

# MASSACHUSETTS BAR EXAMINATION

SECOND DAY JULY 30, 2009

## ESSAY SECTION

### MORNING PAPER QUESTIONS

1. John and Tom were the only children of Richard, a widower. Richard and John were particularly close. Through his business connections, Richard discovered that the penthouse in a luxury residential building in City could be purchased pre-construction for \$800,000. In the presence of Stan and Walt, Richard suggested to John that John buy the penthouse suite. Richard offered to make a down payment of \$400,000, and suggested that John acquire a first mortgage for the remaining amount. Later when alone with John, Richard explained that he was currently discussing a business deal with Stan and Walt that could result in a financial loss. Consequently, Richard instructed John that he did not want Richard's name on anything to do with the penthouse. Richard also asked that John not mention the arrangement to Tom.

John bought the penthouse for \$800,000, using the \$400,000 given to him by Richard. John executed a promissory note for \$400,000, secured by a purchase mortgage back to Seller. John took title in his own name. Richard paid all fees and expenses associated with the transaction. John rented the penthouse to Ann for \$2,000 per month. The business deal proved to be very profitable for Richard, Stan and Walt. Stan then asked John if Richard would allow John to sell the penthouse suite to him for \$1,000,000. John never mentioned the offer to Richard, but John told Stan that Richard had consented to the sale. Stan then paid John \$1,000,000 for a duly executed, acknowledged deed to the penthouse. John paid off his promissory note to Seller with the purchase money and received a discharge of the mortgage. Ann continued to live in the penthouse but Ann has not paid her rent in several months. Richard died unexpectedly the day after John's sale of the penthouse to Stan.

Tom has been appointed the Administrator of Richard's estate and consults you for advice. Walt tells you of the conversation he overheard between Richard and John about purchasing the penthouse. Subsequently, you find John's deed transferring the penthouse to Stan.

What are the rights of the parties?

2. In 1984, Harry and Jill married in Boston. Harry verbally abused Jill, and their marriage did not work out. Thus, Jill moved to a small town in western Massachusetts only ten weeks after they were married. Harry and Jill did not stay in touch with each other.

In 1985, Harry met Wilma and they began to date quite seriously. Harry never told Wilma about his earlier marriage to Jill, as Wilma had already told him that she could not marry a divorced man for religious reasons. In 1986, Harry asked his lawyer Lenny to arrange for a rapid and discreet divorce from his earlier marriage with Jill. Lenny called Jill, but she did not return his call. Lenny flew to the Dominican Republic and (with the help of a Dominican lawyer) had a court there enter a final divorce decree for Harry's 1984 marriage to Jill. Harry mailed a copy of the final Dominican Republic divorce decree to Jill. Harry then proposed marriage to Wilma, who agreed.

In 1987, Lenny visited Wilma at her apartment two days before Harry and Wilma were scheduled to be married. Lenny told Wilma that Harry came from a very wealthy family, and that Wilma needed to sign an agreement with Harry agreeing that if they ever were divorced for any reason that she would get (i) no more than \$200,000 of Harry's property, (ii) no more than \$1,000 per month per child in child support, and (iii) no spousal support. Lenny then gave Wilma an accurate list of all of Harry's current assets (totaling over \$10 million in value) and the agreement to sign. Wilma spent less than one minute reading the documents that Lenny had given to her, and then she signed the agreement and gave it back to Lenny. The next day Harry signed the same agreement. The following day Harry and Wilma had their wedding in Boston. Five years later Wilma gave birth to their son Dexter.

In 2008, Jill (who had not remarried) came back to Boston and knocked on the front door of Harry's house. When Wilma answered the door, Jill told Wilma of Jill's 1984 marriage to Harry. Jill also told Wilma that Harry had physically abused her during the marriage. The next day, Wilma filed for divorce from Harry in Probate and Family Court. Wilma requested that the court award her half of Harry's net worth (which was now \$12 million) as well as spousal support of \$10,000 per month. Wilma also requested that Harry pay \$5,000 per month in child support for Dexter.

The following day, Jill filed for divorce from Harry in the same Probate and Family Court, and demanded that she be awarded half of Harry's net worth plus monthly spousal support. Jill also requested that Harry pay \$5,000 per month in child support to her two year old daughter Mary (even though Harry is not Mary's biological father).

What are the rights of Harry, Wilma, Dexter, Jill and Mary?

3. On April 2, 2004, Abby contacted Dennis, a project manager for Jones Construction Company (“Jones”), and told Dennis that she wanted to build an in-ground pool in her backyard by July 1, 2004 in time for July 4<sup>th</sup>. Abby told Dennis that she was hosting a fundraiser for a local charity on July 4<sup>th</sup> and needed to have the pool completed by then. Dennis gave Abby a written proposal that stated Jones would complete the job for \$50,000 with \$20,000 down and the balance upon completion. Abby told Dennis that the pool needed to be completed by July 1<sup>st</sup> and Dennis orally assured her it would be done on time. Abby gave Dennis a \$20,000 check payable to Jones which Jones deposited in its bank account.

Jones started the excavation for the pool in late April but encountered ledge rock underground which made it very difficult and more expensive to build the pool. On June 1, 2004, Jones’ President, Jack, called Abby and told her that it would cost an additional \$10,000 to build the pool because of the problems with the ledge. Jones refused to perform any more work until Abby agreed to pay the additional \$10,000. Abby paid the additional \$10,000.

By June 21<sup>st</sup>, Jones had completed approximately 75% of the work needed to complete the pool. Abby contacted Jack and expressed concern that the pool would not be completed by July 1<sup>st</sup> as promised by Dennis. Jack told her that Dennis did not have the authority to make a promise to complete the pool by July 1<sup>st</sup> without Jack’s approval which Jack never gave. Jack told Abby that it was unlikely that the pool would be completed by July 1<sup>st</sup> and asked her to pay the balance of \$30,000 immediately. Abby refused and hired another pool company to whom she paid \$40,000 to finish the job by July 1<sup>st</sup>, which it did. In the meantime, Abby made a non-refundable deposit of \$5,000 to rent a local function hall for the July 4<sup>th</sup> fundraiser in the event the pool was not completed on time.

What are the rights of the parties?

4. Paul is a professional hockey player, who has played for the Boston Bulldogs since the 2003-2004 hockey season. From the beginning of Paul's professional hockey career, Paul has been represented by Dan, an employee of Acme, a professional sports player representation agency. Acme is incorporated in Delaware, and has its principal place of business in Texas.

Prior to Paul becoming a member of the Bulldogs, Paul and Dan were both residents of Texas. Paul owns real property in Texas and has a number of family members residing there as well. In 2003, when Paul moved to Boston to play for the Bulldogs, Dan accompanied him for two months. Paul had asked Dan to come to Boston and live with him in order to get Paul established in Boston and to perform a number of personal errands and services.

In 2006, a meeting was held at Acme's Texas office between Paul, Dan and the officers of the Acme Corporation. At the meeting, Paul signed a new contract in which Paul agreed to compensate Acme \$100,000 for their services. The contract stated that should any dispute arise between the parties it would be governed in accordance with Texas law. After Paul signed the contract, he returned to Massachusetts along with Dan. Dan had agreed to stay with Paul in Massachusetts for a few weeks to provide personal and sports related services. Shortly after their arrival in Massachusetts, Paul became disenchanted over the financial terms of the new contract with Acme. Paul and Dan had an argument over the contract and Paul refused to pay any further compensation to Acme. Dan then returned to Texas.

Shortly thereafter, Paul filed a complaint against Acme and Dan in Massachusetts Superior Court alleging that Dan and Acme misled him about the financial terms of the new contract, making the new contract unenforceable and void. The hockey playoff rounds then began, and Paul's playing schedule became very intense and demanding of his time. When the hockey season ended, Paul mailed a copy of the Superior Court complaint to Acme's Texas office ninety-five days after he had filed it with the court.

What procedural steps may the defendants take in this action?

5. One evening at a local Boston pub, after several drinks, George muttered to John, who was sitting next to him at the bar, that George would pay someone to kill his wife. John responded that if George were serious, John was willing to do the job. George offered John \$500 and a bag containing one-half ounce of marijuana to kill George's wife Carol, with the understanding that John would carry out the job alone. George did not tell John that Carol was pregnant. George and John agreed that John would go to George's house later that night. As part of the plan, George told John where to find some jewelry so that it would look like Carol was killed during the commission of a crime. After George slipped John the marijuana and \$500 in cash, the two men shook hands.

When George arrived home, Carol, who had been up waiting for him, began to grill George on his whereabouts. While George and Carol were arguing in the kitchen, John arrived at the kitchen door. When Carol saw John through the door's glass panel, Carol grabbed a knife from the kitchen counter. When John broke the glass panel and put his hand through to reach the doorknob, Carol screamed "I'll take matters into my own hands." Carol then stabbed herself in the stomach and neck, and fell to the floor bleeding profusely. John immediately fled.

Shocked, George ran out of the house and into the street, shouting for help. George saw Harold, an obstetrician, who was pulling his car out of his driveway. George waved down Harold's car. When Harold rolled down his car window, George told Harold "My pregnant wife's been hurt, please help!" Harold replied "I'm sorry, but I'm late for a patient at the hospital. You'll have to call 911." Harold then drove away.

Carol recovered from the incident but went into labor three months before her due date. Carol's child was plagued with a number of health problems resulting from his premature birth. The child died of pneumonia the day before his first birthday, never having left the hospital.

What crimes have been committed, and what defenses may be raised, and in each case, by whom?

**MASSACHUSETTS BAR EXAMINATION**

**SECOND DAY JULY 30, 2009**

**ESSAY SECTION**

**AFTERNOON PAPER QUESTIONS**

6. In May 2002, Jane was ten years old and a member of Miss Mary's fourth grade class at the Hillside School ("Hillside"), a private elementary school. One day during a class recess, Jane fell off a jungle gym on the school's playground while chewing on a cinnamon flavored toothpick. The jungle gym was manufactured by Gym, Inc. ("Gym"), the toothpick was manufactured by Foods, Inc. ("Foods") and the toothpick was sold at Corner Variety ("Corner"). Jane's parents signed a form at the beginning of the school year waiving all potential negligence claims against Hillside.

Jane landed face down on the ground. The toothpick broke and punctured Jane's lower lip leaving Jane with a disfiguring scar, about two and one-half inches long, running horizontally beneath Jane's lower lip. Jane has had several surgeries and will need further surgery to reduce the facial scar. Jane's parents did not think that Jane's initial surgery performed by Doctor was done properly, thereby worsening the scarring, and had another physician perform the subsequent surgeries. Jane had been a child model for a local department store but Jane's modeling work stopped after her fall due to her scar.

Alice was Jane's classmate in Miss Mary's class at Hillside at the time of Jane's fall. Alice's parents, Ed and Sally, owned Corner, a small family-owned variety store selling bread, milk, candy, newspapers and lottery tickets. Occasionally, Alice would sell candy to her classmates at Hillside. Classmates ordered candy from Alice. Alice would collect money from her classmates and then Alice would turn over all the money collected to her parents at Corner in exchange for the candy to be given to her classmates. Larry, a classmate of Jane, gave Jane the toothpick. Larry had purchased the toothpick from Alice.

Foods' toothpicks sold by Corner were packaged in clear plastic wrappers, about two by two and one-half inches long, which were designed with a stamped background and a small picture of a toothpick with a face on it. Also, on the wrapper, was the writing "Hot Cinnamon

Fire Pix” and “Twelve Cinnamon-Flavored Pix – Imitation Flavors.” There was no other writing on the wrapper. The toothpicks were ordinary wooden toothpicks: flat, narrow, pointed at one end, and slightly broader and rounded at the other end. Foods’ toothpicks were one of about two hundred candy items sold at Corner. The toothpicks cost fifty cents and were sometimes bought by adults but bought more often by children. Corner bought all of its candy from Sweets, Inc., a candy wholesaler.

What are the rights, liabilities and defenses of the parties?

7. John owned many valuable pieces of land including Blackacre. In 2000, John signed his first will. Under the terms of this will, half of John's estate would go upon his death to his wife Mary, with the remaining half of John's estate split equally by John's two adult children: Alison and Barbara. John left nothing to Charles, Mary's adult son by her prior marriage. John's signing of this will was formally witnessed by Alison and Barbara, as well as by John's attorney Edward.

In 2001, John adopted David, the adult child of John's recently deceased brother. Later that year Mary and John divorced.

In 2002, John suffered a stroke and became mentally incompetent. Edward was appointed to be John's guardian. Edward owed substantial illegal gambling debts to Frank. When Frank threatened to hurt Edward if he did not pay these debts, Edward offered to sell Blackacre to Frank for one dollar. Frank accepted Edward's offer, and took ownership of Blackacre in 2004. Frank then transferred ownership of Blackacre to his son George as a wedding gift. George, who did not know what his father Frank did to earn money, subsequently transferred ownership of Blackacre to himself and his wife Nancy as tenants by the entirety.

John died in 2008, and John's will was immediately filed with the Family and Probate Court.

What are the rights of Alison, Barbara, Charles, David, Mary, Edward, George and Nancy?

8. In 2004, Artie, a real estate agent, and Bill, a builder, agreed that they would open a business that would buy, renovate and sell real property. Bill agreed to contribute his carpentry skills and equipment to renovate the properties, and Artie agreed to market and sell the properties. They agreed to share expenses and any profit made from the sales of the properties. Artie and Bill opened the business under the name “AB Properties” and Artie maintained the books for the business. For several years, business was great and AB Properties bought, renovated and sold twenty properties including three properties in Town. These three properties were purchased in 2007 and Artie and Bill obtained a mortgage from National, a bank, to buy the properties.

In 2008, Artie and Bill asked Carl if he wanted to go into business with them. Carl was a carpenter who had worked as an employee of AB Properties since 2004. Carl agreed. Several months later, National, the bank holding the mortgages on the three properties in Town, commenced foreclosure proceedings. The three properties were sold at foreclosure for less than the amount of the outstanding mortgage debt, leaving a balance due of \$400,000.

Bill has recently learned that, unbeknownst to him, Artie received a 5% commission on each of the 20 sales that AB Properties had completed. Bill demanded that Artie pay him half the commissions that Artie received, but Artie refused. Carl also demanded that Artie pay him a portion of the commissions. Artie has learned that Bill often used leftover materials from the AB Properties’ jobsites at his and his parent’s homes. Artie has demanded that Bill pay him for these materials.

National has commenced a lawsuit against AB Properties, Artie, Bill and Carl seeking to recover the \$400,000 deficiency after the foreclosure sales.

What are the rights of AB Properties, Artie, Bill, Carl and National?

9. Plaintiff, Bar Association, is a Massachusetts association of real estate attorneys. Defendant, National Closings Inc. (“NCI”) is a Delaware corporation operating in several states including Massachusetts. NCI provides settlement services to banks during the closing of real estate loans. NCI has made an \$80,000 profit each year over the last five years it has operated in Massachusetts. As a profit generating and cost savings measure, NCI employs non-attorneys to conduct most of its settlement services for the banks. NCI’s settlement services include real property title searches, document preparation and the recording of real estate instruments at the local county registry of deeds. NCI employs an attorney to witness the final closing of the real estate loans.

The Massachusetts Legislature has passed an Unauthorized Practice of Law Statute prohibiting the practice of law by persons not admitted to practice by the Supreme Judicial Court of Massachusetts. Further, the Legislature has delegated the enforcement authority of the Unauthorized Practice of Law Statute to the Massachusetts Attorney General or any bar association located within the state of Massachusetts.

Bar Association has brought suit in U.S. District Court against NCI. Bar Association has filed a motion seeking a preliminary injunction enjoining the NCI practice of employing non-attorneys for its settlement services alleging the actions constitute the practice of law and violate the Massachusetts Unauthorized Practice of Law Statute. Further, Bar Association sought to enjoin NCI from advertising its services via web based and print media within Massachusetts. NCI has brought a counterclaim seeking to declare the Massachusetts Unauthorized Practice of Law Statute as unconstitutional. Both parties have filed Motions to Dismiss.

You are the law clerk to the U.S. District Court judge assigned the case. Please prepare a memorandum outlining the legal issues raised in the case.

10. Irene, a Boston physician, treated Paula, who was suffering from a rare disease. Paula died while under Irene's care. Shortly thereafter, Paula's family filed a complaint against Irene in Massachusetts Superior Court for wrongful death and gross negligence. During the trial, the judge ruled the following evidence offered by the Plaintiff admissible over objection:

(A) Testimony of Nurse, who stated that she overheard Irene say to Paula's family after Paula's death: "I'm so sorry about what happened to Paula."

(B) An e-mail message from Irene to her husband Jim, also a physician, sent after Paula's death that read: "See attached x-rays. If I had done things differently, maybe Paula would still be alive."

(C) Portions of Paula's record from the hospital where Paula died, which included Irene's notations as to medications and amounts being prescribed. Prior to these records being offered into evidence, Irene's attorney Marie overheard Irene tell Jim "I feel guilty about altering the drug dosage amounts in the record after Paula died, but I was scared."

(D) Digital images of Paula's x-rays that had been downloaded onto a computer and projected onto a large screen in the courtroom for use by the jury as a demonstrative aid.

(E) A paperback "pill book" purchased at a local drug store by Plaintiff's counsel. Plaintiff's counsel had asked Irene to read several passages from the book that described the effects of two medications that Irene had prescribed for Paula.

(F) Statement of Dr. X, a medical examiner who was called to testify about the findings in the autopsy report of Dr. Y. Dr. Y was the medical examiner who had performed Paula's autopsy, but was not available at trial. Dr. X stated: "My opinion is that I agree with Dr. Y's assessment and certification of Paula's death as the result of complications from the drugs prescribed."

In each instance, explain whether the ruling was correct, and what, if any, ethical violations have been committed.