VIRGINIA BOARD OF BAR EXAMINERS

Norfolk, Virginia - February 22, 2000

Write your answer to Questions 5 and 6 in Answer Booklet D - (the BLUE booklet)

5. Anxious to complete his snow clearing responsibilities so he could begin his snowmobiling vacation in Vermont, Peter Pane borrowed a Super Duper 1250 Deluxe lawn mowing tractor with a snow blade from his next door neighbor, Ian Christo. Both Peter and Ian reside in Loudoun County, Virginia.

Using the Super Duper, Peter had cleared all but one of the driveways which he had under contract. As he was working on clearing that last one, the steep driveway leading to Ronny Church's detached garage, the Super Duper began making a series of horrible groaning noises, culminating in a loud and smoky bang. Thereafter, the Super Duper wouldn't move, and, try as he might, Peter was unable to restart its engine.

With the assistance of his lazy son, Matt, Peter managed to detach the snow blade and to tow the Super Duper behind his pickup truck to "Johnny Mac's Mower Shop," a sole proprietorship owned and operated by John McGreenahan in Leesburg, Virginia. Although John was not in the shop when they arrived, Matt and Peter were welcomed by John's assistant and only employee, Frank, who said he could "fix anything with an engine." Nothing was said about how Peter came into possession of the Super Duper.

Eschewing formality, Frank told them to leave the Super Duper, take one of the Shop's business cards from the counter, and call in a day or so. Believing Frank to be a man of his word, Peter decided this would be a good opportunity to have his $3,000 snowmobile, which he happened to have in the bed of his pickup truck, tuned up. Frank said he could do it and agreed that both the snowmobile and the Super Duper would be ready in two business days. On his way out, Peter picked up a business card, which read as follows:

Johnny Mac's Mower Shop
New & Used/ Sales & Service
"If it's to mow, we'll make it go."

155 Center Street (h) 703-555-UMOW
Leesburg, Virginia (f) 703-555-1212

Fascinated with both the snowmobile and the Super Duper, Frank worked all night and completed the work on each. Just as he was getting ready to leave the shop for breakfast the next morning, two men, Ed Kerrigan and Sean Drape, walked into the shop. Ed, a school teacher, was shopping for a lawn tractor at off-season prices, and Sean had just come along for the ride. Ed told Frank that he was looking for a mower that was capable of cutting his hilly lawn quickly. Sensing an opportunity to make some quick money, Frank showed Ed the Super

Duper Peter had left for repairs. Frank told Ed, "This is as good quality a riding mower as you'll find anywhere," and quoted Ed a reasonable price. Ed paid the price in cash and loaded the Super Duper into his truck.

Meanwhile, Sean was browsing and saw the snowmobile Peter had left for a tune up. He was surprised to see a snowmobile in a mower shop, but asked Frank if it was for sale. Frank said it was and quoted a good price. Sean paid the price in cash and loaded the snowmobile in Ed's truck.

Neither Ed nor Sean is aware of the chain of events leading to the presence of the snowmobile and the Super Duper in Johnny Mac's Shop. Frank took the cash and left town. His whereabouts are unknown.

Two days later, Peter confronts John at the shop and, seeing no evidence of his snowmobile or the Super Duper Deluxe, demands the return of the items which he left for repair. John replies that he has no record of the existence of either and tells Peter that he will "need to look into the matter and get back to you." Reconstructing the above facts, John consults with you in your law office and asks for your counsel on the following questions under the Virginia Commercial Code:

(a) What rights, if any, do Peter and Ed have to the Super Duper Deluxe? Explain fully.

(b) What rights, if any, do Peter and Sean have to the snowmobile? Explain fully.

(c) Assume that a week after purchasing and taking delivery of the Super Duper, Ed decides to move it from his garage to a shed at the back of his property. Although the engine starts on the first try, it is seemingly undersized and moves very slowly even on level ground, making it unlikely that it has enough power to mow his hilly lawn. Ed consults his own lawyer and insightfully asks what warranties, if any, did John McGreenahan breach? Explain fully.

Reminder: Write your answer to the above question #5 in Booklet D - the BLUE Booklet.

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6. Ally is in the business of buying and selling rare coins. She buys coins for her inventory mostly at sales conducted in auction houses. Ally contracts with "purchasers," each of whom signs an agreement, the form of which is reproduced below.

Purchaser Agreement

The undersigned ("Purchaser") agrees to act on behalf of Ally ("Ally") as an independent contractor to purchase rare coins. Purchaser shall attend sales specified by Ally and bid on coins from a confidential listing supplied by Ally (the "Buy List"), at an amount not to exceed the amount shown on the Buy List. Purchaser shall not submit any bid until Ally has given telephonic approval for the specific bid.

Purchaser shall contract in the name of Purchaser for such coins, without disclosing the identity of Ally. Funds for authorized purchases shall be supplied by wire transfer upon Purchaser's request.

Purchaser shall be compensated for travel expenses at the lesser of (i) Purchaser's actual costs in attending such sales, or (ii) a per diem of $150.00. Purchaser shall also receive a quarterly bonus equal to 25% of the savings effected by Purchaser on coins purchased by Purchaser for less than the authorized prices set forth on the Buy List.

This arrangement may be terminated upon notice by either Purchaser or Ally.

Dated:_____

Signed:_____

Purchaser

Bill signed a purchaser agreement and thereafter attended several sales to buy coins. At the first sale, Bill located coins on the Buy List. After calling Ally for authorization, Bill contracted to buy coins in his name at prices less than the Buy List prices. Ally wired funds Bill used to consummate that transaction.

Bill subsequently learned from other purchasers that, although they have all been informed of the standard policy requiring them to get prior approval, they never call Ally for authorization. If a coin is on the Buy List, they buy it if they can get it at or under the Buy List price. None of the other purchasers has ever had a problem getting the funds from Ally to complete the purchase. Ally has refused to forward the money only when the sale price has exceeded the Buy List price.

After learning this information, Bill began purchasing coins at prices below the Buy List prices without Ally's prior authorization. Ally always supplies Bill with funds to cover these purchases, despite the lack of Ally's prior approval.

Last Saturday, Bill attended an auction conducted by Carl and found a U.S. 1913 Leaping Liberty quarter in mint, uncirculated condition. The price shown on the current Buy List for

a 1913 Leaping Liberty quarter in such condition is $50,000. Without calling Ally, Bill bid $30,000 and contracted with Carl to buy the coin for that price.

It turns out that the Buy List was in error. The entry should have read, "1913 Leaping Liberty Quarter, mint, uncirculated condition, $20,000."

Ally refused to wire the funds to close the transaction, asserting that Bill is an independent supplier of coins and that Ally will not buy the coin from Bill for $50,000. Bill disputes Ally's assertion and claims a bonus of $5,000 on that transaction (*i.e.*, 25% of the difference between the $50,000 Buy List price and the $30,000 contract price).

(a) What is the legal relationship between Ally and Bill regarding Bill's contract for the purchase of the 1913 quarter, and what is the nature of Bill's authority, if any, to bind Ally to the contract? Explain fully.

(b) What are the rights and obligations of Ally, Bill, and Carl with respect to the transaction involving the 1913 quarter? Explain fully.

Reminder: Write your answer to the above question #6 in Booklet D - the BLUE Booklet.

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Write your answer Questions 7 and 8 in Answer Booklet E - (the PURPLE booklet).

7. Fred and Wilma had been married for 13 years and had no children. Ever since returning from their honeymoon in Bermuda, they had resided in Alexandria, Virginia. They separated on June 6, 1998.

On May 25, 1999, Wilma filed a suit for divorce *a vinculo matrimoni* in the Circuit Court for the City of Alexandria against Fred on the ground of adultery. On June 8, 1999, Fred filed an answer denying all material allegations and a cross bill for a no-fault divorce.

At the trial of the case, Wilma testified extensively as to her conclusion, based mostly upon reports she had received from friends who did not wish to testify and on Fred's late comings and goings, that Fred had been having an affair with his secretary, Hilda. On cross-examination, she stated that she and Fred had separated on June 6, 1998 with the intent of ending the marriage and had not cohabited since that time.

Fred had been advised by his attorney to assert his Fifth Amendment privilege against self-incrimination as to the adultery issue but, ever impulsive and irritated by the manner of Wilma's attorney, Fred admitted under oath to having an affair with Hilda. He also testified that June 6, 1998 was the date of the separation and that he and Wilma had not even seen each other since that date.

Hilda was called to testify. She took the Fifth Amendment as to the alleged adultery but testified that in fact Fred and Wilma had been separated since June 6, 1998. Hilda stated that

she had helped Fred move from the marital abode on June 6, 1998 and that, to the best of her knowledge and belief as Fred's secretary and friend, Fred and Wilma had not cohabited since that date.

At the close of evidence, Fred's attorney moved that Wilma's case be dismissed and that Fred be granted a no-fault divorce.

After a recess, and before the court ruled on Fred's motion, the parties jointly requested a continuance for a few weeks to "try to work things out." The court granted the continuance, but the parties were unable to "work things out."

They reconvened before the court, Fred withdrew his motion, and, with the court's approval, the trial resumed.

During the resumed hearing, the following additional evidence was adduced. A private investigator hired by Wilma testified verifying Fred's adulterous relationship with Hilda and attesting that the adulterous relationship had commenced in March 1998, prior to the June 6, 1998 separation. Wilma admitted on cross-examination that she had in fact tired of Fred and had confided in a friend that she hoped Fred would fall in love with another woman so she could get out of her marriage.

Two documents were admitted into evidence. One was a letter written by Wilma and dated January 15, 1998, which stated in part, "I wish Fred would share the rest of his life with someone like Hilda or even Hilda herself." The second was a greeting card, the envelope for which was addressed to Fred at his office and was postmarked April 1, 1988. The card stated on the cover, "Thinking of You." Inside, Wilma had written the words, "Hope this will be a wonderful beginning for you and that special someone who is now in your life. With best wishes, Wilma."

At the close of the evidence, Fred's attorney again moved that Wilma's case be dismissed and that Fred be granted a no-fault divorce.

(a) Assume the trial had ended at the conclusion of the first hearing. How should the court have ruled on the motion Fred's attorney made at that time? Explain fully.

(b) How should the court rule on the motion Fred's attorney made at the conclusion of the resumed hearing? Explain fully.

Reminder: Write your answer to the above question #7 in Booklet E - the PURPLE booklet.

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8. Frank was employed as a driver by Rover Deliveries, Inc. ("Rover"). While making a delivery in Rover's van at the Shopping Spree Mall, Frank was driving at less than the posted speed limit of 15 miles per hour. He unavoidably rear-ended Kathy's car when Kathy had to stop suddenly to avoid hitting a pedestrian who was midway in a crosswalk.

Kathy suffered a "whiplash," for which she had to wear a cervical collar for two weeks, and soft-tissue injury to her back and shoulders. Her special damages consisted of $2,500 in medical bills, $150 in lost wages, and $300 in damages to her car.

Kathy filed a motion for judgment in the Circuit Court of Buckingham County against Rover, alleging in the following language that:

> 1. Rover Deliveries, Inc. ("Rover") is a Virginia corporation duly authorized to do business in Virginia;
>
> 2. While driving her car in the Shopping Spree Mall parking lot in Buckingham County, plaintiff sustained serious personal injuries when a vehicle owned by Rover and driven by Frank went out of control and struck her car from the rear;
>
> 3. Rover breached its duty of care by failing to keep its vehicle under control at all times;
>
> 4. The sole and proximate cause of plaintiff's injuries was Rover's breach of its duty of care; and
>
> 5. As a result of the accident, plaintiff sustained property damage and personal injuries, including pain and suffering, for which plaintiff seeks judgment against defendant in the amount of $375,000.

Rover filed a timely demurrer stating the following and nothing more:

> Now comes Rover Deliveries, Inc., a Virginia corporation, by counsel, and submits its demurrer to the plaintiff's motion for judgment, respectfully asserting as grounds therefor that:
>
> 1. The motion for judgment fails to state a cause of action against the defendant; and
>
> 2. The motion for judgment is insufficient in law.

The judge properly overruled the demurrer on the ground that it failed to specify the particulars in which Rover claimed Kathy's motion for judgment was deficient. Rover filed an answer denying the allegations of the motion for judgment and pleading an affirmative defense of contributory negligence. The case eventually went to trial.

At the trial, a venire of fifteen people, three of whom were women, was sworn and questioned on voir dire. Kathy's attorney exercised her peremptory challenges to remove all three women from the panel. Rover's attorney objected, and the court asked Kathy's attorney to explain why she so used her peremptory challenges. She stated:

> Your Honor, I can't give you specific reasons without revealing my trial strategy. I've challenged these prospective jurors on the basis of their appearances and my instincts. Beyond that, I can't explain it and, in any event, the defendant hasn't shown how it has

been prejudiced by my challenges.

Based on this explanation, the court overruled Rover's objection.

At the trial, Kathy, dressed provocatively and speaking in an especially theatrical manner, testified at length about how her car had been "smashed into" and the mental anguish and pain and suffering she had experienced and would continue to experience. Other witnesses were called to support Kathy's allegations, and then she rested.

Rover's attorney then moved the court to strike the plaintiff's evidence and enter summary judgment in Rover's favor on the ground that Kathy was guilty of contributory negligence as a matter of law. The judge denied the motion but called the attorneys to the bench and urged them to settle the case. The judge related that he had noticed the all-male jury's emotional reaction to Kathy's exaggerated and dramatic testimony.

Unwilling to settle for the demand made by Kathy, Rover called witnesses in its defense, including Frank, who testified that he had been driving slowly at the time of the collision and that Kathy had stopped suddenly in front of him. Following this testimony, the defense rested.

The jury was properly instructed on liability, damages and contributory negligence. The judge also admonished the jury that they were not to be swayed by emotion. They retired to deliberate and returned fifteen minutes later with a verdict of $300,000 for the plaintiff.

Rover's attorney then timely moved for a new trial or, in the alternative for a remittitur, on the ground that the verdict was excessive. The court granted Rover's motion for a new trial, provided, however that there would be no new trial if Kathy accepted a remittitur reducing the verdict to $50,000.

(a) What particulars should Rover have asserted in its demurrer to make it sustainable? Explain fully.

(b) Did the court rule correctly on:

(i) Rover's objection to the exercise of plaintiff's peremptory challenges to strike the prospective female jurors? Explain fully.

(ii) Rover's motion to strike plaintiff's evidence and enter summary judgment for Rover? Explain fully.

(iii) Rover's motion for a new trial or, in the alternative, a remittitur? Explain fully.

Reminder: Write your answer to the above question #8 in Booklet E - the PURPLE booklet.

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Write your answer Question 9 in Answer Booklet F - (the Gray booklet)

9. In 1990, Walker, a domiciliary of Charlottesville, Virginia, prepared a properly executed will that contained the following dispositive provisions:

"1. I leave all my real property situated within the State of Virginia to my wife for life and the remainder to my children who survive me; and

"2. I leave the residue of my estate to my children who survive me."

The will also contained the following provision: "Any beneficiary of this will who unsuccessfully challenges any provision hereof shall forfeit all bequests hereunder."

Walker passed away on January 1, 2000 domiciled in Charlottesville, Virginia. He is survived by his wife, Louise, whom he married in 1960 and who is 75 years old, and by two adult sons, Wilbur and Thomas. Except for the family residence, all the real property he owned in Virginia at the time of his death was his separate property and was valued at approximately $4,000,000 and generated about $100,000 a year in rents. The remainder of his estate was valued at $5,000,000.

A woman named Doris claims she is a child of Walker and entitled to take under his will. In late January 2000, Doris filed with the clerk of the Circuit Court in Charlottesville an affidavit and other authenticated documents showing conclusively that Doris had been born out of wedlock and that Walker's paternity of Doris had been established judicially in 1955.

Louise is outraged that all Walker left her in his will is a life estate in his Virginia real property. She recalls that, at the time he made the 1990 will, Walker was under extreme duress because of business reverses and she believes he did not fully understand what he was doing when he drafted his will.

Wilbur questions whether Walker intended to include Doris as one of "my children" as that term is used in Walker's will.

(a) Is there any theory upon which Louise could base a challenge to Walker's will and, if so, will she be precluded from taking the bequest under the will if she is unsuccessful in making the challenge? Explain fully.

(b) If Wilbur disputes Doris' claimed right to take under Walker's will and seeks a court interpretation:

(i) What conclusion will the court likely reach on the question whether Doris is one of "my children" as that term is used in Walker's will; and

(ii) Will the fact that Wilbur initiated the inquiry result in the forfeiture clause being enforced against him if the court rules in favor of Doris?

Explain fully.

(c) Ignoring tax considerations, what right is available to Louise that will probably be more advantageous to her than accepting Walker's bequest to her, and what will she receive from Walker's estate if she exercises that right? Explain fully.

Reminder: Write your answer to the above question #9 in Booklet F - the GRAY booklet.

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