

**MASSACHUSETTS BAR EXAMINATION
SECOND DAY MARCH 1, 2012
ESSAY SECTION
MORNING PAPER QUESTIONS**

1. Bill worked for Megacorp, which is based in Boston, for three years. In January 2010, three and one-half years after he was laid off, Bill sued Megacorp and its President, Sarah (an Irish citizen who lived and worked in Ireland), in Suffolk Superior Court. The Complaint set forth claims of defamation while he was an employee, breach of his employment contract, and wrongful discharge in violation of Chapter 93A. Bill's Complaint did not have a jury demand.

During the lawsuit, certain motions were presented to the Court.

- a. Bill served the Complaint and Summons in early February by certified mail on Megacorp in Boston, and by certified mail on Sarah in Ireland. Megacorp and Sarah moved to dismiss the Complaint for inadequate service of process. Bill opposed this motion. The Court scheduled the motion for hearing at the end of February. Sarah came to Boston to personally attend the hearing on this motion to dismiss. Bill had a deputy sheriff serve her by hand just outside the Superior Court courtroom. The deputy sheriff served her with a copy of the Complaint and Summons on behalf of herself and as President of Megacorp. The Court then held a hearing on the motion to dismiss.
- b. Sarah, who had never resided in the United States, moved to dismiss the Complaint on the basis of a lack of personal jurisdiction. Bill opposed this motion to dismiss.
- c. Megacorp and Sarah filed their Answers in March 2010. Fifteen days later, Bill filed an Amended Complaint which included a jury demand. Megacorp and Sarah moved to strike Bill's Amended Complaint. Bill opposed this motion to strike.
- d. In October 2010, Megacorp served by hand a set of interrogatories and document requests on Bill. Bill promptly responded to the document requests. When Bill did not respond to these interrogatories within 40 days, Megacorp moved to compel interrogatory answers and for sanctions. Bill immediately served his interrogatory answers on Megacorp and opposed Megacorp's motion.

- e. Megacorp and Sarah moved for summary judgment on all counts based on the statute of limitations, and also on the Chapter 93A count as being inapplicable. Bill opposed the motion.
- f. Bill prevailed at trial for \$100,000 and three months later judgment entered in his favor. Twenty-nine days thereafter, Megacorp and Sarah filed Notices of Appeal by hand with the Suffolk Superior Court Clerk's Office. Bill served a motion to strike these Notices of Appeal on the grounds that they were not effectively filed. Megacorp and Sarah opposed this motion.

How should the Court rule on these motions?

2. Mary exercised to stay fit but felt that she needed professional instruction and equipment for a better workout. Mary visited Fun Fitness (“Fun”) in Boston, a chain of exclusive womens’ health clubs with its parent company, Quality Health Clubs, Inc. (“Quality”) incorporated in Delaware. Quality operates health and fitness clubs under different names and with local management throughout the United States. Fun advertises that it provides group exercise programs, individual training instruction with qualified instructors, and weight training with state-of-the-art equipment manufactured by Muscle Inc. (“Muscle”). Jane is employed as a personal trainer at Fun. Jane has no formal training or certifications but she exercises daily, is familiar with the exercise machines and lifts weights using Muscle equipment.

Mary joined Fun and paid \$1,000 for a one-year membership. As part of Fun’s membership process, Mary, as the member, was required to sign Fun’s release form which stated as follows:

Member agrees to follow all rules and regulations of the management at Fun Fitness. Member is responsible for the appropriate use of all equipment. Member understands that inappropriate use of equipment may cause injury to the Member and to others. Member holds Fun Fitness harmless and agrees not to seek any compensation for injuries caused by or based on a claim of negligence received while using the facilities, machines or equipment at Fun Fitness.

Mary became a regular at Fun—attending group classes, swimming, using exercise equipment and lifting weights. Mary used Muscle’s Warrior Shoulder Bench Press (“Warrior”) by sitting on the bench, holding the bar with the weights above her head, and performing repetitions by moving the bar up and down. The lifting bar was secured by slots and pegs on both sides of the bench. The bar had metal hooks on its ends allowing Mary, while sitting on the bench, to move the bar forward and put the hooks onto the pegs above her head.

On her day off, Jane went to Fun to work out. While there, Jane saw Mary using the Warrior. Jane yelled to Mary: “Mary, hold up, I’ll spot for you. You shouldn’t do that alone.”

Mary thanked Jane and then added substantially more weight to the bar than she usually lifted. Jane spotted Mary but the added weight was too much for Mary as she was unable to lift the bar cleanly. Mary was tiring and losing her strength. After telling Mary to take a break, Jane went to the front desk to take a personal phone call. While Jane talked on the telephone, she faced away from Mary. Mary continued lifting but was unable to hold up the bar. Mary tried to put the bar's hooks onto the pegs, but the pegs were unable to hold the bar's weight. The pegs snapped off the Warrior under the weight of the bar and the bar came down on Mary and crashed onto her chest. She was seriously injured.

Ambulance was called and Mary was taken to Hospital. Ed was the emergency medical technician ("EMT") on Ambulance. George was the driver of Ambulance. While going to Hospital, Ambulance was struck by Car operated by Larry. Larry went through a red light. Larry claimed that Car would not stop. Car's brakes had been serviced recently by Repair Shop ("Repair"). Car had been the subject of a recall for defective equipment. Neither George nor Larry wore seatbelts. Ed, George and Larry were injured in the accident. Ambulance was able to continue to Hospital with Mary.

Doctor performed emergency surgery on Mary at Hospital for her injuries. Mary remained at Hospital for several weeks, requiring care and treatment for repeated infections and other complications from the surgeries. While at Hospital, Mary was treated for her injuries by Surgeon, who performed several more operations. Mary continued to have medical problems. Surgeon told Mary that her injuries were aggravated by Ed's treatment in Ambulance and by the accident with Larry. Surgeon was also critical of the care provided by Doctor and by the staff at

Hospital. Several patients previously treated by Doctor had complained to Hospital about Doctor's care.

What claims and defenses may be raised by the parties?

3. Paula owned a house in Town where she lived with her son Sam and their dog. In November 2007, Paula called OilCo, a Massachusetts corporation, to get an oil delivery to fill her oil tank in the basement of her house. OilCo did not own any oil delivery trucks. Instead, OilCo contracted with small, independently-owned oil companies at fixed prices and these small companies delivered oil to the customers like Paula. After Paula placed her order with OilCo, OilCo contracted with Jack, doing business as “Sunshine Oil.” Jack had recently bought an older oil delivery truck and developed a small customer base of his own. Jack’s business consisted of approximately 50 customers of his own plus any deliveries for customers of OilCo. Jack’s oil delivery truck did not have any signage on it. When Jack arrived at Paula’s house, he told her he was there to deliver her oil and she paid him with a check made payable to OilCo. When Jack delivered oil for OilCo, he used a receipt ticket that he gave to customers that had “OilCo” and OilCo’s telephone number imprinted on them, which he had been given by OilCo to use.

While delivering oil to Paula’s house, the hose on Jack’s truck burst causing about 100 gallons of oil to spill onto Paula’s yard, including an area where she maintained a prize-winning vegetable garden during the summer months. At the same time, Paula’s dog came running into the area of the spill and got oil all over him. Paula witnessed what happened and became extremely emotional and fainted. Paula was unable to work for a week due to her distress and the need to care for her property. Paula asked OilCo to remove six inches of soil from the area of the spill, re-sod the area and plant many new trees and bushes. Paula also asked OilCo to compensate her for the emotional distress she suffered as a result of the accident. OilCo refused. Paula started to look for a lawyer to bring suit against OilCo for the damages to her yard, lost wages and for her emotional distress arising out of the incident.

InsureCo, Paula's homeowner's insurance company, agreed to cover the cost of cleaning up the oil, which totaled \$100,000. InsureCo then hired Larry, a lawyer, to bring suit against OilCo to recover the \$100,000 to clean up the spill. Larry contacted Paula to obtain information to respond to discovery requests made by OilCo in the suit. He introduced himself as the lawyer hired by InsureCo to bring suit against OilCo for its negligence in delivering the oil. Larry told Paula that he would also seek to recover her damages against OilCo. In 2009, Larry filed suit on behalf of InsureCo in Superior Court seeking to recover the \$100,000 in clean-up costs. For the next two years, Larry communicated with Paula about the status of the suit but never told her that he had not filed suit on her behalf. He assisted her by drafting answers to interrogatories and represented her at her deposition. In 2011, Paula asked Larry about the status of her suit. At that time, he told her he was only representing the interests of InsureCo and that he could not pursue her claims against OilCo because he had a conflict of interest as the attorney for InsureCo.

What are the rights of the parties?

4. Sue was a student attending Beacon High School (“BHS”). Sue served as the Junior Class Secretary of the public high school’s Student Government Association (“SGA”). The school district had a policy in place, which Sue was required to sign, regarding eligibility to represent its schools in such positions. The district’s policy stated:

“All students elected to student offices, or who represent their schools in extracurricular activities, shall have and maintain good citizenship records. Any student who does not maintain a good citizenship record shall not be allowed to represent fellow students nor the schools for a period of time recommended by the student’s principal, but in no case, except when approved by the board of education, shall the time exceed 12 calendar months.”

At the beginning of the school year, Sue and other members of the SGA planned to have an event called “Bandfest.” The event consisted of a battle-of-the-bands concert designed to welcome all of the returning students back from their summer break. Sue and Bill, another member of the SGA, enlisted the participation of five student bands. Bandfest was scheduled to take place on October 11th and was to be held in the school’s auditorium. Mr. Stern, the school’s guidance counselor, served as the event’s faculty advisor and was to be responsible for running the event’s sound and lighting equipment.

Shortly before the scheduled event, school administrators learned that Mr. Stern was unavailable to attend. At an SGA meeting held on October 4th, Mr. Stern informed Sue and other members of SGA that they would need to reschedule the event. This announcement upset Sue and the others. Sue and Bill then tried to meet with the High School’s principal, Ms. Adams. Unable to see Principal Adams immediately, they retreated to the school’s study hall.

At the study hall the students became agitated. Using the school’s computer, the students accessed an email account belonging to Sue’s father. From that email account, Sue sent a mass email message alerting students and parents that BHS’s administrators had cancelled Bandfest and urged them to contact Principal Adams and Mr. Stern. That afternoon in the hallway of the school, Sue was confronted by a visibly upset Principal Adams and Sue was warned to stop her “petty protest or there will be consequences.”

Later that night, still upset from the day, Sue posted a message on her blog. The blog was hosted by an internet website unaffiliated with BHS. The blog post contained a copy of Sue’s earlier email and encouraged BHS students to continue their calls and emails to Principal Adams and Mr. Stern.

The blog post appeared to be signed by Sue and Bill. The blog posting further stated: “Let’s show these disgusting faculty a-holes that they cannot get away with this.” The blog post came to the attention of school officials on October 7th. On the same day, Sue went to Principal Adams’ office to accept her recent student nomination for Senior Class President. At this time, Principal Adams confronted Sue regarding the blog post and requested that Sue withdraw her candidacy for Senior Class President. Sue refused and Principal Adams refused to allow Sue to run for any senior class position.

That evening, Sue and her parents were broadcast on local TV news stations criticizing Principal Adams and the BHS administration.

On the next day, when elections were held, Principal Adams learned that a number of students planned to wear “Vote for Sue” buttons to the student voting assembly. Principal Adams stationed herself at the entrance to the student assembly and forced a number of students to remove the “Vote for Sue” buttons that they were wearing stating “they are disruptive and set a bad example.” Sue, however, was permitted to enter the assembly wearing a “RIP Democracy” t-shirt. After a boisterous assembly, students elected Sue as their Senior Class President. Principal Adams immediately disallowed the vote and awarded the position to the student receiving the next highest number of votes. Subsequently, Sue lost the ability to be the Senior Class commencement speaker. Principal Adams verbally reprimanded Bill for his role in the incidents. However, Bill was allowed to participate in all upcoming high school activities.

What are the rights of the parties?

5. Polly was driving to work with her husband when their car was hit by another car driven by Dash. When the police officer arrived at the intersection, he observed that Dash seemed confused and disoriented, with slurred speech. Dash was taken to the hospital where medical personnel gave him several tests, including a rapid urine screening test. The test results were recorded in the hospital's discharge summary report. The report reflected that Dash tested positive for alcohol, along with the following language: "This test is a rapid screening system. A second method must be used to obtain a confirmed analytical result." Polly suffered serious mental and physical injuries from the collision.

At the trial in Superior Court, upon direct examination of Polly, Polly's counsel asked her the following questions:

- a. "Did you hear Dash's testimony in the criminal case against him that he hit your car because his brakes failed?"
- b. "Do you have an opinion as to how fast Dash's car was traveling when you first saw it?"

Dash's counsel, on cross-examination of Polly, asked her:

- c. "Didn't your husband yell 'Watch out!' just before you entered the intersection?"
- d. "Haven't you been involved in three other intersection accidents in the six years prior to this accident?"
- e. "In your opinion, was your car designed to protect you in accidents like the one that happened involving Dash?"

Also at trial, Polly's counsel offered into evidence the following:

- f. Testimony of Witness that Witness had observed Dash just before the accident, and that in Witness's opinion, Dash was drunk.
- g. A certified copy of Dash's prior conviction for negligent operation of a motor vehicle.
- h. The hospital record that included the results of Dash's rapid urine screening test.

Assuming objections were made in each of the above instances, how should the Court rule?

**MASSACHUSETTS BAR EXAMINATION
SECOND DAY MARCH 1, 2012
ESSAY SECTION
AFTERNOON PAPER QUESTIONS**

6. John set up the John Trust (“Trust”) in 2005 and appointed his lawyer Larry as its sole trustee. Under the terms of the Trust, the assets and income of the Trust were to be used for “the reasonable comfort, maintenance and support” of John’s wife Mary during her lifetime. Upon Mary’s death, any remaining assets in the Trust were to be donated to Cambridge Charity (“Charity”). A separate provision of the Trust provided that should John gift his 1967 Ford Mustang to the Trust, then the car would be for the exclusive use and benefit of his daughter Sally during Mary’s lifetime, and then was to be given to Charity.

During John’s lifetime, he gifted \$500,000 of his cash to the Trust, along with a 1968 Ford Mustang that John had swapped at a car show in 2006 for his 1967 Ford Mustang.

John loved Mary very much, and during their 40 year marriage he let her make most of their financial decisions.

John suffered a minor stroke in 2004 and a more serious stroke in early 2007. After this second stroke, John lived at home and was cared for by Mary. As Mary did not want anyone to see John suffering from the second stroke, Mary did not allow anyone else to come into their house in 2007 and 2008. John died in 2008.

After John died, Mary maintained her same high standard of living and sent to Larry all of her living expense bills even though she had millions of dollars in savings in the bank. Larry paid all of the bills that Mary sent to him from the cash that John had gifted to the Trust and from the proceeds of Larry’s 2010 sale of the 1968 Ford Mustang. Larry also paid himself \$150 an hour for his trustee services. By the end of 2011, the Trust had no assets. Mary has not died.

Charity and Sally have filed suit in Probate and Family Court claiming that they had been cheated out of their rights under the Trust.

What are the rights of the parties?

7. Dave owned Farmland, 50 acres of land in Central, Massachusetts. Dave struggled to make a living off of Farmland, so he received a \$250,000 mortgage on Farmland from Local Bank to help him operate Farmland and pay salaries and expenses. The business did not succeed, and Dave decided to get out of the farming business. Dave had been approached over the years by several real-estate developers about a potential sale of Farmland. When the economy suffered a recession in 2007, there were no longer any offers to purchase Farmland. To generate income, Dave entered into a written lease for Farmland with Sam, also a farmer. The lease was for 25 years at \$25,000 per year. Then, Sam subleased three acres of Farmland to Joe for farming. Neither Sam nor Joe lived on Farmland. Sam rented a house on Farmland to Tom, who needed a place to live.

In 2009, Dave and Sam amended the lease to Farmland giving Sam the option to purchase Farmland for \$1,000,000 at any time during the term of the lease. Sam gave Dave a deposit of \$25,000, which was placed in an interest-bearing account at Local Bank. The amendment also provided that if the option was not exercised during the term of lease, the deposit would be returned to Sam. Neither the lease nor the amendment was recorded.

Dave continued to have financial difficulties caused by several bad investments and was unable to make payments on the mortgage to Local Bank. In 2010, Local Bank declared Dave's mortgage in default.

In 2010, Contractor performed repair work on the house occupied by Tom at Sam's request and direction. Contractor did not receive payment for his work, and he had a lien placed on Farmland for \$20,000.

In 2011, Dave entered into a purchase and sale agreement to sell Farmland to Bob for \$1,300,000. Bob asked Dave about Sam's interest in Farmland. Dave gave Bob a copy of Sam's lease but Dave did not mention the amendment giving Sam the option to buy Farmland.

After the purchase and sale agreement was signed, the IRS filed a lien against Dave for unpaid income taxes. The lien remains unpaid.

Before the sale to Bob took place, Sam gave Dave notice that he wished to exercise the option to purchase Farmland for the agreed-upon price of \$1,000,000. Dave refused to convey Farmland to Sam. Bob is ready to finalize his purchase of Farmland, but the closing date is not yet scheduled.

What are the rights of the parties?

8. Barbara owned and operated a business which made specialty glass for use in biomedical and aerospace industries. She leased from Jessie a manufacturing facility that Jessie had mortgaged to Mortgage Company.

On May 1st, Barbara applied to First Bank for a \$50,000 loan to finance the expansion of her business. At the time of her application and before any loan was made, First Bank filed financing statements executed by Barbara covering all of Barbara's business assets.

Barbara also applied to Second Bank for an additional loan in the amount of \$25,000. Second Bank approved the loan on June 1st and gave Barbara the loan proceeds on the same day. Barbara used these loan proceeds to install security cameras in the facility. Second Bank required Barbara to grant it a security interest in her business assets and to execute financing statements, which Second Bank immediately filed.

Thereafter, on July 1st, Barbara obtained the \$50,000 loan proceeds from First Bank and executed a security agreement. The security agreement granted First Bank a security interest in Barbara's business assets "whether now owned or hereafter acquired" for all liabilities of Barbara to First Bank "whether now existing or hereafter contracted." Barbara used a portion of these proceeds as a deposit on the purchase of silicon, a material that is used in the glass manufacturing process, from Seller.

On August 1st, Barbara bought state-of-the-art laser equipment for use in her manufacturing process financed by a \$100,000 loan on that day by Second Bank. Barbara executed a security agreement and a financing statement which described the laser equipment as collateral. Second Bank did not file a financing statement.

On September 1st, Barbara purchased two laptop computers, one for use in her business and one for use at home by her family. She financed the purchase of the laptop computers with a \$5,000 loan from Second Bank and granted Second Bank a security interest in the laptop computers. Second Bank did not file financing statements.

On October 1st, Barbara wrote a \$2,000 check payable to Jessie for October's rent. Jessie, who owed Hank money, delivered the check to Hank with the following endorsement on the back: "Pay Hank only." Hank subsequently endorsed the check over to his friend Oscar to satisfy a debt he owed Hank.

Barbara's business began to have difficulty. On December 1st, Barbara sold a very expensive piece of specialty glass to Customer, took the money and left the country. Barbara has

defaulted on her lease and all of her loans. Jessie was unable to pay the mortgage and defaulted. At the time she absconded with the money, Barbara still owed Seller \$40,000 for the silicon.

What are the rights of the parties?

9. Mary, a white high school senior, applied as an in-state student for admission to State University for the fall of 2010. Mary's working-class family members are newly-arrived legal immigrants to the United States from Europe. Due to Mary's economic status, State University was her only affordable option. Each year, State University receives approximately four times as many in-state applicants as can be enrolled in State University. In 2005, the State Legislature passed a new law mandating that State University utilize an automatic admission program for all of its state's high school students. Among other reasons, the law was passed to boost State University's minority enrollment to reflect the state's growing minority population. The program, known as the Top Ten Percent ("TTP") Plan, offered admission to any state resident who graduated in the top ten percent of her high school class. Since 2008, students admitted under the TTP Plan made up 80 percent of the freshman class. Race is not a specific factor taken into consideration for the TTP Plan. Nevertheless, the TTP Plan has produced one of the nation's highest rates of minority enrollment for state universities. Specifically, since 2008, the TTP Plan has resulted in minority enrollment exceeding 30 percent of all entering freshmen. Mary did not qualify for admission to State University under the TTP Plan.

In order to fill the remaining 20 percent of the entering class seats, State University relied on a prospective student's academic performance and a personal achievement measure. The personal achievement measure judged the quality of two submitted essays and considered a number of additional factors, such as a student's community service, work experience, family status, leadership and race. State University officials believed that the personal achievement measure was a way to increase diversity at State University's individual classroom level among African and Hispanic Americans at a level greater than the TTP Plan could provide. Mary was not admitted to State University under these criteria.

Mary's parents were disappointed and angered by State University's denial of their daughter's admission to State University. Mary contacted an attorney and sued State University in federal court. In addition, Mary's parents began an intense public media campaign against State University's admission policies. Enlisting the help of sympathetic local politicians, Mary's parents and others were successful in passing a 2011 voter-approved state constitutional amendment.

The language of the 2011 constitutional amendment was as follows:

“State Public Colleges and Universities are Hereby Prohibited From Granting Preferential Treatment to Any Individual or Group on the Basis Of Race, Sex, Color, Ethnicity, or National Origin.”

Civil Rights for All (“CRA”) was a national civil rights advocacy group with a local chapter in the state where State University was located. CRA was angered by the passage of the constitutional amendment, viewing the amendment as a threat to its core mission of increasing minority enrollment in state universities. CRA recently brought suit in federal court seeking to enjoin application of the state’s new constitutional amendment. Mary intervened in the lawsuit.

You have been hired as the law clerk to the Federal District Court Judge assigned to hear the matter. Assume that the constitutional amendment passed by the voters complies with all of the State’s election laws.

Write a memo outlining the rights of the parties.

10. Debbie asked Peggy, a partner in a Boston law firm, to write a letter of recommendation for Debbie's application to the Massachusetts bar. Debbie had just joined Peggy's firm after practicing in another state. Although Peggy did not know Debbie well, they had attended law school together decades earlier. Peggy vaguely remembered hearing that Debbie had been involved in the misuse of client funds, in addition to other trouble. When Peggy asked Debbie about the matter, Debbie indicated that it had been resolved years before. In fact, Debbie had been disbarred in the state in which she had previously practiced as a lawyer. Peggy felt uncomfortable recommending Debbie, but because Peggy was in the midst of a trial and under pressure to meet a number of deadlines, Peggy wrote a letter to the Board of Bar Examiners stating:

I recommend Debbie for admission to the Massachusetts bar. I have known Debbie for many years both professionally and personally. Even in the face of adversity, I have found her conduct to be honest, honorable and professional. I am confident that Debbie will uphold the highest standards of the bar.

After mailing the letter, Peggy went home. Upon arriving home, Henry, Peggy's husband, told her: "I'm leaving you for another woman." Enraged, Peggy grabbed a brass candlestick from the mantle and struck him, killing him.

Peggy immediately called her sister, Susan, and told her what had happened. Susan told Peggy to stay where she was and that Susan would be right over. Susan had been drinking all day with Michelle, her housemate. After telling Michelle what had happened, Susan told Michelle: "I'm borrowing your car." After Michelle tried to stop her, Susan pushed Michelle to the floor and kicked her repeatedly with her steel-toed stiletto heels. Susan then took Michelle's car keys from her pocket, grabbing Michelle's wallet and checkbook before leaving the house.

Susan drove Michelle's car to Peggy's house, picked her up and drove her to the cruise boat terminal. There, Peggy bought a ticket for a transatlantic cruise using one of Michelle's

checks, which Susan had given to her. Susan had signed Michelle's name to the check. As Peggy was about to board the ship, she was apprehended by police.

Shortly thereafter, Police Officer cornered Susan in a local convenience store. As Susan tried to flee, Police Officer shouted "Stop!" whereupon Clark, the clerk behind the counter, took out a revolver and fired into the air. The bullet from the shot ricocheted off the ceiling and killed Ben, an innocent bystander. Susan was forcibly taken into custody after fighting with law enforcement officers.

What offenses and violations have been committed and what defenses, if any, may be raised by the parties?