VIRGINIA BOARD OF BAR EXAMINERS

Roanoke, Virginia - July 24, 2007

You MUST write your answer to Questions 1 and 2 in WHITE Answer Booklet A

1. Billy Ray Valentine and his wife, Wilma owned a 30-acre tract of land located in Poquoson, Virginia. There was a dirt road that crossed over a part of the Valentines' 30-acre tract. The origin of the road is unknown, but since 1969, Powhatan Timber Company ("PTC") had used the road for sporadic and occasional visits to check timber growth on several tracts of timberland the company owned on the back side of the Valentine property. Although PTC had constructed a paved road on its own land, PTC used the dirt road because it was a shorter route to these particular tracts of timberland. At no time during the occasional use of the dirt road by PTC did PTC use it to haul timber or logs.

By deed of gift dated June 28, 1980, Billy Ray and his wife conveyed ten of the 30 acres to their son Johnny. That same year, Johnny built two houses on the 10 acres that had been conveyed to him. Also in 1980, on a one-acre tract adjoining his 10 acres, Johnny constructed a basketball court and a large storage shed. Johnny then built a tall fence around the entire 11 acres. The dirt road did not cross any of the 11 acres fenced by Johnny.

Billy Ray and his wife died in 1998 and in their wills devised to their niece, Dottie, the remaining 20 acres that they had not conveyed to Johnny in 1980. Following settlement of the estates under the wills, Dottie contacted Johnny and demanded that he immediately remove the fence, the basketball court and the shed from the one-acre tract. Johnny responded with a letter refusing Dottie's demands and declaring himself as the owner of the one-acre tract.

Dottie also constructed a gate blocking the dirt road that had been used by PTC. The company's president threatened litigation, asserting that PTC's use of the road as it had for more than three decades gave PTC the right to continue using it for purposes of forestry, timbering, and/or logging.

(a) On what legal theory might Johnny base his assertion that he acquired ownership of the one-acre tract, and would he be likely to prevail? Explain fully.

(b) On what two (2) legal theories might PTC base its assertion that it had acquired an easement to continue using the dirt road for purposes of forestry, timbering, and/or logging, and would it be likely to prevail on each? Explain fully.

Reminder: You MUST answer Question #1 above in the WHITE Booklet A

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2. Second Chances, Inc. ("SCI") is a Virginia corporation with its principal place of business in Norfolk, Virginia. SCI operates an embryonic stem-cell laboratory in Norfolk. International Health Systems, Inc. ("IHS"), a Maryland corporation with its principal place of business in Baltimore, Maryland, operates a chain of hospitals and organ transplant centers.

Until recently, Dr. Harry Harvest was employed by IHS as its medical director under an employment contract that contained a restrictive covenant not to compete for a period of time after the termination of his employment with IHS and a provision prohibiting Dr. Harvest from using or

disclosing any of IHS's treatment technologies and other trade secrets for any purpose other than in connection with his employment with IHS.

Paul Preston, the president of SCI, knowing of Dr. Harvest's contract with IHS, nevertheless induced Dr. Harvest to quit his employment with IHS and to join SCI as its chief scientist and laboratory director. Dr. Harvest moved to Norfolk and commenced his employment with SCI. IHS learned that Dr. Harvest's work with SCI was in a field of endeavor that competed with IHS's organ transplant business and involved the use of some of the treatment technologies developed by IHS.

On July 2, 2007, IHS filed a complaint against SCI and Dr. Harvest in the Norfolk Circuit Court. The complaint alleged three counts: count one, a state law claim against SCI for intentional interference with IHS's contract with Dr. Harvest; count two, a state law claim against Dr. Harvest for breach of his covenant not to compete and violation of IHS's trade secrets; count three, a claim alleging that Dr. Harvest infringed IHS's federal embryonic stem-cell license in violation of a federal statute. The complaint prayed for damages in the amount of $200,000 and for injunctive relief. The complaint did not contain a demand for a jury trial.

IHS's complaint was served on Dr. Harvest at his home on July 3, 2007. On the same day, Dr. Harvest gave a copy of the summons and complaint to Preston, but SCI was not served at its offices until July 9, 2007. Preston delivered the complaint to Lois Lawyer, a partner in the law firm that customarily represented SCI in litigation matters. He assured Ms. Lawyer that there was no substance to any of the counts in the complaint and told her he wanted her firm to represent Dr. Harvest as well as SCI in the lawsuit. Preston told Ms. Lawyer that he would feel more comfortable if the suit were moved to federal court and, in any event (either in federal or state court), he wanted the case tried before a jury.

(a) What two bases for removal to federal district court are suggested by the foregoing facts, and would either or both be a proper basis for removal in this case? Explain fully.

(b) What must Ms. Lawyer do procedurally to effect a removal? Explain fully any filing requirements, including the time limits, the nature and content of the pleadings, and the places of filing.

(c) Assuming that removal is accomplished, what steps should Ms. Lawyer take to ensure that the case will be tried to a jury in federal court? Explain fully.

(d) What ethical considerations are raised by the joint representation of both SCI and Dr. Harvest, and what actions, if any, should Ms. Lawyer take prior to agreeing to represent both defendants? Explain fully.

Reminder: You MUST answer Question #2 above in the WHITE Booklet A

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➔➔ *Now MOVE to the YELLOW Answer Booklet B* ←←

You MUST write your answer to Questions 3 and 4 in YELLOW Answer Booklet B

3. Bunky Bunkhouser and Lumpy Laramore, both Virginia residents, formed a valid limited partnership in 1997 pursuant to the Virginia Revised Uniform Limited Partnership Act to "hold, improve, maintain, sell (in whole or in part), operate and lease" the Hollow's Edge, an apartment complex in Fairfax County, Virginia. The entity was named Hollow's Edge Limited Partnership ("HELP"); Bunky was its sole general partner, and Lumpy was its first limited partner. In time, some twenty additional individuals became limited partners of HELP.

HELP had a short written partnership agreement that contained among its provisions the following:

(i) The partnership agreement may be amended only with the unanimous consent of all the partners.

(ii) The maximum annual management fee the partnership may pay is ten percent (10%) of the annual rental income received by the partnership.

(iii) The partnership books shall be closed and balanced at the end of each fiscal year and audited by an independent accounting firm regularly engaged by the partnership.

(iv) Within ninety (90) days after the end of each fiscal year the general partner shall deliver to each limited partner a balance sheet and income statement showing the capital account of each limited partner.

The partnership agreement says nothing about the general partner serving as manager of the partnership's property.

Although Bunky has managed HELP's property since 1997, there was never a management contract between Bunky and HELP. In 2005 Bunky realized that he had never charged HELP for any part of the management fee referenced in the partnership agreement. Without notifying the limited partners, Bunky decided to charge HELP the maximum management fee for the years he had managed the apartments. Apportioned over each year since 1997, Bunky caused HELP to pay him a total of $335,000 for such "past due" management fees. Bunky has always furnished the annual financial statements to the limited partners, but he never reopened any of the statements to adjust for the management fees.

In May 2007, Lumpy filed suit for an accounting in the Circuit Court of Fairfax County, Virginia, against Bunky and HELP. Ten days later, Lumpy was killed in a tragic automobile collision on the Capital Beltway.

Lumpy's adult son, Wyatt, was substituted as plaintiff in the suit in his capacity as executor of his father's estate. The Virginia Revised Uniform Limited Partnership Act provides, in pertinent part:

> If a partner who is an individual dies . . . the partner's executor . . . may exercise all the partner's rights for the purpose of settling his estate or administering his property including any power the partner had to give an assignee the right to become a limited partner. Va. Code Ann. § 50-73.48.

After Lumpy's death and Wyatt's qualification as executor of Lumpy's estate, Bunky proposed an amendment to the HELP partnership agreement to extend the duration of the partnership by 25 years, one effect of which would be to extend his management tenure and perpetuate his receipt of management fees. All of the then current limited partners approved the amendment. The partnership interest owned by Lumpy's estate did not participate in this decision because Wyatt was never given notice that any amendment had been proposed, nor was he asked to approve it.

The Circuit Court Judge allowed Wyatt, acting as executor, to amend the lawsuit to include a challenge to the amendment.

The pending lawsuit raises the following issues, which you must answer:

(a) What duties, if any, did Bunky owe the HELP partnership, and in what respects did he violate those duties by paying himself the management fees? Explain fully.

(b) Was the extension of the partnership term for HELP valid? Explain fully.

Reminder: You MUST answer Question #3 above in YELLOW Booklet B

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4. Joe Brown, who spent the evening drinking beer and whiskey at the bar of a disco in Abingdon, Virginia, was physically ejected by Casey White, the proprietor, for being drunk and disorderly. Joe uttered a vague threat against Casey and staggered into the parking lot, where he met his brother, Randy. Joe told Randy that Casey had thrown him out of the disco, and, after talking it over, Joe and Randy decided to go back to the disco and "teach Casey some manners."

They found Casey standing just inside the front door of the disco. Joe, slurring his words, said angrily to Casey, "If I wasn't so drunk, I'd do it myself, but I'm going to have my brother here kick your butt." Joe then staggered away, went out to his car, and promptly passed out in the back seat.

Casey then told Randy to get out or he would be thrown out just like Joe. Randy grabbed Casey and, after kicking him, threw him into the street. Casey pulled a knife from his pocket and lunged at Randy, attempting to stab him. Seeing this, Randy became alarmed and pulled a pistol from his pocket and shot Casey in the shoulder.

Joe and Randy were arrested and criminally charged with violation of the following statute for the injury to Casey:

> If any person maliciously shoot, stab, cut, or wound any person or by any means cause him bodily injury, with the intent to maim, disfigure, disable, or kill, he shall, except where it is otherwise provided, be guilty of a Class 3 felony. If such act be done unlawfully but not maliciously, with the intent aforesaid, the offender shall be guilty of a Class 6 felony

At their joint trial, the facts were undisputed. Joe defended on the grounds that (i) he was not present during the fight as it was taking place between Randy and Casey, (ii) he had no knowledge that Randy had a firearm, and (iii) he was intoxicated to such an extent that he was unable to form the intent to commit the charged crime.

Randy defended on the ground of self-defense and asked the trial judge to instruct the jury accordingly.

(a) Can the Commonwealth's Attorney make out a prima facie case against Joe for violation of the statute? Explain fully.

(b) Can Joe prevail on any of his defenses? Explain fully.

(c) Should the judge grant Randy's request for a self-defense instruction? Explain fully.

Reminder: You MUST answer Question #4 above in YELLOW Booklet B

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→→ Now MOVE to Salmon colored Answer Booklet C ←←

You MUST write your answer to Question 5 in Salmon Answer Booklet C

5. McCoy Construction and Paving Company ("McCoy Paving"), a Delaware corporation with its principal place of business in Appomattox County, Virginia, had a long-term supply contract with Rocky Resources Corporation ("Rocky"), a Colorado corporation with its principal place of business in Colorado. The contract called for Rocky to deliver 2,000 tons of crushed stone to McCoy Paving in Virginia on the 15th day of the first month of each calendar quarter. The contract was signed on December 1, 1990, and required quarterly deliveries from January 15, 1991 through October 15, 2000. It provided in part that, "This contract shall be construed and enforced in accordance with Colorado law."

On July 15, 1995, Rocky missed its delivery. McCoy Paving waited until July 17, and then its president, Perry Quinn, called the president of Rocky, Gordon Langston, to inquire what had gone wrong. Langston replied, "Oh, I thought I called and told you. We won't be able to make the July delivery. But don't worry, we'll be back on track in October." Quinn was annoyed at the lapse, but Rocky's performance had been generally satisfactory up to then, so he took no further action at that time. Rocky met all further shipping requirements.

On February 1, 2001, however, McCoy Paving sued Rocky in the Circuit Court for the County of Appomattox, Virginia for damages sustained on account of Rocky's failure to make the July 15, 1995, delivery. McCoy Paving arranged for service of process upon Rocky by filing an affidavit that Rocky was a non-resident of Virginia with the Clerk of the Circuit Court and requesting the Clerk to serve the Complaint and related process on the Secretary of the Commonwealth of Virginia, who accepted and forwarded the same to Rocky in Colorado.

Rocky appeared by counsel and filed a motion to quash the service of process on the ground that the court lacked personal jurisdiction over Rocky. After a hearing, the Judge denied the motion to quash. Rocky then filed its answer asserting, among other things, that McCoy Paving's claim was barred by the statute of limitations.

At his deposition, President Langston of Rocky acknowledged the July 17, 1995, conversation with President Quinn of McCoy Paving. He agreed that Rocky had failed to deliver crushed stone as scheduled on July 15, 1995, and explained that, "I have no excuse for that missed delivery. We just didn't get it done."

Rocky moved for summary judgment on the ground that the claim was barred by the applicable Virginia five-year statute of limitations. The trial court denied Rocky's motion, holding that the claim was governed by Colorado's 10-year statute of limitations for causes of action based on written contracts.

Relying on Langston's deposition, McCoy Paving moved for summary judgment on the issue of liability. Rocky objected to the use of the deposition testimony and opposed the motion on the ground that material factual issues were in dispute. The Circuit Court granted McCoy Paving's motion and, following a subsequent trial on damages, entered judgment in favor of McCoy Paving in the amount of $15,000.

(a) Did the court err in denying Rocky's motion to quash service of process? Explain fully.

(b) Did the court err in denying Rocky's motion for summary judgment? Explain fully.

(c) Without regard to whether the court ruled correctly on Rocky's motion for summary judgment, did the court err in granting McCoy Paving's motion for summary judgment? Explain fully.

Reminder: You MUST answer Question #5 above in Salmon Booklet C

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END OF SECTION ONE