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## Virginia Bar Exam, February 2009, Section 2

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## VIRGINIA BOARD OF BAR EXAMINERS

Norfolk, Virginia – February 24, 2009

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

6. George Wilson decided to sell a large estate he owned near the Country Club of Virginia. Wilson engaged Broker, a local real estate broker, as his exclusive agent to sell the estate, and Broker was to receive a commission of 6% of the sale price if he sold the property on terms acceptable to Wilson. Fortuitously, Broker's uncle, Jimmy, the president of a lobbying firm in Washington, D.C., was in the market for a Virginia retreat that he could use on weekends to get away from the pressures of his business.

On a Saturday afternoon in July, Broker picked Jimmy up at a local coffee shop and proceeded toward Wilson's estate to show it to Jimmy. As he rounded a curve at an excessive speed on River Road near the estate, Broker lost control of his car. He ran into a ditch on Wilson's property, seriously injuring Jimmy.

Lucky, a gardener employed by Wilson, happened to be using a tractor owned by Wilson to remove some debris from the ditch. Lucky saw the incident and drove the tractor to the edge of the ditch where, after Broker got Jimmy out of the car, Lucky attached a chain to Broker's car and hooked the other end of the chain to the tractor. While attempting to pull Broker's car out of the ditch, Lucky negligently turned the tractor on its side in front of an oncoming vehicle in which Hoppy was a passenger. Hoppy was seriously injured in the collision.

When Jimmy was well enough to think again about his affairs, he spoke by telephone with Art, an attorney in Fairfax, Virginia. All Jimmy told Art was, "I was injured when my nephew, Broker, ran his car into a ditch on Wilson's property. I was on the way to look at the property, which Wilson had listed for sale with my nephew as his real estate broker. I don't want to sue Broker, but I do want to sue Wilson for my injuries." Based on that conversation, Art agreed to undertake the representation of Jimmy.

Coincidentally, Hoppy also consulted Art by phone and told Art only the following: "I was injured when my car collided with a tractor being operated by Wilson's gardener that suddenly turned on its side in front of me. I want to sue Wilson for my injuries." Based on that conversation, Art agreed to undertake the representation of Hoppy.

- (a) Assuming that Broker was negligent in operating his car, can Wilson be held vicariously liable for Jimmy's injuries? Explain fully**
- (b) Assuming that Lucky was negligent in operating the tractor, can Wilson be held vicariously liable for Hoppy's injuries? Explain fully.**
- (c) What ethical obligations must Art satisfy before instituting the personal injury actions requested by Jimmy and Hoppy? Explain fully.**

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

7. Biscuits, Inc. (“Biscuits”), a Virginia corporation, operated a commercial bakery in Danville, Virginia.

On December 15, 2007, Biscuits decided to change the packaging for its cookies. Chad Ray (“Ray”), Biscuits’ plant manager, consulted, among other suppliers, a company in Lynchburg, Virginia called Custom Wrap, Inc. (“Custom Wrap”), which designed and produced cellophane packaging materials. Ray described to Custom Wrap’s sales representative the kind of wrapping and artwork he had in mind, gave the sales representative several of the cardboard trays Biscuit used to package the cookies so that Custom Wrap could determine the correct size of the wrapping, and asked whether Custom Wrap’s lot prices were competitive with other producers in the area.

The sales representative for Custom Wrap told Ray that, at \$56.00 per roll, Custom Wrap could beat the competitors’ prices if Biscuits ordered in 1,000 roll lots. He also said he would design the artwork but would need final approval before incurring the expense of producing the printing plates. He also mentioned that Custom Wrap had a policy requiring a customer who was not satisfied with product to notify Custom Wrap in writing within 20 days of delivery. This notification policy was in fact customary in the trade.

Ray said he understood all this and would need to see the artwork so he could seek approval from Biscuits’ marketing department but that everything else seemed acceptable.

Unbeknownst to Custom Wrap, a corporation named Frawley Baking Co. (“Frawley”) had purchased all the assets of Biscuits, including the Danville plant. Under the terms of the transaction, which closed on December 20, Biscuits warranted that all pending contracts between Biscuits and any other party were listed on the attached Schedule A. Biscuits agreed to indemnify Frawley for any liability arising from any breach of this warranty. Schedule A did not mention Custom Wrap.

In early January, Custom Wrap sent to the Danville plant a sample roll of the cellophane wrapping with the artwork it had designed. Ray, who was now employed as plant manager by Frawley, phoned Custom Wrap’s representative, told him that the artwork would have to be changed to reflect Frawley’s name but that, otherwise, the wrapping material was satisfactory and instructed him to ship 1,000 rolls of cellophane wrap at \$56.00 per roll.

On February 1, 2008, Custom Wrap delivered to the Danville plant 1,000 rolls manufactured with Frawley’s name correctly imprinted on the material.

On April 15, 2008, Ray phoned Custom Wrap and complained that the cellophane was too narrow for the cookie trays and said that he was sending the goods back to Custom Wrap. Custom Wrap stated that the wrapping had been manufactured in strict accordance with the sample sent to Biscuits and approved by Ray and that it would soon be sending an invoice for the full amount, which it expected Frawley to pay. Instead, on April 20, 2008, Frawley delivered the 1,000 rolls back to Custom Wrap’s factory with a letter “rejecting the goods as non-conforming.”

Custom Wrap filed a Complaint against Frawley in the appropriate state court alleging that, under the Virginia UCC, a contract existed between Custom Wrap and Frawley; that Frawley had breached that contract; and that Custom Wrap is entitled to recover \$56,000.

Frawley's Answer denied the existence of a contract between Custom Wrap and Frawley and raised the affirmative defense that, in any event, Frawley properly rejected Custom Wrap's shipment of nonconforming goods as permitted under the Virginia UCC.

Frawley also filed a third-party complaint against Biscuits, alleging that if Frawley were found liable to Custom Wrap, Biscuits is liable to indemnify Frawley for breach of the warranty in the contract of sale. Biscuits' Answer denied any liability to Frawley.

**What is the likely outcome on:**

- (a) Custom Wrap's claims against Frawley? Explain fully.**
- (b) Frawley's affirmative defense against Custom Wrap? Explain fully.**
- (c) Frawley's third-party complaint against Biscuits? Explain fully.**

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

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**→→ Now MOVE to PURPLE Answer Booklet E ←←**

**You MUST write your answer to Questions 8 and 9 in PURPLE Answer Booklet E**

**8.** Edgar, a recent engineering graduate from Virginia Tech, set up a civil engineering consulting firm in Salem, Virginia.

Edgar opened an unsecured line of credit with Engineering Supply Co. and regularly purchased office and engineering supplies. On December 1, 2008, the line of credit had an unpaid balance of \$500.

On December 1, 2008, Edgar borrowed \$50,000 from Big Lick Bank (the "Bank") and signed a security agreement giving the Bank a security interest in "all my current and after acquired equipment, supplies, and accounts receivable." On December 5, 2008, the Bank properly filed a financing statement perfecting its interest under the December 1 security agreement.

On December 30, 2008, Edgar bought a \$1,000 field survey kit from Engineering Supply Co. on credit and gave Engineering Supply Co. a security agreement that listed the field survey kit as collateral to secure the \$1,000 purchase price and the existing \$500 balance on his line of credit with Engineering Supply Co.

On January 6, 2009, Edgar borrowed \$1,500 from Fast Freddie's Easy Loans to buy a

new executive chair for his office. He gave Fast Freddie a security agreement pledging the field survey kit and “my currently owned and after acquired office furniture” as collateral to secure the loan. On January 6, 2009, Fast Freddie’s Easy Loans properly filed a financing statement reflecting the terms of their January 6, 2009 security agreement.

On January 7, 2009, Edgar purchased a new sofa for his office from Office Furniture Limited for cash.

On January 15, 2009, Engineering Supply Co. filed a financing statement reflecting the terms of the December 30 security agreement it had with Edgar to secure the cost of the field survey kit and the \$500 debt.

Edgar is in default on his obligations to the creditors recited above, who now seek to foreclose their security interests.

**Explain fully which of the foregoing creditors have competing security interests in the following items of Edgar’s property and which creditor has priority:**

- (a) **The field survey kit purchased from Engineering Supply Co.?**
- (b) **The new office sofa purchased from Office Furniture Limited?**
- (c) **The supplies purchased from Engineering Supply Co.?**

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

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9. Helen contracted with Cameron to renovate the upper floor of her townhouse located in the historic area of the City of Alexandria, Virginia.

In the course of tearing out the bathroom walls of the 100-year-old townhouse, Cameron discovered two green metal lockboxes hanging from a hook behind a wall. Inside the lockboxes were a number of white envelopes. The only identifying data on the envelopes was the return address for a prior owner of the townhouse, long since deceased, who had sold the townhouse to a family who lived there themselves for 30 years and then sold it to Helen, the current owner, 10 years ago.

The envelopes in the first lockbox contained \$182,000 in gold coins, which had been minted during the Depression of the 1930’s, when bank collapses were common in the United States.

Inside the envelopes in the second lockbox were valuable pen and ink drawings of the United States Capitol by a famous artist. The drawings originally had been donated to the United States of America, but thereafter were stolen sometime in the 1930’s from one of the museums in Washington, D.C. and never recovered despite intense efforts by U.S. Government officials.

On the same day as Cameron's discovery of the lockboxes, a repairman working on a completely different project at the house next door, while hurriedly unloading his truck, inadvertently left a dusty, but expensive antique cabinet on Helen's property next to some construction debris and trash, which had been left there by Cameron. When Helen saw the cabinet, said she wanted it and told Cameron to move it into her garage. Before Cameron could do so, a passerby named Peter Pane, believing that the cabinet had been discarded, retrieved it from Helen's property, loaded it into the back of his mini-van, and drove off to his home in Fairfax County, Virginia. Thereafter, Peter painstakingly restored the cabinet and, once finished, affixed it to a wall in his house.

- (a) **As between Cameron and Helen, who is entitled to the \$182,000 in Depression-era coins and why? Explain fully.**
- (b) **Who is entitled to the drawings of the Capitol and why? Explain fully.**
- (c) **What is the best argument that can be advanced first on behalf of Helen, and then on behalf of Peter, for entitlement to the cabinet? Explain fully.**

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

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