

March 28, 2019 (3:10pm)

✖✖ After each bar exam, the Virginia Board of Bar Examiners invite the Deans [or the Deans' designees] of all Law Schools located in Virginia, to meet with the Board. Representatives from some of the law schools in Virginia collaborate to prepare suggested answers which we think should be acceptable to the Virginia Board of Bar Examiners. These answers also include cites to some of the case and statutory law for reference even though the VBBE may not expect such specificity in applicants' answers on the exam. jrz

Summary of suggested answers to the essay part of the February 2019 Virginia Bar Exam

Prepared by the following *attendees*, who were at the post exam meeting with the VBBE: J. R. Zepkin & William H. Shaw, III of William & Mary Law School, Emmeline P. Reeves of University of Richmond Law School, Benjamin V. Madison III of Regent University Law School, Cale Jaffe of University of Virginia Law School & C. Reid Flinn of Washington & Lee Law School (also a member of the adjunct faculty at William & Mary Law School and University of Richmond Law School).

The following, while not attending the meeting, provided us great help with suggested answers in each's particular area[s] of specialty: Eric DeGroff, James Duane, L.O. Natt Gantt, II, Louis Hensler, Michael Hernandez, Lynne Kohm, Kathleen McKee, all of Regent University Law School; Samuel W. Calhoun, Robert T. Danforth, and David Eggert, all of Washington & Lee University Law School;

1. [02.19] [Wills] In 2010, Sophie, a widow, had two living adult children, Harley and David. That year, in the presence of her best friends, Cynn timer and Sylvia, she wrote in her own hand and signed the following document:

I, Sophie, as my last will and testament, do hereby leave 50% of my estate to my daughter, Harley, and 50% of my estate to my neighbor, Annie. I do not want to leave any of my estate to my son, David, because he has a great job.

/S/ Sophie April 9, 2010

Sophie had a tumultuous relationship with Harley and David. After a bitter fight with Harley on Thanksgiving in 2015, Sophie announced, "I am absolutely revoking my will," and tore the 2010 document in half in front of Harley and David.

In 2017, Sophie struggled with her physical health after a stroke and moved in with Harley. While living happily with Harley, Sophie handwrote and signed the following note in Harley's presence:

I, Sophie, hereby declare that I am reviving my April 9, 2010 will (attached).

/S/ Sophie September 24, 2017

Sophie taped the two torn pieces of the 2010 document together and stapled them to the September 24, 2017 note.

In January of 2018, Annie, Sophie's neighbor, died. One week later, Sophie died. Sophie's only surviving relatives are Harley and David.

- (a) Was the 2010 document a valid will? Explain fully.
- (b) Was the 2015 revocation of the 2010 document effective? Explain fully.
- (c) Was the 2017 revival of the 2010 document effective? Explain fully.
- (d) How should Sophie's estate be distributed? Explain fully.

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- (a) Yes, it was a valid holographic will. Sophie signed the will “in such a manner as to make it manifest that the name is intended as a signature” Va. Code §64.2-403.A because she signed at the bottom, after the dispositive provisions, using her correct name. The document was also wholly in Sophie’s handwriting, in compliance with Va. Code §64.2-403.B. Sophie’s testamentary intent is clear from the language “my last will and testament” and the dispositive provisions. No facts exist to suggest a lack of testamentary capacity, and Sophie had attained the age of majority since she had two adult children in 2010.
- (b) Yes. Va. Code §64.2-410.A provides for revocation by physical act. Sophie tore up the 2010 will in its entirety after making the unambiguous statement, “I am absolutely revoking my will,” thus demonstrating her intent to revoke.
- (c) Yes. Va. Code §64.2-411 provides that a revival must be executed according to the same formalities for executing a will. The 2017 note was a validly executed holographic revival since it was entirely in Sophie’s handwriting and signed by her in such a way to make it manifest that her name was intended as her signature (signed at the bottom of the document, after its dispositive portion). Sophie’s intent to revive her earlier revoked will is evident from the express language of the note (“I am reviving my April 9, 2010 will.”). Pursuant to Va. Code §64.2-414, the revival “shall be deemed to have been made at the time it was re-executed, republished, or revived.”
- (d) Arguably, the estate should be distributed 75% to Harley and 25% to David. Since Sophie’s 2010 will was revived as discussed in part (c) above, Harley takes 50% of the estate according to the terms of the will.

Annie’s bequest lapses since she predeceased Sophie, and it is not saved by the anti-lapse statute [Va. Code §64.2-418.B], assuming Annie was neither Sophie’s grandparent nor a descendant of Sophie’s grandparent.

Assuming that the language of the will did not create a residuary, then the lapsed gift passes by intestate succession. In this case, Harley and David would each take one-half of the lapsed bequest (*i.e.*, 25% of the estate) since Annie had no surviving spouse and Harley and David were her only children [Va. Code §64.2-200]. Harley would thus take a total of 75% of the estate, and David would take 25%.

Attendees Note: It’s our thinking that the following alternative answer should earn full credit.

On the other hand, it is arguable that the language “50% of my estate . . . 50% of my estate” did create a residuary, since it was simply a mathematical division of the estate’s value, rather than a disposition of particular assets. In this case, the lapsed bequest would pass to Harley, the other residuary beneficiary, pursuant to Va. Code §64.2-416.B.2. Harley will also argue that Sophie’s intent to disinherit David was expressly stated in the revived 2010 will and should be given effect. If so, Harley would therefore take 100% of the estate: 50% by the revived 2010 will and 50% by the lapsed bequest.

2. [02.19] [Real Estate] The Copper Creek Land Company (Copper Creek) has contracted to purchase four (4) adjacent tracts of land in Tazewell County, Virginia. All documents have been properly recorded.

Tract 1

Ten years ago, Suzanne conveyed Tract 1 to her daughters, Morgan and Allyson, by deed which stated that they held the Tract “as joint tenants.” Two years ago, Morgan died and by her last will left all her property to her friend, Fred. Allyson has contracted to sell Tract 1 to Copper Creek, advising them that upon Morgan’s death Tract 1 became her property.

Tract 2

Twenty years ago, Tom conveyed Tract 2 to his son, Jack, for life, and upon his death to Jack’s son, Stan. Recently, Stan conveyed his interest to George by a deed which recites, “I convey all of my right, title and interest in Tract 2 to George.”

Jack is still living. George has contracted to sell Tract 2 to Copper Creek.

Tract 3

Ten years ago, Edgar conveyed Tract 3 by deed to Carl and his heirs so long as Tract 3 is used solely for residential purposes. Five years ago, Carl built and has continually operated a garage for tractor repairs on Tract 3. Last year, Edgar died and in his will left his entire estate to his son, Jimbo. Jimbo has contracted to sell Tract 3 to Copper Creek.

Tract 4

Fifteen years ago, Henry conveyed Tract 4 by a deed reciting, "I convey Tract 4 to John for life, then to Ken for life, and then to Lucas." Five years ago, Lucas obtained a loan from Roscoe and gave Roscoe a deed of trust conveying all of his right, title and interest in Tract 4 to a trustee as security for a promissory note payable to Roscoe. Last year, John and Ken died, and Lucas defaulted on the loan owed to Roscoe. Lucas contracted to sell Tract 4 to Copper Creek. In the meantime, Roscoe advertised a sale of the property under the terms of the deed of trust he holds, gave all required notices, and set the sale for 30 days from today.

Can Copper Creek Land Company acquire title to each of these tracts free of any other interests by purchasing the respective tracts at the present time from:

- (a) Allyson? Explain fully.
- (b) George? Explain fully.
- (c) Jimbo? Explain fully.
- (d) Lucas? Explain fully.

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- (a) No. Allyson only owns an undivided one-half interest in Tract 1. Although Morgan and Allyson validly took title to Tract 1 as joint tenants, the deed from the grantor (Suzanne) did not expressly state a right of survivorship [Va. Code §55-20.1], so Morgan's interest passed by her will to Fred, who therefore owns an undivided one-half interest in the property. Copper Creek can therefore only acquire Allyson's half interest at this time.
- (b) No. Stan would be able only to convey his interest, an indefeasibly vested remainder, by deed to George. Jack maintains a life estate in the tract because he is still living. Copper Creek cannot get a fee simple interest free and clear unless they obtain a conveyance of Jack's life estate as well as George's remainder.
- (c) Yes. When Edgar delivered the deed to Carl, Carl received a determinable fee because the conveyance was denominated with the durational limit "so long as Tract 3 is used solely for residential purposes," and Edgar retained a possibility of reverter.

When Carl breached the stated condition, "so long as Tract 3 is used solely for residential purposes," by constructing and operating an automobile repair garage upon the premises, title reverted to Edgar in fee simple absolute. Edgar then devised that interest to Jimbo. (Note that an adverse possession claim by Carl would be unsuccessful since his occupation of the tract began five years ago, well short of the 15-year limitations period.)

- (d) Yes, if Copper Creek buys before foreclosure and the sale proceeds are sufficient to pay off the encumbrance. Lucas's vested remainder ripened into a present possessory fee simple absolute upon the death of John and Ken. Lucas had given a deed of trust on Tract 4 to Roscoe as security for his promissory note. With the note in default, Roscoe may have Tract 4 sold, and the purchaser at the foreclosure sale will acquire title in fee simple absolute.

However, Lucas does have a right to pay off the security interest before foreclosure, and the seller

has the right to satisfy the security interest at closing with the sale proceeds. Assuming the proceeds are sufficient to pay off the deed of trust and the closing takes place before foreclosure, title will then be marketable.

3. [02.19] [Agency, Partnerships & UCC - Negotiable Instruments] In October 2017, Patty Pounds set up a valid corporation known as Patty Cake, Inc. from which to operate a bakery. Patty was the only stockholder in the corporation and served as President; Patty's father was the Secretary. She signed a lease for property in Richmond with a kitchen in the back and a small retail space in the front. The lease was in the name of Patty Cake, Inc. and was signed by Patty as President.

Patty personally borrowed \$10,000 from First Bank to equip and furnish the bakery. Patty gave First Bank a promissory note that included a provision for a security interest in the accounts receivable of Patty Cake, Inc. Because Patty had no credit, as a favor to his daughter, Patty's father co-signed on the face of the note to First Bank, adding after his signature the words, "Guarantor of all amounts due."

Shortly after signing the lease, one of Patty's friends, Betty Beans, asked if she could move her coffee shop to the front of the bakery. Both Patty and Betty thought that each could increase the volume of her business and, at the same time, reduce expenses if they shared the location. They agreed that they would share the costs of common expenses equally, but that each would operate her business independently of the other. They advertised the new shop as "Bakery and Beans." The businesses maintained separate cash registers for their receipts each day, but they shared the expense of a common web page, outside signage, advertising, rent and utilities.

In order to deliver baked goods to her customers, Patty purchased a used van for \$8,000 and gave a promissory note in that amount to Goodwill Motors which she signed "Bakery and Beans, by Patty Pounds."

Both businesses did well in the joint location until the City tore up the street in front of Bakery and Beans in January of 2018, and both street and sidewalk access were severely limited. In March 2018, Gary, the owner of Goodwill Motors, came to the shop to collect the payment, which was overdue, on the note for the van. As he entered the store, he tripped over a loose tile and broke his leg. Shortly thereafter, Gary retained an attorney to collect the sums owed under the promissory note and to sue for his injuries from the fall. Gary, through his attorney, sued Betty and Patty, individually, as partners in Bakery and Beans, to recover for the balance due on the promissory note and his injuries from the fall.

When Patty missed her payment to First Bank, First Bank realized that it had inadvertently failed to perfect its security interest in the accounts receivable. Further, a subsequent secured creditor to whom the corporation had given a security interest in the same receivables did perfect its interest and foreclosed on all the receivables before First Bank could do so. First Bank demanded payment of the promissory note and filed suit against Patty's father on his guaranty.

- (a) Is Gary likely to prevail against both Patty and Betty individually for his injuries from the fall? Explain fully.
- (b) Is Gary likely to prevail against both Patty and Betty individually for the balance due on the promissory note to Goodwill Motors? Explain fully.
- (c) Is First Bank likely to prevail against Patty's father in its suit on the \$10,000 promissory note? Explain fully.

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Attendees Note: It did not appear that the BBE were looking for a tort analysis as to the slip and fall but rather as a question of liability of Patty & Betty, based on their business relationship(s)

- (a) Gary is not likely to recover against Patty and Betty individually on a partnership theory of liability. Partners are jointly and severally liable for the debts of the partnership; however, Patty and Betty have not formed a partnership. A partnership is the association of two or more persons to operate as co-owners a business for profit. No express agreement is required to create a partnership. Sharing profits triggers a presumption of partnership, and other indicia of partnership include sharing control and sharing losses. Here, Patty and Betty are sharing some expenses, but they are not sharing profits or control. Importantly, each is operating her business independently of the other. Thus, it is clear that Patty and Betty are not

partners, and they will not be individually liable to Gary for his fall on a partnership theory.

- (b) Gary is likely to recover against Patty and Betty individually for the balance due on the promissory note to Goodwill Motors. Although, as discussed above, Patty and Betty are not in a true partnership, Gary may prevail on a purported partnership theory. Under purported partnership, or partnership by estoppel, a person who represents herself as a partner, or consents to being represented by another as a partner, is liable to third parties who extend credit to the apparent partnership in reliance on the representation. Va Code §50-73.98(A). Here, Patty represented herself as a partner in a partnership with Betty by signing the note "Bakery and Beans, by Patty Pounds." Although Betty may not have consented to this particular representation, she also held herself out as a partner with Patty through the signage at the store and advertising. Additionally, the facts suggest that Gary extended credit, ie selling the van on credit, in reliance on his reasonable belief that Betty and Patty were partners. Thus, Gary has a strong claim against Patty and Betty individually based on purported partnership.
- (c) No. Patty's father is discharged from liability to the extent First Bank impaired the collateral.

Patty's father is an accommodation party [Va. Code §8.3-419(a)] because he signed the note for the purpose of incurring liability without being a direct beneficiary of the value given. Patty's father co-signed the note as a favor for Patty, the accommodated party. The value given was for Patty's benefit because she used the loan for her business.

An accommodation party is obliged to pay the instrument in the capacity in which he signs Va. Code §8.3A-401(a)(i), even if he receives no consideration. Patty's father signed as "Guarantor of all amounts due," therefore making himself fully liable despite the fact that he received no consideration from Patty Va. Code §8.3-419(b).

An accommodation party is obligated to pay even if the person enforcing the obligation knows of the accommodation Va. Code §8.3-419(c). However, Va. Code §8.3-419(c) creates an exception as provided in Va. Code §8.3-605(e). An accommodation party is discharged to the extent that the person entitled to enforce the obligation impairs the collateral securing the obligation. When First Bank failed to perfect its security interest in Patty's receivables, it impaired the collateral Va. Code §8.3-605(g)(i). This prevented Patty's father from gaining reimbursement from the collateral, so he is relieved from paying First Bank to the extent of the value of the collateral that was lost.

Finally, First Bank knew of the accommodation because Patty's father co-signed the note, thus satisfying the notice requirement [Va. Code §8.3-605(h)], and he not waive discharge either by consent to First Bank's actions Va. Code §8.3-605(i)(i) or by express agreement Va. Code §8.3-605(i)(ii).

4. [02.19] [Federal Civil Procedure] In June 2018, Big John (John), a Virginia resident, bought an outdoor gas fire pit in Hampton, Virginia. John was injured while using the fire pit when the propane gas tank exploded. John had purchased the fire pit from Buckroe Home Equipment, Inc. ("Buckroe"), a Delaware corporation with its principal place of business in the City of Hampton, Virginia. The fire pit had been manufactured by Firebox Mfg. Corp. ("Firebox"), a North Carolina corporation with its principal place of business in Currituck County, North Carolina.

John filed suit for personal injuries against Buckroe and Firebox in the U.S. District Court for the Eastern District of Virginia. He alleged damages of \$150,000.

Ten days after the Complaint was served on Buckroe and Firebox, Buckroe filed a Motion to Dismiss for lack of subject matter jurisdiction. John argued in opposition that there was subject matter jurisdiction but that, if the Court found no jurisdiction, the proper course would be to remand the case to the state court, not dismiss it. The District Court granted Buckroe's Motion to Dismiss.

On November 1, 2018, John refiled the suit, again alleging damages of \$150,000 against Buckroe and Firebox, in the Circuit Court of the City of Hampton and properly served the Complaint on the defendants. Both defendants filed an Answer on November 30, 2018.

On December 14, 2018, John settled with Buckroe for \$75,000 and, upon motion by John, the Court dismissed the

claims against Buckroe. John did not amend his Complaint after dismissing Buckroe. On January 2, 2019, Firebox received the Court's Order dismissing Buckroe. On January 11, 2019, Firebox filed and served a Notice of Removal to the U.S. District Court for the Eastern District of Virginia.

This time, John, concluding that he preferred to be in state court, filed a Motion to Remand the case back to the state court on grounds that (i) the removal was improper, (ii) the removal was untimely, and (iii) in light of the settlement with Buckroe, the federal court lacks subject matter jurisdiction because the amount in controversy requirement is not satisfied.

(a) Was the U.S. District Court's ruling granting Buckroe's Motion to Dismiss correct? Explain fully.

(b) How should the U.S. District Court rule on each ground of John's Motion to Remand? Explain fully.

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(a) Yes, the District Court was correct in granting Buckroe's Motion to Dismiss. The case does not rest on any federal question and would have to qualify for federal subject matter jurisdiction, if at all, under diversity of citizenship jurisdiction. That would require establishing complete diversity of the plaintiff and defendants. Complete diversity means that the plaintiff is a citizen of a state different from every defendant. Here, Big John, the plaintiff, is a Virginia citizen. The two defendants are corporations. A corporation has dual citizenship—the citizenship of the state of incorporation and the citizenship of its principal place of business. Buckroe Home Equipment, Inc. is incorporated in Delaware and has its principal place of business in Hampton, VA. The other defendant, Firebox Mfg. Corp., is incorporated in North Carolina and has its principal place of business in Currituck County, North Carolina. Because the plaintiff is a citizen of Virginia, and Buckroe is also a citizen of Virginia, there is a lack of complete diversity. Thus, diversity jurisdiction does not exist, the court lacks subject matter jurisdiction, and the court was correct in dismissing the action.

(b) The U.S. District Court should deny John's motion to remand. John sued Buckroe and Firebox in the Circuit Court of the City of Hampton, VA. John then settled with Buckroe, the company that had prevented complete diversity between plaintiff and defendants. After Firebox was dismissed, there was complete diversity between John and Firebox. A further condition is that, in cases removed to Federal Court based on diversity, the case can be removed if a later change in the case (such as Buckroe being dismissed here), so long as the change/and removal occur within one year from commencement of the action.

Moreover, defendant Firebox had 30 days from receipt of the order showing the change in the status of the case to remove it by filing a notice of removal. Here, Firebox removed the case within two months of its commencement and nine days after receiving the order showing the dismissal of Buckroe. Thus it was a timely removal. John's argument that, because he had settled with Buckroe for \$75,000, the amount in controversy was not satisfied, is erroneous. The facts say John did not amend the complaint after the settlement and, thus, it sought \$150,000. Indeed, John is entitled to seek from a single tortfeasor the entire amount of injury from an incident. The court would, based on the pleadings, accept that more than \$75,000 exclusive of interests and costs was at issue and, therefore, both complete diversity and the amount in controversy were satisfied. The case was properly removed.

5. [02.19] [Professional Responsibility] Phillip was involved in a car accident late one night and both he and the other driver, Jack, assured the investigating officer that their respective stoplights were green. Both drivers were severely injured, and there were no independent witnesses to the collision.

Shortly after the accident, Jack filed suit against Phillip for personal injuries in the appropriate Circuit Court. Phillip was uninsured and took the suit to a high school friend, Cate, who is a newly licensed solo practitioner, to discuss retaining her. Phillip asked Cate to defend him and to file a counterclaim against Jack for his own personal injuries because he believed the accident was Jack's fault. Cate told Phillip that she is a transactional real estate attorney and has no experience litigating tort matters and has no expertise with medical issues. Phillip wants to begin a romantic relationship with Cate, and he sees the representation as a possible excuse to spend time together.

During a dinner date, Phillip told Cate that representing him would be good experience and he would agree not to sue Cate for malpractice if she would represent him at a discounted rate. Cate agreed to defend Phillip in the personal injury suit brought by Jack for one-half of her normal and customary hourly rate, and Phillip agreed not to sue her for any malpractice. She also agreed to file Phillip's counterclaim for his personal injuries, but she insisted on a 40% contingency fee of any amount recovered on Phillip's behalf. Cate felt pressured to accept the representation because of their long-term friendship. That evening after dinner, Cate and Phillip also began a sexual relationship. The representation agreement was never reduced to writing.

Thereafter, Cate represented Phillip at trial. Jack lost his suit against Phillip, and Phillip prevailed on his counterclaim against Jack. The jury awarded Phillip \$200,000 in damages. Cate received the \$200,000 within two weeks of trial and deposited the check in her client trust account. She immediately advised Phillip of receipt of the check and told him she would send him \$120,000 which was his portion of the counterclaim judgment minus the 40% contingency fee. Phillip told Cate that he had found a new girlfriend and that Cate needed to send him \$160,000 because she agreed to represent him for half-price on everything.

- (a) Did Cate's agreement to defend Phillip in the action brought by Jack violate any Rules of Professional Conduct? Explain fully.
- (b) Did Cate's agreement to represent Phillip in his counterclaim against Jack violate any Rules of Professional Conduct? Explain fully.
- (c) Did Cate violate any Rules of Professional Conduct when she entered into a sexual relationship with Phillip? Explain fully.
- (d) What do the Rules of Professional Conduct permit Cate to do with the money in her client trust account? Explain fully.

Answer all questions according to the Virginia Rules of Professional Conduct.

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- (a) Yes. Cate violated Rule of Professional Conduct [RPC]1.8(h) by agreeing to represent Phillip on the condition that he agree not to sue her for malpractice. RPC 1.8(h) prohibits a lawyer from making an agreement prospectively limiting the lawyer's liability to a client for malpractice "except that a lawyer may make such an agreement if the lawyer is an employee of the client and the client is independently represented in making the agreement." The employee exception clearly does not apply. Thus, Cate violated this Rule.

In addition, RPC 1.1 on competency would have to be evaluated. Comment #2 to RPC 1:1 states: "A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question." In theory, Cate can take on the assignment – if she puts in the work to become competent in the field or brings in a more experienced attorney to assist her in her preparation.

Also, even though the agreement is not in writing, she has not violated RPC 1.5(b) because the rule states only that lawyers should "preferably" put fee agreements with new clients in writing. Finally, discounting her fee alone does not violate RPC 1.5(a) because her fee would still be reasonable.

- (b) Yes. Cate likely violated RPCs 1.5(a) and 1.5(c) in agreeing to represent Phillip in his counterclaim. First, RPC 1.5(a) provides that a lawyer's fee must be reasonable, and it provides eight factors for assessing reasonableness, most notably the "fee customarily charged in the locality for similar legal services" and "the experience, reputation, and ability of the lawyer." A forty percent contingent fee is higher than the customary 33%, and it might be justified if Cate were an expert in personal injury litigation. She is not; in fact, she has no experience in area and therefore charging such a high percentage appears unreasonable. In addition, RPC 1.5(c) provides that contingent fees, like this fee here, must be in writing and must state (1) the method the fee is to be determined, (2) the expenses to be deducted from the recovery, and (3) whether such expenses are deducted before or after the contingent fee is calculated. Cate's agreement with Phillip was not in writing and therefore violated this rule.

- (c) No. Virginia is somewhat unique in that the Virginia Rules of Professional Conduct do not prohibit a lawyer from beginning a sexual relationship with a client, even after the attorney-client relationship commences. Comment 10 to RPC 1.7 counsels that “A lawyer’s romantic or other personal relationship can also adversely affect representation of a client.” The Comment, however, does not carry the force of a rule, and it defers to the attorney’s judgment (i.e., it advises that a sexual relationship “can” adversely affect the representation, not that it always “will” have an adverse effect.)

Cate’s actions might give rise to a personal conflict of interest under RPC 1.7 if there were a “significant risk” that her representation of Phillip would be “materially limited” by a “personal interest of the lawyer” – her long-term friendship (and brief romantic relationship) with Phillip. Even if Cate had a conflict under 1.7, however, she still could continue with representing Phillip if she “reasonably believe[d]” she could competently do so (RPC 1.7(b)(1)), and she obtained Phillip’s consent to the representation in writing (RPC 1.7(b)(4)).

In sum, Cate’s decision to enter into a sexual relationship with Phillip might not be advisable, but it is not prohibited by any Rules of Professional Conduct in Virginia.

- (d) When the lawyer and client disagree as over a fee that the lawyer will be paying from funds the lawyer has in his or her client trust account, the lawyer should promptly disburse to the client the undisputed portion of the funds and keep the disputed portion of the funds in the trust account (RPC 1.15, Comment 3). Here, Cate must remit to Phillip the \$120,000, the undisputed portion, which she has done. She must then keep the disputed \$40,000 in her trust account until the matter is resolved. She should suggest promptly resolving their dispute through mediation or arbitration, such as through the Virginia State Bar’s Fee Dispute Resolution Program. As for the final \$40,000, Phillip does not dispute that portion of the award is owed to Cate, so she can transfer that amount to her general business account.

6. [02.19] [Va. Civil Procedure & Equity] On June 8, 2018, Jerry went to Bob’s house in Tazewell, Virginia, to collect a debt. When Bob refused to pay, Jerry punched him in the face several times. Bob sustained injuries during the assault that required medical treatment, so he filed a personal injury action against Jerry in the General District Court of Tazewell County seeking \$1,500 as compensation for his medical expenses.

A trial was held in the General District Court on Thursday, October 4, 2018. At the trial, Bob testified about the assault, the extent of his injuries, and the cost of his medical treatment. Jerry did not testify. At the conclusion of the trial, the General District Court entered a judgment awarding Bob \$1,500. Jerry decided to appeal the General District Court’s decision to the Circuit Court of Tazewell County. He filed a Notice of Appeal in the General District Court on Monday, October 15, 2018. He then followed the appropriate procedural steps required to perfect his appeal.

Before a trial was held in the Circuit Court, Bob filed a Motion to Dismiss the case claiming that Jerry had failed to timely file a Notice of Appeal. The Circuit Court denied Bob’s motion and the case proceeded to a jury trial. At trial, Bob testified consistently with his previous testimony from the General District Court trial. After laying a proper foundation, Bob also moved to admit into evidence video footage from his home security camera that clearly showed Jerry attacked him. Jerry objected to the admission of the video footage. Although Jerry admitted that the video footage was relevant and highly probative, he argued that Bob could not introduce evidence during the Circuit Court trial that he had failed to introduce during the General District Court trial. The Circuit Court overruled Jerry’s objection, and the video was admitted into evidence. After the video was played for the jury, Bob’s neighbor, Phil, testified about a conversation that he had with Jerry’s wife regarding the assault. Jerry did not object to Phil’s testimony. Jerry did not testify at the trial or put on any defense evidence. At the conclusion of the trial, the jury returned a verdict in Bob’s favor and awarded him \$1,500. The Circuit Court subsequently entered a judgment consistent with the jury’s verdict.

Jerry appealed the Circuit Court’s decision to the Supreme Court of Virginia, following all of the procedural steps required to perfect his appeal. On appeal, Jerry argued that the evidence presented at trial was insufficient to support the jury’s verdict. Additionally, Jerry argued that the Circuit Court erred by admitting hearsay testimony from Phil. Jerry also filed a notice stating that he intended to present additional testamentary evidence to the Supreme Court about the alleged assault.

- (a) Did the Circuit Court err by denying Bob’s pretrial Motion to Dismiss Jerry’s appeal? Explain fully.

- (b) Did the Circuit Court err by overruling Jerry's objection to the video footage? Explain fully.
- (c) Should the Supreme Court address Jerry's argument regarding Phil's testimony? Explain fully.
- (d) Should Jerry be permitted to present the additional evidence to the Supreme Court? Explain fully.

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- (a) The court did not [correction inserted on 06.06.19] err in denying Bob's pretrial motion to dismiss Jerry's appeal. Jerry had to file his notice of appeal within 10 days of the date of judgment, which was October 4th. Va. Code §16.1-106. Under Va. Code §2-210[A] the event day does not count, so Oct. 5th would be the first day. The 10th day is Oct. 14th, which is a Sunday. Under Va. Code §2-210[B], when the last day is a Sunday, the party gets to the next work day to file the notice of appeal. Jerry just made it.
- (b) The court did not err in overruling Jerry's objection to the video footage. The trial in circuit court is a trial *de novo* under Va. Code §16.106. The trial court is not deciding whether the GDC judge got it right, but deciding the case on the evidence admitted at the trial in the circuit court.
- (c) The SCV should not address Jerry's argument regarding Phil's testimony because Jerry did not object to the admission of the testimony during the trial in circuit court. Under SCV Rule 5:25, Jerry had to make timely objection to the admission & state the grounds for the objection of Phil's testimony in the circuit court, or the issue is waived.
- (d) Jerry is not permitted to offer evidence in the SCV. The SCV functions as an appellate, not trial, court and reviews the trial in the circuit court and addresses whether the circuit judge erred.

7. [Va. Civil Procedure & Torts] In 1998, Riles Plumlee went to work as a sports reporter writing in *The Northern Virginia Times* ("The Times"), a daily newspaper published by its owner, Old Dominion Media, Inc. ("Media"), a Virginia corporation with its principal office in Fairfax, Virginia. Riles had accepted an oral offer of at-will employment and never had a written contract of employment with Media.

Riles soon developed a specialty, reporting on the game of soccer at all levels, from youth leagues to professionals. Riles' reporting career coincided with the phenomenal growth in the popularity of soccer.

In 2006, Riles recognized the potential of Chirpster (a then-new online news and social networking service on which users post and interact with messages, known as "chirps"). On his own initiative and time, Riles opened a documented Chirpster account (the "Account") under the handle of "@Riles_NoVaTimes." In doing this, Riles accessed Chirpster using the Account's non-public login information (including username and password), which he kept secret, as he did with his Gmail account. He printed a copy of the Account's login information and kept it in a file.

Riles used the Account to send daily chirps about breaking soccer news and directing the Account's Chirpster followers to his articles on *The Times'* website, growing the number of his followers to 135,000. As a Chirpster account, the Account provided access to unique, non-public information, including the continually updated list of followers, as well as receipt of all chirps and related rechirps of followers (providing valuable insight into the interests of followers and others). The Account also has the capacity to send and receive direct, private messages with any follower or subgroup.

On February 22, 2019, Riles resigned from *The Times* and accepted a sportswriting job with a new, online subscription-based reporting and commentary website, known as Soccerworld.com. Media learned that Riles is scheduled to announce his hiring by Soccerworld.com on a nationally televised sports talk show on Wednesday, February 27, 2019, during which a graphic display will show Riles has changed the Account handle to "@Riles_Real Soccer," where he will encourage the Account's followers to subscribe to soccerworld.com. Soccerworld.com paid Riles a starting bonus based on the number of the Account's Chirpster followers.

Upon learning of this, *The Times'* editor-in-chief demanded that Riles relinquish use of the Account (including login

and password) so that, among other things, *The Times* could have direct access to the 135,000 Chirpster followers, which had been accustomed to visiting *The Times*' website and had been counted in its circulation for purposes of revenue from advertisers. Riles refused.

Media filed a Complaint in the Circuit Court of Fairfax County against Riles on February 25, 2019, alleging that he had wrongfully and intentionally converted the Account to his own use and that it would be impossible to recreate the Account with the same follower list. The Complaint requested injunctive relief precluding Riles from accessing the Account and obligating Riles to deliver the Account login and password to Media.

- (a) What must Media show to successfully assert a claim for the tort of conversion in this case under Virginia law? Explain fully.
- (b) In addition to the Complaint, what might Media file with the Court and what steps would Media need to take to secure immediate injunctive relief? Explain fully.
- (c) What factors should the Court consider in granting or denying a request for injunctive relief, and how is the Court likely to rule on this particular request by Media? Explain fully.
- (d) Is *The Northern Virginia Times* a necessary party to the Circuit Court proceeding? Explain fully.

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- (a) In order to successfully assert a claim for the tort of conversion in this case, Media will have to show a wrongful exercise of authority over its property (ie the Account), inconsistent with its ownership right. Specifically, Media will have to prove that (1) the Account is a property interest that can be subject to a conversion claim under Virginia law, (2) Media has an ownership interest in the Account, and (3) Riles has interfered with that ownership interest.

In Virginia, the general rule is that conversion only applies to tangible property, although Virginia courts have found that an action may lie for the unlawful conversion of certain intangible property rights that have been documented. United Leasing Corp. v. Thrift Ins. Corp., 247 Va. 299, 305 (1994). Here, Media will argue that the Chirpster account is the proper subject of a conversion claim because it was "documented" and because Riles printed a copy of the Account's login information and kept it in a file.

Media will also have to establish its ownership interest in the account. Media will argue that Riles was an employee of Media at the time that he opened the account and that Riles did so in the course of his employment as a sports writer for Media. Media will also point to the fact that the Account handle refers to "NoVaTimes," a clear reference to the name of the newspaper. Riles will counter that the Account belongs to him because he created the Account "on his own initiative and time."

If Media can persuade the court that the Account is a property interest subject to a conversion claim under Virginia law and that the Account belongs to Media, then Media will be successful on the conversion claim. It's clear that Riles has exercised authority over the Account and has interfered with any property interest Media may have.

Attendees Note: There is a case, *B.H. Media Group v. Andy Ritter*, Civ. Action No. 7:18cv388 (W.D. Va. 2018) (unpublished). The case involved a Twitter account and the court held that documentation of an account was something that could be converted.

- (b) In addition to the Complaint, Media ought to file a motion (also referred to at times as petition) for a temporary injunction. If the Complaint was not a verified one, the motion should attach affidavits supporting the grounds for a temporary injunction.
- (c) The factors a court should consider in considering whether to grant or to deny injunctive relief include the following: (a) Is there an adequate remedy at law?; (b) does the plaintiff have a likelihood of success at trial; (c) is the harm to the plaintiff if the injunction is not granted greater than the harm to the

defendant if the injunction is granted; and (d) does the public interest weigh in favor or against an injunction. The Court, as a condition of granting any temporary injunction is likely to require the Plaintiff to post a bond to protect the Defendant if, on a trial on the merits, the Court determines that the injunction should not have been granted.

- (d) The facts do not suggest that *The Daily Times* is even a separate entity from Old Dominion Media Group, Inc., characterized as *The Daily Times*' "owner." Thus, it is not even clear that the newspaper has capacity to be sued. In any event, its interest would be fully represented by Old Dominion Media Group, Inc.

8. [02.19] [Corporations & Professional Responsibility] Alice, Betty, and Cathy were the officers, directors and sole shareholders of ABC Corp., a validly formed Virginia corporation engaged in the manufacture of the tubes in which lipstick is supplied. ABC Corp. has its home office and manufacturing plant in Norfolk, Virginia. It is the major supplier of lipstick tubes to A Beautiful You, Inc., a large makeup manufacturer in Virginia. ABC Corp. has been profitable and pays substantial dividends to the three owners.

Lawyer maintains a law practice in Norfolk. He became acquainted with Alice, Betty, and Cathy several years ago when he represented each of them in real estate matters. Lawyer also represented them in the formation of ABC Corp. five years ago. Lawyer has not represented any of the three shareholders in any personal matter in the past five years. Lawyer has, however, performed all the legal work of ABC Corp. since its formation.

In June 2017, Alice made an appointment with Lawyer to discuss what Alice described as a "personal matter." During their meeting, Alice told Lawyer that she had just learned that Betty and Cathy, without informing Alice and using different counsel, had formed a Delaware corporation called B&C, Ltd. to produce tubes for lip moisturizer manufactured by a subsidiary of A Beautiful You, Inc., which operates a plant in Mexico. B&C, Ltd. set up a plant in Mexico a year ago and has been supplying tubes to the subsidiary since then. It has been a profitable venture, and Betty and Cathy have received substantial dividends from B&C, Ltd. Alice wants Lawyer to file suit against Betty and Cathy.

- (a) On what theory or theories, if any, can Betty and Cathy be sued for their actions relating to the formation and operation of B&C, Ltd.? Explain fully.
- (b) What forms of action can be brought and by whom? Explain fully.
- (c) What procedural steps must be taken in order to perfect the right to sue? Explain fully.
- (d) What ethical considerations are raised by Alice's consultation with Lawyer, and how should Lawyer resolve them?

Explain fully.

Answer (d) according to the Virginia Rules of Professional Conduct.

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- (a) Betty and Cathy can be sued for breaching their fiduciary duty of loyalty to ABC Corp. by usurping a corporate opportunity. As officers and directors of ABC Corp., Betty and Cathy owe fiduciary duties to the corporation. Specifically, they may not take a business opportunity in which the corporation may reasonably be interested without first offering the opportunity to the corporation. Here, B&C, Ltd., clearly involved in the same type of business as ABC Corp., is working with a subsidiary of ABC's customer A Beautiful You, Inc. It is likely that ABC Corp. would be interested in this business, and thus, Betty and Cathy have breached their duty of loyalty by not offering the opportunity to ABC Corp.
- (b) The corporation could bring an action against Betty and Cathy. However, it is unlikely that the board would cause the corporation to file suit. Alternatively, Alice could bring a shareholder derivative suit on behalf of ABC Corp. against them.
- (c) The procedural steps that must be taken in order to perfect the right to sue in a derivative suit are (1) a standing requirement and (2) demand. To have standing to bring a derivative suit, the shareholder must have owned stock at the time of the alleged wrongdoing and he or she must fairly and adequately

represent the interests of the corporation. Additionally, the shareholder must make written demand on the corporation prior to bringing the suit. After making demand, the shareholder must wait until the demand is rejected or until 90 days pass, unless he or she can show irreparable injury to the corporation. If the demand is rejected, the shareholder may file the suit only if he or she alleges that the demand was not properly rejected by a disinterested decision-maker.

- (d) The first question to consider is who is the client. The lawyer has not represented any of the three shareholders (A, B, or C) in any personal matter (real estate transactions) in the past five years. However, Lawyer continues to perform significant legal work for ABC Corp., something she has done since the organization's formation. It is the work on behalf of ABC Corp. that Lawyer must evaluate for conflicts of interest when Alice approaches Lawyer to initiate a lawsuit against Betty and Cathy.

Lawyer has former clients in A, B, C individually because of prior real estate transactions. RPC 1.9 focuses on conflicts involving the "same or a substantially related matter" as the prior representation. Given that the derivative suit is a wholly unrelated matter, RPC 1.9 is not likely to be implicated.

Suing B & C in forming B & C Ltd., however, likely presents a concurrent conflict under RPC 1.7 with Lawyer's work on behalf of ABC Corp. Rule 1.7 prohibits Lawyer from taking on A's claim if it would be "directly adverse" to her existing work for ABC Corp., or if "there is significant risk that the representation ... will be materially limited by" Lawyer's responsibilities to ABC Corp. Lawyer can only represent A against B & C if the lawyer obtained B & C's written consent after consultation. Given that obtaining such consent is highly unlikely, Lawyer cannot proceed in representing A.

Lawyer has a separate problem in Alice's request to represent her. Given that the attorney has learned confidential material from Alice that the officers and directors of ABC Corp. would need to know, the Lawyer now has an irreconcilable conflict. She/he cannot represent Alice in the derivative suit while remaining loyal to ABC Corp. as a whole. Moreover, she has a duty to maintain confidential the information that Alice told her as a prospective client, under RPC 1.18 and could not do that while representing ABC Corp. The Lawyer's inability to represent either Alice or ABC Corp. is cemented by the lawyer's obligation to communicate with current clients about ongoing matters under RPC 1.4.

9. [02.19] [Domestic Relations] In 2000, Adele and Ronnie Delk, both age 28, married and purchased a home in Mechanicsville, Virginia, for \$400,000, making a \$100,000 down payment and financing the balance with their local credit union. Ronnie began a law practice immediately after they were married, and Adele practiced medicine as a family physician until the birth of their son, whom they affectionately called Peanut, in 2010. Ronnie's law practice grew, and all of his income went toward the payment of household expenses, including the mortgage and maintenance of their home. Ronnie and Adele agreed that Adele would stay at home to raise Peanut at least until he entered grade school.

In 2012, Adele discovered that Ronnie had been having numerous adulterous relationships. Adele filed suit for divorce and demanded primary physical custody of Peanut, spousal support and equitable distribution of the marital estate. Ronnie's Answer to the Complaint denied the alleged adultery and sought liberal visitation, joint legal custody and equitable distribution of the marital estate.

On the eve of an *ore tenus* hearing to resolve all issues, Adele and Ronnie entered into a written settlement agreement with the assistance of their respective legal counsel. The settlement agreement divided the marital estate and provided that, in consideration of Ronnie's conveying to Adele his interest in the marital home, which was then worth \$500,000, Adele waived all claims to spousal support and waived all claims for future child support. They agreed to joint legal custody and that Ronnie would have liberal visitation rights with Peanut of two three-day weekends per month. The trial court entered a final decree of divorce in December 2013. The decree affirmed, ratified and incorporated by reference the settlement agreement.

In 2016, when Peanut entered kindergarten, Adele returned to her medical practice because she had free time to devote to work and because she substantially had depleted the equity she had received in the marital residence. Adele asked Ronnie for financial support, but Ronnie said that he already paid her in full for all future spousal and child support. Ronnie offered to keep Peanut at least half of each month as a means to help Adele financially, but Adele refused.

Adele went back to work full-time, which frequently involved working late and "on call" hours and asking Ronnie to

pick Peanut up from day care and take care of him until Adele got off work. One evening, on her way home, Adele was struck broadside by a tractor-trailer. Adele sustained severe physical injuries requiring intensive physical therapy and vocational rehabilitation. She will require convalescent care for at least eight months and will not have any income during that period.

Adele has filed a motion for spousal and child support. Ronnie opposes Adele's motion on the ground that the settlement agreement precludes her demand for such support. He has also filed a motion to amend the terms of shared custody reflected in the settlement agreement so that Peanut would be with Adele and him an equal amount of time. Adele opposes Ronnie's motion on the grounds that the issue of custody was already determined in the settlement agreement and that, in any event, her parents are available to assist her with Peanut while she recovers.

- (a) Should the Court award Adele spousal support? Explain fully.
- (b) Should the Court require Ronnie to pay child support? Explain fully.
- (c) What factors should the Court consider with respect to Ronnie's motion to amend the terms of shared custody in the settlement agreement, and how is the Court likely to rule? Explain fully.

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- (a) The Court should not award spousal support to Adele, even assuming that her circumstances have changed materially. She signed a property settlement agreement with Ronnie, by which she waived her right to claim future spousal support from him in exchange for valuable consideration received. The agreement was incorporated within the parties' final divorce decree and became a term of the decree. Va. Code §20-109.1 There is no claim that the agreement was obtained by fraud or that it is unconscionable. In these circumstances the Court's authority to award or modify spousal support is governed by the property settlement agreement. Va. Code §20-109(c). Here, the Court may not award spousal support to Adele because she waived any claim she had by the agreement, thereby depriving the Court of authority to award support to her.

[The 2018 amendment does not apply because the facts here predate the effective date of the amendment, July 1, 2018]

- (b) The Court may require Ronnie to pay to Adele child support for Peanut, even though Adele waived her claim for such support by the agreement. While she may waive her right to spousal support, she may not waive Peanut's right to proper care and maintenance in the future. The parties' agreement may govern the property and other rights of the parties, but the agreements take subject to the Courts right to make a child support award in the appropriate case notwithstanding an agreement to the contrary. Kelley v. Kelley 248 Va. 295 (1994). The Court retains continuous jurisdiction to change or modify its order relating to care and maintenance of a child. Va. Code §20-108. On these facts, the Court should award child support to Adele for Peanut because of a material change in her circumstances.
- (c) As with child support, the Court is not precluded by the terms of the agreement to change the terms of custody and visitation in the appropriate case. *Id.* Even over Adele's objection, the Court may alter the terms of the agreement regarding custody and visitation in this case if Ronnie can show a material change in the parties' circumstances to justify a change in the award and such change is in Peanut's best interests. The Court must consider the "best interests of the child" factors set forth in Va. Code §20-124.3 in making its determination.

Here, the Court will likely award the parties joint physical custody with equal visitation of Peanut. There is no suggestion that Ronnie is an unfit parent. Since Ronnie is able to take care of Peanut, he is preferred, as his parent, to supervise him instead of supervision by Peanut's grandparents.