

MASSACHUSETTS BAR EXAMINATION

SECOND DAY	JULY 29, 2004	ESSAY SECTION
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MORNING PAPER
(9:00 A.M. TO 12:00 NOON)
QUESTIONS

1. Wife brought a complaint for divorce against Husband. They have been married for fifteen years. There are two children, Anne, age 6, and Barbara, age 12. Husband has always known he was not the natural father of either child, but the children did not know that.

Husband is the sole beneficiary under the will of his wealthy father who is 80 years of age. Wife and her two sisters share equally in the remainder interest under a trust which her deceased father had set up in his will. The trust provides for a life interest in Wife's mother, who is now 70 years of age and in apparent good health.

Wife seeks an asset division, custody of both children and support payments for both children. She contends that Husband and the children have developed strong familial feelings. Husband admits that they have done so and that he will continue to treat them as if they were his children, but contends he has no obligation to pay Wife for their support if they are divorced.

Peter, a life-long friend of Husband, filed a complaint against Wife for his visitation rights with Anne, whom he claims is his daughter. Wife admits that Anne is Peter's daughter.

What are the rights of Wife, Husband and Peter?

2. OutSource Company (“OutSource”), a Massachusetts corporation, is engaged in the business of providing computer-assisted telemarketing services to corporate customers. In January, 2003, OutSource’s purchasing director, John, got in touch with Maxima Computers Inc. (“Maxima”), also a Massachusetts corporation, asking whether Maxima would be able to sell to OutSource 25 Maxima computer systems, including hardware and software, for installation in OutSource’s facility in central Massachusetts.

The OutSource request was routed to Mary, a Maxima sales representative. She called John and quoted a purchase price of \$1,000,000 for the units. John told her that OutSource’s budget for the purchase was \$750,000 and that they had to be delivered within 14 days. Because OutSource was under intense time-pressure to have the computer systems up and running so as to service its customers, John asked Mary for an immediate meeting with his and her supervisors present “to resolve on a price.” Mary agreed and the four individuals then met. At the meeting, Mary gave John a Maxima “quotation form” that proposed a price of \$775,000. The form stated that “any contract resulting from this quotation must be on an official Maxima contract form.” John and his supervisor signed the quotation form as did Mary and her supervisor. Later that day, OutSource wired \$200,000 to Maxima as a down-payment and entered into contracts with three corporations to provide telemarketing services commencing 21 days later.

The next day, Maxima’s senior vice-president for sales called John and told him that “there is no deal,” and returned the \$200,000. Desperate for the equipment, OutSource went to another company and purchased 25 computer systems, paying \$900,000. The delay caused OutSource to be unable to provide its customers with its services on time and so they took their telemarketing needs elsewhere.

OutSource has retained you to advise it on its rights, if any, against Maxima, and any defenses Maxima might assert.

3. On January 12, 2004, Sarah announced her intention to resign as president and chief executive officer of High-Tech Corp. (“High-Tech”). High-Tech’s board appointed three of its members as a search committee to find Sarah’s successor. The search committee offered the position to Harry, an executive from another company, but he did not accept. The board then voted to direct Sarah “to find a successor.”

In February, through a mutual friend, Sarah met Tom, the senior vice president of a competitor company, which, as he told Sarah, was likely to be acquired by a national conglomerate, with the expected loss of his job once the new owners took over. Sarah told Tom that he would have to gain the approval of the board if he chose to accept the offer, but she said, “They have always taken my advice before and, if I recommend you, I expect that the board will approve your hiring.”

In early March, the search committee learned that Harry had expressed renewed interest in the position. Without telling Sarah, and not knowing of her talks with Tom, the search committee again offered the job to Harry, who accepted. On the same day, not knowing that the search committee had made the offer and Harry had accepted, Sarah gave Tom a draft of a letter containing proposed terms and conditions of his employment at High-Tech. After consulting his lawyer, Tom suggested no changes to the letter but asked Sarah if the board was agreeable. She replied, “Not quite yet, but they will be.” Tom then signed the letter and immediately resigned from his present position. The next day Sarah met with the Board and told them that she had “signed up” Tom to succeed her. The special committee then reported that it had hired Harry.

What are the rights of the parties?

4. Alarmed by the increase in underage smoking and the social and economic costs associated with such conduct, the Massachusetts legislature passed the following law:

Within a 1000 foot radius of any public playground, playground area in a public park, elementary or secondary school, cigarettes, smokeless tobacco products, cigars or other tobacco products may (1) *not* be advertised or displayed on any outdoor billboard or structure including any advertising, whether indoors or outdoors which is directed toward, or visible from such parks or schools; (2) *not* be advertised or displayed at their point of sale if any portion of the advertisement or display is lower than five feet from the floor of any retail establishment accessible to person younger than 18 years old.

All cigarette, smokeless tobacco, cigar and other tobacco products must contain the following language displayed in large print: ***Using this Product Causes Cancer or Serious Lung Disease.***

Within 60 days of the effective date of this Act, all companies selling cigarettes, smokeless tobacco, cigars or other tobacco products must disclose the identity of any added constituent other than tobacco in descending order according to weight, measure or numerical count. This information will be disclosed to the public if there is a reasonable basis for believing that the disclosure of such information will reduce underage smoking.

You represent a tobacco company which has always kept its ingredients secret. What constitutional arguments may be made to challenge the provisions of this law and what is the likelihood of success of these arguments?

5. Ann lived and worked in Massachusetts. She accepted a new job which required her to move to Chicago. She sold her Boston condominium but did not obtain other housing in Chicago since she planned to stay with a relative while she decided where to live. She rented a van from Moovit Co., a Vermont corporation with a principal place of business in Massachusetts. As she drove west on the Massachusetts Turnpike, Ann entered a construction zone with a reduced speed limit. As she attempted to slow down, the van's brakes failed and she smashed into the rear of the car in front of her. Pat, a passenger in the car hit by Ann and also a Massachusetts resident, was severely injured. Ann remained to provide information to a Massachusetts State Trooper, including her Massachusetts license and her former Boston address. She then obtained a replacement van from Moovit and drove to Chicago. She began her new job and, several months later, bought a condominium in Chicago.

Two years after the accident, Pat filed suit against Ann in federal court in Massachusetts alleging that Ann's negligence caused Pat serious injury and seeking damages in excess of \$75,000. Ann moved to dismiss Pat's complaint claiming that the District Court lacked subject matter jurisdiction and that venue was improper. While Ann's Motion to Dismiss was pending, she also filed a third party complaint against Moovit, seeking indemnification and alleging that the accident occurred because the rented van's brakes were defective. Seven months after filing her complaint, Pat moved to amend her complaint by adding Moovit as a defendant.

A. How should the court rule on Ann's Motion to Dismiss?

B. How should the court rule on Pat's Motion to Amend?

C. Assume that Pat's Motion to Amend is allowed. Moovit moves to dismiss Pat's complaint. How should the court rule?

MASSACHUSETTS BAR EXAMINATION

SECOND DAY	JULY 29, 2004	ESSAY SECTION
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AFTERNOON PAPER
(2:00 P.M. TO 5:00 PM.)
QUESTIONS

6. Testator executed his will about ten years before he died in 2004. At the time of execution of his will, his wife, his sons, Abel, Baker, Charlie, David and Xavier, his daughters, Eve, Frances, Gail and Harriett were all alive.

He drew his will by himself. Its only dispositive language was as follows: "I give, devise and bequeath all of my property, real and personal, tangible and intangible: First, to my wife; Second, should she predecease me, my summer home to my son Abel, and one half of all else to my sons Abel, Baker, Charlie and David and one half , in equal shares , that is one fourth each, to my daughters, Eve, Frances, Gail and Harriett."

The testator's wife predeceased him and Baker and Harriett, both intestate, also predeceased him. Harriett had no issue, and Baker was survived solely by his daughter, Irma, who also survived the testator. The other children of the testator survived him. The summer home burned down five years before testator's death and he collected \$200,000 from the fire insurance company which he retained.

There was uncontroverted evidence that the testator disliked Xavier, believing him not to be his son , and doted upon his granddaughter Irma.

How should the estate be distributed?

7. Dealer, a drug dealer, conceived a plan to break into the house of Pusher, a competing drug dealer, that night, while Pusher was out of town, and steal a large shipment of cocaine, which had just been delivered to Pusher. He called in one of his gang members, Sam, and told him of the plan, which Sam agreed to carry out. Later, Sam contacted his brother Jack, another gang member, who agreed to accompany him and drive the getaway car.

That night, Jack drove Sam to Pusher's house in his car. While Jack waited in the car, Sam, who was unarmed, entered Pusher's house through a rear door which was unlocked. Unknown to Sam, Pusher had returned early and was at home in his kitchen. Pusher heard Sam enter the house and rushed at him with a gun in his hand as Sam walked through the door to the kitchen. The two men struggled with the gun, which discharged, striking and killing Pusher. Jack, sitting in the car, heard the gunshot, became nervous and drove away.

Sam ran from the house with Pusher's gun but no cocaine and, unable to find Jack, fled on foot to a local bar where he had several beers and became intoxicated. Upon leaving the bar several hours later, Sam approached a car waiting at a stop light and pointed Pusher's gun at the driver, Mary, taking her purse and forcing her out of the car. He then hopped in the car and sped away. Looking in the rear view mirror, Sam noticed Child, Mary's infant child, who was asleep in a car seat in the back seat of the car. Sam continued to drive the car to a nearby shopping mall, locked it and left it there, assuming that the car, and Child, would be found soon. In fact, the car remained undiscovered for two days during which there was an extreme heat wave. By the time the car was found, Child had died from heatstroke and dehydration.

After leaving the car, Sam ran to Jack's house, where he told Jack and Jack's wife, Willa, what had happened. Willa gave Jack the keys to her car and some money which Jack and Sam used to escape.

What crimes have been committed, what defenses may be raised, and by whom?

8. Plaintiff sued Defendant in the Massachusetts Superior Court for personal injuries suffered as the result of Defendant's negligence when Defendant struck Plaintiff, a pedestrian, with his car. Defendant raised the affirmative defense of comparative negligence. At trial, the following evidence offered by Plaintiff and by Defendant was ruled admissible by the trial judge over objection. In each instance, was the trial judge's ruling correct?

(a) By Plaintiff: The written report prepared by Doctor, Plaintiff's treating physician who died prior to trial. Doctor's report contained the following notations:

(1) "Plaintiff states that he was struck by a car driven at a high rate of speed."

(2) "In my opinion, Plaintiff will have permanent disabilities as a result of his injuries."

(b) By Plaintiff: The testimony of Plaintiff's wife, that Defendant had visited her after the accident and had made the following statements to her:

(1) "I am so sorry for all the pain and suffering Plaintiff is going through from the accident."

(2) "I'd like to help out with Plaintiff's medical bills."

(c) By Plaintiff: A copy of Defendant's automobile liability insurance policy, which had been provided to Plaintiff during pretrial discovery.

(d) By Defendant: The official police report prepared by the officer who investigated the accident, a portion of which contained the following statement made to the officer by Ike, an eyewitness to the accident:

“I saw Plaintiff run out into the road in front of Defendant’s car, and Defendant had no time to stop.”

- (e) By Defendant: The testimony of a witness, Wilson, that he had seen Plaintiff minutes before the accident and that in his opinion Plaintiff was drunk at that time.
- (f) By Plaintiff: The testimony of Employer, Wilson’s former employer and a resident of the town where Wilson lived, that (1) she had caught Wilson stealing from her and had fired him; and (2) in her opinion, Wilson was a dishonest person who could not be trusted to tell the truth.

9. Tim's father owned Black Acre in fee simple absolute, a one acre parcel of land with a house and garage situated thereon. In 1974, Tim acquired his interest in Black Acre via a duly executed and recorded deed from his father. The father's deed conveyed Black Acre to Tim subject to the following condition: "to my son Tim for so long as he remains married and if he should divorce, the ownership is to be shared by Tim and my daughter, Mary." Tim's father died testate in 1986 and left all of his property to Tim. Mary is still alive.

Tim, the present record owner, is married but presently separated and has entered into a written purchase and sale agreement with Jack and Diane. Jack and Diane are unmarried friends who are interested in purchasing the property and living together. According to the terms of the contract, Tim is to convey "a marketable and good and clear record title subject to restrictions and encumbrances of record which do not interfere with the use of Black Acre for residential purposes." The contract was signed by the parties on February 1, 2004, and the delivery of the deed was scheduled for May 1, 2004. The agreed upon selling price was \$680,000. Jack and Diane were to take title as joint tenants. Tim held the deposit of \$68,000.

A neighbor of Black Acre informed Jack and Diane that years ago toxic waste was dumped on Black Acre and that the property occasionally emits a strong odor. According to the neighbor, Tim was aware of this but the odor continues, especially in warm weather, thereby limiting use of the property.

On April 15, 2004, Jack died, devising his real estate to his friend, Ed, and bequeathing his personalty to another friend, Betty. On April 25, 2004, Diane notified Tim that she would not proceed with the purchase of Black Acre and demanded a refund

of the \$68,000 deposit. Tim refused Diane's demand for the return of the deposit and intends to proceed with the sale.

What are the rights of the parties?

10. Ed invited Bob and Bob's fifteen year old son, Walt, to a baseball game. Both Ed and Bob had a number of beers during the game. Bob was not sure whether Ed or he should drive home but he did not say anything and Ed drove home. During the ride home, Ed drove above the speed limit but neither Bob nor Walt told Ed to slow down. Suddenly, Ed lost control of his car causing the car to cross the road into oncoming traffic.

Trucker was driving a tractor trailer truck with a load of steel in excess of the statutory limit when he saw Ed's car cross the median strip in his direction. Trucker jammed on his brakes. Ed, seeing the tractor trailer truck coming toward him, jerked the steering wheel to the left missing the truck but hitting a telephone pole on the side of the road. Bob and Walt were thrown against the windshield in the collision and both Bob and Walt were injured.

Doctor stopped at the accident scene. He took Bob and Walt in his car to the local hospital. On the way, Bob's speech was incoherent and he appeared confused. The doctor pulled up to the emergency room door, let Bob and Walt out and drove away. Bob started toward the door with Walt, but then turned around and wandered out toward a busy street, unsteadily as though he were drunk. Walt was unable to stop Bob. Bob came out from in front of Tom's pick-up truck, which was illegally parked, and stumbled into the street. Mary, driving down the road, was surprised to see Bob suddenly in front of her car and jammed on her brakes. However, Mary's car struck Bob who hit his head on the front bumper of Mary's car.

Bob was then rushed to the hospital and taken immediately up to surgery, where x-rays revealed a burst blood vessel in his brain. Surgeon, the neurosurgeon who

examined Bob, planned to perform surgery as required. However, Surgeon misread the x-rays and concluded that the vessel was in an area which was inoperable. Consequently, Surgeon ordered Bob to be treated with drugs only. Unfortunately, Bob suffered severe brain damage.

What are the rights of the parties?

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