

## VIRGINIA BOARD OF BAR EXAMINERS

Roanoke, Virginia - July 26, 2005

Write your answers to Questions 6 and 7 in Answer Booklet D - (the **PURPLE** booklet)

6. Al, an insurance agent for Insko Casualty Co. ("Insko") in Monterey, Virginia, and Vera, a regional vice president for Insko, were each charged with embezzlement and conspiracy to embezzle. They were indicted under the following Virginia statute:

If any person wrongfully and fraudulently use, dispose of, conceal, or embezzle any money . . . check . . . or any other personal property . . . he shall have received for another or for his employer, principal, or bailor, or by virtue of his office, trust, or employment, or which shall have been entrusted or delivered to him by another, . . . he shall be guilty of embezzlement. Embezzlement shall be deemed larceny.

The events leading to the indictments are the following:

Al maintained a statutorily required checking account, designated "Client Trust Account," into which he deposited checks sent to him by his clients. The clients sent him these checks for the express purpose of paying Insko the premiums on insurance the clients had purchased through Al. Al would then forward the premiums to Insko by drawing checks payable to Insko from that account. Over the years, Al had fallen into the habit of withdrawing funds from that account to cover some of his business expenses, but he was always able to replace those funds within a week by depositing into the Client Trust Account enough of the monthly commission check he received from Insko.

In recent months, Al began drawing larger sums from the Client Trust Account and was unable to replace the funds from his commission checks. As a consequence, he began "rolling over" the Client Trust Account, *i.e.*, using funds received from one client to pay premiums due on a policy held by another client.

On July 1, 2005, Al confided the problem to Vera, his supervising vice president. After they talked about it at length, Vera and Al agreed that Al would telephone each of his clients and explain to them that, because of recent very large increases in casualty losses, Insko found it necessary to impose a "temporary 2% premium surcharge" for the next six months. They calculated that the additional 2% would replenish the Client Trust Account in six months and that no one would be any the wiser.

They wrote up a script of what Al would tell the clients. They agreed that Al would cease drawing funds from the Client Trust Account for anything other than the purpose for which they were intended, *i.e.*, payment of client premiums. They also agreed that, if any client seemed reluctant to pay the extra 2%, the client should be instructed to communicate with Vera and she would "set the client straight."

However, on July 2, 2005, before Al could get around to making any of the phone calls, one of his clients received a notice of cancellation from Insko for failure to pay premiums. The client had timely paid the premiums to Al, but Al had fallen so far behind in his "rollover" scheme that he had not covered this particular client's premiums. The notice of cancellation to the

client precipitated an immediate investigation, revealing Al's "rollover" scheme and the plan hatched by Al and Vera. They were both arrested and charged as indicated above.

Which specific facts can the Commonwealth Attorney use to prove each element of the crime as defined by the statute, and will the facts support convictions of Al and Vera on each count of the indictment? Explain fully.



**Reminder: Write your answer to the ABOVE question #6 in Booklet D - the PURPLE Booklet.**

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7. Louise Duncan, recently widowed with three children, lived on a large family estate known as Tarrymore in Virginia. Her husband had left her a large estate, and she needed help managing the investments, taking care of Tarrymore, and raising the children. Louise asked Baxter, a childhood friend, if he would be willing to help her. Specifically, Louise told Baxter that, if he would quit his job in the city, move to Tarrymore, and take on those duties until her youngest child left home and went to college, she would devise Tarrymore to him in her will. Baxter agreed to do all those things. Because of the longstanding friendship between them, they did not think it necessary to reduce their agreement to writing.

Louise then had her lawyer prepare a document entitled Last Will and Testament ("First Will"), which stated, "I devise Tarrymore to Baxter. I leave the residue of my estate to my three children in equal shares." Baxter was present in the room when, in the presence of two witnesses, Louise declared this to be her last will and testament, signed it, and asked each of the witnesses to sign it, which they did.

Baxter promptly quit his job, moved to Tarrymore, and for the next seven years, worked diligently in managing Louise's investments, acted as a surrogate father to the children, and did all the maintenance and repairs on Tarrymore and the surrounding grounds. At the end of those seven years, Louise's youngest child went off to college.

At about that time, Louise met Daniel. They fell in love and married within months. Louise told Baxter that, as she now had another man in the house and the children were all living elsewhere, she no longer needed his services. Baxter immediately moved away.

Louise then personally typed out a document that she entitled Last Will and Testament ("Second Will"), which made no mention of the First Will. The Second Will stated in its entirety, "I name Daniel as the Executor of my estate. I direct him, upon my death, to liquidate all the assets in my estate, pay all debts, and distribute the remainder as follows: two-thirds to Daniel and one third to my children in equal shares." In Daniel's presence, Louise declared that this was her last will and testament, signed it, and placed it in a sealed envelope in her wall safe.

Louise died last month. Daniel offered the Second Will for probate, and made plans to liquidate all the assets, including the sale of Tarrymore. Baxter filed a claim against the Louise Duncan Estate for breach of contract and, together with Louise's children, contested the Second

Will and offered the First Will for probate.

Louise enjoyed testamentary capacity when she executed each will, and no one is alleging that anyone exerted fraud, duress, coercion, or undue influence on Louise.

- (a) Which party should prevail on Baxter's claim for breach of contract? Discuss fully.
- (b) Who should prevail in the will contest, and how should Louise's estate be distributed? Explain fully.
- (c) In the event that the First Will is valid, does Daniel have any right to part of Louise's estate? Explain fully.
- (d) If neither of the wills is ultimately admitted to probate, to whom and in what shares would Louise's estate be distributed? Explain fully.



**Reminder: Write your answer to the ABOVE question #7 in Booklet D - the PURPLE Booklet.**

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**→→ Now SWITCH to the GREEN Answer Booklet - Booklet E ←←**

**Write your answer to Questions 8 and 9 in Answer Booklet E - (the GREEN booklet).**

**8.** Sue was driving home from work in Norfolk, Virginia, when a car driven by Joe collided with Sue's car at an intersection. The damage to both cars was slight. Sue told Joe that she was not injured and said she might have been partly at fault for not coming to a complete stop at the corner. Joe and Sue exchanged insurance information and departed.

The next day, Sue began to feel pain in her neck and upper back. She learned from her physician that she had suffered "soft tissue" injury and would have to stay home from work for two weeks.

Sue realized she had used up all her sick leave at work and would not be paid during the period of her absence. She described the accident to her lawyer, Larry, and, instructed him to sue Joe but to ask only for her lost wages, plus enough to cover a fair fee for Larry. Larry filed an action in Norfolk General District Court alleging negligence and seeking a judgment against Joe for \$10,000. At the same time, Larry propounded a set of fifty (50) written interrogatories to be answered by Joe. When Joe was served with the Motion for Judgment and the Interrogatories, he phoned Sue and angrily called her a liar. Joe then called his lawyer, Ann, and asked her to represent him in the litigation.

Ann immediately called Larry and told him that Joe was not going to answer the Interrogatories. She also filed a petition for removal of the action to the Norfolk Circuit Court.

Sue was angry that Joe had called her a liar and told Larry that she wanted to increase the amount of her claim for damages to \$75,000. Upon the removal to the Norfolk Circuit Court, Larry filed a motion to increase the *ad damnum*.

When her deposition was taken, Sue admitted telling Joe at the scene of the accident that she had not been injured and that she was partly at fault. In other discovery, Larry acquired information to the effect that Joe was a small-time cocaine dealer. Larry told Ann about this and said that if Joe would agree to pay \$50,000 in settlement, Larry and Sue would not report Joe's cocaine dealings to the police. Ann abruptly rejected the demand and ended the conversation.

Then, the following proceedings, all timely commenced, occurred in the Circuit Court:

- Larry filed a motion to compel Joe to answer the Interrogatories. Ann opposed the motion on the ground that the Interrogatories had been improperly propounded.
  - Ann filed a motion for summary judgment, attaching Sue's deposition testimony. Larry opposed the motion.
  - Ann filed a brief in opposition to Larry's motion to increase the *ad damnum*, asserting that the court had no power to increase it beyond the jurisdictional amount permissible in the General District Court because that is where the action had initially been filed.
- (a) How should the court rule on Larry's motion to compel answers to the Interrogatories? Explain Fully.
  - (b) How should the court rule on Ann's motion for summary judgment? Explain fully.
  - (c) How should the court rule on Larry's motion to increase the *ad damnum*? Explain fully.
  - (d) Did Larry's conduct in making the settlement demand violate any ethical obligations, and, if so, does Ann have any duty to report Larry's conduct to any authority? Explain fully.



**Reminder: Write your answer to the ABOVE question #8 in Booklet E - the GREEN Booklet.**

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9. In 2004, A.J. Jones ("AJ"), a resident of Madison, Virginia, invested \$35,000 with Commonwealth Securities, Inc., a Virginia corporation ("CSI"), with its principal office in Roanoke, Virginia. He was led to believe by television advertisements, glossy brochures, and other materials prepared by CSI that he was purchasing a one-year certificate of deposit, which

would earn interest at the rate of 15%. A recent letter from CSI states that the actual investment vehicle AJ purchased is a subordinated debenture note, which CSI is now, one year later, unable to pay. The result is that AJ has lost his entire investment.

AJ knows at least a dozen more people in Madison County alone who made the same investment in a similar amount. Indeed, AJ recently read in the newspaper that more than 300 people dispersed throughout Virginia, who invested varying amounts based on differing but roughly similar advertising schemes, are estimated to have received the same nonpayment letter he received from CSI. The same newspaper article states that "communications such as those made by CSI in Virginia may be the type of false and misleading statements that violate Sections 12(2) and 17 of the Securities Act of 1933 and Section 10(b) of the Securities Exchange Act of 1934."

Although AJ has done some Internet research on the subject and has all of the materials pertaining to his purchase, he is concerned that he will be overwhelmed if he alone files suit against CSI, which historically has been represented by a large New York law firm. AJ has consulted a firm of attorneys specializing in securities litigation on behalf of plaintiffs and asks if there is a way for all of the purchasers, whoever they are and wherever they may live in Virginia, somehow to file suit in a federal district court against CSI to recover their money and the promised interest.

Is it possible for AJ to proceed in federal district court in the manner he desires and, if so, what are the legal prerequisites for his doing so, and will he be able to comply with those requirements in this situation? Explain fully.



**Reminder: Write your answer to the ABOVE question #9 in Booklet E - the GREEN Booklet.**

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***Proceed to the short answer questions in Booklet F - (the PINK Booklet).***