

VIRGINIA BOARD OF BAR EXAMINERS
Norfolk, Virginia - February 25, 1997

Answer Questions 5 and 6 in Answer Booklet D

5. Strebor, Inc. was a small but successful manufacturing corporation located in Roanoke, Virginia. Mr Roberts was president and sole shareholder of the corporation. Ill health prevented him from running the business, so he decided to sell the assets of Strebor.

To assist with the sale, Mr. Roberts retained the services of the law firm of Trent & Marley. The details of the sale were handled by William Trent, a general partner in Trent & Marley. James Updike, the long-time chief financial officer of Strebor, was directed by Mr. Roberts to work with Trent on the deal.

Two prospective buyers approached Updike and Trent and made offers. One offered \$6,000,000 in cash and the other \$7,000,000 in cash. Updike and Trent did not communicate these offers to Mr. Roberts. Instead, they decided to form a corporation called Widget, Inc., which would make a \$5,000,000 offer for the Strebor assets. To help fund the purchase, they approached Karl Bly, a wealthy Charlottesville investor. They explained Mr. Roberts' interest in selling, offered Bly a 45% interest in Widget for \$2,000,000, and concealed all information about their relationship to Strebor and the other interested buyers. Bly accepted the offer. Bly, Updike and Trent became the sole shareholders, officers and directors of Widget.

By this time, Mr. Roberts was seriously ill and in the hospital. Trent visited him at the hospital and told him that the only offer that had been made for the Strebor assets was the \$5,000,000 offer from Widget on the following terms: \$1,500,000 cash upon closing and the balance in the form of an unsecured promissory note payable in quarterly installments of principal and interest over a five-year period. Trent did not tell Mr. Roberts anything about who the principals of Widget were. Mr. Roberts expressed his disappointment that a better offer had not been received, but said that, in light of his poor health, he would accept the offer.

Trent prepared a contract of sale, a bill of sale, and a deed transferring all the Strebor assets to Widget on the terms described above. He took the documents to the hospital and assured Mr. Roberts that they were all in order. Relying on that assurance, Mr. Roberts signed the documents without reading them. If he had read the documents, he would have noticed that the signatories who were required to sign the contract on behalf of Widget were Trent, Updike and Bly. Upon closing, Widget paid the agreed-upon \$1,500,000 down payment to Mr. Roberts and took title to all the Strebor assets.

For two quarters running, Widget failed to make payments in accordance with the contract. Mr. Roberts has now retained your firm, Parker & Pauling, to enforce his rights, and, in the course of exploring the circumstances, your firm has discovered the foregoing

facts. Your firm is preparing to sue Widget, Inc., Updike, Trent, Bly, and the firm of Trent & Marley for rescission, restitution, and money damages, and your supervising partner asks you to answer the following questions:

- (a) Does the fact that Updike was an officer of Strebtor and had been specifically assigned by Mr. Roberts to work on the deal excuse the failure of Updike and Trent to have communicated the other two offers to Mr. Roberts? Explain fully.
- (b) On what basis, if any, can the law firm of Trent & Marley be held liable for the acts and omissions of William Trent? Explain fully.
- (c) Has William Trent breached any Disciplinary Rules of the Code of Professional Responsibility and, if so:
 - (i) What breaches have occurred?
 - (ii) Does your firm, Parker & Pauling, have any obligation to report anything to the Virginia State Bar?

Explain fully.

- (d) Does the fact that Bly was unaware of the wrongdoings by Updike and Trent preclude an action for rescission and restitution against Widget, Inc.? Explain fully.

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6. In 1936, in a carefully planned burglary, Tom stole a 200 year old Stradivarius violin. The violin was insured for \$30,000. The insurance company paid the claim and, to cover the possibility that the violin might subsequently be recovered, took from the true owner an assignment transferring to the insurance company all rights in the violin.

On his deathbed in 1996, Tom confessed to his wife, Wanda, that he had stolen the violin and told her where she could retrieve it. Tom, a Virginia resident, died intestate. Shortly after his death, Wanda took possession of the violin.

At the time of his death, the only other property Tom possessed was 100 shares of Alpha Co. stock, which he had inherited in 1993. The stock is worth \$40,000. He is survived by Wanda and Darla, a daughter by a previous marriage. Wanda has been appointed Administrator of Tom's estate. Larry is the attorney hired by Wanda to represent her as Administrator.

Wanda explains to Larry how Tom had acquired the violin and consults with Larry about what she should do with it. Larry offers to represent Wanda in her individual capacity in dealing with the insurance company regarding the return of the violin. Larry negotiates

payment of a finder's fee by the insurance company, and, upon returning the violin, Wanda receives \$300,000, 25% of the estimated \$1.2 million value of the violin. Wanda pays Larry \$30,000 as his fee for negotiating with the insurance company.

In due course, Wanda files the Administrator's final accounting with the Commissioner of Accounts. The accounting shows an estate valued at \$40,000. Darla objects to the accounting, claiming that the entire finder's fee should be added to Tom's estate. Wanda responds that the finder's fee belongs to her.

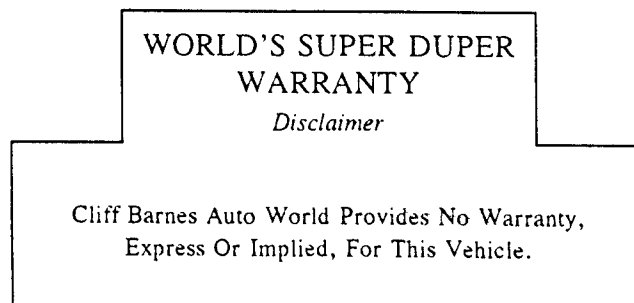
- (a) Should the finder's fee be included in Tom's estate? Explain fully.
- (b) To whom and in what proportions should Tom's estate be distributed? Explain fully?
- (c) Did Larry commit any ethical violation by undertaking the engagement to represent Wanda in her individual capacity to negotiate the finder's fee? Explain fully?

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Answer Questions 7 and 8 in Answer Booklet E

7. Freddy Sizemore was employed as the general manager of Cliff Barnes' Auto World ("World"), a Virginia sole proprietorship located in Falmouth, Virginia, specializing in the sale and financing of pre-owned automobiles. Cliff Barnes, the owner of World, devoted almost all of his time to wagering on college and professional sports, which he did from Cliffy's Sports Bar, also owned by him and also located in Falmouth. As a result, Freddy made practically all of the day-to-day decisions at World and, at least to hear him tell it, did all of the work there.

Frustrated by Cliff's unfulfilled promises to pay him more money, Freddy decided to take matters into his own hands. Freddy decided that World's sales, and correspondingly his own income, would improve if the warranty disclaimer language on the automobile stickers was revised. Accordingly, on February 3, 1997, he saw to it that the former "AS IS" warranty sticker was replaced on each automobile on World's lot with the following sticker:



During the first week of the new "warranty program," Cathy White decided to purchase a 1993 Grand Marquis which had only 31,500 miles, after Freddy told her "this is an absolute dreamobile, owned by a little old lady who drove it only to church, to the hairdresser, and to the grocery store." Ms. White paid with a check made payable to World, in the amount of \$13,500, and drove the Grand Marquis off the lot that same morning.

Later that same day, Dean Smith came by, as was his custom at least once a week, to see what classic automobiles might be on World's lot. As luck would have it, there was a rare 1965 Ford Mustang convertible in mint condition on the lot, just like the one Dean had driven when he was a senior in high school. Knowing Dean to be a classic car buff, and sensing his overwhelming desire to own the Mustang, Freddy proposed an even swap - the Mustang for Dean's baby blue 1997 Jeep Grand Cherokee Limited (which was less than 3 months old, had only 4200 miles, and had an original sticker price of \$37,000). As much as Dean wanted the Mustang, he would not agree to an even trade.

Finally, a deal was struck: Dean would exchange his 1997 Jeep for the Mustang and \$5,000. Freddy explained that while there wasn't \$5,000 in World's cash drawer and that World's checks were all in the possession of Cliff, who was then unavailable, the only thing he knew to do was to endorse Ms. White's check in the amount of \$13,500 to Dean and for Dean to pay \$8,500 in return. Having been to his bank earlier that day in order to withdraw cash to pay his employees at the three automobile service stations he owns, and not wanting his wife to know the details of the Mustang purchase, Dean readily agreed and paid Freddy \$8,500 in cash. Freddy endorsed the reverse side of Ms. White's check as follows:

Pay: Dean Smith
Cliff Barnes Auto World
By: /s/ Freddy Sizemore
General Manager

The two exchanged title documents and keys, and Dean drove away in the 1965 Mustang with a smile on his face and Cathy White's check in his pocket.

Just as he was closing World's office that evening, Junior Jones dropped by to deliver the second of three installments on the down payment for the 1989 pickup truck that Cliff had agreed to hold for him. Ordinarily, World would not "hold" an automobile for a customer, but Cliff liked Junior, no doubt because Junior was a great high school athlete. Even though Junior's grandparents told him that Cliff was not to be trusted, Junior thought Cliff was "a good guy." Their deal, which was struck in March of 1996, was that Junior would make three payments of \$500 each over the next year and then Junior could take

delivery on the truck once he reached the age of 17, which would be on March 5, 1997. Junior wrote and signed a check for \$500, and Freddy told him to leave the payee line on the check blank, because he would stamp the check with World's name stamp so that it would be "official," to use Freddy's word. Junior complied and handed his check to Freddy.

After Junior left, Freddy put a set of "Dealer" license plates on the Jeep, completed the Jeep's title in his own name, took all of the money out of World's cash drawer, and printed his own name on the payee line of Junior's check. Freddy jumped in the Jeep and started to drive out of town. Before he reached the town limits, Freddy stopped at Mary Lumpey's convenience store where he paid for a 12 pack of beer and some beef jerky by endorsing the reverse side of Junior's check as follows:

/s/ Freddy Sizemore

Mary Lumpey, the owner of the convenience store, put the beer and beef jerky in a bag and explained that there was only \$220 in the store's cash register. Freddy replied, "Just give me what you got, cause I don't have any cash and I don't have time to cash that check elsewhere." After a moment's hesitation, Mary Lumpey complied and Freddy has not been seen since.

The next afternoon, Cliff made one of his infrequent visits to World's offices, where he learns the above facts. In addition, Cathy White appears and tells Cliff that, contrary to the ownership history recited by Freddy, the Division of Motor Vehicles and her mechanic have informed her that the 1993 Grand Marquis was owned by a taxi cab company and really has 331,500 miles, not 31,500. She claims that she would not have bought the car had she known this, and that she has "half a mind to stop payment on my check to your sleazy company."

Both checks are drawn on accounts at Falmouth National Bank and have now been presented for payment. Neither Cathy White, who is now on a 30 day European vacation, nor Junior, who himself is out of state on a 17 day basketball road trip, are available for consultation. Michael Kay, who is the Bank's president and who has been informed of all of the above, confers with you in your law office and asks whether the Bank should pay each check, and if so, to whom and in what amount. Prepare a letter to Mr. Kay with your advice, explaining fully your analysis.

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8. Acme Trucking Company is a corporation incorporated in Delaware and headquartered in Charleston, West Virginia. It does most of its business in West Virginia,

Pennsylvania, Ohio and Maryland.

Joey Johnson, a driver employed by Acme, was driving an Acme truck, hauling a load through Virginia to a destination in Maryland. Joey stopped in Clinton Forge, Virginia to visit his parents and found that his brother, Cletus, who is a resident of Clinton Forge, Virginia, was also visiting. Without Acme's knowledge and against company rules, Joey offered to take Cletus along for the ride to Maryland, and Cletus accepted. After a night on the town, they set out together, and, after a couple of hours on the road, Joey asked Cletus to drive for a while so he (Joey) could get some sleep.

While Cletus was driving through Newport News, Virginia, he ran a red light and struck a car being driven by Mary Jones. Her brother, Larry Jones, was a passenger in the car. Mary was seriously injured, was hospitalized for three months, lost over six months of work, incurred significant medical expenses and suffered the total loss of her car. Larry received only minor injuries and lost no time off work. His total outlay was \$150 to cover treatment for abrasions at the hospital emergency room.

Mary and Larry are both residents of Newport News, Virginia. Very soon after the collision, Cletus disappeared and can not be found.

Mary and Larry have retained your firm to represent them in a possible lawsuit for damages. Your supervising partner asks you to draft a memorandum addressing the following questions:

- (a) Is there any basis for filing suit in federal district court in Virginia, and, if so, who should the named parties be? Explain fully.
- (b) Can Acme be named as the only defendant in the federal suit, or are there other parties who are required to be named as defendants? Explain fully.
- (c) If suit is filed in federal district court and it is later determined that it would be more advantageous to be in state court, what, if any, limitations are there to withdrawing the federal suit and refile in state court? Explain fully.
- (d) If suit is filed in state court in Virginia, on what basis, if any, can the court obtain jurisdiction over all the potential defendants? Explain fully.
- (e) If suit is filed in state court in Virginia, can it be pleaded so as to prevent removal to federal district court by the defendants? Explain fully.

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Answer Questions 9 and 10 in Answer Booklet F

9. Don and Sally, both age 21, were married in 1980 in Hampton, Virginia. Don had modest means and worked in the family hardware store. Unbeknownst to Don, Sally was the beneficiary of a multi-million dollar trust established by her grandparents.

Sally's father, Frank, had opposed Sally's marriage to Don in the belief that Sally would be marrying "beneath her class." Frank insisted that, before the wedding, Don and Sally enter into an antenuptial agreement.

Frank retained Logan, a local Hampton attorney, to draft the antenuptial agreement. Frank undertook to pay Logan's fee and instructed Logan as to what the terms of the agreement should be.

Don and Sally met with Logan about a week before the wedding date. Logan described antenuptial agreements generally, told them that, at Frank's request, he would be representing both Don and Sally in the matter, but told them not to worry about the fee because Frank was taking care of it. When he mentioned in passing that they were free to consult attorneys of their own choice, Don told Logan that he was reluctant to let others know he was entering into an antenuptial agreement, so he would let Logan handle the whole transaction. Logan did not tell them that Frank was dictating the terms of the agreement.

On the day before the wedding, Don and Sally were summoned to Logan's office to review and sign the agreement he had drafted. This was the first time Don had seen the agreement. Don noticed that, although a schedule of his assets, which he had furnished at Logan's request, was attached as an exhibit to the agreement, no such similar schedule of Sally's was attached. When Don commented to Sally about the omission, Sally said that if Don really loved her it should not matter how much or how little she was worth. Don acquiesced, and they both signed the agreement.

The agreement contained the following provisions, upon which Frank had insisted:

1. All property owned by either Don or Sally before the marriage, as well as any increase in the value of such property during the marriage, would be and remain the separate, non-marital property of the party who brought it into the marriage;
2. During the marriage, Don and Sally would keep their financial affairs separate and maintain separate bank accounts; all property acquired by Sally from her own resources during the marriage, and all increases in the value of any such property during the marriage, would be and remain Sally's separate, non-marital property; and
3. If Sally and Don were for any reason to divorce, they each waived the right to claim and receive spousal support as well as any interest in the other's marital and non-marital property.

Notwithstanding the terms of the antenuptial agreement, and up until early 1995, when Don was injured in an automobile accident and rendered permanently unable to work, Don paid all ordinary living expenses out of his earnings. Title to assets such as their home, a mountain cabin, and various investments in stocks and other securities, all of which have increased substantially in value, was taken jointly in the names of Don and Sally. However, Sally's income from the trust was used to purchase those assets.

Because of discord that has arisen in the marriage since Don's injury, Sally and Don have decided to divorce. Don believes he should be entitled to receive both spousal support from Sally and a share of the property they acquired and accumulated during the marriage. Sally retains Logan to represent her, and Logan asserts the antenuptial agreement as a bar to any such claims by Don.

- (a) Are there any grounds upon which Don can successfully challenge the enforceability of the antenuptial agreement? Explain fully.
- (b) Can Don successfully move to disqualify Logan from representing Sally in the divorce proceedings? Explain fully.
- (c) In undertaking the engagement to draft the antenuptial agreement and to represent Don and Sally jointly, what, if any, violations of professional ethics did Logan commit? Explain fully.

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10. Ann and Barry, who are residents of Franklin County, Virginia, have been dating since 1992. Barry is a general contractor who builds residential housing for resale ("spec" houses), primarily in the Smith Mountain Lake area of Franklin County. During 1992 and 1993, Ann frequently assisted Barry by performing work on several of the houses on a volunteer basis.

In 1993, Ann purchased a 15-acre tract of real property in Franklin County with the intention of building a house on it. Barry agreed to serve as Ann's general contractor. Title to the 15-acre tract is in Ann's name. Ann's parents loaned her \$60,000 for construction of the home, and they took back Ann's promissory note and a deed of trust on the property. The deed of trust was promptly and properly recorded.

Barry told Ann that he wished to repay her for all the volunteer assistance she had given him. During the same time Barry was supervising the construction of Ann's house, he was also building a number of spec houses. The construction financing for the spec houses was being advanced by way of a loan to Barry from Mount Savings Bank in Rocky Mount, Virginia.

Unbeknownst to Ann, Barry used some of the workers he had employed to build the spec houses to perform work on Ann's house, and he diverted for use on Ann's house some of the materials intended for the spec houses. Barry charged these items of labor and materials, the value of which totaled \$25,000, as expenses against the construction loan from Mount Savings Bank.

When Ann's house was completed in 1994, Barry moved in with Ann, and they have continued since then to occupy the house jointly. Barry told Ann that he would not charge her anything for the labor and materials he had provided for her house. Instead, he told her to apply the \$25,000 value of those items toward the payment of rent for his occupancy of the house.

In December 1996, Ann received a letter from Mount Savings Bank stating truthfully that: Barry had defaulted on the construction loan for the spec houses; the Bank had learned that Barry had improperly charged against the loan sums expended on Ann's house for labor and materials; in a suit by the Bank against Barry for breach of the loan agreement and fraudulent diversion of the loan proceeds, the Bank had obtained a judgment for \$50,000; the Bank has been unable to collect the judgment because of Barry's insolvency; and the Bank intends to sue Ann unless she satisfies the judgment.

The current market value of Ann's house and land is \$75,000. The current balance on the secured promissory note being held by Ann's parents is \$58,000. There are no liens on Ann's real property other than the one created by the deed of trust securing the promissory note.

- (a) On what legal theory or theories may Mount Savings Bank proceed against Ann or her property to recover any or all of the amount of the judgment against Barry? Explain fully.
- (b) What type of action should the Bank commence to enforce its claim against Ann or her property, and:
 - (i) In what court should such an action be commenced?
 - (ii) Whom must the Bank name as parties defendant and why?
 - (iii) What facts must Bank establish in order to succeed in any such action?
Explain fully.
- (c) Can Ann escape liability if she can prove that the reasonable rental value of Barry's occupancy since he moved into the house is at least \$25,000? Explain fully.
- (d) What effect, if any, does the deed of trust recorded by Ann's parents have on the Bank's efforts to enforce its claim? Explain fully.

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