VIRGINIA BOARD OF BAR EXAMINERS

Norfolk, Virginia - February 23, 2010

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

1. On March 1, 2009, Tice's Variety Store ("Tice's") in Russell County, Virginia, mailed a purchase order on Tice's standard form to Motor Car Wax Company ("MCW") in Suffolk, Virginia, for 2,000 cans of its premium car wax for a price of $3.00 per can of wax. This car wax was developed and promoted by MCW for use on the latest model cars with the best exterior finish available. On the reverse side of Tice's order form were 13 printed conditions, one of which stated, "Tice's may reject any defective goods within 30 days of delivery." The entire form was printed on one piece of paper, front and back, using the same style, color, and size of type. MCW received and processed Tice's order and, on March 5, 2009, sent Tice's an order confirmation on MCW's standard form that also contained a number of printed conditions, one of which stated: "Any objections to the quality of goods shipped must be made in writing within ten days of receipt of the goods." Another of the printed conditions stated: "MCW gives no warranties of any nature, either express or implied." Like Tice's purchase order, MCW's entire form was printed on one piece of paper, front and back, using the same style, color, and size of type. Tice's regularly did business with MCW and had received MCW's standard confirmation form with each transaction.

Tice's received and paid for the shipment of wax from MCW on April 1, 2009, and began displaying the wax in its stores on the same day. Tice's sold 200 cans the first day. Three days later, Tice's received several complaints that the wax had discolored the paint on its customers' cars. After some investigation, Tice's determined that the wax was not suitable for use on newer cars and, on April 15, 2009, sent an e-mail notifying MCW that Tice's rejected the entire order as being defective and returned the remaining wax to MCW. MCW refused to accept the return, asserting that the terms of the agreement required Tice to reject the goods within ten days of receipt.

Tice's then filed suit in the Circuit Court of the City of Richmond and served MCW's registered agent whose office and residence were in Richmond. Tice's sought judgment for $6,000 with interest from April 1, 2009, alleging that the product was unfit for the purpose for which it was designed and that it was not merchantable. Tice's also prayed for an award of attorney's fees although neither Tice's order form nor MCW's confirmation form mentioned anything about recovery of attorney's fees in the event of a dispute.

MCW answered and asserted the following affirmative defenses: (i) that Tice's failed to reject the goods on the terms required by their contract and (ii) that MCW had disclaimed all warranties.

(a) How should the court rule on each of MCW's affirmative defenses? Explain fully.

(b) If Tice's were to prevail in its suit, should the court award Tice's its attorney's fee? Explain fully.

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

* * * * *

2. Greg Settlor of Farmville, Virginia died in January 2009. By will, he devised his entire estate to a trust established for the benefit of his nephew, Ronnie, age 40. Ronnie was a former nightclub owner, whom everyone knew as a philanderer. He spent most of his time betting on horses and sporting events, and as a result of his lifestyle, had numerous creditors and three ex-wives. While he often helped Ronnie financially, Settlor had always told him he would not support his decadent lifestyle.

In his will, which was probated in the Circuit Court of Prince Edward County, Virginia, Settlor named his brothers Ken and Frank, as co-trustees ("Trustees"). The trust instrument stated that Settlor ". . . has great concern about Ronnie's lifestyle, and, for that reason, the Trustees shall pay the income from the trust to Ronnie each month for his support and maintenance, and annually only so much of the corpus as the Trustees and Ronnie mutually deem necessary and proper."

The majority of Settlor's estate consisted of commercial rental property in Prince Edward County and $300,000 in cash. Ken and Frank entered into a written agreement with a local real estate firm to manage the trust's rental properties for a monthly fee and signed the agreement "Ken and Frank, as Trustees."

Soon after becoming a Trustee, Frank's janitorial business began having financial difficulties. Frank started withdrawing funds from the trust to cover his business and some personal expenses. Later that same year, Frank lost his business and all of his assets to his creditors. Ken knew of Frank's actions but did not personally benefit from them.

After learning about the trust, one of Ronnie's creditors obtained a valid judgment against Ronnie for $200,000 and initiated a garnishment proceeding in the appropriate court against the Trustees and Ronnie to recover the amount of the judgment from the trust assets.

While discussing the garnishment with his attorney, Ronnie discovered that the Trustees had never paid the real estate firm under the property management agreement and that the firm had filed an action against Ken and Frank, individually and as Trustees, to recover the fees owed. After confronting Ken and Frank about the real estate firm's claim, Ronnie also learned that Frank had misappropriated some of the trust funds.

Ronnie's attorney filed a complaint in the Circuit Court of Prince Edward County against Ken and Frank, alleging breach of fiduciary duty and seeking an accounting and recovery of the misappropriated funds. In light of his insolvency, Frank did not offer any defense. Ken, on the other hand, contested any liability on his part and alternatively argued that, if found liable, he would have to account for only half of the misappropriated funds.

(a) Can Ronnie's creditor reach the trust assets to satisfy its judgment against Ronnie? Explain fully.

(b) Is Ken liable to Ronnie for any part of the funds misappropriated by Frank? Explain fully.

(c) Are Ken and Frank individually liable to the real estate firm for the unpaid management fees? Explain fully.

Continued on the next page

(d) May the real estate firm recover the unpaid management fees from the trust assets? Explain fully.

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

* * * * *

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

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

3. Fred, a wealthy resident of Lebanon, Virginia, who had a long history of emotional problems and who until recently had been receiving inpatient psychiatric treatment, was a spectator at a fire on Main Street. Tim, a cameraman for WLTV, the local television station, was covering the fire when Fred accosted him.

By coincidence, Fred had at his home a camcorder similar to the one Tim was using. Under the delusional belief that the camcorder belonged to him, Fred grabbed the camcorder and hollered, "That's my camcorder! You don't have any right to take pictures with it!" In fact, the camcorder, valued at $5,000, was the property of WLTV.

Fred ran off with the camcorder, pursued by Tim. About a block away, Tim caught up with Fred. In the scuffle in which Tim was attempting to wrest the camcorder away from Fred, Fred tripped over the curb, hit his head as he fell, and suffered a fractured skull. Also, in the course of the scuffle, the camcorder fell to the concrete sidewalk and was smashed beyond repair.

After a period of hospitalization, Fred recovered. He was charged with grand larceny of the camcorder. At the same time, Tim was charged with assault and battery against Fred.

Concurrently, Fred filed a civil action for damages against Tim and WLTV alleging that Tim's battery was the proximate cause of his injuries and that WLTV was vicariously liable. WLTV cross-complained against Fred for the value of the camcorder.

Fred's attorney advises him that he should consider two possible pleas to the larceny charge: not guilty by reason of insanity or an "Alford" plea.

Tim's attorney advises him that he should plead not guilty to the battery charges and that he should assert the defenses of self-defense and defense of property.

(a) Regarding the criminal case against Fred, (i) is the insanity plea likely to succeed, and (ii) what is an "Alford" plea and what advantage, if any, would it have for Fred in these circumstances? Explain fully.

(b) Regarding the criminal case against Tim, are the defenses of (i) self-defense and/or (ii) defense of property likely to succeed? Explain fully.

(c) In the civil case, can WLTV be held liable if it is found that Tim committed battery against Fred and that the battery caused Fred's injuries? Explain fully.

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

* * * * *

4. Olly Owner is a resident of Norfolk, Virginia. In 2007, he entered into a brokerage agreement with Atlantic Yacht Sales ("AYS"), a Delaware corporation with its only place of business in Annapolis, Maryland, as the exclusive agent for the sale of Olly's high-speed motorboat. The AYS employee with whom Olly dealt was Sammy Slick, a resident of Delaware.

Slick knew that Olly was in the market for a larger boat and told him about a 59-foot yacht named "First Draw" that AYS was under contract to sell for First Draw's owner. Slick told Olly he could get a "better deal" if he would do the following: Sell Slick Olly's motorboat "off-the-books" at a discount and then buy First Draw directly from its then owner, thereby avoiding AYS's substantial brokerage fees on both transactions. Olly agreed and consummated the transaction as proposed by Slick in early 2008.

In 2009, Olly decided to sell First Draw, which was berthed in Norfolk. He executed a new brokerage agreement with AYS, giving AYS the exclusive right to sell First Draw and stipulating that Slick would be the primary sales representative. In mid-2009, Slick took First Draw to Annapolis, where he allowed Howard Jones, a resident of New York, to view and inspect it.

In December 2009 in Norfolk, Slick presented Olly with a letter that Jones had sent him from New York offering to buy First Draw for $850,000, "subject to the usual condition that the vessel first pass the customary luxury level yacht inspection prior to closing and delivery of the vessel, which shall take place in Norfolk, Virginia. The $5,000 cost of the inspection to be advanced by Olly as seller and reimbursed by Jones as purchaser at closing." Olly accepted the offer by signing Jones' letter and returning it to Slick, who arranged for the inspection by a Norfolk-based inspector. Olly paid the $5,000 inspection fee, and First Draw passed the inspection.

Just before the scheduled closing, Slick presented Olly in Norfolk with a letter from Jones revoking his offer to purchase First Draw. The letter was on AYS's letterhead and signed, "Howard Jones by Sammy Slick." In fact, in a telephone conversation between Jones in New York and Slick in Annapolis, Jones had authorized Slick to write, sign, and deliver the letter to Olly in Norfolk. Soon thereafter, Olly learned that, in January 2010, Jones had purchased a different yacht from AYS for $1.2 million and that Slick had earned a substantial commission from that sale.

On February 1, 2010, Olly filed a complaint in the United States District Court for the Eastern District of Virginia (Norfolk Division) to recover $850,000 for breach of the contract and for tortious interference with the contract for the sale of First Draw. The complaint named AYS, Slick, and Jones as defendants. When AYS learned of the "off-the-books" transactions between Slick and Olly, Slick abruptly moved on February 10 from Delaware to Virginia Beach, Virginia, where he established residency and began working for a yacht broker there. Slick was served with the summons and complaint at his new residence in Virginia Beach. AYS and Jones were soon thereafter properly served by certified mail at their places of business.

Slick's first response to the complaint was to file a motion to dismiss the case against him for lack of subject matter jurisdiction. At the same time, Jones filed a motion to dismiss for lack of personal jurisdiction, asserting truthfully that he had never set foot in Virginia and that he personally had never had any direct contact with anyone in Virginia regarding the purchase of First Draw. AYS answered the complaint and filed a counterclaim against Olly for $65,000, which was the amount of the brokerage fees AYS would have earned if Olly had not entered into the sham transaction with Slick in early 2008.

(a) How should the District Court rule on Slick's motion to dismiss for lack of subject matter jurisdiction? Explain fully.

(b) How should the District Court rule on Jones' motion to dismiss for lack of personal jurisdiction? Explain fully.

(c) On what basis, if any, might Olly move to dismiss AYS's counterclaim, and would he be likely to succeed? Explain fully.

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

* * * * *

➔➔ *Now MOVE to Tan Answer Booklet C* ←←

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

5. Justin and Bree Scott, husband and wife, were injured when their automobile, driven by Justin, was struck by Daisy West's automobile as Justin attempted to exit and West attempted to merge onto Highway 81 in Botetourt County, Virginia. The Scotts retained Renard Hill, a Virginia attorney, to represent them both. Justin and Bree signed a contingency fee agreement in which they agreed to pay Hill one-third of any monetary recovery he obtained for them and to reimburse him for any costs he advanced on their behalf. In explaining the terms of his representation, Hill did not explain to the Scotts that Bree might have a cause of action against Justin if it were found that Justin had been negligent in causing the accident.

Hill filed two separate actions against West in the Circuit Court of Botetourt County alleging in each that West was negligent: *Justin Scott v. Daisy West* and *Bree Scott v. Daisy West*. The answers filed by West's attorneys denied negligence and, in response to Justin's case, asserted the affirmative defense that Justin was contributorily negligent by braking suddenly and changing lanes without signaling. Hill conducted thorough discovery and accumulated a substantial file of documents in the two cases. Hill had advanced $2,500 for costs in each case.

Justin's case went to trial first, and the jury returned a defense verdict, finding that Justin had been contributorily negligent. This result angered the Scotts, who decided to fire Hill and retain another attorney to handle Bree's case. Bree demanded that Hill deliver to her the file and all the deposition transcripts, witness statements, interview notes, and medical records relating to her case so she could give these materials to her new attorney. Hill responded that he would deliver the file and the accompanying materials as soon as Bree paid him $9,000, which represented fees for the number of hours he had spent working on her case at his customary billing rate, plus the $2,500 he had advanced as costs.

(a) Did Hill satisfy all ethical obligations to Bree at the time she retained him? Explain fully.

(b) If Bree had wanted to amend her action to name Justin as a defendant, under what circumstances, if any, could Hill have continued to represent Bree? Explain fully.

Continued on the next page

(c) **May Hill ethically withhold from Bree the file and records she has requested until she has paid him as demanded? Explain fully.**

(d) **What steps could Hill have taken to preserve his claim to any fees and costs due him from an ultimate monetary recovery obtained by Bree's new attorney, and would Hill be entitled to recover any fees and costs in these circumstances? Explain fully.**

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

* * * * *

END OF SECTION ONE