

Summary of Answers to the Essay Part of July 2007 Virginia Bar Exam

Prepared by Greg Baker & J. R. Zepkin of William & Mary Law School and Benjamin V. Madison, III & 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.

*** – For this exam, the Board did not disclose the customary amount of information and cites regarding the answer to each question, but basically provided a summary of the areas of discussion that was expected.

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

1) Billy Ray Valentine and his wife, Wilma owned a 30-acre tract of land located in Poquoson, Virginia. There was a dirt road that crossed over a part of the Valentines' 30-acre tract. The origin of the road is unknown, but since 1969, Powhatan Timber Company ("PTC") had used the road for sporadic and occasional visits to check timber growth on several tracts of timberland the company owned on the back side of the Valentine property. Although PTC had constructed a paved road on its own land, PTC used the dirt road because it was a shorter route to these particular tracts of timberland. At no time during the occasional use of the dirt road by PTC did PTC use it to haul timber or logs.

By deed of gift dated June 28, 1980, Billy Ray and his wife conveyed ten of the 30 acres to their son Johnny. That same year, Johnny built two houses on the 10 acres that had been conveyed to him. Also in 1980, on a one-acre tract adjoining his 10 acres, Johnny constructed a basketball court and a large storage shed. Johnny then built a tall fence around the entire 11 acres. The dirt road did not cross any of the 11 acres fenced by Johnny.

Billy Ray and his wife died in 1998 and in their wills devised to their niece, Dottie, the remaining 20 acres that they had not conveyed to Johnny in 1980. Following settlement of the estates under the wills, Dottie contacted Johnny and demanded that he immediately remove the fence, the basketball court and the shed from the one-acre tract. Johnny responded with a letter refusing Dottie's demands and declaring himself as the owner of the one-acre tract.

Dottie also constructed a gate blocking the dirt road that had been used by PTC. The company's president threatened litigation, asserting that PTC's use of the road as it had for more than three decades gave PTC the right to continue using it for purposes of forestry, timbering, and/or logging.

- (a) On what legal theory might Johnny base his assertion that he acquired ownership of the one-acre tract, and would he be likely to prevail? Explain fully.
- (b) On what two (2) legal theories might PTC base its assertion that it had acquired an easement to continue using the dirt road for purposes of forestry, timbering, and/or logging, and would it be likely to prevail on each? Explain fully.
- (a) Answer should contain a discussion of adverse possession, including its elements and whether on these facts, Johnny has acquired title by adverse possession. Under Va. Code §8.01-236 there is a 15 year period for one to acquire title by adverse possession, assuming the other elements are proven.
- (b) Answer should contain a discussion of easement by prescription, including its elements and whether on these facts, PTC had acquired an easement by prescription. By case law, there is a 20 year period for one to acquire a prescriptive easement, assuming the other elements are proven. The second theory was not discussed.

2) Second Chances, Inc. ("SCI") is a Virginia corporation with its principal place of business in Norfolk, Virginia. SCI operates an embryonic stem-cell laboratory in Norfolk. International Health Systems, Inc. ("IHS"), a Maryland corporation with its principal place of business in Baltimore, Maryland, operates a chain of hospitals and organ transplant centers.

Until recently, Dr. Harry Harvest was employed by IHS as its medical director under an employment contract that contained a restrictive covenant not to compete for a period of time after the termination of his employment with IHS and a

provision prohibiting Dr. Harvest from using or disclosing any of IHS's treatment technologies and other trade secrets for any purpose other than in connection with his employment with IHS.

Paul Preston, the president of SCI, knowing of Dr. Harvest's contract with IHS, nevertheless induced Dr. Harvest to quit his employment with IHS and to join SCI as its chief scientist and laboratory director. Dr. Harvest moved to Norfolk and commenced his employment with SCI. IHS learned that Dr. Harvest's work with SCI was in a field of endeavor that competed with IHS's organ transplant business and involved the use of some of the treatment technologies developed by IHS.

On July 2, 2007, IHS filed a complaint against SCI and Dr. Harvest in the Norfolk Circuit Court. The complaint alleged three counts: count one, a state law claim against SCI for intentional interference with IHS's contract with Dr. Harvest; count two, a state law claim against Dr. Harvest for breach of his covenant not to compete and violation of IHS's trade secrets; count three, a claim alleging that Dr. Harvest infringed IHS's federal embryonic stem-cell license in violation of a federal statute. The complaint prayed for damages in the amount of \$200,000 and for injunctive relief. The complaint did not contain a demand for a jury trial.

IHS's complaint was served on Dr. Harvest at his home on July 3, 2007. On the same day, Dr. Harvest gave a copy of the summons and complaint to Preston, but SCI was not served at its offices until July 9, 2007. Preston delivered the complaint to Lois Lawyer, a partner in the law firm that customarily represented SCI in litigation matters. He assured Ms. Lawyer that there was no substance to any of the counts in the complaint and told her he wanted her firm to represent Dr. Harvest as well as SCI in the lawsuit. Preston told Ms. Lawyer that he would feel more comfortable if the suit were moved to federal court and, in any event (either in federal or state court), he wanted the case tried before a jury.

(a) What two bases for removal to federal district court are suggested by the foregoing facts, and would either or both be a proper basis for removal in this case? Explain fully.

(b) What must Ms. Lawyer do procedurally to effect a removal? Explain fully any filing requirements, including the time limits, the nature and content of the pleadings, and the places of filing.

(c) Assuming that removal is accomplished, what steps should Ms. Lawyer take to ensure that the case will be tried to a jury in federal court? Explain fully.

(d) What ethical considerations are raised by the joint representation of both SCI and Dr. Harvest, and what actions, if any, should Ms. Lawyer take prior to agreeing to represent both defendants? Explain fully.

(a) The two bases for removal that are suggested by the facts are (1) Diversity of citizenship and (2) Federal Question.

Diversity:

Diversity of citizenship requires an analysis of not only the parties' citizenship but also whether the amount in controversy requirement of 28 USC §1332 is satisfied, i.e., whether the amount in controversy exceeds \$75,000 exclusive of interests and costs. The test for amount in controversy asks only whether the court, on reviewing the complaint, can say to a legal certainty that less than the amount in controversy is at issue. Here, the complaint seeks \$200,000 and nothing in the facts suggests that the court could say to a legal certainty that less than \$75,000 exclusive of interest and costs is at issue. Thus, the analysis should turn to the citizenship of the parties.

In determining diversity, one must determine what the citizenship is of the parties at the time of the filing of the suit. Complete diversity of citizenship is necessary, meaning that no party on the plaintiff's side can be of the same state citizenship as a party on the defendant's side. Thus, the citizenship of every party in the case has to be determined. Then one can see whether complete diversity exists.

Citizenship of Each Party

Corporate parties (SCI and IHS): Corporations (SCI and IHS) have dual citizenship – place of incorporation and principal place of business ("PPB"). Here, SCI's place of incorporation and PPB are VA; IHS's place of incorporation and PPB are MD.

Citizenship of individual (Harry Harvest): The test for the citizenship of an individual is his/her domicile. The test for domicile is a two part one: (1) where is the person physically located, and (2) where does the person have an intent to make his/her permanent residence and whenever absent return there. If both parts of the test are not met, one should go back to the location where the person last had both physical presence and intent to make it his/her permanent residence. The facts say that, prior to the filing of suit, Harvest moved to Norfolk and began his employment with SCI. That should satisfy both parts of the domicile test.

We have a corporate plaintiff (IHS) whose citizenship is MD. We further have a corporate defendant (SCI) whose citizenship is VA and an individual defendant (Harvest) whose citizenship is VA. As of the time of filing suit, no party on the plaintiff's side of the case is of the same citizenship of a party on the defendant's side of the case. Thus, complete diversity of citizenship exists.

Removal:

Even though diversity of citizenship exists, one must analyze whether the removal statutes permit removal of the case based on diversity of citizenship. The answer is "no" because of 28 USC §1441(b), which states:

Any civil action of which the district courts have original jurisdiction founded on a claim of right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

The second sentence, referring to actions "other" than federal question ones, includes diversity of citizenship. Even though the federal court would have diversity of citizenship jurisdiction, this part of the removal statutes precludes removal if any defendant is a citizen of the state where suit is filed. Here, suit was filed in the Circuit Court of the City of Norfolk, Virginia. Because SCI and Harvest are citizens of Virginia, removal cannot be accomplished under diversity of citizenship jurisdiction.

Federal Question:

For a case to satisfy federal question jurisdiction, one must (1) have a well-pleaded complaint, and (2) the federal question must be central enough that it satisfies the murky substantiality/centrality rule.

A complaint is well pleaded if, in light of the claims and the elements of the claims, a federal question has to be litigated as part of the plaintiff's case. Here, one of the claims (Count III) is that Harvest infringed IHS's federal embryonic stem-cell license in violation of a federal statute. Federal law would have to be litigated as part of the plaintiff's case and thus should satisfy the well-pleaded complaint rule.

(b) In order to effect the removal, Ms. Lawyer must comply with 28 USC §1446, which provides:

§ 1446. Procedure for removal

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to *Rule 11 of the Federal Rules of Civil Procedure* and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

- (c) In order to assure a jury trial, Ms. Lawyer must comply with Rule 38 of the Federal Rules of Civil Procedure, which provides:

Rule 38. Jury Trial of Right

(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by (1) serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to the issue, and (2) filing the demand as required by Rule 5(d). Such demand may be indorsed upon a pleading of the party.

(c) Same: Specification of Issues. In the demand a party may specify the issues which the party wishes so tried; otherwise the party shall be deemed to have demanded trial by jury for all the issues so triable. If the party has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

(d) Waiver. The failure of a party to serve and file a demand as required by this rule constitutes a waiver by the party of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

- (d) Ms. Lawyer's representation of both SCI and Dr. Harvest presents a conflict of interest resulting from joint representation. Virginia Rule of Professional Conduct 1.7(a) provides that a concurrent conflict of interest exists if "there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client." Here, there is a significant risk that Dr. Harvest and SCI will have competing interests in the representation such as, for instance, if Dr. Harvest attempts to blame SCI for the contractual interference because it "induced" him to join SCI or if SCI attempts to limit Dr. Harvest's defense on counts two and three if it learns it cannot be held responsible for his actions in that regard.

Given this concurrent conflict, Ms. Lawyer can only represent both if "each affected client consents after consultation, and: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) the consent from the client is memorialized in writing." Prior to undertaking representation, Ms. Lawyer should therefore ensure that each of these conditions is satisfied. Perhaps most importantly in this case, she should explain to both SCI and Dr. Harvest the potential for conflicts of interest between, as well as the advantages, disadvantages, and implications of joint representation (such as the affect of joint representation on the attorney-client privilege).

- 3) Bunky Bunkhouser and Lumpy Laramore, both Virginia residents, formed a valid limited partnership in 1997 pursuant to the Virginia Revised Uniform Limited Partnership Act to "hold, improve, maintain, sell (in whole or in part), operate and lease" the Hollow's Edge, an apartment complex in Fairfax County, Virginia. The entity was named Hollow's Edge Limited Partnership ("HELP"); Bunky was its sole general partner, and Lumpy was its first limited partner. In time, some twenty additional individuals became limited partners of HELP

HELP had a short written partnership agreement that contained among its provisions the following:

- (i) The partnership agreement may be amended only with the unanimous consent of all the partners.
- (ii) The maximum annual management fee the partnership may pay is ten percent (10%) of the annual rental income received by the partnership.
- (iii) The partnership books shall be closed and balanced at the end of each fiscal year and audited by an independent accounting firm regularly engaged by the partnership.

(iv) Within ninety (90) days after the end of each fiscal year the general partner shall deliver to each limited partner a balance sheet and income statement showing the capital account of each limited partner.

The partnership agreement says nothing about the general partner serving as manager of the partnership's property.

Although Bunky has managed HELP's property since 1997, there was never a management contract between Bunky and HELP. In 2005 Bunky realized that he had never charged HELP for any part of the management fee referenced in the partnership agreement. Without notifying the limited partners, Bunky decided to charge HELP the maximum management fee for the years he had managed the apartments. Apportioned over each year since 1997, Bunky caused HELP to pay him a total of \$335,000 for such "past due" management fees. Bunky has always furnished the annual financial statements to the limited partners, but he never reopened any of the statements to adjust for the management fees.

In May 2007, Lumpy filed suit for an accounting in the Circuit Court of Fairfax County, Virginia, against Bunky and HELP. Ten days later, Lumpy was killed in a tragic automobile collision on the Capital Beltway.

Lumpy's adult son, Wyatt, was substituted as plaintiff in the suit in his capacity as executor of his father's estate. The Virginia Revised Uniform Limited Partnership Act provides, in pertinent part:

If a partner who is an individual dies...the partner's executor...may exercise all the partner's rights for the purpose of settling his estate or administering his property including any power the partner had to give an assignee the right to become a limited partner. Va. Code Ann. § 50-73.48.

After Lumpy's death and Wyatt's qualification as executor of Lumpy's estate, Bunky proposed an amendment to the HELP partnership agreement to extend the duration of the partnership by 25 years, one effect of which would be to extend his management tenure and perpetuate his receipt of management fees. All of the then current limited partners approved the amendment. The partnership interest owned by Lumpy's estate did not participate in this decision because Wyatt was never given notice that any amendment had been proposed, nor was he asked to approve it.

The Circuit Court Judge allowed Wyatt, acting as executor, to amend the lawsuit to include a challenge to the amendment.

The pending lawsuit raises the following issues, which you must answer:

(a) What duties, if any, did Bunky owe the HELP partnership, and in what respects did he violate those duties by paying himself the management fees? Explain fully.

(b) Was the extension of the partnership term for HELP valid? Explain fully.

(a) Discuss Bunky's fiduciary duty of care and loyalty to the Partnership and his duty to observe the terms of the Partnership agreement and that he must avoid self dealing. Under the revised Uniform Partnership Act, a general partner is not entitled to a management fee unless the partnership agreement provided for one and this one did not.

Bunky's violations of duty were [1] self dealing; [2] breach of duty of loyalty by failing to account for any fees taken without authorization and by his failure to adjust the annual statements for his taking the management fee.

(b) The extension of the partnership term was not valid. The partnership agreement provided that all partners must approve it and the statute provided in the problem facts gave the Executor the same rights as the deceased partner and the Executor was not given notice and did not approve it. *Friedberg v. Hague Park Apartments et al* 61 Va. Cir. 589 (2001)

4) Joe Brown, who spent the evening drinking beer and whiskey at the bar of a disco in Abingdon, Virginia, was physically ejected by Casey White, the proprietor, for being drunk and disorderly. Joe uttered a vague threat against Casey and staggered into the parking lot, where he met his brother, Randy. Joe told Randy that Casey had thrown him out of the disco, and, after talking it over, Joe and Randy decided to go back to the disco and "teach Casey some manners."

They found Casey standing just inside the front door of the disco. Joe, slurring his words, said angrily to Casey, "If I wasn't so drunk, I'd do it myself, but I'm going to have my brother here kick your butt." Joe then staggered away, went out to his car, and promptly passed out in the back seat.

Casey then told Randy to get out or he would be thrown out just like Joe. Randy grabbed Casey and, after kicking him, threw him into the street. Casey pulled a knife from his pocket and lunged at Randy, attempting to stab him. Seeing this, Randy became alarmed and pulled a pistol from his pocket and shot Casey in the shoulder.

Joe and Randy were arrested and criminally charged with violation of the following statute for the injury to Casey:

"If any person maliciously shoot, stab, cut, or wound any person or by any means cause him bodily injury, with the intent to maim, disfigure, disable, or kill, he shall, except where it is otherwise provided, be guilty of a Class 3 felony. If such act be done unlawfully but not maliciously, with the intent aforesaid, the offender shall be guilty of a Class 6 felony. "

At their joint trial, the facts were undisputed. Joe defended on the grounds that (1) he was not present during the fight as it was taking place between Randy and Casey, (ii) he had no knowledge that Randy had a Firearm, and (iii) he was intoxicated to such an extent that he was unable to form the intent to commit the charged crime.

Randy defended on the ground of self-defense and asked the trial judge to instruct the jury accordingly.

(a) Can the Commonwealth's Attorney make out a prima facie case against Joe for violation of the statute? Explain fully.

(b) Can Joe prevail on any of his defenses? Explain fully.

(c) Should the judge grant Randy's request for a self-defense instruction? Explain fully.

(a) Student should discuss the law of accessories and principals.

(b) Discuss the effect of voluntary intoxication.

(c) Where the defendant was the aggressor, he must retreat as far as he can under the circumstances and make a good faith attempt to abandon the fight. Student should discuss whether the evidence sufficiently shows that Randy did this so that Randy would be entitled to a jury instruction on self defense. See Virginia Model Jury Instruction - Criminal 52.510.

5) McCoy Construction and Paving Company ("McCoy Paving"), a Delaware corporation with its principal place of business in Appomattox County, Virginia, had a long-term supply contract with Rocky Resources Corporation ("Rocky"), a Colorado corporation with its principal place of business in Colorado. The contract called for Rocky to deliver 2,000 tons of crushed stone to McCoy Paving in Virginia on the 15th day of the first month of each calendar quarter. The contract was signed on December 1, 1990, and required quarterly deliveries from January 15, 1991 through October 15, 2000. It provided in part that, "This contract shall be construed and enforced in accordance with Colorado law."

On July 15, 1995, Rocky missed its delivery. McCoy Paving waited until July 17, and then its president, Perry Quinn, called the president of Rocky, Gordon Langston, to inquire what had gone wrong. Langston replied, "Oh, I thought I called and told you. We won't be able to make the July delivery. But don't worry, we'll be back on track in October." Quinn was annoyed at the lapse, but Rocky's performance had been generally satisfactory up to then, so he took no further action at that time. Rocky met all further shipping requirements.

On February 1, 2001, however, McCoy Paving sued Rocky in the Circuit Court for the County of Appomattox, Virginia for damages sustained on account of Rocky's failure to make the July 15, 1995, delivery. McCoy Paving arranged for service of process upon Rocky by filing an affidavit that Rocky was a non-resident of Virginia with the Clerk of the Circuit Court and requesting the Clerk to serve the Complaint and related process on the Secretary of the Commonwealth of Virginia, who accepted and forwarded the same to Rocky in Colorado.

Rocky appeared by counsel and filed a motion to quash the service of process on the ground that the court lacked personal jurisdiction over Rocky. After a hearing, the Judge denied the motion to quash. Rocky then filed its answer

asserting, among other things, that McCoy Paving's claim was barred by the statute of limitations.

At his deposition, President Langston of Rocky acknowledged the July 17, 1995, conversation with President Quinn of McCoy Paving. He agreed that Rocky had failed to deliver crushed stone as scheduled on July 15, 1995, and explained that, "I have no excuse for that missed delivery. We just didn't get it done."

Rocky moved for summary judgment on the ground that the claim was barred by the applicable Virginia five-year statute of limitations. The trial court denied Rocky's motion, holding that the claim was governed by Colorado's 10-year statute of limitations for causes of action based on written contracts.

Relying on Langston's deposition, McCoy Paving moved for summary judgment on the issue of liability. Rocky objected to the use of the deposition testimony and opposed the motion on the ground that material factual issues were in dispute. The Circuit Court granted McCoy Paving's motion and, following a subsequent trial on damages, entered judgment in favor of McCoy Paving in the amount of \$15,000.

(a) Did the court err in denying Rocky's motion to quash service of process? Explain fully.

(b) Did the court err in denying Rocky's motion for summary judgment? Explain fully.

(c) Without regard to whether the court ruled correctly on Rocky's motion for summary judgment, did the court err in granting McCoy Paving's motion for summary judgment? Explain fully.

(a) The court did not err in denying the motion to quash. Rocky having contracted to supply service or things in this Commonwealth would be subject to the long arm jurisdiction of Virginia's courts under Va. Code §8.01-328.1(2).

(b) Yes, the court erred in denying Rocky's motion for summary judgment. Under Va. Code §8.01-247 where a contract is governed by the law of another State, if the claim is barred by either the other State's or Virginia's statute of limitation, it's time barred in the Virginia action.

(c) The court erred in granting McCoy's motion for summary judgment because it was based on Langston's deposition. Va. Code §8.01-420 and Rule 3:20 both bar the use of discovery depositions in ruling on a motion for summary judgment unless all parties to the action agree for it to be used.

6) Tex, the owner of a very valuable and rare 1953 Gibson Les Paul goldtop electric guitar, allowed his daughter, Jolene, an aspiring country singer, to use the guitar for a singing engagement in Abingdon, Virginia. He pointed out to her before she left home that the knob that controlled the volume on the guitar was loose and needed repair. Tex instructed Jolene to get it repaired and said he would reimburse her for the cost.

Jolene took the guitar to a shop in Abingdon; the sign painted on the window indicated that it was "Moe's Guitars — Sales and Repairs." Moe looked at the guitar, agreed to fix it, gave Jolene a claim ticket, and told her she could pick it up later in the day.

Moe repaired the loose knob and marked the \$100 price of the repair on his copy of the claim ticket, which he then tied to the neck of the guitar. He hung the guitar on the wall behind the counter and went to lunch, leaving the shop in the hands of Bubba, a new sales clerk he had hired the day before.

Soon after Moe had left, Garth Rivers, a country music superstar who was in town, walked by Moe's shop and happened to see the 1953 Gibson Les Paul goldtop guitar hanging behind the counter. He recognized it as a very rare guitar and was surprised to see it because he believed that the few remaining ones of that model were owned by private collectors. Garth entered Moe's shop and told Bubba, "I want that guitar — no haggling. I'll give you \$50,000 for it."

Bubba, thinking that the claim ticket Moe had tied to the neck of the guitar was a price tag, concluded that a sale for \$50,000 would be a very good deal for Moe. He agreed to sell it. Garth went out to his tour bus, returned with \$50,000 in cash, and handed it to Bubba. Bubba wrote out a receipt and gave it to Garth along with the guitar, with the claim ticket still tied to the neck of the guitar.

Bubba had never seen so much money and could not resist the temptation to keep it for himself. He took the

money, left town, and his present whereabouts are unknown. When Moe returned from lunch, he saw that Bubba and the guitar were gone. Assuming that Bubba had stolen the guitar, Moe reported it to the police and Jolene.

Six months later, Garth was contacted by an investigator employed by Insko, the insurance company that had insured Tex's guitar against loss. The investigator explained that Tex had filed a claim for \$50,000, the fair market value of his "stolen" guitar, that Insko was investigating the loss, and that Garth had been seen playing that guitar during one of his performances. The Insko investigator demanded that Garth surrender the guitar. Garth explained the circumstances under which he had acquired the guitar and refused to surrender it.

As between Tex and Garth, who bears the risk of loss under the Uniform Commercial Code? Explain fully.

- a) The BBE thought the answer of who beared the risk of loss was a close one and would give full credit for a well reasoned analysis that reached either conclusion. The Board wanted a discussion of the agency relationship between Tex and his daughter, Jolene, and that the daughter took the guitar to a store which she would have known did repairs and also sold musical instruments. This knowledge would be imputed to Tex because of the agency relationship. Va.'s UCC provides:

§ 8.2-403. Power to transfer; good faith purchase of goods; "entrusting."

(1) A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though

- (a) the transferor was deceived as to the identity of the purchaser, or
- (b) the delivery was in exchange for a check which is later dishonored, or
- (c) it was agreed that the transaction was to be a "cash sale," or
- (d) the delivery was procured through fraud punishable as larcenous under the criminal law.

(2) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business.

(3) "Entrusting" includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods have been such as to be larcenous under the criminal law.

(4) The rights of other purchasers of goods and of lien creditors are governed by the titles on secured transactions (Title 8.9A), bulk sales (Title 8.6A) and documents of title (Title 8.7).

What made the issue close was that while the guitar was sold to Garth Rivers in the ordinary course of business and he paid fair market value for it, there were some facts that raised the question of whether he was buying it in good faith. These facts were that the guitar had a claim ticket attached that said \$100.00 and also the quickness that Garth forked over \$50,000.00 for the guitar.

- 7) Wanda was a very successful rock star earning more that \$1 million a year. In 1999, she married Harry, and in 2000 Wanda gave birth to their daughter, Doe. Harry had negligible income during the marriage, but he and Wanda lived a lavish lifestyle using Wanda's earnings. In January 2005, upon returning to her home in Virginia Beach, Virginia from an out-of-town engagement, Wanda found Harry in bed with Doe's nanny. Wanda immediately ejected Harry from the house and filed suit in the Circuit Court of Virginia Beach for divorce on the ground of adultery. Wanda did not seek spousal support or child support, but asked for custody of Doe.

Harry left the house and filed a counterclaim for divorce alleging cruelty as the ground and seeking spousal support and equitable distribution of the marital property. Harry did not object to Wanda having custody of Doe, but asked to be relieved of any child support obligation. Since Wanda was desperate to get Harry out of Doe's life completely, Wanda initially entered into an agreement with Harry that he would be relieved of any child support obligation, and she did not seek child support from him. Wanda later changed her mind, but Harry asked the court to enforce their agreement.

The evidence at trial established Harry's adultery and that Wanda and Harry did not cohabit for more than a year following the separation. In addition, the evidence established that Wanda purchased the home in Virginia Beach in 1998

for cash at a price of \$3 million and that market forces increased its value to \$5 million. Wanda also had an investment portfolio, the sole source of which was her earnings since 2000, and which was managed entirely by her financial advisor. The evidence established that at the time of trial the portfolio was valued at \$20 million.

At the trial, Harry's attorney made an oral motion to amend his counterclaim to change the ground for divorce from cruelty to the no-fault ground that Wanda and Harry had been separated for a year. Over Wanda's objection, the court granted the motion.

In January 2007, almost a year after the end of the trial, the court issued a decision denying Wanda a divorce on the ground of adultery; granting Harry a divorce based on the one-year separation; and awarding Harry one-half the value of the home in Virginia Beach, an equitable distribution of 10% of the investment portfolio valued as of the time of trial, and spousal support of \$20,000 per month to be paid by Wanda. The court also entered an order awarding Wanda sole custody of Doe and relieving Harry of any obligation to provide child support. The court's opinion made no findings regarding the custody and support of the child but stated that the court was simply enforcing the parties' agreement.

Between the time of the trial and the court's decision, the investment portfolio increased in value from \$20 million to \$25 million due solely to the stock market and the management efforts of Wanda's financial advisor. Harry's attorney made a motion to reopen the trial in order to revalue the investment portfolio to reflect the higher current value. The court granted the motion.

On appeal, Wanda asserts as grounds of appeal, each of which was properly preserved, that the court erred:

- (a) In granting Harry's oral motion to change the grounds of his counterclaim for divorce and awarding him a divorce based on the one-year separation.
- (b) In granting Harry's motion to reopen the trial for the purpose of revaluing the investment portfolio;
- (c) In awarding Harry one-half of the value of the Virginia Beach home;
- (d) In awarding Harry spousal support; and
- (e) In relieving Harry of obligations for support of Doe.

How should the appellate court resolve each of Wanda's grounds of appeal? Explain fully.

- (a) The court did not err in granting Harry's oral motion to amend his counterclaim and in granting the divorce on the grounds of separation for the statutory period. Under Rule 1:8, leave to amend is to be liberally granted to attain the ends of justice and it is discretionary with the court on which ground to grant a divorce where multiple grounds are shown.
- (b) The court did not err in granting Harry's motion to reopen the trial for the purpose of revaluing the investment portfolio since the matter was still pending & within the control of the trial court. No final order had been entered and become final under Rule 1:1. The investment portfolio was marital property and whether to grant a motion to reopen the matter is a discretionary call by the trial judge. Here the long time interval between filing suit and the court's decision supported the judge's decision to reopen.
- (c) The trial court erred in granting Harry 1/2 of the value of the Virginia Beach home because the home was separate property. It was her home and Harry did not contribute anything to the home.
- (d) Student should recognize and discuss that while the divorce was awarded based on no fault grounds, there was still Harry's adultery, which bars support unless to do so would work an injustice. See Va. Code §20-107.1[B]
- (e) The trial court erred in relieving Harry of the support obligation based on following the parties' contract. The court should have decided this issue based on what was in the best interest of the child.

8) Andrew Jackson Madison ("AJ"), an experienced attorney who practiced for many years in the State of Maryland, was recently licensed as a member of the Virginia State Bar. He is now practicing law exclusively in Northern Virginia. AJ

has obtained large recoveries for five plaintiffs in separate product liability actions against Cutter Corporation, a chainsaw manufacturer incorporated in Delaware, with its principal place of business in Harrisonburg, Virginia. Each of the product liability actions has been filed in the Circuit Court of Prince William County, Virginia.

Cutter Corporation has offered to settle another lawsuit filed by AJ on financially attractive terms, provided AJ agrees not to take any cases against Cutter Corporation in the future, AJ seeks your guidance on the following questions:

- (a) Assuming AJ's client is willing to settle, may AJ agree to a settlement that contains such a provision? Explain fully.
 - (b) Would it make any difference if the Circuit Court of Prince William County approved the settlement and all its terms? Explain fully.
 - (c) Suppose the client is willing to settle, but AJ is not willing to agree upon any restriction on his future law practice. What are AJ's obligations as a member of the Virginia State Bar? Explain fully.
 - (d) For purposes of answering this subsection "d" only, suppose Cutter's in-house general counsel, herself a member of the Virginia State Bar, makes a very lucrative, but highly confidential settlement offer with the stipulation that AJ not tell anyone (including not even his client or the court) about the restriction on his future law practice. The dollar amount of the settlement will unquestionably lead AJ's client to want to accept the offer. What are AJ'S obligations as a member of the Virginia State Bar? Explain fully.
- (a) AJ may not agree to such a settlement provision. It would violate Rule of Professional Conduct [RPC] 5:6(b).
 - (b) If the court approved the settlement, then RPC 5:6(b) specifically authorizes the attorney to enter into the agreement.
 - (c) RPC 1.2 provides that a "lawyer shall abide by a client's decision, after consultation with the lawyer, whether to accept an offer of settlement of a matter." Therefore, if the settlement is approved by the court, RPC 5.6(b) does not prohibit the agreement, and AJ must abide by the client's decision. This situation presents a conflict for the attorney and AJ must inform the client and the attorney should withdraw from the representation. If the settlement is not approved by the court, AJ cannot participate in it even if the client wants to agree to it.
 - (d) AJ would be obligated to make full disclosure to the client RPC 1:4(c). Further, AJ is obligated to report the in house counsel's improper conduct. RPC 8.3(a) & 8.4(a).

9) Testator, a resident of Virginia, died on January 1, 2007. His properly executed self-proving will was probated and provided as follows in its entirety:

"I give and devise my residence property in Honaker, Virginia to my wife, Wendy, to do with as she pleases, and, if it remains undisposed of at her death, title shall pass to my brother, Bob.

I give and devise to my son, Dick, my apartment building in Cleveland, Virginia.

I give and bequeath my U.S. Treasury bonds to my daughter, Jane.

I give, devise, and bequeath to my grandchildren, Seth and Rob, my certificates of deposit."

The inventory of Testator's estate showed that his residence in Honaker was valued at \$1,000,000; the apartment building was valued at \$750,000; the U.S. Treasury bonds were valued at \$250,000, and the certificates of deposit were valued at \$75,000.

The apartment building was encumbered by a deed of trust securing a \$500,000 personal loan made to Testator by First Bank, which was due upon sale of the apartment building or upon Testator's death.

Testator had used the proceeds of the loan from First Bank to purchase a fully paid \$1,000,000 life insurance policy on his own life and had designated Seth and Rob as the beneficiaries.

Testator was survived by Wendy, Bob, Dick, Jane, Seth, and Rob. In the probate proceedings, the following demands are lodged against Testator's estate:

- (a) Bob claims that he owns an interest in the residence in Honaker and asks the court to define and declare his interest. Wendy disputes Bob's claim.
- (b) First Bank demands payment of the \$500,000 balance on its loan. Dick asserts that the U.S. Treasury bonds, certificates of deposit, and life insurance proceeds should be used first to satisfy the debt. Jane, Seth, and Rob assert that First Bank's recourse is to the apartment building that secured the loan.

How should the judge resolve each of the demands? Explain fully.

- (a) The judge should rule that Bob has no interest in the residence in Honaker. "... an absolute and unqualified power of disposing, conferred by will, and not controlled or explained by any other provision, should be construed as a gift of the absolute property." Burwell's Ex'rs v. Anderson 30 Va. 348 (1831).
- (b) The judge should rule that the \$500,000.00 loan should first be paid out of the US Treasury Bonds & certificates of deposit. Virginia adheres to the common law rule that "... even though a debt is secured by a mortgage or other lien on land, if it is a personal debt of the decedent, it is to be paid primarily out of his personalty." Brown, Administrator v. Hargraves 198 Va. 748 [1957].

The life insurance proceeds are paid directly to the beneficiary under the insurance policy and are not part of the estate.

*** Effective July 01, 2007 a new statute Va. Code §64.1-157.1 was adopted that reads in part:

§ 64.1-157.1. Nonexoneration; payment of lien if granted by agent

A. Unless a contrary intent is clearly set out in the will, a specific devise or bequest of real or personal property passes, subject to any mortgage, pledge, security interest, or other lien existing at the date of death of the testator, without the right of exoneration. A general directive in the will to pay debts shall not be evidence of a contrary intent that the mortgage, pledge, security interest or other lien be exonerated prior to passing to the legatee.

The BBE indicated that a student relying on this new statute and answering that the apartment building property would pass to Dick, subject to the lien of the deed of trust, would get full credit, but noted that the testator died on January 01, 2007, which would have been prior to the effective date of the new statute.