

**Summary of suggested answers & annotations to the essay part of the July 2015 Virginia Bar Exam. Prepared by William H. Shaw, III, Reid Flinn & J. R. Zepkin of William & Mary Law School, David Frisch & Emmeline P. Reeves of University of Richmond Law School, Eric DeGroff & Benjamin V. Madison III of Regent University 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 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. jrjz

1. [Agency & Personal Property - Bailment] Alvin instructed his employee, Elmer, to deliver one of the company cars to Fred's Body Shop for Fred to repair a minor dent in the front fender. He told Elmer, "Just tell Fred to smooth it out as best he can. I don't want to pay to have it painted."

It was just before lunchtime when Elmer left to drive the car to Fred's, so, on the way, Elmer stopped at the Burger Barn to buy something for lunch. In navigating the drive-through lane at Burger Barn, Elmer scraped and dented the side of the car against the microphone stand, damaging both the driver-side door of the car and the microphone stand.

When he arrived at Fred's, Elmer told Fred, "Alvin wants you to fix the dents." Fred had previously done repairs for Alvin and recognized Elmer as Alvin's employee, so he took Elmer at his word. Fred prepared a work order itemizing the work to be done as follows: "(i) knock out dent in front fender, repaint if necessary: \$100 + \$250 for painting if needed; (ii) repair damage to driver-side door and repaint area: \$1,250." The work order also stated, "These amounts are estimates only. Customer authorizes Fred's Body Shop to proceed with the described work as long as the cost does not exceed the estimates by 25%. Customer also agrees that Fred's Body Shop is not responsible for losses or damage to the vehicle while the vehicle is in Fred's possession."

Elmer signed the work order without objection and took the customer copy back to Alvin's office, where he laid it on Alvin's desk. Alvin was speaking to a supplier on the phone at the time, so he nodded to Elmer as if to signify acknowledgment of the work order. When he finished his telephone conversation, Alvin passed his eyes over the work order without paying much attention to the details and placed it in his outbox with other documents to be filed.

A week later, when Alvin went to pick up the car, Fred presented the invoice, with a copy of the work order, in the amount of \$1,800, which was 20% over the total estimate. He explained truthfully that the overestimate charges were justified because it had been necessary to paint the front fender because the paint had chipped and cracked during the repair of the dent and that the door panel had required extra sanding and preparation.

Alvin objected, saying he knew nothing about why the door panel had to be repaired. He said he would pay only \$100, the cost of knocking out the front fender dent, which was all he had authorized Elmer to direct Fred to do. Also, when Alvin checked the glove compartment, he found that an expensive digital camera he had left in there was missing. It was later established that one of Fred's employees who worked on the car and was no longer employed had stolen the camera.

(a) In a suit by Fred's Body Shop to recover the entire \$1,800, what defenses, if any, might Alvin assert, and what is the likely outcome? Explain fully.

(b) May Alvin recover the value of the stolen camera from Fred's Body Shop? Explain fully.

(c) In a suit by Burger Barn against Alvin and Elmer to recover for the damage to the microphone stand, what defenses, if any, might Alvin assert, and what is the likely outcome? Explain fully.

(d) If Alvin is found liable to Burger Barn, does Alvin have any right of recovery from Elmer? Explain fully.

✖✖

(a) In Fred's Body Shop's suit to recover the entire \$1800, Alvin will assert the defense of Elmer's lack of authority to enter into the contract to fully repair the vehicle. Fred's strongest argument in response is that Alvin ratified the contract; however, the ratification argument will likely fail.

In order to bind a principal in contract, the agent must act with either actual or apparent authority, or the principal must subsequently ratify the contract. Actual authority may be either express or implied, and it is based on the principal's communications with the agent and the agent's reasonable belief that he is authorized.

Here, Elmer clearly did not have actual authority to authorized repainting of the front fender. In fact, Alvin expressly instructed him not to have the front fender repainted. Additionally, Alvin did not ask Elmer to have the side door repaired, and there was no basis on which Elmer could reasonably believe that Alvin approved that work. Alvin was unaware of that damage.

Elmer also likely did not act with apparent authority. An agent acts with apparent authority where the third party reasonably believes, based on manifestations of the principal, that the agent is authorized. Apparent authority arises out of the principal's holding out of the agent as authorized. Here, Fred recognized Elmer as Alvin's employee, but merely holding Elmer out as an "employee" is not a manifestation that Elmer had authority to contract for all of these repairs, nor was there a sufficient basis for Fred to reasonably believe that Elmer was authorized. Thus, Elmer did not act with apparent authority.

Fred will argue that Alvin ratified the contract. Ratification is a subsequent affirmation of an unauthorized contract. In order to ratify, the principal must know the material terms of the contract, or be aware of his lack of knowledge. In other words, a principal cannot avoid ratification by relying on his ignorance of the contract terms where he was deliberately ignorant of those terms. Additionally, silence may constitute ratification where a person would be expected to speak. Here, it is a close call as to whether Alvin's actions were sufficient to ratify the contract, but the better conclusion is that they were not. Alvin's "nod" was not ratification because he did not yet know the material terms of the contract. Elmer had just handed him the work order. There is a stronger argument that his subsequent silence, or failure to object, constituted ratification. However he clearly did not have actual knowledge of the contract terms, as he did not read the work order closely. Fred will argue that he should have read the work order, but it doesn't seem from the facts that Alvin was even aware of his lack of knowledge. In other words, this does not seem to be a case of deliberate ignorance. Thus, the better conclusion is that Alvin did not ratify and thus he will be successful in his defense of lack of authority.

(b) Recovery for the stolen watch would presume a bailment relationship between Alvin & the body shop. A bailment relationship, however, requires delivery by the bailor and consent by the bailee. Because the watch was out of sight in the glove compartment and presumably not disclosed to Fred when the car was delivered for repair, Fred could argue that he did not consent to a bailment of the watch and thus incurred no liability for its care.

Even if a bailment relationship did exist, Virginia follows the common law approach of basing the standard of care upon who benefits from the relationship. In a commercial relationship such as this one, the benefit is typically considered to be mutual, and an ordinary standard of care applies. Thus, Fred would have to have been guilty of ordinary negligence in his care of the watch in order to be liable for its loss.

Another analysis that could be offered [though thinking is that it was not required for full credit] is that Alvin may attempt to recover the value of the stolen camera from Fred on an agency theory. Under the doctrine of respondent superior, an employer is liable for the torts of his employee committed within the scope of his employment. Here, Fred's employee was acting outside the scope of his employment when he stole the camera. The theft was an intentional act committed with no purpose to serve his employer's interest. Fred would not be liable based on respondent superior.

(c) In the suit by Burger Barn against Alvin and Elmer to recover for the damages to the microphone stand, Alvin will assert the defense that Elmer acted outside the scope of employment; however, Alvin is likely to lose on this defense. Alvin's liability for Elmer's actions would be based on respondeat superior. Under the doctrine of respondeat superior, an employer is liable for the torts of his employee that are committed within the scope of employment. Alvin will argue that Elmer's stop for lunch was a personal errand and thus he was not acting within the scope of his employment at the at time. However, courts generally hold the employer liable for employees' minor deviations, often referred to as a "detour." Here, Alvin's deviation from his employment was quite minor and would therefore likely be considered within the scope of employment.

(d) Yes, if Alvin is found liable to Burger Barn, Alvin would have a right to recover against Elmer. Where an employer is found liable for his employee's torts under the doctrine of respondeat superior, the employer has an indemnification claim against the tortfeasor employee.

**2.** [Local Government - Sovereign Immunity & Dillon Rule] The City of Falls Church, Virginia wishes to install, for use by the public, electric vehicle charging stations at its City-owned parking lots. City officials believe that electric powered vehicles

are more energy efficient than those which are gasoline powered and that the City should actively encourage its citizens to switch to electric powered vehicles. Parking lot patrons who wish to use the charging stations will pay both for parking and for the charge to their hybrid or all-electric vehicles. Construction and related installation costs for each of three charging stations are projected to be \$40,000.

Section 15.2-967 of the Code of Virginia states:

Any locality may provide off-street parking facilities and open them to the public, with or without charge, and when any locality constructs or has constructed any such facility, it may lease space therein for private commercial purposes which are necessary for sound fiscal management of the parking facility or which space is not suitable for parking.

The Code of Virginia defines the term "locality" to mean "a county, city or town as the context may require." Va. Code Ann. §15.2-102. The City's charter does not mention public parking facilities or electric charging stations, and the above are the only sections of the Code of Virginia which are pertinent to this topic.

Separately, the City, as owner and operator of the Broad Street public parking lot, has been sued by Maddie Madison in Circuit Court on the ground that the City breached its duties to her, as an invitee, to maintain the parking lot on a winter day and to keep it clear from ice and snow. Maddie alleges that, after parking her automobile in the City-owned lot at 10:00 a.m. on February 22, 2015, a sunny, clear day, she slipped and fell in the parking lot, sustaining extensive physical injuries.

It is undisputed that on February 21 there had been a severe snowstorm, that on February 22 there was still an accumulation of four inches of snow, including in the parking lot, and that the high temperature was 33 degrees Fahrenheit, just barely above freezing. Maddie claims that the City's breach of its duties to keep the lot clear and warn her of danger was the proximate cause of her injuries.

By February 22, City employees still had not cleared the Broad Street parking lot of snow and ice, because the City chose to devote its snow clearing efforts to secondary streets, once the primary streets were cleared. The City did not place any warning or "closed" signs at the parking lot. Maddie's attorney provided written notice of her claim to the City prior to filing the lawsuit.

The City manager asks you, as the City Attorney, the following questions:

(a) Is it legally permissible under Virginia law for the City to expend public funds to construct and to install, and thereafter to operate, a three-space electric vehicle charging station for use by the public for a fee within the City's Broad Street parking lot? Explain fully.

(b) What two defenses can the City assert in good faith to Maddie's Complaint, and how should the Circuit Court rule on each? Explain fully.

xx

(a) This part involved the Dillon Rule which limits the powers of local governments to those powers expressly granted by the General Assembly. The grants of authority also include any powers reasonably necessary or fairly implied to carry out the functions expressly authorized.

The Va. Code section cited expressly authorizes local governments to construct public parking facilities and to charge for their use.

The Va. Code section makes no reference to local governments operating charging stations and this issue turns on whether doing so falls under a power reasonably necessary or fairly implied to carry out the powers expressly granted.

- (i) An argument in favor of the City is that the additional income is necessary in for the operation of the parking facility.
- (ii) An argument against the City is that the Dillon Rule is to be strictly construed against the local governments, where there is any reasonable question as to whether the local government has been granted the authority in question.

The facts make the issue close. Thinking is that either conclusion would be accepted, so long as it was well expressed.

(b) The facts of this part of the question come from the case of Gambrell v. City of Norfolk 267 Va. 353 (2004). There are two defenses that the City should assert:

(i) The snow removal operation involved a governmental function and the City had sovereign immunity for negligence claims arising out of the operation. Tate v. Rice 227 Va. 341 (1984)

The applicant should recognize, as the Gambrell court did, that while routine street and parking lot maintenance if involved, it is a proprietary function and the municipality does not enjoy sovereign immunity.

However, where there is a weather emergency and the local government needs to make decisions on how and where to allocate resources, this is a governmental function because it is directly related to the general health, safety and welfare of the citizens. The City enjoys sovereign immunity from liability for negligence in either the exercise or the failure to exercise a governmental function.

The Gambrell court also noted that the fact that the City charged for the parking did not change any of the analysis.

(ii) The City should plead that Maddie assumed the risk and that it owed no duty to her as an invitee because of the open and obvious nature of the conditions. It was mid morning when the injury occurred and the facts suggest nothing that would have hidden the existence of the snow and ice from Maddie. Maddie should have seen 4" of snow from the previous day's storm on a clear sunny day, and should have known the ground would be slippery when the high temperature was only 33 degrees.

Thinking is that there's a possibility that some credit will be given for an answer arguing contributory negligence as a defense.

**3.** [Real Property] Sam purchased a unit in Golden Oaks Condominium in Northampton County on the Eastern Shore of Virginia in 2012. Sam was an avid fisherman, and the condo was to be his vacation spot. Golden Oaks consists of one multi-story building with forty residential units situated in the middle of a paved parking lot that was lined to accommodate 100 vehicles.

The governing documents for the condominium, all of which Sam read in some detail before the purchase of his unit, clearly state that the parking lot is a common element of Golden Oaks. These documents also provide for a Board of Directors of the condominium association, which has final authority to manage Golden Oaks and to maintain and control the common elements.

A month after the closing, Sam came to his condominium for a two-week fishing vacation. When he was parking his vehicle, Sam saw that the parking lot was almost full and he realized that ten parking spaces were unusable because the neighboring landowner had constructed a storage shed on those spaces. Although Sam had viewed the parking lot before he purchased his condominium, he had not noticed the encroachment of the shed into the parking lot because there were very few cars in the lot at that time. Now, however, it is obvious to Sam that the storage shed had been there for a long time, and he is concerned that the encroachment on the condominium's parking lot was improper.

Sam sought out the condominium manager and told her his concerns. She seemed uninterested and told Sam that there are plenty of parking spaces for the unit owners and their guests. She also told him that no one else had complained in the six years since the neighbor built his shed and that everyone knew that the shed belonged to Jackson, the neighbor. In fact, she added that Jackson is her cousin and that he checks with her from time to time to make sure there is no problem with the shed's location. She also informed Sam that, although there is nothing in writing, the Board of Directors of the condominium association has allowed Jackson to keep his shed there as long as he pays the property taxes on the area covered by his shed.

Not satisfied with the manager's response, Sam then met with the Board of Directors of the condominium association and asked the Board to require the removal of the shed. The Board agreed with the condominium manager, acknowledged that Jackson had been paying the proportional taxes, and refused to take any action to do anything about the shed.

Sam was furious at this and confronted Jackson directly and demanded that he remove the shed. Jackson refused, asserting that he owned the land occupied by the shed by adverse possession.

Sam consults you for advice on the following questions:

- (a) Does he (Sam) have standing to sue Jackson to require him to remove the shed? Explain fully.
- (b) What would Jackson have to prove to establish that he owned the land occupied by the shed by adverse possession, and, based on these facts, can he prevail? Explain fully.

✖✖

- (a) The condo association has the authority to make decisions regarding use of the common areas and has consented to Jackson's placement of the shed. Although Sam, the condo owner, was inconvenienced by the presence of the shed, he does not have standing to sue Jackson. In the case of Kuznicki v. Mason 273 Va. 166 [2007], the SCV noted that under Va. Code §55-79:53(A) and §55-79.80(B), only the condominium unit owners' association had standing to sue for claims related to common elements and limited common elements.
- (b) To establish title by adverse possession, Jackson would have to prove that his possession was: (1) actual and visible; (2) exclusive; (3) continuous; and (4) hostile to the ownership rights of Golden Oaks, for a period of 15 years. His possession was clearly actual and visible, as he constructed a shed that covered ten parking spaces in a specific area of the parking lot. It appears that he had exclusive use of the shed, and that his use of those spaces for the shed had been continuous for the last six years. It appears, however, that he may have taken possession with the Board's permission, which would arguably have led to the creation of a license rather than adverse possession. A license may be granted orally, and is freely revocable. In any event, it is clear that Jackson has not met the statute's 15-year requirement for adverse possession.

Thinking is that it was not expected that students would address the issue of irrevocable licenses in order to earn full credit, but that it is likely that some credit might be given for such a discussion. Jackson could claim an irrevocable license based upon his reliance on the Board's permission to use the parking lot and the expense he has incurred as a result. If the court found that the expenses of constructing and maintaining the shed and paying a proportional share of the property taxes were sufficient, Jackson could claim that he had essentially acquired an easement over that portion of the parking lot.

**4.** [Personal Property & UCC - Secured Transactions] Mack owned a John Deere farm equipment dealership in Appomattox, Virginia. On August 1, 2014, Mack borrowed \$250,000 from Aberdeen Bank ("the Bank"). In connection with the loan, Mack signed a security agreement granting the Bank a security interest in all of Mack's "inventory" and assigning Mack's "accounts and chattel paper" to the Bank. The Bank properly perfected its security interest.

On August 15, 2014, Mack purchased a tractor for cash from Bob, a local used equipment dealer, and received an executed bill of sale from Bob. Unknown to Mack, Bob had stolen the tractor several weeks before from Goolsby, a resident of nearby Buckingham County.

On September 1, 2014, Farmer, a local farmer, after inspecting the bill of sale from Bob to Mack, purchased the tractor from Mack for \$20,000. Farmer made a \$5,000 down payment and signed an installment sales contract, agreeing to pay Mack the balance of the purchase price, plus interest, in monthly installments over the next 12 months. The installment sales contract granted to Mack a security interest in the tractor and specified that all payments would be made directly to Mack. Farmer timely paid the October, November and December payments.

Mack missed his December 1, 2014 note payment. The Bank immediately declared Mack in default, as permitted by Mack's note and security agreement. The Bank also properly notified Farmer by letter of Mack's default and instructed Farmer to make all future payments on his installment sales contract directly to the Bank.

Farmer immediately went to Mack's store to inquire about the Bank's letter. Mack told Farmer: "Continue to make your monthly payments to me. The Bank has no right to collect from you. Our contract is just between you and me."

Three weeks later Farmer was served with a complaint in an action filed by Goolsby in the proper circuit court. In the

complaint Goolsby sought to recover possession of the tractor, alleging that the tractor had been stolen from him.

Farmer filed his timely answer, asserting the affirmative defenses that (i) as a good faith purchaser for value, his claim to the tractor was superior to Goolsby's, and (ii) any right of Goolsby to recover the tractor should be conditioned on Goolsby's reimbursing Farmer for the amounts he had paid to Mack.

- (a) Should Farmer ignore the Bank's letter and, as directed by Mack, continue making payments to Mack? Explain fully.
- (b) What are the merits of Goolsby's suit to recover the tractor, and how should each of Farmer's affirmative defenses be resolved? Explain fully.
- (c) If Goolsby prevails in his action against Farmer, is Farmer liable to Mack and the Bank for the remaining payments on the installment sales contract? Explain fully.
- (d) If Goolsby prevails in his action against Farmer, what remedy, if any, does Farmer have against Mack? Explain fully.

✖✖

- (a) After receiving proper notification from the Bank of its interest, Farmer should make payments to the Bank. Va. Code §8.9A-406 & 8.9A-607
- (b) Goolsby should prevail against Farmer's defense of bona fide purchase. A buyer ordinarily cannot acquire better title than his seller's. Under the law of bona fide purchase there are a four exceptions to this rule, but none of those exceptions would give Mack good title to the tractor. The common law exception of "apparent authority" would not help Mack because Goolsby, the rightful owner, did nothing to clothe Bob with the appearance of ownership or authority to sell. The entrustment exception under UCC 2-403(b)&(c) would not help Mack because – though Bob may have been a merchant of such goods – Goolsby did not entrust the tractor to him. Bob merely stole it. The voidable title exception, both at common law and as expressed in UCC 2-403(a) would not help Mack because Bob did not purchase the tractor from Goolsby; he stole it.  
  
Under the law of bona fide purchase, Mack could not have acquired title to the tractor. Because he had no title himself, he could not convey good title to Farmer. Thus, Goolsby should be able to recover the tractor from Farmer.
- (c) Farmer would not be liable to either Mack or the Bank. The Bank stood in Mack's shoes as to the right to collect on Farmer's note to Mack. Mack, in making the sale to Farmer, under Va. Code §8.2-312(1), warranted that his [Mack's] title was good and that Mack had the right to transfer title to Farmer. Mack breached this warranty resulting in a total failure of consideration, i.e. the tractor.
- (d) Under Va. Code 8.2-714 & §8.2-715, Farmer's given a cause of action against Mack for breach of the warranty of good title. Farmer could recover all that he paid Mack and all that he paid the Bank on the note to Mack, since the Bank's position as a lien creditor was derivative of Mack's ownership, or lack of ownership. Also incidental and consequential damages under Va. Code §8.2-715 are permitted.

5. [Domestic Relations & Va. Civil Procedure] Jack and Diane married in 1982 and resided in Lebanon, Virginia. In late 2013, Jack began having an affair with another woman and eventually left Diane and moved in with the other woman. In 2014, Jack decided to file for divorce from Diane.

To avoid attorney's fees, Jack turned to a "do-it-yourself" divorce Internet website, where he obtained forms for a "Complaint for Divorce" and a "Summons." In a blank space in the form Complaint in which the "grounds of divorce" were to be stated, Jack typed, "I wish to divorce Diane because the thrill of our marriage is gone."

After completing the forms, Jack filed the documents with the local circuit court clerk and delivered file-marked copies of the summons and complaint to the sheriff's office to be served on Diane. The deputy sheriff serving the documents went to Diane's home in Lebanon; however, Diane was not there, and her seventeen-year-old daughter, who also lived in Diane's home, answered the door. The sheriff handed the documents to Diane's daughter, explained their importance, and told her to give them to her mother when she got home. When Diane got home, her daughter gave her the documents, and Diane promptly retained an attorney to represent her in the divorce proceedings.

Diane's attorney moved to quash the service of process on her due to defective service. The judge denied the motion to quash. Immediately thereafter, Diane's attorney filed a demurrer requesting the court to dismiss Jack's Complaint on the ground that the Complaint failed to state a proper ground for divorce and therefore failed to state a claim. The judge overruled the demurrer. Without objection from Diane's attorney, a hearing ensued in which Jack was granted a divorce from Diane. At the same hearing, the marital assets of Jack and Diane were divided between them, and Diane was granted sole custody of their children. A final order memorializing the judge's decisions was entered on December 1, 2014.

In the spring of 2015, Diane found out that Jack had lied about his financial status when he testified at the divorce hearing and that he had hidden marital funds in several offshore bank accounts. On April 1, 2015, Diane's attorney filed with the court a request for leave to file a bill of review. In the request, Diane's attorney stated the sole ground for the request was that, after entry of the court's final order, Diane had for the first time discovered new evidence, i.e., the hidden offshore accounts, which were substantial and would have altered the judge's division of property. The judge denied the request for leave, ruling that it had been untimely filed, and, in addition, that the grounds asserted for a bill of review were inadequate.

(a) Did the judge err by denying Diane's motion to quash service? Explain fully.

(b) Did the judge err by overruling Diane's demurrer? Explain fully.

(c) Did the judge err in her ruling concerning Diane's bill of review? Explain fully.

✖✖

(a) The judge ruled correctly, that service on Diane was good. The Deputy Sheriff followed the statute [§8.01-296] trying first to serve Diane in person at her usual place of abode without success because she was not there; and then, at Diane's usual place of abode, serving the papers on a member of Diane's family, her 17 year daughter, who was not a temporary sojourner and explained what the papers were about and instructed her to give the papers to her Mother. Service was good at that point.

Our thinking is that It was not necessary to discuss whether, on these facts, the court's process constituted the complaint with the summons attached.

(b) The judge erred by overruling the demurrer. the grounds for divorce stated in the Complaint "that the thrill of our marriage is gone" is not a proper ground for divorce in Virginia. A demurrer tests the legal sufficiency of the complaint and in consideration of the demurrer, the factual allegations in the complaint are assumed to be true. Therefore, assuming that the Complaint's allegation of Jack's grounds are true, nevertheless, the demurrer should have been granted because the Complaint failed to state a proper ground for the divorce.

(c) The judge erred in her ruling concerning Diane's motion for leave to file a bill of review. Under Va. Code §8.01-623, a bill of review lies only to a final order in an equitable proceeding. On the facts of the question, the judge's order was a final order. A divorce action is an equitable proceeding. The Bill of Review must be filed within six months of the entry of the final order against which the bill of review is being filed. Diane filed the motion for leave within the six month period.

Thinking is that it was not necessary to discuss whether filing the motion for leave to file a bill of review within the six month period would be compliance, or did the actual bill of review need to be filed within that time period.

A bill or review can be brought on either of two alternative grounds: [1] error of law apparent on the face of the record of the proceeding; and [2] newly/after discovered evidence. If the bill of review is sought on the grounds of newly/after discovered evidence, leave of court to file the bill of review must be first obtained.

When seeking leave to file a bill or review on the grounds of newly/after discovered evidence, the moving party should allege, and be prepared to prove:

[i] what the evidence would be and attach affidavits of witnesses to support the allegations so the court can make

a finding that all the elements are present. The elements are:

[a] the evidence was discovered after trial; and

[b] the evidence is material and on another trial should produce opposite results on the merits; and

[c] the evidence is not cumulative, corroborative or collateral; and

[d] the evidence could not have been discovered with reasonable diligence before trial; and

[e] the evidence can be produced at a new trial.

On the facts of the question, the judge abused the court's discretion in not permitting Diane to file the bill of review and thus getting a chance to prove the elements described above.

Our thinking is that the necessary answer to (c) is as stated above. If an applicant either added to this answer, or as the sole answer, responded that there was an error of law apparent on the face of the record since as a matter of law, the grounds alleged to support a divorce were insufficient, the BBE may permit the additional/alternative answer to be used for extra credit to offset any failing in the answers to the rest of the questions in #5., or give some credit, where the necessary answer was not provided to (c)..

6. [Criminal] Tom and Jerry lived in Norfolk, Virginia, where they had grown up together. They were unemployed, broke, and unable to find work. Jerry suggested that they rob a bank. After some discussion, they decided that the best plan would be for each of them to rob a bank on the opposite sides of the city at the same time. They believed this would confuse the police, delay response time, and improve their chances of getting away. They agreed that Jerry would rob the A&S Bank on the east side of town and that Tom would rob the Bluewater Bank on the west side, both at 10:00 a.m. on April 1.

At 9:00 a.m. on April 1, Tom and Jerry set out on their mission in Jerry's car. Jerry drove Tom to the Bluewater Bank. En route, Jerry handed Tom a toy pistol and told him to enter the bank at precisely 10:00 a.m. and that he (Jerry) would enter the A&S Bank simultaneously. They coordinated their watches and, as Jerry dropped Tom off in front of the Bluewater Bank, Jerry said, "OK, let's do it. I'll pick you up where we talked about."

At 10:00 a.m., Jerry entered A&S Bank, and saw no one present but a teller. He brandished a real handgun and handed the teller a note and a cloth bag. The note stated, "Put all the money in your cash drawer in the bag and give it to me. Don't make a sound, and nobody will get hurt." Seeing the handgun, the teller emptied the cash drawer into the bag.

At the same time on the other side of town, Tom entered the Bluewater Bank and, with the toy gun concealed in his coat pocket, walked to a teller window. He was so nervous that all he could do was whisper to the teller, "This is a robbery." The teller said, "I'm sorry. I didn't hear what you said." At that point, Tom turned, rushed back outside, took out his cell phone, and sent Jerry a text message saying, "I can't do it. I'm outta here."

Back at the A&S Bank, Jerry received the text message and quickly responded, "Stick to the plan." Tom saw Jerry's message, went straight to the bus terminal, and boarded a bus for Richmond. Meanwhile, Jerry took the money-filled bag from the A&S teller. At gunpoint, he told the teller to come out from behind the counter, forced her to lie face down on the floor about 15 feet from the counter, and told her not to move or make a sound for the next 15 minutes.

Unbeknownst to Jerry, the teller had activated a silent alarm, and the police were waiting for him as he ran out of the bank. Jerry later confessed and told the police about everything that had happened between him and Tom from the time they first talked about robbing the banks up to and including Tom's text message. Tom subsequently was arrested in Richmond.

The Commonwealth's Attorney charged Tom with the following crimes: (i) conspiracy; (ii) attempted robbery of the Bluewater Bank; and (iii) robbery of the A&S bank.

The Commonwealth's Attorney charged Jerry with abduction.

(a) Do the facts support a prima facie case against Tom on each of the three crimes with which he is charged, what defenses might Tom assert, and what is the likely outcome on each defense? Explain fully.



(b) Do the facts support a prima facie case against Jerry on the crime of abduction, what defenses might he assert, and what is the likely outcome on each defense? Explain fully.

✖✖

(a) The facts support a prima facie case against Tom on each of the three crimes, conspiracy, attempted robbery and robbery.

- (1) Conspiracy. A conspiracy is an agreement between two or more persons by concerted action to commit a crime. Proof of an overt act in furtherance of the conspiracy is not necessary for a conviction of the crime which was the object of the conspiracy. Gray v. Commonwealth 260 Va. 675 (2000)

Here, the agreement between Tom and Jerry to rob the banks completed the crime of conspiracy.

As a defense to the charge, Tom might claim that he withdrew from the conspiracy as shown by his abandonment of the crime and notifying Jerry about his withdrawal. The defense would not succeed because the crime of conspiracy was already complete before Tom's withdrawal. Gray v. Commonwealth 30 Va. App. 725 (1999), judgment affirmed on other grounds, 260 Va. 675, supra.

- (2) Attempt. One who intends to commit a crime and commits a direct, but ineffectual act towards commission of the crime, has committed the crime of an attempt. Sizemore v. Commonwealth 218 Va. 980 (1978)

In this case, Tom was guilty of the attempted robbery of the Bluewater Bank. He had formed the intent to rob the bank and entered the bank with the toy gun, approached the teller, and announced his purpose.

As a defense to the charge, Tom might claim that he abandoned the criminal activity and therefore is not liable. However no Virginia case recognizes abandonment as a defense to the crime of attempt and in any case the crime of attempt was already complete when Tom tried to abandon the criminal enterprise.

- (3) Robbery of A&S bank. Robbery is the taking, with the intent to deprive the owner or custodian, permanently, of personal property, from his person or in his presence, against his will, by force, threat or intimidation.

Note: The indictment may charge the robbery of A&S Bank, but proof of the robbery requires a taking from its employee or custodian of the property.

Jerry committed the A&S Bank robbery. As a member of the conspiracy Tom would be liable for the crime of robbery of A&S Bank. He would be liable for any foreseeable crime committed by any of the conspirators, in this case, Jerry, even if Tom was not present at that robbery.

Tom might defend against the charge by claiming that since he withdrew from the conspiracy, and so texted Jerry, he is not liable for Jerry's commission of the A&S Bank robbery. The defense should fail because Tom did not notify Jerry of his withdrawal until Jerry was already engaged in committing the substantive offense. See Gray v. Commonwealth 30 Va. App. 725 (1999), judgment affirmed on other grounds, 260 Va. 675, supra.

Further, while in order to withdraw effectively, he must make it known clearly to his co-conspirator. Merely leaving a text is ineffectual in notifying his co-conspirator unless and until the co-conspirator sees the text.

Tom may also claim that since the object crime, the robbery of A&S Bank, was completed, the conspiracy merged into the robbery and he therefore may not be convicted of the conspiracy. This defense would be successful only if Tom was tried for the robbery and then later was tried for the conspiracy. Otherwise, the defense would be unsuccessful. Va. Code §18.2-23.1; Boyd v. Commonwealth 236 Va. 346 (1988)

(b) The facts support a prima facie case against Jerry for the crime of abduction. For purposes here, abduction occurs when a person by force or intimidation seizes, takes, transports or detains another person with intent to deprive that person of liberty. Va. Code §18.2-47

By use of force and/or intimidation, Jerry has committed abduction by directing the teller's actions at gunpoint by seizure, detention and transportation.

Jerry might defend against the charge by arguing that there is a certain amount of restraint inherent in the commission of robbery, and that here he did not restrain the teller any more than necessary to commit the robbery, and that such restraint of the teller was merely incidental to the robbery. See Brown v. Commonwealth 230Va. 310 (1985)

Jerry had completed the robbery (taken the money by force/threat) before he directed the teller to lay down on the floor and not move or make a sound. His directions were not incidental to the robbery or restraint inherent in the completion of the robbery. The defense should not succeed.

7. [Professional Responsibility] Shockoe Construction Company ("Shockoe") is a family-owned general contracting firm located in Richmond, Virginia. K.T. Davis ("Davis") is the President and Chief Executive Officer of Shockoe. He recently succeeded his father in that position, the latter having become Chairman of the Board of Directors. The Davis family members own all of the stock of Shockoe.

Linda Lane ("Lane") and her law firm have served as legal counsel to Shockoe and have done all of the legal work for the company. Lane has also served for many years as the Davis family lawyer.

Tim Winston ("Winston"), the company's Chief Financial Officer, has been with Shockoe for many years, but owns no stock and is not a member of the company's Board of Directors. Last year, Winston came to Lane's office and asked her to prepare his will. He explained that he has no close relatives and that Shockoe and many of its employees have been his whole life. He told Lane that, because he has lived frugally, he now has a substantial estate that he would like to leave entirely to RVA Bank in trust for the benefit of disabled employees of Shockoe. Lane prepared the will as directed by Tim, and it was properly executed in Lane's office.

Last week, Davis asked Lane to attend an urgent meeting of the Shockoe Board of Directors. At the meeting, Davis told the Board that in his opinion Winston, while always a good and faithful employee, was "slowing down in his old age" and was showing signs of carelessness with certain financial matters and should be dismissed from employment with the company. Davis is certain that Winston will not leave voluntarily and will have to be fired. Davis and the Board asked Lane for advice on how best to handle Winston's discharge to avoid any claims he might have against the company. Lane often worked with Winston in his role as CFO, but, aside from having prepared Winston's will as he requested, neither Lane nor her firm performed any other legal work for him.

(a) Under the Rules of Professional Conduct, would it be ethically permissible for Lane, in her role as legal counsel for Shockoe, to render the legal advice requested by Davis and the Board? Explain fully.

(b) Under the Rules of Professional Conduct, would it be ethically permissible for Lane to inform Davis and the Board of the provisions of Winston's will and his generous intentions for Shockoe's disabled employees? Explain fully.

(c) Under the Rules of Professional Conduct, was it ethically proper for Lane to have prepared Winston's will? Explain fully.

✖✖

(a) Applicants should discuss Rules 1.9 and 1.7. Neither Lane nor her firm performed any legal work for Winston since preparing his will, so Winston is a former client. Rule 1.9 therefore applies:

*(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless both the present and former client consent after consultation.*

The two matters in question are substantially related since both involve the welfare of Shockoe and its employees, and are materially adverse since Shockoe anticipates firing Winston. It is unlikely that both clients would sign a waiver; furthermore, seeking a waiver may involve breaching the duty of confidentiality per Rule 1.6.

Applicants should also discuss Rule 1.7, which states the general rule for conflicts of interest:

*(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a*

*concurrent conflict of interest. A concurrent conflict of interest exists if:*

*(1) the representation of one client will be directly adverse to another client; or*

*(2) there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.*

*(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph(a), a lawyer may represent a client if each affected client consents after consultation, and:*

*(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;*

*(2) the representation is not prohibited by law;*

*(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and*

*(4) the consent from the client is memorialized in writing.*

Applicants should discuss the existence of a conflict pursuant to Rule 1.7(a)(2) for the reasons mentioned above. Even with a waiver, Lane would run afoul of Rule 1.7(b)(1), since she could not reasonably believe herself able to provide competent and diligent representation to both clients given their opposing interests.

- (b) Applicants should explain that informing Davis and the Board of the provisions of Winston's will would violate Rule 1.6(a):

*(a) A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).*

Winston's testamentary dispositions fall within the scope of Rule 1.6(a) since they are the basis of Lane's representation, and none of the exceptions of Rule 1.6(a), (b), or (c) applies.

- c) Applicants should discuss Rule 1.13(e):

*A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7 . . . .*

When Winston retained Lane to prepare his will, there was no concurrent conflict with Shockoe, so Lane did not violate Rule 1.7. It is arguable that, given Lane's longstanding representation of Shockoe and her in-depth knowledge of the company and its key personnel, including Winston, she could have anticipated the possibility of a future conflict involving Winston.

8. [Corporations] Peanut, Inc., ("Peanut") is a Virginia corporation, operating a wholesale peanut business. Peanut is governed by a six-member Board of Directors and has 200 outside shareholders. Victor, the son of Peanut's founder, was the Chairman and Chief Executive Officer of Peanut until his death in July of 2014. Victor failed to graduate from high school and was not a good business person. Victor's value to the corporation related to his family, community, and industry connections.

In February 2012, Victor convinced the Board of Directors of Peanut to purchase the assets and assume the liabilities of Old Sweden Corp. ("Old Sweden"), a small manufacturer of chisel plows used specifically in the peanut industry. Old Sweden was owned by Victor's best friend, Amy. Amy was Old Sweden's sole owner and, acting solely in her capacity as the director of manufacturing, agreed to sell the company to Peanut. One of the members of the Peanut Board of Directors, Linus, asked

questions about the potential liabilities of Old Sweden, but there was no actual due diligence investigation. Victor told the remaining Board members that Amy had assured him that all of Old Sweden's liabilities were shown on the corporate books. After a brief discussion of the pros and cons of the purchase at the Board meeting, the Board voted unanimously to purchase Old Sweden, and the purchase was consummated.

In June 2013, the Peanut Board of Directors, at a regularly scheduled Board meeting with Victor present, voted unanimously to loan Victor \$175,000 to use for the purchase of a used Cessna airplane. The loan was made from Peanut corporate funds, and Victor purchased the airplane.

In September 2013, a number of former employees of Old Sweden sued Peanut, as Old Sweden's successor, claiming wage violations of the Fair Labor Standards Act (FLSA). An investigation by Peanut before closing the purchase of Old Sweden's assets and assuming its liabilities would have revealed these undisclosed claims by the former Old Sweden employees.

In January 2014, the Board of Directors of Peanut was presented with a settlement demand of \$600,000 for a global settlement of the FLSA suit. The Board of Directors voted unanimously to approve the settlement, which caused the corporate debts of Peanut to exceed its assets.

In July 2014, Victor was flying his Cessna from Richmond to Virginia Beach, when the plane crashed in Surry County. Victor was killed as a result of the crash. Victor's only asset was the airplane, which was a total loss as a result of the crash, and Victor had failed to procure any insurance on the Cessna. As a result, the \$175,000 loan will not be repaid by Victor.

Through shareholder action, the Board of Directors of Peanut has now been lawfully replaced. The new Board seeks your legal advice on the following questions:

- (a) Was the decision to sell Old Sweden to Peanut made by Amy, acting solely as Old Sweden's Director of Manufacturing, lawful? Explain fully.
- (b) Did the previous Peanut Board of Directors act within its power in purchasing the assets and assuming the liabilities of Old Sweden without first seeking shareholder approval? Explain fully.
- (c) Is it likely that the members of the previous Peanut Board of Directors can be held individually liable for (i) the \$600,000 paid on the FLSA claims; (ii) the \$175,000 loan to Victor? Explain fully.

✖✖

- (a) Yes, the decision to sell Old Sweden to Peanut was lawful. A sale of all, or substantially all, the assets of a corporation is a fundamental corporate change and generally there are certain procedural steps that a corporation must adhere to when effecting a fundamental corporate change. However, under the Virginia Code, there is an exception when all of the shareholders approve the sale of assets. Here, Amy was the sole shareholder of Old Sweden and she clearly approved the sale. Thus, the sale was lawful. Va. Code §13.1-724
- (b) Yes, the Peanut Board of Directors acted within its power in purchasing the assets and assuming the liabilities of Old Sweden without first seeking shareholder approval. Purchasing assets of another corporation is not a fundamental corporate change, and there is, accordingly, no requirement of shareholder approval.
- (c) (i) It is likely that the members of the previous Board of Directors can be held individually liable for the \$600,000 paid on the FLSA claims. Directors owe fiduciary duties, including duties of care and loyalty, to the corporation. In Virginia, directors are protected by the good faith business judgment rule, and they are liable for breaches of their fiduciary duties only where they fail to exercise their good faith business judgment when making decisions on behalf of the corporation. Here, the directors likely failed to exercise business judgment when deciding to purchase the assets and assume the liabilities of Old Sweden because they did no due diligence. It was not sufficient to simply rely on the assertions of the seller. The directors made no independent inquiry, and because of Old Sweden's undiscovered liabilities, the decision to purchase Old Sweden ultimately rendered Peanut insolvent.  
  
(ii) The members of the previous Board will not likely be individually liable for the loan to Victor. This transaction does not seem to have violated either the fiduciary duty of care or loyalty. A loan to a director is not per se improper, and there are not sufficient facts to show that the decision to make the loan was not within the good faith business judgment of the directors. Additionally, although a conflict of interest transaction, the Board apparently was aware of

the terms of the transaction and, although Victor was clearly interested, the loan was nonetheless approved by a sufficient number of disinterested directors because approval was unanimous. Further, the presence of, or even a vote by, a director with a conflicting interest in a given transaction does not affect the validity of the action. Thus, the directors would not be liable in connection with the loan to Victor.

9. [Federal Civil Procedure & Va. Civil Procedure] Dave Davis, a resident of Alexandria, Virginia, retained the legal services of Lance & Lawson (“L & L”), a New York law firm with its only office in New York City, to represent him as a claimant in a National Futures Association (“NFA”) arbitration proceeding. As part of that proceeding, on the advice of L & L, Davis retained the expert witness services of Professor Wallace Wade, a resident of Lexington, Kentucky, for \$10,000 per day plus expenses.

The retainer agreement between Davis and L & L established the hourly billing rates for L & L and required Davis to pay all costs and expenses, including the NFA filing fee and expert witness fees. The retainer agreement, which did not address where the arbitration hearing would be held, nor where the legal services would be rendered, was sent by L & L via Priority U.S. Mail to Davis at his home, where he signed the agreement in ink and then sent the original back by overnight delivery service to his lawyers’ New York City office, as instructed. Shortly after receipt of the signed retainer agreement, L & L initiated the arbitration proceeding. Within a few days, Davis received the following email from L & L: “As an addendum to our retainer agreement, as we discussed yesterday by phone, if we don’t get you a recovery, we will reimburse you 50% of Wade’s bill.”

Over the course of the next three months, L & L communicated frequently from New York by phone and email with Davis, while the latter was in Virginia, met with Davis in his home in Alexandria on two occasions to prepare for the arbitration hearing, and both Larry Lance and Louis Lawson were present in Washington, D.C. for a one-day pre-hearing mediation conference and at the arbitration hearing held five days in Washington, D.C. and four days in Tysons Corner, Virginia.

Davis’ claim in the NFA proceeding was rejected, and he recovered nothing. He blamed what he considered to be Wade’s inept testimony for the loss and refuses to pay Wade’s fee.

Following the conclusion of the NFA proceeding, Wade filed a Complaint against Davis in the U.S. District Court for the Eastern District of Virginia for non-payment of expert witness fees based on breach of contract. Davis was properly served with the Complaint this morning, July 28, 2015.

Davis intends to deny liability to Wade, whom Davis now regards as an incompetent blowhard. Davis also believes that in the event he is found liable to Wade, L & L is legally responsible for half based on the earlier email from L & L to Davis. Davis consults with you as his new lawyer and asks the following questions:

(a) Within what number of days must Davis serve an Answer to Wade’s Complaint and what is the date on which he must begin counting that number of days?

(b) Although he intends to deny liability to Wade, is there a procedure by which Davis can assert a claim against L & L for payment of “50% of Wade’s bill” as a part of the civil action Wade commenced in the U.S. District Court, and, if so, within what period of time may he do so without leave of court? Explain fully.

(c) In the event L & L asserts lack of personal jurisdiction as an objection to being made a party to Wade’s litigation, how should the District Court rule? Explain fully.

✖✖

(a) (i) Fed. R. Civ. P. 12(a) (1) (A) provides “A defendant must serve an answer within 21 days after being served with the summons and complaint...”

(ii) Fed. R. Civ. P 6 states that one excludes the day of the event (here, date of service). The day after service on Davis will be day one.

(b) (ii) Fed. R. Civ. P. 14 allows a party who is sued on a claim, as a third party plaintiff, to serve a third-party summons and complaint on a new party who “is or may be liable to the defendant for all or part of the” amount plaintiff sued defendant/third-party plaintiff for.

(ii) Fed. R. Civ. P. 14(a) (1) gives a defendant 14 days after being served with the complaint & summons, to serve a third-party summons and complaint on the non party. After the 14 days, third-party plaintiff would need leave of court.

(c) As to whether the Federal District Court in Virginia can acquire long arm in personam jurisdiction over L&L, a non resident of Virginia, the court must engage in two inquiries:

(i) First, the court should examine if L&L engaged in any of the conduct described in Virginia's Long Statute §8.01-328.1. The answer should discuss the following:

- (1) Did the law firm transact business in Virginia, when it agreed to represent a Virginia resident? L&L sent the retainer agreement to Davis, in Virginia, and Davis signed it in Virginia and returned the original it to the law firm. The facts, by referring to the original being returned to L&L, suggests that a copy for Davis to keep was sent too. Arguably this suggests that the contract came into existence when Davis signed it in Virginia. Entering into a contract in Virginia would be transacting business in Virginia. It requires only a single transaction.

The addendum, agreeing to pay 50% of the expert's fee if L&L failed to get Davis a recovery was sent via email to Davis in Virginia, amending the contract.

Of the nine days over which the arbitration hearing was held, in four of the days, the arbitration hearing was held in Tysons Corner, Virginia.

- (2) Did the law firm contract to provide goods and services in Virginia? While the forum where arbitration was to take place had not been specified, L&L did come to Virginia and met with Davis, at his home in Virginia as well as represented him in Virginia at four of the nine days the arbitration hearing . This would be providing services, pursuant to the contract, in Virginia.

Note: It's our view that, for full credit, it was not necessary to discuss ¶ B. of §8.01-328.1 [Virginia's Long Arm Statute] providing that using a computer or computer network in Virginia creates grounds for long arm jurisdiction. Under §18.2-152.2, "using a computer is defined as "A person "uses" a computer or computer network when he attempts to cause or causes a computer or computer network to perform or to stop performing computer operations" The law firm emailing Davis in Virginia would have caused his computer to operate.

It's also our view that a strong argument can be made that this part of the Long Arm Statute would apply to the facts.

- (ii) The court should also consider, independently of the Virginia Long Arm Statute analysis, whether Due Process would be offended by exercise of jurisdiction over L & L in Virginia Federal Court. The essence of the minimum contacts analysis is whether the defendant could reasonably have anticipated being sued in a forum in light of its contacts. When a law firm enters into an agreement to represent a Virginia citizen in arbitration, the defendant ought not to be surprised on later being sued in VA, especially after having performed part of the work while physically in Virginia. The reasonable inference is that the law firm—which had already had contact with Virginia (the agreement, signed, delivered and returned from there) and the e-mail addendum—would continue to deal with the Virginia client. Though the facts state that it was not clear where the arbitration would occur at the time of the entry of the agreement, the continued contacts with a VA resident are reasonable to presume.

The leading US Supreme Court case on contracts and Due Process is Burger King v. Rudzewicz, 105 S. Ct. 1074 (1985). There, the Court identified four factors to consider in evaluating whether a defendant could reasonably anticipate being sued in another state:

- (1) prior negotiations
- (2) contemplated future consequences
- (3) the terms of the contract

(4) the parties' actual course of dealing

All of these factors must be evaluated in determining whether the defendant purposefully established minimum contacts within the forum.” Applying these, the negotiations here were between NY firm and a VA resident (suggests could anticipate suit in VA). Second, contemplated future consequences would include the defendant’s dealing with the Virginia resident, regardless of whether the arbitration was held in VA. Third, the terms of the contract simply confirm the firm is representing VA resident. Fourth, the parties actual course of dealings had the law firm not only recommending the expert, but coming to VA a number of times, handling the arbitration in VA.

The facts of the question were taken from Thornapple Associates, Inc. v. Izadpanah, Defendant v. Collett, Third Party Defendant 2014 U.S. Dist. Lexis 139333 [2014]. The federal district court held that the law firm was subject to long arm jurisdiction and dismissed the law firm third party defendant’s motion to dismiss for lack of personal jurisdiction..