MASSACHUSETTS BAR EXAMINATION

SECOND DAY ESSAY SECTION

AUGUST 1, 2002
MORNING PAPER
(9:00 A.M. TO 12:00 NOON)
QUESTIONS

1. Beantown, a Massachusetts corporation, owned and operated a large entertainment center in Massachusetts. Agency was a New York corporation with an office in New York City. Agency was in the business of procuring engagements for its clients, who are entertainers, and charged them ten percent of the amount they received from engagement contracts. Agency negotiated by telephone with Beantown for its client, Singer, a California resident, a contract pursuant to which Singer had a one week engagement at Beantown's entertainment center for $50,000. Neither Agency nor Singer had any other business activity at any time in Massachusetts.

Beantown advertised the engagement extensively at a cost of over $100,000. Singer claimed that she found the advertisements distasteful and notified Beantown that she would not perform under the contract. Agency also claimed that it objected to the advertisements and started to circulate among other New York agents a letter claiming that Beantown was a pornographer and should be avoided. When the president of Beantown came to New York to object to Agency's letter circulation, which had been approved by Singer, Agency's president said that the letter circulation would stop and Singer would perform under her contract if Beantown doubled the payment to Singer. The president of Beantown refused to do so.

Beantown then brought suit against Agency and Singer in the United States District Court for the District of Massachusetts, claiming each was liable for breach of contract and for defamation. Agency and Singer both moved to dismiss the suit for lack of jurisdiction.

How should the court rule?

2. Andy and Betty, husband and wife, had one child, Charles, aged 6. In January, 1995, Andy and Betty hired Architect to design a house for them and contracted with Contractor to build it. The contract specifications incorporated in the agreements with Architect and Contractor required (1) that Architect approve the placement of the components of the heating system in the house and the system's compliance with the contractual specifications; and (2) that Contractor use only an oil burner manufactured by Great Burners, Inc., with a ten-year warranty. Seeking to reduce costs, Contractor installed a less expensive burner, with no warranty, manufactured by Lo-Heat Corp., and Architect approved. No one informed Andy and Betty of the substitution.

The house was built by December, 1995, and Andy, Betty and Charles moved in. On January 6, 1996, the oil burner exploded, causing a fire that led to the collapse of the house. As a result of being hit with falling masonry, Andy sustained serious brain damage which rendered him comatose until June, 2000, when he recovered consciousness. Charles suffered two broken legs, leaving him with a permanent limp. As a result of the fire, Betty has required treatment for major psychiatric illness.

In November, 1997, Architect left Massachusetts to work elsewhere.

In March, 1998, Betty retained Lawyer One to sue Architect, Contractor, and Lo-Heat Corp. for personal injuries sustained by her, Andy and Charles, and for damages resulting from the loss of the house. In April, 2002, not having heard from Lawyer One in many months, Betty learned that he never filed suit and had been disbarred. She then retained Lawyer Two, requesting that he bring suit on behalf of herself, Andy and Charles, against Architect, Contractor, Lo-Heat Corp. and Lawyer One.

What are the rights of the parties?

3. After receiving a substantial inheritance from her father's estate, Patricia looked around for investment opportunities. Patricia had no formal education beyond high school and worked as a bookkeeper in a small office. One day, she noticed an advertisement in the Boston Bugle, placed by Big Oil, Inc. ("Big Oil"), offering one of its Boston gasoline service stations ("the property") for sale for $300,000. Patricia called the telephone number listed in the advertisement and spoke with Big Oil's real estate manager, Chuck. A month later, Patricia took title to the property in her own name. At the same time, she signed a contract with Big Oil whereby Big Oil agreed, for $20,000 per year, to maintain the property's underground tanks in good condition.

Patricia was not represented by counsel. Big Oil's in-house counsel prepared the quitclaim deed and the maintenance contract. Neither counsel nor Chuck informed Patricia of the following: (1) the underground storage tanks at the property were corroded, and gasoline was escaping into the ground; (2) the property was subject to a right-of-way easement that Big Oil had granted to the owners of a neighboring shopping mall; and (3) the property was one of several parcels of real estate subject to an undischarged recorded blanket mortgage granted by Big Oil to Town Bank.

Shortly after purchasing the property, the following events occurred: (1) the state Environmental Protection Department ordered Patricia to remove the tanks and clean up the pollution caused by the leaks; (2) the mall owners started a major construction project and used the easement across the property for truck access to such a degree that Patricia's customers could not pull up to the pumps; and (3) Town Bank foreclosed on Big Oil's mortgage and claimed title to the property.

What are the rights of the parties?

4. Wendy and Exford were married for ten years before being divorced in 1993. They had one son, Chandler. Prior to their divorce, Wendy and Exford executed a separation agreement. Pursuant to that agreement, which subsequently was incorporated and merged in the judgment of divorce entered in the Probate and Family Court, Wendy was granted physical custody of Chandler, who was then one year old, and Exford was granted reasonable rights of visitation with Chandler and ordered to pay child support to Wendy. The agreement also provided that "Exford shall pay alimony to Wendy in the amount of $500.00 per month."

The following year, Wendy became engaged to Hubert, who was quite wealthy. At the time, Wendy had no assets of value, although she was employed in a lucrative position as an account executive. They were married in 1995. A few days before their wedding, Hubert presented Wendy with an antenuptial agreement, informing her that it must be signed before they were married. The agreement provided that upon a divorce, each party waived all rights to the property and assets of the other and that neither party was entitled to alimony. The agreement contained a complete list of each party's income and assets. Wendy reviewed the agreement with Lawrence, a lawyer arranged for by Hubert, at a one-hour appointment the day before the wedding and, after Lawrence assured her that it was a standard agreement, she signed it.

Immediately after Wendy and Hubert were married, Wendy quit her job at the insistence of Hubert, who desired that she remain at home as a homemaker. Hearing of Wendy's marriage to Hubert, Exford, who was then unemployed, stopped paying both alimony and child support to Wendy. Since Wendy then was being well provided for by Hubert, she took no action against Exford.

Recently, Hubert left Wendy and filed a complaint for divorce, which is now pending. Hubert has stopped providing any support for Wendy or paying any household bills. Wendy has no savings or other assets in her own name. She has been unable to secure employment anywhere in this area and has no present means to support herself and Chandler. She wishes to move with Chandler from

Massachusetts to Nebraska, where her family lives and where she has been offered employment. Exford, who lives in the same town as Wendy, objects to this move and has threatened to seek custody of Chandler, who himself would rather remain with Exford than move to Nebraska. After several years of unemployment, Exford has inherited a family business and now enjoys a greater income than ever before.

What are Wendy's rights as against Exford and Hubert?

5. Frank and Mary were married in 1995. Frank had no children, and Mary had two children, Jill and Kevin, from a prior marriage. In 1996, Frank made a will which contained the following provisions:

1. *I give my condominium in Boston, Massachusetts to my brother, Bill.*
2. *I give my farm in Great Barrington, Massachusetts to University, my alma mater.*
3. *I give my stock in Alpha Corp. to my wife, Mary, if she survives me, otherwise to my wife's children.*
4. *I give the sum of $25,000 to my secretary, Della, if she survives me, otherwise to her son, Sam.*
5. *I give the rest, residue and remainder of my estate as follows: one-half to my said wife, Mary, and one-half to my sisters.*

Frank executed the will at his office, witnessed by his lawyer, Laura, and by Paul, Della's husband.

Frank and Mary were divorced in 1998. Mary later married Frank's brother, Bill, and Frank, alone in his office one night, crossed out Bill's name in Article 1 of his will and wrote in the name of University. In 1999, Alpha Corp. merged with Beta Corp. and Frank received shares of stock in Beta Corp. in exchange for his Alpha Corp. stock. Two months ago, Frank entered into a written agreement to sell his farm to Developer.

Frank died last month. At the time of his death, Frank's closest living relatives were his brother, Bill, and two sisters, Alice and Betty. Another sister, Catherine, had died in 1985, survived by her daughter, Melissa, who was living at the time of Frank's death. Mary, was also living, as was her daughter, Jill, but Mary's son, Kevin, had died in 2001, survived by a son Kevin Jr. Both Della and her son, Sam, also were living. In addition to the condominium, the farm and the stock in Beta Corp., Frank owned, at the time of his death, other assets exceeding one million dollars in value. The

sale of the farm, which had been scheduled to take place last week, has been postponed temporarily due to Frank's death.

Frank's will has been filed with the Probate and Family Court. What are the rights of the parties?

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AFTERNOON PAPER
(2:00 P.M. TO 5:00 P.M.)
QUESTIONS

6. The plaintiff brought suit in a federal district court for a state located in a circuit where the Court of Appeals had not rendered any decisions concerning affirmative action issues. She alleged that her federally protected rights had been violated by the state-owned and operated graduate school of computer science which had denied her application for admission. She sought a judgment requiring the school to admit her.

At the trial, the following facts were established:

The plaintiff had slightly higher undergraduate grade-point averages and standardized test scores than several admitted applicants who were classified by the graduate school as minorities. The written admissions policy statement of the school provided:

> *The ultimate goal is the admission of outstanding and capable students. Each applicant is to be evaluated individually, with primary significance placed upon the undergraduate grade-point averages and standardized test scores. Other variables to be considered include leadership and work experience, residency, unique talents or interests and similar qualities. An additional goal is the admission of a meaningful number of minority students to enrich the educational experience offered by the school.*

Prior to the adoption of the policy, entry classes consistently included between 2% and 3% of minority students. During the five years of admissions prior to the plaintiff's application, pursuant to the policy, the percentages of minority admissions were: 7%, 10%, 21%, 15% and 13%. In the year of the plaintiff's application, the percentage was 15%.

How should the Court rule?

7. Plaintiff sued Defendant for negligence resulting from Plaintiff's fall on an allegedly defective staircase at Defendant's place of business. At trial, the following issues arose. In each instance, how should the court rule?

1. Building Inspector, who investigated whether the staircase was in violation of the state building code, was called by Plaintiff's counsel. He testified that he had no present memory of the matter but stated that he had taken notes during his investigation. After he was shown his notes, he stated that he could not recall the investigation but identified the notes as his. Plaintiff's counsel offered the notes and Defendant's counsel objected.
2. On cross-examination, Plaintiff's counsel asked Defendant: "Did you repair the staircase after the accident?" Defendant's counsel objected.
3. Defendant's counsel called Plaintiff's former wife to testify and asked her what Plaintiff had told her, while they were married, about how the accident had happened. Plaintiff's counsel objected.
4. On cross-examination, Defendant's counsel asked Plaintiff whether he had been convicted in this court 9 years ago of the crime of assault and battery with a dangerous weapon. Plaintiff's counsel objected.
5. Defendant's counsel offered the deposition of a witness to the accident who at the time of trial was vacationing out of state. Plaintiff's counsel objected.

8. Keith was deeply in debt and facing financial ruin. He conceived of a plan to divert several hundred thousand dollars of his employer's bank deposits to his own account for up to a year and to conceal the diversion by altering his employer's computerized accounting records. To conceal the diversion of funds, Keith recruited Chris, a computer specialist, by promising Chris an unlimited supply of illegal drugs.

Keith explained his plan to his wife, Jane. He demanded that she steal the illegal drugs Keith had promised to Chris from the hospital where she worked. When Jane initially refused, Keith threatened to commit suicide. The threat was credible, as Keith had tried to commit suicide previously. She relented and began stealing illegal drugs from the hospital where she worked.

Keith's first attempt to divert the deposits was a failure because the computer failed to conceal the transfer of deposits to Keith's personal account. Keith, with Chris's assistance, reversed the transaction and restored the money to the proper accounts without being discovered. Frightened, Chris refused to participate any further. When Keith cut off Chris's drug supply, Chris agreed to participate again. On the next effort, the deposits were successfully diverted to Keith's personal account and the diversion was successfully concealed.

Keith used the diverted deposits to pay off his debts. Keith's employer, however, uncovered the unauthorized transfer of deposits during a routine annual audit.

What crimes, if any, have been committed by Keith, Chris and Jane? What defenses, if any, are available to any of the parties?

9. On December 31, 1998, Paula resigned as President of Payroll, Inc., a Massachusetts company providing payroll services to small businesses, and entered into a Severance Agreement which provided, in part, that for a 2 year period beginning January 1, 1999, she would render consulting, advisory and related services to Payroll as requested and that she would not "directly or indirectly solicit the payroll preparation business of any Payroll customer or assist any other person to do so or encourage any third party to solicit or recruit the services of any Payroll employee."

Paula had been a friend and mentor to Michael, Payroll's Marketing Vice President, and to Sally, Payroll's Sales Vice President. Michael and Sally, concerned about job security under a new regime, formed M&S Associates, Inc., a Massachusetts corporation (M&S) in March, 1999 whose purpose was to investigate opportunities to develop payroll and payroll services businesses. Michael and Sally were the only shareholders and directors of M&S and both continued to work for Payroll. In June, 1999, Payroll promoted Michael to Senior Vice President; Michael never informed Payroll about M&S or that M&S had begun negotiations to purchase Salary, Inc., a Delaware corporation engaged in a business similar to Payroll's. Michael and Sally resigned from Payroll in January, 2000 when M&S purchased Salary and formed MSP, Inc., a Delaware corporation (MSP) with a principal place of business in Massachusetts. Michael, MSP's President, Sally, MSP's chief operating officer and Paula, MSP's Chair, were the only shareholders. Michael and Paula each held 35% of the stock; Sally held the remaining 30%.

After obtaining additional outside financing, MSP's Board of Directors changed and Sally resigned as a MSP director. MSP's Board then began negotiations to be acquired by Emtech, Payroll's largest competitor. Michael did not keep Sally informed about these negotiations. As soon as MSP had reached an agreement in principle to be acquired, Michael fired Sally without cause and MSP bought back Sally's MSP stock at its original $2500 cost, as required by the shareholders' agreement. Shortly thereafter, MSP was acquired by Emtech and MSP's stock is now worth $12 million. Both Michael and Paula were retained as Emtech employees.

What are the rights of Payroll and of Sally?

10. Myflex, a Massachusetts manufacturer of nautical equipment, used insulation material produced and supplied by Indown to soundproof its products. In all instances, Myflex initiated its purchases of Indown's insulation material either by sending its standard form purchase order to Indown, or by placing a telephone order to Indown, followed by its standard form purchase order. The Myflex standard form purchase order included a *"Terms and Conditions"* section which stated:

> *Any controversy arising out of, or relating to, this contract shall be settled by arbitration in the City of Boston in accordance with the American Arbitration Rules then obtaining. This purchase order represents the entire agreement between both parties, notwithstanding any Seller's order form, whether sent before or after this purchase order, and this document cannot be modified except in a writing signed by Myflex's authorized representative.*

In response to Myflex's purchase orders, Indown ordered the requested material from its factory and sent Myflex an invoice which contained the following provision:

> *Terms and Conditions: Notwithstanding any contrary or inconsistent conditions that may be contained in your purchase order, your order is accepted subject to the prices, terms and conditions of the mutually executed contract between us, or, if no contract exists, your order is accepted subject to our regular scheduled price and terms in effect at time of shipment and acceptance of any order is expressly conditioned on the buyer's assent to any conflicting terms.*

There was no arbitration provision anywhere in Indown's invoice and there was no additional written document between the parties. Myflex usually paid Indown within 30 days of its receipt of Indown's invoice.

In 2000, Myflex began receiving reports from its customers that its products had been involved in, and perhaps had caused, several fires aboard boats resulting in both personal injury and property damage. Upon investigation, Myflex determined that the insulation material supplied by Indown did not meet the fire retardant specifications set forth in its purchase orders to Indown.

Myflex was sued in a class action and impleaded Indown. Indown moved to dismiss on the basis of the Myflex Purchase Order clause requiring arbitration.

What are the rights of Myflex, its customers and Indown?