

## VIRGINIA BOARD OF BAR EXAMINERS

Norfolk, Virginia - February 22, 2005

Write your answer to Questions 1 and 2 in Answer Booklet A - (the WHITE booklet)

1. On New Year's Eve, Scooter, Jo-Jo, and Meredith, Jo-Jo's wife, were having beer and pizza at a restaurant in St. Paul, Virginia. Jo-Jo, who was extremely jealous and had an ungovernable temper, had heard rumors for several months that Scooter and Meredith had been seeing each other secretly. On this evening, Jo-Jo thought he noticed suggestive eye contact and body language between Scooter and Meredith. Jo-Jo said angrily, "Look, I don't know what's going on between you two, but, if it doesn't stop, someone is going to get hurt!"

Scooter responded equally angrily, "You stupid S.O.B.! You're just an ignorant hillbilly and don't know what you're talking about. I'm getting out of here." Jo-Jo became enraged at being called an S.O.B. and ignorant hillbilly. Scooter reached into his vest pocket for his cell phone to call a taxi. Jo-Jo, concerned that Scooter was reaching for a gun, yelled, "No one calls me that and lives!" He pulled a pistol from his boot and shot and killed Scooter.

Neither Jo-Jo nor Scooter was intoxicated at the time of the altercation. Scooter did not possess a weapon at the time. The other patrons in the restaurant witnessed and can testify to these events, including the heated verbal exchange between Jo-Jo and Scooter and the fact that Scooter was reaching into his vest pocket at the time of the shooting.

At the subsequent murder trial, Jo-Jo's defense is that he believed Scooter was reaching into his vest pocket for a gun or a knife and that he (Jo-Jo) believed he was in mortal danger. Jo-Jo's counsel argued alternatively that (i) the killing was justifiable homicide, (ii) the killing was excusable homicide, and (iii) at most, Jo-Jo can be convicted of manslaughter, not murder.

- (a) What is the likely outcome of each of counsel's three arguments? Explain fully.
- (b) If Jo-Jo is convicted, in what level of appellate court can he file an appeal, and what standard of review will the appellate court apply in examining the evidence and the inferences deducible there from? Explain fully.

**Reminder: Write your answer to the above question #1 in Booklet A - the WHITE Booklet.**

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2. Ten years ago, Artis, the owner of a chain of retail hardware stores, leased a newly constructed building owned by Realty Company ("Realty") in Salem, Virginia. At the time of the lease, the building consisted of a "shell." It had floor space, heating and air-conditioning, plumbing and electrical, a partitioned office area, and a restroom, but was otherwise empty.

After taking possession, Artis installed shelving, counters, cabinets, and other accoutrements necessary for conducting his retail hardware business. The shelves, counters and cabinets were all

bolted to the floors and walls for safety reasons, but several times over the years Artis rearranged the store and, each time, he would unbolt these accoutrements, move them around, and refasten them to the concrete floor with bolts.

In the "shop area" of the store, Artis had fastened a mounted moose head to the wall. He was especially proud of this trophy because it was the first moose he had killed after he began hunting.

Artis decided not to renew the lease and to consolidate operations of his retail chain in his Roanoke store, where he had recently doubled the retail floor space. He advised Realty of his decision, and Realty immediately advertised the building as being available and suitable for a retail business.

Artis then undertook to move his merchandise and equipment to Roanoke. He began unbolting and removing the shelves, counters and cabinets, intending to install them in his Roanoke store. Except for leaving the bolt holes exposed in the concrete floors, removal of these items did no damage to the building.

Ollie, a long-time employee, expressed interest in the moose head. It was the symbol of his high school fraternity, and he wanted it as a memento of his long-passed high school days. Knowing that he would have no place to display the moose head in his Roanoke store, Artis told Ollie, "Take it. It's yours. I'll put it in writing later." Ollie then removed the trophy and took it home. Removal of the moose head left three small holes in the wall where it had been hanging. Artis wrote up and signed a chattel deed, which recited that he was transferring the moose head to Ollie, but, in the rush of moving to the Roanoke store, neglected to give Ollie the deed.

When Realty learned that Artis was removing the shelves, cabinets, and counters, Realty demanded that Artis cease doing so and leave those items in the Salem store, asserting that they were Realty's property. Realty also demanded that Ollie return the moose head, claiming that Ollie had no proof of ownership and that, in any event, the trophy belonged to Realty. Artis and Ollie both refused Realty's demands.

The lease under which Artis had occupied the property was silent concerning ownership improvements made by Artis.

What are the rights and obligations of the parties? Explain fully.

**Reminder: Write your answer to the above question #2 in Booklet A - the WHITE Booklet.**

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**→→ Now SWITCH to the YELLOW Answer Booklet - Booklet B ←←**

Write your answer to Questions 3 and 4 in Answer Booklet B - (the YELLOW booklet)

3. Dave and Paul own adjoining parcels of land in Lynchburg, Virginia. In 1999, Dave built an office building on his parcel, and, unknown to either Dave or Paul, Dave's building encroached three feet onto Paul's parcel, which at the time was just a vacant lot.

In 2004, Paul and Ted entered into a contract by which Ted agreed to purchase Paul's parcel for \$150,000, the fair market value. A week before the closing of this transaction was to occur, the Virginia Department of Transportation surveyed the frontage road that ran in front of Dave and Paul's parcels, and the encroachment of Dave's building became known for the first time. The encroachment of Dave's building did not materially affect the uses to which Paul's parcel could be put, but a fair estimate of the value of the three-foot strip occupied by the encroachment was \$10,000, effectively reducing the fair market value of Paul's parcel to \$140,000.

When the encroachment became known, Ted told Paul he refused to consummate the purchase of Paul's parcel unless the encroachment were removed. Paul demanded that Dave either remove the encroachment or purchase the entire parcel from him for \$150,000. Dave refused to do either. He did, however, offer to pay Paul the \$10,000 value of the three-foot strip, an offer that Paul declined.

All the offices in Dave's building were leased to tenants holding long-term leases. The only way to remove the encroachment would be for Dave to tear down the encroaching part of the building. It would take about three months and cost about \$75,000 for Dave to abate the encroachment. In addition, it would require that four of Dave's eight tenants move out during the demolition and reconstruction, and it would greatly inconvenience the remaining tenants.

Paul filed a bill in equity against Dave and Ted. In the count against Dave, he alleged trespass and sought a mandatory injunction requiring Dave to remove the encroachment. In the count against Ted, he alleged breach of contract and sought an order requiring Ted to specifically perform the contract by paying the entire contract price. Assume that it was proper for Paul to join Dave and Ted as defendants and his claims against them in the same suit.

- (a) As against Dave, do the facts support a cause of action for trespass, what defenses might Dave assert, and how will the court likely rule on Paul's prayer for the mandatory injunction? Explain fully.
- (b) As against Ted, is the court likely to grant Paul's request for specific performance, and, if so, will the court require Ted to pay \$150,000? Explain fully.

**Reminder: Write your answer to the above question #3 in Booklet B - the YELLOW Booklet**

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4. In 2001, John James, a resident of the City of Roanoke, Virginia validly executed a will under which he left his entire estate to his wife, Mary. The will named Mary as executor and waived the requirement for a surety on an executor's bond. John and Mary had two children of their marriage, Bob age 10, and Sandra, age 12. The children were not mentioned in the will.

John died on February 10, 2005 at the age of 40, survived by Mary and his two children. The property at the time of John's death consisted of the following:

- A joint checking account containing \$25,000 held in the names of John and Mary;
- The family home valued at \$500,000, held as tenants by the entirety with the right of survivorship;
- \$3,000,000 in cash and securities that John inherited from his parents in 2003; these assets were held in John's name; and
- A life insurance policy in the face amount of \$1,000,000 owned by John and payable on his death to a trust for the benefit of his surviving children.

Mary was in possession of a document entitled Durable General Power of Attorney, which John had signed in early 2004 authorizing Mary to sell, transfer, and otherwise deal with property held in his name.

- (a) May Mary use the power of attorney to deal with John's property?
- (b) What steps must Mary take in order to establish her capacity as executor?
- (c) Which items of the property listed above are included in John's gross estate for federal estate tax purposes?
- (d) Will Mary be required to file a federal estate tax return?
- (e) Will any federal estate taxes be due on the estate?
- (f) What is the effect of John's death on the ownership of the joint checking account?
- (g) What is the effect of John's death on the ownership of the family home, and is there anything Mary needs to do to carry out that effect?
- (h) Do the children have any claim to a share of the \$3,000,000 John had inherited?

Explain your answers fully.

**Reminder: Write your answer to the above question #4 in Booklet B - the YELLOW Booklet.**

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→→ Now SWITCH to the TAN Answer Booklet - Booklet C ←←

Write your answer to Question 5 in Answer Booklet C - (the TAN booklet)

5. Paul and Mary Platzer were injured when their automobile, driven by Paul, was struck by Daisy Dimsdale's automobile as Paul attempted to exit and Dimsdale attempted to merge onto Highway 81 in Virginia. The Platzers retained Conrad Hill, an attorney, to represent them, and they each signed a contingency fee agreement in which they agreed to pay Hill one-third of any monetary recovery he obtained for them and to reimburse him for any costs he advanced on their behalf.

At the time Paul and Mary retained him, Hill did not advise Mary that she might have a cause of action against Paul if Paul also was negligent.

Hill filed two separate actions against Dimsdale alleging that Dimsdale was negligent: *Paul Platzer v. Daisy Dimsdale* and *Mary Platzer v. Daisy Dimsdale*. The Grounds of Defense filed by Dimsdale's attorneys denied negligence and, in response to Paul's case, alleged he was contributorily negligent by braking suddenly and changing lanes without signaling.

While both Platzer actions were pending, Ana Young, an associate in the firm representing Dimsdale, quit her job there and joined Hill's firm as an associate. At her prior firm, Young had not worked on the Platzer/Dimsdale matters and knew nothing about them. Upon joining Hill's firm, Young immediately began working on both Platzer cases. She told Hill not to worry about the contributory negligence defense in Paul's case because it had been her experience that her prior firm always pleaded that defense without investigating its merit. Hill did not discuss with the Platzers the fact that Young had come to work for him from the firm representing Dimsdale.

- (a) Did Hill satisfy all ethical obligations to Mary at the time she retained him? Explain fully.
- (b) After Young joined Hill's firm, could Young's former firm have successfully moved to disqualify Hill and anyone in his firm from further representation of Paul and Mary? Explain fully.

**Reminder: Write your answer to the above question #5 in Booklet C - the TAN Booklet**

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END OF SECTION ONE