

VIRGINIA BOARD OF BAR EXAMINERS

Roanoke, Virginia - July 29, 1997

Answer Questions 1 and 2 in Answer Booklet A

1. Domenic DeLitto ("Dom"), a native of Radford, Virginia, was a child actor who, in his pre-teen years, had been very successful. His substantial earnings, more than \$1,000,000, had been placed in a trust and prudently invested by the trustee, First Bank of Radford ("Bank"). Under the terms of the trust, the income was to be used for his support, maintenance and education in the sole discretion of the trustee, and the corpus was to be turned over to him thirty days after his eighteenth birthday.

Dom's father and Dom's Uncle Ted had orally agreed that, if anything were to happen to Dom's parents during Dom's minority, Ted would take care of Dom until Dom was eighteen. Dom's father also said he was going to make arrangements with the Bank to ensure that Ted would be compensated for taking care of Dom if the eventuality ever arose. Before any formal arrangements could be made with the Bank, Dom's parents were killed in a tragic accident. Dom was thirteen years old at the time, and he moved in with his Uncle Ted. Ted never took any steps to adopt Dom or to be declared Dom's legal guardian.

The Bank continued to make monthly payments to Ted which were just sufficient to pay the expenses of supporting Dom. At a time when Dom was almost sixteen years old, Ted asked the Bank to increase the monthly payments by an amount sufficient to compensate him for his services in taking care of Dom. The Bank trust officer said it was not possible under the terms of the trust and that, if Ted wanted to change the trust, he would have to hire a lawyer.

On his sixteenth birthday, grateful that his uncle was taking good care of him and knowing that the Bank had declined to compensate Ted, Dom said, "Don't worry, Uncle Ted. After I turn eighteen, the Bank has to turn all the money over to me. I promise that, if you keep taking care of me, I'll give you \$50,000 as soon as the money is mine." Satisfied with the apparent sincerity of his nephew, Ted did nothing further to secure his compensation and continued to care for Dom.

Within a year, relationships between Dom and Ted deteriorated badly, and on his eighteenth birthday, Dom moved out of the house with these parting words: "If I ever see you again, it'll be too soon. And, as far as you getting any money from me, forget it!" At the time Dom moved out of the house, the Bank had not yet distributed the trust corpus to him.

- (a) If Ted sues Dom for breach of contract, what defenses can Dom reasonably assert and will any of the defenses be likely to prevail? Discuss fully.

- (b) What equitable remedies are available to Ted for the recovery of compensation for the services he rendered to Dom and is he likely to prevail on any of them? Discuss fully.

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2. Jo Jo Conroy, Peter O'Kane and Chris Warsaw, all of whom were active members of the Virginia State Bar, formed COW Partnership ("COW") and executed a general partnership agreement which provided that the purpose of the partnership was to purchase a certain 250-acre parcel of land in Stafford County, Virginia, and develop the land into residential building lots.

The land was owned by Peter and was purchased by COW at an agreed upon price based upon an independent appraisal. Chris was named managing partner with specific duties, the performance of which would entitle him to a fee of \$100,000 when the first 25 lots were sold. Chris engaged accountants, lawyers, land surveyors, engineers and landscape architects at considerable expense to COW and quickly placed COW in debt beyond the original capital contributed by the partners. Although Jo Jo and Peter were upset about the debt, they allowed Chris to continue to manage the project. Eventually some 44 lots were sold, and COW began to show a small profit but not without Jo Jo and Peter vowing that they would never go into business with Chris again.

The price of each lot had been fixed by the partners after consulting with the appraiser. After one-third of the lots had been sold, Chris learned that Hoke, Inc., a major corporation, was moving its national headquarters to Stafford County and there was likely to be a heavy demand for building lots. Without telling his partners about Hoke's plans to move to Stafford County, Chris bought 20 lots from COW in his father-in-law's name and later sold the lots at a substantial profit, which he retained for himself.

When Jo Jo and Peter noticed a sudden surge in lot sales, they purchased the 150 acres adjoining COW's property but did not tell Chris what they had done. Later, Jo Jo and Peter sold the 150-acre parcel at a substantial profit, which was attributed to the rapid sell-out of COW's project and which they retained for themselves.

- (a) Do Jo Jo and Peter have any interest in the profit Chris made from the 20 lots he bought from COW? Discuss fully.
- (b) Does Chris have any interest in the profit arising from the sale of the 150 acre parcel by Jo Jo and Peter? Discuss fully.
- (c) What, if any, provisions of the Virginia Code of Professional Responsibility have been violated by the actions of Chris, Jo Jo and Peter and what responsibilities does each have as a result? Discuss fully.

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Answer Questions 3 and 4 in Answer Booklet B

3. Mary Russell, a frugal elderly lady who had never married, lived alone in a

small house near Natural Bridge in Rockbridge County, Virginia. She received regular visits from her friend, Rosa Scott, who twice a week drove from her nearby home in Buena Vista to take food and other necessities to Mary. Rosa always got there in time to watch Mary's favorite soap opera with her, during which they frequently shared a glass of peppermint schnapps.

Some of Mary's brothers and sisters visited her once or twice a year. Her brother, John, would occasionally bring her a load of firewood and other small gifts.

On one of her visits, Rosa became alarmed when Mary told her of being "flimflammed" out of \$500 by an aluminum siding salesman who had stopped by her house. The next week Rosa took Mary to the office of an attorney in Lexington, Virginia, who drew up a petition to the Circuit Court of Rockbridge County seeking the appointment of a guardian for Mary.

The petition was presented to the Circuit Court Judge who, after appointing an attorney to represent Mary and examining Mary and Rosa in open court, appointed a local bank as Mary's guardian, finding that "Mary Russell by reason of mental and physical infirmity, impaired health and advanced age, is incapable of handling and managing her estate and has been for many years." The bank subsequently qualified as guardian and took possession of Mary's substantial savings account.

After the Court hearing, Rosa drove Mary home where they watched their regular television program. Before Rosa left, Mary told her she wanted to write her will and get all of her business "out of the way" that day. Mary asked Rosa if she would "write down exactly what I say and do not interrupt me." Rosa agreed and wrote by hand with a pencil on a sheet of note paper the following:

"To Rosa Scott I leave the income on my \$90,000 bank account for her life and a life estate in my house and lot. At her death everything is to go to the Covington Boys Home. I am doing this because Rosa Scott has been kind to me and is the only person who ever helps me and the Covington Boys Home has done so many good works in my community."

After Rosa "finished writing the will," Mary read it over, signed her name, dated it, and put it on her kitchen table. Mary then asked Rosa to call Fred Fox, a neighbor, to come to her house to witness the will. When Fred arrived, Mary told him she had dictated and signed her will, and asked him to read it and witness it, which he did. Present in the room at the time were Mary, Rosa and Fred. The following handwriting appears on the lower left portion of the document:

"Witness
Fred Fox
May 18, 1995"

Six months later Mary broke her hip in a fall at her home, and was taken to a nursing home where she subsequently died.

The will was presented to the Clerk of the Circuit Court of Rockbridge County and was probated by her after Fred Fox swore that he had witnessed its execution.

The local bank, which had served as Mary's guardian, qualified as Administrator C.T.A. of her estate, which consisted of Mary's house and lot, and an \$84,000 balance in her guardianship account.

Mary's brother, John, properly appealed the probate order and filed a chancery suit against the Administrator and beneficiaries of the will in which he alleged:

- (a) that Mary was not mentally competent to execute a will; and
- (b) that, if she was competent, the will was not properly witnessed and was therefore invalid.

At the trial of the appeal of the probate order and the chancery suit, evidence was heard as to all matters in controversy. Rosa and Fred testified as to the events surrounding the execution of the will, that the dispositive provisions of the will were entirely in Rosa's handwriting, and opined that Mary was competent. Fred testified that Mary's signature and Rosa's name in the body of the will were both there when he witnessed it.

John introduced the Circuit Judge's finding made at the time of the appointment of Mary's guardian and argued, based on that finding, that Mary was not competent to execute a will. He also pointed out that Rosa's name only appeared on the document one time, and that was in the first sentence where she was designated as a beneficiary of the will.

How should the Court rule on each ground of John's suit? Discuss each ground (a & b) separately and fully.

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4. Sam Goodfellow owns a clothing store in Norfolk, Virginia. The store is the exclusive retail outlet in Hampton Roads for the Tidewater Outfitters brand of clothes, which is very popular among outdoors enthusiasts. The Tidewater Outfitters brand is manufactured in Oregon by Pacific Tidewater Manufacturing Company ("Pacific").

In 1990, Sam entered into a contract with Pacific which provides that Sam "shall be the exclusive retailer of the Tidewater Outfitters brand in the cities of Norfolk, Portsmouth, Chesapeake, Virginia Beach, Suffolk, Hampton and Newport News." The contract is for a term of ten years with an option for Sam to renew it for an additional five years. The contract had been drafted in Oregon by Pacific's attorneys, signed there by Pacific's president, and sent to Sam in Norfolk for his signature. Satisfied that it accurately reflected their agreement, Sam had signed and mailed the contract back to Pacific in Oregon.

In 1997, Pacific informed Sam that it was negotiating with Al Smug, who wished to open a store in Newport News, to sell the Tidewater Outfitters brand. Sam reminded Pacific's president that, under their contract, Sam was the exclusive retailer in the area. Pacific's president told Sam that they could probably resolve the matter amicably and invited Sam to meet

with him at his vacation home in Colorado to discuss it.

Sam decided to combine the trip to Colorado with a cross-country car trip he had planned for his vacation. While driving through Indiana, Sam was involved in a collision with a truck owned by Eastern Transfer Company ("Eastern"), a long-haul trucking company. Sam suffered severe injuries and his car was a total loss. Eastern is a Virginia corporation and has an office in Norfolk, Virginia. The driver of the truck resides in Alta Vista, Virginia.

Sam retains you to sue Pacific for an injunction prohibiting Pacific from permitting Al Smug or anyone else to sell the Tidewater Outfitters brand in the Hampton Roads area. He also wants you to sue Eastern and its driver for personal injury and property damage and to recover his actual losses plus damages for pain and suffering. You plan to file both cases in the Circuit Court of the City of Norfolk.

In resolving conflict of laws issues involving matters of contract, Oregon applies the law of the state where the contract was made, unless the issue in dispute relates to the performance of the contract, in which case it applies the law of the state where the contract is to be performed. The law of Oregon provides that contract provisions for exclusive retail dealerships are terminable at the option of either party to the extent that the period of exclusive dealership exceeds five years. Virginia law does not restrict the length of time for which exclusive dealership arrangements may be made.

Indiana limits monetary recovery in personal injury and property damage actions to amounts actually lost. Virginia allows recovery of actual losses plus damages for pain and suffering.

- (a) Does the Norfolk Circuit Court have jurisdiction in the suits against Pacific and Eastern? Discuss fully.
- (b) What is Virginia's conflict of laws rule on issues involving matters of contract, and which state's law should the Circuit Court apply in the suit against Pacific? Discuss fully.
- (c) Would the Court's decision as to which state's law to apply, in answer to part "(b)", be different if the contract between Sam and Pacific contained a clause providing that "in all matters involving the interpretation or enforcement of this contract the laws of Oregon shall apply"? Discuss fully.
- (d) What is Virginia's conflict of laws rule on issues involving tort claims, and which state's law should the Circuit Court apply as to the damage issues in the suit against Eastern? Discuss fully.

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Proceed to questions in Booklet C