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VIRGINIA BOARD OF BAR EXAMINERS

Norfolk, Virginia – February 23, 2010

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

6. Sam and Jane were divorced in 2003 by decree of the Circuit Court of the City of Norfolk, Virginia. The final divorce decree incorporated a Stipulation and Property Settlement Agreement. The Agreement provided that Sam would pay the reasonable college expenses of their son, Tom, who was 15 years old when the Agreement was executed.

The Property Settlement Agreement also contained the following provision:

The parties agree that any dispute of any nature concerning any issue arising from the provisions of this Agreement shall be resolved by binding arbitration according to the rules of the American Arbitration Association.

After graduating from high school, Tom enrolled in college. During his first semester Tom spent more time socializing than studying. As a result, his grades were well below average, and he was put on academic probation. Sam decided that there was no reason to spend any more money on Tom's college education until Tom "grew up," and Sam told Jane he would suspend paying any of Tom's college expenses until Tom proved that he was serious about his education.

Jane disagreed and continued to pay for Tom's college expenses from her own funds. After incurring \$35,000 in tuition and other college expenses, Jane filed suit against Sam in the Circuit Court of the City of Norfolk for breach of contract to recover these expenditures.

In response, Sam filed a motion to compel arbitration based on the arbitration provision in the Property Settlement Agreement. Jane opposed the motion on the ground that the arbitration provision did not apply because her suit was merely an action to recover money. The Circuit Court judge granted Sam's motion and ordered the parties to arbitrate the dispute.

The American Arbitration Association then appointed a neutral arbitrator. Sam and Jane mutually submitted the following issue to the arbitrator: "Does the Property Settlement Agreement obligate Sam to pay for Tom's college expenses despite Tom's poor academic performance, and should Sam reimburse Jane for the expenses she incurred?"

After a full evidentiary hearing, the arbitrator ruled in favor of Jane, holding that, "Sam shall forthwith reimburse Jane for the \$35,000 she expended, plus interest, and Sam shall continue to pay all reasonable expenses for Tom's college education."

Sam refuses to comply with the arbitrator's award and wants the Circuit Court to vacate it. Jane wants to enforce the award.

- (a) Did the Circuit Court judge rule properly on Sam's motion to compel arbitration? Explain fully.**

Continued on the next page

- (b) Upon what grounds may a Circuit Court vacate an arbitrator's award, and would any of those grounds justify vacating the award in this case? Explain fully.
- (c) What procedure must Jane employ to make the arbitration award enforceable at law if Sam continues to refuse to comply? Explain fully.

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

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7. Vendor owned two parcels of real property on Main Street in Salem, Virginia. Parcel One, on West Main Street, was improved with a two-story office building. Parcel Two, on East Main Street, was an unimproved lot. Vendor had purchased both parcels in 2007, and now listed both parcels for sale.

Regarding Parcel One, Vendor and Smith signed a contract on December 1, 2009 by which Smith agreed to buy Parcel One for \$250,000. The contract contained the following term: "Closing shall occur on February 1, 2010, at which time Vendor shall deliver the office building in its present condition and convey marketable title to Parcel One."

In preparation for the closing, Smith obtained a title insurance binder, which listed a lien in the amount of \$10,000 in favor of the company that had performed heating, ventilation, and air conditioning ("HVAC") repairs in 2006. Vendor firmly believes that the HVAC bill had been paid by the person from whom he bought Parcel One in 2007 and, therefore, that the lien had been satisfied. However, Vendor cannot produce proof that the HVAC lien had been paid, and no one else is available to verify payment of the lien.

In mid-December 2009, a snowstorm blanketed the area, and the snow accumulation on the roof of the office building on Parcel One reached 18 inches. The roof began to sag, and Vendor attempted to brace it. However, the bracing proved inadequate, and the interior suffered damage that would cost \$50,000 to repair.

As the date of closing approached, the damage to the building had not been repaired, and the HVAC lien remained of record. Smith said he would not close the deal unless Vendor undertook the repairs at Vendor's expense and agreed to set aside in escrow \$10,000 from the sale proceeds to provide for payment of the lien if it could not otherwise be removed. Vendor refused both demands, insisting that he had no responsibility for repairing the damage because it had occurred after their contract had been signed and that the lien had been paid. Smith refused to close, and Vendor sued Smith for specific performance of the contract.

Thomas, who owns an apartment development adjacent to Parcel Two, told Vendor that he (Thomas) was interested in buying it and dedicating it as a neighborhood playground for young children. Vendor orally agreed to sell Parcel Two to Thomas for \$75,000. Over the next few weeks, Thomas, a self-promoter and city activist, released a widely publicized statement to the media touting his civic largesse and, with Vendor's knowledge, purchased some used

playground equipment, refurbished it, and had it installed on Parcel Two, all at a cost to Thomas of \$15,000.

A few days before the scheduled closing, Vendor received an offer from a developer to buy Parcel Two for \$150,000. Vendor accepted the developer's offer and refused to close the deal with Thomas. Thomas thereupon sued Vendor for specific performance of their agreement. Vendor asserted the Statute of Frauds as a defense and offered to reimburse Thomas for all costs he incurred in connection with the playground equipment.

- (a) **Can Vendor prevail against Smith in his suit for specific performance of their agreement on Parcel One? Explain fully.**
- (b) **What is the likely outcome of Thomas' suit against Vendor for specific performance of their agreement on Parcel Two? 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. Roy and Jake, long-time neighbors, owned adjoining parcels of land in Bee, Virginia, which is an area of scenic, pastoral beauty. For many years, they had lived next door to each other in houses close to their common property line. After a number of increasingly contentious disagreements between them, Jake decided to move and built a new house at the far end of his property, at the top of a hill some 2200 feet away from Roy's home.

Roy, on the premise that he wanted to be sure that Jake would not be "spying" on him from his new hilltop home, constructed a 15-foot-high tripod on which he mounted floodlights, a wireless camera, and motion sensors. The motion sensors activated floodlights and wireless camera after dark whenever there was any movement around Jake's house.

The floodlights became a source of great annoyance to Jake, often waking him from sleep. The floodlights would unexpectedly light up the entire area surrounding his home late at night at the slightest movement of any stray animal or trees swaying in the wind. Also, Jake objected to the wireless camera's tracking his every move on his own property and the fact that the wireless transmissions emanating from the camera interfered with the television reception from the TV dish mounted on Jake's roof.

Jake's lawyer wrote and delivered a letter describing the effect on Jake and his property and requesting that Roy either disable the floodlights and camera or redirect them so that they did not point in Jake's direction. Roy simply ignored the letter.

Jake's lawyer then sent another letter informing Roy that Jake intended to build a fence just inside Jake's side of the common property line tall enough to block the lights and the line-of-sight of Roy's wireless camera. Roy ignored this letter as well, so Jake built the fence.

The fence was about 30 feet high, constructed of 25 utility poles about 10 feet apart, with plastic wrap and canvas hung between the poles. It was unsightly, but it served the intended purpose – it blocked the floodlights and camera. It also blocked the afternoon sun on Roy’s side of the property line and kept Roy’s vegetable garden from getting the amount of sun it needed. The fence, as it stands, probably reduces the value of both Roy’s and Jake’s property slightly and mars somewhat the pastoral nature of their respective properties, but Jake finds it worth the cost.

Roy now wants to sue Jake in Circuit Court to have the fence removed, while at the same time keeping the floodlights and camera in place.

- (a) **On what theory might Roy base his lawsuit, what remedy should he seek, and is it likely that the facts will support each of the elements necessary to state a *prima facie* case? Explain fully.**
- (b) **What defense might Jake reasonably assert against Roy’s claim, and what is the likelihood that such a defense will succeed? Explain fully.**
- (c) **To what court may the losing party in Roy’s suit appeal once the Circuit Court makes its final judgment?**

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

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9. Peter Pane was injured when he was struck by a City snow plow while he was walking within a designated cross-walk on King Street in the City of Alexandria, Virginia in December 2009. At the time of the incident, a light snow was falling, and the City employee who was driving the snow plow and clearing away the snow was exceeding the posted speed limit by at least ten miles per hour. The City employee was admittedly in a hurry because he wanted to return the snow plow to the City’s vehicular maintenance facility before closing time in order to have the plow’s brakes checked. In his remarks to the investigating police officer at the scene of the incident, the City employee described the snow plow’s brakes as feeling “somewhat squishy” and as making a whining noise when applied.

Peter suffered a broken arm and a broken leg as a result of the collision, and he missed about 4 weeks of work. Although Peter is a resident of the City of Alexandria, he is a lawyer who is employed by a federal government agency, the offices for which are located in the District of Columbia. Having heard about the statements of the snow plow driver, and before initiating any litigation regarding the collision, on February 15, 2010 Peter sent by U.S. mail a letter, addressed to the Mayor and members of the City Council of Alexandria, demanding the opportunity to review “all documents (including any e-mails) pertaining to safety inspections, maintenance and repairs of the City’s snow plows for the time period January 1, 2006 to the present.” Peter’s letter made no reference to the collision and listed his residence address for the purpose of a reply. The letter was received by the Mayor and City Council on February 17, 2010.

On February 19, 2010, Peter filed a Complaint in the Circuit Court for the City of Alexandria, seeking an award of \$1 million dollars from the City of Alexandria as compensation

for his personal injuries, pain and suffering, and loss of income resulting from the negligent operation of the snow plow by a City employee on the day of the collision and the City's improper maintenance of the snow plow.

The Mayor asks you the following questions and directs you to answer them in the order presented:

- (a) **What defenses can the City assert that its status as a City within the Commonwealth of Virginia protects it from liability to Peter? Explain fully.**
- (b) **Is the City obligated to allow Peter to review the requested documents even though he has not initiated formal pretrial discovery in connection with his lawsuit? Explain fully.**
- (c) **How, if at all, would your answer and analysis of subpart (a), above, differ if the term "County" or "County of Fairfax, Virginia" was substituted in each instance for "City" or "City of Alexandria, Virginia" and Peter's letter was addressed and sent to the chief executive of the County of Fairfax? 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).