

**Summary of suggested answers & annotations to the essay part of the February 2014 Virginia Bar Exam.**  
**Prepared by Susan Grover, Eric Chason, John Donaldson & J. R. Zepkin of William & Mary Law School,**  
**Emmeline P. Reeves & Wade Berryhill of University of Richmond Law School, C. Scott Pryor of Regent University**  
**Law School & Leslie Alden of George Mason University School of Law**

After each bar exam, representatives from some of the law schools in Virginia collaborate to prepare suggested answers which we think should be acceptable to the Virginia Board of Bar Examiners. These answers also include references to some of the case and statutory law for reference even though the BBE may not expect such specificity in applicants' answers on the exam. jrz

1. [02/14] [Criminal Law] Jay Gantry, who had recently fallen on hard times, was indicted in the Circuit Court of Lee County, Virginia on four counts of larceny for having allegedly violated the Virginia Bad Check Law (Virginia Code §18.2-181), which provides in pertinent part as follows:

Any person who, with intent to defraud, shall make or draw or utter or deliver any check . . . upon any bank, . . . knowing at the time of such making, drawing, uttering or delivering, that the maker or drawer has not sufficient funds in, or credit with, such bank, banking institution ,trust company, or other depository, for the payment of such check . . . although no express representation is made in reference thereto, shall be guilty of larceny . . .

The word "credit" as used herein, shall be construed to mean any arrangement or understanding with the bank . . . for the payment of such check . . .

.Any person making, drawing, uttering or delivering any such check . . . in payment as a present consideration for goods or services for the purposes set out in this section shall be guilty as provided herein.

The following undisputed evidence was presented at a bench trial:

Jay had a checking account at The Bank of Pennington Gap (Bank), into which his net monthly salary of \$3,500 was automatically deposited on the first of each month. Jay paid all his living expenses out of this account but never kept track of the running balance. On May 1, the actual balance in the account was \$2,150.

Transaction # 1: On May 1, Jay bought a saddle horse from Bob and gave him a check for \$500 as full payment. Jay continued to draw checks on the account, and, although he did not realize it, by May 10 he was overdrawn. Bob presented the \$500 check to the Bank on May 15, and Bank dishonored it for insufficient funds.

Transaction # 2: On May 15, Jay delivered a check for \$175.00 to Finance Company to cover his May car payment. Bank promptly returned the check to Finance Company for insufficient funds. On May 17, Jay received a letter from Bank informing him that his account was over drawn and stating, "Knowing that your employer regularly deposits your salary in your account on the first day of each month, we are willing to begin honoring your overdrafts, but there will be a \$25 charge on each occasion. If you want to take advantage of this offer, please sign and return to us the enclosed copy of this letter. We will begin honoring the overdrafts after we receive the signed copy."

Transaction # 3: On May 20, after a day drinking beer and smoking dope with his friends, Jay was "wasted." He decided to go with his friends to the Wise County horse show and enter his new horse in the quarter mile race that night. Being broke, Jay stopped by the drive-in window of Bank and gave the teller a \$400.00 check made out to cash. Without verifying Jay's balance and being rushed, the teller gave Jay the cash. On May 30, Jay signed and mailed back to Bank the letter he had received on May 17. Because of the intervening Memorial Day weekend, when there was no mail service, Bank did not receive the signed letter until June 5.

Transaction # 4: Also on May 30, Jay bought a banjo from Fred and gave him a check for \$700 dated June 4. Jay knew the account was overdrawn on May 30, but he expected that his salary would be deposited on June 1 as usual. In any event, he believed that Bank would honor the check under the terms of the letter he had signed and returned. On June 4, Fred presented the check to Bank for payment. Because of a glitch in Jay's employer's bookkeeping system, the automatic deposit of his salary was delayed. Bank dishonored the check to Fred for insufficient funds.

What defenses, if any, are available to Jay as to each of these transactions, and how should the court rule on

each? Discuss fully.

\*\*

This was a question testing the applicants' analytic skills in applying a fact pattern to a particular criminal statute.

Transaction #1: Jay can successfully defend on the basis that the facts do not establish beyond a reasonable doubt any fraudulent intent on his part and indicate that when tendering the May 1<sup>st</sup> check, he was not overdrawn on that day.

Transaction #2: Jay can successfully defend because the facts show that the check was given for cover a payment that was already due. The check was not given for "present consideration", as the statute requires. Sylvestre v. Commonwealth 10 Va. App. 253 [1990]

Transaction #3: Here, Jay had been told by the bank that he was overdrawn and he had not signed and returned the letter from the bank offering overdraft protection. Voluntary intoxication is not a defense and will not negate "intent" under these circumstances. Jay has no viable defense to this charge. Leslie - I did not include your "could make the argument" suggestion b/c of the facts of the problem that the offer by the bank expressly indicated that it would start the OD protection "after we receive the signed copy" and do not recollect any discussion at the meeting as to this argument being considered.

Transaction #4: Here Jay gave Fred a post-dated check and the facts indicate that he had a reasonable expectation that his pay check would be deposited several days before the date of the check. The post dated check is not "present consideration" per case law in Virginia. Also, There was no evidence of an intent to defraud at the time the check was given. Warren v. Commonwealth 219 Va. 416 [1978] Jay can successfully defend on this basis.

2. [02/14] [Personal Property & Va. Civil Procedure] Shortly before his death in 1912, Colonel Riles E. Plumlee made a gift to Columbia University in New York City of his collection of Civil War artifacts, including an inscribed Tiffany silver sword and scabbard (collectively, the "Sword"), presented to him in recognition of his gallantry and leadership on behalf of his country during the Civil War. The Sword was engraved with a number of inscriptions as well as Col. Plumlee's name.

Col. Plumlee's gift to Columbia was acknowledged and accepted by the University's president. The Sword was put on display in the University's Memorial Hall on campus.

In 1977 the Sword was discovered missing. Columbia did not report the Sword as missing because as an institution the University was self-insured for property loss and because the University feared that publicizing such losses would adversely affect its prospects with prospective donors for future gifts.

The Sword is presently in the possession of Seamus and Sophia Haynee of Virginia Beach, Virginia. They acquired the Sword in 1992 from a collector, Izzy Jones, who himself had bartered for the Sword in 1979 with another collector, George McClure. George had admitted to Izzy that he bought the Sword from a thief in 1978. George's whereabouts are now unknown.

During the time the Sword was in the possession of Izzy Jones, an attorney for Columbia University made contact with Izzy and asked for the opportunity to inspect the Sword. Even though the attorney was able to describe the Sword in great detail, including many of the inscriptions, Izzy refused to provide the Sword for inspection, falsely insisting that he "could document his own ownership as well as other predecessors in title ... well beyond the time that you are referring to as a date of loss." In fact, Izzy could not document his ownership, or the ownership of others, any earlier than 1979, when he acquired the items from George McClure.

Izzy had told the Haynees, a wealthy but somewhat scatterbrained pair of socialites, that there had been a "claim against the Sword, but that it had been resolved and was, thus, fully saleable." The Haynees did not inquire how the claim was resolved, who made the claim, or even the basis of the claim. They simply paid Izzy \$91,000 and received in return the Sword and a bill of sale without warranties.

The Haynees had an extensive private collection of Civil War artifacts, and they frequently held charity events in their home and invited people to view the collection. During one such event, a retired history professor from Columbia, now living in Norfolk, recognized the Sword, photographed it with his cell phone, and sent the photographs to the current

president of Columbia University.

Shortly thereafter, Columbia University filed a detinue action in the U.S. District Court for the Eastern District of Virginia (Norfolk Division) against the Haynees to recover possession of the Sword. The Haynees do not dispute that the Sword they purchased from Izzy in 1992 once belonged to Memorial Hall exhibit and that Columbia University had once been the rightful owner. However, the Haynees assert the following affirmative defenses: (1) that they acquired superior title because they purchased in good faith for value, and (2) Columbia University's suit is barred by the doctrine of laches.

- (a) Can Columbia University prove a *prima facie* case of detinue against the Haynees? Explain fully.
- (b) How would the court be likely to rule on each of the Haynees' defenses? Explain fully.

\*\*

- [a] Neither the thief of the sword nor anyone taking from the thief had title; their title was void, not voidable. It is irrelevant that subsequent transferees were acting in good faith. UCC §2-403(1).

The elements that must be alleged and proven in an action in detinue are: [1] plaintiff has a current property right in the property; [2] plaintiff must have a right to immediate possession; [3] the property must be capable of possession; [4] the property must have some value; and [5] defendant must have had possession of the property prior to the filing suit. It appears that Columbia can prove a *prima facie* case for recovery.

- [b] [1] As explained in [a], purchasing in good faith is not a good defense where the property is stolen property.

As to the defense of laches:

[i] If laches can be a defense to this type of action, laches would not apply b/c on the facts, Columbia filed suit "shortly" after learning of where the sword was. There was no delay in filing suit. Brown University v. Tharpe 2013 U.S. Dist. Lexis 79164 [E.D. Va.] (2013);

or

[ii] Detinue is a law action [Kelly v. Lehigh Min. & Mfg. co. 98 Va. 405 [1900] & Burke's Pleading & Practice 4<sup>th</sup> Ed., §125, page 240 indicating a detinue action is commenced by filing a motion for judgment, which was a pleading used to institute only law actions, not equitable ones] and consequently, laches was not an available defense to a law action. Laches can be used only in equitable actions where there is no applicable statute of limitations.

\* It's our thought that while the alternative answers are not consistent with each other, there's a good likelihood that, for this bar exam, either analysis will earn full or significant credit. In the Brown University case opinion, which formed the fact pattern for the question, the federal court makes a statement that "In this case, Brown University ("Brown") invokes the equitable remedy of detinue to recover a Tiffany presentation sword." In the essay question, suit was filed in the Eastern District Federal Court. jrj

3. [02/14] [Partnerships & Corporations & Va. Civil Procedure] Adam and Bill were partners in the business of buying distressed properties in Norfolk, Virginia and renovating them for sale. They had two or three projects going at any given time. They had no bookkeeper or other employees and ran the business informally using a checking account maintained at First Bank to conduct the financial affairs of the business. The account was in Adam's name with the subtitle "Rehab Account." All revenues were deposited into the Rehab Account and all expenses were paid with checks written on that account. From time to time Adam would also pay personal living expenses for himself and Bill from the Rehab Account.

In early 2010, Adam and Bill acquired an abandoned four-unit apartment building on Granby Street in Norfolk. They believed they could renovate the units, sell them as condominiums, and make a profit. They made the down payment using funds in the Rehab Account, and agreed to pay the person from whom they bought the building the balance of the sale price when the condominium units were sold.

The roof of the building was structurally unsound, and Adam and Bill tried to do the repairs and replacement on the cheap. They were able to get the roof approved by the building inspector, but they suspected it was likely that before

long the roof would develop leaks.

Anticipating that they might be open to liability when the roof problems became apparent and having heard that they could shield themselves from personal liability by forming a corporation, Adam and Bill downloaded some forms and instructions on the Internet, and formed a Virginia corporation called Four Residences On Granby, Inc. ("FROG"). They purchased a minute book with form bylaws, stock register, and blank stock certificates from a stationery store. They transferred title of the apartment building to FROG, designated themselves as the sole directors and officers, issued stock to themselves, and otherwise went through the corporate formalities of holding regular shareholders' and directors' meetings, keeping minutes, and the like.

When they finished the renovation, FROG advertised the condos for sale. At no time did FROG disclose the roof problem. All four units were sold, and the proceeds were deposited in the Rehab Account at First Bank with funds from other, non-FROG projects.

As expected, the roof developed bad leaks, and the Condominium Owners Association("COA") insisted that Adam and Bill fix it. When negotiations failed to resolve the dispute, COA sued FROG for water damage to the units and the costs of replacing the roof. FROG filed an answer denying liability. During discovery, COA learned of the Rehab Account and how Adam and Bill used it. COA also learned that FROG had no assets in its name. COA asks you as their lawyer the following questions:

- (a) What legal theory can COA assert to reach any of the Rehab Account to satisfy a judgment COA might obtain and, if so, will COA be likely to prevail on that theory? Explain fully.
- (b) What must be done procedurally to employ that theory in this lawsuit? Explain fully.

\*\*

- [a] The facts of this problem came from *Klaiber v. Freemason Assoc., Inc* 266 Va. 491 [2003]. To reach the Rehab Account to satisfy a potential judgment, COA should assert the legal theory of piercing the corporate veil. Generally, shareholders are not personally liable for the debts of a corporation. Where, however, shareholders have controlled or used the corporation to evade a personal obligation or perpetrate a fraud or crime, to commit an injustice or to gain an unfair advantage, the court may pierce the corporate veil and hold shareholders liable for the debts of the corporation.

In Virginia, piercing is an extraordinary remedy rarely applied; however, piercing the corporate veil is justified when the unity of interest is such that the separate personalities of the corporation and the individual no longer exist and to adhere to that separateness would work an injustice. Here, the shareholders clearly formed in the corporation to avoid personal liability for problems with the roof of the building. Additionally, there was a clear unity of interest and ownership between the shareholders and the corporation.

Although they followed certain corporate formalities by holding regular shareholder and director meetings, the corporation never conducted any business independent of the shareholders' business of renovating and selling the property at issue and the shareholders deliberately never capitalized the corporation. Because of the egregious facts in this situation, COA will likely be successful in its effort to pierce the corporate veil and hold the shareholders personally liable on this debt. Additionally, once the veil has been pierced and a judgment entered against the shareholders personally, then COA will be able to satisfy its judgment from the assets in the Rehab Account, which is held in a shareholder's name.

- [b] In order to employ the theory of piercing in this lawsuit, the shareholders, Adam and Bill, must be added the lawsuit. Currently, the corporation is the only defendant, so COA must add Adam and Bill as defendants in order to obtain a judgment against them personally. To do so, the plaintiff must seek leave of court to file an amended complaint adding Adam and Bill. Under the Virginia Code, new parties may be added to a case by order of the court at any time as the ends of justice may require. §8.01-5[A]

4. [02/14] [Wills & Administration of Estates] Roger and Molly Brian, husband and wife, were residents of the County of Roanoke, Virginia. They had three adult children of their marriage: George, Wiley, and Darlene. In 2000, Roger executed a valid will by which he left his entire estate to his wife, Molly. The will named Molly as Executor. The will did not

mention any of the three children.

One of the children, George, died in an automobile accident in 2006. George was survived by his wife, Anna, and two minor children, Ken and Julie.

Roger died on January 30, 2014. Molly, who was seriously ill at the time of Roger's death, died on February 8, 2014, before Roger's will was offered for probate. Molly died without a will.

Roger and Molly were survived by their two children, Wiley and Darlene, and by Anna (George's widow) and her two minor children, Ken and Julie.

At the time of his death, Roger had interests in the following assets:

- A joint checking account containing \$30,000 held in the names of Roger and Molly as joint tenants with the right of survivorship;
- A family home valued at \$250,000 held in the names of Roger and Molly as tenants by the entirety with the right of survivorship;
- Rights as sole beneficiary in a trust created by his grandparents, from which he received all of the income. The trust instrument provided that the corpus would be distributed to Roger's children upon Roger's death. The corpus of the trust at the time of Roger's death was \$9,500,000, and there was accumulated, undistributed income of an additional \$25,000; and
- A 2012 Cadillac titled in Roger's name and valued at \$20,000.

When Molly died, her estate consisted of \$250,000 she had inherited from her parents and which she held in her sole name in a separate account, and such other assets as she received as a consequence of Roger's death.

- a) What is the title of the person who will manage Roger's estate, and how will that person be selected? Explain fully.
- b) What is the title of the person who will manage Molly's estate, and how will that person be selected? Explain fully.
- c) Which of the assets in which Roger had an interest at the time of his death must be included in the inventory of Roger's estate, and which ones should not be included? Explain fully.
- d) Which of the assets mentioned in the facts given above must be included in the inventory of Molly's estate? Explain fully.
- e) Who is entitled to receive a share of Molly's estate and in what proportions? Explain fully.

\*\*

- [a] The title of the personal representative of Roger's estate is "administrator with will annexed of the estate of Roger Brian, deceased" or in traditional parlance, "administrator c.t.a". The Court or the Clerk of the Circuit Court of Roanoke County would appoint the Administrator CTA. §64.2-500[A]
- [b] Because Molly died intestate, the title of the personal representative will be "administrator of the estate of Molly Brian, deceased." The administrator will be selected pursuant to §64.2-502 by the Court or Clerk of the Circuit Court of Roanoke County from among the qualified applicants, who include persons entitled to distribution (heirs/distributees—living children).
- [c] The requirements of what must be listed in the inventory for Rogers estate are set forth in §64.2-1300[A]. The inventory must include all personal estate under the fiduciary's supervision and control, the decedent's interest in any multiple party accounts in any financial institution, all real estate over which the fiduciary has power of sale, and any other real estate that is an asset of the estate. The inventory should include:

- [i] The decedent's interest in the joint checking account (presumed to be  $\frac{1}{2}$ ) is included by the terms of the statute. Although [husband's] interest in the joint checking account will pass automatically to [wife] because of the right of survivorship, such interest must nonetheless be included in the inventory according to §64.2-1300[A].
- [ii] The accumulated, undistributed income under the grandparents trust is included. The decedent, who was entitled to all trust income for life, does not forfeit the right to income accrued and undistributed at time of death. §64.2-1008[B] [Uniform Principal & Income Act]
- [iii] The Cadillac, being tangible personal property solely owned by the decedent, is included.

The corpus of the trust is not included. By the terms of the trust Roger's children have a vested remainder in the corpus. The family home is not included in the inventory. It being held as tenants by the entirety, decedent's interest was extinguished at his death, and Molly became sole owner by he terms of tenancy.

- [d] The requirements of what must be listed in the inventory for Molly's estate are set forth in §64.2-1300[A]. The inventory must include all personal estate under the fiduciary's supervision and control, the decedent's interest in any multiple party accounts in any financial institution, all real estate over which the fiduciary has power of sale, and any other real estate that is an asset of the estate. The property items that must be included are:
  - [i] The family home and the joint bank account, being solely owned by Molly at her death by reason of her survivorship interest, must be included in the inventory of her estate.
  - [ii] In addition, the estimated value of her distributable interest, net of debts, taxes and expenses of administration, in Roger's estate, of which she is sole legatee, must also be included. A residuary legatee of a decedent's estate does not have a specific interest in particular items of personal property in the estate during the period of administration. During administration, title to the estate's personal property is in the personal representative, not the residuary legatee.
  - [iii] The \$250,000.00 she'd inherited from her parents and held in a separate account.

Assuming the Administrator CTA of Roger's estate had not qualified and transferred title to the Cadillac to Molly's estate, the car should not be included because a residuary legatee of a decedent's estate does not have a specific interest in particular items of personal property in the estate during the period of administration. During administration, title to the estate's personal property is in the personal representative, not the residuary legatee.

- [e] Molly having died intestate, her property descends to her children, and descendants per stirpes of deceased children, by the statutes of descents and distribution, §§64.2-200, 201 and 202. Accordingly:
  - [i] Wiley takes 1/3 of the real estate and 1/3 of the net person estate.
  - [ii] Darlene takes 1/3 of the real estate and 1/3 of the net person estate.
  - [iii] Ken, a grandchild, takes 1/6 of the real estate and 1/6 of the net person estate.
  - [iv] Julie, a grandchild, takes 1/6 of the real estate and 1/6 of the net person estate.

- 5.** [02/14] [Va. Civil Procedure] Larry Lawyer filed a complaint in Norfolk Circuit Court against ACME Manufacturing Company (ACME) on behalf of his client, Sam Jones, alleging breach of a written contract of employment. The litigation was very contentious, and Lawyer filed numerous pretrial motions objecting to ACME's every request for document discovery and depositions. Among the documents requested by ACME during discovery was the employment contract. ACME had searched its files for the contract but was unable to find it. Jones claimed not to have it either.

ACME asserted that the contract contained an arbitration clause requiring Jones to submit any dispute to final and binding arbitration. Based on that assertion, ACME requested the court to convene a hearing to take testimony on the contents of the contract and moved to compel arbitration. At the hearing on February 1, 2013, Jones testified that he could

not remember any arbitration clause in the contract; however, on cross examination, he testified that he found his copy of the contract about a week ago and gave it to Lawyer. Jones said that he and Lawyer had reviewed portions of the contract together just before the hearing. The judge asked Lawyer if that was true, but Lawyer declined to answer. Instead, Lawyer moved to nonsuit the complaint against ACME. The judge granted the nonsuit, but suspended the order granting the nonsuit until further order of the court.

Before adjourning and while in open court, the judge strongly reprimanded Lawyer for having failed to inform ACME's counsel and the court that the contract had been located. The judge also took the opportunity to admonish Lawyer for having filed repeated pretrial motions that the judge said she considered frivolous, dilatory, and wasteful of the time and resources of court and counsel. The judge then ordered all parties to a hearing on March 1, 2013 to consider sanctions against Lawyer and Jones.

At the conclusion of the hearing on March 1, the judge awarded sanctions against Lawyer in the amount of \$60,000 to compensate ACME for attorney's fees and costs it had incurred in dealing with Lawyer's actions. A few days later, Lawyer filed a motion for reconsideration of the sanctions. In support of his motion, Lawyer argued, first, that the court had no authority to award sanctions and, second, in light of the fact that the court had granted a nonsuit on February 1, the court had no jurisdiction to act. He also argued in the brief that, in doing so *sua sponte*, the court had been "discriminatory and irrational to the core" and that the court in its findings made "incredible assertions and mischaracterized the prior case law." He concluded his brief with the statement that "George Orwell's fertile imagination could not supply a clearer distortion of the plain meaning of language to reach such an absurd result. The court's findings demonstrate graphically the absence of logic and common sense."

Upon reading this brief, the judge issued an order to show cause (i) why Lawyer should not be held in contempt for using the language he did in the brief; (ii) why the court should not revoke Lawyer's right to practice in the Norfolk Circuit Court, and (iii) why the court should not report the matter to the Virginia State Bar with the recommendation that the Bar consider revoking Lawyer's license to practice law.

- (a) Did the court have the authority to award the sanctions against Lawyer? Explain fully.
- (b) Does the court have the authority to carry out each of the specifications in the order to show cause? Explain fully.

\*\*

There are two statutory and rule sources of authority for the granting of sanctions, §8.01-271.1 & Rule 4:12. In addition, the courts have certain inherent authority to impose certain sanctions. The general sanctions statute is §8.01-271.1 and the court's authority in issues arising under Part Four [Discovery] of the Rules of Court in Rule 4:12.

The conduct subject to the question of can the court sanction is: [i] failing to supplement the earlier answers to a request to produce the contract; [ii] filing repeated pre-trial motions that the judge considered frivolous, dilatory and wasteful; [iii] counsel's argument in a brief, sharply critical of the court.

- [a] As to whether the court had authority to impose any of the sanctions, it did. While the court had entered an order granting a nonsuit, which was a final order and engaged the 21 day period under Rule 1:1, the court, in that order had suspended it, pending the court's rulings on sanctions. That was effective to keep the matter within the power [jurisdiction] of the court. *Williamsburg Peking Corp. v. Xianchin Kong* 270 Va. 350 (2005)
- [b]
  - [i-a] Failing to supplement the earlier responses to discovery - the court did not have authority at that point to impose any sanctions under Rule 4:1. The plaintiff would first have had to seek and obtain an order from the court compelling ACME to supplement; Brown v. Black 260 Va. 305 [2000] or alternatively
    - [i-b] The failing to supplement was neither an oral nor written motion so §8.01-271.1 would not apply as to awarding sanctions for failure to supplement. Neither Rule 4:1 in imposing the duty to supplement, nor Rule 4:12 authorizing sanctions for failure to obey an order to comply with certain numbered provisions in Part 4 of the Rules makes any reference to the failure to supplement. Arguably the court has no authority to impose sanctions for this failure. The court could always continue the case and let the non offending side refile the request and the offending side would then have to comply.

- \* It's our thought [guess!] that alternative [i-b] is so detailed, it was not what the Board was looking for as the answer.

[ii] As to the repeated filing of frivolous motions, §8.01-271.1 would authorize the court to impose sanctions on its own motion. The attorney had notice and an opportunity to be heard. Taboda v. Daly Seven, Inc. 272 Va. 211 [2006]

[iii] counsel's offensive arguments would not be motions, either oral or written, under §8.01-271.1, but would be contempt of court under §18.2-456 as misbehavior in the presence of the court ¶ (1) or vile, insulting language under ¶ (3)

Also, under the holdings in Taboda v. Daly Seven, Inc. 272 Va. 211 (2006) and in re Moseley 273 Va. 688 (2007) the court had the authority to bar, for egregious conduct, Lawyer from practicing in the Norfolk Circuit Court.

The court has the authority, as does anyone, to report Lawyer's conduct to the Virginia State Bar.

- \* We do not think that the following was required as part of the answer, but any reader of this summary should be mindful that Canon 3D(2) of the Canons of Judicial Conduct provides:

"A judge who receives reliable information indicating a substantial likelihood that a lawyer has committed a violation of the Code of Professional Responsibility should take appropriate action. A judge having knowledge that a lawyer has committed a violation of the Code of Professional Responsibility that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects should inform the Virginia State Bar"

**6.** [02/14] [Va. Civil Procedure] Following a business dispute, Mike sued Trey in the Circuit Court for the City of Bristol, Virginia for breach of contract, claiming damages in the amount of \$250,000. Mike filed an appropriate request for a jury trial. The trial commenced on June 20.

During voir dire, the judge allowed wide latitude to both sides in questioning the jury panel. In questioning Reba, it was revealed that she was Trey's sister. Mike moved to strike Reba for cause. The judge denied the motion, and noted Mike's objection. Mike's lawyer then used one of his peremptory challenges to strike Reba.

In questioning Page, it was revealed that he was a partner with Trey in a business that was unrelated to the business involved in the current lawsuit. Page admitted that he had talked to Trey about the subject matter of the lawsuit and was very familiar with the facts in dispute. When asked if he would benefit in any way if the jury were to return a verdict in favor of Trey, Page responded, "Not directly, but it might free up some money that Trey could then invest in our partnership." Mike's lawyer moved to strike Page for cause. The judge denied the motion, noting Mike's objection. Again, Mike's lawyer used one of his peremptory challenges to strike Page.

During his questioning of the panel, without objection from Mike's lawyer, Trey's lawyer prefaced many of his questions with remarks such as, "Do you think this carpetbagger coming from upstate will affect your judgment?" "Does it bother you that Mike is asking you as residents of Bristol to find against one of your fellow residents?" "Mike comes to town with this high-priced lawyer from upstate to try to scare you into believing Mike's cock and bull story."

At the conclusion of the trial, the jury returned a verdict in favor of Trey. On July 1, the judge entered a final judgment on the verdict. Thirty days later, on July 31, Mike filed a motion in the Circuit Court to set aside the verdict on the ground that the evidence did not support the verdict. The judge declined to entertain the motion.

Later the same day, Mike filed a notice of appeal in the Circuit Court, specifying that he intended to take his appeal to the Court of Appeals of Virginia, where he subsequently timely filed his petition for appeal. The grounds on which Mike based his appeal, were that the Circuit Court erred by (i) denying his motions to strike Reba and Page from the jury for cause, and (ii) allowing Trey's lawyer to ask the jury panel questions (which were set out in detail in Mike's brief) calculated to "poison their minds and create unfair bias." Trey immediately filed a motion requesting the Court of Appeals to dismiss Mike's appeal.

- (a) Did the circuit judge err in declining to entertain Mike's motion to set aside the verdict? Explain fully.
- (b) Should the Court of Appeals dismiss Mike's appeal? Explain fully.
- (c) If Mike's appeal were properly before an appellate court, how would the court be likely to rule on each of the grounds asserted by Mike? Explain fully.

\*\*

- [a] No. The final order had been entered by the judge on July 1<sup>st</sup>. It was 30 days later when Mike filed a motion to set aside the verdict. Under Rule 1:1, the matter remained under the control of the trial court for 21 days and no longer unless prior to the end of the 21 days, the court had modified, suspended or vacated the order.
- [b] No it should not dismiss the case. Mike filed his petition in the wrong appellate court. Appeals in civil cases, other than domestic relations matters, go to the Supreme Court of Virginia, not the Court of Appeals of Virginia. Under §8.01-677.1, the appellate court is barred from dismissing the appeal, but is directed to transfer it to the correct appellate court.
- [c]
  - [i] As to permitting Reba, Trey's sister to sit on the jury, the trial court erred. §8.01-358 permits counsel to ask prospective jurors "...whether he is related to either party, or has any interest in the cause, or has expressed or formed any opinion, or is sensible of any bias or prejudice therein .... and if it shall appear to the court that the juror does not stand indifferent in the cause, another shall be drawn or called and placed in his stead for the trial of that case." On these facts, considering the relationship, the judge should have excused the juror. The fact the Mike got the juror off the panel by using one of his peremptory challenges does not cure or render the error harmless. *Breeden v. Commonwealth* 217 Va. 297 (1976) "A defendant has a right to an impartial jury drawn from a "panel" .. free of exceptions."
  - [ii] As to permitting Page, Trey's business partner to serve, while it's may be a little closer issue, the judge should have excused the juror for the same reasons as mentioned in [i]. Also, this prospective juror had information about the facts of the case, However these calls are discretionary ones by the trial court and will be reversed only if there's a manifest error or abuse of discretion. *Cantrell v. Crews* 259 Va. 47 [2000]
  - [iii] As to the questions to the prospective jurors by Trey's lawyer the appellate court should decline to consider the issue because Trey's lawyer failed to make timely objection and state the grounds for the objection at the time the questions were asked. The trial court was not given an opportunity to rule on the issue and to consider a limiting instruction to the jury. Rule 5:25 would prohibit appellate consideration. In the Rule, there is permission for exceptions to attain the ends of justice, but on these facts, the exception would not be applied.

7. [02/14] [Real Estate] Bob owned in fee simple a farm in Montgomery County, Virginia, which fronted on a state highway. In 2008, Jane purchased an adjoining farm that had no highway frontage and could be reached only by a county road, which led a mile and a half to the highway. Recognizing that it would shorten the access to her farm, Jane asked Bob to sell her an interest that would allow her to use the existing dirt road across his farm, which led from her house more directly to the state highway. Bob, in the spirit of being a good neighbor, refused to accept any payment but gave Jane a validly executed deed that described the dirt road and recited her right to use it. Nothing in the deed limited the duration of this right.

Jane did not record the deed, but she used the dirt road for access continuously thereafter. Jane's house and the dirt road that commenced at the front of her house and continued across Bob's farm were plainly visible to anyone on Bob's farm.

In 2012, Tom visited Bob's farm and offered to purchase it. Bob sold the farm to Tom for \$200,000 and conveyed the property in fee simple by a General Warranty deed containing English covenants of title. This deed did not mention the right that Bob had previously deeded to Jane, and a title search conducted on Tom's behalf revealed no such encumbrance on the property.

When Tom moved onto the farm, he installed and locked a gate across the dirt road. Jane explained that Bob had granted her the right to use the dirt road, but that she had lost the deed. When Tom asked Bob about it, Bob confirmed

that he had granted Jane the right and that he had forgotten to mention it in his deed to Tom.

- (a) What are the respective rights of Jane and Tom regarding Jane's right to use the dirt road, and which of them would be likely to prevail in the dispute? Explain fully.
- (b) Is Tom entitled to prevail in a suit against Bob for breach of covenant based on:
  - (i) The General Warranty provisions of the deed? Explain fully.
  - (ii) The English covenants of title contained in the deed and, if so, which one(s)? Explain fully.

\*\*

- [a] Jane is likely to prevail against Tom in the dispute over Jane's right to use the road. Jane received a valid express easement from Bob, but the issue is whether Tom took the property subject to Jane's easement. When the servient tenement is transferred, the new owner takes subject to the easement unless the new owner is a bona fide purchaser for value with no notice of the easement. The easement was not recorded, and thus, Tom did not have record notice. However, the physical location of the road leading directly from Jane's house to the highway put Tom on constructive notice of a potential interest or use. Thus, Tom was not a bona fide purchaser without notice and he owns the property subject to Jane's easement.
- [b]
  - [i] Pursuant to the General Warranty, the grantor covenants that he, his heirs and personal representatives will forever warrant and defend such property unto the grantee, his heirs, personal representatives and assigns, against the claims and demands of all persons whomsoever. Because Bob, the grantor on the deed to Tom, placed a cloud of title on the property, he could be found liable to Tom.
  - [ii] Tom will prevail on a claim based on a breach of the covenant against encumbrances in his deed. Bob should have disclosed and excepted the presence of the roadway easement in the deed to Tom, but he failed to do so, thereby rendering Bob liable on the covenant. The other English covenants - seisen, right to convey, warranty, quiet enjoyment and further assurances were not violated.

**8.** [02/14] [Contracts & Suretyship] Fred and Ethyl, who are husband and wife, were residents of the City of Virginia Beach, Virginia, where Ethyl personally owned and operated a yoga studio as a retail business. Fred is an avid surfer and a stay-at-home dad. He has never worked, other than as a part-time life guard, and he has no business experience.

In June 2011, Ethyl, accompanied by Fred, attended a meeting at the offices of Lessor, Inc., a Virginia corporation, which owns the building in which Ethyl's business was located, for the purpose of executing a commercial lease agreement. The commercial lease agreement was in Ethyl's name only, and Ethyl alone signed the lease agreement.

During the course of the meeting, Fred was handed a typed document titled "Guaranty" and told he had to sign the document or Ethyl would not be able to obtain the lease for the studio. Fred was given no explanation as to the contents of the "Guaranty" or the terms of the underlying commercial lease agreement. Nor was Fred advised that by signing the "Guaranty" he was signing a document that purported to make him individually liable to a greater degree than Ethyl would be on the commercial lease agreement. Fred was unsure of what he was signing, but signed the "Guaranty" anyway so his wife could obtain the lease for her studio. Neither Fred nor Ethyl was advised by an attorney, and neither negotiated any of the terms of the documents, which were offered on a "take it or leave it" basis.

Among other provisions, the "Guaranty" signed by Fred contained the following provisions:

- ". . . the liability of the Guarantor is primary and shall not be subject to any deduction for any claim of offset or defense which Tenant . . . may have against Lessor."
- ". . . this Guaranty shall not be terminated or impaired by reason of any extension of time or indulgence granted by Lessor to Tenant . . ."
- "This Guaranty shall be absolute and unconditional and shall remain in effect as to any renewal,

extension, amendment, assignment, transfer or other modification of the Lease, whether or not currently expressed in the Lease, and whether or not Guarantor has notice thereof."

The yoga studio's business suffered, the studio's rent went unpaid for 6 months, and Ethyl's studio lease was declared in default by Lessor. Ethyl left Fred in December 2013 and moved to Argentina with her new boy friend.

On February 10, 2014, Lessor, Inc. filed a complaint in the Circuit Court of the City of Virginia Beach against Ethyl for breach of the commercial lease agreement and against Fred on the "Guaranty" in order to recover unpaid rent, attorney's fees and related costs.

Fred recently inherited some money from his father, so he has the ability to pay Lessor. Fred asserts that he has no obligation to pay but that, if he does, his obligation to pay is secondary to Ethyl's primary obligation. Lessor, Inc., on the other hand, asserts that Fred is a primary obligor .

Fred recites the above facts and asks you the following questions:

- (a) What is the correct characterization of Fred's obligation? Explain fully.
- (b) What is Fred's best defense against Lessor, Inc. based on the terms of the "Guaranty" and the circumstances under which he signed it, and how is the Circuit Court likely to analyze and rule on that defense? Explain fully.
- (c) If Fred is ultimately required to pay Lessor, Inc., what rights, if any, does she have to recover against Ethyl? Explain fully.

\*\*

- [a] Fred's obligation is primary, not secondary. In other words, he has guaranteed payment of the rent due under the lease and not merely its collection. The obligee landlord thus may sue Fred without having exhausted (or even commenced) collection efforts against Ethyl.
- [b] The common law of suretyship gives Fred many defenses against the claim of the obligee; however, he waived them in the guaranty document. Guarantees are contracts and thus may waive legal rights even if the guarantor did not read or understand the document. Nonetheless, contract parties in Virginia may raise the defense of unconscionability especially where the terms of the contract are non-negotiable and are egregiously one-sided. Either conclusion as to whether the contract was unconscionable should be acceptable, if well argued.
- [c] If Fred pays the obligee, the common law of suretyship gives Fred a claim against Ethyl because, between the two, she was the one who should have paid the obligee. This sort of claim can be called either reimbursement or indemnification.

The facts and analysis of this problem were drawn from Columbia Realty Venture, LLC v. Dong Dung, 83 Va. Cir. 258 (Fairfax 2011).

**9.** [02/14] [Federal Civil Procedure, UCC-General Provisions & Conflicts] On January 2, 2013, Golden Beverage, Inc. ("Golden"), a California corporation with its principal place of business in Colorado, and Jefferson Orchards, Inc. ("Jefferson"), a Delaware corporation with its principal place of business in Albemarle County, Virginia, entered into a written contract requiring Jefferson to deliver large quantities of fresh apples from its orchards in Virginia to Golden in Colorado. The contract was negotiated and signed during a meeting of the companies' executives at the Boar's Head Resort in Charlottesville, Virginia. The contract provided that Jefferson would deliver the apples to Golden's warehouse in Colorado throughout the 2013 apple harvest season.

After a dispute arose over the delivery of apples under the contract, in October 2013, Golden sued Jefferson in the Circuit Court for the City of Charlottesville, alleging breach of the contract and claiming damages in the amount of \$50,000. Jefferson promptly filed a notice of removal and other appropriate papers to remove the case to the United States District Court for the Western District of Virginia in Charlottesville. The following week, Jefferson filed an Answer and Counterclaim against Golden, alleging that Golden had breached the contract by refusing to accept certain deliveries and seeking \$30,000 in damages for Golden's alleged breaches.

In pretrial proceedings, Jefferson argued that the breach of contract claims should be governed by Virginia law. Golden argued for application of Colorado law. The District Court agreed with Jefferson and at trial instructed the jury in accordance with Virginia law.

The jury returned a verdict in favor of Jefferson on Golden's claim and found in favor of Jefferson on its Counterclaim, awarding Jefferson damages in the amount of \$30,000. On December 15, 2013, the Court entered final judgment in conformity with the jury's verdict.

On January 15, 2014 Golden filed a motion for relief from the judgment, alleging that the judgment was void because the court lacked jurisdiction over the controversy.

- [a] Was the Court correct in applying Virginia law? Explain fully.
- [b] On what two grounds could Golden have moved before trial to have the case remanded to state court for lack of diversity jurisdiction, and what would have been the likely outcome on each ground of such a motion? Explain fully.
- [c] Should the Court grant Golden's motion for relief from the judgment, and, if so, what should the relief be? Explain fully.

\*\*

- [a] The court was incorrect in applying Virginia law. Virginia choice-of-law principles require application of the law of the place of performance (Colorado) on questions of what the contract requires. Questions of contract formation, by contrast, are governed by the law of the place of contracting (Virginia). Under this rule, the court should have applied Colorado law. Because the contract pertains to the sale of goods, the UCC would typically apply. At one time Virginia's version of the UCC allowed the law of the place of contracting to apply but that is no longer the case. §8.1A-301(c) now provides that traditional choice of law rules apply to a sale of goods so the court would apply Colorado law under current Virginia choice-of-law rules.
- [b] The two diversity jurisdiction grounds for remand were the case's failure to meet the diversity amount and the fact that the defendant is a citizen of the forum state.

There is no diversity of citizenship jurisdiction, even though the parties are diverse, because the amount in controversy requirement is not met. The jurisdictional amount for diversity cases is greater than \$75,000. 28 USC § 1332. The complaint in this case seeks only \$50,000. The amount in controversy must be met by the plaintiff's complaint, so the demand in the defendant's counterclaim cannot be aggregated with the plaintiff's demand to achieve the diversity amount. A motion for remand on this ground would have prevailed.

The other ground for remand was that the defendant is a citizen of Virginia. The removal statute, 28 USC § 1441(b), forbids removal in diversity cases if a defendant is a citizen of the forum state. Corporate parties have two states of citizenship: the state of incorporation and the principle place of business. This defendant is thus a citizen of Delaware and Virginia. Because one of the defendant's states of citizenship is the forum state, the removal statute forbids removal. A motion for remand on this basis should therefore have been successful.

- [c] Golden's motion should be granted. The court lacked subject matter jurisdiction because the jurisdictional amount was not met. The jurisdictional amount is greater than \$75,000. Plaintiff's claim is for only \$50,000 and the diversity statute does not permit the defendant's demand to be aggregated with the plaintiff's demand to reach the jurisdictional amount.

Golden may file a motion seeking relief from judgment because subject matter jurisdiction was lacking. Golden's motion for relief should be in the form of a motion under Rule 60 of the Federal Rules of Civil Procedure. Rule 60 permits relief from judgment and permits the court to reopen and correct the court's error in allowing the case to proceed in the absence of subject matter jurisdiction. Although subject matter jurisdiction may not be collaterally challenged, it may be challenged at any time up until conclusion of the last available appeal in the case. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506 (2006) The court should grant the relief sought, reopening the judgment and dismissing for want of subject matter jurisdiction.