

MODEL ANSWER - QUESTION I - February 2010

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

MODEL ANSWER - QUESTION II - February 2010

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

MODEL ANSWER - QUESTION III - February 2010

1. (a) Because Bob created the business on his own it was most likely a sole proprietorship. A sole proprietorship is a default business organization that is created when an individual starts up a business on his/her own. The owner of a sole proprietor is personally responsible for all of the businesses debts and liabilities.

(b) The creation of a sole proprietorship does not require any formal action other than the opening of the business. However, because Bob is operating under a difference name, he should register his trade-name (d/b/a) with the Vermont Secretary of State's office.

2. (a) A general partnership is a default business organization that is created when two or more individuals go into business together. Thus, it is generally created by a written or oral agreement between two or more people. All of the general partners are personally jointly and severally liable for the business's debts and liabilities, and they generally share equally in the business decisions and in the profits and losses (unless the agreement between the partners states differently).

A limited partnership has both general partners and limited partners. The general partners are like the partners of a general partnership. The limited partners, however, are only liable up to the amount of their investment in the business. Moreover, limited partners do not make any of the business decisions.

(b) A general partnership can be created without any formal action between the parties other than entering into business together. You can, but are not required, to file a general partnership with the secretary of state's office. If you do so, you would file a written agreement between the parties that includes the name of the partnership, names and mailing addresses of all partners and registered agent. The signature of at least two partners is needed and the statement must be notarized.

Limited partnerships must file with the secretary of state's office. The application must include the name of the partnership, the name and address of each general partner, name and address of its registered agent, name and residence of each limited partner, amount and description of property contributed by each limited partner, and the date that the partnership will dissolve.

(c) Bob and Alice most likely created a general partnership because they did not take any formal action in creating the partnership.

3. (a) Corporation: A corporation is one of the more complex business entities and has the most formalities in its creation, governance and management. Corporations are created by filing articles of incorporation with the secretary of state's office. The business and affairs of the corporation are managed under the board of directors subject to any limitations set forth in the articles of incorporation. Directors adopt by-laws for managing and regulating the business of the corporation. A corporation must have at least a president and secretary. The owners of a corporation are generally the shareholders. The personal liability of shareholders for debts of the corporation is generally limited to the amount of their investment.

Limited Liability Company: A limited liability company is a relatively new form of business that is a hybrid between a partnership and a corporation. Limited liability companies have a great deal of flexibility in their structure, management and operations. Limited liability companies are created by filing articles of organization with the secretary of state's office. The owners of a limited liability company are generally the members of the company. The limited liability company may choose whether the members are personally liable for company debts like the partners of a general partnership, or whether they enjoy limited liability like the shareholders of a corporation. Capital contributions to a limited liability company may consist of tangible or intangible property and may include cash, property or contracts for services to be performed. A limited liability company may be member-managed or manager-managed.

(b) In order to create the limited liability company, Bob and John would have needed to file articles of organization with the secretary of state's office. Articles of organization include information such as the name of the company, its business purpose, the location of its principal office. The articles of organization also identify the registered agent for the company, whether there is a specific term for the company or whether the term is at-will. The articles also state whether the company is member-managed or manager-managed, and whether the members of the company are personally liable for its debts. In addition to filing the articles of organization, Bob and John would need to create an operating agreement for the company. The operating agreement specifies the details of how the company will be run. The operating agreement is, in essence, a contract between the parties that generally explains, among other things, the operations of the company, when and how meetings are called and held, and how profits and losses are to be allocated.

4. The parents may bring claims against Bob, Alice and "Amazing Wooden Toys." Amazing Wooden Toys is liable because it is the entity that created and placed into the marketplace the defective toys. Bob and Alice were likely general partners and as such, both are liable for the debts of the company.

John was not associated with "Amazing Wooden Toys" so he would not have any liability.

Depending upon how Bob and John converted the assets of "Amazing Wooden Toys" to "New Furniture Company," "New Furniture Company" may or may not be liable for the claims by the parents. If Bob and John essentially continued Amazing Wooden Toys under the new name, then New Furniture could be liable for the claims. If, however, as it appears from the facts, Bob and

John created a whole new and separate entity, then it is unlikely that New Furniture would be liable.

5. (a) Any general partner has the right to dissolve a partnership, which appears to be what Bob did. Upon such dissolution and after all bills are paid, the assets of the partnership should be distributed to the partners in accordance with their share of the profits. Here, Bob apparently took all of the partnership's assets for his new company. In doing so, he likely breached his fiduciary duty and contractual agreement with Alice on how the assets should be distributed. Alice can likely also make claims of conversion against Bob for converting the assets of Amazing Wooden Toys to his own use and/or for the benefit of New Furniture. Accordingly, Bob is likely liable to Alice for 25% of the value of the assets of Amazing Wooden Toys at the time of its dissolution.

(b, c) It is unlikely that Alice has claims against either John or New Furniture Company unless Alice can establish that they wrongfully conspired with Bob to convert Alice's share of Amazing Wooden Toys. Also, to the extent that New Furniture Company took assets of Amazing Wooden Toys, Alice may have claims of conversion against New Furniture Company.

MODEL ANSWER - QUESTION IV - February 2010

Trust Account Deposit—obligation to self report.

Preserving Client Confidences

Candor To Tribunal

Courtesy to Opposing Counsel

Conflict of Interest

Obligation To Report

Yolanda retained Allen. In Vermont, while it is preferable that a fee agreement be in

writing, it is not a requirement. The fact pattern is silent as to whether Allen explained to Yolanda the basis and nature of his fee, as well as the expenses for which she will be responsible. If he did not do so at their initial meeting, he is required to do so within a reasonable period of time.

Funds held in connection with a representation must be held in trust until they are earned. Allen had yet to earn the funds he received from Yolanda. Therefore, it was proper for him to deposit the check into the firm's trust account.

Allen may have violated the Rules of Professional Conduct when he wrote a trust account check to the expert witness immediately after he deposited Yolanda's check to the trust account. The Rules of Professional Conduct require lawyers to have “collected funds” prior to making a

disbursement from a trust account. In that the check to the expert witness was issued immediately following the deposit of Yolanda's check, Allen disbursed funds that had yet to be collected.

There are several exceptions to the "collected funds" rule. Each exception allows lawyers to disburse funds that have yet to be collected if the lawyer reasonably believes that the instrument that he or she deposited to the client trust account will clear and will become collected funds in a reasonable period of time. With respect to personal checks, the exception states that lawyers may presume that the check will clear and become collected funds only if the personal check(s) that is deposited to the trust account does not exceed \$1,000.00 per transaction. Therefore, if Yolanda's check was a personal check, the exception does not apply and Allen violated the Rules of Professional Conduct by disbursing trust account funds that were not "collected funds". If the check from Yolanda was not a personal check, Allen did not violate the Rules, so long as the check was of the type that the Rule presumes lawyers can reasonably believe will clear and will constitute collected funds within a reasonable period of time.

In addition, the Rules of Professional Conduct prohibit lawyers from using a client's money to carry out the business of another client. The fact pattern indicates that Yolanda's check bounced. Therefore, if funds belonging to other clients were in the trust account, and if the bank honored the check that Allen issued to the expert before Charlie wrote his own check to cover the \$500, then Allen violated the Rules by using other clients' money to carry out Yolanda's business.

Allen has a duty to communicate with Yolanda. That duty includes a duty to consult with her about the means by which the objectives of her case are to be accomplished. Allen may have violated that duty by failing to discuss with Yolanda the fact that he intended to use \$500 of her funds to hire an expert. That is, it is not clear that Yolanda understood or agreed that her funds would be used to hire a snowmobile expert. In addition, when Allen issued the check to the expert, the bookkeeping rules required him to keep a record of the transaction, as well as to notify Yolanda that a portion of her funds had been disbursed.

Rule 1.6(a) prohibits a lawyer from revealing information relating to the representation of a client unless the client consents or unless disclosure is required by Rules 1.6(b) or (c). Rule 1.6(b) requires a lawyer to reveal information relating to the representation of a client in order to prevent the client from committing a criminal act that the lawyer reasonably believes will result in death of, or substantial bodily harm to, a person other than the person committing the act. If Allen reasonably believed that Yolanda would commit a criminal act that would result in Zelda's death, or, in substantially bodily harm being inflicted upon Zelda, then Allen had a duty to reveal her statement to the appropriate authorities.

If Allen reasonably decided that Yolanda's statement that she would hurt Zelda if given the chance would not have resulted in death or substantial bodily to harm to Zelda, he would not have been required to reveal the statement. However, Rule 1.6(c)(1) would have permitted him to do so if he reasonably concluded that disclosure was necessary to prevent Yolanda from committing a crime.

Absent Yolanda's consent, Allen shall not disclose the fact that Yolanda admitted to possessing the snowmobile. Of course, this is a moot if, as may be apparent from the question, the police charged her because they found her in possession of the snowmobile.

If the case goes to trial, Yolanda has a right to testify in her own defense. In general, a lawyer may refuse to offer evidence that the lawyer reasonably believes is false. The exception to the general rule is in criminal cases where the lawyer represents the criminal defendant. If Yolanda insists on testifying in her own defense, Allen should discuss her testimony with her and disclose to her that his ethical duties will require him to take reasonable remedial measures if she testifies falsely. If Yolanda testifies and denies taking the snowmobile, Yolanda's admission to Allen during the initial interview may impose upon Allen a duty to take remedial measures with respect to her false testimony, including, if necessary, disclosure to the court.

Allen's statement to the prosecutor probably does not violate the Rules of Professional Conduct. In general, the Rules do not prohibit attorneys from being rude. The statement does, however, run contrary to the Bar Association's efforts to promote civility. Also, Allen needs to keep in mind that his duty is to Yolanda and that it might not be in her best interest to take the criminal case to a trial. In general, the Rules leave it to the client to decide the objectives of a case, with the lawyer responsible for deciding, in consultation with the client, the means by which those objectives will be pursued. Thus, while Allen might relish an opportunity to "bury" the prosecutor, Yolanda might want to accept a plea. If she chooses to do so, the Rules of Professional Conduct require Allen to abide by her wishes.

It is not clear whether Allen learned of Barbara's representation of Zelda. Assuming he did, Allen had a duty to communicate the potential conflict to Yolanda. Furthermore, Allen would most likely be prohibited from representing Yolanda in connection with the relief from abuse case. The Rules of Professional Conduct prohibit a lawyer from representing a client in a case that is the same or substantially similar to a case in which the lawyer represented a former client, and where the former client's interests are materially adverse to the new client. Once Barbara withdraws (see below), Zelda becomes a former client in the same case in which she was represented. Her interests are materially adverse to Yolanda's. As such, Allen would have to withdraw from the relief from abuse case, unless both Yolanda and Zelda gave informed consent in writing to the conflict. Under the fact pattern, Allen would not have to withdraw from the criminal case. The theft of the snowmobile appears wholly unrelated to the abuse case.

Under the fact pattern, Allen is not representing Yolanda in the relief from abuse case. Therefore, he does not have any ethical obligation with respect to Yolanda telling the Court that she would never hurt Zelda.

a. Dishonesty, Deceit, and Misrepresentation

The Rules of Professional Conduct prohibit attorneys from engaging in conduct that involves dishonesty, deceit, or misrepresentation. The Rules also prohibit attorneys from knowingly making false statements of fact or law to tribunals. When Yolanda raised the potential conflict, Barbara responded in such a way as to suggest she had run a conflict check. She had not.

Arguably, then, she violated the Rules in that her statement involved dishonesty, deceit, and misrepresentation by misleading the Court into thinking that she had run a conflict check.

The Rules of Professional Conduct require a lawyer to take reasonable remedial measures upon learning that the lawyer made a false statements of law or fact to a tribunal. Therefore, upon learning that Yolanda had, in fact, retained Allen, Barbara had a duty to inform the Court of her previous misstatement that it “can't be true” that Allen represented Yolanda. Nothing in the question indicates that Barbara complied with this duty.

b. The Conflict, Barbara's duty to withdraw, and serving the order

The Rules of Professional Conduct prohibit lawyers from representing a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists when the representation of one client is directly adverse to another client. In addition, if a lawyer is prohibited from representing a client due to a concurrent conflict of interest, that prohibition is imputed to all other lawyer's in the firm.

When Zelda contacted Barbara, Yolanda was Allen's client. A concurrent conflict existed in that Barbara's representation of Zelda would be directly adverse to Yolanda's interests. The fact that Yolanda is represented by Allen, as opposed to Barbara, is irrelevant. Given the timeline, Allen would have a conflict in representing Zelda. His conflict is imputed to all the lawyers in his firm, including Barbara. ,

A lawyer must withdraw from a case in which the lawyer's continued participation would result in a violation of the Rules of Professional Conduct. Barbara's continued representation of Zelda would result in an impermissible conflict of interest. Therefore, Barbara has a duty to disclose the conflict to Zelda and to withdraw from representing Zelda. When she withdraws, Barbara must take reasonably practicable steps to protect Zelda's interests, including returning her file and any unearned fees that Zelda may have paid.

Given the emergent nature of Zelda's case, Barbara's conduct might have been excused if she had withdrawn upon learning of the conflict. However, she had the order served on Yolanda *after* she learned of the conflict. In so doing, Barbara took action on behalf of one client in a case where that client's interests were directly adverse to the interests of another client. Her defense to such an allegation would be that the Court ordered her to arrange to have the order served on Yolanda. Of course, by the time she complied with the Court's order, she knew of the conflict. She should have gone back to Court, disclosed the conflict, and let the Court decide how to serve its order on Yolanda.

A lawyer may not bring a claim unless there is a good faith basis for doing so. While Zelda's case is of the type where it may be difficult to asses a client's claims, especially given the emergent nature of those claims, the fact pattern is silent as to whether Barbara made any attempt to ensure that she had a good faith basis to request a relief from abuse order.

d. Duty to Self-Report

When a lawyer has knowledge that “another” lawyer has violated the rules in such a way as to raise a substantial question as to the lawyer's trustworthiness, honesty, or fitness to practice, the lawyer has a duty to notify the appropriate professional authority. The rule clearly refers to a violation by “another” lawyer. Arguably, then, Barbara has no duty to self-report.

a. Depositing personal funds into the trust account

In general, lawyers are not allowed to commingle personal and client funds. However, when a lawyer learns of the failure of a deposit against which trust account disbursements were made, the lawyer has a duty to protect whatever client funds remain in the trust account. Allen wrote the check to the expert, but his responsibilities extend to Charlie in that Rules make one partner liable for the misconduct of another if the lawyer ratifies the conduct or fails to take reasonable steps to avoid or mitigate the consequence of the misconduct. Therefore, Charlie did not violate the Rules of Professional Conduct when, after learning that Yolanda's check had bounced, he deposited his own funds to cover the trust account check that Allen had issued to the expert witness. In so doing, Charlie acted to protect funds belonging to other clients that remained in the trust account.

b. Duty to report Allen

Charlie must notify the appropriate professional authority if he knows that another lawyer has committed a violation that raises a substantial question as to the other lawyer's honesty, trustworthiness or fitness. Decisions from the Vermont Supreme Court and the Professional Responsibility Program establish that the misuse of client funds is a serious violation, regardless of whether actual injury occurs. Arguably, then, Charlie has a duty to report Allen for disbursing funds that had yet to be collected and, in the process, endangering funds that belonged to clients other than Yolanda.

c. Duty to report Barbara

Charlie appears to have a duty to report Barbara. Assuming he learns of her misleading statement to the Court, her failure to inform the Court upon learning of the conflict, and her decision to serve the Order on Yolanda, Charlie will have received information tending to show that Barbara violated the rules in such a way as to raise a substantial question as to her honesty and fitness. Charlie appears to have acquired such information in that he reviewed Allen's intake notes AND, also, learned that Barbara had the order served upon Yolanda As such, Charlie appears to have a duty to report Barbara's conduct to the disciplinary authorities.

- **< > Allen Fee agreement The check from Yolanda & the check to the expert witness Maintaining Client Confidences & Candor to Tribunal- Initial Interview with Yolanda Rudeness Potential Duty to Disclose Conflict & Withdraw Barbara Meritorious Claims Charlie**

Question 1: Breach of Contract (“Does Peter have a claim for breach of contract against Dana?”)

The call of the question assumes that there is a valid contract between Peter and Dana. The contract in question required the purchase of an organic farm consisting of 220 acres of agricultural and forest land, farm buildings (and the right to a revenue stream from the antenna silo), and the antique furniture, all for a price of \$500,000. The contract was a written contract for the purchase of land and other items. Notwithstanding the time lapse for wiring the funds, it appears that Peter properly performed his end of the bargain by making payment.

Peter's best argument for breach would be the absence of a meeting of minds. *Starr Farm Beach Campowners Assoc. v. Boylan*, 174 Vt. 503, 505 (2002) (“An enforceable contract must demonstrate a meeting of the minds of the parties: an offer by one of them and an acceptance of such offer by the other.”) Peter would argue that he was promised 220 acres of land to be used for forestry, agriculture, and farm buildings, but what he actually acquired was only 180 acres - the other 40 will be occupied by giant wind turbines that are inconsistent with his bargain. In addition, Peter can argue that Barry (as Dana's agent) included as part of the “deal” the promise of \$1,000 a month in rental payments associated with the antenna lease on the silo. (Points were awarded for noticing that the revenue stream is included in the appraisal prepared by the Bank, suggesting that the parties believed the antenna lease forms part of the essential bargain.)

Dana is likely to prevail in a breach of contract dispute with Peter for two reasons. First and foremost, notwithstanding Peter's lack of knowledge of the wind turbines (and Dana's failure to disclose), the contract involves the purchase of real estate, and Peter will be deemed to be on inquiry notice of conditions affecting the real property. In this case, Peter himself recognizes the presence of one turbine, and fails to make further inquiry after his discussion with Barry. In addition, Peter never conducts a title search to determine the “development restrictions” specifically called out in the listing. Most important, the P&S states that the conveyance itself is “subject to restrictions and encumbrances of record.” Combined with the integration cause, Peter will be deemed to have taken the property subject to the WindCo lease, notwithstanding his argument that he bargained for 220 acres of forestry / farmland.

A strong example of inquiry notice working in reverse (i.e., court enforces sale despite buyer's discovery of conservation restrictions undermining the essential purpose for purchasing the real estate) is found in the Vermont Supreme Court's recent decision in *Field v. Costa*, 2008 VT 75 (June 6, 2008):

Second, with respect to the antenna lease, although Barry represents to Peter that he will be the recipient of the revenue stream upon purchase of the property, the lease is neither recorded nor evidently made part of the P&S agreement, meaning that the oral agreement has no effect. (Points are also awarded for pointing out the possibility that the oral lease is for more than one year, meaning that it is voidable under the statute of frauds. See also 27 V.S.A. §302 (specifying ineffectiveness of conveyance of an estate in land created orally without a signed instrument) But more importantly, the P&S Agreement contains an integration clause that would supersede any oral agreement between Dana (using Barry as the agent) and Peter.

Question 2: Rescission of Contract (Does Peter have a basis for rescinding the contract?)

Peter has three basic arguments why rescission of the contract may be warranted; however, none are likely to be successful.

Peter could argue under the doctrine of mutual mistake that there was no meeting of the minds between the parties based on the amount of agricultural / forestry acreage conveyed.

Enequist v. Bemis, 115 Vt. 209, 212 (1947). The Vermont courts have also stated that where an error is in the substance of the bargain, rescission with restitution of whatever has been parted with is the only permissible relief. Peter would say that the discrepancy in the acreage useable for forestry / agricultural purposes - which Barry (as the agent of Dana) never understood and therefore never disclosed to Peter - goes to the heart of the substance of the bargain. The remedy in such a case is not a reduction in purchase price (i.e., partial restitution / purchase price abatement), but rescission of the entire contract. *Moonves v. Hill*, 134 Vt. 352 (1976) and *Rancourt v. Verba*, 165 Vt. 225 (1996).

Dana is likely to argue, however, that where the risk in the contract is placed on the buyer (i.e., the risk that encumbrances / restrictions of record may limit the use of the property), there can be no claim for rescission or restitution:

Rancourt v. Verba, 165 Vt. 225, 229 (1996). When Peter's inquiry notice is viewed as a whole, it seems clear that he had many warning signs regarding the wind turbines but chose not to inquire further, thereby accepting the risk of receiving less than what he bargained for.

With respect to the fact that Dana did not sign the P&S, Peter can argue that the contract was one for the sale of real property, and that by failing to sign the contract was voidable. 12 V.S.A. § 181(5) ("An action at law shall not be brought in the following cases unless the promise, contract or agreement upon which such action is brought or some memorandum or note thereof is in writing, signed by the party to be charged therewith or by some person thereunto by him lawfully authorized: ... [a] contract for the sale of lands.") However, because the parties have already performed, Peter is unlikely to prevail on an action at law to recover a restitutionary payment from Dana, notwithstanding the failure to sign.

The problems with timing of payments should not be enough in and of themselves to warrant rescission. Although time was of the essence, and the final payment was made three hours late, both parties substantially performed - in Dana's case by delivering the warranty deed and the bill of sale at closing - so that a court would not find grounds for rescinding absent a showing that the specific harm for which relief was sought resulted from the failure to perform. That does not appear to be the case based on the facts.

(As a bonus, points would be awarded for pointing out that the warranty deed Dana delivered for the real property does not create a basis under property law for voiding the conveyance. While Dana was warranting good title as to her own actions, the warranty deed does not place a requirement upon Dana to disclose any information she may have regarding the WindCo agreement. With regard to the possibility that the transaction can be voided Dana is probably off

the hook because the development agreement with WindCo was with a predecessor in interest, so the warranty deed she delivers is still a representation of her own actions, not a representation that there are no other encumbrances / restrictions of record).

Question 3: Furniture (“Can Peter acquire the furniture without also taking the land?”)

If the contract is rescinded because of absence of meeting of minds, there is no basis for Peter to take the furniture by itself: the furniture was part of a package deal involving \$700k worth of overall value (real estate, right to payments from the antenna lease, and furniture) that Peter is acquiring for \$500k. As summarized by the Supreme Court in *Rancourt v. Verba*, 165 Vt. 225 (1996):

Peter should not be able to use specific performance to obtain the furniture, while escaping the obligation to take the land as he finds it. There is nothing in the fact pattern to suggest that there were two separate contracts (e.g., one for land, one for furniture)

Question 4: Cellco Revenue Stream (“... Explain what rights Peter has (if any) with respect to the revenue stream from Cellco's use of the silo”)

The oral arrangement between Dana and Cellco relates to an interest in land, which generally speaking must be in writing. Under 27 V.S.A. § 302, “Estates or interests in lands, created or conveyed without an instrument in writing shall have the effect of estates at will only. An estate or interest in lands shall not be assigned, granted or surrendered unless by operation of law or by a writing signed by the grantor or his attorney.” The nature of the antenna agreement is more akin to a license, revocable at the option of the landowner. To the extent that Dana and Cellco had tried to enter into a lease, a lease for more than one year must be in writing and recorded in the land records (or at least be evidenced by a memorandum of lease). There is no suggestion here that the agreement is an easement of any kind (although again, Peter should have done the title search to check.)

Absent retaining a recorded easement to secure rights to the revenue stream, Dana cannot enforce her interest in the silo, nor does Cellco have any legal entitlement to maintain its equipment on the silo. Peter can evict Cellco (i.e., revoke its license to be on its property), and demand damages under a trespass theory. Ideally, Peter may try to negotiate a new, permanent lease with Cellco.

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- The law is well-settled in Vermont and other jurisdictions that if a party to a contract has "sufficient facts concerning [another party's] interest in the property to call upon him to inquire, he is charged with notice of such facts as diligent inquiry would disclose." *Black River Assocs. v. Koehler*, 126 Vt. 394, 399, 233 A.2d 175, 179 (1967); *see also Fed. Sav. & Loan Ins. Corp. v. Urschel*, 157 P.2d 805, 810 (Kan. 1945) (notice of those facts that a reasonably diligent investigation would have unearthed is implied where there is knowledge of facts so informing that a prudent person would be prompted to inquire further). Faced with a similar factual scenario, a Texas court reasoned: “Although

[plaintiff] maintains that it was not aware of the prior right of first refusal until it began negotiations to purchase the property . . . any proper inquiry would have disclosed this adverse right. Since [an instrument concerning the property] was recorded and available for inspection, [plaintiff] is charged with constructive notice of its contents.” *Startex First Equip., Ltd. v. Aelina Enters., Inc.*, 208 S.W.3d 596, 602 (Tex. Ct. App. 2006).

Where a contract has been entered into under a mutual mistake of the parties regarding a material fact affecting the subject matter thereof, it may be avoided in a court of law at the instance of the injured party, and an action lies to recover money paid under it. ... The mistake must be one vitally affecting a fact or facts on the basis of which the parties have contracted; and where they have mutually assumed a certain state of facts to exist and contracted on the faith of that assumption, relief from the bargain should be given if the assumption is erroneous.

when a court finds that the party requesting rescission has assumed the risk of the mistake, rescission will be denied. *See* Restatement (Second) of Contracts § 154, at 402-03 (1981); *Shavell v. Thurber*, 138 Vt. 217, 219-20, 414 A.2d 1152, 1153-54 (1980) (even if court finds mutual mistake, no relief granted where buyer assumes risk of mistake by entering transaction knowingly); *Enequist*, 115 Vt. at 213, 55 A.2d at 620 ("If it is shown that the hazard of gain or loss, whatever it may be, was accepted by the parties and entered into the contract, relief will be refused.").

a party seeking rescission of a contract entered into by mutual mistake is not entitled to retain favorable portions of the contract and disregard the rest. *Caledonia Sand & Gravel Co. v. Joseph A. Bass Co.*, 121 Vt. 161, 165, 151 A.2d 312, 315 (1959). In essence, the injured party is given an all-or-nothing option in situations involving mutual mistake. *See Moonves*, 134 Vt. at 355, 360 A.2d at 62 ("Rescission is, of course, an option of the plaintiffs on the facts as found. It is not relief they are compelled to take; they may prefer to keep the property in question and pay the stipulated price.").

MODEL ANSWER - QUESTION VI - February 2010

(1) What type of notice must be provided to Dr. Dentist before the Board can consider revoking her license? Discuss.

The Vermont Administrative Procedures Act (“APA”) has two provisions on notice that govern the notice that must be given to Dr. Dentist. The general rule on pre-revocation notice for a license is stated in 3 V.S.A. § 814(c):

See also In re J.H., 2008 VT 97, ¶ 20, 184 Vt. 293, 302, 958 A.2d 700, 707 (“[A]ny license revocation or suspension that occurs in violation of the statute is void.”). The contested case provision of the APA affords some additional detail on the notice, requiring “(1) a statement of the time, place, and nature of the hearing; (2) a statement of the legal authority and jurisdiction

under which the hearing is to be held; (3) a reference to the particular sections of the statutes and rules involved; and (4) a short and plain statement of the matters at issue.” 3 V.S.A. § 809(b).

The Vermont Supreme Court has further addressed the sufficiency of notice for license revocation proceedings, holding that “[n]otice of an investigation by a licensing board is adequate if it fairly apprises the person of the nature of the charges so he may prepare for the hearing and defend his position.” *Braun v. Board of Dental Examiners*, 167 Vt. 110, 117, 702 A.2d 124, 128 (1997). Therefore, the minimum requirement is that the alleged facts constituting the violative conduct by Dr. Dentist should be set out in writing, with a level of detail that would fairly apprise a reasonable person of the charges and allow preparation of a defense.

The statute allows the notice to be mailed to Dr. Dentist; personal service is not required. 3 V.S.A. § 814(c).

(2) What type of proceeding must the Board hold to decide whether Dr. Dentist's license should be revoked? Discuss the procedural requirements for such a proceeding.

A proceeding to revoke a professional license is a “contested case” under the APA. A contested case is a proceeding, including a licensing proceeding, in which the “legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing.” 3 V.S.A. § 801(b)(2). While 3 V.S.A. § 814(c) does not specifically use the term “contested case,” § 814(a) does refer to the opportunity for a hearing before the grant, denial, or renewal of a license. (“When the grant, denial or renewal of a license is required to be preceded by notice and opportunity for hearing, the provisions of this chapter concerning contested cases shall apply.”) (Emphasis added). In addition, 3 V.S.A. § 129(a)(3) specifies that licensing boards may revoke licenses only after “disciplinary hearing.” *See also* 26 V.S.A. § 767 (Board of Dental Examiners has duty to investigate complaints and charges and hold hearings to determine if they are substantiated). Vermont Supreme Court decisions likewise refer to license revocation cases as contested cases. *See Devers-Scott v. Office of Professional Regulation*, 2007 VT 4, ¶ 55, 181 Vt. 248, 271, 918 A.2d 230, 247 (In a license revocation case, the Court noted “a stipulated consent order is not persuasive precedent for a contested case such as this one.”); *see also In re Desautels Real Estate, Inc.*, 142 Vt. 326, 334, 457 A.2d 1361, 1365 (1982) (“The intent of [§ 814(c)] is to give a licensee a hearing.”).

Generally speaking, the statutory contested case procedures call for the agency to act in a quasi-judicial capacity. The notice requirements are set forth above. *See* 3 V.S.A. § 809(b). Opportunity must be given all parties to respond and present evidence and argument on all issues involved. 3 V.S.A. § 809(c). Testimony should be recorded for possible later transcription, which must be made available on request. 3 V.S.A. § 809(f). Dr. Dentist is entitled to be represented by an attorney, and the attendance of witnesses may be compelled by the Board and by Dr. Dentist's attorney. 3 V.S.A. §§ 129(a)(2), 809(h). Finally, the Board's decision must be “based exclusively on the evidence and on matters officially noticed.” 3 V.S.A. § 809(g). In other words, only information taken into the record may form the basis of a decision.

Another point is that “the burden of proof in a disciplinary action shall be on the [Board] to show by a preponderance of the evidence that the person has engaged in unprofessional conduct.” 3

V.S.A. § 129a(c). Thus, the Board should be required to proceed first with presentation of its evidence of violations before Dr. Dentist (or her representative) is offered the opportunity to present her evidence and argument. The Vermont Supreme Court has specifically held that the preponderance of the evidence standard satisfies due process requirements. See *In re Miller*, 2009 VT 112, ¶ 19.

A final note is that the APA allows for informal disposition of any contested case by stipulation, agreed settlement, consent order, or default, unless precluded by law. 3 V.S.A. § 809(d). Thus, if the parties agree, they are free to resolve the matter without the necessity of proceeding with the contested case hearing.

(3) Do the Vermont Rules of Evidence apply in this proceeding? Discuss.

The Rules of Evidence apply but in a relaxed fashion. Specifically, the APA provides that in a contested case proceeding:

3 V.S.A. § 810(1). The Vermont Supreme Court has addressed this provision and clarified that “administrative proceedings before the Board are ‘relaxed’ and allow the use of hearsay evidence if otherwise reliable.” *In re Miller*, 2009 VT 112, ¶ 17; see also *In re Desautels Real Estate, Inc.*, 142 Vt. 326, 335-336, 457 A.2d 1361, 1365 (1982) (noting “the liberal contours of 3 V.S.A. § 810(1)”).

(4) May the Board of Dental Examiners take emergency action to prevent Dr. Dentist from practicing during the pendency of the administrative proceeding? If so, what process, if any, must be afforded to Dr. Dentist in connection with the emergency action? Discuss.

Yes, the Board has authority to prevent Dr. Dentist from practicing, but only in certain circumstances. Vermont Statutes title 3, section 814(c) provides:

3 V.S.A. § 814(c).

The alleged facts appear to present an imminent threat to public health, safety and welfare, as patients could be seriously injured. If the Board finds that public health, safety or welfare imperatively require emergency action, the Board may order a summary suspension of Dr. Dentist's license before the hearing is held. However, there exists a “constitutional imperative of providing, upon timely request, a prompt post-suspension hearing following a summary-suspension order when a full hearing and final decision on the merits is unlikely to occur in the short term.” *In re Miller*, 2009 VT 112, ¶ 11, n. 5. Thus, upon request, the Board must promptly hold such a hearing to review the summary suspension, unless a full hearing on the merits is imminent.

- No revocation, suspension, annulment, or withdrawal of any license is lawful unless, prior to the institution of agency proceedings, the agency gave notice by mail to the licensee of facts or conduct which warrant the intended action, and the licensee was given an opportunity to show compliance with all lawful requirements for the retention of the license.

... The rules of evidence as applied in civil cases in the superior courts of this state shall be followed. When necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible thereunder may be admitted (except where precluded by statute) if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. ...

If the agency finds that public health, safety, or welfare imperatively requires emergency action, and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action. These proceedings shall be promptly instituted and determined.

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