

**FEBRUARY 2002**

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

**QUESTIONS AND BOARD'S ANALYSIS**

**Facts Applicable To Questions 1 and 2**

James was formally charged with obtaining goods by the false pretense of a bad check in the amount of \$3,500; breaking and entering a storehouse of another; rogue and vagabond; and theft of property over \$500. Prior to the commencement of the trial in the District Court of Maryland for Prince George's County, on motion of the State and without objection, the rogue and vagabond charge was marked "stet" on the docket. The State then nol prossed the counts of breaking and entering and theft of property over \$500. The defense made no objections. The case was tried in the District Court on an agreed statement of facts. The District Court denied defendant's motion for judgment of acquittal and found him guilty of obtaining goods, identified in the District Court trial as a Chevrolet station wagon, by false pretenses. James was sentenced to confinement for 6 months; ordered to pay a \$1,000 fine; and to make restitution in the amount \$1,000.

James appealed to the Circuit Court for Prince George's County, Maryland. When the case came on for hearing in the Circuit Court three months later, the State moved to amend the District Court statement of charges on the false pretenses charge from "goods in the amount of \$3,500" to "one Chevrolet station wagon" with the explanation that the \$3,500 represented the value of the Chevrolet station wagon. The State also moved in the Circuit Court to remove the rogue and vagabond count from the "stet" docket and to reinstate the counts that had been nol prossed in District Court so that the State could proceed to trial in the Circuit Court on all the counts in the District Court charging document, as amended.

**QUESTION 1**

**(15 Points          27 Minutes)**

**You are counsel for James. State in detail the responses you would make to the State's motions in Circuit Court citing your authorities under the rules.**

**BOARD'S ANALYSIS**

Amendment to false pretenses charge

a. The appeal from the District Court is a de novo appeal to the Circuit Court. Therefore, the offenses are tried on the original District Court charging documents. Courts and Judicial Proceedings Article, Section 12-401(f); Maryland Rule 7-112, Maryland Rule 4-201(c).

b. The charging document may be amended and the form and sufficiency of the pleadings are governed by Maryland Rules 4-204. Maryland Rule 7-112 (c).

c. Amending the District Court charging document in Circuit Court from “goods in the amount of \$3,500.00” to “one Chevrolet station wagon” changed the identity of the property allegedly obtained by James by false pretenses because, for the first time, the requested amendment identified the nature of the goods. The amendment is not permitted because it was more than form as it went to essential facts necessary to prove the crime and James did not consent to the amendment.

#### Rogue and vagabond

d. The State can remove the “stet” from the rogue and vagabond charge and try that count in the Circuit Court as it proceeded under the original District Court charging document within one year of placing that charge on the “stet” docket. Maryland Rule 4-428(a). The *de novo* appeal proceeded on the same District Court charging document. This charge can be reactivated in Circuit Court. *LaFaivre v. State*, 338 Md. 151, 158, 656 A.2d 789 (1995).

#### Breaking and entering and theft of property over \$500

e. Maryland Rule 4-247(a) permits the State to terminate a prosecution of a charge. The State did not file a new charging document in Circuit Court. It proceeded on the original District Court statement of charges. The prosecution under the District Court statement of charges was terminated by the State *nol* prosequing those counts and, on the given facts, cannot be reinstated on the original District Court statement of charges.

### **ADDITIONAL FACTS APPLICABLE TO QUESTION 2**

Assume that prior to the commencement of the trial in District Court, James had pleaded guilty to obtaining goods by the false pretense of a bad check in the amount of \$750 as part of a plea bargain under which the State *nol* prosequed the counts of breaking and entering and theft of property over \$500. Assume thereafter James timely filed an appeal to the Circuit Court.

### **QUESTION 2**

**(5 Points            9 Minutes)**

**Under these assumed facts, can the State prosecute the *nol* prosequed counts against James in the Circuit Court trial? Explain in detail.**

## BOARD'S ANALYSIS

Exception to rule requiring a  
new charging document to reinstate  
nol proessed charges

James filed an appeal thereby rescinding the plea arrangement. Either expressly or impliedly, the State had nol proessed the counts of breaking and entering and theft of property over \$500 because of the guilty plea. The State may, at its election, reinstate the nol proessed counts without obtaining a new charging document. LaFaivre, 338 Md. at 156.

Case authorities:

LaFaivre v. State, 338 Md. 151, 656 A.2d 789 (1995)

Busch v. State, 289 Md. 669, 426 A.2d 954 (1981)

Brown v. State, 285 Md. 105, 400 A.2d 1133 (1979)

Johnson v. State, 358 Md. 384, 749 A.2d 769 (2000)

### Facts Applicable To Questions 3 and 4

Jane loaned Richard \$75,000 on June 1, 1997 payable in full on January 1, 1998. Short on funds when the payment was due, Richard paid \$2,000. On April 15, 1998 by letter Richard informed Jane that he would pay as soon as he sold his house in Anne Arundel County, Maryland. Richard never sold his house. On July 20, 1998, he paid Jane \$38,000 by check with the notation on the check of "payment in full of the 6/1/97 loan". Jane cashed the check and had no further contact with Richard. Jane died in January 2001. In reviewing Jane's personal papers, the personal representative of her estate, Harry, discovered the \$35,000 shortfall in payment. On behalf of the estate, Harry made demand on Richard for the \$35,000. Richard refused to pay any more. The personal representative filed suit in the Circuit Court for Anne Arundel County, Maryland, on behalf of the estate against Richard on April 1, 2001 for the \$35,000 shortfall in payment. Filed with the Complaint in the suit was a motion for summary judgment. That motion was supported by an affidavit of Harry as personal representative that the facts and matters set forth were true to the best of his knowledge, information, and belief.

### QUESTION 3

(18 Points 33 Minutes)

**What defenses would you plead on behalf of Richard to insure his ability to properly defend the suit? Assess briefly the facts upon which your defenses are raised.**

## BOARD'S ANALYSIS

Richard would raise the following defenses pursuant to Maryland Rule 2-323(g) for affirmative defenses. Accord and satisfaction on the facts that on his payment of \$38,000 by

check he had written on the check “payment in full of the 6/1/97 loan”; that check had been cashed by Jane with no comment. Estoppel and laches because Jane cashed the check and did nothing to seek recovery after July 20, 1998. Statute of limitations because the suit by Harry was not filed within three years of the date that the loan became payable in full. Statute of frauds because the given facts do not indicate whether the loan was oral or in writing. Defective affidavit supporting the motion for summary judgment.

Assessment of facts upon which the defenses are raised. Analysis of defenses:

(1) The defense of accord and satisfaction will fail. Richard’s attempt on his \$38,000 check payment to have Jane acknowledge “payment in full” will not succeed. The loan of \$75,000 to Richard was liquidated and undisputed. There was a specified amount payable at a particular time and there are no given facts that Richard ever disputed the loan itself. There was no release of the entire loan debt. See *Eastover Company, Inc. v. All Metal Fabricators, Inc.*, 221 Md. 428,433-434, 58 A.2d 89 (1960).

(2) The defense of limitations will fail. On April 15, 1998, Richard by letter told Jane that he would pay as soon as he sold his house. Even though Richard never sold his house, his April 15, 1998 letter acknowledged the debt. That acknowledgment of the debt tolled the statute of limitations and April 15, 1998 became the date from which the statute of limitations would run. The July 20<sup>th</sup> payment could be argued as an acknowledgment of the debt and thereby an extension of the statute of limitations as well. See *Jenkins v. Karlston*, 329 Md. 510, 531, 620 A.2d 894 (1993) and see *Knight v. Knight*, 155 Md. 243, 247-249, 141 A. 706 (1928). Suit was filed within three years of April 15, 1998.

(3) The defenses of estoppel and laches will fail. Jane merely cashed the check without any further contact with Richard. No release was given or requested.

(4) The defense of statute of frauds will fail. The loan was to Richard and the obligation to pay was Richard’s obligation, not the obligation of another person. The loan was to be paid within one year from the making of the loan. Courts and Judicial Proceedings Article, Section 5-901.

#### **QUESTION 4**

**(5 Points 9 Minutes)**

**What responses would you file to plaintiff’s motion for summary judgment? State the reasons for your responses.**

#### **BOARD’S ANALYSIS**

The motion for summary judgment of Harry, the personal representative of Jane’s estate, will fail. Harry’s affidavit in support of the motion for summary judgment is fatally defective. *Mercier v. O’Neill Associates, Inc.*, 249 Md. 286, footnote 1 at 287-288, 239 A.2d 564 (1968).

Maryland Rule 2-501(a) requires that the motion for summary judgment be supported by an affidavit if filed before the adverse party's initial pleading or motion is filed. Maryland Rule 2-501(c) requires that the affidavit supporting or opposing a motion for summary judgment be made on personal knowledge. Personal knowledge means that the facts are affirmed under the penalties of perjury as true. Maryland Rule 1-202 (b).

### **Facts Applicable to Question 5**

Tom and Jerry were both charged in the Circuit Court for Baltimore County, Maryland with particular violations of the laws regulating controlled dangerous substances. Jack, an assistant public defender in the litigation unit, Baltimore County, Maryland Public Defenders Office, was appointed to represent Tom. Jill, also an assistant public defender in the litigation unit in that office, was appointed to represent Jerry. Jerry with his counsel and the State entered into plea bargaining and Jerry has now decided to plead guilty and to assist the prosecution in its case against Tom by testifying against Tom at trial.

### **QUESTION 5 (7 Points 12 Minutes)**

**Can Jack and Jill continue to represent their respective clients?**

#### **BOARD'S ANALYSIS**

Rule of Professional Conduct 1.10 (a) states:

“While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8(c), 1.9 or 2.2.”

If the Baltimore County Public Defender's Office is considered a firm and/or if Jack and Jill are in the same unit in the public defender's office, than Jack and Jill are in a conflict situation under Rule 1.7 (a) [“[a] lawyer shall not represent a client if the representation of that client will be directly adverse to another client”]. Tom and Jerry have a constitutional right to counsel under the Sixth Amendment and Article 21 of the Maryland Declaration of Rights includes the right to have counsel's representation free from conflicts of interest.

If Tom waives this apparent conflict, this disqualification situation would be removed. Rule 1.10(d).

Case authority: See *Austin v. State*, 327 Md. 375, 609 A.2d 728 (1992).

### Facts Applicable to Questions 6, 7 and 8

After a court trial in the Circuit Court for Charles County, Maryland, on July 1 the trial judge entered a verdict in favor of Abel against Baker in the amount of \$50,000. The Clerk of the Court wrote the judgment announced by the court on a sheet of paper, which the judge signed and the Clerk filed. The Clerk immediately made and dated a written entry in the file of the judgment, but failed to record the judgment in the index of judgments in the Clerk's office until July 15. Baker's financial statement as of July 1 discloses the following:

- a house and lot in Charles County owned by Baker and his wife as tenants by the entirety and occupied as their residence
- a farm in Charles County owned by Baker and his brother as joint tenants
- a shopping center in Charles County owned by Baker
- an interest owned by Baker in a real estate partnership which owns an office building with a positive cash flow of \$5,000 per month
- an Individual Retirement Account in Baker's name at a bank in Charles County with a balance of \$25,000.

#### QUESTION 6

(15 Points 27 Minutes)

**(a) What actions under the Maryland Rules can Baker take to contest the judgment? (b) When must each such action be taken? (c) Does any such action affect Baker's right to relief pursuant to another such action?**

#### BOARD'S ANALYSIS

(a) Baker can file a Motion to Alter or Amend Judgment, Rule 2-534, or a Motion to Revise Judgment, Rule 2-535. Baker may also file a notice for an *in banc* review by three judges of the circuit (other than the trial judge). Rule 2-551. Baker may also file a notice of appeal to the Court of Special Appeals. MD. ANN. CODE, COURTS & JUDICIAL PROCEEDINGS §12-301; Rule 8-201.

(b) A Motion to Alter or Amend Judgment must be filed within 10 days after the entry of judgment. Rule 2-534. A Motion to Revise Judgment must be filed in 30 days after the entry of judgment. Rule 2-535(a). A notice for an *in banc* review must be filed within 10 days after the entry of judgment. Rule 2-551(b). A Notice of appeal must be filed within 30 days after the entry of judgment. Rule 8-202(a).

(c) A Motion to Alter or Amend Judgment postpones the time for filing of a notice for an *in banc* review to within 10 days after disposition of the motion, Rule 2-551(b), and postpones the time for filing a notice of appeal to within 30 days after withdrawal or disposition of the motion. Rule 8-202(c). A notice for an *in banc* review filed prior to the disposition of that motion is premature and of no effect. Rule 2-551(b). A notice of appeal filed prior to the

withdrawal or disposition of that motion is premature but is effective; processing of the appeal is delayed until withdrawal or disposition of the motion. *Waters v. Whiting*, 113 Md. App. 464, 688 A.2d 459 (1997) . A Motion to Revise Judgment does not extend the time for filing of a notice of appeal. *Stephenson V. Goins*, 99 Md. App. 220, 636 A.2d 481, *cert den.*, 335 Md. 229, 643 A..2d 384 (1994). The filing of a notice of appeal divests the Court of the authority to hear a Motion to Revise Judgment (unless the appeal is dismissed). *Eisenbeiss v. Jarrell*, 52 Md. App. 677, 451 A.2d 940 (1982), *cert. den.*, 464 U.S. 820 (1983). Review pursuant to a notice for an *in banc* review precludes an appeal to the Court of Special Appeals by Baker (unless the notice for an *in banc* review is withdrawn). Rule 2-551(h).

### QUESTION 7

(8 Points 14 Minutes)

**Upon the recording and indexing of the judgment, on what property listed on Baker's financial statement, (a) does Abel have a lien? (b) can Abel otherwise satisfy his judgment?**

### BOARD'S ANALYSIS

(a) A money judgment recorded and indexed in the county of entry is a lien on the defendant's interest in land in that county. Abel has a lien on Baker's shopping center. Rule 2-621; MD. ANN. CODE, COURTS & JUDICIAL PROCEEDINGS §11-402 (b) . Abel does not have a lien on the residence because it is held in a tenancy by the entireties, *Birney v. Smith*, 200 F.3<sup>rd</sup> 225 (4 Cir. 1999), or on the farm because it is held in a joint tenancy, *Eastern Shore Bldg. & Loan Corp. v. Bank of Somerset*, 253 Md. 525, 253 A.2d 367 (1969)

(b) Although Abel does not have a lien on the jointly held farm, Abel can obtain a writ of execution on the farm. and will have a lien when the joint tenancy is severed by the sheriff's sale *Eastern Shore Bldg. & Loan Corp. v. Bank of Somerset*, 253 Md. 525, 253 A.2d 367 (1969). Abel cannot order a sale of Baker's partnership interest but can obtain a charging order on Baker's share of the profits or other distributions. Rule 2-649. Baker's IRA is exempt from execution. MD. ANN. CODE, COURTS & JUDICIAL PROCEEDINGS §11-504.

### QUESTION 8

(7 Points 13 Minutes)

**(a) When can Abel execute on the judgment? (b) How is Abel's right to execute on the judgment affected by any action by Baker to contest the judgment?**

### BOARD'S ANALYSIS

(a) The judgment was entered when the clerk made a written record of it on the file jacket or on a docket within the file. Rule 2-601(b). The failure to record and index the judgment does not affect the right to a writ of execution in the county where it was entered. Rule 2-641(a) .

However, a, money judgment is automatically stayed until the expiration of ten days after its entry. Rule 2-632(b).

(b) If Baker files a post-trial motion, Abel may still execute on the judgment unless the Court grants a discretionary stay of enforcement of the judgment. Rule 2-632(c). If Baker files an appeal, Baker is entitled to a stay of enforcement of the judgment by filing a supersedeas bond in the amount of the judgment plus interest and costs. Rule 8-422(a), Rule 8-423(b) (1)

### **Facts Applicable To Questions 9 and 10**

On November 1, 2001, Carl Icon purchased the assets of an energy trading division from Endrun Partnership, a Maryland general partnership, in which Tom, Dick and Harry were the three general partners.

On January 2, 2002, having discovered that the partners in Endrun had misrepresented the market value of the assets, Icon filed suit in the Circuit Court for Montgomery County against Endrun Partnership and Tom, Dick and Harry. A legally sufficient summons for each defendant, with a copy of the complaint and each exhibit attached, was immediately issued and delivered to Arthur Anderson, Icon's attorney.

On Wednesday, January 16, George, Tom's close friend, picked up Tom's mail at the Houston, Texas Post Office, including an envelope containing his summons, addressed to Tom and mailed by certified mail requesting: "Restricted Delivery — show to whom, date, address of delivery". George signed his own name on the return receipt and later gave the envelope to Tom.

On Thursday, January 17, Dick was handed his summons by Anderson, Icon's attorney of record, at the Amtrak station in New Carrollton, Maryland, where Dick was about to board a train for a secure, undisclosed location.

On Friday, January 18, Harry was handed his summons by Icon at the BWI Airport, just outside of Baltimore, Maryland, after a short, and unpleasant, conversation.

On Friday, January 18, at 9:00 a.m., a private process server went to the Endrun Partnership office in Montgomery County and left the summons for Endrun Partnership with Kenneth, the office manager.

Returns attesting service on each defendant were properly filed with the court the following week.

At 4:00 p.m. on Friday, February 15, Tom, Dick and Harry appear in your office with directions to file timely responses to the Complaint on behalf of all defendants, raising all defenses that might avoid a trial on the merits. You are about to leave for a President's Day Celebration (to which Endrun was a major contributor), and want to wait until the morning of Tuesday, February 19, 2002, to draft responses, if possible.

**QUESTION 9**  
**(15 Points 27 Minutes)**

**(a) What preliminary defenses, other than to the merits, can be asserted on behalf of each defendant? (b) What pleading or paper will you file on behalf of each defendant? (c) Can responses be timely made on behalf of each defendant? Can you wait until Tuesday?**

**BOARD'S ANALYSIS**

Service on Tom is insufficient. The summons was not delivered to Tom. Rule 2-124(a). Service on a defendant by certified mail is complete only upon delivery. Rule 2-121(a). I must file a motion to dismiss for insufficiency of service of process before an answer. Rule 2-322 (a).

A defendant served outside the state has 60 days in which file an answer. Rule 2-322(b) (1). The motion to dismiss automatically extends the time for filing an answer. Rule 2-322 (c).

I can wait until Tuesday to file a response on behalf of Tom.

Service on Dick is sufficient. Service may be made by an attorney for a party. Rule 2-123 (a). I must file an answer. Rule 2-323. A defendant served within the state has 30 days in which to file an answer. Rule 2-322(a). The last day for filing falls on a Saturday, which extends the time until the next business day. Rule 1-203. Since Monday is a state holiday, I can wait until Tuesday.

Service on Harry is insufficient. Service may not be made by a party. Rule 2-123 (a). I must file a motion to dismiss for insufficiency of service of process before an answer. Rule 2-322 (a).

Service on Endrun Partnership is insufficient. While service on an individual may be made by leaving the summons at the individual's usual place of abode with a resident of suitable age and discretion, Rule 2-121(a), service on a general partnership must be made by serving any general partner. Rule 2-124(d) . I must file a motion to dismiss for insufficiency of service of process before filing an answer. Rule 2-322 (a).

I should file the motions to dismiss within the times allowed for the filing of an answer to preclude the entry of an improvident order of default.

**QUESTION 10**  
**(5 Points 9 Minutes)**

**Discuss any concerns you might have with respect to the request that you represent all of the defendants.**

**BOARD'S ANALYSIS**

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client unless the lawyer reasonably believes the representation will not be adversely affected and the client consents after consultation. Rule 1.7(b). The consultation shall include explanation of the implications of the common representation and any limitations resulting from the lawyer's responsibilities to another, as well as the advantages and risks involved. Rule 1.7(c).

A lawyer retained by a partnership represents the entity through its partners. Rule 1.13(a). In dealing with the partners of a partnership, a lawyer shall explain the identity of the client when it is apparent that the interests of the partnership are adverse to those of a partner with whom the lawyer is dealing. Rule 1.13 (d). A lawyer representing a partnership may also represent a partner, if consent of the partnership required by Rule 1.7 to the dual representation is given by a partner other than the partner who is to be represented. Rule 1.13(e).

I will need the consent after consultation of each partner, on his own behalf and on behalf of the partnership, to the representation of each other defendant.