

VIRGINIA BOARD OF BAR EXAMINERS

Roanoke, Virginia – July 24, 2012

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

6. Yancey Tucker and his brother Fred, residents of Warm Springs, Virginia, were on trial in the Circuit Court of Bath County. Yancey was charged with malicious wounding of Ron Mason. Both Yancey and Fred were charged with conspiracy to commit such malicious wounding. The malicious wounding statute, Code of Virginia section 18.2-51, states:

If any person maliciously shoot, stab, cut, or wound any person or by any means cause him bodily injury with the intent to maim, disfigure, disable or kill, he shall . . . be guilty of a Class 3 felony.

The evidence at the trial established the following facts:

- On the night of February 14, 2012, Yancey and Fred were at the bar of the local tavern and had been drinking heavily for several hours when they saw Ron Mason and his brother, Morgan, enter the tavern and begin playing pool.
- Yancey and Fred harbored a longstanding animosity for Morgan, who had once threatened to “cut Yancey down to size” and had tried to stab Yancey at a cockfight they had attended.
- Yancey said to Fred, “This is our chance to get even with Morgan. I’ve got my pistol. Let’s get him when he leaves.” Fred nodded his approval.
- After several more drinks, Yancey and Fred left the bar and waited out front. Fred, after waiting a few minutes, said, “I don’t think this is a good idea. Let’s forget about it,” and staggered off toward the parking lot, got into his car, and fell asleep.
- About 15 minutes later, Morgan and Ron came out the front door. They were confronted by Yancey, who, after an exchange of expletives, drew his pistol.
- Yancey had for many years worn glasses to correct a vision problem that, without his glasses, caused his eyes to cross resulting in double vision. On this occasion, he had left his glasses in the car.
- Yancey, intending to shoot Morgan, took aim and fired, but his aim was misdirected by his double vision. The bullet struck Ron instead, resulting in Ron’s losing most of his left ear.
- Blood tests revealed that at the time of the incident the blood alcohol levels of Yancey and Fred were more than twice the level considered legal intoxication, and a medical expert called as a witness by Yancey and Ron testified that they were both in alcoholic stupors.
- An optometrist called as a witness by Yancey testified that, without his glasses, Yancey’s double vision caused the misdirected shot.

The defenses asserted by Yancey to the malicious wounding charge were that (i) he was

too drunk to have formed the intent to commit the crime charged and (ii) the shooting of Ron was accidental.

The defense asserted by Yancey and Fred to the conspiracy charge was that no conspiracy was committed because Fred had walked away before the shooting occurred.

**Can Yancey and Fred prevail on the defenses they have asserted?
Explain fully.**

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

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7. Ten years ago, Romeo Dickerson founded Commonwealth Cigar Corporation (“CCC”), a corporation properly organized and validly existing pursuant to the laws of Virginia. CCC had an agreement with a Spanish company, Professor Sila Cigar Factory, granting CCC the exclusive right to distribute Professor Sila brand cigars in the Mid-Atlantic states.

Initially, Romeo was the sole shareholder, officer, employee, and director of CCC. The articles of incorporation contained a provision limiting to \$2,000 the liability of any officer or director for damages arising out of a breach of fiduciary duty. CCC was properly capitalized, and Romeo observed all corporate formalities, making all required corporate filings, holding shareholder and board meetings and keeping minutes thereof, and the like. At the outset, CCC paid its debts promptly, though in time CCC developed a reputation for slow payment of bills and for demanding arbitrary invoice reductions in return for any payment at all.

In 2009, Romeo and Izzy Investor, an outside investor, entered into a stock subscription agreement whereby Izzy acquired 30% of CCC’s stock for \$30,000 and Izzy’s guarantee of a bank letter of credit in favor of Professor Sila that allowed CCC to buy cigars on better terms. The subscription agreement also provided that Romeo remained the sole employee and manager of the business of CCC. Over time, however, Izzy and Romeo had a series of falling-outs, and their relationship deteriorated.

Without informing Izzy, Romeo formed another corporation, International Cigar Company (“International”). International operated out of the same facilities as CCC, using CCC’s equipment, without compensation to CCC. Initially, International sold cheaper cigars imported from the Dominican Republic. There came a time when Professor Sila expressed dissatisfaction with CCC’s efforts to market the Professor Sila brand. Romeo then renegotiated the original exclusive distributorship agreement with Professor Sila, transferring exclusive rights to International. CCC then abandoned efforts to sell the Professor Sila brand and continued doing business on a much reduced scale selling only less popular brands.

When Izzy discovered what Romeo had done, he sued Romeo in the Circuit Court of Fairfax County, Virginia. In the complaint, titled *Izzy Investor v. Romeo Dickerson*, Izzy alleged that Romeo breached the fiduciary duty owed to CCC and sought to recover damages for his own account directly from Romeo measured by the diminution of the value of Izzy’s 30% interest in CCC. The complaint asserted that a suit directly against Romeo was justified because CCC was a close corporation functioning essentially as a partnership in which Romeo was the general

partner.

Romeo asserted the following defenses: (i) that Izzy's claim is a corporate cause of action, not a claim accruing personally to Izzy; (ii) that, in any event, Romeo is protected from liability by the business judgment rule; and (iii) Romeo's liability is capped at \$2,000 by the provision in CCC's articles of incorporation.

Is Romeo likely to prevail on each of his defenses? 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 answer to Questions 8 and 9 in GREEN Answer Booklet E

8. In March 2012, Peter, an avid runner, was jogging along Midlothian Turnpike, in Chesterfield County, Virginia. As he was crossing at an intersection against a traffic signal for pedestrians that was showing the "Don't Walk" command, Peter was struck by one of two vehicles that collided at the intersection. At the moment of the accident, Kenny, the driver of one of the cars, was speeding, and Dino, the other driver, had failed to stop at a red traffic light. The impact of the accident caused Dino's vehicle to strike Peter.

Peter sued both Dino and Kenny for personal injuries. Dino failed to file responsive pleadings within the time required by the Rules. Kenny filed an answer and grounds of defense. He denied his own negligence, denied that Peter was injured to the extent alleged, and alleged that Peter was guilty of contributory negligence.

Two months after Dino was served with process, Dino's lawyer filed a motion for leave to file late pleadings. He attached an affidavit wherein Dino stated under oath that, while out of town for several weeks, he overlooked taking the suit papers to his lawyer. Counsel for Peter and Kenny objected to the motion and moved for entry of default judgment against Dino. The trial court denied Dino's motion and ruled that he was in default. A judgment of default on the liability issue was entered accordingly, reserving the issue of damages pending Peter's proof.

At trial, Peter presented evidence as to the negligence of Dino and Kenny, regarding injuries to his leg and hip, and medical expenses he incurred because of the injuries. Dino's counsel made several objections to the admission of Peter's evidence regarding his injuries, all of which were overruled on the ground that Dino was in default. Additionally, Dino sought to introduce evidence that Peter had been in a previous accident and that many of the expenses he was claiming in the present suit were duplicative because they had been incurred for the treatment of an injury received in the earlier accident. The court rejected this evidence, again on the ground that Dino was in default.

After hearing all the evidence, the court, on Kenny's motion to strike, ruled that Peter was guilty of contributory negligence as a matter of law.

- (a) Was the court correct in not allowing Dino to file late pleadings? Explain fully.
- (b) Was the court correct in overruling Dino's objections to Peter's evidence as to his injuries and expenses? Explain fully.
- (c) Was the court correct in refusing to admit Dino's evidence about Peter's expenses incurred in the earlier accident? Explain fully.
- (d) Is Peter entitled to a judgment against Dino despite the court's ruling that Peter was guilty of contributory negligence as a matter of law? Explain fully.

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

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9. Dick and Jane Wilson, prior to their divorce in 2010, bought a home in Lee County, Virginia. Title to the home was held by them as, "Tenants by the entirety, with the right of survivorship, as at common law."

Jane moved to California shortly after the divorce was final, and Dick remained in the home, which he shared with their daughter, Margo, who was Jane's only child. The home was the only marital asset; however, no disposition was made of the home in the divorce proceedings and neither party requested equitable distribution.

Jane was killed in a surfing accident shortly after arriving in California. A safe deposit box that Jane had maintained in the Bank of Pennington Gap, Virginia contained two documents: (i) One was completely in her handwriting and contained no words other than the following: "I, Jane Wilson, leave my entire estate to my sister, Helene. June 30, 2011." (ii) The other document was what appeared to be a duly executed deed dated January 1, 2011, signed by Jane, and purporting to convey, "My home in Lee County, Virginia to my nephew, Jimbo." Jane had never met Jimbo, and she did not know where he lived.

Jane was survived by Margo, Jimbo, Helene, and Dick. Each of them has asserted an interest in the Lee County home.

What interest, if any, do Margo, Jimbo, Helene, and Dick each have in the Lee County home? Explain fully.

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).