

MASSACHUSETTS BAR EXAMINATION

SECOND DAY

**JULY 31, 2008
MORNING PAPER**

ESSAY SECTION

QUESTIONS

1. There are two unrelated requests for advisory opinions before the Supreme Judicial Court of Massachusetts propounded by the Massachusetts legislature asking for answers to questions about the constitutionality of two bills pending before the legislature. The questions are as follows:

(A) A proposed bill, No. S1958, would restrict the ability of criminal offenders to profit from their crimes by the sale of rights to movies, books or any other media. The proposed bill provided as follows:

An Act Relative to Profits from Crime. Any entity contracting with a Defendant must submit a copy of a contract to the Department of the Attorney General for its determination whether the proceeds under the contract are substantially related to a crime. If so, the contracting party must pay over any monies which would otherwise be owed to the person who committed the crime. The funds shall be deposited into an escrow account and made available to the victims of the crime. "Defendant" is defined as "a person who is the subject of pending criminal charges, or has been convicted of a crime, or has voluntarily admitted to the commission of a crime."

Opponents asserted that the proposed statute is unconstitutional. Accordingly, the legislature asked the Court to give an advisory opinion as to the constitutionality of the proposed bill and answer to the following question: "Does S1958, by restricting the ability of criminal offenders to profit from their crimes, violate the Constitution of the United States?"

How should the Court answer the legislature's question?

(B) Charitable institutions have come under scrutiny for their large endowments in recent years. Critics, including members of many state legislatures and congress, have questioned whether these non-profit institutions continue to fulfill their charitable purpose and whether their non-taxable status should remain. Consequently, pending in the Massachusetts legislature is a

proposed bill, No. H3065, that would tax certain charitable non-profit institutions. The proposed bill provided as follows:

An Act Relative to the Taxation of Endowments. Any charitable non-profit institution that has an endowment fund in excess of \$750 million dollars shall be subject to an annual tax of 2 ½ per cent of all monies in excess of \$750 million dollars. For the purposes of this section an endowment fund shall be an institutional fund of a private charitable non-profit institution not wholly expendable by the institution on a current basis under the terms of the applicable gift instruments.

Twenty-five charitable non-profit institutions would be impacted by the bill if it became law. These institutions assert that the bill is unconstitutional. The legislature asked the Court to give an advisory opinion as to the constitutionality of the proposed bill and answer the following question: “Does H3065, by subjecting charitable non-profit institutions with an endowment in excess of \$750 million dollars to taxation, violate the Constitution of the United States?”

How should the Court answer the legislature’s question?

2. You represent BikesUSA, a bicycle manufacturer, in the following matters:

(A) Sports Stores, a national retail sporting goods chain, placed a written order with BikesUSA for 10,000 bicycles to be shipped in two equal shipments. BikesUSA has completed production of the first 5,000 bicycles but has not yet shipped them, and it has partially completed production of the second 5,000 bicycles. Sports Stores has just notified BikesUSA that it is cancelling the entire order due to a slowdown in its business that has resulted in the closing of several of its stores. BikesUSA's sales department has found that Discount Mart, a chain of discount stores, will buy these bicycles at one-half the price Sports Stores had agreed to pay, on the condition that BikesUSA pay Discount Mart's broker a 10% commission and further that BikesUSA pay substantially higher charges for expedited shipping to Discount Mart.

(B) BikesUSA agreed to purchase bicycle shifters from Shiftco to fill rush orders from two different customers, Cycle Express and Pedals, Inc. Shiftco required payment in advance from BikesUSA for expedited production of the shifters to enable BikesUSA to fill its customers' rush orders. The shifters have just been delivered to BikesUSA, but all are defective and unusable. BikesUSA has found another company, Allied, to produce the shifters at a much higher price, but Allied's shifters cannot be shipped to BikesUSA for several months. As a result, Cycle Express has cancelled its order. Pedals, Inc. still wants its order filled.

In each matter, what will you advise BikesUSA?

3. One month ago Sally inherited House from her grandfather. House was on a two acre oceanfront parcel of land which included three hundred feet of a small beach that was under water at high tide.

The only land access to House was through a parcel of land currently owned by Alex. One hundred years ago, the former owner of Alex's parcel sold the former owner of Sally's parcel the right to have a driveway to House from the town highway for use by "horses, buggies, carriages and foot traffic only." For the last fifty years Sally's grandfather, as well as his guests, have driven their cars on the driveway on a regular basis to reach House. Sally owns a gardening store and thus drives a large pickup truck. Three weeks ago Sally received a letter from Alex telling Sally that she could not drive her pickup truck, or indeed any motor vehicle, on the portion of the House's driveway that was on his land. At the same time Alex placed a locked gate across the driveway at a location where the driveway was on his land. In response, Sally erected on a portion of her land a ten foot tall fence that partially blocked the view of the ocean from Alex's house.

Two weeks ago Sally erected a large sign facing the beach portion of her parcel of land stating "No Trespassing. Violators will be prosecuted." One day last week at low tide, Betty powered up to this beach by jet ski and proceeded to have a picnic on the sand. Sally saw Betty doing this, screamed at Betty to leave immediately, and took photographs of Betty to show to the police.

Sally's view of the ocean from House was partially blocked by a large tree on land owned by Chuck. Last week, Sally, incorrectly believing that the tree was on her land since her grandfather had once told her that he owned the land on which the tree stood, cut down the tree and sold the wood as firewood in her garden store for \$200. When Chuck approached Sally about the removal of this tree, Sally told him that the tree was dying and that she did him a favor by cutting it down. The tree that Sally cut down had immense sentimental value to Chuck since he had played under it as a child.

What are the rights of Alex, Betty, Chuck and Sally?

4. Harry and Wendy met in 1985 and were married in 1988. Three days prior to their wedding day, Wendy presented Harry with an Agreement and asked him to sign it. Wendy suggested that Harry have a lawyer take a look at the Agreement. She also told Harry that their marriage was conditional on his signing of the Agreement. Harry was not happy about signing the Agreement but did so without consulting a lawyer. At the time, Wendy had assets worth approximately \$750,000 including interests in various family businesses. Harry's assets totaled approximately \$25,000. Harry had a high school diploma and worked as a bank teller. The Agreement listed Harry's and Wendy's separate property that each owned prior to the marriage and provided that upon a termination of the marriage this separate property will remain the sole and separate property of the respective owner prior to marriage. The Agreement also provided that all other property was deemed to be marital property subject to division. Wendy did not disclose on the separate property list attached to the Agreement her collection of gold coins worth \$35,000 which she kept in a safe deposit box. Both Harry and Wendy waived alimony under the Agreement. The Agreement also contained a provision that Wendy would obtain sole custody of any children born of the marriage.

Harry and Wendy had one child, Abby, born in 1990. In 1994, Harry and Wendy purchased House, putting title solely in Wendy's name. After Abby was born, Harry stayed home as a full-time father, helping out occasionally in Wendy's family businesses. Harry drove Abby to and from school, helped her with her homework and always attended her school plays and sports activities. Due to her work schedule, Wendy was frequently unable to attend Abby's school and sporting activities. During the marriage, Harry and Wendy lived a lavish lifestyle and belonged to the local country club and yacht club. In 2004, when Abby started high school, Harry told Wendy that he wanted to go to college and eventually get a graduate business degree. Wendy dismissed his suggestion and stated that she would always take care of him. Thereafter, Wendy started to exhibit hostility toward Harry. On one evening, she became irate at Harry, shoved him against the wall and ripped the telephone out of his hand when he attempted to call the police. Later that same evening, Wendy apologized to Harry. Several months later, unbeknownst to Harry, Wendy transferred House to Wendy's father as trustee of a trust of which Abby was the sole beneficiary. Wendy, Harry and Abby continued to live in House until January 2008, when Harry and Wendy separated. Abby has graduated from high school and will be attending college in the fall of 2008.

Harry has filed for divorce claiming that he is unable to support himself and maintain the lifestyle to which he is accustomed. Harry has requested alimony, sole legal custody of Abby and exclusive right to House. Harry has also requested that the court order Wendy to pay Abby's college tuition.

What are the rights of the parties?

5. Widow sued Doctor in the Superior Court alleging that Doctor negligently performed gastric bypass surgery on her late Husband resulting in Husband's wrongful death.

At trial, the following occurred:

- (A) Prior to the surgery, Doctor was in the care of a psychotherapist. Widow offered in evidence the psychotherapist records to show that Doctor was not in a proper mental state of mind to perform such major surgery, which contributed to her Husband's death. Doctor objected.
- (B) Immediately prior to his death, Husband, in his last breaths, stated to Widow that Doctor had said to Husband just before the surgery, "Do not worry, I may appear nervous to you but I know what I am doing." Widow sought admission of Husband's statement and Doctor objected.
- (C) In a pre-trial deposition, Nurse, who assisted in Husband's surgery, testified that Doctor appeared nervous during the surgery and kept asking Nurse for surgical advice. Nurse has since died. Widow sought admission of Nurse's deposition testimony and Doctor objected.
- (D) Doctor called Expert Witness to testify as to Doctor's fine reputation and expert surgical skills. Widow, during her cross-examination of Expert Witness, proffered evidence of Expert Witness's conviction eleven years ago for perjury. Doctor objected.
- (E) At the end of the extremely difficult trial, Widow's counsel, in the heat of closing argument, stated: "If Doctor were as compassionate about his patients as he would have you believe, then why did he just two weeks ago offer Widow one million dollars to settle this case. Doctor should rightfully pay for Husband's death with his huge insurance policy." Doctor objected and moved for mistrial.

In each instance, how should the Court rule?

MASSACHUSETTS BAR EXAMINATION

SECOND DAY

**JULY 31, 2008
AFTERNOON PAPER**

ESSAY SECTION

QUESTIONS

6. Plaintiff is a Massachusetts construction company with its principal place of business in Cambridge, Massachusetts. Defendant is a Delaware corporation with its principal place of business in Texas. Defendant operates a chain of hotels throughout the United States, including a hotel in Massachusetts, and maintains a branch office in Boston, Massachusetts, among other places throughout the country, where it hires employees and takes reservations for its hotels.

Between 2004 and 2007, Plaintiff and Defendant entered into contracts totaling more than \$5,000,000 for renovation and remodeling work to Defendant's hotels in Georgia, Connecticut, Massachusetts, Texas, Pennsylvania and Virginia. The work to be performed at each hotel was detailed in each contract. However, as to the work performed at the Massachusetts hotel, the Plaintiff and Defendant executed a General Release barring all claims for that location. Plaintiff and Defendant communicated through video conferencing, faxes, telephone conversations, emails, and mail sent to and from Massachusetts and Texas. Plaintiff's representatives traveled to Texas to execute the contracts, and Plaintiff sent workers from Massachusetts to the out-of-state locations.

Defendant failed to pay in full for the construction services rendered under each contract. There were substantial cost overruns during the projects. Also, Plaintiff has become aware that Defendant is having financial difficulties caused by an aggressive expansion program and has heard reports of a change in Defendant's management. Plaintiff brought a lawsuit asserting claims for breach of contract and violations of Mass. Gen. Laws Ch. 93A, §11. Plaintiff's suit was originally filed in Massachusetts state court and Defendant then removed the action twenty-five days later to the United States District Court for the District of Massachusetts.

Defendant has moved to dismiss Plaintiff's complaint pursuant to Fed. R. Civ. P. 12(b). Plaintiff has moved to obtain a prejudgment attachment pursuant to Fed. R. Civ. P. 64. How should the Court rule on the motions?

7. Owner, a sole proprietor, owned and operated a business which manufactured and sold computer chips to computer hardware manufacturers. On February 1st, Owner purchased a building to serve as a new plant facility for the business. Owner financed the purchase with a loan from Commercial Bank, secured by a mortgage on the building.

Thereafter, on April 1st, Owner applied to Commercial Bank for a loan to finance an expansion of his business. At the time Owner applied for the loan and before any loan was made, Commercial Bank filed a financing statement covering as collateral all of Owner's business assets.

Owner then applied to Savings Bank for an additional loan for operating expenses. Savings Bank gave him the loan on May 1st, requiring him to execute a security agreement granting it a security interest in all of his business assets, and Savings Bank immediately filed a financing statement.

On May 15th, Owner received from Commercial Bank the business expansion loan that he had applied for on April 1st. Owner executed a security agreement which granted to Commercial Bank a security interest in all of his business assets "whether now owned or hereafter acquired" for all liabilities of Owner to Commercial Bank, "whether now existing or hereafter contracted."

On June 1st, Owner bought a large air conditioning unit, financed by a loan given to him that day by Savings Bank. He executed a security agreement covering the unit, which was installed on the roof of Owner's building on June 2nd. Savings Bank filed a financing statement for the unit on June 25th.

On July 1st, Owner purchased several computers for the business. He financed the purchase with another loan from Savings Bank, executing a security agreement which granted Savings Bank a security interest in the computers. On July 15th, Savings Bank filed a financing statement covering the computers.

On September 1st, Commercial Bank made a further loan to Owner to cover his payroll expenses. Thereafter, due to an economic downturn in the computer hardware industry, Owner's business began to fail. He sold one final order of computer chips to Buyer, who took delivery of them, and then Owner closed his business, defaulting on all of his loans.

What are the rights of the parties?

8. Alan worked at Large Corporation (“Large”). Last year Bob, Large’s President, correctly suspected that Alan secretly was applying for a job at a competitor, Small Corporation (“Small”). Since Bob really did not want Alan to leave Large, Bob called Small’s President and falsely told her that Alan was a thief. As a result, Alan was not hired by Small to a position that would have paid him twice as much money as what Large was paying him.

When Alan learned from Small’s President exactly why he was not hired by Small, Alan stormed into Bob’s empty office and threw Bob’s valuable Ming vase on the floor, where it shattered.

The next day, Bob asked Alan if he had broken the vase. Alan’s response was to roll his eyes, laugh and then state “Maybe I did and maybe I didn’t.” This response caused Bob to question Alan’s current mental health. Bob immediately sent a confidential email to two Large employees (Alan’s supervisor and the head of human resources at Large) in which Bob alerted them to his fears that Alan was mentally unstable and might be dangerous. As a result of this email, Alan’s supervisor did not recommend Alan for a major promotion to a job position at Large which would have involved more job stress.

The next month Alan was rushing along with Charles, who was a salesman for another company, to a meeting at the Large office complex. The two of them fell on a wet spot on the floor that had been created by a leaking water pipe. Alan broke his leg and Charles broke his arm.

To prevent theft, Large installed many hidden 24 hour video cameras in the stockrooms at their facilities. The video feeds from these cameras were recorded and reviewed by Security, an outside security company. Except for Bob, no Large employees knew about these hidden cameras. Very early one summer morning, Denise biked to her job at Large. She decided to change out of her biking clothes and into her work clothes in the back of a deserted Large stockroom behind a row of boxes. A week later Denise learned that a video of her changing her clothes that morning had been posted on the internet on a website entitled “Nude At Work.”

What are the rights of Alan, Bob, Charles, Denise and Large?

9. Three brothers, Mark, Robert and James, were nephews of Stella, an elderly widow with no children. In 2002, Stella validly executed a will in which she named Mark as Executor and made a specific bequest of her home in Anytown to James. She also left the remainder of her estate including a certificate of deposit in the amount of \$500,000 to Mark and Robert in equal shares. Shortly thereafter, Mark and Robert had a dispute and stopped speaking to each other.

Robert continued to maintain a close relationship with Stella. Mark, however, did not visit or otherwise contact Stella after his dispute with Robert. Robert often spoke to Stella about his dispute with Mark and frequently remarked how unreasonable and bad-tempered Mark was. Robert visited Stella almost daily. In 2005, after one visit in which Robert spoke poorly of Mark, Stella asked Robert to locate a lawyer to assist her in creating a new will. Robert introduced Stella to Attorney. Before a new will was prepared, Stella was suddenly admitted to the hospital and diagnosed with a serious heart condition and possibly a stroke. During her hospitalization, and at Stella's direction, Attorney prepared a new will naming Robert as Executor, retaining the bequest of her home in Anytown to James and bequeathing the remainder of her estate solely to Robert. Attorney prepared the will and visited Stella at the hospital. Attorney read the will to Stella in the presence of two disinterested witnesses. Stella nodded her understanding of the will's terms to Attorney in the presence of the witnesses. Due to Stella's medical condition, one of the witnesses assisted Stella in signing the will by guiding Stella's hand. In the course of her representation of Stella, Attorney learned that Stella owned a beach house in Massachusetts that she wanted to sell. Attorney purchased Stella's beach house for the asking price.

Stella was subsequently discharged from the hospital and returned home. Anne, Stella's close friend and a nurse, moved into Stella's house to assist her. At that time, Stella executed a power of attorney in favor of Anne so that Anne could assist with Stella's finances and pay Stella's bills. Soon thereafter, Stella became withdrawn and quiet. Whenever Stella had visitors, Anne would not leave Stella's side. Anne answered all telephone calls, opened all mail and screened all visitors. Anne discouraged visits to Stella from friends and relatives including Robert, telling them that Stella was sleeping or wasn't feeling well. On one occasion while Robert was visiting, Anne became very upset at some questions posed by Robert and shouted at him to leave. On this occasion, Stella pulled the bed sheets up to her chin and looked around the room apprehensively and bewildered. Over time, Stella's medical condition worsened and she became forgetful.

Stella died soon thereafter. In 2007, approximately one month before her death, Stella executed a new will, witnessed by two of Anne's friends, in which Stella named Anne as her Executor and left her entire estate to Anne.

The wills executed in 2002, 2005 and 2007 have been timely filed in the probate court by their respective executors. Timely objections have been made by each executor to the allowance of the other wills.

What are the rights of the parties?

10. Lawyer agreed to represent Client in Client's pursuit of a songwriting career. Client left in Lawyer's possession for safekeeping \$10,000 in proceeds from a recent sale of one of Client's musical scores. Client also left with Lawyer, for safekeeping, a number of originally composed scores, along with a few prized autographed photos of famous entertainers. Lawyer deposited the Client's \$10,000 into his law firm's operating account and stuffed the scores and autographs in his briefcase. On his way home from work, Lawyer stopped at his favorite nightclub and struck up a conversation with Sally, the nightclub's cabaret singer. Sally was unhappily married to Client. Sally asked Lawyer to represent her in a divorce proceeding against Client, and Lawyer readily agreed. Lawyer showed Sally one of Client's scores and asked her opinion of its musical quality. As he left the nightclub, Lawyer, who was short on money, gave the Bartender two of Client's prized autographed photos in lieu of a tip.

Later that evening at home, Client and Sally began to argue, and Client threatened to punch Sally and pushed her into a wall. Client grabbed his coat and briefcase, telling Sally that he would soon be back and she would be sorry. Fearing for her safety, Sally called 911 and provided a description of Client's car. While on patrol, Trooper responding to the 911 call, observed Client's car driving down the road at a high rate of speed. Trooper pulled over Client's car and ordered Client out of the car. Trooper noticed a strong smell of burnt marijuana emanating from Client's clothing and vehicle. Trooper searched the entire vehicle, including the closed glove compartment and trunk. During the search, Trooper discovered in the glove compartment an unlicensed handgun, and in the trunk, a briefcase which contained 2 kilograms of cocaine. Trooper then arrested Client.

What, if any, crimes and ethical violations have been committed?

Will Client be successful in a motion to suppress the handgun and cocaine?