

## **MODEL ANSWER - QUESTION I - FEBRUARY 2008**

PLEASE NOTE: QUESTION I was a "Multistate Performance Test" (MPT) will not be answered here.

## **MODEL ANSWER - QUESTION II - FEBRUARY 2008**

PLEASE NOTE: QUESTION II was a "Multistate Performance Test" (MPT) will not be answered here.

## **MODEL ANSWER - QUESTION III - FEBRUARY 2008**

1—Unless extended by motion or agreement, the deadline for filing a responsive pleading under Rule 12 is 20 days. The responsive pleading may be an answer or a Rule 12(b) motion to dismiss. The answer must respond to all allegations in the complaint and state any affirmative defenses.

2—There may be an affirmative defense for improper venue. 12 V.S.A. § 402 provides that venue will be in the county where either party resides. Unless one of the parties is a resident of Rutland County, the case could be subject to dismissal for improper venue. If the affirmative defense is not timely raised, it is waived.

3—Anne could either file a permissive counterclaim or file a separate action. This would not be a compulsory counterclaim because the maintenance and bike repair contracts are separate agreements.

4—Anne could object to the request for her marital affairs and may be able to object to at least some disclosure of any criminal convictions that could not be related to issues at a potential trial. The scope of discovery is governed by Rule 26, and extends to any information reasonably calculated to lead to the discovery of admissible evidence. Protective orders can be sought under Rule 26(c) if discovery subjects a party to annoyance, embarrassment, oppression, or undue burden or expense. The court may make any order which justice requires to shape or limit discovery in any way.

5—Anne will have to disclose the second report, but not the first if she does not choose to use this in trial. Discovery as to consulting experts who will not testify can be obtained only as provided in Rule 35(b) (mental or physical examinations) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means. V.R.C.P. 26(b)(4)(B). As to testifying experts, opposing parties can obtain through discovery the identity of each person whom the other party expects to call as an expert witness at trial, the subject matter on which the expert is expected to testify; the substance of the facts and opinions as to which the expert is expected to testify and a summary of the grounds for each opinion. V.R.C.P. 26(b)(4)(A)(i).

6—Rule 26(h) requires that counsel confer in detail in good faith to resolve disputes or narrow issues in dispute before seeking court intervention. With respect to any discovery motion to the

court, an attorney must certify, subject to Rule 11, that such efforts have been made. If good faith consultation does not resolve the dispute, the parties may file a motion to compel or for a protective order.

7—The document is discoverable and has been requested, because the January 10 contract is a document that relates to the January 1 contract. Although Bob may not remember the second contract, that does not limit the scope of his discovery request. Anne's attorney should advise Anne that the document must be disclosed. Anne's attorney, however, should not simply defy Anne's explicit instruction. If Anne remains adamant in her instruction, Anne's attorney will have to file a motion to withdraw as Anne's counsel in the case.

8—Anne's attorney has an obligation to convey all settlement proposals to her client, and may not decide to either withhold those proposals or the final response to such proposals without Anne's input. While Anne may have resolved to "never pay a nickel to Bob," that general statement does not relieve counsel of the obligation to inform Anne of the proposal.

#### **MODEL ANSWER - QUESTION IV - FEBRUARY 2008**

Joe could consider other approaches before filing for bankruptcy. For example, he could send cease and desist letters to his creditors which will require them to stop contacting him for a 30-day period. During this time, he could go to a consumer credit counseling agency. Such agencies often renegotiate debt obligations on behalf of consumers. Joe could enter a voluntary debt management plan (DMP) with the agency. Under a DMP, Joe would repay some or all of his debts by sending the agency a monthly payment which it then distributes to creditors. Such a plan, though, will probably not wipe out all of Joe's debt and it may not stop the bank from initiating a foreclosure action against Joe's town house. In any event, you will advise Joe to attend a consumer credit counseling session because under current bankruptcy laws, he will be required to do so before he can file for bankruptcy.

If the bank proceeds with the foreclosure action because Joe cannot get current with his payments, Joe will probably want to file for bankruptcy protection. Once he files for bankruptcy, the automatic stay goes into effect and no creditor can take any action against any of Joe's assets. (11 U.S.C. § 362) So, the bank would be stopped from taking any action against Joe's town house unless it was granted relief from the automatic stay.

Given Joe's financial picture and his desire to keep his town house, Joe will want to file a Chapter 13 case.

*First*, Joe's income is too high to file under Chapter 7. (Chapter 7 is often called "straight" bankruptcy and is the chapter under which all of a debtor's non-exempt assets are liquidated with the proceeds from the liquidation being used to pay off creditors.) Under the bankruptcy law's required "means test", Joe's median income—calculated by annualizing his last six months of income ( $\$4,500/\text{month} * 12 \text{ months} = \$54,000$ )—is above the State's median income for a one-person household (i.e.,  $\$41,171$ ). On the basis of your initial interview, Joe is not eligible to file under Chapter 7 of the Bankruptcy Code.

*Second*, Joe has non-exempt equity in his town house that he cannot protect from his creditors. Exempt property is property designated by law that a person may protect from claims of his creditors. You have figured that some of Joe's equity in his house is not exempt by taking the fair market value of Joe's house—\$225,000—and subtracting his \$125,000 mortgage to come to a net interest of \$100,000 in equity. Under Vermont state exemptions, he can claim only \$75,000 of that equity as exempt. (Joe will want to choose Vermont's exemptions over the federal exemptions because Vermont's are more generous and will provide Joe with greater protection.) So, even if he could file under Chapter 7, his house would be sold to liquidate the remaining \$25,000 in equity that is not exempt, with that portion being used to pay his creditors.

Under Chapter 13, Joe will have three to five years to repay his creditors from projected "disposable income," in addition to staying current on his monthly bills. He will have to present the Bankruptcy Court with his repayment plan—the Chapter 13 plan—for its review and approval.

Regarding Joe's property interests and debts:

**LLC (property):** From the fact scenario, Joe owns the LLC. More facts are required to determine his ownership interest. However, he will need to disclose his interest in the LLC in his schedules.

**Town House (property):** Since the bank is a secured creditor, it is required to be paid all delinquent amounts in full over the term of the plan. Plus, Joe must remain current on his monthly mortgage payments. His debt obligation will not be discharged in bankruptcy.

**Hospital and Doctor bills (debt):** These are general unsecured debt. These creditors will receive a "dividend" or a percentage of the total amount due as determined by the required means test for Chapter 13 cases. A debtor in a Chapter 13 case is required to pay all his projected "disposable income" over a three to five year period as long as that amount is at least as much as creditors would receive if the debtor's non-exempt assets were liquidated under Chapter 7. Any amount beyond the required dividend payment will be wiped out or "discharged" upon successful completion of Joe's Chapter 13 case.

**Child Support Obligation (debt):** This is a priority unsecured debt. Congress has determined that this type of debt obligation will not be discharged in bankruptcy. Joe will likely be required to repay this obligation in full.

**Credit Card Debts (debt):** Like Joe's hospital and doctors bills, these debts are general unsecured debts. So, these creditors will receive the general unsecured creditors' dividend. However, any one of the credit company's may challenge the discharge of the debt owed it if the company can show that Joe incurred the debt from a luxury purchase made within six months of filing for bankruptcy. So, Joe might not be able to discharge the debt he incurred in taking his Thanksgiving trip to Hawaii. More facts are required to make this determination.

**Work Truck (property):** If the title of the truck is in the name of the LLC, then it will not become part of Joe's bankruptcy estate. But, you will want to verify this to make sure that is

accurate, so you should advise Joe to bring in the title to the truck for your review. If the truck is held in Joe's name, you will need to determine his equity interest. Under Vermont exemptions, one can exempt up to \$2,500 in a car. More facts are required to make this determination.

**Student Loans (debt):** Joe will not be able to discharge this debt obligation. For policy reasons, Congress has determined that student loans are not dischargeable in bankruptcy except upon a showing of undue hardship. While Joe's accident is unfortunate, it does not rise to the necessary level of undue hardship. However, during the life of the plan, he may be able to reduce his monthly payments to the student loan holders.

**401k Account (property):** Joe will be able to exempt his \$8,000 account as it is under Vermont's exemption limit of \$10,000. However, during the life of the Chapter 13 plan, Joe will be prohibited from making contributions to the account; for the three to five year period of the Chapter 13 plan, all his disposable income is required to be dedicated to the repayment of his creditors.

**Snowmobile (property):** Presumably the debt on this asset is secured with Joe having pledged the snowmobile as collateral for the loan. If Joe wishes to keep the snowmobile, he will have to pay the lender the value of the snowmobile. Because of depreciation of the snowmobile, this might be less than the \$1,500 he currently owes. You will need to determine the fair market value of the snowmobile to determine how much Joe will have to pay the secured creditor: \$1,500 or less.

### **MODEL ANSWER - QUESTION V - FEBRUARY 2008**

1. Overall the wills are valid; however the gift to Alison is not. At the time the will was executed, three witnesses were required. 14 VSA §5. However, one of the witnesses, Alison, was also intended to receive a gift under the will. Alison is not a heir-at-law, but rather just a friend. Accordingly, under 14 VSA §10, the will itself is valid, however, the gift to Alison is not. The defective signature is not cured by the fact that the wills were handwritten by John and Mary. Vermont does not recognize holographic wills, and therefore, their execution needed to be witnessed by three witnesses. There is not a requirement that a will be dated, accordingly, the lack of a date does not invalidate the wills.

2. Alison Smith: Because both John and Mary died, Alison would be next in line to receive the diamond bracelet. However, because she was also a witness to the will, the gift to her is invalidated. There is an argument that because Vermont laws have recently been amended to require only 2 witnesses to a will, that her witnessing of the will is no longer needed and therefore she should be allowed to keep the gift. However, the amendment changing the required number of witnesses from 3 to 2 is silent on this issue. Accordingly, it is likely that the will with respect to Alison would have needed to have been valid at the time of execution and that the subsequent amendment to the state statute did not cure this defect. There is also an argument that because John and Mary handwrote their wills thereby creating holographic wills, no witnesses were necessary. However, Vermont does not recognize holographic wills. For these reasons, the gift to Alison fails.

Beth Jones: Subject to the discussion on Henry, Beth should receive the bracelet because both John and Mary died and the gift to Alison was invalid (as discussed above)

Susan: Subject to the discussion on Henry, Susan receives her gift of the residuary estate because she survived her parents, even though it was only for a few hours. Her gift is put into the trust and it is now left to the trustee to care for. After Susan died, the gift given to her by her parents will be distributed under Susan's estate, and not her parents

Henry: When a child of a person making a will is born after the will is made, and the will does not provide for that child, the child will have the same share in the estate of his/her parent as of the parent had died intestate. The share of the child will be the same as if the parent died intestate, unless it is clear from the will that it was specifically the intent that provision should not be made for the after-born child. 14 VSA §555. In this case, the wills of John and Mary do not specify that an after-born child should not receive an inheritance, and therefore, Henry would receive what would have otherwise been due him if his parents died intestate. Under the general rules of descent, if Henry's parents died without a will, Henry and his sister would have received equal shares of the parents' estate. 14 VSA §551. Accordingly, Henry's share was half of the estate.

Franklin Memorial Library: Because Henry gets half of the estate because he was not named in his parents' will, and because Susan survived both parents and would therefore be entitled to the remaining half of the estate (less the bracelet), there is nothing left for the library to receive.

3. Before entering the duties of office, a trustee appointed under a will must file a petition and give a bond with surety to the probate court. 14 VSA §2301. The condition of the bond are as follows: to make an inventory of the estate belonging to the trustee, to manage and dispose of the estate and faithfully discharge the duties as trustee, to render an account of the property in the trustees hand within one year and at other times when required by the probate court, and to settle the accounts with the probate court at the expiration of the trust, and to pay over and deliver the estate remaining in the trustees hands to the persons entitled to the estate at the end of trust. 14 VSA §2302. In the management of the trust estate, the trustee must perform the duties specified in the bond, and must keep separate and distinct all money, property and securities received by them in the capacity of trustee. 14 VSA §2321. The trustee must provide a full account of the management of the trust on an annual basis. 14 VSA § 2324.

The trustee must carry out the trust as directed by the will. Accordingly, with regard to the trip to Europe, no, the trustee cannot provide Henry's guardians with funds from the trust to help pay for the trip. The wills specifically state that the purpose of the trust is for the beneficiary's health, support and education. A trip to Europe for a 4 year old does not satisfy any of these criteria.

### **MODEL ANSWER - QUESTION VI - FEBRUARY 2008**

1. What recourse, if any, does Huey have against Sue's Sporting Goods?

\* No express warranty issues, and no warranty of merchantability issues

\* Implied warranty of fitness for a particular purpose applies if seller had reason to know purpose for which the goods are required and that buyer was relying on the seller's skill or judgment to furnish suitable goods. 9A VSA 2-315.

\* Although language designed to disclaim implied warranty would ordinarily be effective, you can't waive warranty of fitness for a particular purpose in connection with the sale of new or unused consumer goods. 9A VSA 2-316(5).

\* Here, Huey was relying on Sue to select appropriate basketballs for the use he described to her.

\* Discussion of damages & remedies for breach of implied warranty

2. What is Huey's obligation to Team Outfitters with respect to payment for the uniform?

\* Starting point re price is 9a VSA 2-305 regarding supplying missing term.

\* Discussion of impact of fact that he took the uniforms. Does this mean acceptance of the price on the invoice?

3. What recourse, if any, does Huey have against Team Outfitters in connection with the uniforms.

\* Sample or model uniform creates an express warranty

\* Discussion of impact of the fact that he took and used uniforms. Acceptance of non-conforming goods.

4. What recourse, if any, does Huey have against Local Health Club?

\* No evidence of express warranty (or discuss whether there is)

\* Local Health Club is not a merchant, so no implied warranty of merchantability

\* Probably no recourse

Board of Bar Examiners

2418 Airport Road, Suite 2

Barre, VT 05641

TEL: (802) 828-3281

FAX: (802) 828-1695