

## Questions and Answers July 2008 Exam

1. There are two unrelated requests for advisory opinions before the Supreme Judicial Court of Massachusetts propounded by the Massachusetts legislature asking for answers to questions about the constitutionality of two bills pending before the legislature. The questions are as follows:

(A) A proposed bill, No. SI958, would restrict the ability of criminal offenders to profit from their crimes by the sale of rights to movies, books or any other media. The proposed bill provided as follows:

An Act Relative to Profits from Crime. Any entity contracting with a Defendant must submit a copy of a contract to the Department of the Attorney General for its determination whether the proceeds under the contract are substantially related to a crime. If so, the contracting party must pay over any monies which would otherwise be owed to the person who committed the crime. The funds shall be deposited into an escrow account and made available to the victims of the crime. "Defendant" is defined as "a person who is the subject of pending criminal charges, or has been convicted of a crime, or has voluntarily admitted to the commission of a crime."

Opponents asserted that the proposed statute is unconstitutional. Accordingly, the legislature asked the Court to give an advisory opinion as to the constitutionality of the proposed bill and answer to the following question: "Does SI958, by restricting the ability of criminal offenders to profit from their crimes, violate the Constitution of the United States?"

### **How should the Court answer the legislature's question?**

(B) Charitable institutions have come under scrutiny for their large endowments in recent years. Critics, including members of many state legislatures and congress, have questioned whether these non-profit institutions continue to fulfill their charitable purpose and whether their non-taxable status should remain. Consequently, pending in

the Massachusetts legislature is a proposed bill, No. H3065, that would tax certain charitable non-profit institutions. The proposed bill provided as follows:

An Act Relative to the Taxation of Endowments. Any charitable non-profit institution that has an endowment fund in excess of \$750 million dollars shall be subject to an annual tax of 2½ per cent of all monies in excess of \$750 million dollars. For the purposes of this section an endowment fund shall be an institutional fund of a private charitable non-profit institution not wholly expendable by the institution on a current basis under the terms of the applicable gift instruments.

Twenty-five charitable non-profit institutions would be impacted by the bill if it became law. These institutions assert that the bill is unconstitutional. The legislature asked the Court to give an advisory opinion as to the constitutionality of the proposed bill and answer the following question: "Does H3065, by subjecting charitable non-profit institutions with an endowment in excess of \$750 million dollars to taxation, violate the Constitution of the United States?"

**How should the Court answer the legislature's question?**

# Answer

## Part A

The constitutionality of proposed bill No. S1958 would depend on the application of the due process clause to the taking of profits from defendants and making them available to victims of the crime. The bill uses the power of the state to deprive a party who is entitled to the benefits received from their efforts in producing a literary work from receiving compensation from that contract. Thus the state is depriving a person of property. To do so the state must afford that person due process of law. The proposed legislation defines defendant in three ways, a person convicted of a crime, a person who has criminal charges pending, and a person who has admitted the commission of a crime.

### **Convicted Criminal**

The definition under which the statute is constitutional is the one that defines the defendant as a having been convicted of a crime. The defendant in this case has been afforded all of the process given a criminal defendant, a trial, the ability to call and cross examine witnesses, the right to confront witnesses, and an impartial tribunal. As a result of that process the state has established that the defendant is a convicted criminal, and can take various steps against him such as depriving him of his liberty and depriving him of his property by imposing a fine, and depriving him of his right to vote. Depriving a convicted criminal of any right to profit from his crime through the production of literary work is similar to the imposition of financial penalties like fines or forfeiture when a person is convicted of a crime. Statutes such as the Son of Sam law in New York have deprived him of his right to profit from literary works and have been held constitutional. While a criminal defendant might argue that the law impairs the obligation of contract, the police power exception to the contracts clause would probably enable the statute to survive a constitutional challenge.

### **Person with Criminal Charges Pending**

The application of the proposed statute to a person with criminal charges pending would be unconstitutional because the state has taken property before it has afforded the defendant due process of law. A criminal defendant is presumed to be innocent until proven guilty and convicted. The statute proposes taking away his contract rights before he has had a trial and had the benefits of due process afforded to a person accused of a crime.

### **A Person Who Has Voluntarily Admitted to the Commission of a Crime**

The statute is probably unconstitutional as applied to a person who has admitted to the commission of a crime because that person has not been afforded due process. There is no adjudication that he is guilty of the crime because of the admission. It is possible that he has a valid defense to the commission of the crime so that he could not be convicted. Therefore, the statute is unconstitutional as it applies to a person who had admitted to the commission of a crime.

## Part B

The private charitable not profit institutions would attack the constitutionality of H3065 on the ground that the proposed bill violates the Equal Protection Clause of the Fourteenth Amendment in that it improperly discriminates against private charitable non-profit institutions with endowments in excess of \$750 million.

The first issue is to establish the standard of review under the Equal Protection Clause, Since the proposed statute is a tax statute and does not affect fundamental interests and does not discriminate on the basis of suspect classifications, the standard of review is the lower tier of equal protection and those challenging the statute would have to show that there was no rational basis for the classifications made in the statute.

The first classification made by the statute is that it only taxes non-profit institutions. There is a rational basis for a separate statute which only taxes non-profit institutions. These institutions benefit from exemptions contained in other tax statutes. They do not pay taxes on income which would be taxable income to for-profit entities. Contributions to these non-profits often qualify for charitable deductions on the donor's income tax return. Most non-profit institutions are exempt from real estate taxes on their property even though they consume services which are financed by ad valorem taxes. It is rational to argue that the proposed tax is a way of offsetting the other tax advantages enjoyed by non-profit institutions.

The second classification is by the size of the endowment. It is rational to tax only the largest endowments because they are the non-profit institutions who are the greatest beneficiaries of other tax laws and that they can more easily afford the tax than institutions with smaller endowments.

This tax is an excise tax in the nature of an estate tax which taxes the total assets of an entity. Such tax statutes such as the United States Estate Tax have an exemptions which precludes taxation of individuals without significant worth.

2. You represent BikesUSA, a bicycle manufacturer, in the following matters:

(A) Sports Stores, a national retail sporting goods chain, placed a written order with BikesUSA for 10,000 bicycles to be shipped in two equal shipments. BikesUSA has completed production of the first 5,000 bicycles but has not yet shipped them, and it has partially completed production of the second 5,000 bicycles. Sports Stores has just notified BikesUSA that it is cancelling the entire order due to a slowdown in its business that has resulted in the closing of several of its stores. BikesUSA's sales department has found that Discount Mart, a chain of discount stores, will buy these bicycles at one-half the price Sports Stores had agreed to pay, on the condition that BikesUSA pay Discount Mart's broker a 10% commission and further that BikeUSA pay substantially higher charges for expedited shipping to Discount Mart.

(B) BikesUSA agreed to purchase bicycle shifters from Shiftco to fill rush orders from two different customers, Cycle Express and Pedals, Inc. Shiftco required payment in advance from BikesUSA for expedited production of the shifters to enable BikesUSA to fill its customers' rush orders. The shifters have just been delivered to BikesUSA, but all are defective and unusable. BikesUSA has found another company, Allied, to produce the shifters at a much higher price, but Allied's shifters cannot be shipped to BikeUSA for several months. As a result, Cycle Express has cancelled its order. Pedals, Inc. still wants its order filled.

In each matter, what will you advise BikesUSA?

### **Answer Part A**

A BikesUSA has entered into a valid written contract to sell ten thousand bicycles to Sports Stores. The notification by Sports Stores before the time for performance by BikesUSA that it was cancelling the entire order is an anticipatory breach by Sports Stores. BikesUSA therefore has by remedies of the non-breaching seller. The first remedy is that it is excused from performing the contract. It could not seek specific performance because the goods are not unique. The seller is entitled to be put in the position it would have been in if the contract had been performed.

The proper measure of damages here is set out in UCC § 2-708(2), which provides that a seller is entitled first to the profit the seller would have made on the sale of the bicycles. The profit is the difference between the sales price for one thousand bicycles less the costs of manufacture and other expenses incurred in fulfilling its contractual obligations. Second BikesUSA is entitled to an allowance for costs reasonably incurred in the manufacture of the bicycles. Those costs would include the total cost of producing the first five thousand bicycles. If the reasonable action to mitigate damages would be to complete production of the second 5000 bicycles, then the costs incurred after the anticipatory breach would be included. If damages would be better mitigated by selling the unfinished bicycles for scrap, then the extra costs of producing the second group of bicycles after the anticipatory breach could not be recovered. The seller appears to have determined that it was best to finish the second set of bicycles and that does not appear to be unreasonable

There is subtracted from BikesUSA damages the net payments received for resale of the goods. This amount would be the half price which Discount is willing to pay less the 10% broker's commission and the higher expedited shipping charges.

### **Answer Part B**

B BikesUSA has entered into a valid contract with Shiftco to purchase bicycle shifters. Shiftco knew of the urgency of the order in order to fulfill contracts with Cycle Express and Pedals Inc. Shiftco breached the contract by shipping non-conforming goods giving BikesUSA the remedies of a non-breaching buyer against a breaching seller.

First BikesUSA will recover the amount paid to Shiftco because the goods were of no value to BikesUSA.

Second BikesUSA will recover from Shiftco the damages computed by the mechanism of cover, the difference in the amount it was required to pay Allied for the shifters minus the amount of the contract with Shiftco.

Finally Bikes USA will be able to collect consequential damages which includes the profit it would have made from the Cycle Express Order and any damages which it incurred because of its tardiness on the order from Pedals. These damages were clearly foreseeable by Shiftco at the time it entered into the contract to deliver the shifts on an expedited basis These two orders were the reason the the expedited delivery and the requirement that seller pay the full contract price before delivery.

3. One month ago Sally inherited House from her grandfather. House was on a two acre oceanfront parcel of land which included three hundred feet of a small beach that was under water at high tide.

The only land access to House was through a parcel of land currently owned by Alex. One hundred years ago, the former owner of Alex's parcel sold the former owner of Sally's parcel the right to have a driveway to House from the town highway for use by "horses, buggies, carriages and foot traffic only." For the last fifty years Sally's grandfather, as well as his guests, have driven their cars on the driveway on a regular basis to reach House. Sally owns a gardening store and thus drives a large pickup truck. Three weeks ago Sally received a letter from Alex telling Sally that she could not drive her pickup truck, or indeed any motor vehicle, on the portion of the House's driveway that was on his land. At the same time Alex placed a locked gate across the driveway at a location where the driveway was on his land. In response, Sally erected on a portion of her land a ten foot tall fence that partially blocked the view of the ocean from Alex's house.

Two weeks ago Sally erected a large sign facing the beach portion of her parcel of land stating "No Trespassing. Violators will be prosecuted." One day last week at low tide, Betty powered up to this beach by jet ski and proceeded to have a picnic on the sand. Sally saw Betty doing this, screamed at Betty to leave immediately, and took photographs of Betty to show to the police.

Sally's view of the ocean from House was partially blocked by a large tree on land owned by Chuck. Last week, Sally, incorrectly believing that the tree was on her land since her grandfather had once told her that he owned the land on which the tree stood, cut down the tree and sold the wood as firewood in her garden store for \$200. When Chuck approached Sally about the removal of this tree, Sally told him that the tree was dying and that she did him a favor by cutting it down. The tree that Sally cut down had immense sentimental value to Chuck since he had played under it as a child.

What are the rights of Alex, Betty, Chuck and Sally?

### **Answer Question 3**

#### **Sally v Alex**

Sally has an appurtenant easement by grant to use the driveway over Alex's land for use by horses, buggies, carriages and foot traffic only. The easement is unlimited in time and benefits successive owners of Sally's land and burdens successive owners of Alex's land. Because the original easement was granted in 1908 when motor cars were in use but rare, Sally will argue that the easement should be interpreted to permit the current mode of transportation, namely motor vehicles. The biggest obstacle to that construction is the word "only" in the grant. The Restatement of Property third which was applied in another recent easement case by the Supreme Judicial Court calls for a presumption in favor of construction of the easement to permit modern means of transportation. I think the court would construe the limitations in the grant in light of modern transportation particularly since motor cars have used the driveway for the past fifty years.

Sally has a second argument with respect to motor vehicles. If the language of the easement is to be interpreted literally then the use of the easement during the past 50 years by cars would constitute a continuous open notorious and adverse use of the driveway and would create an easement by prescription in favor of Sally.

With respect to the pickup truck, a liberal construction of the easement by grant would permit the use of a pickup truck as well as automobiles. If Sally has to rely on the easement by prescription, she would argue that the scope of the easement by prescription is defined by the prescriptive use which would be the use by motor vehicles.

Sally will be successful in suing Alex and will be able to obtain injunctive relief preventing Alex from blocking the easement which can be used by motor vehicles.

#### **Sally v. Alex**

The fence erected by Sally unnecessarily exceeds six feet in height and is maliciously erected or maintained for the purpose of annoying the owners or occupants of adjoining property by restricting their view of the ocean. By statute in Massachusetts such a fence is a spite fence and a private nuisance. Alex can sue Sally in tort for damages. In addition the Supreme Judicial Court has construed the statute to give the court the right to abate the nuisance by ordering that the fence be reduced to a height of six feet.

#### **Sally v. Betty**

In Massachusetts, Sally owns the three hundred feet of beach which lies between mean high and mean low water. However, that land is subject to the right of the public to use the area between high and low tide for fishing, fowling and navigation. Betty's use of the beach which was clearly posted with a no trespassing sign does not come within those exceptions. Therefore Sally has an action against Betty and members of her family for trespass, and for injunctive relief if the trespass is continuing in nature. She will be awarded nominal damages even if there were no actual damages. In addition she might ask the police to prosecute for criminal trespass.

#### **Chuck v. Sally**

The Massachusetts Appeals Court case of Glavin v. Eckman (2008) is directly in point. In that case the court awarded the wronged property owner whose trees had been cut by a neighbor to improve the neighbor's view of the water the replacement value of the trees rather than damages measured by the worth of the timber at \$200 or diminution of the property's value. Under Mass law c 242 sec 7 the award when trees are intentionally cut

is tripled. Sally's mistaken belief that she owned the land on which the tree stood will not be a defense.

4. Harry and Wendy met in 1985 and were married in 1988. Three days prior to their wedding day, Wendy presented Harry with an Agreement and asked him to sign it. Wendy suggested that Harry have a lawyer take a look at the Agreement. She also told Harry that their marriage was conditional on his signing of the Agreement. Harry was not happy about signing the Agreement but did so without consulting a lawyer. At the time, Wendy had assets worth approximately \$750,000 including interests in various family businesses. Harry's assets totaled approximately \$25,000. Harry had a high school diploma and worked as a bank teller. The Agreement listed Harry's and Wendy's separate property that each owned prior to the marriage and provided that upon a termination of the marriage this separate property will remain the sole and separate property of the respective owner prior to marriage. The Agreement also provided that all other property was deemed to be marital property subject to division. Wendy did not disclose on the separate property list attached to the Agreement her collection of gold coins worth \$35,000 which she kept in a safe deposit box. Both Harry and Wendy waived alimony under the Agreement. The Agreement also contained a provision that Wendy would obtain sole custody of any children born of the marriage.

Harry and Wendy had one child, Abby, born in 1990. In 1994, Harry and Wendy purchased House, putting title solely in Wendy's name. After Abby was born, Harry stayed home as a full-time father, helping out occasionally in Wendy's family businesses. Harry drove Abby to and from school, helped her with her homework and always attended her school plays and sports activities. Due to her work schedule, Wendy was frequently unable to attend Abby's school and sporting activities. During the marriage, Harry and Wendy lived a lavish lifestyle and belonged to the local country club and yacht club. In 2004, when Abby started high school, Harry told Wendy that he wanted to go to college and eventually get a graduate business degree. Wendy dismissed his suggestion and stated that she would always take care of him. Thereafter, Wendy started to exhibit hostility toward Harry. On one evening, she became irate at Harry, shoved him against the wall and ripped the telephone out of his hand when he attempted

to call the police. Later that same evening, Wendy apologized to Harry. Several months later, unbeknownst to Harry, Wendy transferred House to Wendy's father as trustee of a trust of which Abby was the sole beneficiary. Wendy, Harry and Abby continued to live in House until January 2008, when Harry and Wendy separated. Abby has graduated from high school and will be attending college in the fall of 2008.

Harry has filed for divorce claiming that he is unable to support himself and maintain the lifestyle to which he is accustomed. Harry has requested alimony, sole legal custody of Abby and exclusive right to House. Harry has also requested that the court order Wendy to pay Abby's college tuition.

What are the rights of the parties?

#### **Answer Q 4** **Ante-nuptial agreement**

The first issue to be determined whether the ante-nuptial agreement will be enforced to the extent that such agreements are enforceable.

The argument in favor of enforcement is that it substantially complied with the requirements for enforceability. The agreement was in writing. There was substantial disclosure by each party concerning the extent and nature of their assets. While Wendy did not disclose the \$35,000 worth of gold coins her disclosure of \$750,000, including interests in the family business, could be considered substantial compliance. While Harry did not have a Lawyer examine the document, he was given the opportunity to do so three days before the wedding. The agreement contained reasonable provisions based upon the status of the parties at the time they entered into the agreement, since all property acquired during the marriage was subject to division. While there was a disparity in their incomes Harry was able to earn a modest living and the provision barring alimony was reasonable.

The argument against enforcement is that Wendy did not fully disclose her assets, and that delivery of an agreement prepared by her lawyer three days before the marriage was not adequate to permit review by Harry's lawyer. It could be argued that the agreement was unfair because there was no right to alimony in Harry despite the fact that his income was substantially less than Wendy's income. Finally it could be argued that the agreement was the product of duress because the marriage was condition on Harry signing it and it was present just three days before the wedding.

I believe that the court would find the agreement unenforceable but will answer questions on the assumption that the agreement is enforceable and that it is unenforceable.

#### **Right to a Divorce**

Either Harry or Wendy has the right to a no-fault divorce on the ground of irreconcilable differences. Harry also has the right to divorce on the grounds of cruel and abusive treatment as the result of Wendy's shoving him into a wall and ripping a phone from his hand.

#### **Alimony**

- If the ante-nuptial agreement is enforceable, Harry would not be entitled to alimony. If it is unenforceable, the court could grant alimony because Wendy has a substantial income and Harry has no substantial job skills. If alimony is granted, It is likely that the court would grant temporary alimony to allow Harry to go back to school and acquire job skills so that he could support himself. Another argument Harry could make even if the ante-nuptial agreement is enforceable is that in exchange for being a stay at home dad during Abby's high school years, Wendy promised him that she would take care of him. Periodic payments until he could acquire job skills could be considered the remedy for breach of that promise.

#### **Custody and College Tuition**

- Depending on the month of Abby's birth in 1990 she is either 18 years old or months away from her 18th birthday and no longer a minor. Therefore the issue of custody is probably moot. If the court were to decide that issue, the ante-nuptial agreement with respect to custody is unenforceable and it is likely that Harry the caregiver would at least obtain physical custody if not sole custody of Abby.

### **College Education**

In Massachusetts a parent has the obligation to support a child who is going to college and to pay for college tuition until the child reaches age 23. This obligation is unaffected by the ante-nuptial agreement. It is likely that the court would place the entire burden of paying for a college education on Wendy since her income and resources are vastly superior to Harry's income and resources.

### **The House**

Since the house was acquired during the marriage, it is a marital asset subject to division under ch 208 sec 34 whether or not the ante-nuptial agreement is enforceable. Since this is a long term marriage, Harry would be entitled to one half of the house even though it was held originally in Wendy's name. The court might also permit Harry and Abby to live in the house during Abby's college years and order it sold and the proceeds split thereafter. The transfer to Wendy's father is probably a transfer in fraud of creditors by Wendy and the court could undo that transaction. Harry might consider not asking for the house since the sole beneficial owner is his daughter with whom he has a close relationship.

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### **Division of other Assets of Wendy**

While Harry did not ask for a division of all of the assets of Wendy and Harry pursuant to Ch 208 sec 34, if the ante-nuptial agreement is unenforceable, the court could award Harry half of the combined assets of Harry and Wendy since this is a long term marriage of twenty years' duration . If the court ordered a division of assets it is unlikely that Harry would receive alimony.

### **Tort Suit**

Because Wendy shoved Harry against a wall, Harry also has a tort suit against Wendy for battery

5. Widow sued Doctor in the Superior Court alleging that Doctor negligently performed gastric bypass surgery on her late Husband resulting in Husband's wrongful death.

At trial, the following occurred:

- (A) Prior to the surgery, Doctor was in the care of a psychotherapist. Widow offered in evidence the psychotherapist records to show that Doctor was not in a proper mental state of mind to perform such major surgery, which contributed to her Husband's death. Doctor objected.
- (B) Immediately prior to his death, Husband, in his last breaths, stated to Widow that Doctor had said to Husband just before the surgery, "Do not worry, I may appear nervous to you but I know what I am doing." Widow sought admission of Husband's statement and Doctor objected.
- (C) In a pre-trial deposition, Nurse, who assisted in Husband's surgery, testified that Doctor appeared nervous during the surgery and kept asking Nurse for surgical advice. Nurse has since died. Widow sought admission of Nurse's deposition testimony and Doctor objected.
- (D) Doctor called Expert Witness to testify as to Doctor's fine reputation and expert surgical skills. Widow, during her cross-examination of Expert Witness, proffered evidence of Expert Witness's conviction eleven years ago for perjury. Doctor objected.
- (E) At the end of the extremely difficult trial, Widow's counsel, in the heat of closing argument, stated: "If Doctor were as compassionate about his patients as he would have you believe, then why did he just two weeks ago offer Widow one million dollars to settle this case. Doctor should rightfully pay for Husband's death with his huge insurance policy." Doctor objected and moved for mistrial.

In each instance, how should the Court rule?

## **Answer Question 5**

### **Part A**

A To be admissible the trial judge would have to find the records relevant on the issue of Doctor's malpractice. Without some expert evidence to connect the Doctor's state of mind, shown by the records, to his negligence in performing the surgery, it is doubtful that they would be admissible on grounds of relevancy.

The records involve communications between a patient and his psychotherapist relative to the diagnosis and treatment of his mental or emotional condition and are protected by the patient-psychotherapist privilege. Use of the records in this case does not come within any exceptions to the privilege. Therefore Doctor, the holder of the privilege can claim the privilege and the court must sustain doctor's objection.

If Widow could surmount the relevancy and privilege objections, the records would not be excluded because of hearsay. The psychotherapists records are admissible under the business records exception to the hearsay rule. Statements in those records by Doctor would be admissions.

### **Part B**

B. If the statement of Husband, who is now deceased, was made to widow in good faith and of his personal knowledge, it would be a statement of a deceased person and not inadmissible because of hearsay or as a private conversation between husband and wife. The good faith issue requirement seems to be satisfied since husband believed he was truthful when the statement was made. The statement implies that Husband observed doctor's nervousness as he prepared to undergo the operation and to that extent it is of husband's personal knowledge. The portion of the statement where Doctor said that he knew what he was doing is not of husband's personal knowledge and is inadmissible. Therefore Doctor's objection to the statement should be sustained with respect to Doctor's knowledge of his condition but overruled with respect to Husband's observation of Doctor's nervousness.

### **Part C**

C Statements contained in a pretrial deposition of a witness, since they are made under oath and are subject to cross-examination are admissible substantively if the witness is unavailable. Nurse's death satisfies the unavailability requirement. The statement is marginally relevant on the issue of Doctor's negligence since it implies that Doctor was not sure how to proceed with the operation. Therefore Doctor's objection should be overruled

### **Part D**

D The ability to introduce the perjury felony conviction of expert witness depends on whether he was sentenced to state prison. If he was not sentenced to state prison, then the conviction would only be admissible for ten years after he was convicted. However, if he was sentenced to state prison it would be admissible for 10 years from the expiration of the minimum sentence which would probably be greater than a year, and a conviction eleven years old would be admissible to impeach credibility. The objection would either be sustained or overruled depending on whether a state prison sentence was imposed.

### **Part E**

E The statement made by Widow's counsel was beyond the permissible parameters of final argument because it was not confined to comment on evidence which was admitted at trial. The statement referred to an inadmissible offer in compromise and an

inadmissible reference to the defendant's insurance coverage. At a minimum, the trial judge should sanction the lawyer and tell the jury that they should disregard the statement. Given the highly prejudicial nature of the statement, the judge is likely to conclude that the warning would not be sufficient and grant Doctor's motion for a mistrial.

6. Plaintiff is a Massachusetts construction company with its principal place of business in Cambridge, Massachusetts. Defendant is a Delaware corporation with its principal place of business in Texas. Defendant operates a chain of hotels throughout the United States, including a hotel in Massachusetts, and maintains a branch office in Boston, Massachusetts, among other places throughout the country, where it hires employees and takes reservations for its hotels.

Between 2004 and 2007, Plaintiff and Defendant entered into contracts totaling more than \$5,000,000 for renovation and remodeling work to Defendant's hotels in Georgia, Connecticut, Massachusetts, Texas, Pennsylvania and Virginia. The work to be performed at each hotel was detailed in each contract. However, as to the work performed at the Massachusetts hotel, the Plaintiff and Defendant executed a General Release barring all claims for that location. Plaintiff and Defendant communicated through video conferencing, faxes, telephone conversations, emails, and mail sent to and from Massachusetts and Texas. Plaintiff's representatives traveled to Texas to execute the contracts, and Plaintiff sent workers from Massachusetts to the out-of-state locations.

Defendant failed to pay in full for the construction services rendered under each contract. There were substantial cost overruns during the projects. Also, Plaintiff has become aware that Defendant is having financial difficulties caused by an aggressive expansion program and has heard reports of a change in Defendant's management. Plaintiff brought a lawsuit asserting claims for breach of contract and violations of Mass. Gen. Laws Ch. 93 A, §11. Plaintiff's suit was originally filed in Massachusetts state court and Defendant then removed the action twenty-five days later to the United States District Court for the District of Massachusetts.

Defendant has moved to dismiss Plaintiff's complaint pursuant to Fed. R. Civ. P. 12(b). Plaintiff has moved to obtain a prejudgment attachment pursuant to Fed. R. Civ. P. 64. How should the Court rule on the motions?

**Answer Question 6**  
**12 (b) 2 Motion**

The defendant's motion to dismiss under Fed R Civ P 12(b) includes two motions, a motion to dismiss for lack of jurisdiction over the person under rule 12 (b) (2) and motion to dismiss for failure to state a cause of action under rule 12 (b) 6.

It is likely that the defendant will be successful on its 12 (b) (2) motion. Plaintiff's cause of action is based upon separate contracts for work in Defendant's hotels on contracts which were executed in Texas for work performed in Georgia, Connecticut, Texas, Pennsylvania and Virginia. There is no cause of action for any work to be performed in Massachusetts because the parties have settled their differences with respect to the Massachusetts contract and executed mutual general releases. Thus the Plaintiff's claims do not relate to contracts executed in Massachusetts or contracts to be performed in Massachusetts and the Massachusetts long arm statute would not furnish a basis of personal jurisdiction., because the cause of action does not arise out of a contract which is related to Massachusetts.

The plaintiff's best chance of success in defeating the 12 b (2) motion is to argue that the defendant's operation of hotel in Massachusetts, its maintaining a branch office, its hiring of employees and taking reservations in Massachusetts constitutes a corporate presence in Massachusetts which would subject it to lawsuits in Massachusetts which do not involve activities in Massachusetts.

There would be no motion 12 (b) to challenge the subject matter jurisdiction in the Federal court. That would be challenged by a motion to remand the case back to the state court.

**Quasi in Rem Jurisdiction**

The attachment of real property owned by the defendant in Massachusetts will not form the basis of *quasi in rem* jurisdiction in Massachusetts, because that real estate is not related to the cause of action which the plaintiff is pursuing.

**12 (b) 6 Motion**

The defendant will be successful in its 12 (b) (6) motion to dismiss those counts of the complaint which deal with ch 93A sec 11. because none of an alleged unfair or deceptive practices occurred in Massachusetts. Ch 93A does not create a cause of action for unfair or deceptive practices outside of Massachusetts.

**Motion for Prejudgment Attachment Under Rule 64**

Rule 64 provides for prejudgment attachments on property of the defendant in the Massachusetts Federal District Court on the same basis that the plaintiff could obtain such an attachment in Massachusetts State Courts. If plaintiff survives a motion to dismiss, then it could obtain a real estate attachment and a personal property attachment on the Defendant's hotel in Massachusetts providing it complies with rule Massachusetts Rule Civ P. Rule 4.1 which is incorporated into Federal Rule Civ P. Rule 64. Plaintiff must give the defendant notice that it is seeking a real estate attachment and obtain permission for the attachment after a hearing. The judge must find that there is a reasonable likelihood that the plaintiff will recover a judgment including interest and costs in an amount equal to or greater that the amount of the attachment. If the

attachment is granted it would only attach the property of the defendant in Massachusetts. The plaintiff might also attempt to follow rule 4.2 of the Mass R Civ P and use trustee process to attach the Defendant's bank accounts in Massachusetts.

7. Owner, a sole proprietor, owned and operated a business which manufactured and sold computer chips to computer hardware manufacturers. On February 1<sup>st</sup>, Owner purchased a building to serve as a new plant facility for the business. Owner financed the purchase with a loan from Commercial Bank, secured by a mortgage on the building.

Thereafter, on April 1<sup>st</sup>, Owner applied to Commercial Bank for a loan to finance an expansion of his business. At the time Owner applied for the loan and before any loan was made. Commercial Bank filed a financing statement covering as collateral all of Owner's business assets.

Owner then applied to Savings Bank for an additional loan for operating expenses. Savings Bank gave him the loan on May 1<sup>st</sup>, requiring him to execute a security agreement granting it a security interest in all of his business assets, and Savings Bank immediately filed a financing statement.

On May 15<sup>th</sup>, Owner received from Commercial Bank the business expansion loan that he had applied for on April 1<sup>st</sup>. Owner executed a security agreement which granted to Commercial Bank a security interest in all of his business assets "whether now owned or hereafter acquired" for all liabilities of Owner to Commercial Bank, "whether now existing or hereafter contracted."

On June 1<sup>st</sup>, Owner bought a large air conditioning unit, financed by a loan given to him that day by Savings Bank. He executed a security agreement covering the unit, which was installed on the roof of Owner's building on June 2<sup>nd</sup>. Savings Bank filed a financing statement for the unit on June 25<sup>th</sup>.

On July 1<sup>st</sup>, Owner purchased several computers for the business. He financed the purchase with another loan from Savings Bank, executing a security agreement which granted Savings Bank a security interest in the computers. On July 15<sup>th</sup>, Savings Bank filed a financing statement covering the computers.

On September 1<sup>st</sup>, Commercial Bank made a further loan to Owner to cover his payroll expenses. Thereafter, due to an economic downturn in the computer hardware industry, Owner's business began to fail. He sold one final order of computer chips to Buyer, who took delivery of them, and then Owner closed his business, defaulting on all of his loans.

What are the rights of the parties?

8. Alan worked at Large Corporation ("Large"). Last year Bob, Large's President, correctly suspected that Alan secretly was applying for a job at a competitor, Small Corporation ("Small"). Since Bob really did not want Alan to leave Large, Bob called Small's President and falsely told her that Alan was a thief. As a result, Alan was not hired by Small to a position that would have paid him twice as much money as what Large was paying him.

When Alan learned from Small's President exactly why he was not hired by Small, Alan stormed into Bob's empty office and threw Bob's valuable Ming vase on the floor, where it shattered.

The next day, Bob asked Alan if he had broken the vase. Alan's response was to roll his eyes, laugh and then state "Maybe I did and maybe I didn't." This response caused Bob to question Alan's current mental health. Bob immediately sent a confidential email to two Large employees (Alan's supervisor and the head of human resources at Large) in which Bob alerted them to his fears that Alan was mentally unstable and might be dangerous. As a result of this email, Alan's supervisor did not recommend Alan for a major promotion to a job position at Large which would have involved more job stress.

The next month Alan was rushing along with Charles, who was a salesman for another company, to a meeting at the Large office complex. The two of them fell on a wet spot on the floor that had been created by a leaking water pipe. Alan broke his leg and Charles broke his arm.

To prevent theft, Large installed many hidden 24 hour video cameras in the stockrooms at their facilities. The video feeds from these cameras were recorded and reviewed by Security, an outside security company. Except for Bob, no Large employees knew about these hidden cameras. Very early one summer morning, Denise biked to her job at Large. She decided to change out of her hiking clothes and into her work clothes in the back of a deserted Large stockroom behind a row of boxes. A week later Denise

learned that a video of her changing her clothes that morning had been posted on the internet on a website entitled "Nude At Work."

What are the rights of Alan, Bob, Charles, Denise and Large?

## **Answer Q 7**

### **The Mortgage on Owner's Building**

Commercial Bank has a first mortgage on building of Owner and can foreclose that mortgage to repay its mortgage loan.

#### **Savings Bank's Security Interest in Owner's Business Assets**

Savings Bank obtained a security interest in Owner's business assets on May first when Owner executed a security agreement in conjunction with the loan for operating expenses, and Savings Bank perfected that security interest by filing. The making of the loan was the consideration for granting the security interest. Owner has ownership rights in the collateral which it gave. If there are no prior perfected liens, Savings Bank has a first lien on the business assets of Owner which existed on May first.

#### **Commercial Bank's Security Interest in Owner's Business Assets**

Commercial Bank did not obtain collateral in the Owner's business assets on April first because Owner did not execute a security agreement with respect to his other business assets at that time. The filing of a financial statement cannot perfect a security agreement that does not exist.

The filing on of a financing statement by Commercial Bank on April first satisfies the perfection requirement, once the collateral attached by the execution of the security agreement on May 15. Therefore, Commercial Bank has a second lien behind Savings Bank, which perfected its security interest on May 1, on all of Owner's business assets which existed on May first and a first lien on all assets acquired after that.

#### **Air Conditioning Unit**

Since Savings Bank financed the purchase of the large air conditioning unit which was purchased by Owner and installed on the roof of owner's building on June 2, and obtained a security agreement from Owner, Savings Bank has a purchase money security interest which would give it a first lien on the air conditioning unit if it perfected its interest within 20 days of Owner taking possession of the air conditioning unit. Since Savings Bank did not perfect by filing a financing statement until June 25, Savings Bank has lost its first lien priority and holds a second lien behind Commercial Bank which acquired and perfected its security interest with an after acquired clause. If the air conditioning unit is not readily removable it will be considered a fixture and Commercial Bank as mortgagee will have first priority because it is part of the real estate.

#### **Security Interests in Computers**

##### **Competing Security Interests in Computer Chips and Proceeds**

Buyer, as a purchaser in the ordinary course of business takes title to the computer chips free of any lien. The first holder of the security interest, either Savings Bank or Commercial Bank, depending on whether the chips sold were in existence on May 1 will have a security interest in the proceeds of the sale.

#### **Remedies**

The parties will have the following remedies.

Commercial bank has a right to foreclose its mortgage, and its first lien on the air conditioning unit. If it receives more than the first mortgage plus the value of the air conditioning equipment, then it must account for its surplus to Owner. No one appears to

have a second lien on the real estate. Therefore any surplus would go to Owner's unsecured creditors.

Savings Bank as first lien holder has the right to take possession of all business assets held on May 1, and the computers on which it holds a purchase money security interest. If it gives notice to Owner and the junior lienor, Commercial Bank, that it intends to keep the business equipment and computers in satisfaction of the debt and receives no objection, Savings Bank can keep the assets.

If there is an objection to Savings Bank keeping the assets in satisfaction of the debt or if Savings Bank wants to establish a deficiency, it can sell the assets at either a public or private sale in a commercially reasonable manner. If Savings Bank receives less than the outstanding balance of the indebtedness it can sue Owner for a deficiency judgment for the difference between the amount received and the balance due on the note. If Savings Bank receives more than the outstanding balance of its debt upon the sale of the assets, it must account for the surplus. Since Commercial Bank has a second lien on the assets, the surplus would first be paid to Commercial Bank and if Bank is completely satisfied then any remaining surplus goes to Owner.

Commercial Bank as holder of a first lien on some assets would go through the same procedure as Savings Bank

8. Alan worked at Large Corporation ("Large"). Last year Bob, Large's President, correctly suspected that Alan secretly was applying for a job at a competitor, Small Corporation ("Small"). Since Bob really did not want Alan to leave Large, Bob called Small's President and falsely told her that Alan was a thief. As a result, Alan was not hired by Small to a position that would have paid him twice as much money as what Large was paying him.

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learned that a video of her changing her clothes that morning had been posted on the internet on a website entitled "Nude At Work."

What are the rights of Alan, Bob, Charles, Denise and Large?

**Answer Question 8**  
**Alan v. Big Slander**

Alan has an action in defamation against Bob individually and Large under the doctrine of respondeat superior because Bob was acting within the scope of his employment when he called Small's president and told her what he knew to be false: namely that Alan was a thief. Since this accused Alan of a crime it is slander per se and does not need proof of special damage. However, here there is special damage, which is the difference over a reasonable period of time between what Bob's salary would have been at Small Corporation and what it was at Large Corporation. In addition there are general damages to compensate for loss of Alan's reputation.

**Bob v. Alan Conversion**

By taking possession of Bob's Ming vase and smashing it, Alan has committed the tort of conversion of a chattel and Bob will be successful in obtaining a judgment for its fair market value.

**Alan v. Bob Slander**

If Bob made an untrue statement because Alan had no mental instability, he as Large's president Bob has a qualified privilege as a defense in a slander action to forward an opinion of Alan as an employee to Bob's superiors concerning the mental stability of Alan provided that the opinion is reasonable under the circumstances and made in good faith. If the only evidence Bob has concerning mental instability is the statement about the Ming vase and there is substantial information that Alan was such a good employee that Bob did not want him to leave, Bob's good faith is in doubt. If the statement about Bob's mental health is false and not made in good faith and was made either deliberately or negligently, Bob and Large Corporation will be liable in slander for the difference between the pay at the potential new job and Alan's current salary and for damages to Alan's reputation.

**Alan and Charles Slip and Fall**

As an employee of Large who was injured in the course of his employment, Alan has no action in tort even if Large were negligent in letting the water accumulate on the floor. He will however, be able to collect worker's compensation for his injury even if Large were not negligent.

Charles is a business invitee on the premises of Large. He will be successful in suing Large in tort for his broken arm if he can show that Large was negligent in permitting the water to accumulate from the leaking pipe because it had been in existence long enough for Large to have known about it and taken measures to correct it. Charles must also show that he was not more negligent than Large in causing his fall.

- form of invasion of privacy.
- The material published must be highly offensive to a reasonable person.
- The person hiring an independent contractor is not liable for the torts of the independent contractor.
- An additional theory of liability is that a person who hires an independent contractor can be held liable for his negligence in hiring an unfit contractor.

### **Denise v. Security and Large**

Large has the right to contract with an outside security company to provide security cameras to prevent theft in its warehouse. However, the Security was under an obligation to control the product of those cameras so that the information would only be used for its intended purpose. Denise has a right of privacy so that her personal life is not exposed to the public if that exposure would be offensive to a reasonable person when she takes reasonable precautions to safeguard that privacy. Her temporary nudity which occurred when she was changing from her biking clothes to her work clothes in a remote corner of the company warehouse which was subject to video surveillance would be an act protected under her right of privacy. Security whose employee posted the video on the internet violated her right of privacy and will be liable to her for the damage to her reputation and her mental anguish. Large is probably not liable because Security is an independent contractor. However, if Large was negligent in hiring that contractor or any Large employees participated in the posting of the video on the internet, Large would be liable. Large may also be liable if the embarrassment caused any physical injury for a worker's compensation claim

9. Three brothers, Mark, Robert and James, were nephews of Stella, an elderly widow with no children. In 2002 Stella validly executed a will in which she named Mark as executor, and made a specific bequest of her home in Anytown to James. She also left the remainder of her estate, including a certificate of deposit in the amount of \$500,000 to Mark and Robert in equal shares. Shortly thereafter, Mark and Robert had a dispute and stopped speaking to each other.

Robert continued to maintain a close relationship with Stella. Mark however, did not visit or otherwise contact Stella after his dispute with Robert. Robert often spoke to Stella about his dispute with Mark and frequently remarked how unreasonable and bad-tempered Mark was. Robert visited Stella almost daily. In 2005, after one visit in which Robert spoke poorly of Mark, Stella asked Robert to locate a lawyer to assist her in creating a new will. Robert introduced Stella to Attorney. Before a new will was prepared, Stella was suddenly admitted to the hospital and diagnosed with a serious heart condition and possible a stroke. During her hospitalization, and at Stella's direction, Attorney prepared a new will naming Robert as Executor, retaining the bequest of her home in Anytown to James and bequeathing the remainder of her estate solely to Robert. Attorney prepared the will and visited Stella at the hospital. Attorney read the will to Stella in the presence of two disinterested witnesses. Stella nodded her understanding of the will's terms to Attorney in the presence of the witnesses. Due to Stella's medical condition, one of the witnesses assisted Stella in signing the will by guiding Stella's hand. In the course of her representation of Stella, Attorney learned that Stella owned a beach house in Massachusetts that she wanted to sell. Attorney purchased Stella's beach house for the asking price.

Stella was subsequently discharged from the hospital and returned home. Anne, Stella's close friend and a nurse, moved into Stella's house to assist her. At that time, Stella executed a power of attorney in favor of Anne so that Anne could assist with Stella's finances and pay Stella's bills. Soon thereafter, Stella became withdrawn and quiet. Whenever Stella had visitors, Anne would not leave Stella's side. Anne answered all telephone calls, opened all mail and screened all visitors. Anne discouraged visits to Stella from friends and relatives including Robert, telling them Stella was sleeping or wasn't feeling well. On one occasion while Robert was visiting, Anne became very upset at some questions posed by Robert and shouted at him to leave. On this occasion, Stella pulled the bed sheets up to her chin and looked around the room apprehensively and bewildered. Over time, Stella's medical condition worsened and she became forgetful. Stella died soon thereafter. In 2007, approximately one month before her death, Stella executed a new will, witnessed by two of Anne's friends, in which Stella named Anne as her executor and left her entire estate to Anne.

The wills executed in 2002, 2005 and 2007 have been timely filed in the probate court by their respective executors. Timely objections have been made by each executor to the allowance of the other wills.

What are the rights of the parties?

## **Answer Question 9**

### **Validity of 2007 Will**

•Since the most recently executed will, if valid, is the last will and testament and revokes previous wills where its testamentary disposition is totally different from previous wills. Therefore, the validity of the wills will be discussed starting with the 2007 will giving the entire estate to Anne. The validity of the 2007 will can be attacked on grounds of mental competence and undue influence.

#### **Mental Competence**

The facts indicate that Stella suffered declines in her health since 2005 with a heart condition and possible stroke and that over time Stella's mental condition worsened and she became forgetful. Stella died on month after executing the 2007 will. Anne has the burden of showing that Stella was mentally competent at the time she executed the 2007 will. She must show that Stella knew the nature and extent of her assets, the natural objects of her bounty and that she knew she was making a will. The contents of the 2007 will was totally different testamentary pattern from her earlier wills disinheriting all three nephews who were the natural objects of her bounty. Given her physical and mental condition in 2007, it is doubtful that she can meet that burden

#### **Undue Influence**

Stella's nephews will challenge the will on the grounds of undue influence. To succeed they must prove that the 2007 will reflected the desires of Anne not Stella. The relationship between Anne and Stella during the last two year's of Stella's life where Anne had a power of attorney and totally controlled Stella's finances and her access to her mail, to telephone calls and visitors is the type of circumstance where undue influence can be practiced. The fact that Anne was present at all times when Stella had visitors and that she asked Robert to leave when he was asking questions is further circumstantial evidence of Anne's dominance over Stella. Stella's reaction in pulling the covers up to her chin and looking around the room apprehensive and bewildered is strong evidence that Anne dominated all aspects of Stella's life. Anne has a fiduciary relationship to Stella as her agent under the power of attorney. The 2007 will which disinherits Stella's nephews, beneficiaries of previous wills, and leaves everything to Anne is significant circumstantial evidence of undue influence. Finally, there is Stella's frail mental condition which makes it easier to unduly influence her. The fact that Anne was a close friend of Stella will not prevent the finding of undue influence. There is a high likelihood that the probate judge will invalidate the 2007 will on grounds of undue influence.

### **Validity of 2005 Will**

If the 2007 will is found invalid, then the validity of the 2005 will becomes the issue. The same two grounds mental competence and undue influence will be raised by Mark, the nephew disinherited by the 2005 will together with the issue of improper execution.

#### **Mental Competence**

The facts on Stella's mental competency are quite different in 2005. Stella initiated the process for drawing a new will and had communicated her wishes to an attorney before she was admitted to the hospital and was diagnosed with a serious heart condition and possible stroke. The testamentary pattern in the will remembered two of the three objects of her bounty and she had good reason to disinherit Mark who did not visit her or otherwise contact her. At the time the will was executed, the entire contents were read to

her and she nodded her assent each provision. I would conclude that the 2005 will will not be overturned on the grounds of mental incompetence.

### **Undue Influence**

Likewise the facts concerning undue influence are quite different in 2005. While Robert maintained a close relationship with Stella and frequently disparaged Mark to her, it was Stella's idea, not Robert's idea to make a new will and to ask Robert to find a lawyer to draft the new will. Stella originated the changes to her will and understood that they had been incorporated into the new will. I would therefore conclude that the will would not be disallowed because of undue influence.

### **Improper Execution**

To be valid a will must be signed by the testatrix or by someone else in her presence and at her express direction. In this case Stella required assistance and arguably the signature was not completely hers. However, it was signed in her presence and she clearly accepted the assistance of the witness who helped her sign. Therefore I would conclude that the will was not improperly executed and effectively revoked the 2002 will at least with respect to the legacy to Mark.

### **Validity of 2002 Will**

If the probate judge concludes that both the 2005 and 2007 are invalid, then the validly executed 2002 will would be Stella's last will and testament because an invalid will does not revoke previous wills.

### **Attorney's Purchase of Beach House**

Attorney had a fiduciary relationship with Stella. That relationship will require that all financial transactions between lawyer and client be carefully scrutinized for fairness, particularly when a client is old and frail like Stella. However, such transactions are not completely forbidden. In this case it appears that Stella on her own decided to sell the beach house and independently set an asking price for the property. Attorney did not appear to take advantage of his fiduciary position when he purchase the property for the asking price as long as that price approximated fair market value. Therefore, Stella's executor will not be able to rescind this transaction.

### **Conclusion**

I would conclude that the 2005 will is Stella's last will and testament and that Robert will be appointed executor, James will inherit her home in Anytown and that Robert will be the residuary legatee. Mark and Anne will receive nothing from Stella's estate.

10. Lawyer agreed to represent Client in Client's pursuit of a songwriting career. Client left in Lawyer's possession for safekeeping \$10,000 in proceeds from a recent sale of one of Client's musical scores. Client also left with Lawyer, for safekeeping, a number of originally composed scores, along with a few prized autographed photos of famous entertainers. Lawyer deposited the Client's \$10,000 into his law firm's operating account and stuffed the scores and autographs in his briefcase. On his way home from work, Lawyer stopped at his favorite nightclub and struck up a conversation with Sally, the nightclub's cabaret singer. Sally was unhappily married to Client. Sally asked Lawyer to represent her in a divorce proceeding against Client, and Lawyer readily agreed. Lawyer showed Sally one of Client's scores and asked her opinion of its musical quality. As he left the nightclub, Lawyer, who was short on money, gave the Bartender two of Client's prized autographed photos in lieu of a tip.

Later that evening at home, Client and Sally began to argue, and Client threatened to punch Sally and pushed her into a wall. Client grabbed his coat and briefcase, telling Sally that he would soon be back and she would be sorry. Fearing for her safety, Sally called 911 and provided a description of Client's car. While on patrol, Trooper responding to the 911 call, observed Client's car driving down the road at a high rate of speed. Trooper pulled over Client's car and ordered Client out of the car. Trooper noticed a strong smell of burnt marijuana emanating from Client's clothing and vehicle. Trooper searched the entire vehicle, including the closed glove compartment and trunk. During the search, Trooper discovered in the glove compartment an unlicensed handgun, and in the trunk, a briefcase which contained 2 kilograms of cocaine. Trooper then arrested Client.

What, if any, crimes and ethical violations have been committed?

Will Client be successful in a motion to suppress the handgun and cocaine?

## Answer Question 10 Ethical Violations

Lawyer has committed the following ethical violations:

### **Commingling funds**

Rule 1.15(a) of the Rules of Professional Conduct requires that a lawyer keep clients funds in his possession in a separate account from his personal funds. Lawyer violated this rule by depositing the \$10,000 he received in his law firm operating account.

### **Failing to Safeguard Property**

Rule 1:15 (a) of the Rules of Professional Conduct requires that property other than money be identified as such and appropriately safeguarded. Lawyer violated this rule when he stuffed the scores and autographs in his briefcase, because this is not an appropriate repository for fragile documents.

### **Violation of Conflict of Interest Rules**

Rule 1.7 (A) of the Rules of Professional Conduct provides that a lawyer shall not represent a client if the representation of that client will be directly adverse to another client. Lawyer was representing Client in pursuit of a songwriting career. This is a general form of representation which involves a direct relationship with all of clients business activity. The representation of client's wife in a divorce is directly adverse to handling Client's business career because the financial aspects of that business career will become an issue in the divorce proceedings. Therefore lawyer violated the conflict of interest rules.

### **Violation of Confidentiality Rule**

Rule 1.6 of the Rules of Professional Conduct provides that a lawyer shall not reveal confidential information relating to the representation of a client unless the client consents after consultation. The musical scores which Lawyer received from Client for safekeeping constituted confidential information, particularly with respect to client's Wife who was contemplating divorce. The number and quality of those scores could be a large issue in divorce negotiation. Lawyer violated Rule 1.6 when he showed one of the scores to Client's wife.

### **Larceny of the Picture**

Rule 8.4 of the Rules of Professional Conduct provide that it is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty trustworthiness or fitness as a lawyer in other respect, or engage in conduct involving dishonesty. By giving two photographs that had been entrusted to his possession to the bartender, Lawyer appropriated the photographs to his own use and has committed larceny of the photographs, a crime. In doing so he violated rule 8.4.

## Clients Crimes

Client is guilty of the following crimes

Assault, when the threatened to punched Sally and put her in fear of an immediate battery.

Battery, when Client pushed Sally into a wall.

Speeding, if he was exceeding the speed limit immediately before he was stopped by Trooper.

Possession of an unlicensed handgun which was found in the glove compartment.

Possession with intent to distribute the two kilograms of cocaine found in the trunk because two kilograms is an amount which would be used for personal consumption.

**Motion to Suppress**

•Client will not be successful in his motion to suppress the handgun and the cocaine. Trooper was not only conducting a stop for a traffic violation because he had knowledge of the previous 911 call from Client's wife. At the time of the stop, the smell of marijuana on the defendant and his clothing gave the Trooper reasonable cause to search the entire car including the glove compartment and the trunk without a warrant for narcotics. The handgun and the cocaine were discovered pursuant to that valid warrant less search.