

Summary of Answers to the Essay Part of July 2010 Virginia Bar Exam

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After each bar exam, the Virginia Board of Bar Examiners invites representatives from each of the law schools in Virginia to meet with the Board for a review and discussion of the range of answers the Board will accept for each essay question. As a result of these discussions, the Board will often expand the scope of what is an acceptable answer.

Please remember what follows is just a summary, which includes some "filling in" based on the general information the Board furnished. jrjz

[1] [WILLS] Myrtle Davis, a widow, died in June 2010 in a nursing home in the City of Poquoson, Virginia. She was survived by her two sons, Dean and Ronnie, and a daughter, Nancy Jo.

Until January 2008, when she was admitted to the nursing home, Myrtle continued to live at Ketan House, the home she and her deceased husband had occupied on the Chesapeake Bay in Hampton, Virginia. Ketan House sat on 50 acres overlooking one of the widest, most accessible parts of the bay and was a prime location for development. Over the years, many developers approached Myrtle about buying the property, but Myrtle refused to sell the house and property even though she lacked resources to support herself.

Myrtle's children respected her decision not to sell, and, in 1999, the children and Myrtle entered into a written contract agreeing: that Ketan House and the adjoining property would not be sold prior to Myrtle's death; that the children would advance Myrtle money to support herself; that each of the children would contribute in such amounts as they were able; that Myrtle would provide at her death that Ketan House and the surrounding property would be sold, the advances that the children made would be repaid to them, and the balance distributed equally among the three children. Over the next ten years each of the children made various cash contributions to their mother's support. The children recently had the house and property appraised at approximately \$3.5 million dollars.

After Myrtle's death, a will signed on April 1, 2008 by Myrtle and attested before two officers of a local bank, was found in Myrtle's safe deposit box at the bank. The will contained provisions disposing of various articles of tangible personal property, leaving Ketan House and the adjoining property to Dean, and the remainder of Myrtle's property consisting of stocks and investment accounts equally to her three children. The stocks and investment accounts were maintained in a brokerage account in Richmond, Virginia. The will did not have self-proving provisions, and it named Nancy Jo, now a resident of New Orleans, Louisiana, as the executor.

(a) In what jurisdiction should the estate be administered? Explain fully.

(b) What is the effect of the written agreement among Myrtle and her three children on the disposition of Ketan House and on the April 1, 2008 will? Explain fully.

(c) Is the will entitled to probate, and, if so, what must be done to have it admitted to probate? Explain fully.

(d) Can Nancy Jo qualify as executor of Myrtle's estate? Explain fully.

[a] Under Va. Code § 64.1-75, primary jurisdiction for probate lies with the circuit court (and its clerks) "wherein the decedent has a mansion house or known place of residence." Under Va. Code § 64.1-76, there is a presumption that moving into a nursing home does not change the testator's place of legal residence; this presumption "may be rebutted by competent evidence."

Before moving into the nursing home, Myrtle's legal residence was in Ketan House in Hampton, and there is a presumption that it remained Hampton until her death. None of the facts suggest an intent to change her residence to Poquoson, and in fact suggest a very strong attachment to Ketan House. So, jurisdiction lies with the Circuit Court for the City of Hampton.

[b] The written agreement is an enforceable contract. "A contract to make a will is controlled by the same rules and principles and is enforceable as other contracts. Thus, in order to be enforceable the contract

must be certain and definite, based on a valuable consideration and the proof thereof must be clear and convincing. Ordinarily, if the contract involves real estate it must be in writing, but if in writing it is sufficient if signed only by the decedent.” Harrison on Wills & Administration for VA & WV § 5.03. Also: Wingold v. Crowder 164 Va. 431 [1935], Burke, Exec. v. Gale 193 Va. 130 [1951]

The contract must be specifically performed. “[E]quity can do what is equivalent to specific performance by compelling those upon whom the legal title has descended to convey or deliver the property in accordance with the terms of the agreement on the ground that it is charged with a trust in the hands of an heir, devisee, personal representative or purchaser with notice.” *Id* (Harrison). Thus, Dean holds Ketan House as constructive trustee for the benefit of himself and his two siblings. As such, Dean must sell Ketan House and comply with the terms of the agreement.

To the extent that the Will does not conflict with the terms of the contract, the terms of the Will will operate.

- [c] While the will is not a self proving will, it does satisfy the Virginia statutory requirements for due execution. Va. Code § 64.1-49. A self-proving affidavit is not required. The will was in writing and signed by Myrtle. § 64.1-49 also requires that the will be signed or acknowledged in the presence of two competent witnesses, present at the same time. Moreover, the two witnesses must “subscribe the will in the presence of the testator.”

The will proponents will seek probate before the deputy clerk in charge of probate in the Circuit Court for the City of Hampton. Va. Code § 64.1-77. Because there was no self-proving affidavit, the proponents will need to present testimony from the bank officers verifying the authenticity of their signatures and establishing the requisites for due execution described above (i.e., that the testator signed or acknowledged the will in the presence of both and that they subscribed the will in the presence of the testator). The bank officers may also need to testify as to the testator's capacity and intent. The proponents may offer depositions of the bank officers if, for good cause, they cannot personally testify. Va. Code § 64.1-87.

- [d] The fact that Nancy Jo is not a Virginian does not bar her from qualifying as executor. In order to qualify, though, Nancy Jo would need to consent to service of process in Virginia. Moreover, Nancy Jo must post surety on her fiduciary bond--even if waived by Myrtle's will--unless a Virginia resident also qualifies as co-executor (or administrator c.t.a. to be precise) along with her. Va. Code § 26-59.

There is a conflict, though, between Nancy Jo and Dean over the 1999 agreement. This conflict does not, per se, bar Nancy Jo from serving as executor. But, the court would have the power to deny letters testamentary to Nancy Jo if Dean objects and convinces the court that the conflict would interfere with Nancy Jo's performance of her duties.

[2] [CONFLICTS + FEDERAL & VIRGINIA PRACTICE & PROCEDURE] Peter and Paula Pane, residents of Virginia, owned a two-acre lot in the prestigious Robinson Forest subdivision in Fairfax County. In January 2007, they entered into a builder's standard form home construction contract with Home America Corporation (“HAC”), a national homebuilder, for the construction of a home on their Robinson Forest lot. HAC is a Delaware corporation, the executive offices of which are now located in Washington, D.C. Until 2005, HAC's headquarters had been in Baltimore, Maryland.

The Panes claim that prior to execution of the contract, HAC's salesperson told them that the exterior finish of the house would be “conventional stucco that requires little to no maintenance.” The construction contract stated, among other things, that the “interpretation, validity and construction of the terms and conditions of this contract shall be governed by the laws of the State of Maryland.” The contract specifications provided that “the exterior finish of the house shall be conventional stucco.” In fact, the home was actually constructed using a synthetic stucco product for the exterior finish. Synthetic stucco, which is inexpensive to buy and install, has an unfortunate history of water infiltration problems.

The Panes' home was completed on July 1, 2007, and on that date HAC turned over occupancy to them. The Panes did not realize that synthetic stucco had been used, although the HAC home warranty book, which was given to them on July 1, 2007, plainly stated that the exterior finish of the home was synthetic, not conventional, stucco and that homeowners are responsible for inspecting the exterior every three months and for caulking the seal around the exterior finish of the house, when needed.

Within a few months after the Panes took occupancy, the home began to experience serious water infiltration problems, which HAC was unsuccessful in remediating. The water infiltration caused mold, and the Panes both experienced for the first time debilitating migraine headaches.

On July 20, 2010, the Panes filed a complaint against HAC in the Circuit Court for Fairfax County, setting forth counts for breach of contract and fraud and seeking to recover \$450,000 in compensatory damages. The Maryland statute of limitations for breach of contract is three years and for fraud it is two years.

HAC's in-house general counsel has just reviewed the Panes' complaint, which was served on HAC today, and asks for advice on the following questions.

(a) If it is assumed that the Circuit Court in Virginia would enforce the choice of law provision in the home construction contract, which state's contract statute of limitations will the Virginia court apply, and will it bar the Panes' claim for breach of contract against HAC? Explain fully.

(b) If it is assumed that the Circuit Court in Virginia would enforce the choice of law provision in the home construction contract, which state's fraud statute of limitations will the Virginia court apply, and will it bar the Panes' claim for fraud against HAC? Explain fully.

(c) Without regard to the assumptions stated in parts (a) and (b), above, will the Circuit Court in Virginia enforce the choice of law provision in the home construction contract? Explain fully.

(d) Are there grounds HAC can assert to transfer the case to a federal district court, and, if so, what steps must HAC take, and within what time limit, to accomplish the transfer? Explain fully.

- [a] The choice of law provision means that the substantive provisions of the contract will be construed under Maryland law. However as to procedural matters, such as the statute of limitations, the Virginia court will apply Virginia law. However, while Virginia's written contract provisions in §8.01-246 establishes a five year s/l for written contracts, §8.01-247 provides that "No action shall be maintained on any contract which is governed by the law of another state or country, if the right of action thereon is barred either by the laws of such state or country or of this Commonwealth". Thus the Virginia court would apply the shorter of the two periods of limitation, which would be the three year period under Maryland law. Since suit on the contract claim was filed more than three years after delivery of the home to the Panes, the statute of limitations on the contract claim would have run and the claim was barred.
- [b] Because the statute of limitations as to a claim for damages from fraud is an issue of procedure, not substantive rights of the parties under the contract, the Virginia court will apply Virginia's two year statute of limitations under §8.01-243[A]. Also, it will apply §8.01-249[1] which establishes a discovery rule for the starting of the clock to when the claim is discovered or by the exercise of due diligence reasonably should have been discovered. Applicant should discuss whether the provisions in the warranty contract describing the stucco as synthetic and advising of the maintenance requirements was sufficient to put the Panes on notice and start the statute of limitations running. However, whether the statute started to run on the date of delivery of the Home Warranty Book, on July 01, 2007 or a few months later after taking occupancy when the Panes started experiencing problems, the two year S/L for damages for fraud would have run before suit was filed on July 20, 2010.
- [c] This was a choice of law provision and the law in Virginia is that these types of clauses will be enforced if the state who's law is selected to govern the substantive provisions of the contract is reasonably related to the purpose of the agreement. The BBE thought on the facts, the choice of law provision was probably not enforceable because there was no relationship between the contract and the State of Maryland. The only "Maryland" facts are that the other party previously was located there. Hooper v. Musolino 234 Va. 558 [1988].
- [d] Removal permits a defendant to move a case from state trial court to federal district court. 28 U.S.C. § 1441 allows removal only if the case could originally have been brought in federal court. That means the federal district court must have subject matter jurisdiction, such as federal question, 28 U.S.C. § 1331, or diversity subject matter jurisdiction, 28 U.S.C. § 1332, in order for the defendant to be able to remove the case.

Removal is permissible in this case because the case could have been filed originally in federal district court under that court's diversity subject matter jurisdiction. The diversity statute, 28 U.S.C. § 1332, requires that all plaintiffs be citizens of states different from the defendants' state(s) of citizenship. The facts state that plaintiffs are residents of Virginia, which suggests (given no facts to the contrary) that they are citizens/domiciliaries of Virginia. The diversity statute, 28 U.S.C. § 1332(c), defines a corporation's citizenship to be dual: the place of incorporation and the principal place of business. Here, the defendant's place of incorporation is Delaware and the principal place of business is DC. The latter conclusion is based on the fact that only fact that we have to indicate place of business is that the defendant's headquarters are in DC. Thus, diversity exists between the Virginia plaintiffs and the DC/Delaware defendants. The diversity statute also requires that the amount in controversy exceed \$75,000. Here, the amount of damages the plaintiffs seek exceeds \$75,000. Federal diversity jurisdiction is proper.

The geography of removal: Under 1441(a) the defendant may remove from the state court to the federal district court located in the same district where the state court is sitting.

Procedures for removal are codified at 28 U.S.C. § 1446 and provide:

Time for removal: The time for removing to the federal court is within 30 days from when the defendant is served with process.

Procedure for removal: To remove, the defendant simply files a notice of removal, including grounds for removal, with the appropriate federal district court, which divests the state court of jurisdiction. Notice of removal must state the grounds for removal and be accompanied by all process, pleadings and orders served in the case to date. This automatically removes the case, and the case is now pending in federal court unless plaintiff successfully seeks remand to state court.

The Bar Examiners were asked whether they were interested in the applicants' discussing the recent Supreme Court decision of *Hertz Corp. v. Friend*, 130 S. Ct. 1181 (2010) and they said that they were not. In *Hertz*, the Supreme Court decided that the "principal place of business" under section 1332[C](1), which defines corporate citizenship for purposes of diversity, refers to the location where a corporation's officers direct, control, and coordinate the corporation's activities, its "nerve center."

[3] [UCC SALES] Percival Purchaser ("Purchaser") was an avid collector of coins, which he believed to be a better investment than stocks and bonds. While traveling through Virginia, Purchaser came upon a stamp and coin store owned by Stanley Seller ("Seller") in Farmville. In the course of browsing around the shop and talking to Seller about fishing and various military bases on which both had served, Purchaser saw a set of coins minted in 1955. The set included a penny, a nickel, a dime, a quarter, a half-dollar, and a silver dollar, all encased in a single plastic display box. In the lower left-hand corner of the plastic box was a small brass plaque engraved with these words: "1955 Coin Set, Mint Condition, Uncirculated."

Purchaser believed the set would be a great addition to his collection, so without discussing the condition or value with Seller, Purchaser paid Seller's asking price of \$5,000. When Seller put the coin set in a carry-out bag for Purchaser, he also included a slip of paper on which the following words were inscribed:

This is our estimate for insurance purposes only of the present retail replacement cost of items and is not necessarily the amount you might obtain if the articles were offered for sale: One set of U.S. coins minted in the Denver Mint, uncirculated, and in mint condition, appraised to be worth \$12,500.

A few weeks later, at a gathering hosted by Purchaser for fellow coin collectors, he was proudly showing off his newly acquired 1955 set. One of the guests, who was a known and respected appraiser of collectible coins, examined the set carefully. He told Purchaser that, although the coins were in very good condition, they had actually been circulated and, on the market were worth little more than their face value, which was in fact true.

When Purchaser tried to return the coins to Seller and get a refund of the \$5,000, Seller just laughed and said, "So, sue me. You bought those coins 'as is.' You didn't rely on me, and I didn't make any warranties to you."

What UCC sales warranties, if any, might Purchaser reasonably assert that Seller made and breached? Explain fully.

The statement on the plaque is an express warranty. The date and the “uncirculated” statement would be a description and affirmation of fact warranties under §8.2-313(1)(a) & (b) and it was part of the basis of the bargain. There is no requirement of reliance. *Daughtrey v. Ashe* 243 Va. 73 [1992]

The estimate of value regarding the items on the slip of paper would be “an affirmation of value” under §8.2-313(2) and not a warranty.

Also, the seller being a merchant, there was a warranty of merchantability. To be merchantable under §8.2-314(2)(a) the coins must be able to “pass without objection in the trade under the contract description.” The plaque provides the description and the coins would not pass muster. Also, under §8.2-313(2)(f) the goods must conform to affirmations on the container or label. The coins did not. Under §8.2-316(3)(b), there is no warranty of merchantability with regards to defects that the buyer ought to have discovered during an examination of the good, creating the issue that should be discussed of whether on these facts, the buyer ought to have realized that the coins had been circulated.

The BBE did not require, for full credit, a discussion of the implied warranty of fitness for a particular purpose under §8.2-315. They indicated the Board would give extra credit to applicants with a good discussion of why there would not be such a warranty on these facts.

[4] [AGENCY + PERSONAL PROPERTY + VA. CIVIL PROCEDURE] Irene Star (Irene) owned a valuable diamond and emerald necklace that she desired to sell to obtain cash for a business venture. Angela Blake (Angela) was an independent rare gem broker in Wise, Virginia. Irene and Angela entered into a written contract, under which Angela agreed to take possession of the necklace for the purpose of selling it at a price no less than \$75,000, and Irene would pay Angela a 10% commission.

Angela had been invited to an elegant gem show at the upscale Inn at Wise, which she knew would be attended by leading jewelers from around the country. To show off the necklace, she wore it at the gem show. As anticipated, she got several inquiries as to its availability and received an offer of \$100,000 for it. She told the offeror she would get back to her within a week.

Feeling a bit woozy after having drunk several glasses of champagne being served at the gem show, Angela retired to the ladies lounge to refresh herself. She took off the necklace and laid it on the counter while she dabbed her face with cold water. She absent-mindedly walked out of the ladies lounge without the necklace. She left the show and headed for home without realizing that she had left the necklace behind.

In the meantime, Grace Milan (Grace), a housekeeping employee of the Inn at Wise who had gone into the ladies lounge to clean up, saw the necklace lying on the counter. She had no idea of its value, but she recognized it as the one Angela had been wearing and went searching for Angela. Someone told Grace that Angela had just left, so Grace put the necklace in her purse, intending to telephone Angela to tell her that she had the necklace and would return it to her. She put her purse on a shelf in the employees’ coatroom. When Grace finished her work shift, she retrieved her purse and discovered that the necklace was missing – someone had stolen it. She reported the series of events to her manager.

When Angela got home, she suddenly realized that she had left the necklace at the gem show, and, just as she began to panic, the phone rang. It was the manager of the Inn at Wise calling to tell her that Grace had found the necklace but that, unfortunately, someone must have stolen it out of her purse because, when Grace went to retrieve her purse from the employees’ coatroom at quitting time, the necklace was missing.

Irene sued both Angela and the Inn at Wise for the loss of the necklace, basing the claim against each on a breach of duty as a bailee of the necklace.

(a) What must Irene prove to establish a *prima facie* bailment case against Angela, and is it likely that she will prevail in her suit against Angela? Explain fully.

(b) What must Irene prove to establish a *prima facie* bailment case against the Inn at Wise, and is it likely that she

will prevail in her suit against the Inn at Wise? Explain fully.

(c) To which Virginia court would an unsuccessful litigant in the suit brought by Irene appeal?

- [a] When a bailor relies on a contract of bailment rather than pursuing recovery *ex delicto* on the bailee's negligence, a *prima facie* case requires only that plaintiff prove delivery and the bailee's failure to return the good. In this case, Irene should have no difficulty establishing a *prima facie* case. The bailee, Angela, would be liable under the contract unless she could show that her failure to return the necklace was without fault or negligence on her part.

As with most commercial bailments, the arrangement in this case was for mutual benefit – Irene expecting to benefit from sale of the necklace and Angela expecting to benefit by earning a substantial commission. Angela would therefore be held to a standard of ordinary diligence and would be liable for ordinary negligence. Given the value of the necklace, Angela's act of taking the item off, laying it on the counter in the ladies' lounge, and then absent-mindedly leaving the lounge without it, would likely constitute ordinary, if not gross, negligence. Thus, Irene would likely prevail in her suit against Angela.

- [b] Where there is no bailment contract, a bailor must prove delivery and acceptance to establish a *prima facie* case for liability. Here again, Irene intentionally yielded possession of the necklace, and Grace deliberately took it up when she found it, though she did so with the intention of returning it to its owner. The fact that Grace had no idea of its value would be irrelevant to the question of whether a bailment relationship was created. Delivery by Irene and acceptance by Grace would clearly be established.

Grace is an employee of the Inn (given in the facts), and therefore, the Inn is vicariously liable for her actions taken in the scope of her employment. Presumably, as a housekeeping employee, Grace's duties included the safekeeping of mislaid items belonging to customers of the Inn until the items could be returned to the owner. Therefore, Grace was acting within the scope of her employment when she took possession of the necklace and the Inn is vicariously liable for her actions (putting the necklace in her purse and leaving her purse in the employees' coatroom).

If Grace (and the Inn, by extension) had a duty to safeguard the property of guests, then the bailment relationship would arguably have been for the mutual benefit of the hotel and its guests, and a standard of ordinary care would apply. If, on the other hand, the court concluded that Grace had no obligation to take possession of the necklace, but did so strictly as a favor, then the bailment was gratuitous and Grace would be held to a standard of only slight care, and would be liable only if guilty of gross negligence. In either case, Irene is unlikely to succeed in her suit against the Inn. Grace's initial effort to find Angela, and her subsequent act of placing the necklace in her purse and leaving it in what should have been a reasonably secure employee coatroom, would likely constitute at least ordinary care.

- [c] This being a civil case, not involving domestic relations matters, the appeal would go by petition to the Supreme Court of Virginia.

[5]. [CRIMINAL LAW] Sylvia, an undercover narcotics detective for the Carroll County Sheriff's Department, made arrangements with Jay to meet him at a restaurant parking lot in Hillsville, Virginia, for the purpose of purchasing one-half pound of marijuana for the price of \$950. She also arranged for a squad of other officers to be nearby in an unmarked car, ready to make the arrest at her signal.

When Jay arrived at the meeting site, he parked his pickup truck near Sylvia's unmarked vehicle and beckoned with his hand for Sylvia to come over to his vehicle. Sylvia walked over to Jay's pickup, leaned in the passenger side window, and asked to see the "product," that is, the marijuana. Jay told Sylvia get into the truck so he could make the exchange inside the passenger compartment. She refused at first, but after several requests by Jay, she opened the passenger-side door. At the same time, she gave the signal for the other officers to spring into action. They rushed up to Jay's pickup and arrested him.

While one of the officers was handcuffing Jay, an unloaded handgun slipped out from under Jay's waistband. At that moment, an accomplice of Jay named Red, who had been hiding under a tarpaulin in the cargo bed of Jay's pickup, jumped up and started running away. One of the other officers apprehended him. The officers searched Jay and Red and

the entire pickup, but found no marijuana or other contraband.

The officers read Jay his Miranda rights, after which Jay spoke freely. He said, "I wanted to get Sylvia inside my truck. Then, I would hand her a bag with some dry leaves in it and tell her to give me the money. If she refused, the plan was for Red to poke his head in through the rear window to scare Sylvia into surrendering the money. I intended to show her the handgun only as a last resort."

Jay was subsequently charged with attempted robbery and attempted use of a firearm while attempting a robbery. The Commonwealth is offering Jay a plea bargain with a significantly reduced sentence.

(a) Assuming that at trial the Commonwealth's Attorney can prove each of the foregoing facts beyond a reasonable doubt, do the facts support each of the elements of the crimes of (i) attempted robbery and (ii) attempted use of a firearm while attempting a robbery? Discuss fully.

(b) Explain what an "Alford" plea is and explain fully whether or not, based on the facts, it would be advantageous for Jay to enter such a plea? Discuss fully.

- [a] No, the evidence fails to support all of the elements. Robbery is the taking, with the intent to steal, of the personal property of another, from his person or in his presence, against his will, by violence or intimidation. Proof of attempted robbery requires proof of an intent to commit all of the elements of robbery and in addition, proof that the defendant committed a direct, but ineffectual, act to accomplish the crime. The direct, but ineffectual act is commonly referred to as the requirement of an overt act. The answer to the question turned on the requirements of an overt act and intent to commit the principal crime.

The BBE thought the better answer was that the evidence fell short in that the conduct in "planning" the act does not constitute an overt act. Also, under the rationale of the Supreme Court of Virginia in the case the BBE relied on, *Jay v. Commonwealth* 275 Va. 510 [2008], on very similar facts, concluded that the evidence did not prove beyond a reasonable doubt the intent to use violence or intimidation in order to steal the victim's personal property. The court noted that at no time did the accused threaten force or violence and the evidence did not negate that if the victim had just given up the money, there would have been no threat of force or violence.

If the attempted robbery charge failed, then the attempt to use a firearm, etc. charge fails also. The BBE did indicate that an applicant that recognized the intent and overt act issues and discussed them well, but reached the conclusion that the evidence was sufficient, would receive full credit.

- [b] An *Alford* plea permits an accused to consent to being convicted without admitting that he committed the offense, but acknowledging his awareness of the quantity of evidence against him and that he did not want to take a chance on a jury trial. It is not a conditional plea of guilty and the consequences of an *Alford* plea are the same as with a guilty plea: waives right to trial by jury, gives up the right to confront witnesses, to cross examine and the right to appeal the conviction.

The BBE did not reveal their whether such a plea would be advantageous to Jay, but it's expected that any reasonable analysis would be acceptable.

[6] [BUSINESS ORGANIZATIONS] Four physicians, Drs. Allen, Baker, Carter and Dobbs, living in Lynchburg, Virginia and practicing medicine there, plan to start a winery to produce high quality wines for the commercial market. They have located a tract of land in Nelson County, Virginia, which they believe to be ideal for their purposes and which they intend to purchase. They are further negotiating with a prospective manager with extensive experience, who is enthusiastic about the project. Dr. Allen will be active in the management of the business, and Drs. Baker, Carter and Dobbs will be investors inactive in management.

Each of the four Doctors expects to contribute \$250,000 to the business. They do not expect the business to be profitable for 5 years, and, in addition, they have each committed to guarantee \$1 million in bank loans to be made to the business. They believe that the endeavor will be enormously profitable after 10 years.

The Doctors have consulted you and have requested your advice on forming the appropriate entity for the project. They wish to consider (i) a corporation, (ii) a general partnership, (iii) a limited partnership, and (iv) a limited liability company.

Answer and explain fully the following questions as to each form of entity:

(a) How is each form of entity governed?

(b) Will the entity shield the Doctors from personal liability from the debts of the entity?

(c) How will the net income of the entity be taxed under the federal income tax laws?

(d) Which form of entity will likely be most appropriate for the Doctors?

- [a] [i] Corporation: Is governed by a Board of Directors and Officers §13.1-673, §13.1-693 & §13.1-694
- [ii] General Partnership: Is governed by its general partners. §50-73.91
- [iii] Limited Partnership: Is governed by its general partners. §50-73.29
- [iv] Limited Liability Company: Is governed by its members unless the articles of organization or an operating agreement provides in writing for management by a manager or managers. §13.1-1022.
- [b] [i] Corporation: Yes, the owners [stockholders] are protected against liability for the corporation's debts.
- [ii] General Partnership: The general partners are liable for the partnership debts.
- [iii] Limited Partnership: The general partners are liable for the partnership's debts; the limited partners are liable for the partnership's debts only up to the amount of their capital contributions, so long as the limited partners do not become involved in the day to day operation of the partnership's business.
- [iv] Limited Liability Company: Members are not liable for the debts of the limited liability company. §13.1-1019
- [c] [i] Corporation: If the corporation is a C corporation, then the corporation pays tax on income when earned and the shareholders also pay tax on dividends when paid. The income is taxed at two levels. If the corporation is an S corporation, then the corporation pays no tax itself. The owners, though pay tax directly on income as earned. The income is passed through to the owners.
- [ii] General Partnership: The partnership is not taxed; net income, for tax purposes is passed onto and taxed to the partners.
- [iii] Limited Partnership: The partnership is not taxed; net income, for tax purposes is passed onto and taxed to the partners.
- [iv] Limited Liability Company: The limited liability company is not taxed; net income, for tax purposes is passed onto and taxed to the partners.
- [d] The LLC form will probably be the best choice for the doctors since it will avoid any dual taxation and still immunize the doctors from the debts of the LLC.

[7] [CREDITORS RIGHTS + UCC SECURED TRANSACTIONS] Ed Heart Forklifts, Inc. ("Heart"), a forklift dealership with places of business in both Powhatan and Chesterfield Counties, Virginia, obtained a line of credit loan from Jackson Ward Bank ("Bank"). As collateral for the loan, Heart executed a security agreement granting Bank a security interest in a new machine lathe used in Heart's business for manufacturing custom fittings for forklifts. An unsigned

financing statement specifically describing the machine lathe, naming Heart as the debtor and Bank as the secured party, was promptly filed by Bank with the Clerk of the State Corporation Commission in Richmond. There is currently a \$30,000 unpaid balance on the line of credit.

Several months later the machine lathe failed and it was taken to Mike's, a local mechanic's shop, for repairs. The damage was extensive, requiring the machine to be rebuilt at a cost of \$15,000. Mike, the mechanic, following the advice of his attorney brother-in-law to always check for liens before making high dollar repairs, checked with the Circuit Court Clerks' offices in Powhatan and Chesterfield and confirmed that there were no recorded financing statements in those locations in Heart's name describing the machine lathe. Thereafter, Mike agreed to repair the machine lathe, with payment by Heart upon completion of the repairs.

Upon completion of the repairs, Heart failed to pay the bill as agreed. Mike, who had determined that the machine lathe was currently valued at \$25,000, informed Heart that he would retain possession of the machine lathe and sell it to recover the amount due for the repairs.

Bank then notified Mike that it held a security interest in the machine lathe as collateral for its loan to Heart. Mike demanded proof of the security interest, and Bank gave him a copy of the recorded financing statement. Bank then demanded possession of the machine lathe for the purpose of selling it to enforce its security interest.

(a) Does Bank have an enforceable security interest in the machine lathe? Explain fully.

(b) What rights, if any, does Mike have against Bank to retain the machine lathe and to be paid for his repair charges? Explain fully.

[a] Yes. A security interest attaches to the collateral when it become enforceable against the debtor and the other requirements such as value being given, the debtor had rights in the collateral. §8.9A-203.

[b] The Bank's security interest is generally good against Mike because it was filed properly with the SCC. It does not have to be signed by the debtor; execution of the security agreement constitutes authorization for the filing of the financing statement. §8.9A-310. However, Mike would have a lien superior to the Banks because of having possession of the property, a mechanic's possessory lien, for up to \$800.00 of the amount due him. After that, Mike's interest and lien on the property would be inferior to the Bank's. Once the bank was paid in full, Mike would step back in line, if there was any money left. §8.9A-333 & §43-33.

[8] [LOCAL GOVERNMENT & FEDERAL PRACTICE & PROCEDURE] Potomac Cable Corporation ("Potomac"), a Delaware corporation with its headquarters in Bethesda, Maryland, filed a lawsuit on July 23, 2010 in the United States District Court for the Eastern District of Virginia, properly based on diversity jurisdiction, seeking damages, declaratory relief, and injunctive relief against the City of Alexandria, Virginia (the "City").

Potomac, the operator of a cable television system by virtue of a non-exclusive franchise granted by the City in 1995, alleges in its Complaint that the City is now preparing to offer cable television services directly to City residents via a fiber optic cable network that the City has constructed.

Potomac asserts that the City's operation of the cable television system is unlawful for two reasons: First, that the City's operation of such a system would be *ultra vires* and, second, that the City Council's decision to start its own cable service was made in a meeting closed to the public, i.e., a so-called "executive session," and that it should have been decided and voted on by the City Council in a public meeting.

The City opposes the lawsuit and, acknowledging that there is no statute or City Charter provision that uses the specific words "cable television," cites the following sections of the Code of Virginia to justify its position that it has the power to engage in the cable television venture:

- Section 15.2-2109(A), which authorizes localities to establish and operate "waterworks, sewerage, gas works (natural or manufactured), electric plants, public mass transportation systems, stormwater management systems, and other public utilities."

- Section 15.2-102, which defines the term “locality” to mean “a county, city, or town as the context may require.”
- Section 15.2-1102, which confers upon municipal corporations the authority to exercise functions “necessary or desirable to secure and promote the general welfare” as authorized by state law.
- Section 15.2-102, which defines the term “municipal corporation” to “relate only to cities and towns.”

As to Potomac’s claim that the City’s decision was unlawfully made in a closed meeting, the City takes the position that the operation of a cable television system is a proprietary function and contends that when performing a proprietary function, the City Council is entitled to make such decisions in private, just like any other private business, in order to protect the economic interests of the City.

Because the City has announced its intention to begin enrolling cable television customers on August 1, 2010, Potomac now files a motion for a preliminary injunction to enjoin the City from proceeding with any enrollments pending a trial on the merits of the lawsuit.

The District Court Judge asks you, as her law clerk, to answer the following questions:

(a) Based on an analysis *solely* of the Virginia statutory sections cited above, is the City empowered as a matter of Virginia law to operate its own cable television system? Explain fully.

(b) Is the City Council’s executive session vote to begin operating a cable television system valid under Virginia law? Explain fully.

(c) What criteria should the District Court use to determine whether a preliminary injunction should be issued, and how ought the Court rule in this instance? Explain fully.

- [a] This part required the applicant to recognize the *Dillon* rule that states local governments have only the powers expressly granted them by the General Assembly of Virginia and that statutes granting authority to local governments should be narrowly construed against the granting of authority. The BBE thought the better conclusion was that the City did not have the authority to operate a cable system, it indicated it was primarily looking for a recognition and accurate description of the *Dillon* rule accompanied by a good discussion. *Marcus Cable Associates v. City of Bristol* 237 F. Supp. 2d 675 [2002] ✖ subsequent to this decision, the General Assembly enacted the *Municipal Cable Law*, §15.2-2108.2 *et seq.* significantly restricting the authority of local governments to operate a cable television system. This does not change the analysis in the *Marcus* case as to how the *Dillon* rule functions.

There was discussion over whether the use in question (a) of “*solely*” could be misleading and suggest to an applicant that the BBE was not looking for a *Dillon* rule analysis, but rather only a statutory analysis. The BBE did not think the question was misleading, but did note the point.

- [b] No, the closed session vote was not valid. Subject to certain exceptions that do not apply to this situation, the Virginia Freedom of Information Act [§2.2-3700 *et seq.*] requires that all meetings of public bodies must be public.
- [c] The criteria are: [i] that the plaintiff is likely to succeed on the merits; [ii] that the plaintiff is likely to suffer irreparable harm in the absence of preliminary relief; [iii] that the balance of equities tips in the plaintiff’s favor; and [iv] an injunction is in the public interest. All four requirements must be satisfied by a “clear showing”. *The Real Truth About Obama, Inc. V. Federal Election Commission et als* 575 F.3d 342 [2009]. ✖ Note this case went up to the 4th Circ. and then to the USSC. The USSC reversed on First Amendment issues and remanded to the 4th Circuit. The 4th Circuit reissued its earlier opinion as to the facts and the criteria for issuance of a temporary injunction and remanded to the District Court for further proceedings on other matters.

[9] [UCC - NEGOTIABLE INSTRUMENTS] Mary Moore, a recent Virginia Tech graduate and licensed civil engineer, has started a business in Blacksburg, Virginia, as a sole proprietor providing temporary civil engineering services to businesses in the area.

Mary rented an unfurnished office. When Mary's friend, June Smith, visited the office, she noticed that Mary was using a card table and a straight back chair as her only office furniture. As a friendly gesture and without telling Mary, June went to Kanter Office Furniture where she purchased a suite of office furniture and had it delivered in a Kanter truck to Mary. June signed a promissory note for \$20,000, payable to Kanter and due in 60 days. June signed the note as follows: "June Smith as agent for Mary Moore." After learning what June had done, Mary gratefully accepted the furniture, signed the delivery documents acknowledging receipt, and used the furniture in her office. When the note came due, June was unable to pay. Kanter demanded payment from Mary, who refused, saying that June was not authorized to purchase the furniture or sign the note as Mary's agent.

In another transaction, Mary borrowed \$5,000 from Hokie Bank for her new business. She signed a promissory note and gave Hokie Bank a security interest in Mary's accounts receivable, which the bank considered would satisfy the debt in the event of default. Mary's father, John Moore, as a favor to his daughter, co-signed on the face of the note, adding after his signature the words, "Guarantor of all amounts due." The bank inadvertently failed to perfect its security interest in Mary's accounts receivable. Mary defaulted on the note. At the time of her default, Mary's accounts receivable would have been sufficient to pay the note. However, a subsequent secured creditor to whom Mary had given a security interest in the same receivables did perfect its interest and foreclosed on the receivables before Hokie Bank could do so. Hokie Bank demanded that John Moore pay the balance due on the note.

In order to travel to her clients' businesses, Mary purchased a used automobile from VT Motors for \$10,000. Mary signed a promissory note in that amount payable in monthly installments to VT Motors. Before it would deliver the automobile to Mary, VT insisted on a guarantor because Mary had no established credit. John Moore, her father, signed the note, adding after his signature the words, "Guarantor of collection of this debt by VT Motors." The note contained an acceleration clause making the entire balance due in the event of default by Mary. Three months later Mary missed a payment on the note. VT Motors was unable to reach Mary, who was on an extended business trip out of the area. VT Motors, invoking the acceleration clause, demanded payment from John Moore of the entire balance due.

(a) Is Mary liable to Kanter Office Furniture on the note signed by June Smith as agent? Explain fully.

(b) Is John Moore liable to Hokie Bank for the balance due on the note that he signed as "Guarantor of all amounts due?" Explain fully.

(c) Is John Moore obligated to pay the note to VT Motors that he signed as "Guarantor for collection of this debt?" Explain fully.

- [a] Mary did not authorize June to purchase the furniture and sign the promissory note and June did not have apparent authority to enter into the transaction on Mary's behalf [Mary did not make any sort of manifestation that June could act on her behalf, nor could Kanter Office Furniture have reasonably believed that June was authorized], but after learning of what happened and seeing the furniture, her subsequent conduct constituted a ratification - Mary knew the terms of the contract and impliedly accepted the benefit of the deal by taking the furniture - of what June had done and Mary became liable on the note.
- [b] Moore was an accommodation party under §8.3A-419 and on paying the debt is entitled to transfer of the collateral to him in order to try to gain reimbursement for what he paid. When the Bank failed to perfect and protect its security interest in Mary's receivables, it adversely affected Moore's ability to gain reimbursement from the collateral and consequently to the extent of the value of the collateral that was lost, Moore is relieved from paying the Bank. §8.3A-605(e)(f)&(g)(i).
- [c] No, Moore's not obligated to pay the note to VT Motors. Under §8.3A-419(d), when Moore added "guarantor of collection...." Moore became obligated to pay only if [i] execution of judgment against the other party had been returned unsatisfied, [ii] the other party is insolvent or in an insolvency proceeding, [iii] the other party cannot be served with process, or [iv] it is otherwise apparent that payment cannot be obtained from the other party.