

MASSACHUSETTS SCHOOL OF LAW

Trial Court Discovery
Spring, 2007 - Judge Robert Cornetta

FINAL EXAMINATION

Instructions:

This final examination consists of three (3) questions of equal weight. Question one (1) has multiple parts to it. Please number your responses accordingly in your blue books, viz: Question 1, select answers a,b,c or d; then go on to essay Questions 2 & 3.

This is not an open book examination. Therefore, you are to have no outside sources with you during the examination. You must write **legibly** in order to receive full credit for each question. It is highly recommended that you keep in mind proper writing style, syntax, spelling, punctuation and the like in completing your answers. If you intend to cite a case or statute, be sure it is correct. Incorrect cites will result in deduction of credit.

Questions two (2) and three(3) are essay questions requiring you to write out your responses *after* carefully thinking about each problem. Your answers to these questions should be concise and should not repeat the fact pattern. Each essay question calls upon you to identify the issues, discuss them in the context of the given fact pattern and arrive at a conclusion supported by applicable law.

Please remember that it is *quality* and not quantity that counts.

Good luck !!!

,Question 1:

Multiple Choice:

Please select the best answer to each question and mark the same accordingly in your blue book:

1. Under criminal rules of automatic discovery, each is true *except*:

- a. Defense counsel is entitled to a copy of the criminal records of the Commonwealth's witnesses
- b. Defense counsel is entitled to all statements made by a *co-defendant*
- c. The identity of all confidential informants should be denied by the Court where a search and seizure has been conducted by the police pursuant to an issued warrant
- d. The Commonwealth can move for a *stay* of automatic discovery

2. Regarding a bill of particulars, each of the following is true, *except*:

- a. The Commonwealth's response can be amended prior to trial
- b. Where the Commonwealth's response is "see police report", defense counsel has no further recourse
- c. It is not the Commonwealth's duty to provide a bill of particulars as part of automatic discovery
- d. If the Commonwealth provides a response to a request for a bill of particulars, the defense is entitled to rely upon the same at trial

3. The most recent Supreme Judicial Court protocol regarding privilege is found in:

- a. *Commonwealth v. Lampron*
- b. *Commonwealth v. Stockhammer*
- c. *Commonwealth v. Bishop*
- d. *Commonwealth v. Dwyer*

4. Regarding the issue of HIPPA, each is true *except*:

- a. Hospitals are required to deny automatic access to patients records except in instances where the Commonwealth is seeking production of the same

- b. HIPPA can be satisfied by merely obtaining the written authorization of the patient to have access to hospital records
- c. The fact that a person has been treated at a particular medical facility is not privileged information
- d. While HIPPA is applicable to criminal cases, it is also applicable to civil cases

5. In seeking discovery of search warrant information, the following is true, except:

- a. Search warrants are docketed separate and apart from other criminal cases
- b. A search warrant return is discoverable just as the warrant itself is
- c. Affidavit sufficiency applies to all search warrants sought
- d. Impartial magistrates, not judges, can only issue search warrants, which is what makes them subject to discovery

6. Regarding requests for admissions, which of the following is true?

- a. If a request is not responded to within thirty days it is deemed admitted
- b. Requests for admission are not subject to objection
- c. Matters denied upon request for admission cannot be used at trial
- d. An answering party may give lack of knowledge or information as a reason for failure to admit or deny without more

7. Regarding depositions, the following is true, except:

- a. If a witness being deposed is disruptive or fails within reason to cooperate, the party conducting the deposition may apply to ANY state court for an order of relief
- b. In conducting an out of state deposition, the deposing party must obtain upon motion a letter declaratory from the Court
- c. Under the rules of discovery, depositions can be conducted via electronic recording or by court stenographer

d. Video depositions can be introduced at trial without the witness being present

8. Regarding the use of interrogatories, the following is true *except*:

- a. Only thirty interrogatories can be served upon a party as a matter of right
- b. The rule provides a means of obtaining judgment for failure to respond to interrogatories without the interrogating party having to appear before a judge
- c. Interrogatories to an adverse party can only be served in writing
- d. Requests for interrogatories cannot be served together with a copy of the summons and complaint

9. Each of the following is true, *except*:

- a. Physical and mental examinations can be had by a party even over the objection of an adverse party
- b. Depositions upon written questions can be had
- c. While discovery can provide for production of documents and tangible items, discovery by entry onto lands or property of others can be effectively blocked by an opposing party based upon principles of search and seizure law
- d. In lieu of responding in writing to interrogatories, the targeted party can produce relevant business records in satisfaction of the request

10. Each of the following is true, *except*:

- a. Parties may by stipulation deviate from discovery procedures found in the Massachusetts Rules of Civil Procedure
- b. An opposing party may require that discovery requests be provided to him/her in a particular sequence in order to facilitate discovery being answered
- c. Depositions are not always necessary in civil cases
- d. Any deposition may be used by ANY party for the purpose of impeaching the testimony of the deponent as a witness at trial

Question 2

Sigmund Fried is a psychiatrist who specializes in treating the elderly. He runs a large psychiatric clinic in town. Sometime ago, Sigmund began treating Susan Senior, an 87 year old widow who has suffered for years from anxiety, depression and fear of leaving home, fear of heights and fear of elevators and airplanes.

Sigmund was informed prior to beginning treatment of his patient by Susan's daughter, Angel O'Mercy (her married name), that Susan had formerly experienced an adverse reaction to Paxil. Susan and Angel informed the doctor that they did not want the clinic treating her with Paxil.

Susan has now been treating with Sigmund for some 9 months. At first, she was making good progress. Suddenly (and after Sigmund had his associate Healing Quickly begin seeing Susan), her progress stopped and she again began experiencing adverse symptoms.

Angel suspects Healing has put Susan on Paxil. This is so because suddenly one of Susan's medications was changed from a white pill to a blue capsule. Susan's former doctor had her on blue capsule Paxil.

Angel has a power of attorney over Susan and holds Susan's healthcare proxy.

Angel called Sigmund's office and asked to speak with the doctor. The nurse practitioner who answered the phone said that because of patient/client confidentiality they could not disclose whether or not Susan was being treated at Dr. Fried's clinic. She was told that the new HIPPA law prevented persons from gaining any access to patient records. In addition, Angel was told that since Dr. Fried's records were all computerized that it would be impossible for anyone to see the records without jeopardizing the privacy of all of Sigmund's patients.

Angel is both frightened for her mother's care as well as angry at Sigmund's clinic's rebuff of her request. Angel told the nurse practitioner that if she could not have access to her mother's records, that she would stop taking her to Sigmund's clinic. The nurse practitioner's response was that if Angel did this, Sigmund's clinic would have to report her to elder protective services.

Angel has now come to you for advice. What, if anything can you advise Angel she might do?

Question 3:

On February 12th, Floyd Fence was arrested by police and charged with receiving stolen property, breaking and entering in the night time with intent to commit a felony, illegal possession of a firearm and possession of class B controlled substance, cocaine.

Floyd has been out of the housebreaking business for about five (5) years. Since being released from custody, Floyd has been a successful security consultant, putting his B&E knowledge to work and making a good living at it. On February 12th, he was at an apartment building on 100 Main Street giving the owner a quote to install a new electronic security system in the building.

Floyd was taken into custody as part of a police stake out of 100 Main Street, the multi unit apartment building. Working on information provided by Peter Pawnbroker, a confidential informant ('CI'), police were told that two weeks before Floyd's arrest, he had broken into the residence of a prominent local citizen, and had looted the home of valuable art pieces, a .45 caliber handgun and ammunition, and a sum of cash. CI also informed police that Floyd was running a fence operation out of 100 Main Street, trading stolen goods for cash, drugs and other stolen property. So far, no one knows exactly what happened during the burglary or when it is supposed to have taken place.

Armed with a search warrant based upon information received from CI, the police broke down the door to an apartment in the building, arrested everyone there including Floyd and the building's owner, searched the unit and seized a .45 automatic handgun, \$50,000.00 in U.S. currency, five (5) "twists" of cocaine and a variety of valuables including rare coins, two pieces of museum quality paintings, a bronze Remington bust and a Roman tapestry obviously worth a considerable amount of money.

No one knows the true identity of CI, but Floyd suspects Peter since in the old days, before his transformation, Floyd used to fence stolen goods exclusively with Peter.

Peter is supposed to be currently under indictment for receiving stolen property at his pawn shop. The word around town is that he has "cut a deal" with the D.A.. He is also supposed to have a long prior "rap" sheet. Some even think that if Peter did not give up someone to the police for the burglary of the prominent citizen's home that he would be doing 'big' time. There is also a suggestion that Peter is psychotic and that he was once treated for mental illness after accusing more than one person of embezzling funds from him. He is supposed to have fantasized about bringing an entire stolen car ring down by his own investigation.

You represent Floyd and he tells you he is a reformed man. He had nothing to do with the criminal activity going on in the apartment. He tells you this entire episode is a mistake and that someone is giving the police bad information.

Please advise what discovery measures and/or motions you might use in defending Floyd in this matter.