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Virginia Bar Exam, July 2008, Section 2

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VIRGINIA BOARD OF BAR EXAMINERS

Roanoke, Virginia – July 29, 2008

You MUST write your answers to Questions 6 and 7 in PURPLE Answer Booklet D

6. Jim Doper was arrested in New York by federal Drug Enforcement Agency (DEA) officers and charged with transporting and selling illegal drugs. The DEA seized and declared forfeited property worth \$500,000 belonging to Doper. All proceedings against Doper were brought in the U. S. District Court for the Southern District of New York.

Doper retained Susan Barrister, an attorney residing in and practicing criminal defense law in New York City (which is within the Southern District of New York), to defend him on the criminal drug charges and in the related civil forfeiture proceeding to recover the seized property. Doper entered into a written contingency fee arrangement by which he agreed to pay Barrister 40% of the value of any property recovered from forfeiture.

Barrister, recognizing that her experience in forfeiture proceedings was limited, searched online internet sources and found Al Solicitor, a lawyer residing and practicing in Harrisonburg, Virginia, who appeared to be highly qualified in defending civil forfeiture proceedings in the U. S. District Courts. With Doper's consent, Barrister associated Solicitor as co-counsel and entered into a written agreement reciting that Barrister would keep the first one-fourth of any fee earned in the civil forfeiture proceeding and that Barrister and Solicitor would share the remaining three-fourths in proportion to the amount of time each spent working on the forfeiture matter.

Although they never met face-to-face, Barrister and Solicitor exchanged from their respective offices in Virginia and New York several telephone calls, letters, and e-mails related to Doper's defense. Before the trial, through negotiations conducted between Barrister and the U.S. Attorney representing the DEA, they reached a plea bargain in which Doper pleaded guilty to a lesser offense, and the U.S. Attorney agreed to release \$500,000 worth of property from forfeiture. Doper then paid Barrister \$200,000 as the agreed 40% contingency fee.

Asserting that Solicitor had not performed any meaningful work on the case, Barrister declined to pay Solicitor any part of the contingent fee. Solicitor, claiming that he had spent just as much time on the forfeiture matter as Barrister, filed suit for breach of contract against Barrister in the U. S. District Court for the Western District of Virginia, claiming \$87,500 as his share of the contingent fee. Barrister, through Virginia counsel, filed the following three-part motion: (a) to dismiss for lack of subject matter jurisdiction; (b) to dismiss for lack of personal jurisdiction over Barrister; and (c) for transfer of venue to the U.S. District Court for the Southern District of New York. Barrister's supporting affidavit asserted that Solicitor's efforts had not contributed to the settlement with the DEA and that, in any event, the time spent by Solicitor on the forfeiture matter was minimal.

In opposition to the motion, Solicitor filed an affidavit describing the communications exchanged in the course of his association with Barrister.

How should the U.S. District Court for the Western District of Virginia rule on each of the three parts of Barrister's motion? Explain fully.

Reminder: You MUST answer Question #6 above in the PURPLE Booklet D

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7. Tom Testator and his wife, Wanda, residents of Virginia, had three children: Ann, Betty and Christopher. On May 1, 2001, Tom created a trust titled Tom Testator Revocable Trust (“the Trust”), which he alone signed. The Trust provided that at Tom’s death the trust assets would be distributed “in equal shares to such of my children who survive me.”

In June 2001, Tom executed, with all appropriate formalities, a will that included the following provisions:

- I. I give and bequeath \$10,000 to Wanda and to each of my children, Ann, Betty, and Christopher.
- II. I give and bequeath \$10,000 each to my brother, Dave, and his wife, Susan.
- III. I give and bequeath my 100 shares of stock in Bank of Virginia to my brother, Bill.
- IV. I am leaving a written list disposing of certain items of my property; such list in existence at my death shall be determinative with respect to the items devised and bequeathed therein.
- V. I give and bequeath all the rest of my property, both real and personal, tangible and intangible, wheresoever situate and howsoever held, to the trustee of the Tom Testator Revocable Trust dated May 1, 2001.

Tom and Wanda divorced in January 2007, and Tom died two months later. Tom was survived by the following persons:

- Wanda and his two daughters, Ann and Betty.
- Michael, the child of Tom’s son, Christopher, who had died in 2005.
- His brothers, Bill and Dave, and Dave’s ex-wife, Susan. Dave and Susan had divorced in 2003.

After the payment of all the debts, taxes and expenses of administration, the remainder of Tom’s assets consisted of:

1. A checking account with a balance of \$100,000;
2. A certificate of stock in Tom’s name for 500 shares of New Dominion Bank. This certificate had been issued in exchange for Tom’s 100 shares of Bank of Virginia upon its merger with New Dominion Bank in 2006;
3. A portfolio of stocks and bonds held in the name of the Trust and valued at \$5,000,000;
4. An automobile, tools, a stamp collection, miscellaneous clothing and jewelry; and
5. A 500-acre farm.

Tom’s will was found in his safe deposit box along with a written list bearing Tom’s signature and the following typewritten words: “I leave my stamp collection and my car to Ann. I want Betty to have all my jewelry. I give my tools to Bill. I give my farm to Dave.”

Also found in the safe deposit box, appended to the Trust instrument, was a typed document entitled “Trust Amendment – March 2004” bearing Tom’s signature. The amendment provided for a \$10,000 gift to the alumni fund at Tom’s college, to be distributed upon his death

before any other distributions by the Trustee. As was the case with the written list found with Tom's will, Tom's signature on the Trust Amendment was not witnessed or notarized.

Michael, concerned that he would not benefit from the Trust, filed a challenge to the will in the Norfolk Circuit Court. He asserted that Tom's residuary bequest to the Trust is invalid on the ground that it would result in distribution of estate assets through a document (the Trust) that was not executed in compliance with the legal formalities for making a will.

The following questions arise during the probate of Tom's will:

- (a) **How should the Court rule on Michael's challenge? Explain fully.**
- (b) **How and in what amounts should the \$100,000 in the checking account be distributed? Explain fully.**
- (c) **How should the New Dominion stock be distributed? Explain fully.**
- (d) **Is the Trust Amendment leaving \$10,000 to the alumni fund at Tom's college valid? Explain fully.**
- (e) **Is the written list signed by Tom and found in Tom's safe deposit box an effective disposition of the property listed in it? Explain fully.**
- (f) **Is Tom's estate required to file a federal estate tax return? Explain fully.**

Reminder: You MUST answer Question #7 above in the PURPLE Booklet D

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➔➔ Now MOVE to the GREEN Answer Booklet E ←←

You MUST write your answers to Questions 8 and 9 in GREEN Answer Booklet E

8. One day after years of marital strife, Wife stormed out of the condominium unit (the "condo") she and Husband owned in Pulaski, Virginia. Several days after the separation, Wife, using her front door key, entered the condo to pick up some clothes and to attempt reconciliation with Husband. She changed her mind about the reconciliation when she found evidence that Husband had been entertaining his girlfriend in the condo.

In a fit of anger, Wife disclosed to a deputy sheriff that Husband had been burglarizing homes in the area and that the jewelry he had stolen was stored in their desk drawer in the condo. The deputy sheriff asked Wife if she would allow him to search the condo without a warrant. Wife readily agreed and, using her key while Husband was absent from the condo, let the deputy sheriff in and directed him to the desk drawer. When the deputy opened the desk drawer he found a large cache of jewelry.

Husband was indicted and tried for burglary and grand larceny in the Circuit Court of Pulaski County. At the jury trial, Husband moved to suppress all the evidence seized during the search of the condo on the ground that the search violated his right against unlawful search and seizure. The judge had allowed Wife to voluntarily testify against Husband. Husband moved to strike all her testimony on the ground that it violated his spousal privilege to prevent Wife from testifying. The Judge denied both motions. Husband did not testify on his own behalf. The jury found him guilty on all counts.

During the post-conviction sentencing phase of the trial, the Judge allowed the Commonwealth Attorney to introduce records of Husband's prior felony convictions. Husband objected and argued that introduction of the felony convictions was improper because Husband had not testified during the trial. Husband was sentenced to five years in prison.

Husband now wishes to appeal his conviction and the sentence imposed by the Judge.

- (a) Did the Judge err in denying Husband's motion to suppress the evidence seized during the warrantless search of the condo? Explain fully.**
- (b) Did the Judge err in denying Husband's motion to strike Wife's testimony? Explain fully.**
- (c) Should the Judge have allowed the Commonwealth Attorney to introduce the records of Husband's prior felony convictions? Explain fully.**
- (d) To which court should Husband direct his appeal, and what steps must he take to perfect the appeal? Explain fully.**

Reminder: You MUST answer Question #8 above in GREEN Answer Booklet E

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9. Peggy filed a Complaint against Doctors Orthopedic Care Corporation ("DOC"), a Virginia non-stock corporation in the Circuit Court of the City of Alexandria, Virginia. The Complaint seeks \$1 million dollars in compensatory damages for personal injuries sustained in a vehicular collision allegedly caused by the negligence of DOC in the operation of one of its ambulances.

Peggy's lawyer arranged for a private courier service to deliver the following documents to Andrew Jackson ("AJ"), who is DOC's outside legal counsel and a member of the board of directors of DOC: a copy of the Complaint and exhibits (which consisted of copies of the Police Department's report of the collision and of the traffic ticket issued to the ambulance driver for failure to yield the right of way). As a courtesy, Peggy's lawyer also sent a copy of the Complaint and the exhibits by facsimile transmission to AJ's office.

AJ, in fact, received both the fax copy and the copy delivered by the courier on the same day, May 1, 2008, but those were the only documents ever served by Peggy's lawyer. Preoccupied with other matters at the time, AJ laid the papers down on a conference table, and one of AJ's paralegals mistakenly put all of the papers in a file folder for a different client.

AJ completely forgot about the Complaint until today, July 29, 2008, when he received a telephone call from a helpful acquaintance in the Clerk's Office of the Circuit Court. The Deputy Clerk told AJ that a default judgment finding DOC liable to Peggy had been entered by the Court against DOC on June 8 at plaintiff's request and that a jury had been impaneled just this morning for a hearing on the amount of damages.

AJ appeared at the hearing on behalf of DOC and objected to the Court's going forward with the hearing on the grounds that (1) DOC had not received proper notice of the hearing and (2) that, in any event, the Court lacked jurisdiction. The trial judge stated that she considered the objections relating to lack of notice of the hearing and lack of jurisdiction as separate, independent issues and that she would take them under advisement. She said she would allow the hearing to proceed and she would rule separately on each objection after doing some research. Further, she stated that AJ's participation in the hearing would not constitute a waiver of his objections to lack of notice and jurisdiction.

During the course of hearing, AJ sought to introduce evidence to challenge the default finding of DOC's liability. Peggy's lawyer objected to the introduction of any such evidence.

The judge immediately took a lunch recess and now asks you, as her law clerk, to explain fully to her how she should rule on the following:

- (a) Peggy's lawyer's objection to AJ's attempt to introduce evidence on liability.**
- (b) AJ's objection that DOC had not received proper notice of the hearing.**
- (c) AJ's objection that the Court lacked jurisdiction.**

Reminder: You MUST answer Question #9 above in GREEN Answer Booklet E

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Proceed to the short answer questions in Booklet F - (the PINK Booklet).