

**MASSACHUSETTS BAR EXAMINATION
SECOND DAY FEBRUARY 27, 2014
ESSAY SECTION
MORNING QUESTIONS**

1. Alex and Betty went into the Jewelry Store. While Alex attempted to distract the Clerk with a question, Betty grabbed a \$300 ring from a display case and put it into her purse. Clerk, however, saw Betty take the ring and he told Betty to put it back. In response, Alex pulled a knife out of his pocket and waved it in Clerk's face. Alex then gave Clerk a shove. Clerk staggered backwards, tripped, hit his head on the edge of a countertop, fell to the floor, and died. Meanwhile, Alex and Betty ran out of the Jewelry Store and into Alex's car. As Alex drove the car and drank a beer, Betty put her purse under the front seat of the car and lit a marijuana cigarette.

A few miles away, Paul, a policeman, stopped Alex's car for speeding after he saw Alex throw an empty beer can out of the car's window. As Paul approached the car, he smelled marijuana smoke coming from the car. Paul asked Alex for his driver's license, but Alex did not have one. At that point Paul saw a sawed-off shotgun on the back seat of the car. Betty then exited the car and ran away. Paul arrested and handcuffed Alex, and placed him into the back seat of Paul's police cruiser. Paul then searched a nearby park, and found Betty. As Paul was arresting her, Betty pushed Paul into a passerby, Sam. Sam fell down, hit his head and died. Eventually, Paul handcuffed Betty, and placed her next to Alex in the police cruiser. Paul then searched Alex's car and found the sawed-off shotgun on the back seat of the car, and Betty's purse under the front seat of the car. Inside Betty's purse, Paul found the ring from the Jewelry Store, a half-ounce of marijuana, and a half-ounce of crack cocaine.

The next day, while investigating Clerk's death, Paul learned that the Jewelry Store had a hidden camera that recorded both audio and video surveillance of the inside of the store. Ed, the owner of the Jewelry Store, gave Paul a copy of this surveillance tape for the period when Alex and Betty were inside the Jewelry Store.

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

2. On September 2, 2012, Jane spoke to Tom, the sole owner and president of Prime Flooring, Inc. (“Prime”), about new linoleum flooring for her kitchen in her home. Tom discussed two options of installation: Prime could put the new floor over the existing floor, or if there were imperfections with the existing floor, Prime could place plywood over the floor and lay new linoleum over the plywood. Tom also told Jane that because the flooring to be replaced was over 23 years old and probably the home’s original flooring, it could have been made with asbestos. At no time during this conversation was there any talk about the possibility of removing the old linoleum. Tom gave Jane a proposal, on Prime’s stationary, stating the installation price for labor and materials and providing for an additional cost of \$500 if plywood was needed to cover the existing floor. Jane agreed to have Prime install new linoleum in her kitchen.

On September 18, 2012, Bob and Ernie (“Installers”), floor installation contractors who worked mainly but not solely for Prime, came to Jane’s house to install the new floor. Installers had the proposal with them, met with Jane briefly, but they never told Jane of their relationship with Prime. When Installers finished work for the day, they left Jane a note saying they would return the next morning to finish the job and the note was signed “Prime Floors.”

Rather than leave the old floor, Installers called Tom and told him that they intended to remove the old floor. Tom gave Installers no instructions about how to remove the old linoleum or the possibility of there being asbestos. Installers were not licensed to remove asbestos. Installers removed the old linoleum flooring, and then sanded a rough part of the floor, which released asbestos fibers contained in the old flooring into the house, thereby contaminating nearly all of Jane’s house. Jane was not allowed to return to the house and Jane had to rent an apartment for nine weeks. All furniture, clothing, draperies, books, food, mattresses and anything non-porous was thrown out. Jane had to replace all furniture and furnishings. Jane also had to pay for the cost of the asbestos clean-up. Jane’s house was a shell and Jane lost most of her worldly possessions (including her collections of Christmas tree ornaments from around the world and Hummel music boxes passed down through generations of Jane’s family) from the asbestos contamination.

In 2013, Jane filed a suit in the Superior Court against Tom, Prime and Installers. Jane seeks damages for damage to her home and clean-up costs, loss of use of her home, loss of personal property and miscellaneous expenses.

What are the rights of the parties?

3. Acme sold tablets and other personal electronic devices (“PEDs”). Shortly after Acme began selling PEDs with lithium batteries supplied by Manufacturer, Acme’s customers began reporting severe overheating and fires in PEDs which contained Manufacturer’s lithium batteries. Acme took pictures of several damaged PEDs and also retained several PEDs sent to it by customers. Acme hired Engineer, a professor, to analyze these PEDs. Engineer prepared a written report and gave it to Acme. Engineer’s report showed that the lithium batteries supplied by Manufacturer had not been made in accordance with Acme’s specifications. When questioned by Acme, Manufacturer acknowledged that it had deviated slightly from Acme’s specifications but claimed that the change had been required by Environmental Protection Agency (“EPA”) regulations. Customer had bought four PEDs from Acme containing Manufacturer’s lithium batteries, which overheated and damaged the PEDs.

Customer sued Acme and Manufacturer in Superior Court. Prior to trial, the following occurred:

- a. Customer wanted information about Acme’s liability insurance coverage.
How can Customer obtain this information?
- b. Customer sent a deposition notice to Manufacturer seeking testimony about Manufacturer’s process for making lithium batteries, a list of all locations where Manufacturer shipped lithium batteries, and the gross dollar amount of Manufacturer’s sales of lithium batteries.
What should Manufacturer do if it does not want to provide such testimony?
- c. Customer sought to depose Engineer and to obtain a copy of her report. Acme objected. Engineer insisted on being paid \$1,000 per hour for her time.
What are the rights of Customer, Acme and Engineer?
- d. Customer sent a deposition notice to Manufacturer to depose Manufacturer’s President. When Manufacturer’s President arrived at the deposition, video cameras had been set up to videotape her deposition. Manufacturer’s President objected and refused to proceed.
What are the rights of the parties?

- e. Customer scheduled the videotape deposition of its own expert witness' testimony for use at trial. Manufacturer wants to oppose this procedure.

What are the rights of the parties?

- f. Acme wanted EPA to answer questions without an oral deposition.

What action, if any, may Acme take?

- g. Acme and Manufacturer want their respective expert witnesses to photograph and conduct a complete examination of Customer's PEDs, but Customer has objected.

What, if anything, can Acme and Manufacturer do:

- i. to take pictures of Customer's PEDs; and
- ii. to conduct a complete examination of Customer's PEDs?

- h. Customer sent Acme 10 interrogatories with five sub-parts each. Customer also sent 50 requests for admission, each of which asked Acme to admit to the authenticity of attached photographs of Customer's damaged PEDs.

What are the rights of the parties?

- i. Customer sent a request for production of documents to Acme seeking all communications, including all electronic communications, between Engineer and Acme's attorneys.

What are the rights of the parties?

- j. Customer sent a written request to Manufacturer and Acme asking that all parties confer regarding electronically stored information.

What are the rights and obligations of the parties?

4. Dr. X, a well-known Massachusetts medical researcher, and Hospital, which owned certain patents, formed a company (the “Company”), to develop and commercialize therapy products. Dr. X devoted substantially all of his professional time to the activities of the Company after its formation.

Patient suffered from a medical condition for which the Company’s products had been created. After undergoing a battery of diagnostic tests conducted by Dr. X, Patient agreed to participate in one of the Company’s medical trials. Based on the test results and Patient’s medical history, Dr. X referred Patient to Surgeon, a member of the medical staff at Hospital, for a consultation after which Surgeon determined that Patient qualified for the medical trial.

On the day Patient was admitted to Hospital to start the treatment, Patient signed an informed consent (the “Consent”), in the presence of Dr. X. The Consent disclosed the nature of the medical trial, and the potential risks associated with the treatment. Neither Dr. X nor the Consent mentioned, however, that another person had died during her participation in an earlier medical trial for the same condition as Patient’s. Further, neither Dr. X nor the Consent mentioned Dr. X’s or Hospital’s financial interests in the Company.

The next day, Patient underwent a procedure administered by Surgeon as part of the treatment. Surgeon did not review the Consent with Patient prior to the procedure, during which Surgeon mistook Patient for another patient, and also removed one of Patient’s healthy kidneys. After realizing the mistake, a visibly shaken Surgeon said to Patient’s wife (“Wife”) following the surgery, “I mistook your husband for another patient.” Upon hearing this news, Wife, who was six-months pregnant, became distressed and went into labor. The next day, Wife gave birth to a daughter who died hours later.

Months after the treatment, Patient continued to suffer from the effects of the procedure, which left him permanently debilitated.

What are the rights of Patient and Wife?

5. Rick and Lorie were engaged to be married. About three weeks before the wedding, Rick and Lorie executed a prenuptial agreement. Lorie was reluctant, but Rick, who had received a large inheritance from his grandmother, insisted and made the marriage conditional on signing of the agreement. According to the agreement, which was drafted by Rick's lawyer, Lorie waived any future claims for alimony, child support and any right to property owned by Rick before marriage. Lorie did not consult a lawyer before signing the agreement.

Rick was a corporate executive and worked very long hours during the first year of their marriage. Feeling lonely and ignored by her husband, Lorie had an affair with their neighbor, Shane. Despite Lorie's best efforts to conceal the affair, Rick discovered the relationship when he overheard a telephone conversation between Lorie and Shane. Rick was furious and kicked Lorie out of the house. With no place to go, Lorie, a homemaker, moved in with Shane. Rick was devoutly religious and, on that basis, did not believe in divorce.

Lorie discovered that she was pregnant two months after Rick kicked her out. Lorie did not tell Rick, with whom she had not spoken since she moved in with Shane. Lorie did tell Shane that she was pregnant and Shane assumed the baby was his. Shane was at Lorie's side when the baby, named Karl, was born and helped care and provide for the baby over the next year. Shane proposed marriage to Lorie and presented her with an expensive engagement ring. Lorie accepted. Before Lorie and Shane could be married, however, Lorie had to secure a divorce from Rick. Lorie set up a meeting with Rick to discuss a potential divorce.

During the meeting, Rick surprised Lorie by apologizing for being a distant husband. He said he understood why Lorie had the affair and was willing to forgive her and start over again. Lorie, who had always felt guilty about the infidelity, agreed to reconcile with Rick. Lorie advised Shane of her decision and Lorie, along with Karl, moved back in with Rick. Six months after Lorie moved back in, however, Rick told her that he could never trust her again and that he wanted to end the marriage.

Rick subsequently filed for a fault-based divorce alleging adultery. He also sought physical custody of Karl and asked the court to enforce the prenuptial agreement. Rick maintained that Lorie should be denied alimony, in particular, because she committed adultery.

Lorie filed an answer and counterclaim seeking alimony, child support and equitable distribution of any marital property. Lorie also sought physical custody of Karl because, as she

repeatedly told Rick, “I am his mother and children need to be with their mother.” Shane intervened in the divorce proceedings and claimed that he was Karl's father. He sought physical custody of Karl and return of the expensive engagement ring, which Lorie maintained was a gift.

During the divorce proceedings, it was discovered that Rick did not disclose a \$10,000 interest in a real estate project at the time the prenuptial agreement was executed.

What are the rights of the parties?

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AFTERNOON QUESTIONS**

6. Peter, who is African-American, worked for 10 years at Big Corporation (“Big”) as an accountant. Chris was Peter’s supervisor at Big. On January 2, 2011, Peter’s employment at Big was terminated by Chris, allegedly due to Peter’s poor performance on the job in 2010. Peter filed a racial discrimination claim alleging wrongful termination against Big at the Massachusetts Commission Against Discrimination on February 1, 2011, and then filed this discrimination claim in Superior Court in late 2011. At the jury trial of this civil matter, the following evidence was admitted over objection:

- a. Peter testified that at the April 2011 state administrative hearing on Peter’s request for unemployment compensation, Chris testified that Peter had been performing his job responsibilities at Big in “an excellent manner in most respects.”
- b. Peter’s wife Sally testified that Peter had told her in private in December 2010 that Chris had told Peter to “start looking for a job elsewhere as Big might be having layoffs soon.”
- c. Peter offered, and the Court admitted, a private email message from Chris to his wife Martha dated the day of Peter’s termination in January 2011. In this email message Chris referred to Peter twice using a racially derogatory word.
- d. Emily, Peter’s new employer, testified that she called Doug, Big’s President, in mid-January 2011 to get a job reference on Peter before she hired Peter, and that Doug told her over the phone that Peter was an “A+ employee” and that Emily should hire Peter.
- e. Big offered, and the Court admitted, a properly authenticated court record which showed that Peter had been convicted and sentenced four years ago in Massachusetts for a misdemeanor – shoplifting a \$200 coat from a store.
- f. Frank, who had worked at Big with Peter for many years, testified that Peter had a general reputation for truthfulness and veracity among his many co-workers at Big.

- g. Peter testified that Big had offered to settle the case with a payment by Big to Peter of \$500,000.

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

7. Fast Freddie's is a well-known used car business known for its zany television advertisements and promotions. Fast Freddie's sales slogan is "Good Cars Cheap." Fast Freddie's buys its cars at Auto Auction, performs minimal maintenance and repairs, and then puts the cars on the lot for sale. Fast Freddie's inventory of cars turns over quickly. Fast Freddie's also promises "Credit to everyone, no one is turned down." Many of Fast Freddie's customers do not have good credit.

Joe was looking for a reliable used car to commute to work. He had been laid off and his car was repossessed, but he had been recently rehired. Joe had a limited budget and was hoping to spend no more than \$5,000 for a car. One day, Joe watched Fast Freddie's sales ad on cable television, when a 2005 car ("Car") was shown. The price was \$5,000. The next day, Joe visited Fast Freddie's lot, saw the Car and went for a test drive. Joe did not know much about cars. The Fast Freddie's salesman who showed Car to Joe was Sam, who had worked at Fast Freddie's and other used car dealerships for many years. Sam often appeared in Fast Freddie's television ads. Joe asked Sam about Car's repair history, accident record and condition. Sam told Joe, "Car is in great shape. It's a real beauty. The previous owner, a little old lady, had recently replaced the brakes, water pump and clutch." Sam boasted, "For nine years old, Car's a humdinger. It's good for another 100,000 miles. These babies run forever."

Joe agreed to buy Car from Sam at Fast Freddie's. The sales agreement signed by Ed, the sales manager at Fast Freddie's, and Joe contained the following provision: "Fast Freddie's agrees to sell, and Joe agrees to buy, Car for the price of \$5,000. Joe will pay \$2,500 in cash and the remaining \$2,500 by check at the time of delivery."

The next day, October 2nd, Joe went to Fast Freddie's to pick up Car. Joe, before giving Sam the money, said, "I'd like my brother-in-law, a mechanic, to take a look at Car to make sure everything is o.k." Sam said, "Don't waste your time. Car is as good as new. If you don't want it, I have other customers ready to buy it." Although Joe was reluctant and had a bad feeling about Sam, Joe decided not to have his brother-in-law check out Car and bought it. After inspecting Car briefly, "kicking the tires," and checking "under the hood," Joe gave Sam \$2,500 in cash and a check payable to Fast Freddie's for \$2,500 drawn on Joe's account at Central Bank. Then Sam gave Joe the keys to Car and Joe drove it off the lot.

On October 3rd, Sam went to Easymoney, a check cashing service where he endorsed the back of Joe's check by signing only his name, presented the check to the cashier and received \$2,500 in cash.

On October 5th, Joe was driving to work when Car broke down and had to be towed to a local service station. After looking at Car, the mechanic on duty at the service station told Joe that the clutch was stripped, burned out, and needed to be replaced. The brakes were also worn-out and the engine needed to be overhauled. Car would not last much longer. When Joe told the mechanic that he had owned Car for only a week, the mechanic said, "Where did you buy this piece of junk? Tell me you didn't buy it at Fast Freddie's, did you?" The mechanic said Car had a value of \$750 and could only be used for scrap parts.

On October 6th, Joe hand-delivered a letter to Sam at Fast Freddie's describing Car's burned-out clutch and brakes and the need for an engine overhaul. Joe demanded his money back and said that Car was at the service station. Joe stated, "You can have this junk box back!" Joe also instructed Central Bank not to pay the check for \$2,500 given to Fast Freddie's for Car.

On October 7th, Mary, the manager of the Easymoney branch, went to Central Bank and demanded payment of Joe's check. Central Bank refused to pay. Easymoney informed both Joe and Fast Freddie's that Central Bank refused payment and demanded payment from them.

Easymoney has brought an action to recover the value of the check against Joe, Fast Freddie's, Sam and Central Bank. The parties asserted counterclaims and cross-claims against each other.

What are the rights of the parties?

8. Wendy is a licensed social worker in Massachusetts. Recently, Wendy was asked by a local news reporter to comment on some highly publicized cases in which a state agency (“Agency”) charged with overseeing the welfare of children was coming under attack for failing to monitor the children. In two particular cases, one child was seriously beaten and another child was kidnapped by the non-custodial parent. Wendy told the news reporter that she did not have any knowledge of the particular cases, but sharply criticized Agency, saying that it was well known that Agency was rife with mismanagement and that no one cared about the children.

Wendy also stated that Agency was wholly understaffed while, at the same time, Agency’s senior managers had given themselves big pay raises. Wendy’s comments appeared in an article written by the news reporter in Newspaper. As a result of the article, a complaint was issued by the Board of Registration (“Board”), which licensed social workers including Wendy, asserting that Wendy had violated an ethical regulation prohibiting licensed social workers from “commenting on cases involving the welfare of children and engaging in unprofessional conduct which undermines the integrity of the profession.” After an adjudicatory hearing, at which Wendy had an opportunity to respond to the complaint, Board found that Wendy had violated the regulation and permanently revoked her social worker’s license.

Janet, a member of Board, also served as Chairperson of the Society for the Advancement of Children (“Society”). Hank, Wendy’s husband, was a pediatrician and was also a member of Society. Shortly after Board revoked Wendy’s license, Hank wrote a letter to the editor of Newspaper criticizing Board’s revocation of his wife’s license and identifying several reforms that, if enacted, would protect children under the care of the state. Hank subsequently learned of a publicly advertised lecture that Society was sponsoring at a public college in Boston. He also learned that Janet was scheduled to speak on the topic of advocating for children’s safety at the public lecture.

Several months earlier, Society had notified Hank that his membership benefits, including his ability to attend lectures given by Society, had been suspended for his failure to pay Society’s membership dues. When Hank arrived at the lecture hall, Janet recognized him and told him that he could not enter the lecture hall and that he was not allowed to participate. He was not given a reason as to why he was not allowed to enter. When Hank persisted in trying to enter, he was threatened with arrest.

Jeff, a member of Society, lives in New Hampshire and traveled to Boston to attend the lecture sponsored by Society. On his way to Boston, Jeff paid a three-dollar toll to cross the bridge leading to Boston. Subsequently, Jeff learned that local residents living in the city where the bridge is located only had to pay a fifty-cent toll. Jeff was outraged.

Wendy, Hank and Jeff have each filed separate lawsuits in U.S. District Court.

What are the rights of the parties?

9. Landlord owned several houses in Town, Massachusetts, which contained apartments for rent. Landlord leased one of the apartments (the “Premises”) in May 2011 pursuant to a tenancy-at-will agreement. The monthly rent was \$1,250, due on the first day of each month.

Prior to moving in, Tenant had been especially interested in the Premises because of its access to a common area that included an empty room (the “Common Room”), that Tenant wanted to use for exercise. To induce Tenant to lease the Premises, Landlord specifically told Tenant that Tenant could use the Common Room to store his heavy exercise equipment, in addition to using the room for exercise, which Tenant did.

Shortly after moving into the Premises with his spouse and children, Tenant discovered numerous repairs requiring attention. Tenant complained about these matters to Landlord, who assured Tenant that Landlord would address them.

By October of 2011, Tenant was fed up with Landlord’s inaction. Tenant requested an inspection by Town’s Board of Health. As a result, on October 14, 2011, the Board of Health delivered a letter to Landlord, which Landlord received. The letter identified the following violations on the Premises: “broken window panes in the kitchen and childrens’ bedroom, rotted window frames, missing window locks, non-functioning door locks, light fixtures and kitchen faucet, broken bathroom floor tiles and unsanitary conditions on the property.”

After Landlord’s receipt of the letter, Landlord and Tenant spoke several times regarding the condition of the Premises. Months of discussions failed to result in any repairs to the Premises, however. Consequently, Tenant withheld rent that was due on each of May 1 and June 1, 2012. On June 2, 2012, Landlord served Tenant with a Notice to Quit for non-payment of rent, and informed Tenant that Tenant could no longer use the Common Room. Thereafter, the Common Room remained locked, preventing Tenant’s entry.

Rather than vacating the Premises, at the end of June 2012, Tenant paid a locksmith \$1,320 to install doors and locks on the front and side entrances to the apartment. Tenant did not pay rent in July or August of 2012. In early August 2012, Tenant purchased seven windows and installed them at a cost of \$2,235. Tenant submitted the invoices totaling \$3,555 to Landlord, who did not reimburse Tenant for the costs.

On September 1, 2012, Tenant once again did not pay rent. On September 2, 2012, Landlord served Tenant with a second Notice to Quit for non-payment of the rent that was due

on the first of May through September 2012, totaling \$6,250. Landlord subsequently filed an action for summary process.

What are the rights of the parties?

10. Tony was a widower and a successful business man. He also was estranged from his two children, Megan and Andre. As he got older, Tony became more reclusive and was described by family and friends as "eccentric." In fact, Tony received psychiatric counseling in 2008. Tony remained very close to his favorite nephew, Christopher, who visited Tony frequently, ran errands for him, and attended to his personal affairs. Tony was very grateful for Christopher's care and attention.

In 2010, Tony was diagnosed with cancer. He later executed a will and a related trust that named Paulie as Trustee. The trust included the following language:

- (a) All net income to be paid to Christopher for life;
- (b) Paulie, as Trustee, may invade the principal for Christopher in such amounts as Paulie, in his sole and reasonable discretion, determines;
- (c) The trust is to terminate at Christopher's death and any remaining principal is to be distributed to High School; and
- (d) Christopher's rights and interests in the trust shall not be transferable by voluntary or involuntary act or by operation of law, and shall not be subject to execution or process for enforcement of judgments or claims of any sort against Christopher.

Tony did not include his house, which was valued in excess of \$1 million dollars, in the will or the trust. Tony also did not make any reference to his children in the will or the trust.

Christopher was notorious for lavish spending and had difficulty managing his own finances. Tony helped Christopher out with his expenses from time to time. Tony was concerned about Christopher's ability to manage his finances.

Tony died in 2012 and the trust was funded with \$2 million dollars. Bank obtained a judgment against Christopher for failure to repay a personal loan in the amount of \$50,000. Bank requested a court order directing Paulie to pay all future installments of trust income to Bank, rather than to Christopher, until the judgment was satisfied.

Christopher wanted Paulie to invade the trust principal so that Christopher could invest in a new business venture, but Paulie refused. Christopher requested a court order removing Paulie as the trustee.

Because of Paulie's refusal to invade the trust principal and because High School was concerned about Christopher's ability to manage his finances, Christopher and High School

wanted to terminate the trust and divide the trust's principal.

Tony's children challenged the will in probate court. They have also sought possession of Tony's home, but Paulie refused based on his understanding of Tony's wishes.

What are the rights of the parties?