The Court should deny Simon's motions.

- See: Rule 3-121(c) on "nail and mail" Pickett v. Sears Roebuck and Company, 365 Md. 67, 775 A.2d 1218 (2001).

- In Personam jurisdiction proper if ordered by Rule 3-121(c). Proper service effected even though return of proof of service not timely filed. See Rule 3-126(g) - no effect on validity of service.
- CJ §4-401 Original jurisdiction in District Court; Venue proper because under CJ §6-201(a) the action could be brought in Carroll County, the place of residence of Simon or in Frederick County, the county in which Simon is employed.

### **ADDITIONAL FACTS FOR QUESTION 2**

Assume that the District Court denies Simon’s motion on July 14, 2003, and further orders that Simon shall have 15 days within which to file a notice of intention to defend. Simon decides to file a motion for reconsideration on July 29, 2003. The Court denies the motion on July 30, 2003. On August 21, 2003 Simon files a notice of intention to defend and a demand for a jury trial in the District Court. On August 23, 2003, Clover files a District Court motion to strike Simon’s demand for a jury trial.

### **QUESTION 2**

**What are the grounds for Clover’s motion to strike? How should the Court rule? Please explain the reasons for the ruling.**

### **BOARD’S ANALYSIS - QUESTION 2**

- The District Court has exclusive original jurisdiction under CJ §401(l).
- Right to Jury Trial CJ §4-402(e) in actions in excess of \$10,000; Rule 3-325 divests District Court of jurisdiction to rule on the timeliness of jury demand at any time before the record is transmitted to the Circuit Court.
- Simon had 15 days from order of court granting the extension until July 29th to file his notice of intention to defend, and until August 8<sup>th</sup> to file his demand for a jury trial.
- The District Court has authority to rule on Clover’s motion to strike since Clover timely filed its motion to strike within 10 days after Simon filed his notice of jury demand (Rule 3-311) and the District Court had not yet transmitted the record to the Circuit Court (Rule 3-325(c)).
- Circuit Court has jurisdiction to strike demand for failure to satisfy the “amount in controversy” requirement.

### **ADDITIONAL FACTS FOR QUESTION 3**

Assume that the District Court grants Clover’s motion. On August 21, 2003, Simon serves Clover with a notice of deposition for the President of Clover, who is terminally ill. Simon also serves Clover with 35 interrogatories, some of which ask about the President’s extramarital affairs and personal financial holdings, and requests copies of the President’s personal credit card records and personal income tax returns for the previous five years.

### QUESTION 3

**Should counsel for Clover file any motions in response to Simon's discovery requests? Explain your answer fully.**

#### BOARD'S ANALYSIS - QUESTION 3

Counsel for Clover should file a motion for protective order within 5 days of service of Simon's interrogatories (Rule 3-421(c)). The grounds for Clover's motion are:

- Request untimely filed by Simon.
- Requested interrogatories in excess of number (15) permitted by Rule 3-421(b).
- Request for depositions not permitted under Rule 3-421. Rule 3-431 governs the procedure for the taking of a deposition. Simon did not obtain leave of court to perpetuate the testimony by deposition.
- The request for the income tax returns and credit card records are sought for the purposes of annoyance, embarrassment, oppression and undue burden and expense under Rule 3-421(c).

#### ADDITIONAL FACTS FOR QUESTION 4

At trial, Clover introduces evidence of its contract with Simon, Simon's payment history, and Simon's refusal to honor demands for payment. After Clover rests its case, Simon testifies that he made all payments to Clover and that they were not properly credited to his account. Simon offers the following items in evidence:

- a) Audio tapes that Simon secretly made of his telephone conversations without the consent of the employees of Clover with whom he conversed regarding his dissatisfaction with the efforts of Clover to locate his payments.
- b) Article from a national newspaper about marital problems of the President of Clover, and
- c) Testimony from Simon's neighbor that she had heard from her brother, a former Clover employee, that several current Clover employees have pocketed cash paid by customers at the cash service window instead of crediting the account of the customers.

### QUESTION 4

**Clover objects to each item of evidence offered. How should the Court rule on each objection? Please fully describe the reasons for each ruling.**

#### BOARD'S ANALYSIS - QUESTION 4

- CJ §10-401(a) (wire tap Act) expressly prohibits admission of tapes made in violation.
- Relevance (Rules 5-401, 5-402), Hearsay (Rule 5-802), authenticated under Rule 5-902(b).
- Hearsay (Rule 5-802).

## ADDITIONAL FACTS FOR QUESTION 5

After the close of evidence, the Court enters judgment for Clover in the amount of \$8,659.62, plus attorney's fees, costs, and prejudgment and postjudgment interest at the rate of 14% per annum. Simon hires an attorney, Ben Better-Judgment to represent him in an appeal based on errors made by the District Court in the awarding of the interest.

### QUESTION 5

- a. **How should Ben Better-Judgment proceed to obtain an appeal on the District Court's judgment?**
- b. **What is the likelihood of his success?**
- c. **Can Clover execute its judgment while the appeal is pending?**

**Please explain.**

### BOARD'S ANALYSIS - QUESTION 5

- Appeals: C-J §12-401(a)&(f) appeal to Circuit Court on District Court record. See also, Rules 7-101 et seq.
- Prejudgment interest will be at stated contract rate but post judgment interest should not be greater than 10% per annum. See C-J §11-106, §11-107(a), §12-401(f) and Rule 7-102(b).
- Rule 3-632(d) permits execution on judgment after expiration of ten day period (Rule 3-632(a)) after entry of money judgment. Unless under Rule 8-422(a) an alternative security is filed.

## ADDITIONAL FACTS FOR QUESTION 6

Subsequent to the trial, one of Clover's employees who resides in Carroll County sends a letter to the State's Attorney for Carroll County alleging that Simon has committed a violation of the Maryland Wiretapping and Electronic Surveillance Act by taping home telephone conversations of that employee without that employee's knowledge and consent. Shortly thereafter, Simon was properly charged, tried and convicted of violating the wiretap statute in the Circuit Court for Carroll County, Maryland. The Judge sentenced him, without explanation, to the penalty of 20 years imprisonment and a fine of \$25,000. Simon's wife hires Abe Winner, a prominent criminal defense attorney, to appeal his sentence.

### QUESTION 6

- a. **What should Abe Winner do to have the sentence reduced?**
- b. **If he is unsuccessful, to which courts should he seek review of the sentence?**
- c. **What is the likelihood of success of his efforts on Simon's behalf?**

## **BOARD'S ANALYSIS - QUESTION 6**

- Court should state reasons for sentence imposed under Rule 4-342(g).
- Court retains revisory power under Rule 4-345 for 90 days after imposition. Thereafter, Court can only revise sentence for illegality. Simon's sentence violated the statute. Therefore, it was illegal. Motion could be filed to correct the sentence.
- Rule 4-352 and Rule 2-551 en banc review of conviction (3 judge panel appointed by Chief Judge but excludes trial judge) but binding on defendant.
- Appeal to Court of Special Appeals §12-308, and §12-307 for Certification to Court of Appeals.

## **PRELIMINARY FACTS FOR QUESTION 7 THROUGH 9**

Elaine Attorney, a well-respected lawyer duly admitted to practice in the State of Maryland has represented John and Sally Rich in their personal matters for 17 years. The couple has always used Elaine as their lawyer, because Elaine has represented Sally's family in their considerable banking and real estate business. Elaine also represents Yellow Dog Café, Inc., a Maryland close corporation, all of the stock of which John and Sally own as tenants by the entirety.

In May 2003, John and Sally came to Elaine's office to tell her of their plans to separate, and asked Elaine to prepare separation and divorce papers for them. Elaine informs them that she only wants to represent Sally. Elaine refers John to Mary Lawyer at Break and Upp, a prominent divorce firm in Chestertown, Maryland.

## **QUESTION 7**

**What must Elaine do prior to undertaking any representation? Explain your answer.**

## **BOARD'S ANALYSIS - QUESTION 7**

Elaine should recognize that a conflict of interest exists under Rule 1.7. Elaine previously represented both spouses and the Café. Therefore, in undertaking to represent Sally only in the domestic relations matter, Elaine must request that John waive the conflict and consent to Elaine's continued representation of Sally. Elaine must procure informed consent from John, after consultation. It is better practice to evidence consent in writing although not required under the Rules. Since Elaine has sent John to other counsel, that request for consent should be reviewed and advice should given by counsel prior to John's consent. With respect to any matters affecting the Café, Elaine must obtain consent from all interested persons or withdraw from representation of the entity.

## **ADDITIONAL FACTS FOR QUESTION 8**

Mary Lawyer, a partner of Break and Upp enters into an agreement with John to represent him for her usual hourly rate of \$275.00 plus one-third of the value of any property settlement made to John in the divorce. Mary also requires John to pay a retainer fee of \$7,000 and a deposit of \$500

for costs, both of which she promptly deposits into the firm's operating bank account.

John tells Mary that he would like to "net" \$1,000,000 from the divorce, and that Norman, an accountant with a nationally recognized accounting firm, will prepare his financial statement for use at trial. When reviewing a transcript of John's deposition that was defended by another lawyer in her firm, Mary realizes that John has secreted marital assets and that certain entries on the statement prepared by Norman are false. Her conclusions are based on John's prior oral admissions to her as well as on the information contained in confidential documents in her files.

Immediately prior to a hearing for alimony, Mary confronts John about his omissions but John tells Mary not to worry about anything because he intends to testify in accordance with the facts contained in his deposition, and that she should realize that those facts are consistent with the financial statement prepared by Norman.

### **QUESTION 8**

**What are Mary's duties in this situation, and to whom does she owe them?**

#### **BOARD'S ANALYSIS - QUESTION 8**

- Mary is required to adhere to Rules 3.3, 3.4(b); 1.6; she cannot present evidence which she reasonably believes to be false and she may not allow her client to testify falsely.
- It is ethically impermissible to charge a contingent fee in a domestic relations case (Rule 1.5(d)(i)).
- Rule 1.15 does not permit commingling of funds.

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

The Parties negotiate a property settlement prior to trial, and John receives \$600,000. Mary deducts from the settlement (i) one-third (1/3) or \$200,000, and (ii) \$12,000 for her hourly fees based on lengthy negotiations and documentation. Displeased with the result, John files a complaint about Mary's representation with the Attorney Grievance Commission, claiming that: (i) her fees were too high and (ii) she was unethical.

### **QUESTION 9**

**Bar counsel attempts to conduct an investigation on John's complaints, but Mary fails to respond to any of Bar Counsel's written inquiries because she: (a) has a heavy caseload, (b) is running for a seat on the local school board, and thinks that the claims are frivolous. Describe Mary's responsibilities in the grievance process and her likelihood of success in defending the complaint. Please explain.**

#### **BOARD'S ANALYSIS - QUESTION 9**

See Md Rule 16-701 et seq.; safekeeping of retainer (no commingling) Rules 16-601, 16-607, and Rule 1.15(a)&(b); 1.5 reasonable fee; Rule 8.1(a)&(b) disclosure to Bar Counsel. Cooperation with Bar Counsel essential and required by Court of Appeals.