

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

BACKGROUND FACTS FOR QUESTIONS ONE THROUGH THREE

(5 Minutes)

Set on a bluff overlooking a broad and scenic river and only one hour from Washington, D.C., Haleysville is the county seat of Comet County, Maryland. Haleysville is a town of 750 souls which has long been renowned for its picturesque charm, cultural attractions and the agreeably slow pace of its residents' lifestyles. About twenty years ago, Haleysville constructed municipal water and sewer systems to serve the residents of the Town. The Town government has also permitted out-of-town residents to connect to the water and sewer systems both of which currently have ample unused capacity.

In 1998, the Jupiter Development Corporation purchased a 600 acre farm adjacent to the town limits and filed development proposals with appropriate local and state agencies to develop the farm as a residential subdivision containing 2500 dwelling units. An integral element in Jupiter's plans is connecting the property to Haleysville's water and sewer systems.

Responding to a storm of protest from Haleysville's residents, the Haleysville Town Council hastily enacted a municipal ordinance which prohibited any further extensions of the Town's water and sewer systems beyond Town limits. Upon learning of the ordinance, the Comet County Planning Commission denied the development proposal submitted by Jupiter on the basis that water and sewer services were no longer available for the property.

Jupiter has filed a multi-count action against Comet County and the members of the Comet County Planning and Zoning Commission in both their official and personal capacities in the Circuit Court for Comet County alleging that the ordinance violated various provisions of the federal and State constitutions as well as the laws of the State of Maryland relating to local government legislation. The lawsuit seeks a declaratory judgment as well as a temporary and a permanent injunction, damages and related relief. Summonses were served only upon the County and each individual defendant.

QUESTION I

(15 Minutes 10 Points)

The Comet County Attorney believes that both the State of Maryland and the Town of Haleysville should be parties to the action. **How should she raise these issues with the Court? How should the Court rule?**

BOARD'S ANALYSIS

The Comet County Attorney should file a Motion to Dismiss pursuant to Maryland Rule 2-322.

Maryland Annotated Code Courts & Judicial Proceedings Article §3-405 provides that any declaratory judgment action questioning the validity of a local government ordinance or franchise must include the local government entity as a party. §3-405(b). In addition, Courts & Judicial Proceedings Article §3-405(c) also provides that the Maryland Attorney General must be notified of the action by certified mail notice.

The Court should order the joinder of the Town of Haleysville as a defendant pursuant to Maryland Rule 2-211 and permit the intervention of the State if requested by the Attorney General.

QUESTION II

(15 Minutes 10 Points)

During the early discovery phase of the lawsuit, the Comet County Attorney fired a secretary for unsatisfactory job performance. The former secretary wrote to the lawyer representing Jupiter Corporation and told her that she was a former employee of the County Attorney and that, in that capacity, she had gained access to information which would “blow the lid off of the County’s defenses” in the litigation. The letter went on to state that the secretary had been treated unfairly by the County and that the County had treated Jupiter Corporation unfairly as well and that she wanted to “set things straight.” She asked if she could meet with the attorney to “tell the inside story.” **How should Jupiter Corporation’s attorney proceed? What factors should be considered?**

BOARD’S ANALYSIS

Jupiter’s attorney should proceed very carefully. The Maryland Rules of Professional Conduct 4.2 provides that a lawyer shall not communicate about the subject of his or her representation with the party that the lawyers know to be represented by another lawyer unless consent has been given. Federal Courts in Maryland, applying Maryland law, have ruled that *ex parte* communications between a lawyer and former employees of an adverse party in a litigation violates Rule 4.2 where the purpose of the communication is to obtain privileged or confidential information. *Zachair, Limited v. Driggs*, 965 F. Supp. 741 (D. Md. 1997), Affirmed 141 F 3rd 1162 (4th Cir., 1998); *Camden v. Maryland*, 910 F. Supp. 1115 (D. Md. 1996). Any communication between the attorney for the Jupiter Corporation and the former secretary should be in the presence of an attorney for the County.

QUESTION III

(15 Minutes 10 Points)

At trial, Jupiter called Joseph Verdi as an expert witness in land use planning. During his

direct testimony, Verdi stated that some of his opinions were based upon a published analysis of land use development patterns in Maryland which had been prepared by several professors from State universities pursuant to a grant from a non-profit foundation. On cross-examination, Verdi was questioned about passages from the study which were inconsistent with one of his conclusions. At the close of the testimony, the attorney for Comet County moved that the study be admitted into evidence. The attorney for Jupiter objected. **How should the trial judge rule on the objection? What factors should she take into consideration?**

BOARD'S ANALYSIS

Whether the report is admitted will depend on how the court characterizes it. Statements from "learned treatises" are admissible in Maryland for purposes of buttressing or challenging the opinions of an expert witness. MRE 5-803(b)(17). However, the rule specifically adds that the materials "may be read into evidence but may not be received as exhibits." The Maryland Rules of Evidence also permit the introduction of public reports where the report sets forth matters "observed pursuant to a duty imposed by law, as to which matters there is a duty to report." MRE 5-803(b)((8). The report was prepared by employees of a public agency but there is no indication of any legal mandate. The report should not be admitted as an exhibit; portions of the report may be read into evidence.

BACKGROUND FACTS FOR QUESTIONS FOUR THROUGH SIX

(5 Minutes)

After months of intense negotiations with several major league baseball franchises, you have successfully negotiated a five year, multi-million dollar contract for your superstar client, Marvin Moody, with the Baltimore Orioles. At the press conference you answer questions concerning your client's character with the hopes of convincing the media that his earlier problems with the law are behind him.

Unfortunately, several weeks later, you receive a telephone call from Marvin. He explains that he was involved in a fight at a bar, and while driving through downtown Baltimore he was stopped by the police for running a red light. He was charged with driving while intoxicated and with first degree assault, a felony, from the incident that occurred at the bar. He is dissatisfied with his current lawyer's performance at the preliminary hearing and asks that you represent him in Circuit Court.

You enter your appearance as his attorney in the Circuit Court for Baltimore City on February 10, 1999. You and Mr. Moody agree that your main objective is to resolve this matter prior to the month of April when the baseball season starts. Accordingly, you quickly negotiate a plea of nolo contendere, the terms of which are acceptable to Mr. Moody and the State's Attorney. The Judge however, informs you that she refuses to be bound by the plea agreement and if it isn't withdrawn, she may impose a more severe sentence. You withdraw the plea and enter a plea of not guilty. You object to her unwillingness to accept the plea agreement. You also object to her presiding at the trial on the grounds that she has knowledge of your client's willingness to enter into a plea agreement. She

overrules both of your objections. You then request the Court to set a trial date prior to the month of April. Over your objection, the Judge sets the trial date for August 1, 1999.

The results of Mr. Moody's breathalyser showed that he was legally intoxicated. To prevent this information from adversely influencing the jury on the assault and battery charge, you file a motion on March 15, 1999 for separate trials on the assault and DWI charges. At the same time you move to postpone the trial date claiming that it should not be held during the baseball season, and in the alternative, you move to have the case stetted. The Judge denies all of your motions. Following a three day jury trial, your client is found guilty on both counts.

QUESTION IV

(30 Minutes 20 Points)

Based on the objections you made and the motions you filed, are there grounds for asserting a successful appeal at an appropriate time? Explain your answer thoroughly.

BOARD'S ANALYSIS

1. Per Maryland Rule 4-243, a Judge is not required to accept a plea agreement, and, if the plea is not withdrawn, has the right to impose a sentence that is less favorable than the plea agreement. Therefore, no grounds to appeal exist due to the Judge refusing to accept the plea agreement. Rule 4-243 also provides that when a defendant withdraws a plea and pleads not guilty, then upon the objection of either party the judge to whom the agreement was presented may not preside at a subsequent court trial on any charges rejected in the plea agreement. Here the Judge presided at a jury trial, not a court trial, after rejecting the plea agreement. Therefore there is no grounds for an appeal on this basis.

2. Maryland Rule 4-271 requires that a trial date be no later than 180 days after the earlier of the first appearance of counsel, or the first appearance of the defendant before the circuit court. Mr. Moody's trial date was within this time period and therefore there is no grounds to appeal on this basis.

3. Per Maryland Rule 4-252(b), a motion for a separate trial on offenses in circuit court must be made within 30 days after the earlier of the first appearance of counsel or the first appearance of the defendant before the court. Here, the motion was brought outside of this thirty day period, and therefore was properly denied by the Judge. A motion to postpone a trial date may be granted for good cause, but what constitutes good cause is left to the Court's discretion. Denying a motion to postpone that is based on a defendant's employment schedule probably is not an abuse of that discretion. Finally, the motion to stet the case was properly denied because Maryland Rule 4-248 states that only the State's Attorney can move to have a case stetted.

4. Any appeal of Mr. Moody's case must be to the Court of Special Appeals (see Rule 8-301).

Per Maryland Rule 8-202, a Notice of Appeal of the Court of Special Appeals must be filed within thirty days after entry of the judgment or order from which the appeal is taken.

QUESTION V

(15 Minutes 10 Points)

At Mr. Moody's sentencing, the trial Judge is not available due to illness. Another Judge authorized to act in that Court, however, states that he has reviewed the transcript and all presentence investigations and is prepared to impose a sentence. You object on the grounds that sentencing should be imposed by the trial Judge, and that Mr. Moody should be given the opportunity to make a statement. The Judge overrules your objections on the grounds that the transcript and presentence investigations are sufficient.

The Judge then imposes a sentence of one year in prison, six months of which he suspends, and a \$500 fine. Mr. Moody becomes enraged upon hearing the sentence, and begins shouting obscenities at the Judge. Although you are able to calm Mr. Moody down, the Judge, over your objection, immediately revises the sentence by requiring Mr. Moody to serve two years in prison, none of which is suspended, and increases the fine to \$1,000.

(1) What rights of your client, if any, have been violated by the sentencing Judge? Please explain your answer fully.

(2) Assuming that grounds for an appeal exist, to which Court would you appeal and within what time frame?

BOARD'S ANALYSIS

(1) The sentencing Judge has violated several of Mr. Moody's rights. First, per Maryland Rule 4-342(e), Mr. Moody has the right to make a statement and to present information in mitigation of punishment prior to being sentenced. Secondly, although Maryland Rule 4-344 gives the Court revisory power over a sentence it imposes, the Court may not increase the sentence after it is imposed. Therefore, despite Mr. Moody's outburst, it was improper for the Judge to increase Mr. Moody's sentence and fine.

Finally, Rule 4-342(c) requires the judge who presided at trial to sentence the defendant. However, Rule 4-361 states that if a judge is unable to perform an act because of death, sickness or other disability, any other judge authorized to act in that court may sentence the defendant and perform any other act or duty if satisfied that he or she can properly do so. Here, the trial Judge was not available due to sickness, and another judge authorized to act in that court imposed the sentence. The sentencing Judge stated that he had reviewed the transcript and all presentence disclosures, thereby indicating that he was satisfied that he could properly sentence the defendant.

(2) The appeal should be taken to the Court of Special Appeals within 30 days after entry of judgment. Rule 8-202.

QUESTION VI

(15 Minutes 5 Points)

During the jury's deliberations you noticed a young woman standing outside of the Courthouse with her severely disabled child, who was confined to a wheelchair. On impulse, you gave her four Orioles baseball tickets to luxury seats that Mr. Moody had given you for next week's game against the Yankees. She graciously accepted the tickets. The following day the jury rendered its guilty verdict and upon leaving the Courthouse, you saw one of the jurors getting into a car with the young woman to whom you had given the tickets.

What, if anything, should you do? What factors should you consider?

BOARD'S ANALYSIS

Rule 3.5 of the Maryland Rules of Professional Conduct prohibits a lawyer from seeking to influence a juror, and requires a lawyer who has knowledge of any such violation to report the same to the court or other appropriate authority. Here, the baseball tickets were given on impulse and not with the intent to influence a juror, and the connection between the young woman and the juror was unknown at the time the tickets were given. Therefore, there is no violation of Rule 3.5. However, the possibility exists that a juror may have benefitted from the tickets and there is an appearance of possible impropriety. Accordingly, it would be prudent to disclose what happened to the Court in anticipation of possible claims that there was improper motivation, and/or knowledge of the connection between the juror and the young woman.

BACKGROUND FACTS FOR QUESTIONS SEVEN THROUGH NINE

(5 Minutes)

Anne Apple and her husband Bill are physicians employed at Anne Arundel County General Hospital. They reside in Anne Arundel County. After a period of marital discord, Bill left the marital home and moved into an apartment also located in Anne Arundel County.

On September 1, 1998, Anne filed a complaint for divorce in Anne Arundel County against Bill. With the Complaint, Anne included a Notice of Deposition. The notice stated that Anne's attorney would take Bill's deposition at 10 a.m. at her office in Baltimore County on October 15, 1998. On September 25, 1998, Anne handed the Complaint, Summons and Notice of Deposition to Bill when he came to the marital home to pick up their daughter, Caroline, for an agreed upon visitation.

Bill has retained you, a Maryland attorney, to represent him in the divorce action.

QUESTION VII

(15 Minutes 10 Points)

What procedural defects, if any, exist regarding service of process? How should those issues be raised?

BOARD'S ANALYSIS

In accordance with Maryland Rule 9-202, service of process in an action for divorce is the same as in other actions. Maryland Rule 2-123 provides that service of process may be made by certain specified persons "but not by a party to the action." Since Anne served her husband, service of process was ineffective.

QUESTION VIII

(15 Minutes 10 Points)

Bill does not want to attend the deposition. What pleadings should you file to oppose the taking of the deposition? Give the basis for these pleadings.

BOARD'S ANALYSIS

First, counsel should attempt to contact Anne's attorney, Md. Rule 2-431, and seek to obtain an agreement not to proceed with the deposition at this time as service of process was defective, the place of the deposition is inappropriate under the rules, and the date scheduled is not in accordance with the rules. If an agreement cannot be reached, counsel should file a Motion for a Protective Order, Md. Rule 2-403, with the required certificate.

The first basis for the motion is that there is ineffective service and that the action will be dismissed. The second basis is that under Md. Rule 2-413(b), the defendant cannot be required to attend a deposition in Baltimore County: he does not reside there, is not employed there, and does not engage in a business there. Furthermore, the action is filed in Anne Arundel County, and there is no court order for the deposition to occur in Baltimore County. Finally, the date of the deposition is in violation of Maryland Rule 2-411. Bill's initial pleading is not due until 30 days after September 25, 1999. Therefore, without leave of court the date of the deposition must be on or after the date Bill's initial pleading is due.

QUESTION IX

(30 Minutes 15 Points)

Bill would like to have more visitation with his daughter and believes that he may want joint custody. He believes that Caroline's babysitter will testify on his behalf as she keeps a daily log when she watches Caroline and has said that Caroline is very well behaved after visits with Bill. Bill has seen the log but does not have a copy of it.

After a scheduling conference, a *pendente lite* hearing is scheduled before a master. You have learned through discovery that Anne intends to call the babysitter as a witness. The babysitter will not return your phone calls and you have been unable to serve her with a subpoena *duces tecum*. At the hearing before the master, the babysitter testified that Caroline is unruly after visits with her father and that it takes several days after her visits for her to calm down. The babysitter did not bring her log with her. You request a postponement to require her to bring her log. The request is denied. The master will not allow your client to testify as to the contents of the log.

On February 22, 1999, you receive the master's report and recommendations together with the proposed order. He did not give Bill joint physical custody but did give joint legal custody. However, visitation remains unchanged. Bill is unhappy with the result and feels that the babysitter's testimony was damaging to his case.

(1) What are your client's rights to obtain further review of the master's findings, recommendations and proposed order?

(2) Can you impeach the testimony of the babysitter through her log? What is the legal basis?

BOARD'S ANALYSIS

(1) Maryland rule 2-541(b) states that the referral of domestic matters to a master is governed by Md. Rule 9-207. Maryland Rule 9-207 (a)(1)(F) governs the issues in this case.

In order to obtain further review of the master's findings, recommendations and proposed order, exceptions must be filed pursuant to Md. Rule 9-207(d) within five days of February 22, 1999, the date the findings and recommendations were served under Rule 9-207(c). The exceptions must be in writing and set forth the asserted errors with particularity. Bill must file and order a transcript in accordance with Md. Rule 2-541(h)(2). A hearing, if requested, will be held within 60 days in accordance with Md. Rule 2-541(i). The court may permit additional evidence if the procedures set forth in 2-541(i) are followed. As there is not a final order, no further appeal may be taken after the decision in the exceptions hearing.

(2) Bill has several means to impeach the testimony of the babysitter.

Maryland Rule 5-613 permits a party to question a witness about a prior inconsistent statement provide that the babysitter is given an opportunity to explain or deny the statement as set forth in subsection (a). Extrinsic evidence, Bill's testimony, of the statement would be admissible under subsection (b) provided that there was compliance with subsection (a). This clearly is non-collateral matter.

In terms of exceptions to the hearsay rule, the log is admissible under several alternative theories under the hearsay rule. Md. Rule 5-802.1(a) permits introduction of the log as a prior witness statement if the log was signed by the babysitter. If the babysitter claims to no longer have knowledge of the child's behavior, it could be admissible under Md. Rule 802.1(e) as past recollection recorded. The log also could be admissible under Md. Rule 5-803(b)(1) (present sense impression) or (6) (business records). The log arguably could have been a present sense impression since it described the child's behavior at or near the time of the acts. It also could be a record of regularly conducted business activity. It was made near the time of the acts, on a daily basis, by the babysitter who witnessed the acts, and in the course of her business as a day care provider.