

JULY 2003

OUT-OF-STATE ATTORNEYS EXAMINATION

QUESTIONS AND BOARD'S ANALYSIS

PRELIMINARY FACTS FOR QUESTIONS 1 AND 2

On March 1, 2002, Sam Slim, a resident of Baltimore County executed and delivered to Ann Affluent a promissory note for \$25,000 with interest to be paid monthly at an annual interest rate of 10%; the note stated that the principal balance was to be paid on January 2, 2003. The note also provided, among other things, that, in the event of default, Slim would pay Ann's attorney's fees in an amount equal to one-third of the amount due. Slim's business did not prosper and he fell behind on his monthly interest payments. On January 2, 2003, he failed to make any payment.

Slim maintains a checking account at the Queen Anne Bank (the "Bank"). Ann is aware of the account's existence and knows the balance is in excess of \$50,000. To her knowledge, Slim has no other assets in Maryland other than those connected with the business.

Ann confronted Slim about the money due her and demanded its payment. Slim replied that he was going on a three-week vacation to Brazil and would attend to the matter when he returned. Ann has learned that Slim has started a "Going Out of Business" sale at his garden center.

Ann desires to sue Slim for the money due her under the note and to ensure that there are assets available to satisfy any judgement in her favor. Assume that the principal due under the note is \$25,000 and the interest due is \$1,500. Ann would like to file suit in the District Court of Maryland if possible for the full amount owed and would like to receive a judgement for attorney's fees as well.

QUESTION 1

Can Ann file suit in the District Court of Maryland? For what amounts? Explain your reasoning fully.

BOARD'S ANALYSIS – QUESTION 1

Ann can bring an action for the full amount in District Court. She seeks recovery of \$26,500 in principal and interest. Md. Cts. & Jud. Proc. Code Ann. § 4-401 (1) provides that the maximum jurisdictional limit for the District Court is \$25,000 "exclusive of . . . interest, costs and attorney's fees if attorney's fees are recoverable by law or contract." The amount she wishes to claim thus does not exceed the maximum jurisdictional limit of the District Court and that court has subject matter jurisdiction.

QUESTION 2

What legal options are available to Ann to assure that the Slim's assets will be available to satisfy a judgment? What facts and circumstances must Ann show in order to accomplish this? What pleadings and other documents must Ann file in order to obtain a court's order to accomplish this? Explain your reasoning fully.

BOARD'S ANALYSIS – QUESTION 2

Ann should attempt to obtain an order attaching his assets, i.e. the bank account and the material in the garden store, on original process pursuant to the authority granted to Maryland courts by Section 3-302 - 3-305 of the Courts and Judicial Proceedings Article. If granted and properly served upon Slim, an attachment on original process will subject the assets to the control of the court during the pendency of the action and will make the property available to satisfy a judgment, if any, in Ann's favor. Unfortunately for Ann, the grounds for granting an attachment on original process in Maryland are quite narrow.

Ann's action against Slim is based upon a contract and is for liquidated damages. Slim's actions and planned actions, i.e. conducting a going out of business sale as well as by telling Ann that he intended to take a lengthy trip to South America, may provide provided a basis to conclude that he is, or is about to become, an absconding debtor. If a judge so finds, the court is authorized to issue an order of attachment. Md. Cts. & Jud. Proc. Code Ann. § 3-303 (d).

In order to accomplish her objectives, Ann should include a request for a writ of attachment on original process with her complaint. The request must be supported by an affidavit verifying the facts set forth in the complaint and demonstrating why she is entitled to the writ. Maryland Rule 3-115(a). In addition, Ann will be required to file a bond in an amount the court deems appropriate. Maryland Rule 3-115(c).

BASIC FACTS FOR QUESTIONS 3 AND 4.

On June 1, 2002, Christopher Marlowe borrowed \$400,000 from Beaumont and Fletcher National Bank ("B&F"). In support of his application, he submitted a financial statement showing a net worth in excess of \$1,000,000. Marlowe defaulted on the loan and B&F has filed a collection action against him. During discovery, B&F learned that Marlowe was recently involved in an action with his former wife relating to child support. In a hearing in that action, Jane Jones, who was and is Marlowe's accountant, was called as a witness by Marlowe and testified that as of March, 2002, Marlowe's net worth was less than \$25,000. As a result of this information, B&F has amended its lawsuit to include a claim for fraud and punitive damages and has summoned Jones to testify at trial about Marlowe's former and current financial status. However, Jones has married Marlowe since

she gave her earlier testimony and now refuses to testify.

Assume that you are B&F's attorney and that you have obtained a transcript of Jones' prior testimony. Also assume that the testimony about these topics is relevant.

QUESTION 3

Can Jones be required to testify as to (1) Marlowe's financial status as of March, 2002 and/or (2) his current financial status? What grounds can be raised to prevent her from testifying? How should the Court rule? Explain your answer fully.

BOARD'S ANALYSIS – QUESTION 3

Jones and/or Marlowe can assert several testimonial privileges regarding Jones's potential testimony. Whether these assertions will be successful will depend upon the subject matter of the testimony.

As Marlowe's spouse, Jones cannot be compelled to testify against her husband in a criminal case. However, this privilege does not extend to civil cases. Md. Cts. & Jud. Proc. Code Ann. § 9-106. However, Jones cannot disclose any confidential communication received from her husband during their marriage without her spouse's permission. Md. Cts. & Jud. Proc. Code Ann. § 9-105.

As Marlowe's accountant, Jones may not disclose any communication received from Marlowe in the course of her rendering professional services to him. Md. Cts. & Jud. Proc. Code Ann. § 9-110. However, this privilege extends only to communications from a client to the accountant and information contained in the client's books and records. The accountant can be compelled to testify regarding other matters.

Since Marlowe and Jones were not married at the time of earlier testimony, the marital privilege is not applicable to Marlowe's financial status as of March, 2002. Since Jones has already testified as the Marlowe financial status as of March at his request, he has waived the accountant's privilege.

Marlowe can assert the accountant's privilege and the marital privilege with regard to questions relating to his current financial status to the extent that Jones would have to reveal privileged communications (either marital or accountant's) to answer them. Section 10-913 of the Courts and Judicial Proceedings Article prohibits the introduction of evidence of a defendant's financial circumstances prior to a verdict of liability and a finding that an award of punitive damages is supported by the facts. However, this statute applies only to personal injury cases.

QUESTION 4

Can Jones's prior testimony be used at trial? Why? Explain your answer fully.

BOARD'S ANALYSIS – QUESTION 4

When Jones testified at the earlier trial, she did so as Marlowe's accountant and at his request. Under Maryland law, if the scope of her employment included making such statements, her testimony constitutes an admission which can be introduced in the second trial. *Brown v. Hebb*, 167 Md. 535, 175 A. 602 (1934); MRE 5-803(3). The testimony is admissible.

BASIC FACTS FOR QUESTIONS 5 THROUGH 9

Tom Pullings had just arrived home from his first semester at college when he went to the Big Store, a large store in Talbot County, Maryland to buy groceries for his mother. While at the store, Pullings was observed by John Lawman, an off-duty Talbot County Police Department officer, who was working as a security guard at the store. Lawman believed that Pullings was attempting to steal some items from the store and grabbed Pullings by the jacket as Pullings was leaving the store. Pullings resisted and in the resulting melee both men staggered into, and knocked down, Anne Elderly, another shopper. Elderly was injured as a result. At the time of the incident, Lawman was wearing his Talbot County Police Department uniform and was working at the store with the express permission of his supervisor at the Department according to a written County policy. The incident took place on December 23, 2000.

Pullings and Elderly reside in Talbot County, Maryland. Lawman is a resident of Caroline County; the Big Store is owned by Big Stores, Inc., a Virginia corporation with its principal office in that state; it has stores in all Maryland counties.

QUESTION 5

In January, 2003, Elderly decided that she would like to file an action for damages. She consulted with Bob Barrister, a Maryland lawyer. After listening to Elderly's story, Barrister explained to Elderly that her case was a very difficult one and that success was not guaranteed. Barrister said he would represent Elderly for a contingency fee of 40% of the amount recovered from the defendants. Barrister also said that the case would require substantial out-of-pocket expenditures for expert witnesses, investigators and similar expenses. Elderly agreed to pay Barrister \$5,000 for such purposes. Barrister and Elderly then shook hands and Elderly left. Two days later, Elderly mailed Barrister a check for \$5,000. Barrister deposited the check in his office checking account.

After investigating the facts surrounding Elderly's claim, Barrister decided that there were colorable causes of action for negligence against Lawman, Pullings, Big Stores, Inc. and Talbot County.

(a) What issues are raised by Barrister’s agreement with Elderly and Barrister’s handling of the check?

(b) What procedural steps, if any, should Barrister take before filing suit?

BOARD’S ANALYSIS – QUESTION 5

A contingent fee agreement must be in writing. MRPC 1.5(c). The agreement must include provisions relating to the manner in which the expenses of litigation are to be paid. Barrister’s oral agreement with Elderly satisfies neither of these requirements. In addition, the fee charged must be reasonable in light of the likelihood of success, the difficulty of the case, the experience of the lawyer and other factors set forth in Rule 1.5. A 50% contingency fee might fail to satisfy these standards.

Barrister must deposit the money in an escrow or trust account. It can be disbursed only for the purposes intended by Elderly. MRPC 1.15; Maryland Rule 16-603; 16-606; 16-607. Barrister’s misuse of his client’s money is a gross violation of the Rules of Professional Conduct and warrants serious sanction. *Attorney Grievance Comm’n v. Moore*, 301 Md. 169, 482 A.2d 497 (1984).

Before filing a claim for unliquidated damages against a local government or one of its employees, the plaintiff must file a written notice to the local government stating the time, place and cause of the injury. Courts and Judicial Proceedings Article Section 5-304. The notice must be delivered within 180 days of the event giving rise to the claim.

QUESTION 6

Barrister filed a complaint in the Circuit Court for Montgomery County on behalf of Elderly against all of the defendants. After reviewing the complaint, the lawyers for the various defendants decided that their clients’ interests would be better served if the case were tried in Talbot County.

How should the lawyers for the defendants attempt to transfer the case? How will the court rule on such a request? Explain your answer.

BOARD’S ANALYSIS – QUESTION 6

Maryland Rule 2-322 provides that an objection to venue must be made by a motion filed prior to the filing of an answer. Failure to do so results in waiver of the defense.

Md. Anno. Code Courts and Judicial Proceedings Article Section 6-201 and 6-202 set forth Maryland’s general venue rules. Section 6-201(a) states that a civil action may be brought in a county where the defendant resides, carries on a regular business, is employed or habitually engages in a vocation. In an action involving multiple defendants with no single venue otherwise applicable, Subsection (b) provides that the action may be brought in any county where any one of the defendants could be sued or in the county where the cause of action arose. Section 6-202(3)

provides that where a corporate defendant has no principal office in the State, venue lies where the plaintiff resides. Where more than one county has venue, the plaintiff may chose which county he or she prefers to try the case. *Swanson v. Wilde*, 74 Md. App.57, 536 A.2d 694, *aff'd*, 314 Md. 80, 548 A.2d 837 (1988). Big Stores, Inc. does business in Talbot County, Pullings resides there and Lawman is employed there. Thus, there is a single venue that is applicable and the Court should grant the motion.

Any defendant can also move to transfer the case under Rule 2-327(c) on the grounds of *forum non conveniens*. This motion would be supported by pointing out that the scene of the accident, and all of the fact witnesses reside or are located in the Talbot County area. A court has the discretion to grant such motions based upon considerations such as the efficient administration of justice and the convenience of witnesses and parties. *Simmons v. Urquhart*, 101 Md. App. 85, 643 A.2d 487 (1994), *rev'd on other grounds* 339 Md. 1, 660 A.2d 412 (1995).

QUESTION 7

At trial, Barrister called the director of security services for Big Stores, Inc. to testify regarding the Store's procedures for observing potential shoplifters. During her testimony, the director made a statement at variance with her prior deposition testimony. Barrister then asked the chief if she had ever made a statement contradicting her last answer during her deposition. The attorney for Big Stores, Inc. objected to the question on the grounds that (1) Barrister was attempting to impeach his own witness and 2) Barrister had to disclose the contents of any such prior statement prior to asking questions about it.

How should the Court rule on the objection? Why?

BOARD'S ANALYSIS – QUESTION 7

The Court should overrule the objection. Both of the common law rules asserted by the objecting attorney have been modified by the Maryland Rules of Evidence. MRE 5-607 provides that the credibility of a witness may be challenged by any party, including the party who called the witness. MRE 5-613 states that a witness may be questioned about a prior inconsistent statement without disclosure of the prior statement's contents if, prior the end of the examination, disclosure is made and the witness given an opportunity to explain or deny making the statement.

PRELIMINARY FACTS FOR QUESTIONS 8 THROUGH 10

Dudley Duke was walking home from his job as a bartender at the "Krusty Krab", a popular

hangout in Charles County, Maryland, late at night on December 27, 2002. He was accosted by a man who struck him several times. The assailant fled before the police arrived. Three days later, Tom Terrapin entered the Krusty Krab and was identified by Duke as his assailant. Duke confronted Tom and the two had a shoving match. Tom was arrested and charged with second degree assault for both incidents.

QUESTION 8

Tom went to see Anne Esquire, a Maryland lawyer who had represented members of the Terrapin family on numerous occasions in the past. Tom denied any involvement in the first incident and said that Duke had been the aggressor in the second. Esquire entered her appearance on behalf of Tom. One week before trial, Tom's older brother Pete came to see Esquire about an unrelated criminal charge. Pete told Esquire that he had assaulted Duke on December 27. Pete asked Esquire to keep the information confidential.

In light of Pete's statement, what actions should Esquire take? What information may she disclose?

BOARD'S ANALYSIS – QUESTION 8

Lawyer's knowledge that Pete confessed to the first assault against Duke makes it impossible to represent Tom and Pete simultaneously. MRPC 1.7 provides that a lawyer should not represent two clients where the representation of one client will be materially limited by the lawyer's responsibilities to the other unless the lawyer reasonably believes that the representation will not be adversely affected and the client consents after consultation. Here, if it were not for his representation of Pete, Lawyer could raise several inquiries at trial or, perhaps, suggest to the police that Pete is actually the guilty party. *Lettley v. State*, 358 Md. 26, 33 (2000). Thus, it is impossible for Lawyer to provide Tom with effective assistance of counsel. *Id.* at 44, 45. Lawyer must move to strike his appearance and request a continuance for Tom in order to obtain new counsel. While Lawyer cannot, of course, reveal who confessed to him, he can explain to the trial judge that he has information from another client which would interfere with his ability to conduct his case. The Court of Appeals has ruled that such statements made by lawyers are to be accepted at face value by the courts. *Id.* at 48. *Holloway v. Arkansas*, 435 U.S. 475, 485, 98 S. Ct. 1173, 55 L.Ed. 2d 426 (1978). The trial court should grant both the motion to strike appearance and a motion for continuance to permit Tom to obtain another attorney. *Lettley v. State, supra*, at 48.

QUESTION 9

Tom timely requested a jury trial on all charges and the cases were transferred to the Circuit Court. Tom's trial on both assault charges are scheduled together. **What motion should Tom's lawyer make regarding trial of both incidents at the same time? When should the**

motion(s) be filed? How should the court rule? Explain your answer thoroughly.

BOARD'S ANALYSIS – QUESTION 9

Tom's lawyer should file a motion to sever the counts under Maryland Rule 4-253. The motion should be filed within 30 days of the date Tom's lawyer entered her appearance or Tom's initial appearance, whichever occurs earlier. Maryland Rule 4-252(b). While Maryland law allows trial judges some degree of discretion in ruling on severance motions in nonjury trials, in jury trials, trial courts have no discretion. The test applied in Maryland is whether "the evidence as to each individual offense would not be mutually admissible at separate trials." *Wieland v. State*, 101 Md. App.1, 17, 643 A.2d 446 (1994). There is no way that, if the incidents were tried separately, evidence about the second confrontation would be admitted in the trial as to the first. *Id.*, at 18. The counts should be severed.

QUESTION 10

At Tom's trial, the State called Duke as a witness. On direct examination, Duke testified that he had been quietly standing at the bar on December 30th when he was shoved and punched by Tom. On cross examination, Tom's lawyer asked Duke whether he had been convicted of a crime. The State's Attorney objected. Tom's lawyer then preferred to the Court that Duke had been convicted of possession of dangerous weapons in 1996 and 1999 and of theft in 1985 and that the evidence was relevant to show Duke's violent character and lack of credibility. All of the convictions were misdemeanors. **How should the Court rule on the objection? Explain your answer thoroughly.**

BOARD'S ANALYSIS – QUESTION 10

The Court should sustain the objection. As to the issue of character, evidence of prior crimes is inadmissible to prove the character of the person. MRE 5-404(b). MRE 5-609 sets out a several part analysis regarding the admissibility of prior crimes to attack credibility. First, the crime must be an infamous one or "[an]other crime relevant to the witnesses' credibility" and the Court must determine that the probative value outweighs the danger of unfair prejudice to the witness or objecting party. MRE 5-609(a). Second, the conviction must have occurred within 15 years. MRE 5-609(b).

In Maryland, infamous crimes are treason, felony, perjury, forgery and the so-called *crimen falsi*, i.e. misdemeanors involving dishonesty. The illegal possession of a weapon does not involve dishonesty and, since it is a misdemeanor, it is not an infamous crime.

While theft is an infamous crime, Duke was convicted in 1985, outside of the 15 year limit set out in MRE 5-609(b).