

MASSACHUSETTS BAR EXAMINATION

SECOND DAY

JULY 27, 2005
MORNING PAPER
(9:00 A.M. TO 12:00 NOON)
QUESTIONS

ESSAY SECTION

1. The shareholders of Top Steak House, Inc., from its creation in 1995 to January 1, 2004, were Andy, Clyde and several members of the Smith family. Andy was the purchasing agent for the corporation. He frequently bought equipment for it from Kitchen, Inc., in which he was a minority shareholder. He arranged for Kitchen, Inc. to add large sums to its invoices for most of the purchases. Bruce was the trustee of a voting trust for the members of the Smith family and was the president of Top Steak House, Inc. He retained Populus, Inc., a public relations company which he controlled to advertise Top Steak House, Inc. Populus, Inc. placed the restaurant's advertisements exclusively in a magazine which publicized one of Top Steak House's principal competitors as "the best in town." As a result, Top Steak House, Inc. lost a significant amount of business and its annual profits became annual losses.

On January 1, 2004, Andy's shares in Top Steak House, Inc. were redeemed by the corporation for an agreed price. On June 1, 2004, Bruce's shares were also so redeemed. As part of each redemption agreement, Bruce signed for the corporation and mutual releases for all claims were exchanged between the parties. All of the shareholders signed the January 1 agreement. All of the shareholders except Clyde signed the June agreement.

What are the rights of Top Steak House, Inc., Clyde and members of the Smith Family?

2. In the late 1990's, Thomas left his family and joined a sect called The Group. At the time, Thomas was married to Mary and had two children with her, Al and Jane. Thomas also had a stepson, Joe, from Mary's previous marriage. In 2001 Thomas executed a will leaving his estate to The Group.

In 2003, Thomas left The Group and returned home to his family. In July 2003, he executed a new will, revoking all wills he may have executed previously, leaving his principal residence and his vacation home to Mary, his baseball card collection to a nephew, Jack, and \$200,000 to his stepson, Joe. Thomas left the remainder of his estate, to be divided equally, to his children, Al and Jane. Thomas was seeing a psychiatrist and taking medication when this will was executed, and its execution was witnessed by his son, Al and his housekeeper, Tim. Thomas then gave his baseball card collection to Jack for a birthday present in November 2003.

While Thomas was living with The Group, he had a relationship with Sally who gave birth to a daughter, Kay. Sally never took legal action to prove that Thomas was Kay's biological father. Members of The Group referred to Kay as Thomas' daughter when he was there. After leaving The Group, Thomas had no contact with either Sally or Kay. Kay is now thirteen years old.

Thomas and Mary divorced in May 2004. Thomas died in July, 2004 at his residence in Boston, Suffolk County, Massachusetts. The original of the will executed in July 2003 was found in Thomas' office but the provision pertaining to Joe was crossed out. The will was filed in the Suffolk County Probate and Family Court in September 2004.

What claims, if any, do The Group, Mary, Jane, Al, Joe, Sally and Kay have against Thomas' estate?

3. Sue and Eddie lived together while both were attending college. After graduation they agreed that Eddie would attend law school and Sue would postpone her graduate studies (she had been awarded a fellowship) until Eddie became a lawyer. Eddie attended law school full-time while Sue worked several jobs to support Eddie and herself, including paying most of his tuition.

After Eddie became a lawyer, he opened an office using \$75,000 that he borrowed from an uncle. He purchased an office condominium unit (“condo”) in his own name using \$100,000 that Sue had inherited from her father’s estate. Eddie’s practice flourished and Sue worked as the office receptionist, bookkeeper and office manager. After five years, Eddie’s practice was so busy that he hired several lawyers and additional office staff. Eddie sold the condo and purchased a small office building in his own name using the proceeds of the condo sale.

Sue and Eddie were married six months later and had a baby one year after they were married. Sue stayed home with the baby, and no longer worked at the firm. Eddie was earning several hundred thousand dollars per year and was able to make several successful investments in his name only. Eddie and Sue lived in an exclusive neighborhood. Eddie made a significant down payment and financed the rest with a mortgage for \$500,000. While she worked at the law firm, Sue earned a modest salary, but had earned no income since the birth of the baby. Sue had, however, become used to an extravagant life style. Sue never did pursue her graduate studies but she still planned to attend graduate school when her baby was in school.

After Eddie announced to Sue that he wanted a divorce, he moved out of the house. He rented a penthouse condominium. Eddie refused to pay support to Sue, but he did make weekly child support payments. Eddie continues to pay the monthly mortgage on the home where Sue and the baby live, but he has said to Sue “you can only live there for now.” After Eddie moved

out, Sue began to date Tom, a known drug dealer and Tom has moved in with Sue and the baby.

Eddie has filed for divorce.

What are the rights of Sue and Eddie?

4. After a difficult pregnancy, Mother gave birth to Baby at Hospital. Within hours, and while Baby was still at Hospital, Baby developed a severe infection ultimately resulting in permanent and almost total paralysis. Baby's parents consulted other physicians once the extent of Baby's injuries became apparent and learned that immediate treatment during Baby's first 24 hours would have significantly lessened, if not successfully have treated, Baby's infection.

On Baby's sixth birthday, Mother sued Hospital for malpractice on behalf of Baby and Baby's parents. Hospital answered, denying any negligence in Baby's treatment and alleging that its liability was limited by the charitable immunity statute. Hospital refused to produce Baby's Hospital records, claiming that they had "gone missing." Hospital also admitted that it had made no effort to identify those physicians and nurses who had treated Baby during the first 24 hours of Baby's life. Hospital was eventually ordered to determine who the treating physicians and nurses were but later reported that it was unable to do so without Hospital records which admittedly once existed but were now permanently lost.

Mother moved for sanctions including entry of judgment against Hospital and the assessment of damages in the amount of \$5 million, arguing that Hospital's loss of Baby's medical records deprived Baby and Mother from being able to prove their case. While Mother's Motion for Sanctions was pending, she received an anonymous telephone call identifying Resident as the physician who failed to understand the significance of Baby's blood test and failed to notify Baby's obstetrician. Two weeks before Baby's seventh birthday, Mother moved for leave to amend her complaint, adding Resident as a defendant and a separate count against Hospital for spoliation of evidence. Several weeks later, and before the Court had ruled on Mother's motions, Hospital moved to dismiss Mother's motions contending that the sanctions requested were not appropriate remedies, that the motion to amend was not timely and that, even if it were, there was no cause of action for spoliation under the circumstances.

How should the Court rule?

5. Mill, an old manufacturing plant, was converted to commercial office space 8 years ago. As much of the original equipment and details as possible were incorporated into the design of the office space. Tenant, an internet-based employment agency, leased office space from Landlord and its space included Mill's former Boardroom which contained hand-carved woodwork and an elaborate fireplace.

About 2 years into Tenant's 5 year lease, the roof began to leak badly. Tenant notified Landlord immediately since the water ruined several computers. Landlord promised to fix the leak immediately. Workmen arrived and patched the roof but evidently were not able to either find or fix the leak. On four more occasions, especially after large snowstorms, the roof leaked and Tenant's equipment was damaged or destroyed. Each time, Tenant called Landlord who promised to fix the problem and each time Landlord's repair crews were unable to stop the leaks. Indeed, the water ran off the roof with such force that a large mound of ice formed on the walkway just below the stairs to Tenant's entrance. Landlord salted and sanded the ice slick formed from the leaking roof and warned Tenant to be careful when exiting the Mill.

Tenant finally invited Expert to examine Mill's roof and to make suggestions for repairing it. Expert arrived after a particularly large snowstorm, slipped on the icy walkway in front of Tenant's stairs and was hospitalized with serious injuries. Tenant wrote Landlord terminating the lease 18 months before its expiration. Landlord objected but Tenant moved out. Landlord then hired Roofer to replace the leaking roof. Roofer discovered that the roof had been improperly installed 8 years earlier by Contractor. While the roof was being repaired, one of Roofer's workers knocked over a bucket of hot tar setting fire to that portion of the Mill containing the Boardroom. Roofer offered to repair the damaged offices but refused to replace the Boardroom's paneling and carved fireplace. Landlord objected.

What are the rights of the parties?

MASSACHUSETTS BAR EXAMINATION

SECOND DAY

JULY 27, 2005
AFTERNOON PAPER
(2:00 P.M. TO 5:00 P.M.)
QUESTIONS

ESSAY SECTION

6. Seller owned and operated a private school. Purchaser told Exec, Seller's principal of the school that he wanted to buy Seller's building and use it as a nursing home. He said he needed assurance that a night club across the street was going out of business, as reported in the newspapers. Exec said, and believed, that the reports were true. The basis for the statement was his conversation, several months earlier, with the son of the night club's manager. Exec never discussed it with the night club's manager.

Before the purchase and sale agreement was signed, Purchaser asked Jan, Seller's employee, who was the janitor in Seller's building, whether he knew if the night club was going to close. Jan said: "Definitely, sometime before the end of the next two months." In fact, Jan knew that the night club's manager recently had signed a five year lease to operate the night club.

In reliance on the information he had received, Purchaser signed the purchase and sale agreement, which contained the following: "The purchaser acknowledges that he has not relied upon any representation not set forth in this instrument as a basis for signing it." The agreement also provided: "Seller will provide regular inspections and maintenance of the building for use by the Purchaser for six months after the closing of this agreement."

Three months after the closing, there was a flood in an attic storage area, caused by a leak in the roof. Purchaser's electronic equipment, which he had placed there, was damaged. It had been the practice of Purchaser to inspect and maintain the roof in the nursing home which he

operated. It was not the practice of Seller to inspect and maintain the roof above the attic area in his school building.

What are Purchaser's rights?

7. Following a routine appendectomy, Paula experienced an infection located at the point of the surgical incision. She mentioned this to her friend, Tim, a corporate lawyer, who referred her to Martha, his sister-in-law, a lawyer who specialized in medical malpractice claims. Paula then retained Martha to sue Dick, the surgeon who had performed the appendectomy, for negligence. In a telephone conversation, Martha told Paula that her fee would be about one-third of any recovery. Martha asked for, and Paula sent to her, a check for \$5,000 “to cover expert and other expenses,” as Martha said. Martha used the money to pay the past due account of an expert whom she had retained in an unrelated case.

During discovery, Paula, as she admitted confidentially to Martha, had lied at her deposition concerning the extent of her physical and emotional injuries. Based chiefly on that testimony, Dick offered to settle the case for \$100,000, an amount far beyond Martha’s own estimate of the value of the claim. Paula accepted the offer. Dick delivered a check in that amount to Martha payable to “Martha, as attorney for Paula.” Martha endorsed and deposited the check to her firm’s operating account, but did not inform Paula of its receipt. Several months later, Paula asked Martha about the status of the case. Martha said she would look into it and then wrote a check to Paula for \$65,000, retaining \$35,000 for herself, which she divided, unknown to Paula, with Tim, the referring lawyer. After receiving the check, Paula demanded that Martha send her the balance of the settlement and an accounting of the \$5,000 advanced by Paula. Martha refused to do either.

Paula complained of Martha’s actions to the Board of Bar Overseers. Please prepare a memorandum for the Board concerning the merits of the complaint?

8. Chad, an undercover plainclothes police officer employed by Anytown, MA, saw an automobile go through a red light. Chad knew the car: it belonged to Dan, whom Chad had arrested on many occasions for drug-related offenses. Chad, driving an unmarked vehicle, followed Dan's car to an apartment on Main Street in the town, where Chad thought that Dan had once lived. Chad watched from a distance as Dan, looking furtively around (as it seemed to Chad), opened the trunk of his car and removed an open shoe-box from the trunk. Sunlight glinted on the box's contents which looked to Chad like filled cellophane sandwich bags.

After Dan entered the apartment house, Chad approached Dan's car and jimmied open the locked trunk. He saw what appeared to be a trace of a whitish, powdery substance on the trunk's floor which he recognized, from his experience, as heroin. He closed the trunk and approached the door of the apartment house, which was locked. He pressed the buzzers of the four apartments and someone buzzed him in.

Inside, Chad went to Apartment 3, where he believed Dan lived. He heard music coming from the apartment and rapped on the door. Receiving no response, he attempted to pick the lock but failed. He then slammed his body against the door, which gave way, rushed into the apartment and, pointing his gun, shouted "Police! Where's Dan?" Annette, Dan's girl-friend who lived in the apartment, pointed to the kitchen, where Chad found Dan starting to flush the contents of the bags down the sink drain. Pistol still drawn, Chad ordered Dan to stop and to raise his hands. At that moment, Annette slammed a hammer on Chad's shoulder causing him reflexively to pull the trigger in Dan's direction but missing him. Dan then pulled a gun from under the sink, shoved it against Chad's stomach and said "You're a goner, copper!" Annette, meanwhile, finished flushing the contents of the bags. She then said to Dan, "Give me the gun, I'll do it." He gave her the gun; she aimed it at Chad and pulled the trigger. Nothing happened;

the gun was not loaded. Chad retrieved his gun, arrested Dan and Annette, and radioed for assistance.

What crimes have been committed? What procedural and substantive motions are available to Dan and Annette?

9. In April 2000, Plaintiff, a Massachusetts resident, sustained severe bodily injury when the car she was driving on the Massachusetts Turnpike was struck by a tractor-trailer truck driven by Driver, a Vermont resident. In March 2003, Plaintiff commenced a civil action in the Massachusetts Superior Court against Driver and his employer, Transport Corp., a New York corporation.

(a) Assume that Transport Corp. was concerned about a trial in the Massachusetts Superior Court, where it had been advised that jury verdicts against corporate defendants were often substantial. What action(s) may Transport Corp. take and with what anticipated success?

Regardless of your answer to Question "A" above, assume for all remaining questions that the civil action proceeds in Massachusetts Superior Court.

(b) In June 2004, during pre-trial discovery, Plaintiff learned that Service Corp., which operated a truck repair facility in Massachusetts, may have been negligent in repair of the tractor-trailer truck immediately prior to the accident and that such negligence may have contributed to the accident. What action(s) may Plaintiff take and with what anticipated success?

(c) Also during pre-trial discovery, Plaintiff learned that Driver had only minimum liability insurance coverage and that after he was served by Plaintiff with the summons and complaint, he transferred all of his assets to Wanda, his wife. What action(s) may Plaintiff take to secure satisfaction of any judgment she may receive against Driver?

(d) At trial before a jury, after the close of the evidence presented by Plaintiff, Transport Corp. believed that Plaintiff had not met her burden of proof against it and moved for a directed verdict, which the Court denied. Transport Corp. then presented its evidence in the case. What additional action(s) may Transport Corp. take in order to further its contention that Plaintiff had not met her burden of proof and when must such action(s) be taken?

(e) After trial, the jury returned verdicts against Driver and Transport Corp. awarding damages to Plaintiff in an amount which Plaintiff believed was grossly inadequate. Other than appeal, what action(s) may Plaintiff take to obtain relief from the judgment entered upon the verdicts?

10. Recently, the town of Blackton in eastern Massachusetts experienced a rash of criminal activity, including several unsolved burglaries. At 2:00 A.M. on June 1st, Pauline, a Blackton police officer, was conducting a routine patrol in her police cruiser in the area where the burglaries have occurred, when she observed Daniel driving his car down the street, slowing down as he passed each house. Pauline became suspicious, turned on her overhead light and pulled the car over.

Pauline exited her cruiser and approached Daniel's car. She asked Daniel for his license and registration and when he opened his glove compartment, she shined her flashlight into it, observing a revolver. She ordered Daniel out of the car, arrested and handcuffed him. Pauline then searched the front and back seat areas of the car, and under the front seat she found a plastic bag containing what appeared to be marijuana. Shortly thereafter, Daniel was brought to the Blackton police station, where Pauline read him his *Miranda* rights, which he waived, and he gave a statement admitting that the bag contained marijuana and that when he was stopped he was looking for an address to complete a drug deal.

Later, at 3:00 A. M., Oliver, another Blackton police officer, was dispatched to Victoria's home where a burglary had just taken place. Victoria told Oliver that she had been awakened by a noise on her porch and had seen from her window a man in a black hooded sweatshirt leaving her house carrying a large sack. She also told him that she was missing valuable jewelry and several antique coins. Oliver left Victoria's house and as he was returning to the station, he saw Craig, dressed in a black hooded sweatshirt, walking down the street. He had no sack with him. Oliver exited his car and as he approached Craig, Craig began to run away. Oliver chased and caught him. He patted him down and felt in Craig's pants pocket what seemed to be several coins. He reached into Craig's pocket and pulled out a number of antique coins. He then asked

Craig where he had hidden the sack. At first, Craig denied any knowledge of a sack, but when asked again, he disclosed the sack's location. Oliver placed Craig under arrest and later retrieved the hidden sack, which contained more coins and Victoria's jewelry.

Daniel and Craig were indicted in separate cases for various offenses related to the activities for which they were arrested. Daniel filed a motion to suppress the revolver, the marijuana and the statement he made at the police station. Craig filed a motion to suppress the coins found in his pocket, the sack and its contents, and his statement disclosing the location of the sack. How should the judge rule on each motion?