

**Summary of Answers to the Essay Part of July 2009 Virginia Bar Exam**

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After each bar exam, the Virginia Board of Bar Examiners invites representatives from each of the law schools in Virginia to meet with the Board for a review and discussion of the range of answers the Board will accept for each essay question. As a result of these discussions, the Board will often expand the scope of what is an acceptable answer.

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

1. In 2000, Ben Caldwell, a resident of the County of Roanoke, Virginia executed a valid will by which he left his entire estate to his wife Nancy. The will named Nancy as Executor. Ben and Nancy had three adult children of their marriage: George, Wiley, and Polly, none of whom was mentioned in Ben's will. George died in an automobile accident in 2006, survived by his wife, Mary, and two minor children, Ken and Julie.

Ben died on June 30, 2009. Nancy, who was seriously ill at the time of Ben's death, died on July 25, 2009, before Ben's will was offered for probate. Nancy died without a will. Ben and Nancy were survived by their two children, Wiley and Polly, and by Mary and her two minor children, Ken and Julie.

Ben died with interests in the following assets:

- A joint checking account containing \$30,000 held in the names of Ben and Nancy as joint tenants with the right of survivorship.
- A family home valued at \$250,000 held as tenants by the entirety with the right of survivorship.
- Rights as sole beneficiary in a trust created by his grandparents, from which he received all of the income. The trust instrument provided that the corpus would be distributed to Ben's children upon Ben's death. The corpus of the trust at the time of Ben's death was \$9,500,000, and there was accumulated, undistributed income of an additional \$25,000.
- A 2007 Cadillac titled in his name and valued at \$20,000.

When Nancy died, her estate consisted of \$250,000 she had inherited from her parents and which she held in her sole name in a separate account, and such other assets as she received as a consequence of Ben's death.

- [a] What is the title of the person who will manage Ben's estate and how will that person be selected? Explain fully.
- [b] What is the title of the person who will manage Nancy's estate and how will that person be selected? Explain fully.
- [c] Which of the assets mentioned in the facts given above must be included in the inventory of Ben's estate, and which ones should not be included? Explain fully.
- [d] Which of the assets mentioned in the facts given above must be included in the inventory of Nancy's estate? Explain fully.
- [e] Who is entitled to receive a share of Nancy's estate and in what proportions? Explain fully.
- [a] The title of the person who will manage Ben's estate is called an administrator C.T.A.. The Clerk or the Judge of the Circuit Court of Roanoke County will choose a suitable and competent personal representative. The person so chosen shall be a residual or a substantial legatee under the will, or his designee. Upon failure of any such person so to apply within thirty days, qualification can be made by any such person entitled to administration if there had been no will.
- [b] The title of the person who will manage Nancy's estate is called an administrator. The Clerk or the Judge of the Circuit Court will choose a suitable and competent personal representative. Since Nancy is not survived by a spouse who is the sole distributee of her estate and would be favored for administration, such distributee(s) whom the clerk or court determines suitable and competent shall be appointed.

- [c] The only assets that must be included in Ben's estate inventory is the 2007 Cadillac and the undistributed trust income in the amount of \$25,000. His other property passed per the terms of how he held title.
- [d] The value of the joint checking account at the time of Nancy's death, the value of the family home, and the \$250,000 she inherited from her parents should be included in Nancy's estate inventory.
- [e] Nancy died intestate and Va. Code §64.1-1 establishes the course of intestate succession. Wiley & Polly would each take 1/3 of her estate and Ken & Julie will divide evenly the 1/3 share of their deceased father. §64.1-3.

2. Tony, a self-employed building contractor, owned three parcels of real property in Bristol, Virginia. The parcels had been appraised by an independent appraiser at a value of \$125,000 each. They were assessed for taxation purposes by the City of Bristol at \$90,000 each. Title to Parcel 1 was held by Tony and his wife, Paula, as tenants by the entirety. The other parcels were unencumbered and owned by Tony in fee simple.

Tony's contracting business had slowed to a halt. Aside from the parcels, Tony has no assets other than some building equipment, and he relies for living expenses on Paula's salary as a librarian at the Bristol Public Library. He owes creditors cumulatively \$300,000, including \$200,000 he owes to the Bank of Commerce ("Bank"). Bank had lately been pressing Tony to reduce the debt.

On April 15, Tony received a letter from Bank's attorney demanding that Tony either make a "substantial payment" on the outstanding balance or give Bank deeds of trust on the three parcels as security for the debt.

On April 30, Tony and Paula executed and recorded a deed conveying Parcel 1 to Paula in exchange for a payment of \$500.

On May 1, when Bank learned of this transaction, it commenced suit to recover the full \$200,000 owed by Tony.

On May 5, Tony executed a deed of trust on Parcel 2 in favor of his father to secure a \$45,000 unpaid loan that his father had made to him two years earlier.

Also on May 5, Tony conveyed Parcel 3 to his friend, Alfred, in exchange for a promissory note for \$100,000 payable in a single lump sum payment due five years from the date of the note. In the deed of conveyance, Tony retained the right to repurchase Parcel 3 for \$100,000 at any time during the same five years.

Bank then amended its complaint to pray for an order setting aside the deed to Paula on Parcel 1, the deed of trust to Tony's father on Parcel 2, and the deed to Alfred on Parcel 3. In his answer, Tony denied that Bank has the right to have those conveyances set aside.

What arguments should Bank make in support of its prayer to set aside each of the conveyances, what arguments should Tony make in opposition, and how should the court rule on each? Explain fully.

Arguments the Bank should make are:

- [i] The conveyances of Parcel 1 to Paula, the conveyance of a deed of trust on Parcel 2 in favor of his Dad, without any additional consideration and the conveyance of Parcel 3 to his friend were all made with the intent to hinder and defraud his creditors and under Va. Code 55-80, the Bank is entitled to the court's setting aside the conveyance and making the property subject to the Bank's claims.
- [ii] Tony would argue that as a debtor, under Virginia law, he's entitled to prefer one creditor over another. He should also argue, as to Parcel 1, that since it was held with Paula as Tenants by the Entirety, it was immune from the reach of a creditor of just him and that the court should not set aside the transfer of Parcel 1.

The BBE thought the claim of fraud as to Parcels 2 & 3 was correct and that Tony was correct in his argument as to Parcel 1. The BBE would give some credit for an answer that argued only that the conveyances of Parcels 2 & 3 were voluntary conveyances, under Va. Code §55-81, by an insolvent debtor or a debtor that became insolvent as a result of the conveyances. In order to get full credit the applicant would need to conclude that the conveyances of Parcel 2 & 3 were fraudulent and a discussion of the voluntary conveyance was not necessary in order to get full credit for a well discussed and reasoned answer based solely on a fraudulent conveyance theory. Lastly, the BBE thought Tony's argument about Parcel 1 and it being immune from the Banks' reach was correct.

3. On New Year's Eve, Officer Bradford responded to the site of an automobile accident on a state highway in the City of Covington, Virginia. The driver of one of the cars was severely injured and had been taken by ambulance to the nearest hospital. Jabo, the driver of the other car, was still at the scene of the accident. When Officer Bradford asked Jabo for his driver's license, Jabo produced a picture ID card and explained sheepishly that his driver's license had been suspended for 90 days three weeks earlier and that the car he was driving belonged to his next door neighbor, who had lent it to him so he could take his pet dog to the veterinarian. The dog had suffered a broken hind leg when a car ran over it.

Officer Bradford then administratively impounded the car Jabo was driving and issued a citation and summons, charging Jabo with a violation of the following Virginia statute:

**Section 46: Driving while license suspended. (A)** No resident whose driver's license has been suspended shall thereafter drive a motor vehicle on any highway in the Commonwealth until the period of such suspension has terminated. Violation of this subsection is a misdemeanor, the penalty for which shall be a term of confinement of 10 days in jail, except that the court shall not impose the minimum term of confinement for violation of this subsection where operation of the motor vehicle occurred in a situation of apparent extreme emergency which requires such operation to save life or limb.

**(B)** In addition to any other penalty provided by this section, any motor vehicle that has been administratively impounded may in the discretion of the court be impounded for an additional period of up to 90 days. However, if at the time of the violation the offender was driving a motor vehicle owned by another person, the court shall have no jurisdiction over such motor vehicle.

**(C)** Upon conviction of a violation of subsection A, the court shall suspend the person's driver's license for an additional period equal to the period for which it had been previously suspended.

On January 30, Jabo appeared before the Covington General District Court. Officer Bradford testified as to what Jabo had told him at the scene of the accident. Jabo then entered a plea of guilty to the offense, a misdemeanor. The court imposed a 10-day jail sentence, ordered the car impounded for an additional 90 days, and suspended Jabo's license for an additional 90 days.

Jabo's attorney filed a motion to vacate the court's imposition of the 10-day jail sentence, the impoundment of the car, and the additional 90-day suspension on the ground that each of those actions exceeded the court's power under Section 46.

Following Jabo's conviction, Officer Bradford discovered that Jabo had previously been convicted of driving under the influence and had been adjudicated an habitual offender.

The Commonwealth's Attorney indicted Jabo for violation of the following Virginia statute:

**Section 48: Operation of a motor vehicle by an habitual offender prohibited. (A)** It shall be unlawful for any person adjudicated an habitual offender to drive any motor vehicle on the highways of the Commonwealth while the revocation or suspension of the person's driving privilege remains in effect.

**(B)** Any person found to be an habitual offender under this article, who is thereafter convicted of driving a motor vehicle in the Commonwealth while the revocation or suspension determination is in effect shall be punished as follows:

\* \* \*

(2) If such driving of itself endangers the life, limb, or property of another and the person has previously been convicted of driving while under the influence, such person shall be guilty of a felony punishable by confinement in a state correctional facility for not less than one year nor more than five years.

At the commencement in the Covington Circuit Court of Jabo's trial on the indictment, after the first juror was sworn, Jabo's attorney introduced evidence of Jabo's conviction under Section 46 in the General District Court and moved to dismiss the indictment on the ground that trial on the Section 48 charges unlawfully subjected Jabo to double jeopardy.

(a) How should the General District Court rule on each part of Jabo's motion to vacate? Explain fully.

(b) How should the Circuit Court rule on Jabo's motion to dismiss the indictment? Explain fully.

This is what the BBE describe as a "performance" question and what they are looking for is how well the applicant can discuss and analyze a set of facts and apply a particular law, as given in the problem. The answer is graded based on how well the applicant can apply the law to the given facts.

[a] [i] Given the language of Section 46 as given in the problem, the BBE thought that the language "... situation of apparent extreme emergency which requires such operation to save life or limb." applied only to human life and not to the life of a dog. They thought the "life or limb" clearly mean a human. Thus the correct answer was that the court properly imposed the 10 day jail sentence.

[ii] The court, by virtue of Section 46 (B), in the last sentence was deprived of authority to order extended impoundment of the vehicle because the vehicle was owned by another person.

[iii] As to the additional period of suspension of Jabo's license, based on the rationale under [i] the exception applied only to humans and thus the conviction was proper and the additional suspension was proper.

[b] On Jabo's motion to dismiss the indictment based on double jeopardy, there was considerable discussion. The BBE definitely wanted the applicant to recognize the applicability of the Blockburger test for double jeopardy as set forth in Blockburger v. U.S. 284 U.S. 299. The discussion with the BBE focused on the holding in Blockburger that double jeopardy does not apply where each offense has an element that the other does not. Under the holding in Johnson v. Commonwealth 38 Va. App. 137, the Court of Appeals of Virginia recognized that the element of being prohibited from driving because you are suspended was different from the element of being prohibited from driving because you've been declared a habitual offender. It is probable that an applicant that correctly recognizes the holding of Blockburger without more will get full or substantial credit. It appeared that after the discussion the BBE were concerned whether it would be unfair to require an applicant's answer to go further than that.

The BBE were not looking for an analysis under Va. Code §19,2-274.

4. Paula Pane, a thirty-two year old mother of three children, was injured in a vehicular collision in Fairfax, Virginia when her automobile was struck from behind by an expensive sports car operated by Ronny Church. Ronny is a notorious raconteur whose name often appears in local newspaper gossip columns and who was once quoted as having said, "I've never worked a day in my life, and I'm proud of it." Ronny had inherited a sizeable fortune and, in fact, had never worked.

Paula sued Ronny in the Circuit Court of Fairfax County, Virginia for \$500,000 in compensatory damages and \$350,000 in punitive damages, alleging that Ronny's gross negligence in operating his own motor vehicle was the proximate cause of the collision, which resulted in her personal injuries, including the pain and suffering she has experienced. Ronny denied liability, and the case proceeded to trial before a jury. The property damage claims had been settled separately by the parties' insurance companies.

At trial, the evidence established the following facts: Paula was stopped in the correct lane waiting to make a proper turn when Ronny's car struck hers. Immediately prior to the time of collision, Ronny was exceeding the posted speed limit by at least 10 miles per hour and was abruptly changing lanes. Paula's physician testified that Paula suffered a sprain of the muscles and the ligaments involving the neck and upper back, that there were no broken bones, but that, because of extreme discomfort, Paula was required to wear a foam collar, take pain medication, and undergo physical therapy for several months. He did not feel that she had any permanent disability and that as of the trial date she had no symptoms relative to her injured area. Paula's out-of-pocket expenses in connection with her injuries were \$6,755, almost all of which represented the cost of medication, hospitalization, and healthcare provider fees. As Paula was unemployed, there was no claim for lost wages.

During a recess on the first day of the two-day trial, Frank, Paula's father, forgetting momentarily the general admonition of the trial judge, which was announced to all witnesses and parties, not to converse with any juror until the case is over, struck up a conversation with one juror about the weather and gardening. At one point during that conversation, Frank lamented that he "just hadn't time this year to do everything I regularly do in the garden, because I've been babysitting the grand kids pretty much full time since Paula's accident."

The jury deliberated for less than an hour and returned a verdict for \$450,000 in compensatory damages and \$350,000 in punitive damages.

In interviewing a juror after the trial, Ronny learned that the verdict had been based on a vote of six to one. The

dissenting juror, who was the one Ronny interviewed, said that, although she agreed with all the other jurors that Ronny had been grossly negligent, she had “refused to go along because the amount was way out of line only because of Ronny’s reputation as a rich playboy.” This juror also told Ronny about Frank’s conversation with one of the other jurors.

Based on this information, Ronny timely filed the following motions asking for a new trial on all issues, including liability and damages:

- [1] For a new trial on the ground that the jury’s verdict was not unanimous;
- [2] For a new trial on the ground of Frank’s conversation with one of the jurors; and
- [3] For a new trial on the ground that the verdict was excessive.

The judge asks you, as her law clerk, to prepare a memorandum explaining fully your answers to the following questions:

- [a] Must the court grant a new trial based on the less-than-unanimous verdict?
  - [b] Must the court grant a new trial because of Frank’s conversation with the juror?
  - [c] What is the standard for making the determination that a verdict is excessive, and, in the event the court determines that the verdict was, in fact, excessive, must the court grant a new trial, or does it have any other options?
  - [d] In the event the court grants a new trial solely on the ground that the verdict was excessive, should the court grant the new trial on all issues or should it limit the new trial to the issue of damages?
- [a] Yes the court must grant a new trial. Jury verdicts must be unanimous. *Counts v. Commonwealth* 137 Va. 744.
  - [b] Applicant should recognized that the mere fact of the conversation does not mean a new trial must be granted. The judge should determine what was said and if it affected the jury’s deliberations. It was not necessary for the applicant to discuss the law regarding when the judge can or should examine the jurors about their deliberations.
  - [c] The standard for deciding if the jury’s verdict is excessive is described as whether it “shocks the conscience of the court”. If it does, the judge can put the plaintiff on terms to accept a reduced judgment or the judge will order a new trial.
  - [d] If the court decides to grant a new trial, it’s a discretionary call whether to order a new trial on all issues, or just on the amount of damages. The court should consider whether the amount of the verdict is so excessive as to suggest that the jury was prejudiced by bias against Ronny because of his wealth and lifestyle. The BBE thought the better call was to order a new trial on damages only, but would accept either conclusion, if well argued by the applicant.

5. Maddy, who recently graduated from college and is joining her friend Sophia on a celebratory, two-week vacation trip to Europe, left her automobile at the home of Sophia’s parents in Vienna, Virginia, since that is reasonably convenient to Dulles International Airport. As Maddy and Sophia were leaving for the airport, Maddy handed over her automobile keys to Sophia’s father, AJ, asking him to “keep an eye on my car” and saying he could move it “if necessary” while she and Sophia were traveling out of the country.

Several days later, AJ, who was frustrated that the egress for his own automobile to exit from his driveway was blocked by a repairman’s van, drove Maddy’s automobile to work. Because he was late for a meeting and not thinking about what he was doing, AJ inadvertently parked Maddy’s automobile in a “no parking/towing enforced” zone in the parking garage connected to the office building where he worked.

When AJ returned that evening to where he had parked Maddy’s automobile, he learned that it had been towed by Bud’s Towing, an independent contractor retained by Office Building Corporation (“OBC”), the owner of the office building and parking garage.

AJ went to Bud’s impoundment lot in Vienna, Virginia and paid the towing fee to Bud. AJ received a receipt, which authorized release of the car to him. As AJ began to drive off the towing company’s property, he noticed that the automobile’s radio was missing. Because AJ had listened to the radio that morning on the way to work, he knew that it must have been in the car when he parked it. In fact, the radio had been removed while the car was in Bud’s possession. When AJ confronted Bud and demanded that the radio be replaced, Bud said “Listen, once I park a car in my storage lot, I don’t pay attention to it any more

after that. If you're towed from a no parking zone to my place, it's your problem." When AJ began to protest, Bud, who is the sole owner of the towing company, just grinned and pointed to the language on the back of AJ's receipt for the towing charges, which stated:

"Bud's Towing is not responsible for loss or damages to your property, no matter what the reason. Have a nice day."

AJ asks you the following questions:

- [a] Does AJ have any liability to Maddy for the missing radio? Explain fully.
  - [b] Does Bud's Towing have any liability for the missing radio? Explain fully.
  - [c] Does OBC have any liability for the missing radio?
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- [a] Applicant should show recognition that this started off as a gratuitous bailment and AJ would have been liable only for gross negligence. Applicant should discuss whether, when AJ used the car, the bailment became one for mutual benefit, in which AJ would be liable for ordinary negligence and whether parking in a no parking zone was negligence. Discussion should also include the analysis that when AJ used the car to go to work, he exceeded the scope of the bailment which is treated as a conversion and the bailee becomes absolutely liable. All of the foregoing must be discussed in order to gain full credit.
  - [b] Bud's Towing owes Maddy a duty of ordinary care and can not contract away liability for breach of this duty. Also, the disclaimer was on the back of the receipt for the towing charges, which was not part of any contract and was given after AJ had paid for the release of the car.
  - [c] OBJ only possibility of liability would be under a theory of vicarious liability, but on the facts given, Bud was an independent contractor.

6. Brad, who worked for many years as General Manager of Acme Motors, a profitable automobile dealership in Suffolk, Virginia, was offered the opportunity to purchase the dealership. Brad was interested but did not have the necessary funds. He contacted his childhood friend, Sam, a successful and wealthy real estate developer, for advice on how to go about raising the capital. Sam suggested that they purchase Acme Motors together. Brad agreed.

Brad and Sam orally agreed that Sam would put up the money necessary to make the purchase, that Brad would manage the day-to-day operation of the business, that Sam would arrange the finances, and that, although Sam would not actively work at the dealership, they would share the profits equally.

After consummating the deal with the prior owner of the dealership, Sam applied for a business license, listing the entity as a partnership named New Acme Motors, LTD, whose partners were Brad and Sam. Sam also opened a line of credit and a business account at First Bank in the name of New Acme Motors, LTD, and they started doing business under the new name.

Suzie, who had recently inherited a substantial amount of money from her father, went to the New Acme Motors to buy a new car. She had known Brad for many years, and she knew that Sam and Brad were partners in New Acme Motors. In conversation with Brad, Suzie said she was looking for ways to invest her inheritance. Brad said he was about to draw \$50,000 from a credit line at First Bank to finance his inventory but that, if Suzie were interested, he would offer her a favorable rate of interest and borrow the money from her rather than from the bank. Suzie agreed, so she wrote a check in the amount of \$50,000 payable to Brad. In turn, Brad gave Suzie a promissory note payable in one year bearing interest at the rate of 10%. Brad signed the note, "New Acme Motors, LTD, by Brad." Brad deposited the check in Acme's business account at First Bank and eventually used the money to finance inventory.

A month later, Sam and Brad retained a lawyer to prepare a written partnership agreement, which contained the terms to which they had originally agreed. The written agreement was not filed with the State Corporation Commission.

A year later, the sale of automobiles began to decline precipitously. Sam sent Brad a letter that stated, "This is to advise you that I hereby terminate and withdraw from our partnership in New Acme Motors, LTD."

Brad acknowledged Sam's letter, and Brad continued to work for three months, winding up the business. Neither Brad nor Sam told First Bank about Sam's decision to terminate the partnership. During those three months, Brad drew another

\$25,000 from the First Bank line of credit in the name of New Acme Motors, LTD to cover expenses of winding up. Brad then closed the doors and left town. His whereabouts are unknown.

The promissory note to Suzie is unpaid and past due. The last \$25,000 loan from First Bank is due and unpaid. They both demand that Sam pay them these amounts. Sam refused.

As to Suzie's demand, Sam asserted he is not liable because (i) he was not a partner at the time she made the loan inasmuch as there was no written partnership agreement between Sam and Brad; (ii) in his agreement with Brad, he (Sam) did not agree to share the losses; (iii) he did not sign the promissory note or authorize Brad to sign it; and (iv) he was, in any event, a limited partner.

As to First Bank's demand, Sam asserted that he is not liable because he had terminated the partnership before Brad drew the last \$25,000 from the First Bank line of credit.

In whose favor would a court be likely to resolve each of Sam's assertions? Explain fully.

As to Sam's assertions in response to Suzie's demand:

- [i] The agreement to form a partnership does not have to be in writing, so long as all the essential elements of a partnership agreement are agreed to.
- [ii] It is not necessary for one to agree to share losses, so long as there's an agreement to share profits. If you share profits, you share losses.
- [iii] Brad was acting within his authority as a partner in an effort to conduct the partnership affairs and it was a valid partnership debt.

As to Sam's assertions in response to the Bank's demand:

- [i] Sam is liable. While the partnership had been dissolved, the process of winding up the partnership affairs had not been completed and Brad probably had actual authority to make the loan, but certainly had apparent authority to do so.

7. During their years as classmates at Emory and Henry College, Gordon, Langston, and Quinn formed a general partnership, the business of which was renting dormitory-size refrigerators to fellow students. After graduation, they expanded the business of the partnership to general equipment leasing, based in Richmond, Virginia. Gordon stayed in Virginia, where he resided, to manage the partnership. Langston and Quinn moved back home to Atlanta, Georgia.

A few years later, at a quarterly business meeting at a fancy restaurant and bar in Atlanta, the partners, after having consumed far too many alcoholic beverages, got into a violent argument, which resulted in a fistfight. They all suffered physical injuries, and the altercation resulted in the following litigation.

**Complaint** – Gordon v. Langston and Quinn: Gordon filed a Complaint based on proper diversity jurisdiction against Langston and Quinn in the federal district court in Atlanta, alleging assault and battery against each of them and seeking to recover \$80,000 in damages.

**Counterclaim** – Langston v. Gordon: Langston filed an Answer denying all of Gordon's allegations and included a two-count counterclaim:

- Count I – that Gordon had started the fight and was, therefore, liable for Langston's injuries.
- Count II – that Gordon had breached the partnership agreement by diverting a disproportionate share of the profits from the business to himself, and he sought an accounting and damages of more than \$100,000.

**Cross-Claim** – Langston v. Quinn: Langston filed a three-count cross-claim against Quinn:

- Count I – that Quinn had started the fight and was, therefore, liable for Langston's injuries.
- Count II – that Quinn participated with Gordon in breaching the partnership agreement by diverting a disproportionate share of the profits from the business to herself.
- Count III – that Quinn had failed to pay when due a loan of \$75,000 Langston had made to Quinn to enable her to

purchase a condominium.

Gordon filed a motion to dismiss each of the two counts of Langston's counterclaim against him on the ground that neither is allowed under the Federal Rules of Civil Procedure.

Quinn filed a motion to dismiss each of the three counts of Langston's cross-claim, also on the ground that none of them is allowed under Federal Rules of Civil Procedure.

How should the court rule on each motion? Explain fully, being certain to include in your answer an explanation of the difference between a counterclaim and a cross-claim.

First, part of the question asks for an explanation of the difference between a counterclaim and a cross-claim. A counter claim is asserted by a defendant against a plaintiff. A cross claim is asserted by a defendant against another defendant. As to how the court should rule on the motions to dismiss.

[a] Motion to dismiss both counts of the counterclaim

[i] Count I, Langston's assault and battery claim clearly fits within Rule 13 as a compulsory counterclaim because it relates to the claims the plaintiff sued Langston on.

[ii] Count II, Langston's claim is for breach of a partnership agreement against the plaintiff, although it does not deal with the same transaction and occurrence as the plaintiff Gordon's claim against Langston, it did not have to do so. Two bases in the Rules would support this Count II. First, Rule 13(b) allows permissive counterclaims by a defendant against a plaintiff even if the permissive counterclaim does not arise from the same transaction or occurrence. Second, Rule 18(a) allows any party asserting a claim (including explicitly a counterclaim) to join to another claim that party has already asserted any other claim that the defendant has against the party.

[b] Motion to dismiss the cross-claim.

[i] Count I of Langston's Cross-Claim asserts a claim against Quinn arising from the assault and battery claim. Thus, it would fall within Rule 13(b) Cross-Claim's permission to assert a claim arising from the same transaction or occurrence as the original claim or of a counterclaim. This is the claim, referred to in Moore's as the "qualifying claim," (*i.e.* a claim clearly permitted to be brought under the Federal Rules, regardless of other claims) that allows Langston to join other claims on to Count I.

[ii] Count II has Langston asserting a claim against Quinn for breaching the partnership agreement. Although this does not arise from the same transaction or occurrence of the original action, that does not matter. Because Langston has a "qualifying claim" (*i.e.* a claim clearly permitted to be brought under the Federal Rules, regardless of other claims) with which to join other claims, he can rely on Rule 18 to join as many claims as he has, regardless of whether they are transactionally related or not. Rule 18 says "a party asserting a . . . crossclaim may join, as independent or alternative claims, as many claims as it has against an opposing party."

[iii] Count III has Langston asserting a claim against Quinn for failing to pay when due a loan of \$75,000.00. Although this does not arise from the same transaction or occurrence of the original action, that does not matter. Because Langston has a "qualifying claim" (*i.e.* a claim clearly permitted to be brought under the Federal Rules, regardless of other claims) with which to join other claims, he can rely on Rule 18 to join as many claims as he has, regardless of whether they are transactionally related or not. Rule 18 says "a party asserting a . . . crossclaim may join, as independent or alternative claims, as many claims as it has against an opposing party."

8. Roscoe Bendel ("Roscoe") owns a farm in Floyd County, Virginia, where he keeps a few dairy cows and also raises vegetables for sale at the City Market in Roanoke, Virginia. Roscoe does his banking with State Center Bank ("Bank"), where he maintains an interest bearing deposit account in the amount of \$25,000, which remains on deposit with Bank to date. Other than the documents referred to below, no other documents exist in connection with any of the following transactions:

- Roscoe borrowed \$40,000 from Bank for the purchase of building supplies to upgrade his barn at a cost of \$10,000, with the remainder for other operating expenses. He signed a promissory note and a security agreement granting Bank a security interest in the \$25,000 deposit account and in the refrigeration equipment that was built-in and permanently integrated as part of the barn. Bank placed the security agreement in the file folder it maintains on its dealings with Roscoe.



- Roscoe borrowed \$50,000 from Bank to finance the spring planting of his crops. He signed an agricultural lien document granting Bank a lien on the crops. Bank then recorded a notice of its lien with the Clerk of the Circuit Court of Floyd County.
- Roscoe borrowed \$7,000 from Bank to purchase new milking equipment. He signed a promissory note for the \$7,000 loan; the text of the note recited that the milking equipment was collateral for the loan. Bank placed the promissory note in the file folder it maintains on its dealings with Roscoe.
- Roscoe borrowed \$30,000 from Bank to finance the purchase of a tractor, which he intended to use exclusively on the farm. Roscoe signed a security agreement granting Bank a security interest in the tractor. Bank filed a properly executed financing statement with the Clerk of the State Corporation Commission.

Due to weather conditions, Roscoe had a poor crop season and needed further financial help. He borrowed \$15,000 from his neighbor, Jim Elliot, and offered Elliot the tractor as security for his loan. Roscoe signed a security agreement to that effect, and Elliot took possession of the tractor and moved it to his (Elliot's) farm.

Later in the year, Roscoe borrowed \$250,000 from the Floyd Friendly Credit Company ("FFC"). Roscoe signed a security agreement granting FFC a security interest in the \$25,000 deposit account, the barn, the crops, the milking equipment, and the tractor. FFC filed a properly executed financing statement with the State Corporation Commission, covering all the collateral listed above.

Roscoe has now defaulted on all the foregoing obligations. Explain fully your answers to the following questions. Do NOT discuss the issue of the priorities of the security interests among the creditors.

- [a] Did Bank and FFC each acquire and perfect security interests in the following items of collateral:
- (i) The \$25,000 deposit account?
  - (ii) The refrigeration equipment built into the barn?
  - (iii) The crops in the ground?
  - (iv) The milking equipment?

- [b] Did Bank, FFC, and Elliot each acquire and perfect a security interest in the tractor?

- [a] Did Bank and FFC each acquire and perfect security interests in the following items of collateral:

- [i] The \$25,000 deposit account?

The Bank acquired and perfected its security in the deposit account. The Bank had a common law right of set-off in the deposit account even before Roscoe granted the security interest in it. The Bank perfected its security interest in the deposit account by "control." §8.9A-314(a) (perfection by "control"), §8.9A-312(b)(1) (perfection in a deposit account by nothing other than control), and §8.9A-104(a) (means of "control").

FFC acquired a security interest in the deposit account by its security agreement with Roscoe but filing was useless as a means of perfection. §8.9A-312(b).

- [ii] The refrigeration equipment built into the barn?

The Bank's security agreement with Roscoe describing "refrigeration equipment" transferred a security interest in the refrigeration equipment even if it is a fixture. §8.9A 9-109(c)(11)(B). However, the Bank took no step to perfect its security interest.

FFC's security interest in the "barn" is one in real estate and thus ineffective. §8.9A-109(c)(11). See also 9-109(a)(1). The filing with the State Corporation Commission is immaterial (although it would have been sufficient to perfect a security interest in fixtures such as the refrigeration equipment. §8.9A-501(a)(2) (n/w/s §8.9A-501(a)(1)(B)).

- [iii] The crops in the ground?

The Bank's agricultural lien document is presumably sufficient to grant it a security interest in the crops. The filing of a notice of its lien with the Clerk of the Circuit Court is not sufficient to perfect that security interest. §8.9A-310(a) (filing required unless otherwise provided), §8.9A-501(a)(2) (all filings with State Corporation

Commission unless otherwise provided.-

FFC's security agreement covers the crops and grants it a security interest in them. Its filing with the State Corporation Commission perfected its security interest.

[iv] The milking equipment?

A promissory note with a grant of a security interest in the milking equipment is sufficient. See §8.9A-102(b)(11) (definition of "chattel paper"). The facts indicate the Bank took no steps to perfect even where, as here, it is a purchase-money security interest.

FFC's security agreement described the milking equipment and therefore it acquired a security interest in it. FFC's filing with the State Corporation Commission perfected its security interest. §8.9A-310(a) (filing to perfect security interest in goods) and §8.9A-501(a)(2) (place of filing as State Corporation Commission).

(b) Did Bank, FFC, and Elliot each acquire and perfect a security interest in the tractor?

Each creditor acquired a security interest in the tractor per the terms of the three security agreements. All three creditors perfected their security interests. The Bank and FFC perfected by filing with the State Corporation Commission. UCC 9-310(a) (filing to perfect security interest in goods) and §8.9A-501(a)(2) (place of filing as State Corporation Commission). Elliot perfected his security interest by taking possession of the tractor. §8.9A-313(a) (can perfect security interest in goods by possession).

N.B., this assumes that no certificate of title was issued for the tractor. Were the tractor a titled vehicle, none of the creditors would be perfected. §8.9A-313(b)

9. In April 1999, Terry filed a suit for divorce against her husband, Henry, in the Circuit Court of Sussex County, Virginia on the grounds of cruelty and adultery. In May 1999, after the Complaint was served on Henry, the parties met and negotiated a Property Settlement and Support Agreement that they signed. The agreement provided for division of the marital property and specified that Henry would thereafter pay Terry \$1,000 per month spousal support.

In June 1999, the court entered a final decree in which the Court granted a divorce to Terry, awarded her custody of their son, Billy, and ordered Henry to pay \$1,200 per month child support for Billy. The final decree did not specifically mention support payments to Terry, but the court did approve the Property Settlement and Support Agreement and incorporated it into the final decree as follows:

. . . Further Decreed that the Property Settlement and Support Agreement made between the parties hereto on the 15th day of May 1999, a copy of which Agreement is affirmed, ratified and incorporated by reference in this decree. The parties shall not have any property rights or duties of support and maintenance, except as provided in the said Property Settlement and Support Agreement. No future modifications to said Agreement shall be made without a decree of this Court.

During 2007 and 2008, Henry's real estate brokerage business encountered tough economic times, and, in April 2008, he proposed to Terry that she accept \$700 a month in spousal support payments rather than the \$1,000 specified in the Agreement. Terry was reluctant and told Henry that he should first obtain the Circuit Court's approval. Henry said, "Look, I don't want to have to pay lawyers to go to court on this." Eventually Terry agreed, and these reduced payments continued for one year. In June 2009, Terry found herself strapped by the reduced income and asked Henry to restore the original level of support payments. She also asked him to increase the monthly child support payment for Billy. Henry refused both requests.

Terry then filed a motion in the Sussex County Circuit Court, asking the court (i) to order Henry to pay her all of the arrearages in the difference between the \$1,000 specified in the court-approved Agreement and the \$700 to which they had later agreed; (ii) to increase her spousal support payments to \$2,000 per month (which request she supported with significant evidence of hardship and changed circumstances); (iii) to increase child support for Billy to \$1,700 per month (which request she also supported with evidence of changed circumstances, including the facts that Billy needed braces and that there was a substantial increase in the cost of Billy's private school education); and (iv) to hold Henry in contempt for failing to keep up the spousal support payments in accordance with the original Agreement.

How should the Court rule on:

- [a] Terry's request for payment of the arrearages?
- [b] Terry's request for increased spousal support?
- [c] Terry's request for an increase in child support?
- [d] Terry's request to hold Henry in contempt? Explain fully.

- [a] Arrearages will be assessed for court ordered awards, or for contractual obligations, or as the parties have agreed and reduced to writing, when the payor has not paid support accordingly. Here, the parties reduced their agreement of spousal support payments to a Property Settlement Agreement (PSA) which was duly incorporated into the divorce decree by the court, making the parties liable for the PSA promises as if it were a court order. Therefore, H will be liable for what he did not pay according to the original PSA. Furthermore, even though H and W orally agreed to the new amount of support of \$700, W was right, H should have reduced this agreement to a new court order. Because he did not do so, he will be required to pay all arrearages according to the original order and the PSA.
- [b] Spousal support is awarded according to the 11 factors in the VA Code, one of which may be significant hardship, and may be changed upon a showing of substantial changed circumstances. Because the PSA was incorporated into the divorce decree, and the court reserved the right to modify that spousal support upon petition of the court, it may do so. Hardship must be proved by substantial evidence, and any change in spousal support may only be awarded upon a showing of a substantial change of circumstances. Here, W has apparently given evidence of such hardship (though not in detail in the fact pattern) and substantial change of circumstances from the original order. Therefore, H will be ordered to pay an increased amount of spousal support as the court deems appropriate.
- [c] Child support may be modified based on the best interests of the child and a showing of substantial change of circumstances. Here, the child needs braces, and his education costs have significantly increased, making an increase in child support appropriate where the child's needs have been sufficiently clarified. H will have to pay the increased child support.
- [d] Contempt of court is appropriate to enforce a direct court order. It generally allows for fines and or incarceration as the court deems appropriate when a complete disregard has been shown for the authority of the court. It is generally considered a punitive remedy useful for the court to assert its authority. Here, although H paid according to the parties' separate oral agreement, he was still in violation of the express court order, making him in contempt. The fact that W knew and agreed to the new terms may be an important factor for the court to consider in holding H in contempt. It may also be appropriate to note the fact that both parties were experiencing economic difficulties, but these considerations are entirely up to the court. The court may choose to hold H in contempt as it has full authority to do so, but may not do so in light of the parties' oral agreement and H's good faith in maintaining some measure of support payments. It is most likely that the court will not hold H in contempt, but W will prevail on arrearages, an increase in spousal support, and an increase in child support.