Summary of Answers to the Essay Part of the July 2008 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. jrz

1. Mr. and Mrs. McCoy purchased a lot from Mr. and Mrs. Davis in Surry County, Virginia, upon which they intended to build a home. During negotiations preceding the sale, the McCoys expressed concern about the suitability of the lot because they feared the soil might not have sufficient percolation for a septic system. The Davises responded truthfully that the lot and an adjoining one had passed the County's percolation tests within the past year, and the owner of the adjoining lot had recently been issued a building permit for a home with a septic system. The McCoys confirmed that information.

On July 1, 2007, the McCoys and Davises signed a real estate purchase contract wherein the sale was expressly conditioned upon their being able to obtain a building permit and percolation clearance for a septic system at such time as they took title. On September 1, 2007, the McCoys paid the contract price, and the Davises conveyed the property by deed. No mention was made in the deed of the conditions upon which the sale was contingent. Two months after the sale, the McCoys applied for a building permit, but were turned down because, in August 2007, the County had changed its method of determining the suitability of soil for a septic system, and the lot did not pass the new test. The McCoys want to know what their rights are against the Davises. Because they will not be able to use the lot for the intended purpose, they no longer have any use for it.

(a) If the evidence is that on September 1, 2007 neither the Davises nor the McCoys were aware of the change in the County requirements, what equitable remedy, if any, is available to the McCoys, and upon what facts would any such remedy be based? Explain fully.

(b) If the evidence is that on September 1, 2007 the Davises *were* aware of the change in the County requirements, knew that the lot would not pass the test under the new requirements, and failed to inform the McCoys, what equitable remedy, if any, is available to the McCoys, and upon what facts would any such remedy be based? Explain fully.

[✖] The BBE viewed this problem as requiring discussion about rescission under two theories:

(a) This involved a mutual mistake of fact that was a material part of the contract and the BBE thought on the facts, rescission would lie. Miller v. Reynolds 216 Va. 852 (1976)

(b) This scenario involved a unilateral mistake of fact brought about by the concealment and/or fraud of the Sellers and rescission would lie.

Neither a discussion of the doctrine of merger nor of the enhanced burden of proof on a fraud claim [clear & convincing evidence] was required for full credit.

2. Shortly after their marriage, Larry and Connie purchased a home on a residential lot(the "home") in Damascus, Virginia, which is in Washington County. They took title as tenants by the entirety with the right of survivorship. They separated in 2005, by which time the home was fully paid for. A protracted, acrimonious divorce suit followed.

Connie and the two children of the marriage continued to occupy the home pending entry of the final divorce decree. Connie let it be known that she would like to keep the home after the final decree, but only if it were awarded to her free and clear. Larry said he did not want the home but that he opposed awarding it free and clear to Connie as part of the property settlement and that he would refuse to buy out Connie's interest. On February 29, 2008, Larry took out a $150,000 loan from First Bank (the "Bank") and executed a deed of trust conveying "all my right, title, and interest" in the home to secure the loan. On May 1, 2008, Bank duly recorded its deed of trust.

On May 5, 2008, the divorce court issued a final decree dissolving the marriage and granted Connie a lump sum judgment of $75,000 for delinquent child support, ordering that the judgment be docketed by the Clerk as a lien against any and all of Larry's real estate in Washington County. The Clerk docketed the judgment for delinquent child support on the following day, May 6.

Leaving for later determination issues regarding the division of the marital property, the court commented from the bench that, unless Larry and Connie could agree upon disposition of the home, the court would be unlikely to award it free and clear to Connie.

On May 10, 2008, Larry filed suit for partition of the property by sale. The home had an appraised value sufficient to produce net proceeds of $300,000 after costs of sale. Connie opposes the sale, still hoping to force Larry to relinquish any claim on the home. Bank was permitted to intervene as a party to Larry's suit for partition. Bank claims a right to receive $150,000 from the proceeds of any sale, asserting that the lien of its deed of trust, being prior in time, takes priority overall other liens on the property. Bank bases its claim to priority on the following Virginia statute:

> *"When a deed purports to convey property, real or personal, which the grantor does not own at the time of the execution of the deed, but subsequently acquires, such deed shall, as between the parties thereto, have the same effect as if the title which the grantor subsequently acquires were vested in him at the time of the execution of such deed . . . ."*

(a) Do the facts support a *prima facie* case in Larry's suit for partition by sale of the home? Explain Fully.

(b) How should the court rule on Bank's claim that its deed of trust takes priority over all other liens on the home? Explain fully.

(c) If the home is sold, how should the net proceeds of $300,000 be distributed? Explain fully.

[✖]

(a) Applicants should discuss the particulars of a partition proceeding and note that on these facts that [1] the property, being a single family home, could not be conveniently partitioned in kind; [2] the parties could not agree about what to do with the property; and [3] the parties were co-owners as tenants in common. The BBE thought that a prima facie case for partition by sale had been made.

(b) The statute cited applied and/or governed only the parties to the deed of trust, husband and bank, but not the wife. Her lien for the support arrearage attached to the land ahead of the Bank's deed of trust lien, which would be enforceable against only the husband's interest in the land. The

applicant should recognize that the entry of the final decree of divorce severed the tenancy by the entirety and converted the owners' estates into a tenancy in common and this occurred after husband signed the deed of trust, and thus the deed of trust was signed at a time when the property was immune from claims by Larry's creditors. Hausman v. Hausman, 233 Va. 1 (1987).

(c) Wife would get [i] $150,000.00 representing her half interest in the property; plus [ii] out of Larry's share, the delinquent support judgment of $75,000.00 would be satisfied first and paid to Wife; and [iii] Bank would get the remaining $75,000 of Larry's share as a payment on the loan secured by the deed of trust.

3. VGD, a properly formed and existing Virginia general partnership, produces high grade plastic injection-molded enclosures for computers and other electronic devices at its plant in Rocky Mount, Virginia. The partners are Vic, Gail, and Dave. Vic is the plant manager and product designer, Gail is the chief financial officer, and Dave is the marketing and sales manager.

Because of significant design changes, VGD recently replaced its injection machines and molds. During a partnership meeting at which all partners were present, they decided as a matter of policy that, although the old molds and injection machines had a market value of about $500,000,they would not sell any of the obsolete equipment to competitors.

While traveling on a sales trip, Dave met the plant manager for Baines Molding Co. (BMC),who offered to pay $1,000,000 for VGD's old molds and machines. Believing that BMC's business was in a line of plastics different from that of VGD and without consulting Vic and Gail, Dave accepted BMC's offer and authorized the delivery of the old injection machines and molds to BMC. It turns out that BMC's acquisition of the VGD equipment enabled BMC to bid successfully against VGD for a lucrative government contract. Vic and Gail angrily confronted Dave, who justified his action on the grounds that he did not believe that BMC was a direct competitor and that the premium price offered by BMC justified the sale.

Dave, who had a disabled child, invented a "joystick" that would allow people with limited manual dexterity to play video games. He developed it at home in his garage, with his own equipment, and in his spare time. He obtained a patent on the device in his own name and then, with Zane, formed a partnership called DZ Partners to produce and sell the special joystick.

When Vic and Gail learned of Dave's involvement with DZ Partners, they chastised him for having obtained the patent in his own name and having entered into partnership with Zane. Dave explained truthfully that Zane was already in the business of manufacturing devices for disabled children and that the new venture in no way competed with VGD.

(a) What duties, if any, did Dave owe to the VGD partners, and did he breach any such duties by selling the obsolete equipment to BMC? Explain fully.

(b) Did VGD have any rights in the patent obtained by Dave for the special joystick? Explain fully.

(c) On what basis, if any, might VGD assert a right to receive any portion of the profits earned by DZ Partners from the sale of the special joystick, and is it likely that VGD would prevail in any such claim?

[✖]

(a) Dave owed his partners the normal fiduciary duties of care and loyalty and to not engage in self dealing. Dave probably breached his fiduciary duty by his willful misconduct of acting contrary to partnership policy. Applicants should discuss whether his action in selling the obsolete equipment

was wilful misconduct or error in judgment and note that Dave knew of the agreement and did not get consent prior to the sale. The BE were looking for a robust discussion.

(b) VGD did not have any rights in the patent obtained by Dave. The product and the partnership with Zane was totally unrelated to the business of the partnership and Dave did it on his time, not VGD time..

(c) There is no basis on which VGD can assert a right to receive any portion of the profits of DZ Partners. VGD would likely assert Dave had a duty not to compete with the partnership as the bases for claiming profits earned by DZ Partners from the sale of the special joystick. It is unlikely VGD will prevail because DZ was not in competition with VGD and there was nothing in the facts suggesting that the terms of the VGD partnership prohibited any partner from any outside business interests or ventures that were in no way in competition with VGD.

4. In response to an advertisement in a trade publication, The Green Grocer, Ltd.("Grocer"), which operates a chain of trendy grocery stores located throughout Northern Virginia, ordered 500 cases of Hanover tomatoes at a price of $50 per case from Bugwamp Vegetable Farms("Bugwamp").

Grocer phoned in the order by using the toll free telephone number in Bugwamp's advertisement. Bugwamp e-mailed Grocer, thanking it for the order and advising that the tomatoes would be shipped around the second week of July. The next day Bugwamp faxed a confirming letter to Grocer, attaching one of Bugwamp's printed delivery forms containing a description of the goods, the price, and the terms of payment. Among the terms stated on the form was a provision for interest at the rate of 1.5% per month on any invoice not paid within 30 days and a provision disclaiming all warranties (express and implied).

After the order was placed, about one-fourth of Bugwamp's tomato crop was destroyed by anew, virulent insect which attacks and ruins tomato plants. Happily, there is an effective, but very expensive, insecticide which combats the insects and preserves the plants. Bugwamp began using this insecticide and was able to save the remaining three-fourths of its crop, but its cost of production was raised considerably. In order to make its budgeted profit margins, Bugwamp made an unannounced "business decision" to honor only its most lucrative contracts, which are those in excess of $65 per case.

As a result, Bugwamp has refused to ship any tomatoes to Grocer. When Grocer insisted upon compliance with the "deal," Bugwamp asserted that the "deal" was not an enforceable contract and, further, that, because of the now well-known insect problem, it was excused from performance by commercial impracticability as set forth in the following provision of the Code of Virginia:

(A) Delay in delivery or nondelivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.

(B) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.

(C) The seller must notify the buyer seasonably that there will be delay or non delivery

and, when allocation is required under paragraph (B), of the estimated quota thus made available for the buyer.

Grocer asks you, as its lawyer, to answer the following questions:

(a) Is there an enforceable contract between the parties and, if so, what are its terms? Explain fully.

(b) Is Bugwamp excused from performance as a result of the "commercial impracticability" provision cited above? Explain fully.

[✖]

(a) The contract is enforceable. The tomatoes were goods and the contract was subject to Article 2 §8.2-102. The contract was in writing, between two merchants and signed by the party against whom enforcement is sought. §8.2-201(1) Green Grocer, Ltd.'s phone call was an offer and the offer was accepted by the email from Bugwamp thus forming a contract. Bugwamp's subsequent fax was a proposal for additional terms because the contract had already been formed. §8.2-207 The proposed changes as to payment terms did not materially alter the contract and when Green Grocer did not object within a reasonable time, they became part of the contract. The proposed changes as to exclusion of warranties did materially alter the contract and did not become part of the contract.

(b) Applicant should discuss the statute [§8.2-615] and whether it excused performance. The BBE thought the better answer is that while the parties did not contemplate the possibility of the visiting insects, the statute was not complied with and performance was not excused. Per the comments to this section of the UCC "1. This section excuses a seller from timely delivery of goods contracted for, where his performance has become commercially impracticable because of unforseen circumstances not within the contemplation of the parties a the time of contracting." [✖] The BE did not expect the applicant to be familiar with the comment and it's inserted for aid in understanding what this particular provision is about.

However, the Seller, Bugwamp, made no effort to notify the Buyer, Green Grocer and the harm to the Seller was only reduced profits and did not render Bugwamp's performance "commercially impracticable". Bugwamp just failed to meet it's budgeted profit and had enough tomatoes to fulfil its contract with Green Grocer, or could go into the market and get what it needed, albeit at an increased costs.

5. Dan Debtor is the sole proprietor of Dan's Corner Bookstore in Norfolk, Virginia. The bookstore has fallen on hard times in the year since the opening of MegaBooks in the nearby shopping mall. For the past six months, Dan has been legally insolvent, in that he cannot pay his debts as they become due.

Acme Publishing Co., a supplier of Dan's, had earlier obtained a $5,000 judgment against Dan in the Norfolk Circuit Court. Acme has also has made a "final demand" for payment of an additional $75,000 Dan owes, which has not yet been reduced to judgment. Recently, Acme learned of the following actions taken by Dan within the past month:

- He removed a valuable collection of rare books from the bookstore and gave them to his son on the occasion of his son's birthday.
- He paid $50,000 in past due rent to the limited liability company that owns the building in which Dan's Corner Bookstore is located. The building is listed for sale. Dan is the sole member of the LLC.

- He has been negotiating with a collector in Philadelphia, Pennsylvania to sell a valuable antique Revolutionary War printing press to the collector.

Acme asks you to answer the following questions:

(a) On what basis, if any, can Acme challenge the gift of the rare books to Dan's son and what can Acme do to perfect the challenge? Explain fully.

(b) May Acme file an effective *lis pendens* on the building owned by the LLC or otherwise secure payment from the proceeds of any sale of the building? Explain fully.

(c) What steps, if any, can Acme take to prevent the sale of the antique printing press and eventually have its value applied toward the amounts Dan owes Acme? Explain fully.

[✖]

(a) Applicant should discuss [i] fraudulent transfers made with the intent to hinder or defraud creditors, which under §55-80 can be set aside and the property reached by the creditor and [ii] voluntary conveyances made while the debtor is insolvent or rendering the debtor insolvent is void as to creditors of the debtor at the time of the conveyance and under §55-81 can be set aside and the property reached by the creditor. The BE indicated that if the applicant discussed well just one of these statutory provisions, full credit would be given. Acme should file suit, alleging one or both theories of action and asking the court, under its equitable powers, to set aside the conveyance such that the property would be subject to the claims of the creditor. Acme can get a writ of execution on the $5,000.00 judgment it already has and ask the sheriff to levy on the rare books.

(b) Acme may not file a *lis pendens* yet. Under §8.01-268, a *lis pendens* may not be filed unless the action on which the *lis pendens* is based seeks to establish an interest by the filing party in the real property described in the memorandum. Only when an action is pending the outcome of which can affect title to real estate is it proper to file a *lis pendens*.

(c) Acme can file an attachment proceeding against Dan Debtor and his antique printing press, alleging grounds for an attachment, ie the property is about to be disposed of in a way that will hinder creditors from collecting the $75,000.00 that is due Acme. Acme should also file suit seeking a money judgment against Dan Debtor for the $75,000.00. Acme could also file suit seeking a temporary injunction against Dan Debtor to enjoin him from disposing of the antique printing press and to preserve it to be available to satisfy any judgment in the suit for $75,000.00

6. Jim Doper was arrested in New York by federal Drug Enforcement Agency(DEA) officers and charged with transporting and selling illegal drugs. The DEA seized and declared forfeited property worth $500,000 belonging to Doper. All proceedings against Doper were brought in the U. S. District Court for the Southern District of New York.

Doper retained Susan Barrister, an attorney residing in and practicing criminal defense law in New York City (which is within the Southern District of New York), to defend him on the criminal drug charges and in the related civil forfeiture proceeding to recover the seized property. Doper entered into a written contingency fee arrangement by which he agreed to pay Barrister 40% of the value of any property recovered from forfeiture.

Barrister, recognizing that her experience in forfeiture proceedings was limited, searched online internet sources and found Al Solicitor, a lawyer residing and practicing in Harrisonburg, Virginia, who appeared to be highly qualified in defending civil forfeiture proceedings in the U.S. District Courts. With

Doper's consent, Barrister associated Solicitor as co-counsel and entered into a written agreement reciting that Barrister would keep the first one-fourth of any fee earned in the civil forfeiture proceeding and that Barrister and Solicitor would share the remaining three-fourths in proportion to the amount of time each spent working on the forfeiture matter.

Although they never met face-to-face, Barrister and Solicitor exchanged from the irrespective offices in Virginia and New York several telephone calls, letters, and e-mails related to Doper's defense. Before the trial, through negotiations conducted between Barrister and the U.S. Attorney representing the DEA, they reached a plea bargain in which Doper pleaded guilty to a lesser offense, and the U.S. Attorney agreed to release $500,000 worth of property from forfeiture. Doper then paid Barrister $200,000 as the agreed 40% contingency fee.

Asserting that Solicitor had not performed any meaningful work on the case, Barrister declined to pay Solicitor any part of the contingent fee. Solicitor, claiming that he had spent just as much time on the forfeiture matter as Barrister, filed suit for breach of contract against Barrister in the U. S. District Court for the Western District of Virginia, claiming $87,500 as his share of the contingent fee. Barrister, through Virginia counsel, filed the following three-part motion: (a) to dismiss for lack of subject matter jurisdiction; (b) to dismiss for lack of personal jurisdiction over Barrister; and (c) for transfer of venue to the U.S. District Court for the Southern District of New York. Barrister's supporting affidavit asserted that Solicitor's efforts had not contributed to the settlement with the DEA and that, in any event, the time spent by Solicitor on the forfeiture matter was minimal.

In opposition to the motion, Solicitor filed an affidavit describing the communications exchanged in the course of his association with Barrister.

How should the U.S. District Court for the Western District of Virginia rule on each of the three parts of Barrister's motion? Explain fully.

[✖]

(a) Since there is no federal issue, subject matter jurisdiction will have to be based on diversity of citizenship. Two requirements always determine whether diversity of citizenship jurisdiction exists: (1) Is there complete diversity of citizenship – i.e., no party on the plaintiff's side of the case is a citizen of the same state as any party on the defendant's side?; and (2) has the amount in controversy requirement of the diversity statute been satisfied?

As to citizenship, there is only one plaintiff (Solicitor), and one defendant (Barrister). They are of course both natural persons. The test for determining citizenship of natural persons is their domicile – where they live and intend to make their residence. The facts make it clear that Solicitor's domicile is VA, and that Barrister's domicile is NY. Therefore, complete diversity of citizenship exists.

The amount in controversy (AIC) required is an amount "<u>exceeding</u> $75,000 exclusive of interests and costs." The test of determining whether the AIC has been met is the Court asks: Based on the allegations of the Complaint, is it a legal certainty that there is no way the plaintiff can recover <u>more</u> than $75,000 exclusive of interests and costs? The facts state that Barrister received 40% of $500,000 – the $200,000 – and that the agreement with Solicitor was that Barrister would receive one-fourth of any fee earned in the civil forfeiture proceedings and that Solicitor and Barrister would share the remaining three-fourths according to the time spent working on the matter. There's a dispute between Solicitor and Barrister on how much Solicitor worked, but apparently it will not matter here. One-fourth of $200,000 is $50,000 – leaving exactly $150,000 to fight over.

The facts said Solicitor claimed he had spent "just as much time on the forfeiture matter as Barrister" The test the court applies is to ask whether to a legal certainty the plaintiff (here Solicitor) could recover more than $75,000.00. Solicitor is claiming to have worked "as much" as Barrister, implicitly conceding that Barrister had worked roughly as much as he. Under the agreement, then, Solicitor couldn't be looking to recover more than half of $150,000.00, or exactly $75,000.00 Since the amount must exceed $75,00.00, the dollar requirement for diversity is not met and the judge should grant the defendant's motion to dismiss..

The BBE indicated that full credit would be given for an answer that recognized the requirements for diversity but failed to realize that dollar test threshold is in excess of th $75,000.00, not just equal to $75,000.00, if the requirements were otherwise well explained and the applicant concluded that the judge should deny the defendant's motion to dismiss..

(b) The question of the court acquiring personal jurisdiction over the defendant involved long arm jurisdiction. Two inquiries are necessary. (i) whether the defendant had the type of purposeful contacts with Virginia that constitutionally makes it fair [due process] to be sued in Virginia. This is commonly referred to as having sufficient minimum contacts as set forth in the International Shoe & Burger King U.S. Supreme Court cases. Here, Barrister sought out Solicitor in Va. and then had numerous telephone conversations, letters and e-mails over their contract. These should the kind of purposeful contacts with a state that permit being sued in Virginia without violating due process protections; and (ii), do the facts fit into any of the statutory provisions of Virginia's Long Arm Statute, §8.01-328.1 *et seq.*

The BE wanted the applicant to discuss the specific provisions of Virginia's Long Arm Statute and whether under the facts, any apply, in particular, ¶A1., transacting business in Virginia The facts do not permit one to determine where the contract came into existence. Discussion of ¶B. using computer, etc. was not required. While the BE thought that long arm jurisdiction in Virginia was permitted on these facts, the Board was primarily looking for a good discussion.

(c) Venue would be "proper" in either Southern District of New York or the Western District of Virginia. The general venue statute provides that venue is proper wherever either substantial events, or series of events, giving rise to the claim arose, or where any defendant resides. The substantial events part of the statute supports both districts; the defendant residing supports SDNY. But just because there are more bases under the general venue statute for one district over another doesn't determine whether transfer of venue is appropriate. Instead, the question comes down to "is the district to which the case is being transferred one that would have jurisdiction", or as the BE stated "could the action have been properly filed in that jurisdiction". The BBE also noted that there is a presumption in favor of the plaintiff's choice for bringing the action, so long as it is a proper forum for venue and thought that the motion to transfer should be denied.

The BBE did not expect a discussion of the propriety of a contingent fee arrangement in a criminal case. See Rules of Professional Responsibility Rule 1:5. Fees. ¶ (d).

7. Tom Testator and his wife, Wanda, residents of Virginia, had three children: Ann, Betty and Christopher. On May 1, 2001, Tom created a trust titled Tom Testator Revocable Trust ("the Trust"), which he alone signed. The Trust provided that at Tom's death the trust assets would be distributed "in equal shares to such of my children who survive me."In June 2001, Tom executed, with all appropriate formalities, a will that included the following provisions:

I. I give and bequeath $10,000 to Wanda and to each of my children, Ann, Betty, and Christopher.

II. I give and bequeath $10,000 each to my brother, Dave, and his wife, Susan.

III. I give and bequeath my 100 shares of stock in Bank of Virginia to my brother, Bill.

IV. I am leaving a written list disposing of certain items of my property; such list in existence at my death shall be determinative with respect to the items devised and bequeathed therein.

V. I give and bequeath all the rest of my property, both real and personal, tangible and intangible, wheresoever situate and howsoever held, to the trustee of the Tom Testator Revocable Trust dated May 1, 2001.

Tom and Wanda divorced in January 2007, and Tom died two months later. Tom was survived by the following persons:

- Wanda and his two daughters, Ann and Betty.
- Michael, the child of Tom's son, Christopher, who had died in 2005.
- His brothers, Bill and Dave, and Dave's ex-wife, Susan. Dave and Susan had divorced in 2003.

After the payment of all the debts, taxes and expenses of administration, the remainder of Tom's assets consisted of:

1. A checking account with a balance of $100,000;
2. A certificate of stock in Tom's name for 500 shares of New Dominion Bank. This certificate had been issued in exchange for Tom's 100 shares of Bank of Virginia upon its merger with New Dominion Bank in 2006;
3. A portfolio of stocks and bonds held in the name of the Trust and valued at $5,000,000;
4. An automobile, tools, a stamp collection, miscellaneous clothing and jewelry; and
5. A 500-acre farm.

Tom's will was found in his safe deposit box along with a written list bearing Tom's signature and the following typewritten words: "I leave my stamp collection and my car to Ann. I want Betty to have all my jewelry. I give my tools to Bill. I give my farm to Dave."

Also found in the safe deposit box, appended to the Trust instrument, was a typed document entitled "Trust Amendment – March 2004" bearing Tom's signature. The amendment provided for a $10,000 gift to the alumni fund at Tom's college, to be distributed upon his death before any other distributions by the Trustee. As was the case with the written list found with Tom's will, Tom's signature on the Trust Amendment was not witnessed or notarized.

Michael, concerned that he would not benefit from the Trust, filed a challenge to the will in the Norfolk Circuit Court. He asserted that Tom's residuary bequest to the Trust is invalid on the ground that it would result in distribution of estate assets through a document (the Trust) that was not executed in compliance with the legal formalities for making a will.

The following questions arise during the probate of Tom's will:

(a) How should the Court rule on Michael's challenge? Explain fully.

(b) How and in what amounts should the $100,000 in the checking account be distributed? Explain fully.

(c) How should the New Dominion stock be distributed? Explain fully.

(d) Is the Trust Amendment leaving $10,000 to the alumni fund at Tom's college valid? Explain fully.

(e) Is the written list signed by Tom and found in Tom's safe deposit box an effective disposition of the property listed in it? Explain fully.

(f) Is Tom's estate required to file a federal estate tax return? Explain fully.

[✖]

(a) Michael's challenge to the pour over trust will fail. All that is required under Virginia law is that the trust be in writing, identified under the will, and executed before or concurrently with the will. §64.1-73(A)(1). The trust need not be executed in accordance with the formalities for a will. §64.1-73(C)(ii). The trust can also be unfunded. §64.1-73(B)

(b) The checking account is not specifically bequeathed under either the will or the trust. However, it is the only piece of personal property in the probate estate that is not itself specifically bequeathed. So, it will be the asset to bear the cost of paying the $10,000 gifts under the will. All the children who are beneficiaries of the specific dollar bequests will take:
- (i) Wanda does not take because the divorce revoked the gift to her. §64.1-59
- (ii) Ann takes her $10,000.00 bequest.
- (iii) Betty takes her $10,000.00 bequest.
- (iv) Christopher takes his $10,000.00 bequest.
- (v) Dave takes his $10,000.00 bequest
- (vi) Susan takes her $10,000.00 bequest. Her divorce from Dave does not revoke the bequest. Only the divorce of a testator, not a beneficiary, results in revocation.
- (vii) Michael takes the $10,000 bequest for his predeceased father, Christopher, under the anti-lapse statute.

(c) The 500 shares of New Dominion pass to Bill. The doctrine of ademption does not apply because the New Dominion stock was issued as a result of the merger with Bank of Virginia. §64.1-62.3(A)(1).

(d) Yes, the amendment to the revocable trust is valid. The fact that the trust was amended after the execution of the will does not affect the validity of the trust or the bequest to the trust. §64.1-73(C)(i), (iii).

(e) The Code has long allowed for a separate writing specifying the disposition of tangible personal property. The writing needs to be signed and referred to in the will [incorporated by reference]. The fact that the writing was not in existence at the time the will was executed is not a problem.

The attempt to dispose of the real estate by separate writing is not effective (the farm) and the real estate will be part of the residuary estate. §64.1-45.1

Alternatively, the BBE will accept as to the real estate [the farm] an answer based on a new [2007] statute, §64.1-49.1, that the list found in the safe deposit box could effectively dispose of the real estate to Dave if Dave could prove by clear and convincing evidence (the standard required under 64.1-49.1) that Tom intended the list to be "an addition to or alteration of [Tom's] will." Absent such proof, it would dispose of only the personal property under 64.1-45.1.(f)

(g) Yes, Tom's executor needs to file an estate tax return. The cutoff for 2007 is a gross estate of more than $2,000,000. Tom's portfolio of $5,000,000 is included in his gross estate because he retained the power to revoke the trust.

8. One day after years of marital strife, Wife stormed out of the condominium unit (the "condo") she and Husband owned in Pulaski, Virginia. Several days after the separation, Wife, using her front door key, entered the condo to pick up some clothes and to attempt reconciliation with Husband. She changed her mind about the reconciliation when she found evidence that Husband had been entertaining his girlfriend in the condo.

In a fit of anger, Wife disclosed to a deputy sheriff that Husband had been burglarizing homes in the area and that the jewelry he had stolen was stored in their desk drawer in the condo. The deputy sheriff asked Wife if she would allow him to search the condo without a warrant. Wife readily agreed and, using her key while Husband was absent from the condo, let the deputy sheriff in and directed him to the desk drawer. When the deputy opened the desk drawer he found a large cache of jewelry.

Husband was indicted and tried for burglary and grand larceny in the Circuit Court of Pulaski County. At the jury trial, Husband moved to suppress all the evidence seized during the search of the condo on the ground that the search violated his right against unlawful search and seizure. The judge had allowed Wife to voluntarily testify against Husband. Husband moved to strike all her testimony on the ground that it violated his spousal privilege to prevent Wife from testifying. The Judge denied both motions. Husband did not testify on his own behalf. The jury found him guilty on all counts.

During the post-conviction sentencing phase of the trial, the Judge allowed the Commonwealth Attorney to introduce records of Husband's prior felony convictions. Husband objected and argued that introduction of the felony convictions was improper because Husband had not testified during the trial. Husband was sentenced to five years in prison.

Husband now wishes to appeal his conviction and the sentence imposed by the Judge.

(a) Did the Judge err in denying Husband's motion to suppress the evidence seized during the warrantless search of the condo? Explain fully.

(b) Did the Judge err in denying Husband's motion to strike Wife's testimony? Explain fully.

(c) Should the Judge have allowed the Commonwealth Attorney to introduce the records of Husband's prior felony convictions? Explain fully.

(d) To which court should Husband direct his appeal, and what steps must he take to perfect the appeal? Explain fully.

[✖]

(a) The judge did not err. The facts likely give the wife actual authority to consent, and surely give her apparent authority, which is all that is necessary to permit a reasonably objective officer to believe she could lawfully let him conduct the search. The officer was reasonable in believing that she had the authority to consent.

(b) The judge did not err. Under §19.2-271.2 a spouse may be compelled to testify on behalf of the other spouse, but neither may be compelled to testify against the other spouse, with some exceptions not applicable to these facts. The privilege against testifying against the spouse belongs to the witness spouse, not the defendant spouse.

(c) Not only should the judge have allowed the Commonwealth's Attorney to introduce the records of Husband's prior felony convictions, under §19.2-295.1, the Commonwealth's Attorney <u>shall</u> present such evidence at the sentencing hearing.

(d) Appeals of traffic & criminal convictions, except when a death sentence is imposed, go to the Court of Appeals by Petition. The first step in the appellate process is to file a Notice of Appeal in the trial court's clerk's office within 30 days of the date of the order of conviction & sentence being appealed from. A copy of the Notice of Appeal should be sent the clerk's office of the Court of Appeals, too. The BE indicated that for full credit, it was not necessary for the applicant to take the appeal beyond the filing of the Notice of Appeal.

9. Peggy filed a Complaint against Doctors Orthopedic Care Corporation ("DOC"), a Virginia non-stock corporation in the Circuit Court of the City of Alexandria, Virginia. The Complaint seeks $1 million dollars in compensatory damages for personal injuries sustained in a vehicular collision allegedly caused by the negligence of DOC in the operation of one of its ambulances.

Peggy's lawyer arranged for a private courier service to deliver the following documents to Andrew Jackson ("AJ"), who is DOC's outside legal counsel and a member of the board of directors of DOC: a copy of the Complaint and exhibits (which consisted of copies of the Police Department's report of the collision and of the traffic ticket issued to the ambulance driver for failure to yield the right of way). As a courtesy, Peggy's lawyer also sent a copy of the Complaint and the exhibits by facsimile transmission to AJ's office.

AJ, in fact, received both the fax copy and the copy delivered by the courier on the same day, May 1, 2008, but those were the only documents ever served by Peggy's lawyer. Preoccupied with other matters at the time, AJ laid the papers down on a conference table, and one of AJ's para legals mistakenly put all of the papers in a file folder for a different client.

AJ completely forgot about the Complaint until today, July 29, 2008, when he received a telephone call from a helpful acquaintance in the Clerk's Office of the Circuit Court. The Deputy Clerk told AJ that a default judgment finding DOC liable to Peggy had been entered by the Court against DOC on June 8 at plaintiff's request and that a jury had been impaneled just this morning for a hearing on the amount of damages.

AJ appeared at the hearing on behalf of DOC and objected to the Court's going forward with the hearing on the grounds that (1) DOC had not received proper notice of the hearing and(2) that, in any event, the Court lacked jurisdiction. The trial judge stated that she considered the objections relating to lack of notice of the hearing and lack of jurisdiction as separate, independent issues and that she would take them under advisement. She said she would allow the hearing to proceed and she would rule separately on each objection after doing some research. Further, she stated that AJ's participation in the hearing would not constitute a waiver of his objections to lack of notice and jurisdiction.

During the course of hearing, AJ sought to introduce evidence to challenge the default finding of DOC's liability. Peggy's lawyer objected to the introduction of any such evidence.

The judge immediately took a lunch recess and now asks you, as her law clerk, to explain fully to her how she should rule on the following:

(a) Peggy's lawyer's objection to AJ's attempt to introduce evidence on liability.

(b) AJ's objection that DOC had not received proper notice of the hearing.

(c) AJ's objection that the Court lacked jurisdiction.

[✖]

(a) The judge should sustain Peggy's lawyer's objection but only if the court has jurisdiction. A defendant in default, under Rule 3:19(c) admits liability and is no longer permitted to challenge liability.

(b) The judge should overrule the objection of failure to receive notice, but only if the court has jurisdiction. A defendant in default, under Rule 3:19(a) is no longer entitled to notice of further proceedings, except notice shall be given to any counsel of record and if service was by posting, the mailing requirements of §8.01-296(2)(b) must be complied with prior to any entry of judgment by default.

(c) The court did lack jurisdiction. Peggy's lawyer had not had the clerk prepare a summons under Rule 3: 5 and attach it to the complaint for service on the defendant. These two documents form the *process* which, under Rule 3:8, must be responded to within 21 days from service on the defendant or the defendant is deemed in default. A defendant may waive service of process, or make a general appearance by filing responsive pleadings, either of which would relieve the plaintiff of the burden of having process served, but neither occurred under the facts. Consequently, under the holding of Lifestar Response v. Vegosen 267 Va. 720 [2004] the court never acquired jurisdiction over the defendant.

The curative statute [§8.01-288] did not apply because it speaks of *process* which was received in time and on the facts, process was never issued, let alone received.

> The BE recognized that the order of the questions may cause some confusion since the answer expected in (a) & (b) assumes that the defendant was properly served and the court had jurisdiction over the defendant, when the answer to (c) is that the court never acquired jurisdiction and thus can not proceed with any damages hearing.