

VIRGINIA BOARD OF BAR EXAMINERS  
Chesapeake, Virginia - February 23, 1999

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

5. In 1982, Tom and Ben began practicing law together as partners in Fredericksburg, Virginia. As their practice grew, they hired associates and, in 1989, they incorporated as a professional corporation under the laws of Virginia. Tom and Ben have always been the only officers, directors and shareholders of the corporation. In 1990 they purchased an office building in downtown Fredericksburg, where they located their law offices.

On Sunday evening, March 8, 1998, a major snowstorm hit the Fredericksburg area. When Ben arrived at the office on Monday morning, March 9, at 7:30 a.m., it had stopped snowing but the weather still appeared threatening. Ben cleared the snow that had piled up in the walkway leading to the front door. The foyer, just inside the front door, was tiled in marble which became slippery in wet weather as people entered and tracked in snow and water. Ordinarily, Ben would have placed inside the front door a non-slip rubberized carpet which was kept nearby for use in such conditions but, because it had stopped snowing, Ben decided it would not be necessary.

At 10:00 a.m. on March 9, Claire, a client of the firm, went to the office to consult Tom about a matter as to which she had made an appointment. Although Claire was a client of the firm, Tom is the only attorney who had ever done any work for her. As Claire entered the front door, she slipped on some water that had accumulated on the tile. She broke her hip and was hospitalized. She was left with a permanent limp and lasting pain as a result.

The matter about which Claire had come to consult Tom involved a promissory note Tom had prepared for her in 1995, when she had loaned \$10,000 to her son, Sam, to open a ski shop in Nags Head, North Carolina. It is undisputed that, when Claire asked Tom to draft the note for her, she told Tom she wanted a negotiable promissory note because there might come a time when she needed the cash and might want to sell or otherwise negotiate the note. The note prepared by Tom and signed by Sam read as follows:

November 1, 1995

I promise to pay to the order of my mother, Claire, the sum of \$10,000 with interest at the rate of ten percent (10%) per annum. Said sum to be payable in full not later than two years after the opening of Sam's Ski Emporium in Nags Head, North Carolina.

/s/ Sam

The opening of Sam's Ski Emporium was delayed by local environmentalists, whose vocal opposition had held up issuance of the necessary permits. Sam's Ski Emporium finally opened in November 1996.

In February 1998, Claire tried to sell the note at a discount to Acme Finance Co. because she needed the cash. Acme refused to buy it, telling Claire that the note was not negotiable. As a result, Claire was forced to borrow the money she needed and to pay interest on the loan.

Claire, who is now able to get around, consults you about her personal injury and the promissory note. She is not sure about the nature of the business organization of Tom and Ben's firm or the state of title to Tom and Ben's building at the time of her injury. Assume Ben was negligent in failing to take safety precautions on the morning of March 9, 1998. Advise Claire on the following questions:

- (a) If the building was owned by Tom and Ben's professional corporation, from what party or parties can Claire recover damages on her personal injury claim? Discuss fully.
- (b) If the building was owned by Tom and Ben as the only general partners in the firm, from what party or parties can Claire recover damages on her personal injury claim? Discuss fully.
- (c) You have ascertained that Tom and Ben's law firm has been a professional corporation since 1989. Was the promissory note prepared by Tom negotiable, and, if not, against what party or parties can Claire assert a claim for damages she incurred because of the non-negotiability of the note? Discuss fully.

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

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6. Virginians for Economic Progress (VEP) is a non-profit corporation dedicated to providing skills training for high school drop-outs. Two years ago, VEP obtained a federal monetary grant to provide automotive mechanics training for its clients. The Government Accounting Office has given notice that it wishes to audit VEP's books to ensure that the grant funds are being properly spent. VEP's chief executive officer, Don, opposes the audit, asserting that VEP's books are confidential.

Andrea, an attorney in private practice in Richmond, Virginia, is a member of VEP's board of directors. The directors are volunteers and receive no compensation from VEP.

Don asked Andrea for her advice regarding the audit. Andrea explained to Don the basis of what she believes is a legitimate argument that VEP may oppose the audit on the ground that the government's demand exceeds the scope of the audit provisions of the grant documents.

Later in the discussion, Don told Andrea that the real reason he opposes the audit is that, without making the necessary disclosures, he had contracted some of VEP's training services to a business owned by his brother-in-law. This is a violation of the terms of the grant. It is also a possible violation of federal criminal statutes.

At the next meeting of VEP's board, Don presented the matter without mentioning the contract with his brother-in-law. Andrea, present at the meeting, remained silent. Based on Don's presentation, the board unanimously adopted a resolution opposing the audit.

- (a) What, if any, ethical issues are raised under the circumstances by the fact that Andrea is both an attorney and a member of VEP's board of directors? Discuss fully.
- (b) Was Andrea required under the Virginia Code of Professional Responsibility to disclose to the board of directors Don's having contracted with his brother-in-law? Discuss 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. Bruno Baxter, a resident of Manassas, Virginia and a former professional wrestler with current aspirations for a career in elected politics, was injured when he sat down in a movie theater seat which collapsed at the Manassas Cinema. The Manassas Cinema is a sole proprietorship owned and operated by Rudy Churchill, himself a lifelong resident of Manassas.

Just two months before this unfortunate incident, Rudy had replaced all the Manassas Cinema's theater seating with the trendiest "rocking chair" type theater seats manufactured by Couch Potato Industries, Inc. ("Couch Potato"), a Delaware corporation with its only offices and manufacturing plant located in Indiana. Rudy's son, Homer, who was "between jobs" at the time, had installed the seats with the help of one of his drinking buddies.

Couch Potato's sales director had negotiated the deal with Rudy in Manassas. This was the only time any Couch Potato representative had been present in Virginia to conduct business. The terms of the sale included a cash payment of \$20,000 and a promissory note in the amount of \$80,000 from Rudy to Couch Potato, secured by a properly perfected security interest in the chairs.

Bruno's lawyer hired Gary Williams, a consulting engineer from McLean, Virginia to examine the seat in which Bruno had been injured and to assist with formulating a theory of liability. With Rudy's cooperation, Williams was given the opportunity to examine and photograph the seat in question as well as the other seats in the theater. Williams concluded that this particular seat had been improperly installed by Homer. Williams submitted an eight-page "confidential" report to Bruno's lawyer setting forth his methodology, the photographs, and his findings. Bruno's lawyer promptly remitted a \$750 check to Williams, representing the fee for his services.

Believing that a claim against Couch Potato would ultimately be more lucrative than a suit against Rudy, Bruno's lawyer retained Maxwell Smart, a structural engineer from New York City, New York, who specializes in seat collapse cases. Smart made an independent

investigation and, with Rudy's cooperation, also was given the opportunity to examine the seat in question as well as the other seats in the theater.

Unlike Williams, Smart concluded that the seat in question had been negligently manufactured because it lacked a traverse support bar sometimes installed on theater seats of this type by other manufacturers. Smart outlined his method of investigation, his findings and his opinions in a ten-page report addressed and sent to Bruno's lawyer and labeled "Confidential." Smart also sent a bill for \$2,500, which Bruno paid promptly.

Following his receipt of Smart's report, Bruno's lawyer filed a \$300,000 personal injury action against Couch Potato in the United States District Court for the Eastern District of Virginia. It is the intention of Bruno's lawyer to call Smart, but not Williams, as an expert witness at trial, and he has so advised Couch Potato's general counsel. Although the U.S. District Court for the Eastern District of Virginia has issued local rules, none addresses the questions posed below.

- (a) On what grounds, if any, might Couch Potato challenge Bruno's right to bring his action in the United States District Court for the Eastern District of Virginia, what procedure should Couch Potato use to effect a timely challenge, and what should be the court's ruling on each of the grounds asserted by Couch Potato? Discuss fully.
- (b) If the suit goes forward, upon what conditions, if any, may Couch Potato take depositions of Williams and Smart to discover their opinions? Discuss fully.
- (c) Can Couch Potato require Bruno to produce a copy of Williams' confidential report on the theater seat? Discuss fully.

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

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8. In 1968, Mary and Ted graduated from American University School of Law in Washington, D.C. A week after graduation, they married and purchased a home in Washington, D.C. Title to this home was taken jointly in both their names.

Even though Mary had graduated first in her law school class and had been editor-in-chief of the law review, she decided she did not want to practice law. She never took a bar examination. Instead, she took a job as an administrator with a charitable foundation devoted to improving living conditions in urban areas. Ted took a job with a large Washington, D.C. law firm.

In 1978, Mary and Ted moved to Fairfax County, Virginia and purchased a new home for \$100,000. Title to this home was also taken in both their names. They decided not to sell the Washington, D.C. home because they were able to rent it for more than enough to cover the mortgage payment.

By 1980, Mary and Ted were experiencing marital problems. Ted, who was by then an influential partner in his law firm, worked long hours, and, when he was at home, he and Mary fought like cats and dogs. In 1981, a fire partially destroyed their home in Fairfax County, causing Mary to become more irritable than she already was. During an argument one night, Ted lost his temper and moved out. He moved back into the home in Washington, D.C. Mary continued to live in the Fairfax County home. In 1988, Ted, telling Mary that he was never going to move back to Fairfax County, convinced Mary to convey to him title in the Washington, D.C. home. She grudgingly executed a deed, which was properly recorded, conveying her interest in the home to Ted.

In early 1996, Mary lost her job. At Mary's request, Ted began paying her a monthly amount sufficient to cover her living expenses until she could get another job. By late 1998, Mary had still not gotten a job. During that period, she had increasingly devoted her time to her new hobby, painting silhouettes. Also, in late 1998, Mary's boyfriend, with whom she had been having a romantic relationship for the past seven months, moved in with her.

Ted, upset because Mary's boyfriend had moved in and concluding that Mary was not trying diligently to get a job, stopped making the monthly payments.

Mary, furious over Ted's decision to stop paying her, decides that she will file for divorce. It is clear that Ted and Mary will not be able to reach an out-of-court settlement regarding their rights in their marital property. She retains you to represent her in the divorce proceedings and seeks your advice on the following questions.

- (a) What grounds should Mary assert as bases for the divorce, and what defenses might Ted reasonably raise as to each ground? Discuss fully.
- (b) Does the court have the power to award Mary title to the Fairfax County home, and, if so, what factors should the court consider in exercising that power? Discuss fully.
- (c) What interest, if any, does Mary have in the Washington, D.C. home? Discuss fully.
- (d) Under the circumstances, will the court be likely to order Ted to pay Mary a lump sum for support, and, if so, is Ted entitled to a credit for the amounts he paid Mary during the period of her unemployment? Discuss 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.** Tom was pulled over by a deputy sheriff for reckless driving near Roanoke, Virginia while driving a car loaned to him by his brother-in-law, Dan. During the routine computer check by the deputy for outstanding warrants, the deputy learned that the car fit the

description of a vehicle seen speeding away from the scene of a burglary earlier that day. The burglar had stolen a valuable coin collection.

The deputy asked Tom for permission to search the trunk and interior of the car. Tom asked the deputy, "Am I under arrest?" The deputy answered, "No, not yet." Tom then refused to allow the deputy to search the car.

At that moment, Dan happened to be driving by, and he stopped. He explained to the deputy that he, Dan, had loaned the car to Tom a few days ago and asked what was going on. The deputy told Dan that the car matched one seen leaving the scene of a burglary and that, unless he received permission to search the car here and now, he would impound the car until he could obtain a search warrant. Dan, over Tom's objection, told the deputy, "To hell with it. Go ahead and search it."

The deputy found the stolen coin collection under the front seat in a bag bearing the owner's name and upon which Tom's fingerprints were later identified. He impounded the car as evidence and arrested Tom, who was later indicted for burglary and possession of stolen property and bound over for trial.

**(In answering parts a and b, assume that permission was legally required before the car could be searched.)**

- (a) Does Tom have standing to object on Fourth Amendment grounds to the search of the car? Explain fully.
- (b) Did Dan's consent to the search of the car overcome any Fourth Amendment objection that might be raised by Tom? Explain fully.
- (c) At trial, what legal inference, if any, arises from the discovery of the bag of coins under the front seat of the car? Explain fully.

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

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