

Final Edition: April 12, 2021 (4:33pm)

✖✖ After each bar exam, the Virginia Board of Bar Examiners invites the Deans [or the Deans' designees] of all Law Schools located in Virginia, to meet with the Board. Representatives from all 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. For the February 2021 exam, due to the current pandemic the VBBE did not hold a face to face meeting with us, but asked that the representatives from the law schools collaborate and send in a summary of what was thought should be acceptable answers to the essay questions. This was done.

✖✖ It should also be noted that while we think the answers that follow should be acceptable for full credit, keep in mind that the VBBE do give credit for good analysis and sometimes will accept for at least partial credit, alternate theories of analysis that are not what they had in mind as the preferred answer. jrz

### Summary of suggested answers to the essay part of the February 2021 Virginia Bar Exam

Prepared by the following who collaborated to prepare the suggested answers for the VBBE: J. R. Zepkin, Jennifer Franklin & 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), Amanda Compton & Mike Davis of George Mason Law School, Rena Lindevaldsen of Liberty University Law School and Laura Wilson of Appalachian School of Law.

The following, provided us great help with suggested answers in each's particular area[s] of specialty: Carliss Chatman & Mark A. Williams of Washington & Lee Law School, Lynchburg City Attorney Walter Erwin, James Duane, Lynne Kohm, Kathleen McKee, Kim Van Essendelft & Steven Walton of Regent University School of Law.

1. [02.21] [ Va. Criminal] On March 2, 2020, undercover detective Al approached Sam who was standing on a corner in Portsmouth, Virginia. Al and Sam had never met each other before. Al asked Sam if he knew someone named Biff who lived in the neighborhood. Sam replied that he had met Biff, but he did not know him well. Al asked Sam to help him find Biff and told Sam that his girlfriend was very sick and needed oxycodone, which Biff could get for him. Al then told Sam that he wanted to purchase \$200 worth of oxycodone. Sam replied that he did not know anything about oxycodone.

When Al described oxycodone as a prescription medicine his girlfriend needed, Sam agreed to help him find Biff but Sam told Al again that he knew nothing about oxycodone and had never heard of it. Sam got in Al's car and gave him directions to several places where Biff might be found. A little after 10:00 p.m. they found Biff in a bar. Sam waited in Al's car while Al and Biff had a brief conversation which Sam could not hear. When he returned to the car, Al told Sam that Biff wanted him to return to the bar at midnight.

After Al drove away, Biff went to Joe's house which was near the bar. Biff knew that Joe kept quantities of oxycodone and planned to get the amount Al desired. No one answered the door and, finding that it was not locked, Biff opened the door and entered the house intending to take the oxycodone he needed. Once inside Biff realized that Joe no longer lived there and left the house. On the way out the door, Biff picked up a big silver vase that he thought he could sell.

When Al and Sam returned to the bar to meet Biff, Al took some money from his glove compartment, handed it to Sam, and asked him to give it to Biff. He said Biff would give Sam a package to bring back. Sam did as Al requested, and returned with a brown paper package. Al then revealed himself as a police detective and arrested both Sam and Biff for felony distribution of a controlled substance.

The grand jury indicted both Sam and Biff for distribution of a controlled substance. Biff was also indicted for common law burglary of the silver vase at Joe's former residence. The Commonwealth filed a pretrial motion seeking to have the two defendants tried together, to which Sam objected. The court granted the motion for a joint trial.

At trial, Sam will testify that he did not know Al was involved in an illegal purchase and that he was only helping Al get medicine for his girlfriend. Furthermore, Sam had no criminal record and there was no evidence that he was addicted to any

substance.

At trial, Al will testify that he had never met or heard of Sam before meeting him on March 2, and that Sam had not been a suspect or even a person of interest in any drug investigation.

As to the burglary charge, Biff asserts as a defense that he had not broken into the house because he simply opened an unlocked door; therefore, he cannot be guilty of burglary.

Sam renews his objection to the joint trial on the ground that the court cannot conduct a joint trial over the objection of one of the defendants.

- [a] What defense might Sam reasonably assert to the charge against him, what would he need to prove, and how is the court likely to rule? Explain fully.
- [b] How should the court rule on Biff's defense to the burglary charge? Explain fully.
- [c] How should the court rule on Sam's objection to the joint trial? Explain fully.

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- [a] Sam may have three separate defenses:

The best answer is that Sam could defend upon entrapment. See Stamper v. Commonwealth, 228 Va. 909 (1985). Al planned the offense and procured Sam's commission of the crime. Sam would not have committed the crime but for Al's persuasion or trickery. Sam has no criminal record, was not addicted to any substance, Al did not suspect him of any drug offense nor of any history of drug use, which demonstrates that there was no predisposition to commit the crime. Although the Commonwealth might argue that Al merely presented Sam with the opportunity to which he readily acquiesced, because Al was the person to approach Sam and not the other way around, the court would likely rule in Sam's favor. See Commonwealth v. Master Rubio Allen 94 Va. Cir. 276, 2016 Va. Cir. Lexis 232 Norfolk Cir. Ct., CR15-1821 (2016).

If properly argued, Sam could assert that the Commonwealth did not prove the element that he "knowingly" possessed the drug, i.e. that Sam did not know the character of the substance as a prohibited drug. However, Al told Sam that he was looking to buy prescription Oxycodone and was willing to pay \$200 for it from Biff rather than from a pharmacy. At the time the transaction took place, Al did not specify that he was in fact buying the oxycodone from Biff and no facts show that Sam looked in the paper bag, but Sam did testify that he was helping Al get medicine for his girlfriend, which undermines any argument that he did not know what was in the bag. See Sierra v. Commonwealth, 59 Va. App. 770 (2012). On these facts, the court would likely reject the defense.

Sam could assert an accommodation defense. A successful accommodation defense would not result in an acquittal but would result in mitigation of the sentence. See Code § 18.2-248(D). Sam would have to prove by a preponderance of the evidence that he was not a dealer of drugs and did not intend to profit from the transaction or to encourage the use of the drugs but was motivated by a desire to accommodate a friend. Here, Sam had no criminal record, indicated no prior knowledge of the drug, he did not get any money from the transaction, and he indicated he was merely trying to help Al get medicine for his girlfriend. A court may find that Sam's part in the transaction was an accommodation. See Stillwell v. Commonwealth, 219 Va. 214 (1978).

- [b] The court should overrule Biff's defense. Because he entered the dwelling after 10:00 p.m., the facts suggest that Biff entered the dwelling at night. Only an "entering" but not a "breaking" is required when a statutory burglary is committed in the nighttime. Here, both common law burglary and statutory burglary have been committed. "Breaking" includes no more than, as here, opening an unlocked door; the element is met. Code § 18.2-89.
- [c] It is within the court's discretion whether to sever the trial. In doing so, the court would consider whether Sam would be prejudiced by the joint trial. See Rule 3A:10(a) Rules of the Supreme Court of Virginia. The court would likely grant at least part of Sam's objection to the joint trial, as it would be prejudicial to Sam to try Biff's burglary charge with Sam's drug charge. Those offenses are not connected and could prevent the jury from "making a reliable judgment about guilt or innocence" regarding Sam's drug charge. On the other hand, the illegal substance at issue is that which Biff handed to Sam as part of the exchange. To that extent, the court would likely deny properly order a joint trial for that

offense.

2. [02.21] [UCC Sales] Doobie Cooper owns and operates a car lot located in Phoebus, Virginia, known as Doobie's Fine Cars, where he sells and repairs cars and targets vintage sports car enthusiasts as clients. For some time, Jelks kept his 1967 Pontiac GTO Convertible, *The Judge*, at Doobie's car lot showroom facility and paid an annual fee to Doobie's for storing and performing maintenance work on *The Judge*. The fully restored car attracted a lot of potential customers to the lot.

At the end of the 2020 season, Jelks decided to relocate to Arizona and sell *The Judge*. Before leaving, Jelks put a "For Sale" sign on *The Judge* and told Doobie, "I'll pay you a fee of 10% for selling my car, so long as I clear \$35,000 on the deal. Sell it 'as is.' The maintenance records are in the glove box below the dashboard."

Unknown to Doobie, Jelks had intentionally altered the repair and maintenance record to falsely show that a new factory model replacement engine had been installed in 1986 that was identical to the original engine.

After Jelks moved, Percy Purchaser visited Doobie's car lot and said he was looking for "a classic sports car with a newer or rebuilt engine that I can drive on a regular basis and keep as a show car." Doobie replied, "*The Judge* is just the car for you."

Doobie sold *The Judge* to Percy. At the time of the transaction, Doobie said to Percy, "the car is being sold 'as is.' Jelks kept it here for the last 5 years, and I've done all the maintenance. This car is the finest looking GTO you will ever see." Prior to completing the deal, Doobie took Percy out for a short drive through the Hampton Roads Bridge Tunnel, let him drive and inspect the car, and showed him where the car's records were kept. Percy's inspection revealed nothing ostensibly wrong with the car or the engine, and after review, he was unable to see anything irregular in the maintenance records that were in the glove box. Based on that, Percy agreed to pay \$40,000. Doobie prepared the necessary paperwork, including a bill of sale, which read, "Sold as is, no warranties."

Within a month, Percy experienced engine trouble. He immediately took the car to Bobby's Service Center, where, at a cost of \$2,000, he had the engine torn apart and inspected. Bobby confirmed that laboratory tests run on the engine demonstrated that it simply was worn out, having been installed and run since 1967, which far exceeded the life expectancy for that model of engine.

Bobby said that the old engine could not be repaired and that a replacement would cost a minimum of \$10,000.

- [a] Is Percy likely to succeed in a claim against Doobie arising under the UCC by reason of Doobie's status as seller of the car? Explain fully.
- [b] What cause or causes of action, if any, under the UCC might Percy assert against Jelks due to his alteration of the maintenance records, and is Percy likely to succeed? Explain fully.
- [c] Is Percy likely to succeed in revoking the sale and recovering any damages under the UCC? Explain fully.

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- [a] Yes, Percy can assert claims for breach of express warranty, implied warranty of fitness for a particular purpose, and implied warranty of merchantability. The express warranty claim should prevail, but the implied warranties have been effectively disclaimed.

The maintenance records constituted an express warranty, in that they were an "affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain" – namely, that the car's engine had been rebuilt or replaced, when in fact it had been running since 1967 and was worn out [Va. Code §8.2-313]. Doobie's statement that the car is "the finest looking GTO you will ever see," on the other hand, would amount merely to puffing or sales talk.

Doobie may have breached an implied warranty of fitness for a particular purpose, but it was effectively disclaimed (see final paragraph of part (a) below). Percy told Doobie he was looking for "a classic sports car with a newer or rebuilt engine that I can drive on a regular basis and keep as a show car," and relied on Doobie's expertise to select suitable goods. Va. Code 8.2-315 provides that, "Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or

furnish suitable goods, there is unless excluded or modified under the next section [8.2-316] an implied warranty that the goods shall be fit for such purpose." Thus, assuming Percy's statement constitutes a "particular purpose for which the goods are required" and Doobie knew Percy was relying on Doobie's skill or judgment to select suitable goods, then liability would attach on this theory, unless the warranty has been effectively disclaimed.

Percy would not recover for a breach of the implied warranty of merchantability, because it was effectively disclaimed (see next paragraph). Although Doobie is a merchant of classic cars, and normally goods sold by a merchant must be fit for their ordinary purpose so as to pass without objection in the trade, this warranty may be disclaimed.

Va. Code 8.2-316(3)(A) provides that, "unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty." Here, the bill of sale stated, "Sold as is, no warranties." This was an effective disclaimer of both implied warranties. Percy will argue that circumstances did indicate otherwise, due to Jelks' fraud (see part (c) below).

[b] Yes. Percy can assert against Jelks a cause of action for fraud in the inducement. Common law remedies, including fraud, are available under the UCC [Va. Code 8.1A-103(b); 209 Va.109 (1979)]. The elements of fraud in the inducement are an intentional misrepresentation of a material fact not discoverable by reasonable inspection, scienter, reliance, detriment, and damages. Jelks deliberately falsified the maintenance records, knowing the significance of this fact to a buyer. Percy relied to his detriment by buying the car and has suffered damages since the engine must be replaced. Robberecht v. Maitland Bros. 220 Va. 1019 [1979]

[c] Yes. Revocation of acceptance [Va. Code 8.2-608] requires that the nonconformity substantially impairs the value of the goods; acceptance was reasonably induced by the difficulty of discovering the nonconformity before acceptance, or by the seller's assurance to cure; the buyer gave notice of revocation within a reasonable time after discovering the nonconformity and before any substantial change in condition of the goods not caused by their own defects. Here, the engine was at the end of its life expectancy, which could not have been discovered without an expensive tear-down, and which was concealed by the fraudulent maintenance records. Assuming timely notice to the seller, Percy may therefore revoke acceptance and obtain a refund of the purchase price.

For breach of express warranty under Va. Code. §8.2-313 & 721 & 608[1][b] & 612 & 711, as discussed above, Percy may also recover the \$2,000 incurred in investigating the condition of the engine as incidental damages [8.2-711]. Note that Percy could elect to receive the \$10,000 to repair and \$2,000 incidental damages; the UCC allows the injured party to elect whichever measure of damages it prefers. No consequential or cover damages appear in the facts.

**3. [02.21][Wills & Professional Responsibility]** When Harold married Winny he had an adult child, Sam, from a prior marriage. Harold and Winny were married and resided in Virginia. Winny had no children. They used a Virginia lawyer, Len, to draft Wills for both of them. Len obtained the appropriate consent to draft Wills for Harold and Winny. Len drafted both Wills, which were thereafter validly executed.

Harold's Will named Winny as his sole beneficiary with Sam as residuary beneficiary if Winny predeceased Harold. Winny's Will named Harold as her sole beneficiary with Sam as residuary beneficiary if Harold predeceased her. Among other assets, Harold and Winny owned a rare Jackson Pollock painting and Harold privately told Len that he and Winny had an "understanding" that Sam would inherit the painting, regardless of who died first.

After Harold died, Winny married Fred and sent a signed, handwritten note to Len that said:

*"When I decided to leave everything to Sam, I did not anticipate that I would ever fall in love again. Sam hates "artsy" stuff and Fred loves the Pollock painting so much. I would like to change my Will to leave the Jackson Pollock painting to Fred. I will still leave everything else to Sam. I will call you next week to come by to discuss it with you. I know Sam will understand. Winny"*

Winny died the next day and Sam submitted Winny's original Will to probate.

Fred has asked Len to represent him to contest the Will on the ground that the handwritten note was a valid new Will that superseded the original Will.

Sam has objected to Len representing Fred in this matter. Sam also contends that Harold and Winny had a contract to leave the painting to Sam, and Winny could not change the terms of the agreement after Harold died. Finally, Sam contends that even if Winny could change her Will, the note she wrote is not effective to do so.

- [a] May Len represent Fred to contest the Will? Explain fully with reference to the Virginia Rules of Professional Conduct.
- [b] Was there an enforceable contract between Harold and Winny that precluded Winny from changing her Will after Harold died? Explain fully.
- [c] Assume for this question only that Winny had the power to change her Will. Is Winny's note to Len sufficient to do so? Explain fully.

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- [a] No. The Virginia Rules of Professional Conduct, Rule 1.9(a), provides, "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same **or a substantially related matter** in which that person's interests are materially adverse to the interests of the former client unless both the present and former client consent after consultation."

The Rule imposes on a lawyer a continuing duty of loyalty and confidentiality to former clients. These obligations continue even after a client's death. Len/Fred might argue that Harold's will has gone through probate, and that the intentions expressed in that will have been honored. (Winny inherited the entirety of Harold's estate as the sole beneficiary.) There is also a "testamentary exception" to attorney-client privilege that allows quarreling beneficiaries to access privileged communications of the decedent. The exception might be leveraged to confirm and carry out the decedent's (here, Winny's) testamentary intentions.

But these arguments overlook that probate of Winny's will is "substantially related" to Len's representation of Harold. Len's duty of loyalty to Harold should prevent him from representing Fred and advocating a position that is contrary to Harold's goals from the prior representation.

Len is further admonished not to represent Fred by Rule 3.7, which generally provides, "A lawyer shall not act as an advocate in an adversarial proceeding in which the lawyer is likely to be a necessary witness." Given Len's conversations with Harold and Winny at the time their original wills were drafted, he likely would be called as a witness in Fred's action to contest the will. The testamentary exception to the attorney-client privilege could allow Len to be called as a witness, thereby preventing him from representing a party in that proceeding.

See Rules 3.7 and 1.9(a), as well as LEO 728, 1473, 1399 and 1456.

- [b] No. There are two possibilities: a contract entered into at time of Will execution not to amend and a contract entered into separately as to just the painting.

Two persons can enter into a binding contract not to revoke or amend their wills, but the agreement must be explicit and will not be inferred simply from execution of reciprocal wills. "Proof of the contractual nature of this agreement between testators must be clear and satisfactory." *Keith v. Lulofs*, 283 Va. 768 (2012). The proof could be in the form of an express statement in the Wills, testimony by witnesses as to "admissions" by the testators, or circumstances that imply an agreement. *Id.* None of these forms of evidence is present here. The separate "understanding" as to the painting actually suggests the opposite; that the spouses believed they were generally free to change their testamentary dispositions. The letter from Winny to Len gives no indication that Winny believed herself contractually bound not to amend her Will. She had "decided," not promised, she wrote, to leave everything to Sam.

The supposed "understanding" between Harold and Winny as to the painting could be an enforceable contract, and Sam might have standing to enforce it as a third-party beneficiary to that contract. Contracts can be oral. However, Sam would need to establish the usual elements of a contract—offer, acceptance, and consideration, as well as its essential terms, by clear and convincing evidence. *Blincoe v. Blincoe*, 209 Va. 238 (1968). A mutual, explicit promise to forbear from disposing of the painting in any way other than giving it to Sam could satisfy all these elements. However, the evidence of such mutual promise does not rise to the level of clear and convincing. Further, because Sam seeks to enforce an oral contract against someone now deceased, his testimony would require corroboration from a source other than Sam and not in Sam's control. *Virginia Home for Boys and Girls v. Phillips*, 279 Va. 279 (2010).

There is no corroborating evidence here. Notably, the note from Winny to Len also gives no hint that Winny had promised to leave the painting to Sam.

Moreover, even if there were a contract, this technically would not “preclude Winny from changing her Will.” It would instead give Sam a basis for requesting that a court impose a constructive trust against Winny’s estate or, if distribution has already occurred, against whomever is in possession of the estate property, putting them under a duty to transfer the property to him. The law of wills and the law of contracts are independent of one another. A valid Will should be probated as written, and if it breaches a contract, the remedy lies in contract law.

[c] No. The note to Len would need to constitute a valid holographic codicil, as it was not attested. The two requirements for finding that a document is a testamentary instrument are capacity and testamentary intent. It appears Winny had capacity but lacked testamentary intent in writing the note. Testamentary intent entails reference to property, persons, and death and a desire that the document itself effect the transfer of property to persons at death. At least some evidence of such intent must appear on the face of the Will. Bailey v. Kerns, 246 Va. 158 (1993). The last of the elements is missing in this note to Len; “I would like to...” lacks definiteness, and “I will call you...” suggests anticipation of future action to create and execute a codicil. Cf. Mumaw v. Mumaw, 214 Va. 573 (1974). Signing informally supports the conclusion of lack of testamentary intent. Even if a court concluded that the note’s reference to property, persons, and death was sufficient to allow extrinsic evidence, see Bailey supra, as to whether Winny viewed the note itself as a testamentary instrument, there is no extrinsic evidence here that would support a finding on that last element. [Note: An applicant should not be faulted for stating that extrinsic evidence as to testamentary intent is not allowed; the SCV has been quite inconsistent on this point.]

If the document were a testamentary instrument, Fred would need also to establish validity—that is, proper execution. Assuming the handwriting in the note is entirely that of Winny, as proved by two witnesses familiar with her handwriting, the will is holographic, in which case witnesses are not required, only a signature. Va. Code §64.2-403. A first name alone can constitute a signature, if that was an ordinary way for the testator to sign her name. Irving v. Divito, 294 Va. 465 (2017). Thus, if testamentary intent were present, the document would be a valid and effective testamentary instrument, but lack of such intent means the note is not sufficient to change Winny’s will.

**4. [02.21][Local Government]** Blacksburg, Virginia is an independent city with a population of 40,000 people. It has adopted the City Manager form of government. A city council of five members is elected by the general public and the city council elects a mayor from among its members.

The current Mayor of the City of Blacksburg has breakfast at a local diner every Monday morning. It is not uncommon for different people to show up and have breakfast with him. They usually discuss the national news and local high school sports.

On Monday, October 21, the Mayor had breakfast with a local developer (Developer). Thomas, a member of the Blacksburg City Council, also sat at the table to participate in casual conversation. A retired judge and his wife Prudence came into the diner. Prudence was also a member of the Blacksburg City Council. They joined the Mayor, Developer and Thomas.

The conversation quickly turned to the City Council meeting scheduled for the following Thursday, October 24. On the agenda was an ordinance to approve the sale of an unused public playground to Developer. The playground was once surrounded by public housing, but in recent years, the housing had been torn down and replaced by small businesses. As a result, it no longer made sense to use the land for a playground.

Developer told the group that he had an option with a nationally known franchise to build a steakhouse on the property if he could obtain ownership. The Mayor was thrilled because he wanted to increase the commercial tax base for the City. However, Prudence considered Developer to be generally dishonest, and she questioned the existence of the option. When she did, Developer produced a copy of the contract and gave it to Prudence. After reviewing it, she told the Mayor and Thomas that she would vote for the sale.

Developer then asked Prudence to take a copy of the contract to Susan, another member of the City Council. He asked Prudence to seek Susan’s support for the contract.

Later that day Prudence met with Susan to discuss the playground proposal. Susan was furious. As soon as Prudence left, Susan called a reporter for the local newspaper (Reporter) and told him about the entire day’s events. Since Blacksburg is an independent city that has adopted a City Manager Plan, Reporter immediately sent the City Manager a nasty

email complaining that he was not given notice that the City Council was meeting at the diner that morning. Reporter also demanded that the playground contract be sent to him before his deadline at 5:00 p.m. Wednesday so that he could write an article for Thursday's newspaper. The City Manager could not decide what to do, so he did nothing.

On Thursday, October 24, the Blacksburg City Council held its meeting. All five members of the City Council were present.

The first item on the agenda involved a request to close Main Street on December 15 for the annual Christmas parade. Prudence made the motion to close the street and Thomas seconded the motion. The clerk called the roll. The vote was 4-1 in favor with the Mayor opposed. All procedural requirements for approval of the motion were met. The Mayor announced that the vote carried but he was tired of all the requests to close streets so he, as Mayor, was vetoing the action by the majority.

The next item on the agenda was the proposed sale of the City playground. The ordinance was read as required by the City Charter. Thomas made a motion to adopt the ordinance and Prudence seconded the motion. The vote was 3-2 in favor of the sale. Again, all procedural requirements for approval of the motion were met. The Mayor announced that the motion carried. The meeting was then adjourned.

- [a] Did any members of the Blacksburg City Council violate Virginia law with respect to their actions at the diner on October 21? Explain fully.
- [b] Assume for this question only that the contract was not subject to a valid exemption. Was Reporter entitled to a copy of the contract before Thursday's City Council meeting? Explain fully.
- [c] What is the status of the vote to close Main Street for the annual Christmas parade in light of the Mayor's veto of the Council's action? Explain fully.
- [d] What is the status of the vote to approve the ordinance to sell the City playground to Developer? Explain fully.

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- [a] Section §2.2-3701 of the Virginia Freedom of Information Act ("Act") defines a "meeting" to include an informal assemblage of (i) as many as three members or (ii) a quorum, if less than three, of the constituent membership, wherever held, with or without minutes being taken, whether or not votes are cast, of any "public body." The definition of "public body" in §2.2-3701 includes an independent city such as Blacksburg.

Section §2.2-3707 of the Act requires that public bodies shall: (a) have all meetings open to the public, unless a specific exemption for a closed meeting applies; (b) give notice of the date, time, and location of its meetings by posting on its website, posting area, and at the office of the clerk or chief administrator; (c) allow their meetings to be filmed; and, (d) shall keep proper minutes of their meetings.

Section §2.2-3700 requires that the Act's openness provisions be construed liberally and any exemption from public access be construed narrowly.

In the facts given, the Mayor, Thomas, and Prudence all had a "meeting", as defined by the Act, at the diner and discussed the ordinance to approve the sale of the unused public playground to Developer. Because the meeting of 3 Council members did not meet the requirements of the Act, all 3 council members violated the Act. There are possible proceedings for enforcement of the Act under §2.2-3713 and significant potential civil and criminal penalties under §2.2-3714.

- [b] Section §2.2-3701 of the Act defines "public records" to include all writings and recordings of any kind, in the possession of a public body or its officers, employees or agents in the transaction of public business.

Section §2.2-3704 of the Act requires that unless otherwise required by law or subject to a specific exemption under the Act, all public records shall be open to citizens of the Commonwealth and representatives of newspapers and magazines with circulation in the Commonwealth. This section also requires that a public body make 1 of 5 responses in writing to a request for records within 5 working days of the request. Under the facts given, the only applicable response is to provide the record within the 5 working days.

Under the facts given, the reporter is a citizen of the Commonwealth working for a local newspaper. The facts also stipulate that the contract is not subject to any exemption. Since the contract is a public record related to the transaction of public business and there is no exemption, the reporter is entitled to either inspect or copy the contract within 5 working days of the request.

The reporter requested a copy of the playground contact on Monday, October 21. The City Manager was not required to respond to the reporter's request and produce the contract before Thursday, October 24, the date of the Council meeting. While it may be unwise to do so, under the Act, the City Manager may wait until Monday, October 28 to provide the reporter with a copy of the contract.

[c] It is difficult to answer this question with any degree of certainty without knowing the provisions of Blacksburg's City Charter.

Section §15.2-2013 of the Virginia Code provides that a locality may permit the temporary use of public rights-of-way for other than public purposes and close the rights-of-way for public use and travel during temporary use. Also, Section §15.2-1427 of the Virginia Code provides that "unless otherwise specifically provided for by the (Virginia) Constitution or by other general or specific law, an ordinance may be adopted by a majority of those present and voting at any lawful meeting."

The motion to close Main Street for the annual Christmas parade passed by a 4-1 vote which satisfied the requirements of Section §15.2-1427. In addition, under §15.2-1423, while the Mayor is head of the local government for official functions and ceremonial purposes, the Mayor has no veto power. Other than performing those functions, the mayor is simply one member of the city council with one vote and has no more authority than any other council member. There is nothing in Title 15.2 that gives the mayor of a city the authority to veto ordinances that are adopted by a majority of the city council.

However, some city charters do give the mayor the authority to veto ordinances that are adopted by the city council. It is possible that Blacksburg's City Charter gives the mayor veto authority. If it does not, the Mayor's veto has no effect and the motion passes.

[d] The vote to approve the ordinance to sell the City playground did not garner enough votes to proceed with the sale of the property to the Developer. Section §15.2-2100(A.) of the Virginia Code provides that no rights of a city or town in and to its waterfront, wharf property, public landings, wharves, docks, streets, avenues, parks, bridges, or other public places, or its gas, water, or electric works shall be sold except by an ordinance passed by a recorded affirmative vote of three-fourths of all the members elected to the council.

In addition to the enumerated classes of property in Section §15.2-2100(A.), it also takes a three-fourths vote of all the members elected to city or town council to sell a "public place." The Virginia Attorney General has advised that a "public place" is an area that has been devoted to the use of the public at large or by the municipality itself in carrying out its governmental functions (e.g., a school building, a public office building, etc.). See, 2000 Opinions of the Attorney General at page 62 and 2001 Opinions of the Attorney General at page 50 advising that city-owned buildings that had been used by Hopewell as schools were public places that may not be sold without a three-fourths vote. See *also*, 1983-1984 Opinions of the Attorney General at page 31.

Property that was used as a City playground would qualify as a public place. Since there are 5 members of City Council and only 3 voted in favor of the sale, three-fourths of all members elected to Council did not approve the sale. Since the vote to sell the former playground property only passed by a simple majority vote and not the three-fourths vote required by Section §15.2-2100(A.), the 3 to 2 vote does not authorize the sale of the playground to the Developer. See: Article VII, Section 9, Virginia Constitution

Drafters Note: Thinking is that the Dillon Rule does not apply to these facts.

5. [02.21] [VA Civil Procedure] Aloha Market, Inc. is a Hawaii corporation with its headquarters located in Kailua, Hawaii. In early 2017, Aloha Market expanded into Virginia and opened stores in the City of Charlottesville and the City of Norfolk. Aloha Market registered with the Virginia State Corporation Commission as a foreign corporation and appointed Mabel, an attorney in Fairfax County, to serve as its registered agent.

On July 1, 2018, Phillip, a resident of the City of Richmond, Virginia, was visiting in the City of Charlottesville. While shopping at Aloha Market, Phillip slipped and fell as he was approaching the registers and injured his back. Jack, the Aloha Market manager on duty, was loading a truck outside the back of the store at the time Phillip fell. Jack was called to the front, investigated the incident, and gave Phillip a copy of the report signed by him as manager on duty. Phillip, a scuba instructor, missed four months of work and incurred approximately \$30,000 in medical bills for treatment of his back injury.

Phillip, representing himself, filed a Complaint in the Circuit Court for the City of Richmond on June 30, 2020, on a theory of negligence, naming both Jack and Aloha Market as defendants and seeking \$250,000 in compensatory damages for personal injuries. Phillip's wife, Sherrill, is a Richmond Deputy Sheriff. Sherrill personally served the Complaint and Summons on Jack at Aloha Market's Charlottesville store on February 10, 2021, while she and Phillip were visiting. Sherrill timely filed the proper return of service with the Clerk of Court. Jack immediately forwarded the suit papers to Aloha Market's corporate headquarters in Hawaii, where they were received a few days later.

- [a] Were Jack and Aloha Market each properly served with the Complaint and Service of Process? Explain fully.
- [b] Was Service of Process on both Jack and Aloha Market effective? Explain fully.
- [c] Was Phillip's lawsuit timely filed and within the applicable statute of limitations? Explain fully.
- [d] Assume for this question only that Aloha Market challenges venue. Is it likely to succeed, and if so, what venue or venues would be appropriate? Explain fully.
- [e] Assume for this question only that Jack believes he is not a proper defendant. How should he seek dismissal from the case and is he likely to succeed? Explain fully.

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- [a] Service on Jack. Service on Jack was improper. A sheriff may only serve the summons and complaint in her county/city or in a contiguous county/city. See Va. Code §8.01-295. Here, the City of Charlottesville is not within the sheriff's bailiwick (City of Richmond) or one contiguous. (Note here- a bar candidate may not be familiar with the geography of Virginia and may not be aware that the City of Charlottesville is not contiguous to the City of Richmond). In addition, papers must be served by "any person of age 18 years or older and who is not a party or otherwise interested in the subject matter of the controversy." See Va. Code §8.01-293 (A)(2). Sherrill is married to the plaintiff and therefore arguably has an interest in the outcome of Phillip's case. For [a] & [[b]: Va. Code §§13.1-763 & 766, §§8.01-301 & 329, §§Va. Code §8.01-293, 295 & 288.,

Service on Aloha Market. Service on Aloha Market was improper. Aloha Market is incorporated and has its principal place of business in Hawaii. It is a foreign corporation which has properly registered to do business in Virginia. As such, process may be served on "any officer, director, or registered agent of the foreign corporation." See Va. Code §8.01-301.1. Jack, though a manager of the market in the City of Charlottesville, is not an officer or director of Aloha Market. Process in this case can be attained by serving Mabel, its registered agent in Fairfax County.

- [b] Service of process on both Jack and Aloha Market was effective. Notwithstanding improper service on each, both defendants received the summons and complaint [the *process*] in a timely manner (within a year of filing of the lawsuit). Therefore, the means of improper service are of no consequence here, since Jack and Aloha market actually received the papers. See Va. Code §8.01-288. (Note that forgiveness of improper service does not pertain to cases of divorce and annulment of marriage).
- [c] Phillip's lawsuit was timely filed. "Every action for personal injury, whatever the theory of recovery,...shall be brought within two years after the cause of action accrues." Va. Code §8.01-8.01-243[A]

See Va. Code §8.01-243 (A). Phillip's cause of action accrued on July 1, 2018, and therefore filing suit on June 30, 2020 was timely.

- [d] A case seeking damages for personal injuries does not fall under Va. Code §8.01-261 (Category A- Preferred Venue). In this case venue would be proper where either of the defendants resides, or where a defendant has appointed a

registered agent to receive process, or where the cause of action arose. See Va. Code §8.01-262 (Category B-Permissive Venue). & §8.01-264[A]. The fact pattern is silent as to where Jack resides, but assuming he resides in the City of Charlottesville, Phillip may file his lawsuit in the City of Charlottesville or Fairfax County, where Mabel, the registered agent for Aloha Market is located. The City of Charlottesville is also a proper venue because that is where the cause of action arose.

The City of Richmond is an improper venue. A defendant must object to this venue within 21 days (or within the period of extension of time for filing responsive pleadings). A defendant must also set forth where he believes venue to be proper. See Va. Code §8.01-264. It is likely that the defendants will seek transfer to the City of Charlottesville, as that is where the cause of action arose, and where the witnesses are likely located. Although Fairfax County is a permissible venue, it is unlikely that either defendant will seek transfer to that venue, since the only nexus that Fairfax County has to this case, is that is where the registered agent for Aloha Market is located.

- [e] If Phillip's cause of action does not set forth a valid cause of action against Jack as a matter of law, Jack should file a demurrer, which tests the legal sufficiency of the complaint. In this case the demurrer is likely to be sustained. If Phillip's cause of action sets forth a valid cause of action, Jack could proceed by initiating discovery. Through the use of interrogatories, requests for admission and depositions, Jack may be able to establish that Phillip has no facts which would support a claim against him as a matter of law. He then may file a motion for summary judgment pursuant to Rule 3:20 and Va. Code §8.01-420. (Note however, that no deposition can be used to support Jack's motion, unless all parties agree). Unless there are facts which suggest that Jack is somehow legally liable to Phillip, the court is likely to grant Jack's motion for summary judgment.

The fact pattern suggests that Jack believes he is an "improper" defendant. Perhaps the facts intimate he was improperly joined as a party. If that be the case, Jack should file a plea of misjoinder. If the court finds Jack's plea has merit, Jack will be dismissed from the case and the case will continue against Aloha Market only. See Va. Code 8.01-5(A). Linnen v. Machielsens 372 F. Supp. 811, 821, citing Miller v Quarles 242 Va. 343 [1991].

**6. [02.21] [Creditors Rights]** Hal and Wanda are married to each other and live in Fairfax County, Virginia. They have one minor daughter together, Diane. Hal and Wanda maintain a bank account with a balance of \$5,000 at Central Bank in Fairfax which they hold "jointly with right of survivorship."

Hal executed and delivered two promissory notes to Chad. Note 1 was for \$2,000, which Hal used to pay for a cruise that he went on with Wanda. Note 2 was for \$2,000 to pay for medical bills incurred by Diane.

Hal defaulted on both Notes, and Chad filed a lawsuit in Fairfax County Circuit Court against both Hal and Wanda to collect on Notes 1 and 2. Chad plans to satisfy any judgment that he obtains with funds from Hal and Wanda's account at Central Bank.

Wanda filed an answer, asserting as a defense that she was not a party to either Note and therefore has no liability for either. Hal and Wanda have no other defenses to the lawsuit.

- [a] How is the Circuit Court likely to rule on Wanda's defense as to each Note? Explain fully.
- [b] Is Chad likely to succeed in satisfying any judgments obtained on Notes 1 and 2 from the account at Central Bank? Explain fully.
- Assume for (c) and (d) only, that the judgment on at least one of the Notes can be satisfied from the account at Central Bank.
- [c] What action, if any, should Chad take to collect the judgment from Central Bank? Explain fully.
- [d] What Virginia statutory rights, if any, are available to allow Hal and Wanda to protect the funds in the Central Bank account? Explain fully.

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[a] Only Hal is liable on Note 1 since Wanda did not sign it.

Usually a party cannot be held liable on a negotiable instrument unless it bears her signature or the signature of an authorized representative. §8.3A-401.

However, because Wanda's equally liable for the medical expenses for the parties' daughter, per the doctrine of necessities, Wanda would be liable on note 2. Virginia Code Section §55.1-202; Schilling v. Bedford County Hospital, 225 Va. 539 (1983) While Wanda didn't sign either note, she shared with Hal the duty to pay for Diane's necessary medical bills and with everyone knowing about the loan to pay the kid's med bills, she is likely subject to judgment.

[(b)] The account is in joint tenancy with the right of survivorship, (not tenancy by the entirety) and a creditor of one of the owners, who is the judgment debtor, can reach the debtor's share of the account. Chad will have a lien on the debtor's right to receive the money in the bank account. Va. Code §6.2-606 is There is a presumption that when an account is owned by a husband and wife, they own it equally so at least Hal's interest can be reached. So Chad can reach Hal's interest in the bank account for both judgments. Since Wanda's not liable for Note 1, Chad, arguably, can reach Wanda's interest in the account for the judgment against her for Note 2, used to pay Diane's medical bills.

[c] After 21 days had run from the date of the entry of any judgment order [Rule 1:1] Chad should file a Suggestion in Garnishment, that requests the Clerk's Office of the court where the judgment was entered, to issue a writ of execution and garnishment on the parties' bank account to reach the judgment debtors' shares in the bank account. Garnishment. Rendleman, *Enforcing Judgments and Liens in Virginia*, Chapter 4. Bank account garnishment ¶8.8(c).

[d] The judgment debtor[s], can each claim a \$5000 Homestead Exemption in the funds in the bank account. Va. Code §34-4, Rendleman, *Enforcing Judgments and Liens in Virginia* ¶4.7[F] Wilson v. Virginia National Bank, 196 S.E.2d 430 (1973) See Jones v. Conwell 227 Va. 176

Drafters' Note: It's likely that at least some credit will be given for an analysis concluding that the account was owned as Tenants by the entirety and not subject to the individual debts of either owner. See Virginia Code §55.1-136 and In re Potter, 274 B.R. 224 (Bankr. E.D. VA 2002)

7. [02.21] [Equity & Contracts] Joey was a computer genius who started playing with his dad's computer when he was only three years old and was already programming by age five. By the time he was in middle school, Joey was designing and selling computer games and had earned more than \$1,000,000. On his thirteenth birthday, Joey's parents took him to the First Bank of Richmond (First Bank) to help him set up an investment program to manage all the money that he was making.

Joey and his parents then had a trust drafted for Joey which would hold and invest Joey's money and his future earnings. First Bank was given custody of the funds and authority to manage the investments. Joey's parents were designated as co-trustees of the trust; First Bank was designated as the sole successor trustee. The trust provided that the trustees should use so much of the income from the trust as the trustees determined necessary for Joey's health, education and maintenance until he was age eighteen. The principal of the trust was to be distributed to Joey outright upon his request after he attained the age of eighteen. After the trust was executed and the funds invested, First Bank began making monthly payments to Joey's parents as provided in the trust.

Joey's parents had an oral agreement with Joey's uncle Derek that, if both of them were to die while Joey was a minor, Derek would take care of Joey until he was twenty-one. Joey's father also told Derek that he would make arrangements with First Bank to ensure that Derek would be compensated for taking care of Joey if such a tragedy ever arose. Unfortunately, before these arrangements could be formalized, Joey's parents were killed in an accident. As agreed, Joey, who was sixteen at the time, moved in with Derek, but Derek never took any steps to adopt Joey or to become his legal guardian.

First Bank began paying Derek the sum it had previously paid Joey's parents. When Joey turned seventeen, Derek asked First Bank to increase the payments by an amount that would properly compensate Derek for his services in caring for Joey. First Bank responded that it could not do so under the terms of the trust and that if Derek wanted to modify the terms of the trust, he would have to seek legal advice.

When he learned this, Joey, who was grateful that Derek had taken such good care of him, told Derek, “if you keep taking care of me, I’ll give you \$100,000 as soon as I can get my money from the trust.” Derek and Joey enjoyed a good relationship, so Derek did nothing to alter the terms of the trust or to seek legal advice.

Four months later, the relationship between Joey and Derek began to deteriorate, and on Joey’s eighteenth birthday he moved out of Derek’s house. As he left the house, Joey shouted, “uncle Derek, I hope I never see you again. You’ll never get a dime from me!” Joey never did give Derek any money, and Derek brought a lawsuit against Joey alleging breach of the contract to take care of him.

- [a] What defenses can Joey reasonably assert against Derek’s lawsuit, and are any such defenses likely to prevail? Explain fully.
- [b] What equitable remedies, if any, are available to Derek for recovery of compensation for the services he rendered to Joey, and is he likely to prevail? Explain fully.

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- [a] The contract at issue here is Joey’s oral contract made when he was a minor that Derek sought to enforce after Joey had attained majority. A minor who ostensibly enters into a contract can either honor the deal or void the contract. Upon reaching age 18, he must act promptly to void the contract. On turning 18 years old Joey told Derek he would never get a penny from Joey. Thus, the contract is unenforceable because Joey lacked capacity when the agreement was made and, on attaining majority, promptly voided the contract.

Another defense to enforcement of the contract is the Statute of Frauds. Virginia Code § 11-2 prohibits any agreement, without a written contract “[t]o charge any person upon a promise made after attaining the age of majority, to pay a debt contracted during infancy, or upon a ratification after attaining the age of majority, of a promise or simple contract made during infancy.” See also *Strother v. Lynchburg Trust & Savings Bank*, 155 Va. 826 (1931) (noting infancy defense to a contract claim but that disaffirming obligation after attaining majority necessary when the person to be charged does attain majority). Although the statute of frauds defense is worth discussing, the defense does not on the facts appear to apply. Uncle Derek was not seeking to enforce a renewed promise by Joey after Joey had attained majority.

Thus, although the defense of incapacity is likely to prevail, the defense of the statute of frauds ought not prevail.

- [b] Even if his contract claim fails, Derek should be entitled to recover compensation for his care of Joey based on quantum meruit and possibly, in addition, the use of a constructive trust in equity. First, Derek has a cause of action based on quantum meruit. In *Mongold v. Woods*, 278 Va. 196 (2009), the Supreme Court of Virginia recognized that quantum meruit should operate based on an implied contract when the contract was not enforceable. Still, the defendant received valuable service from the plaintiff for which he was not compensated. The Virginia Supreme Court reached a similar result in *Hendrickson v. Meredith*, 161 Va. 193 (1933).

Where service is performed by one, at the instance and request of another, and there is no enforceable express contract between the parties as to compensation for such service, the law implies a contract that the party who performs the service shall be paid a reasonable compensation therefor, if necessary to avoid injustice. Thus, if the contract between Joey and Derek is unenforceable, this equitable cause of action should be available. The remedy is an award of damages amounting to the reasonable value of the work performed, less the compensation received for that work (here, any payments from the trust that Derek received before he stopped receiving them). Then point is that the concept of quantum meruit and equity will step in to prevent the injustice of Derek’s performing services under the trust but not receiving any compensation for those services.

Drafters Note: Exam takers might also note that Derek might have had a cause of action against the trust, based on an oral contract with Joey’s father as trustee. An applicant could also suggest a constructive trust as a remedy available. See *Crestar Bank v. Williams*, 250 Va. 198 (1995); *Richardson v. Richardson*, 242 Va. 242 (1991).

8. [02.21] Fed. Civil Procedure] Pete, an inmate at Pine Hill Prison (PHP), through his *pro bono* attorney, timely filed a Complaint in the United States District Court for the Western District of Virginia, Roanoke Division, against PHP. The Complaint also named as a defendant Rocky, in his official capacity as a correctional officer, alleging that he and PHP violated Pete's Eighth Amendment right to be free from cruel and unusual punishment. Pete alleged the Defendants used excessive force when Rocky fired pepper spray at Pete, resulting in injury to Pete and subsequent hospitalization. Among other allegations, Paragraph 11 of the Complaint states:

11. *Rocky stuck his arm through a hinged feeding box to Pete's cell door and sprayed Pete in the face and chest with pepper spray repeatedly, yelling profanities at him.*

In response, Rocky and PHP filed a Motion to Dismiss the Complaint for failure to state a claim upon which relief can be granted, based upon the allegation in Paragraph 11 of the Complaint. Pete opposed the Motion to Dismiss. The judge denied the Defendants' Motion to Dismiss.

During discovery, Pete requested all video surveillance outside of Pete's cell block, as well as all documents, video, and audio recordings from PHP's internal investigation into the incident, which had been conducted by Rocky's direct supervisor. Rocky and PHP officials failed to produce video or audio responsive to this request, although they conceded that there was continual video surveillance of the cell block, including Pete's cell, at the time alleged. Rocky and PHP claimed that "the video showed nothing and unfortunately it was lost." The supervisor's brief investigative report of the incident found "no evidence" that the incident had occurred despite Pete's obvious injuries and hospitalization.

Prior to trial, Pete filed a Motion for Sanctions for Spoliation of Evidence seeking judgment as a matter of law for Rocky and PHP's failure to preserve the surveillance video, "which would have shown the assault on Pete, and the failure to reasonably provide medical treatment." The Motion was denied by the judge.

At trial, Pete called Don, an inmate in the cell next to Pete, who testified that he heard Rocky say, "I have had enough of your crap. Enjoy some spice to your day," along with profane verbal abuse against Pete. Don testified that he could hear the use of the pepper spray, he could smell the pepper spray, which caused him to cough, and said the "assault went on forever." Pete testified as to the facts of the assault and that nurses ignored his pleas for help for over two hours. Pete called Nurse Natasha, who recited Pete's medical record from the date of the incident: "Complaint and Treatment: pepper spray used. Inmate was decontaminated. No injuries reported."

Rocky called the prison warden, who testified that Rocky did not use pepper spray because Department of Corrections' guidelines require documentation and there was none. Pete elicited testimony from Rocky and the other PHP employees relating to their alleged spoliation of evidence.

After hearing all the evidence, the jury found in favor of the Defendants PHP and Rocky, and the judge contemporaneously entered final judgment for the Defendants. Pete did not file an appeal.

Three months after the trial, Pete's attorney received an anonymous package with a thumb drive and a handwritten note stating that there had been a surveillance video showing the assault on Pete, and that it was intentionally destroyed by Rocky. The note also said that, unbeknownst to Rocky, the supervisor had locked in his top desk drawer an audio recording from his investigative meeting with Rocky, wherein Rocky admitted the assault (saying he had just "lost it"), admitted he destroyed the video, and begged for help "covering it up" because he needed to keep his job. The thumb drive contained the audio recording.

- [a] Was the District Court judge correct in denying the Defendants' Motion to Dismiss? Explain fully.
- [b] What arguments should Pete have made in support of his Motion for Sanctions for Spoliation of Evidence, what arguments should Rocky and PHP have made in response, and was the District Court judge correct in denying the Motion? Explain fully.
- [c] What Motion should Pete file based upon the information contained in the anonymous package, when must he file it, and what must he show in support thereof? Explain fully.

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[a] The question presented is whether the plaintiff's allegations were factually sufficient to support plaintiff's claims and, thus, whether the motion to dismiss should be denied. Because the allegations of paragraph (11) were detailed enough to provide factual support for plaintiff's claims, the motion to dismiss should be denied. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2007), support dismissal for insufficient allegation of facts. In those cases, the plaintiff alleged conclusions, such as that the telephone carriers in *Twombly* had entered into conspiratorial agreements, without offering any facts to support such allegations. Similarly, in *Twombly* the Supreme Court held insufficient pleadings asserting claims against government officials for discriminatory detention of aliens. There, the Court followed *Twombly* and held that formulaic assertions of facts and conclusions would not suffice to allege a viable complaint. Moreover, in both *Twombly* and *Iqbal* the Court observed that the complaints lacked plausibility because the allegations were consistent with conduct for which defendants would not be liable—i.e., in *Twombly*, that the telephone carriers had acted in parallel fashion out of business interests and without any agreement between them; and in *Iqbal*, that the government officials had detained Muslims for neutral reasons rather than acting in a discriminatory manner. See also *Bass v. E. I. DuPont de Nemours & Co.*, 325 F.3d 261 (holding Title VII hostile work environment claim lacked sufficient allegations to survive).

By contrast, Pete's complaint alleged detailed facts supporting the claim that defendants violated Pete's right to be free of cruel and unusual punishment. Specifically, Pete alleged that Rocky stuck his arm through the hinged feeding box in Pete's cell door and sprayed Pete in the face and chest with pepper spray, all while yelling profanities at Pete. These allegations are of facts and not like the conclusionary allegations in *Twombly* and *Iqbal*. Thus, they should be sufficient to state a claim on which relief could be granted and the defendants' motion to dismiss should be denied.

[b] Pete could argue in support of his spoliation of evidence argument that Federal Rule of Civil Procedure 37(e) applied. Under that Rule, if electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court can enter a variety of sanctions. The exam taker should discuss the fact that the defendants *failed to take reasonable steps to preserve* the video, which qualifies as electronically stored information. The court has a range of sanctions for which Pete could argue, including the entry of judgment in favor of the party who is deprived of evidence.

[c] Plaintiff could bring a motion for relief or motion to vacate the judgment under FRCP 60(b) based on newly discovered evidence. Applicants may receive credit so long as they clearly understand the general concept of providing relief to a party from a final judgment, discuss the issues here, particularly whether the evidence, confirming a surveillance video and that it was intentionally destroyed by Rocky along with the admission he "lost it," as newly discovered evidence that could not with reasonable diligence be found in time to move for a new trial. The answer would also want to discuss the relief here, i.e., if granted, vacating the judgment and conducting further proceedings in which the plaintiff had the benefit of pursuing discovery to determine all evidence of the destruction of the video and cover up and to move for sanctions as a result.

**9. [02.21] [Partnership & Professional Responsibility]** Arnold, Burton and Clyde practiced law in Poquoson, Virginia, under the firm name of *Arnold, Burton & Clyde, Attorneys at Law*. Each had contributed the sum of \$20,000 as operating capital when the firm was first established, and they rented their office space. They had no agreement covering their relationship but often referred to themselves as "equal partners." On June 30, 2020, Burton was killed in an automobile accident. On July 24, 2020, the firm paid Burton's widow the sum of \$10,000 representing the unpaid balance of Burton's share of the net earnings of the firm for the first six months of 2020, which included his share of work in progress.

Arnold and Clyde carried on the practice after Burton's death, using the same stationery and without changing the firm's name. As of December 31, 2020, the firm showed a net profit of \$600,000 for the year, there having been several substantial cases that were initiated in August of 2020 and settled in the last few months of the year. The firm records also showed two obligations payable in March of 2021; one for \$15,000 incurred by purchasing a computer in March of 2020, and the other for \$5,000 related to computer software purchased after Burton's death. All other expenses of the firm had been paid during 2020.

Burton's widow, who was also his Executrix, called on Arnold and Clyde in January of 2021 and asked for Burton's share of the earnings of the firm during the latter half of 2020 for fees collected after his death, and for his share of firm assets and for his cash contribution. She also asked that she be given a statement of the financial relationship between the law firm and herself as Burton's Executrix.

- [a] What was the legal effect of Burton's death on the partnership? Explain fully.
- [b] Assuming the absence of any agreement among the partners as to the rights of the personal representative of a deceased partner against the partnership, what, if any, claim did Burton's Executrix have against the firm for: (1) firm assets, (2) fees collected after Burton's death, and (3) Burton's cash contribution to capital? Explain fully.
- [c] Does Burton's estate have an obligation to pay any part of the charge for the computer, or the charge for the software? Explain fully.
- [d] Can Arnold and Clyde continue to use the name "*Arnold, Burton & Clyde, Attorneys at Law*" and, if so, for how long? Explain fully with reference to the Virginia Rules of Professional Conduct.

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- [a] Burton dissociated from the partnership upon his death, but his death did not cause a dissolution of the partnership. A partner is dissociated from the partnership upon death. VA Code §50-73.109(7)(a). However, the dissociation of a partner by death from a partnership at will does not trigger dissolution and winding up of the partnership. See VA Code §50-73.117 (excluding dissociation by death from a partnership at will from list of events causing dissolution and winding up of partnership business). Here, the partnership was at will because the partners did not agree to a particular term or undertaking. See VA Code §50-73.79. Thus, the partnership continued after the death of Burton.

Under the Virginia Uniform Partnership Act, the partnership must buy out the dissociated partner's interest when the partnership continues after the partner's dissociation. VA Code §50-73.112. See also §50-73.111 (A) (Article 7 of the statute applies if the partner's dissociation does not cause dissolution and winding up of the partnership business). The buy-out price is greater of the partnership's (1) liquidation value or (2) going concern value, on the date of dissociation. VA Code §50-73.112 (B). Thus, the partnership is only required to pay Burton's estate the value of his interest at the time of his death. Presumably the value of the partnership would not be affected by fees collected after Burton's death if those fees were based on cases initiated after his death.

Burton's estate would be liable to the seller of the computer purchased in March, 2020, and it could be liable to the seller of software purchased after Burton's death if the seller was unaware of his death. However, the partnership is obligated to indemnify Burton's estate for both expenses.

Partners are personally liable for debts of the partnership, §50-73.94 (A), and a partner's dissociation does not discharge the partner's liability for a partnership obligation incurred before dissociation. §50-73.114 (A). Although a dissociated partner generally is not liable for partnership obligations incurred after dissociation, the dissociated partner will be liable to a third party who transacted business with the partnership within one year of the dissociation and who reasonably believed that the dissociated partner was still a partner without notice or knowledge otherwise. §50-73.114 (B).

Here, the partnership purchased the computer while Burton was still a partner, and thus, his estate would be liable for the debt. The software was purchased after his death; however, it was less than one year after his death and the facts provide that the partnership was still using his name. Thus, the software seller may be able to prove that it reasonably believed that Burton was still a partner in the firm. If so, then the estate would be liable to the software seller as well.

Nonetheless, the firm must indemnify Burtons' estate as to both of these expenses. After a dissociated partner's interest is bought out by the partnership under section §50-73.112, the partnership must indemnify the dissociated partner for all partnership obligations, whether incurred before or after the partner's dissociation. VA Code §50-73.112 (D). Thus, although the estate could be liable to both the computer seller and the software seller, it would have an indemnification claim against the partnership.

- [b] Yes. The governing rule from the Virginia Rules of Professional Conduct would be Rule 7.1, which generally provides, "A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading."

The Comments to Rule 7.1 address the question of whether a firm's name is misleading. Comment 5 states, in relevant part, "A firm may be designated by the names of all or some of its members, **by the names of deceased**

***members where there has been a continuing succession in the firm's identity*** or by a trade name such as the "ABC Legal Clinic." ... It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a nonlawyer."

Based on the facts provided, it is fair to conclude that keeping the firm name as "Arnold, Burton and Clyde" may be necessary to maintain the firm's long-established identity. (If the firm had used this name for many years, the argument for keeping the name intact would be stronger.)