

MASSACHUSETTS BAR EXAMINATION

SECOND DAY JULY 28, 2011

ESSAY SECTION

MORNING PAPER QUESTIONS

1. On May 15, 2010, Paul went to Store and bought a thirty-foot long metal ladder (“Ladder”). Two weeks later, Paul was standing on the top rung of the Ladder repairing the gutters on his house, when Paul suddenly fell to the ground. As a result, Paul injured his back and broke both of his legs.

Paul filed suit against Store in Superior Court. At the jury trial of this civil matter, the following evidence was admitted over objection:

- A. Paul testified that when he went to Store on May 15, 2010 to buy a ladder, Bill (the Store’s manager) told him that the Ladder was extremely safe and strong.
- B. Paul testified that Bill visited him in the hospital the day after the fall. Paul further testified that during that visit Bill said (i) that the Store was sorry that Paul was in such pain and (ii) that the Store would pay all of Paul’s medical bills for the fall.
- C. Paul also testified that when Paul asked Bill, during Bill’s visit to Paul in the hospital, how the Store could sell such a dangerous ladder to an unsuspecting customer, Bill just stared at Paul and said nothing.
- D. Paul testified that, since July 2010, Store has placed large orange and black warning labels on all of the metal ladders that it sells. These labels stated (in English and Spanish) as follows: “Warning!! Do not stand on the top rung of this ladder or you may fall and badly injure yourself.”

- E. Paul called Detective to testify. Detective testified that Mike, the owner of Store, had been convicted two years ago of the rape of a child and had just died in prison.

- F. Bill called Charlie, the owner of the company that manufactured the Ladder. Charlie testified that, two weeks before Paul filed suit against Store, Paul settled all of his claims against Charlie's company for \$20,000.

- G. Bill called Paul's neighbor Sam. Sam testified that Paul must have been reckless the day that he fell because Paul habitually acted in a reckless manner.

In each instance, were the Trial Judge's rulings to admit correct?

2. Eddie, a well-known businessman, amateur musician and event producer, wanted to stage a concert with his wife, Wendy, at Baseball Park, a beloved and historic baseball park in City. Eddie and Wendy entered into a contract to rent Baseball Park for 6 days. They negotiated the contract with Harry, director of operations for Baseball Park. The concert would be held on two nights, but set-up and break-down of staging, equipment and seating required additional days. Harry incurred expenses in preparing Baseball Park for the concert, chose Eddie and Wendy over another concert promoter who wanted to use Baseball Park for a concert on the same dates, and knew that Baseball Park would benefit from concession sales, parking and from the sale of T-shirts, photographs and other items. Eddie gave Harry a \$200,000 deposit.

To headline his concert, Eddie signed Mark, a native of City, a former rapper and model who was now an actor. Mark was well-known for action and soft-porn movies. Mark had given up his singing career before his group became successful selling millions of records and performing concerts throughout the world. Mark was trying to revive his singing career as his recent films were not financially successful. Eddie convinced Burt, a local investor, to personally loan Eddie \$500,000, believing that Mark's popularity in City would make the event successful. Also, Mark said that his old group might show up on stage. The loan was to be repaid to Burt along with a 10% share of Eddie's profits from the concert in lieu of interest. Eddie used all of the loan to pay for expenses related to the concert. Advance ticket sales for the concert were slow despite aggressive advertising.

Mark suddenly cancelled the concert a week before it was scheduled when he received a starring role in an action film to be made by Movie Producer in Thailand. The filming of the movie was scheduled to begin on the same day as Eddie's concert and would last for several months. While travelling to Thailand, Mark learned that his former girlfriend, Amy, had given an interview to *Personal Magazine* giving details of Mark's personal life, including illegal drug use. Several clothing companies that sponsored Mark cancelled their contracts because of the article.

When Eddie learned that Mark had cancelled the concert and left for Thailand, Eddie e-mailed Mark stating, "You have humiliated me. I'm ruined financially and personally. I'll make sure that you never work in this town again!" After receiving

Eddie's message, Mark, against Movie Producer's wishes, left the movie set and returned to City to perform the concert. The movie was delayed indefinitely. However, Eddie had already cancelled the concert and it was not rescheduled. Eddie failed to repay the loan to Burt. Eddie has requested that Harry return his deposit but Harry has refused.

What are the rights of the parties?

3. James was the Principal of High School in Massachusetts. Sam, an 18 year-old, was a senior at High School. One day, James called Sam to his office to discuss his absenteeism from school. A month earlier, James had found Sam in possession of marijuana while at High School. During the meeting to discuss Sam's absenteeism, James smelled a strong odor of marijuana coming from Sam. James asked Sam if he had been smoking marijuana, which Sam denied. James then searched Sam's clothing but finding nothing, sent Sam back to class.

While Sam was in class, James went to Sam's locker and observed a lock on the handle. James obtained some bolt cutters from a storage room and cut the lock. Upon opening the locker, James saw a handgun and several large clear plastic bags containing what appeared to be marijuana on the floor of the locker. James immediately went to Sam's class and screamed at Sam demanding to know where he got the drugs and the gun. Afraid, Sam told James that he had received everything from a guy named Mark who lived a block from High School. James then called Police who took Sam into custody. At that time, James informed Police what Sam had told him about his source of the drugs and gun.

As a result of the information provided by James, Police conducted surveillance of Mark's home for several weeks but were unable to uncover any incriminating evidence. Subsequently, at approximately 4:00 a.m. one night, Police attached a mobile tracking device to the undercarriage of Mark's vehicle while the vehicle was parked in his driveway. The driveway leading up to Mark's house was open and there was no gate or fence. Mark's property did not contain any "No Trespassing" signs. The tracking device logged and recorded the precise movements of Mark's vehicle. After a few months of tracking Mark's movements using the tracking device, Police were alerted by information from the tracking device that Mark's vehicle had just left a location which Police suspected was used to grow marijuana. Police immediately began to follow Mark's vehicle and observed that Mark was driving the vehicle. Police stopped Mark's vehicle on the street directly in front of his house. When Mark was asked to get out of his vehicle, he complied. Police searched his vehicle but did not find any drugs.

Police then asked Mark for permission to search his house, which he refused to give. Police again asked Mark for permission to search his house saying to him "we can

get a search warrant but it will go a lot easier for you if you just let us in.” After several more requests by Police, Mark told Police “go ahead.” Police searched the house and found two small bags of heroin. Mark was placed under arrest and taken to the police station.

At the police station, Mark was given his Miranda warnings. Police told Mark that it would help his defense if he told Police who his drug supplier was. Mark refused and asked for a lawyer. Mark was placed into a holding cell. Police placed Ian, a paid informant, in the cell with Mark and instructed Ian not to question Mark about the drugs or his supplier but to report to Police any statements that Mark made. While in the cell, Mark laughingly told Ian that the Police missed the “stash of drugs, guns and cash” he had hidden in a crawlspace under the house. Ian subsequently told Police what Mark had said. Police conducted another search of the house and found \$100,000, several guns and cocaine in the crawlspace.

Sam has filed a motion to suppress the evidence obtained from the search of his locker.

Mark has filed a motion to suppress his statement to Ian and all the evidence found at his house.

How should the Court rule on the motions?

4. Harold and Wanda lived in Boston. They had known each other as adolescents and had occasionally dated. After renewing their earlier acquaintance, Harold and Wanda married in 2000. Wanda had a daughter, Diane, who was born in 1995 from a previous relationship. Wanda was from modest economic means and worked as a legal secretary earning \$40,000 a year. As a partial owner of a lucrative family construction business, Harold had substantial wealth and real estate holdings. Harold's total wealth was estimated at \$30 million. Wanda was not certain of Harold's actual wealth but inferred from his lifestyle that he was wealthy.

Two week's before their marriage, Harold's lawyer, Lew, presented Wanda with an agreement that Harold had already signed. The agreement provided that if the marriage were terminated, Wanda would resolve any differences by obtaining title to the marital home and title to the family automobile, along with a yearly payment of \$25,000 until her death or remarriage. Lew had insisted that the agreement had to be signed or that the marriage would not be able to take place because Harold was under considerable pressure from his family to obtain the agreement. Wanda was confused and showed the agreement to a co-worker, Andy, who was a new associate in the law firm where Wanda worked.

Andy had handled divorce work before and worked on domestic relations cases for three to four years. However, Andy had never represented a client with such an agreement. Andy contacted Lew, and Lew told Andy that the agreement was a standard legal agreement. Later that evening, Andy quickly read the proposed agreement before rushing off to make the beginning of a Boston Bruins game. A few days later, Wanda approached Andy to ask his advice. Andy stated that the agreement appeared fine and was pretty standard. Andy further stated, "Hey, you love this guy, right? My fee is really reasonable, you can buy me lunch someday. Go ahead and sign the agreement." Wanda signed the agreement and the marriage was blissful for the first five years and struggled along for the next five years. The marriage ended in 2010. During the marriage, Wanda and Harold had twin children, Charlie and Bonnie.

The divorce proceedings filed in the Massachusetts Probate and Family Court became contentious. Feeling overwhelmed, Wanda fled Massachusetts without notice and settled in California with her three children. Harold became enraged and demanded

that the twins be returned to Massachusetts and stated that “I am no longer paying for that brat, Diane.” Wanda was recently diagnosed with a debilitating neurological disorder and her physician told her she would soon require twenty-four hour nursing care. Wanda became overwhelmed and depressed, and began to drink alcohol heavily.

What are the rights of the parties?

5. In March 2008, Paula, a Massachusetts resident, was driving to South Carolina to visit her family. While driving on the highway in Virginia, her car was struck in the rear by a truck driven by Donald, causing her to suffer serious injuries. Donald was employed as a part-time driver for General, Inc., a trucking company. General was incorporated under the laws of the State of Delaware but maintained its corporate offices and operating facilities in Virginia.

As a result of the accident, Paula was in the hospital for two weeks and also spent time at a rehabilitation facility upon her return to Massachusetts. A police investigation into Paula's accident determined that a defective brake on General's truck was the cause of the accident. The brake had been manufactured by Brakes, Inc., a Massachusetts corporation, with offices in Boston.

General's business consisted of delivering supplies to various companies along the east coast of the United States. During the years 2006 to 2010, General had delivery accounts with two Massachusetts companies and made seven deliveries to those companies during those years. General occasionally posted advertisements for employment in a Massachusetts trade journal, but otherwise did not advertise in Massachusetts and did not actively solicit business from companies in Massachusetts. Since 2009, General has maintained an interactive website allowing companies in several states, including Massachusetts, to order supplies directly through General. General also maintained a post office box in Delaware.

Donald was originally from Massachusetts, but moved to Virginia six years ago. Donald maintains homes in both Virginia and Massachusetts but lives most of the year in Virginia and spends two months during the summer at his lakeside home in Massachusetts.

In January 2011, Paula filed suit against Donald and General in the United States District Court for the District of Massachusetts. Paula's counsel caused a summons and a copy of the complaint to be sent certified mail to the post office box maintained by General in Delaware. Paula's counsel also had a summons and a copy of the complaint served by a deputy sheriff at Donald's lakeside home in Massachusetts. The deputy sheriff affixed the summons and complaint to the front door of Donald's lakeside home. Frank, Donald's friend, occasionally checked Donald's lakeside home when Donald

wasn't there. Upon finding the summons and complaint at the house, Frank mailed them to Donald.

By statute in Virginia, "every action for personal injuries, whatever the theory of recovery, . . . shall be brought within two years after the cause of action accrues."

After mailing the summons and complaint to General's post office box in Delaware, Paula's counsel sent a written request for waiver of service of process to General requesting that it waive service of process. General refused to waive service of process for fear that it would lose the right to contest whether the court could exercise personal jurisdiction over General. Paula's counsel subsequently hired a process server in Virginia to serve the summons and a copy of the complaint on General at General's corporate offices in Virginia.

General and Donald have each filed motions to dismiss raising several grounds in support of their respective motions.

Paula's counsel has filed a motion to assess costs against General for failure to waive service.

How should the Court rule on the motions?

MASSACHUSETTS BAR EXAMINATION

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ESSAY SECTION

AFTERNOON PAPER QUESTIONS

6. Alex and Bruce met one morning and decided to rob Bank. The two of them got into Alex's car and drove to Bank. Just after Alex parked his car next to a fire hydrant in front of Bank, Policeman approached the car, told them to park elsewhere, and smelled marijuana smoke coming from the car. He immediately ordered Alex and Bruce out of the car. Policeman then opened the glove compartment of the car, and found an unregistered handgun. Policeman also saw on the back seat of the car a small bag with about half an ounce of marijuana and a sawed off shotgun.

As Policeman attempted to arrest Alex and Bruce, Alex shoved Policeman into Dave, who happened to be walking by. Dave fell down, hit his head on the sidewalk and died. Bruce took advantage of the commotion to flag down and get into a passing taxi. Bruce took the taxi to the house of his girlfriend, Emma. Bruce told Emma that the police were after him, and Emma told him to go hide in the basement of her house for the rest of the day. While in the basement of Emma's house, Bruce saw a large red suitcase. Bruce was curious, so he opened the red suitcase, and saw that it was full of cocaine. Bruce closed the red suitcase.

Meanwhile, the police contacted the taxi company and found out where Bruce had been dropped off by his taxi. The police then stormed Emma's house looking for Bruce. As Bruce thought that Emma had reported his location to the police, Bruce ran over to the red suitcase and opened it. The police arrested Bruce and Emma. The police then found some heroin in a pocket of Emma's pants.

What crimes have been committed? How should the court rule on defendants' motions to suppress evidence?

7. Sue, the owner of Valley Farms, grew a rare variety of butter and sugar corn called “Golden Kernel.” This type of corn had a limited growing season, and was highly sought after by upscale restaurants and markets. Bob was a wholesaler of high quality and exclusive fruits and vegetables supplying gourmet food markets (“Retailers”). Sue agreed to sell Bob 500 bushels of “Golden Kernel” corn at \$20.00 per bushel with delivery to Bob from June through August 2010. Sue and Bob signed a written contract prepared by Bob for the 500 bushels of “Golden Kernel” corn.

Sue purchased the “Golden Kernel” seeds at Farm Store where she spoke to Joe, a Farm Store employee. Sue told Joe that she had an order to provide 500 bushels of “Golden Kernel” corn to a wholesaler. Farm Store carried several varieties of “Golden Kernel” seeds. Joe recommended the Sunshine Products brand of “Golden Kernel” seeds saying, “it’s the sweetest corn you ever ate.” The Farm Store’s invoice contained a disclaimer of “all warranties, including any implied warranties,” located in small writing in the lower right hand corner of the invoice. Sue purchased the seeds and then planted them as directed.

In June, Sue began delivering the “Golden Kernel” corn to Bob. In July, Bob asked Sue to stop delivery because of a scheduling problem with his retailers. Bob told Sue that such delays were standard in the high end food business where restaurants change their seasonal menus without notice. Sue disagreed but stopped delivery. Bob told Sue that he did not know how long the delay would last and that she could sell the “Golden Kernel” corn to others. Sue did not pick any “Golden Kernel” corn during the delay and bins of undelivered “Golden Kernel” corn rotted.

Two weeks later, Bob told Sue that the scheduling problem was resolved and that she could again deliver the “Golden Kernel” corn to him. Bob asked Sue if she could fulfill the contract and she said yes. At the end of July, Sue had delivered only 150 bushels to Bob. Bob’s Retailers returned 50 bushels of “Golden Kernel” corn to him because the corn had a bad bitter taste and was partially rotted.

To fulfill his orders to Retailers, Bob purchased “Golden Kernel” corn from other farms at \$30.00 per bushel. However, due to an article praising “Golden Kernel” corn in *Gourmet Magazine*, Bob was able to sell the corn to the Retailers for a significantly

higher price. Retailers then increased their prices for “Golden Kernel” corn charged to their restaurant customers.

What are the rights of the parties?

8. Larry owned an industrial building, which he leased in part to Acme Corporation. Larry used the rest of the building for his own business. Several years into the lease term, Tenant Corporation acquired Acme, assuming Acme's lease.

After Tenant acquired Acme, Larry built an addition to the building. As part of this expansion, without notice to Tenant, Larry removed a shower room used by Tenant's employees, and bricked up 50 windows that Tenant relied on for sunlight and ventilation. The building's basement also became subject to sewage overflows, which remained unaddressed by Larry despite Tenant's complaints.

Tenant discovered that in addition to monthly rent, Larry was charging Tenant for 100% of the building's monthly utility costs. Under the assumed lease, however, Tenant was only to be charged for 65%, based on its occupancy of the building. When Tenant protested, Larry stated that he had always charged Acme for 100% of the utilities despite the terms of the lease. Acme denied this claim, providing written evidence to the contrary.

When Tenant refused to pay more than its 65% share of the utilities, Larry threatened to terminate the lease immediately. After deciding that it could not risk any interruption of its operations, Tenant found another facility and began relocating. Tenant informed Larry that Tenant would vacate the building on November 30th, with 13 months remaining on the lease. As a result of Larry's additional threats of termination, Tenant, under protest, continued to pay 100% of the utilities in addition to rent through its departure date, after which Tenant ceased all further payments to Larry.

Shortly after Tenant moved out, Bank foreclosed on the building. After the Bank had signed a purchase and sale agreement with the Purchaser, but before the building's deed had been delivered, Larry paid the full amount secured by the Bank's mortgage. The Bank then delivered the deed to Larry.

Larry also owned beach property bordering Beach Lane, a dirt road that provided access to Cape Cod Bay. Roberta owned a house in a subdivision adjacent to Larry's property. Roberta had bought her house two years ago from Xavier, who had used Beach Lane regularly for over 25 years. To get to the bay, Roberta drove onto Beach Lane from Cranberry Trail, which ran behind Roberta's property. Roberta's house was one-half mile away from the intersection of Beach Lane and Cranberry Trail. Before Larry placed

boulders across Beach Lane to stop traffic, Roberta would park her car at the end of Beach Lane and walk over the dunes to the bay. After Larry's blockage of Beach Lane, Roberta nonetheless continued to use the dirt road to reach the bay on foot.

What are the rights of the parties?

9. Tom lived in Boston with Gloria for 30 years. During this time, Tom and Gloria had a long-term relationship but were not married. Their relationship was so close that they always referred to themselves as husband and wife. Tom and Gloria had two sons from their relationship, Sam and Paul. Tom owned many commercial real estate properties that he leased and which were valued at \$20 million. In 2000, Tom executed a Deed of Trust under which he transferred all of his commercial real estate to himself as sole trustee. The net income of the trust was payable to him during his life and the trustee was instructed to pay him all of or such part of the principal of the trust estate as Tom might request in writing from time to time. Tom retained the right to revoke the trust at any time. Upon his death, the successor trustee was to pay the principal and income to Gloria if she survived him.

Tom went to Florida for several months each winter to visit old army friends. He told Gloria and his sons that when he visited Florida he would stay in a rooming house. Unbeknownst to Gloria and his sons, Tom had married Wilma some forty years earlier in Florida. Tom owned an ocean view estate in Miami valued at \$2 million. In 1965, prior to Tom's marriage to Wilma, Wilma gave birth to a baby girl, Donna. Donna's birth certificate listed Wilma as the mother, however, none of the certificate's spaces for information about Donna's father contained any information, rather each of these spaces was stricken through with a straight horizontal line. Unsigned hospital records from Florida pertaining to Donna's birth lists Wilma as the mother and indicated that the child was "illegitimate." In 1970, months after their marriage, Tom and Wilma swore in an affidavit before a notary public that the birth record relating to Donna "does not fully and correctly state all the facts relating to said birth." The affidavit identified Tom and Wilma as Donna's "natural parents." However, U.S. Army service records from 1977 indicated that Tom had filled out an Army beneficiary slip listing Wilma as his wife and Donna as his "step daughter."

In 2010, Tom died and his last will and testament was found by Gloria. The will provided that: "ten percent of my estate is to go to my loving wife and that the remaining ninety percent is to be divided evenly between my issue then living." Just weeks before Tom's death, Tom told the President of a local charity that he intended to give the charity \$1 million upon his death.

Gloria has filed for probate of the will in the Probate and Family Court Department in Boston.

What are the rights of the parties?

10. Landowner inherited a remote weekend retreat consisting of wooded land and a cabin, where he made maple sugar which he sold locally. Although “No Trespassing” signs were posted prominently throughout the property, over the years, recreational snowmobilers traversing the property had damaged Landowner’s maple trees and vandalized the cabin. To address this, Landowner installed barbed wire along the property line to block access to the main trail leading onto the land. Landowner also strung a low barbed wire strand farther down the trail close to the cabin, and covered the strand with bushes.

Father, who owned three snowmobiles, lived several miles from Landowner’s property. Late one snowy Saturday afternoon, Father and Son, who was fifteen, decided to race each other on snowmobiles. Father also invited Neighbor, with whom he had shared a few beers that afternoon, to race with them. Upon reaching the barbed wire blocking the trail to Landowner’s property, Son lifted the wire so that Father, Neighbor and Son could drive under it.

Once on Landowner’s property, the three continued to race their vehicles toward the cabin. As they neared the structure, Son hit the low barbed wire at high speed, sending him airborne. Upon witnessing the snowmobile landing on top of Son, Father went into shock and collapsed. Neighbor ran into the cabin for help and knocked over the evaporation equipment Landowner used to make maple sugar, igniting a fire.

Landowner arrived at the property in time to see flames rising in the sky. On his way to the cabin, Landowner drove past Father and Son. Despite Neighbor’s pleas to take them to the hospital, Landowner instead focused on extinguishing the fire. Father and Son were both transported to the hospital by firemen who arrived on the scene; however, the delay in Son’s medical attention resulted in amputation of Son’s leg. After the accident, Father suffered from severe headaches, reading problems, gastrointestinal distress, nightmares and depression. As a result, Father could not drive or work. Landowner’s cabin and its contents were completely destroyed by the fire, and Landowner was unable to deliver maple syrup to the local merchants who had ordered from him.

What are the rights of the parties?