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Virginia Bar Exam, July 2016, Section 1

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VIRGINIA BOARD OF BAR EXAMINERS
Roanoke, Virginia – July 26, 2016

WHITE BOOKLET - Write your answer to Question 1 in the WHITE Answer Booklet 1

1. Adelle's home was located on a five-acre parcel near Carterton, Virginia. Adelle's parcel fronted on a narrow country road. Just inside the property line on Adelle's parcel, there was a very large old oak tree that appeared to be dying and was leaning precariously in the direction of the road. Prompted by a weather service warning of an approaching severe storm accompanied by high winds, Adelle decided she would take the tree down. Using a chainsaw, Adelle began to cut through the 24-inch diameter base of the trunk. With wedges and anchoring ropes, she plotted the cut so as to ensure that the tree would fall back onto her land. When she had cut about halfway through the trunk, the predicted storm hit, accompanied by torrential rain and strong winds. Adelle stopped working and went back to her home to wait out the storm.

Driver, driving his car along the road and blinded by the intensity of the storm, swerved to avoid what appeared to be a flooded spot and crashed headlong into the tree. Driver was rendered unconscious. The force of the collision snapped the anchoring ropes and dislodged the wedges that Adelle had placed in the cut, but the tree remained standing.

Samara, who had been driving in the opposite direction, saw what had happened, pulled over on the shoulder, and rushed to Driver's aid. She pulled the still unconscious, bleeding Driver out of the wreckage, across the road, and into the backseat of her car, intending to take him to the closest hospital. At that moment, a strong gust of wind came up and the tree toppled across the road. It fell onto Samara's car. One of the branches struck Samara and broke her leg and several ribs. The trunk crushed Samara's car, severely injuring Driver. If Samara, instead of moving Driver, had simply ministered to him in his own car, Driver would not have been injured by the falling tree.

The following litigation ensued:

Suit # 1. Driver sued Adelle in negligence for the injuries he sustained when the tree crushed Samara's car. Adelle defends on two grounds: (i) that she breached no duty to Driver and (ii) that her acts were not the proximate cause of Driver's injuries.

Suit # 2. Driver sued Samara in negligence for the injuries he sustained when the tree crushed Samara's car.

Suit # 3. Samara sued Adelle in negligence for the injuries she suffered when the tree branch struck her. Adelle asserts the defense of contributory negligence.

- (a) **In Suit # 1, is Adelle likely to succeed on each of her defenses? Explain fully.**
- (b) **In Suit # 2, what is Samara's best defense? Explain fully.**
- (c) **In Suit # 3, is Adelle likely to succeed on her defense? Explain fully.**

* * * * *

BLUE BOOKLET - Write your answer to Question 2 in the BLUE Answer Booklet 2

2. Porter Bass (“Bass”) is the sole general partner of Westover Ale House, LP (“Westover”), a Virginia limited partnership and the country’s fastest growing microbrewery. Westover has several limited partners, none of whom has any role in the business except Sam Stout (“Stout”), Westover’s sales manager.

Last year Bass went on a three-month vacation and left the operation of Westover to Stout. Sales plummeted during Bass’ absence, as Stout’s time was consumed operating the business. In desperate need of operating funds, Stout applied to Craft Community Bank (“CCB”) for a \$600,000 line of credit for Westover. CCB knew that Westover was a limited partnership and that Bass was its general partner, but knowing that Stout was a sales manager who had been temporarily placed in charge, and over Stout’s signature as sales manager, issued the line of credit to Westover.

Upon Bass’ return, CCB demanded repayment of the loan unless Bass signed a personal guaranty of payment. Bass signed a personal guaranty and delivered it to CCB.

To compensate for the risk Bass had assumed by signing the guaranty, Bass prepared and executed a partnership resolution authorizing Westover to pay him a fee for guaranteeing the loan. So far, Bass has caused Westover to pay him over \$30,000 in guaranty fees. The partnership agreement is silent as to Bass’ right to receive a guaranty fee.

The winter of 2015-2016 was harsh for the craft beer business. The loan from CCB is now in default. CCB has filed an action against Westover, Bass, and Stout to recover the balance due on the loan. To make matters worse for Bass, the limited partners are upset that he has paid himself guaranty fees. Bass has countered that no one would have guaranteed the loan unless Westover had agreed to pay a guaranty fee, so it does not matter that Westover paid the fee to him rather than someone else.

- (a) **On what bases, if any, is Bass liable to CCB? Explain fully.**
- (b) **On what bases, if any, is Stout liable to CCB? Explain fully.**
- (c) **What recourse do the limited partners have against Bass for his receipt of guaranty fees, and what form of action should they employ to effect such recourse? Explain fully.**

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YELLOW BOOKLET - Write your answer to Question 3 in the YELLOW Answer Booklet 3

3. Warehouse, Inc., a Virginia corporation that develops warehouse properties near port facilities, became interested in purchasing a particular parcel of land in Suffolk, Virginia, but had heard rumors that the Planning Commission was considering a recommendation for an ordinance that would change the zoning to prevent construction of a warehouse in the area. Before the parcel came on the market, Warehouse’s president, Paula, consulted Atticus, an attorney who happened to be the Planning Commission’s counsel. Paula gave Atticus a \$5,000 retainer to advise Warehouse on the zoning issues and to open tentative negotiations with the owner of the parcel.

Atticus told Paula, “It’s not yet public information, so I’m not supposed to reveal it, but there is a major disagreement among the Commissioners, and it is highly unlikely that the ordinance recommendation will pass. I don’t think you have to worry about zoning, so you shouldn’t delay acquiring the parcel. I’ll keep you informed.” He also said to Paula, “As far as my participating in negotiations is concerned, I don’t think I should get involved because of my position with the Planning Commission. But I’ll refer you to my sister, Sue, who is a well-connected real estate broker in town, and she can undertake to identify the parcel owner and commence negotiations.”

Atticus did not disclose to Paula that the current owner of the parcel was Atticus’ aged stepfather, whose surname was different from Atticus’ and whose will, which Atticus had drafted, directed that the parcel would be left at his death to Atticus and his sister, Sue.

Paula contacted Sue and retained her as Warehouse’s agent for the purpose of acquiring the property at a 7% commission. Sue did not disclose her stepfather’s ownership or that Atticus had secretly told her about the will.

To avoid escalating the price, Paula directed Sue not to disclose Warehouse’s identity and to make any offer contingent on a favorable resolution of the zoning issue. Warehouse’s in-house property managers believed the parcel was worth between \$350,000 to \$400,000 on the open market, but because of the development potential, it might be worth it for Warehouse to pay as much as \$450,000. Paula told Sue not to budge over \$350,000, however, Warehouse would go as high as \$450,000 if, after very hard bargaining, it appeared necessary.

Sue told Atticus about her retention by Warehouse. They agreed that Sue would share her commission 50-50 with Atticus. Atticus also told Sue “confidentially” that the recommendation regarding the zoning ordinance would fail. For the next few weeks, Sue told Paula she was in negotiations with the owner of the parcel. In fact, she simply met once with her stepfather and got him to agree to sell the property for \$500,000. When Sue felt the moment was right, she met with Paula and reported that the owner was holding out for \$600,000, but she was confident she could bargain him down to \$500,000, but no less. Warehouse authorized her to offer \$500,000 and to disclose that Warehouse was the purchaser. In the meantime, the Planning Commission failed to recommend the zoning ordinance, and the stepfather died. The executor of his estate completed the transaction at the \$500,000 price, and conveyed the parcel to Warehouse. Sue received her \$35,000 commission and transmitted half to Atticus. Eventually, the proceeds of the sale were distributed equally to Atticus and Sue.

Warehouse discovered the duplicity engaged in by Atticus and Sue. Warehouse filed a complaint against Atticus with the Virginia State Bar and sued both Atticus and Sue for breach of fiduciary duty.

- (a) **What, if any, duties imposed on Atticus by the Virginia Rules of Professional Conduct did he violate? Explain fully.**
- (b) **Is Warehouse likely to prevail in its suit for breach of fiduciary duty against both Atticus and Sue and, if so, what damages might Warehouse recover? Explain fully.**

NOTE: Do not discuss the Realtor Code of Ethics.

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GRAY BOOKLET - Write your answer to Question 4 in the GRAY Answer Booklet 4

4. Maddie Madison, a resident of Fairfax City, Virginia, went car shopping at Calvin Rowe's Auto Sales ("CRAS") in Sterling, Virginia, on June 1, 2016. Finding an \$18,000 car she wanted to purchase, Maddie completed and signed without negotiation the following CRAS standard form documents: a Credit Application, a Credit Placement Order, and a Retail Installment Sales Contract ("RISC"). Each of the aforementioned documents cross-referenced the others, expressly stated that together they "comprised the entire agreement between the parties affecting this purchase," and subsequently was countersigned by the CRAS sales manager.

One provision of the Credit Placement Order stated:

[Maddie], as purchaser and legal owner of the vehicle, hereby grants CRAS a security interest in the vehicle being purchased. CRAS shall attempt to place the RISC with a lender that will extend credit for the purchase to [Maddie], but if CRAS is unable to do so within five days, CRAS may cancel the sale and the contract, and [Maddie] will return the vehicle. If [Maddie] fails to return the vehicle, CRAS shall be entitled to repossess the vehicle and shall have all other rights under the Code of Virginia and common law.

The RISC stated that, "[t]he vehicle will remain the property of CRAS pending approval of a lender, but [Maddie] assumes all responsibility for the vehicle" and required her "to furnish her own Insurance Policy covering the vehicle." The RISC further stated that CRAS "will calculate [Maddie's] Finance Charge on a daily basis at the Annual Percentage Rate as of the date of sale, June 1, 2016."

As a down payment on the purchase of her new car, Maddie traded in her old car and paid CRAS \$1,000 in cash. Thereafter, Maddie drove her new car off the CRAS lot and has not returned. CRAS attempted for over a week to obtain financing for the sale to Maddie, but was unsuccessful. CRAS has been unable to reach Maddie by phone for more than a month. On July 9, 2016, CRAS repossessed the car from Maddie's home and, the next day, sold the car at public auction in Richmond, Virginia, without providing prior notice to Maddie.

Viewing the three documents signed by CRAS and Maddie, there is an inconsistency regarding ownership of the vehicle – that is, between the RISC, which states that the car was to "remain property of CRAS pending approval by lender" and provisions in the other two documents, which treat the car as Maddie's property and are "effective as of the date of sale," which was June 1, 2016. The documents do not contain an "order of precedence" provision.

Maddie retains you as her lawyer and asks the following questions:

- (a) **What rule of construction would a Virginia court use to resolve the apparent inconsistency about ownership among the contractual provisions in the three documents signed by the parties, and what is the result of the rule's application on these facts? Explain fully.**

(Cont'd on next page)

- (b) **What is the proper characterization of the agreement between Maddie and CRAS pertaining to the car, and was CRAS entitled to repossess the car? Explain fully.**
- (c) **What rights, if any, does Maddie have under Article 9 of the Uniform Commercial Code as adopted in Virginia as the result of CRAS's repossession and sale of the car? Explain fully.**

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PINK BOOKLET - Write your answer to Question 5 in the PINK Answer Booklet 5

5. Jerry, Bob, Phil, Rick, and Mickey were the members of a rock band that regularly toured around the country. None of them was considered the “leader” of the band, but lately Mickey was acting as if he were the leader, which was creating discord among the band members. It got to the point where Jerry and Phil found it intolerable, so the two of them agreed upon a plan to “get rid of” Mickey: while touring in Lee County, Virginia, they would lure him into the woods and shoot him to death.

Neither Jerry nor Phil owned a gun, but they knew Bob had a pistol he had recently stolen. They approached Bob, told him of their plan to kill Mickey, and asked Bob to let them use the pistol. Bob enthusiastically agreed, saying that he too was getting tired of Mickey trying to “take over” the band and that they would be better off without him. Bob instructed them to throw the pistol into the river after they used it to shoot Mickey.

After their final performance in the area, Bob and Rick went to their homes in different states. Jerry and Phil, who stayed behind in Lee County, induced Mickey to accompany them to the woods on the pretext that they were going to make a buy from a marijuana supplier. In accordance with the plan, Phil stayed with Jerry’s van as a lookout and getaway driver. After Jerry and Mickey had walked about one hundred yards into the woods, Jerry shot Mickey in the back of the head and killed him. Jerry and Phil fled the area and drove to Rick’s house in West Virginia.

Rick was ignorant of what had happened to Mickey, but when Jerry and Phil arrived at his house they told Rick exactly what they had done and, saying they needed a place to hide out, asked Rick to let them stay in his basement for a while to avoid the ongoing police investigation. Rick expressed shock and said he wanted nothing to do with them, but when Jerry and Phil refused to leave, Rick reluctantly agreed to let them stay for a few days. After a week, Rick had second thoughts and told them to get out or he would call the police and report what had happened. Jerry and Phil departed, and Rick never did report the incident to the police.

Several months later, Bob was arrested on unrelated drug charges. After properly advising Bob of his *Miranda* rights, the police interrogated him about the drugs he possessed. They also asked him if he knew anything about Mickey’s murder. Bob cracked and told the police everything he knew. He explained that Phil and Jerry killed Mickey because they wanted him out of the band, that he had provided the gun used in the murder, and that Rick had allowed Jerry and Phil to hide in his basement after the murder.

All four of them – Jerry, Phil, Bob, and Rick – were charged with first-degree murder. In addition, Bob was charged with the drug offense for which he had been arrested. The Commonwealth Attorney sought to try all the charges against Bob in a single trial. Bob’s attorney filed a pretrial motion to sever the drug charges and have them tried separately.

- (a) **Can the Commonwealth make out a *prima facie* case of first-degree murder as to each of the four defendants? Explain fully.**
- (b) **How should the Court rule on Bob’s motion to sever the drug charges? Explain fully.**

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END OF SECTION ONE