

VIRGINIA BOARD OF BAR EXAMINERS

Norfolk, Virginia - February 21, 2006

You MUST write your answers to Questions 1 and 2 in WHITE Answer Booklet A

1. As a newly admitted member of the Virginia State Bar, practicing law in Roanoke, Virginia, you have agreed to represent Cameron Client, a woman who was recently fired by her employer for "unsatisfactory performance." Cameron insists that the real reason she was fired was that she refused the sexual advances of her supervisor.

You know that Cameron's former employer, Mountain Trust Company, a Virginia corporation, is represented generally by a prominent, long-standing law firm in Roanoke, Virginia.

Cameron tells you that her good friend, Sophia, who has no attorney of her own, is a clerical employee in Mountain Trust's human resources department and wants to help, but is fearful that Mountain Trust will retaliate against her. Sophia told Cameron that she has seen prior written reports of sexual harassment on the part of Cameron's supervisor in connection with other female employees at Mountain Trust.

Cameron has done some further investigation and believes that A.J. Jones, a senior vice president of Mountain Trust, also has knowledge of other, similar incidents involving the supervisor. A.J. is a good friend of Cameron's father and might be willing to talk "off the record."

Cameron wants you to interview both Sophia and A.J. separately and *ex parte*, thinking that she can use whatever information is gained without disclosing its source.

Are you able, consistent with your professional obligations as a Virginia attorney, to conduct each of these interviews *ex parte*, and, if so, under what conditions? Explain fully.

Reminder: You MUST answer Question #1 above in WHITE Booklet A

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2. Ted, an 85-year-old resident of Alverado, Virginia, had worked all his life as a carpenter and, being very frugal, had accumulated a large estate.

In the last year or so, Ted started using a walker to assist him in getting around and had increasingly begun exhibiting bizarre behavior. He began uncharacteristically to spend large sums at the local tavern buying drinks for his drinking buddies, including the mayor of Alverado. He would curse friends and neighbors who came to visit him. He accused the local merchant who had sold him the walker and his "enemies" of cheating him and said he would shoot the merchant next time he saw him.

Concerned about these developments, Bill, Ted's brother, filed a guardianship petition in the Circuit Court of Washington County, Virginia. The petition alleged that, by reason of mental and physical infirmity, impaired health, and advanced age, Ted was incapable of taking proper care of his property and managing his estate. Lucius, a local lawyer, was appointed guardian *ad litem* to represent Ted's interests in the proceeding. At a hearing, the court heard evidence of Ted's eccentric

behavior and physical condition and granted the petition, appointing Bill as guardian of Ted's person and his property.

Soon afterwards, Ted asked Lucius to prepare a new will for him. He told Lucius he owned a \$100,000 certificate of deposit (CD) in First Bank that he wanted to give to Bill for taking care of him; that his separate \$50,000 CD in Second Bank should go to the Regional Carpenter's Apprenticeship Program to help young carpenters succeed as it had helped him succeed; and that the five cases of rare whiskey in his basement should go to the mayor of Alverado. Ted also gave Lucius details about rental properties and a sizable portfolio of securities he owned. He said, "There are other people I should probably leave something to – my half-brother Harry; my sister Nell; my common law wife Wilma; and Wilma's son Sam, whom I never adopted but treated as a son. They're going to fight over the property anyway, so just let the probate court figure out how to split it up. Don't mention them in the will or put anything in it for them." Lucius drafted a will specifying only the bequests of the CDs and cases of whiskey and not mentioning the other persons or assets.

On the day Ted went to Lucius's office to execute the will, he was not feeling very well and had just emerged from a period of erratic behavior. In the presence of Lucius and his secretary, Ted said, "I want to finalize this will you just wrote for me, but I'm pretty shaky today, so Lucius, will you sign my name for me and then would you and your secretary witness it?" Lucius signed Ted's name, and then Lucius and his secretary signed the will as witnesses.

Ted died a month later. He was survived by Bill, the mayor, Harry, Nell, Wilma, Sam, and also by a long-estranged sister, Clara. In addition to the CDs and the whiskey recited above, Ted's estate consisted of the rental properties and the portfolio, which altogether were valued at \$1 million. When the will was presented for probate, Clara challenged it on the grounds that (i) Ted lacked testamentary capacity and (ii) that the will had been improperly executed.

- (a) How should the court rule on each ground of Clara's challenge?
Explain fully.
- (b) To whom and in what proportions should Ted's estate be distributed?
Explain fully.

Reminder: You MUST answer Question #2 above in WHITE Booklet A

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→→ Now MOVE to YELLOW Answer Booklet B ←←

You MUST write your answers to Questions 3 and 4 in YELLOW Answer Booklet B

3. Bill owned in fee simple a farm in Montgomery County, Virginia, which fronted on a state highway. In 2001, Mary purchased an adjoining farm that had no highway frontage and could be reached only by a county road, which led a mile and a half to the highway. Recognizing that it would shorten the access to her farm, Mary asked Bill to sell her an interest that would allow her to use the existing dirt road across his farm leading to the state highway. Bill, in the spirit of being a good neighbor, refused to accept any payment but gave Mary a validly executed deed that described the dirt road and recited her right to use it. Nothing in the deed limited the duration of this right.

Mary did not record the deed, but she used the dirt road for access continuously thereafter. Mary's house and the dirt road commencing at the front of her house and continuing across Bill's farm were plainly visible to anyone on Bill's farm.

In 2005, Sam visited Bill's farm and offered to purchase it. Bill sold the farm to Sam for \$200,000 and conveyed the property in fee simple by a General Warranty deed containing English covenants of title. This deed did not mention the right that Bill had previously deeded to Mary, and a title search conducted on Sam's behalf revealed no such encumbrance on the property.

When Sam moved onto the farm and noticed that Mary was using the dirt road, he installed and locked a gate across the road. Mary explained that Bill had granted her the right, but that she had lost the deed. When Sam asked Bill about it, Bill confirmed that he had granted Mary the right and that he had forgotten to mention it in his deed to Sam.

- (a) **What are the respective rights of Mary and Sam regarding Mary's right to use the dirt road, and which of them would be likely to prevail in the dispute? Explain fully.**
- (b) **Is Sam entitled to prevail in a suit against Bill for breach of covenant based on:**
 - (i) **the General Warranty provisions of the deed? Explain fully.**
 - (ii) **the English covenants of title contained in the deed and, if so, which one(s)? Explain fully.**

Reminder: You MUST answer Question #3 above in YELLOW Booklet B

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4. For years Emily Beasley was a trusted employee of Tom Hawk a Richmond, Virginia residential construction contractor. Among Emily's duties were the tasks of negotiating compromises of disputes with subcontractors over the amounts of the subcontractors' invoices and writing checks in the compromise amounts for Tom's signature. Tom's checking account is maintained at Central Bank in Richmond.

Emily betrayed Tom's trust. She developed a scheme whereby she occasionally challenged a subcontractor's bill, negotiated a compromise, drafted a check in the compromise amount, and, when Tom signed the check, sent it to the subcontractor with "Payment in Full" written conspicuously on the check. She would then write a separate check in the amount of the difference between the invoice amount and the compromise amount payable to a bogus company she formed, forge Tom's signature to this separate check, deposit the check in the bogus company's account, and take the money for herself.

This practice went on for over two years, and Emily's success emboldened her. In one instance, a local subcontractor, Solar Solutions, Inc. ("SSI"), had submitted an invoice for \$10,000. Without discussing with anyone whether Tom had any basis to challenge SSI's \$10,000 invoice, Emily wrote a check payable to SSI for \$5,000 and wrote "Payment in Full" conspicuously on the

check. She then forged and deposited a check for \$5,000 payable to her bogus company. When SSI's comptroller received the check, he struck through "Payment in Full," wrote "Partial Payment" above it, and cashed the check. He then called Tom directly, demanded an explanation, and demanded that Tom pay SSI the \$5,000 difference. Tom refused. Four months later, SSI tendered back to Tom the \$5,000 it had received and sued Tom for the entire amount of the invoice, \$10,000.

Despite the fact that Central Bank regularly sent Tom monthly checking account statements, including copies of the cancelled checks, Tom relied on Emily to review the statements and did not discover Emily's scheme until the phone call from SSI. Tom has now learned that Emily wrote forged checks to her bogus company for \$25,000 in 2004, \$30,000 in 2005, and \$10,000 in the last 30 days. Tom has demanded that Central Bank recredit his checking account with the total amount of all the forged checks. Central Bank has refused to do so.

- (a) **Is Tom liable to Solar Solutions, Inc.? Include in your answer a discussion of the effects, if any, of Solar Solutions' (i) cashing a check that had been marked "Payment in Full," (ii) striking "Payment in Full" and substituting "Partial Payment," and (iii) tendering repayment of the \$5,000. Explain fully.**
- (b) **What obligations, if any, does Central Bank have to recredit Tom's account with the amounts of any of the forged checks? Explain fully.**

Reminder: You MUST answer Question #4 above in YELLOW Booklet B

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➔➔ Now MOVE to TAN Answer Booklet C ←←

You MUST write your answer to Question 5 in TAN Answer Booklet C

5. Coach Tom hosted an overnight party at his home in a small town in southwest Virginia for the seniors on the local high school football team to celebrate the victory in the last game of their high school careers. Tom furnished all the food and beverages, including several kegs of beer.

The party was a great success and passed without incident until Officer Samson, the local police chief, learned about it a few days later. After talking to a number of the boys about what had happened, Samson informed Tom that he intended to have him charged with contributing to the delinquency of minors because Tom had provided the beer. Samson also said he was looking forward to being a witness at Tom's trial. This outraged Tom and he accused Samson of pursuing the charges only because he had a grudge against him going back to the time when Tom and Samson were on the high school football team together twenty years ago.

At the hearing before the local magistrate, the magistrate declined to issue any warrants against Tom. As Tom was driving out of the parking lot, still angry about the whole situation, he saw Samson in uniform standing next to his police car and talking with a man cutting grass nearby. Tom accelerated his car and aimed it directly at where Samson was standing. Samson saw Tom speeding toward him and jumped out of the way. Tom missed Samson but rammed the police car at the precise place where Samson had been standing.

Thereafter, Tom was indicted on two charges, which were set for trial together in the local circuit court: (i) assault and (ii) attempted capital murder of a law enforcement officer. The applicable murder statute provides that:

Capital murder shall include the willful, deliberate, and premeditated killing of a law enforcement officer when such killing is for the purpose of interfering with the performance of the officer's official duties.

At the trial in circuit court, the Commonwealth's Attorney presented evidence of all of the foregoing facts and rested his case. Tom's attorney immediately made the following motions before presenting any evidence:

- A. To strike the Commonwealth's evidence as legally insufficient to sustain a conviction of assault.
- B. To strike the Commonwealth's evidence as legally insufficient to sustain a conviction of attempted capital murder of a law enforcement officer.
- C. To dismiss either the assault or the attempted murder charge on the ground that prosecuting Tom for both violates the Double Jeopardy Clause of the U.S. Constitution.

How should the court rule on each of the motions? Explain fully. Your answers to A and B should address (i) the elements of each offense as well as (ii) the standard the court must apply in reviewing the sufficiency of the evidence.

Reminder: You MUST answer Question #5 above in TAN Booklet C

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END OF SECTION ONE