# VIRGINIA BOARD OF BAR EXAMINERS

Roanoke, Virginia - July 28, 1998

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

**5.** On October 11, 1997, a high school football game was held at the Fredricksburg City Stadium between Hope High School and Clinton High School. The stadium is owned and operated by the City of Fredricksburg, which leases the stadium to others for recreational and athletic events. Both schools are located in Fredricksburg, Virginia. The two schools have been playing each other since 1942. The rivalry is very strong, and thousands attend the game each year.

City Stadium can seat 20,000 people. The stadium can accommodate another 1,000 people standing on the grassy area behind the south end zone. The crowd for the October 11th game exceeded everyone's expectations. An hour before the game there were nearly 21,000 people in the stadium. Stadium officials, who were City employees, decided to stop selling tickets. Many of the fans had traveled great distances to get to the game. They became very angry when they were told they could not enter the stadium. By game time nearly 2,000 people were standing outside waiting to get into the game. Fearing a riot, the stadium officials decided to let more people into the stadium. They also called for more police officers.

The stadium was filled to capacity, and people were standing everywhere. However, the police and stadium officials were able to maintain order.

In violation of City rules and regulations, Jim and John brought liquor into the stadium. Jim and John consumed the liquor and became intoxicated. When the game ended, they became quite frustrated because the large crowd delayed their efforts to leave the stadium. Jim and John pushed several people in front of them. Bowen, one of the persons who were pushed, fell to the ground and was trampled by the crowd. Bowen sustained substantial injuries. Bowen was hospitalized and incurred significant medical expenses as a result of his injuries. He was unable to identify Jim and John.

On March 11, 1998, Bowen sent to the Fredricksburg School Division Superintendent a letter describing the circumstances of his injury, demanding compensation, and enclosing copies of his medical bills. The Superintendent is a school board employee and not a City employee.

On April 1, 1998, having had no response from the Superintendent, Bowen retained you to represent him in a possible suit.

(a) Has Bowen fulfilled the procedural prerequisites for asserting a claim against the City? Explain fully.

(b) Putting aside the need to fulfill certain procedural prerequisites, can Bowen

prevail on the merits in a suit for damages against the City? Explain fully.

(c) Assume that the stadium was owned and operated by the County instead of the City, and put aside the need to fulfill certain procedural prerequisites. In that event, would Bowen be able to prevail on the merits in a suit for damages against the County? Explain fully.

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

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**6.** Chuck and Diane were married in England in 1985. They moved to Fairfax County, Virginia in 1995. They have three children named Mary, Katherine and Will, aged 9, 7 and 5 respectively.

Chuck left Diane in 1996 and moved to Raleigh, North Carolina to establish residence in North Carolina with the intention of getting a quick divorce. North Carolina law has a six-month residency requirement and permits a divorce after a six-month separation even if a couple has children. After residing in Raleigh for the requisite six months, Chuck filed for divorce in the Superior Court for Durham County, North Carolina, a court of record. Although Diane was properly served with process in Fairfax County, Virginia, she did not respond to or appear in the suit.

In January 1997, the North Carolina court entered a final decree of divorce. In addition to granting the divorce, the decree awarded custody of the children jointly to Chuck and Diane, with Diane as primary custodian, and ordered Chuck to pay spousal support of $100 per month and child support of $100 per month. In fact, to date, Chuck has not paid any of the child or spousal support ordered by the North Carolina court.

In May 1998, Chuck moved back to Fairfax County, Virginia. In June 1998, Diane filed a petition in the Fairfax County Juvenile and Domestic Relations District Court asking the court to set aside the North Carolina divorce decree, seeking sole custody of the children, seeking an order requiring Chuck to pay all arrearages in the child and spousal support ordered by the North Carolina court, and seeking an increase in child support to $1,000 per month and in spousal support to $1,000 per month.

Chuck, properly served with process, responds to the petition asserting that the Virginia court is bound by the final decree of the North Carolina court and may not change any part of it.

May the Virginia court properly:

(a) Set aside the North Carolina final decree of divorce? Explain fully.

(b) Substitute its own judgment in place of the North Carolina --

(i) Child custody award?
(ii) Child support award?
(iii) Spousal support award?

Explain fully.

(c) Order Chuck to pay the arrearages in child and spousal support? Explain 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. At the depths of the real estate market's decline in Northern Virginia in 1990, Andy Churchill, ever the optimist, purchased 37 acres of land in Prince William County, Virginia at a foreclosure sale. Churchill subsequently subdivided the property into 31 one-acre lots, dedicated two interior streets (known as Tanqueray Way and Dolphin Lane) to public use, and properly recorded among the land records of Prince William County a series of covenants applicable to all lots, which provided in pertinent part:

> No lot shall be used except for residential purposes. No building shall be erected, placed or permitted to remain on any lot other than one detached single-family dwelling with a value of at least $250,000. Any such dwelling shall not exceed two stories in height and shall have an attached garage for not more than three automobiles.

The development was aptly, if not immodestly, named "Churchill Estates."

The rear of Lot 7 of Churchill Estates adjoined the Smiley Face Preschool, which had been owned and operated by Emmit and Rhonda Kelly since 1975. The Preschool property was not part of Churchill Estates although, at one time, all of the property encompassing both the Preschool property and Churchill Estates had been owned by the Swanson family.

By the end of 1995, 30 of the Churchill Estates lots had been sold and developed with single-family residences valued well in excess of $250,000. The only remaining lot, Lot 7, was not sold and was not maintained by Churchill who, despite his financial success on this and other projects, had a penchant for penny pinching. Although Churchill had seeded Lot 7 with a mixture of rye grasses, he refused to hire someone to mow the grass, believing instead that the owners of Lots 6 and 8 would do so rather than live next to an unkempt property. Unfortunately, no one performed the maintenance, and Lot 7 was, by all accounts, a terrible eyesore.

In January of 1998, the Kellys purchased Lot 7 with the idea of installing a playground as an amenity to the Preschool. The Kellys did not realize that the covenants were present until after they purchased Lot 7 and began their detailed planning for the playground. On advice of their attorney, Dean Smith, the Kellys wrote all of the Churchill Estates lot owners asking that they waive the covenants as to Lot 7 by signing the release document prepared by Mr. Smith and attached to the letter. In the release document, the Kellys agreed to perform extensive landscaping (such that the playground would be barely visible from the street) and to allow after-school use of the playground by the Churchill Estates lot owners and their children.

All Churchill Estates lot owners complied with the request except for Mr. and Mrs. Stickindamud, whose youngest son, Bartholomew, had been expelled from Smiley Face for disciplinary reasons. The Stickindamud's home is at the opposite end of Churchill Estates from Lot 7, and they have been advised by an appraiser that they can show no damage or loss in value to their property if the playground is constructed. They did not respond to the letter from the Kellys. However, Mrs. Stickindamud (without her husband's knowledge) did call Mrs. Kelly and asked if Bartholomew's expulsion would preclude him from enjoying the playground with other neighborhood children. Mrs. Kelly assured her that Bartholomew would be allowed to enjoy the playground.

Existing zoning allows the construction of a playground in the Churchill Estates subdivision if a special use permit is issued by the County. The Kellys complied with the required advertising in a newspaper of general circulation, the mailing of notice of the application for the special use permit to all lot owners in Churchill Estates, and the posting of conspicuous notice on Lot 7 for a full four weeks. The Kellys then obtained the required permit at a public hearing before the Prince William County Board of Supervisors. The Stickindamuds neither appeared at the hearing nor otherwise objected to the permit application. The day following the hearing before the Board of Supervisors, the Kellys erected on Lot 7 facing the street a 4'x 3' sign which read:

Coming Soon -
SMILEY FACE PLAYGROUND
We're always smiling here.
703-555-1212

Within a week's time, the Kellys had obtained a building permit for $950 and signed a $55,000 construction contract with a builder for installation of the playground and landscaping. Upon learning about the building permit and the construction contract, Mr. and Mrs. Stickindamud come to your law office in Manassas, Virginia and ask for your advice on the following questions:

(1) Do they have any rights to enforce the covenants recited above and, if so, what are those rights, what court action can they take and in what court should they take it?

(2) What defenses are available to the Kellys and what is your assessment of each?

After the Stickindamuds have left your office, you discover several incoming facsimile transmissions which have been sent to you by Sherry Jo Weaver, Dean Smith's paralegal. Each fax is preceded by a cover sheet identifying the addressee and containing the following statement:

> This communication is confidential and is intended to be privileged pursuant to the attorney-client and work product doctrines, as applicable.

The first fax contains a cover sheet properly addressed to you. It covers a letter from Dean Smith to you regarding a case filed last year in which the two of you are counsel of record for two large corporations that are involved in a dispute about an office lease.

The second fax, however, appears to have been erroneously sent to you. The fax cover sheet is addressed to Mr. and Mrs. Kelly and also to you. It accompanies a four-page letter from Smith to the Kellys, which begins with the following words: "This letter will provide you with my analysis of your development rights in connection with Lot 7 of Churchill Estates." The letter does not indicate that copies (i.e., "cc's") have been sent to anyone else.

(a) Advise the Stickindamuds fully on question (1), above.

(b) Advise the Stickindamuds fully on question (2), above.

(c) What, if any, ethical obligation do you have as a member of the Virginia State Bar, consistent with your obligations to the Stickindamuds, as a result of your having received the second fax? Explain fully.

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

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**8.** In 1990, Ames took a job with The Haberdashery, a men's clothing store in Richmond, Virginia. Bates owns and operates The Haberdashery's two stores, in very desirable locations, one on Midlothian Turnpike and the other on West Broad Street.

When Ames came to work for the Haberdashery in 1990, he signed a multi-page employment agreement which contains the following provision:

> Employee hereby agrees that he shall not divulge any trade secrets or proprietary or confidential information to anyone during or following employment. Further, for a period of ten years following termination of employee's employment, employee shall not engage in any business within 75 miles of the Richmond metropolitan area which competes with The Haberdashery.

The employment agreement is typed in very small print. Ames did not read the employment agreement before he signed it.

For several years Ames was the top salesperson at The Haberdashery. Bates was extremely impressed with Ames and wanted to give him more incentive to sell. Accordingly, in 1994 Bates made Ames manager of the Broad Street store and assigned to him 1% of the net sales of both stores on top of his existing salary and commission. Bates also told Ames that, if Ames would continue working for him, when he (Bates) decided to sell the stores he would sell them to Ames, including the goodwill, leases, fixtures, accounts receivable and inventory. Bates repeated this statement on several occasions, especially when he was trying to motivate Ames to sell more. In fact, Ames, looking forward to the day when Bates would retire and sell the stores to him, declined a number of lucrative employment and business opportunities extended to him over the years.

In 1997, Bates decided to open a new store approximately 50 miles away in Williamsburg and gave Ames responsibility for the project. For almost a year Ames traveled between Richmond and Williamsburg to make the necessary arrangements for the new store. He identified a prime location, which was the last available site in the exclusive retail area in the historic district of Williamsburg. Ames negotiated a very favorable lease and recruited some outstanding salespeople.

Just before the lease was to be finalized, Ames learned that Bates had entered into an agreement to sell The Haberdashery stores to his brother-in-law for $1 million, of which $600,000 represented the cost of the inventory and $200,000 represented the value of the Richmond leases.

Ames was furious. He approached Bates and offered to pay the same amount Bates' brother-in-law had agreed to pay. When Bates refused, Ames decided to open the Williamsburg store for himself under the name of Williamsburg Haberdashery. He executed the lease that had been intended for Bates' new store in his own name, hired for himself the salespeople he had recruited, and began ordering merchandise for his own account. After making these arrangements, he mailed his written resignation to Bates.

Bates sues in State court to enjoin Ames based upon the non-competition provision in the employment agreement.

(a) What defenses can Ames reasonably raise in the suit brought by Bates, and what is the likely outcome of each? Explain fully.

(b) Can Ames prevail if he files a cross-bill for specific performance of Bates' promise to sell him the stores? Explain 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.** In 1988, about two months before his seventy-fifth birthday, Sly Fox had the persistent feeling that his life was coming to a close, and he set about to get his affairs in order. Sly lived in Elm City, Virginia, a town of about 300 residents in a very rural county. He had lived in Elm City for more than thirty years with Frieda Fox, a person known to everyone in town as his wife. They had a son, Max, who was Sly's only child. Max's wife had recently given birth to a daughter, Gina.

Sly, wanting to update his will to reflect the birth of his granddaughter, made an appointment with his poker partner, Larry Lawyer, to re-write his will. For many years, Larry had been a regular participant in a Thursday night poker game at Sly's home, where Frieda served up plenty of refreshments.

Larry brought the new will to Sly's home on poker night. It was validly signed by Sly and witnessed by three of his poker buddies and contained the following provisions:

> "1. I appoint Elm City Bank as Executor of my estate and Trustee under my will.
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> "2. I bequeath $100,000 to my son.
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> "3. I bequeath one-half of my stock in Elm City Bank to be held in trust and the income therefrom to be used by Trustee, in its sole and absolute discretion, for the education of my granddaughter, Gina. At such time as Gina reaches age 21, Trustee shall deliver the principal and all accumulated income to Gina.
>
> "4. I bequeath $200,000 to my wife.
>
> "5. I devise and bequeath the remainder of my estate to be held in trust and the income to be paid by Trustee to our local orphanage, Town Children's Home."

At the time he executed this will, Sly owned 100 shares in Elm City Bank, which shares were valued at $50,000. In the ensuing years, following a series of mergers and acquisitions, the stock split and was replaced by stock in the successor entities and increased in value ten-fold. When, as a result of the successive mergers, the Elm City Bank closed, leaving no successor bank or branch in Elm City, Sly sold his stock for $500,000 and invested it in certificates of deposit.

Also in the intervening years, Town Children's Home had ceased to exist. Just outside of town, however, a religious organization had started up a halfway house for juvenile offenders, and a private foundation had established an alternative school for economically disadvantaged children.

Sly died in early 1998, survived by Frieda, Max and Gina. At the time of his death, Sly's estate was valued at roughly $1 million and consisted of cash and certificates of deposit held in various accounts at First Savings Bank in a neighboring town, at which bank Sly had conducted all his financial affairs in recent years.

Max presented the will to the Clerk of the Circuit Court for probate. The Clerk, who had been one of Sly's poker buddies, noting the demise of Elm City Bank, permitted Max to qualify as Administrator C.T.A. but not as Trustee.

Three months after Sly's death, a woman calling herself Cherie Fox appeared before the Clerk of the Circuit Court with her attorney from Richmond, Virginia and advised the Clerk that she was the widow of Sly and wished to renounce the will and take her statutory share. Cherie asserted in an affidavit filed with the Clerk and accompanied by a certified copy of a marriage license that: she and Sly had been married in Richmond forty years earlier; Sly had left Richmond and deserted her two years after their marriage; they had never divorced; and she had not seen Sly since he had left Richmond.

During an appropriate probate proceeding, Frieda, Max, Gina and Cherie each assert their claims. The halfway house and the alternative school both appear, each seeking to have itself substituted as the beneficiary under the bequest in paragraph 5 of Sly's will. Max, as Administrator C.T.A., advises the court truthfully that First Savings Bank has expressed its willingness to serve as Trustee under Sly's will.

(a) Assuming that Cherie's assertions are false, how should Sly's estate be distributed? Explain fully.

(b) Assuming that Cherie's assertions are true and that she can prove them, how should Sly's estate be distributed? Explain fully.

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

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