Summary of suggested answers & annotations to the essay part of the February 2017 Virginia Bar Exam. Prepared by William H. Shaw, III, J. R. Zepkin, Eric Chason & John Donaldson of William & Mary Law School, Emmeline P. Reeves of University of Richmond Law School, Benjamin V. Madison III of Regent University Law School, Robert T. Danforth & Samuel W. Calhoun of Washington & Lee Law School & C. Reid Flinn who is on the adjunct faculty of William & Mary Law School, George Mason University Law School, Washington & Lee Law School and University of Richmond Law School.

✖✖ 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 cites to some of the case and statutory law for reference even though the VBBE may not expect such specificity in applicants' answers on the exam. jrz

1. [02/17 - Corporations & Torts] Lake Madison, a large residential community in Loudoun County, Virginia, was started in 1990 and is a self-controlled community with its own private utilities, roads, security force and common amenities (including a lake, golf course, swimming pool and tennis courts). Control of these facilities is vested in Lake Madison Owners' Association ("LMOA"), a Virginia nonstock corporation.

LMOA has a single class of members, which elects the directors of LMOA. Each resident lot owner is a member of LMOA and is required to pay such charges, dues and assessments as may be levied by the Board of Directors of LMOA.

LMOA's Articles of Incorporation provide that its officers and directors shall be entitled to indemnification "to the fullest extent permitted by Virginia law." LMOA's articles and bylaws are silent about removal of directors.

At its April 2016 meeting, the LMOA Board of Directors approved board member Ron Riley's idea to conduct a triathlon, open to the public, with an entry fee, using community facilities, including the lake, in order to raise funds for certain community improvements. As part of its approval, the LMOA Board authorized Riley to "take the lead in managing all aspects of the planned triathlon." Although not a lawyer, Riley was very eager to manage the triathlon and had good intentions for the LMOA. Without consulting with anyone else, Riley downloaded an entry form from the Internet and modified the form only by adding references to "Lake Madison," which all triathlon participants would be required to sign. The first sentence of the entry form stated:

> *In consideration of this entry being accepted to the Lake Madison Triathlon, I hereby for myself and my heirs waive, release, and forever discharge any and all rights and claims for damages which I may have or may hereafter accrue to me against the organizers and sponsor (and their representatives) for any and all injuries suffered by me in the above-referenced event.*

Believing that the entry form would provide adequate protection from any liability, Riley did not think to review LMOA's general liability insurance policy, which contains an express exclusion for claims arising in connection with fee-based activities that are open to the general public.

Sam Smoot, a local school teacher, paid his entry fee and signed the entry form. On the day of the triathlon, Sam sustained severe personal injuries when, at the beginning of the swimming portion of the event, he waded into Lake Madison to a point where the water reached his thighs, dove into the water, and struck his head on either the lake bottom or an object beneath the water surface.

Sam filed a ten million dollar lawsuit in the Circuit Court of Loudoun County against LMOA and Riley, alleging that both negligently failed to ensure that the Lake was safe, to properly supervise the swimming event and to advise participants of the risk of injury.

Ned North, a twenty-five year Lake Madison resident who had long been a vocal critic of the LMOA Board and its decisions, is concerned that if Sam's lawsuit is successful, the LMOA's financial stability will be jeopardized, and the Board of Directors will have no alternative but to vote to levy a large assessment against each lot owner of Lake Madison in order to pay the judgment in favor of Sam. Citing these concerns, Ned lodged a request with the Board 10 days ago to inspect and review the minutes of meetings of the Board of Directors of LMOA that pertain to the Lake Madison Triathlon and to obtain a list of all members of LMOA. Ned consults with you, as his attorney, and asks the following questions:

(a) Is the "release" portion of the entry form enforceable against Sam? Explain fully.

(b) Is Ned entitled to inspect and review the minutes and to obtain a list of all members of LMOA? Explain fully.

(c) Do the members of LMOA have the authority to remove Riley as a director of LMOA? Explain fully.

(d) What does it mean for Riley to have a right of indemnity under LMOA's Articles of Incorporation in connection with Sam's lawsuit and would LMOA be required to indemnify Riley, even after his removal as a director of LMOA, regardless of the outcome of the suit against him? Explain fully.

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(a) The release portion of the entry form is not enforceable because it is against public policy. See Hiett v. Lake Barcroft Community Ass'n, 244 Va. 191 (1992).

(b) Yes, Ned is entitled to inspect and review the minutes and to obtain a list of all members of LMOA. Under both the Virginia Nonstock Corporation Act and the Property Owners' Association Act, a member may inspect the minutes of Board of Directors' meetings and obtain a list of the members, as long as the member acts with a proper purpose and gives the requisite notice. Va Code Ann. 13.1-933; Va Code Ann 55-510 (B), (D). Because Ned is a member of LMOA he will be permitted to review the Board minutes and obtain a list of all members.

(c) Yes, the members of LMOA have the authority to remove Riley as a director. Unless otherwise provided in the corporation's articles of incorporation, the members of a nonstock corporation may remove a director with or without cause at a meeting specially called for that purpose. Va. Code Ann. 13.1-860(A). A simple majority vote would be sufficient to remove a director, again, unless otherwise provided in the articles. Va. Code Ann. 13.1-860(B). Here, LMOA's Articles are silent about the removal of directors, and thus, the members by remove Riley as a director by majority vote.

(d) Riley's right to indemnification under LMOA's Articles of Incorporation means that LMOA must pay for or reimburse Riley's reasonable expenses, including counsel fees and any judgment against Riley, in connection with Sam's lawsuit. Yes, LMOA would be required to indemnify Riley, even after his removal as director of LMOA, regardless of the outcome of the suit against him so long as he is not found to have engaged in willful misconduct or a knowing violation of the law. LMOA's Articles of Incorporation provide that its officers and directors shall be entitled to indemnification "to the fullest extent permitted by Virginia law." Thus, under Virginia law, LMOA has obligated itself to provide indemnification and to advance funds or pay for reasonable expenses even if he is removed as a director, again, with the caveat that the obligation to indemnify does not apply if the director engaged in willful misconduct or a knowing violation of law. Va. Code Ann. §13.1-883(A) & (B)

2. [02/17 Wills] In 1990, Jack B. Nimble (Jack) properly executed a valid will in which he left his residence property located in Wise County, Virginia, to his wife, Mary, with the proviso that if Mary predeceased Jack the residence would go to their only child, Felix. Jack and Mary had acquired the residence shortly after their marriage as "tenants by the entireties with the right of survivorship." Jack also left his stock portfolio to Mary and his tangible personal property to his brother, Tom. No other bequests were made, and an Executor was named.

In 2000, Jack and Mary divorced. The decree of divorce did not mention property rights, and Mary moved to Hawaii. In 2006, Jack's brother Tom died, survived only by his wife, Nancy.

In 2008, Jack made and executed a valid holographic will which provided in its entirety the following:

May1, 2008

This is my last will and testament. I give my car to my sister Julie, and my real estate to my son Felix.

Jack B. Nimble

Jack died in 2015, survived by Mary, Felix, Julie, and Nancy. His estate consisted of the residence property in Wise County, 50,000 shares of valuable bank stock, a 2015 model Lexus sedan, and a gun collection.

To whom and for what reasons should the following items in Jack's estate be distributed?

(a) The real estate in Wise County? Explain fully.

(b) The 2015 model Lexus? Explain fully.

(c) The gun collection? Explain fully.

(d) The bank stock? Explain fully.

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(a) Mary and Felix each take an undivided one-half-interest as tenants in common.

The tenancy by the entireties became a tenancy in common upon the 2000 divorce decree (assuming divorce *a vinculo matrimonii*) [Va. Code 20-111]. Mary and Jack each then had an undivided half-interest. Mary's half-interest was therefore not part of Jack's estate upon his death.

Felix takes Jack's half-interest pursuant to the 2008 will. The question stipulates the validity of the 2008 will [wholly in the testator's handwriting and signed by the testator as proved by at least two disinterested witnesses: Va. Code 64.2-403(B)]. Since Jack never revoked his 1990 will (neither by physical act nor by subsequent testamentary instrument executed with the formalities of a will), he died with two valid wills.

The later 2008 will therefore revokes and supersedes inconsistent provisions of the earlier 1990 will [Va. Code §64.2-410(C)]. It may be accurate to describe the 2008 will as a holographic codicil which modified the 1990 will, but this would not affect the answer: Felix takes Jack's half-interest.

(b) Julie takes pursuant to the terms of the 2008 will.

The 1990 will bequeathed tangible personalty to Tom, and the 2015 model Lexus is an item of tangible personalty. However, the 2008 will bequeathed "my car" to Julie. The specific bequest in the later 2008 will therefore revokes and supersedes the inconsistent bequest in the earlier 1990 will [Va. Code §64.2-410(C)].

The Lexus was not part of Jack's estate when Jack made the 2008 holograph, but a will is construed to speak "as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will" [Va. Code §64.2-414].

(c) Felix takes by intestate succession.

The 1990 will bequeathed tangible personalty to Tom. Guns are tangible personalty.

However, since Tom predeceased Jack, Tom's bequest of the gun collection lapses. The anti-lapse statute [Va. Code §64.2-418] does not apply since Tom did not leave a descendant, merely a widow.

Lapsed bequests fall into the residuary of the estate. Neither will has a residuary clause, so the gun collection passes instead by intestate succession [Va. Code §§64.2-200 to -206].

Jack left no surviving spouse because he and Mary divorced prior to his death and he did not remarry. Assuming Jack had no other children, Felix is Jack's sole surviving descendant and therefore inherits the gun collection. Nancy does not take because she is neither Jack's surviving spouse nor his descendant.

(d) Felix takes by intestate succession.

Jack's bequest to Mary was revoked by operation of law when they divorced in 2000, and Mary is treated as if she predeceased Jack [Va. Code §64.2-412]. The bequest to Mary therefore lapses. The anti-lapse statute [Va. Code §64.2-418] does not apply since Mary is not Jack's grandparent or a descendant of Jack's grandparent.

Lapsed bequests fall into the residuary of the estate. Neither will has a residuary clause, so the stock passes instead by intestate succession to Felix (Jack left no surviving spouse, and Felix is Jack's only surviving descendant).

3. [02/17 Domestic Relations] Archie and Veronica never married or lived together, but had a child on January 5, 2011, whom they named Archie, Jr. ("Junior"). Shortly before Junior's second birthday, Veronica filed a petition in the Virginia Beach Juvenile and Domestic Relations District Court ("J&DR Court") seeking a determination that she should have sole legal and physical custody of Junior. Archie attended the custody hearing in April 2013, and did not contest Veronica's request to have primary physical custody of Junior. At the conclusion of the custody hearing, the J&DR Court judge entered an order awarding joint legal custody to Archie and Veronica with primary physical custody to Veronica.

Junior has thrived while living in a single-parent home with Veronica, and he currently attends kindergarten. Archie has been very involved in Junior's life, exercising regular visitation (with Veronica's permission), participating in pre-school and kindergarten activities, and receiving copies of Junior's educational and medical records. Archie is a successful architect and has provided Junior with his own bedroom in the rather large home which Archie designed for himself. Archie has always

supported Junior's relationship with Veronica.

Veronica's mother, Grandmother, also has been very involved in Junior's life, visiting and vacationing with Veronica and Junior frequently. Also, Grandmother takes care of Junior when Veronica is working or is otherwise unavailable, including overnight. Archie has always disapproved of Grandmother's relationship with Junior, as she routinely says negative things about Archie to Veronica. Junior clearly enjoys and benefits from his relationships with both Archie and Grandmother.

In July 2016, Archie was found guilty of felony tax fraud. He served 60 days in jail and is currently on probation. Since Archie's release from jail, Veronica has refused to permit Archie to visit Junior, claiming that, "I will not have my son spend time with a convicted felon!" Meanwhile, Grandmother has begun to demand more and more time alone with Junior.

In October 2016, Archie and Grandmother filed separate visitation petitions in J&DR Court. At the court proceeding on Archie's petition, Veronica objected to any visitation by Archie. Archie responded that he is entitled to reasonable visitation by reason of the Court's April 2013 Order granting him "joint legal custody" or, alternatively, simply because he is Junior's father.

At the court proceeding on Grandmother's petition, Veronica objected to any court-ordered visitation. Although Veronica is not opposed to Grandmother having visitation with Junior, she is adamant that any visitation be on her terms. Archie objected to any visitation by Grandmother. However, neither Veronica nor Archie disputed that Grandmother and Junior have a very good relationship. Grandmother responded that, based on that undisputed fact, visitation by her is in Junior's best interests and that, based on that fact alone, the Court should grant her petition.

(a) Is Archie likely to prevail on his argument that the Court's April 2013 Order entitles him to visitation with Junior? Explain fully.

(b) Is Archie likely to prevail on his argument that he is entitled to visitation with Junior because he is Junior's father? Explain fully.

(c) Is Grandmother likely to prevail on her "best interests" argument that her undisputed existing good relationship with Junior entitles her to visitation? Explain fully.

(d) If any party wishes to appeal the decision of the J&DR Court judge, to what court should the appeal be taken? Explain fully.

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(a) Archie is likely to prevail on his argument that the Court's April 2013 order entitles him to visitation with Junior. The order granted Archie joint legal custody with Veronica over Junior. Implicit in that grant is a right to visitation with Junior even if the order did not so provide. His criminal conviction does not revoke the custody order nor the right to visitation, unless it is determined at trial that it is not in Junior's "best interests" for Archie to have a right to visitation, an unlikely result given Archie's active and positive contacts with Junior.

(b) Archie is not likely to prevail on his argument that he is entitled to reasonable visitation simply because he is Junior's father. Assuming the April 2013 custody order did not exist, the test for Archie's right to visitation is whether it is in Junior's "best interests" that Archie have visitation with him, which supersedes Archie's right in and of itself as Junior's father. Va. Code §20-124.3

(c) Grandmother will likely not prevail on her "best interests of the child" argument, alone, that her undisputed existing good relationship with Junior entitles her to visitation. Where, as here, Veronica and Archie, both fit parents, object to an order granting a right of visitation to Grandmother, then before application of the "best interests of the child" test, Grandmother must prove by clear and convincing evidence that it would cause actual harm to Junior's health or welfare without such visitation. Griffin v Griffin, 41 Va. App.77 (2003). If Grandmother does overcome that burden, then she has the burden of proving by a preponderance of the evidence whether and what visitation is in Junior's "best interests". Id.

(d) The appeal from decision of the J&DR Court judge should be taken to the Circuit Court in the same jurisdiction.

4. [02/17 Federal Civil Procedure] At the end of the 2015 academic year, Duke, a college junior, agreed to drop off two of his classmates at their homes in Abingdon, Virginia, where all three of them resided at the time. He was driving his SUV near Harrisonburg, when he had to brake suddenly to avoid a disabled beer truck, and Penny, who was sitting in Duke's front

passenger seat, was injured when the vehicle struck an embankment. Duke and the other passenger, Buddy, who was sleeping in the back seat, were not injured in the crash.

Penny hired Lester, an Abingdon attorney, who, on December 10, 2016, filed a Complaint on Penny's behalf in the Circuit Court for Washington County (Abingdon) against Duke for negligence and sought $90,000 in compensatory damages for her injuries.

After graduating in May 2016, Duke and Buddy both moved to Knoxville, Tennessee, to work for Duke's grandfather. Buddy did not like working, and in January 2017 he moved back to Harrisonburg, Virginia, to begin graduate studies.

On January 18, 2017, Duke was personally served in Knoxville with Penny's Summons and Complaint. Duke hired a Knoxville attorney, Andrew, who, on February 1, 2017, filed an Answer and Notice of Removal to the United States District Court for the Western District of Virginia – Harrisonburg Division. He chose the Harrisonburg Division, as opposed to the Abingdon Division, on the premise that the accident occurred near Harrisonburg. Andrew simultaneously filed and served all other documents in state court necessary to effect the removal.

The Notice of Removal recited that it was based on diversity jurisdiction, i.e., that Penny was a citizen of Virginia, and Duke was a citizen of and domiciled in Tennessee at the time the suit was filed and that the amount in controversy satisfied the requirement. The Notice further asserted that venue was proper in Harrisonburg because that is the division where the accident occurred.

On February 15, 2017, Lester filed a Motion to Remand the case to the Circuit Court of Washington County on the following grounds: I) complete diversity did not exist at the time the accident occurred as Penny and Duke were both Virginia residents and ii) the case was improperly removed to the Harrisonburg Division as opposed to the Abingdon Division. Simultaneously, and without further inquiry into the facts, Lester filed a Motion to Amend the Complaint to add Buddy as a defendant, alleging that Buddy contributed to Penny's injuries because he negligently failed to warn Duke of the disabled beer truck just prior to the impact. Andrew filed a response opposing the addition of Buddy as a defendant, asserting that it was done in bad faith. He also filed a Rule 11 Motion for Sanctions against Lester, asserting that the Motion to add Buddy was frivolous. On the day before filing the Motion for Sanctions, Andrew had telephoned Lester and told him he would be filing the motion on the next day. Lester later moved to dismiss the Motion for Sanctions.

(a) Was the case properly removed to federal court? Explain fully.

(b) How is the Court likely to rule on Penny's Motion for Remand? Explain fully.

(c) What arguments should be made in support of and against the Motion to Amend the Complaint to add Buddy as a defendant, and how is the Court likely to rule? Explain fully.

(d) What arguments should be made in support of and against the Motion for Sanctions, and how is the Court likely to rule? Explain fully.

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(a) The case was properly removed to federal court. To remove a case, the defendant must show that the case is one within the subject matter jurisdiction of federal courts. Here, the case falls under the diversity statute, 28 U.S.C. § 1332. To satisfy that statute, the plaintiff and defendant must be completely diverse—i.e., citizens of different states. Plaintiff Penny is a citizen of Virginia. The facts state that in May 2016 Defendant Duke moved to Knoxville, Tennessee. Suit was filed on December 10, 2016. Whether there is complete diversity is decided at the time of the filing of the suit. It does not matter that there could have been a lack of complete diversity at the time of the accident. As of December 10, 2016, Penny and Duke were completely diverse.

Moreover, the other hurdle in diversity is that it must involve an amount in controversy exceeding $75,000 exclusive of interests and costs. The test for whether the amount in controversy is met is the legal certainty test. That test provides that, unless to a legal certainty on reviewing the complaint the district court can say that there is no way the plaintiff can recover more than $75,000 exclusive of interests and costs, the plaintiff will have satisfied the amount in controversy requirement. The facts state that Penny suffered personal injury and sought $90,000 in her complaint. Nothing suggests that she could not recover more than $75,000 exclusive of interests and costs. Therefore, both the complete diversity requirement and amount in controversy requirement are met and there is subject matter jurisdiction under 28 U.S.C. § 1332. There is no defendant that is a citizen of Virginia at the time of removal and the removal was done within 30 days of service on Duke, as required by the removal statute. Because there is only one defendant, consent of all defendants is a non-issue. Moreover, the facts state that "Andrew . . . filed and served all other documents in state court necessary to effect removal." Therefore removal was proper.

(b) The Court is likely to grant Penny's motion to remand unless the court allowed the procedural defect to be corrected by transfer under the transfer of venue statute, 28 U.S.C. § 1406. Wright & Miller's *Federal Practice & Procedure* states: "A defendant's failure to remove a case to the correct 'division' as dictated by Section 1446(a)_ of Title 28 is not a jurisdictional defect, but a procedural one, and therefore must be objected to or the defect is waived. Such a procedural defect could be cured simply by transferring the case under Section 1406(a) to the correct division." 14C FEDERAL PRACTICE & PROCEDURE, *Jurisdiction* § 3732 (2016). Here, the motion to remand within 30 days of removal would satisfy the "objection" to the procedural defect. If an applicant mentioned that transfer of venue to the correct division would have been a possible option for the court, the applicant has authority in this leading treatise to support him or her.

(c) The Motion to Amend to add Buddy would hinge on the court's discretionary call under 28 U.S.C. § 1447(e), which states: "If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to state court."

The argument against adding Buddy would be that the joinder was merely fraudulent joinder to seek to have a Virginia defendant in the case and, thus, to frustrate removal because a Virginia defendant would destroy complete diversity. If Duke could argue that adding Buddy was for that purpose, the court would have the discretion to deny joinder. Then Penny could pursue her action against Duke in state court. By contrast, if Penny can argue that Buddy failed in a duty of care to warn Duke, then she would have an argument that the joinder was not fraudulent, that the court should allow joinder and remand the action to state court." The question seemed to be looking for the ability of each party to argue both sides of this point and show they knew it hinged on whether it was fraudulent joinder and that the district court had discretion to either deny joinder, if the judge thought it was fraudulent, or grant joinder and remand to state court if the judge thought joinder was not fraudulent.

(d) The argument in favor of the motion for sanctions would be that the plaintiff, in filing a motion to join Buddy signed by plaintiff's counsel, violated the certifications under Rule 11 that accompany a signing of a pleading, motion or other paper—specifically, (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (2) the claims ... and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law; [and] (3) the factual contentions are warranted on the evidence or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.

The motion likely violated certification (2) because Virginia law does not require a passenger to warn the driver unless it is clear that the driver is taking no precautions for the passengers' safety and/or that there is a dangerous condition, and certification (3) that the factual contention of Buddy's not giving a warning would not be supported by the facts because he was sleeping in the back seat according to the facts.

Nevertheless, the argument against sanctions should prevail because Fed. Rule Civ. Pro. 11(c)(2) provides a "safe harbor" now. A party cannot simply file a motion for sanctions, as defense counsel did here. Instead, he must *serve* the motion on opposing counsel prior to filing it and give the party who counsel maintains to have violated any certifications 21 days to withdraw the pleadings. Here, because defense counsel did not follow Rule 11 procedures, plaintiff's counsel should be able to successfully argue against the motion for sanctions. (There is a Fourth Circuit case that holds that, if the party who had a Rule 11 motion filed against him did not object to the failure to follow Rule 11 procedures, the party waives the "safe harbor." However, there is no indication that plaintiff's counsel had done so here.)

5. [02/17 Virginia Civil Procedure] In March 2016, Greg, an avid cyclist, was riding his bicycle throughout Byrd Park in Richmond, Virginia. As he was crossing at an intersection against a traffic sign for pedestrians that was showing the "Don't Walk" command, Greg was struck by one of two vehicles that collided at the intersection. At the moment of the accident, Bud, the driver of one of the cars, was speeding, and Hank, the other driver, had failed to stop at a red traffic light. The impact of the accident caused Hank's vehicle to strike Greg.

Greg sued both Hank and Bud for personal injuries. Hank failed to file responsive pleadings within the time required by the Rules. Bud filed an Answer and Grounds of Defense. He denied his own negligence, denied that Greg was injured to the extent alleged, and alleged that Greg was guilty of contributory negligence.

Two months after Hank was served with process, Hank's lawyer filed a Motion for Leave to file late pleadings. He attached an affidavit wherein Hank stated under oath that, while out of town for several weeks, he overlooked taking the suit

papers to his lawyer. Counsel for Greg and Bud objected to the motion and moved for entry of default judgment against Hank. The trial court denied Hank's motion and ruled that he was in default. A judgment of default on the liability issue was entered accordingly, reserving the issue of damages pending Greg's proof.

At trial, Greg presented evidence as to the negligence of Hank and Bud, regarding injuries to his leg and hip, and medical expenses he incurred because of the injuries. Hank's counsel made several objections to Greg's evidence regarding his injuries, all of which were overruled on the ground that Hank was in default. Additionally, Hank sought to introduce evidence that Greg had been in a previous accident and that many of the expenses he was claiming in the present suit were duplicative because they had been incurred for the treatment of an injury received in the earlier accident. The Court rejected this evidence, again on the ground that Hank was in default.

After hearing all the evidence, the Court, on Bud's motion to strike, ruled that Greg was guilty of contributory negligence as a matter of law.

(a) Was the Court correct in not allowing Hank to file late pleadings? Explain fully.

(b) Was the Court correct in overruling Hank's objections to Greg's evidence as to his injuries and expenses? Explain fully.

(c) Was the Court correct in refusing to admit Hank's evidence about Greg's expenses incurred in the earlier accident? Explain fully.

(d) Is Greg entitled to a judgment against Hank despite the Court's ruling that Greg was guilty of contributory negligence as a matter of law? Explain fully.

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(a) The decision whether to grant leave to file late pleadings is a discretionary call by the trial court and the trial court's ruling will not be disturbed unless the SCV finds the trial court abused its discretion. Applicant should discuss whether there was good cause shown to support the motion for leave to file late pleadings: [1] why was the defendant late in appearing [waited two months before filing motion for leave to file a late pleading]; [2] any prejudice to the opposing side in permitting late filing; [3] good faith of the moving party; [4] the existence of a substantial defense [ie contributory negligence]; [5] promptness of the moving party. Rule 3:19(b) & AME Financial Corporation v. Kiritsis 281 Va. 384 [2011]

✖✖ Thinking is that a good discussion should earn full credit, with either conclusion. In the AME case there were circumstances suggesting the defaulting defendant had been dilatory in protecting his interests even though the plaintiff's counsel had warned him of the consequences. The SCV affirmed the trial court's denial of leave to file late pleadings.

(b) The judge was incorrect. Rule 3:19(c)(3)(i) specifically permits the defaulting defendant to object to the plaintiff's evidence regarding damages.

(c) The judge was incorrect. Rule 3:19(c)(3)(ii) specifically permits the defaulting defendant to offer evidence regarding damages.

(d) Yes. When Hank became in default, he admitted liability to Gregg and conceded that Gregg was free of contributory negligence. See: Funkhouser v. Million 209 Va. 89 [1968]

6. [02/17 Agency & Torts] Larry was the long-time general manager of an upscale hotel in Blacksburg, Virginia, called The Palace. On behalf of The Palace, Larry hired Conway, a general contractor, to completely remodel the hotel's library. Conway prohibited all Palace personnel and guests from entering the library while it was being renovated. Larry left it in Conway's hands to complete the job, did not check on the progress of the work, and only wanted to go into the library for the final inspection.

One evening, Stone Concepts (SC), a subcontractor hired by Conway to create a massive stone fireplace, was working in the library. One of the SC employees had blocked the main entrance leading from the lobby into the library. There was a side entrance to the library from the adjoining cocktail lounge, which offered a shortcut to the restroom on the other side of the library. SC had failed to block that entrance. Gerry, a guest who needed to use the restroom, walked into the library

through that side entrance, not realizing that the room was under construction. However, when he entered the library, he saw that there were materials and equipment on the floor. One SC worker, who did not speak English, rushed toward Gerry to prevent him from entering the construction area any further. Gerry, alarmed by the worker's approach, began to back-peddle and tripped over some larger pieces of stone to be used in the fireplace. Gerry injured his right shoulder when he fell.

Gerry then stumbled out of the library and saw Junior, Larry's son, who worked part time as a gardener at the hotel. Gerry and Junior had attended high school together and had always vehemently disliked each other. Gerry began to verbally abuse Junior about the "dirty" and "dangerous" hotel and swore he would sue. These comments enraged Junior, and he punched Gerry in the face, fracturing his jaw.

Gerry has retained an attorney to file suit against The Palace for his personal injuries. Gerry says Junior has no money of his own, and he does not want to sue SC because the owner is a friend of the family. The Complaint alleges that The Palace is (i) indirectly liable for the negligence of SC for leaving the stone where Gerry could trip over it, (ii) directly liable for negligence because of the unsafe condition in the library, and (iii) indirectly liable for battery committed by its employee, Junior.

(a) Is The Palace vicariously liable for injuries to Gerry resulting from the alleged negligence of SC in leaving the stone where Gerry could trip on it? Explain fully.

(b) Is The Palace directly liable to Gerry for the alleged unsafe conditions in the library? Explain fully.

(c) Is The Palace vicariously liable for the battery committed on Gerry by Junior? Explain fully.

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(a) No, The Palace is not vicariously liable for Gerry's injuries resulting from the alleged negligence of SC in leaving the stone where Gerry could trip on it. Under the doctrine of respondeat superior, an employer is liable for the torts of his employee committed within the scope of employment. There is generally no liability for the torts of an independent contractor. Virginia courts consider various factors to determine whether an individual is an employee or an independent contractor, but the determinative factor is the power to control the means and method of performing the work. Here, it is clear that the tortfeasor SC was an independent contractor of The Palace. Larry, an employee of The Palace, hired Conway, a general contractor who then in turn hired SC. Conway was an independent contractor of The Palace because Larry did not control how Conway performed the work. As stated in the facts, Larry left it in Conway's hands complete the job, did not check on the progress of the work, and only wanted to go into the library for the final inspection. Conway hired SC. The Palace was in no way controlling how SC performed its work. Thus, SC was clearly an independent contractor, not an employee, of The Palace. Virginia does recognize some exceptions to the general rule of no liability for the torts of an independent contractor, such as inherently dangerous activity and negligent hiring, but none of the exceptions apply in this situation. Thus, The Palace is not vicariously liable for SC's negligence.

(b) The Palace is most likely not directly liable to Gerry for the alleged unsafe conditions in the library. Gerry is asserting a premises liability claim against The Palace. The nature of a landowner's duty owed to people on its property as to dangerous conditions on the land depends on the legal status of the plaintiff with regard to the property, i.e. trespasser, licensee, or invitee. An invitee is a person who has been invited onto the premises by the landowner, and invitees include those who enter for a purpose related to the business of the landowner. Here, the facts describe Gerry as a "guest" of The Palace, and thus, he was at least initially a business invitee. The landowner owes an invitee a duty of reasonable care to keep the property reasonably safe, which includes an obligation to warn of or make safe nonobvious dangerous conditions known to the landowner and a duty to make reasonable inspections to discover dangerous conditions and to then make them safe. The landowner generally does not have a duty to warn of a condition that is so obvious that the invitee should reasonably have been aware of it. Additionally, the owner's duty does not extend to places beyond the invitation and to which the invitee is not reasonably expected to go.

The Palace can make several arguments against liability to Gerry. The Palace will argue that its invitation to Gerry did not extend to the library and accordingly The Palace owed no duty to him once he entered the library. In response, Gerry will argue that the side door through which he entered was not blocked off and it was not apparent that he should not enter the library until after he entered and immediately prior to his injury, and thus he did not exceed the scope of his invitation. Gerry will also argue that, as an innkeeper, The Palace owed him a heightened duty of care. On the other hand, The Palace will argue that the hazard was created by an independent contractor over which it had no control and that the large pieces of stone on which he tripped were an open and obvious danger as to which

The Palace had no duty to warn. The facts clearly establish that Gerry saw that there were materials and equipment on the floor when he entered the library, supporting The Palace's position that the danger was open and obvious.

Although this case is a close call and could be decided either way, the better conclusion is that The Palace is not liable to Gerry because he exceeded the scope of his invitation and the danger was open and obvious.

(c) The Palace is not likely liable for the battery committed on Gerry by Junior. As previously noted, under the doctrine of respondeat superior, an employer is liable for the torts of his employee committed within the scope of employment. It seems that Junior was an employee of The Palace. Junior worked part-time as a gardener at the hotel, and presumably The Palace controlled the means and method of how Junior performed his work. The Palace is not likely liable for the tort, however, because Junior was not acting within the scope of his employment when be battered Gerry. Under Virginia law, an act generally is within the scope of the employment if (1) it was expressly or impliedly directed by the employer, or is naturally incident to the business, and (2) it was performed, although mistakenly or ill-advisedly, with the intent to further the employer's interest, or from some impulse or emotion that was the natural consequence of an attempt to do the employer's business. Here, although Junior may have acted in a misguided attempt to protect his employer - Junior punched Gerry after becoming enraged by Gerry's allegations that the hotel was "dirty" and "dangerous" and his threat to sue, the act (punching Gerry in the face) was sufficiently far removed from conduct directed by his employer (gardening), that a court would not likely find The Palace liable.

7. [02/17 Evidence] Keith was brutally murdered in the bathroom at his home in Scott County, Virginia. Keith had been stabbed numerous times all over his body, and horizontal “figure-eight” symbols had been painted on the bathroom walls in Keith’s blood.

Keith’s murder had striking similarities to the murder of Ron thirty years earlier in Scott County, including multiple stab wounds and horizontal “figure-eight” symbols drawn in his blood on the bathroom walls. Bob, a local painter, had been convicted of the first degree murder of Ron and sentenced to twenty-five years of incarceration. Following his release from prison, Bob returned to Scott County. He and Keith lived in the same town.

Following a thorough investigation, Bob was charged with the first degree murder of Keith. At the trial in circuit court, one of the Commonwealth’s witnesses testified that a horizontal “figure-eight” symbol represented infinity. Bob did not object to this testimony. The Commonwealth then offered into evidence photographs of the “figure-eight” symbols drawn on Keith’s bathroom walls. Bob timely objected to the photographs, arguing that their gruesome nature would unfairly influence the jury. The Court overruled Bob’s objection, admitted the photographs, and allowed the Commonwealth to show them to the jury.

The Commonwealth called a retired detective, who thirty years earlier had personally investigated Ron’s murder, to testify about the similarities between the murders of Keith and Ron. The Commonwealth then sought to introduce in evidence certified copies of court orders regarding Bob’s prior convictions, including the one for the murder of Ron as well as others for several misdemeanor traffic offenses. Bob timely objected to the introduction of the murder conviction order on the ground that it was unfairly prejudicial to him because it implied that he had the propensity to commit crimes. Bob also timely objected to the introduction of the traffic offense orders on the same ground. The Court overruled both objections.

As its last witness, the Commonwealth called Bob’s wife, Janis, to testify against Bob. Janis had provided the investigating detectives with incriminating information that linked Bob to Keith’s murder and voluntarily agreed to testify. When Janis took the stand, but before she gave any testimony, Bob immediately invoked Virginia’s spousal privilege and objected to Janis being called as a witness. The Court overruled Bob’s objection and allowed Janis to testify.

Janis testified that she saw Bob and Keith get into a heated argument in public at the grocery store days before Keith’s murder. Bob objected to this testimony, again, invoking the spousal privilege. The Court overruled the objection.

Janis also testified that, later in the evening after Bob’s argument with Keith, when she and Bob were lying in bed, Bob told her that “Keith would pay,” and that “it was time that Keith met infinity.” Janis explained that Bob told her not to tell anyone about his plans concerning Keith. Bob did not make similar statements to anyone else before the trial. Bob timely objected to Janis’s testimony concerning his statements about Keith, again invoking the spousal privilege. The Court overruled this objection as well.

(a) Did the Court err in overruling Bob’s objection to the introduction of the photographs? Explain fully.

(b) Did the Court err in overruling Bob’s objection to the introduction of the orders establishing his prior

convictions for

(I) the murder of Ron? Explain fully.

(ii) the misdemeanor traffic offenses? Explain fully.

(c) Did the Court err in allowing Janis to take the stand as a witness to testify against Bob? Explain fully.

(d) Did the Court err in overruling Bob's objection concerning Janis's testimony about

(I) the argument she observed at the grocery store? Explain fully.

(ii) Bob's bedroom comments about Keith? Explain fully.

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(a) The Court did not err in overruling Bob's objection to the introduction of the photographs. The crime bears indications of a signature or at least sufficient idiosyncratic features as it relates to an earlier murder Bob committed. Bob did not object to the Commonwealth's witness testimony about the symbols drawn in blood on the bathroom wall. Even if he had objected, the photographs are relevant as illustrative of that testimony and their probative value outweighs any prejudice to Bob by their admission.

(I) The general rule is that evidence of prior crimes is inadmissible in the trial of a criminal charge, but there are exceptions to this general rule such as where, as in this case, such evidence is relevant to prove the identity or modus operandi of the perpetrator where identity is disputed. Turner v. Commonwealth 259 Va.645 (2000).

(ii) The Court did not err in overruling Bob's objection to the introduction of the orders establishing his prior conviction for the murder of Ron, because the signature nature of the prior crime as it relates to the present charge is relevant to establish the identity or modus operandi of Bob as the offender in the case, and the relevance outweighs the prejudicial effect to Bob.

(iii) Because the nature of the prior misdemeanor crimes do not satisfy any exception to the general rule, the latter obtains, so that the Court erred by overruling Bob's objection to the introduction of the prior conviction orders for these offenses.

(b) The Court did not err in allowing Janis to "take the stand" as a witness against Bob. The Commonwealth may compel Janis, Bob's current wife, to take the stand against Bob so long as she consents or wishes to do so. The choice is hers alone and Bob can't prevent her from taking the stand against him. Virginia Code §19.2-272.1.

(I) There are two marital privileges: the "take the stand" privilege (see above) and the "marital communication" privilege. Bob cannot object to his current spouse taking the stand to testify against him, unless the testimony implicates the marital communication privilege.

(ii) The Court did not err in permitting Janis to testify against Bob, over his objection, about the argument in the grocery store, because it was not a marital communication.

(c) The Court did err in overruling Bob's objection concerning Janis' testimony regarding Bob's bedroom comments about Keith. When Bob made these comments to Janis, he clearly intended that they were confidential, no one else was present, the

communication did not address criminal acts against her (or their children), and they were married. In these circumstances, Bob could properly prevent Janis from testifying about the communication, even if she wanted to testify about them. Virginia Code §8.01-398.

8. [02/17 UCC - Sales] Maddie Madison and Riles Plumlee, owners of two local businesses in Warrenton, Virginia, were social friends and had discussions in early 2016 about Riles Asphalt & Paving Company ("RAPCO") paving the parking lot at the warehouse of Madison Movers & Storage Corporation ("Movers").

Riles told Maddie that he had been in the paving business since 1979 and that over the years his company had paved parking lots for other moving companies as well as businesses which operated and stored heavy equipment at their premises. Maddie told Riles she knew nothing about the paving business, so Riles offered several other businesses for which he had done work as references. Riles also assured Maddie that he personally would be on site, operate the roller, and supervise the entire job, emphasizing that the most important feature was the quality of the asphalt product for which RAPCO had an exclusive source in Northern Virginia. Riles told Maddie that, while labor was minimal, the majority of the cost would be for paving material furnished. Before quoting a price, Riles visited Movers' warehouse, measured the parking lot, and observed Movers' operations at the warehouse.

In September 2016, Maddie asked Riles for his "best price for a proper paving job for my parking lot." There were no specifications, site testing, or engineering design. Instead, on behalf of their companies, Maddie and Riles reached a "handshake" deal for a price of $75,000, or $71,250 if paid in advance. Maddie elected to pay the lower amount, in advance of the work being performed. RAPCO paved the parking lot in October of 2016.

Problems with the paving arose shortly after the work was completed. When RAPCO refused to remedy the problems, Movers retained an expert who investigated and opined that the asphalt was of poor quality and insufficient to bear the heavy loads in Movers' trucks and forklifts. The expert estimated the repair cost at $40,000, and Movers wishes to sue RAPCO for breach of their oral contract to recover that cost.

Movers retains you as its lawyer and seeks your advice on the following issues:

(a) Is Movers' oral agreement with Riles enforceable as a contract under the Uniform Commercial Code as adopted in Virginia? Explain fully.

(b) What specific UCC breach of contract theory would best support Movers' claim? Explain fully.

(c) May Movers recover its attorney's fees if it prevails against RAPCO? Explain fully.

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(a) This transaction involves both sales and services, but since the majority of the cost is for the asphalt, "moveable things" under §8.2-105(1), the predominant purpose of this contract is the sale of goods. The contract is therefore governed by UCC Art. 2.

Because the contract was for the sale of goods for the price of $500.00 or more, the contract falls within the Statute of Frauds [8.2-201(1)]. Although this was an oral agreement ("handshake deal"), Maddie fully paid in advance and RAPCO accepted payment, so the contract is enforceable under §8.2-201(3)(c).

(b) Movers has three possible theories: express warranty, implied warranty of merchantability, and implied warranty of fitness for a particular purpose. Implied warranty of fitness for a particular purpose is its best argument.

Express warranty: §8.2-313 imposes an express warranty if affirmations of fact or descriptions become part of the basis of the bargain. RAPCO referred to the quality

of the asphalt product and emphasized to Maddie that this was the most important feature of the entire job. This language was probably sufficient to make an express warranty. If so, then since an expert later testified that the asphalt product had "poor quality," the express warranty was breached.

Implied warranty of merchantability: RAPCO is a merchant under §8.2-104(1) since it deals in asphalt. RAPCO therefore made an implied warranty of merchantability under §8.2-314(1). Whether this asphalt was fit for its ordinary purpose under §8.2-314(2)(c) would depend on whether supporting heavy equipment is considered an ordinary purpose of asphalt. This is arguable: Maddie could assert that the ordinary use of the grade of asphalt purchased for a moving company warehouse would include supporting heavy equipment; RAPCO could assert that heavy vehicular traffic is not an ordinary use. Note that if made, this warranty was not disclaimed or modified [§8.2-316].

Implied warranty of fitness for a particular purpose [8.2-315]: Maddie told RAPCO that the purpose of the asphalt was for the warehouse parking lot of her moving business, and RAPCO knew that the parking lot would therefore have heavy vehicle traffic. RAPCO explicitly mentioned its prior paving jobs for businesses that operated and stored heavy equipment, so RAPCO also had reason to know that Maddie was relying on RAPCO's skill or judgment to furnish suitable goods. RAPCO thus warranted that the asphalt would be suitable for that particular purpose, but the asphalt was in fact of poor quality. Note this warranty was not disclaimed or modified [§8.2-316].

RAPCO's best argument is that Maddie failed to notify RAPCO of the breach pursuant to §8.2-607(3)(a). Maddie never rejected the asphalt despite having a reasonable opportunity to inspect, so she accepted under §8.2-606(1)(b). §8.2-607(3)(a) requires that where tender has been accepted, the buyer must notify the seller of the breach within a reasonable time after he discovers or should have discovered the breach, or the buyer will be barred from any remedy.

RAPCO refused to remedy the problems, so RAPCO was informed of those problems (thus eliminating any issues involving its potential right to cure under §8.2-508).

It is unclear whether Maddie met the standard described in §8.2-607, Comment 4. Maddie likely met the test of letting RAPCO know that the transaction was "troublesome." Later, however, the Comment states that the seller must have been notified that the transaction involved a "breach." Maddie should immediately send RAPCO written notice of breach. This might be too late because it could be beyond a reasonable time from when she discovered the breach.

Assuming that Maddie is not barred by §8.2-607, she is seeking damages for accepted goods under §8.2-714. Subsection (2) defines damages as the difference between the goods as warranted and the goods as accepted. The cost of repair might be viewed as one way of calculating that difference. If not, Maddie could point out that Comment 3 makes clear that the subsection (2) formula isn't intended to be exclusive, and that the cost of repair is a reasonable method of calculating loss under §8.2-714(1).

✖✖ Thinking is that applicants should discuss all three above-mentioned warranty theories, but that a cogent answer for or against the reasonableness of notice should earn credit.]

(c) No. Virginia follows the American Rule: attorney's fees are not recoverable by the prevailing party absent special circumstances such as an enabling contractual provision or statute. There was no written contract; the oral agreement said nothing about attorneys' fees; and the facts indicate no relevant statute.

9. [02/17 Real Property] In February 2015, Chris, who owns a 400-acre farm in Appomattox County, Virginia, conveyed a five (5) acre parcel thereof to Rick. The deed described the parcel as bounded on the north by State Route 24, on the east and west by land owned by third parties, and on the south by a 15-foot farm road on Chris's land, running from Chris's barn out to State Route 460 near the Appomattox

Day School, which Rick's children attend. The deed made no mention of Rick having any right to use the farm road.

At the time Rick purchased the five acres from Chris, he lived in Farmdale, a development across the road on the north side of State Route 24. In September 2016, Rick moved into the new home he had built on the five acres. He began using Chris's farm road to take his children to school rather than going the long way around on Route 24. Rick also invited a few of his former neighbors from Farmdale, whose children also attended Appomattox Day School, to come across his land and use the shortcut across Chris's road.

When Chris discovered this, he confronted Rick and ordered him and the others to stop using his road. A fistfight ensued between Chris and Rick, and later that day Chris, in a fit of anger, closed the farm road by building a fence across it.

Rick filed suit in the local circuit court asserting (I) that he has the right to use the farm road and (ii) that others at his invitation may also use it. He alleged in his Complaint that the mention of the road in the deed from Chris conferred those rights. He seeks to compel Chris to remove the fence and reopen the farm road.

In his Answer to the Complaint, Chris responded that Rick has no interest in the farm road. He asserted that Rick has access to the public highway (State Route 24), that he has no right to use the farm road, that it was referred to in the deed only for the purpose of describing the southern boundary line of Rick's parcel of land, and that no easement or right of way over the farm road was granted to Rick in the deed or otherwise. He also argued that the road is his property, and if he had meant to give Rick an easement over it, he would have done so in the deed. And, in any event, Chris asserted, Rick certainly had no right to invite others to use the road.

How and on what legal bases should the Court rule on each of the two assertions made by Rick? Explain fully.

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The Court should rule that Rick has the right to use the farm road but that others may not use it. The Supreme Court of Virginia has held that "where a grantor conveys land by deed describing it as bounded by a road or street, the fee of which is vested in the grantor, he implies that such way exists and that the grantee acquires the benefit of it." Walters v. Smith, 186 Va. 159, 169 (1947); Robertson v. Robertson, 214 Va. 76, 79 (1973). Here, Chris's deed conveying the property to Rick described the land as bounded on the south by a 15-foot farm road on Chris's land. This situation falls squarely within the rule in Virginia that such a description in the deed gives rise to a right by the grantee to use the road. Thus, Rick is correct that he has the right to use the farm road. Nothing in the Virginia case law, however, permits the grantee to allow others to use the boundary road on the grantor's property. Thus, the Court should rule against Rick in his claim that others at his invitation, may also use it.