

**MASSACHUSETTS BAR EXAMINATION
SECOND DAY FEBRUARY 26, 2015
ESSAY SECTION
MORNING QUESTIONS**

1. You are the attorney for Town’s Board of Selectman (the “Board”). You have just been told that the Board is planning to vote on the following four matters at its next meeting:
 - a. A Town written policy allows Town residents and organizations to rent the large auditorium in the Town Hall in the evenings “for instruction in any branch of education, learning or the arts, or for social, civic, and recreational meetings and entertainment events pertaining to the welfare of the community.” Some Town residents have complained to the Board about the rental of the Town Hall auditorium by local religious groups. Accordingly, it has been proposed to amend this Town rental policy to prohibit the rental of the Town Hall auditorium “by religious organizations or for use in religious activities such as Bible study, singing religious songs, and prayer.”
 - b. Sam owns a bar on the main street of Town that offers musical entertainment on weekends. He is proposing to offer totally nude dancing as entertainment for the patrons of his bar. Some Town residents are upset at this proposal and feel that it will bring in crime and other negative effects caused by adult entertainment. Accordingly, a new Town public safety and health ordinance has been proposed making it illegal for a person “to knowingly or intentionally appear in public in a state of nudity.” Under this ordinance, however, persons may appear in public with minimal covering of their body.
 - c. Some Town residents are upset at a growing number of people going door-to-door in residential neighborhoods promoting various social, political and religious causes. These residents feel that these door-to-door visitors disturb the peace, violate a resident’s reasonable expectation of privacy and offer the potential for being used by criminals to look for houses to break into. Accordingly, a new Town public safety and health ordinance has been proposed to make it illegal for a person “to go in and upon private residential property in Town to promote any cause without first (i) obtaining a permit from the Board by completing and signing a registration form (which shall be available

for public inspection) or (ii) obtaining permission from the owner or legal occupant of the private residential property.”

- d. Town has a large public park (the “Park”) with several permanent stone monuments in it – including a monument to Town’s war veterans, a monument to the events of September 11, and a monument to the Ten Commandments of the Bible. All of these monuments were built with donated funds from local civic or fraternal organizations. In addition, over the years, the Town has always allowed protests, marches, and other public events to occur in the Park. The Truth, a religious organization with no prior connection to Town, has requested that the Board give it permission to pay for and build a permanent stone monument in the Park dedicated to the Truth’s Prophet and his teachings. In response, the Board has proposed an ordinance, which is based on the Board’s prior practice, limiting the building of permanent monuments in Park to those that “either (i) directly relate to the history of the Town, or (ii) were donated by groups with longstanding ties to the Town.” If this ordinance passes, then the Board plans to use it to deny the request by the Truth to build their proposed monument.

What legal advice would you give to the Board on these matters?

2. Tom responded to an advertisement in the local newspaper offering a two-bedroom apartment in City, Massachusetts. The building also contained four other apartments. Laura, the owner of the apartment building, showed the apartment to Tom. During the showing, Laura asked Tom about his family and if he had any children. Tom replied that he was not married. Tom loved the apartment and entered into a written two-year lease with Laura, effective January 1st. The lease contained provisions barring: (i) pets; (ii) occupancy by anyone under 14 years of age; (iii) occupancy by unmarried couples; and (iv) the use of the apartment for any business purposes. Tom gave Laura \$2,000 as a security deposit, which Laura deposited into her personal savings account.

In January, Tom moved into the apartment with his dog. Tom was a free-lance writer and worked almost entirely out of the apartment. Susan, Tom's girlfriend, and her six-year old son Jack, from a prior relationship, stayed with Tom for a few days every month. In May, Tom asked Susan and Jack to move in with him. Shortly after Susan and Jack moved in, Tom complained to Laura that the air conditioning was not working right. Laura came to the apartment to check the air conditioning and observed Susan, Jack, and Tom's dog. While Laura was there, Tom also complained about other problems in the building and apartment that he thought were building code violations, including a lack of hot water, hallway light bulbs not working, and a broken toilet in his apartment.

Laura hired a contractor to check the air conditioning system and to look at the other complaints Tom had raised. The contractor worked on the air conditioning system, replaced the light bulbs in the hallways, and fixed the toilet. The contractor could not find any problem with the hot water heater but he did tell Laura that the hot water heater "looked old." While the contractor was in the basement, he noticed an old electrical panel that did not appear to be in compliance with City's electrical code. The contractor mentioned this to Tom but did not say anything to Laura.

Tom continued to pay his rent for June and July even though he was not completely satisfied with the repairs that had been made. Specifically, the apartment always seemed hot, even when the air conditioning was running, and he constantly had to jiggle the toilet handle to stop the toilet from running.

At the end of July, Tom received a letter from Laura stating that he was in violation of the lease provisions barring: (i) pets; (ii) occupancy by anyone under 14 years of age; (iii)

occupancy by unmarried couples; and (iv) the use of the apartment for any business purposes. Laura's letter gave him thirty days to correct the violations. Upon receiving the notice, Tom was irate. Tom did not pay the August rent and notified City's Board of Health that the apartment had electrical problems and did not have hot water. Upon learning that Tom had filed a complaint with City's Board of Health, Laura sent a written notification to Tom terminating the lease. In September, City's Board of Health inspected Tom's apartment but did not find any health code violations.

Tom did not pay the September and October rent payments. In November, Laura applied the security deposit to the outstanding rent and initiated a summary process action against Tom.

What are the rights of the parties?

3. In contemplation of divorce, Hank and Wilma, who had a two-year old son Sam, agreed in writing, as follows:

Wilma agrees that Hank shall have custody of Sam. Wilma shall pay Hank \$2,500 monthly for Hank's support until his death or remarriage and \$300 monthly in child support until Sam reaches 21 years of age. In return, Hank agrees not to pursue any action, in any court, for support of himself or Sam, or to seek any increase in Wilma's obligations hereunder.

In June of 2000, a Judgment of Divorce Nisi issued, incorporating the terms of the above agreement, and also stating that the agreement survived as an independent contract. The next month, Hank married Zelda after she informed Hank that she was pregnant. The couple purchased a house together as tenants by the entirety. Wilma stopped making support payments to Hank that September, after she read of his marriage to Zelda in the newspaper, but continued to make child support payments for Sam.

Hank and Zelda worked before and after the birth of their daughter, Donna. The couple saved money in a joint bank account from which they made payments on the mortgage until it was paid off in 2012. Hank then quit his job to devote time to Donna, who had developmental disabilities, and to spend more time with Sam. Zelda was unhappy with Hank's decision, and ordered him to leave the house. Hank refused, telling Zelda he wanted either to live in the house or to sell it and share the proceeds. Zelda responded that either way, she would not give Hank a divorce for religious reasons. Aside from the house, Hank had few assets, and was forced to reduce his standard of living. He wanted to send Sam to private school, but did not have money for the tuition. Wilma, in the meantime, had become a very successful businesswoman.

Hank's father, Frank, did not approve of Zelda. As a result, Zelda forbade Frank from ever meeting Donna. Notwithstanding his disapproval of Zelda, Frank had always wanted to meet Donna, his only granddaughter, and to help her if he could.

What are the rights of the parties?

4. Cora agreed to sell a mansion and three acres of land (the “Estate”) to Robert for \$5 million. Prior to signing the final purchase and sale agreement, Robert sent Cora an email requesting that Cora make certain repairs to the interior and exterior of the Estate prior to completing the sale. Specifically, the repairs requested included: (i) planting new rose bushes in the front yard; (ii) replacing the carpeting in the mansion; (iii) installing new countertops in the kitchen; and (iv) painting all of the upstairs bedrooms. Cora wrote back to Robert via email: “OK, I’ll take care of it.” The final purchase and sale agreement, however, made no reference to any repairs being made or requested.

Cora retained several contractors to perform work on the Estate prior to the sale:

- a. Cora hired Mary to plant new rose bushes in the front yard for a flat fee of \$50. Mary thought the job would take approximately one hour. However, the work took six hours because the front yard was much larger than Mary had expected. Mary asked Cora to pay \$300, which she said was “perfectly reasonable given the size of the job.” Cora refused to pay Mary anything more than \$50.
- b. Cora hired Thomas to replace all of the carpeting inside the Estate for \$5,000. However, Thomas called Cora the day before he was scheduled to start work at the Estate and told Cora that he was still working on another project, and therefore would not be able to start at the Estate for another few weeks. Thomas offered to send William instead. Cora accepted. William completed the work at the Estate. Cora offered to pay William \$3,000.
- c. Cora hired Matthew to install granite countertops in the kitchen for \$1,000. Matthew later told Cora that “granite is hideous” and she would be “better off with marble.” Cora agreed to have Matthew install marble instead of granite for the same price. However, after the marble countertops were installed, Cora did not like how they looked and refused to pay Matthew.
- d. Cora hired Alfred to paint to all of the upstairs bedrooms for \$2,500. Alfred completed all of the work with the exception of one wall in one bedroom. Before he could finish painting the final wall, Alfred got sick and was unable to return. Cora refused to pay Alfred because he failed to complete the job.

Cora also ordered a box of energy-efficient LED light bulbs from the local hardware store for \$50. When the light bulbs were delivered to the Estate, Cora was busy inspecting the marble

countertops. Cora paid the delivery man for the light bulbs and told him to “just leave the package there.” Cora did not open the package until the next day. When Cora did open the package, she discovered that the hardware store sent fluorescent light bulbs instead of energy-efficient LED light bulbs. Cora called the hardware store and demanded that she be allowed to cancel the order, return the fluorescent light bulbs, and get her money back. The hardware store refused to cancel the order and give Cora her money back but, instead, offered to have the energy-efficient LED light bulbs delivered immediately in exchange for the fluorescent light bulbs.

When Robert inspected the Estate and discovered that some of the requested repairs were not completed, he demanded to terminate the purchase and sale agreement.

What are the rights of the parties?

5. Law Firm agreed to defend Company in an employment discrimination case brought against Company by Salesperson. Law Firm advised Company that Company had a high likelihood of success if the case was tried, because Salesperson could not prove her damages. During the pendency of the case, NewCo acquired all of the assets of Company, which continued in existence. NewCo hired Law Firm as its general outside employment counsel and granted Law Firm's Chief Litigator substantial stock in NewCo to ensure that she was always available to work for NewCo. NewCo then advised Law Firm that NewCo did not want Law Firm to continue to defend Company.

Company (i) had paid all of its bills to Law Firm; (ii) had no new lawyer to take Law Firm's place; and (iii) asked Law Firm not to withdraw but to try to settle the case. Law Firm nevertheless moved to withdraw as counsel for Company and Chief Litigator told the Court that she and Law Firm (a) did not agree with positions the Company wanted to take in the case; (b) had a conflict of interest with Company; and (c) were not being paid.

Law Firm's motion was allowed. Law Firm undertook no further defense for Company, and Salesperson obtained a default judgment for \$5 million. Law Firm did not advise NewCo that it faced any risk from a default judgment.

Salesperson filed an action against NewCo to recover her judgment on a theory of successor liability. Chief Litigator told NewCo's Chief Executive Officer on the telephone that NewCo was unlikely to win, that it would have to pay the \$5 million plus interest, and that NewCo should settle. Law Firm's associate wrote an email to NewCo's Chief Executive Officer telling him NewCo should settle. The associate then died on a ski trip. NewCo decided not to settle but to try the successor liability case which it lost.

NewCo then filed suit against Law Firm alleging that Law Firm had violated the Rules of Professional Conduct, breached its fiduciary duties, and committed legal malpractice. At trial, NewCo called Salesperson as a witness. Salesperson's lawyer was going to testify that she would have advised Salesperson to take a settlement of less than \$2 million, had one been offered. Law Firm objected to that testimony. Law Firm offered into evidence the email written by its associate, over NewCo's objection.

What are the rights of the parties?

**MASSACHUSETTS BAR EXAMINATION
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ESSAY SECTION
AFTERNOON QUESTIONS**

6. Jane was a student at NHC, a private college located in Boston. After Jane attended NHC for two years, NHC expelled Jane for allegedly cheating on a final exam. Jane filed a complaint with the federal Equal Employment Opportunity Commission (the “EEOC”), claiming gender discrimination. After Jane received a right to sue letter from the EEOC, she filed suit against NHC in Suffolk Superior Court making two claims – one claim for gender discrimination under federal law and another claim for breach of contract (based on the statement of non-discrimination found in the NHC student handbook). Jane claimed \$30,000 in damages, and demanded a trial by jury.

- a. Eighty-five days after the Complaint was filed, Jane had a deputy sheriff serve a copy of the Summons and Complaint on the President of NHC, in hand, at Boston’s Logan Airport after returning from a family vacation. One week later, NHC filed a Motion to Dismiss. Jane opposed this Motion.
- b. While this Motion to Dismiss was pending, and one hundred days after the Complaint was filed, NHC removed the action from the Superior Court to the U.S. District Court. Jane filed a Motion to Remand the matter to state court, which NHC opposed.
- c. As the Motion to Remand was denied over Jane’s objection, the matter was litigated in the U.S. District Court. Jane amended her Complaint to make it a class action and defined the “class” as all other female students who had been disciplined by NHC while Jane was a student at NHC. Jane estimated that the size of such a proposed class was approximately one hundred people. Jane then filed a Motion to Certify the Class, which NHC opposed.
- d. Following the completion of discovery, the U.S. District Court granted NHC summary judgment on the claim for gender discrimination under federal law, but denied summary judgment on the claim for breach of contract. Upon receipt of that ruling, Jane filed a Motion to Remand the matter to state court, which NHC opposed.
- e. During the trial of the action in U.S. District Court, the judge allowed the jury members to submit to the Court proposed questions for witnesses. The Court asked the witnesses

most of the questions submitted by the jurors. Jane objected to this procedure and moved for a mistrial.

How should the courts have ruled on these motions?

7. Jack, a 45 year-old attorney, was suffering from a stretch of bad luck. He had been laid off from his job as an attorney and his wife threw him out of their marital home. A short time later, while Jack was crossing the street to get to the Unemployment Office, he was struck by a car driven by Hank. Jack and Hank had known each other in high school. Hank felt terrible about hitting Jack and waited with him until the ambulance arrived. While Jack and Hank were waiting for the ambulance, Sam, a reporter for Town News, took a picture of Jack lying in the street with a distraught Hank sitting beside him. The picture ran in the online edition of Town News the next day with a caption that described Jack as an “unemployed ambulance chaser” and Hank as “one sorry driver.” The picture and accompanying caption went “viral” and was posted on multiple social media sites.

Jack suffered numerous injuries from the accident, including a broken leg requiring him to use crutches. When Hank learned of Jack’s troubles, including the fact that he had been thrown out of his house, Hank offered to let Jack sleep on his couch until he “got back on his feet.” Jack was concerned, as Hank did not live in a very safe area of Town, but he agreed because he had no other options at that point. Hank’s apartment building was owned by Oscar. There had been a rash of burglaries in the area over the last few weeks so Oscar hired Larry, a locksmith, to fix a broken door lock on the rear door to the apartment building.

About two weeks after Jack moved in with Hank, Jack and Hank went to the local Pub to have a couple of beers and watch the football game. Several beers later, Jack and Hank got into a heated argument about the accident. Hank claimed that Jack had walked out in front of his car without warning. Jack became outraged and threw one of his crutches at Hank. Hank dodged the flying crutch which, unfortunately, struck Spike, the leader of a local biker gang, in the head. Hank immediately ran out of the Pub. Spike grabbed Jack by the shirt collar and dragged him to the back room of the Pub. Spike threatened to hurt Jack unless Jack paid him \$5,000. Jack told Spike that he didn’t have a penny to his name. Angered, Spike locked Jack in the back room and left. After Spike had left the room, Jack tried to climb out of a window but, due to his prior injuries, he fell and broke his collar bone. Spike was a regular customer at the Pub and had caused trouble before, including starting several fights at the Pub.

Meanwhile, Hank ran back to his apartment and once inside, shut off all the interior and exterior lights including the light in the common stairway. A few minutes later, Pam, who lived in the upstairs apartment, came home. While Pam was trying to find her keys in the dark, she

was attacked by Scott, who had been waiting in the dark inside the hallway. Scott had gained access to the building through the rear door that Larry had been hired to fix.

Jack wrote to the social media sites that have posted the picture and demanded that the picture be taken down. Jack also heard that the law firm where he worked had hired a younger lawyer at a much lower salary to do essentially the same work he had been doing.

What are the rights of the parties?

8. In 2011, Fred executed a will, witnessed by his accountant and Fred's daughter-in-law Wendy, that included the following provisions:
- a. I leave \$40,000 to my daughter-in-law Wendy.
 - b. I leave \$20,000 to my brother, Ben, and direct that my hockey card collection be sold to satisfy this bequest.
 - c. I leave my ceramic statue of Mozart to my sister Susan.
 - d. I leave the rest and remainder of my estate, including stock in ABC Corporation, to Bank as the personal administrator of my estate and trustee for my only child, Harvey, and his children, with Bank to have full discretion to pay out any part of the income or principal to any of them during the life of Harvey for their support, maintenance, and happiness. No creditor of Harvey shall reach Harvey's interest by any legal process.

Harvey and Wendy divorced in January 2013. Under the terms of the divorce decree, Harvey was ordered to pay Wendy a lump sum of \$100,000 as a division of their marital assets, and \$2,000 monthly for the support of Wendy and their two young children. Immediately after the divorce, however, Harvey moved to another country, and has yet to pay Wendy any money. As a result, Wendy and the children have been forced to move into a temporary shelter and subsist on food stamps.

In late 2013, a fire broke out in Fred's apartment, killing him and destroying the original copy of his will, which Fred kept in his desk. Shortly before the fire, Fred told Wendy, with whom he had remained on good terms, that he had not revoked or revised his will, and gave Wendy a duplicate unsigned copy. At the time of Fred's death, his estate consisted of the hockey card collection, which was valued at \$15,000, the stock of ABC Corporation, which was valued at \$500,000, and \$40,000 on deposit at a local bank. The ceramic statue of Mozart was valued at \$7,000, although it had been worth approximately \$10,000 at the time Fred executed the will.

What are the rights of the parties?

9. David owned David's Pizza Shop, a pizzeria in Boston. David had one full-time employee, Charlie, a 16 year-old who delivered the pizzas in the company car. Because High School was playing in the Championship Game, David believed that business would be busier than normal. Therefore, David decided to hire Kevin, a local cab driver, for one day only to help make deliveries on the day of the game. David agreed to pay Kevin \$500 for his services for the day. David requested that Kevin wear a hat and t-shirt emblazoned with "David's Pizza Shop" on them while making deliveries. Kevin agreed.

The pizza shop received two big orders on the day of the game. Mark placed an order for delivery of 25 large pizzas for his Championship Game party. Gina ordered 20 large pizzas for her Championship Game party. Both orders were paid in advance. David asked Charlie to handle the delivery to Mark's house and Kevin to handle the delivery to Gina's house.

While on his way to deliver the pizzas to Mark's house, Charlie noticed that the company car was running low on gas and stopped at a gas station to refill the tank. As he was exiting the gas station, Charlie accidentally and unknowingly ran over the foot of Julie, a pedestrian. When Charlie finally arrived at Mark's house, Mark was upset that the delivery was late and the pizzas were cold. Charlie apologized and told Mark that he would be reimbursed in full for the cost of the pizzas. Mark accepted the pizzas, but refused to tip Charlie. Charlie was enraged and slammed the screen door in Mark's face, knocking out Mark's two front teeth.

Charlie called David on his way back to the pizza shop and explained that Mark's delivery was late and the pizzas were cold. Charlie also informed David that he had told Mark that the pizza shop would reimburse him for the cost of the 25 pizzas. David said: "That's fine, just get back here as soon as possible." Charlie made no mention of stopping at the gas station or slamming the screen door in Mark's face.

Mark called David to complain about his encounter with Charlie and, moreover, to claim his reimbursement. David said to Mark: "I'm sorry about what happened with Charlie, but I don't know anything about a reimbursement. You took the pizzas and you're paying for them."

Gina also was concerned that her pizzas would be late. She called David to inquire as to the estimated delivery time. David told Gina "my driver is on his way." As Kevin arrived at Gina's house, the brakes on his cab malfunctioned and he drove the cab into Gina's garage door, which was totally destroyed. Kevin left Gina a business card containing the contact information for David's Pizza Shop.

The next day several lawsuits were filed against David's Pizza Shop. First, Julie filed suit against David's Pizza Shop seeking damages for her injuries suffered as a result of Charlie running over her foot. Second, Mark filed suit against David's Pizza Shop seeking damages for injuries suffered as a result of Charlie knocking out Mark's two front teeth. Mark also sought damages based on Charlie's promise to reimburse him for the cost of the 25 large pizzas. Third, Gina filed suit against David's Pizza Shop seeking damages for destruction of her garage door.

David has asked for your legal advice on what liabilities he faces in these lawsuits. How would you advise him?

10. Claudia lived in a two-apartment brownstone. She never trusted her neighbor Dan, who lived in the other apartment and who hosted rambunctious parties and left beer bottles and garbage all over their shared backyard. Last Wednesday, after she arrived home from work, Claudia heard loud banging and a commotion from Dan's house. A few minutes later, she looked out into their backyard and saw Dan wheeling a cart across the lawn with an upside down human leg sticking out of the cart. He appeared to dump the leg into their joint dumpster. She called the police and told them what she had seen.

When the police arrived, they spoke to Claudia who let them into the back yard to search. The police found the cart and observed what appeared to be blood droplets. The blood was later tested and found to be from the victim, later identified as Victoria.

The police then forced their way into Dan's apartment with their weapons drawn, and found Dan in his kitchen, holding a knife, and standing over Victoria's dismembered body. Dan dropped the knife and ran. The officers tackled and handcuffed him. All the while, Dan was mumbling that he was sorry and that he had "taken all kinds of pills." The police read Dan his *Miranda* rights and arrested him. Because Dan claimed to have taken all kinds of pills, the officers took him to the hospital prior to booking him to conduct a blood test, which showed no medication in Dan's system.

At the police station, and after having been read his *Miranda* rights a second time, Dan told the police that he met Victoria and her boyfriend, Bob, at a bar that afternoon. Bob and Victoria went with Dan back to Dan's apartment to continue drinking. Dan said he passed out, and when he woke up he saw that Victoria was dead and he was only trying to "clean up the mess."

When questioned by the police the next day, Bob denied having anything to do with Victoria's death, but admitted that he and Victoria planned to wait until Dan passed out and then rob Dan. Bob was arrested and, when searched, the police found a large hunting knife. Bob said he "always carries the knife with him."

The medical examiner found that Victoria had suffered atrocious and painful injuries before her death.

What crimes have been committed? What motions to suppress will be allowed or not allowed?