Summary of Suggested Answers to the Essay Part of the July 2011 Virginia Bar Exam
Prepared by Susan S. Grover, Eric Chason & J. R. Zepkin of William & Mary Law School, Emmeline P. Reeves & David Frisch of University of Richmond Law School , C. Scott Pryor of Regent University Law School.

After each bar exam, representatives from some of the law schools in Virginia collaborate to prepare suggested answers which should be acceptable. jrz

1. [Va. Civil Procedure] Several years ago, three extremely valuable Greek vases were stolen from a collection at the Chicago Art Museum, a not for profit corporation organized under the laws of the state of Illinois ("Museum"). Each of the vases is estimated to have a value in excess of $5 million. Yesterday, following diligent investigation by the Museum's investigators, they received information from a reliable source that the vases are in the hands of Alexander, a dealer in ancient artifacts. Alexander resides in Toronto, Canada, but has an antique store in the City of Norfolk, Virginia, where he has been secreting the vases. The source reported credibly that Alexander has contracted to sell the stolen vases to a Saudi dealer and that the Saudi dealer plans to take delivery of the vases on the day after tomorrow and depart immediately with the vases for the Middle East. The source also reported that Alexander is currently in Canada and plans to return to Norfolk briefly on the day after tomorrow to meet the Saudi dealer at Alexander's antique store in Norfolk to deliver the vases to the dealer and then return to Canada.

Museum retains you to do what is necessary to recover the vases and in the meantime to prevent removal of the vases from Norfolk.

[a] What form of action must you file to initiate the process of obtaining pretrial recovery of the vases, what must you plead to properly state Museum's claim for recovery, and what additional requirement must you satisfy as a prerequisite for obtaining the relief you seek from the court? Explain fully.

[b] Whom should be named as parties in the action? Explain fully.

[c] In what court must you commence the action? Explain fully.

[a] [i] Form of action is a petition for pre-trial seizure in detinue. §8.01-114

[ii] Must plead: §8.01-114

(1) kind, quantity and estimated fair value of the specific property being sought;

(2) describe the basis of plaintiff's claim with such certainty that will give the adverse party reasonable notice of the true nature of the claim and the particulars;

(3) allege one or more grounds mentioned in Va. Code §8.01-534 [grounds for attachment code section] by stating facts, not conclusions, from which the judicial officer can conclude there's reasonable cause to believe the grounds exist.

(4) the petition must be sworn to by the plaintiff or his agent.

[iii] additional requirements are plaintiff must furnish a bond payable to the defendant in an amount equal at least to twice the value of the property being sought on the condition of re-delivery of the property to the defendant if the plaintiff loses §8.01-115; plaintiff must pay the proper costs, fees and taxes.

[b] The person in possession of the property [Alexander], along with any other persons claiming the property [Saudi dealer] should be made party defendant

[c] The normal dollar jurisdictional brackets for the general district court apply to actions to recover specific personal property so the action must be filed in circuit court. §16.1-77

Note: The detinue analysis is the best choice. If an applicant used the following attachment analysis, respectable credit should be given, depending on the thoroughness of the analysis.

[a] [i] Form of action is a petition for attachment. §8.01-533

[ii] If seeking to recover specific personal property, must plead or assert: §8.01-537

(1) kind, quantity and estimated fair market value of the property sought;

(2) character of the estate claimed by the plaintiff;

(3) plaintiff's claim with such certainty as will give the adverse party reasonable notice of the true nature of the claim;

(4) what sum, if any, plaintiff claims for its detention;

(5) specific facts supporting the existence of one or more grounds for attachment as set forth in §8.01-534.

(6) the petition must be sworn to.

(7) whether immediate seizure is sought.

[iii] Additional requirements are plaintiff must furnish a bond payable to the defendant in an amount equal to at least twice the value of the property being attached; plaintiff must pay the proper costs, fees and taxes. §8.01-537.1

[b] The party in possession of the property [Alexander] and anyone claiming the property or an interest in the property [Saudi] should be made defendant. §8.01-539

[c] The general district court can hear attachment proceedings involving only personal property, but this case exceeds the normal dollar jurisdictional brackets for this court and thus the action must be brought in the circuit court. §16.1-77

Note: It would not be a good answer to say that the Museum should file a complaint seeking a temporary injunction against Alexander enjoining him from disposing of the property pending further court action. The reasons are: [1] Since detinue or attachment, both law based actions, would work, the Chicago Art Museum has an adequate remedy at law and this, absent a specific statutory authorization, would negate using an equitable remedy; [2] the problem of enforcement against two foreign nationals.

2. [Wills, Trusts & Estates] In 2005, Dr. Roger Ridge (Roger), a widower and resident of Charlottesville, Virginia, executed a valid will in which he named his sister Jane as executor and made the following bequest: "I leave all my property, real and personal, to my daughter Lara, provided, however that, if I die before she reaches her majority, all my property shall be distributed to my sister Jane to be held in trust for the benefit of Lara until she reaches her majority. It is my intention that, in all events, Lara shall have the benefit of all the property in my estate." At the time, Lara was 14 years old.

For many years, Roger maintained a safe deposit box at First Bank, where he kept jewelry, large amounts of cash, and bearer bonds. In 2007, Roger contracted a life-threatening disease for which he was undergoing prolonged treatment. Anticipating that he would need help in managing his affairs and caring for Lara, he gave Jane a key to the safe deposit box and told her that if it got to the point where he could not take care of things, she should take out, as necessary, enough money and bonds to pay for household expenses, his medical bills, and Lara's support. He told Jane not to remove any of the jewelry because it had belonged to Lara's mother, and he wanted Lara to have it when she turned 18. Periodically, Jane withdrew money from the safe deposit box to cover Roger's and Lara's expenses.

As Roger's condition worsened, Roger told Jane, "I think I'm nearing the end. I believe my $1 million life insurance policy will be enough to take care of Lara. I want you to empty the safe deposit box and hold the jewelry for Lara, so that, when I'm gone, the cash and bonds will provide for you and your family." On the same day, Jane emptied the safe deposit box as directed. At the time, the balance of the cash and bonds was $250,000, which Jane deposited in her own brokerage account. She put the jewelry in her own safe deposit box. She told Roger what she had done, and he

responded, “Good. Now I can rest knowing I’ve taken care of my family.” Later the same day, while Lara was visiting him, Roger said, “ Don’t worry Lara, Jane will have the money to take care of you.”

Roger died in 2009 a week before Lara turned 18. He was survived by Lara and Jane. At the time of his death, there was in place an insurance policy on Roger’s life with a $1 million death benefit naming Jane as beneficiary, “as trustee for the education and support of Lara.” There was also a family farm that Roger and his only sibling, Jane, had inherited from their widowed mother, who had died intestate.

Lara is now 18. She asserts that the $250,000 in cash and bonds and the jewelry that Jane removed from Roger’s safe deposit box, the family farm, and the $1 million life insurance proceeds are all part of Roger’s estate and that she is entitled to it all under Roger’s will.

What rights, if any, does Lara have in:

[a] The $250,000 in cash and bonds? Explain fully.

[b] The jewelry? Explain fully.

[c] The family farm? Explain fully.

[d] The life insurance proceeds? Explain fully.

[a] The issue is whether Roger made valid gift of the funds to Jane. We need donative intent, delivery, and acceptance. (The gift could be characterized as causa mortis—conditioned up Roger’s imminent demise—but the characterization does not alter the analysis as Roger does die.)

Donative intent: Roger says, “I want you to empty the safe deposit box and hold the jewelry for Lara, so that, when I’m gone, the cash and bonds will provide for you and your family.” Arguably, the gift is conditioned up his death (and would be void if he recovered), making it a gift causa mortis. Since Roger does die, the characterization as a gift causa mortis is not important. We should, however, note the potential problems of undue influence and lack of capacity. Jane enjoys a confidential relationship with Roger because she is managing his financial affairs and now receives a gift. Later in the day, Roger tells Lara, “Don’t worry Lara, Jane will have the money to take care of you.” Roger may be referring to the life insurance policy, but it is conceivable that he is confused and thinks that Jane will be holding the safe-deposit box funds for Jane as well.

Delivery: We do have a problem as Roger delivers nothing to Jane during the conversation just quoted. In 2007, he gave her a key to the safe deposit box, but in a fiduciary capacity to care for him and Lara if the need arises. If that is the case, Jane is holding the funds as trustee for Roger and Lara. Roger’s later conversation, however, should simply be interpreted as an amendment to that trust so that Jane now benefits. Nothing in Virginia law prohibits an oral trust of personal property. *See* Va. Code § 55-544.02(A)(requirements for trust creation); § 55-546.02(A) (“Unless the terms of a trust expressly provide that the trust is irrevocable, the settlor may revoke or amend the trust.”). The amendment would, however, need to be proven by clear and convincing evidence. *See* id. § 55-546.02(C) (“The settlor may revoke or amend a revocable trust: If the terms of the trust do not provide a method, by any method manifesting clear and convincing evidence of the settlor's intent.”). Proving the amendment may be difficult if Jane is the only witness.

Acceptance: Jane appears to accept the gift.

[b] This appears to be a valid trust. Roger asks Jane to hold the jewelry for Lara.

[c] By intestate succession, Jane and Roger took as tenants in common. Roger's ½ interest passes directly to Lara under the will. Jane keeps her ½.

[d] Jane will hold the proceeds in trust for Lara unless Lara can have Jane removed for cause, perhaps arguing that Jane exerted undue influence over the $250,000 gift. Removal would not alter the terms of the trust, however, only the trustee. The trust term would continue, presumably for Lara’s lifetime, to provide for her education and support.

3. [Agency] Patient, a resident of Lexington, Virginia, sued Dr. Baird, a pathologist, and Memorial Hospital ("Memorial"), a private for-profit hospital in Lexington, for malpractice. Count1 of the complaint alleged that Dr. Baird negligently misinterpreted Patient's pathology specimen and failed to timely diagnose cancer. Count 2 of the complaint alleged that Dr. Baird was the employee of Memorial and that, consequently, Memorial was liable for Dr. Baird's malpractice. Memorial denied the allegations, asserting that it had no liability to Patient.

At a trial by the court, without a jury, the judge concluded that Dr. Baird had committed malpractice as alleged by Patient. However, the judge requested that the parties submit post-trial briefs limited to the question whether Memorial should be held liable for Dr. Baird's negligence.

The trial record contains the following evidence relevant to the issue:

• Dr. Baird is a board certified pathologist who maintains an office in Lexington several blocks from Memorial and has a private practice, which he runs from that office.

• For 10 years, Dr. Baird has had a contractual relationship with Memorial, under which he serves as Director of Pathology for the hospital. Dr. Baird supervises Memorial's lab operation and the lab technicians employed by Memorial but has no authority to hire, fire, and discipline the employees. His principal function is to receive from Memorial's pathology lab specimens obtained by Memorial's lab technicians, to exercise his professional judgment in interpreting them, and to render diagnoses based on his interpretations.

• Dr. Baird is contractually required to spend at least two hours of every weekday working at the lab in the hospital, where he works at a desk and lab table in Memorial's lab, using diagnostic equipment furnished by Memorial.

• Dr. Baird receives a quarterly payment of $25,000 from Memorial for his services. The payment is not dependent on the number, type, or complexity of the specimens he is required to review. Memorial does not withhold taxes or make other deductions from the quarterly payment. Dr. Baird pays for and carries his own malpractice insurance, but Memorial's insurance covers him as well.

• The specimens are taken largely from patients of Memorial itself or of other physicians in the community. Dr. Baird frequently refers patients of his own to Memorial's lab and, under his contract with Memorial, obtains lab services free of charge to his patients. Patient, the plaintiff in this case, was not Dr. Baird's patient.

• All pathology reports are rendered on Memorial letterhead, written in a format prescribed by Memorial, and signed by Dr. Baird as "Director of Pathology." Dr. Baird is required under his contract to render his interpretations "timely," which ordinarily means within12 hours of receipt of the specimens.

• Dr. Baird is required under his contract to follow lab procedures prescribed in writing by Memorial. Although the lab procedures do not prescribe how Dr. Baird exercises his professional judgment, Memorial reserves the right in unusual, but not infrequent instances, to subject Dr. Baird's interpretations to peer review by a panel of Memorial's in-house physicians and to override his interpretations when appropriate.

What arguments should each side make in its brief, and how should the court rule? Explain fully.

Under the doctrine of respondeat superior, an employer is liable for the negligent acts of its employees committed within the scope of employment. Generally, however, there is no liability for the negligence of an independent contractor. Thus, the issue in this question is whether Dr. Baird is an employee or an independent contractor of Memorial Hospital, and Patient will argue in his brief that Dr. Baird is an employee and therefore Memorial is responsible for his negligence under respondeat superior and Memorial will argue that he is an independent contractor, for which the hospital has no liability.

In Virginia, the factors which are to be considered when determining whether an individual is an employee or an independent contractor are (1) selection and engagement, (2) payment of compensation, (3) power of dismissal, and (4) power to control the work of the individual. The fourth factor, power to control, is determinative.

Memorial will argue that the fact that the doctor exercises his professional judgment in interpreting pathology lab specimens indicates that it does not have the power to control the doctor in his performance of his duties. Additionally, the hospital will argue that the following facts further support its position that the doctor is an independent contractor: he is a

board certified physician; he maintains a private practice and his own office; he has no authority to hire, fire or discipline hospital employees; Memorial does not withhold taxes; and he maintains his own malpractice insurance.

On the other hand, Patient will argue that although exercise of professional judgment by a physician is a factor, it is not the only factor in determining employment status of a physician. Patient will point to the following facts in support of its position that Dr. Baird is an employee of Memorial: he holds the position of "Director of Pathology" at the hospital; he supervises lab operations and the lab technicians; he is required to spend at least two hours of every weekday in the lab at the hospital where he uses Memorial's equipment; he is paid a flat salary, which is not dependent on the amount of work he performs; Memorial's malpractice insurance covers him; pathology reports are on Memorial's letterhead, written in a format prescribed by Memorial; he is required to render his interpretations in a particular time frame set by Memorial; and Memorial reserves the right to subject his interpretations to peer review and to override his interpretations.

The court will likely conclude that although Dr. Baird exercises his professional judgment in performing his duties, Memorial nonetheless retains substantial control over Dr. Baird's job performance, specifically by reserving the right to subject his interpretations to peer review and to override his interpretations. In addition to the power to control, there are sufficient additional indicia of an employer/employee relationship, such as the hospital's payment of Dr. Baird on the basis of time rather than the amount of work performed and the hospital's providing of the place and tools of employment, that it is likely that the court will rule that Dr. Baird is an employee of Memorial. The facts for this problem came from McDonald v. Hampton Training School 254 Va. 79 (1997).

4. [Va. Criminal Law & Procedure & Professional Responsibility] Olive, a wealthy resident of Norfolk, Virginia, was the proud owner of a sizeable private art collection, including a very valuable painting done by Andy Warhol in his early years. The painting had been appraised at $50,000.

Olive's neighbor, Kevin, was an art dealer from whom Olive had bought several pieces in the past. Before leaving on an extended vacation to South America, Olive gave Kevin a key to her house and the entry code to her silent burglar alarm system. She asked Kevin if he would keep an eye out for her collection and periodically go into her house to see that things were in order. She asked him to be especially vigilant about the Warhol. Kevin agreed.

Kevin's art gallery was experiencing financial difficulties. He had connections in the stolen art market and thought he could probably find a private collector who would pay handsomely for Olive's Warhol. Kevin developed a scheme in which he would make it appear that vandals had broken into Olive's house and stolen the Warhol. He knew there was a period of delay before the burglar alarm would trip and the police would respond. Accordingly, late one night Kevin, using the key Olive had given him, entered the house without turning off the alarm system, and proceeded quickly down the hall to where the Warhol was hanging. On the way, he overturned some furniture to make it look like vandalism. He grabbed the Warhol, exited through the back door, and hid the painting in his basement. The police arrived within five minutes.

Another private collector who did business with Kevin's gallery delivered to Kevin a Picasso worth about $1,000,000 for which he wanted Kevin to find a buyer. Kevin stored the Picasso in a vault in his gallery and began soliciting potential buyers.

Olive returned from her vacation and learned of the "break-in." She later learned through various channels that Kevin had been the one who took the Warhol, but she did not report it to the authorities. She also learned that Kevin was trying to sell the Picasso and that the owner was insisting on getting $1,000,000 for it. She told Kevin that she knew he had the Warhol and that she intended to report him to the police, but that she would refrain from doing so if he would sell the Picasso to her for $500,000. Kevin refused.

Olive met with Larry, her attorney, and told him about Kevin's theft of the Warhol and about the Picasso. She told Larry that she would be willing to forget about the Warhol if she could get the Picasso at a bargain price.

Olive instructed Larry to do the following: To get in touch with Kevin on her behalf; tell Kevin that Olive knew that Kevin had taken the Warhol; and tell Kevin she would report it to the law enforcement authorities unless Kevin agreed to sell the Picasso to Olive for $500,000.

[a] Of what crimes is Kevin guilty? Explain fully.

[b] Of what crime is Olive guilty? Explain fully.

[c] Can Larry ethically carry out Olive's instructions? Explain fully.

[d] What ethical obligation, if any, does Larry have to disclose to law enforcement authorities what Olive has revealed to him? Explain fully.

[a] Kevin is guilty of felony embezzlement, the elements of which are [1] wrongful conversion to his own use the property of another with the intent to permanently deprive the rightful owner of the use thereof: and [2] that the property had been entrusted to the defendant by another ; and [3] the value of the property was $200.00 or more. Embezzlement can be charged as Larceny. Virginia Model Jury Instructions - Criminal Instruction No. G23.100

Due to Kevin having permission to enter the home it is not clear if he would be guilty of statutory burglary, [enter a dwelling in the nighttime without the permission of the owner with the intent to commit larceny] the issue being whether entering for a purpose that was not within the consent of the owner would make the entry unlawful. See: Jones v. Commonwealth 279 Va. 295 (2010) and Davis v. Commonwealth 132 Va. 521 (1922)

Arguably, Kevin was guilty of grand larceny, the issue being the effect of his permission to enter the home and protect the property, though he did not have the authority to appropriate and transport the property for his own gain.

[b] Olive may be guilty of attempted extortion in having threatened [offered] to not report Kevin's embezzlement/larceny if he would sell the Picasso to her for an unjustified low price. The elements of extortion are the threat of injury [ie report Kevin to the police] which threat caused the person to part with money or other pecuniary benefit [sell the Picasso for a unjustified low price] Virginia Model Jury Instructions - Criminal G24.100

[c] Sections 1.2(c) and 1.2(e) of the Rules of Professional Conduct require Larry to refrain from the acts that Olive requested and to tell Olive that he cannot ethically carry out Olive's instructions. Section 1.2(c) prohibits a lawyer from assisting clients in conduct the lawyer knows is criminal or fraudulent. For Larry to suggest that Kevin give Olive a price break on the Picasso in exchange for Olive's not reporting Kevin's theft would be asking Kevin to commit a crime. Rule 1.2(e) requires Larry to inform Olive of the limitations that the Rules impose on Larry's ability to do what Olive asked. Larry is, by contrast, free to tell Kevin that Olive knows that Kevin is the one who took the Warhol.

[d] Larry's ethical obligation depends on what Olive does. Rule 1.6-(c)(1) requires Larry to counsel Olive that the action she proposes would constitute a crime, to advise her to withdraw from her plan and to inform her that Larry must report the plan unless Olive withdraws. If Olive does withdraw, then the attorney-client privilege requires Larry to maintain in confidence all that Olive has communicated to him. If Olive refuses to withdraw from her criminal plan, then Larry has an ethical obligation to report Olive's plan to law enforcement. Rule 1.16 (b)(1) permits Larry to withdraw from further representation if Olive persists in her plan.

5. [UCC - Negotiable Instruments & Bank Deposits & Collections] Terry Wilson took his automobile to Fix It Mechanic ("Fix It") to have the transmission repaired. When the work was complete, Wilson paid Fix It's bill with his personal check made payable to Fix It in the amount of $350. The check was drawn on First Bank.

While driving home from the repair shop, the car's transmission locked up, causing Wilson to lose control, crash into a telephone pole and damage his car. The damage to the car eventually cost Wilson $1,000 to repair.

After closing the repair shop on the evening Wilson's car was repaired, Fix It's owner went to the Uberts Grocery Store and purchased $300 worth of groceries, gave the cashier Wilson's check properly endorsed to the order of Uberts, and left with his groceries and $50 in cash.

Early the following morning, Uberts properly endorsed Wilson's check and deposited it in its bank account for collection. Also, the first thing the next morning Wilson went to the main office of First Bank and lodged a timely and properly filled out stop-payment order on the check he had given Fix It.

When the check arrived at First Bank for payment, First Bank negligently failed to honor Wilson's stop-payment order. It paid the check and debited Wilson's account in the amount of $350.Upon receiving his monthly bank statement reflecting the debit, Wilson immediately notified First Bank and demanded that it re-credit $350 to his account based on

First Bank's failure to follow his instructions to stop payment. First Bank refused, asserting that it had been extremely busy on the day the check arrived and that, in any event, it had no liability to Wilson for its negligence.

[a] Does First Bank have a valid defense to Wilson's demand that his account be recredited in the amount of the check? Explain fully.

[b] If First Bank *had* stopped payment pursuant to Wilson's stop-payment order, what rights, if any, would Uberts have against Wilson *on the check*? Explain fully.

[a] If First Bank pays over a stop payment order Wilson can recover damages. Wilson has the burden of proving damages. The usual measure is the difference between the amount paid by First Bank and the amount Wilson would have had to pay if it was stopped. Here there would be no loss since Uberts Grocery store was a holder in due course and would have recovered from Wilson (on drawer's obligation) if the check had not been paid. First Bank could also claim under §8.4-407 that it's subrogated to the rights of the holder in due course and defend on that basis. §8.3A-418 (the payment by mistake section) would not help First Bank since the Uberts Grocery store gave value and took the check in good faith. Bottom line is that First Bank wins.

[b] Uberts Grocery store is a holder in due course under §8.3A-302 because: [i] The instrument when negotiated to Uberts did not on its face bear any appearance of forgery or other irregularity; [ii] Uberts took the instrument [a] for value; [b] in good faith; [c] without notice that the instrument was overdue, had been dishonored or that there was any uncured default; [d] without notice that the instrument contained an unauthorized signature; [e] without notice that anyone else claimed a right in the instrument [§8.3A-306]; and [[e] without notice of any defense or claim in recoupment. Wilson is liable as drawer. Even if Wilson had a recoupment claim or other defense, it would not be good against Uberts Grocery since it was a holder in due course.

6. [Real Estate] The Eagle Rock Land Company ("Eagle Rock") has contracts to purchase four adjacent tracts of land in Botetourt County, Virginia. Eagle Rock has obtained current title examinations of each parcel. All documents have been properly recorded.

Tract 1. Fifteen years ago, Henry conveyed Tract 1 by a deed reciting, "I convey Tract 1 to John for life, then to Ken for life, and then to Lucas." Five years ago, Lucas obtained a loan from Roscoe and gave Roscoe a deed of trust conveying all of his right, title and interest in Tract 1 to a trustee as security for a promissory note payable to Roscoe. Last year John and Ken died, and Lucas defaulted on the loan. Lucas contracted to sell Tract 1 to Eagle Rock. In the meantime, Roscoe advertised a sale of the property under the terms of the deed of trust he holds, gave all required notices, and set the sale for 30 days from today.

Tract 2. Ten years ago, Amelia conveyed Tract 2 to her children, Julia and Mary, as joint tenants. Mary died five years ago and by her will left all of her property to a friend, Horace. Julia has contracted to sell Tract 2 to Eagle Rock, advising Eagle Rock that she and Mary had owned it with right of survivorship.

Tract 3. Thirty years ago, Dan conveyed Tract 3 by a deed reciting, "I convey Tract 3 to my son, Robert, for life, and upon his death, to Robert's son, Junior." Recently Junior conveyed his interest to George by a deed, which recites, "I convey all of my right, title and interest in Tract 3 to George." Robert is still living. George has contracted to sell Tract 3 to Eagle Rock.

Tract 4. Ten years ago, Carl conveyed Tract 4 by a deed reciting, "I convey Tract 4 to Sean and his heirs so long as Tract 4 is used solely for residential purposes." Five years ago, Sean built and has continually operated a garage for motorcycle repair on Tract 4. Carl died last year and, in his will, he left his entire estate to his son, Jethro. Jethro has contracted to sell Tract4 to Eagle Rock.

Can the Eagle Rock Land Company acquire title to each of these tracts free of any other interests by purchasing the tracts at the present time from the persons who contracted to sell them? Explain fully.

Tract 1. No, Eagle Rock cannot acquire title to Tract 1 free in clear of other interests. In the original conveyance, Henry conveyed a life estate to John, a vested remainder subject to complete divestment in life estate in Ken and an indefeasibly vested remainder in Lucas. After John and Ken died, Lucas' interest ripened into a present possessory interest in fee simple absolute. Indefeasibly vested remainders can be

encumbered, and thus, Roscoe's interest is valid, and because Lucas has defaulted on the loan, the trustee may foreclose on the deed of trust by selling the property. Eagle Rock could purchase Tract 1, but it would be subject to Roscoe's deed of trust. Additionally, Lucas has the right of redemption up until the foreclosure sale.

Tract 2. Yes, Eagle Rock can acquire title to Tract 2 free and clear of other interests. In order to create a joint tenancy with rights of survivorship in Virginia, the deed must explicitly include survivorship language. Assuming that the conveyance to Julia and Mary did in fact include such survivorship language, then Julie and Mary owned the property as joint tenants with rights of survivorship and Mary's will purporting to leave her property to Horace was ineffective, and Julia owned the entire parcel upon Mary's death. Thus, Julia can convey the entire parcel to Eagle Rock free and clear of any other interests.

The Examiners would also give full credit for an answer assuming that the original conveyance did not include survivorship language, and therefore Mary and Julia were tenants in common without rights of survivorship. In that case, Horace would own a ½ interest pursuant to Mary's will and Julia would not be able to convey the entire property to Eagle Rock.

Tract 3. No, Eagle Rock cannot acquire title to Tract 3 free and clear of other interests. In the original conveyance, Dan conveyed a life estate to Robert and an indefeasibly vested remainder in Junior. Vested remainders are freely transferrable, so Junior properly conveyed his interest to George. George, furthermore, could convey that interest to Eagle Rock. Because, however, Robert is still living, George could only convey that future interest, the indefeasibly vested remainder. Therefore, Eagle Rock cannot acquire title to Tract 3 free and clear of other interests.

Tract 4. Tract 4. Yes, Eagle Rock can acquire title to Tract 4 free and clear of other interests. Carl conveyed a fee simple determinable to Sean and retained a possibility of reverter. When Sean violated the condition in the conveyance by using the property for nonresidential purposes, the property automatically reverted to Carl as a fee simple absolute. Carl then devised the fee simple absolute to his son Jethro and Jethro can now contract to convey title to Tract 4 free and clear of other interests to Eagle Rock.

7. [Local Government, Constitutional Law & Va. Civil Procedure] Riley Plumlee ("RP"), an adult resident of Fairfax County, Virginia, is the sole owner of a parcel of land, on which there was an unoccupied duplex dwelling, located in the City of Alexandria, Virginia (the "City"). On January 3, 2011, the City issued a building permit to permit RP to repair damage to the dwelling caused by an accidental fire.

When the City conducted a routine inspection in early May, RP's dwelling was observed with most of the roof missing, shattered brickwork, windows pulled loose from their frames, dangling electric wires at the point where the electrical utility service was connected to the house , and piles of dangerous debris strewn about.

On May 5, 2011, RP received a letter by certified mail from the City, stating that the dwelling had been inspected and found to be "unsafe and a public nuisance" pursuant to certain cited provisions of the Virginia Uniform Statewide Building Code ("USBC") and the Code of the City of Alexandria. The letter directed RP to board-up and secure the dwelling by May 26, 2011,and to demolish the dwelling by June 5, 2011. The letter also stated: "Any owner who is aggrieved by the above decision may appeal pursuant to Section 106.5 of the USBC. Such appeal must be filed in writing within 21 days of this notice."

RP did not appeal, although he promptly retained an attorney and he met with City officials. At the meeting, he promised to make certain repairs, which he started but did not complete.

On June 15, 2011, RP received a second certified mail letter from the City, advising that"the City will be demolishing the dwelling structure on your property under the emergency provisions of the USBC and that this is a continuum of the City's May 5, 2011 action, declaring the structure to be 'unsafe and a public nuisance.'" On July 10, 2011, the City demolished the dwelling structure on RP's land. On July 20, 2011, without further communication with the City, RP filed in the Circuit Court of the City of Alexandria a Complaint against the City, consisting of three counts:

In Count 1, RP asserts that he was deprived of his federal procedural due process right sunder 42 U.S.C. § 1983 because the City provided insufficient notice and opportunity to be heard before the demolition occurred. Although RP acknowledges having received the May and June letters from the City, he argues that the notice was insufficient because

the USBC requires that any notice of demolition be published in a newspaper of general circulation. The City does not contest the publication requirement directly, but argues that RP – the sole owner – had actual notice in this case.

In Count 2, RP pleads a common law negligence claim sounding in tort for property damages.

In Count 3, RP asserts a state law claim for violations of his due process rights under Article I, Section 11 of the Virginia Constitution, alleging that the City had taken his property by inverse condemnation for public use without just compensation.

How is the Circuit Court likely to analyze and decide:

[a] Count 1 – federal procedural due process claim? Explain fully.

[b] Count 2 – common law negligence claim for property damages? Explain fully.

[c] Count 3 – inverse condemnation claim? Explain fully.

[a] The circuit court should dismiss RP's Count 1 claim of failure to afford him federal due process. He had actual notice that the City deemed his property to be unsafe and a public nuisance. RP also received notice that the City was going to demolish the building. RP failed to exercise any rights he was advised of as to appealing the City's administrative actions. Lee v. City of Norfolk 281 Va. 423 [2011]

[b] The circuit court should dismiss RP's Count 2 common law negligence claim for property damage for two reasons.

[i] First the City when acting to abate a public nuisance is exercising it's police power and is entitled to absolute immunity. This was action to protect the public safety and involves discretionary authority on the part of the City. Lee v. City of Norfolk 281 Va. 423 [2011]

[ii] Second, under Va. Code §15.2-209(a) one who has a claim for negligence against a city must file a written statement with the City, advising of the time, place and location and nature of the cause of action. Failure to do so gives the City a defense to the action. RP did not give the required notice. Lee v. City of Norfolk 281 Va. 423 [2011]

[c] The circuit court should dismiss RP's Count 3 claim for inverse condemnation because the abatement of a nuisance by a public body is not a compensable taking. This action comes under the police power of the government and is not a taking of private property for public use in the sense contemplated by the constitution, for which compensation must be allowed. Lee v. City of Norfolk 281 Va. 423 [2011]

8. [UCC - Sales] Waverly Lumber, Inc. ("Waverly") was a supplier of lumber to construction companies in the Tidewater area of Virginia. It entered into the following written contracts with companies with ongoing projects.

Suffolk Builders ("Suffolk") ordered 250 sheets of five-ply construction grade plywood to be delivered to a specified construction site. Waverly's driver made the delivery and deposited the load, at the direction of Suffolk's foreman, just inside the chain-link fence surrounding the construction site. Later in the day, Suffolk's foreman realized that the plywood was three-ply, not the five-ply ordered. He called Waverly and told them about the mistake, asked Waverly to deliver the requested five-ply and pick up the three-ply load first thing the next morning. At the end of the day, Suffolk's foreman pulled the chain-link gate shut, without locking it. That night, some neighborhood children frequently seen playing in the construction site after hours entered the site, took 15 sheets of the plywood and used it to make a skateboard ramp. Waverly delivered the five-ply shipment, picked up the remaining 235 sheets of three-ply, and added the cost of the 15 missing sheets to Suffolk's bill. Suffolk refused to pay for the missing sheets, asserting that but for Waverly's misdelivery, the plywood would have been moved and used on the site the day before.

Tidewater Building Contractors ("Tidewater") ordered 525 kiln-dried floor joists cut into12-foot lengths and delivered to Tidewater's building site. Waverly made the delivery, and soon after the joists were unloaded and the driver left, Tidewater's building superintendent discovered that a large number of them appeared to be "green" and not properly dried. He immediately called Waverly, reported the discovery, and told Waverly to come pick up the joists and replace them with ones that were properly dried. Waverly informed Tidewater's superintendent that kiln-dried joists were currently

in short supply and that Tidewater would have to wait for a week to get replacements. After talking to Waverly, but without telling Waverly, Tidewater's superintendent concluded that 400 of the joists were dry enough and that he could use them.

In the meantime, Waverly sold those same 525 joists at a substantial premium to another builder who was willing to take them as is. When Waverly's driver showed up the next morning to pick up the "green" joists, Tidewater's superintendent said he would return only the 125 that he could not use. Waverly insisted that it was entitled to the return of the entire shipment of 525.Tidewater insisted that it was entitled to reject part of the shipment and keep the balance.

[a] What are the rights and obligations of Waverly and Suffolk with regard to the 15 missing sheets of plywood? Explain fully.

[b] What are the rights and obligations of Waverly and Tidewater with regard to the 525 floor joists? Explain fully.

[a] Article 2 of the Uniform Commercial Code - Sales [§8.2-101 *et seq*.] governs this dispute because plywood is a moveable goods. Waverly violated an express warranty [§8.2-313(b)] that the plywood would be five-ply; therefore, Suffolk was entitled to reject it. However, even a rejecting buyer has a duty to hold the rejected goods "with reasonable care" [§8.2-602(2)(b)] and if leaving the gate unlocked is unreasonable, Suffolk is liable for the value of the 15 missing sheets.

[b] Article 2 of the Uniform Commercial Code - Sales [§ 8.2-101 et seq.] governs this dispute because floor joists are moveable goods. Waverly arguably violated an express warranty that the floor joists be "kiln-dried;" therefore, Tidewater was entitled to reject all of them [§8.2-601(a)]. In any event, Tidewater effectively rejected all the floor joists because it seasonably notified Waverly of its rejection [§8.2-602(1)]. However, Tidewater's subsequent exercise of ownership over the 400 joists was "wrongful" [§8.2-602(2)(a)] and Tidewater is a converter of those joists; i.e., it is liable for the value of the goods, not merely the contract price. Waverly is entitled to the remaining 125 joists.

9. [Professional Responsibility] Cameron Cabel was recently fired from her job at Beneficial Bank, a Virginia Corporation, ("Beneficial") in Richmond, Virginia, allegedly for "poor performance." However, Ms. Cabel believes the reason she was fired is that she had resisted the sexual advances of her supervisor. She retained Larry Lawson, a member of the Virginia State Bar and a solo practitioner in Ashland, Virginia, to represent her in a suit for sexual harassment against Beneficial. Beneficial is represented in all business and litigation matters by a large law firm in Richmond.

Cameron told Larry that Riley Ray, an executive vice president of Beneficial, who happens to be a good friend of Cameron's father, knows about other accusations of sexual harassment against her supervisor. She said that Mr. Ray would probably be willing to talk "off the record" with Larry.

Maddie, a close friend of Cameron who works as a clerk for Beneficial, told Cameron that she has knowledge of two earlier investigations into allegations that Cameron's supervisor had sexually harassed other female employees. However, Maddie was reluctant to help Cameron by "going public" with the information for fear that Beneficial would retaliate against her. Cameron reported Maddie's revelation to Larry.

Larry would like to interview both Riley Ray and Maddie separately and *ex* parte, without disclosing the interviews to Beneficial's attorneys.

Are there any restrictions in the Virginia Rules of Professional Conduct that prevent Larry from conducting either of these *ex parte* interviews or that impose any obligations on him before conducting either of them? Explain fully.

For purposes of Rule 4.2 of the Rules of Professional Responsibility, Riley Ray, as an executive vice president, is within the control group of the corporation, those who have the power to bind the corporation. For this reason, Larry must go through the attorneys for the corporation to get permission to interview Riley Ray. Ultimately, as a potential witness, Riley Ray would be appropriate to depose if the lawyers do not produce him for the informal interview.

Maddie is not within the control group of the corporation because she is a lower level employee. For that reason there is not a definite obligation to go through the corporation's lawyers to interview her. The rules impose on Larry a duty of candor, which requires him to let Maddie know that the case is or will be the subject of litigation, and to ask her whether

she is comfortable talking with him and giving him information that could help Cameron's case. Rule 4.3 (a) requires Larry, in dealing with the unrepresented Maddie, not to state or imply that Larry is disinterested.