July 2024 Virginia Bar Exam
Questions & Suggested Answers

August 15, 2024 (2:26pm)

✖✖ 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 each's area[s] of specialty: Professor Jeremy W. Hurley of Appalachian School of Law and Professor Beth Belmont of Washington & Lee Law School

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Question 1 [07/24 UCC Sales]

Susan Swift ordered patio chairs from World's Best Patio Furniture Shop (World's Best), which is located in Cape Charles, Virginia, when she was there on vacation. The chairs were to be delivered the following week to her home in Chesapeake, Virginia. After receiving Susan's order, World's Best shipped the chairs to Susan as requested and charged her for the aggregate amount of the purchase price of the patio chairs plus shipping charges.

When the chairs arrived, Susan noticed that all of the chair legs were dented. She was busy getting the patio ready for summer though and did not call World's Best until a couple of days after she received the damaged chairs. When Susan spoke to World's Best a couple of days later, she explained that the chairs had arrived damaged and that she would not accept them because of the damage. She told them she would hold the chairs for them to pick up.

World's Best agreed to pick up the damaged chairs and to deliver a satisfactory set of replacement chairs the next day. Susan was happy World's Best had agreed to replace the chairs. She returned the damaged chairs to their original box, put the box in her garage and made sure the garage was fully locked.

That night, a fire broke out in the garage and everything inside the garage was completely destroyed. The garage had not been insured as to its contents and no one knew, or could determine, the origin of the fire. The next morning, World's Best, unaware of the fire, arrived to deliver the new chairs and to collect the damaged chairs. When World's Best learned the original chairs had been destroyed in the fire, they requested payment from Susan for both the original chairs and the replacement chairs.

(a) May Susan refuse to pay for the original chairs that were destroyed in the fire? Explain fully.

(b) What effect, if any, does the fact that Susan waited a couple of days to call World's Best have on her position? Explain fully.

(c) What effect, if any, does the fact that the chairs were destroyed in a fire in Susan's garage have on her position? Explain fully.

✖✖
(a) Susan may refuse to pay for the original chairs that were destroyed in the fire.

Virginia Uniform Commercial Code (UCC) applies to contracts to sell goods. *See* VA Code § 8.2-102. Under the UCC, a buyer, unless otherwise agreed, is entitled to inspect goods tendered or delivered "at a reasonable place and time and in any reasonable manner" before the buyer is obligated to pay or accept the goods. *See* § 8.2-513. Such inspection may occur after the goods arrive, when the seller is required to send the goods to the buyer.

If, upon completion of such reasonable inspection, the buyer were to discover the goods were otherwise nonconforming, the buyer is entitled to reject the goods. *See* § 8.2-602. In order for the buyer to reject the goods, the buyer must notify the seller of the nonconformance within a reasonable time after delivery. *Id.* If the buyer does not properly reject the nonconforming goods within a reasonable time, the buyer may deemed to accept the goods. *See* § 8.2-606. Acceptance of the goods, unless otherwise agreed, would cause the buyer to need to make payment for the accepted goods as well as pass the title to the buyer. *See e.g.,* § 8.2-310, § 8.2-327, § 8.2-401.

Such transfer would also pass the risk of loss to the buyer. *See* § 8.2-401. Proper rejection or revocation of acceptance would revest "title to the goods in the seller," which would make it so that the seller would bear the risk of loss. *See* § 8.2-401. Proper revocation, similar to rejection, occurs when the buyer discovers the nonconformance within a reasonable period of time, and notifies the seller within a reasonable period of time of discovery. *See* § 8.2-608. However, such nonconformance, in the case of revocation of acceptance, must be of substantial impairment. *See Manassas Autocars, Inc. v. Couth*, 274 Va. 82, 645 S.E.2d 443 (2007). Should the goods become damaged prior to notification of the seller of the revocation of acceptance, the buyer would still bear the risk of loss. *See id.* Furthermore, the buyer owes the duty of reasonable care, as a bailee, when holding onto rejected or revoked acceptance goods.

Here, Susan ordered patio chairs from World's Best, which are moveable property, which would be properly classified as goods. Accordingly, this contract is governed by Virginia's UCC.

After the chairs arrived, Susan was entitled to inspect them, which she did. Upon inspection, she noticed that the legs of all of the chairs were dented, which means that the goods were nonconforming. Therefore, Susan had the right to reject such goods. She rejected the delivery of the chairs after a couple of days, when she told World's Best about the damaged chairs. The two-day delay may be determined by the fact finder to be an unreasonable period of time; however, considering how busy Susan was, the fact that she was a consumer buyer, and that World's Best agreed to replace the chairs, it is likely for two days of delay to be considered a reasonable period of time.

Assuming that Susan properly rejected the chairs, risk of loss continued to be borne by World's Best, the seller. Accordingly, when the fire destroyed the garage and all of the contents within it, including the chairs, Susan would not be held liable for paying the contract price for such destroyed chairs.

Should the fact finder determine that the two-day delay was an unreasonable period of time before providing notice of the nonconformity, Susan would be deemed to have accepted the chairs. She could argue that her providing notice of the nonconformity was a revocation of acceptance. Since Susan immediately discovered that the chairs were dented and then provided notice of such nonconformity within two days of such discovery, it is likely that a fact finder would determine that such two-day period was a reasonable period of time for revocation of acceptance. Furthermore, because all of the chairs were dented, there is a likelihood that a fact finder would make the determination that the chairs were substantially impaired. Moreover, she provided notice of such revocation before the chairs were destroyed during the garage fire. Therefore, the risk of loss shifted to Word's Best prior to the destruction of the chairs. Accordingly, Susan would not be held liable for paying for those destroyed chairs.

However, since Susan owed a duty of reasonable care as a bailee of the rejected/revoked acceptance chairs, if World's Best was able to prove that it was unreasonable for Susan to store the chairs in the garage or that she had been unreasonable in either causing the fire or in putting it out, she would be liable to pay for such chairs. The facts indicate that "no one knew, or could determine, the origin of the fire." Consequently, it is unlikely that World's Best would be able to succeed on such argument.

Therefore, Susan would be able to refuse to pay for the destroyed chairs, because she either properly rejected or revoked acceptance of the chairs, and did not breach her duty of care as a bailee of the chairs while waiting for their recollection by World's Best.

(b) Susan waiting a couple of days to call World's Best would slightly weaken her position. However, she would still be able to prevail.

As discussed above, if, upon completion of such reasonable inspection, the buyer were to discover the goods were otherwise nonconforming, the buyer is entitled to reject the goods. *See* § 8.2-602. In order for the buyer to reject the goods, the buyer must notify the seller of the nonconformance within a reasonable time after delivery. *Id.* If the buyer does not properly reject the nonconforming goods within a reasonable time, the buyer may deemed to accept the goods. *See* § 8.2-606. Acceptance of the goods, unless otherwise agreed, would cause the buyer to need to make payment for the accepted goods as well as pass the title to the buyer. *See e.g.,* § 8.2-310, § 8.2-327, § 8.2-401.

Such transfer would also pass the risk of loss to the buyer. *See* § 8.2-401. Proper rejection or revocation of acceptance would revest "title to the goods in the seller," which would make it so that the seller would bear the risk of loss. *See* § 8.2-401. Proper revocation, similar to rejection, occurs when the buyer discovers the nonconformance within a reasonable period of time, and notifies the seller within a reasonable period of time of discovery. *See* § 8.2-608. However, such nonconformance, in the case of revocation of acceptance, must be of substantial impairment. *See Manassas Autocars, Inc. v. Couth*, 274 Va. 82, 645 S.E.2d 443 (2007). Should the goods become damaged prior to notification of the seller of the revocation of acceptance, the buyer would still bear the risk of loss. *See id.* Furthermore, the buyer owes the duty of reasonable care, as a bailee, when holding onto rejected or revoked acceptance goods.

After the chairs arrived, Susan was entitled to inspect them, which she did. Upon inspection, she noticed that the legs were dented, which means that the goods were nonconforming. Therefore, she had the right to reject such goods. She rejected the delivery of the chairs after a couple of days, when she told World's Best about the damaged chairs. The two-day delay may be determined by the fact finder to be an unreasonable period of time; however, considering how busy Susan was, the fact that she was a consumer buyer, and that World's Best agreed to replace the chairs, it is likely for two days delay to be considered a reasonable period of time.

Assuming that Susan properly rejected the chairs, risk of loss continued to be borne by World's Best, the seller. Accordingly, when the fire destroyed the garage and all of the contents within it, including the chairs, Susan would not be held liable for paying the contract price for such destroyed chairs.

Should the fact finder determine that the two-day delay was an unreasonable period of time before providing notice of the nonconformity, Susan would be deemed to have accepted the chairs. She could argue that her providing notice of the nonconformity was a revocation of acceptance. Since Susan immediately discovered that the chairs were dented and then provided notice of such nonconformity within two days of such discovery, it is likely that a fact finder would determine that such two-day period was a reasonable period of time for revocation of acceptance. Furthermore, because all of the chairs were dented, there is a likelihood that a factfinder would make the determination that the chairs were substantially impaired. Moreover, she provided notice of such revocation before the chairs were destroyed during the garage fire. Therefore, the risk of loss shifted to Word's Best prior to the destruction of the chairs. Accordingly, Susan would not be held liable for paying for those destroyed chairs.

Therefore, while holding onto the chairs would weaken Susan's argument for rejection , she would still likely be able to prevail in her argument that she properly revoked acceptance of the chairs. Accordingly, she would still be able to successfully argue that she should not be held liable for the destroyed chairs.

(c) The fact that the chairs were destroyed in a fire in Susan's garage would slightly weaken her position. However, she would still be able to prevail.

As discussed in (a), proper rejection or revocation of acceptance revests "title to the goods in the seller," which would make it so that the seller would bear the risk of loss. *See* § 8.2-401. Proper revocation, similar to rejection, occurs when the buyer discovers the nonconformance within a reasonable period of time, and notifies the seller within a reasonable period of time of discovery. *See* § 8.2-608. Should the goods become damaged prior to notification of the seller of the revocation of acceptance, the buyer would still bear the risk of loss. *See id.* Furthermore, the buyer owes the duty of reasonable care, as a bailee, when holding onto rejected or revoked acceptance goods.

Here, assuming that Susan properly rejected the chairs, risk of loss continued to be borne by World's Best, the seller. Accordingly, when the fire destroyed the garage and all of the contents within it, including the chairs, Susan would not be held liable for paying the contract price for such destroyed chairs.

Should the fact finder determine that the two-day delay was an unreasonable period of time before providing notice of the nonconformity, Susan would be deemed to have accepted the chairs. She could argue that her providing notice of the nonconformity was a revocation of acceptance. Since Susan immediately discovered that the chairs were dented and then provided notice of such nonconformity within two days of such discovery, it is likely that a fact finder would determine that such two-day period was a reasonable period of time for revocation of acceptance. Furthermore, she provided notice of such revocation *before* the chairs were destroyed during the garage fire. Therefore, the risk of loss shifted to Word's Best prior to the destruction of the chairs. Accordingly, Susan would not be held liable for paying for those destroyed chairs.

However, since Susan owed a duty of reasonable care as a bailee of the rejected chairs, if World's Best was able to prove that it was unreasonable for Susan to store the chairs in the garage or that she had been unreasonable in either causing the fire or in putting it out, she would be liable to pay for such chairs. The facts indicate that "no one knew, or could determine, the origin of the fire." Consequently, it is unlikely that World's Best would be able to succeed on such argument.

Therefore, while the fact that the chairs were destroyed in Susan's possession, Susan would be able to succeed in her argument that the risk of loss was ultimately borne by the Seller, World's Best, either through proper rejection or revocation of acceptance, and that she did not breach her duty of reasonable care of the chairs.

✖✖ **Note:** The sub-questions (a), (b), and (c) have substantial overlaps between them. Accordingly, we believe that, while a full response to (a) would require addressing the issues within (b) and (c), examinees should still be able to get full credit for (a) even if they "saved" some of the analyses for (b) and (c).

Question 2. [07/24 Domestic Relations]

Tamara and Hunter met when they were age 19 via an online dating app, had dinner a week later and were married on Valentine's Day in 2014. They were married in Hampton, Virginia, where they have lived during their entire marriage. Neither Tamara nor Hunter went to college, but Hunter promised that he would always earn enough money for them to live very well. Hunter, a shipyard worker and wannabe professional pool shark, spends most of his free time playing billiards at a local pool hall. Hunter makes a very nice living, and although they never had children, he insisted that Tamara, who never had a job, not work outside the home.

Tamara and Hunter had a happy marriage in the beginning, but after a year, Hunter began to smoke a lot of marijuana, drink heavily, and often dated women from the pool hall. His spending on such outside activities often left insufficient funds for the household and personal expenses that Tamara had to manage each month. Although Hunter never physically abused Tamara, he publicly criticized her constantly, often to the point where she became emotionally distressed and physically sick.

Frequently, Hunter left Tamara alone while hanging out at the pool hall or on an excursion with one of his girlfriends. Tamara knew of Hunter's involvement with other women, and she left Hunter several times over the years, but she always returned. In spite of Hunter's behavior, the two continued to live together and have sexual relations. However, Tamara began to experience panic attacks and eventually slipped into a deep depression, leading her to seek counseling.

One day, Hunter declared to his best friend that he would immediately stop his philandering ways, smoking marijuana and excessive drinking, which he did. Unknown to Tamara, Hunter also began secretly stashing his earnings from pool games and weekend side jobs into a separate bank account, now totaling over $100,000. However, he never broke his habit of harshly criticizing Tamara.

On July 30, 2023, Hunter and Tamara got into a heated argument, and Hunter verbally assaulted her for over an hour. Tamara became sick and immediately packed her bags and left their home. Tamara moved in with a friend and after a few weeks she slept with him after a night out on the town. Tamara never went back to Hunter, and they agreed in writing to remain separated.

Her health has improved, and she now wants a divorce from Hunter. In June 2024, she retained a lawyer and asked him to file for divorce based on (i) constructive desertion, (ii) cruelty, (iii) adultery, and/or (iv) no-fault grounds. In addition to the divorce, she seeks spousal support and a share of the marital assets.

(a) Is Tamara entitled to a divorce under Virginia law based on the four grounds suggested to her lawyer? Explain fully.

(b) How is the court likely to rule on Tamara's request for spousal support? Explain fully.

(c) How is the court likely to rule on Tamara's request for a share of marital assets? Explain fully.

✖✖

(a) Tamara might be entitled to a divorce upon the grounds of cruelty. Cruelty as a ground of divorce includes physical cruelty, mental cruelty, or a combination of either that endangers the life or health of another. It can be granted after one year from the act. Although the burden of proof is high to establish cruelty, here, mental cruelty can be established by Hunter's constant public criticism and humiliation of Tamara, his waste of funds to the point of not providing for the payment of household bills, his frequent partying, his involvement with other women, and his frequent verbal assaults against Tamara to the point of causing her emotional and physical illness. If Hunter asserts the defense of recrimination – based on Tamara's post-separation adultery – she might not be entitled to a fault-based ground for divorce.

Subject to the same defense of recrimination, Tamara might be entitled to a divorce on the alternative ground of Hunter's constructive desertion of the marriage by the acts of mental cruelty imposed upon Tamara and his willful neglect of marital duties.

Tamara is not entitled to a divorce on the ground of adultery because the facts here are not sufficient to prove with clear and convincing evidence that Hunter had sexual intercourse (or sodomy) with another woman. To the extent the facts state that he frequently went on "excursions" with his girlfriends and that is sufficient to satisfy clear and convincing evidence of sexual intercourse, Tamara still is not entitled to a divorce based on adultery because she condoned the conduct. The facts indicate that Tamara knew of his involvement with other women, left the home several times, and returned to live with Hunter and engage in sexual relations with him. Additionally, if she could satisfy proof for adultery, the defense of recrimination could bar this ground as well.

Depending on the date the suit was filed and when she formed the intent to end the marriage, Tamara may not be entitled to a divorce on no-fault grounds. When the couple has no children, the period of separation required for a no-fault divorce is one year, unless the parties have an agreement providing at least for the disposition of property, in which case the period of required separation six months.

Here, the parties separated on July 30, 2023 and there is no property settlement agreement. She met with an attorney on June 2024, which would not satisfy the one year period. Moreover, the period of separation does not commence unless and until at least one of the parties has the intent to end the marriage. It is not clear when Tamara formed the required intent. If she formed that intent by July 30, 2023, then the one year period would be satisfied as of July 30, 2024, and she would be entitled to a no-faulty divorce.

(b) The court will likely rule that Tamara is entitled to spousal support. She has a need for support based on her high school education, low earning capacity, and their agreement that she not work during the nine years of marriage. Hunter is a shipyard worker and has the ability to pay spousal support. While Tamara's adultery, even post–separation, would otherwise bar her from receiving support from Hunter, support may be awarded to correct the manifest injustice of barring support, upon consideration of the relative income of the parties and their relative fault in the dissolution of the marriage. There is a great disparity of income here and Hunter's fault leading to the dissolution is much greater than Tamara's.

(c) To the extent the court has jurisdiction to dissolve the marriage, it can then distribute marital assets. If the one year of separation has not been met, she may obtain a bed and board divorce on cruelty or constructive desertion grounds. Once the court dissolves the marriage, however, the court should grant Tamara's request for a share of marital assets.

The facts do not indicate that any of the assets are separate property. Even though Hunter has been secretly stashing earnings from pool games and side jobs into a separate bank account, those monies do not constitute separate property under Virginia law. The fact that none of the marital assets were produced by Tamara is not relevant as all property that comes in during the marriage, to the extent it is not separate property, constitutes marital property regardless of who earned the money.

In making an equitable distribution, the court will consider that they have been married for ten years, he engaged

in cruelty and adultery during the marriage, the fact that she does not appear to have separate property capable of producing income, and the fact that he engaged in waste of marital assets. As to the waste of assets, the facts indicate that after they married he began smoking marijuana, drinking heavily, and dating women – often leaving insufficient funds for household and personal expenses. The court will also consider that Tamara is only 29 years old and her health has improved after leaving Hunter; thus, she is able to obtain some form of employment but has reduced earning potential because she has been out of work for ten years.

✖✖	We think that while applicants are likely not required to identify all 11 factors related to division of marital assets in order to get full credit, they should discuss the factors relevant to the facts

Question 3 [07/24 FRCVP]

On January 2, 2023, Good Bourbon, Inc. (Good Bourbon), a New York corporation with its principal place of business in Kentucky, and Willie's Barrels, Inc. (WB), a Delaware corporation with its principal place of business in Dinwiddie County, Virginia, entered into a written contract requiring WB to make and deliver custom oak barrels from its factory in Virginia to Good Bourbon in Kentucky.

The barrels were specially crafted for use in the bourbon manufacturing and storage process. The contract was negotiated and signed during a meeting of the companies' executives at the Jefferson Hotel in Richmond, Virginia. The contract provided that WB would deliver the barrels to Good Bourbon's warehouse in Kentucky throughout the fall of 2023.

A dispute arose over the timeliness of the delivery of barrels under the contract. In October of 2023, Good Bourbon sued WB in the Circuit Court for the City of Richmond, alleging breach of the contract and claiming damages in the amount of $50,000. WB promptly filed a notice of removal and other appropriate papers to remove the case to the United States District Court for the Eastern District of Virginia in Richmond. The following week, WB filed an answer and counterclaim against Good Bourbon, alleging that Good Bourbon had breached the contract by refusing to accept certain deliveries and seeking $30,000 in damages for Good Bourbon's alleged breaches.

In pretrial proceedings, WB argued that the breach of contract claims should be governed by Virginia law. Good Bourbon argued for application of Kentucky law. The District Court agreed with WB and at trial instructed the jury in accordance with Virginia law.

The jury returned a verdict in favor of WB on Good Bourbon's claim and found in favor of WB on its counterclaim, awarding WB damages in the amount of $30,000. On December 15, 2023, the court entered final judgment in conformity with the jury's verdict.

On January 15, 2024, Good Bourbon filed a motion for relief from the judgment, alleging that the judgment was void because the court lacked jurisdiction over the controversy.

(a) Was the court correct in applying Virginia law? Explain fully.

(b) Before trial, on what grounds might Good Bourbon have reasonably moved to have the case remanded to state court for lack of diversity jurisdiction, and what should have been the likely outcome of each? Explain fully.

(c) Should the court grant Good Bourbon's motion for relief from the judgment, and if so, what relief should be granted? Explain fully.

✖✖

(a) The District Court erred in applying Virginia law. Under the *Erie* doctrine a federal district court, in a diversity case, applies the law of the state in which the district court is located *See Klaxon v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941). "The UCC, as adopted by Virginia, dictates that in the absence of a "choice of law" agreement between parties to a contract, "the rights and obligations of the parties are determined by the law that would be selected by application of this State's conflict of laws principles." VA Code § 8.1A–301 (2008). In deciding conflict of laws issues, Virginia applies *lex* loci *contractus,* meaning that "the nature, validity and interpretation of contracts are governed by

the law of the place where [the contract was] made." *Black v. Powers,* 48 Va. App. 113, 128, 628 S.E.2d 546, 554 (2006)(*quoting C.I.T. Corp. v. Guy,* 170 Va. 16, 22, 195 S.E. 659, 661 (1938))

Further, the "law of the *place of performance governs questions concerning the performance of a contract*" and "the place of *performance of a sales contract is usually considered to be the place where goods are delivered*." *Madaus v. November Hill Farm, Inc.,* 630 F. Supp. 1246, 1248 (1986)." (emphasis added)*See Anderson v. Green-Gifford, Inc., No. CL07-5344, 2008 WL 8201362* (Va. Cir. Ct. Oct. 16, 2008). The facts state that [t]he contract provided that WB would deliver the barrels to Good Bourbont's warehouse in Kentucky through the fall of 2023." The dispute that arose was over the timeliness of delivery of barrels under the contract. The facts further state that Good Bourbon refused to accept certain deliveries. Because these matters related to performance, Kentucky law as the law of the place of performance would apply.

✖✖ We think any answer will get full credit because a while ago, the VBBE removed "conflict of laws" from the list of topics exam takers are responsible for.

(b) Before trial, Good Bourbon could reasonably have moved to remand the case to state court based requirements for diversity of jurisdiction under 28 U.S.C. § 1332 are complete diversity of citizenship and that the amount in controversy exceeds $75,000 exclusive of interests and costs. Here, each plain is a citizen of different states from each defendant. The parties are corporations. Under § 1332, a corporation is a citizen of every state in which it is incorporated and the state in which the corporation has its principal place of business.

(c) Here, Good Bourbon is incorporated in New York and issue has its principal place of business in Kentucky. Willie's Barrels is incorporated in Delaware and its principal place of business is in Dinwiddie County, Virginia. Each defendant is completely diverse from each defendant and thus complete diversity exists.

The second requirement of the diversity statute is that the amount in controversy "exceed the sum or value of $75,000 exclusive of interests and costs." The test for where the amount in controversy requirement has been met is generous: Can the court say to a legal certainty that the amount in controversy does not exceed $75,000 exclusive of interests in controversy. Here, Good Bourbon sought only $50,000 in its complaint. The date for determining whether the requirement is met is the time of the filing of the complaint. At that point the District Court ought to be able to say to a legal certainly that less than the required amount in controversy was at. Even if one also considered the $30,000 Willie's Barrels sought in its counterclaim, that was based on refusal to accept certain deliveries. Thus, the amount seems to relate to the dispute on which Good Bourbon base its $50,000 claim. In other words, the $30,000 would not be added to the $50,000 to satisfy the amount in controversy (1) because the time of filing is the point at which the requirement is met or not, and (2) the amount sought in the counterclaim appears to be more a set-off of the $50,000, seeking to offset Good Bourbon's claim—not something that adds to the amount of the overall claim.

The additional basis on which Good Bourbon could seek remand is the in-state removal provision of 28 U.S.C. § 1441(b)(2), which provides that "[a] civil action otherwise removable solely on the basis of [diversity jurisdiction under § 1332] may not be removed if any of the parties in interest properly joined is a citizen of the state in which suit is brought. Although a minority of circuits treats this requirement as jurisdictional, precedent in the Fourth Circuit considers the requirement in section 1441 to be waivable—like any other defect in removal—if the non-removing party fails to move to remand within 30 days of filing of the notice of removal. *See Medish v. Johns Hopkins Health System Corp.*, 272 F. Supp. 719. 774 (2017).

In sum, the Court should grant the motion to remand base on the jurisdictional defect of failure to satisfy the amount in controversy requirement. But the court should not grant the motion based on Willie's Barrels being a citizen of Virginia.

A motion for relief from judgment would be under Federal Rule of Civil Procedure 60. Presumably, the argument here would be that the judgment is void because the court lacked diversity jurisdiction at the time of the judgment. Under *Caterpillar, Inc. v, Lewis*, 519 U.S. 61, 77-78 (1996), the United States Supreme Court held that defects in removal ought not prevent a judgment obtained when the federal district court has jurisdiction. Here, the counterclaim for $30,000, if it demonstrated an amount in dispute beyond the $50,000 sought by Willie's Barrels, could show that the court had a sufficient amount in controversy to satisfy the diversity statute at the time of judgment. If so, the court should deny Good

Bourbon's motion for relief from judgment.

However, if the amount in dispute to a legal certainty never could exceed $75,000, including at the time of judgment, the court should grant the motion for relief because the court lacked jurisdiction.

Question 4 [07/24 VCVP + Torts]

Paula was walking home on the sidewalk along Oak Street, a residential two-way street in Fairfax, Virginia. It was daytime and clear. Oak Street is straight and flat. Paula needed to cross Oak Street to get to her house.

There was a marked crosswalk across Oak Street just past the intersection of Maple and Oak. When she was across the street from her house, she looked both ways, saw that no cars were coming from either direction, and began to cross the street.

As she was crossing the street, Mike, driving a truck, turned onto Oak Street from Maple Street. He was looking the other way for oncoming traffic when he turned onto Oak Street and crossed over the crosswalk. He did not see Paula before running into her 15 feet beyond the crosswalk.

Paula was injured in the accident. Paula filed suit against Mike for his negligence in not keeping a safe lookout and causing her injuries. Mike denied that he was negligent but did not assert any affirmative defenses in his answer.

At trial, Paula admitted that although there was a clearly marked crosswalk at the intersection of Maple and Oak, she chose to cross outside the crosswalk because it was closer to her house.

At the end of the trial, Mike asked for a jury instruction on contributory negligence because crossing the street outside a crosswalk is a traffic infraction in Virginia. The court granted a contributory negligence instruction over Paula's objection.

The jury returned a verdict in favor of Paula. The judge set aside the jury verdict and entered judgment for Mike, finding that Paula was contributorily negligent as a matter of law.

(a) Did the court err in allowing the contributory negligence instruction over Paula's objection? Explain fully.

(b) What are the elements necessary to prove contributory negligence by Paula? Explain fully.

(c) Assume for this part only that the court correctly allowed the contributory negligence instruction. Did the court err in setting aside the jury verdict and entering judgment for Mike? Explain fully.

✖✖

(a). The court did not err in allowing the contributory negligence instruction. Virginia is one of a very few jurisdictions that still recognize strict contributory negligence. If a defendant is deemed to be negligent which proximately caused an accident and damages/injuries to a plaintiff, the plaintiff is nonetheless barred from recovery if she, herself, was negligent and her negligence was also a proximate cause of the accident and damages/injuries. The trier of fact does not compare the degree of negligence of the parties. Any negligence by the plaintiff which is a proximate cause of the accident and her injuries will bar the plaintiff from any recovery. Here, the fact pattern suggests that there is sufficient evidence to instruct the jury on contributory negligence. Paula chose not to cross Oak Street in the crosswalk, in violation of Virginia Code Section 46.2-923(A). In fact, she was 15 feet away from the crosswalk when struck by Mike's truck. She also had a duty to keep a proper lookout for oncoming vehicles.

Generally, contributory negligence is an affirmative defense which should be pleaded by a defendant in response to a plaintiff's complaint. However, Rule 3:18 (c) makes it clear that even if a defendant does not plead the defense of contributory negligence, he may still rely on it as a defense if plaintiff's own evidence reveals sufficient facts to support an instruction. The fact pattern suggests that Paula admitted during plaintiff's case in chief that she was not in the crosswalk at the time of impact. Therefore, the defendant was entitled to have the jury instructed on the issue of contributory negligence.

(b). The plaintiff's evidence must show or the defendant must prove that 1). The plaintiff has a duty to take reasonable precautions for her own safety, 2). The plaintiff failed to act as a reasonably person would have acted for her own safety under the circumstances, and 3). The plaintiff's action(s) or inaction(s) was/were a proximate cause of the plaintiff's damages/injuries.

(c) Virginia Code Section 8.01-430 empowers the trial judge to enter judgment *non obstante veredicto* (J. N. O. V.), where the jury's verdict is contrary to the evidence, or it is without evidence to support it. However, if reasonable persons may differ in their conclusions of fact to be drawn from the evidence or if the conclusion is dependent on the weight to be given to the testimony, the trial judge should not exercise this power. See *Carter v. Lambert*, 246 Va. 309, 435 S.E. 2d 403 (1993).

The given fact pattern is devoid of specific factual information to determine if the trial judge was correct in granting judgment for Mike as a matter of law. Further factual information is needed: How much time elapsed from the time Mike commenced his right turn until impact with Paula? How fast was Mike proceeding? How fast was Paula walking? How far out in the street was Paula when she was struck? Was she in the street for sufficient time that Mike could or should have taken action to avoid striking Paula; i. e., last clear chance doctrine? However, it could be argued by the plaintiff that crossing Oak Street outside of the crosswalk, though negligent, was not a proximate cause of the accident, as Mike was never looking in Paula's direction at any time before the accident; so it doesn't matter whether she was in or outside of the crosswalk. See *Moses v. Southwestern Virginia Transport*, 273 Va. 672, 643 S. E. 2nd 156 (2007).

If the factual evidence at trial was undisputed that Paula was guilty of contributory negligence as a matter of law, then the trial judge correctly set aside verdict and entered judgment for Mike. However, if reasonable minds could differ as to Paula's contributory negligence and proximate cause, then the trial judge erred in setting aside the verdict and entering judgment for Mike as a matter of law.

Question 5 [07/24] Substantive Criminal

Vicky lives by herself in Richmond, Virginia. She owns an older home with high ceilings and tall windows. Vicky treasures her privacy and put in window shades that would block out the light and prevent her neighbors from peering in. She regularly leaves the shades up during the day and puts them down at night. With the shades down, lights need to be turned on inside the house to see. Vicky spends most of the year in this home.

Vicky also owns a home on the Northern Neck of Virginia where she regularly spends weekends. Before leaving one weekend, she made sure that all of her doors were locked, that all of the lights were turned off, and that her window shades were up so her house plants could get light.

When Vicky returned, she found that a rear window in her house had been broken. The break was large enough for a person to crawl through. She found that the rear door was unlocked, all of the shades in her home were down, and all of the lights were on. She knew that someone had been in her home. She found that several things had been stolen, including her family silver, a two-carat diamond ring, and a diamond bracelet worth more than $10,000. The thief even took the antique jewelry box that contained the jewelry. Vicky immediately called the police.

Officer Edwards responded and took Vicky's information. He confirmed that the lights were on and that the shades were down. He took pieces of the broken glass and found fingerprints on the rear door handle. He found blue jean material on the glass. He spoke to neighbors who said they had not seen anyone at the home during daylight hours. He soon discovered that a diamond bracelet had been pawned that morning. He took Vicky to the pawn shop, and she confirmed that it was her bracelet.

The owner gave Officer Edwards the name and address of Peter, the person who pawned the bracelet, as well as his picture.

Officer Edwards left the pawn shop and went to Peter's address and knocked on the door. Annie answered the door and the officer asked Annie if Peter was at home. She said he had left early that morning. Officer Edwards left his business card and walked around the property, noticing a locked storage shed with a window. He looked through the window and saw what appeared to be Vicky's antique jewelry box. He then went back to the house and asked Annie who owned the storage shed.

Annie said that she and Peter owned the shed but only Peter had a key. Officer Edwards then returned to the police station. At the station, he received a report that the fingerprints from Vicky's door belonged to Peter. Officer Edwards then obtained a search warrant for Annie and Peter's storage shed.

He took the warrant to Annie and Peter's house. Peter was present and upon seeing the search warrant, Peter took his key and opened the storage shed. Officer Edwards found the rest of Vicky's jewelry in her antique jewelry box in the shed. Officer Edwards did not take a statement from Peter.

Officer Edwards charged Peter with common law burglary, which has been codified in Virginia. Officer Edwards charged Annie with receiving or concealing stolen goods.

(a) What are the elements of the crime of common law burglary, and should Peter be convicted of common law burglary? Explain fully.

(b) What are the elements of the crime of receiving or concealing stolen goods, and should Annie be convicted of receiving or concealing stolen goods? Explain fully.

✖✖

(a) The elements of common law burglary are breaking and entering into a dwelling house of another in the nighttime with the intent to commit a felony within. The intent to commit a felony can be inferred by the presence and by the taking of items valued over $10000 from the home. Peter can be identified as the perpetrator because his fingerprints were on the door handle, he was identified as the person who had pawned Vicky's bracelet, and Vicky's antique jewelry box was found in Peter's locked shed.

Here, the issues are:

(1) Whether the house in Northern Neck is a dwelling since Vicky only lived there intermittently and was not there when the incident happened. At common law a dwelling house is a place that is regularly used for sleeping. And, in Virginia, a house remains a dwelling even when it is unoccupied so long as the occupant intends to return for that purpose. Thus, it does not matter that the house in Northern Neck was not Vicky's primary residence or that she was not at home when the break in occurred. Because she regularly stayed there on the weekends and left with the intent to return for that purpose, the house was a dwelling house under the common law.

✖✖ We think an analysis as to either house should work b/c the analysis is the same.

(2) As to the breaking, the evidence of the broken window large enough for a person to crawl through, the piece of jean fabric on the glass, and Peter's fingerprints on the rear door handle support a finding that Peter broke into the house.

(3) At common law, the breaking had to have occurred in the nighttime. While it is unknown precisely the time of day that the breaking occurred, the circumstantial evidence points to a breaking at night: the neighbors did not witness any one at the home during the day, the window shades were pulled down, and the lights were turned on. From this evidence, it can reasonably be inferred that Peter entered at night, turned on the lights, and pulled down the window shades so that the neighbors would not see. Even so, however, the question will be whether this circumstantial evidence is sufficient to support a finding that Peter broke in at night. (Based on the first paragraph of the fact pattern, Peter might argue that he pulled the shades to prevent the neighbors from seeing him even in the day light, and that he had to turn on the lights to see with the shades down. However, that paragraph describes the shades and need for privacy at the Richmond home and nothing in the fact pattern indicates that Vicky used identical shades in the Northern Neck home.) [Note: An examinee may point out that Peter could be convicted of statutory burglary as Virginia defines burglary as entering in the nighttime or breaking and entering during the day, and Virginia recognizes statutory burglary as a lesser-included offense of common law burglary.]

✖✖ We think the stronger view is the circumstantial evidence is not enough to establish that Peter broke in during the night.

The elements of the crime of receiving or concealing stolen goods includes (1) buying or receiving from another

person any stolen goods or other thing, or aiding them in concealing the goods or other thing, while (2) knowing that they are stolen.

Here, the stolen goods were found in shed owned by Anna and Peter, but Peter alone had the key to the shed. Peter opened the shed with the key when the officer returned with the warrant. There is no evidence that Anna knew the shed contained stolen property or that she had received any of the stolen property, nor is there any evidence that Anna benefited from the stolen property. Therefore, Anna could not be convicted of the crime of receiving or concealing stolen property.

Question 6 [07/24 VCVP + Creditors' Rights]

Larry, a longtime resident of North Carolina, recently retired and purchased his dream vacation home on Smith Mountain Lake in Franklin County, Virginia. Larry quickly became fishing buddies with Bob, his next-door neighbor on Smith Mountain Lake. Bob is a longtime resident of Franklin County, Virginia. He knew the best fishing spots on the lake and shared Larry's passion for the outdoors.

Bob had cultivated a small farm on his property and often sold produce at the local farmer's market. He bragged to Larry about how he has "lived off of the land" since his divorce.

One day as they fished, Bob asked Larry for a short duration $50,000 loan to purchase a boat he had been eyeing. Bob explained that he would receive an influx of cash soon from his real estate business but not in time to purchase the boat. The boat was much nicer than the current boats he owned, which he had inherited from his late father. Larry agreed and loaned Bob $50,000. Bob signed a valid promissory note agreeing to repay the loan within 90 days. Bob purchased the boat and the two enjoyed it through the summer until Larry, while driving it with Bob's permission, accidentally hit and damaged a Cabin Cruiser anchored at a nearby marina.

The owners of the Cabin Cruiser (the Millers) brought a lawsuit against Larry and obtained a $60,000 judgment against him in the Franklin County Circuit Court, and then obtained a judgment lien against him in that county. With the $50,000 loan then due and planning to use it to partially satisfy the judgment, Larry demanded payment on the note from Bob.

Bob rejected Larry's demand because his expected business income had not been realized and he did not have the money to repay the loan. In fact, Bob confessed to Larry that he lived a pauper's life. Unfortunately, his real estate business had never really broken even and his only other income besides his farmer's market sales was a small amount of spousal support from his ex-wife. Most of his assets, including his home, had been inherited from his father. Bob then told Larry that he was going to have to sell his lake house.

Larry filed suit against Bob in the Franklin County Circuit Court and obtained a judgment against Bob for $50,000, which the Franklin County Clerk then docketed.

Larry, now in need of money himself, wants to pursue any property that Bob owns to satisfy the judgment.

(a) What steps should Larry take to force the sale of Bob's lake house under Virginia law, and how can he best protect his interest from efforts by Bob to sell his home to a third party before a court ordered sale of the property? Explain fully.

(b) What steps should Larry take to acquire tangible personal property from Bob and what general timeline must be followed for doing so? Explain fully.

(c) What statutory debtor exemptions, if any, may be available to Bob with regard to Larry's efforts to pursue debt recovery from him? Explain fully.

(d) For a judgment lien obtained against Larry by the Millers, what is the duration of the lien, and can it be extended under Virginia law? If so, what steps must be taken by the Millers? Explain fully.

✖✖

(a) Larry should file an equitable action to force the sale of Bob's lake house and record a memorandum of lis pendens to protect his interest. At issue are the procedures available to Larry under Virginia law to enforce his judgment lien against Bob's real property.

Every judgment rendered in Virginia is a lien on real estate to which the defendant is possessed from the time it is recorded in the Circuit Court on the judgment lien docket where the land is situated. A suit in equity may be brought to enforce a lien of judgment and to obtain a decree of sale of the real estate. If it appears that the rents and profits will not satisfy the judgment in 5 years, the court will order the sale of the property and the application of the proceeds in satisfaction of the judgment.

A memorandum of lis pendens is appropriate when the action on which the lis pendens is based seeks to establish an interest by the filing party in the real estate. The memorandum must set forth the title of the cause of action, the object thereof, the court where the action is pending, the amount of the claim, and the name of the person whose estate is affected. This will bind a subsequent purchaser once filed.

The facts state that the Franklin County Circuit Court Clerk has docketed the judgment for $50,000 that Larry obtained against Bob. Therefore, Larry has a lien on Bob's lake house and should file a complaint in the Circuit Court of Franklin County to obtain a decree of sale. In addition to filing the equitable action, Larry should file the memorandum of lis pendens in the circuit court setting forth the requirements previously discussed, which will bind subsequent purchasers and protect his interest in Bob's house. Va. Code §§ 8.01- 458; - 462; -463; - 268.

(b) Larry should request a writ of fieri facias [writ of execution] from the circuit court clerk. At issue are the procedures available to Larry under Virginia law to enforce his judgment and obtain a lien on Bob's personal property.

Upon request of a judgment creditor, the clerk of the court where a judgment is entered should issue a writ of fieri facias at the expiration of 21 days from the date of judgment. The writ will command the sheriff or other officer to levy upon the judgment debtor's goods by repossessing and selling such goods, then conveying the proceeds of the sale to the creditor. The sheriff will fix the time and place for sale and post a notice at least 10 days before the sale, which should be at a place near the residence of the owner. The writ will include a return section for the officer to describe the property found and actions taken, and the officer will return whether the money has been or cannot be made. The sheriff is generally ordered to make the return within 90 days.

Because Larry did not obtain a judgment against Bob's specific personal property, he should seek to have the sheriff levy upon and sell Bob's personal property. Specifically, Larry should request that the Franklin County Circuit Court Clerk issue a writ of fieri facias 21 days after judgment commanding the sheriff to levy upon Bob's tangible personal property, post a notice of sale at least ten days before the sale, and conduct a public auction to sell the seized property. The sheriff will return the writ with details of the property seized and actions taken within 90 days.
Va. Code §§ 8.01- 466; - 474; - 483; - 487; - 492.

✖✖ **Note:** The language of the question was about the steps that Larry should take to "acquire tangible personal property." We believe that the question was in reference to a writ of fieri facias [writ of execution], which would not result in Larry acquiring the tangible property; rather, Larry would acquire the proceeds of the sale of such tangible personal property.
If Larry wanted to acquire the tangible personal property itself, he may pursue a detinue action. This action may be brought in either the GDC or the circuit court (depending on the amount in controversy), and would involve a description of the property, the plaintiff's right to the property, and the basis of the claim. Based on the wording of the question, we believe that an examinee who discussed either a writ of fieri facias or a detinue action should receive credit for subpart (b).

(c) The homestead exemption and a variety of other exemptions may be available to Bob with regard to Larry's efforts to pursue debt recovery from him. At issue are the statutory exemptions provided to judgment debtors under Virginia law.

A Virginia householder may hold exempt from a creditor real and personal property not in excess of $5,000 in value, or if 65 or older, not in excess of $10,000. In addition, the householder may hold exempt real or personal property used as the principal residence of the householder not exceeding $25,000 in value (increased to $50,000 effective July 1, 2024).

The right to receive spousal support to the extent reasonably necessary for support of the debtor is exempt from the creditor process. There are also a variety of poor debtor's exemptions, including unpaid spousal support, family heirlooms not to exceed $5,000, clothes not to exceed $1,000, home furnishings not to exceed $5,000, tools used in an occupation not to exceed $10,000, and motor vehicles not to exceed $6,000 (increased to $10,000 effective July 1, 2024). There are also certain articles exempted to householders engaged in agriculture, including a tractor (up to $3,000) and fertilizer (up to $1000).

Based on the stated facts, Bob runs a small farm on his property and sells his produce at the farmer's market. He receives support from his former spouse. Neither his age nor any specific items of personal property are given, so it is unclear about whether the age-related or other personal property exemptions would be applicable here. However, Bob would likely be able to claim his homestead exemption for his lake house (principal place of residence) up to $25,000 in value (increased to $50,000 as of July 1, 2024), because the facts indicate that he has been a longtime resident of Franklin County, VA.

In addition, assuming that Bob is under 65 years old and because of the fact that Bob has been living a "pauper's life" with not much income other than the spousal support and farmer's market sales, the "poor debtor exceptions" should also be available for him. Accordingly, Bob's spousal support should be exempt as well as the specific items of property discussed previously up to the limits given, such as the exemption up to $5,000 in value for his home furnishings, up to $10,000 for tools of his trade (e.g., farming equipment), and up to $6,000 for his automobile (increased to $10,000 effective July 1, 2024).
Va. Code §§ 34-4; 34-26; 34-27; 34–28.2.

(d) The duration of the judgment lien obtained against Larry by the Millers is 10 years and can be extended under Virginia law.

A judgment lien against real property becomes effective once such lien is recorded on the judgment lien docket in the circuit where the property is located. For circuit court judgments dated after July 1, 2021, no execution shall be issued after 10 years from the date of the judgment unless the period is extended. The period may be extended for an additional 10 years by recording a certificate in the clerk's office prior to the expiration of the original judgment lien period. An additional 10-year extension may be obtained by recording another certificate prior to the expiration of the recordation of the second certificate.

The Millers obtained a judgment against Larry in the Circuit Court of Franklin County. Therefore, their judgment lien is effective for 10 years from the date it was entered by the court. The Millers can extend this lien for two additional 10-year periods by following the previously described recording procedures.
Va. Code §§ 8.01-458; -251.

Question 7 [07.24 Evidence]

We're In a Pickle, Inc. (WIP), a Virginia corporation, manufactures and sells pickleball rackets and planned to introduce a high-end titanium racket to the market in time for the winter holiday season.

On May 1, 2022, WIP ordered a shipment of titanium from Terry's Titanium Co. (TT), another Virginia corporation, through TT's online portal. When WIP inquired about the status of its order several weeks later, TT denied it ever received the online order and refused to ship the titanium. By the time WIP was able to find replacement titanium, it was too late to bring the rackets to market in time for the holiday season.

WIP sued TT for breach of contract, alleging that it lost $10,000 in profits because it missed the holiday shopping rush. TT claimed that no contract was ever entered because TT never received the online order and that even if there had been a valid contract, there was no market for high-end pickleball rackets and WIP would not have made any profit.

During settlement negotiations, TT sent a settlement package to WIP, which included an internal email from TT's President, Carl Ramirez (Ramirez), to his Board of Directors that indicated WIP's order had been received on May 2, 2022. TT placed the words "CONFIDENTIAL - FOR SETTLMENT PURPOSES ONLY" on the top of each page of the package, including the email.

While discussing a possible settlement, Ramirez told WIP, "our analysis of the market concluded that WIP's profits would have been between $5,000 and $10,000" and offered to settle the case for $5,000. The settlement negotiations were unsuccessful, and the case went to trial.

During the trial, WIP sought to introduce Ramirez's offer to settle for $5,000, and Ramirez's internal email to his Board indicating that TT received WIP's online order on May 2, 2022.

In his trial testimony, Ramirez denied that TT did any market analysis of WIP's lost profits. WIP then sought to impeach Ramirez with his statement, "our analysis of the market concluded that WIP's profits would have been between

$5,000 and $10,000."

TT objected to all three pieces of evidence.

(a) How is the court likely to rule on the admissibility of Ramirez's offer to settle for $5,000? Explain fully.

(b) How is the court likely to rule on the admissibility of Ramirez's email to his Board? Explain fully.

(c) How is the court likely to rule on the admissibility of Ramirez's statement, "our analysis of the market concluded that WIP's profits would have been between $5,000 and $10,000"? Explain fully.

✖✖

(a) The court will likely exclude Item 1, Ramirez's offer to settle for $5,000. Supreme Court of Virginia Rule 2:408(a) prohibits the admission in a civil case of evidence of "statements made during compromise negotiations," particularly those statements "promising, or offering . . . a valuable consideration in compromising or attempting to compromise the claim [at issue,]" where such statements are offered to "prove or disprove the validity or amount of a disputed claim." This is a civil case, the statement was an offer of consideration made during settlement negotiations to settle the case, and there is nothing in the prompt that suggests that the evidence is being offered for any relevant purpose other than to establish the validity of the claim. Item 1 should be excluded.

(b) Item 2, the Ramirez email to the TT Board regarding receipt of WIP's order, presents a stickier problem. The prompt is not clear as to when Ramirez sent the email to his Board or for what purpose – the prompt merely states that the email was included in the settlement package. The timing and purpose of the email would likely be dispositive.

If the email was generated outside the settlement context – for example, as part of a regular report to update the Board on the month's orders – then the email is likely admissible. The email is certainly relevant, it raises no hearsay concerns (because it is a statement by a party opponent under Rule 2:803), no facts indicate it would fall within the attorney-client privilege, and Rule 2:408 does not protect it. Indeed, Rule 2:408 specifically provides:

> Otherwise admissible evidence that existed prior to the commencement of compromise negotiations, including pre-existing documents or electronic communications, is not excludable under this Rule merely because such evidence was disclosed, produced, or discussed by a party during such negotiations.
>
> Notably, Rule 2:408(c) specifically carves out of Rule 2:408(a)'s exclusion electronic communications – which Item 2 is – and makes clear that preexisting communications are not excludable simply because they were disclosed during negotiations.
>
> If, however, the communication between Ramirez and the Board occurred after the dispute arose and for the purposes of attempting to settle (e.g. to alert the Board to TT's exposure to liability in an effort to get the Board to grant authority for a settlement offer), there is a strong argument to be made that Item 2 should not be admitted. Federal Rule of Evidence 408, to which Virginia Supreme Court Rule 2:408 is an analogue, is consistently interpreted to apply to internal statements, discussions and memoranda made or prepared in the context of attempts to settle disputes. This is because, without interpreting the rule to reach such communications, organizational parties could not undertake the internal discussion necessary to settle. This would undercut Rule 2:408's purpose (i.e. to foster settlement).
>
> C. The court will likely exclude Item 3, Ramirez's statement during the settlement discussions that "our analysis of the market concluded that WIP's profits would have been between $5,000 and $10,000." The evidence certainly falls within Rule 408(a)'s reach because it is a statement "made during compromise negotiations about the claim" (2:408(a)(2)). And while WIP argues that the statement is not being offered to establish "the validity or amount of a disputed claim," but rather to impeach, Rule 2:408(a) specifically provides that such statements may not be admitted "to impeach by a prior inconsistent statement or by contradiction." There is nothing in the prompt that suggests that the evidence is being offered for any relevant purpose other than impeachment (or, *sub rosa*, to prove the validity or amount of the disputed claim, which is also an improper purpose under 2:408), so Item 2 should be excluded.

Question 8 [07.24 Partnerships]

Allison, Brooke, and Claire were general partners in a landscaping business they called ABC Partners. They had no written partnership agreement, they shared profits and losses equally, and they received no other compensation from ABC Partners. Their office was located in Virginia Beach, Virginia, and a majority of their work and their profits came from landscaping performed for Office Buildings Corp. (OBC), an entity that managed office buildings.

Anytime OBC had a landscaping job for ABC Partners, it sent over a contract and, if the terms were approved by ABC Partners, it signed the contract and returned it to OBC.

ABC Partners received a proposed contract from Big Building Life, LLC (Big Building) for a landscaping job of the type typically undertaken by it. Allison and Brooke wanted to enter into the contract with Big Building, but Claire was concerned that the pricing in the proposal would result in a loss, so she opposed it and told Allison and Brooke not to accept it.

Nevertheless, Allison and Brooke, purporting to act on behalf of ABC Partners, entered into the contract with Big Building.

Claire was angry that Allison and Brooke had contravened her express instructions. The next day, when ABC Partners received a proposal for a new landscaping job from OBC, Claire decided to enter into the contract with OBC in her own name, rather than in the name of ABC Partners.

As it turns out, the contract with Big Building was very unprofitable. Claire asserted that the losses on the Big Building contract were not obligations of ABC Partners and refused to share in the losses.

On the other hand, Claire's contract with OBC was very profitable. Claire asserted that the profits on this contract were not profits of ABC Partners and refused to share the profits with Allison and Brooke.

Allison and Brooke plan to complete the work on the first Big Building contract and to enter into a second contract with Big Building for additional work at a higher rate of compensation.

Claire tells them that, as far as she is concerned, ABC Partners is at its end and that they no longer have the power in the name of ABC Partners to finish up the first Big Building contract or to take the second contract (or any other additional work) from Big Building.

(a) Did Allison and Brooke have the authority to enter into the first contract with Big Building on behalf of ABC Partners? Explain fully.

(b) What duties, if any, to ABC Partners did Claire breach when she contracted with OBC in her own name? What remedy, if any, is available to ABC Partners to recover the profits earned by Claire under that contract? Explain fully.

(c) Did Claire effectively terminate the right of Allison and Brooke, on behalf of ABC Partners, to finish the work under the first contract with Big Building and enter into the second contract with Big Building? Explain fully.

✖✖

(a) Yes, Allison and Brooke had the authority to enter into the first contract with Big Building on behalf of ABC Partners.

In the absence of an agreement otherwise, each partner has equal rights in the management and conduct of partnership business. Further, although an act outside the ordinary course of business of a partnership may be undertaken only with the consent of all of the partners, a difference arising as to a matter in the ordinary course of business of a partnership may be decided by a majority of the partners.

Here, because there was no written partnership agreement or oral agreement between the partners modifying the statutory default rules, each partner in ABC Partners had an equal vote, and ordinary course of business decisions would be decided by a majority. The proposal from Big Building was for a landscaping job of the type ordinarily undertaken by the partnership and, thus, the agreement with Big Building was in the ordinary course of partnership business. Because this was an ordinary matter, the difference over the contract with Big Building would be resolved by a majority of the partners. Allison and Brooke constituted a majority of the of the partners, and therefore, had the right to enter into the contract with Big Building on behalf of the partnership.

(b) When Claire contracted with OBC in her own name, she breached the duty of loyalty owed to ABC Partners, and the remedy of an accounting is available to ABC Partners to recover the profits earned by Claire under that contract.

A partner owes a fiduciary duty of loyalty to the partnership. A partner may not compete with the partnership or misappropriate partnership opportunities. A partner must account to the partnership for any profit derived by the partner from the appropriation of a partnership opportunity.

By entering into a landscaping contract with OBC in her own name, Claire was competing with ABC Partners by taking business away from the partnership. Additionally, the new contract with OBC was clearly a partnership opportunity – it was the same type of work that the partnership performed (landscaping) for an existing customer. Thus, Claire breached her duty of loyalty to the partnership, and the partnership is entitled to an accounting and can recover from Claire the profits from her individual contract with OBC.

(c) Claire did not terminate the right of Allison and Brooke, on behalf of ABC Partners, to finish the work under the first contract with Big Building, but she did effectively terminate their right to enter into the second contract with Big Building.

A partner is dissociated from a partnership upon notice of the partner's express will to withdraw as a partner. In a partnership at will, which is formed when the partners have not agreed to a term or particular undertaking, a partner's dissociation by express will triggers dissolution of the partnership. Upon dissolution, the partnership business is wound up. During that period, partners only have actual authority to enter into transactions appropriate for winding up, e.g. settling claims, selling asserts, concluding existing work.

Here, Claire gave Allison and Brooke notice of her intent to withdraw from the partnership, effectively dissociating her from the partnership. Because ABC Partners was a partnership at will (no facts suggest that the partners agreed to a term or undertaking), Claire's dissociation by express will dissolved the partnership and it entered winding up. Allison and Brooke had the right to finish the work under the first contract with Big Building because concluding work under an existing contract is appropriate for winding up, but they did not have the right to enter into a new contract with Big Building because taking on new work is not appropriate for winding up.

Question 9 [07.24 Real Property and Wills]

Henry and Whitney were married in 1980 in Hot Springs, Virginia. They bought their marital home in Hot Springs in 1981 and it was titled in their names, with rights of survivorship. The home was purchased with marital funds. In 1985, Henry left Whitney and Henry rented an apartment. Whitney remained in the Hot Springs home. They had no children and were never divorced.

In 1990, Henry and Sally began dating. The relationship became serious, and they purchased a newly constructed house together in 1991 in Roanoke, Virginia. The deed was in both names. The deed made no reference to rights of survivorship. Henry and Sally each contributed to the purchase of the Roanoke house. In 1992, Sally gave birth to Bonnie, the child of Henry and Sally. Henry and Sally never married. Henry, Sally, and Bonnie lived happily in the Roanoke house for 18 years.

In 2011, Henry died unexpectedly. He left no will. Bonnie now claims an interest in the Hot Springs home. Sally claims that the Roanoke house is hers. Whitney claims that she has an interest in the Roanoke house as well.

For purposes of this question, assume that Whitney will not benefit from exercising her right to take an elective-share of the augmented estate. Your answer should be based on Virginia's law of intestate succession.

(a) What type of tenancy was created when Henry and Whitney purchased the Hot Springs home in 1981? Explain fully.

(b) What interest, if any, does Whitney have in the Hot Springs home? What interest, if any, does Bonnie have in the Hot Springs home? Explain fully.

(c) What type of tenancy was created when Henry and Sally purchased the Roanoke house? Explain fully.

(d) What interest, if any, do the following have in the Roanoke house?
1. Sally
2. Bonnie
3. Whitney

Explain each fully.

✖✖

a) The issue is what type of tenancy was created when Henry and Whitney purchased the Hot Springs home in 1981 since they were already married and bought the house with rights of survivorship.

When property is conveyed to spouses, Virginia law presumes against a tenancy by the entirety unless all required common-law unities exist (time, title, interest, marriage and possession), and the instrument uses (i) the language designating the spouses as "tenants by the entireties" or "tenants by the entirety" or (ii) expressly stating the expression "with survivorship," or similar language in the instrument. §55.1-136; § 55.1-135; See Jones v. Phillips, 299 Va. 285, 850 S.E.2d 646 (2020); Evans v. Evans, 290 Va. 176, 183, 772 S.E.2d 576 (2015); In the context of a tenancy by the entirety, the right of survivorship means that upon the death of either spouse, the whole of the estate by the entireties remains in the survivor.

Here, Henry and Whitney were married in 1980 in Hot Springs, Virginia. They bought their marital home in Hot Springs in 1981. Therefore, the unities of time, title, interest, marriage and possession all existed since they bought the home at the same time, it was titled in both of their names, and they were married at the time of purchasing the home, with the same interest and right of possession. The only issue remaining is whether Henry and Whitney took as joint tenants, or as tenants by the entirety. Here, the property was titled in their names, with "rights of survivorship." Although the presumption is against finding a tenancy by the entirety, coupled with the common law unities and language of a right of survivorship, a tenancy by the entirety is created.

Therefore, Henry and Whitney purchased the Hot Springs home in 1981 as tenants by the entirety.

(b)
1. Whitney

The issue is what interest, if any, does Whitney have in the Hot Springs home since the co-tenancy in the home was never severed.

Any interest in real property, held as tenants by the entireties, can only be severed by a written instrument if that instrument is a deed that is signed by both spouses, as grantors. Although a joint

tenancy may be severed in a number of ways during life, death does not sever a joint tenancy or a tenancy by the entirety. If title to the marital residence, as expressed in the deed, is "joint with right of survivorship" with the surviving spouse, or is "tenants by the entirety," then the surviving spouse automatically becomes the sole owner upon the death of the other spouse.
Here, in 1985, Henry left Whitney. However, they never divorced. Whitney remained in the Hot Springs home. In 2011, when Henry died, his interest in Hot Springs immediately transferred to Whitney, since her right of survivorship remained in the home.

Therefore, Whitney owns the Hot Springs home, solely, in fee simple absolute, because she owned the home with a right of survivorship with Henry.

2. Bonnie

The issue is what interest, if any, does Bonnie have in the Hot Springs home as Henry's sole child despite the Hot Springs home being non-probate property.

In Virginia, when a person dies without a will, their property will pass to their heirs under an intestate succession scheme. The estate includes probate property, and will not include non-probate property. Non-probate property includes property that is subject to a right of survivorship.

Here, although Bonnie is Henry's child, Bonnie will not take an interest in the Hot Springs home. As explained above, Whitney is the sole owner of the Hot Springs house. This is because the property was subject to a right of survivorship, and is non-probate.

Therefore, Bonnie does not have any interest in the Hot Springs home since it is non-probate property.

(c) The issue is what type of tenancy was created when Henry and Sally purchased the Roanoke house but were not married and the deed made no reference to a right of survivorship.

In Virginia, when property is held by two or more persons, there is a presumption that a tenancy in common is created, unless the words "right of survivorship" or equivalent language is used.

In 1990, Henry and Sally began dating. In 1991, they purchased a newly constructed house together in Roanoke, Virginia. Although the deed was in both names and Henry and Sally each contributed to the purchase of the Roanoke house, the deed made no reference to rights of survivorship. Therefore, Henry and Sally purchased the Roanoke house as tenants in common.

(d) The issue is what interest, if any, do Sally, Bonnie, and Whitney have in the Roanoke house.
In Virginia, if a person dies intestate but survived by a spouse, the widow or widower is entitled to the entire estate passing by intestacy, unless the decedent had any children who are not also the children of the surviving spouse. If the decedent had such children, the surviving spouse and all of the decedent's children divide the estate, with the spouse taking one third and all of the decedent's children sharing the other two thirds. A person's interest in a tenancy in common is conveyable, inheritable, or devisable.

Here, when Henry died in 2011, he was survived by Sally (his partner), Bonnie (his child), and Whitney (his surviving spouse). As explained above, Henry held the Roanoke house as a tenant in common with Sally. His one-half interest in the house passes through intestate succession. Henry and Whitney separated in 1985; but, they never divorced. Therefore, Whitney is his surviving spouse and is entitled to a part of Henry's estate. Still, Henry and Sally had a child, Bonnie, together in 1992. For this reason, Whitney would only take one-third of Henry's estate, and Bonnie, who was 19 in 2011, would take the remaining two-thirds. Finally, since Sally is not his legal wife, she would take nothing from Henry's estate.

Therefore, Sally, Bonnie, and Whitney all own the Roanoke house as tenants in common. (1) **Sally** retains her **one-half interest** in the Roanoke house. Henry's one-half interest will be split Bonnie and Whitney, with (2) **Bonnie** having two-thirds of Henry's interest, and (3) **Whitney** having one-third of his interest. (Sally has 50%, Bonnie has 33%, and Whitney has 16%).