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Suite 700, One Exchange Plaza
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FEBRUARY 2006 NORTH CAROLINA BAR EXAMINATION
(Essay Portion)

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Harold and Wilma were married in 1996. They shared a happy marriage in Greensboro, North Carolina until January 2003. In January 2003, Harold began to feel restless and dissatisfied with Wilma. Harold took up archery as a hobby and a way to spend time away from home. He joined the local chapter of the “William Tell Archery Club” and began to regularly attend the club’s weekly “Shoot-Outs” and weekend picnics. As his archery improved, he spent more and more time at the club. At the club, he met Gretchen. Gretchen took extra time to help Harold with his archery skills. In May 2003, Harold separated from Wilma and moved into an apartment in the same complex in Greensboro where Gretchen lived.

Sometime in March 2003, Wilma thought Harold was spending too much time at the archery club and began to suspect that he was having an affair. She hired a private detective, who saw Harold and Gretchen talking to each other and practicing archery together on a daily basis, although it appeared to the detective that Gretchen had a steady romantic relationship with the manager of the archery club. After Harold moved out, however, in June 2003, the private detective saw Harold and Gretchen kissing and, on more than one occasion, Harold spending the night at Gretchen’s apartment.

Wilma wants to sue Gretchen for alienation of affection and criminal conversation.

QUESTIONS:

1. Analyze the strengths and weaknesses of Wilma’s potential claim against Gretchen for alienation of affection.
2. Analyze the strengths and weaknesses of Wilma’s potential claim against Gretchen for criminal conversation.

Developer owned thirty acres at 1818 Dover Road, Raleigh, NC, on which he intended to build several buildings. The thirty acres were divided into six, five acre lots, none of which were delineated on the land, but all of which were shown on a plat filed with the register of deeds. Developer employed Architect to design a building for one of the lots.

While Architect was working on the design, Developer obtained a loan from Strong Bank. Strong Bank secured the loan with a deed of trust lien on the entire thirty acres. After recording the deed of trust, Strong Bank advanced funds under the deed of trust.

While construction was underway and while Architect was still performing design services, Developer defaulted on the loan and payment of Architect's fees. Strong Bank began foreclosure on the thirty acres and Architect filed a mechanics' and materialmen's lien against "land located at 1818 Dover Road, Raleigh, NC, owned by Developer." Architect then notified Strong Bank that his lien was superior to Strong Bank 's deed of trust lien.

QUESTION:

What are the lien rights if any of Architect and Strong Bank?

Alice Attorney was a lawyer at ABC Law Firm, in Greensboro, North Carolina. On February 28, 2005, Wanda Wife, an acquaintance of Alice's family, asked Alice to represent her in an action to collect past due child support payments from Howard Husband, from whom Wanda had been divorced for 3 years and who had not paid child support payments in two years. The amount of child support payments past due totaled \$25,000. Bernard Barrister, an attorney who left ABC Law Firm in July of 2003 taking all of his clients with him, had represented Husband in a breach of contract action against a supplier for Husband's restaurant in 2001. Barrister had been the only attorney at the firm to work on that case and to have knowledge of the particulars thereof.

Alice agreed to represent Wife in the action. Because Wife was unable to pay the flat hourly rate normally charged by Alice's firm, Alice agreed to undertake the representation on a contingency fee basis. A written agreement set forth the terms of the contingency arrangement: Alice would represent Wife in return for ten percent (10%) of the amount of past due child support payments collected from Husband. In addition, Alice would be reimbursed the costs of litigation, to be deducted from the award before the contingent fee was calculated.

QUESTIONS:

1. Did Alice Attorney violate the North Carolina Rules of Professional Conduct in undertaking the representation of Wanda Wife?
2. Does the billing arrangement negotiated between Alice Attorney and Wanda Wife violate the North Carolina Rules of Professional Conduct?

Sadie Smith, a grandmother, was riding in a car driven by her husband, Harry Smith, when their vehicle was struck by a tractor trailer which ran a red light. Mr. and Mrs. Smith were killed instantly.

Mr. Smith had three adult children, Jim, Hank and Nancy. Hank predeceased Mr. Smith. Mr. Smith had five grandchildren, Alice, Betty, Carol, David, and Eliza. Eliza was Hank's only child. Smith left bank accounts valued on the date of his death at \$30,000, and his estate received a wrongful death settlement from the trucking company in the amount of \$900,000.

Three months before his death, Mr. Smith met with Attorney Brown who was asked to prepare a new will naming his wife as primary beneficiary and his grandchildren as secondary beneficiaries. Mr. Brown completed the documents one week prior to Mr. Smith's death and mailed a draft to Mr. Smith for his review.

After the accident, Jim Smith went to his father's house to look for his will and found a stack of papers on his father's desk. The stack of papers included a "Last Will of Harry Smith," dated January 20, 2000, which left his residuary estate in equal shares to his grandchildren. The document was marked in large handwritten letters "CANCELLED." A large empty envelope from Attorney Brown addressed to Mr. Smith was on the bottom of the stack. On the back of the envelope, the following was written in bright blue ink: "I, Harry Smith, being of sound mind, write this as my last will. I leave all of my estate to my dear wife, Sadie. I am writing this out since Attorney Brown is taking his sweet time to prepare my new will March 3, 2004." The stack of papers was anchored to the desk by Mr. Smith's two checkbooks.

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Jim Smith, Mary Smith and Mr. Smith's secretary reviewed the back of the envelope and agreed it is Mr. Smith's handwriting.

QUESTION:

How will Mr. Smith's estate be distributed?

Sandhills Creek Golf Club, Inc. (“Sandhills”) is a North Carolina corporation operating a profitable public golf course in Moore County, North Carolina. Sandhills has a \$3 million certificate of deposit with First National Bank and no debt. Alice Adams has served as a member of the board of directors of Sandhills since 2000. Throughout the period from 2000 to 2004, the board identified property for developing a residential subdivision near the golf course as an important business goal for Sandhills.

In March 2004, a Moore County real estate broker approached Adams on the putting green at Sandhills and informed her that Sally Seller, who owned 10 acres of land adjoining the golf course, was planning to sell her property. Adams contracted to purchase Seller’s property in her own name for \$250,000 without disclosing her plans to the Sandhills board of directors. In July 2004 Adams disclosed the purchase to the Sandhills board, saying that although she intended to hold the land for herself, the golf club “would be protected.”

In October 2004 the Sandhills board demanded Adams’s resignation and announced that Sandhills would bring a lawsuit to challenge Adams’s purchase of Seller’s property. As soon as she learned of the board’s intentions, Adams tendered her resignation and drove to the office of Tom Ruffin, a Moore County lawyer who regularly represented Sandhills. In 1995 Ruffin had prepared various estate planning documents for Adams, but he has not represented her since. Adams was shown into Ruffin’s private office and said: “Thanks for seeing me on such short notice. You’re my lawyer, and I need your advice about the lawsuit Sandhills is bringing against me.”

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QUESTIONS:

1. Is Adams liable to Sandhills for purchasing Seller's property?
2. May Ruffin represent either Adams or Sandhills in the lawsuit?

Paul and members of his family used a road across Dan's land for more than forty years to reach Paul's land on which he maintained a hunting cabin and a family cemetery. The public, on occasion, used the road to attend hunts, funerals and social events on Paul's land. Paul maintained the roadway, making occasional repairs and once repaired a bridge across the stream. There was no other access for vehicular traffic to Paul's land.

No permission from Dan to cross his lands had been given or requested.

On March 5, 1998, Dan placed a barricade across the road and told Paul to stop using it. Paul replied to Dan that he had a right to use the road and that Dan should remove the barricade.

Paul filed the appropriate action in the Superior Court, Gates County, North Carolina, where the land was situated to stop Dan from denying Paul and others use of the road across Dan's lands by having a permanent easement declared.

Paul and Dan stipulated that Dan knew Paul and others used the road, that the use had been without permission, continuous and uninterrupted for more than forty years and that the road had been located in the same place for more than forty years.

At trial the above evidence and stipulations were presented. From judgment declaring a permanent easement in favor of Paul, Dan appealed.

QUESTION:

Should the judgment be upheld?

Sam Smith was on trial for the first degree murder of Homer Hill. Homer was found dead in a soybean field in October 2000, 200 yards from Runt Smith's Country Store in Bertie County, North Carolina. Homer died as a result of three (3) bullet wounds to the head, fired from a .25 caliber pistol. The bullets struck Homer in the center of his forehead, his left eye and his right eye. Homer's hands were tied behind his back with duct tape, and his laces were missing from his boots. Sam was seen in and around the store on the day before Homer's body was discovered. When Sam was arrested, a pat down search of his clothing revealed a sales slip from a local store showing a purchase of beer, peanuts and a box of .25 caliber ammunition three days before the date that Homer was killed. There was no confession. The murder weapon was never found. Sam pled not guilty.

At the trial, in August 2001, in a hearing outside the presence of the jury, the prosecutor, Dave Adams, advised the court that he wanted to present evidence concerning Sam's murder of Walter Randy in 1989. Sam had confessed to killing Walter Randy and had entered a plea of guilty to second degree murder in 1989 for which he served nine (9) years in prison. Sam's lawyer objected and asked the Court for a hearing. The trial Judge agreed. At the hearing, Adams offered evidence relating to the 1989 second degree murder of Walter Randy. Walter Randy had been found dead in the same soybean field in October, 1989 exactly 200 yards from Runt Smith's Country Store in Bertie County, North Carolina. Walter Randy died as a result of three (3) bullet wounds to the head. The bullets had been fired from .25 caliber pistol and the bullets struck Walter in the center of his forehead, his left eye and his right eye. Walter's hand were tied behind his back with duct tape, and his laces were missing from his boots. The conviction for

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second degree murder was 10 years old as of the time of the offense at issue here. Dave Adams told the Court that this evidence was critical to the State's case. The evidence tended to prove that Homer's murder was committed by Sam, in that the circumstances tended to show it was identical in almost every detail and thus, identified Sam Smith as the murderer. Smith's lawyer objected to the admission of evidence concerning Walter Randy's murder by Smith. The Trial Court overruled the objection and allowed the jury to hear the evidence concerning the murder of Walter Randy.

Sam was convicted of the premeditated murder of Homer. At sentencing, the jury deadlocked on whether or not the death penalty should have been imposed and Sam received a sentence of life imprisonment without parole.

On Appeal, the defendant asserted that the Trial Judge committed prejudicial error by allowing into evidence the 10 year old murder of Walter Randy.

QUESTION:

Did the Trial Court commit error when it admitted the evidence of Sam Smith's 10 year old murder of Walter Randy?

Billy had a crush on his college classmate, Bessie. One morning Bessie showed up at Billy's apartment and told him that the previous evening she had gone out on a date with Slick Sam and that Slick Sam had gotten her extremely drunk and then took advantage of her state by having sex with her. Billy's roommate, Robby, was present during this conversation. Billy decided he was going to go to Slick Sam's house and "beat him within an inch of his life" to get retribution for what he did to Bessie. He asked Robby to go with him, and Robby agreed. Bessie tells Billy where Slick Sam lived, what he looked like, and what he was wearing the night before. Billy and Robby drive in Robby's car to the house. Billy brought a baseball bat with him. When they arrived at Slick Sam's house, Billy (carrying the bat) and Robby walked up to the front door. Billy tried the doorknob, and it was open. Billy opened the door and entered, and Robby followed him. Billy saw a man matching Bessie's description of Slick Sam asleep on the couch. Billy hit the man several times with the bat, and yelled at him that "this is for raping Bessie." Robby did nothing but stand next to the couch as Billy hit Slick Sam with the bat. Billy and Robby then left the scene. Slick Sam suffered several facial cuts and a broken rib during the assault.

QUESTIONS:

1. What crimes were Billy guilty of under these facts?
2. Was Robby guilty of any of the crimes committed by Billy?
3. Was Bessie guilty of any crime?

Bryson loaned \$50,000 to Debtor. Debtor signed a promissory note agreeing to pay Bryson the full amount on or before January 1, 2001. Debtor failed to pay the note when due. Bryson demanded payment and Debtor refused. On June 1, 2001, Bryson brought an action in the Superior Court, Buncombe County to collect the promissory note. Debtor answered the complaint and denied owing anything. Bryson's lawyer failed to proceed and six months later left Buncombe County, North Carolina without notifying Bryson. Debtor's lawyer decided to let the case sit because Debtor had no real defense and owed the money to Bryson.

On June 1, 2002, Bryson's case appeared on the administrative civil calendar for a status review. Nothing had happened in the case for a year. Notice was sent to both lawyers but neither appeared for the status review. The judge involuntarily dismissed Bryson's case for failure to prosecute pursuant to Rule 41(b), North Carolina Rules of Civil Procedure. The judge's order of involuntarily dismissal specified that the dismissal was without prejudice and provided that a new action based on the same claim could be instituted within six months from June 1, 2002.

The court taxed the costs of the action against Bryson. Pursuant to the order of dismissal, the Clerk of Superior Court of Buncombe County taxed costs against Bryson in the amount of \$175.00.

In 2003, Bryson realized that he had heard nothing about his suit against Debtor and learned that his lawyer had left town. Bryson hired a second lawyer to look into the status of the case. She did so, and on February 16, 2003, filed a civil action against Debtor in Superior Court, Buncombe County to recover the \$50,000. She did not pay the

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costs taxed against Bryson in the original action before filing the new lawsuit against Debtor.

Debtor's lawyer moved to dismiss the new action alleging that:

(1) Bryson's second action was barred because the action was not filed within the six (6) months allowed by the court in the involuntary dismissal order entered on June 1, 2002 and (2) that Bryson had failed to pay the costs of the first action before re-filing the lawsuit on the promissory note. The judge granted Debtor's motion and dismissed the action with prejudice on the grounds that Bryson had violated Rule 41(b) and (d), North Carolina Rules of Civil Procedure:

QUESTIONS:

1. Did the court err in dismissing Bryson's case because he failed to re-file within the six month period set forth in the involuntary dismissal order pursuant to Rule 41 (b)?
2. Did the court err in dismissing Bryson's case because he failed to pay the costs that had been taxed against him in the first action in violation of Rule 41(d)?

Johnny Goode bought a set of batteries manufactured by Battery Company for his boom box from a local shop, Audio Accessories. When he reached his van in the parking lot, he removed the batteries from their sealed container and began to install them into his boom box. Goode noticed the batteries were damp but nothing else unusual at the time. As he later drove through town listening to his favorite CD on his newly energized boom box, his fingers begin to sting and burn. He went to the emergency room shortly thereafter, by which time his hands were red, blistered and, as he described them, “on fire.” Goode was admitted and treated for severe chemical burns presumably related to a battery acid leak, eventually requiring skin grafts, with resulting disfigurement and partial loss of use of the hands.

Goode sued the Battery Company and Audio Accessories, alleging breach of the implied warranty of merchantability. Defendants moved for summary judgment on the ground that Goode was unable to establish that the battery products were defective at the time they left the manufacturing plant or the store. In opposition to a strong evidentiary showing by the defense, Goode offered his own affidavit setting out the circumstances of his purchase of the batteries and subsequent injury.

QUESTIONS:

1. How should the court rule on Battery Company’s motions, and why?
2. How should the court rule on Audio Accessories motions and why?

Joe Smith was charged with second-degree murder in the Superior Court, Mecklenburg County. He entered a plea of not guilty.

Smith was represented by a court appointed lawyer, Tom Swift, who had been practicing criminal law for twenty-four years and had been certified a specialist in that field.

In preparation for the trial, the defendant had provided Swift with the names and contact information for six witnesses he said would provide very strong alibi testimony for him. Swift interviewed each of the witnesses at least twice prior to trial but did not subpoena any of them. He also told the defendant that he would not call them as witnesses during the upcoming trial because in his opinion they would do more harm than good. Smith strenuously disagreed and filed a pro se motion seeking substitution of counsel and alleging ineffective assistance of counsel which he contended violated his federal and state constitutional rights.

The defendant was granted a pre-trial hearing and the Court denied his motion. The defendant renewed his objection at trial. The trial commenced and Swift did not call any of the alleged alibi witnesses. The jury found the defendant guilty and he appealed. He argued on appeal that he was denied his basic rights under both the Sixth Amendment to the United States Constitution and Article I of the North Carolina Constitution which guarantees a criminal defendant the right to “confront the accusers and witnesses with other testimony.”

QUESTION:

1. Did the trial court err in not allowing substitute counsel under the above facts?

On January 5, 2005, Perfect Picture, a start-up photography company, entered into a contract with More 'N Storage, Inc. to store Perfect Picture's photography equipment at its storage facility. Two months after entering into the contract, More 'N Storage was unable to locate Perfect Picture's property.

On May 1, 2005, Perfect Picture filed a complaint against More 'N Storage. Thereafter, on May 17, 2005, the attorney for Perfect Picture contacted the attorney for More 'N Storage, explaining that they had decided it was in Perfect Picture's best interest to settle the matter. On May 18, 2005, Perfect Picture's attorney sent a letter to More 'N Storage, Inc.'s attorney stating that Perfect Picture was willing to settle the dispute upon terms and conditions requiring the payment of \$32,750.00 plus interest over a three year time period and provided a specific schedule for the payments. The letter spelled out the particular terms and conditions which were required for the settlement of the matter and stated that More 'N Storage, Inc.'s attorney would prepare the settlement agreement and promissory note. The letter further stated that Perfect Picture's attorney would forward a copy of the settlement letter to the court.

On May 19, 2005, the attorney for More 'N Storage sent an unexecuted settlement and mutual release agreement and an unexecuted promissory note in full compliance with the May 18th letter to Perfect Picture's attorney. He included a cover letter indicating that his client approved the settlement. However, Perfect Picture refused to sign the settlement documents and wanted to proceed with the lawsuit.

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More 'N Storage has filed a motion to enforce the settlement agreement. Perfect Picture argues that the execution of the settlement documents was a condition precedent to the formation of the contract. North Carolina law applies.

QUESTIONS:

1. Was the execution of the settlement agreement and promissory note a condition precedent to the formation of the contract between Perfect Picture and More 'N Storage?
2. Was a binding and enforceable contract formed between Perfect Picture and More 'N Storage?