

KENTUCKY BAR EXAMINATION

FEBRUARY 24, 2009

ESSAY QUESTIONS 1 - 6

QUESTION #1

Part A.

The State of Maine has adopted the following statute, which provides in part:

Every citizen may freely speak, write, and publish the person's sentiments on all subjects, being responsible for the abuse of the right, but no person shall picket or engage in other protest activities, nor shall any association or corporation cause picketing or other protest activities to occur, within three hundred feet of any residence, cemetery, funeral home, church, synagogue, or other establishment during or within one hour before or one hour after the conducting of an *actual funeral or burial service* at that place....

“No person shall picket or engage in other protest activities, nor shall any association or corporation cause picketing or other protest activities to occur, within three hundred feet of any *funeral procession*.”

A member of a fundamentalist church that picketed military funerals out of belief that war in Iraq was punishment for America's tolerance of homosexuality filed a two-count complaint against the Governor and Attorney General of Maine and the county prosecutor in that state, seeking declaratory and injunctive relief from the Maine statute which imposed time and space limitations on protest activities during or shortly before or after funeral or burial services and during funeral processions.

Assume the statute was duly enacted prior to picketing and the picketing of the funeral processions occurred on public roadways and the picketing of the military funerals occurred on property owned and maintained by the public.

Decide the following two issues, stating your reasons and what you believe to be the applicable legal analysis:

- A. The constitutionality of the funeral procession provision;
- B. The constitutionality of the funeral protest provision.

(See Part B of Question #1 on next page)

Part B.

The McCracken County Board of Education has adopted the following policy: The school's dress code, which prohibits students from wearing any clothing or emblem "that is obscene, sexually suggestive, disrespectful, or which contains slogans, words or in any way depicts alcohol, drugs, tobacco or any illegal, immoral, or racist implication."

The principal has the authority to send the offender home to change and to assign appropriate punishment, which would include suspension from class for three days.

This dress code for middle school students was explained by teachers to students prior to the beginning of the 2008 fall term.

During the fall of 2008, student, Tommy Whitlow arrived at class wearing a T-shirt with music star, Spanky Presley, Jr. on the front and two Confederate flags displayed on the back, along with the phrase "Southern Thunder." The student was called to the principal's office, and in compliance with the dress code, the student was given a choice of turning the shirt inside-out for the rest of the day or returning home to change shirts. The student refused and was suspended for three days.

The student returned after three days, still wearing the same shirt, and was again suspended for three days. He has not returned to class and is being home-schooled. The student contends he was wearing the T-shirt to commemorate the birthday of the singer's father and, further, to express his southern heritage. The principal defends the dress code as a proper exercise of board authority to regulate student conduct and safety and to avoid conduct that might be offensive to other students or result in violence. The school applied the dress code to this T-shirt, which it contends is racially sensitive, but on a prior occasion, did not apply the code to prohibit a student from wearing a black armband to protest the Iraq War.

The student filed an action challenging both the constitutionality and the application of the dress code. You are the district judge and must decide the following issues, and in so doing, state your reasons and legal analysis:

- A. Is wearing the T-shirt constitutionally-protected speech?
- B. Is the school's dress code constitutionally permissible?

QUESTION #2

Lucky Landowner died in 1962, leaving two children born to his marriage (Child One and Child Two), and one (Child Three) born as a result of a relationship to a woman he never married.

At the time of his death, Lucky owned a piece of property located in Mineral County, KY. Following his death, an affidavit of descent was filed by One and Two, stating that they were his only heirs. No administration of his estate was ever undertaken. At the time of Lucky's death, Kentucky had a statute in effect which provided that, "[a] bastard shall inherit only from his mother and his mother's kindred."

Years later, in 2004, following a complete shutdown of Middle Eastern and South American oil imports to the U.S., the mineral estate under this land became very valuable, and One and Two leased these minerals to Company. Three got wind of the lease, and filed suit, claiming a 1/3 interest in any royalties from the extraction of minerals, because she was Lucky's acknowledged blood child and his heir at law.

The circuit court now has cross-motions for summary judgment before it, based upon the above uncontested facts.

PART ONE: You are a first-year clerk for the trial judge, and she wants a short memo on the issues, the applicable law, and suggested resolution of the case. What do you write?

PART TWO: Assume the same facts, except that this time, Lucky lives until 2004, leaving a will executed in 2000, which, following some specific bequests, bequeaths his residuary estate, "absolutely and in fee simple to my surviving children in equal shares . . .," naming One and Two as his children. A separate provision of the will includes the following definition: "for purposes of this Will, "children" means the lawful blood descendants in the first degree of the parent designated . . ." This will is admitted to probate on the petition of One and Two, who take the position that Three is out of luck.

Three files an action in circuit court, attempting to establish her right to a share of the proceeds, and citing the fact that although her mother was never married to Lucky, he acknowledged Three as his child, and paid support to her mother until Three reached 18 years of age. Her claim is bolstered by a certified copy of her birth certificate, which names Lucky as her father, and a paternity decree of a court of competent jurisdiction adjudging Lucky to be her father. The record in the paternity action confirms that Lucky paid support for Three until she reached majority.

Again, we have cross-motions for summary judgment. You are again a clerk to the trial judge. She wants a memo on the issues and the law, and a suggested resolution. What do you write?

QUESTION #3

In 1995, Buyer executed a Contract for Deed (the “Contract”) in which Buyer promised to pay Seller \$50,000.00 for the purchase of a parcel of real property and a house in Louisville, Kentucky (the “Property”). Pursuant to the Contract, Buyer paid the Seller \$6,000.00 as a down payment and agreed to pay the remaining \$44,000.00, plus interest, in equal monthly installments over 20 years. At the time the Contract was executed, the Property was subject to a first mortgage held by Bank A, and a second mortgage held by Bank B. Buyer was aware of the first and second mortgages and the Contract revealed that Buyer’s installment payments would be used by Seller to service the mortgage debt.

It was provided and agreed in the Contract that at such time as Buyer paid in full all of the monthly installments, Seller would convey a Deed to the Property to Buyer free and clear of all liens and encumbrances. It was further provided that at no time would the Property be encumbered for more than \$40,000.00 (the total of the first and second mortgages) and that Seller “would not place or cause to be placed on said property any liens, mortgages or other encumbrances.” Buyer took possession of the Property and lived in the house. Buyer made the required installment payments in the following years and made improvements to the property totaling \$3,500.00, although Buyer had expressed to others that Buyer was having second thoughts about purchasing the Property.

In 2001, a judgment creditor of Seller’s recorded a judgment lien against the Property in the amount of \$10,000. In 2002, Seller assigned all Seller’s interest in the Contract to Bank B. In 2003, the IRS recorded a tax lien for \$35,000.00 against all real property of Seller, including the subject Property.

Upon discovery of these liens, and after unsuccessfully demanding that Seller obtain releases of these liens, Buyer gave notice of termination, stopped making payments and vacated

the property.

Seller defaulted on the first mortgage. Bank A foreclosed and the property was sold at a foreclosure sale. Seller and Bank B sued Buyer. Buyer counterclaimed against Seller and denied any liability to Bank B.

Questions presented:

1. Which party, if any, breached the contract? Discuss the nature of the breach.
2. What remedy, if any, is available to: (a) the Seller; (b) the Buyer; (c) Bank B?
3. If any party is entitled to recover damages, what is the appropriate measure of those damages and is any party entitled to an offset against any such damages?
4. What effect, if any, did the assignment by Seller to Bank B have on the claims of: (a) the Seller; (b) the Buyer; (c) Bank B?

QUESTION #4

The city of Fictional, Kentucky, is a large population center, bordered on the north by land owned by Jerome Garcia. State Route 99 winds through Garcia's land and is the most traveled route to Fictional. Commercial development begins at the northern city limits, and due to the undeveloped Garcia land, this area has, over time, become a highly sought after location for putting up billboards since it is the first thing most visitors see as they enter the city via Route 99.

In 1982, Frank's Fantasy Land, a retail establishment selling adult sexually oriented books, videos, and other related items, leased a small plot of land at the northern edge of the city along Route 99 from Hot Rod Auto Works, to use as a site for a billboard. Frank's Fantasy Land put up a high billboard advertising its wares and greatly benefited from the location and visibility of the billboard. As more and more billboards were placed in the general area, by other businesses, Frank's Fantasy Land sought to stand out from the crowd by making its advertisements increasingly creative. In fact, by 1985, the advertisements were generating backlash. Vandals frequently damaged the billboards in attempts to "censor" the ads.

Frank's Fantasy Land sought greater security for the site. In 1986, it paid Hot Rod Works an amount equal to five (5) times its annual lease payment as the purchase price for the property in exchange for fee simple title to the plot of land via general warranty deed. Frank's Fantasy Land properly recorded the deed in the County Clerk's office. In addition, it erected a fence around the plot. Representatives of Frank's Fantasy Land would access the billboard through a lockable door in the fence to change the advertisements and generally maintain the billboard. Frank's Fantasy Land has improved the property in other ways over the years, including upgrading to an electronic billboard that the local newspaper has described as "more appropriate for Las Vegas."

Meanwhile, in 1984, Garcia had passed away. His will devised his land to the Church of High Morals and Good Thoughts. This land was immediately north of Frank's Fantasy Land's billboard site. The Church memorialized the transfer by properly recording a copy of the will in 1984.

The Church of High Morals and Good Thoughts' membership began to rapidly expand with the overall growth of Fictional's population, combined with its hiring of a new and popular preacher, Rev. Deuteronomy Dolla. Faced with an expanding congregation in 2005, the Church decided to build a new Church facility on the property it had been devised by Garcia.

As preliminary site preparation work began in 2006, the Church negotiated with Frank's Fantasy Land for a sanitary sewer easement over Frank's Fantasy Land's billboard site property. The Church's surveyors immediately informed the Church that Frank's Fantasy Land's billboard site property was located within the legal description of the Garcia property, as shown in the legal description incorporated into the 1984 Garcia will. The Church had never liked that an adult sexually oriented establishment's billboard was so close to its property. It asserted legal title to the land and demanded that Frank's Fantasy Land remove its fence and billboard. Frank's Fantasy Land disputed the Church's claim and refused to remove its improvements.

In 2007, the Church of High Morals and Good Thoughts filed a quiet title action to establish that it owned the disputed land. Based on the facts presented, identify which entity will prevail and explain the basis for your conclusion.

QUESTION #5

Bud Wise went to Double Kwik to buy a twelve pack of beer. After paying the clerk with a personal check he left, forgetting his check book. Almost two hours later, a man in a ski mask comes into the store and demands of the lone clerk, "Give me the money or you will get hurt." The clerk immediately empties the cash register, putting all the cash in a Double Kwik bag. The masked man had his hand in his pocket and the clerk believed he had a gun in his pocket. The register contained \$3,800.00, all of which was handed to the man.

The clerk was told he had better not call the cops and to lie face down on the floor for fifteen minutes or he would be killed. The clerk did as instructed and fifteen minutes later got up, and seeing no one, called the police. The clerk noticed that Bud's check book was gone from the counter and told the police upon their arrival. The clerk also told the police he thought the masked man was John Smith, a high school acquaintance who had a drug problem.

The masked man went to his apartment and counted his money, taking out \$300.00, and then wrote two checks to himself, John Smith, signing Bud Wise's name. He took the money and checks to a bad part of town and bought only \$300.00 worth of cocaine, as the local drug dealer would not take the two checks offered. John snorted the cocaine on the way back to his apartment. As luck would have it, when he opened his door, the police, hidden outside, rushed in and arrested John. The police found the Double Kwik bag, still containing \$3500.00, in plain view.

Upon searching John, the police found the two checks and an empty baggy in John's pocket. The police noticed John's unsteadiness on his feet and his red glassy eyes, as well as a white powdery substance around John's nose. The police did not find a gun.

The police call you, an assistant prosecutor, and relay the facts mentioned above. They want to know what crimes should be listed on the citation, if any. Please list the crimes you feel may or may not exist with an explanation of why you feel they exist or fail. Do not discuss any criminal procedure, just the crime(s) and elements or lack of elements, based on the above facts.

QUESTION #6

The licensing of physicians to practice medicine in the Commonwealth of Kentucky is controlled by Chapter 311 of the Kentucky Revised Statutes (KRS 311.530 - 311.992). The State Board of Medical Licensure is an independent board created by state government, located in Franklin County, Kentucky, and is granted the power to regulate physicians by the Kentucky General Assembly. The state board is an administrative agency that must comply with Chapters 13A and 13B of the Kentucky Revised Statutes.

Dr. Sam Grey is a physician properly licensed to practice medicine in the Commonwealth of Kentucky and maintains his practice in Jefferson County, Kentucky. On June 20, 2008, the State Board of Medical Licensure, (the Board) received a complaint from Barb Blue that Dr. Sam Grey was under the influence of alcohol while he was setting her broken arm in his medical office. On June 25, 2008, the Board received a complaint from Rob Red that Dr. Grey was under the influence of alcohol while he was in Dr. Grey's office being treated for a sprained ankle.

The Board investigated the complaint by Barb Blue and made a determination that the complaint had merit. The Board further made a finding that the complaint filed by Rob Red did not have merit.

Dr. Grey was provided with notice that a complaint had been filed against him alleging he violated KRS 311.595(7) by being under the influence of alcohol while treating a patient (Barb Blue) and that a hearing was scheduled on October 10, 2008. The hearing was rescheduled by the Board for November 1, 2008. The Board indicated they had provided Dr. Grey with notice of the new hearing date, however, Dr. Grey denied receiving notice of the new hearing date and the Board could not produce a copy of the renote. However, Dr. Grey appeared at the November 1, 2008 hearing and denied the allegations made against him.

During the evidentiary hearing conducted by the board, there were discussions between the board members of the number of malpractice claims made against Dr. Grey. Upon a review

of the evidence presented at the hearing, the Board suspended Dr. Grey's medical license on the basis of a finding that there was substantial evidence in support of the fact that Dr. Grey treated Barb Blue while under the influence of alcohol. Dr. Grey appealed the Board's ruling on the basis that his due process rights were violated by the Board.

Question #1:

Where and in what court would Dr. Grey file his appeal?

Question #2:

What would be the standard of review for the reviewing court?

Question #3:

Were Dr. Grey's due process rights violated by the Board's failure to send Dr. Grey a copy of the re-notice of the hearing on November 1, 2008? Were Dr. Grey's due process rights impacted by the failure of the Board to notify Dr. Grey of the complaint by Rob Red? Please explain why or why not.

Question #4:

Were Dr. Grey's due process rights violated by the Board's discussion of the history of Dr. Grey's malpractice claims against him? Please explain why or why not?

Question #5:

A reporter from the Kentucky News has requested copies of the complaint filed by Barb Blue and Rob Red under the Kentucky Open Records Act. Must the Board produce the complaints of either or both of the complainants? Please explain why or why not?