

**MASSACHUSETTS BAR EXAMINATION**

**SECOND DAY JULY 29, 2010**

**ESSAY SECTION**

**MORNING PAPER QUESTIONS**

1. Alex, Betty and Cathy were highly experienced business people who ten years ago jointly purchased all of the stock of Company, a Massachusetts corporation. For nine years, all three worked full time for Company for equal \$300,000 per-year salaries. Alex was in charge of manufacturing, Betty was in charge of sales, and Cathy was in charge of everything else. Alex, Betty and Cathy were each one-third shareholders of Company and the only members of Company's Board of Directors. Alex, Betty and Cathy never signed any shareholder or employment agreements. Company has never paid a dividend.

At a duly noticed meeting twelve months ago, Company's Board of Directors voted 2 to 1 (with Alex being the dissenting vote) for Company immediately to terminate Alex's employment and replace him with David. David is Cathy's husband and Betty's brother, and had no prior experience in manufacturing. The next day, Company stopped paying Alex a salary.

The following week, Company held its regularly scheduled annual meeting. At this meeting, Betty, Cathy and David were nominated and elected as members of the Board of Directors. Alex nominated himself to be a member of the Board of Directors, but was not elected.

Three months later, David told Alex's wife that the month after Alex's employment was terminated, Company had secretly purchased ten percent of Cathy's Company stock so that David and Cathy would have the cash to make a down payment on a new house. Alex immediately demanded that Company purchase all of his Company shares for the same per-share price that Company had given to Cathy. Alex also demanded that Company allow him to review Company's financial records. Company refused both of these requests by Alex.

Unbeknownst to anyone else at Company, two years ago Alex bought from Eddie for \$10,000 a small piece of land ("Blackacre") next to Company's manufacturing facility. Alex knew that Company would need to own Blackacre for its upcoming expansion. Last week,

Betty, Cathy and David found out that Alex owned Blackacre when Alex offered to sell Blackacre to Company for \$150,000.

Also last week, Alex began working for XYZ, a competitor of Company, as XYZ's Vice-President of Manufacturing. While at Company, Alex had complete access to Company's secret manufacturing formulas.

What are the rights of the parties?

2. Jim and Mary were married and had a son, Bob. Jim and Mary had a wonderful married life: friends, family, money, a beautiful home in City and a summer home at Seacoast. Bob was a good son, got along with his parents, attended college and subsequently achieved success in a business career. However, their world was shattered when Mary became ill and died in 2003. Without Mary, Jim became depressed, isolated and was drunk most of the time. Consequently, Jim became estranged from his friends, colleagues, and Bob and his family.

In 2005, Jim executed a will which provided: "I bequeath the sum of \$1,000 to my son, Bob, and nothing more; provided further, if my son, Bob, contests any part of this will, he shall forfeit this bequest." The will gave the entire remainder of Jim's estate to Jim's mother, Kay, and named Kay as the executrix.

In 2005, Jim continued to drink heavily. Doctor prescribed an anti-depressant, which Jim took as needed. Jim was convicted twice in 2004 for driving under the influence of alcohol. Further, City police placed Jim in protective custody for public drunkenness several times in 2004 and 2005. Bob, who was trying to reconnect with Jim, visited Jim several times and found him passed out on the living room couch. Jim appeared delusional at times to Bob, friends and colleagues. When Jim executed his will, the witnesses smelled alcohol on his breath but Jim seemed to know what he was doing. Jim complained that he was not close to Bob and that he wanted to take care of Kay.

In 2006, Jim stopped drinking and got his life back in order. Jim met Sue at a college reunion and married her in 2007. Sue was an independently wealthy and successful business woman. Sue had a daughter, Nancy, age 10, from a previous marriage.

Sue established a trust and named SafeBank as the trustee. Sue and Dan, a trust officer at SafeBank, signed a trust agreement providing for the income of the trust to be paid to Jim for his lifetime and upon Jim's death, to Sue's daughter Nancy. Further, upon Nancy's death, the principal was to be paid to two named charities: The Hope Fund and The Children's Fund. Sue's signature was witnessed by two employees of SafeBank. Dan acknowledged his signature before a notary public. Sue deposited \$1,000,000 at SafeBank to fund the trust. Income from the trust was paid to Jim until his death in 2009. Jim was survived by Bob, Sue, Kay, Nancy and Bob's children, Richard and Patty.

At the time of his death, Jim had interests in the following property and assets:

(i) A residence valued at \$1,500,000 which Jim and Sue owned as tenants by the entirety,

(ii) Various corporate stocks worth a total of \$600,000, all of which Jim had purchased in the name of “Jim, pay on death to Kay,”

(iii) A retirement plan account containing \$2,000,000 with Kay as the named beneficiary, pursuant to a designation of beneficiary form that Jim had signed in 2005,

(iv) The summer home at Seacoast which he owned with Mary as tenants by the entirety, and

(v) \$500,000 in cash, after payment of all debts and estate administrative expenses.

Kay filed the will executed by Jim with the probate and family court. Bob filed an objection to the allowance of Jim’s will. Sue has revoked the trust.

What are the rights of the parties?

3. Pamela was a customer of Super Hardware Store (“Super”). In 2008, while shopping at one of Super’s stores, Pamela tripped over a display case in one of the aisles fracturing her ankle and suffering other injuries. Pamela brought suit against Super seeking to recover for the injuries she alleged to have suffered in the accident.

Prior to trial, the following occurred:

- a. Pamela filed a motion *in limine* seeking to exclude Super from offering any evidence concerning the design of the display case because Super had accidentally discarded the display case after the accident.

During the trial, the following occurred:

- b. Pamela sought to testify that Chris, a high-school student who worked part-time at Super, told her that Super’s employees were always leaving things in the aisle and that Super should have been more careful. Super’s counsel objected.
- c. Pamela sought to introduce evidence that Super offered to settle the case for \$200,000 at a mediation session held one month before trial. Super’s counsel objected.
- d. Pamela sought to testify that shortly after the incident, Super re-designed the area where she had fallen. Super’s counsel objected.
- e. Super sought to introduce evidence that Pamela had sued a store for a prior trip and fall accident two years earlier. Pamela’s counsel objected.
- f. Super sought to introduce evidence that, after the accident while Pamela was out of work, she received disability insurance payments from a policy Pamela had previously purchased. Pamela’s counsel objected.
- g. Super called Walter as a witness at trial. Walter saw Pamela’s accident and a few days after the accident prepared a written memorandum of his observations. This memorandum stated that at the time of the accident Pamela was texting on her cell phone and not looking where she was walking. At trial, Walter could not remember exactly what had happened. Super offered Walter’s memorandum of his observations of Pamela’s accident into evidence. Pamela’s counsel objected.

The jury returned a verdict in favor of Pamela. After the Court’s discharge of the jury, the following occurred:

- h. Super’s counsel attempted to initiate contact with one of the jurors from the trial to find out why the jury had ruled against Super. The juror refused to talk to Super’s

counsel. Super's counsel then filed a motion with the Court seeking leave to communicate with the jury.

How should the Court rule?

4. Doctor became Pat's primary-care physician in 2007. Pat was seventy-five years old and had been diagnosed with a number of chronic medical conditions including arthritis, emphysema and lung cancer. Doctor coordinated the multiple medical specialists involved in Pat's care, and was responsible for all of the prescription medications that Pat used. Many of the prescription medications that Pat used had known potential side effects including drowsiness, dizziness, lightheadedness, and fainting. Pat visited Doctor six times each year. Doctor continued to prescribe the medications to Pat without discussing any of the potential side effects and without warning Pat about driving.

Each month, beginning in 2007, Pat purchased his prescription medications at Big Discount Pharmacy ("Big Discount"). In 2009, Big Discount streamlined a number of its business operations in an effort to increase profits and control its business expenses. Big Discount discontinued providing its customers with detailed written computer printouts that explained the medication ingredients and all of the known side effects. However, each of the bottles of prescription medications that Pat continued to purchase from Big Discount was conspicuously marked with the following warning label: "DO NOT TAKE THIS MEDICINE WITHOUT FOOD."

One day in early 2010, after leaving an appointment with Doctor, Pat drove his automobile to purchase his prescription medications at Big Discount. Thereafter, during his drive home, Pat began to feel extremely weak and dizzy. Pat eventually passed out while driving and veered off Main Street killing Victor, who was walking on the sidewalk.

While responding to the emergency report of Pat's accident on Main Street, Police Officer's cruiser went through a red light and was hit by another automobile driven by Sally as it entered the intersection. Police Officer was seriously injured, and as a result of his injuries he became permanently disabled and unable to continue to work.

What are the rights of the parties?

5. Polly was a teacher at a local public charter school. While attending an anti-war rally on Boston Common, Polly stripped and danced nude amidst the crowd, which included families with young children. Polly was arrested and charged under a Massachusetts statute that provided: “A person who is guilty of open and gross lewdness shall be punished by imprisonment in the state prison for not more than three years.”

The following day, Head of School Smith (“Smith”), met with Polly to inform her that she was suspended immediately for five days for “unbecoming conduct and other good cause.” The same day, Smith sent Polly, who did not have an employment contract, a letter notifying her of the five-day suspension. The letter stated the reasons for her suspension, and that there would be a hearing on the matter at the end of the five-day period.

During her suspension, Polly, who was six-months pregnant, went into premature labor. On the advice of her doctor, Polly was admitted to Massachusetts State Hospital (“Hospital”). While there, Polly was told that she would have to stay indefinitely to preserve the life and health of her unborn child. When Polly attempted to leave Hospital after arguing with her doctor over the length of her stay, Hospital’s lawyer obtained a court order for Polly’s indefinite confinement. Three days later, doctors performed an emergency cesarean section on Polly and discovered that the fetus had already died. Thereafter, Polly was released from Hospital.

Polly’s actions attracted local and national media attention. Columnist, who worked for a local paper (“Newspaper”), wrote: “Neither Polly, nor anyone else, should have to work for someone like Smith. He has been sued for sexual harassment by three different individuals in the past. If heads of schools were required to run for election, issues like these would come to light sooner.” Columnist’s statement regarding the sexual harassment charges was erroneous, having been based upon research on someone with the same name as Smith. Smith sued Columnist and Newspaper for libel.

What are the applicable constitutional rights of the parties?

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**SECOND DAY JULY 29, 2010**

**ESSAY SECTION**

**AFTERNOON PAPER QUESTIONS**

6. The ABC Company (“ABC”) hired George in July 2008 to be its bookkeeper. One of George’s job responsibilities was to review ABC’s monthly checking account statements from Bank in order to discover any unauthorized transactions. Another of George’s job responsibilities was to go every afternoon to the mailroom at ABC’s building and bring ABC’s mail to Tim, who was ABC’s Chief Financial Officer and George’s supervisor. Included in this mail were envelopes containing checks made out to ABC from ABC’s customers. On March 1, 2010, Tim gave George the additional job responsibility of preparing all of ABC’s checks for Tim’s signature, as only Tim had signing authority on ABC’s checking account at Bank.

Every month beginning in January 2009 and ending in January 2010, George removed from the mail that he gave to Tim an envelope with a \$3,000 check made out to ABC from Megacorp. George then promptly endorsed and deposited each of these \$3,000 checks into his personal checking account at Bank.

In addition, in December 2009, George took a blank check on ABC’s checking account at Bank. George then made out this blank check to himself for \$20,000. George signed Tim’s name to this check and deposited it into George’s personal checking account at Bank.

On March 20, 2010, George took from the mail to ABC a \$100,000 check which had been sent to ABC by Smallcorp. That same day, George endorsed and deposited this check into George’s personal checking account at Bank. On April 2, 2010, a Smallcorp manager saw that its \$100,000 check had been deposited into George’s Bank account, rather than ABC’s Bank account, and immediately called Tim. Tim investigated and discovered all of George’s thefts. George was fired on April 9, 2010 and later pled guilty to numerous crimes. Sadly, by April 9, George had already spent all of the money that he had stolen.

On April 15, 2010, Tim contacted Bank, told a bank official in detail about each of these thefts by George, and demanded that Bank reimburse ABC in full for all of George’s thefts. Bank refused to do so.

On April 23, 2010, Bank cancelled ABC’s \$200,000 credit line with Bank.

What are the rights of the parties?

7. Hal and Gloria lived together for several years before getting married in 1995. Gloria had a son, Tim, from a previous relationship. After their marriage, Hal and Gloria bought a home for \$400,000 in Newtowne. For the down payment to purchase this home, Hal and Gloria used Gloria's savings, money received as wedding gifts, and money from Ed, Gloria's uncle. They financed the balance of the purchase price with a mortgage from Firstbank. Before Gloria married Hal, Gloria owned a townhouse in City with four rental apartments which she purchased for \$350,000 in 1989.

Two days prior to the marriage, Hal and Gloria executed a prenuptial agreement. Gloria was reluctant to sign the agreement, but Hal insisted and made the marriage conditional on the signing of the agreement. According to the agreement, Gloria waived any future claims for alimony, child support, and rights to any property owned by Hal before the marriage. Gloria did not consult an attorney before signing the agreement.

Hal and Gloria had two children, Joe and Sally. By the time she married Hal, Gloria worked her way up the corporate ladder at Transglobal. Gloria travelled frequently, held an executive position and earned in excess of \$100,000. After Sally was born, Gloria left Transglobal and stayed home to care for the children. Hal worked as an engineer for Engineering Co. when he met Gloria. Gloria paid for Hal's graduate school education. Hal also moved up the corporate ladder at Engineering Co. to become an executive vice-president earning a considerable salary, annual bonus, and stock options.

During their marriage, Hal questioned Gloria's fidelity, alleging that Gloria had an affair. They were separated when Gloria learned that she was pregnant with Sally but reconciled shortly before Sally was born. Gloria became moody, and was known to be verbally abusive.

In 2008, Gloria filed for divorce alleging an irretrievable breakdown of the marriage. She requested custody of the children, support for herself and the children, conveyance to her of certain property and an equitable division of marital assets. Also, Gloria asked the court to find the prenuptial agreement invalid and unenforceable. Hal filed an answer and a counterclaim in which he sought a divorce on the grounds of cruel and abusive treatment, custody of Joe, age 13, an equitable division of marital assets and enforcement of the prenuptial agreement. He requested visitation rights only with Sally, age 12. Hal denied any responsibility for Tim, age 17. Hal traveled regularly for work and planned to use his elderly mother or a nanny to care for Joe. Hal rented an apartment in City which he shared with his girlfriend, Alice.

Gloria stayed in the home in Newtowne with Tim, Joe and Sally. Gloria worked as a yoga instructor at her own studio, Yogalife. Gloria keeps a good home and takes care of the children. Tim was diagnosed with a serious medical condition that will require future operations and care. Hal has told Joe that Gloria is trying to break up the family and Joe is angry with Gloria. Gloria has become romantically involved with Rich, a student in one of Gloria's yoga classes.

When Hal and Gloria married, the townhouse in City had a value of \$450,000. It is now valued at \$650,000. Hal and Gloria shared equal responsibility for maintaining and improving the townhouse. The townhouse now needs some minor improvements and repairs but the apartments rent easily.

Hal's pension plan account was fully vested and worth \$2,000,000. Hal will not be eligible to receive any money from the pension plan until he reaches retirement age in 2019. Hal had a life insurance policy with Goodlife. Gloria was the named beneficiary of the policy until recently.

The home in Newtowne is now valued at \$625,000. The home needs some work and updating. Also, Hal and Gloria have a number of joint and individual bank accounts.

Gloria claims that Hal has an interest in a trust now worth over \$1,000,000 with his siblings, Al and Betty. The trust was established by Hal's parents. Hal did not disclose his interest in the trust when the prenuptial agreement was executed.

What are the rights of the parties?

8. Drake, a Vietnam War veteran, lived in a rooming house in City. He suffered from post-traumatic stress syndrome and frequent episodes of depression and anxiety as a result of his experiences in Vietnam. One evening while Drake was watching the evening news about the war in Iraq, his landlady, Violet, knocked on Drake's door demanding that he pay his overdue rent and refusing to leave until he "paid up." When Violet threatened to call the police, Drake threw open the door, screamed at her and violently shoved her to the floor.

Cindy, another rooming house tenant who had been drinking and taking drugs in her room most of the day, saw what happened and ran back to her room to get a handgun that she had been given in exchange for some drugs. At the same time, Violet got up and ran downstairs to the front door with Drake in hot pursuit. Drake and Violet reached the front door simultaneously. Drake held the door shut, preventing Violet from leaving.

By this time, Cindy had retrieved her handgun and started down the stairs toward Drake holding the handgun and yelling obscenities at him. About halfway down the stairs, she started shooting at Drake. One of the bullets struck Violet, killing her instantly. Cindy's gun then jammed. Drake grabbed the gun out of her hand and started hitting her with the butt of the gun over and over again until she stopped moving. Drake then went into Violet's room and broke open a strongbox that he knew was there. Inside the strongbox he found some cash and jewelry which he took.

Drake then ran out the front door and into the street in front of an oncoming car driven by Jim. Drake pointed the gun at Jim's car. Jim accelerated his car toward Drake but missed him, striking a parked car. Drake ordered Jim out of the car and took his wallet and cell phone. Drake then drove off in Jim's car. Jim ran into the rooming house to get help and call the police. A few hours later, the police found Drake wandering in the streets mumbling to himself that "the voices" had told him to do it. Drake was arrested by the police.

What crimes may be charged and what defenses or motions may be asserted?

9. Bonnie, pursuant to a 2006 deed from Amos, is the record owner of a two-story house located at 5 Oak Street in Boston. Calvin is the record owner of a three-story house located at 7 Oak Street in Boston. Calvin took title to his house by a 1982 deed from Dan. The parties agree that the entire driveway, which lies between the two houses, is on the land that Bonnie bought from Amos. When arranged side-by-side and bumper-to-bumper, four cars are able to park in the driveway.

The driveway was constructed in 1950 by Amos. Amos and Dan shared the use of the driveway and each owner parked on the side closest to his respective house. Around 1970, Dan paid to install curbing and tore down hedges that were on his side of the driveway to make more room for parking. Subsequently, Amos and Dan agreed to share the cost of paving the driveway.

In 1983, Calvin received a letter from Amos that requested that Calvin and his tenants stop parking in any part of the driveway. However, Silas, a tenant of Calvin's, continued to park his car in the driveway for the entire period of his tenancy from 1986 to 1992. In 1992, Jack, another tenant of Calvin's, began to park his car in the driveway. After receiving a letter from Amos requesting that Jack not park in the driveway, Jack nonetheless continued to park in the disputed area between one and four times per month until he moved out in 2002. In 1998, Johnson, a neighbor living several houses away, received permission from Amos to park in the driveway. Johnson then proceeded to park there and occasionally blocked Calvin's tenants from parking in the driveway. In 2002, Calvin's mother moved into Calvin's house and began to park in the driveway, despite receiving occasional notes on her car windshield from Johnson requesting that she stop parking there.

In 2008, Calvin initiated an action in Superior Court to establish his rights to the driveway. Bonnie moved for summary judgment.

What are the rights of the parties?

10. Edward, a Boston resident, was an employee of Subcontractor, a New Hampshire corporation. Subcontractor had an agreement with Contractor, a Delaware corporation with its main corporate office in Waltham, Massachusetts. The agreement provided for Subcontractor's total indemnification of Contractor "from any claims, damages and expenses arising out of or resulting from the performance of work done by Subcontractor or its employees for Contractor." Edward was injured while working on a Boston job for which Contractor had engaged Subcontractor, resulting in Edward incurring expenses in excess of \$250,000. A few months later, on March 1, Edward sued Contractor in Superior Court in Boston, claiming that his injuries were caused by Contractor's negligence.

(a) On March 25, Contractor filed a notice of removal in the United States District Court in Boston. Edward filed a motion to remand the action.

(b) Along with its answer, Contractor filed third-party claims against Subcontractor, Subcontractor's insurer ("Insurer"), and a member of the Board of Directors of Insurer ("Director"). In its claim against Director, Contractor sought a declaration from Director that Insurer, by issuing a certificate of insurance, had agreed to assume Subcontractor's indemnification obligations to Contractor. Director moved to dismiss the complaint under Rule 12(b)(6).

(c) Prior to Edward filing his complaint, Contractor's in-house counsel engaged a physicist, seeking an opinion as to whether Edward's injuries resulted from the accident. In response to in-house counsel's request, the physicist delivered a memorandum to in-house counsel marked "confidential," addressed "to file." Edward later filed a motion to compel production of the memorandum, which was listed in Contractor's privilege log.

(d) After a trial on the merits, a jury found for Edward. Thereafter, Edward released Contractor from liability in exchange for an assignment of Contractor's claims against Contractor's defense attorney ("Attorney"). As an assignee, Edward sued Attorney alleging that she had been negligent for failing to introduce "unassailable physical and forensic evidence" that would have shown that Edward's injuries resulted from Edward having been more negligent than the Contractor. Attorney filed a motion for summary judgment.

(e) Attorney subsequently timely sued Edward for intentional infliction of emotional distress. The day after Attorney's complaint was filed, Edward was killed in a car crash. Edward's estate filed a motion to dismiss.

How should the court have ruled on each motion?