MALAGUTI'S TIPS FOR CONSIDERATION ON THE EVE OF THE MASSACHUSETTS ESSAY EXAM

Some of these tips may seem obvious, but they are worthy of mention.

In General

1. Early to bed, early to rise. You may be anxious but even if you have trouble sleeping, get to your bedroom or hotel room and get some rest. Review a few notes, relax a little, but don’t stay up half the night. Also, get up early enough, and leave early enough, to get to the exam site in plenty of time. You don’t need the extra anxiety caused by running late.

2. What happened today is done; don’t dwell on it. It’s time to commit your energies to tomorrow’s task. If you think you did poorly on the multistate portion of the bar exam, remember that the essay section counts just as much. Many of us swear that it was the essay portion of the exam that got us through. Conversely, if you think you did really well on the multistate portion of the bar exam, don’t forget that the essay section counts just as much.

3. The name of the game is “preparation.” You have prepared with professional bar exam instructors and materials. If you truly have put in your maximum effort, there is nothing else you could have done (within reason). Take confidence from your preparation and put it into practice. In a way, the task tomorrow is merely to do 10 more practice essays.

Real Property/Mortgages

A review of the past 22 bar exams reveals that the following issues are big: easements (including prescriptive easements), issues involving recording, marketable and record title, purchase and sale agreements (including the enforceability of “offers to purchase”), restrictive covenants, and brokers and brokers’ commissions. In addition, the issues of fraud and Chapter 93A often find their way into real estate essay questions.

1. Easements: This is the most-commonly tested issue on the Property essay questions. You have to understand how easements work. Particularly, understand how “appurtenant” easements work (the easement and dominant and servient estates remain intact through successive transfers of title). Don’t forget the “negative” (view) easement. Understand how hard it is to “abandon” an easement in Massachusetts: you need the passage of a long period of time plus some overt act that shows abandonment such as erecting a fence or building blocking the easement. Also, remember that easements sometimes overlap with restrictive covenants (covenants running with the land). This is important because restrictive covenants lapse in 30 years, unless renewed for up to 20 years, while easements generally are perpetual.
2. Recording: Massachusetts is a pure notice jurisdiction. Several fact patterns from prior exams involved real estate interests that were reduced to writing and delivered, but not recorded. Sometimes third persons obtain actual knowledge of the unrecorded transaction; this, of course, causes them not to be a BFP.

3. Marketable Title: Several questions involve persons who purchased without hiring an attorney or conducting a title search. Understand how the obligation to deliver marketable title "dies" when the deed is delivered. Often issues of fraud and Chapter 93A are slipped in. Remember: unless it's a seller who is involved in the real estate development business, or a real estate broker (who is in the business of marketing property), there is no duty of a private seller to disclose property defects in Massachusetts; Chapter 93A only applies to persons engaged in "trade or commerce."

4. Purchase and Sale Agreements / Offers to Purchase: Don't forget that the "offer to purchase (OTP) is usually enforceable just as much as a formal purchase and sale agreement. McCarthy v. Tobin. To make the OTP unenforceable, the parties usually must include a clear statement that it is not enforceable and that a P & S, which will be the only binding document, will follow. Don't forget that, in Massachusetts, environmental and zoning contingencies can't be bootstrapped onto the obligation to deliver marketable title.

5. Brokers and Brokers' Commissions: There are essentially three ways for a broker to earn his or her commission: (1) as provided in a written brokerage agreement; (2) if no brokerage agreement, under Tristram's Landing (the broker: (i) produces a ready, willing and able buyer who (ii) signs a binding P & S, and (iii) the transaction closes in accordance with the terms of the P & S); or (3) although the broker doesn't produce a P & S as provided in Tristram's Landing, s/he is the "procuring" or "efficient cause" of a sale that occurs.

6. Possible Fact Patterns on Property and Mortgages:

It's too late to read entire cases tonight, but below are encapsulations of some recent cases and laws I believe to present possible sources for essay questions:


This case involves whether a real estate broker who provided misinformation as to the zoning of a particular property, which information she received from the seller, had a duty to exercise reasonable care in making such representations. The SJC ruled she does, and that the exculpatory clause in the purchase and sale agreement does not preclude the buyer's reliance on prior written representations.

The owner of property for sale told the broker either that the property was zoned "Residential Business B" or that it was zoned "Business B." The zoning law provided for no "Residential Business B" designation, although it did provide for a "Business B" designation. The broker, who had experience listing and brokering properties in the
town, was not aware of any prior business use of the property, and although she saw businesses located across the street, she observed only houses and not businesses adjoining the property on either side. The broker advertised the property in at least two newspapers as being zoned “Business B.”

The buyer saw the ads, as well as the “Multiple Listing Service” listings designating the property as being zoned for “Business B,” which would support the hair salon he intended to operate at the location. He made an offer to purchase and the parties entered into a standard form Purchase and Sale Agreement. One provision of that standard form (the so-called “exculpatory clause”) stated:

“The BUYER acknowledges that the BUYER has not been influenced to enter into this transaction nor has he relied upon any warranties or representations not set forth or incorporated in this agreement or previously made in writing, except for the following additional warranties and representations, if any, made by either the SELLER or the Broker(s): NONE.”

After paying the purchase price and taking a deed to the property the buyer discovered that the property was zoned “Residential B,” and that he could not operate a hair salon on it. He sued the broker for negligent misrepresentation and violations of Chapter 93A. The broker moved for summary judgment.

The SJC held that, while a broker ordinarily may rely on information provided by the seller in making representations about a property, a broker is not insulated from all liability merely by virtue of such reliance, and must take reasonable steps to avoid disseminating false information to buyers. The critical question is whether the broker “failed to exercise reasonable care or competence in obtaining or communicating the information.” Additionally, where it is unreasonable in the circumstances for a broker to rely on information provided by the seller, the broker has a duty to investigate further before conveying such information to prospective buyers.

The SJC found that, construing the facts most favorably to the buyer, the non-moving party, a trier of fact could find that the broker failed to exercise reasonable care in making representations as to the zoning status of the property. Moreover, it construed the exculpatory clause as actually permitting reliance by the buyer on prior written representations made by the seller or broker that are not set forth or incorporated in the agreement. (The broker argued that the exculpatory clause did not permit reliance on prior written representations not set forth in the agreement.) The SJC thus refused to allow the summary judgment and ordered that the case proceed to trial on the negligent misrepresentation and 93A counts.


This case involved whether a mortgagee who held the mortgage, but not the underlying mortgage note, could properly foreclose. The SJC ruled that it could not. This question
will arise when original mortgagees (banks, mortgage companies, etc) assign the mortgage or “sell the paper.”

The prevailing doctrine, and the multistate rule, is that an assignment of the debt carries the mortgage with it: the so-called rule of “the mortgage follows the note.” But, in contrast to most jurisdictions, in Massachusetts the mere transfer of a mortgage note does not carry with it the mortgage. As a consequence, in Massachusetts a mortgage and the underlying note can be split.

At common law, a mortgagee possessing only the mortgage was without authority to foreclose or otherwise disturb the possessory interest of the mortgagor. Statutory codifications of the common law have not changed the common law. Either a mortgagee, or its authorized agent standing in its shoes, must physically possess the note in order to foreclose.

The SJC applied this ruling “prospectively” rather than “retroactively” so that it does not affect mortgages foreclosed prior to the date of the decision.


This is an interesting case that is chock-full of issues – breach of a purchase and sale agreement, anticipatory repudiation, breach of the covenant of good faith and fair dealing, specific performance, liquidated damages, Massachusetts civil pleading and practice, and the availability of attorneys’ fees under a liquidated damages clause – and thus presents an excellent vehicle for a bar exam question.

In October 1999, the Proskys entered into a purchase and sale agreement (P & S) with K.G.M. Custom Homes, Inc. (KGM) by which the Proskys agreed to sell to KGM approximately 45.7 acres of land in Norton, Massachusetts for the purpose of developing residential homes, and with the price to be determined by the number of “approved and permitted buildable house lot[s].” The P & S fixed the closing for twenty-one (21) days “after all final approvals are granted and the expiration of any and all appeal periods.” The P & S also contained a liquidated damages provision that specified that in the event of a breach by the Proskys, “the [Proskys] shall pay [KGM], as liquidated damages, a sum of money equal to all charges and fees paid by [KGM] in connection with this transaction, including but not limited to, attorney’s fees.”

In or about August, 2004, after a five-year process, during which time KGM worked to gain approval for its development plan, and after a dispute over the calculated sale price, the Proskys’ attorney falsely told one of KGM’s attorneys that the Proskys had received a higher offer for the property and informed him that KGM should calculate its damages based on the liquidated damages provision of the P & S. Instead, KGM filed suit for specific performance. While the suit was pending, KGM received final approval for its plan, and the parties met at the office of KGM’s real estate attorney in an attempt to close on the sale of the property. Due to the Prosky attorney’s withholding of information in the days leading up to the closing, as well as his aggressive and unreasonable behavior at the closing (he taunted the buyer’s attorney and refused to
allow him to examine the actual mortgage and note his clients were to sign to complete the deal), the parties were unable to close the sale.

After a jury-waived trial, a Superior Court judge ruled that the Proskys anticipatorily repudiated the purchase and sale agreement when their attorney told KGM that the Proskys had a higher offer and the buyer should calculate its liquidated damages. The judge further found that the Prosky attorney’s “attempt to scuttle the deal” at closing constituted an actual breach of the implied covenant of good faith and fair dealing and, as a result, he allowed KGM to choose either compensatory damages as provided by the liquidated damages provision of the purchase and sale agreement, or specific performance. K.G.M. elected to receive compensatory damages.

On appeal, the Proskys did not contest the finding that they anticipatorily repudiated the agreement, but argued that their attorney’s actions at the closing did not constitute an actual breach, and that therefore monetary damages were not available, as specific performance is the only recognized remedy for anticipatory repudiation. They further argued that it was KGM who committed a breach of the agreement at the closing by failing to show that it was able to perform in accord with its terms. Additionally, the Proskys argued that KGM failed to make a seasonable election of remedies where it did not amend its complaint to seek compensatory damages under the liquidated damages provision of the agreement. Finally, they argued that, even if they did commit an actual breach that properly gave rise to the judge’s remedy, the judge erred in holding them liable for attorney’s fees incurred in connection with the litigation over the dispute.

The SJC held:

(1) The Proskys committed an actual breach of the P & S.

The Massachusetts law on anticipatory repudiation is unique. With few exceptions, "[o]utside of the commercial law context, Massachusetts has not generally recognized the doctrine of anticipatory repudiation, which permits a party to a contract to bring an action for damages prior to the time performance is due if the other party repudiates." One such exception occurs where a seller of land informs the "holder of an enforceable option" to purchase that he plans to sell the land to a third party. Moreover, in Massachusetts, the remedy for an anticipatory repudiation is limited to specific performance. Thus, the Proskys argued that their attorney’s anticipatory repudiation limited their liability to specific performance, and not damages.

But the SJC agreed with the trial judge that the actions of the Prosky’s attorney at the attempted closing constituted an actual breach.

“Every contract implies good faith and fair dealing between the parties to it.” “The implied covenant of good faith and fair dealing provides ‘that neither party shall do anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract....’” "[T]he implied covenant exists so that the objectives of the contract may be realized. The trial judge was correct that the Prosky attorney’s
actions at the closing constituted an actual breach of the implied covenant of good faith and fair dealing. The Proskys' counsel (and therefore the Proskys themselves) had no intention of going forward with the closing, and that he and the Proskys instead intended to prevent KGM from reaping "the fruits of the contract."

(2) KGM was not required to amend its complaint in order to recover to seek liquidated damages.

In Massachusetts, "[i]t is settled by [SJC] decisions and by the great weight of authority that the right to specific performance either affirmatively or by way of injunction is not lost because the contract contains a provision for the payment of a penalty or liquidated damages in the event of a breach. Ordinarily an aggrieved party to a contract is not entitled to both remedies. As such, plaintiffs are commonly allowed to elect either remedy where they have been the victim of an actual breach. This election is particularly appropriate where, as here, KGM sought specific performance under the belief that the purchase price was far less than the price eventually determined by the judge. Given that specific performance of the agreement would have cost KGM almost $300,000 more than it anticipated at the start of the suit, the trial judge did not err in allowing KGM to elect to receive liquidated damages.

The fact that KGM did not amend its complaint to seek liquidated damages does not change this analysis. The issues of the anticipatory and actual breach of the agreement up through the failed closing were thoroughly litigated by the parties, and the judge's decision to offer KGM its choice of remedy was well within the scope of the litigation. While the preferred course of conduct would have been for KGM to seek amendment of its complaint to conform to the evidence regarding the actions evidencing breach occurring subsequent to the filing of its suit for specific performance, and to specifically seek liquidated damages under the agreement, it was not required to do so. See Mass. R. Civ. P. 15(b)("When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence ... may be made ... but failure so to amend does not affect the result of the trial of these issues"). Simply put, because the issue was fully litigated, the Proskys could not have been surprised by the judge's decision, and thus were not prejudiced by KGM's failure to amend the complaint.

(3) The parties' agreement did not allow for recovery of attorney fees.

Finally, the Proskys claimed that the trial judge erred in awarding KGM $120,000 in attorneys' fees incurred in litigating the matter. The trial judge found that the liquidated damages provision of the P & S provided for attorneys' fees. The SJC disagreed:

"Our traditional and usual approach to the award of attorney's fees for litigation has been to follow the 'American Rule': in the absence of statute, or court rule, we do not allow successful litigants to recover their attorney's fees and expenses." There is no statute or court rule that would provide for the awarding of attorney's fees in this case.
The parties, however, may construct their agreement to provide for the payment of attorneys’ fees through clear and unambiguous language. The relevant portion of the agreement states that, in the event of a breach by the Proskys, “the [Proskys] shall pay [KGM], as liquidated damages, a sum of money equal to all charges and fees paid by [KGM] in connection with this transaction, including but not limited to, attorney’s fees.” On its face, the clause appears to contemplate only attorney’s fees incurred in connection with the transfer of the land, which would include the process of securing approval from the necessary authorities. Thus, where the plain language of the agreement does not contemplate the awarding of attorney’s fees for litigating its breach, the judge’s decision represented a windfall for KGM, which goes against the intent of the American Rule.

**Chiarelli v. Differ**, (Mass. Land Court, May 19, 2014)

Sisters Nancy Chiarelli and Sarah Differ were co-tenants of the house in Quincy that they grew up in. Sarah lived in the house with their mother, her daughter, and her husband, Marc, and his daughter; Nancy lived in Florida with her husband and family. In 2006, Sarah asked Nancy to convey her 1/2 interest in the house to Sarah so that she could refinance. Sarah promised to return Nancy’s 1/2 interest after the refinance was completed. After getting the promise in writing, Nancy agreed, and that transaction went smoothly. In 2008, Sarah made the same request. Nancy agreed without getting anything in writing, and conveyed her 1/2 interest to Sarah. Sarah reneged on the agreement and did not return Nancy as a co-tenant. In apparent anticipation of Nancy’s lawsuit, Sarah conveyed the title to the property to her husband, Marc.

Nancy sued and Sarah and Marc for: (1) intentional misrepresentation, (2) fraud in the inducement, (3) breach of contract, (4) estoppel, and (5) specific performance. Sarah denied any intent to defraud – she claimed it was just a breach of an unenforceable contract -- and raised the statute of frauds as a defense.

The Land Court held:

(1) Nancy could not prove the elements of intentional misrepresentation.

To recover on her claim of intentional misrepresentation, Nancy had to prove that Sarah or her husband made a false statement of material fact in order to induce Nancy to agree to the 2008 transaction and execute the 2008 deed, and that Nancy reasonably relied on this false statement to her detriment. Massachusetts law requires that Sarah or Marc must have known that the statement was false when either of them made it, or the statement’s truth or falsity must have been susceptible of actual knowledge. The statement that Nancy alleges was false is Sarah’s promise to restore Nancy’s 1/2 interest in the property after the 2008 refinance was completed and her statement that she would use the money from the refinance for repairs to the property. The evidence establishes that Nancy relied to her detriment on these statements, as she executed the 2008 deed surrendering her interest in the property. The evidence further establishes that her reliance was reasonable, as the statements suggested that Sarah was proposing the same arrangement that they had made and completed in 2006. In fact,
Nancy confirmed with Sarah that the 2008 transaction would be the same as the 2006 transaction. The evidence does not establish, however, that these statements were false when Sarah made them. Rather, the evidence establishes that Sarah did intend to restore Nancy's 1/2 interest in the property and to use the money for repairs when she made those statements in 2008. It was only after Nancy gave the 2008 deed and Sarah and Marc completed the refinance transaction that Sarah changed her mind and reneged on her agreement. Because neither Sarah nor Marc made a false statement of material fact in the 2008 transaction, Nancy did not proved her claim for intentional misrepresentation.

(2) Nancy could not prove the elements of fraud in the inducement. Nancy's claim of fraud in the inducement failed for the same reason her cause of action for intentional misrepresentation failed: the inability to prove that Sarah intended to renege on the oral agreement at the time the agreement was made. "Fraud in the inducement" is a form of misrepresentation. It is contrasted with "fraud in the factum." The term "fraud in the factum" typically refers to "the rare case when there has been fraud as to the essential nature of [a legal] instrument or an essential element of it." "Fraud in the inducement," by contrast, occurs "when a misrepresentation leads another to enter into a transaction with a false impression of the risks, duties, or obligations involved." Because the Land Court judge found that Sarah had intended to restore Nancy's 1/2 interest in the property and use the money from the refinance for repairs when she made her statements to that effect, there was no fraudulent inducement.

(3) Sarah did breach her contract with Nancy.

To recover on her breach of contract claim, Nancy had to prove that she and Sarah had a valid agreement, that Sarah breached her duties under the agreement, and that the breach caused Nancy damage. There is no doubt that Nancy and Sarah reached an agreement in that Nancy would convey her 1/2 interest in the property to Sarah for the purpose of Sarah's refinancing and taking out equity for repairs. In exchange, Sarah agreed to convey a 1/2 interest in the property back to Nancy after the refinance was completed. There is also no doubt that Sarah breached the 2008 agreement with Nancy. She did not perform her obligation to convey a 1/2 interest in the property back to Nancy. And, finally, there is no doubt that the breach caused Nancy damage. Specifically, it deprived her of her 1/2 interest in the property that she had conveyed to Sarah only in the expectation and agreement that it would be returned to her.

(4) The statute of frauds did not make the contract unenforceable.

Sarah and Marc raised the affirmative defense of the Statute of Frauds. Under the Statute of Frauds, a contract for the conveyance of land is not enforceable unless it is set forth in a writing executed by the person to be charged. G.L. c. 259, § 1, Fourth. There is no doubt that the 2008 agreement was a contract for the conveyance of land — namely the 1/2 interest in the property, and thus is within the statute of frauds.
In Massachusetts, however, there is an exception to the statute of frauds—estoppel—that applies to this case. "A plaintiff's detrimental reliance on, or part performance of, an oral agreement to convey property may estop the defendant from pleading the Statute of Frauds as a defense." Here, Nancy performed her obligation under the 2008 agreement by conveying her 1/2 interest to Sarah, and relied to her detriment on Sarah's promise to convey the 1/2 interest back to her. This exact reliance was found to be reasonable and to take an oral agreement out of the statute of frauds in other Massachusetts cases. Application of the equitable exception to the Statute of Frauds "has depended upon the degree of reliance on the oral agreement by the party pursuing specific enforcement." While 'earlier Massachusetts decisions laid down somewhat strict requirements for an estoppel precluding the assertion of the statute of frauds, . . . more recent decisions . . . indicate a trend on the part of the Supreme Judicial Court to find that the circumstances warrant specific performance." Nancy's conveyance takes the 2008 agreement out of the statute of frauds and renders the agreement enforceable.

(5) Nancy is entitled to specific performance.

Nancy sought specific performance of the 2008 agreement; specifically, a judgment ordering Marc as owner of the Property to convey to her a 1/2 interest in the Property. "Whether specific performance should be granted is within the sound discretion of the judge. Specific performance is a proper and usual remedy in disputes involving the conveyance of land. Specific performance is favored because "[i]t is well-settled law in this Commonwealth that real property is unique and that money damages will often be inadequate to redress a deprivation of an interest in land." Because Sarah breached her contractual obligation to convey a 1/2 interest in the property, Nancy is entitled to specific performance of that obligation. Sarah's pre-litigation conveyance of the property to Marc does not prevent specific performance of Sarah's contractual obligation. Marc is a defendant in this case and took title to the Property with full knowledge and actual notice of the 2008 agreement between Sarah and Nancy. Moreover, Marc did not provide any consideration for this conveyance; indeed, no money changed hands between Marc and Sarah as part of her conveyance to him.

**Constitutional Law**

A review of the past 22 bar exams reveals that the following issues are big: free speech, federal preemption, free exercise (religion), takings (including the public purpose requirement), and the state action doctrine. Don't forget that the Massachusetts constitutional law essays will largely involve federal constitutional law, except to the extent that Massachusetts constitutional law provides greater protection of individual rights.

1. **Free Speech:** Remember the stringent Massachusetts standard: First, a court must determine whether the plaintiff has shown that governmental policies or regulations substantially burden the free exercise of his or her sincerely held religious beliefs. If so, the court examines whether the governmental entity involved can
demonstrate that: (1) it has an interest sufficiently compelling to justify that burden, and (2) the granting of an exemption to persons in plaintiff’s position would unduly burden that interest. Also, don’t forget that, unlike under the federal Constitution, Massachusetts public school have free speech rights even when the speech is offensive (unless it causes a disruption of school activities); “bong hits for Jesus” flies in Massachusetts!

2. Preemption Methodology:

1. There must be a federal law (statute, regulation, executive order, decided case etc.) and a state (including county and municipal governments) law (statute, regulation, executive order, decided case etc.);

2. Determine whether the federal government has the authority/power (e.g., commerce power) to enact the federal law. If not, you are done. If so, proceed.

3. As whether there is an express preemption in the federal law. If so, you are done. If not, proceed.

4. Ask whether the federal law results in field preemption (was intended to occupy the entire field of concern). If so, you are done. If not, proceed.

5. Ask whether there is conflict preemption:

   a. It is literally impossible to comply with both federal and state law, or

   b. The state law impedes the accomplishment of federal objectives.

3. Takings: The Massachusetts Constitution provides the same protection as the Fifth Amendment to the federal Constitution; you can apply federal cases. Although a taking cannot occur without a “public purpose,” the U.S. Supreme Court has ruled that the public use requirement is “coterminous” with a state’s police powers. This means that states will be given great deference when it comes to the question whether a taking is supported by a public purpose.

4. State Action: All applications of the federal Constitution, and most applications of the Massachusetts Constitution, require that the defendant be engaged in state action. But the Massachusetts Civil Rights Act and Public Accommodations Act apply to private actors. The Massachusetts Civil Rights Act, however, also requires threats, intimidation or coercion. Don’t forget about the exclusivity of the MCAD in employment and housing cases.

5. Possible Fact Patterns on Constitutional Law:
The most recent Massachusetts law requires that protesters at reproductive health care facilities now must keep at least 35 feet from the clinic’s “entrance, exit, or driveway” (it used to be 18 feet). G.L. c. 266 § 120E 1/2. The law also exempts four classes of individuals, one of which is comprised of “employees or agents of [a reproductive healthcare] facility acting within the scope of their employment.”

SCOTUS struck down the Massachusetts law, but not strictly on the grounds the protestors had asserted. Consistent with the traditionally open character of public streets and sidewalks, it determined that the government’s ability to restrict speech in such locations is “very limited.” In particular, the guiding First Amendment principle is that the “government has no power to restrict expression because of its message, its ideas, its subject matter, or its content” applies with full force in a traditional public forum. As a general rule, in such a forum the government may not “selectively ... shield the public from some kinds of speech on the ground that they are more offensive than others.” It took notice, however, that government should be afforded somewhat wider leeway to regulate features of speech unrelated to its content. “[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions ‘are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.’” In this regard, content-based limitations on speech merit strict scrutiny: the law must be the least restrictive means of achieving a compelling state interest. Conversely, content-neutral limitations on speech merit intermediate scrutiny: the law must be “narrowly tailored to serve a significant governmental interest.”

From there, the Court held:

(1) The Massachusetts law was content-neutral because it did not require “enforcement authorities” to “examine the content of the message that is conveyed to determine whether” a violation has occurred. Whether a protestor violates the Act “depends” not “on what they say,” but simply on where they say it. Indeed, petitioners can violate the Act merely by standing in a buffer zone, without displaying a sign or uttering a word. While it is true that limiting the buffer zone restriction to abortion clinics has the “inevitable effect” of restricting abortion-related speech more than speech on other subjects, a facially-neutral law does not become content-based simply because it may disproportionately affect speech on certain topics. On the contrary, “[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.” The question in such a case is whether the law is “justified without reference to the content of the regulated speech.” The Massachusetts Act is. Its stated purpose is to “increase forthwith public safety at reproductive health care facilities.” It is not the case that “[e]very objective indication shows that the provision’s primary purpose is to restrict speech that opposes abortion.”
Nor is the Massachusetts Act content-based just because it exempts four classes of individuals, one of which is comprised of "employees or agents of [a reproductive healthcare] facility acting within the scope of their employment," an exemption which, it is argued, favors one side in the abortion debate and concomitant viewpoint discrimination. The Court found that there is nothing inherently suspect about providing some kind of exemption to allow individuals who work at the clinics to enter or remain within the buffer zones. In particular, the exemption cannot be regarded as simply a carve-out for the clinic escorts; it also covers employees such as the maintenance worker shoveling a snowy sidewalk or the security guard patrolling a clinic entrance. Given the need for an exemption for clinic employees, the "scope of their employment" qualification simply ensures that the exemption is limited to its purpose of allowing the employees to do their jobs. There is no suggestion in the record that any of the clinics authorize their employees to speak about abortion in the buffer zones.

Accordingly, the Massachusetts law is content-neutral and requires intermediate scrutiny: it must be "narrowly tailored to serve a significant governmental interest."

(2) The Massachusetts Act, however, was not "narrowly tailored to serve a significant governmental interest." By demanding a close fit between ends and means, the tailoring requirement prevents the government from too readily "sacrific[ing] speech for efficiency." For a content-neutral time, place, or manner regulation to be narrowly tailored, it must not "burden substantially more speech than is necessary to further the government's legitimate interests." Such a regulation, unlike a content-based restriction of speech, "need not be the least restrictive or least intrusive means of" serving the government's interests. But the government still "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals."

In the context of petition campaigns, we have observed that "one-on-one communication" is "the most effective, fundamental, and perhaps economical avenue of political discourse." And "handing out leaflets in the advocacy of a politically controversial viewpoint ... is the essence of First Amendment expression"; "[n]o form of speech is entitled to greater constitutional protection." When the government makes it more difficult to engage in these modes of communication, it imposes an especially significant First Amendment burden.

The buffer zones burden substantially more speech than necessary to achieve the Commonwealth's asserted interests. The Commonwealth's interests include ensuring public safety outside abortion clinics, preventing harassment and intimidation of patients and clinic staff, and combating deliberate obstruction of clinic entrances. The Act itself contains a separate provision, subsection (e)—unchallenged by petitioners—that prohibits much of this conduct. That provision subjects to criminal punishment "[a]ny person who knowingly obstructs, detains, hinders, impedes or blocks another person's entry to or exit from a reproductive health care facility." Mass. Gen. Laws, ch. 266, § 120E½(e). If Massachusetts determines that broader prohibitions along the same lines
are necessary, it could enact legislation similar to the federal Freedom of Access to Clinic Entrances Act of 1994 (FACE Act), 18 U.S.C. § 248(a)(1), which subjects to both criminal and civil penalties anyone who "by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services." Some dozen other States have done so. If the Commonwealth is particularly concerned about harassment, it could also consider an ordinance such as the one adopted in New York City that not only prohibits obstructing access to a clinic, but also makes it a crime "to follow and harass another person within 15 feet of the premises of a reproductive health care facility."

The Commonwealth points to a substantial public safety risk created when protestors obstruct driveways leading to the clinics. That is, however, an example of its failure to look to less intrusive means of addressing its concerns. Any such obstruction can readily be addressed through existing local ordinances. See, e.g., Worcester, Mass., Revised Ordinances of 2008, ch. 12, § 25(b) ("No person shall stand, or place any obstruction of any kind, upon any street, sidewalk or crosswalk in such a manner as to obstruct a free passage for travelers thereon"); Boston, Mass., Municipal Code, ch. 16–41.2(d) (2013) ("No person shall solicit while walking on, standing on or going into any street or highway used for motor vehicle travel, or any area appurtenant thereto (including medians, shoulder areas, bicycle lanes, ramps and exit ramps)"). All of the foregoing measures are, of course, in addition to available generic criminal statutes forbidding assault, breach of the peace, trespass, vandalism, and the like.

In addition, subsection (e) of the Act, the FACE Act, and the New York City anti-harassment ordinance are all enforceable not only through criminal prosecutions but also through public and private civil actions for injunctions and other equitable relief. We have previously noted the First Amendment virtues of targeted injunctions as alternatives to broad, prophylactic measures. Such an injunction "regulates the activities, and perhaps the speech, of a group," but only "because of the group's past actions in the context of a specific dispute between real parties." Moreover, given the equitable nature of injunctive relief, courts can tailor a remedy to ensure that it restricts no more speech than necessary. In short, injunctive relief focuses on the precise individuals and the precise conduct causing a particular problem. The Act, by contrast, categorically excludes non-exempt individuals from the buffer zones, unnecessarily sweeping in innocent individuals and their speech.

The point is not that Massachusetts must enact all or even any of the proposed measures discussed above. The point is instead that the Commonwealth has available to it a variety of approaches that appear capable of serving its interests, without excluding individuals from areas historically open for speech and debate. And, given the vital First Amendment interests at stake, it is not enough for Massachusetts simply to say that other approaches have not worked.
Other Possibilities:

**Fisher v. University of Texas**, U.S. Supreme Court (June 24, 2013) – Affirmative Action

Once again, affirmative action is in the news, and the bar examiners have repeatedly demonstrated a proclivity to test the issue in the past. Abigail Fisher, a young woman from Texas, applied to the University of Texas at Austin but was rejected. Fisher, who is white, then filed a lawsuit, arguing that she had been a victim of racial discrimination because minority students with less impressive credentials than hers had been admitted. The university prevailed in the lower courts, but found a skeptical audience among the conservative Justices at oral argument at the Supreme Court. Although Fisher and her lawyers made clear that they were not asking the Court to overrule its 2003 decision in *Grutter v. Bollinger*, ruling that the University of Michigan Law School could consider race in its admissions process as part of its efforts to achieve a diverse student body, the Court nonetheless seemed ready to put real restrictions on when and how universities can consider race.

But on June 24th, a broad majority of the Court reinforced that affirmative action must be strictly reviewed, although it did not outlaw those programs. The Court explained that a university’s use of race must meet “strict scrutiny” analysis. Thus, a university’s use of affirmative action will be constitutional only if it is “narrowly tailored.” The Court in *Fisher* took pains to make clear that courts can no longer simply rubber-stamp a university’s determination that it needs to use affirmative action to have a diverse student body. Instead, courts themselves will need to confirm that the use of race is “necessary” — that is, that there is no other realistic alternative that does not use race that would also create a diverse student body. Because the lower court had not done so here, the Court sent the case back for it to determine whether the university could make this showing.

**Schuette v. BAMN** (2014) – Affirmative Action

In November 2006 election, a majority of Michigan voters supported a proposition to amend the state constitution to prohibit “all sex- and race-based preferences in public education, public employment, and public contracting.” The day after the proposition passed, a collection of interest groups and individuals formed the Coalition to Defend Affirmative Action, Integration and Immigration Rights and Fight for Equality by Any Means Necessary (Coalition). The Coalition sued the governor and the regents and boards of trustees of three state universities in district court by arguing that the proposition as it related to public education violated the Equal Protection Clause. About a month later, the Michigan Attorney General and Eric Russell, an applicant to the University of Michigan Law School, filed separate motions to intervene as defendants, which were granted. Both sides moved for summary judgment and the plaintiffs moved
to have Russell removed from the case as he did not represent interests separate from those of the Michigan Attorney General. The district court granted summary judgment in favor of the defendants and granted the motion to remove Russell as an intervenor. The U.S. Court of Appeals for the Sixth Circuit affirmed in part and reversed in part by holding the proposed amendment unconstitutional and upholding the removal of Russell as a party to the litigation.

Justice Anthony M. Kennedy delivered the opinion for the three-justice plurality. The plurality held that this case was not about the constitutionality of race-conscious admissions, but rather about whether the voters of a state can choose to prohibit the use of race preferences in the decisions of governmental bodies, specifically with respect to school admissions. The plurality held that the attempt to define and protect interests based on race ran the risk of allowing the government to classify people based on race and therefore perpetuate the same racism such policies were meant to alleviate. While voters may certainly determine that some race-based preferences should be adopted, it is not the role of the courts to disempower the voters from making such a choice. If certain issues were decided to be too sensitive to be addressed by voters, it would be denying the voters their right to debate and act through the lawful democratic process.


G.L. C. 140 § 131(a) makes it unlawful to store a firearm that is not carried by or under the immediate control of the owner or other authorized user unless the firearm is secured in a locked container or equipped with a safety device that renders the firearm inoperable by anyone other than the owner or other authorized user. The defendant challenged the law in light of the United States Supreme Court’s decisions in District of Columbia v. Heller, 554 U.S. 570, 635 (2008), which held that the Second Amendment to the United States Constitution guarantees an individual the right to keep and bear arms for self-defense in the home, and McDonald v. Chicago, —— U.S. ——, 130 S.Ct. 3020, 3036, 3050, 177 L.Ed.2d 894 (2010), which incorporated the guarantees of the Second Amendment into the Fourteenth Amendment to the United States Constitution, making the Second Amendment applicable to the States. The SJC ruled that, where § 131L(a) allows the owner of a firearm to carry or otherwise keep the firearm under the owner’s immediate control within the home, and where the storage requirements are reasonably designed to prevent persons who are not licensed to possess or carry a firearm, including felons, the mentally ill, and children, from gaining illegal access to a firearm, § 131L(a) falls outside the scope of the right to bear arms protected by the Second Amendment.

The SJC cited to Heller extensively and noted that, while holding that the Second Amendment provides an individual right to keep and bear arms in self-defense in the home, the Supreme Court in Heller made clear that the Second Amendment right is “not unlimited.” “From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” The SJC previously
Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.


Most Americans are covered by employer-sponsored health insurance. In 2010, Congress passed the Affordable Care Act (ACA), which relies on the Department of Health and Human Services (HHS) to specify what kinds of preventive care for women should be covered in certain employer-based health plans. HHS exempted religious employers (churches and their integrated auxiliaries, associations of churches, and any religious order), non-profit organizations that object to any required contraception, employers providing grandfathered plans (that have not had specific changes before March 23, 2010), and employers with fewer than 50 employees. The HHS decided that all twenty contraceptives approved by the U.S. Food and Drug Administration (FDA) should be covered. Companies that refuse are fined $100 per individual per day, or they could replace their health coverage with higher wages and a calibrated tax.

Hobby Lobby is an arts and crafts company founded by self-made billionaire David Green and owned by the Evangelical Christian Green family, with about 21,000 employees. It provided the contraceptives Plan-B and Ella until it dropped its coverage in 2012, the year it filed its lawsuit.

Hobby Lobby’s lawsuit technically was not a First Amendment Free Exercise suit; it instead was asserted under the Religious Freedom Restoration Act (RFRA). The history of RFRA is important. The United States Supreme Court ruled in Employment Division v. Smith (1990) that a person may not defy neutral laws of general applicability even as an expression of religious belief. This dispensed with prior Supreme Court law requiring review under strict scrutiny when plaintiffs demonstrate that governmental policies or regulations substantially burden the free exercise of his or her sincerely held religious beliefs. In 1993, Congress responded by passing RFRA, which essentially brought back the old standard by requiring strict scrutiny even when a neutral law of general applicability “substantially burden[s] a person’s exercise of religion”. The RFRA was amended in 2000 by the Religious Land Use and Institutionalized Persons Act (RLUIPA) to redefine exercise of religion as any exercise of religion, "whether or not compelled by, or central to, a system of religious belief", which is to be "construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution". The Supreme Court upheld the
The constitutionality of the RFRA as applied to federal statutes in *Gonzales v. O Centro Espirita* in 2006.

Justice Alito authored the 5-4 decision in favor of Hobby Lobby, thus striking down the HHS mandate, as applied to closely held corporations with religious objections to prevent the plaintiffs from being compelled to provide contraception under their healthcare plans. The Court ruled that the purpose of extending rights to corporations is to protect the rights of shareholders, officers, and employees. It said that "allowing Hobby Lobby to assert RFRA claims protects the religious liberty of the Greens and the Hahns of the shareholders. The court found that for-profit corporations could be considered persons under the RFRA. It noted that the HHS treats nonprofit corporations as persons within the meaning of RFRA. The court stated, "no conceivable definition of the term includes natural persons and nonprofit corporations, but not for-profit corporations." Responding to lower court judges' suggestion that the purpose of for-profit corporations "is simply to make money", the court said, "For-profit corporations, with ownership approval, support a wide variety of charitable causes, and it is not at all uncommon for such corporations to further humanitarian and other altruistic objectives." The court rejected the contention that "the Nation lacks a tradition of exempting for-profit corporations from generally applicable laws," pointing to a federal statute from 1993 that exempted any covered health care entity from engaging in "certain activities related to abortion". [39]

The court then held that the HHS contraception mandate substantially burdens the exercise of religion, rejecting an argument that the $2,000-per-employee penalty for dropping insurance coverage is less than the average cost of health insurance. The court argued that "companies would face a competitive disadvantage in retaining and attracting skilled workers," that increased wages for employees to buy individual coverage would be more costly than group health insurance, that any raise in wages would have to take income taxes into account, and that employers cannot deduct the penalty.

The court found it unnecessary to adjudicate on whether the HHS contraceptive mandate furthers a compelling government interest and held that HHS has not shown that the mandate is "the least restrictive means of furthering that compelling interest". The court argued that the most straightforward alternative would be "for the Government to assume the cost..." and that HHS has not shown that it is not "a viable alternative."


In 1999, the town of Greece, New York, governed by a five-member town board, started the practice of beginning town meetings with a prayer given by an invited member of the local clergy. The town did not adopt any policy regarding who may lead the prayer or its content, but in practice, Christian clergy members delivered the vast majority of the prayers at the town's invitation. In 2007, Susan Galloway and Linda Stephens complained about the town's prayer practices, after which there was some increase in
the denominations represented. In February 2008, Galloway and Stephens sued the
town and argued that the town’s practices violated the Establishment Clause of the First
Amendment by preferring Christianity over other faiths. The district court found in favor
of the town and held that the plaintiffs failed to present credible evidence that there was
intentional seclusion of non-Christian faiths. The U.S. Court of Appeals for the Second
Circuit reversed and held that the practices violated the Establishment Clause by
showing a clear preference for Christian prayers.

In a 5-4 decision the U. S. Supreme Court held that the context and jurisprudence
surrounding the First Amendment suggested that the Establishment Clause was never
meant to prohibit legislative prayer, which created the proper deliberative mood and
acknowledged religion’s role in society. The content of this prayer does not need to be
non-sectarian, because such a requirement would place the courts in the role of arbiters
of religious speech, which would involve the government in religion to an extent that is
impermissible under the Establishment Clause. The Court thus held that the prayers in
question do not violate this tradition and are therefore acceptable under the First
Amendment. Justice Kennedy further argued that legislative prayer is primarily for the
members of the legislative body, and therefore such prayers do not coerce the public
into religious observance. Though the respondents testified that they felt offended by
these prayers, Justice Kennedy distinguished between offense and coercion and noted
that the former does not violate the Establishment Clause.

Domestic Relations

A review of the past 22 bar exams reveals that the following issues are big: prenuptial
agreements, jurisdiction, property division (equitable distribution), alimony, child
support, custody and paternity. To be frank, the issue of prenuptial/postnuptial
agreements is huge.

1. Prenuptial and Postnuptial Agreements: Remember the factors:

   1. No Fraud or Coercion: This is a fact-driven element, which is more easily
      satisfied where there are extensive negotiations over the agreement and both
      parties are represented by attorneys.

   2. Full Disclosure of Assets: Each party must make a complete and detailed
      disclosure of the assets brought into the marriage, and those made the
      subject of the agreement. The SJC stated in Ansin that “[t]he obligation is
      greater with respect to [post]marital agreements because each spouse owes
      a duty of absolute fidelity to the other.”

   3. Fair and Reasonable: The agreement need not provide for equal division of
      assets, but it must be "fair and reasonable" both at the time of execution and
      at the time of divorce. Again, this is a fact-driven question, which involves
      consideration of such matters as a comparison of the outcome under the
      agreement versus the outcome that would have occurred otherwise, whether
both parties were represented by counsel, the impact of enforcement on the children, if any, length of the marriage, motives of the contracting parties, relative bargaining positions of the parties, etc.

4. No Alterations of Marital Obligations: The agreement cannot remove a party’s legal obligation, e.g., spousal and child support.

5. Statute of Frauds: The agreement must be in writing, and signed by the parties.

2. Jurisdiction: The following are the grounds for personal jurisdiction in a Massachusetts divorce case:

1. The couple lived together as a married couple in Massachusetts (even if that was not the case at the time of commencement of the divorce action);

2. The cause of action arose in Massachusetts (even if the couple was not living there);

3. Both parties lived in Massachusetts at the commencement of the divorce;

4. One of the couple lived in Massachusetts for at least a year preceding the divorce action;

5. The parties both consent to divorce in Massachusetts (personal jurisdiction is always waivable).

3. Equitable Distribution: Read over the required factors a couple of more times: length of marriage, conduct, age, health, station in life, occupation, amount and sources of income, vocational skills, employability, estate of each party, liabilities and needs, opportunity for the future acquisition of capital and assets and income.

4. Alimony: You need to be aware of the new alimony law in Massachusetts, which becomes operative tomorrow. The purpose of alimony remains the same: to satisfy the needs of the parties. But there are now four different types of alimony:

1. "General term" alimony: periodic payments of support are made to a recipient spouse who remains economically dependent after the divorce.

   In marriages of 5 years or less, general term alimony shall continue for not longer than fifty percent of the number of months of the marriage.

   In marriages of 5 to 10 years, general term alimony shall continue for not longer than 60 per cent of the number of months of the marriage.
In marriages of 10 to 15 years, general term alimony shall continue for not longer than 70 per cent of the number of months of the marriage.

In marriages of 15 to 20 years, general term alimony shall continue for not longer than 80 per cent of the number of months of the marriage.

In marriages of more than 20 years, the court may order alimony for an indefinite length of time.

General term alimony terminates upon the remarriage of the recipient or the death of either spouse. It also terminates when the paying spouse attains full retirement age, even if the paying spouse chooses not to retire at full retirement age.

General term alimony shall be suspended, reduced or terminated upon the cohabitation of the recipient spouse when the recipient spouse has maintained a “common household” with another person for a continuous period of at least 3 months.

2. “Rehabilitative” alimony: periodic payments of support to a recipient spouse who is expected to become economically self-sufficient by a predicted time, e.g., the completion of job training or an educational course of study.

A rehabilitative alimony order usually cannot exceed 5 years. Rehabilitative alimony will end upon the remarriage of the recipient, the occurrence of a specific event in the future (e.g., graduation from a training program) or the death of either spouse.

3. “Reimbursement” alimony: the periodic or one-time payment of support to a recipient spouse after a marriage of not more than 5 years to compensate the recipient spouse for economic or non-economic contribution to the financial resources of the paying spouse, such as enabling the paying spouse to complete an education or job training.

Reimbursement alimony shall terminate upon the death of the recipient or a date certain. Once ordered, the parties are not able to seek or obtain a court modification of the reimbursement alimony order.

4. “Transitional” alimony: the periodic or one-time payment of support to a recipient spouse after a marriage of not more than 5 years to transition the recipient spouse to an adjusted lifestyle or location as a result of the divorce.

Transitional alimony terminates upon the death of the recipient or a date certain that is not longer than 3 years from the date of the parties’ divorce. As with reimbursement alimony the parties are not able to seek or obtain a court modification of the transitional alimony order.
In determining the appropriate form of alimony and in setting the amount and duration of support, a court shall consider 9 factors: the length of the marriage; age of the parties; health of the parties; income, employment and employability of both parties, including employability through reasonable diligence and additional training, if necessary; economic and non-economic contribution of both parties to the marriage; marital lifestyle; ability of each party to maintain the marital lifestyle; lost economic opportunity as a result of the marriage; and such other factors as the court considers relevant and material. Although it is hard to memorize all 9, it makes sense to review them enough times to become familiar with them.

Subject to the exceptions listed above, the Probate Court can modify alimony awards upon a "material change in circumstances." However, if the paying spouse gets remarried, in no event shall the assets and income of the paying spouse's new spouse be considered in a redetermination of alimony in a modification action.

Alimony is not dischargeable in bankruptcy.

5. Custody / Removal of Children from the Commonwealth: The prevailing maxim is: the best interests of the child. Know the difference between legal custody (the right to make major decisions affecting the children's lives) and physical custody (which parent the child is actually living with). Probate Courts have jurisdiction over the question whether one of the parents may remove the minor children from the Commonwealth. This can be done without court intervention if both parents agree. But, if the Probate Court becomes involved, it must consider whether the move will provide a "real advantage" to the family unit, and be in the best interests of the children involved.

6. Child Support: Predetermined "child support guidelines" govern most issues of determination of child support. You must be aware of the new guidelines which state, inter alia:

1. Income from means tested benefits such as Social Security (SSI), Transitional Aid to Families with Dependent Children (TAFDC), and Supplemental Nutritional Assistance Program (SNAP) are excluded for both parties from the calculation of their support obligations.

2. Availability of employment at the "attributed income level" must be considered in attribution of income cases.¹

3. The text makes clear that all, some, or none of income from secondary jobs or overtime may be considered by the court, regardless of whether this is new income or was historically earned prior to dissolution of the relationship.

¹ The Guidelines allow for "attribution of income" for any party (custodial or non-custodial) where there is a finding that the party is capable of working and is unemployed or underemployed.
4. Reference is made to the 2011 Alimony Reform Act; the text does not, however, provide a specific formula or approach for calculating alimony and child support in cases where both may be appropriate.

5. Clarification is given as to how child support should be allocated between the parents where their combined income exceeds $250,000.

6. A new formula is provided for calculating support where parenting time and expenditures are less than equal (50/50) but more than the assumed standard split of two thirds/one third.

7. Guidance and clarification is given in the area of child support over the age of eighteen where appropriate. While the Guidelines apply, the court may consider a child's living arrangements and post-secondary education. Contribution to post-secondary education may be ordered after consideration of several factors set forth in the Guidelines and such contribution must be considered in setting the weekly support order, if any.

8. The standard for modification is clarified to reflect the recent Supreme Judicial Court decision in Morales v. Morales, 464 Mass. 507 (2013)(see below).

9. Circumstances justifying a deviation are expanded to include extraordinary health insurance expenses, child care costs that are disproportionate to income or when a parent is providing less than one-third parenting time.

Prior law remains intact that a parent may not be relieved of child support payments under a prenuptial or marital agreement. Additionally, the death of a parent does not automatically terminate his or her obligation to provide child support; however, it obviously provides a material change in circumstances.

7. Paternity: A child born to a married woman is presumed to be the child of her spouse (whether that spouse is of a different gender or the same gender). A putative father or mother may challenge the presumption, but is burdened in proving his paternity by the "clear and convincing evidence" standard. The Probate Court is authorized to order blood or genetic testing regarding paternity. The results of such testing are not determinative; they will be weighed with other evidence.

8. Possible Fact Patterns on Domestic Relations Law:


The parties were married in July, 1985. At the end of 2003, the couple began experiencing marital difficulties and sought the assistance of a marriage counselor. In early 2004, the husband informed his wife that he "needed" her to sign an agreement if their marriage was to continue. The wife said she would not sign any such agreement,
and that discussion of the issue made her "physically ill." The parties separated for about six weeks. While the parties were separated, the husband promised his wife that he would recommit to the marriage if she would sign a marital agreement. She agreed to do so. The parties resumed living together, and went on a "second honeymoon." In April, 2004, the husband and wife began negotiating the terms of an agreement. Each retained counsel. Several draft agreements were exchanged. Both parties fully disclosed their marital assets. The parties signed the agreement in July, 2004.

The agreement set forth the parties' intent that, in the event of a divorce, the terms of the agreement are to be "valid and enforceable" against them, and "limit the rights" that "otherwise arise by reason of their marriage." The agreement recited that the parties were aware of the rights to which they may be entitled under Massachusetts law, that each had retained independent legal counsel, and that each executed the agreement "freely and voluntarily." The agreement stated that the parties were "aware of the other's income," warranted that each had been provided with "all information requested by the other," and affirmed that each "waives his or her rights to further inquiry, discovery and investigation." The agreement further recited that each was "fully satisfied" that the agreement "will promote marital harmony" and "will ensure the treatment of Husband's property to which the parties agreed before their marriage and since their separation."

The agreement stated that the wife "disclaims any and all interest she now has or ever may have" in the husband's interest in the Florida real estate and other marital assets. The husband agreed to pay the wife $5 million, and thirty per cent of the appreciation of all marital property held by the couple from the time of the agreement to the time of the divorce. The agreement provided that the wife could remain in the marital home for one year after any divorce, with the husband paying all reasonable expenses of that household. The husband agreed to pay for the wife's medical insurance until her death or remarriage, and he agreed to maintain a life insurance policy to the exclusive benefit of the wife in the amount of $2.5 million while the parties remained married.

In June 2005, the wife asked the husband to move out of the marital home, which he did. In November 2006, the husband filed for divorce. The wife challenged the enforceability of the agreement signed in July 2004.

Holding: Both prenuptial and postnuptial agreements will be judicially enforced in Massachusetts as long as:

No Fraud or Coercion: This is a fact-driven element, which is more easily satisfied where there are extensive negotiations over the agreement and both parties are represented by attorneys.

Full Disclosure of Assets: Each party must make a complete and detailed disclosure of the assets brought into the marriage, and those made the subject of the agreement. The SJC stated in Ansin that "[t]he obligation is greater with respect to [post]marital agreements because each spouse owes a duty of absolute fidelity to the other."
Fair and Reasonable: The agreement need not provide for equal division of assets, but it must be "fair and reasonable" both at the time of execution and at the time of divorce. Again, this is a fact-driven question, which involves consideration of such matters as a comparison of the outcome under the agreement versus the outcome that would have occurred otherwise, whether both parties were represented by counsel, the impact of enforcement on the children, if any, length of the marriage, motives of the contracting parties, relative bargaining positions of the parties, etc.

No Alterations of Marital Obligations: The agreement cannot remove a party's legal obligation of spousal and child support and the like.

Statute of Frauds: The agreement must be in writing, and signed by the parties.

**Alimony**

Review in detail the new alimony law as described above. We are still waiting for a big alimony question after passage of the new law.


A 2008 divorce judgment required the father to make weekly child support payments to the mother for support of their minor child. In 2009, approximately one year after the divorce judgment, and following the father's job promotion, the mother filed a complaint requesting the modification of the child support order to reflect the father's increase in income. Following a trial before a judge in the Probate and Family Court, the judge found that there was no "material and substantial change of circumstances and no modification [was] warranted," and dismissed the complaint. The SJC reversed and remanded for further proceedings because, after 1998, G.L. C. 208 § 28 required that a child support order shall be modified "if there is an inconsistency between the amount of the existing order and the amount that would result from application of the child support guidelines" (the so-called "inconsistency standard") and not merely under the "material and substantial change of circumstances" standard.


This case involved the interface of bargained-for agreements incorporated into court judgments and the restrictions of G.L. c. 208, § 28 (which conditions post-minority support and education upon a child's being domiciled in the home of a parent and principally dependent upon that parent for maintenance). A Probate and Family Court judge held the father in contempt on a complaint of contempt filed by the mother for failure to pay child support and education expenses as required by a court-approved separation agreement (as modified) that was mutually agreed to by the parties upon their divorce, and subsequently incorporated and merged into a judgment of divorce nisi. After a one-day trial, the judge found the father in civil contempt and ordered him to pay $9,200 to the mother in child support arrears and $6,448 per year toward the
parties' son's education expenses.

But G.L. c. 208, § 28 states that a judge may make appropriate post-minority orders for "maintenance, support and education of any child," only if the child is "[1] domiciled in the home of a parent, and is [2] principally dependent upon said parent for maintenance." The father contends that the mother presented insufficient evidence at trial to demonstrate that the § 28 conditions were satisfied when the stipulations underlying the mother's complaint were court approved. Thus, according to the father, the judge could not hold him in civil contempt.

Without deciding whether the son was in fact domiciled with the mother and principally dependent on her when the modifications were approved, the Appeals Court held the father in civil contempt because he "chose to unilaterally stop paying the child support" obligations he "willingly, freely, and voluntarily" entered into without objection. The trial judge properly held the father in contempt irrespective of a determination whether the child support obligations complied with the domicile and dependency conditions set forth in G.L. c. 208, § 28. If the father objected to the obligations, then his proper recourse would have been to initiate appropriate modification proceedings, as opposed to unilaterally stopping payments, as he ultimately chose to do. Consequently, the father cannot contest the validity of the support orders he voluntarily entered into, notwithstanding his argument on appeal that said orders were issued without compliance with the domicile and dependency conditions set forth in § 28.

Silva v. Carmel, 468 Mass. 18 (2014) — Does Chapter 209A apply to intellectually-disabled adults in a group home?

In Silva v. Carmel, the SJC considered whether Chapter 209A, the Massachusetts abuse-prevention statute, applies to the perpetrator and victim who lived in a group home for intellectually-disabled adults licensed by the Massachusetts Department of Developmental Services (DDS). The high court stated that it did not because individuals who share a common diagnosis or status, rather than marriage, blood, or other relationships enumerated in G.L. c. 209A, § 1, and who live together in a state-licensed residential facility, do not qualify as "household members" within the meaning of G.L. c. 209A, § 1. The SJC did not believe that such individuals were in the same household, as defined under the statute, because (1) they lived in the group home only because the DDS had placed them there for the provision of services, and (2) each seemed to have his own biological family that otherwise provided the type of support typical of families. The SJC also seemed a bit concerned about the effect that abuse orders placed on residents of such group homes could have on the orderly administration of group homes and the DDS service system.
Things to Remember for MA Essays
Evidence, Criminal, Civil Procedure/Federal Jurisdiction and 93A

(For all subject areas, simply apply existing law to emails, text messages, softcopy communications or E-agreements when present on the essay exam.)

Evidence

1. Massachusetts evidence essays often deal with cases in the Superior Court or Probate Court -- use Massachusetts evidence law not the FRE that are used when the case is in the Federal District Court. Unlike the FRE, Massachusetts rules of evidence are not codified. Massachusetts rules of evidence come from various statutes, case law and the common law. Massachusetts has not adopted the Proposed Rules of Massachusetts Evidence which are similar to the FRE.

2. MA has a wide open cross examination rule provided the information sought is relevant not B, C, D under the FRE.

3. Cannot use habit to show actions in conformity with that habit unless it is a routine business practice of the company and specific instances of misconduct cannot be used to impeach.

4. Expect a privilege issue, Attorney-Client, Mediator, Priest-Penitent, Social Worker, Spousal, Fifth Amendment and Psychotherapist (heavily tested and defined as a Psychiatrist or Psychologist.) Massachusetts recognizes the crime/fraud exception to the Attorney-Client Privilege. Liberally discuss ethical violations and rule 11 lapses that occur.

5. Husband and Wife are disqualified from testifying about confidential marital communications that are oral (not emails or letters). Spousal disqualification applies even if both want to offer the testimony unless communications involve threats, abuse, nonsupport or neglect or where one spouse is dead or the communications are related to a contract between them. In criminal cases, on matters other than communications, the privilege belongs to the testifying spouse who can refuse to testify if marriage is in existence at trial. In a criminal case, unemancipated minors living with a parent cannot testify against that parent unless the victim is a member of the same family living in that home.

6. Expert (BEET) scientific testimony must satisfy Daubert/Lanigan 4 Ps and a T requirements and aid the jury’s understanding of the event. Source of expert’s knowledge can be virtually anything. Lay witness only speech, speed, signature and sobriety but not sanity.

7. The Uniform Photographic Copies of Business and Public Records Act allows photocopies of the records of certain public entities and businesses to be admitted into evidence overcoming both best evidence (enlargements as demonstrative aids AOK) and any hearsay objections. Hospital records and reports are generously admitted statutorily with advanced notice.

8. Hearsay-Any out-of-court statement offered to prove the truth of the matter asserted therein -a party’s own statement (an admission), agent’s statements and coconspirator’s
statements are all considered hearsay but admissible as exceptions to the hearsay rule. Likewise, prior inconsistent statements of a testifying witness that were made under oath are admissible if the statement was voluntary & corroborated.

9. No Present Sense Impression, no Lack of Business Record, the Learned Treatise Exception can only be used during cross or re-direct and read into evidence, Ancient Document is 30 years old not 20, Dying Declarations apply only to homicide cases and look to apply our Dead Man’s Rule on the admissibility of a decedent’s statement if the decedent’s statements are shown to have been made in good faith with the decedent’s first-hand knowledge.

10. Crawford, the Sixth Amendment and Melendez-Diaz are alive and well in Massachusetts so apply in criminal cases with reports, records, other documents as well as hearsay statements. Article 12 of the Massachusetts Declaration of Rights guarantees every Defendant the right to confront his/her accusers “face to face”.

11. Okay to say “sorry” but admissions made during settlement discussions are admissible!

Criminal Law/Procedure

12. MA criminal law is a mix of the Common Law and various statutes. MA has adopted the MPC test for the insanity defense. If the Defendant suffers from a mental disease or defect such that the Defendant could not understand the criminality of his act nor conform his actions to the law then he is legally insane and not responsible for the crime. Insanity is an Affirmative Defense that must be raised by the Defendant. Once the Defendant offers evidence of insanity, the prosecution bears the burden of showing proof beyond a reasonable doubt that the Defendant was sane.

13. You will likely have conspiracy issues to address. MA does not require an overt act for conspiracy. All that is necessary to be guilty of the conspiracy is an agreement to commit the crime although a coconspirator is not necessarily liable for all acts of the other conspirators unless he/she is actually present.

14. Close family members cannot be accessories after the fact.

15. The distinction between Murder and Manslaughter is Malice, thus an absence of Malice = Manslaughter. Murder is the unlawful killing of a human being with malice aforethought. Malice aforethought—think FIGRISBI. First Degree Murder requires premeditation, deliberation, extreme atrocity, cruelty, or a killing committed during the commission of a felony where death occurs by the acts of a felon unless shield rule applies.

16. An assault requires neither fear nor apprehension of harm, all that is needed are actions reasonably calculated to place the victim in imminent fear of bodily injury. Look for electronic threats, stalking or harassment.

17. Massachusetts provides significant protection in the event there is police misconduct, unauthorized use of electronic listening devices or a search conducted incident to an illegal
arrest. Use the 4th, 5th, 6th, and 8th Amendments as well as Articles 12 and 14 of the Massachusetts Declaration of Rights. Massachusetts provides a rule of “automatic standing” to items seized from an individual’s home or automobile where possession of the seized contraband is an element of crime.

18. MA still uses the Aguilar/Spinelli Test while US uses Gates. Gates uses the Totality of the Circumstances Test to determine the existence of probable cause. The Aguilar/Spinelli test for probable cause requires the police to show that the informant is reliable and the police must provide a sufficient basis to establish the source of informant’s knowledge.

Civil Procedure/Federal Jurisdiction

20. Subject Matter Jurisdiction, Personal Jurisdiction and Venue are necessary to file suit. Federal courts primarily have subject matter jurisdiction over three kinds of lawsuits:

- cases involving questions of federal law
- cases involving constitutional issues
- cases involving diversity of citizenship: where the plaintiff and defendant are from different states and the damages are reasonably likely to exceed $75,000.

Massachusetts district courts have concurrent jurisdiction with superior courts over civil actions involving money damages. Superior courts have the broadest powers of equitable relief. Claims where there is no reasonable likelihood that recovery by the plaintiff will exceed $25,000, must be filed and heard in the District Court. If the Defendant timely raises an objection to District Court jurisdiction in that the damages are likely to exceed $25,000 and the District Court finds that is true, then the complaint must be dismissed.

21. Removal jurisdiction provides the defendant the right to remove an action from a state court to the Federal Court in that forum. Defendant may remove an action from state court to Federal Court if the action could have been brought initially in Federal Court unless the basis for removal is diversity jurisdiction, then the Defendant cannot be from the state where suit is entered.

22. General jurisdiction arises from defendant’s contacts, ties and relations to the forum that are so significant that the defendant is subject to suit by any plaintiff for any reason. With specific jurisdiction, the cause of action arises from the activities of the defendant in the forum and therefore it is permissible to hold the defendant responsible for actions that arise from those activities and contacts. The contacts that are needed are less when jurisdiction is specific jurisdiction.

23. Federal and Massachusetts Rule 4 provide the mechanics for effecting service of process that is consistent with the requirements of the Due Process Clause. State long arm statutes provide a manner of giving notice to Defendants who are absent from the jurisdiction. Massachusetts requires the controversy to have some greater connection to its forum than simply minimum contacts in order to use its Long Arm Statute. A Defendant acquiesces to the exercise of personal jurisdiction by failing to raise the issue in its first defensive move. Defendants may also consent to jurisdiction either by appearance or by contract (electronically or otherwise).
24. Equitable remedies are non-monetary remedies that are granted by a judge without a jury. Equitable remedies include injunctive relief, specific performance, and declaratory judgment. Specific performance is an equitable remedy that allows the court to order that a contract for unique property be performed in accordance with its terms and is used in real estate issues/unique goods cases on the MA bar exam.

The court looks at the following five factors in analyzing the grant of an injunction:

- whether there is an adequate remedy at law;
- whether the plaintiff is likely to succeed on the merits of the case;
- whether there is an immediate and irreparable injury being suffered;
- whether the balance of the harms tip in favor of granting the injunction; and
- whether public policy considerations favor granting the injunction.

Under extraordinary circumstances, ex parte temporary restraining orders are issued without notice to the other side. Preliminary injunctions may be issued after an initial hearing of some sort where both parties have the opportunity to “be heard”. Permanent injunctions are issued only after a full hearing on the merits or judgment on the case and remain in force unless reversed on appeal. Attachments can be granted by the Superior or District Court under Rule 4.1 in cases where there is a reasonable likelihood of success of a money judgment over and above any insurance shown to be available to satisfy that judgment.

25. Rule 11 requires the attorney who signs a pleading to verify it: (1) is based on existing law or a good faith belief in reversal of existing law; (2) is not interposed for any improper purpose such as delay or harassment, and (3) is a factually and legally meritorious pleading. The Court will impose sanctions on the attorney for not complying with Rule 11 requirements or can similarly use G.L. C. 231 for frivolous actions.

26. Motion to Dismiss (first of the Three Testing Motions, Motion for Summary Judgment and Motion for a Judgment as a Matter of Law (Directed Verdict and JNOV in Massachusetts.) A Motion to Dismiss asks the court to dismiss the Complaint or various legal counts contained in the Complaint. Look to apply it. Rule 12(g) requires the consolidation of Rule 12 defenses in a single motion to dismiss. In deciding these motions the evidence should be viewed in the light most favorable to the nonmoving party without weighing the credibility of the witnesses.

27. Defendants file counterclaims pursuant to Rule 13 to assert claims against the Plaintiff for relief. There are two kinds of counterclaims: compulsory and permissive. Cross-claims are claims for relief filed by defendants against other defendants or by plaintiffs against plaintiffs.

28. Deposition under Rule 30 is the questioning of a party or witness under oath. Non-parties may be served with a subpoena under Rule 45 for their attendance at the deposition. Depositions
are admissible under the former testimony exception or without a showing of unavailability where designated as a trial deposition of a treating or examining expert. WATCH FOR THIS!!!

93A

29. A court's analysis of what is unfair or deceptive will not be limited to merely contract, negligence or breach of warranty claims. Harassment, defamation, invasion of privacy and claims by clients against their attorneys all can fall within the list of illegal actions so long as the conduct happens in the consumer realm. Fraud, deception and unfair methods of competition also violate Chapter 93A. Certain actions are deemed to be violations of Chapter 93A by their very nature. Under the law, these illegal activities include certain debt collection practices, Truth in Lending violations, landlord-tenant actions and sales tactics.

30. **93A protects both consumers and businesses.** The Attorney General is authorized to pursue 93A violations on behalf of the Commonwealth’s residents. Generally, 93A actions are filed in Superior Court where equitable relief is available. There is **no right to a jury trial** in a 93A action. **93A actions have a 4-year statute of limitations. 93A damages can include double or treble damages, attorney's fees and costs.** Use liberally on contract, sales, torts warranty and landlord claims.

31. A consumer must send a detailed **30-day demand.** Injured businesses are not required to make such a demand before filing suit under Section 11.

32. 93A business plaintiffs must show that the defendant’s acts in Massachusetts were "unfair methods of competition" or were "unfair" or "deceptive". A business Plaintiff must show a higher level of fraud and deception of the Defendant’s actions. The actions must be sufficient as to raise the eyebrow of those inured to the rough and tumble of the business world in order to sustain a violation of 93A as hard business tactics are expected in the business world.

33. Have faith. **Larry Bird** was a great basketball player because he played with the confidence his hard work paid for and would not be denied what he felt he earned. Sound familiar?

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25 THINGS TO REMEMBER FOR THE BAR EXAM

Contracts

1. Consideration: Massachusetts follows the minority rule regarding consideration. In Massachusetts, consideration is either a detriment to a party, or a benefit to the other party. Thus, if I am already contractually obligated to paint Mike’s house but am thinking about breaching the contract and Mike’s next door neighbor Ursula offers me $100 if I agree not to breach that contract, then I have a valid contract with Ursula. The majority rule would be no contract, because of preexisting duty rule. The rationale: a party to a contract always has a “right” to breach, and is giving up that right.

2. Land: An oral contract for the sale of land requires all 3 PIP (Possession, Improvements, Payments which are obviously not rent) elements in order to be enforceable.

3. Anticipatory Repudiation: Massachusetts does not recognize anticipatory repudiation, but beware of any acceleration clause in contract in the fact pattern. And note that Massachusetts does recognize the doctrine of anticipatory repudiation for UCC contracts involving goods. Some exceptions apply -- Specific performance of real estate, quantum meruit, and rescission.

Torts

4. Wrongful Adoption: Massachusetts recognizes wrongful adoption claim (either intentional or negligent misrepresentation), if the agency fails to disclose material information which it knew or should have known about the adopted child. It is an affirmative duty.

5. Wrongful birth/pregnancy cases: In these cases, any damages are offset by the emotional benefits of having child. The child does not have action for “wrongful life.”

6. Negligent infliction of emotional distress: The claim is broader than majority rule. Recovery is available for a bystander outside of zone of danger if (1) a close relative, and (2) sees accident or comes on scene right afterwards, and injured party is there.

7. Social host liability: a social host is liable for actions of a drunk driver if the host knew or should have known he would drive, and host gave alcohol or permitted him to drink.

8. Massachusetts Tort Claims Act: The act does not apply to MPA, MBTA, or MTA. It applies to and housing authorities and state schools. Negligent acts or omissions within scope of employment covered. $100k per plaintiff. Need to file claim with employer’s executive officer w/in 2 years. No liability for acts or non-acts which are a “discretionary function.” (But it really has to rise to the level of a “policy” decision.)
What is immune: Performance (or failure to perform) a discretionary function, intentional torts, collection of taxes or holding of goods, granting (or failure to grant) permits and licenses, claims against fire departments for negligently controlling a fire, and against police for failing to solve a crime or failing to detain suspects.

**Agency**

9. **Employer/employee issue:** The employer is vicariously liable (respondeat superior) for the negligence of the employee, so it is crucial to make the right determination. It is a fact-based test, and the determining factor is the “right to control” the agent’s performance of the delegated duties. If the right to control exists, actual control is not needed.

10. **Factors to consider:** Some factors to consider in making the determination are the method of payment (weekly v. per job completed), length of employment (the longer it goes on, the more it looks like an employer/employee relationship), the custom in the industry, whether the agent is engaged in a distinct business and has other clients, etc.

11. **SOHO/FOHO Distinction:** The employer is liable for the negligent acts of the employee occurring with the “scope of his/her occupation.” The employer is not liable for the negligent acts of the employee occurring when on a “frolic on his/her own.”

   **Sound Bite:** Substantial/slight deviations from the job description remain in the SOHO category. Sometimes, the employer is liable for the intentional torts of the employee, such as a bouncer’s use of force. Think: foreseeable opportunity and incentive.

**Partnerships**

12. **New Partner’s Liability:** A newly admitted partner is not responsible for the pre-existing debts of the partnership. An outgoing partner remains liable for obligations which arose when he/she was a partner.

13. **Limited Liability Partnerships:** Like limited partnerships, limited liability partnerships require a filing with the Secretary of State. A partner in a limited liability partnership is not personally liable for the debts of the partnership, unless that limited partner is personally negligent or personally guaranteed the debt.

**Corporations**

14. **Closely Held Corporation:** The definition of a close (or closely held) corporation is a corporation which has (1) few shareholders, (2) the majority of whom manage the business, and (3) there is no ready market for the shares.

15. **Closely held Corporation Fiduciary Duties:** In a closely held corporation, shareholders owe one other a high level of fiduciary duty (think partners in a partnership). Minority shareholders cannot be frozen out. The court will look to see if
there is a legitimate business purpose if a freeze-out is claimed, and will also look to see if there are less harmful alternatives.

16. **Piercing the corporate veil:** Generally, the officers and shareholders of a corporation are not personally liable for the debts of the corporation. The exception occurs when courts decide to “pierce the corporate veil.” This will happen when (1) corporate formalities are ignored (such as using the corporate bank accounts to pay personal bills), (2) the corporation is inadequately capitalized (so there is no money to pay creditors), or (3) the court finds it necessary to prevent fraud.

17. **Shareholder Derivative Suits:** Under the MBCA, a shareholder must always make a demand on the Board of directors. A derivative lawsuit cannot be commenced for 90 days afterwards, unless corporation (1) rejects demand earlier, or (2) irreparable harm will result from waiting.

18. **Shareholder Derivative Suits – Standing:** A shareholder must have owned (or inherited) shares at time of wrong, and must fairly represent the corporation.

19. **Appraisal rights:** Shareholders who disagree with fundamental changes to a corporation are given appraisal rights. Before fundamental change shareholder vote is taken, a dissenting shareholder must give written notice, and cannot vote for the change. The corporation must then offer a fair amount for the shares. If shareholder is dissatisfied with offer, she must give the corporation a counteroffer. If the corporation does not want to pay the counteroffer, the corporation must file action in court within 60 days, asking the court to figure out what is a proper amount. Otherwise, corporation must pay the amount demanded in the dissenting shareholder’s counteroffer.

20. **Successor Corporation Liability:** If the new entity is a “mere continuation” of the former business, successor liability will follow.

**Wills**

21. **Revocation** – cancel, obliterate, tear, torch, operation of law, new will (remember “cotton”).

22. **The first warm body rule.** Surviving spouse, then kids, then parents, then siblings. And remember: per capita at each generation.

23. **Anti-lapse statute:** If blood can take but have predeceased, then their issue step up and take decedent’s share. The anti-lapse statute applies to all transfers at death, but only if the deceased beneficiary is related to decedent by parents or grandparents.
**Trusts**

24. **Revocable Trusts**: Revocable trusts (the presumption is now revocability, unless stated otherwise) do not need to be funded. They can receive money from the decedent's will (a pour-over will).

25. **Spouse/Creditors**: A surviving spouse can include assets in a revocable trust to compute the statutory share. Creditors can get paid out of the revocable trust, also.