

Summary of Answers to the Essay Part of February 2009 Virginia Bar Exam
Prepared by Greg Baker & J. R. Zepkin of William & Mary Law School, Benjamin V. Madison, III, Thomas C. Folsom and C. Scott Pryor of Regent University School of Law.

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. Lonnie, a resident of Craig County, Virginia, executed a valid will with a self-proving affidavit in 1995. The will appointed Atticus as Executor of his estate and devised the entire estate to Lonnie's younger brother, Carl.

Lonnie married once and was divorced prior to 1995. There were no children of his marriage, and he had not remarried. He had no continuing obligations to his first wife or any other debts.

Lonnie died in 2008, survived by Carl. Lonnie's entire estate at the time of his death consisted of a farm in Craig County valued at \$250,000, various securities worth \$1,500,000, and a checking account of \$100,000.

Atticus found among Lonnie's papers a life insurance policy on Lonnie's life in the amount of \$250,000, listing Lonnie as owner. Lonnie had paid all the premiums and named Molly as the beneficiary. Atticus discovered that Molly is a woman with whom Lonnie had a romantic relationship dating back to the early 1990's. It turns out that she had a son, Buford, born in 1998, who Lonnie had never acknowledged as being his.

Following Lonnie's death, Molly, as mother and next friend of Buford, filed suit in the Circuit Court of Craig County, alleging that Lonnie was Buford's father. Evidence at the trial established that Lonnie and Molly had an intimate relationship, and genetic testing established conclusively that Lonnie was Buford's father, even though Lonnie's name did not appear on Buford's birth certificate.

Molly demands that Atticus distribute to her, as Buford's mother, whatever share of Lonnie's estate Buford may be entitled to receive. Atticus believes that he is not required to do so.

Atticus seeks your advice and asks you to answer the following questions and explain your answers fully:

- (a) Is Buford entitled to inherit from Lonnie, and, if so, what portion of Lonnie's estate is he entitled to inherit?
 - (b) Is Atticus required to distribute to Molly, as Buford's mother, any share of the estate to which Buford may be entitled?
 - (c) If Buford dies in the year 2010, unmarried and without issue, survived by Molly and Carl, who succeeds to any undistributed balance of Buford's share of the estate?
 - (d) Is Atticus, as Executor, required to file federal and state estate tax returns for Lonnie's estate?
- [a] Buford is a pretermitted child, since he was born after Lonnie had made the will. He's entitled to such portion of Lonnie's estate as he would have inherited if Lonnie had died intestate, which, since there's no surviving spouse, Buford would take all of Lonnie's estate. §64.1-1, §64.1-70.
- [b] Molly, as mother of Buford, is entitled to receive Buford's inheritance as custodian for Buford.
- [c] If Buford died in 2010, he would be 12 years old and any portion of his inheritance remaining would pass to the person or persons to whom it was given by will, which would be Carl. §64.1-70 [last sentence]
- [d] Atticus, as Executor, is required to file a Federal Estate Tax return because the estate was over \$2,000,000.00. Atticus is not required to file a Virginia Estate Tax return because for decedents dying on or after July 01, 2007,

Virginia no longer has an estate tax.

2. In December 2007, Fred and Ethyl Homeowner contracted with Garage Area Systems, Inc. ("GAS") for the construction of a pre-fabricated garage structure at their home in Fairfax County, Virginia. GAS is a Delaware corporation, the principal office of which is in College Park, Maryland. GAS does not maintain an office or any other facility in Virginia. Although GAS has an established Internet website and uses a national television advertising program, it does not send solicitations through the U.S. Mail.

GAS is in the business of furnishing patented, pre-engineered garage structures including a variety of interior finishes, which can be installed in a single day on a concrete pad. Though GAS does not perform the on-site construction with its own employees, GAS will manage the entire process (including a final "as built" on site inspection) for an additional fee and have the installation work performed by one of its "approved," independent garage constructors for those customer selecting the "Platinum Service Level."

Fred and Ethyl chose the Platinum Service Level and signed a contract with GAS in the amount of \$50,000, the entirety of which was paid to GAS before the garage was installed. GAS' form contract, which the Homeowners signed at their home, did not contain a dispute resolution provision, but it did include in its fine print a disclaimer of all implied warranties. GAS subcontracted with Garage Builders, L.L.C., a Virginia limited liability company, to perform the on site work. Though the on-site project work was completed and inspected in a single day, as advertised, Fred and Ethyl could not have been more displeased with the result. The garage, as installed, did not look at all like the photographs on GAS' website; the garage was not structurally sound; and the materials used in the garage emitted such a putrid odor that it made their household pets sick. Accordingly, they decided to sue GAS and proceeded *pro se* to do so.

Although Fred and Ethyl reside in Fairfax County, Virginia, where the garage was constructed, Fred decided to file the Complaint in the Circuit Court of Prince William County, Virginia because he works in Prince William County and that County's courthouse is more convenient to him. The Complaint seeks to recover the \$50,000 paid to GAS, plus other compensatory damages.

On January 3, 2008, Fred, proceeding *pro se*, filed a single original of the Complaint in the clerk's office, but failed to request that it be served and did not pay the fee for the Sheriff to serve the Complaint on GAS. Nor did Fred do anything further to see that the Complaint was served.

GAS first became aware of the lawsuit only yesterday when it received through the U.S. Mail an envelope from Fred containing nothing more than a copy of a one-page Motion for Default Judgment and a one-page Notice of Motion, stating that the Motion for Default Judgment is on the Court's docket for Friday, February 27, 2009.

GAS' in-house lawyer retains you to represent GAS, informs you of the above, and asks you to answer the following questions:

- (a) How should GAS respond to the Motion for Default Judgment to best protect its interests, and what, if any, relief might it obtain? Explain fully.
 - (b) Without regard to any service of process issues, is GAS as an entity subject to the jurisdiction of a Virginia circuit court in a case such as this one and, if so, on what basis? Explain fully.
 - (c) Assuming for the purpose of this subsection "c," only, that GAS had been properly served with the Complaint, may GAS object to venue in the Prince William County Circuit Court? Explain fully.
- [a] GAS should respond to the motion for default judgment in two ways: [1] GAS should make a special appearance moving to dismiss the motion for default judgment based on the fact that the court had no jurisdiction over GAS because it was never served; and [2] Under §8.01-277 B., GAS should move for dismissal of the action with prejudice based on Fred's failing to have GAS served within one year of filings suit and having failed to exercise diligence in trying to get GAS served. §8.01-275.1 & Rule 3:5(e).
- [b] Applicant should discuss whether Virginia's Long Arm Statute [LAS], §8.01-328.1 *et seq* applied. This required inquiry in to two areas:

- [1] Do the facts engage any of the particular instances listed in the LAS; and
 [2] If so, are the Constitutional requirements for Due Process met in hauling GAS into the Virginia courts.

As to [1], §8.01-328.1(1) may apply, if the contract was executed by GAS in Virginia, it would have transacted business in Virginia. This provision is a single act requirement. The BBE acknowledged that the facts did not reveal whether GAS signed the contract in Virginia. Also, §8.01-328.1(2) would apply in that GAS contracted to provide services or things in the Commonwealth. The action arises out of the contract.

As to [2], Due Process requirements are met in light of GAS's purposeful conduct, it would be consistent with fair play and substantial justice for a Virginia court to exercise personal jurisdiction. GAS had engaged in business in Virginia, contracting to perform services, construction and to supervise such construction, all in Virginia.

- [c] As to venue, applicant should recognize that this was a contract action and that while the facts are not clear whether the contract was signed by GAS in Virginia, GAS did contract to perform services in Fairfax and any breach would have occurred in Fairfax. Thus the cause of action would have arisen in Fairfax. Venue would be in Fairfax, not Prince William County and on motion of GAS, the court should transfer the case to the Circuit Court of Fairfax County. §8.01-262[4]

3. After twenty years of marriage, Bonnie and Clyde, both in their mid-40s, separated. Bonnie filed a petition in the Juvenile and Domestic Relations District Court in Richmond, Virginia for (1) primary physical custody of their only child, Andy, (2) spousal support, and (3) child support. At the trial, the following facts were offered by Bonnie and Clyde and admitted in evidence by the judge:

Andy is 12 years old. He is an excellent student, shows good judgment, and has many good friends he has known since kindergarten in the neighborhood where he has lived since birth. Andy is very close to both parents. Andy and Clyde both enjoy riding go-karts and shooting at the practice range, and they spend some time each weekend engaging in those activities.

Witnesses testified that, outwardly, Bonnie and Clyde appeared to maintain a stable household in a well-kept home and both of them exhibited a loving, caring relationship with Andy.

Bonnie worked for the past 10 years as a branch manager at the local bank. Clyde was steadily employed as a truck-driver for a local carrier. Their combined incomes furnished a comfortable living, but it required both incomes to maintain the moderate standards to which they had become accustomed.

However, for the past two years or so, both of them had been engaged in extramarital affairs, which they had managed to keep secret from each other. Bonnie was involved with the regional vice-president of the bank. Clyde was involved with Ginger, a co-worker who lived across town. Bonnie learned of Clyde's relation with Ginger when she accidentally tapped into a "steamy" voice message Ginger had left on Clyde's cell phone. Wracked with her own guilt, Bonnie decided to confront Clyde and, at the same time reveal her own infidelity, believing they could work through the problem.

Even after admitting his own infidelity, Clyde could not accept the situation. He immediately moved out of the family home and took up residence with Ginger. He also confronted Bonnie's paramour, who, fearing the repercussions on his own career, fired Bonnie on the pretext of poor job performance.

On the way home, and distraught over being fired, Bonnie caused a serious automobile accident in which she suffered injuries that left her temporarily disabled. She has been undergoing physical therapy, and her physician testified that, although she is capable of performing normal household duties, it will be at least a year before she can return to full time employment. She continues to live in the family home.

After Bonnie's accident, Andy moved in with Clyde and Ginger and testified that, although he misses his mom and neighborhood friends, he would prefer to live with Clyde and Ginger. Because Ginger lives in a different school district, Andy has transferred to another school. Clyde definitely wants Andy to live with him. Bonnie believes it is harmful to Andy's well-being to live in an "unmarried" household. Clyde and Ginger do not intend to marry in the foreseeable future, but, to shield Andy from any exposure to intimate activities, they maintain separate bedrooms in Ginger's house.

The judge said she would rule on the issues of custody and spousal support but would reserve ruling on the issue of child support until later.

On the issue of custody of Andy, the judge referred the attorneys for the parties to Va. Code § 20-124.3, which specifies 10 factors that the court must use in determining Andy's best interests. Noting that no single factor is determinative and that the outcome will be determined by a balancing of the factors, the judge directed the attorneys to file briefs applying the facts in evidence to the following four of the 10 statutory factors:

- I. The age and physical and mental condition of the child, giving due consideration to the child's changing developmental needs;
 - ii. The age and physical and mental condition of each parent;
 - iii. The relationship existing between each parent and child, giving due consideration to the positive involvement with the child's life and each parent's ability to assess the child's intellectual, physical and emotional needs;
 - iv. The reasonable preference of the child, if the court deems the child to be of reasonable intelligence, understanding, age and experience to express such a preference.
- (a) Applying the facts to each of the four statutory factors, what arguments should Bonnie make in support of her petition for primary physical custody of Andy? Explain fully.
 - (b) Applying the facts to each of the four statutory factors, what arguments should Clyde make in support of his desire to maintain primary custody of Andy? Explain fully.
 - (c) Considering Bonnie's adultery and her employment situation, should the court grant Bonnie's petition for spousal support or deny it? Explain fully.

[a]&[b] BBE wanted a good discussion with a solid application of the facts to the statutes given in the problem. The BBE viewed this question as a new approach, measuring the applicant's ability to match the facts with the law as given in the problem and ability to draw out those facts that supported and hurt each side over each issue, primary physical custody and primary custody. The BBE wanted applicants to discuss each of the statutory factors listed in the question and relate the facts given to support (a) Bonnie's claim for custody; and (b) Clyde's claim for custody. §20-124.3

[c] Adultery is not a factor for the court to consider on the issue of child support. The BBE wanted applicants to recognize that adultery is normally a bar to spousal support, but when manifest injustice would occur, the court may, in its discretion, order such support. §20-107.1

4. Sam Brown, a resident of Norfolk, Virginia, agreed to sell his cabin cruiser to his friend, Joe White, for \$15,300. In payment, Joe executed the following promissory note and delivered it to Sam on May 1, 2004, in exchange for the boat's title.

FOR VALUE RECEIVED, the undersigned promises to pay to Sam Brown, or to his order, the principal sum of FIFTEEN THOUSAND DOLLARS ONLY (\$15,300.00) with interest thereon, said sum and accrued interest to be due and payable on May 1, 2010.

/s/ Joe White

The note contained no additional terms or other words and there were no other documents evidencing the sale of the boat. In 2005, Sam purchased a golf cart from Jake Blue. Because Jake, Sam and Joe had been close friends for most of their lives, Jake was willing to accept Joe's note to Sam in payment for the cart. Wanting to insure that Joe would not later be indebted to a hostile creditor, Sam endorsed the note with the following language: "Pay to Jake Blue ONLY. /s/ Sam Brown."

February 2009, Jake needed cash unexpectedly. He endorsed the note simply by signing his name, "Jake Blue," on the back of the note and offered to sell it to Wayne for \$7,000.

Wayne believes that purchasing the note at that price would be a good investment but has the following concerns about it:

- (a) whether Jake has the power to negotiate the note to Wayne;
- (b) whether the note will bear interest and, if so, at what rate and from what date;
- (c) for what principal amount, if any, he can enforce the note; and
- (d) whether, if Wayne has to sue to obtain payment of the note, he will be able to recover his attorney's fees.

Address each of Wayne's concerns and explain fully to him how you would resolve each.

- [a] Sam was a holder in possession of the instrument. His restrictive endorsement limiting payment to a particular person or otherwise prohibiting further transfer or negotiation of the instrument is not effective to prevent further transfer or negotiation of the instrument. §8.3A-206
- [b] Unless the instrument specifies it is payable with interest, there is no interest. If the instrument specifies that it is payable with interest, the interest is payable from the date of the instrument. If the instrument specifies that it is payable with interest, but the interest rate cannot be ascertained from the description, the interest rate is the judgment rate in effect at the place of payment of the instrument and at the time interest first accrues. §8.3A-112
- [c] Jake can enforce the note for \$15,000.00 because words prevail over numbers. §8.3A-114
- [d] Wayne cannot recover attorney's fees. Virginia follows the American rule that unless a statute or the agreement itself grants the right to the winning party to recover attorney's fees, each side must bear the burden of its attorney fees.

5. Jimmy owned Whiteacre, a large tract of land on top of a mountain in Giles County, Virginia, upon which he wanted to develop a subdivision. Whiteacre was not landlocked, but access to Whiteacre from the closest public road was circuitous and extremely difficult.

Jimmy's sister, Geneva, owned Greenacre, an adjoining parcel of land where she had a summer cabin. Access to and from Greenacre was equally difficult

Mike owned Blackacre, a parcel adjoining Greenacre and fronting on Highway 460. Several years ago, Mike had granted Geneva an easement to use a private road running across Blackacre to Highway 460. The recorded easement stated that, "This easement shall be for access to the summer cabin on Greenacre." There were no public rights of passage over this private roadway.

When Geneva married and decided to move out of the area, she orally offered to sell Greenacre to Jimmy for \$25,000. Jimmy, believing the easement across Blackacre would solve the access problem and allow him to develop Whiteacre, orally accepted Geneva's offer. He immediately wrote a check payable to Geneva for \$25,000, making the following notation in the memo line at the lower left corner of the check: "For purchase of Greenacre." Geneva promptly endorsed and cashed the check and went on a cruise with her new husband, a law student.

When Geneva returned, Jimmy asked her to sign a deed conveying Greenacre to him. Geneva said she had changed her mind about selling Greenacre and offered to refund Jimmy's money. She said her husband had told her she was not bound by any sale because she had only orally agreed to sell the land to Jimmy.

Jimmy filed suit against Geneva for specific performance, and the Circuit Court, holding that Geneva and Jimmy had entered into a binding, enforceable contract, granted specific performance. Title to Greenacre, including the easement across Blackacre, was conveyed to Jimmy by a Special Commissioner of the Court.

Jimmy subdivided Whiteacre and Greenacre into 25 wooded lots and advertised them for sale. His advertising material contained a map showing that access between the lots and Highway 460 was on the road across Blackacre.

Mike sued Jimmy to enjoin Jimmy's use of the easement to serve the 25 lots in the subdivision. Jimmy filed an

answer and counterclaim against Mike. In the counterclaim he alleged as grounds for relief that, "Jimmy and his successors in interest have the right to cross Blackacre for access to all the lots in the subdivision either (i) by reason of the extreme difficulty of otherwise obtaining access to said lots or, in the alternative, (ii) by reason of the existing easement heretofore granted by Mike."

(a) Was the court correct in granting specific performance of the contract between Jimmy and Geneva? Explain fully.

(b) How should the court rule on each of the grounds alleged in Jimmy's counterclaim? Explain fully.

[a] Yes, the court was correct in granting specific performance. The issue the BBE wanted discussed is the Statute of Frauds, §11-2. To be enforceable, a contract to sell land must be in writing and signed by the party to be charged, which in this case would be Geneva. §11-2(6) The Statute of Frauds. The BBE thought the agreement was enforceable because (i) Jimmy has fully performed, having paid Geneva in full; and/or (ii) Geneva's endorsement and cashing of the check, that was marked "For purchase of Greenacre" created a sufficient memorandum of the transaction to constitute a writing.

✖✖ The BBE would accept either (i) or (ii) for full credit for subpart (a) and if the applicant gave both (i) & (ii), would give some extra credit that could be used, if needed, to get full credit for the applicant's answer to subpart (b).

[b] (i) A reasonable argument could be made that the extreme hardship resulting from denying Jimmy the use of the road justified the court in declaring there to be an easement by necessity, but the BBE thought the argument should fail because Jimmy did have access. He was not landlocked.

b) The existing easement was for access to only Greenacre but not Whiteacre. In addition, Jimmy's use substantially changed the burden and scope of use of the private road. The court should rule against Jimmy on this ground of the counterclaim too.

6. George Wilson decided to sell a large estate he owned near the Country Club of Virginia. Wilson engaged Broker, a local real estate broker, as his exclusive agent to sell the estate, and Broker was to receive a commission of 6% of the sale price if he sold the property on terms acceptable to Wilson. Fortuitously, Broker's uncle, Jimmy, the president of a lobbying firm in Washington, D.C., was in the market for a Virginia retreat that he could use on weekends to get away from the pressures of his business.

On a Saturday afternoon in July, Broker picked Jimmy up at a local coffee shop and proceeded toward Wilson's estate to show it to Jimmy. As he rounded a curve at an excessive speed on River Road near the estate, Broker lost control of his car. He ran into a ditch on Wilson's property, seriously injuring Jimmy.

Lucky, a gardener employed by Wilson, happened to be using a tractor owned by Wilson to remove some debris from the ditch. Lucky saw the incident and drove the tractor to the edge of the ditch where, after Broker got Jimmy out of the car, Lucky attached a chain to Broker's car and hooked the other end of the chain to the tractor. While attempting to pull Broker's car out of the ditch, Lucky negligently turned the tractor on its side in front of an oncoming vehicle in which Hoppy was a passenger. Hoppy was seriously injured in the collision.

When Jimmy was well enough to think again about his affairs, he spoke by telephone with Art, an attorney in Fairfax, Virginia. All Jimmy told Art was, "I was injured when my nephew, Broker, ran his car into a ditch on Wilson's property. I was on the way to look at the property, which Wilson had listed for sale with my nephew as his real estate broker. I don't want to sue Broker, but I do want to sue Wilson for my injuries." Based on that conversation, Art agreed to undertake the representation of Jimmy.

Coincidentally, Hoppy also consulted Art by phone and told Art only the following: "I was injured when my car collided with a tractor being operated by Wilson's gardener that suddenly turned on its side in front of me. I want to sue Wilson for my injuries." Based on that conversation, Art agreed to undertake the representation of Hoppy.

(a) Assuming that Broker was negligent in operating his car, can Wilson be held vicariously liable for Jimmy's injuries? Explain fully

(b) Assuming that Lucky was negligent in operating the tractor, can Wilson be held vicariously liable for Hoppy's

injuries? Explain fully.

- (c) What ethical obligations must Art satisfy before instituting the personal injury actions requested by Jimmy and Hoppy? Explain fully.
- [a] As to whether Wilson can be held vicariously liable, the BBE would accept an answer of either No, or probably not. The Broker was an agent as an independent contractor and the issue to be discussed is how much control Wilson had over the Broker.
- [b] The BBE would accept either conclusion, if well argued, but thought the better view was the Wilson was liable because Lucky was probably within the scope of employment at the time of the accident, but recognized there were some factors on the side of the opposite conclusion.
- [c] The answer the BBE wanted was based on §8.01-271, commonly referred to as the sanctions statute. The attorney in both instances, filed suit immediately after his phone call with the client and without making any investigation of the facts. The BBE thought that the attorney, before filing suit, was required under the statute to exercise diligence in determining that the facts alleged were well founded.

There was discussion about whether the reference to *ethical obligations* in the question was misleading, directing the applicant to the provisions in the Rules of Professional Conduct dealing with dual representation and recognizing potential conflicts based on [1] either client may get subpoenaed as a witness for or against the other client since everyone was contemporaneously at the scene during the two incidents; and [2] if the attorney obtained judgments in favor of each client, against Wilson, if Wilson did not have sufficient resources to satisfy both judgments, there would be a conflict. The BBE indicated that subpart [c] would count for no more than 20% of the total points allocated to the total problem and while it did not say for sure that credit would be given for a well reasoned answer based on an examination of the Rules of Professional Conduct, the sense was that respectable credit would be given.

7. Biscuits, Inc. ("Biscuits"), a Virginia corporation, operated a commercial bakery in Danville, Virginia.

On December 15, 2007, Biscuits decided to change the packaging for its cookies. Chad Ray ("Ray"), Biscuits' plant manager, consulted, among other suppliers, a company in Lynchburg, Virginia called Custom Wrap, Inc. ("Custom Wrap"), which designed and produced cellophane packaging materials. Ray described to Custom Wrap's sales representative the kind of wrapping and artwork he had in mind, gave the sales representative several of the cardboard trays Biscuits used to package the cookies so that Custom Wrap could determine the correct size of the wrapping, and asked whether Custom Wrap's lot prices were competitive with other producers in the area.

The sales representative for Custom Wrap told Ray that, at \$56.00 per roll, Custom Wrap could beat the competitors' prices if Biscuits ordered in 1,000 roll lots. He also said he would design the artwork but would need final approval before incurring the expense of producing the printing plates. He also mentioned that Custom Wrap had a policy requiring a customer who was not satisfied with product to notify Custom Wrap in writing within 20 days of delivery. This notification policy was in fact customary in the trade.

Ray said he understood all this and would need to see the artwork so he could seek approval from Biscuits' marketing department but that everything else seemed acceptable.

Unbeknownst to Custom Wrap, a corporation named Frawley Baking Co. ("Frawley") had purchased all the assets of Biscuits, including the Danville plant. Under the terms of the transaction, which closed on December 20, Biscuits warranted that all pending contracts between Biscuits and any other party were listed on the attached Schedule A. Biscuits agreed to indemnify Frawley for any liability arising from any breach of this warranty. Schedule A did not mention Custom Wrap.

In early January, Custom Wrap sent to the Danville plant a sample roll of the cellophane wrapping with the artwork it had designed. Ray, who was now employed as plant manager by Frawley, phoned Custom Wrap's representative, told him that the artwork would have to be changed to reflect Frawley's name but that, otherwise, the wrapping material was satisfactory and instructed him to ship 1,000 rolls of cellophane wrap at \$56.00 per roll.

On February 1, 2008, Custom Wrap delivered to the Danville plant 1,000 rolls manufactured with Frawley's name

correctly imprinted on the material.

On April 15, 2008, Ray phoned Custom Wrap and complained that the cellophane was too narrow for the cookie trays and said that he was sending the goods back to Custom Wrap. Custom Wrap stated that the wrapping had been manufactured in strict accordance with the sample sent to Biscuits and approved by Ray and that it would soon be sending an invoice for the full amount, which it expected Frawley to pay. Instead, on April 20, 2008, Frawley delivered the 1,000 rolls back to Custom Wrap's factory with a letter "rejecting the goods as non-conforming.

Custom Wrap filed a Complaint against Frawley in the appropriate state court alleging that, under the Virginia UCC, a contract existed between Custom Wrap and Frawley; that Frawley had breached that contract; and that Custom Wrap is entitled to recover \$56,000.

Frawley's Answer denied the existence of a contract between Custom Wrap and Frawley and raised the affirmative defense that, in any event, Frawley properly rejected Custom Wrap's shipment of nonconforming goods as permitted under the Virginia UCC.

Frawley also filed a third-party complaint against Biscuits, alleging that if Frawley were found liable to Custom Wrap, Biscuits is liable to indemnify Frawley for breach of the warranty in the contract of sale. Biscuits' Answer denied any liability to Frawley.

What is the likely outcome on:

(a) Custom Wrap's claims against Frawley? Explain fully.

(b) Frawley's affirmative defense against Custom Wrap? Explain fully.

(c) Frawley's third-party complaint against Biscuits? Explain fully.

[a] As to Custom Wraps claim against Frawley, the BBE viewed this as a Statute of Frauds issue, under the UCC Statute of Frauds, §8.2-201. This was a sale of goods of a value of \$500.00 or more and the negotiations between the parties were oral. The BBE wanted a discussion of whether any of the exceptions to the Statute of Frauds, contained in §8.2.201(3) applied, in particularly ¶(a) - specially manufactured goods and ¶(c) goods received and accepted [discussed under question subpart ¶ [b]. The BBE thought the specially manufactured exception analysis was the best answer.

[b] As to Frawley's affirmative defense of rejection of non conforming goods, the BBE Custom had the better side but wanted a discussion of rejection of the goods under §8.2-602 and revocation of acceptance under §8.2-608. Both must occur within a reasonable time and the facts indicate that Custom Wrap had told the Buyer's representative that notification must be given writing within 20 days of delivery. The facts further state that the 20 day period notification period was customary in the trade. Frawley did not respond for 2 ½ months and did so by phone not in writing. An oral agreement as to reasonable time is enforceable. §8.1A-205 and so are usage of trade terms under §8.1A-201(b)(3).

[c] As to Frawley's third-party complaint against Biscuits, Biscuits should win because there was no contract between Biscuits and Custom Wraps and consequently, Biscuits had not breached its duty to disclose to Frawley, all contracts it had. While §8.2-204(3) permits a contract to be formed even though one or more terms are left open, it does, as a condition for a contract to be formed that the parties intended to make a contract. On the facts of the problem, Ray "said he understood all this and would need to see the art work so he could seek approval from Biscuits' marketing department but that everything else seemed acceptable. The BBE thought that at the point of this conversation, no contract was entered into and it was after the closing of the sale from Biscuits to Frawley on December 20th before any final approval was given. Thus, on December 20th, there was no contract to be disclosed by Biscuits to Frawley.

8. Edgar, a recent engineering graduate from Virginia Tech, set up a civil engineering consulting firm in Salem, Virginia.

Edgar opened an unsecured line of credit with Engineering Supply Co. and regularly purchased office and

engineering supplies. On December 1, 2008, the line of credit had an unpaid balance of \$500.

On December 1, 2008, Edgar borrowed \$50,000 from Big Lick Bank (the "Bank") and signed a security agreement giving the Bank a security interest in "all my current and after acquired equipment, supplies, and accounts receivable." On December 5, 2008, the Bank properly filed a financing statement perfecting its interest under the December 1 security agreement.

On December 30, 2008, Edgar bought a \$1,000 field survey kit from Engineering Supply Co. on credit and gave Engineering Supply Co. a security agreement that listed the field survey kit as collateral to secure the \$1,000 purchase price and the existing \$500 balance on his line of credit with Engineering Supply Co.

On January 6, 2009, Edgar borrowed \$1,500 from Fast Freddie's Easy Loans to buy anew executive chair for his office. He gave Fast Freddie a security agreement pledging the field survey kit and "my currently owned and after acquired office furniture" as collateral to secure the loan. On January 6, 2009, Fast Freddie's Easy Loans properly filed a financing statement reflecting the terms of their January 6, 2009 security agreement.

On January 7, 2009, Edgar purchased a new sofa for his office from Office Furniture Limited for cash.

On January 15, 2009, Engineering Supply Co. filed a financing statement reflecting the terms of the December 30 security agreement it had with Edgar to secure the cost of the field survey kit and the \$500 debt.

Edgar is in default on his obligations to the creditors recited above, who now seek to foreclose their security interests.

Explain fully which of the foregoing creditors have competing security interests in the following items of Edgar's property and which creditor has priority:

- (a) The field survey kit purchased from Engineering Supply Co.?
 - (b) The new office sofa purchased from Office Furniture Limited?
 - (c) The supplies purchased from Engineering Supply Co.?
- [a] Engineering Supply Co. has the first lien on the field survey kit since it filed with 20 days to secure its purchase money security interest. It will be ahead of the Bank as to the kit since it holds a purchase money security interest. §8.9A-324. Fast Freddy's security interest would be last since it filed after the Bank had filed.
 - [b] The BBE viewed the new office sofa as equipment and since the Bank had filed first and office equipment was covered in its security agreement, the Bank was first. Fast Freddie would be next in line.
 - [c] As to the supplies purchased from Engineering Supply Co. On Edgar's unsecured line of credit, the Bank's lien is superior because it's the only creditor that has a security interest in the office supplies.

9. Helen contracted with Cameron to renovate the upper floor of her townhouse located in the historic area of the City of Alexandria, Virginia.

In the course of tearing out the bathroom walls of the 100-year-old townhouse, Cameron discovered two green metal lockboxes hanging from a hook behind a wall. Inside the lockboxes were a number of white envelopes. The only identifying data on the envelopes was the return address for a prior owner of the townhouse, long since deceased, who had sold the townhouse to a family who lived there themselves for 30 years and then sold it to Helen, the current owner, 10years ago.

The envelopes in the first lockbox contained \$182,000 in gold coins, which had been minted during the Depression of the 1930's, when bank collapses were common in the United States.

Inside the envelopes in the second lockbox were valuable pen and ink drawings of the United States Capitol by a famous artist. The drawings originally had been donated to the United States of America, but thereafter were stolen sometime in the 1930's from one of the museums in Washington, D.C. and never recovered despite intense efforts by

U.S. Government officials.

On the same day as Cameron's discovery of the lockboxes, a repairman working on a completely different project at the house next door, while hurriedly unloading his truck, inadvertently left a dusty, but expensive antique cabinet on Helen's property next to some construction debris and trash, which had been left there by Cameron. When Helen saw the cabinet, said she wanted it and told Cameron to move it into her garage. Before Cameron could do so, a passerby named Peter Pane, believing that the cabinet had been discarded, retrieved it from Helen's property, loaded it into the back of his mini-van, and drove off to his home in Fairfax County, Virginia. Thereafter, Peter painstakingly restored the cabinet and, once finished, affixed it to a wall in his house.

- (a) As between Cameron and Helen, who is entitled to the \$182,000 in Depression-era coins and why? Explain fully.
- (b) Who is entitled to the drawings of the Capitol and why? Explain fully.
- (c) What is the best argument that can be advanced first on behalf of Helen, and then on behalf of Peter, for entitlement to the cabinet? Explain fully.

[a] Helen, as owner of the property where the *treasure trove* was found, would have first claim, other than against the true owner, to the \$182,000.00 in coins. Cameron while the actual finder, was Helen's agent and she was on and had dominion over the property where the find was made.

There was discussion of the common law rule that the finder has the superior claim to the property against all but the true owner and the BBE indicated that some [no indication of how much] credit would be given for this analysis.

- [b] The drawings belongs to the United States and Helen is a holder for the benefit of the United States.
- [c] For Helen, the best argument in favor of the cabinet being hers is that it was found on her property and that Peter was a trespasser and had no right to take it. It does not matter whether the property was mislaid or abandoned.

For Peter, best argument is that the cabinet had been abandoned.