

Summary of suggested answers & annotations to the essay part of the July 2013 Virginia Bar Exam. Prepared by J. R. Zepkin of William & Mary Law School, Emmeline P. Reeves of University of Richmond Law School, C. Scott Pryor & L. O. Natt Gantt, II of Regent University Law School & Leslie Alden of George Mason University School of Law

After each bar exam, 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 references to some of the case and statutory law for reference even though the BBE may not expect such specificity in applicants' answers on the exam. jrz

1. [07/13] [Real Estate & Equity] Sam Moss filed a complaint in the Circuit Court of the City of Petersburg, Virginia, against Andre Brown, seeking a decree of specific performance of a contract made between the parties for the sale and purchase of a large lot located on Virginia Avenue in Petersburg. An answer was filed by Brown, and the case was heard upon the complaint, answer, and agreed statement of facts.

According to the stipulated facts, Moss had agreed to sell and Brown agreed to purchase the lot for the sum of \$200,000 for the purpose of developing thereon a 12-unit residential condominium building. At the time of the contract, the lot in question was zoned for high density multifamily residential construction, which included condominium projects. Between the time the contract was made and the delivery of the deed, the Petersburg City Council rezoned the lot for single family residential purposes, and the Council has refused to reconsider its decision or to issue Brown a conditional use permit. Brown therefore declined to close on the transaction.

The statement of facts further recited that Moss, in reliance upon the contract, sold his home in Petersburg and purchased a retirement house at Wintergreen Resort in Nelson County and that Brown, in anticipation of going into the real estate development business, sold his former business and has moved to Petersburg.

Moss asserts the doctrine of equitable conversion in support of his case.

No question of fraud, misrepresentation, or unfair dealings on the part of either party is alleged, and the parties agree that the enactment by the City Council of the zoning ordinance was unanticipated.

[a] What is the doctrine of equitable conversion, and how should the court rule on Moss' assertion of the doctrine? Explain Fully.

[b] Would the court be likely to decree specific performance? Explain Fully.

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[a] The facts of this question are taken from the case of Clay v. Landreth 187 Va. 169 [1948]. The doctrine of equitable conversion exists in Virginia, not as a rule of law, but as a discretionary doctrine to be applied when equity considers a thing to be done which ought to have been done. It is a legal fiction based on the presumed intention of the parties. So, as here, where a valid contract for the sale of land exists, the doctrine of equitable conversion would allow the court to specifically enforce the sale. However, application of the doctrine is limited to cases where the enforcement of the contract is in accord with the intention of the parties, free from fraud, and where enforcement will not produce inequitable results. The doctrine will not be applied in a case where to do so would result in hardship or injustice forced upon one party, through a change in circumstances not contemplated by the parties at the time of the contract. The court should not apply the doctrine here.

[b] For the reasons stated above, the court would not be likely to decree specific performance, another equitable remedy. Specific performance will not be decreed where a contract is founded in fraud, or, as here, where a subsequent change of circumstances has defeated the purpose of the contract. Under the circumstances of the case, where something has intervened to prevent the intention of the parties from being realized, enforcement of the contract would be inequitable. Here, both parties changed their positions based on the contract and it would be inequitable for the court to prefer one party over the other.

2. [07/13] [Agency & Va. Civil Procedure] Acme Manufacturing Company ("Acme"), located in the City of Roanoke,

Virginia, moved its warehousing facilities to another location and wanted to sell its Roanoke warehouse building. It decided to attempt to sell the property without the services of a real estate broker. Acme placed for sale signs on the property and advertised in the newspapers and on the local television station that the property was for sale, in each case informing interested buyers to contact Acme's vice president regarding the details.

Without authorization from Acme, Lester Shively, a real estate agent employed by Big Lick Realty, solicited a number of prospective purchasers for the property. Thereafter, the following events occurred sequentially:

First, Carr Warehouses, Inc. ("Carr") contacted Shively and said it wanted to submit an offer. Shively prepared, and Carr's president signed, a standard form real estate purchase agreement, describing the property and offering \$1 million (the "Carr Agreement"). The Carr Agreement contained a clause providing for payment by Acme to Big Lick Realty of commission of 5% of the sale price and stating that the commission provision would survive the closing or termination of the Carr Agreement. Shively met with Acme's president and presented the Carr Agreement, which Acme rejected without signing, and informed Shively that the price was \$1.75 million.

Second, Shively mailed Acme another contract on Big Lick's standard form in which Porter Storage Corp. ("Porter") offered \$1.25 million; this contract (the "Porter Contract") also contained the same survivable 5% commission clause. Acme's president sent it back unsigned, with a letter (the "Acme Letter") signed by the president stating, "Acme thanks you for your continued efforts on our behalf, but the Board of Directors still believes \$1.75 million is a fair price."

Third, a letter was written by Gregory Warehousing Co. ("Gregory") to Big Lick, expressing interest in the property and asking Big Lick to get "its client Acme's approval" to allow Gregory to obtain an independent appraisal. Big Lick sent the letter (the "Gregory Letter") to Acme, whose vice president wrote "Approved" and signed her name at the bottom.

Fourth, Acme's president met directly with Gregory's president and, without the knowledge or participation of Shively or Big Lick, entered into a contract for the sale of the warehouse building to Gregory for \$1.4 million. The contract was silent with respect to any broker's commission.

When Big Lick learned of the sale to Gregory, it demanded that Acme pay Big Lick a 5% commission of \$70,000. Acme refused.

Big Lick sued Acme for \$70,000, alleging that Big Lick has actively marketed the property to prospective purchasers, including Gregory, and that there was in fact an oral agreement by Acme to pay Big Lick a 5% commission. Big Lick's complaint alleged the facts of the foregoing sequential events and attached as exhibits copies of the Carr Agreement, the Porter Contract, the Acme Letter, and the Gregory Letter.

Acme demurred to the complaint, on the ground that the complaint and the exhibits did not state sufficient evidence of an agreement to remove the bar of the Statute of Frauds, and cited in support of the demurrer the following section of the Virginia Code:

§ 11-2. Unless a promise, contract, agreement, representation, assurance, or ratification, or some memorandum or note thereof, is in writing and signed by the party to be charged or his agent, no action shall be brought

[u]pon any agreement or contract for services to be performed in the sale of real estate by a [real estate agent or broker];

The consideration need not be set forth or expressed in the writing, and it may be proved (where a consideration is necessary) by other evidence.

The trial court sustained the demurrer and dismissed the complaint with prejudice. Big Lick appealed the action of the trial court and was granted an appeal.

[a] What is the standard of review the Supreme Court of Virginia will apply in ruling on the demurrer?

[b] How should the Court rule on the trial court's action in sustaining the demurrer?

Explain your answers fully.

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- [a] The trial court's ruling on the demurrer involved an issue of law. The standard of review, on appeal as to an issue of law is the appellate court will consider the issue *de novo*, that is without any deference to the ruling of the court below. Estate of Parfitt v. Parfitt 277 Va. 333 [2009]
- [b] The Court should reverse the trial court's action in sustaining the demurrer. The alleged contract clearly falls within the cited Statute of Frauds. By its terms, 11-2 applies to contracts for services to be performed in the sale of real estate by a real estate broker, and the section requires a writing, signed by the party to be charged, evidencing the contract.

Thus, the issue presented is whether the proffered writings provide sufficient evidence of the alleged contract to satisfy the statute of frauds. Under Virginia law, multiple writings may be used to satisfy the statute of frauds. Additionally, the statute of frauds does not require that the parties' entire agreement be reduced to writing. Rather, the statute requires some written evidence of an otherwise oral agreement.

Here, there are several writings referencing a brokerage agreement between the parties. Both the Carr offer and the Shively offer refer to a commission to be paid to Big Lick. Although neither of these offers was signed by the defendant, the defendant did, in a signed writing enclosed with the Shively offer, expressly thank Big Lick for its efforts "on [Acme's] behalf."

Additionally, an agent of Acme signed the Gregory letter, which refers to Acme as Big Lick's "client," and, by doing so, Acme ratified the reference. Taken together, these documents provide sufficient written evidence of a brokerage contract between the parties to survive a demurrer based on the statute of frauds.

Finally, it is important to note that, in order to ultimately prevail on its breach of contract claim, the plaintiff still must prove that there was, in fact, a contract between the parties. Satisfaction of the statute of frauds merely allows the plaintiff's case to continue.

3. [07/13] [Criminal Law] On Saturday night, June 1, Wilson walked into a police station and stated that he needed to speak to a detective about a double homicide. An officer escorted him to a detective's office, where he was immediately advised of his *Miranda* rights. After signing a written waiver of his *Miranda* rights, Wilson told the detective that he had just killed his wife and daughter and was turning himself in to the police. He told the detective that he and his wife had been having financial difficulties, and that they had a heated argument concerning the subject earlier that week. Wilson said that during the argument, his wife and daughter had insulted him to the point of verbal abuse. He said that they told him he was a "failure as a human being," that he could not provide for his family, and that he was "inadequate as a man in every way." Wilson said that he was extremely upset by their insults and could not "think clearly" for a few days following the argument.

Wilson told the detective that he decided to kill his wife and daughter following the argument. He said that their extravagant spending habits were the source of the family's financial difficulties. He told the detective that he decided to wait to kill them until that weekend, when he was sure that they would both be at home. Wilson said that earlier in the evening of June 1 he told his wife that he was going to give her a massage. When she laid down for the massage, Wilson said he strangled her by placing a heavy barbell over her neck and applying pressure. After killing his wife, Wilson said he went to his daughter's bedroom to kill her using the same method while she slept. Wilson said that she woke up before he could begin strangling her, so he proceeded to strike her repeatedly in the head with the barbell until she lost consciousness. At that point, the detective asked Wilson if his wife and daughter could possibly still be alive. Wilson replied that his wife was definitely dead, but his daughter was still breathing when he left the family's house.

The detective immediately told the station's dispatch officer to send the officer patrolling Wilson's neighborhood to his house to investigate a homicide and offer assistance to any surviving victims. The detective made a lawful arrest of Wilson for the murder of his wife. When he searched Wilson incident to the arrest, the detective found a loaded pistol in Wilson's pocket. A subsequent investigation of Wilson's criminal history showed that his only prior conviction was for sexual battery, a crime punishable by confinement in jail for not more than twelve months and/or a fine of not more than \$2,500.

Two officers arrived at Wilson's house approximately five minutes later. They knocked on the door and announced their presence, but no one answered. They then entered the house through its unlocked front door. The officers

immediately saw Wilson's wife on the floor of the living room. She was obviously dead. The officers continued to search the house for other victims until they found Wilson's daughter in her bed. She was also dead. During the course of this search, the officers seized a clear plastic baggie containing a green leafy plant material later identified as marijuana from Wilson's living room coffee table. The baggie was the only object on the table, and the table was next to Wilson's wife's body. The distinctive odor of marijuana also emanated from the baggie. Wilson's fingerprints and DNA were later recovered from the baggie.

Wilson was indicted for the first degree murder of his wife and daughter, possession of marijuana, and possession of a firearm under a statute that makes it unlawful for one to possess a firearm after having been convicted of a felony.

Wilson filed pretrial motions to suppress the marijuana seized during the warrantless search of his home and the firearm seized during the warrantless search at the police station. The court denied both motions.

At trial, Wilson moved to dismiss the charge of murder and requested that the judge instruct the jury that the highest degree of homicide that the evidence could support was voluntary manslaughter. Also at trial, Wilson moved to dismiss the firearm charge on the ground that there was no evidence to support it.

- [a] Did the court rule correctly on each of Wilson's pretrial motions? Explain fully.
- [b] How should the court rule on each of the motions Wilson made at trial? Explain fully.

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[a] [i] Pretrial Motion to Suppress Marijuana: This motion should be denied. The police were authorized to enter the property under the community caretaker doctrine in order to search for crime victims, one of whom might be alive. There were present, exigent circumstances. As a result, no warrant was needed to enter the property. Once inside, the police observed the marijuana in plain view and also were able to detect the odor of marijuana.

[ii] Pretrial Motion to Suppress Firearm: This motion should be denied. This was a lawful search incident to an arrest.

[b] [i] Trial Motion to Dismiss charge of murder and Instruct on voluntary manslaughter: This motion should be denied. Although every homicide is presumed to be in the 2d degree, here the evidence supports the charge of 1st degree murder because it satisfies the elements of a willful, deliberate and premeditated killing. The defendant, without legal provocation, armed himself and planned the murders by delivering mortal blows. The gruesome facts of the killing support a finding of malice, necessary for murder, so the charge of manslaughter is inappropriate. A charge of voluntary manslaughter is inappropriate because this was not an act done in the heat of passion or upon a sudden provocation; this was premeditated. Involuntary manslaughter is also an inappropriate charge because this defendant acted with the specific intent to kill these victims; this was not an accidental killing.

[ii] Trial Motion to Dismiss Firearm charge: This motion should be granted. Because Wilson's underlying conviction was for a misdemeanor charge, there was no evidence to support the charge of possession of a firearm after having been convicted of a felony.

4. [07/13] [Professional Responsibility] Madison & Jackson, a law firm in Manassas, Virginia, is a general partnership, which consists of 10 attorneys, all of whom are admitted to practice law only in Virginia. The firm handles a significant number of personal injury claims on behalf of injured persons.

Madison & Jackson maintains an Internet website where prospective clients are invited to complete an online form regarding the factual details of their accidents and injuries. In exchange for this information, Madison & Jackson's website promises to provide personal injury claimants a free evaluation of their claims by an experienced, personal injury lawyer.

Cammie, an adult who was injured in a motor vehicle collision in Virginia, logged on to the website. In navigating through it, she saw the following testimonial quote from Sophia Jones, a client for whom Madison & Jackson had obtained a \$2 million recovery:

"Madison & Jackson is the best plaintiff's personal injury law firm in Virginia, in my opinion, and I know from experience. Their clients always get quick results."

Persuaded by this testimonial that Madison & Jackson was the firm for her, Cammie filled out the online form. She provided details about the two-car collision in which she was involved, including the fact that she had consumed three glasses of wine in a one hour period before getting behind the wheel and that the collision involving her automobile occurred about five minutes after she got in her automobile.

One of Madison & Jackson's lawyers, Roy Williams, reviewed Cammie's online information and asked his legal assistant to run a conflicts check. The legal assistant did so and advised Roy that another Madison & Jackson lawyer is currently representing Anita, a client who suffered serious physical injuries as the guest passenger in the automobile driven by Cammie at the time of the collision. As a result, Roy wrote Cammie a letter, telling her that the firm would not be able to take her case.

- [a] Was Roy's decision not to take Cammie's case required by the Virginia Rules of Professional Conduct? Explain fully.
- [b] Did the results of the conflicts check require Madison & Jackson to take any further action consistent with their ethical obligations under the Virginia Rules of Professional Conduct? Explain fully.
- [c] Is the inclusion of Sophia Jones' statement on the law firm's website consistent with the law firm's obligations under the Virginia Rules of Professional Conduct? Explain fully.

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- [a] Yes, Roy's decision to not take Cammie's case was required by the Virginia Rules of Professional Conduct, Rule 1:7 & Rule 1:16(a)(1) because under these facts there is a concurrent conflict of interest. Under the Virginia rules, a lawyer may not represent a client if representation of that client would be directly adverse to an existing client unless (1) the lawyer reasonably believes the representation would not adversely affect the relationship with the other client, (2) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation and (3) both clients consent in writing after consultation.

Additionally, under the imputed disqualification rule, Rules of Professional Conduct, Rule 1:10, if one attorney in a firm cannot represent a given client, then no attorney in the firm can. Here, the representation of Cammie would be directly adverse to an existing client, Anita. Anita was a passenger in the car and would have a claim against Cammie as a driver of one of the vehicles involved in the collision. Further, the representation would involve the assertion of a claim by Anita against Cammie based on Cammie's negligence in drinking before driving. Thus, no attorney in the firm could represent Cammie.

- [b] Yes, the results of the conflicts check did require the firm to take further action. Under the Rules of Professional Conduct, Rule 1:18(a) Cammie would be considered a prospective client under the Virginia Rules. When a prospective client reveals to a lawyer information that could be significantly harmful to that client, the lawyer cannot represent another client with interests materially adverse to the prospective client in the same or substantially related matter. Rules of Professional Conduct, Rule 1:18(b)&(c)

The information Cammie provided - her consumption of alcohol just prior to the accident - could be "significantly harmful" to her and therefore Roy could not represent Anita against Cammie. Because Roy is conflicted, another attorney in his firm also cannot represent Anita unless certain conditions are satisfied. The attorney with information from the prospective client - Roy - must be screened from the matter and written notice of the screening must be promptly given to the prospective client - Cammie.

- [c] The inclusion of Sophia Jones' statement on the firm's website is not consistent with the firm's obligations under the Virginia Rules of Professional Conduct Rule 7:1. A lawyer may not make false or misleading communications about his or her services. An attorney may not make statements implying that the outcome of a particular legal matter was not or will not be related to its facts or merits; comparing the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated; or create an unjustified expectation about the results the lawyer can achieve.

Here, although Sophie qualifies her statement by saying that it is her “opinion,” the statement is still misleading or deceptive because she states the firm is the “best” personal injury firm in Virginia (comparing the firm’s services to others without substantiation). Also, stating the firm “always” gets “quick results” is likely to lead to an unjustified expectation about the firm’s results. Furthermore, including the amount of the recovery is misleading or deceptive because the facts provide no indication that the website included a disclaimer that her results are not indicative of all cases and are related to facts and merits of her particular case. Finally, it’s important to note that the fact that the statement on the website is a quotation from a client does not absolve the attorneys from responsibility. See Legal Ethics Opinion [LEO] 1750

5. [07/13] [Va. Civil Procedure] Winston Smith (the Plaintiff), an adult resident of Maryland, was severely injured in Newport News, Virginia on June 30, 2011, when he was struck by an automobile being negligently operated by Hunter Mitchell, the defendant, who resided in Newport News. The Plaintiff’s injuries were so extensive that they required several surgeries, and it was nearly two years following the accident before his doctors felt they could make a reasonable prognosis about the extent of his recovery.

The plaintiff retained John West, an experienced Washington, D.C. lawyer to represent him in a suit to recover damages arising out of the automobile collision. West determined that the suit should be filed in Newport News, Virginia. Because West was not admitted to practice law in Virginia, West, with the Plaintiff’s consent, associated his law school friend Landis McRoberts, Jr., a member of the Virginia bar, as local counsel. Recognizing that most of the work on the case would likely be done by West, McRoberts sent to West a writing, appointing West as McRoberts’ agent with authority to sign McRoberts’ name to any pleading to be filed in the suit.

In June 2013, West prepared the complaint against Hunter Mitchell, the defendant, and filed it with the Clerk of the Circuit Court of Newport News on the last day before the statute of limitations would have run. The complaint bore the typed signature “Winston Smith By Counsel.” On the signature line below, West had signed “Landis McRoberts, Jr., by JW.” McRoberts was named as “Counsel for Plaintiff.” Below that signature appeared the typed name of John West as “Co-Counsel for Plaintiff.”

It is undisputed that McRoberts is an active member of the Virginia State Bar in good standing, licensed to practice law in Virginia, and that West is a member of the Bar of the District of Columbia in good standing, but is not licensed to practice law in Virginia. Soon after the complaint was filed and served, defense counsel filed a motion for summary judgment on the grounds that the complaint failed to comply with Virginia law because it lacked the signature of either a *pro se* plaintiff or an attorney representing him who was licensed to practice law in Virginia, and that the statute of limitations had run.

McRoberts immediately filed an opposition to the motion, attaching a copy of his writing that had authorized West as his agent to sign his name to pleadings; in the alternative, McRoberts asked for leave to amend the complaint to add his actual signature, citing Supreme Court of Virginia Rule 1:8, which specifically provides that “Leave to amend [pleadings] shall be liberally granted in furtherance of the ends of justice.” At a hearing on the motion, McRoberts represented to the court that he had not personally signed the complaint but that he had requested and authorized West, as his agent, to sign his, McRoberts’, name. McRoberts argued that a person may make another his agent for the purpose of signing a pleading and that the signature of the agent, if properly authorized by the principal, would be as effective as if the principal had personally signed the pleading.

[a] Can McRoberts properly authorize West to sign the complaint on his behalf? Explain fully.

[b] How should the court rule on the motion for summary judgment? Explain fully.

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[a] The facts of this question are taken from the case of Shipe v. Hunter 280 Va. 480 [2010]. McRoberts can not properly authorize West to sign the complaint on his behalf. Va. Code §8.01-271.1 & Rule 1:4(c) require that a pleading be signed by either a *pro se* litigant or by at least one attorney of record in his individual name. Rule 1A:4(2) provides that any pleading shall be invalid unless it is signed by local counsel. The Shipe court rejected the argument that the Virginia attorney could authorize the out of state attorney to sign his [the Virginia attorney’s] name to the pleading.

- [b] The trial court should sustain the Motion for Summary judgment and dismiss the action. When a pleading that is required to be signed by an attorney licensed to practice law in Virginia does not contain such signature, the pleading is a nullity. Consequently the complaint filed in this question [and in the Shipe case] was a nullity and thus there was no valid pleading for the trial court to proceed on. Based on the complaint being a nullity, there's no complaint for the trial court to consider leave to amend. The statute of limitations would have continued to run on plaintiff's claim, even though a complaint had been filed, again, because the complaint was a nullity.

✖✖ Based on the complaint being a nullity, arguably, the judge had no authority to dismiss the case with prejudice, even though the a court would have to sustain a plea of the statute of limitations if the action was later filed properly. It is not expected that any discussion of this is necessary in order to earn full credit.

6. [07/13] [[Va. Civil Procedure] In 2010, Cammie and Jackson, married adults, purchased a new house located in a residential development in Fairfax County, Virginia. The vendor was Southern Homes, Inc., ("Southern"), a nationwide builder with its principal office in Jacksonville, Florida.

Southern's standard purchase contract, which was signed by the parties, stated that contractual matters would be governed by Virginia law. The only mention of the subject of warranties was a provision in all capital letters, printed in type two points larger than the remainder of the contract, that read in its entirety: "ALL WARRANTIES, EXPRESS OR IMPLIED, ARE SPECIFICALLY WAIVED." Other than the foregoing quoted provision, the contract was entirely in a uniform type-face. In addition, the purchase contract stated that, as to dispute resolution: "Any dispute between the parties arising in connection with this purchase contract, which is not otherwise resolved, shall be submitted to binding arbitration for decision, the venue for which shall be Reno, Nevada, and each party is to bear his own attorneys' fees, expenses of witnesses, and pay one-half the costs of arbitration and the fee of the arbitrator."

Within six months of the sale, Cammie and Jackson observed cracks in the basement walls and floors of their new house, which they believed to be evidence of structural defects in the house's foundation. Southern declined to take any remedial action.

Cammie and Jackson sued Southern in the Circuit Court of Fairfax County, claiming breach of contract, negligent design, and breach of the implied statutory warranty contained in Virginia Code § 55-70.1, which states in pertinent part:

In every contract for the sale of a new dwelling, the vendor, if he is in the business of building or selling such dwellings, shall be held to warrant to the vendee that, at the time of transfer of record title or the vendee's taking possession, whichever occurs first, the dwelling together with all its fixtures is sufficiently (i) free from structural defects, so as to pass without objection in the trade, (ii) constructed in a workmanlike manner, so as to pass without objection in the trade, and (iii) fit for habitation.

The above warranties implied in the contract for sale shall be held to survive the transfer of title. A contract for sale may waive, modify or exclude any or all express and implied warranties and sell a new home "as is" only if the words used to waive, modify or exclude such warranties are conspicuous, set forth on the face of such contract in capital letters which are at least two points larger than the other type in the contract and only if the words used to waive, modify or exclude the warranties state with specificity the warranty or warranties that are being waived, modified or excluded. If all warranties are waived or excluded, a contract must specifically set forth in capital letters, which are at least two points larger than the other type in the contract that the dwelling is being sold "as is."

Southern timely filed an answer, which included the affirmative defense that all warranties had been contractually waived. With its answer, Southern also served interrogatories and requests for production of documents on the plaintiffs. In the course of pretrial discovery, Southern's attorney deposed both Cammie and Jackson separately.

Cammie and Jackson also served Southern with interrogatories, one of which asked for information about changes Southern had made in 2011 to the design of its foundations. Southern objected to the interrogatory on the ground that such information was irrelevant to plaintiffs' claim based on a home constructed in 2010 and that measures taken in 2011 to correct prior defects are inadmissible to prove negligence as to any 2010 defects.

Southern filed a Plea in Bar on the basis of its affirmative defense that all warranties had been waived and a motion to compel arbitration based on the contractual dispute resolution provision. Cammie and Jackson filed a motion to

compel an answer to their interrogatory regarding the foundation design change.

- [a] How would the court be likely to rule on Southern's affirmative defense? Explain fully.
- [b] How would the court be likely to rule on Cammie and Jackson's motion to compel an answer to their interrogatory? Explain fully.
- [c] On what bases should Cammie and Jackson oppose Southern's motion to compel arbitration, and how would the court be likely to rule? Explain fully.

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- [a] Southern's affirmative defense, contractual waiver of warranties, as asserted in the Plea in Bar, should be overruled. The contract on its face fails to comply with the statutory requirements for a waiver of warranties. The contract fails to: (1) state with specificity the warranty or warranties that are being waived; (2) be accompanied by language that the property is sold "as is" set forth in capital letters which are two points larger than the other type.
- [b] The motion to Compel Answer to the Interrogatory is likely to be granted. Although evidence of subsequent remedial measures is probably not admissible to prove earlier negligence (unless the Defendant contends remediation is not feasible) the discovery Rule 4:1 permits discovery of any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether the subject matter relates to a claim or a defense. The matter sought in discovery is not privileged. As long as the requested discovery is reasonably calculated to lead to the discovery of admissible evidence, an objection on the ground that the information sought is inadmissible should be overruled.
- [c] The motion to Compel Arbitration is likely to be denied. The plaintiff should argue that the defendant has waived its right to arbitrate by failing to raise it in the answer and by continuing to engage in substantial litigation for an extended period of time in the forum. In addition, plaintiff should argue that the defendant has sought affirmative relief by filing the Plea in Bar and by taking extensive discovery. Further, plaintiff should argue that neither the parties nor the controversy has a connection to Nevada, and to force the cost and expense of a dispute in that forum is unfair or unconscionable, and moving the case to arbitration at this point unfairly prejudices the plaintiff. Finally, the plaintiff could argue that the dispute over the construction of the house was not a dispute arising in connection with the purchase contract, and therefore does not fall within the arbitration provision at all.

7. [07/13] [Corporations] Coratech is a Virginia Corporation headquartered in Russell County, Virginia. Its sole business is the development and sale of proprietary computer software for use in business applications, primarily inventory control. Coratech's Board of Directors recently decided that it required larger quarters to accommodate its expanding business. The Board formed a Site Location Committee (the Committee) to find and recommend the purchase of a new location for its headquarters. It appointed three members of the Board to the Committee, naming Dana as its chair.

The Committee received and carefully studied several proposals from commercial real estate brokers, including one for the last available site in Redknapp Business Park (the "Redknapp site"). The Committee determined that the Redknapp site was particularly attractive because of its high-tech campus-like setting. The Redknapp site was priced at \$500,000. Dana intended at the next regularly scheduled meeting of the Committee to finalize a recommendation to the Board to purchase the Redknapp site. Dana postponed the meeting for a month because its timing interfered with a long-planned golf vacation in Scotland.

Upon Dana's return, and before the meeting of the Committee, Dana received a proposal involving a parcel in Bell Industrial Park (the "Bell parcel"), available for \$350,000. Dana believed that the Bell parcel was better suited for a warehouse facility than for an office-type facility that Coratech required.

The next day, at the Committee meeting, based on Dana's presentation, the Committee unanimously recommended to the Board that Coratech purchase the Redknapp site for \$500,000. Dana did not mention the Bell parcel. The Board debated and adopted the Committee recommendation and submitted a full-price offer of \$500,000. The real estate broker representing the seller responded that, within the last week, his client had received an offer of \$900,000 for the Redknapp site and was about to accept it. The Board, still believing that the Redknapp site was well-suited for Coratech's

needs, responded with an offer of \$1,000,000, which the owner of the Redknapp site accepted.

Unbeknown to the Coratech Board, Dana purchased the Bell parcel for his own account and later sold it for \$700,000.

Upon learning of the foregoing, a Coratech shareholder brought a derivative lawsuit. The complaint alleges that:

(1) The Board of Directors collectively and Dana individually breached their duties to the corporation and are, therefore, liable to the corporation for the difference between the \$1,000,000 paid for the Redknapp site and the \$500,000 for which it could have acquired it.

(2) Dana breached his duty to the corporation and is, therefore, liable for the amount by which he profited by the purchase and sale of the Bell parcel.

You may assume that the derivative suit satisfies all procedural prerequisites.

[a] With regard to the Redknapp site transaction, what duties, if any, did the Board and Dana owe to the corporation; what defenses, if any, might they assert; and what is the likely outcome as to their liability? Explain fully.

[b] With regard to the Bell parcel transaction, what duty, if any, did Dana owe the corporation, what defense might he assert, and what is the likely outcome? Explain fully.

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[a] With regard to the Redkamp site transaction, the Board and Dana owed fiduciary duties of care and loyalty to the corporation. The duty of care requires that directors act in accordance with their good faith business judgment of the best interests of the corporation. The duty of loyalty concerns directors' conflicts of interest and generally requires that directors refrain from self-dealing, competing with the corporation and usurping corporate opportunities. Here, it appears that Dana violated his duty of care in his handling of the Redkamp purchase. Because Dana postponed the meeting to consider the Redknapp site by a month, a competing buyer emerged and the corporation was required to pay an additional \$500,000 to purchase the property.

Dana will attempt to raise the defense of the good faith business judgment rule; however, he should not be successful on this defense. He decided to postpone the meeting based on his own personal interests - his golf trip. He had no business purpose for postponing the meeting. Therefore, the business judgment rule would not apply to that decision, and he will be liable for breach of the duty of care based on his delay in acting on the Redkamp purchase.

Although Dana also owes the corporation a duty of loyalty in connection with the Redkamp purchase, the facts do not establish a violation of that duty. The corporation's only potential argument appears to be that Dana steered the corporation toward the Redkamp property, instead of the Bell parcel, because he intended to purchase the Bell property for himself. However, the facts establish that Dana believe that the Redkamp parcel was better suited for Coratech's purposes. Thus, Dana did not violate his duty of loyalty in the Redkamp transaction.

Similarly, the entire Board owes both duties of loyalty and care in connection with the Redkamp purchase, but the Board did not violate those duties. As for the duty of care, the Board acted properly in delegating responsibility to investigate potential properties to the Site Location Committee. The Committee then performed sufficient inquiry by carefully studying several proposals from commercial real estate brokers, and the Board was justified in relying on the Committee's research in voting to approve the Redkamp purchase. Finally, the Board bore no responsibility for Dana's delay in the acting on the Redkamp property.

[b] With regard to the Bell parcel transaction, Dana owed the corporation a duty of loyalty. As a director, Dana is required to refrain from competing with the corporation or usurping a corporate opportunity. The corporation would argue that Dana learned of the opportunity to purchase the Bell parcel through his position as a director of Coratech and that he should have first offered this opportunity to the corporation. In his defense, Dana will argue, first, that the Bell property was not as well-suited as the Redkamp parcel for Coratech's purposes and, second, that Coratech is not in the business of real estate investment - as the facts indicate, Coratech's sole business is development and sale of computer software. Thus, by buying the parcel as a real estate investment, Dana was not

taking an opportunity that the corporation would pursue. Although Dana has a strong argument on this point, he would have been prudent to disclose the opportunity to the corporation before purchasing the property himself.

8. [07/13] [Va. Civil Procedure & Creditors' Rights] On June 1, 2012, Chris Creditor ("Creditor") obtained a judgment against Dan Debtor ("Debtor") in the Circuit Court of Norfolk, Virginia in the amount of \$60,000 for work performed in remodeling Debtor's restaurant. Debtor, who was being hounded by several creditors, retained the law firm of Smith, Smith & Jones (the "Firm") on June 23, 2012, to defend him against the creditors.

Debtor gave the Smith firm a \$75,000 advance deposit, which was deposited into the Firm's client trust account under an agreement that stated, "This deposit will be applied toward legal services heretofore and hereafter rendered and disbursements for costs advanced by the Firm." The following events then occurred sequentially in 2012:

- On July 28, the Firm made its first disbursement from the trust account to itself for fees earned in the amount of \$17,000.
- On August 1, Creditor obtained from the Clerk of the Norfolk Circuit Court a writ of *feri facias* against Debtor.
- On August 5, the writ was delivered to the Sheriff, and the Sheriff served upon the Firm a notice of the lien of *feri facias*; the notice specified a lien "against all of Debtor's property in Firm's possession."
- On August 10, the Firm made a \$20,000 disbursement from the trust account to itself for fees earned.
- On August 18, the Firm made another disbursement from the trust account to itself in the amount of \$10,000 for fees earned. This left a book balance of \$28,000 of Debtor's initial advance deposit in the trust account.
- On August 19, the Circuit Court issued a garnishment summons against the Firm; the summons was accompanied by a new writ of *feri facias* and another notice of lien.
- On August 20, the Firm and Debtor were both served with the garnishment summons and accompanying documents.
- On August 30, the Firm discovered that as early as August 15 its recently hired bookkeeper had falsified the trust account books and embezzled funds from the trust account so that the actual amount of the balance attributable to Debtor's advance deposit was only \$3,000.
- On September 7, the return date of the garnishment summons, the Firm filed a motion to dismiss the garnishment and also delivered a check to the Court in the amount of \$3,000, the post-embezzlement balance of Debtor's initial advance.

The Firm's motion to dismiss was based on three grounds: [1] none of the \$75,000 advance deposit given to the Firm by Debtor was subject to the lien because it became the Firm's property upon receipt, subject only to a contractual obligation to refund to Debtor any balance remaining upon termination of the representation; [2] the lien was defective and unenforceable because the description specifying "all of Debtor's property in Firm's possession" was vague and uncertain; and [3] in any event, the most the Firm is required to return is \$3,000 left in the trust account attributable to Debtor's initial advance deposit on the date the Firm was served with the garnishment summons.

How should the Court rule on each ground of the Firm's motion to dismiss? Explain fully.

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- [1] The facts of the question are taken from the case of Marcus, Santoro & Kozak, P.C. v. Wu 274 Va. 743 [2007]. When a client furnishes a retainer or advance deposit against fees to an attorney, the money belongs to the client and must be placed in the law firm's trust account and the attorney holds the funds in trust. The funds are the corpus of a trust of which the attorney is the trustee and the client the beneficiary. There is not created a debtor - creditor relationship between the client and the law firm. Consequently the money in the account did not belong to the law firm.

- [2] The lien of the writ of execution on the money in the account was created upon the clerk delivering the writ to the Sheriff on August 5th. [§8.01-501] The law firm had notice of the outstanding writ on August 5th when the Sheriff delivered the notice of the lien of fieri facias on the law firm. The notice was sufficient because §8.01-502, which has specific date elements that must be included in the notice does not apply. It applies to where there is a debtor-creditor relationship between the parties, which was not present on these facts. Thus the notice was sufficient.

When the law firm paid itself for earned fees on August 10th & 18th, while the fees had been earned, the lien of the writ of execution occurred earlier and the payments were subject to the lien of the writ of execution.

The garnishment that was issued on August 19th and served on the law firm on August 20th was enforcing the lien on the money held in trust, that was created by the delivery of the writ of execution to the Sheriff back on August 05th. A garnishment does not create any lien; it enforces a lien on intangible personal property created by the delivery of the writ of execution to the Sheriff.

- [3] The embezzlement by the law firm's employee does not affect any of this as to the liability of the firm for the money in the account, for the money that should be in the account and for the money earlier paid out of the account to the law firm for fees earned. Any loss due to the firm's employee's embezzlement will all on the law firm.

The trial judge should deny the motion to dismiss the garnishment.

Note: In the Marcus, etc. case, in fn.7, the SCV comments that no issue was raised in the trial court as to any lien interest the law firm had in the money held in trust for the client, for its attorney fees under §54.1-3932. It's the feeling of the drafting group that an answer that used the analysis that the law firm had a statutory lien on a portion of the money held in trust to secure payment of attorney's fees should get considerable credit. It is not believed that discussion of the attorney lien issue is necessary in order to earn full credit for the answer as outlined above.

9. [07/13] [Domestic Relations & Va. Civil Procedure] Brent and Gloria Johnson married in 2008 in Blacksburg, which is located in Montgomery County, Virginia. They last lived as husband and wife in Blacksburg where, before the marriage, Gloria had been employed by Virginia Tech as an administrative assistant. She left that job soon after the marriage and was not employed at any other time during the marriage. Brent is unemployed and unemployable due to several felony convictions prior to the marriage, which arose from drug related crimes. In February 2012 Brent was incarcerated for eight months for a probation violation. They have no children of the marriage. Their marriage has been turbulent and, following extensive counseling, they have mutually agreed to seek a divorce. They ceased cohabitation in December 2012 and Brent moved out of the house (the "House") on January 1, 2013 and relocated to Virginia Beach, where he has continuously lived in a rented apartment.

Brent's father was a successful businessman and, when he died in 2005, he left a business, which generates a substantial income, in a trust (the "Trust") of which Brent is the sole beneficiary. The Trust is currently valued at \$10,000,000. Since his father's death, Brent has received between \$200,000 and \$300,000 a year in distributions from the Trust. The Trust owns the House where Gloria continues to live. It has a value of approximately \$350,000. Brent's current assets are \$25,000 in a checking account at Wells Fargo Bank and an auto valued at \$20,000. Gloria has no assets and is not currently employed. Following the separation, Brent instructed the Trust to continue to provide payments of \$5,000 per month to Gloria for her living expenses.

Brent and Gloria now want to divorce. They initially expressed their preference to obtain a no-fault divorce, but Gloria has now threatened that she may instead seek a fault based divorce on the ground that Brent was incarcerated for a period during the marriage. They cannot agree on where to file the action. Gloria wants to file the action in Blacksburg, but Brent insists that it should be filed in Virginia Beach. Gloria intends to demand a property settlement awarding her at least \$2,500,000 in a lump sum, the House, and support payments of \$10,000 a month as long as she remains unmarried. Brent opposes Gloria's demands.

- [a] Can Gloria prevail in her desire that the divorce action be filed in Blacksburg?
- [b] Can Brent and Gloria obtain a no-fault divorce?

- [c] Could Gloria, if she chose, obtain the divorce on the ground of Brent's incarceration during the marriage?
- [d] What factors would the Court take into account in ruling on Gloria's property settlement and support demands, and what is the likely outcome on each?

Explain your answers fully.

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- [a] Yes, Gloria can prevail in her desire to file in Montgomery County, as that is the place where the parties last cohabited, Virginia was her domicile and she had lived in Virginia for 6 months preceding the filing. Under 8.01-261(19), Gloria also has the option of filing in the county or city in which the defendant resides, but she is not required to.
- [b] The parties may file and obtain a no-fault divorce if they have been separated for 1 year, or if they have been separated for 6 months and have a separation agreement. Here, the parties mutually agreed to a divorce, and it appears from the facts that the parties separated either in December 2012 or on January 1, 2013. A separation occurs when (1) there is a physical separation and (2) at least one of the parties intends to and does remain permanently apart. Because it appears that the parties do not have a separation agreement, and that 1 year has not passed since the date of separation, neither could file for a no fault divorce yet.
- [c] Gloria may not obtain a divorce on the ground of Brent's incarceration during the marriage. In order for the incarceration to constitute a ground of divorce, Va. Code Section 20-91 (3) requires that the conviction occur subsequent to the marriage, that the sentence to confinement be more than one year, and that cohabitation not be resumed after knowledge of such confinement. None of these conditions has been met as the felony conviction occurred before the marriage, the confinement was less than one year, and it appeared that cohabitation resumed after the confinement ended. Because the parties mutually agreed to a divorce (at first), neither could assert desertion or abandonment as a ground of divorce.
- [d] In determining the question of the property division, the court would consider the provisions of Code Section 20-107.3. Property acquired during the marriage and titled in the name of both parties is marital property; however, none of the property here is titled in both names. Separate property is property acquired before the marriage and property acquired during the marriage by bequest or devise, and all property acquired during the marriage in exchange for or from the proceeds of separate property, as long as it is maintained as separate property. Here, the Trust was acquired prior to the marriage by devise and is separate. The income from the Trust acquired during the marriage constitutes separate property as long as it is maintained as separate property. The house, which is owned by the Trust, is also considered to be separate property. Hence, it appears that Gloria has no claim to a lump sum of this property, as it is not Marital Property. It appears that Brent's checking account and car also retain their character of separate property because they are separately titled and maintained, although Gloria could argue that they have been a gift to her or transmuted to marital property if she has been able to use them.

In determining the question of spousal support, the court would consider the factors set out in Code Section §20-107.1E. Notably here would be the length of the marriage (4 years), the relatively high standard of living established during the marriage, the needs of the wife, the substantial resources of the husband, the lack of employment of the wife, her age and physical condition, and her contributions to the marriage. Given that Gloria has already received support of \$5000 per month, the court is likely to award her a brief and modest amount of rehabilitative support so that she may qualify for employment in the near future.