

MASSACHUSETTS BAR EXAMINATION

SECOND DAY FEBRUARY 25, 2010

ESSAY SECTION

MORNING PAPER QUESTIONS

1. Duke and Ella were members of City's business, civic and philanthropic community, often appearing on the "society" pages of City's newspapers and magazines, serving on many charitable boards and belonging to many exclusive groups and clubs. The source of Duke and Ella's wealth was unclear but many attributed their wealth to Ella's family while Duke's background remained a mystery. Despite Duke and Ella's insistence on keeping their personal lives private, there was gossip that Duke and Ella's marriage was "stormy" and, at times, "rocky." One Sunday evening, Mae, Duke and Ella's longtime maid, returned from a weekend off and found Duke unconscious and bleeding from a chest wound on the floor in his bedroom and Mae called City police. An ambulance transported Duke to Hospital where he underwent emergency surgery and survived. Ella was not in the house when Mae found Duke and Ella has not been seen since despite a worldwide search to find her by City, state and federal law enforcement officers. As a result of an investigation, and despite many false sightings of Ella, police concluded that Duke's gunshot wound was self-inflicted and charged Duke with Ella's murder.

At Duke's trial for the murder of Ella, a celebrated proceeding covered by local and national media, the following evidence was offered by Prosecution and Defense and a proper objection was made to each by Prosecution and Defense respectively:

(a) A City police report offered by Prosecution of an incident three weeks before Ella's disappearance at a restaurant where Duke and Ella argued while having dinner causing the police to be called. The report was prepared by Officer, a recently retired City police officer now living out of state, who responded to the call at the restaurant. The report contained a statement of Tom, the restaurant manager, stating "This is no big deal. Duke and Ella are regulars. This happens all the time when they've had a few drinks. But this is nastier than usual." Tom's statement in the report continued, "They were arguing about money. I heard Ella say to Duke, you're spending all my money, you lazy, cheating bum. I've had it!"

(b) Testimony offered by Prosecution of Matt, Duke's personal attorney who handled his business affairs, about a conversation Matt had with Duke after Ella's disappearance wherein Duke allegedly confessed to Ella's murder. Also, during this meeting, Duke filled out the claim form with Matt's assistance to collect on a life insurance policy for two million dollars that Duke had taken out on Ella's life six months before Ella's disappearance. Prosecution also sought to introduce into evidence the life insurance policy and claim form.

(c) The testimony offered by Prosecution of Jane, a longtime friend of Ella, of Jane's conversation with Ella wherein Ella stated to Jane that she was "afraid" of Duke and said "I plan to leave Duke for good."

(d) The autopsy report of Medical Examiner offered by Prosecution of an autopsy performed ten years ago on Lucy, Duke's late wife, which indicated unusually high levels of insulin in Lucy's system but which listed the cause of Lucy's death as "inconclusive."

(e) The testimony offered by Defense of Nancy, Ella's psychiatrist, that Ella told Nancy three months before her disappearance that she was "depressed" and sometimes thought she "needed to do something."

(f) The testimony of Harry, the Director of a local homeless shelter, offered by Defense, that Duke visited the shelter weekly to serve supper to the shelter's guests and always served dinner on Thanksgiving at the shelter too.

(g) Records offered by Defense of Pharmacy, a local drugstore where Ella usually filled her prescription for her anti-depressant medication, which indicated that Ella had not refilled her prescription for her anti-depressant medication for the past two months before her disappearance.

(h) Testimony of Rocky, offered by Prosecution, who shared a cell for a few days with Duke at State Prison while Duke was awaiting trial, that Duke confessed to him that he shot and killed his wife. Rocky came forward with the information hoping to get his sentence for his armed robbery and drug possession convictions reduced.

For each objection, how should the trial judge rule? Why?

2. Town has traditionally had a problem with late-night teenage criminal activity, such as robbery, car theft and vandalism.

Last year, a religious order, the House of The True God (the “House”) moved its main church to Town, and began actively recruiting followers from the residents of Town and nearby communities. Followers of the House believe, among other things, that misbehaving teenage children must be subjected to stern physical discipline, specifically whipping with olive branches by their parents, in order to remove the sin from their bodies.

Last week, Town government passed two local criminal ordinances. The first ordinance, the “Youth Curfew,” provided that no person under age 17 could be in a public place in Town between 11 p.m. and 5 a.m. unless they were with their parent, guardian, or licensed teacher. This ordinance was passed both to prevent crime and to protect Town’s youth from being tempted into late-night criminal behavior. The second ordinance, the “Anti-Abuse Rule,” provided that no person under age 17 within Town could be hit with branches or sticks by a parent or guardian. This ordinance was passed to protect Town’s youth from physical abuse by their parents. Both ordinances provided, upon conviction, for a criminal fine not to exceed \$500 per violation.

Last week, Alex, age 16, was on his way home from a late night party at a friend’s house when he was arrested and charged by Town police for being on a public street at 1 a.m. in violation of the “Youth Curfew.” That same night, Town police arrested Bill, a leader in the House, for violation of the “Anti-Abuse Rule” for hitting his 16-year old son Charles on his buttocks with an olive branch after Charles lied to Bill.

Alex and Bill have separately moved to dismiss their respective criminal charges. How should the court rule on these motions and why?

3. Bob and Dan had been friends for many years. After several months of discussions, Bob agreed to buy Dan's house for \$200,000. Bob gave Dan a \$10,000 check for a deposit and wrote the following words on the back of the check:

"Deposit on property at 30 Pine Street, Town. Total price of \$200,000."

A closing was scheduled for the next month. The following week, with Dan's permission, Bob started clearing overgrown brush and trees from Dan's yard and also brought in a substantial amount of fill to level off the yard for an addition Bob hoped to build. While clearing the yard, Bob asked Dan if he could also remove a shed located at the back of the property. Twenty-one years earlier, Dan had given Neighbor oral permission to erect and keep the shed on the property. Dan immediately told Neighbor to remove the shed. Neighbor refused.

When Cheryl, Dan's friend, learned that Dan was selling his house, she told Dan "I'll buy it for much more than \$200,000". Dan then told Bob that he was no longer interested in selling the house to him and returned to Bob the \$10,000 deposit check which Dan had never endorsed. On the day of the scheduled closing, Bob appeared at the closing to buy Dan's house but Dan did not show up and the closing did not occur.

Bob has brought suit against Dan seeking to enforce the sale and for violation of General Laws, chapter 93A.

Dan has brought suit against Neighbor.

What are the rights of the parties?

4. Doe, Jones and Smith (DJS), a Boston law firm, has operated as a professional corporation since 2000. Attorneys Doe, Jones and Smith were the only shareholders and each had equal 1/3 shares. Pursuant to their written shareholder agreement, each attorney agreed that in the event one of them left the firm the departing attorney would not directly compete against DJS. From 2000 to 2008, Doe, Jones and Smith ran the firm on a consensual basis.

In 2008, Andrews became employed as a DJS associate attorney but he never became a shareholder. Doe and Andrews were heavily involved in the personal injury litigation practice at DJS and worked closely together. In 2009, strong disagreements developed between the shareholders over the payment of office support staff. The shareholders' relationship deteriorated and the office environment became strained and fractured. In January 2009, Doe, who was responsible for hiring the firm's outside business vendors, entered into a five-year service agreement with Docu Co. to provide the firm's litigation support services. DJS entered into the agreement without Doe disclosing to the other DJS shareholders that his wife, Wilma, was a 25 percent shareholder of Docu Co. The service agreement paid Docu Co. above market rates.

In July 2009, following an argument with Jones, Doe stated, "I cannot take this place any longer. I am sick of being here!" Jones then demanded to know if Doe meant he was leaving the firm. Doe denied he was leaving DJS. That same day, Doe and Andrews had a private conversation about leaving DJS to form their own law firm. Their plans quickly developed and within days Doe and Andrews had secretly bought the internet domain name "DoeAndrewslaw.com". In addition, Doe secretly filed a certificate of organization with the Massachusetts Secretary of State's office, registering the new firm, "Doe and Andrews, PC".

The following week, Jones and Smith came to the office and found a letter addressed to them from Doe and Andrews. The letter informed Jones and Smith that Doe and Andrews had left the DJS firm to open up a new personal injury law firm located in Boston. Jones and Smith further discovered a copy of a letter on DJS letterhead that Doe and Andrews had mailed to over 100 DJS personal injury clients notifying them of the opening of the new firm and strongly

encouraging clients to transfer their pending case files to their firm. Eventually, 50 of these clients transferred their cases from DJS to Doe and Andrews, PC.

Six months later, Doe and Andrews settled one of the transferred DJS personal injury cases for \$ 2.7 million dollars which resulted in a \$900,000 contingency fee paid to Doe and Andrews for their representation.

What are the rights of the parties?

5. Jack, a novelist, married Martha and secured a life-insurance policy on himself naming Martha sole beneficiary. The policy premiums were paid by automatic deductions from Jack's savings account in a Boston bank. Jack and Martha subsequently had three children, Adam, Betsy and Charles. After the children were born, Jack and Martha executed wills together. Jack's will provided that if he predeceased Martha, she would inherit his manuscripts. Martha's will provided for the disposition of Jack's manuscripts to University. At the same time that Jack and Martha signed their wills, they also signed a written contract not to revoke them.

Jack and Martha divorced amicably after twenty years of marriage. Jack then married Rebecca. Jack subsequently received a major literary prize. To celebrate, Jack invited Martha to lunch. During lunch, Jack gave Martha a savings account passbook issued by a New York bank. Inside the cover of the savings account passbook was a printed form, which Jack had completed with Martha's name as sole beneficiary. Jack explained to Martha that he had opened the savings account for the literary prize proceeds. Jack deposited the proceeds into the savings account a few days after his lunch with Martha.

Martha had a sister, Nancy, who was single with no children, and a brother, Oliver, who had two daughters, Patricia and Quincy. Nancy was very close to Martha and her children, but rarely saw Oliver or his daughters. Nancy prepared her own will, which provided in pertinent part: "I give, devise and bequeath all of my property, real and personal, tangible and intangible, first, to my mother, and should she predecease me, I give, devise and bequeath all of my said property to my nephews Adam and Charles, and my niece, Betsy, in equal shares, that is, one-third to each."

Nancy executed the typewritten will in the presence of Jack and Martha, who also attested the will at the same time. Months later, observing the same will formalities, Nancy prepared a codicil that further provided in pertinent part: "First, to my nephew Adam, 25 shares of X Corp. Second, to my niece Betsy, 25 shares of X Corp. Third, to my nephew Charles, 25 shares of X Corp." Shortly thereafter, X Corp split its stock on a three-to-one basis. Nancy retained all of the X Corp shares.

Subsequently, in January of last year, Jack and Nancy were killed in a car accident while riding home together from Betsy's graduation. At the time of the accident, Nancy's mother, Oliver, and Adam had previously died. In September of last year Rebecca gave birth to a girl.

What are the rights of the parties?

MASSACHUSETTS BAR EXAMINATION

SECOND DAY FEBRUARY 25, 2010

ESSAY SECTION

AFTERNOON PAPER QUESTIONS

6. Alice worked at Hotel in Boston as an assistant bookkeeper for several years earning \$23,000 per year. Last year, Hotel discovered that \$10,000 was missing from one of its payroll accounts. As Hotel believed that Alice had stolen this money, Hotel fired Alice and reported her to the local police. Alice was prosecuted and convicted of grand larceny. Alice appealed her conviction and one-year jail sentence on the grounds that the trial court improperly denied her suppression motion, which claimed that the evidence against her was illegally seized. Alice's main factual defense at her criminal trial was that the real thief was Bill, Hotel's outside financial advisor, who has always lived in Florida.

Last month, with her criminal appeal pending, Alice filed two civil suits.

Alice's first suit was against Hotel in Superior Court for malicious prosecution and defamation on the basis that Hotel falsely claimed to the police and district attorney's office that Alice had stolen money from Hotel. Alice used the sheriff's office to properly serve Hotel with the complaint. Hotel has moved to dismiss Alice's suit against it. In its motion, Hotel also requested that Alice reimburse Hotel for its legal defense costs.

Alice's other suit was against Bill in the U.S. District Court in Boston for tortious interference. Alice served the complaint on Bill at his Florida home by certified U.S. mail. Bill has moved to dismiss Alice's suit against him for a failure to state an actionable claim, a failure to serve him properly, as well as for a lack of personal and subject-matter jurisdiction.

How should the courts rule on these motions to dismiss?

7. Paul, an eighteen year old, went to Tavern with some co-workers one evening after work. While at Tavern, Paul ate a sandwich and also consumed six beers which were served to him by Bartender who was one of Paul's teachers in high school. At about 9:00 p.m., Paul left Tavern and drove to Friend's house where Friend was having a party. Friend lived at home with his Parents. Paul consumed several more beers at Friend's party. Friend's Parents knew about the party and had bought a few cases of beer for the party. Shortly after midnight, Paul left Friend's house. While driving home, Paul approached an intersection and accelerated to 45 miles per hour to get through the intersection while the traffic light was green. When Paul entered the intersection, he struck a car driven by Mary. Mary's car was crossing through the intersection. Mary had slowed down as she approached the intersection and then proceeded through the red light. Mary was traveling at 20 miles per hour at the time of the accident. The speed limit for both roads was 30 miles per hour. Paul and Mary suffered serious injuries as a result of the accident and both of them were rushed to Hospital. Tests performed on Paul when he was admitted to Hospital soon after the accident indicated he had a blood alcohol level of twice the legal limit.

Mary underwent emergency surgery at Hospital. Jeff, Mary's father, rushed to Hospital upon learning of the accident and, upon his arrival, was told that Mary had died moments earlier. Grief stricken upon learning that his only child had died, Jeff had difficulty breathing and experienced chest pains. Debby, a doctor employed by Hospital, examined Jeff and determined he had an anxiety attack caused by learning of Mary's death. Debby treated Jeff for anxiety and sent him home. The next day, Jeff suffered a heart attack and died.

What are the rights of the parties?

8. Safe Co., a Massachusetts manufacturer, supplied and sold chemical resins to Big Co., a producer of brake pads for the railroad industry. Beginning in 2003, Big Co. would send an annual Purchase Order for resin to Safe Co. The Purchase Order did not contain any terms regarding warranties or indemnification. Periodically, as needed, Big Co. would also call Safe Co. to place individual orders for shipments of resin. Upon receiving an order, Safe Co. would send Big Co. an invoice that contained an amount due, as well as, among other preprinted terms, an indemnity provision. Big Co.'s purchasing manager, Donna, initialed all of the Safe Co. invoices next to the price noted on the invoice and gave it to her accounts payable staff to pay.

The following indemnity provision appeared on all Safe Co. invoices sent to Big Co:

Indemnity Agreement: Buyer shall defend, indemnify and hold seller harmless from and against all claims, liabilities, costs and expenses including, but not limited to, those related to injury or death of Buyer's employees arising from or connected with the possession, handling or processing or use of the product by Buyer or others.

The Safe Co. invoice included a further provision which stated:

Existing Contract: No modification of this contract shall be of any force or effect unless in writing and signed by the party claimed to be bound thereby, and no modification shall be effected by the acknowledgement or acceptance of purchase order forms containing different conditions.

Beginning in 2005, Big Co. amended its annual Purchase Orders that it sent to Safe Co. Those changes added new preprinted terms and conditions, including the following:

Warranty: Seller expressly warrants that the goods covered by this order are of merchantable quality, free from defects in material and workmanship conforming to the specifications furnished by Buyer and suitable for purposes intended by Buyer and all without limitation or exclusion of any warranty expressed or implied. Acceptance of all or any part of the goods shall not be deemed to be a waiver of Buyer's right to cancel or return the goods or to make any claim for damages.

Big Co. also sent Safe Co. the newly amended Purchase Orders in 2006 and 2007. Safe Co. continued to send periodic resin shipments as requested, along with the invoices containing the same indemnity language and provisions as in all of its earlier invoices to Big Co.

In late 2007, there was an explosion at the Big Co. factory and it was later determined that the resin supplied by Safe Co. was the likely cause of the explosion.

What are the rights of the parties?

9. Hal and Willa married in Massachusetts in 1985. During the marriage, they tried to have a child by in-vitro fertilization. With each attempt, they signed a consent form provided by the clinic, checking a box indicating that in the event of their “separation” the fertilized eggs should continue to be stored for implantation.

Hal and Willa divorced in 2003. Their separation agreement, which merged into the divorce judgment, provided that Hal, a lawyer, pay Willa, who had never worked outside the home, \$15,000 monthly until either’s death, or Willa’s remarriage. The agreement made no mention of the fertilized eggs, which remained in the clinic.

In 2006, Hal met Donna, a dermatologist who had her own line of skin care products. Donna told Hal that her first husband, Frank, had a history of mental illness and suicidal tendencies, and disappeared in 1996. Donna believed Frank to be dead.

Hal and Donna married in 2007. The following year, Donna sold her skin care business for \$5 million. Around the same time, Donna began to receive threatening emails from Frank, who was in fact still alive. As a result, Donna became dependent on prescription medications, and was required to stop practicing when her medical license was suspended because of her addiction.

Last fall, Hal fell ill and did not work for several months. During this period, Hal stopped making his alimony payments to Willa. Shortly after returning to work, Hal voluntarily accepted a retirement package from his firm at the age of sixty-six. Hal then notified Willa, who was fifty-eight and working as a receptionist, that he would stop paying alimony because of his illness and retirement. To Willa’s dismay, Hal also told Willa that after experiencing several years of infertility themselves, Hal and Donna planned to use the eggs stored at the clinic to have a child.

Several weeks ago, Frank appeared at Donna and Hal’s home and demanded that Donna take him back as her husband.

What are the rights of the parties?

10. Sunnyville, an exclusive summer resort community, has seen an increase in crime during the off-season. Pete and Dave, both ex-convicts on parole, living in City, drove to Sunnyville on an early February evening. Pete drove a car owned by Mary that he removed from a supermarket parking lot in City earlier in the day. While cruising around Sunnyville smoking marijuana and drinking wine, Pete and Dave found a house owned by Owners with no lights on in the house and no car in the driveway. Pete pulled the car into the driveway. Dave broke a rear window of the house with a tire-iron and entered the house. Then Dave let Pete into the house by the rear door. Each carried a flashlight and a pillowcase. Pete had in his jacket pocket a gun that he bought “on the street” in City. Dave had a packet of cocaine in his shirt pocket.

Without turning on any lights, Pete went into the dining room where he found silverware in a cabinet and put the silverware into his pillowcase. Dave went upstairs to the master bedroom where he opened several dresser drawers, found some jewelry and put the jewelry into his pillowcase. Pete and Dave were startled by the sound of a car entering the driveway. The car was driven by Owners’ son, Ed. As Ed entered the front hall of the house, Dave hit Ed over the head with his flashlight and knocked Ed unconscious. Pete went through Ed’s pockets and took his wallet, containing cash and credit cards, along with his gold watch. Pete then turned-on, but did not light, a burner on the gas stove in the kitchen. Then, Pete and Dave ran out of the house with their pillowcases, got into the car and sped away knocking over Owners’ mailbox at the end of the driveway. Ed woke up, smelled gas and called the Sunnyville police to report what happened.

While heading back to City, Pete and Dave stopped at a secluded parking lot in Sunnyville to drink more wine and check out their pillowcases. While on a routine patrol, Officer Smith of the Sunnyville Police Department saw the car parked in the lot with the lights off but with the motor running. This was an area known by the police for drug dealing, especially in the off-season. After watching the car for several minutes, Officer Smith approached the car, knocked on the driver’s window and asked “What’s going on?” Neither Pete nor Dave answered. Officer Smith then asked for Pete’s license and registration. Officer Smith shined his flashlight inside the car and saw a pillowcase on the passenger side floor where Dave was seated. Officer Smith also saw on the floor what appeared to be a bottle in a paper bag. Officer Smith then ordered Pete and Dave out of the car, hand-cuffed them and put Pete and Dave into the rear of his police car. During the process, Pete stumbled and was unsteady. When

Officer Smith patted down Pete, he found the gun. Officer Smith then went back to the car, looked into the pillowcase on the passenger side floor and found the jewelry. Officer Smith continued to look inside the car and found the other pillowcase with silverware inside under the driver's side front seat, several cocaine packets in the glove compartment and Ed's wallet on the backseat. Officer Smith then took Pete and Dave to the Sunnyville police station where they were put in separate rooms for questioning, searched again and read their Miranda rights.

Detective questioned Pete continuously for over one hour without a break despite Pete's repeated requests to take one. Pete denied committing any crimes. Detective left the room telling Pete he was going to talk to the officers questioning Dave. When Detective returned, not knowing what Dave had told the officers, Detective told Pete that Dave told the officers, "It was all Pete's idea and that Pete hit the guy." Pete denied hitting Ed, and stated, "Dave did that, not me."

What crimes may be charged and what defenses or motions may be asserted?