

**MASSACHUSETTS BAR EXAMINATION
SECOND DAY FEBRUARY 25, 2016
ESSAY SECTION
MORNING QUESTIONS**

1. Mary worked at Big Software (“Big”) as a computer software engineer in Boston. Last week was not a good week for her.

On Monday, Harold the janitor cleaned the floor in the lunchroom, but did not put up a sign warning other employees that the floor was wet and slippery. Mary, when running on her way to the bathroom, slipped on the wet floor and fell. She broke her wrist.

On Tuesday, Mary complained about her fall to her supervisor Peter. Peter told her to fill out some forms to report the fall, but otherwise to get back to work. Peter’s lack of sympathy towards her made Mary angry, so she went to her Big work computer, downloaded Big’s most recent software designs, and sent these designs by email to her friend Jane, who worked for Small (which is a direct competitor with Big). Peter, who for weeks had been secretly monitoring Mary’s personal and work emails, saw what Mary had done, and called Mary into his office. He yelled at her for about an hour for sending the software designs to Small. Peter also told her that he had seen her personal emails, including ones from her new boyfriend and her tax accountant. Mary became very upset, left work, and went to her doctor who gave her anxiety medicine to take.

On Wednesday, Peter called Mary back into his office and told Mary that she would need to take off all of her clothes for him and dance, or else he would fire her. Mary refused, burst out crying, and went back to her desk to work. Peter then called Chloe, the President of Big, and told her that Mary was mentally unbalanced and would need closer work supervision by him.

On Thursday, Mary decided to apply for work at Small. She called Jane and Jane told her that she could have a software engineering job at Small as long as her current job references were good. Jane then called Peter for a reference on Mary. Peter told Jane that Mary was an alcoholic and often was drunk at work – neither of which was true. Jane then called Chloe, who told Jane that Mary was mentally unbalanced. Jane then called Mary and said that she would not be hired at Small.

On Friday, Mary faxed a letter to her State Senator Sally telling her that Big was not a good employer to work for and that the state should not hire Big. Peter saw a copy of the letter on the fax machine and told Chloe. Big sued Mary for sending the letter.

What are the rights of the parties?

2. Ethan and Leah met at a mutual friends' wedding in August 2010. Although Leah had a boyfriend, Ben, she started dating Ethan while she was also seeing Ben. While Leah didn't know a lot about Ethan, she was sure he was "Mr. Right." In whirlwind fashion, she dumped Ben and married Ethan in December 2010. Initially, Ethan was a kind husband, although he occasionally commented that he missed his freedom. Once when Leah asked him why he would say such a thing, Ethan got angry and threw a beer bottle at the wall. He also yelled that she got what she wanted. On another occasion, Leah was so afraid that she left their apartment and stayed at her mother's house for the night.

Ethan worked as a merchant marine, which required him to be at sea on a ship for six months at a time. In January 2011, Ethan left for a six-month work assignment at sea. While Ethan was on the ship, the only means of communication he and Leah had was email. Ethan and Leah would frequently email each other. In March 2011, Leah sent an email to Ethan in which she happily announced that she was pregnant. Leah did not get a response from Ethan for several days and when he did respond, he barely acknowledged the pregnancy.

Ethan returned home in June 2011 and Sean was born in July 2011, right on schedule. Soon thereafter, Leah sensed something was wrong. Ethan always seemed sullen. He barely spoke to her or interacted with Sean. Finally, Leah had had enough and demanded to know why he was being so mean to her and the baby. Ethan flew into a violent rage and yelled, "You're just like my first wife! I know that baby's not mine!" Leah was shocked since Ethan had never mentioned that he had been previously married.

Despite Leah's fear and feelings of mistrust for Ethan, she stayed with him until it was time for Ethan to leave for another six-month assignment at sea. While away at sea, Ethan started to feel remorseful. He wrote an email to Leah in which he said "I'm so sorry for what I said. No matter what, I will always care for and take care of Sean as my son."

Things were okay for Ethan and Leah for a couple of years. Ethan took a job in the company's home office so he didn't have to travel and Leah forgot the horrible things Ethan had said. However, in 2014, their marriage hit a rocky patch. Ethan moved out of the house and stopped contributing to the household expenses and for Sean's care. Leah hired Attorney and filed for divorce seeking alimony and child support.

Ethan refused to pay alimony or child support claiming that Sean was not his son. Ethan also demanded a paternity test. Leah objected to any paternity tests insisting that Ethan was

Sean's father. In preparation for the divorce proceedings, Leah told Attorney about Ethan's outburst several years ago in which Ethan said he had been previously married. Leah also told Attorney that she did not know whether Ethan or Ben was Sean's father. Leah also said to Attorney "I don't want to know." Attorney conducted a public records search in Massachusetts and found that Ethan had married Janet in 2007. There was no record that either Janet or Ethan had filed for or obtained a divorce.

In the meantime, Leah and Ben reunited. For years, Ben had always thought Sean was his son. Ben sought to intervene in the divorce action and demanded a paternity test to prove that he was Sean's biological father. Leah told Attorney that if asked during a paternity hearing she would testify that Ben was definitely Sean's father.

What are the rights of the parties?

3. Debtor operated a dry cleaning business in Boston. On January 25, Bank loaned Debtor \$25,000 for general operating purposes. The same day, Debtor signed a valid security agreement pursuant to which Debtor granted Bank a security interest in: “All Debtor’s equipment now owned or hereafter acquired to secure repayment of all debts of whatever nature owed by Debtor to Bank, including all loans and future advances.”

Bank neglected to file a financing statement covering the \$25,000 loan, at which time Debtor owned one dry cleaning machine and no steam presses.

On March 1, Debtor borrowed \$10,000 from NewBank to purchase a steam press. At the time of NewBank’s loan, Debtor signed a valid security agreement granting NewBank a security interest in the steam press. Debtor used the full \$10,000 to purchase the steam press, taking possession of it on March 2. NewBank did not file a financing statement in connection with this transaction.

On September 1, Debtor completely paid off its original obligation to Bank. On September 4, Debtor borrowed an additional \$25,000 from Bank. Debtor did not sign any new security agreements or financing statements in connection with the new loan.

As of October 31, Debtor was in default on both loans, owing \$20,000 to Bank and \$10,000 to NewBank. Both creditors sought to foreclose on Debtor’s dry cleaning machine, which was worth \$20,000, and steam press, which was worth \$10,000.

In addition to its loans from Bank and NewBank, Debtor had a \$5,000 loan outstanding from Lender. Debtor told Lender that Debtor was in possession of a promissory note (the “Note”) that had been signed and delivered to Debtor by Maker, which stated: “I promise to pay \$5,000 to the order of Debtor.”

Debtor negotiated successfully for Lender to accept the Note in full satisfaction of Lender’s \$5,000 loan to Debtor. Without notice to Maker, Debtor then wrote: “Pay to the order of Lender” on the back of the Note, signed it, and delivered it to Lender. Lender thereupon canceled the debt owed to it by Debtor.

Several days later, Debtor approached Maker, and demanded repayment of Debtor’s \$5,000 without presenting the Note. Maker did so, unaware of what had occurred between Debtor and Lender. Later that month, Lender presented the Note to Maker and demanded payment of the \$5,000. Maker refused.

What are the rights of the parties?

4. Fran, Melanie, Colleen and Lisa were all co-workers in Boston. With the state lottery prize approaching \$1 billion, the four co-workers decided to pool their money and buy \$100.00 worth of lottery tickets. Each person would contribute \$25.00. The co-workers also decided that Fran, the most senior employee in the group, would collect the money from everyone and purchase the lottery tickets on their behalf on Friday.

On Friday morning, Fran collected \$25.00 from everyone. In addition to buying tickets for the group, Fran also purchased \$20.00 of lottery tickets for herself. Fran made copies of the group's tickets for everyone to check during the drawing on Friday evening.

When the winning numbers were drawn, none of them matched the tickets purchased for the group. However, Fran was thrilled that one of her tickets would yield a \$50,000 cash prize. Fran sent a text message after the drawing to the group saying: "Hey ladies, I won! I won!" Lisa responded immediately saying: "What do you mean YOU won? Didn't WE ALL win?" Fran responded back: "I'll explain on Monday morning."

Over the weekend, Fran decided to spend her cash prize on a brand new luxury SUV and a fur coat. She planned to bring both items to work with her on Monday morning.

When everyone arrived at work on Monday morning, they gathered at Fran's desk, eager to learn what had happened with the lottery tickets. Fran explained that she had purchased lottery tickets for herself - with her own money - separate and apart from the group. Fran encouraged the group members to double-check their lottery tickets and confirm that none of the winning numbers matched. She then presented a copy of her own winning ticket. After explaining details of the winning ticket, Fran proudly displayed her new fur coat to her co-workers. She also pointed out the office window to direct the co-workers to view her new luxury SUV. The three co-workers congratulated Fran and returned to their desks.

Despite their kind words to Fran, Lisa and Melanie were furious. They felt betrayed by Fran and resented her for flaunting her winnings. Lisa and Melanie decided to meet over lunch to "figure out how we are going to handle this situation." They also invited Colleen to lunch. While Colleen was disappointed that the group did not win, she was genuinely happy for Fran.

Over lunch, Lisa and Melanie discussed ways to "get even" with Fran. They insisted that Fran should have at least told the group about her buying lottery tickets on her own. Lisa suggested that the best way to get back at Fran was to slash the tires on her luxury SUV. Melanie said in response: "That's fine, but what about the fur coat? I can't bear the thought of

seeing that woman in that fur coat every day.” Melanie suggested that they should also take Fran’s fur coat. Lisa and Melanie agreed that Lisa would slash the tires and Melanie would take the fur coat.

Colleen sat quietly and listened to the discussion during lunch. Colleen said: “I don’t have a problem with Fran, so please leave me out of this.” Melanie implored Colleen to participate, but Colleen steadfastly refused. Melanie finally relented and responded: “Fine, but you better not say anything about this plan. And if you do, there will be hell to pay.”

Later that afternoon, Lisa borrowed a knife from the employee cafeteria and went to the parking lot. However, Lisa forgot what Fran’s new car looked like and ended up slashing tires on a SUV that belonged to another employee. When Lisa pointed out the slashed tires to Melanie, Melanie exclaimed “Lisa, you idiot...that’s the wrong car.” Lisa told Melanie “not to worry” because Fran lived in her neighborhood and that she would “take care of the car tonight after work.”

Meanwhile, Melanie planned to take Fran’s fur coat during Fran’s afternoon smoking break. When Fran left her desk to go smoke, Melanie went to take Fran’s fur coat. Colleen, who sat next to Fran, confronted Melanie and asked Melanie to reconsider her plans. Melanie shoved Colleen aside and again warned her that there would be “hell to pay” if she said anything to anyone. Melanie then took the fur coat and put it in the dumpster.

After work, Lisa went to Fran’s house. She discovered that Fran parked the SUV in her garage. Lisa broke into the garage through a side door and, instead of slashing the tires, she decided to set fire to the SUV. Fran’s husband, Bobby, smelled the smoke and went to the garage where he shot and wounded Lisa. The fire from the garage eventually spread to the rest of the house, killing Fran’s elderly mother.

What crimes have been committed? What defenses are available?

5. Tonks LLC (“Tonks”) was a Massachusetts corporation, with a principal place of business in Somerville, Massachusetts. Tonks was an importer, exporter, manufacturer and distributor of foreign and domestic beer. Sherlock Corp. was a South Carolina corporation with a principal place of business in Columbia, South Carolina. Sherlock was licensed by the State of South Carolina as a wholesale distributor of wine, spirits, and beer. Sherlock did not have an office in Massachusetts, and had never owned or rented any property in Massachusetts.

In September 2013, Tonks entered into a distribution agreement with Sherlock for Sherlock to serve as the exclusive wholesaler for Tonks’ new and proprietary product, BostonBeer, in South Carolina. BostonBeer was made with water from the Charles River and was advertised as a “pure Boston beer experience.” Sherlock’s President signed the contract in his office in Columbia, South Carolina. Sherlock then purchased and distributed BostonBeer in South Carolina. Sherlock sent orders and payments for BostonBeer to Tonks’ office in Massachusetts, and Sherlock’s agents traveled to Massachusetts to transport the beer by truck back to South Carolina.

Unfortunately, South Carolinians were not impressed with authentic BostonBeer made with water from the Charles, and sales were slow. Six months later, dissatisfied with the pace of Sherlock’s sales in South Carolina, Tonks terminated the contract. Tonks claimed that Sherlock was \$79,000 in arrears in payments for beer deliveries. Sherlock wanted to continue to do business with Tonks and told Tonks that its termination of the contract violated a South Carolina statute. Tonks filed a Complaint in U.S. District Court in Boston seeking to recover the \$79,000 Tonks claimed it was owed, and for a declaratory judgment that Tonks properly terminated its commercial relationship with Sherlock.

Sherlock has filed a motion to dismiss the complaint. You are the law clerk to the U.S. District Court judge in Boston before whom the motion is pending. Write a bench memorandum to the Court advising the Court about how it should rule on the motion.

**MASSACHUSETTS BAR EXAMINATION
SECOND DAY FEBRUARY 25, 2016
ESSAY SECTION
AFTERNOON QUESTIONS**

6. Jake was at Bar having some beers with friends. When his cell phone rang, Jake walked to the back of Bar near the bathrooms to take the call. When Jake leaned against a closed door (which had a “Do Not Enter” sign on it) while talking on his phone, the door opened and Jake lost his balance and fell down a flight of unlit stairs to the basement and died. Jake’s Mother, the administrator of Jake’s estate, sent a common law and Chapter 93A demand letter to Harold, the owner of both Bar and the building in which Bar was located. When Harold did not respond to the demand letter, Jake’s Mother (on behalf of Jake’s estate and herself personally) filed suit against Harold in Superior Court for wrongful death (based on negligence and/or gross negligence) and for breach of Chapter 93A.

During discovery, Harold admitted that the stairs that Jake had fallen down (i) did not comply with the state building code, (ii) had been built 20 years ago and repaired thereafter in work not covered by building permits, and (iii) had been the subject of frequent complaints to Harold by Bar employees as being dangerous.

At the close of the evidence at trial, the judge gave the wrongful death claims to the jury while reserving the Chapter 93A claim to herself. Harold objected to the Chapter 93A claim not being given to the jury, but the judge overruled this objection. The judge did, however, give the jury an advisory question as to whether the stairs’ lack of compliance with the building code caused Jake’s death.

The jury returned a verdict in favor of the defendant Harold on the wrongful death claims, and answered the advisory question by stating that Jake’s Mother had not proven that the stairs’ lack of compliance with the building code caused Jake’s death.

The judge then entered judgment in favor of Harold on the wrongful death claims. The judge entered judgment in favor of Jake’s Mother on the Chapter 93A claim, and awarded her \$500,000 in loss of consortium damages, along with \$2 million for Jake’s lost future earnings and \$500,000 for Jake’s death. The judge then doubled the damages and awarded Jake’s Mother her attorney’s fees and costs.

Jake's Mother timely moved for judgment notwithstanding the verdict ("JNOV") on the wrongful death claim, and Harold similarly moved for JNOV on the Chapter 93A claim. The judge denied both of these post-trial motions. Both parties appealed.

You are a law clerk for a Massachusetts Appeals Court justice. That justice has asked you to write her a memo on whether the trial judge's rulings were proper.

7. Mark and Claire were both 37-years old and had dated for a number of years when they decided to live together. Mark had a son, Adam, from a prior relationship. Both Mark and Claire agreed that, while eventually they would love to have children of their own, they wanted to wait a few years. Soon after Mark and Claire moved in together, they drafted and signed a document which provided as follows:

- a. Mark and Claire would contribute equally from their respective earnings toward their joint living expenses;
- b. Mark and Claire agreed to freeze fertilized embryos for future use in the event they were not able to conceive a child naturally;
- c. In the event of the death of either Mark or Claire, the fertilized embryos would become the property of the survivor;
- d. If Mark and Claire separated after living together for five years or more, either of them could apply to a court for a fair amount of support, if needed; and
- e. Mark and Claire would execute wills that provided that the entirety of their respective assets would pass to each other upon death.

After living together for six years, Mark and Claire tried to have children but were unable to conceive a child. Previously, Mark and Claire had fertilized embryos frozen and stored at Clinic. While they were living together, Mark purchased 100 shares of stock in ABC3 Corp., a highly profitable technology start-up company.

Mark duly executed a will that provided as follows:

Article I: I leave my collection of baseball cards to my nephew, James.

Article II: I leave my stock in trust for the benefit of any children born to Claire and me.

Article III: I leave my diamond watch to my mother, Shirley.

Article IV: I give the residue of my estate to Claire, if she survives me.

Claire never created a will. During the first year of living together, Mark and Claire shared living expenses equally. Subsequently, Mark paid for the bulk of the living expenses, including rent and utilities. Shortly after executing his will, Mark was killed in a car accident. At the time of his death, in addition to the assets listed above, Mark had a joint savings account of \$100,000 with his mother, Shirley, which account had been opened thirty years prior. Shirley, who was still alive, disliked Claire immensely.

Mark's will was found in his desk drawer after his death. In the margin of his will, Mark had penciled in the following: "In the event of my death, all frozen fertilized embryos shall be destroyed as I do not want my children to be born without knowing their father." Mark had initialed the changes and also had two witnesses sign in the margin next to the changes.

Claire has requested that Clinic release the frozen fertilized embryos to her. Mark had obtained a \$10,000 loan from Town Bank and had handed over the baseball card collection to Town Bank as security for the loan. At the time of his death, the baseball card collection was worth \$2,500 and Mark still owed \$6,000 on the loan. Mark was wearing his diamond watch at the time of his accident. It was never found.

What are the rights of the parties?

8. TechCo was a privately held Massachusetts corporation that produced computers. DataCo was a technology company in the business of data storage. The parties entered into a written agreement for DataCo to buy one of TechCo's "Phoenix" computers for \$200,000. At the time, the market price for Phoenix computers was \$150,000. When TechCo delivered the Phoenix to DataCo on the specified date, DataCo refused to accept delivery or pay. TechCo sued DataCo for breach, claiming that because TechCo's computers were manufactured to order, it was forced to dispose of the Phoenix at a loss.

At trial, DataCo's President testified that DataCo rejected the Phoenix because both parties knew that DataCo actually wanted a "Crane," which was much faster and superior to the Phoenix. DataCo's President further testified that the parties had agreed that their contract would refer to the computer as a "Phoenix" to keep DataCo's new capabilities confidential from its competitors. DataCo's President also testified that in the past, the parties had entered into contracts that had specified a less powerful computer than the model TechCo had actually delivered.

Aside from the matter with DataCo, TechCo had been searching for a new President for some time, and finally made an offer to Patti for the position. TechCo's charter authorized the issuance of one million shares of one class of stock (the "Common Stock"), all of which were issued and outstanding. As part of her compensation package, Patti negotiated stock options for 50,000 shares of TechCo Common Stock at a purchase price of \$10 per share, reflecting its then current valuation. The stock options were exercisable at a rate of 12,500 shares per year over a four-year period.

Venture Capitalist ("VC") offered to invest \$5 million in return for 500,000 shares of TechCo Common Stock at a purchase price of \$10 per share, but insisted that VC's shares have a preference providing for the payment of dividends first to VC's shares in an amount equal to \$2 per share annually, and then equally to all other shares of TechCo Common Stock.

Fern, one of the founders of TechCo, owned 30% of its Common Stock. Fern was bitterly angry about having been passed over as President of TechCo, and the prospect of VC's investment in the company. At a meeting of TechCo's Board of Directors, upon hearing that TechCo's Board and the other holders of the outstanding Common Stock of TechCo supported Patti's hiring and VC's investment, an agitated Fern shouted, "You can't grant stock options to Patti, or sell shares of TechCo with preferential rights!"

What are the rights of the parties?

9. Jonathan was shot and killed by Officer Smith at a rally in Cambridge. Jonathan's family filed a wrongful death civil action against the Cambridge Police Department. The civil action was settled. Criminal charges were also filed against Officer Smith. At a pretrial evidentiary hearing, the Massachusetts Superior Court judge was asked to rule on the following motions:

- a. The prosecution sought to inquire as to the details of the settlement between the Cambridge Police Department and Jonathan's family. The defense filed a motion in limine objecting to admission of this evidence.
- b. The prosecution sought to introduce evidence of additional training programs that were provided by the Cambridge Police Department to its officers after the shooting incident. The defense filed a motion in limine objecting to admission of this evidence.
- c. The defense sought to introduce evidence of Officer Smith's record as a "decorated veteran" of the Cambridge Police Department. The defense also sought to introduce evidence of Jonathan's reputation as a "well-known trouble-maker" in the community, as well as past crimes committed by Jonathan. The prosecution filed a motion in limine objecting to admission of this evidence.
- d. The prosecution moved to exclude Officer Smith from the courtroom during the examination of other police officers at the scene of the shooting.
- e. The defense sought to cross-examine the prosecution's expert witness with a textbook on proper police conduct. The prosecution filed a motion in limine objecting to the use of this evidence.
- f. The prosecution sought to introduce a 16-year old witness who was very nervous and wanted to read her testimony from a prepared written statement. The defense filed a motion in limine objecting to this use of a written statement.

How should the court rule on the motions?

10. You are a law clerk to a justice of the Massachusetts Appeals Court. Next week she will be sitting on a panel to hear the following three cases.
- a. Husband and Wife had two young daughters. They had a deeply held religious belief that parents should use corporal punishment to discipline children. They also had a sincere desire to help children in need and applied to become foster parents. The Commonwealth's Department of Children and Families ("DCF") required that all applicants to become foster parents assure DCF that a foster child would experience a safe, supporting, nurturing environment free from abuse or neglect. In the questionnaire that Husband and Wife completed for DCF, they reported that they "have used physical discipline on their daughters" and that such discipline is "appropriate when there is a continuous pattern of disobedience." Husband and Wife stated that they would not use physical discipline on any foster children. DCF denied their application. Husband and Wife brought suit, lost, and have filed an appeal.
 - b. The state legislature recently enacted a statute making it a crime to possess any "portable device or weapon from which an electrical current, impulse, wave or beam may be directed, which current, impulse, wave or beam is designed to incapacitate temporarily, injure or kill" ("Stun Gun Statute"). Margaret was detained by the manager of a supermarket on suspicion of shoplifting. When the police arrived, they arrested Margaret and conducted a search of her purse. Inside her purse, Margaret had an operational stun gun. She claimed that the stun gun was for self-defense against a former boyfriend. Margaret was charged and convicted of violating the Stun Gun Statute. She has appealed.
 - c. Because of a rash of particularly ugly political advertisements, the state legislature passed a law criminalizing false statements about candidates running for public office that are designed or tend to aid or injure or defeat such candidate. Citizen Smith published pamphlets criticizing Candidate, who was running for state representative. The pamphlets said that Candidate "chooses convicted felons over the safety of children and families." Candidate applied for a criminal complaint against Citizen Smith claiming that Citizen Smith knowingly published false statements designed to defeat Candidate's candidacy. Citizen Smith filed a motion to dismiss the criminal application, which was denied by the Superior Court. Citizen Smith has appealed.

Write a bench memorandum advising the justice on how she should rule on each appeal.