

February 2024 Virginia Bar Exam Questions & Suggested Answers

Updated: March 21, 2024 (9:50am)

✖✖ 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 [remotely]. 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.✖✖ 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

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The following, provided us great help with suggested answers in his area[s] of specialty: Jeremy W. Hurley of Appalachian School of Law.

Question 1 [Domestic Relations]

Several years ago, Beverly filed a suit for divorce against her husband, Dean, in the Circuit Court of Hampton, Virginia. A month after the divorce action was filed, and after the Complaint was served on Dean, the parties privately negotiated and signed a Property Settlement and Support Agreement. The Agreement provided for division of the marital property and specified that Dean would thereafter pay Beverly \$1,500 per month spousal support.

A few months later, the court entered a final decree granting a divorce to Beverly, awarding her custody of their son, Willie, and ordering Dean to pay \$1,700 per month child support for Willie. The final decree did not mention spousal support payments to Beverly, but the court approved the Agreement that Beverly and Dean had executed, and expressly ratified, affirmed, and incorporated it into the final decree along with the following statement:

. . . the parties shall not have any property rights or duties of spousal support and maintenance, except as provided in the Property Settlement and Support Agreement. No future modifications to said Agreement shall be made without a decree of this Court.

During 2022 and 2023, Dean's business encountered tough economic times, and, in early 2023, he proposed to Beverly that she accept \$500 a month in spousal support payments rather than the \$1,500 specified in the Agreement. Beverly was reluctant and told Dean that he should first obtain the circuit court's approval. Dean said, "there is no sense in paying lawyers to go to court on this."

Eventually Beverly agreed, and these reduced payments continued for five months. Beverly soon found herself strapped by the reduced income and asked Dean to restore the original level of support payments. She also asked him to increase the monthly child support payment for Willie. Dean refused both requests.

Beverly then filed a motion in the Hampton Circuit Court, asking the court:

(i) to order Dean to pay her all of the spousal support arrearages in the difference between the \$1,500 specified in the court-approved Agreement and the \$500 to which they had later agreed;

(ii) to increase her spousal support payments to \$2,000 per month (which request she supported with significant evidence of hardship and changed circumstances);

(iii) to increase child support for Willie to \$2,000 per month (which request she supported with evidence of changed circumstances, including the facts that Willie needed braces and that there was a substantial increase in the cost

of Willie's private school education); and

(iv) to hold Dean in contempt for failing to keep up the spousal support payments in accordance with the original Agreement.

How should the court rule on:

(a) Beverly's request for payment of the arrearages? Explain fully.

(b) Beverly's request for increased spousal support? Explain fully.

(c) Beverly's request for an increase in child support? Explain fully.

(d) Beverly's request to hold Dean in contempt? Explain fully.

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a. Arrearages will be assessed for court ordered awards, or for contractual obligations, or as the parties have agreed and reduced to writing, when the payor has not paid support accordingly. Here, the parties reduced their agreement of spousal support payments to a Property Settlement Agreement (PSA) that was duly incorporated into the divorce decree by the court, making the parties liable for the PSA promises as if it were a court order. Therefore, Dean will be liable for what he did not pay according to the original PSA. Furthermore, even though Dean and Beverly orally agreed to the new amount of support of \$500, Beverly was correct that Dean should have reduced the agreement to a new court order. Because he did not do so, he will be required to pay all arrearages according to the original order and the PSA.

b. Spousal support is awarded according to the factors in the VA Code section 20-107.1, one of which may be significant hardship and may be changed upon a showing of a material change in circumstances. See VA Code section 20-109. Because the PSA was incorporated into the divorce decree and the court reserved the right to modify that spousal support upon petition to the court, the court may modify the award. Hardship must be proved by a material change of circumstances. Here, the court order reserved the right to modify. Beverly has apparently given evidence of such hardship (though not set forth in detail in the fact pattern) and material change of circumstances from the original order. Therefore, Dean will be ordered to pay an increased amount of spousal support as the court deems appropriate.

c. Child support may be modified based on the best interests of the child and a showing of a material change of circumstances. VA Code §20-108. Here, the child needs braces, and his education costs have significantly increased, making an increase in child support appropriate where the child's needs have been sufficiently clarified. Dean will have to pay the increased child support.

d. Contempt of court is appropriate to enforce a direct court order. VA Code 16.1-292. It generally allows for fines and incarceration as the court deems appropriate when a wilful disregard has been shown for the authority of the court. It is generally considered a punitive remedy useful for the court to assert its authority. Here, although Dean paid according to the parties' separate oral agreement, he was still in violation of the express court order, making him in contempt. The fact that Beverly knew and agreed to the new terms may be an important factor for the court to consider in holding Dean in contempt. It may also be appropriate to note the fact that both parties were experiencing economic difficulties, but these considerations are entirely up to the court. The court may choose to hold Dean in contempt as it has authority to do so but may decide not to do so in light of the parties' oral agreement and Dean's good faith in maintaining some measure of support payments. It is most likely that the court will not hold Dean in contempt.

Question 2 [Real Property]

Owen, the owner of three non-adjacent undeveloped parcels of land in the City of Roanoke, Virginia, agreed to sell the three parcels to Brian. Brian told Owen that he intended to place a mobile home on each lot for rental, and Owen assured him that he knew of nothing that would prevent him from doing so.

Owen and Brian signed separate contracts for the sale of each of the lots, which included the price to be paid by Brian, the separate closing date for each transaction, and provided that Owen would pay his share of the prorated real estate taxes as of the closing date.

Each contract also provided that the lots were free and clear of all encumbrances. There was no mention of

zoning in any of the contracts.

LOT 1: In an inadvertent oversight, the closing statement failed to allocate any of the real estate taxes to Owen. The deal closed with the entire amount of the taxes allocated to Brian, who received and recorded a properly executed general warranty deed conveying Lot 1 without mention of real estate taxes. A month later, when Brian noticed the oversight, he demanded payment from Owen of Owen's share of the taxes. Owen refused, saying that taxes were allocated on the closing statement and he had no further obligation.

LOT 2: At closing, Brian paid the agreed purchase price for Lot 2 and accepted delivery of a properly executed general warranty deed from Owen. At the time, Brian and his wife were in the midst of a divorce proceeding, and, in an effort to avoid having to list Lot 2 on the schedule of property subject to division by the court, Brian decided not to record the deed and to retain it unrecorded in the safe in his office. When Brian's estranged wife became aware of the Lot 2 transaction, she accused him of concealing his ownership of this asset in the divorce proceeding.

Brian denied her allegation, arguing that as long as the deed to Lot 2 remained unrecorded, he could not be deemed to be the legal owner of that property.

LOT 3: At closing, Brian received and recorded a deed with general warranty and English covenants of title to Lot 3. Brian then went to the Roanoke City Planning Office and requested a building permit to place a mobile home on the lot. He was informed that the zoning for that area did not permit mobile homes, and he was denied the building permit.

Shortly after closing on Lot 3, Brian was contacted by the lawyer for Saul's Septic Systems (Saul's), who said that Saul's had a judgment lien in the amount of \$3,500 on Lot 3 resulting from work Saul's did in installing a septic system under a contract with Owen. Saul's had obtained a judgment in the General District Court for the City of Roanoke and had docketed the judgment in the Circuit Court Clerk's Office four weeks prior to the closing of the sale of Lot 3.

Brian demanded that Owen pay the \$3,500 to clear the lien. Owen refused.

- (a) Is Owen liable for a share of the real property taxes on Lot 1? Explain fully.
- (b) How should a court rule on Brian's argument that he is not the owner of Lot 2? Explain fully.
- (c) What warranties are encompassed by the English covenants of title, and does Brian have a cause of action against Owen for breach of any of those warranties by reason of his inability to obtain a building permit for Lot 3? Explain fully.
- (d) Is Owen liable to Brian for Saul's judgment lien of \$3,500? Explain fully.

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[a] Owen will be liable for his share of the property taxes on Lot 1. Under the doctrine of mutual mistake, a court may give relief where there has been an innocent omission or insertion of a material stipulation, contrary to the intention of both parties. *Ayers v. Mosby*, 256 Va. 228, 234 (1998). Here, the parties agreed in writing that Owen would pay his share of the prorated real estate taxes as of the closing date. In an "inadvertent oversight," the closing statement failed to allocate any real estate taxes to Owen. Instead, Brian paid the entire amount of real estate taxes. Based on the mutual mistake, the court will enforce the terms of the contract of sale, requiring Owen to pay his share of the property taxes on Lot 1. Also, the doctrine of merger did not apply to cut off Brian's claim for reimbursement. Under the merger doctrine, a previous contract is extinguished by an instrument of higher dignity – the deed. The doctrine of merger only applies to the subject matter specifically covered by the deed. It does not apply to provisions that are collateral to the passage of title. *Tribby v. Tribby*, 241 B.R. 380 (E.D. Va. 1999) (quoting *Empire Management & Dev. Co. v. Greenville Assocs.*, 255 Va. 49 (1998)). The merger doctrine is of narrow scope and disfavored. See *Phillip Abi-Najm v. Concord Condominium, LLC*, 280 Va. 350 (2010). Under the merger doctrine, a closing statement does not extinguish a purchase contract. *Empire Management*, 255 Va. at 54. Thus, the purchase contract, including its provisions concerning allocation of the real property taxes, survives.

[b] Yes, a Virginia court should rule that Brian is the owner of Lot 2 notwithstanding his failure to record the deed so long as there is sufficient corroborative evidence of the delivery of the unrecorded deed from Owen to Brian. In order for a deed to be valid, it must: (1) meet certain formalities; (2) be delivered by the grantor; and (3) be accepted by the grantee. Delivery can occur by various methods, including manual delivery. Failure to record the deed, however, does not invalidate it. Once delivery occurs, title passes to the grantee.

Here, on the closing date, Owen manually delivered and Brian accepted delivery of a properly executed deed from Owen. Although Brian did not record the deed, title passed at the moment he accepted the valid deed from Owen. Therefore, a court should rule that Brian is the owner of Lot 2, despite the deed not being recorded.

[c] No, Brian does not have a cause of action against Owen because a lawfully adopted zoning ordinance is not an “encumbrance,” tenancy, or lien on the land.

Here, Owen knew of Brian’s intent to place a mobile home on Lot 3. Before signing the contract, Owen assured Brian that he did not know of anything that would prevent him from doing the same. However, after delivery of the deed, when Brian went to request a building permit to place a mobile home on the lot, his request was denied by the Roanoke City Planning Office due to a zoning ordinance preventing this type of use in that area.

Under Virginia Code § 55.1-356: “The words ‘with English covenants of title’ or words of similar import in the granting part of any deed shall be deemed to be an expression by the grantor of those covenants set out in §§ 55.1-359 through 55.1-362, and in addition thereto the covenant that he is seized in fee simple of the property conveyed.” In other words, the language “English covenants of title” simply mean that the deed is conveyed in fee simple, without any encumbrances of tenancies, or liens on the property. The English covenants of title include the (1) covenant of right to convey; (2) covenant of quiet possession, (3) covenant of free from encumbrances, (4) covenant of further assurances, and (5) covenant of no act to encumber. The covenant of quiet possession free from encumbrance simply constitutes a promise that a grantee will hold and enjoy the land free from any interruption, claim or demand by anybody, and that grantor would indemnify and save grantees harmless against any and every charge or encumbrance. See Va. Code § 55.1-360; *Adams v. Seymour*, 61 S.E.2d 23, 191 Va. 372 (1950).

An encumbrance has been defined as including the existence of physical intrusions or encroachments or superior title or interest in the land held by another party. Lawful zoning ordinances are not encumbrances.

Thus, Brian does not have a cause of action against Owen for a breach of any of the English covenants.

[d] Although Owen breached his covenant that Lot 3 was free from encumbrances, he will not be liable to Brian for the \$3,500 unless Brian satisfies the lien himself or suffers damages as a result of the lien being enforced by Saul’s Septic Systems. Saul’s obtained a judgment in the General District Court for the City of Roanoke arising from work done under contract with Owen. Saul’s properly docketed the judgment in the Circuit Court Clerk’s Office where Lot 3 is situated three weeks prior to closing. Owen covenanted that the lot was free from encumbrances when he conveyed Lot 3 by a deed with general warranty and English covenants of title. Thus, because there was a judgment lien on the property prior to closing,

Owen breached the covenant that the lot was free from encumbrances. However, with regard to judgment liens, it is generally recognized that so long as the judgment is unenforced, no actual damages are incurred by the buyer unless he discharges the lien or suffers damages as a result of the judgment creditor’s enforcement of the lien. Therefore, Owen will become liable to Brian only if Brian suffers actual damages resulting from voluntary satisfaction of the lien or Saul’s enforcement of the lien.

Although Saul’s lawyer has contacted Brian and informed him of the judgment lien, there are no facts to support that a demand of payment or threat of foreclosure has been made by Saul’s.

A possible alternative analysis would be that as explained above in part (c), the covenant free from all encumbrances would include any right to, or interest in, the land, to the diminution of the value of the land. An outstanding right in anyone other than the grantee usually is an encumbrance. This would include a lien, and more specifically a judgement lien. The fact that the outstanding right lies dormant and is not being asserted, or that it is extremely unlikely to ever be enforced does not alter the fact that it is an encumbrance. Whether a property’s title is or is not encumbered is not a matter of agreement of the parties.

✖✖ Comments: (1) Some additional cites and comments that we think are in play for this Essay Question: *Capozzella v. Capozzella*, 213 Va. 820 (1973); *Vicars v. Wiesiger*, 121 Va. 679 (1917); and Virginia Code Section §55.1-356. (2) *This is a repeat of an essay question in September 2020 and February 2011.*

Question 3 [UCC - Negotiable Instruments & Secured Transactions]

After years of trying, Dr. Otto Ortho successfully invented a mechanical device to support the knees of patients recovering from surgery. Otto was awarded a patent for the device that promised to revolutionize the practice of knee surgery. He formed a valid Virginia stock corporation known as New Knees, Inc. (New Knees) and sought financing for the new venture to manufacture and sell the device.

Otto's friend from childhood, Freddy Fox, agreed to cosign a bank loan to New Knees of up to \$500,000.

Although New Knees had no credit history, based on Freddy's guaranty, the promise of Otto's invention, and a security interest in Otto's valuable antique Mercedes automobile, Global Bank agreed to provide a \$500,000 loan to New Knees.

The closing of the loan from Global Bank occurred on December 23, 2022, in the midst of the holiday party at the commercial loan department of the Bank, so there was a lot of noise, merriment and confusion. The note, which was signed at closing by Otto and Freddy, provided in pertinent part as follows:

\$500,000.00 December 23, 2022. The undersigned promises to pay to Global Bank, or order, the sum of five hundred thousand and no/100 dollars with interest at the rate of ten percent per annum in sixty equal monthly installments commencing on January 23, 2023.

Executed this 23rd day of December, 2022.

/s/ Otto Ortho

Guaranteed:

/s/ Freddy Fox

The \$500,000 was deposited to the account of New Knees at Global Bank on December 24, 2022.

After the holidays in January, the loan officer discovered the discrepancy in the numbers in the amount of the note as well as the failure to show New Knees, the corporation, as the maker of the note.

Upon learning that Otto was out of the country and could not be reached for several weeks, and without the knowledge of Otto or Freddy, the loan officer had his secretary change the numbers at the top of the note from "\$500,00" to "\$500,000" by inserting another zero. The secretary also typed in the name of the corporation over Otto's signature and the title "President" after Otto's name.

By September 2023, the note was in default. Unable to reach Otto, Global Bank asked Freddy to pay it off. Wanting to avoid a lawsuit and believing that sooner or later he could get his money from Otto, Freddy paid Global Bank in full. Thereafter, Freddy called Otto and asked him to repay him. Otto was irate that Freddy had paid off the loan and refused to speak with him or pay him. Freddy sent a local towing company to Otto's home to take possession of the antique car.

Freddy then filed an action in the Norfolk Circuit Court against New Knees seeking judgment for \$500,000.

How should the court rule on each of the following defenses raised by New Knees in its answer to Freddy's suit:

(a) That New Knees was indebted to Global Bank, and not indebted to Freddy?

Explain fully.

(b) That the change in the numbers on the note by the loan officer's secretary discharged the liability of New Knees?

Explain fully.

(c) That the insertion by the loan officer's secretary of the corporation's name and Otto's title as President discharged the liability of New Knees? Explain fully.

(d) That Freddy had no right to possession of the antique car? Explain fully.

(e) That Freddy could not recover anything from New Knees because Freddy had paid Global Bank without Global Bank ever obtaining a judgment against Otto, New Knees or Freddy? Explain fully.

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(a) The court should rule that New Knees was ultimately indebted to Freddy, and no longer indebted to Global Bank. A principal is liable on an instrument signed by an agent or agents. If the agent is authorized, the principal is liable whether the agent signed the principal's name, the agent's name, or a combination thereof. See § 8.3A-401.

Here, New Knees, a VA stock corporation, sought financing for the device to revolutionize the practice of knee surgery from Global Bank, the creditor. Otto, the founder of New Knees, signed the note alongside Freddy, Otto's childhood friend. Assuming from the facts that Otto was signing in an official capacity as opposed to taking out the loan as a principal and then contributing such loan to New Knees, Otto would be an agent of New Knees. Therefore, because the closing of the loan with Global Bank was in an official capacity, Otto was authorized to take out such loan on New Knees' behalf. Accordingly, New Knees was indebted to Global Bank.

However, that's not the end of the story. An accommodation party is a type of surety, or one who guarantees the debt of another. See VA Code § 8.3A-419. In order to be an accommodation party, a person cannot have received a direct benefit from the instrument. *Id.* Further, a cosigner is presumed to be an accommodation party. *Id.* An accommodation party is liable on the instrument in whatever capacity he has signed. *Id.* In order to limit such capacity, there would need to be express language. *Id.*

Here, Freddy, Otto's childhood friend, co-signed the bank loan as a guarantor without any specific limitation and did not receive any of the loan amount, because it was deposited to New Knees account at Global Bank. Because Freddy cosigned as a "guarantor" without specific limitation and did not receive direct benefit in the form of any part of the loan amount, Freddy would be considered to be an accommodation party. Accordingly, Freddy was liable for the loan as a surety.

A surety, who makes payment on a loan on the behalf of a principal is entitled to all of the rights and remedies of a creditor. See VA Code § 49-27. Because Freddy made payment of the loan to Global Bank as a surety, Freddy would be entitled to all of the rights and remedies as Global Bank, the creditor, was entitled to. Therefore, New Knees, as a principal of the loan, would be ultimately indebted to Freddy.

(b) The court should rule that the change in the numbers on the note by the loan officer's secretary did not discharge the liability of New Knees.

An alteration is an unauthorized change that purports to modify the obligation of a party. An alteration can modify a completed instrument or an incomplete instrument. See § 8.3A-407. If the alteration is done fraudulently by the holder, it would discharge the liability of the obligor. *Id.* If the alteration is not done fraudulently, the obligor would remain liable but only on the original terms of the obligation. *Id.*

Here, the loan officer's secretary added an extra zero to change the stated number from "500,00" to "500,000." Because neither Freddy nor Otto had authorized such change to the language of the loan, this change by assistant could be characterized as an alteration. It is unlikely for this alteration to be considered fraudulently done, because in the written terms "the sum of five hundred thousand and no/100 dollars with interest at the rate of ten percent per annum..." is clearly spelled out. Therefore, this alteration was simply in order to correct a discrepancy between one part of the agreement and the other.

Finally, the total obligation should remain at \$500,000. In Virginia, the hierarchy of terms is viewed as handwritten, typewritten, printed, and *words prevail over numbers*. See § 8.3A-114. Because the loan instrument clearly wrote out the amount due and there was a contradiction with the numerical representation, the spelled out amount would prevail. Accordingly, the spelled-out amount of "five hundred thousand and no/100 dollars" would prevail over the "\$500,00." Therefore, the obligation would be for the full \$500,000.

(c) The court should rule that the insertion by the loan officer's secretary of the corporation's name and Otto's title as President did not discharge the liability of New Knees.

An alteration is an unauthorized change that purports to modify the obligation of a party. An alteration can modify a completed instrument or an incomplete instrument. See § 8.3A-407. If the alteration is done fraudulently by the holder, it would discharge the liability of the obligor. *Id.* If the alteration is not done fraudulently, the obligor would remain liable but only on the original terms of the obligation. *Id.*

Here, the loan officer's secretary inserted the corporation's name, "New Knees" and added Otto's title as president. Because neither Freddy nor Otto had authorized such change to the language of the loan, this change by assistant could be characterized as an alteration. It is unlikely for this change to be considered fraudulently done, because the intended principal was New Knees with Otto, acting as an authorized agent, and Freddy, acting as a guarantor. Further, Global Bank deposited the \$500,000 loan amount to New Knees' account at Global Bank, which highlights the intent for New Knees to be the principal of the loan.

However, it can be argued that the insertion of New Knees was a forgery of the maker's signature. In the case that the maker's signature does not appear on the note, the maker would not generally be liable for such obligation. See VA Code § 8.3A-403. Ratification by conduct would make it so that the maker would not be able to deny the forgery. *Id.* Further, in the case that the maker is determined have acted negligently to contribute to the forgery or fraudulent indorsement, the maker would also be precluded from denying the validity of the indorsement. See VA Code § 8.3A-406.

Here, New Knees was not indicated on the note. Because indication of New Knees was not included, the unauthorized insertion could be considered as a forgery, since the assistant was not an agent of the maker, New Knees. However, because Freddy, who was a surety for the loan, made payment, such payment could be considered as ratification. If Otto and New Knees were to defend against such liability, they may be able to successful argue that Freddy's conduct did not ratify such forgery, because Freddy wanted to avoid a lawsuit and thought that he was able to recover from Otto or New Knees, and was not a principal to the agreement or had any forgery on his part.

However, it can certainly be argued successfully that Otto and New Knees did contribute negligently to the forgery. There is a duty for reasonable care and a forged signature must be reported to the bank within one year of the creation of the instrument (or issuance of statement). See VA Code § 8.3A-403; VA Code § 8.3A-406.

Here, neglecting to include indication of Otto's company or the role that he had with the company, New Knees, can be argued to be negligent on his part. He did not follow simple review processes to avoid such misidentification. However, this might be within one year of the creation of the instrument or a statement date. Because, the loan instrument was created on December 22, 2022, the amount was deposited on December 24, 2022, one year from then would be December, 2023. If raising the forgery defense occurred on September, 2023, it would be within one-year, and the forgery defense could have been made. However, because, it is now February, 2024, raising the forgery defense would be precluded because there was no report of the "forgery" within one year. Accordingly, the alteration/forgery would not discharge the liability of New Knees.

(d) The court should rule that Freddy had right to possession of the antique car.

A security interest becomes enforceable when such interest attaches to collateral. See VA Code § 8.9A-203. Attachment occurs when there has been value from the creditor, the debtor pledges rights to the collateral, the necessary terms are indicated in a security agreement, and such agreement satisfies the statute of frauds. *Id.*

Here, Otto pledged his valuable antique Mercedes automobile as collateral for the loan to New Knees. Additionally, Global Bank agreed to extend the loan of \$500,000, which is value. Further, the parties agreed to such indication. It is unclear if the SI was expressed in an authenticated writing. Assuming that it was, there would be attachment. If there wasn't that would not necessarily prevent attachment; however, it would require for Global Bank to have had physical possession of the car. In the presence of such enforceable security agreement, Global Bank, as the creditor, would be able to take possession of the car without the involvement of the court. See VA Code § 8.9A-601.

A surety, who makes payment on a loan on the behalf of a principal is entitled to all of the rights and remedies of a creditor. See VA Code § 49-27. Because Freddy made payment of the loan to Global Bank as a surety, Freddy would be entitled to all of the rights and remedies as Global Bank, the creditor, was entitled to. Therefore, because Global Bank was entitled to repossess the car, Freddy would also be entitled to repossess the car.

(e) The court should rule that Freddy could recover from New Knees because Freddy had paid Global Bank even though Global Bank had never obtained a judgment against Otto, New Knees or Freddy.

An accommodation party is liable for an instrument if: (i) the person entitled to enforce the instrument has reduced his claim to judgment against the other party and execution is returned unsatisfied, (ii) the other party has become insolvent, (iii) the other party cannot be served with process, or (iv) it appears useless to proceed against the other party. See § 8.3A-605.

Here, Freddy, as the accommodation party would have been liable even without Global Bank reducing the claim to a judgment, because Otto was completely unreachable by Global Bank and likely would reasonably be determined to be "useless" to proceed against.

A surety, who makes payment on a loan on the behalf of a principal is entitled to all of the rights and remedies of a creditor. See VA Code § 49-27. Because Freddy made payment of the loan to Global Bank as a surety, Freddy would be entitled to all of the rights and remedies as Global Bank, the creditor, was entitled to. Here, because Global Bank was

entitled to repayment and could enforce such repayment, Freddy can enforce such repayment against either New Knees or Otto.

Question 4 [Evidence]

Albert and Betty both live in Tazewell, Virginia. Albert owns Albert's Boston Beans (Boston Beans) which are grown and processed in Massachusetts. Albert claims that Betty's agent, Chuck, signed a valid written contract with Albert for Betty to buy a large quantity of Boston Beans.

Betty refused to buy the beans. Albert sued Betty for breach of the contract in Tazewell County Circuit Court. Once the lawsuit was filed, the parties agreed that Massachusetts substantive law applied to the case. Betty stipulated that Chuck is her agent but denied that there was a contract between Betty and Albert.

During discovery, Albert provided Betty with a 200-page spreadsheet showing the daily average price of Boston Beans over the past five years. The parties stipulated that the spreadsheet was admissible.

At trial, counsel for Albert attempted to introduce a photocopy of the contract into evidence by handing it to Albert and asking, "what is this?" Albert replied, "this is a copy of the contract signed by Betty's agent, Chuck, and me." Betty objected to the introduction of the photocopy because it was not the original contract. The judge overruled the objection on the ground that a proper foundation had been laid when Albert identified it as a copy of the original.

After Albert closed his case, Betty moved to strike the breach of contract claim on two grounds. First, she moved to strike the claim because Albert failed to produce any evidence that the signature on the contract was Chuck's signature. The judge denied this ground, stating that he had known Chuck personally for many years and was very familiar with Chuck's signature. He therefore took judicial notice that the signature was Chuck's.

Betty then moved to strike the claim because Albert failed to provide any evidence of the Massachusetts law that they agreed should govern the contract dispute. The judge denied this ground for Betty's motion, stating, "I'll take judicial notice of Massachusetts law because I can just look it up if I need to."

In Betty's case in chief, rather than admit into evidence the 200-page spreadsheet showing the daily average Boston Bean prices, Betty proffered a single page chart, summarizing information from Albert's spreadsheet and showing the annual average price of Boston Beans. Albert objected to the admission into evidence of the chart, arguing that the parties only stipulated that the original spreadsheet was admissible. The court overruled Albert's objection and allowed the chart into evidence.

- (a) Did the court err in allowing the admission of the copy of the contract into evidence? Explain fully.
- (b) Did the court err in taking judicial notice of Chuck's signature on the copy of the contract? Explain fully.
- (c) Did the court err in taking judicial notice of applicable Massachusetts law without any evidence being presented? Explain fully.
- (d) Did the court err in allowing Betty's chart into evidence? Explain fully.

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- (a) Did the court err in allowing the admission of the copy of the contract into evidence?

No. The trial court erred when it allowed the admission of the copy of the contract into evidence. Rule 2:1005 (d) allows copies of original documents to be admitted where they are authenticated. In order for the copy to be admissible, the best evidence rule would require evidence that the original was not lost or not available. Furthermore, for exception (d) to apply there must be evidence that the copy was made in the regular course of business, and that the person proffering it was the custodian of the record or there was a certificate that the custodian had custody of the original. Although he is the owner of Boston Beans and a signatory to the contract, nothing in the fact pattern indicates that the copy was made in the regular course of business, that it was copied in the regular course of business, that, as owner, Albert was the custodian of the record and that there existed a certificate that he retained the original.

- (b) Did the court err in taking judicial notice of Chuck's signature on the copy of the contract? Explain fully.

Yes, the court erred in taking judicial notice of Chuck's signature on the copy of the contract. Rule 2:201 states that a court may take judicial notice of a factual matter not subject to reasonable dispute in that it is either (1) common knowledge or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Courts may take judicial notice of governors or judicial signatures affixed to official documents. Judges also may not serve as witnesses in cases over which they preside. Chuck's signature is not common knowledge, the document is not an official document, and Chuck is not a governor or judge. Thus, although the judge may be familiar with Chuck's signature, the court may not take judicial notice and the judge may not testify as to the signature.

(c) Did the court err in taking judicial notice of applicable Massachusetts law without any evidence being presented? Explain fully.

No. The court properly took judicial notice of Massachusetts law. Rule 2:202 allows judges to take judicial notice of the laws of other states whether specially pleaded or not and that in doing so the court may consult the appropriate document or publication. In essence, the judge may "look it up."

1. Did the court err in allowing Betty's chart into evidence? Explain fully.

No. The trial court properly admitted Betty's chart into evidence. Rule 2:1006 allows for summaries to be admitted when the contents of a voluminous writing cannot be adequately examined in court. Here the 200 page spreadsheet would be considered voluminous and the summary chart would be proper. However, the rule also requires that the summary be made available to the other parties for examination at a reasonable time and place. And the court may order that they be produced in court. Albert did not object that he had not been provided the summary chart reasonably in advance of trial, only that it was not the spreadsheet that they stipulated to providing. Albert also made no argument that the chart did not properly summarize the information. Thus, the court properly allowed its admission.

Question 5 [Local Government & VCV (b)]

Alva Rider is a resident of Henrico County, Virginia, and commutes daily on a bus owned and operated for community programs by Henrico County. She rides it between her home and a senior center in the City of Richmond, Virginia.

Don Driver, who is employed by Henrico County, was driving the bus on the day of the incident described below. Don's bus route runs down Broad Street through the center of Richmond. On this particular afternoon, Richmond Public Works (RPW), a department of the City of Richmond, had opened a trench in the bus rapid transit lane in order to install a new water line to enhance the city's municipal water service.

Unfortunately, the manager of RPW failed to direct that a proper barricade be erected or that signs be posted warning motorists to exercise caution in the area of the trench. Although Don had noticed the construction activities during his morning trip, he was not paying proper attention on the afternoon trip, and he was driving at six miles per hour above the posted speed limit when the bus ran into the trench. Alva, who was returning from the senior center on the bus, was injured, suffering a fractured elbow and broken leg. She was transported by ambulance to the hospital, subsequently released within 10 days of the incident, and made a full but painful recovery.

Eight months after the incident, Alva hired a local attorney who, without any contact or communication with any Henrico County or City of Richmond public official or employee, filed a Complaint against Henrico County, the City of Richmond, Don Driver, and RPW, in the appropriate circuit court. The lawsuit alleges negligence against the defendants and seeks \$2,000,000 on Alva's behalf.

What legal defenses, if any, might each of the following parties reasonably assert and what is the probable outcome on each defense:

(a) Henrico County? Explain fully.

(b) City of Richmond? Explain fully.

(c) Don Driver? Explain fully.

(d) Richmond Public Works? Explain fully.

✘✘

(b) The city should assert that plaintiff's claim is barred for failure to provide the statutorily required notice and because the city was engaged in governmental functions.

Pursuant to VA Code section §15.2-209, every claim against any county, city, or town for negligence shall be forever barred unless the claimant or his agent, attorney, or representative has filed a written statement of the nature of the claim, which includes the time and place at which the injury is alleged to have occurred, within six months after such cause of action accrued. Here, plaintiff did not provide any notice to the city of her claim until eight months after the incident, when she filed suit against the defendants. Indeed, the facts state that the suit was filed "without any contact or communication with any Henrico County or City of Richmond public official or employee...." Thus, plaintiff's claim against the city is barred.

In addition, the City could argue that its decision to install a new water line to enhance the city's municipal water service is a governmental function, protected by sovereign immunity against negligence claims. A Virginia municipality is immune from negligence while acting in its governmental but not its proprietary functions. The Supreme Court of Virginia has described governmental functions as exercises of a municipality's discretion, activities undertaken for the common good, or in the interest of public health and safety, and exercises of powers delegated or imposed upon the municipality. Proprietary functions are performed primarily for the benefit of the municipality. Routine ministerial acts that involve no discretion are proprietary.

(a) The county should assert that it is absolutely immune from liability for negligence of its officers, servants, and employees. The facts state that plaintiff has sued the county for negligence. As a result, her claim against the county is barred. See *Mann v. County Bd. of Arlington County*, 199 Va. 169 (1957) and *Seabolt v. County of Albemarle*, 283 Va. 717 (2012).

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The planning, design, and initial placement of a city water or sewer system is considered a governmental, and discretionary function. However, the ongoing operation, maintenance and repair of such utilities are not a governmental function subject to immunity, but are proprietary. *City of Chesapeake v. Cunningham*, 268 Va. 624 (2004). The City's actions involve the initial placement of a new water line, which should constitute a governmental function. In addition, the decision whether to erect a barricade and post warning signs should be deemed a governmental function.

The Supreme Court of Virginia has similarly held that a city is immune from liability for failing to use reasonable care to install lights, a barricade, and other safety devices, and in designing and constructing the roadway, because such matters, unlike street maintenance, constitute the exercise of a discretionary governmental function. *Taylor v. Charlottesville*, 240 Va. 367 (Va. 1990). Thus, the city's failure to erect a barricade and post warning signs is protected by sovereign immunity from an ordinary negligence suit.

(c) Don Driver should argue that as a county employee he is covered by the same immunity as the county. He can only be liable for acts of gross negligence. The facts here do not allege gross negligence. The Supreme Court has articulated four factors to determine if an employee is entitled to the same immunity as the municipality. The four factors are: (1) the nature of the function the employee performs; (2) the extent of the government's interest and involvement in the function; (3) the degree of control and direction exercised over the employee by the government; and (4) whether the act in question involved the exercise of discretion and judgment. The Supreme Court has previously held that a school-bus driver is entitled to immunity applying this four factor test. Notably, the court found that transporting children to school involved discretion and judgment. See *Linhart v. Lawson*, 261 Va. 30, 540 S.E.2d 875 (2001). That same logic should apply to a bus driver transporting passengers, leaving Don Driver immune from liability for ordinary negligence.

(d) Richmond Public Works should argue it is not a separate legal entity subject to suit. Rather, it is the city that is the legal entity subject to suit. See *Kane v. City of Richmond*, 18 Va. Cir. 442 (1990).

Question 6 [Criminal Procedural & Substantive Criminal]

The Bargain Motel is located in Portsmouth, Virginia. The police consider the motel to be in a high crime area with significant illegal narcotic trafficking. One morning, at approximately 3:00 a.m., the motel clerk heard a loud argument between two people in the room next door to the office.

The clerk heard a man shout "Get out right now or I'll shoot you!" The clerk then heard someone leave the room next door. Shortly after that, the clerk received a call from the same room and was told that someone tried to break into the room. The motel clerk immediately called the police.

Because of the location, experienced Portsmouth police narcotics officers responded and spoke to the clerk. The clerk told the police that he had rented the room to a man named David Jones (Jones). The clerk pointed out to the police a black BMW that Jones registered as his vehicle. The clerk then warned the police that someone in the room must have a gun because he heard a man threaten to shoot another person, and that the occupant of the room had complained of an attempted break in.

The responding officers went to the room next door and knocked on the door. A man opened the door about five inches. When the door opened, the officer that knocked smelled alcohol and a strong odor familiar to him that arises from cooking cocaine powder to make crack cocaine. The officer displayed his badge and identified himself as a police officer responding to a potential break in.

The officer asked for Jones. The man in the room said that Jones had left. The officer then asked if the black BMW belonged to Jones. The man said "yes." The officer requested identification from the man who answered the door. Instead of complying, the man in the room turned without saying anything and started walking toward the bathroom. The motel room door swung open, and the officer followed the man into the room.

After entering the room, the officer saw what he recognized to be crack cocaine on the bed. The cocaine was in multiple baggies. He also found a single burner hot plate and a gun in the bathroom.

The officer then told the man that he was under arrest and again asked for identification. The man advised that his

driver's license was in the black BMW. The identification was retrieved, and the officers determined that the man was, in fact, David Jones and that the black BMW was his.

Jones was advised that his vehicle would be towed and impounded. Before the tow truck arrived, the police searched the vehicle to secure property in accordance with their impoundment policy and found \$20,000 in cash and several more packages of crack cocaine. Jones was charged with possession of cocaine with the intent to distribute.

At trial, the prosecution attempted to introduce into evidence the baggies of crack cocaine, the hot plate and gun found in the motel room, and the packages of crack cocaine and \$20,000 cash found in the vehicle.

Jones objected to the introduction of the evidence and moved to suppress the evidence obtained by the police from the motel room and from the vehicle.

(a) Assuming the arrest was valid, what legal arguments should be made by Jones and by the prosecution regarding the evidence found in the motel room, and who is likely to prevail? Explain fully.

(b) Assuming the arrest was valid, what legal arguments should be made by Jones and by the prosecution regarding the evidence found in the vehicle, and who is likely to prevail? Explain fully.

(c) Assuming the motions to suppress are denied, what evidence supports a conviction of possession of cocaine with the intent to distribute? Explain fully.

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(a) Assuming the arrest was valid, what legal arguments should be made by Jones and by the prosecution regarding the evidence found in the motel room, and who is likely to prevail? Explain fully.

Jones will argue that the search of the motel room was illegal because there was no search warrant and he did not consent. People and places are protected under the Fourth Amendment from unreasonable searches and seizures, and entry into a dwelling without a search warrant is presumptively unreasonable. That the search took place in a motel room does not negate that presumption because the motel room serves as the occupant's home once rented. By walking to the bathroom and failing to close the door, Jones did not consent to entry and under the facts, the police officer could not rely on plain view, because the facts show that he did not see the cocaine, gun, or other paraphernalia prior to unlawfully entering the room.

The prosecution will argue that no search warrant was necessary because the entry into the motel room was supported by probable cause, officer safety, and exigent circumstances. The officer was responding to a complaint that someone tried to break into the room, and that a gun was involved. When Jones opened the door just a few inches, he denied being the registered occupant of the room, and indicated that the registered occupant was not there. As such, Jones did not indicate that he was a guest of the registered occupant and, thus, he had denied standing to object to entry to the room. Even if Jones had properly identified himself, the Supreme Court has held that consent or exigent circumstances, such as the imminent destruction of evidence or the need to render aid, allows entry into the home. The prosecution may argue that when Jones turned to walk away without saying anything and allowed the door to swing open, he was implicitly consenting to the entry into the room. In addition, the officer was able to identify the odor of cooking cocaine, which would have been enough to establish probable cause to believe that the room contained evidence of a crime which could be imminently destroyed. The information the officer had obtained from the clerk, Jones' denial of being Jones, and Jones telling the officer that Jones had left but admitting that his car was still in the parking lot would have indicated that the room possibly contained a victim of violence who would be in need of aid. And when Jones turned to go to the bathroom instead of providing his identification, the officer also may have properly feared for his own safety and would have been justified in following Jones to ensure that Jones did not go to the other room to secure a weapon. Once in the room, the items were all in plain view.

Despite the presumption that a warrantless search is improper, given the circumstances, the court will likely find that Jones did not consent to entry, but that exigent circumstances permitted entry into the room.

✖✖ NOTE: It is possible, given the prompt saying to *assume the arrest was valid*, that one may argue the search of the room was proper given that the arrest was made in the room and that under the Fourth Amendment officers may search the immediate area where the arrest was made. However, given that the arrest did not take place until after the officers were inside the room and was based on seeing the evidence, this argument is questionable.

- (b) Assuming the arrest was valid, what legal arguments should be made by Jones and by the prosecution regarding the evidence found in the vehicle, and who is likely to prevail? Explain fully.

Jones will argue that the search of the vehicle was improper because he was not in the vehicle when he was arrested and thus, the officers had no basis to search the vehicle beyond obtaining his identification. Indeed, Jones might also argue that retrieving his identification was improper because once he was arrested he did not have the freedom of movement necessary to freely consent to entry to the vehicle to obtain the identification. Jones may also argue that his vehicle was properly parked, was not involved in the reason for his arrest, and there was no need to impound the vehicle and, thus, the officer's "inventory search" was improper.

The prosecution will argue that the vehicle needed to be impounded because its presence at the hotel was tied to Jones being a registered guest and that the impounding of the vehicle was necessary to protect Jones' property and perhaps additional evidence of a crime. Furthermore, Jones was told his vehicle would be towed and impounded and he did not object. Because the search was pursuant to impoundment procedures, the search of the vehicle was proper. In addition, given Jones' arrest on drug charges and his admission that the vehicle was his, the prosecution could argue that it was properly impounded for possible forfeiture.

The prosecution would likely prevail because the search was pursuant to impound procedures.

- (c) Assuming the motions to suppress are denied, what evidence supports a conviction of possession of cocaine with the intent to distribute? Explain fully.

The prosecution will rely on the crack cocaine found in multiple baggies on the bed, the additional packages of crack cocaine found in Jones' car, the \$20,000 cash found in the vehicle, as well as the hot plate, and gun found in the motel room.

Possession can be demonstrated by direct possession of the narcotics, but also by constructive possession which requires proof of knowledge of the illegal nature of the substance and dominion and control over the substance. Here, Jones occupied the motel room and owned the BMW where the cocaine was found. His presence as the only person in the motel room with the cocaine, the hot plate, the smell of fresh cooked cocaine, and the gun, will be enough to establish actual possession. Furthermore, by cracking the door only a few inches, denying he was Jones, trying to redirect the officers elsewhere by saying Jones had left, all support a finding that he knew the illegal nature of the items in his room. Likewise, the presence of the cocaine and the cash inside Jones' vehicle where his identification was found, will also prove his dominion and control over the substance and cash in his vehicle. Thus, this evidence will support a conviction of possession.

The presence of a large amount of cocaine, found "individually packaged," the hot plate, which is used to cook cocaine, the presence of the gun, and such a large amount of cash, all support a finding that he intended to distribute the cocaine.

Question 7 [Wills & Estates]

In 2019, Donna was reaching retirement age and thinking about her legacy. Her live-in boyfriend, Lonnie, despite his failing physical and mental health, was her soulmate and she wanted to make sure he was provided for upon her death.

Daniel and Kay, Donna's children from a prior marriage, were the joys of her life, but she also wanted to provide for others upon her passing. Donna decided to have Alice, a local Roanoke attorney, prepare her will and wanted to make sure that one or more of her favorite charities were beneficiaries of her estate.

Donna had a number of separate assets, including the couple's primary residence, "Primeland," a farm in Montgomery County, Virginia, which she inherited from her parents and which supplied supplemental income to Donna in her lifetime from the sale of crops harvested annually. She also had certain items of separate personal property, including a collection of rare stamps and a collection of rare postcards, both of which have significant monetary value.

Finally, she owned stock in Piper, a publicly traded company.

Donna's will, which was properly executed in 2019, named Alice as executor and provided as follows:

I hereby bequeath a life interest in Primeland, my primary residence, to my boyfriend Lonnie, for his use and enjoyment until his death, after which I give said real estate to my children, Daniel and Kay.

I give to the Roanoke Valley SPCA my collection of stamps.

I give certain personal property to those specified in a separate list, pursuant to Virginia law.

I give the residue of my estate to my children, Daniel and Kay.

After Donna's death in February 2023, Donna's sister-in-law, Barbara, found a handwritten list titled "Personal Property Distribution" from a notebook of Donna's, dated January 18, 2023, which had the following notations, without any signature or explanation from Donna:

My postcard collection should go to Montgomery Law School.

My stock in Piper should go to my executor, Alice.

All remaining personal property should go to Barbara, my sister-in-law.

Alice appropriately filed the will and qualified as executor of the estate. Daniel and Kay are now demanding that they be allowed to live at Primeland, rent free, due to Lonnie's health issues and in order to maintain the Primeland residence and farming operations.

Based on their status as remaindermen of the property, they also claim that they are entitled to receive profits derived from the ongoing and future farming operations at Primeland.

Barbara and representatives of Montgomery Law School are seeking the property conveyed by Donna in the January 2023 Personal Property Distribution list.

The SPCA and Donna's children are claiming that the distribution of personal property in the will should govern who receives such assets.

- (a)** What rights and duties, if any, does Lonnie currently have in Primeland, and is he responsible for property taxes? Explain fully.
- (b)** What rights and duties, if any, do Daniel and Kay currently have in Primeland and are they currently entitled to all or any portion of the income derived from the farming operations? Explain fully.
- (c)** Is Donna's January 2023 Personal Property Distribution list effective under Virginia law to transfer the listed assets to the recipients identified in the document? Explain fully.
- (d)** Who is entitled to:
1. The stamp collection? Explain fully.
 2. The postcard collection? Explain fully.
 3. The Piper stock? Explain fully.
 4. The residue of the estate? Explain fully.

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(a) Lonnie has a present possessory interest in a life estate in Primeland, giving him the current right to possess and use the real property during his life; he would also be responsible for paying the taxes on the property.

A life estate is a conveyance of real property where a specified life-tenant is entitled to possession of the property during their lifetime, and upon the life-tenant's death the property transfers outright to another party (i.e. a remainderman). No specific word are required to create a life estate. A life estate may be created by implication as well as by explicit language, provided the will shows the requisite intent. *Edwards v. Bradley*, 227 Va. 224, 228, 315 S.E.2d 196 (1984). "A testator's intention to convey such an estate must be plainly manifested in the will." *Feeney v. Feeney*, 295 Va. 312, 318, 811 S.E.2d 830 (2018). Extrinsic evidence may be considered only if the language of the will is ambiguous, that is,

susceptible to more than one interpretation. *Gaymon v. Gaymon*, 258 Va. 225, 230, 519 S.E.2d 142 (1999). The life-tenant is responsible for ordinary expenses and taxes relating to the property during their lifetime, and cannot commit waste.

Here, despite Primeland being the “couple’s home,” Donna was the sole owner Primeland since she inherited it from her parents. In 2019, Donna executed a will bequeathing a “life interest” in Primeland to her boyfriend Lonnie, “for his use and enjoyment until his death.” This language strongly supports Donna’s intention to create a life estate. As the holder of the life estate, Lonnie would have the right to exclusively live on the property, and use the property in any manner that did not interfere with the rights of the remainder. More specifically, Lonnie would be required to pay taxes on the property in order to protect the interest of the future interest holders.

Therefore, Lonnie has a present possessory interest in a life estate in Primeland, giving him the current right to possess and use the real property during his life; he would also be responsible for paying the taxes on the property.

(b) Daniel and Kay have a remainder in fee simple absolute in Primeland; they do not have the right to possess or receive profits from the land during Lonnie’s life.

The person who takes the property after the life tenant’s death is known as the remainderman. A life tenant “has the right of possession and to the full enjoyment and use of the land and all the profits arising during his estate therein.” 1 T.W. Harrison & James P. Cox, *Harrison on Wills and Administration for Virginia and West Virginia* § 19.14, at 19-34 (4th ed. 2019). See also *Livesay v. Boyd*, 164 Va. 528, 533, 180 S.E. 158 (1935) (explaining that a life tenant is entitled to the “entire income” generated by a property). When a person actively takes measures that degrade a property’s quality, value, or character, it’s regarded as voluntary or affirmative waste. An injunction to stay waste is the proper remedy.

Here, in Donna’s will she created a life estate for Lonnie, with a vested remainder for Daniel and Kay (“in after which I give said real estate to my children...”). Since Lonnie is the life tenant, only Lonnie has the right to possess Primeland and receive any profits from the same. Based on their status as remaindermen of the property, Daniel and Kay are not entitled to receive profits derived from the ongoing and future farming operations at Primeland. Additionally, since they are not concurrent owners with Lonnie, they cannot demand to live at Primeland. If Daniel and Kay are concerned about Lonnie’s mental and physical health and have evidence of his inability to maintain the Primeland residence and farming operations, then they could bring an action for waste.

Therefore, Daniel and Kay have a remainder in fee simple absolute in Primeland; they do not have the right to possess or receive profits from the land during Lonnie’s life. However, they also have the right to bring an action for waste if Lonnie fails to maintain the premises.

(c) No, Donna’s January 2023 Personal Property Distribution (PPD) list is not effective under Virginia law to transfer the listed assets to the recipients identified in the document.

A bequest through an unattested document is valid if it meets the requirements to be incorporated into a will by reference. Va. Code § 64.2-400 provides that, “If a will refers to a written statement or list to dispose of items of tangible personal property not otherwise specifically bequeathed, the statement or list shall be given effect to the extent that it describes items of tangible personal property and their intended recipients with reasonable certainty and is signed by the testator although it does not satisfy the requirements for a will.”

The written statement or list may be (i) referred to as one that is in existence at the time of the testator’s death, (ii) prepared before or after the execution of the will, (iii) altered by the testator at any time, and (iv) a writing that has no significance apart from its effect on the dispositions made by the will.

Here, Donna’s will read that she gave “certain personal property to those specified in a separate list, pursuant to Virginia law.” It expressly refers to another document and Donna’s intent to incorporate that document into her estate plan. The PPD also clearly describes the personal property to be distributed and its intended recipients. Despite being dated after the execution of the will (January 18, 2023), this does not defeat the document being incorporated by reference. The only issue is that the document is not signed by Donna.

Therefore, Donna’s Personal Property Distribution list is not effective to transfer the listed assets to the recipients identified in the document since it was not signed by Donna.

(d) Based on the above explanations provided in (a) – (c), the following are entitled to:

1. The stamp collection should go to Roanoke Valley SPCA based on the bequest made in the 2019 will.
2. The postcard collection should go to Daniel and Kay as the residuary takers in the 2019 will. Property that is not specifically devised, will go to the residuary takers, if any. Here, the will left the “residuary” of Donna’s estate to Daniel and Kay.
3. The Piper stock should also go to Daniel and Kay, for the same reasons as explained above.

4. The residue of the estate will also go to Daniel and Kay for the same reasons explained above.

Question 8 [Torts & VCV(c)]

Olivia owns a fenced vacant lot in the town of Wytheville, Virginia. She hired an architect, Arthur, to design and build a retaining wall to prevent the erosion of a steep hill on the lot. The wall was completed on January 1, 2010, using ordinary construction materials of rebar, iron bolts, cement and cinderblocks. When he installed the wall, Arthur told Olivia that the wall should be inspected annually for rusted bolts and that if bolts were found to be rusted, they would need to be replaced or the wall could collapse.

For the next several years, Olivia did an annual inspection but found no issue with the bolts. She stopped inspecting the wall in 2017. Between 2017 and 2023, bolts in the wall had become rusted and by April of 2023 were severely rusted. The rusted bolts were not obvious from casual observation but would have been found in an inspection.

On April 1, 2023, Olivia hired Gardner to perform landscaping work on the lot near the wall. They had no written contract. While Gardner was working near the wall, Susan was walking by the lot and saw the work that Gardner was doing.

She stepped over the fence and walked over to him to get a closer look at the flowers he was planting.

While Gardner and Susan were standing near the wall, a rusted bolt failed and the wall collapsed on Gardner and Susan, injuring them both. Gardner and Susan have brought actions against Olivia for their injuries. Before suit was filed, Olivia learned that Arthur could have used rust-proof bolts in his design but failed to do so.

(a) What duties, if any, did Olivia owe to Gardner and did she breach those duties? Explain fully.

(b) What duties, if any, did Olivia owe to Susan and did she breach those duties? Explain fully.

(c) Can Olivia bring a contribution claim against Arthur for failing to design and construct the wall with rust- roof bolts? Explain fully.

✖✖

(a) Olivia owed duties to Gardner to maintain her premises in a reasonably safe condition and warn him of unsafe conditions about which she had actual or constructive notice. Olivia likely breached those duties. At issue is the determination of Gardner's status as an entrant in applying the appropriate standard of care under Virginia premises liability law.

In Virginia, the duty owed to a plaintiff for dangerous conditions on the premises depends on the plaintiff's classification as invitee, licensee, or trespasser. An invitee is a person who enters onto the land in response to an invitation by the owner of the premises either for a business purpose or as members of the public. The landowner owes to its invitees a duty to (1) to use ordinary care to have the premises in a reasonably safe condition for the invitees' use consistent with the invitation, and (2) to use ordinary care to warn its invitees of any unsafe condition that was known, or by the use of ordinary care should have been known, to the owner; except that the owner has no duty to warn its invitees of an unsafe condition which is open and obvious to a reasonable person exercising ordinary care for his own safety. Generally, the plaintiff must introduce evidence of the owner's actual or constructive knowledge of a defective condition on the premises. This can be shown by evidence that the defect was noticeable and had existed for a sufficient length of time to charge its possessor with notice of its defective condition.

Here, Gardner was an invitee because Gardner entered onto Olivia's property for the purpose of performing landscaping services in response to her invitation to do so. Thus, Olivia owed Gardner a duty to have her lot in a reasonably safe condition for Gardner's use and to exercise ordinary care to warn Gardner of an unsafe condition about which she knew or should have known. The facts establish that on April 1, 2023, Gardner was standing near a retaining wall previously constructed in 2010 on Olivia's property when a rusted bolt failed and the wall collapsed on Gardner, injuring him. The facts also establish that Arthur, the architect that designed and built the wall, told Olivia that the wall should be inspected annually for rusted bolts and that if bolts were found to be rusted, they would need to be replaced or the wall could collapse. While Olivia did an annual inspection for several years, finding no issue with the bolts during that time period, she stopped inspecting the wall in 2017. Between 2017 and 2023, bolts in the wall had become rusted and, by April of 2023, were "severely" rusted. Furthermore, the rusted bolts were not obvious from casual observation by Gardner, but would have been found in an inspection by Olivia.

Based on these facts, Olivia failed to exercise reasonable care to warn Gardner of an unsafe condition on her lot about which she knew or should have known. Given the period of time during which Olivia did not conduct the inspections of her wall and the fact that the bolts had become “severely” rusted at the time of Gardner’s injury, Olivia had constructive notice of the defect in the wall. Thus, it is likely that Olivia breached the duties she owed to Gardner.

(b) Olivia likely owed no duty of care to Susan with regard to dangerous conditions on her lot and, thus, breached no duties to Susan. At issue is the determination of Susan’s status as an entrant in applying the appropriate standard of care under Virginia premises liability law.

As discussed previously, the duty of care owed to a plaintiff for dangerous conditions on the defendant’s premises depends on the plaintiff’s status as an entrant. The more the landowner or possessor anticipates or permits the presence of these entrants, the greater the duty of care owed. As such, the duty owed to trespassers is limited compared to the duties owed to licensees or invitees. Specifically, for unknown trespassers, the law imposes no duty of care with regard to dangerous conditions on the premises though the landowner must refrain from inflicting intentional or wilful harm. Once a trespasser becomes known to the landowner, a minimal duty arises to warn of or make safe artificial conditions that are highly dangerous and concealed if these conditions are known to the land possessor in advance.

Here, Susan was walking by Olivia’s property while Gardner was working near the wall and stepped over Olivia’s fence. Susan then walked over to Gardner to get a closer look at the flowers he was planting when the wall collapsed, injuring both Susan and Gardner. There are no facts to show that Susan was invited to enter onto Olivia’s lot or that Olivia anticipated Susan’s presence on her lot. Because she was an unknown trespasser, Olivia owed no duty of care to Susan with regard to dangerous conditions on her property. Furthermore, there are no facts showing Olivia inflicting any intentional harm upon Susan. In short, Olivia breached no duties to Susan.

(c) Olivia does not appear to have a viable contribution claim against Arthur for failing to design and construct the wall with rust-proof bolts. The primary issue is whether any such contribution claim would be affected by Virginia’s statute of repose limiting actions arising out of improvements to real property.

In Virginia, contribution among tortfeasors is allowed under the Virginia Code when negligence is the cause of harm without involving moral turpitude. However, a crucial requirement is that the party from whom contribution is sought must have been liable to the plaintiff, meaning the injured party could have recovered against the contribution defendant. Furthermore, the Virginia Code contains a statute of repose providing that no action to recover for any injury arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution for damages sustained as a result of such injury, shall be brought against any person performing or furnishing the design or construction of such improvement to real property more than five years after the performance or furnishing of such services and construction. See. Va. Code § 8.01-250.

Here, Arthur completed the design and construction services in connection with the retaining wall on January 1, 2010. Although it is questionable whether Gardner and Susan would have a viable cause of action in negligence against Arthur, no action could have been brought more than 5 years after this date of completion. Moreover, the statute of repose expressly states that no action for contribution could be brought after this time period. Therefore, Olivia does not have an enforceable contribution claim against Arthur.

AlBritton v. Commonwealth, 299 Va. 392 (2021); *Franconia Assoc. v. Clark*, 250 Va. 444 (1995); *Grim v. Rahe, Inc.*, 246 Va. 239 (1993); *Pierce v. Martin*, 230 Va. 94 (1985); *Tate v. Rice*, 227 Va. 341 (1984); *Colonial Stores v. Pulley*, 203 Va. 535 (1982); Va. Code §§ 8.01-34; 8.01-250.

✘✘ In (c) while a complete answer should discuss the Statute of Repose [§ 8.01-250], we think some credit should be given for a quality discussion of the architect’s negligence and the right to seek contribution in the primary case.

Question 9 [Professional Responsibility]

Whitney and Henry suffered years of turmoil in their marriage. Recently, Henry retained Lawrence, a local attorney, to represent him in a divorce action. Lawrence disclosed in his initial meeting with Henry that he knew Whitney from volunteering with her on the local Parent-Teacher Association (PTA). He told Henry that during their work together on the PTA, he learned some negative personal information about Whitney’s past which would be relevant to the issues in the case and would likely assist Henry in getting favorable terms for the divorce.

Soon thereafter, Lawrence filed a Complaint for Divorce in the Circuit Court for the City of Roanoke, Virginia, on Henry's behalf seeking sole custody of the couple's children. Whitney retained Alex, who had a local domestic relations practice. In their initial meeting, Whitney balked at his high hourly rate. In response, Alex told Whitney that he would charge a flat fee of \$25,000 to represent her until the divorce was finalized, including all issues of child custody and support and throughout all stages of the litigation.

According to the written "Flat Fee a/k/a Advanced Fee Agreement," the fee was earned upon receipt by Alex and was non-refundable. Whitney promptly paid \$20,000 of Alex's fee. After depositing the money into his firm's checking account, Alex began work on the case, including responding to the Complaint.

As the case progressed, Lawrence was able to effectively tarnish Whitney's credibility with the trial judge by using her personal secrets from the past to catch her in failing to respond truthfully to written interrogatories. Then, using a friend's login information to avoid disclosing his own identity as Henry's attorney, Lawrence shared Whitney's secrets on a local neighborhood association website in hopes of influencing Whitney's neighbors to be witnesses against her in the custody battle with Henry.

After all preliminary hearings had occurred and most discovery in the case was complete, Alex was diagnosed with a serious illness and notified Whitney that he planned to withdraw from the case. Already unhappy with how the case was going, Whitney demanded return of the fee paid to Alex and a copy of the file which Alex had created during the handling of the case. Whitney also demanded a written accounting of the amount of time Alex had spent on the case. Alex reminded Whitney of their fee agreement and of the non-refundable nature of fees already received.

Alex then suggested that, although he had already spent the \$20,000 paid, he would forgive the remaining \$5,000 still owed. Alex also told Whitney that until an agreement on his fee could be reached, Whitney's file would be held at Alex's office and not released to her.

Whitney filed a complaint against both Lawrence and Alex with the Virginia State Bar (VSB). The VSB subpoenaed a copy of Whitney's file from Alex and Alex refused to provide it. He thought Whitney might get a copy of her file from the VSB and believed she was not entitled to the use of his work product prior to resolution of the fee dispute.

Lawrence then received a request for an interview with a VSB investigator regarding Whitney's complaint. He refused to respond to the VSB's request, without explanation.

(a) Did Lawrence have a conflict of interest in representing Henry based on his knowledge of Whitney's personal information, and did his use of the information violate any ethical Rules? Explain fully.

(b) What ethical violations, if any, arose from Alex's fee agreement with Whitney and his handling of her money? Explain fully.

(c) What ethical responsibilities, if any, did Alex have when he was unable to complete representation of Whitney in the divorce? Explain fully.

(d) What ethical violations, if any, arose from Alex and Lawrence's responses to the VSB? Explain fully.

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(a) Did Lawrence have a conflict of interest in representing Henry based on his knowledge of Whitney's personal information, and did his use of the information violate any ethical Rules? Explain fully.

Lawrence's prior knowledge of Whitney through the PTA did not create a conflict of interest under Rule 1.7. Whitney is not a former client, and he Lawrence has no responsibilities to her as a "third person" or because of his own "personal interest" that might materially limit his obligations to his client (Henry). Lawrence and Whitney's work together on the PTA was not in Henry's capacity as a lawyer, so nothing he learned about Whitney from their PTA service would be protected as confidential under Rule 1.6. Lawrence is free to use his prior knowledge in pursuing Henry's claims in the divorce proceeding. (Even if it torpedoed his relationship with everyone else on the PTA...)

However, Lawrence's dissemination of Whitney's information on the neighborhood website – while impersonating someone else! – clearly violated VSB Rule 4.3 in that Lawrence stated or implied to users of that website that he was disinterested in the matter involving Whitney's prior actions, and he failed to disclose that he was representing Henry. He also runs into problems for the same website activity under VSB Rule 4.4(b) ("us[ing] methods of obtaining evidence that

violate the legal rights” of a third person). Finally, impersonating someone else on the neighborhood website likely violated Rule 8.4(c) (“engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer’s fitness to practice law”).

- (b) What ethical violations, if any, arose from Alex’s fee agreement with Whitney and his handling of her money? Explain fully.

Three ethical problems possibly arise from Alex’s fee agreement with Whitney and how he handled her \$20,000 payment. First and most obviously, the flat fee charged (\$25,000) might not be a reasonable fee per the standards set out in VSB Rule 1.5. Second, given that this was pre-payment of a flat fee, the funds likely should have been held in a trust account until the legal work was completed. Funds could be withdrawn from the trust account, so long as Alex kept records as to how much he was withdrawing for payment of his actual services as he completed the work. See VSB Rule 1.15. Third, Alex was obligated to refund any advance payment of the fee that had not been earned. See VSB Rule 1.16(d) (requiring refund of “any advance payment of fee that has not been earned”).

- (c) What ethical responsibilities, if any, did Alex have when he was unable to complete representation of Whitney in the divorce? Explain fully.

Rule 1.16 guides Alex’s obligations to Whitney in seeking to terminate the representation. Under Rule 1.16(a), a lawyer must withdraw if “the lawyer’s physical or mental condition materially impairs the lawyer’s ability to represent the client,” which is arguably the case here with Alex’s “serious illness.” But even then, Alex cannot summarily withdraw. Since the matter is already before a court, Alex can only withdraw with leave of the tribunal. See Rule 1.16(c) (“counsel of record shall not withdraw except by leave of court after compliance with notice requirements...”). Depending on the speed and severity of his illness, Alex’s withdrawal might be more appropriately managed permissively under Rule 1.16(b), which guides when a lawyer “may” withdraw. Under Rule 1.16(b), Alex may not withdraw if his withdrawal would have a “material adverse effect on the interests of the client,” which clearly seems to be the case here. Alex is leaving Whitney high and dry.

Even if Alex’s withdrawal were permissible, he must give Whitney a copy of her file upon her request “whether or not the client has paid the fees and costs owed the lawyer.” See Rule 1.16(e). This rule is also clear that a lawyer cannot use a fee dispute as a basis for refusing to accede to the client’s request for her papers. Documents in the file that unquestionably must be given to Whitney include: “original, client-furnished documents and any originals of legal instruments or official documents,” (e.g., wills) which are the property of the client. In addition, Whitney is owed copies from the lawyer’s file of all attorney-client communications, pleadings, discovery responses, working and final drafts, investigative reports, legal memos, and other attorney work product documents. In short, Whitney is owed the entire file except for a limited number of materials “intended only for internal use,” such as a conflicts check.

- (d) What ethical violations, if any, arose from Alex and Lawrence’s responses to the VSB? Explain fully.

As stated above, Alex cannot deny Whitney access to her file because of their fee dispute. See Rule 1.16(e). Whitney is owed the entire file except for a limited number of materials. Thus, Alex did have an obligation to share the file with the VSB assuming that Whitney waived any confidentiality rights.

And both Alex and Lawrence run into trouble under VSB Rule 8.1, which states that a lawyer cannot “fail to respond to a lawful demand for information from ... a disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by Rule 1.6,” (relating to confidentiality). If Lawrence or Alex believe that materials requested by the VSB are protected from disclosure under Rule 1.6, then they need to say so. And that invocation of Rule 1.6 would have to be in service of their representations of Whitney and Henry – not to shield their own personal misdeeds. Failing to respond (Lawrence) and refusing to respond because of a fee dispute (Alex) are not permissible reasons for denying the VSB requests.