

VIRGINIA BOARD OF BAR EXAMINERS

Norfolk, Virginia - February 27, 1996

Answer Questions 1 and 2 in Answer Booklet A

1. Mario Petty is employed as a courier for Express Delivery Company ("EDC") in Norfolk, Virginia. Petty drives his own car and is reimbursed based upon the miles he drives for the deliveries he makes, but he is not reimbursed for commuting to and from the office unless he makes a pickup or delivery during the commute. Although Mario is a good employee who has never been in any trouble before, he has recently been involved in three incidents. The president of EDC seeks your advice on EDC's liability for Mario's acts.

Last Monday morning, Mario was involved in an automobile accident on his way from home to work one block away from the office. His alarm clock had not rung, and he had overslept. Consequently, Mario was rushing to get to work on time when he negligently rear-ended a car driven by Ronald at a stop sign. He was not making a pickup or delivery en route.

Only two days later, on Wednesday, Mario was making a delivery. He had stopped at a traffic light and intended to turn left. The intersection had two left turn lanes, and as he began to turn, the car to his right, driven by Todd, almost sideswiped him. Todd yelled to Mario, "What do you think you are you doing, you jerk?" Both cars stopped in the intersection before completing the turn, and the drivers exited their automobiles. Todd then bellowed to Mario, "Did you get your driver's license at Toy World? My three-year old daughter can drive better than you!" Mario responded by yelling, "You're going to make me late for my delivery," and punching Todd in the face, breaking his jaw.

The last incident occurred on Friday, when Mario and some fellow workers went to lunch together to celebrate the birthday of EDC's bookkeeper. Before leaving the restaurant, Mario called the office and was told not to continue on his delivery route, but rather to return directly and promptly to the EDC office to pick up a package for an emergency delivery to a customer. En route to EDC's office from the restaurant, Mario negligently struck a car being driven by Steve.

Is EDC liable for damages which its employee Mario caused to Ronald, Todd and Steve as a result of the following incidents and, if so, upon what legal theory or theories:

- (a) Monday's accident? Discuss fully.
- (b) Wednesday's battery? Discuss fully.
- (c) Friday's accident? Discuss fully.

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2. For some 100 years the Chesapeake & Western Railroad Company (the C&W) operated a rail line in Pulaski County, Virginia. Part of the rail line ran across Blackacre, a large farm owned by Newhouse Corp. In 1993 the C&W stopped using this line, took up the rails, and, in 1995, it conveyed the property on which the line had lain to the Commonwealth of Virginia for use as a public trail. Newhouse Corp., however, denied that the Commonwealth had acquired title to the property where the rail line had crossed Blackacre and denied the Commonwealth access to that part of the line by erecting barricades and "no trespassing" signs.

In negotiations with the Commonwealth, Newhouse Corp. pointed to the following language in a 19th century deed from the then-owners of Blackacre (referred to in the deed as the "parties of the first part") to the C&W (referred to in the deed as "party of the second part"):

Whereas the Chesapeake & Western Railroad Company is about to locate their railroad upon and through Blackacre, being a certain tract, piece or parcel of land in Pulaski County, the said land being the property of the parties of the first part . . . , now therefore the parties of the first part for and in consideration of the construction by the party of the second part of a railroad through their lands and the establishment and maintenance of a suitable station, and in further consideration of the sum of \$1.00 to them paid, the receipt of which is hereby acknowledged, the parties of the first part have granted, bargained, sold and conveyed to the party of the second part, its successors and assigns, a right of way, sufficient for the location, construction and maintenance of a railroad track through the said lands of the parties of the first part, not to exceed in width 80 feet, to have and to hold the said right of way and land taken so long as the railroad to be built shall be maintained and operated, but no longer.

Newhouse Corp. acquired Blackacre in an unbroken chain of title from grantor of the deed containing the foregoing language. Accordingly, Newhouse Corp. contends that the Commonwealth has not acquired title to the property.

After negotiations proved fruitless, the Commonwealth decides to bring suit to enforce its claim of ownership and right to possession.

Without regard to which party is likely to prevail, discuss whether each of the following is an appropriate proceeding in which Commonwealth can test its title and right to possession, and explain your conclusions:

- (a) Declaratory judgment
- (b) Unlawful detainer
- (c) Partition

(d) Bill to quiet title

(e) Ejectment

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Answer Questions 3 and 4 in Answer Booklet B

3. In July 1985, Porter Alexander, who lived at Mouth of Wilson, Virginia, executed a valid will which, after the usual introductory language, provided:

- "(1) I direct that my real estate be sold and the net proceeds paid to my beloved wife Willa.
- "(2) I give my 500 shares of bank stock to my uncle Fred.
- "(3) I nominate my friend, Sandy Pendleton, as Executor of my estate."

The will contained no other provisions.

In 1990, Porter was granted a final divorce from Willa, who is still living. He died in November 1995, a resident of Grayson County, Virginia. He was survived by his brother Bret. Porter had no children.

Prior to Porter's death, his uncle Fred died and was survived by Fred's wife Rachel and their adopted son Gary.

Porter's estate consisted of a 9,000 acre farm, upon which he had resided, 2,000 shares of stock in White Top National Bank (White Top), miscellaneous tangible personal property, and a savings account with a balance of \$780,000.

At the time the will was written, Porter owned 500 shares of stock in the Bank of Grayson. That bank was subsequently acquired by and merged into White Top, which issued 2,000 shares of its stock to Porter in exchange for his stock in Bank of Grayson.

After Porter's death, the will was probated, the real estate was sold, and all taxes and debts were paid. The Executor of the estate asks you to explain to him how and to whom he should distribute the assets of the estate.

Prepare a memorandum fully explaining the reasons for your conclusions and dealing separately with the following questions:

- (a) To whom should the 2,000 shares of the White Top National Bank stock be distributed?
- (b) To whom should the tangible personal property and the savings account be distributed?

- (c) To whom should the net proceeds from the sale of the real estate be distributed?
- (d) What would be the effect, if any, on the foregoing distributions if Porter had been survived by a child born to him and Willa in 1988?

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4. Amex Corporation was formed in 1975 as a closely held Virginia corporation. The articles of incorporation and the by-laws are silent on the question of cumulative voting and they contain no special provisions regarding reasons for removal of directors.

The company manufactures low priced traditional furniture in a small facility in Williamsburg, Virginia. Smith, Jones and Craig were the initial directors and the only initial shareholders. They each owned 100 shares of Amex common stock.

The company began to grow. A catalog division was added, and two new manufacturing facilities were opened in Colorado and Alabama. As of 1985 the company had 500 employees. The board of directors was expanded in 1986 to add Hurt and Kole. Kole was a retired bank president who had moved to Williamsburg from New York after he retired from a large Wall Street bank. Kole had significant contacts in New York. Hurt was a prominent business lawyer from Norfolk who had a tremendous ego. Hurt was very active politically and bragged constantly about his contacts in Richmond and Washington.

In 1988 Hurt purchased all of the stock owned by Smith and Jones. After completing the stock purchase, Hurt told Smith and Jones that they could stay on the board as long as they were willing to serve.

Craig and Hurt did not see eye to eye on matters affecting Amex. They fought constantly. Hurt wanted to expand the company further. He wanted to add new distribution centers and increase catalog sales. Craig feared a recession and thought sales would fall off. He was afraid to invest capital for expansion in light of a possible downturn in the economy.

Craig's prognosis about the economy was correct, and he enjoyed remarkable credibility with the other board members who respected his insight and wisdom. Hurt's ego was bruised. He resented Craig even more.

By 1995 Hurt and Craig were barely speaking to each other. In a board meeting held on December 8, 1995, Craig convinced Jones and Smith to vote down Hurt's proposal to take the company public. Hurt now wants to remove Craig, Jones and Smith from the board, and he seeks your advice on how to proceed. He has promised to hire you as general counsel to represent Amex if he is successful.

- (a) Can Hurt effect the removal of Craig, Jones and Smith from the Board, and, if so, what steps must be taken? Discuss fully.

- (b) If Craig, Jones and Smith file a motion for an injunction to prevent their removal, how would a court be likely to rule on their motion. Discuss fully.

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Proceed to questions in Booklet C