Suggested Answers & Comments to the Essay Questions
on the February 2026 Virginia Bar Exam

Submitted by Jennifer Franklin
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Question 1 (Professional Responsibility)

Heavy Metals Corp. (Heavy Metals) manufactures batteries for electric vehicles. It sought to buy land to mine monazite, a source of rare earth metals that it used to manufacture high-efficiency batteries. Linda Lawyer represented Heavy Metals in the purchase of White Acre, a tract of land in Henry County, Virginia. Heavy Metals hired Linda because Linda's law partner, Paul, and Heavy Metals' President were college roommates and close friends.

Heavy Metals asked Linda to hire a geologist. The geologist confirmed that White Acre contained commercial-grade levels of monazite. The geologist also privately told Linda that an identically sized adjoining tract of land, Green Acre, likely contained even higher levels of monazite than White Acre. Heavy Metals purchased White Acre for $100,000.

After her representation of Heavy Metals ended, Linda created a company, MZ, Inc. (MZ), wholly owned by her daughter. MZ purchased Green Acre for $100,000. MZ then approached Heavy Metals and offered to sell Green Acre to Heavy Metals for $200,000.

When Heavy Metals learned about Linda's connection to MZ, its new counsel, Anne Attorney, wrote to Linda demanding that MZ reduce its selling price for Green Acre to $100,000 or Heavy Metals would file a Virginia State Bar ethics complaint against Linda.

Linda shared the letter with her law partner, Paul, who then invited Heavy Metals' President and his wife over for dinner, which they do regularly. Over cocktails, he suggested that Heavy Metals and Linda could "work things out" by having Heavy Metals buy Green Acre for $150,000.

(a) What Rules of Professional Conduct, if any, has Linda violated? Explain fully.

(b) What Rules of Professional Conduct, if any, has Anne violated? Explain fully.

(c) What Rules of Professional Conduct, if any, has Paul violated? Explain fully.

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a. **What Rules of Professional Conduct, if any, has Linda violated? Explain fully.**

Linda's ethical problems begin with her creation of MZ, Inc., wholly owned by her daughter. Although Linda's work on behalf of MZ occurred after her representation of Heavy Metals had ended, it nevertheless violates Virginia Rules of Professional Conduct on conflicts of interest.

First, Linda violates Rule 1.9(a), which 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." Comment 2 to Rule 1.9 confirms the problem presented by Linda's actions: "When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests clearly is prohibited." Creating a company (MZ) for the purpose of acquiring Green Acre and then trying to sell it to Heavy Metals at an inflated price was "materially adverse" to her former client's interests and was "substantially related" to her work for that former client.

Second, Linda also violates Rule 1.9(c)(1) in that she uses "information relating to or gained in the course of the representation to the disadvantage of the former client." Here, Linda only learned about the value of Green Acre because of the geologist's report. That report, which was prepared at the direction of her former client (Heavy Metals), clearly relates to Linda's former representation of Heavy Metals. It is therefore confidential information entitled to protection under Rule 1.6.

Third, the fact that Linda's daughter is the owner of MZ, Inc. could potentially create a future conflict once Anne (improperly) seeks to use the threat of a disciplinary action against Linda to force the sale of Green Acre. Although Rule 1.7 does not prohibit familial representations, it does advise that conflicts might arise due to the "personal interest of the lawyer." To the extent that Linda's daughter feels pressure to sell Green Acre at less than market value to protect her mother, that could possibly present such a conflict. At that point, Linda would be well-advised to tell her daughter that MZ, Inc. needs independent counsel to assist with the sale of Green Acre. (Perhaps Eddie Albert and Eva Gabor would be available for hire.)

b. **What Rules of Professional Conduct, if any, has Anne violated? Explain fully.**

Anne violates Virginia's Rules of Professional Conduct in threatening to file an ethics complaint against Linda in order to pressure Linda's new client (MZ) into selling Green Acre at below its market value. Virginia Rule 3.4(i) is crystal clear that a lawyer shall not "threaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter." That, of course, is precisely what Anne has done.

If Anne has "reliable information" that Linda has violated legal ethics rules in a way that casts doubt on the Linda's "honesty, trustworthiness or fitness to practice law," then she is obligated ("shall") report Linda's professional misconduct to the Virginia State

Bar. *See* Virginia Rule 8.3(a). Anne cannot, however, hold onto this reporting obligation for the purpose of securing an advantage for her client.

c. **What Rules of Professional Conduct, if any, has Paul violated? Explain fully.**

Paul errs when he meets with the President of Heavy Metals *and* suggests a path for resolving the controversy over the sale of Green Acre from MZ to Heavy Metals. Virginia Rule 4.2 states, "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."

The fact that Paul and the President are longtime friends would not prohibit them from getting together for dinner (as they regularly do), so long as they avoid the topic of Green Acre entirely. Comment 4 to Rule 4.2 confirms that the rule "does not prohibit communication with a represented person, or an employee or agent of a represented person, concerning matters outside the representation." If, over dinner, the President raises the issue of Green Acre, then it would be incumbent on Paul to immediately terminate that discussion.

Question 2 (Local Government)

The City of Richmond, Virginia, was determined to keep minor league baseball in the city. With that goal, it built a new and improved stadium set to open in June of 2023. Because it contained stateof-the-art amenities, the City also planned to rent the facility to local schools and colleges for athletic tournaments and festivals.

On May 31, 2023, Adam was walking by the stadium and was excited to see the new facility. He saw no one else at the site. There were no barriers to prevent entry, no warning signs, and no "No Trespassing" signs. Adam was able to enter the stadium and walked up a ramp to get a look at the field. He failed to see a metal grate on the ramp. The grate gave way when he stepped on it, causing him to fall. Adam suffered a severe injury to his leg. He was hospitalized, underwent surgery, and was incapacitated for several months.

Adam's brother Bill was an assistant City Manager for the City of Richmond. When Bill visited Adam in the hospital, Adam told him what happened at the stadium, how it happened, and that he was contemplating hiring an attorney. Bill took notes and wrote a report describing in detail when and where the accident happened, and how a grate in the concourse had given way, causing Adam's fall and injuries. Adam asked Bill to deliver the report to the Richmond City Manager. Bill delivered the report to the City Manager one week after the accident.

Adam then hired an attorney who filed a lawsuit against the City of Richmond on June 1, 2024. The lawsuit alleged that the City's gross negligence was the cause of Adam's injuries and sought damages. In the pleadings, Adam claimed that the City of Richmond owned the property where

he was injured; that at the time of injury, the contractor had completed all work on the stadium and had removed all equipment from the premises; that the City had accepted the completed work; that the City had failed to lock any of the entry gates; that the City Engineer was aware that the grate had been improperly installed because employees discovered the defective grate and notified the City Engineer on two occasions weeks before the injury; and that there were no signs or barriers warning of the danger or preventing entry to the stadium.

The City responded to Adam's lawsuit by arguing that it had not been given proper notice of Adam's claim and that Adam's negligence claim does not support any recovery for his damages.

(a) How should the Court rule on the City's argument that Adam failed to give proper notice of his claim? Explain fully.

(b) How should the Court rule on the City's argument that Adam's allegations do not support a claim for damages based upon negligence by the City? Explain fully.

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(a) How should the Court rule on the City's argument that Adam failed to give proper notice of his claim? Explain fully.

The Court should deny the City's argument that Adam failed to give proper notice of his claim. A plaintiff bringing suit against a City for negligence must provide notice to the governmental defendant within 6 months after the cause of action arises. The notice must be in writing and must describe the nature of the claim and the date, time, and place where the injury occurred. The notice must be to the city attorney or to the mayor or chief executive of the locality. Any form of delivery is acceptable and a substantial equivalent to notice is permitted if the government official is actually aware of the incident.

Here, Adam's brother was the assistant City Manager for the City of Richmond, and he wrote a report describing the date, time, and place where the injury occurred, as well as the nature of the injury. At Adam's request, his brother then delivered the report to the City Manager one week after the accident. Thus, Adam provided notice in writing within 6 months as required and, in any event, the City Manager was actually aware of the incident. Thus the Court should reject the City's argument that Adam did not provide notice.

(b) How should the Court rule on the City's argument that Adam's allegations do not support a claim for damages based upon negligence by the City? Explain fully.

The Court should rule against the City on its argument that Adam's allegations do not support a claim for damages based on negligence by the City.

First, Cities and towns have sovereign immunity for claims arising from functions and acts/omissions of employees and agents acting within governmental functions, which include police and fire protection, operation of public educational facilities, hospitals, jails, and garbage removal. Conversely proprietary functions, which include, routine maintenance of streets, provision of utilities, operation of housing authorities, and maintenance of recreational facilities,

do not trigger sovereign immunity. Here because the baseball stadium is recreational, its maintenance should fall within the proprietary function and sovereign immunity should not bar the claim.

As to Adam's claim of gross negligence, he will likely prevail. Gross negligence is negligence that shows an utter disregard of prudence amounting to the complete neglect of safety of another. When dangers are obvious, a city is under no obligation to install safety devices. Here, the stadium was not yet open to the public, but it was not locked and there were no signs indicating that members of the public could not access the facility. There were no signs or barriers to prevent a person from accessing the stadium or walking on the defective grate, and the grate itself was not obvious, as Adam did not notice it before he walked on it and it broke. The City was aware of the danger and did nothing to prevent the injury that occurred. In the absence of signs indicating the facility was closed or not accessible to the public and no warning signs, Adam may succeed in his claim of negligence. The city may argue that because the stadium was not yet to open it should not be liable, that Adam was a trespasser to whom no duty was owed, or that he was contributorily negligent, but those arguments will likely fail because the city made no attempt to prevent entry. But again, the City can only be held liable for gross negligence, not ordinary negligence, in the maintenance of the stadium, a recreational facility. Va. Code sec. 15.2-1809.

Question 3 (Virginia Criminal Procedure)

While on routine traffic patrol, Officer Parker (Parker) observed an accident on Third Street in Arlington, Virginia. A car driven by Davis failed to stop at a stoplight and collided with another vehicle. The drivers of the vehicles were not injured, but Davis' vehicle was disabled by the collision and could not be driven off Third Street.

In order to issue Davis a citation for his failure to stop at the traffic light, Parker asked Davis for his driver's license. Parker ran the license through an electronic database of criminal records, which revealed an active warrant for Davis' arrest. In light of this information, Parker told Davis that he was under arrest and proceeded to pat him down for weapons and search the contents of his pockets. Parker found and seized a handgun that Davis had under his coat.

Parker then reached into Davis' coat pocket and found an opaque bag, which he had to open in order to see its contents. Inside that bag he found four smaller, sealed clear baggies that each contained a white powdery substance, as well as a note that said, "8 pm, corner 5th & B St." Based on his training and experience, Parker believed that the white powdery substance was fentanyl. Subsequent laboratory analysis confirmed that the four smaller bags seized from Davis' coat pocket each contained almost one gram of fentanyl.

Parker also found $5,000 in bills and a cell phone in the front pocket of Davis' pants. Parker confiscated the money. He searched through the digital contents of the cell phone and read several text messages that Davis had sent to multiple individuals that night telling them that he

would meet them at various locations, including 5th and B Streets at 8 p.m. He also found an image of Davis snorting a powdery substance from the surface of a large glass table.

Pursuant to the standard procedure of the Arlington Police Department concerning stalled or disabled vehicles, Parker arranged to have Davis' car towed to the impound yard maintained by the Department. Later that day, Parker, in compliance with standard police department procedures, searched Davis' car to make an inventory of its contents to prevent items from being lost and avoid accusations of theft by the police. In the back seat of the car, Parker found digital scales covered with a white powder, and he seized them as evidence.

Davis was charged with possession of fentanyl with the intent to distribute it. Prior to his trial, he moved to suppress the handgun, the cash, the opaque bag and its contents, the cell phone and its digital contents, and the digital scales found in the car, on the ground that these items were obtained in unlawful warrantless searches.

(a) How should the Court rule on the motion to suppress the handgun and the cash? Explain fully.

(b) How should the Court rule on the motion to suppress the opaque bag? Explain fully.

(c) How should the Court rule on the motion to suppress the cell phone and its digital contents? Explain fully.

(d) How should the Court rule on the motion to suppress the scales? Explain fully

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(a) How should the Court rule on the motion to suppress the handgun and the cash? Explain fully.

Under the Fourth Amendment and Virginia law, a warrantless search is presumed to be unreasonable. However, police may search a person and the items on their person without a warrant as part of a search incident to a lawful arrest. This exception to the warrant requirement is based on the policies of protecting police officers and preserving evidence.
Here, Officer Parker arrested Davis based on an active warrant and immediately searched Davis's person. During this search, Parker found a handgun under Davis's coat and $5,000 in cash in his pants pocket. Both items were within Davis's immediate control and were discovered during the proper scope of a search incident to arrest.
The Court should deny the motion to suppress the handgun and the cash.

(b) How should the Court rule on the motion to suppress the opaque bag? Explain fully.

Under the Fourth Amendment and Virginia law, searches conducted without a warrant are presumed to be unreasonable. One exception to this rule is the search incident to a lawful arrest, which permits police to search not only the person arrested but also closed containers found on

that person at the time of arrest. This includes the authority to open and inspect items such as bags or pouches that might contain weapons or evidence.

Here, Officer Parker found the opaque bag in Davis's coat pocket while searching him at the time of arrest. Because the bag was on Davis's person and found in the course of a valid search incident to arrest, Officer Parker was permitted to open the bag and inspect its contents, revealing four sealed clear baggies of what proved to be fentanyl and a note indicating a meeting time and location.
The Court should deny the motion to suppress the opaque bag.

(c) How should the Court rule on the motion to suppress the cell phone and its digital contents? Explain fully.

Under the Fourth Amendment and Virginia law, a warrantless search is presumed to be unreasonable unless it falls within a recognized exception. One exception permits officers to search the person arrested and the items found on that person, including a cell phone. However, the U.S. Supreme Court in *Riley v. California* held that this exception does not extend to the digital contents of a cell phone. Officers must obtain a warrant before searching those contents unless another exception applies.

Here, Officer Parker lawfully took Davis's cell phone during the arrest. However, Parker searched through the phone's digital contents without a warrant, reading text messages in which Davis told multiple individuals he would meet them at various locations, and viewing a photo of Davis snorting a powdery substance. There is no indication that Davis consented to the search, that exigent circumstances existed, or that any other recognized exception to the warrant requirement applied. Parker's search of the phone's digital contents was therefore unconstitutional, and the evidence obtained from it must be suppressed.
The Court should grant the motion to suppress the digital contents of the cell phone.

(d) How should the Court rule on the motion to suppress the scales? Explain fully.

The Fourth Amendment and Virginia law permit police to conduct an inventory search of a lawfully impounded vehicle, without a warrant, if the search follows standard police procedures and is not simply for the purpose of investigation.

Here, Davis's car was disabled in the collision and could not be driven off Third Street, making impoundment necessary. Pursuant to standard Arlington Police Department procedures, Officer Parker arranged to have the car towed to the impound yard. Later that day, and in compliance with those same standard procedures, Parker searched the car to make an inventory of its contents to prevent items from being lost and to avoid accusations of theft. In the course of that inventory search, Parker found digital scales covered with a white powder in the back seat. There is no indication that the search was conducted for investigative purposes or that it exceeded the scope of a routine inventory search.
The Court should deny the motion to suppress the scales.

Question 4 (Wills)

In 2015, Harry, who lived in Suffolk, Virginia, executed a valid will which, after the usual introductory language, stated:

• *I nominate my wife, Winnie, as the executor of my estate. If Winnie is not able to serve, then I nominate my neighbor, Nancy*.

• *I give my 500 shares of City Bank stock to my cousin, Conner*.

• *I direct that my real estate be sold, and the proceeds paid to my wife, Winnie.*

• *I direct that the $100,000 in my savings account be held in trust and the income paid to the Suffolk Humane Society*.

The will had no other provisions.

In 2020, Harry and Winnie divorced. Conner died that year and was survived by his adopted son, Dan. Conner had no other descendants.

In 2021, the Suffolk Humane Society shut down and ceased to exist. About 5 miles east of where it had been located, there is another humane society that provides similar services.

In 2024, Harry died. He was survived by his brother, Bill. Harry had no children, and his parents pre-deceased him.

When Harry died, his estate consisted of a farm in Suffolk, 1,000 shares of stock in Stone National Bank, some jewelry and furniture, and a savings account with a balance of $100,000.

When Harry's will was executed in 2015, Harry owned 500 shares of stock in City Bank. That bank later merged into Stone National Bank, which issued 1,000 shares of its stock to Harry in exchange for his 500 shares of stock in City Bank.

After Harry's death, his will was probated, the farm was sold, and all taxes and debts were paid.

(a) To whom should the 1,000 shares of Stone National Bank stock be distributed? Explain fully.

(b) To whom should the jewelry and furniture be distributed? Explain fully.

(c) To whom should the $100,000 in the savings account be distributed? Explain fully.

(d) To whom should the net proceeds from the sale of the farm be distributed? Explain fully.

(e) Who should be appointed to serve as Harry's executor? Explain fully

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a. There are two issues here: whether the 1,000 shares of Stone National Bank stock owned by Harry's estate at the time of his death should be passed down in the same way he disposed of his 500 shares of City Bank stock in his will, and, if so, whether they should proceed to the adopted son of his cousin, Conner, or go through intestacy.

1. The first issue here is whether the Stone National Bank stock will be passed down in the same way as the City Bank stock disposed of in the will. Under the doctrine of ademption, a specific bequest identified in the will, but not in the estate of the decedent, is considered extinguished and is not given to the beneficiary; however, under Va. Code § 64.2-415(B)(1), this does not apply to securities of another entity acquired with respect to the securities mentioned in the bequest as the result of a merger or other similar action initiated by the entity. Here, City Bank merged with Stone National Bank, which issued the new stock to Harry as a result of the merger. The 1,000 shares of Stone National Bank stock therefore fall within the ademption exception and are not extinguished but pass on under the same terms as the 500 shares of City Bank stock would have.
2. The second issue here is, since Harry did not provide a residuary clause or an alternative beneficiary for Conner, whether the stock shares lapse into intestacy or whether they go to Conner's adopted son, Dan. Under Virginia's version of the antilapse statute codified in Virginia Code § 64.2-416, in most cases, if a bequest lapses it falls into the residue; however, that section makes an exception under Virginia Code § 64.2-418, under which a predeceased beneficiary is a grandparent of the testator or a descendent of the testator's grandparent, the descendants of the deceased beneficiary take in their place. This applies to both lineal and adopted descendants, as adopted children are considered the children of their adopted parents under Virginia Code § 64.2-102(1). Here, as Harry's cousin, Conner is a descendant of Harry's grandparent and fits the qualifications for the exception under § 64.2-418, and Dan qualifies as Conner's descendant as an adopted child. Therefore, the antilapse statute will substitute Dan in Conner's place as the beneficiary of the 1,000 shares of Stone National Bank stock.

b. The issue here is what happens to property not specifically bequeathed in a will without a residuary clause. Under Virginia Code § 64.2-401, a testator has the right to make a will that disposes of any property which, if not disposed of, would otherwise pass by intestate succession. Under Virginia's intestacy model, codified in Virginia Code § 64.2-200, property not disposed of by will passes in order first to the surviving spouse, to children and their descendants, to parents and their descendants, and then to siblings and their descendants. Additionally, under Virginia Code § 64.2-412(B), if a gift is made to a spouse and the couple subsequently divorce after the will is executed, the divorce revokes any disposition to the now ex-spouse. Here, Harry's will only provided for the disposition of his stock shares, the sale of his real estate, and his savings account, and did not dispose of any other property by name or have a residuary clause that disposed of the remainder of his assets. Any remaining items, which here are the jewelry and furniture, pass through intestacy. Since Harry and Winnie are divorced, she is not able to take either as a named recipient in the will (since the will was executed prior to the divorce) or, as she is not a current spouse at the time of death, in intestacy. Harry has no children and his

parents have predeceased him, and his only sibling is Bill. Therefore, as Harry's sole intestate heir, Bill will take the jewelry and furniture.

c. There are two issues here: first, whether a testator can create a testamentary charitable trust in their will, and second, whether the court can modify that trust if the named trust beneficiary has ceased to exist before the death of the testator.

1. The first issue here is whether Harry can create a testamentary trust in his will. As Harry died in 2024, Virginia Code § 64.2-427, which governs deaths after June 30, 1999, applies. Section A of § 64.2-427 allows a testator to create a testamentary trust in their will. If a trusteeship is vacant for a charitable trust, Virginia Code § 64.2-757(D) allows that vacancy to be filled by a person designated by the trust terms, by a person selected by the charitable organization, or by a court appointment. Here, Harry has created a testamentary trust relationship by designating the $100,000 in his savings account to be held in trust for the benefit of the Suffolk Humane Society, which constitutes a valid testamentary trust under § 64.2-427. While Harry has not designated a trustee, since this is a charitable trust, the court can appoint a trustee as neither of the two other options for filling the vacancy are applicable. Therefore, it is likely that the designation of this bequest will be held to be a valid testamentary trust, although there is still the problem of the beneficiary's identity as the Suffolk Humane Society has shut down.
2. This leads to the second issue: can the court modify the beneficiary of a testamentary charitable trust if the intended charitable beneficiary has ceased operations before the testator's death? Under the doctrine of cy pres, codified in Virginia Code § 64.2-731, the court can modify the trust to ensure that the property is applied or distributed in a manner consistent with the settlor's charitable purposes. Here, a similar humane society has been located five miles away from the former operations of the Suffolk Humane Society. The court would still have the obligation to investigate the humane society to ensure that its purposes are similar to those of the Suffolk Humane Society. Therefore, it is likely that the $100,000 in the savings accounts will be held as a valid testamentary trust and, if the court deems the other humane society to be an acceptable alternative, that the court will use the doctrine of cy pres to make that humane society the beneficiary of the testamentary trust. If the court does not designate the humane society as an acceptable alternative and cannot find an acceptable alternative, then the testamentary trust would be invalid for want of a beneficiary, and the $100,000 would pass to Bill through intestacy following the analysis in section b above.

d. The issue here is whether Winnie, as Harry's ex-spouse, can take the net proceeds of the Suffolk farm. As stated above, under Virginia Code § 64.2-412(B), if a gift is made to a spouse and the couple subsequently divorce after the will is executed, the divorce revokes any disposition to the now ex-spouse. Here, since the will was made before the divorce and Winnie is listed as the beneficiary of the sale proceeds, she is ineligible to take as a divorced spouse. Since Harry did not provide a contingent beneficiary for the sale proceeds or a residuary clause, the

sale proceeds will pass through intestacy using the analysis in section b. Therefore, Bill will also take the net proceeds from the sale of the farm.

e. The final issue is whether either Harry's primary choice in the will of his now ex-wife, Winnie, or his secondary choice of his neighbor Nancy to serve as the executor should be granted. Under Virginia Code § 64.2-500(B), a person may qualify to be an executor if they take the required oath and give bond; is not an infant, incapacitated, or a convicted felon; and "the court or clerk is satisfied that he is suitable and competent to perform the duties of his office." Additionally, under Virginia Code § 64.2-412(B), a divorced spouse is no longer able to serve as executor unless the will expressly provides otherwise. Here, neither Winnie nor Nancy are infants, and we have no facts to suggest that they are incapacitated or convicted felons. However, since Winnie is his ex-wife and the will does not specifically allow her to serve as executor while being divorced, she is unable to serve as executor under § 64.2-412(B). While the facts here do not provide any information about Nancy's competence or suitability, assuming she is both competent and suitable, she would likely be a satisfactory choice under § 64.2-500(B). Therefore, given the facts provided here, Nancy should be appointed as the executor of Harry's estate.

Domestic Relations (Question 5):

In 2015, Whitney and Holden, both age 32, married and purchased a home in Roanoke, Virginia. Holden began a law practice immediately after they were married. Whitney worked as the executive chef at a high-end restaurant until the birth of their son, Sammy, in 2020. Holden's law practice grew, and all of his income went toward household expenses, including the mortgage and maintenance of their home. Holden and Whitney agreed that she would stay at home to raise Sammy until he entered grade school.

In 2022, Whitney discovered that Holden had been having numerous adulterous relationships. Whitney filed suit for divorce and demanded primary physical custody of Sammy, spousal support, and equitable distribution of the marital estate. Holden denied the alleged adultery and sought liberal visitation, joint legal custody, and equitable distribution of the marital estate.

On the eve of *an ore tenus* hearing to resolve all issues, Whitney and Holden entered into a written settlement agreement with the assistance of their respective legal counsel. The settlement agreement divided the marital estate and provided that, in consideration of Holden's conveying to Whitney his interest in the marital home, Whitney waived all claims to spousal support and all claims for future child support. They agreed to joint legal custody, and that Holden would have liberal visitation rights with Sammy two weekends a month. The trial court entered a final decree of divorce in December 2023. The decree affirmed, ratified, and incorporated by reference the settlement agreement.

In 2025, when Sammy entered kindergarten, Whitney needed to return to work because she needed more income to support herself and Sammy. Whitney asked Holden for financial support,

but Holden said that he already paid her in full for all future spousal and child support. Holden offered to keep Sammy at least half of each month as a means to help Whitney financially, but Whitney refused.

Whitney then went back to work as a chef full-time, frequently working late and "on call" hours and asking Holden to pick Sammy up from school and take care of him until she got off work. One evening, while working in the restaurant, Whitney cut her hand. The injury was severe and required surgery, intensive physical therapy, and vocational rehabilitation. She will require convalescent care for at least eight months and will not have any income during that time.

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

(a) Should the Court award Whitney spousal support? Explain fully.

(b) Should the Court require Holden to pay child support? Explain fully.

(c) What factors should the Court consider with respect to Holden's motion to amend the terms of shared custody in the settlement agreement, and how is the Court likely to rule? Explain fully.

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a) The Court should not award spousal support to Whitney because she signed a property settlement agreement waiving current and future claims to spousal support. Under Virginia law, unless the settlement agreement expressly prohibits modification of the agreement as to duration or amount, the court retains jurisdiction to modify spousal support. (Va. Code §20-109 (c)). Here, however, Whitney is not requesting a modification; she is requesting an order awarding spousal support for the first time. Thus, she is not allowed to recover for spousal support.

b) The Court may require Holden to pay to Whitney child support for Sammy even though Whiteny waived her claim for such support by the agreement. While the law permits her to waive her right to spousal support, she may not waive Sammy's right to proper care and maintenance in the future. The parties' agreement may govern the property and other rights of the parties, but the agreement is subject to the court's right to make a child support award in the appropriate case notwithstanding an agreement to the contrary. (Kelley v. Kelley 248 Va. 295 (1994)). The Court retains continuous jurisdiction to change or modify its order relating to care and maintenance of a child. (Va. Code §20-108). On these facts, the Court should award child support to Whitney for Sammy's because of a material change in her circumstances that leaves her unable to work for at least eight months.

c) As with child support, the Court is not precluded by the terms of the agreement to change the terms of custody and visitation in the appropriate case. Even over Whitney's objection, the Court may alter the terms of the agreement regarding custody and visitation in this case if Holden can show a material change in the parties' circumstances to justify a change in the award and such change is in Sammy's best interests. The Court must consider the "best interests of the child" factors set forth in Va. Code §20-124.3 in making its determination. The most relevant factors here are the age of the child, physical condition of each parent, the relationship existing between each parent and child, and the role each parent has played with the child. The child is five or six years old. For the first five years of his life, Whitney stayed home to care for Sammy. Since the divorce, he has resided primarily with Whitney, with liberal visitation to Holden two weekends a month. Thus, Whitney has been the primary caretaker. Sammy has no physical conditions that would weigh in favor of either parent. The physical condition of each parent is relevant to the analysis as Whitney's injury prevents her from performing many of the tasks she would normally perform, requiring the assistance of her parents in the caretaking functions. In addition, there do not appear to be any facts to indicate that either parent is unwilling to foster continuing contact between the child and the other parent. There also is no suggestion that Holden is an unfit parent. As a result, here, the Court will likely award the parties joint physical custody with equal visitation of Sammy. Since Holden is able to take care of Sammy, he is preferred, as his parent, to supervise him instead of supervision by Sammy's grandparents

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Question 6 (Virginia Civil Procedure)

The Market, Inc. (The Market) is a California corporation with its headquarters located in Salinas, California. Several years ago, The Market expanded into Virginia and opened stores in the City of Charlottesville and the City of Norfolk. The Market registered with the Virginia State Corporation Commission as a foreign corporation and appointed Beth, an attorney in Fairfax County, to serve as its registered agent.

On July 1, 2023, Paul, a resident of Richmond, Virginia, was visiting in Charlottesville. While shopping at The Market, Paul slipped and fell as he was approaching the registers and injured his back. Mark, The Market manager on duty, was loading a truck outside the back of the store at the time Paul fell. Mark was called to the front, investigated the incident, and gave Paul a copy of the report signed by him as manager on duty. Paul, a scuba instructor, missed four months of work and incurred $30,000 in medical bills for treatment of his back injury.

Paul, representing himself, filed suit in the Circuit Court for the City of Richmond on June 30, 2025, alleging negligence against Mark and The Market and seeking $250,000 in compensatory damages for his personal injuries. Paul's wife, Sharon, is a Richmond Deputy Sheriff. Sharon personally served the Complaint and Summons on Mark at The Market's Charlottesville store on February 10, 2026, while she and Paul were visiting. Sharon timely filed the proper return of service with the Clerk of Court. Mark immediately forwarded the suit papers to The Market's corporate headquarters in California, where they were received a few days later.

(a) Were Mark and The Market each properly served with the Complaint and Service of Process? Explain fully.
(b) Was Service of Process on both Mark and The Market effective? Explain fully.
(c) Was Paul's lawsuit timely filed and within the applicable statute of limitations? Explain fully.
(d) Assume for this question only that The 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 Mark 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) Neither Mark nor The Market was properly served with process in the action filed against them by Paul. The specific issues raised by this question are whether service was made by an authorized person upon each defendant and whether a proper person was served with regard to service upon The Market.

Under Virginia law, a Deputy Sheriff may serve process in her bailiwick, which is defined as the locality in which she serves and a contiguous county or city in which she serves. If the Deputy Sheriff serves outside the bailiwick, she is treated as a private process server. A private process server must be 18 years of age, unrelated to any party, and otherwise uninterested in the proceedings. With regard to foreign corporations, process may be served on any officer, director, or registered agent of the foreign corporation.

As to whether service was made by an authorized person upon each defendant, the facts state that Paul's wife, Sharon, who is a Richmond Deputy Sheriff, personally served process upon Mark, a manager of The Market's Charlottesville Store, while Mark was at the store. Charlottesville does not lie contiguous to Richmond and is outside Sharon's bailiwick. Furthermore, while Sharon could serve process outside her bailiwick as a private process server, she is related to Paul, the plaintiff, and interested in the proceedings. Thus, she was not an authorized person to serve process on the defendants.

As to whether a proper person was served with regard to The Market, the facts state that The Market is a California corporation with headquarters in California. It is registered with the Virginia State Corporation Commission as a foreign corporation and maintains a registered agent, Beth, an attorney in Fairfax County. Process in this case was served on Mark, who is a manager and not an officer, director, or registered agent. Thus, Mark was not a proper person on which to serve process for the purpose of serving The Market.
Therefore, Mark and The Market each were not properly served with process.
Va. Code §§ 8.01-293, -295, -301, -329; Va. Code §§13.1-763, -766

(b) Notwithstanding the improper service on Mark and The Market, service was likely effective. The issue is whether each defendant actually received process in the required time.
Under Virginia law, process must be properly served within one year from the date of filing the complaint. "Process" includes the complaint and the summons issued by the clerk. Under a saving provision of the Virginia Code, however, process which has reached the person to whom

it is directed within the time prescribed by law is sufficient although not served as provided under Virginia rules.

Here, Paul filed his action against Mark and The Market on June 30, 2025, and was required to serve each defendant by June 30, 2026. Mark was served with the "Complaint and Summons" on February 10, 2026 and, accordingly received process well before the deadline of June 30, 2026. Furthermore, Mark "immediately" forwarded the "suit papers" to "The Market's corporate headquarters, where they were received a few days later." Assuming that an officer or director at corporate headquarters received the "Complaint and Summons" several days after they were delivered to Mark, as the facts suggest, then The Market also actually received process well before the June 30, 2026 deadline.
Therefore, service of process on both Mark and The Market was likely effective.
Va. Code 8.01-288; *Frey v. Jefferson Homebuilders*, 251 Va. 375 (1996)
(c) Paul's lawsuit was timely filed. This question raises the issues of when his cause of action accrued and the governing statute of limitations.

Under Virginia law, a two-year statute of limitations applies to claims of personal injury. The limitation period begins running when the cause of action accrues. For claims of personal injury, the cause of action accrues on the date of the injury. Accordingly, a personal injury claim must be filed within two years from the date of the injury, unless the injured party is a minor or under a disability such that a tolling provision would apply.

Here, Paul sustained a back injury on July 1, 2023, when he slipped and fell at The Market. The limitation period began running on that date and no tolling provision appears applicable. Accordingly, Paul had until July 1, 2025 to file his lawsuit. The facts state Paul filed suit in the circuit court on June 30, 2025. Therefore, Paul's lawsuit was timely filed and within the applicable statute of limitations.
Va. Code §§ 8.01-230, -243(A)

(d) If The Market challenges venue, it will likely succeed. The issues are whether Richmond is a permissible venue and whether any objection to venue is timely made.

In Virginia, venue is dived into preferred (Category A) and permissible (Category B) venues. Preferred venue is limited to specific types of actions (such as disputes involving wills and land) and permissible venue applies to all other general causes of action not identified as having a preferred venue. An action seeking damages for personal injury would be subject to permissible venue rules. Permissible venue options as relevant here include the place where the cause of action arose, where a defendant resides or has his principal place of employment, and where a defendant has appointed an agent to receive process. Plaintiff's residence is only a permissible venue if there is no other permissible venue in Virginia for the claim. Objections to venue must be made within 21 days from the date of service of process or within the period of any extended time for the response and can be waived by the failure to make a timely objection.

Here, a permissible venue would be Charlottesville because that is where the cause of action arose as the place where Paul was injured when he fell in The Market's Charlottesville store. It is

also a permissible venue as the place where Mark, one of the defendants, is employed. Furthermore, because The Market has appointed Beth, an attorney in Fairfax County, to serve as its registered agent, then Fairfax County is another permissible venue. The facts state that Paul is a resident of Richmond and give no indication that there is any other connection to Richmond with this case or the defendants; thus, it is not a permissible venue.Because Paul filed his lawsuit in the Circuit Court for the City of Richmond, a challenge by The Market to venue would have merit. However, The Market would be required to make this challenge within 21 days of service (or the deadline for any extended response time).
Therefore, the Market should request a transfer of the action to either Charlottesville or Fairfax County and would likely succeedif the challenge is timely made.
Va. Code §§ 8.01-261,-262,-264(A)

(e) Mark should file either a demurrer or motion to drop to seek dismissal from the case. The issue is whether Mark's ground for dismissal is based on the absence of a viable action against him or misjoinder of parties defendant.

Paul's claim appears to be based on the theory of premises liability for a slip and fall while shopping at The Market. A proper defendant would be the owner or possessor of the premises. Under Virginia law, a demurrer tests the sufficiency of the complaint. Here, the facts state that Paul fell as he approached the registers. The facts also state that Mark was the manager on duty and was loading a truck outside the back of the store at the time Paul fell, and Mark subsequently prepared the accident report. Therefore, Mark may argue that the complaint does not set forth sufficient allegations against him to state a viable claim on the ground that he is neither an owner nor possessor of the premises and is not alleged to have engaged in any affirmative act of negligence. If that is his ground for dismissal from the suit, then he should file a demurrer on the ground that the complaint does not set forth a viable cause of action against him.
Under Virginia law, when a party asserts that he is not a proper party to an action and has been improperly joined, a motion to drop on the ground of misjoinder may be filed. Thus, Mark could also seek dismissal by filing a motion to drop and argue that he has been misjoined with The Market, who is the actual owner or possessor of the premises.
Va. Code 8.01-5(A); *Powers v. Cherin*, 249 Va. 33 (1995); *Linnin v. Michielsens*, 372 F.Supp.2d 811, 821 (2005) (citing Miller v. Quarles, 242 Va. 343 (1991))

Question 7 (Evidence)

Sally, a resident of Richmond, Virginia, was injured when her foot slid under the back of her push lawn mower as she was cutting grass on a hillside at her home. Although the mower had a thin rubber safety flap between the back of the mower and the rotating blade under the mower deck, this did not prevent Sally's foot from sliding into the revolving blade.

Sally timely filed suit in the Richmond City Circuit Court against the manufacturer, GrassyWorks, alleging that the mower was unreasonably dangerous and defective due to the inadequate design and composition of the flap, which failed to protect her from injury.

During trial on the issue of damages, Sally's attorney sought to introduce ten witnesses to testify about the impact of the injury on Sally's life, including seven co-workers from the bank where Sally was a teller. GrassyWorks' attorney objected to the number of co-workers who would testify, claiming that testimony from all would be repetitive and therefore not aid the jury on the issue. When asked by the Court what testimony each witness would provide, Sally's attorney said he intended to ask each co-worker about their observations of Sally's difficulties walking and standing for long periods during their shift at the bank. After hearing this summary of proposed testimony, the Court sustained GrassyWorks' objection and limited Sally's attorney to calling three of the witnesses.

After Sally rested her case in chief, GrassyWorks began calling its own witnesses, including some to testify about the adequacy of the design of the mower's safety flap. In defending the design of its mower, GrassyWorks' in-house engineer testified that the flexible, thin rubber composition of the safety flap was essential to the operation of the mower so that it could move with the mower easily on uneven terrain, and that any other option was not feasible.

On cross-examination, Sally's attorney sought to introduce evidence of a newer model of GrassyWorks' mower. The new model was manufactured after and in response to the accident and was modified to include a rigid safety flap between the back of the mower and the blade. Sally's attorney asked the engineer if he was familiar with the newer model. Before he could answer, GrassyWorks' attorney objected and asked to make a motion outside the presence of the jury. After the jury left, he argued to the Court that evidence regarding the newer model, designed and manufactured after the accident and in response to it, was inadmissible. Despite arguments from Sally's attorney in opposition, the Court sustained the objection. After the jury returned and the trial resumed, neither attorney had any questions for the witness, and he left the stand without providing any testimony.

During GrassyWorks' case in chief, it called a private investigator as a witness to introduce photographs taken of Sally in the months before trial, showing physical activities she engaged in, such as jogging and lifting heavy objects. One photo showed Sally marching at a local, very unpopular political protest and carrying a sign with very offensive language. Glancing through these proposed exhibits immediately before the private investigator took the stand and concerned when he saw this photo and recognized that Sally was one of the protesters, Sally's attorney made an objection to its admissibility, which the Court sustained. PM SESSION PAGE 3

(a) Was the Court correct in sustaining the objection to the testimony of the ten witnesses and limiting the number to three? Explain fully.

(b) Was the Court correct in sustaining the objection to the introduction of evidence of the design change on the newer model of mower? Explain fully.

(c) Was the Court correct in sustaining the objection to the introduction of the photograph of Sally at the protest? Explain fully.

(d) After the Court excluded the anticipated testimony of GrassyWorks' in-house engineer regarding the design change to the mower, what steps should Sally's attorney have taken to preserve the evidence and her objection to the Court's ruling for appeal? Explain fully.

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a. **Was the Court correct in sustaining the objection to the testimony of the ten witnesses and limiting the number to three? Explain fully.**

The Virginia Rules of Evidence, found in Part Two of the Rules of the Supreme Court of Virginia, include Rule 2:403, which gives trial courts broad discretion to exclude relevant evidence when its probative value is substantially outweighed by the danger of unfair prejudice or confusion, or the evidence is needlessly cumulative.

Sally sought to call ten witnesses in total, seven of whom were co-workers who would all testify to the same observations about her difficulty walking and standing during her bank shifts. The Court properly asked Sally's attorney to summarize the proposed testimony before ruling. Once counsel confirmed that all seven witnesses would cover identical ground, the Court had a sound basis for limiting the number. The Court did not eliminate this line of testimony entirely, but rather permitted three co-workers to testify, which was sufficient to convey the impact of Sally's injury without wasting the Court's resources or the jury's time on repetitive testimony.

The Court was correct in sustaining the objection to the testimony of the ten witnesses and limiting the number to three.

b. **Was the Court correct in sustaining the objection to the introduction of evidence of the design change on the newer model of mower? Explain fully.**

Virginia Rule of Evidence 2:407 generally excludes evidence of subsequent remedial measures to prove negligence or culpable conduct as a cause of the event that caused injury. However, Rule 2:407 expressly allows such evidence when offered for another purpose, such as to prove feasibility of precautionary measures, if that issue is controverted.

That exception applies here. GrassyWorks' engineer testified on direct examination that the thin rubber flap was the only feasibledesign option, directly placing feasibility in dispute. Sally was therefore entitled to introduce evidence of the newer rigid flap model to rebut the engineer's assertion that no alternative was feasible, not to prove the original design was defective.

The Court was not correct in sustaining the objection to the introduction of evidence of the design change on the newer model of mower.

c. **Was the Court correct in sustaining the objection to the introduction of the photograph of Sally at the protest? Explain fully.**

Virginia Rule of Evidence 2:403 permits exclusion of relevant evidence when its probative value is substantially outweighed by the danger of unfair prejudice or confusion, or the evidence is needlessly cumulative.

GrassyWorks sought to introduce photographs of Sally jogging and lifting heavy objects, which directly established her physical capabilities. The protest photograph added little additional probative value on that point, as the other photographs already fully established her physical capabilities. It also carried a substantial risk of unfair prejudice, as the protest was described as very unpopular and Sally's sign contained offensive language, creating a significant risk that jurors would react negatively to Sally based on her political views or the offensive language on her sign rather than impartially considering her damages claim. Given the minimal probative value and significant risk of unfair prejudice, exclusion under Rule 2:403 was an appropriate exercise of the Court's discretion and did not constitute an abuse of that discretion.

The Court was correct in sustaining the objection to the introduction of the photograph of Sally at the protest.

d. **After the Court excluded the anticipated testimony of GrassyWorks' in-house engineer regarding the design change to the mower, what steps should Sally's attorney have taken to preserve the evidence and her objection to the Court's ruling for appeal? Explain fully.**

Virginia Rule of Evidence 2:103 requires that when evidence is excluded, the substance of that evidence must be made known to the court by proffer, or the issue is waived on appeal.

The engineer left the stand after the jury returned without providing any testimony about the newer mower model, leaving nothing in the record to reflect what that testimony would have shown. Sally's attorney should have asked the Court for an opportunity to make a proffer stating on the record what the excluded evidence would have been, so that the record would preserve the issue for appeal. This could have been done either by having the engineer testify outside the jury's presence or by stating on the record that the engineer would have testified that GrassyWorks designed and manufactured a newer model of the mower with a rigid safety flap after Sally's accident, contradicting the engineer’s earlier testimony that no alternative design was feasible.

To preserve the evidence and her objection to the Court's ruling for appeal, Sally's attorney should have made a proffer of the excluded evidence on the record.

Question 8 (Real Property)

ABC Land Company (ABC) entered into valid contracts to purchase three adjacent tracts of land in Alleghany County, Virginia. All documents were properly recorded.

Tract 1

Ten years ago, Denny conveyed Tract 1 to his daughters, Morgan and Allyson, by deed which stated that they held the Tract "as joint tenants." Two years ago, Morgan died and by her valid will left all her property to her fiancé, Fred. Allyson has contracted to sell Tract 1 to ABC, advising them that upon Morgan's death Tract 1 became her property.

Tract 2

Fifteen years ago, Edward executed a deed reciting, "I convey Tract 2 to John for life, and then to Lucas." Five years ago, Lucas obtained a loan from First Bank and gave First Bank a promissory note secured by a deed of trust conveying all of his right, title, and interest in Tract 2 as security for the loan. John died last year, and Lucas defaulted on the loan owed to First Bank. Lucas contracted to sell Tract 2 to ABC. Before the sale from Lucas to ABC took place, First Bank advertised a sale of the property under the terms of the deed of trust, gave all required notices and set the date of sale.

Tract 3

Twenty years ago, Tom conveyed Tract 3 to his son, Jack, for life, and upon his death to Jack's son, Stan. Recently, Stan conveyed his interest to George by a deed which recites, "I convey all of my right, title and interest in Tract 3 to George." Tom died but Jack is still living. George has contracted to sell Tract 3 to ABC.

(a) Can ABC acquire title to Tract 1 from Allyson at the present time, free of any other interests? Explain fully.

(b) Can ABC acquire title to Tract 2 from Lucas at the present time, free of any other interests? Explain fully.

(c) Can ABC acquire title to Tract 3 from George at the present time, free of any other interests? Explain fully.

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a. **Can ABC acquire title to Tract 1 from Allyson at the present time, free of any other interests? Explain fully.**

(a) No, title would not be free of any other interest since Morgan and Allyson held title as tenants in common.

In order to create a joint tenancy, the conveyance must include words of survivorship. If it does not, then only a tenancy in common is created. A tenancy in common is conveyable and inheritable upon death. See §§ 55.1-134, 55.1-135.

Here, the Denny conveyed Tract 1 to his daughters, Morgan and Allyson, by deed which stated that they held the Tract "as joint tenants." Since this did not include "words of survivorship" language, Morgan and Allyson held title as tenants in common. When Morgan later died leaving all of her property to Fred, this included the one-half interest she had in Tract 1. Therefore, Fred and Allyson hold Tract 1 as tenants in common. ABC can only acquire Allyson's one-half interest.

b. **Can ABC acquire title to Tract 2 from Lucas at the present time, free of any other interests? Explain fully.**

(b) Yes, if ABC buys Tract 2 before foreclosure and the sale proceeds are sufficient to pay off the encumbrance.

Lucas's vested remainder ripened into a present possessory fee simple absolute upon the death of John. Lucas had given a deed of trust on Tract 2 to First Bank as security for his promissory note. With the note in default, First Bank may have Tract 2 sold, and the purchaser at the foreclosure sale will acquire title in fee simple absolute.

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

c. **Can ABC acquire title to Tract 3 from George at the present time, free of any other interests? Explain fully.**

(c) No. Stan would be able only to convey his interest, an indefeasibly vested reminder, by deed to George. Jack maintains a life estate in the tract because he is still living. ABC cannot get a fee simple interest free and clear unless they obtain a conveyance of Jack's life estate as well as George's remainder.

Question 9 (Contracts/Sales)

Billy owned and operated a popular vape and tobacco retail store in Chesterfield County, Virginia. Early in 2024, Billy decided to change the packaging used for his custom vape pen inhalers. He directed his production manager to discuss possible alternatives with River City Packaging, Inc. (RCP), his long-standing packaging supplier. On April 1, 2024, after discussions about the packaging, the production manager gave the RCP representative a verbal order for the new packaging with the condition that before proceeding to manufacture, RCP must submit packaging samples to the plant manager for approval.

During the same period, Billy was negotiating the sale of the vape store's assets to Austin Vapes, Inc. (Austin). After the sale, Billy's vape store would cease to be an operating entity. On April 3, 2024, without notice to RCP, the asset sale from Billy to Austin was completed. Austin hired Billy's plant manager for the same position with the same responsibilities as he had held at Billy's store.

On April 5, 2024, RCP sent the plant manager a written "Acknowledgement of Order" form with RCP's logo at the top and setting out specifications, delivery instructions, order date, and quantity for the new packaging materials. The space for "Price" on the form was left blank, and the following was typed in the "Comments" section: "Obtain customer approval of packaging materials before proceeding." The form also included the following provision: "Buyer waives all claims relating to goods unless received in writing by seller within thirty (30) days of receipt of goods."

On May 1, 2024, the RCP representative met with the plant manager to review samples of the new packaging. The manager told the representative to change the name on the packaging materials to "Austin Vapes" and then "proceed with the order." On May 14, 2024, RCP sent the plant manager new samples of the changed packaging materials for testing on Austin's packaging machinery. RCP did not receive any response regarding the new samples.

In June 2024, RCP shipped the full order of new packaging materials with an invoice for $15,000 to Austin. No payment for the packaging materials was made to RCP. In September 2024, Austin, without prior notice, returned the packaging materials to RCP with a letter stating that they did not meet the size or quality specifications set forth in the Acknowledgement of Order form. RCP responded in writing that it would not accept the returned goods because the natural aging process of the materials had caused discoloration which substantially impaired the packaging materials' value and because the packaging bore the name "Austin Vapes." RCP filed a contract action against both Billy and Austin for the $15,000 purchase price of the packaging materials. Each defendant denied any liability. NOTE: Do not discuss any possible cross-claims between defendants.

(a) What defense(s), if any, does Billy have against RCP on the contract claim, and is Billy likely to succeed? Explain fully.

(b) What defense(s), if any, does Austin have against RCP on the contract claim, and is Austin likely to succeed? Explain fully.

* * * * *

a) Yes, Billy does have a valid defense to RCP on the contract claim. Billy was engaged in negotiations with RCP, but the parties did not form a contract. Billy's email confirming its order clearly provided that the order was conditioned upon submission of sample packaging and approval of the artwork by Billy. There was no contract between the parties until this condition was met. It was not until May 1 - after Billy was sold to Austin

Vapes - that the buyer approved the artwork, the condition was met, and a contract was formed between the parties. Thus, Billy never had a contract with RCP.

b) Austin Vapes can assert there is no enforceable contract because it returned the goods and because of the statute of frauds. It is not likely to succeed on either argument.

First, Austin Vapes will not prevail on its defense that the return of the goods relieved Austin Vapes of any obligation to RCP. Austin Vapes did not timely or effectively reject or revoke acceptance of the goods. First, RCP will argue that the contract between the parties included the provision in its acknowledgment form requiring the buyer to assert any objections to the goods within 30 days of delivery. Austin Vapes did not raise any objections to the wrapping until approximately three months after delivery. RCP will argue in the alternative that Austin Vapes failed to timely reject or revoke acceptance under the default rules of Art. 2. A buyer accepts the goods if it fails to reject them after a reasonable opportunity to inspect. Here, three months passed between delivery and the buyer's objection and a court would likely find that Austin Vapes had accepted the goods and, thus, could not reject. Additionally, Austin Vapes did not effectively revoke its acceptance. A buyer may revoke its acceptance if the nonconformity substantially impairs the value of the goods and the buyer has a reason for its delay in raising the objection (e.g. latent defect or reliance on seller's assurances of cure). It is unclear from the facts whether there was, in fact, a nonconformity of the goods - it is not clear whether RCP or Austin Vapes made the mistake as to the sizing, but in any event, Austin Vapes has no legitimate reason for the delay. The defect, if there was one, would be immediately apparent and there are no facts about RCP promising to cure. Furthermore, the buyer must revoke acceptance within a reasonable time of when it discovered or should have discovered the defect and before a substantial change in the goods. Again, Owens should have discovered the problem with the sizing immediately and three months is not a likely a reasonable time. Additionally, RCP alleges that there is a substantial change in the condition of the goods due to discoloration from the natural aging process. In short, Austin Vapes' defense based on returning the goods will fail.

Austin Vapes will also raise a statute of frauds defense. A contract for the sale of goods of $500 or more is within the statute of frauds and generally must be evidenced by a writing signed by the defendant to be enforceable. Va Code § 8.2-201(1) Here, there were some writings evidencing preliminary negotiations, but the contract was not entered into until the meeting on May 1 when then Austin Vapes manager approved the artwork and instructed RCP to "proceed." Thus, the contact was oral and there is no writing signed by the defendant that sufficiently evidences the contract. There are, however, two exceptions to the statute of frauds that apply on these facts. First, an oral contract is enforceable to the extent that the goods have been received and accepted. Va Code § 8.2-201(3)(c). As discussed above, Austin Vapes received and accepted the goods and thus the contract is not unenforceable based on the statute of frauds. Second, there is an exception to the Art. 2 statute of frauds for specially manufactured goods. Va Code § 8.2- 201(3)(a). An oral contract for the sale of goods is enforceable if the goods are specially ordered by the buyer, cannot be resold by the seller in the ordinary course of its business, and the seller has made a substantial beginning of performance. Here, the goods are clearly specially

ordered and the seller will not be able to resell them. The wrapping was sized to fit the buyer's needs and it included the buyer's name. Also, RCP has completed manufacture of all of the goods. Thus, the contract is enforceable against Austin Vapes.