

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 within 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 another 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 (but no longer marriage), 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. See chart.

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.