Florida Board of Bar Examiners

ADMINISTRATIVE BOARD OF THE SUPREME COURT OF FLORIDA

Florida Bar Examination
Study Guide and Selected Answers

February 2023
July 2023

This Study Guide is published semiannually with essay questions from two previously administered examinations and sample answers.

Future scheduled release dates: August 2024 and March 2025

****Notice to all applicants****
Starting in July 2023, the board primarily will use multiple-choice questions to test Trusts and UCC Articles 3 and 9 when those subjects are on Part A of the General Bar Examination. This Study Guide contains sample multiple-choice items in those subjects.

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PART I – ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2023 AND JULY 2023 FLORIDA BAR EXAMINATIONS

ESSAY QUESTIONS AND SELECTED ANSWERS

Part I of this publication contains the essay questions from the February 2023 and July 2023 Florida Bar Examinations and one selected answer for each question.

The answers selected for this publication received high scores and were written by applicants who passed the examination. The answers are typed as submitted, except that grammatical changes were made for ease of reading. The answers are reproduced here with the consent of their authors and may not be reprinted.

Applicants are given three hours to answer each set of three essay questions. Instructions for the essay examination appear on page 4.

ESSAY EXAMINATION INSTRUCTIONS

Applicable Law

Answer questions on the Florida Bar Examination with the applicable law in force at the time of examination. Questions on Part A are designed to test your knowledge of both general law and Florida law. When Florida law varies from general law, answer in accordance with Florida law.

Acceptable Essay Answer

- Analysis of the Problem - The answer should demonstrate your ability to analyze the question and correctly identify the issues of law presented. The answer should demonstrate your ability to articulate, classify and answer the problem presented. A broad general statement of law indicates an inability to single out a legal issue and apply the law to its solution.
- Knowledge of the Law - The answer should demonstrate your knowledge of legal rules and principles and your ability to state them accurately as they relate to the issue(s) presented by the question. The legal principles and rules governing the issues presented by the question should be stated concisely without unnecessary elaboration.
- Application and Reasoning - The answer should demonstrate logical reasoning by applying the appropriate legal rule or principle to the facts of the question as a step in reaching a conclusion. This involves making a correct determination as to which of the facts given in the question are legally important and which, if any, are legally irrelevant. Your line of reasoning should be clear and consistent, without gaps or digressions.
- Style - The answer should be written in a clear, concise expository style with attention to organization and conformity with grammatical rules.
- Conclusion - If the question calls for a specific conclusion or result, the conclusion should clearly appear at the end of the answer, stated concisely without unnecessary elaboration or equivocation. An answer consisting entirely of conclusions, unsupported by discussion of the rules or reasoning on which they are based, is entitled to little credit.
- Suggestions
    - Do not anticipate trick questions or read in hidden meanings or facts not clearly stated in the questions.
    - Read and analyze the question carefully before answering.
    - Think through to your conclusion before writing your answer.
    - Avoid answers setting forth extensive discussions of the law involved or the historical basis for the law.
    - When the question is sufficiently answered, stop.

QUESTION NUMBER 1

FEBRUARY 2023 BAR EXAMINATION – CONTRACTS/ETHICS

Ridley the Rhino ("Ridley") is a popular YouTube character. Ridley's videos use songs to encourage children to brush their teeth and help their parents with housework. Some Ridley videos have more than 150 million views.

ToyCo has a license from Ridley's creator to make talking Ridley dolls. ToyCo also has an order from MegaMart, a national retailer, for 50,000 units on the condition that ToyCo deliver them by November 1 for the holiday season.

ToyCo's factory can produce all of the components of a talking Ridley doll except for a computer chip necessary for sound effects.

On March 1, ToyCo contacted ChipCo, a leading chip manufacturer, about buying 50,000 sound effect chips. ToyCo informed ChipCo that it needed the chips by July 1 in order to meet the deadline for the MegaMart order. ChipCo said that it would look into whether it could deliver the chips with a July 1 delivery date for $10 per unit if ToyCo submitted a purchase order by email within the next week.

The same day, ToyCo emailed ChipCo a purchase order for 50,000 sound effect chips at $10 per unit, delivered by July 1, with payment due within 30 days. The purchase order was on a standard ToyCo form which stated: "ToyCo reserves all rights with respect to remedies for seller's nonperformance." The next day, ChipCo emailed to ToyCo a confirmation with ChipCo's logo, which read:

CHIPCO CONFIRMATION

Order Date: March 1
Customer: ToyCo
Quantity and price: 50,000 sound effect chips at $10 per chip
Deliver by July 1; Buyer's payment due within 30 days

STANDARD TERMS AND CONDITIONS

1. Jury trial waiver. Buyer and Seller agree to waive a jury trial in any dispute relating to Buyer's Order.

2. Limitation of liability. ChipCo shall not be liable to Buyer for damages of any nature that exceed $10,000.

ChipCo and ToyCo did not communicate further about the order until May 1. On May 1, ChipCo notified ToyCo that it could not deliver the chips until September 1. ChipCo did not provide a reason for the delay and has not responded to ToyCo's calls.

Upon receiving the letter, ToyCo contacted Chip World, another chip supplier. Chip World told ToyCo that delivering the sound effect chips by July 1 required a premium price because of the short notice. Chip World said that if ToyCo would pay $20 per chip and place an order by May 5, it would deliver the chips by July 1.

On May 2, ToyCo contacted your law firm. ToyCo wants to fulfill the MegaMart order, but first seeks advice about its rights against ChipCo.

A conflict check reveals that another lawyer at your firm represented ChipCo in a worker's compensation claim arising from an employee slip-and-fall at a ChipCo factory. The firm has not represented ChipCo since the case settled three years ago.

Prepare a memorandum as follows:

1. Discuss whether ToyCo and ChipCo entered into an enforceable contract. Also, discuss ToyCo's potential claims against ChipCo, any defenses that ChipCo may assert, and any remedies that may be available to ToyCo.

2. Discuss any ethical considerations raised by your firm's representation of ToyCo.

SELECTED ANSWER TO QUESTION 1

(February 2023 Bar Examination)

MEMORANDUM

From: Examinee

To: Partner

Re: ToyCo's Claims & Ethical Considerations

I. ToyCo & ChipCo - Validity & Enforceability of Contract

Validity of March 1 Contract

Contracts concerning real property and services are governed by the common law, whereas contracts for the sale of moveable goods are governed by the UCC. Since the alleged contract at issue is one for the sale of computer chips (moveable goods), Section 2 of the UCC applies. A valid and enforceable contract requires both mutual assent (offer and acceptance) and consideration. A valid offer is an objective manifestation of the offer or to enter into an agreement creating the power of acceptance in the offeree. An acceptance is an objective manifestation of intent to be bound by the terms of the offer. In Florida, consideration can be both a benefit and a legal detriment to the promisor. Additionally, the terms of a contract must be reasonably certain and a contract must contain the essential elements. For UCC contracts, the only essential element is quantity.

While under the common law, the acceptance must mirror the terms of the offer, under the UCC an acceptance containing different/additional terms will not automatically invalidate the contract. If two merchants enter into a contract under the UCC, and the acceptance contains terms that are additional to the offer, the additional terms will be incorporated as part of the contract unless: 1) the additional terms materially alter the terms of the offer; 2) the other party objects to the additional terms within a reasonable time; or 3) the offer limits acceptance to the terms of the offer. If the acceptance contains conflicting terms with the offer, then the "battle of the forms" approach apply and the conflicting terms will be knocked out. A merchant is a commercial entity that deals in goods of the kind at issue. Here, both ToyCo and ChipCo are merchants. Therefore, the special UCC rules regarding additional and conflicting terms would apply.

Here, a valid contract was most likely formed on March 1 when ToyCo sent its purchase order for 50,000 chips at $10 per unit. ChipCo's communication to ToyCo must likely did not constitute an offer, because ChipCo only said that it would "look into" whether it "could" deliver the chips. Because ChipCo stipulated that a potential offer would be open to consideration if sent by email "within the next week", ChipCo's communication was only

an invitation to negotiate. ToyCo's email that same day constituted a valid offer under the UCC. It contained the specific quantity of chips, at $10 per chip and reserving all rights regarding to remedies stemming from non- performance.

A valid acceptance was sent by ChipCo in its confirmation. However, ChipCo's acceptance contained both an additional term and a conflicting term. The additional term is the waiver of jury trial, and the conflicting term is the limitation of liability, which conflicts with ToyCo's offer including its reservation of all rights and remedies. In Florida, parties have a fundamental, constitutional right to a jury trial, which is also protected by the US Constitution. This would most likely constitute a "material" term. Since both parties are merchants, and the additional term (Clause 1) is material, a court would likely not enforce that specific term. However, the underlying contract would still be enforceable. Therefore, a valid contract was formed, but without the term waiving jury trial.

The limitation of liability clause conflicts with the provision in the offer, and would also qualify as "material". ToyCo will argue that the battle of the forms approach should apply, and the term should be knocked out - thus subjecting any issue related to damages to the gap-filling provisions of the UCC. However, ChipCo will argue that ToyCo's non-communication and failure to seasonably object to the term constitutes an acceptance of that term. A court would probably find that because the limitation of liability is a material term that conflicts with the offer, such a limitation is most likely unenforceable.

Defenses to Enforcement

ChipCo could argue that the Statute of Frauds (SOF) should preclude enforcement of the contract. Under the SOF, a contract for the sale of goods worth $500 or more must be in writing and signed by the party to be charged (in this case, ChipCo.). A writing does not have to be a formal contract, but can simply be written evidence of a contract. Additionally, a handwritten or electronic signature is not required in order to satisfy the "signing" requirement. Even a company's logo or letterhead will satisfy the signature requirement. Here, ChipCo sent a written confirmation, which acknowledged the quantity - thereby satisfying the writing requirement and containing the essential term under the UCC. Furthermore, the fact that the confirmation included ChipCo's logo would be sufficient for the signature requirement. Therefore, ChipCo. would not succeed in an SOF defense.

II. ToyCo's Potential Claims against ChipCo & Defenses

Anticipatory Repudiation

A breach of contract is material when the breaching party fails to substantially perform according to the terms of the contract. A breach of contract can occur when one party repudiates the contract before performance is due. A repudiation must be clear and unequivocal, otherwise the non-repudiating party may only demand further assurances. The repudiating party may retract the repudiation, unless: 1) the non-repudiating party has relied on the repudiation to its detriment; 2) has sued for breach of contract; or 3) has

accepted the repudiation. In the case of repudiation, the non-repudiating party must suspend performance in order to avoid further loss to the repudiating party.

Here, ChipCo repudiated the contract by its notification on May 1 that it would not be able to perform delivery until September 1. ChipCo provided no reason for the delay, and did not answer ToyCo's calls. Therefore, ToyCo could successfully argue that ChipCo repudiated the contract. Even though ChipCo communicated that it would be able to deliver the chips by September 1 at the earliest, this would be a material breach of contract as the contract specifically called for delivery by July 1.

ChipCo could argue that ToyCo's anticipatory repudiation was unacceptable, and that its communication did not constitute a clear and unequivocal repudiation of the contract. However, such an argument would most likely succeed. ChipCo did not provide a reasonable alternative, nor did it make a good faith effort to respond to ToyCo's calls. Even if ToyCo was looking for demands for further assurances, those demands seemed futile. Because time was of the essence, ToyCo had a valid and reasonable basis for going forward with an alternative supplier. In fact, ToyCo's contract with Chip World should be considered as a fulfillment of any obligation on the part of ToyCo to operate in good faith and mitigate damages.

Defenses

ChipCo. could argue that ToyCo. did not affect payment. Payment was due on April 30th, per the terms of the contract. According to the UCC, payment is due before performance of delivery. Because the delivery date was specifically set out in the contract, and ToyCo. Did not perform per the contract, ChipCo. could argue that a material breach was committed and therefore its own performance was suspended. However, ToyCo. could argue that ChipCo.'s subsequent conduct did not resemble the good faith required of sellers under the UCC.

III. Remedies Available to ToyCo.

Restitution

If ToyCo. already paid part of the purchase price, or the full purchase price, ToyCo. would be entitled to restitution of any amount paid, as it did not receive any chips from Chip Co.

Remedy - Cost of Cover

Expectation damages are meant to place the parties in a position as if the contract had been performed, and to give the parties the benefit of the bargain. The non-breaching party has no "duty" to mitigate damages (i.e., failure to mitigate does not operate as a bar to recovery), but if there is a failure to mitigate damages then this could reduce the amount of damages. If a seller breaches a contract, then the buyer is entitled to

expectation damages. If the buyer must replace the goods, the damages are measured as the difference between the contract price and the cost for replacement.

Here, ToyCo. will argue that it is entitled to the difference between the contract price and the price it ultimately paid under its contract with Chip World. The total contract price with ChipCo. was $500,000 (50,000 chips x $10 per chip). The cost of the alternative supply amounted to $1 million (500,000 chips x $20 per chip). Therefore, ToyCo. will argue that it is entitled to the difference - i.e., $500,000. If this alternative contract was reasonable, and a court would find that it was sufficient mitigation of damages, which it probably would be, then this is the amount ToyCo. would be entitled to.

Lost Profits

Consequential damages are recoverable under the UCC. Consequential damages that include lost profits are available only if at the time of contacting the breaching party knew or had reason to know of the nature of potential losses, and such losses were a foreseeable event as the result of breach at the time of contracting. Here, the facts do not indicate whether Chip World's supply of chips were of similar or identical quality to the chips that would have been supplied by Chip Co. Chip Co is a leading chip manufacturer, so perhaps the quality would be diminished. If for some reason the dolls become less marketable due to the integration of lesser-quality chips, ToyCo could argue that Chip Co should be liable for any lost profits. However, because the facts are unclear in this regard, and because such damages seem speculative, ToyCo would probably not be able to effectively raise such a claim.

Defenses

ChipCo. could argue that the damages provision operates as liquidated damages, and is therefore the extent of damages that ToyCo could ultimately recover. However, as discussed above, that provision is most likely not part of the contract to begin with and therefore invalid and unenforceable. If the liquidated damages clause were valid and enforceable, which it is most likely not, then ToyCo. would only be able to recover $10,000.

IV. Ethical Considerations

Conflict Of Interest

A lawyer has the duty to provide diligent and competent representation to its clients. Part of providing diligent representation is avoiding conflicts with former, prospective, or current clients. A conflict exists when representing one client would impede effective representation of another client, or would involve the disclosure of confidential information that must be protected. Normally, a lawyer cannot provide representation to a prospective client concerning the same or a substantially related matter in which that lawyer represents a former or current client with adverse interests. Within a firm setting, a

conflict that one lawyer has in a firm is imputed to the other lawyers working at the firm. Therefore, the fact that another lawyer in the firm represented ChipCo. would be imputable to other lawyers in the firm.

If a conflict does exist, then a firm may still provide representation if: 1) diligent and competent representation can be provided to both affected clients; 2) the representation does not involve representing both clients with adverse interests to one another in the same proceeding before a tribunal; and 3) both clients provide their written and informed consent.

Here, even though another lawyer represented ChipCo., that representation concerned a completely unrelated matter - a slip and fall case, as opposed to a contracts dispute case. Therefore, any confidential information acquired as concerns ChipCo. would probably not be at issue in the current case. Thus, representation of ToyCo would most likely be possible.

QUESTION NUMBER 2

FEBRUARY 2023 BAR EXAMINATION – CRIMINAL LAW AND CONSTITUTIONAL CRIMINAL PROCEDURE

Late one night, David was driving his motorcycle. At a red light, David's friend, Jake, pulled up beside him on his motorcycle. They signaled to each other to race when the light changed. When the light turned green, both motorcycles sped off. They were both traveling more than twice the 45 mph speed limit and weaving around cars with David slightly ahead. David suddenly noticed a tall, dark object moving across the roadway just before he struck it. David almost lost control of his motorcycle, but continued driving to his home nearby. Once he arrived in his garage, he noticed damage to his motorcycle, including broken pieces and what looked like blood.

The next day, David got a ride to work. A colleague told David that she witnessed a collision just down the street the prior evening. She explained that a woman in dark clothing was running across the traffic lanes, but that two motorcycles were racing and one hit the woman. The woman died at the scene.

After hearing this, David texted Jake two messages: "I need to know if you talked to the police about me," and, "Did you tell the police I killed that woman last night?"

Police officers investigating the incident set out to talk with all the registered owners of motorcycles in the area. They intended to knock on the doors of owners' residences and see if anyone would speak to them voluntarily. David was standing on the sidewalk in front of his apartment smoking when he saw a police officer driving towards him. The officer also saw David, whom he recognized from a driver's license photo as the registered owner of the next motorcycle on his list.

The officer parked in the parking lot and approached David. As he grew closer, the officer smelled marijuana. When the officer was about ten feet away from David, he was sure the smell was coming from David's cigarette, so he told David not to move. David did not have a prescription for the marijuana. He threw the cigarette on the sidewalk, put his hands in the air and began to walk backward towards his open front door, while the officer repeatedly told him to stop.

David ducked into his home, and the officer followed him. In the kitchen, the officer took David down and told him he was under arrest for misdemeanor marijuana possession and resisting without violence. While the officer was handcuffing David, he noticed two grams of marijuana on the kitchen counter, which he collected as evidence. The officer then went outside and collected the cigarette that David tossed on the sidewalk. The officer performed a field test on the cigarette and the suspected marijuana from the kitchen, revealing that both were positive for marijuana.

Right before placing David in the patrol car, the officer searched David and recovered David's cell phone from his pocket. Looking through the unlocked phone, the officer found David's two texts to Jake. Without saying anything, the officer held the phone up to David displaying the texts. David exclaimed, "She was in the middle of the street! I didn't see her! I never meant to hurt anyone!"

While David was taken to the jail, a different police officer arrived at Jake's home, as he was also a registered owner of a motorcycle in the area. Jake voluntarily allowed the officer inside his home and told the officer everything about the previous evening.

Prepare a memorandum addressing the following:

1. In Florida, vehicular homicide is defined as "the killing of a human being … caused by the operation of a motor vehicle in a reckless manner likely to cause the death of, or great bodily harm to, another." Fla. Stat. § 782.071. Vehicular homicide "does not require that that person knew that the accident resulted in injury or death." *Id*. Discuss whether the facts would support convicting David and Jake of vehicular homicide.

2. Discuss whether the actions of law enforcement violated the **U.S. Constitution** and how the court should rule on any constitutional challenges.

SELECTED ANSWER TO QUESTION 2

(February 2023 Bar Examination)

I. Whether David and Jake can be convicted of vehicular homicide

Under the relevant Florida statute, to commit vehicular homicide one must (1) operate a motor vehicle in a reckless manner likely to cause the death of or great bodily harm to another and (2) such action must result in the killing of a human being. Further, one need not know that the accident resulted in injury or death.

a. David

David would likely be convicted for vehicular homicide. First, he in fact killed a woman when he hit her with his motorcycle. Thus the only question as to him is whether he was driving in a reckless manner. A court/jury would likely find that he was driving in a reckless manner as he was traveling at extremely high speeds (more than twice the 45 mph speed limit) and weaving around cars late at night (when visibility is reduced). This contact constitutes reckless behavior because driving at these speeds at night and weaving in and out of cars includes a high risk of accident/hitting someone with the motorcycle, which can kill or seriously injure a person. Because David was driving recklessly when he hit and killed the woman, he could be convicted.

b. Jake

Even though Jake was not driving the motorcycle that hit and killed the woman, he may also be liable for voluntary manslaughter either under a theory of conspiracy or aiding and abetting.

Florida retains the traditional rules for conspiracy where there must be a meeting between two people to engage in an illegal act. In other words, both of the participants of a conspiracy must actually have the intent to engage in the prohibited conduct. Under Florida law, no overt act is required to complete the crime of conspiracy. For those who enter into a conspiracy, each party can be convicted of both the underlying conspiracy and any crimes that occur doing the undertaking of the conspiracy.

Here, a prosecutor could argue that when Jake pulled up next to David, the each signaled to each other to race when the light was changed. Although they did not use words, they apparently understood the signs they made to each other (indicating a race) and both had the requisite intent to engage in the race. Thus they can be guilty of a conspiracy to either (1) drive reckless, which is a crime or (2) drag race, which is also likely a crime. Because David committed the crime of vehicular homicide while carrying out the conspiracy, his co-conspirator (Jake) can also be convicted of that crime as Jake had not pulled out of the conspiracy (clearly indicated that he no longer desired to race) at the time of the accident. In fact, it appears that Jake was actively racing David at the time David hit and killed the woman.

Alternatively, a prosecutor could try to convict Jake on an accomplice theory. Under Florida law, an accomplice can be held liable to the same extent as the principle (David) if the accomplice offers encouragement to the principle who is committing the crime. Here, Jake encouraged David to race when he pulled up next to him and was also encouraging David to drive recklessly when Jake was racing David. Thus, Jake may also be liable because he "caused" David to drive in a reckless manner by racing him which led to the woman's death.

II. Constitutional issues relating to law enforcement's interactions with David and Jake

There are several potential constitutional issues with how the law enforcement interacted with David in carrying out David's arrest that could limit the evidence that law enforcement could use against David in either a marijuana or vehicular homicide prosecution.

Under the 4th amendment to the Unite State's condition, people in the United States cannot be subject to unreasonable searches or seizures. The key question is reasonableness. Whether a search or seizure is reasonable will depend on whether the government has probable cause to believe a crime has been committed or that evidence of illegal activity will be found (there is a less exacting standard for Terry stops, reasonable suspicion, which allows law enforcement to pat down a suspect if they have reasonable suspicion they have a dangerous weapon). Any evidence that is obtained as a result of an illegal search or seizure may be suppressed during the suspect's prosecution.

a. David's initial arrest

The general rule is that police do not need an arrest warrant to arrest someone in a public place so long as there is probable cause that they have committed a crime. Here, David was in a public place (the sidewalk in front of his apartment) and smoking marijuana (without a valid prescription) when the officer started to approach him. When the officer approached David, smelled marijuana, and became "sure the smell was coming from David's cigarette," he had probable cause to believe that David was committing the crime of marijuana possession, which is a misdemeanor (because the punishment for the crime does not carry the potential sentence of a year or more in jail). Thus, at this point the officer had a right to arrest David even though the officer did not have an arrest warrant.

Before the officer could arrest David, however, David ran back into his apartment. The officer than followed David into the apartment, without either a search or arrest warrant (since David lived there, the officer would generally only need an arrest warrant, not a search warrant, to enter into the apartment to make the arrest). David would argue that this arrest was unlawful and violated his 4th amendment rights because the officer did not have a valid arrest or search warrant and therefore any evidence of crimes found as a result of the illegal arrest (the marijuana inside the apartment, the incriminating messages on the phone) are "fruit of the poisonous tree" and therefore could not be admitted as evidence in his trial. The fruit of the poisonous tree doctrine is meant to have a deterrent effect on law enforcement so that they do not violate the 4th amendment and provides that

any evidence collected as a result of an illegal arrest/search cannot be used as evidence. However, there are several exceptions to this doctrine; in other words, even if the search/seizure was illegal, the officer still may be able to use that evidence (more on this later).

The officer would argue that he had an exception to the warrant requirement: the hot pursuit exception. Under this exception, officers do not need a warrant when they are in hot pursuit of a felon who enters into a building. Here, the officer's invocation of this exception would likely fail as marijuana possession is a misdemeanor and thus the officer should have sought an arrest warrant before entering David's apartment. The officer could also argue he/she did not need a warrant because of another exception, if he thought that David was entering the apartment to destroy evidence. The prosecution/officer would argue that David had already failed to comply with the officer's request, already attempted to get rid of evidence when he threw the marijuana cigarette on the ground, and therefore the officer had a reasonable belief that David was entering the apartment to destroy more evidence. This exception would likely not apply because the officer did not hear sounds like flushing, which could indicate that David was trying to destroy evidence. Finally, the officer could argue that he did not need a warrant because David left the door to his apartment open and there is no indication David closed it when he fled the officer. If the door was open, the officer could argue he did not need a warrant/it was implicit consent on David's part for the officer to enter. This may be the governments best argument but its result is likely a close call. A court would likely find the officer still needed to ask for explicit permission or get a warrant before entering.

Although the arrest likely violated David's constitutional rights, this does not mean he can't be prosecuted. The question is whether any evidence found as a result of his illegal arrest could be suppressed.

b. The marijuana inside the apartment

If an officer is legally inside someone's home, they do not need a warrant to seize any illegal items/evidence of a crime that is in plain view under the plain view exception. If the officer was legally inside David's apartment, it would appear the plain view exception applies to the officer's seizure of the 2 grams of marijuana on the kitchen table (in other words he did not need a warrant to seize this). This is because it was immediately apparent to the officer that the marijuana was illegal without the officer having to touch/move the marijuana.

However, because the officer was not legally inside David's apartment as described above, the officer cannot rely on the plain view exception. Rather, the seizure of this marijuana is a fruit of the poisonous tree of the officer's illegal entry into David's apartment and therefore would likely be excluded as evidence in David's marijuana prosecution.

c. The marijuana on the sidewalk

After arresting David, the officer went back outside and retrieved the marijuana cigarette that David had thrown on the ground. This evidence would not be excluded. This is because the officer's seizure of the marijuana cigarette did not violate David's 4th amendment rights. The 4th amendment's prohibition on searches/seizures applies only to those areas where a defendant has a reasonable expectation of privacy (e.g, the home). David had no reasonable expectation of privacy on the public sidewalk thus the officer did not need a warrant before seizing the marijuana cigarette. Because there is no 4th amendment violation, this marijuana cigarette can be used as evidence in David's prosecution.

d. The contents of the cellphone

Here, there are potentially two issues related to the government trying to use David's incriminating text's to Jake as part of their prosecution of David for vehicular homicide. First, the phone was seized as a result of David's illegal arrest in his apartment (without an arrest warrant) and therefore it is the fruit of the poisonous tree. However, one of the exceptions to the fruit of the poisonous tree exception is inevitable discovery, i.e., the evidence would inevitably been seized regardless of the illegal conduct. Here, the officer would likely have obtained the phone even if he had properly got an arrest warrant and then arrested David. And the officer could have legally searched David as a search incident to lawful arrest. Because law enforcement would have eventually gotten the phone, a court likely would not exclude this evidence under the fruit of the poisonous tree doctrine.

The second issue, is that the officer went through David's phone without first obtaining a search warrant. Although officers generally may search a person as a search incident to a lawful arrest, courts have held that due to modern technology and the amount of information we have on our cell phones (especially smartphones) people have a reasonable expectation of privacy in their phones and police generally need a warrant to search a phone. David would argue that even if the officer could legally seize his phone, the officer needed a search warrant before going through the phone, which he did not have. Therefore, David would argue the texts must be suppressed under the fruit of the poisonous tree doctrine because the officer searched his phone without a warrant. Law enforcement would argue that while generally people have a privacy interest in their phone, David did not because he did not include any passcodes on his phone that was needed to unlock it. Because the phone was not password protected, David would not have a reasonable expectation of privacy and thus the 4th amendment does not apply. This may be a close call as a court may still find one has a reasonable expectation of privacy in an unlocked phone, but ultimately, this likely won't matter as the evidence would come in even if it was illegally obtained under the inevitable discovery doctrine. Law enforcement would argue that they would have eventually sought a warrant for the phone as they spoke with Jake, who told them "everything" which presumably includes the texts David sent and that they also would have found the blood on David's motorcycle connecting him to the death. After this evidence, law enforcement would have probable cause to get a warrant to search David's phone and find the text. Because the police

would have inevitably found these texts anyways, they will likely come into evidence regardless of whether the initial search/seizure was lawful.

e. David's confession

Law enforcement would likely also try to admit David's statement that "She was in the middle of the Street! I didn't see her!" as evidence he committed the crime. David could try to exclude the evidence due to a violation of his miranda rights. Under the 5th amendment to the U.S. Constitution, any person who is in custody and undergoing interrogation must first be given miranda rights, otherwise, anything they say can be excluded. A proper miranda warning give a suspect notice that they have a right to remain silent, anything they do can and will be used against them in court, that they have a right to an attorney, and if they cannot afford an attorney one will be provided for them. Here, the officer never gave David a miranda right before David made the statement. Thus, if David can show he was (1) in custody and (2) the statement was a result of custodial interrogation, he can have his statement suppressed.

Whether someone is in custody depends on whether a reasonable person in their situation would have a reasonable expectation they could leave. At this point, he had already been placed in handcuffs in his apartment and was about to be placed in the patrol car. Thus he was in custody.

Whether something is an interrogation is whether the police make a statement or action that reasonably would make the suspect make incriminating statements. Here, although the police did not ask a question, the officer did show David the incriminating texts with the likely intent (and result) of David making the incriminating statements.

Because this was a custodial interrogation, and because the officer did not first read David his miranda rights, David's statement/confession would likely be excluded from evidence.

f. Jake's confession

It should also be noted that Jake's confession is admissible. Jake voluntarily let police inside his home (consent is an exception to the search/seizure requirement), there is nothing indicating that Jake was in custody, and Jake voluntarily told the officer about the prior evening. Thus, Jake's statements are admissible both as against Jake and David.

QUESTION NUMBER 3

FEBRUARY 2023 BAR EXAMINATION – TORTS/ETHICS

Betty and George were getting married. They hired Cutie Catering to prepare and serve food and beverages at the event. Betty told the company that none of the food at the wedding could contain peanuts because Betty's 6-year-old niece, Nancy, had a peanut allergy.

Shortly before the wedding, Cutie Catering was setting up tables with snacks for guests after the ceremony. One of the tables had a plate with a variety of cookies, some of which were peanut butter cookies. Cutie Catering had inadvertently switched the cookie plate for Betty's wedding with the cookie plate for another event.

While Cutie Catering was setting up the tables, Betty's Aunt Martha arrived with a plate of cookies as a wedding gift. Aunt Martha was unaware of Nancy's peanut allergy, and her cookies contained peanuts as well. Cutie Catering's employees allowed Aunt Martha to leave her cookies next to Cutie Catering's food.

Nancy then arrived at the wedding with her mother. While her mother was conversing with the guests, Nancy went over to the catering tables. Nancy ate one of Aunt Martha's cookies and one of Cutie Catering's peanut butter cookies.

The ceremony began soon thereafter. Nancy stood with the bridesmaids near Betty during the ceremony. As Betty and George took their vows, Nancy had a severe, peanut-related, allergic reaction. Her face swelled, she had difficulty breathing, and she collapsed. Nancy fell into Betty, who fell awkwardly and sprained her ankle. Betty and her guests were terrified and paramedics were called. Nancy recovered after the paramedics gave her emergency treatment. Nancy told her mother that she ate the cookies, which led to the discovery of the peanut-containing cookies from Aunt Martha and Cutie Catering.

The Miami Word, a local news outlet, heard about the incident and posted a story on its website with the headline: "Worst Caterer Ever: Cutie Catering Poisons Child, Ruins Wedding." The story reported that Nancy collapsed because of food poisoning from spoiled ingredients or unsanitary food preparation conditions.

Cutie Catering seeks advice from your law firm. Cutie Catering received a letter from Betty's lawyer threatening a lawsuit for damages. The letter argues that Betty has incurred medical expenses and lost wages as a dance instructor because of her sprained ankle. It also contends that Betty could not audition for the lead role in a musical production and has lost income because of that opportunity. Further, the letter maintains that Betty is distraught after seeing Nancy suffer and because Cutie Catering ruined her wedding.

Cutie Catering was referred to your firm by Lawyer, who works in another firm. Lawyer has proposed that your firm pay her 10% of any fees earned as a referral fee, but she would otherwise not be involved in the matter.

1. Discuss the merits of potential tort claims by Betty against Cutie Catering and any arguments that Cutie Catering may assert against the claims.

2. Discuss the merits of a defamation claim by Cutie Catering against the Miami Word.

3. Discuss any ethical issues raised by the proposed representation.

SELECTED ANSWER TO QUESTION 3

(February 2023 Bar Examination)

I. Betty vs. Cutie Catering Claims

a. Negligence

Rule: In order to maintain a claim of negligence, the plaintiff must prove duty, breach, causation, and damages.

Duty:

Rule: People in Florida have a duty to all foreseeable plaintiffs. The duty is to act as a reasonable prudent person, and this is an objective standard.

Here, Cutie Catering (CC) owed a duty to Betty, as well as anyone else at the wedding, to act like a reasonable, prudent catering company at the wedding. They had the duty to use reasonable care in preparing and setting out the food for the guests. Thus, Betty can meet the first element of negligence.

Breach:

Rule: When a person deviates from the applicable standard of care, they are in breach.

Here, the facts say that CC "inadvertently" mixed up the cookies at Betty's wedding and the cookies for a different wedding, and thus put peanut butter cookies on the catering table. CC did this despite being explicitly warned that Nancy, Betty's niece, had a peanut allergy and that there could be no food with peanuts in it. As such, CC is in breach of the duty to act with ordinary reasonable care.

Causation:

Rule: In Florida, there is causation if there is both cause in fact and proximate cause. But for causation is actual causation, but-for the defendant's negligence, plaintiff would not have been harmed. However, when there are two or more actors responsible for indivisible injury, the actual cause test is met as long as the defendant's actions were a "substantial factor" in causing harm to the plaintiff. Proximate cause focuses on foreseeability. The question is whether the harm that resulted was a foreseeable consequence of the act that made defendant's actions negligent in the first place.

Here, Betty will argue that both cause in fact and proximate cause are present. CC could argue in response that it was ot the but-for cause, because Aunt Martha also brought peanut butter cookies and Nancy ate hers as well as CC's. Furthermore, CC will argue that it was Nancy falling on Betty that caused the harm. In response, Betty will argue that both CC and Aunt Martha's actions were indivisible and that each was a substantial factor in causing the harm. Moreover, Nancy getting sick and falling on Betty was the direct result of both CC and Aunt Martha's actions in leaving out the peanut butter cookies. As such, actual cause is met

because CC's actions were a substantial factor in harming Betty through Nancy.

The court will also find that proximate cause is met. The type of harm from negligently putting out peanut butter cookies is precisely what occurred to Nancy: that is, a child with a peanut allergy eating it and having an allergic reaction. It is further foreseeable that someone having an allergic reaction could fall on the person next to them, and harm them with the same way that Betty was harmed.

Damages:

Rule: In Florida, the measure of damages for negligence is compensatory damages. Compensatory damages are the damages necessary to put plaintiff back into the position they were in before the negligence occurred in order to make them whole. There must be a physical harm or harm to property. Pure economic loss is insufficient for negligence. However, should the plaintiff prove the requisite injury, then they are entitled to noneconomic damages like pain and suffering, but also economic damages like medical expenses and lost wages.

Here, Betty sprained her ankle and thus has the requisite personal injury. Thus, Betty has sufficiently proven all elements of negligence. Accordingly, she can recover for her medical expenses and lost wages. However, the lost income from the leading role is too remote to award as damages. This is because Betty merely had an interest in auditioning for the role, and had not actually secured the role.

b. Vicarious liability

In addition to the negligence analysis above, Betty may also prove vicarious liability against CC to prove negligence.

Rule: An employer is liable to an employee who causes harm to another when they were acting within the course and scope of their employment.

Here, the employees were the ones who inadvertently left out the peanut butter cookies. In addition, the facts say that the employees of CC "allowed" Aunt Martha to place her cookies on the CC's catering table next to their cookies. Accordingly, even if CC has not mixed up their cookies, they still would have been responsible for Aunt Martha's cookies ending up on the table, which led to the allergic reaction of Nancy, and thus CC can be liable because the facts show that CC's employees were acting within the scope of their employment.

c. Joint and Several Liability

CC, may try and argue that Aunt Martha is also at fault and that Betty should sue her.

Rule: At common law, a defendant could be held jointly and severally liable with co-tortfeasors. This meant that the plaintiff could go after anyone defendant for all of the harm and the defendant could then sue the co-defendant for their portion of the damages. However, Florida has abolished joint and several liability. As such, each defendant is only liable for their own proportional share of the harm.

Here, CC will only be sued based on the percentage of fault that is allocated to it, and will not be held jointly and severally liable with Aunt Martha.

d. Defenses to Negligence

Contributory/Comparative Negligence

CC, may argue that Betty and/or Aunt Martha were contributorily, or comparatively negligent.

Rule: Florida is a pure comparative fault jurisdiction. This means that the Plaintiff can still recover even if they were more at fault than the defendants. The plaintiff's share of fault would reduce their overall recovery, however, if the plaintiff were legally drunk and more than 50% at fault, then they would be barred from recovering.

Here, CC may argue that Aunt Martha was also negligent and thus the overall percentage of fault is reduced for CC. This is likely correct, and CC can have its portion of fault reduced. Furthermore, CC may argue that Betty was negligent as well. CC could argue that it was negligent to invite Aunt Martha without telling her about Nancy's allergies. It may have been negligent of Betty not to double-check the catering table. Furthermore, if Betty had been drinking at the wedding and it was proven that she was legally drunk, she may not recover anything.

Intervening and Superseding Causes

CC may try arguing that the peanut butter cookies brought by Aunt Martha and Nancy falling onto Betty which caused her sprained ankle are superseding causes and thus not foreseeable.

Rule: After the defendant's negligence, the defendant will be liable for all harm that is foreseeable. Foreseeable harm is called an intervening cause. Superseding causes, however, are not foreseeable and cut off the defendant's liability. Superseding causes are things like acts of god, intentional torts by third parties, and crimes by third parties. Negligence of others is foreseeable.

Here, CC will not be able to argue that Aunt Martha's conduct in brining peanut butter cookies or Nancy's allergic reaction to it are superseding causes cutting off CC's liability to Betty. This is because Aunt Martha was at best negligent, and Nancy's reaction to eating something she was allergic too was foreseeable.

e. NIED

Betty may also try to bring a claim for negligent infliction of emotional distress (NIED).

Rule: If a defendant places a plaintiff in the zone of danger, then a plaintiff may recover for sever emotional distress is there is a physical impact, or there is a physical manifestation of symptoms. If the plaintiff is a bystander, then there is still a way to recover for NIED. That is, the bystander plaintiff must have been closely related to the victim, the plaintiff must have

been in the presence of the victim, and the plaintiff must have perceived the injury.

Here, Plaintiff is closely related to Nancy, as Nancy is Betty's niece. She was there next to Nancy during the ceremony, and she personally perceived her severe allergic reaction. CC may argue that there was no physical impact or a zone of danger against Nancy. Rather, Nancy suffered from an allergic reaction due to the peanut butter cookies. However, a court may find that this is sufficient for bystander NIED liability provided the other elements are met. The reaction to the allergy sounded quite gruesome, with the swelling face and the collapsing, and the facts state that this made the guests terrified. However, there are no facts showing that Betty manifested any physical symptoms, and that will preclude recover.

Thus, Betty cannot recover for NIED.

f. IIED

Rule: To recover for Intentional infliction of emotional distress (IIED), the plaintiff needs to prove that the defendant acted intentionally or recklessly with extreme and outrageous conduct to cause Plaintiff severe emotional distress, and that plaintiff did suffer severe emotional distress. Extreme and outrageous conduct is conduct outside the bounds of civilized society. In addition, Plaintiff does not need to manifest physical symptoms.

Here, Betty may try and argue that CC is liable under an IIED cause of action. However, she will not be able to prevail. The facts do not show that CC was intentional or reckless by putting out the peanut butter cookies. At best, CC was negligent. Therefore, Betty could not recover for IIED.

g. Battery

Rule: To bring a battery claim, the plaintiff needs to show that the defendant intentionally caused a harmful or offensive contact with Plaintiff or plaintiff's person, and that such contact occurred.

Here, Betty may argue that it was CC's actions that caused Nancy to fall onto Betty which caused her to sprain her ankle. However, the facts do not show that the actions by CC were intentional. Thus, she will not be able to recover for battery.

II. CC vs. Miami World re: Defamation

Rule: In Florida, a statement is defamatory if it is a false statement of fact (not opinion) of and concerning the plaintiff, which harms the plaintiff's reputation with publication and fault. Publication means that the statement was heard and understood by a third party. The level of fault depends on whether the plaintiff was a public figure. Finally, there are special rules for media defendants.

Defamatory statement:

Here, the elements of a defamatory statement are met. First, the first part of the statement "Worst Caterer Ever" is opinion. The statement that "Cutie Catering Poisons Child, Ruins Wedding" is about CC, the plaintiff, and it would certainly harm the plaintiff's reputation. It was printed in the newspaper, and thus publication is met. Miami World could argue that the statement was true, which is an absolute defense to defamation. This is because Miami could technically argue that the allergic reaction was essentially food poisoning. However, CC can very likely rebut this with the report in the story which specified that the "poisoning" was due to spoiled ingredients and unsanitary food preparation. Nothing in the facts suggests that this is true, and therefore CC can prove that Miami made a false, defamatory statement.

Fault:

The requisite level of fault turns on whether CC is a public or private figure

Rule: A public figure must prove that the defendant made the defamatory statement with actual malice: that is, knowledge that the statement was false or reckless disregard for the truth. If plaintiff is a private figure, than all they must prove is negligence. A public figure is generally a celebrity or someone who holds themselves out to the public or involves themselves in topics of public concern.

Here, it would be hard for Miami World to argue that CC is a public figure. They are a wedding catering company and there are no facts indicating that they put themselves out there or inject themselves into the public eye. As such they need only prove negligence. The fact that the story got the facts completely wrong is most likely sufficient proof of negligence.

Libel vs Slander

Rule: Libel is printed defamation, slander is spoken. Slander requires actual proof of damages, unless slander per se, while. Libel does not require such proof. However, libel by a media defendant does require proof of damages, and damages are never presumed. Furthermore, against a media defendant, the plaintiff can send a request for a retraction, and, if the media defendant complies, then plaintiff is limited only to actual damages.

Here, the defamatory statement is printed in a newspaper and thus libel. In addition, as a media defendant, Miami World should have been contacted for a retraction by CC. Moreover, there are no facts indicating that CC suffered actual, pecuniary loss. Thus, because Miami World is a media defendant, CC will not prevail absent some evidence of actual harm.

III. Ethical Concerns re: Referral fee

Rule: the RPC forbids mere referral fees. Fee sharing is okay, as long as there is proper division of fees with the other lawyer, there is an agreement with the client setting out the joint representation, and the agreement sets out the proportionate share and division of the work.

Here, Lawyer is merely seeking a 10% referral fee. She would not otherwise be involved in the matter. This violates the RPC and therefore Lawyer's proposal must be turned down. This is because there would be no actual division of work and there would not be a true joint representation.

QUESTION NUMBER 1

JULY 2023 BAR EXAMINATION – FAMILY LAW/ETHICS

Daughter and Son are half-siblings who are Mother's children. Daughter is 11 years old, and Son is 18 years old. Son's father is deceased. Daughter's father ("Father") is named on Daughter's birth certificate, but never married Mother.

Grandma is Mother's mother and is a widow. Daughter and Son have resided at Grandma's house throughout their lives. During that time, Grandma had sufficient income to meet the children's needs. Grandma remains in good physical health and can continue to provide for Son and Daughter financially.

Mother occasionally lives at Grandma's house, but has left Daughter and Son with Grandma during long stays with friends, stints in jail, and a trip to a rehabilitation center. Mother finally has told Grandma that she agrees to Grandma's request to adopt Daughter and Son, who are both in favor of the adoption.

Father did not assist Mother financially during her pregnancy with Daughter. Father has been incarcerated since Daughter was 2 years old, and Father is not anticipated to be released for another 3 years. Grandma doubts that he would agree to her adopting Daughter, as Grandma has had a contentious relationship with Father. Father was ordered to pay child support after Daughter's birth but made payments sporadically, even though he was employed full-time before his incarceration and had the ability to pay. He is currently in arrears and has never tried to communicate with Daughter while in prison.

Father's parents buy Daughter birthday and holiday gifts, but they rarely spend time with her. Grandma is not aware of their expressing an interest in adopting Daughter and is unsure whether they would consent to her adopting Daughter. Grandma would like your law firm to represent her in connection with adopting Daughter and Son. As a gift to her, Grandma's boyfriend has offered to pay her legal fees.

Grandma also would like to know the impact of adoption on Father's child support order.

Draft a memorandum that addresses the following:

A. Discuss whether Grandma is likely to succeed in adopting Daughter and Son under these facts, including whether Grandma is qualified to adopt and whether Mother, Father, and Father's parents must receive notice or consent to the adoptions.

B. Discuss the impact, if any, an adoption would have on Father's child support arrearage and his obligation to pay child support.

C. Discuss any ethical considerations raised by Grandma's boyfriend's offer to pay her legal fees.

SELECTED ANSWER TO QUESTION 1

(July 2023 Bar Examination)

MEMORANDUM

***TO**: Senior Partner*

***FROM**: Bar Taker Attorney*

***RE**: Grandma's adoption and impacts; ethical considerations*

Adoption Qualification and Eligibility

Adoption is the termination of parental rights in the current legal parents and the giving of those rights to another parent or parents over the adopted individual.

Qualification to Adopt

In the State of Florida, anyone may adopt another. This includes the right of a married couple, same-sex couples, and an individual adult to properly adopt another. Individuals interested in adopting another must file a petition with the court first for termination of the parental rights (described below), then for petition of adoption. When a petition for adoption is submitted for minor children, courts will consider various factors to ensure that the adoption is in the best interest of the child. Such factors can include the adoptive parents fitness to take on the role and responsibility of a legal parent including sufficiency of income, mental, physical, and emotional health, and more. If a court wishes, it may also prescribe a six-month trial period during which the children may live with the possible adult, after which the court can determine suitability of the arrangement based on the prior six months. Courts will also give priority of adoption to blood relatives.

Here, Grandma is qualified to adopt Daughter and Son because she is an adult seeking to adopt. It is not relevant that she is a "widow" and does not disqualify her from being able to adopt the children. Similarly, Daughter and Son have lived in Grandma's home throughout the years, she has already demonstrated sufficient income to meet the childrens' needs, and Grandma remains in good physical health and can continue to provide for the children financially. Similarly, a court will likely not require the six-month waiting period since Daughter and Son have lived with Grandma throughout their lives. Further, Grandma is a blood relative of both Daughter and Son, which the court gives priority to in adoption cases.

Therefore, Grandma is qualified to adopt Daughter and Son.

Qualification to Be Adopted

Similarly, any individual may be adopted in Florida, including adults. The court will seek consent to the adoption for children who are 12 years old or older, though the court may

ignore the failure to consent if the adoption is in the best interest of the child. Further, an adult wishing to be adopted is currently married, both the adult and the spouse must give consent.

Here, both Daughter and Son are eligible to be adopted. The fact that Son is 18 years old and an adult does not disqualify him from being legally adopted by Grandma. The facts do not indicate that he is married, so only his consent is required. He has agreed to the adoption. Similarly, Daughter, who is only 11 years old, does not require consent, though courts will consider it positively that she also agrees.

Therefore, Daughter and Son are eligible to be adopted by Grandma.

Consent to Terminate Parental Rights

Mother - Voluntary Termination

Legal parents must consent to the voluntary termination of their parental rights. Specifically, they will be given notice of the petition to terminate their parental rights, with a summons to appear in court. Upon summons, the parent must appear in court to relinquish their parental rights. Consent must be given in good faith and not under duress or undue influence. Undue influence may be met if there is a person of authority exercising control over someone in a way that an unreasonable person may not agree to.

Here, Mother appears to have consented to the termination of her parental rights when she has "finally told Grandma that she agrees." However, the facts seem to indicate that there might be undue influence because she said she "finally" agreed, which indicates that Grandma has been asking for a long time. The facts do not indicate that Grandma is exercising any control over her daughter to convince her to agree. Further, Mother appears to have drug problems and possibly more, evidenced by her multiple stints in jail and her trip to the rehabilitation center.

Therefore, so long as the court does not determine that Mother has been unduly influenced by Grandma, then her consent to voluntary termination will be accepted.

Father - Involuntary Termination - Abandonment

A father may be deemed to have relinquished his parental rights in certain circumstances, such as if he has abandoned his children. Abandonment has occurred if a parent has never provided any provisions for their children, despite being able to, nor attempted to have any positive relationship with their children. When a parent has abandoned his child, he is not required to receive notice or give consent to the termination of his parental rights.

However, legal parents in jail who have not abandoned their children must be give notice of the petition to terminate their legal rights and an opportunity to consent or object. If a parent objects to termination of their legal rights, a court may nonetheless judicially order

the termination (involuntary termination) if it is in the best interest of the child and other conditions have been met.

Here, it does not appear that Father has completely abandoned his daughter because he did pay the child support "sporadically." The facts do not indicate the last time that he has paid child support, and if it was many years ago, then his sporadic payments may not be sufficient to prevent him from having been considered "abandoned" his child, because he paid less than was owed even though he was able, and has also never tried to communicate with his daughter. Even if they determine that he has not abandoned Daughter, the court may determine to judicially order the termination of his rights based on the fact that he has never tried to have a relationship with Daughter, does not keep up with child support payments, and is incarcerated since Daughter was 2 years old and for another 3 years.

Therefore, Father's rights, even if he does not consent, may be terminated either by way of abandonment or judicial order involuntary termination.

Father's Parents

Individuals must have standing in order to be able to contest the termination of parental rights. To have standing, the individuals must be a party to the suit. Similarly, grandparents will only receive notice of the adoption petition in certain circumstances, such as when the child has lived with the grandparents for a six-month period within the last 24 months.

Here, Father's parents are not qualified to receive notice of the petition of adoption because the children have not lived with them at any time. Similarly, they do not have standing to contest the adoption because they are not a party to the suit.

Therefore, even though they have provided birthday and holiday gifts for Daughter over the years, the Father's parents will likely not be given notice or standing to contest the Daughter's adoption.

Impact the Adoption would have on Child Support Arrearage and Obligation to Pay

Child support is a legal right owed to the child that cannot be waived in any pre-marital agreements or otherwise. A parent owes this funding to the child according to the agreement set forth by the court and failure to pay child support is punishable by law. Subsequent adoption of a child does not impact the amount previously due by the parent. However, the future obligation to pay may be terminated by the new parenting arrangement.

Here, Father will continue to owe the prior child support due to his Daughter. However, his future obligation to pay will cease when he relinquishes his parental rights to the Daughter (either voluntarily or involuntarily).

Ethical Concerns Raised by Boyfriend's Offer to Pay Legal Fees

Third Party Payment of Legal Fees

An attorney generally may not accept payment by third party payers, unless certain conditions are met. The attorney may accept third party payment if 1) he can maintain his independent judgment and not be influenced by the payment of the third party; 2) he retains the duties of loyalty and confidentiality with his client; and 3) the client gives informed consent. A third-party payer should have no privilege or opportunity to influence the case in any way.

Here, attorney may accept Boyfriend's offer to pay for Grandma's legal fees so long as Grandma gives informed consent and attorney ensures that Boyfriend does not influence the case and that attorney upholds his duties of loyalty and confidentiality with Grandma. There are no facts present to indicate that Boyfriend plans to interfere, so this will likely be an acceptable arrangement.

QUESTION NUMBER 2

JULY 2023 BAR EXAMINATION – REAL PROPERTY/CONTRACTS

Jason owned Ajani Fields, a 20-acre property situated in Marion County, Florida, in fee simple. In his will, Jason left Ajani Fields to Lily, and upon her death, to Kyle.

Jason died, and Lily received her interest in the property in a properly recorded deed that was consistent with the devise in Jason's will. Unaware of her actual interest in the property or its value, she decided to sell it. On September 13, Lily posted an advertisement indicating she would sell the property for $300,000.

On September 17, Gideon told Lily that he owned property next door and was interested in purchasing Ajani Fields, but needed some time to decide. Lily said she would give Gideon a week to decide.

Gideon intended to use Ajani Fields and his adjacent 20-acre property for farming. He put out an advertisement for a farmhand. Luke responded and met with Gideon on September 19. Gideon drafted and presented Luke with a written employment agreement that said Luke would work on "all of Gideon's property" with a yearly salary of $50,000 over two years. Gideon told Luke he did not own Ajani Fields yet, but the sale would be happening soon, so Luke would be working on a total of 40 acres of property. Gideon also said he did not own a tractor for Luke to use. Luke accepted, and both parties signed the employment agreement. Later that day, Luke purchased a tractor for $25,000 to do the farm work.

On September 20, Sandra offered Lily $500,000 for the property. Sandra believed that the property was worth far more than Lily's advertised price and wanted to strike a deal quickly. Lily immediately accepted. That day, the two executed a written agreement containing all essential terms, Sandra paid Lily $500,000, and Lily executed a quitclaim deed conveying her interest in the property to Sandra.

On September 21, Gideon called Lily and said that he was accepting her offer to sell Ajani Fields for $300,000. Lily said she sold the property. Gideon promised to sue, saying the property was his because a week had not passed since his prior conversation with Lily.

Gideon immediately called Luke to cancel their agreement. Luke told Gideon he already purchased a tractor and demanded that Gideon honor their deal. Gideon said that he could not afford to pay Luke and make a profit from the farm with half the property size. Luke vowed to sue.

A week later, Luke was able to find another job as a farmhand in the same county making $22,000 per year for a two-year term. Luke was able to return the tractor but lost $2,000 in return fees.

Gideon has retained your law firm and you have been asked to prepare a memorandum as set forth below. For this memorandum, you should assume that there were no legal issues with Jason's ownership or will regarding Ajani Fields.

A. Discuss the merits of any claims that Gideon may assert against Lily with respect to the sale of Ajani Fields.

B. Identify and explain the possessory interests, if any, that Lily, Kyle, Sandra, and Gideon previously had, currently have, or will have in Ajani Fields.

C. Discuss the merits of any claims that Luke may assert against Gideon, including any remedies that Luke may seek and defenses that Gideon may assert.

SELECTED ANSWER TO QUESTION 2

(July 2023 Bar Examination)

To: Gideon

From: Lawyer

MEMORANDUM AT LAW

Re: Ajani Fields Property Dispute & Employment Dispute

Gideon's Claims with Respect to the Sale of Ajani Fields

Gideon's only claim with respect to Ajani Fields is one of promissory estoppel or foreseeable detrimental reliance, which will only allow him to receive reliance damages because no valid contract was formed. A contract is a legally enforceable promise. A contract for the sale of land is governed by the common law. A contract requires mutual assent, through a valid offer and acceptance, consideration, and no defenses to the formation or enforceability of the contract.

An offer demonstrates the offeror's intent to enter a contract on definite and certain terms such that the offeree's can reasonable expect that the offeror would like to enter a contract on such terms. Here, Gideon made the "offer" on September 17th when he told her he was interested in purchasing the property. Lily's ad was not an offer, but an invitation to deal. An invitation to deal may be an offer if there is price, quantity, and offeree identified sufficiently, but here, Lily had not identified an offeree. Gideon's "offer" on September 17th may not be a sufficient offer because it did not include such definite and certain terms as to make it reasonably enforceable by a court. He did not explicitly state whether he would buy the property for the $300k. Furthermore, his offer was not definite, he still had to think about it. Therefore, the true offer likely only occurred when Lily said she would give him a week to decide, although again, it lacks terms that would its contents to be reasonably certain. Lily's offer to keep the offer open for a week was not an enforceable promise. Option contracts only constitute irrevocable offers if they are supported by consideration.

Acceptance is a manifestation of assent to the terms of the offer. Here, Gideon could claim that Lily's offer to give him a week to decide was an acceptance of his offer to buy, but the will be unsuccessful because there were not sufficient terms of the offer to show a meeting of the minds and mutual assent, and, again, her offer was freely recoverable.

Consideration is a bargained for exchange of legal benefit or detriment. Here, no consideration was yet exchanged. Because no promise to pay or sell the land was firmly established. There also must be mutuality, meaning that there are promises on both sides and that they are not illusory. Here, Lily promised to keep the offer open, but currently there is no promise on Gideon's part because he is still deciding. Therefore, a contract was not yet formed.

Finally, there is a significant defense to the enforcement of any such a "contract"--statute of frauds. In Florida, contracts regarding interests in land must be in a writing that can prove the essential terms of the contract with reasonable certainty and is signed by the party to be charged. Essential terms for land contracts include, price and an unambiguous description of the land. The only exception to this rule in which an oral contract could be enforceable would be the part performance exception. This exception requires that there be an oral offer with certain and definite terms, and that the following performance has occurred: possession of the property, paying for the property, and substantial improvements on the property. Gideon can show none of these factors here.

The fact that no valid contract was formed prevents Gideon from gaining ownership of the land. If a contract had been formed, Gideon could likely get a court to grant specific performance in the form of possession of the land instead of money damages because legal damages are inadequate due to the unique nature of each piece of land.

However, Gideon may attempt the equitable action for promissory estoppel and foreseeable detrimental reliance. This is where a party induces reliance on a promise knowing that the other party is likely to rely on the promise, and that the party justifiably relies on the promise to his or her detriment. Courts will then enforce the "contract" to the extent justice so requires, which typically is in the form of reliance damages, or putting the party back in the place as if the contract had never been formed. Here, Lily might have known that Gideon would rely on her promise to keep the offer open. She said he would have a week to decide and knew that it was a piece of farmland that may require certain costs to prepare for ownership. However, it is unclear whether she knew of his reliance, as it was not strongly indicated to her by any of his actions. Gideon likely did not justifiably rely on her promise. While it may have been reasonable for him to expect the promise to stay open, due to the lack of certainty of the final terms of the contract, he probably should not have relied on the "offer" so heavily as to enter into a longterm employment contract that would only be necessary should the sale go through. Property sales are typically arduous processes that a typical person know requires significant inspection and negotiation. Therefore, he did not reasonably rely on the offer. His reliance did cause a detriment, Gideon is now bound to an employment contract under which he could be liable for damages. If the court determines that he did justifiably rely, it will also determine whether injustice requires that Lily pay Gideon for any damages he is liable for under the contract, since the employment contract would not have formed but for Gideon's reliance on Lily's promise. Nevertheless, it is unlikely that the court will grant Gideon this equitable remedy under the circumstances.

<u>Past and Present Possessory Interests</u>

Lily had a life estate in Ajani Fields, which is a present possessory estate that terminates at the end of her natural life. She currently has no interest in the land since she sold it to Sandra.

Kyle no present possessory interest in the land but he has a future possessory interest in the form of a vested remainder. A vested remainder is an executory interest that follow a

life state that is going to a third party and not the grantor after its termination. If it were returning to the grantor it would be a reversion. The remainder is vested because Kyle is ascertained, he is not unborn, and there is no contingent precedent that could block his ability to gain possession at the end of Lily's life. A remainder is subject to Florida's Rule Against Perpetuities, which requires that all unvested property interests be certain to vest or fail within 21 years of the death of a life in being or actually vest or fail within 90 years. Here, the measuring life would be Lily's, and Kyle's interest is certain to vest at the time she dies because it is not contingent. Therefore, his interest is valid under RAP. Finally, Kyle still has the contingent remainder despite Lily's sale. Lily is allowed to sell the land despite only having a life estate, although she is only able to sell the actual interest she has. Therefore, Kyle will still gain ownership of Ajani Fields when Lily dies.

Sandra has a life estate por autre vie. Sandra did not gain fee simple ownership of the property because Lily did not have that to rightfully sell to her. Therefore, he own interest in the land will be for the length of the rest of Lily's life. Sandra only received a quitclaim deed from Lily, which does not include any of the six title covenants available in a general or special warranty deed. Otherwise, Lily would have a claim of action under the warranties of quiet enjoyment and title at the time that her ownership is disturbed by Kyle entering the property.

Gideon has no possessory interest in the land. Even if he is successful under promissory estoppel, he will not receive the land as a remedy but instead only reliance damages.

<u>Luke's Claims Against Gideon</u>

A valid employment contract was formed between Luke and Gideon. An employment contract is governed by the common law. An employment contract that lasts over 1 year and isn't a lifetime employment contract is subject to the statute of frauds--there must be a writing laying out the essential terms with reasonable certainty and signed by the party to be charged. Here, the contract will last for 2 years, so there must be a writing in compliance. Here, the writing seems to comply, it includes essential terms such as the salary and the parties. Employment contracts must specify the subject matter that the work will entail. Here the contract says work on "all of Gideon's property." This may be too unclear to enforce but is likely enough. Both parties signed the contract so it may be enforced against either of them.

Luke will claim that Gideon anticipatorily breached the contract by expressing an unequivocal intent to not honor the contract. Gideon did anticipatorily breach and it was a major breach rather than a minor one. Whether a breach is major or minor depends on whether a party receive a substantial bargain of the benefit. Here, Luke received nothing, so he received no substantial benefit and the breach will be major. Major breaches discharge the nonbreaching party from their duty to perform and entitle them to sue for damages.

<u>Luke's Remedies</u>

In general, one can only collect damages that are reasonably certain and foreseeable and parties have the duty to mitigate damages, or take reasonable efforts to avoid further damages. When an employer breaches an employment contract, the expectation damages are what the employee would have received under the contract less the amount he could be paid for reasonably equivalent work. Therefore, Gideon would be liable for $100k if Luke can show that there is no reasonably equivalent work. However, Luke will have to take reasonable efforts to look for equivalent work.

Under promissory estoppel, Luke can seek reliance damages from Gideon for the purchase of the tractor. The elements of the claim are discussed above. Luke can claim that Gideon induced him to buy the tractor by mentioning one was needed for the work on the land and that Gideon did not already have one. Luke likely did not reasonably rely on the promise because he knew the sale had not happened yet. However, Luke can argue that he assumed the sale was a done deal, especially since Gideon was already entering a binding employment contract with him. If justice so requires, the court will put Luke back in the position as if the contract never happened and he would not have been out $25,000. Gideon's equitable defenses here could be unclean hands (Luke was also aware the sale had not yet occurred). However, Luke can claim that Gideon said "the sale would be happening soon" inducing him to believe that the sale was a done deal and making his reliance justifiable. Again, Luke will have to mitigate by trying to sell the tractor in a commercially reasonable sale.

There is no claim for restitution under a quasi-contract because Gideon has not been unjustly enriched. Under such a claim, if one party conferred a benefit to another party with reasonable expectation to receive a benefit in return, and the party knew of such reasonable expectation but did not put a stop to it, then the party can collect damages if the party of unjustly enriched. There is no unjust enrichment because Gideon was not given the tractor, Luke still has possession. Furthermore, Gideon was not aware that Luke was already purchasing a tractor.

<u>Gideon's Defenses</u>

Gideon can argue that the contract should be rescinded due to impossibility because the subject matter of the contract which formed the basis of the bargain was "destroyed." However, there is still half of the land available under the contract so this argument would likely fail. He can argue that impracticability should excuse his performance. Impracticability is where unreasonable and extreme difficulty or expense is caused by an event occurring, the nonoccurrence of which was presumed by both parties. He could argue that both parties assumed that his contract to buy land would go through. However, this did not cause unreasonable expense on his part because he could still pay Luke to help with the rest of his land and although he would be overpaying, it is not enough to rise to the level of impracticability. He can argue for frustration of purpose, the purpose of the contract that was known to the parties at the time of contracting was to work on the new land and that a supervening event left the purpose valueless not at the fault of either party. This defense is likely to fail because the sale of the land should have been foreseeable to both parties. Gideon could argue it was not if the parties were not legally savvy and truly

believed the option contract was fully enforceable despite the lack of consideration and lack of a written land sales contract.

Gideon can argue that there was mutual mistake on a basic assumption of the contract which was material to both parties and that he did not assume the risk. Purchasing the new land was certainly a basic assumption of the contract because it was communicated to both parties "sale will be happening soon" "40 acres." This extrinsic evidence would be admissible despite the parole evidence rule because there is an exception for contract formation defects. The parole evidence rule makes extrinsic evidence of prior or contemporaneous oral or written contracts inadmissible to alter an unambiguous term in an integrated agreement, which is intended to be the final and complete expression of the parties. Returning to the mutual mistake defense, the purchase of the land was material to the contract because it was the only reason Gideon needed Luke's services. However, Gideon assumed the risk that the sale may not go through. He entered into a binding contract when the purpose of still not finalized, and, thus, he should bear the risk and the contract may not be rescinded or voidable due to mutual mistake.

Gideon's best bet is to argue that the purchase of the land was a condition precedent to the effectiveness of the contract, and that the nonoccurrence of which would discharge both parties of any absolute duties. Based on their discussion, it does not seem like Gideon made it clear to Luke that this was a condition precedent, but it is another exception to the parole evidence rule and so Gideon may be able to prove that it was a part of the contract based on extrinsic evidence. If it were a condition precedent, then Gideon did not breach and Luke will only be able to collect any potential reliance damages.

QUESTION NUMBER 3

JULY 2023 BAR EXAMINATION – TORTS/ETHICS

Amy and Bob own a truck and a sports car. The vehicles are titled in both Amy's and Bob's names, but Bob has never driven the sports car.

Amy and Bob live with their 16-year-old son, Sonny. Sonny is a licensed driver and can drive both vehicles. When Sonny received his driver's license, Bob gave Sonny his key to the sports car.

Amy took the sports car to a mechanic for an oil change. The mechanic noticed that the car's tires were extremely worn. He told Amy that the tires needed to be replaced as soon as possible. He explained that the right size tires were out of stock, but would arrive in three days. Amy made an appointment to have the tires replaced later that week and drove the car home.

That night, Sonny told Amy that he was picking up his friend in the sports car to go to the movies. Amy told Sonny to be careful while driving because it was raining.

While driving to his friend's house, Sonny pulled out his phone to play music. As Sonny approached an intersection with a green light and no traffic, he looked down at the phone and scrolled through a list of available songs.

Sonny did not look up at the road until he selected a song. The traffic light was now red. Sonny hit the brakes and lost control of the car on the wet road. The car skidded out of its lane and into a crosswalk at the intersection, where it struck Parker. Parker had the right of way when she was in the crosswalk. Parker died from the collision before emergency personnel arrived.

Parker was a student in her final year of medical school. She was on track to finish near the top of her class, and she planned to become a surgeon. She was survived by her husband, Henry, and her mother, Maria.

Maria is the personal representative for Parker's estate. One week after the accident, Maria received a phone call from a number that she did not recognize. About 10 minutes later, she received an email from Lawyer. In the email, Lawyer introduced himself, explained that a mutual friend had given him Maria's contact information, and stated that he was emailing after he could not reach her by phone. He expressed his sympathies and explained that he read about Parker's accident in the news. Lawyer told Maria that he had handled similar cases and said: "Based on my experience, I will get you a significant recovery. In fact, you should get punitive damages."

Maria has approached your law firm for assistance with the matter. Prepare a memorandum as follows:

A. Analyze any claims that Maria and Henry could assert against Sonny, Amy, and Bob. Your analysis should address any defenses that may be raised and available remedies.

B. Evaluate the merits of Lawyer's statement about punitive damages.

C. Discuss any ethical issues raised by Lawyer's conduct.

SELECTED ANSWER TO QUESTION 3

(July 2023 Bar Examination)

To: Maria

From: Attorney

Re: Wrongful Death/Negligence Claim

MEMORANDUM OF LAW

Negligence, Generally

To establish a prima facie case of negligence, the plaintiff must prove the following by a preponderance of the evidence: (1) duty; (2) breach; (3) causation (actual and proximate); and (4) harm. A duty of care is owed to all foreseeable plaintiffs. A breach is a failure to conform to the requisite duty/standard of care, and is typically a question of fact for a jury. The typical standard of care in ordinary negligence is to act a reasonably prudent person under the circumstances. There are two forms of causation: actual and proximate. Actual cause is the factual "but for" cause of a certain result; there can be many actual causes in a negligence action. Proximate cause is the "legal cause," and limits the scope of causation only to foreseeable results. Lastly, there must be some sort of harm (typically physical), and plaintiffs can recover compensatory damages (both economic and non-economic - pain and suffering, etc.). With this broad framework in mind, this memo will analyze Maria and Henry's potential claims against all the parties involved here.

Wrongful Death, Generally

Florida allows for wrongful death actions, which allows the personal representative of a deceased's estate to recover against a tortfeasor against the deceased. Here, Sonny likely acted negligently in causing Parker's death. Thus, Maria, as PR of the estate, is able to step into Parker's shoes and claim damages against Sonny (and any other parties, discussed below) for Parker's wrongful death.

Sonny - Negligence

Duty

Here, Sonny owed a duty of care to Parker. Parker, as a person lawfully crossing the crosswalk when she had the right of way, is clearly a foreseeable plaintiff for Sonny, who was driving towards that same crosswalk. Parker was well within the "zone of danger" to Parker's driving.

Breach

Here, Sonny likely breached his duty of care to act as a reasonably prudent person. Sonny was driving in the rain and looking down at his phone while approaching an intersection. He

was scrolling through a list of available songs, and he did not look up until he picked a song (suggesting he was looking at his phone, and not on the road, for quite some time). A reasonably prudent person would likely never look at their phone at all while driving, regardless of the road conditions or distance from an intersection. Sonny may try to argue that he should actually be held to the lower standard of care for children; that he was only required to act as a reasonable 16-year-old with like age, education, experience, and skill. This argument will fail. Because he was driving a motorized sports car - something that is clearly an adult activity, he will be held to the adult standard of care of a reasonably prudent person. Thus, Sonny breached his standard of care.

Causation

Causation is also easily satisfied here. Sonny was the actual cause of Parker's death. But for Sonny looking down at his phone, he would have been able to stop in time and avoid Parker in the intersection. Additionally, proximate cause is satisfied. Everything that happened between Sonny's breach and Parker's death was foreseeable, and there were no intervening, superseding causes between the breach and Parker's death that would break the chain of causation.

Harm

There was clearly a harm here - Parker died as a result of the collision before emergency personnel arrived. Due to some nuances in this case, the full extent and nature of damages will be discussed in a separate section below. However, Maria and Henry are very likely to be successful in their negligence action against Sonny.

Amy and Bob - Dangerous Instrumentality Doctrine and Negligence

Dangerous Instrumentality

Florida has a specific cause of action against those who entrust their vehicle to others. A person who entrusts their vehicle to another, and then harm is done by the vehicle entrusted, is liable to the person harmed under the dangerous instrumentality doctrine. These claims are subject to a number of liability limits categorized by per person and per incident amounts. Here, Bob gave Sonny his key to the sports car to use after Sonny received his driver's license.

Additionally, Amy allowed Sonny to drive the night of the accident when it was raining, she merely told him to "be careful." Thus, both the titleholders entrusted the vehicle to Sonny, and they may be found liable up to certain limits under the dangerous instrumentality doctrine.

As an aside, the sports car (and truck) are titled in both Amy's and Bob's names. If Amy and Bob are married, then this joint titling gives rise to a presumption of a tenancy by the entirety. Only joint creditors of both spouses can levy on property titled as a tenancy by the entirety. If Amy and Bob are found liable and cannot otherwise pay, only a joint creditor of both Amy and Bob may levy on and terminate the tenancy by the entirety of the sports car.

Ordinary Negligence

Maria may also be able to recover in an action for ordinary negligence, under the framework discussed above. While parents are typically not vicariously liable for the negligent acts of their children, they can be found independently liable for negligence on a theory of negligent supervision, ordinary negligence, etc.

Here, Maria may argue that Amy and Bob owed a duty to everyone who could foreseeably be within the zone of danger of the sports car. Additionally, Maria may argue that the requisite standard of care was breached (that of a reasonably prudent person under the circumstances). Amy and Bob may have breached their duty by becoming aware of the need to replace the tires as soon as possible, yet allowing their 16-year-old son to drive on a rainy night without warning him of the condition of the tires. Amy may argue that she acted reasonably because she immediately made an appointment to have the tires replaced later that week; she was only unable to get it fixed at the mechanic because they were out of the right size. She may also argue that while she did not give Sonny notice of the condition of the tires, she did give Sonny notice that it was raining and urged him to be careful. Causation is also questionable - while the parents' actions were certainly an actual cause, it will be harder for Maria to argue that it was the proximate cause. Nonetheless, Maria can argue that it is foreseeable that a 16-year-old will not look at the road when selecting music, and thus, Sonny's actions did not break the chain of causation. Maria and Henry are more likely to recover against the parents on the dangerous instrumentality theory.

Remedies

The typical remedy in negligence actions is compensatory damages, which can include economic damages (hospital bills, lost wages, etc.), and non-economic damages (pain and suffering, emotional distress, etc.). Here, Maria and Henry may be able to recover any economic damages due to the paramedics being called. Additionally, both Maria and Henry may seek loss of consortium damages. These are losses incurred by close relatives or spouses for companionship, housework, and (for Henry) sex. The facts indicate that Parker was near the top of her class in medical school and was on track to become a surgeon. If Parker had already been providing financial support or care to her mother or husband as a result of her medical school success, this will only serve to bolster Maria and Henry's claim to loss of consortium damages. Note that Florida has abolished joint and several liability. Thus, to receive a full recovery, Maria and Henry will need to sue all defendants (Sonny, Amy, and Bob) for their individual apportionment % of fault.

Defenses

Collateral Source Rule

The defendants may argue that there should be a reduction in damages due to Florida's collateral source rule. This rule states that any recovery should be reduced by any monetary award received from another source (except for Medicare and Medicaid, and subject to an offset for the costs of maintaining any such policy). Thus, if Parker had life insurance or any other payable-on-death benefit, defendants can argue that those collateral payments should

offset any damages awarded against them.

Comparative Fault

Florida has recently adopted partial comparative fault, whereby it is a full bar to recovery if the plaintiff was more than 50% at fault for the injury. Here, the facts state that Parker had the right of way and was lawfully in the crosswalk. Thus, it would appear that there is no level of fault attributable to the plaintiff (now, the PR of the estate) because Parker was not acting negligently.

Punitive Damages

Here, Lawyer stated that Maria should receive punitive damages. Punitive damages are available in tort claims if the defendant engaged in intentional misconduct or gross negligence. The amount of punitive damages is limited to either 3x compensatory damages or $500,000, whichever is greater (unless the defendant acted intentionally or was intoxicated, in which the limits may go up).

Here, there is no indication of intentional misconduct or gross negligence. While Parker's resulting death is sad, there is nothing to indicate that Sonny's conduct in checking his phone and running the red light was the result of intentional misconduct or gross negligence. While looking at your phone for an extended period of time while driving is certainly negligent, it does not rise to the level of gross negligence necessary to sustain an award of punitive damages. Thus, Maria (and Henry) will likely be limited to their compensatory damages and loss of consortium (if available).

Ethical Issues

There are two major ethical concerns with Lawyer's behavior: the soliciting phone call/email, and the implied guarantee of a significant recovery. The Florida Rules of Professional Conduct prohibit the solicitation of clients. While mailings and advertisements are allowed (although heavily regulated), direct face-to-face or phone communications may not be initiated by an attorney unless the prospective client is a close family member or former client. Critically, here no attorney may contact a prospective client about an accident within 30 days of that accident. Lawyer in this case both called and emailed Maria one week after the accident, well within the prohibited time period for such solicitation. This was a violation of the RPC - it is of no consequence that Lawyer received Maria's contact information from a mutual friend.

Additionally, under the RPC, attorneys may not guarantee a particular outcome for you. Here, Lawyer stated that he will get Maria a "significant recovery." An attorney may advise clients and prospective clients about their likelihood of success on the merits, and like Lawyer, may use their past experience in giving such advice. But here, Lawyer went too far by guaranteeing such a recovery. This is not permitted under the Florida RPC.

PART II - SAMPLE MULTIPLE-CHOICE QUESTIONS AND ANSWERS

Part II of this publication contains sample questions of the Florida multiple-choice portion of the examination. The questions and answers may not be reprinted without the prior written consent of the Florida Board of Bar Examiners.

The answers appear at the end of this section.

Applicable Law

Questions on the Florida Bar Examination should be answered in accordance with applicable law in force at the time of examination. Questions on Part A are designed to test your knowledge of both general law and Florida law. When Florida law varies from general law, the question should be answered in accordance with Florida law.

MULTIPLE-CHOICE EXAMINATION INSTRUCTIONS

These instructions appear on the cover of the test booklet given at the examination.

1. This booklet contains segments 4, 5, and 6 of the General Bar Examination. It is composed of 100 multiple-choice, machine-scored items. These three afternoon segments have the same value as the three morning segments.

2. Write your badge number in the box at the top left of the cover of your test booklet.

3. When instructed, without breaking the seal, take out the answer sheet.

4. Use a No. 2 pencil to mark on the answer sheet.

5. On the answer sheet, print your name as it appears on your badge, the date, and your badge/ID number.

6. In the block on the right of the answer sheet, print your badge/ID number and blacken the corresponding bubbles underneath.

7. STOP. Do not break the seal until advised to do so by the examination administrator.

8. Use the instruction sheet to cover your answers.

9. To further assure the quality of future examinations, this examination contains some questions that are being pre-tested and do not count toward your score. Time limits have been adjusted accordingly.

10. In grading these multiple-choice items, an unanswered item will be counted the same as an item answered incorrectly; therefore, it is to your advantage to mark an answer even if you must guess.

11. Mark your answers to all questions by marking the corresponding space on the separate answer sheet. Mark only one answer to each item. Erase your first mark completely and mark your new choice to change an answer.

12. At the conclusion of this session, the Board will collect both this question booklet and your answer sheet. If you complete your answers before the period is up,

and more than 15 minutes remain before the end of the session, you may turn in your question booklet and answer sheet to one of the proctors outside the examination room. If, however, fewer than 15 minutes remain, please remain at your seat until time is called and the Board has collected all question booklets and answer sheets.

13. THESE QUESTIONS AND YOUR ANSWERS ARE THE PROPERTY OF THE BOARD AND ARE NOT TO BE REMOVED FROM THE EXAMINATION AREA NOR ARE THEY TO BE REPRODUCED IN ANY FORM.

46 SAMPLE MULTIPLE-CHOICE QUESTIONS

1. One week before the close of discovery in a civil case, Plaintiff considered voluntarily dismissing her action. Plaintiff had never voluntarily dismissed her action. Plaintiff expected that Defendant would move for summary judgment shortly after the close of discovery. Which is true?

   (A) Plaintiff may voluntarily dismiss without leave of court, but the court may assess costs against Plaintiff.
   (B) Plaintiff may voluntarily dismiss without leave of court, and Plaintiff would have to pay costs only if Plaintiff brought the same claims against Defendant again.
   (C) Plaintiff would be subject to taxation of costs only if the court entered a dismissal with prejudice.
   (D) Plaintiff would be subject to taxation of costs only if Defendant prevailed at trial.

2. Dennis was charged with burglary and grand theft. At trial, Dennis called his wife in his case-in-chief to testify that Dennis was known throughout the area where they live as an honest person. The prosecution objected. The testimony is

   (A) admissible as character evidence.
   (B) admissible as impeachment of the alleged victim.
   (C) inadmissible as improper opinion testimony.
   (D) inadmissible as improper reputation testimony.

3. Plaintiff alleges an injury was sustained when a stack of canned goods fell on her in defendant's supermarket. During its defense, the supermarket attempts to offer testimony tending to show the procedures of its supermarket as to displaying and piling canned goods for the consideration of the jury on the question of negligence. Under the Florida Evidence Code,

   (A) the evidence is irrelevant.
   (B) the evidence is admissible only if corroborated by a written policy or procedure addressing the practice.
   (C) the evidence is admissible if it is routine practice of the supermarket.
   (D) the evidence is admissible only if there is a universally accepted method used in the trade.

4. Toymakers, Inc. is a Georgia corporation transacting business in Florida. Until it obtains a certificate of authority to transact business in Florida, which of the following activities is Toymakers prohibited from doing in Florida?

   (A) Maintaining a proceeding in any court in Florida.
   (B) Defending a proceeding in any court in Florida.
   (C) Obtaining orders by mail from Florida residents which require acceptance in Georgia.
   (D) Selling its products through independent contractors in Florida.

5. Frank was arrested and charged with a felony. In response to his attorney's request for discovery, the State should provide certain information. Which of the following is the State NOT required to produce?

   (A) Results of physical or mental examinations, scientific tests, experiments or comparisons.
   (B) All portions of recorded grand jury minutes that pertain to Frank's case.
   (C) All tangible papers or objects that the State intends to use at trial, whether the papers came from Frank or not.
   (D) The names and addresses of all persons known to have information that may be relevant to the offense charged.

6. Nancy Quinn had two sons, Earl Quinn and Brent Quinn, before she married Al Green in 2014. In 2016, Nancy made her first and only will, leaving half her estate to "my husband, Al Green" and one-fourth to each of her two sons.

   On February 15, 2018, Nancy and Al were divorced, but Nancy never got around to making a new will. Nancy died this year, and she was survived by Al, Earl, Brent, and her father, Norman Ritter. Which of the following statements regarding the distribution of Nancy's estate is correct?

   (A) Since a divorce revokes a will made during coverture, Nancy died intestate, and Earl and Brent will each take one-half of Nancy's estate.
   (B) Earl and Brent will each take one-half of Nancy's estate because Nancy's will is void only as it affects Al Green.
   (C) Since Nancy did not change her will within one year after her divorce from Al, Nancy's estate will be distributed exactly as stated in her will.
   (D) Since Nancy's will referred to Al Green specifically as her husband, Al Green will take nothing because he was not Nancy's husband at the time of her death. Earl, Brent, and Norman Ritter will each take one-third of Nancy's estate.

7. Cooper is suing March for money damages. Because he believes portions of March's deposition are highly favorable to his case, Cooper's attorney intends to read parts of the deposition at trial instead of calling March to the stand. March objects to Cooper's use of the deposition at trial. What is the court's likely ruling?

   (A) Cooper may use the deposition at trial, but, if requested, he must read all parts that in fairness ought to be considered with the part introduced.
   (B) Cooper may use the deposition at trial, but only to contradict or impeach March's prior inconsistent statements or pleadings.
   (C) Cooper may not use the deposition at trial, as March is able to testify and no exceptional circumstances exist.
   (D) Cooper may not use the deposition at trial, as this would make March his witness and immune to impeachment.

8. Pete Smith is the active partner and Bill Jones is the silent partner in a general partnership known as "Pete Smith Plumbing." After six years of being uninvolved in the management of the partnership business, Bill purchased 100 toilets for the business. Pete is incensed because it will probably take years to use up the inventory of so many toilets and seeks your advice. The best advice is

   (A) Bill can bind the partnership by his act.
   (B) silent partners are investors only and cannot bind the partnership.
   (C) unless his name is in the partnership name, third persons are "on notice" that he is unauthorized to contract for the partnership.
   (D) Bill, as a silent partner, is not authorized to purchase and, therefore, the sale may be set aside.

9. The State of Florida is prosecuting a former police officer for extortion of money from prostitutes. One of the State's witnesses is Sally. Sally has an adult conviction for vehicular homicide. She was charged with driving a car in a reckless manner resulting in the death of her sister, a passenger in the car. Sally pleaded nolo contendere, was adjudicated guilty and received a suspended sentence although she could have received a sentence of state imprisonment up to 5 years. At trial, evidence of this conviction is

   (A) admissible to impeach Sally because vehicular homicide carries a maximum penalty in excess of 1 year.
   (B) inadmissible to impeach Sally because she never admitted her guilt since she entered a plea of nolo contendere.
   (C) inadmissible to impeach Sally because she received a suspended sentence.
   (D) inadmissible to impeach Sally because she is only a witness and not the criminal defendant.

10. Dan was served with a subpoena to appear and testify at a civil trial by a 19-year-old process server. The process server lied about his age to get the job. The subpoena was issued by an attorney of record in the case and not by the clerk of the court.

    Dan would rather stay home than attend the trial. Dan consults with his attorney to find out if he must comply with the subpoena. The attorney should tell Dan to

    (A) comply with the subpoena to avoid the risk of being held in contempt by the court.
    (B) object to the subpoena because it should have been issued by the clerk of court, not an attorney in the case.
    (C) object to the subpoena because it was served by a 19 year old and, under Florida law, a process server must be no less than 21 years of age.
    (D) object to the subpoena because a subpoena can only be used to compel an individual to appear for a deposition or to produce documents.

11. Defendant was arrested on February 1 and released one month later on March 1 after being charged with a felony. On December 1 of the same year as his arrest, he filed a motion to discharge since no trial or other action had occurred to that point. The court held a hearing 3 days after the motion was filed. Defendant should be

    (A) discharged because more than 175 days passed between arrest and the filing of the motion to discharge.
    (B) discharged because more than 175 days passed between his release from jail and the filing of the motion to discharge.
    (C) brought to trial within 90 days of the filing of the motion to discharge.
    (D) brought to trial within 10 days of the hearing on the motion to discharge.

12. At trial, during the plaintiff's case-in-chief, the plaintiff called as a witness the managing agent of the defendant corporation, who was then sworn in and testified. Defense counsel objected to the plaintiff's questions either as leading or as impeaching the witness. In ruling on the objections, the trial court should

    (A) sustain all the objections and require the plaintiff to pursue this type of interrogation only during the plaintiff's cross-examination of this witness during the defendant's case-in-chief.
    (B) sustain the leading question objections but overrule the other objections because a party is not permitted to ask leading questions of his own witness at trial.
    (C) sustain the impeachment questions but overrule the other objections because a party is not permitted to impeach his own witness at trial.
    (D) overrule all the objections because the witness is adverse to the plaintiff and therefore may be interrogated by leading questions and subjected to impeachment.

13. Vehicles driven by Murphy and Goode collided at an intersection where a traffic light is present. Before the filing of any lawsuit, Murphy told Goode that he ran the red light and offered to settle the claim for $500. Goode refused to accept it. Murphy sued Goode for his personal injuries and property damage and Goode, who was not injured, counterclaimed for property damage.

    At trial, Goode's attorney called his client to the stand and asked him if Murphy has ever made any offers to settle the dispute. If Murphy's counsel objects, the trial court's proper ruling would be to

    (A) sustain the objection because offers to compromise a claim are inadmissible to prove liability.
    (B) overrule the objection because the offer was made prior to the filing of a lawsuit.
    (C) overrule the objection because only an offer to pay medical expenses is inadmissible under the Florida Evidence Code.
    (D) overrule the objection because Murphy's statement was an admission.

14. Peter is the named plaintiff in a class action lawsuit alleging that a local cell phone store had engaged in unfair or deceptive trade practices in its sales of cell phones. In the complaint, Peter sought damages on behalf of himself and a class of all other customers who had purchased cell phones from the store. In order for Peter to maintain the class action, the court must find that

    (A) The class members' claims contain no questions of law or fact that affect only individual members of the class.
    (B) Peter can fairly and adequately protect and represent the interests of each class member.
    (C) Allowing separate claims from individual class members risks inconsistent or varying adjudications.
    (D) None of the above.

15. Leon died intestate owning Florida homestead property titled in his own name. He resided on the property for many years prior to his death. He is survived by his widow, Charlotte, and an adult son by an earlier marriage, Bob. Leon purchased the homestead property with his own funds during the time of his marriage to Bob's mother. Proper disposition of the homestead property is

    (A) fee simple to Charlotte.
    (B) Bob and Charlotte as tenants in common.
    (C) life estate to Charlotte, vested remainder to Bob.
    (D) Bob and Charlotte as joint tenants with right of survivorship.

16. M Corp.'s only assets are machines now in storage. One of its directors is approached by a party interested in buying all of the machines. Which is true regarding the sale of assets?

    (A) The board must consult with shareholders but can sell the machines even if a majority of the shareholders recommends against the sale.
    (B) A majority of the shareholders entitled to vote on the matter must vote in favor before M Corp. can sell the machinery.
    (C) The proposed transaction does not implicate the shareholders' appraisal rights.
    (D) Two-thirds of the board of directors must vote in favor before M Corp. can sell the machinery.

17. The court referred a civil case for mediation on April 1. On April 10, the mediator set an initial mediation conference on April 30. Plaintiff's attorney served a set of interrogatories one week before the case was referred to mediation. Which is true?

    (A) A referral to mediation tolled the time for Defendant to respond to Plaintiff's interrogatories from April 10 to April 30.
    (B) Defendant did not have to respond to the interrogatories until the mediator declared an impasse.
    (C) The referral to mediation automatically added 30 days to the time period to respond to any discovery.
    (D) The referral to mediation did not affect the time period for Defendant to respond to Defendant's interrogatories.

18. William, who solely owned a legal homestead, passed away leaving Lynn, his spouse, and Christopher, their minor child. In his will, William left the homestead to his disabled cousin, Daisy, so that Daisy may have a safe place to live. Lynn contests the devise of the homestead. How will the court rule?

    (A) By allowing the homestead to pass to Daisy.
    (B) By allowing the homestead to pass to Daisy as a life estate with a remainder to Lynn.
    (C) By awarding the homestead to Lynn.
    (D) By awarding the homestead to Lynn and Christopher in equal shares.

19. Mary's grandmother, Helga, died several weeks ago. Mary knows her grandmother had a will, but she cannot find it, nor can she find a copy of it. She knows that her grandmother left her a rather large portion of her estate valued at three million dollars. Which of the following is correct?

    (A) Since the will cannot be found, the law will treat Mary's grandmother as if she died intestate.
    (B) The content of the will can be proved through Mary's testimony.
    (C) The content of the will must be proved by the testimony of at least one disinterested witness.
    (D) The content of the will must be proved by the testimony of at least two disinterested witnesses.

20. Bob Wilson borrowed $20,000 from Ted Lamar to open a hardware store. Ted's only interest in the business was the repayment of his 5-year unsecured loan. Bob was so grateful for the loan that he named his business "Wilson and Lamar Hardware" and purchased signs and advertising displaying this name. He also listed Bob Wilson and Ted Lamar as "partners" on his stationery. When Ted found out, he was flattered to the point that he voluntarily reduced Bob's interest rate from 9 percent to 8 percent per annum.

    A few weeks later, Pete Smith, who had assumed that both Wilson and Lamar were operating the hardware store and was not familiar with the true situation, sold goods to Wilson and Lamar Hardware. Pete Smith has been unable to collect for the goods and he seeks your advice. Your advice to Pete is

    (A) only Bob Wilson is liable.
    (B) Bob Wilson and Ted Lamar are liable jointly.
    (C) Bob Wilson is liable for the entire amount and Ted Lamar is liable only to the extent the debt cannot be collected from Bob Wilson.
    (D) only the de facto partnership arising from the relationship between Wilson and Lamar is liable.

21. During a deposition upon oral examination, a party's counsel may instruct a deponent not to answer a question for which of the following reasons?

    (A) The question asks for hearsay testimony that would be inadmissible at a trial.
    (B) The question asks for evidence protected by a privilege.
    (C) The question asks the deponent for an opinion concerning the ultimate legal issue in the case.
    (D) None of the above.

22. Bill, a single man, owned pasture land in Deerwoods, Florida, which he leased to a tenant. He also owned a condominium in Miami, which he held for investment. In his will, he devised the pasture land to his son Tommy and the condominium to his daughter Julie. All other assets would pass equally to Tommy and Julie.

    Bill met Kathy and married her after she executed a valid prenuptial agreement relinquishing all rights she might otherwise enjoy by marrying Bill. On their Miami honeymoon they drove by the condominium and Kathy declared she'd love to live there. Bill was so happy with Kathy that after the honeymoon he signed and delivered to Kathy a deed conveying the condominium to himself and Kathy as an estate by the entirety and made plans to live in the condominium as soon as the tenant vacated. Bill died the next day. How are the foregoing assets distributed?

    (A) Kathy gets the condominium regardless of the prenuptial agreement, Tommy takes the pasture land and Tommy and Julie split the rest of the estate.
    (B) Due to Kathy's prenuptial agreement, Tommy receives the pasture land, Julie gets the condominium and Tommy and Julie split the rest of the estate.
    (C) Kathy gets the condominium, but because Bill had originally indicated his intent to devise equally to his children, Tommy and Julie will split the remaining estate.
    (D) Regardless of the prenuptial agreement, Kathy is a pretermitted spouse. Since Bill leaves surviving lineal descendants who are not Kathy's, Kathy receives 50% of the estate, Tommy gets the pasture land, and Tommy and Julie split the residue of the estate.

23. Paula is the mother of three children. One child, William, shares Paula's passion for flying. Paula is no longer married to the three children's father, Harry. When William reached eighteen years of age, Paula gave William her bi-plane worth $120,000 and said to William, "William, I know you love this plane. I give it to you now in advance since you will inherit the plane one day anyway."

    Paula subsequently died without leaving a will. At her death, her estate was worth $240,000. Which is true regarding the disposition of Paula’s estate?

    (A) Each of Paula's children will receive $120,000, except for William who will receive nothing.
    (B) Each of Paula's three children will receive $80,000.
    (C) Harry will receive $20,000 plus one-half of the residue of the estate and the three children will share the other one-half of the residue equally.
    (D) Harry will receive $20,000 plus one-half of the residue of the estate and the children, except for William, will share the other one-half of the residue equally.

24. Joan is seriously injured in an automobile accident at 7:00 a.m., June 22. Sunrise on that date was 6:22 a.m. Joan brings suit against Sam, the driver of the other car involved, alleging his failure to have his headlights on caused the accident.

    Sam, in support of his claim that his failure to have his headlights on was not negligent, requests that the judge take judicial notice of the fact that Section 316.217, Florida Statutes, requires the use of headlights only between sunset and sunrise. Sam did not notify Joan prior to trial that he would make this request. The court

    (A) may take judicial notice if Sam shows good cause for his failure to notify Joan of his intention to make this request, and both parties are given the opportunity to present relevant information regarding the request.
    (B) must take judicial notice, because it is public statutory law of Florida.
    (C) must take judicial notice, as it is not subject to dispute because it is generally known within the territorial jurisdiction of the court.
    (D) may not take judicial notice, because Sam failed to give Joan timely notice of his intention to seek judicial notice of this fact at trial.

25. The articles of incorporation for Number One Corporation grant to its board of directors the power to take any action as authorized by law. Which of the following actions by the board of directors must also be approved by the shareholders of Number One Corporation?

    (A) Extension of the duration of Number One Corporation if it was incorporated at a time when limited duration was required by law.
    (B) Merger of Number One Corporation into another corporation with the other corporation becoming the surviving corporation.
    (C) Changing of the corporate name to Number One, Inc.
    (D) Changing of the par value for a class of shares of Number One Corporation.

26. Plaintiff sued Defendant for conversion of stock certificates of ABC Corporation. During the subsequent civil trial, Plaintiff offers into evidence a copy of <u>The New York Times</u> to establish the price of ABC stock on the day of the alleged conversion. Defendant objects on grounds of hearsay

    Assuming that the trial judge overrules the hearsay objection, what evidence, if any, would Plaintiff need to present to authenticate the newspaper?

    (A) No evidence is required because the court overruled the hearsay objection.
    (B) No evidence is required because the document is self-authenticating.
    (C) Authentication must be established by introduction of the document accompanied by an affidavit from a records custodian at the newspaper.
    (D) Authentication must be established by introduction of the document through the testimony of a witness with knowledge that the document is what it is claimed to be.

27. In a pretrial motion, the defendant argues there are no genuine issues of material fact. In support of the motion, the defendant attaches several affidavits from witnesses. Which is the correct caption for the motion?

    (A) Motion to Dismiss for Failure to State a Cause of Action.
    (B) Motion for Judgment on the Pleadings.
    (C) Motion for Summary Judgment.
    (D) Motion for Directed Verdict.

28. Jill made a will leaving all of her stocks to Lou and the rest of her estate to Beth. Several weeks later, she created a codicil to the will that devises her jewelry to Ann. Jill and Beth had a fight and Jill mistakenly ripped up the codicil rather than the will. Jill dies. Which is true about the distribution of Jill's estate?

    (A) Beth receives the jewelry pursuant to the terms of the will.
    (B) Jill's estate will be distributed as intestate property because Jill revoked her will.
    (C) Ann receives the jewelry under the terms of the codicil.
    (D) None of the above.

29. During Defendant's first-degree murder trial, the state called Witness to testify. Witness testified that Defendant was not the man she saw shoot the victim. During the investigation of the murder, Witness told prosecutor that she saw Defendant shoot the victim. This prior statement was made under oath and was recorded by a court reporter, but Defendant's attorney was not present.

    If the State seeks to introduce Witness' prior inconsistent statement for the sole purpose of impeaching Witness, should the court allow the prior statement to be admitted into evidence?

    (A) Yes, because any party can attack the credibility of a witness by introducing a prior inconsistent statement.
    (B) Yes, because a prior inconsistent statement given under oath can be used by any party for any purpose.
    (C) No, because the state cannot impeach its own witness with a prior inconsistent statement.
    (D) No, because Defendant did not have an opportunity to cross-examine Witness at the time the statement was made.

30. Andy and Donna form an LLC and are the only members. Andy contributes a tract of commercial real estate to the LLC. Donna contributes $150,000. Which is true?

(A) Andy and the LLC are co-owners of the commercial real estate.
(B) Donna and the LLC are co-owners of any property that is acquired with the $150,000.
(C) The LLC is the sole owner of the commercial real estate and any property that is acquired with the $150,000.
(D) None of the above.

31. In a timely post-trial motion, Defendant argued for the first time that the trial court lacked subject matter jurisdiction over the case. What action should the court take?

(A) Entertain the motion, because Defendant can assert lack of subject matter jurisdiction at any time.
(B) Entertain the motion, because Defendant can assert lack of subject matter jurisdiction as long as it is raised within 10 days of the judgment.
(C) Refuse to entertain the motion, because Defendant did not raise lack of subject matter jurisdiction in its answer.
(D) Refuse to entertain the motion, because Defendant did not raise lack of subject matter jurisdiction at trial.

32. Smith and Jones had planned to form a Florida corporation that would have done business as an engine repair shop. No paperwork had been filed with the Secretary of State relating to the corporation when Smith and Jones began to purchase equipment needed for the engine repair business. Together they executed and delivered a $10,000 promissory note to Seller in the name of Engine Repair, Inc., signed by Smith "as president" and Jones "as secretary" of that nonexistent corporation. There was no personal guaranty by either Smith or Jones on the note. The corporation was never formed.

Seller learned that the corporation was not in existence only after the debt was not timely paid. Smith was in bankruptcy by that time and Seller sued Jones personally for the entire $10,000. Jones moved to dismiss. In its ruling, the court should

(A) grant the motion because Smith is an indispensable party.
(B) grant the motion to dismiss because Jones did not personally guarantee the note.
(C) deny the motion because Jones signed the note purporting to act on behalf of the corporation with actual knowledge of its nonexistence.
(D) deny the motion because Jones' actions effectively created a corporation by estoppel.

33. Raymond had a valid Florida will devising his entire estate to his friend, Jake. Raymond and Jake had a fight, and Raymond then executed a second valid will, devising his entire estate to charities and expressly revoking the first will. Years later, Raymond and Jake reconciled and Raymond burned the second will. Raymond later died. Does Jake inherit the estate?

    (A) Yes, because burning the second will was an effective act of revocation, reviving the original will.
    (B) Yes, because Florida law is construed to avoid intestacy.
    (C) No, because burning the second will was an insufficient act of revocation absent additional evidence.
    (D) No, because revocation of the second will does not revive the first one.

34. Plaintiff filed a civil complaint against Defendant four years ago. This complaint was voluntarily dismissed three years ago. Two years ago, Plaintiff filed the complaint again and voluntarily dismissed it last year. May Plaintiff successfully file the complaint again this year?

    (A) Yes, if the statute of limitations has not run.
    (B) Yes, if the most recent complaint arose out of the conduct, transaction, or occurrence set forth in the previous complaints.
    (C) No, because the second voluntary dismissal operated as an adjudication on the merits.
    (D) No, because the most recent complaint is a supplemental pleading requiring permission of the court prior to filing.

35. Scott, Joyce, and Mitch formed a member-managed LLC. On January 1, Mitch dissociated from the LLC. Two years later, Mitch sent a demand letter to the LLC seeking to review the LLC's the prior year's federal income tax return. In his demand, Mitch provided 10 days' notice to review the records at the physical address of the company at 1:00 p.m. The LLC refuses to provide Mitch with this information. What is the LLC's best argument for not providing the information sought?

    (A) Mitch is no longer a member of the LLC
    (B) The tax return sought does not pertain to the time period when Mitch was a member
    (C) The demand does not provide for sufficient notice
    (D) None of the above; the LLC must allow Mitch to review the records.

36. Henry is charged with criminal mischief for destroying his wife, Whitney's, car. At trial, Whitney testifies that while in bed one night, Henry admitted destroying her car because she accidentally scratched his car. Henry objects to this testimony as protected under the husband-wife privilege. The Court will

    (A) sustain the objection, only if Henry reasonably expected that his statement to Whitney was confidential.
    (B) sustain the objection, because the husband-wife privilege allows Henry to prevent Whitney from disclosing his statement.
    (C) overrule the objection, because Henry is charged with a crime against his spouse's property.
    (D) overrule the objection, because Whitney voluntarily disclosed the communication and waived the husband-wife privilege.

37. Ava, Billie, and Courtney were traveling in the same car when a pickup truck hit their car. They were injured in the accident, and each filed a separate action against Della, the driver of the truck.

    Before trial, Della moved to consolidate the three actions into one trial. Ava consented, but Billie and Courtney objected. Which is true?

    (A) The court cannot consolidate the three actions over the objections of Billie and Courtney.
    (B) The court cannot hold separate trials on damages if it holds a consolidated trial on liability.
    (C) The court can consolidate the three actions only if all plaintiffs consent.
    (D) The court can consolidate the three actions if they involve a common question of law or fact and consolidation would not deprive a party of a substantive right.

38. Daisy was charged with driving under the influence after she crashed into Pete's car. Daisy offered to plead guilty to a reduced charge of reckless driving. The State and Daisy did not reach an agreement and went to trial. Daisy was acquitted.

    Pete sued Daisy for damages arising from the crash. At the civil trial, Pete's attorney asked Daisy if she offered to plead guilty to any criminal charge relating to the crash. Daisy's attorney objected. Which is true?

    (A) The offer to plead guilty is admissible because it is not offered for the truth of the matter asserted.
    (B) The offer to plead guilty is admissible because it is an admission by a party opponent.
    (C) The offer to plead guilty is inadmissible unless Daisy is unavailable at the civil trial because it is a declaration against interest.
    (D) The Florida Rules of Evidence state that offers to plead guilty are inadmissible.

39. At 10:00 a.m., January 15, a drugstore, Prescriptions, Inc., was robbed by two armed men wearing red handkerchiefs over their faces. A medicine bottle containing narcotic pills along with $148 in small bills was stolen.

    Steve was picked up, searched, interrogated, and fingerprinted. Steve's fingerprints matched those found at Prescriptions, Inc.

    During his deposition, Charles, a clerk at Prescriptions, Inc., gave a detailed description of the two robbers and identified a photo of Steve as one of the robbers. Steve was represented at the deposition by court-appointed counsel, who made no effort to cross-examine Charles. Charles died before trial.

    At trial, the state attempted to introduce Charles' deposition testimony. Steve objected. Which is true?

    (A) The deposition testimony is inadmissible hearsay.
    (B) The court should not admit the deposition testimony because it would violate Steve's constitutional right to confront the witnesses against him.
    (C) The deposition testimony is admissible regardless of whether Charles was available to testify.
    (D) The deposition testimony is admissible under an exception to the hearsay rule that applies only when the declarant is unavailable.

40. During an investigation, Reynolds gave an unsworn statement to a State Attorney's investigator that implicated himself and Sorensen in a criminal scheme to defraud investors. Shortly after making the statement, Reynolds was killed.

    In a subsequent trial of Sorenson for criminal fraud, the prosecution called the investigator and asked her to recount what Reynolds said during their interview. The defense objected to the testimony on hearsay grounds. The testimony is

    (A) admissible as an admission.
    (B) admissible as a statement against interest.
    (C) inadmissible because the statement was not made in furtherance of the conspiracy.
    (D) inadmissible because the investigator's testimony about Reynolds' out-of-court statement is hearsay within hearsay.

41. Simpson created an irrevocable trust with proceeds from the sale of an investment property. The trust instrument designated Thomas to serve as trustee and gave Thomas the duty to provide support payments to Simpson's children, Alice and Brian. The trust instrument further provided that upon Simpson's death, the remaining assets in the trust were to be distributed equally to Alice, Brian, and the Bright Futures Children's Center ("Bright Futures"), a nonprofit organization dedicated to promoting youth sports.

    Simpson died 10 years later. One year before he died, Bright Futures ceased operations because of lack of funding. Alice, Brian, and Thomas cannot agree on how to distribute the trust's remaining assets. Which is correct?

    (A) Because Bright Futures no longer exists, Alice and Brian each must receive a one-half share of the trust assets.
    (B) Because Bright Futures no longer exists, that term of the trust fails and its share of the trust assets passes to Simpson's heirs outside of the trust.
    (C) Because Bright Futures no longer exists, Alice and Brian can modify the terms of the trust to select another charity regardless of whether Thomas agrees with them.
    (D) Because Bright Futures no longer exists, the court may apply the doctrine of cy pres to modify the trust.

42. Benny is delinquent on a $15,000 credit card account with CreditBank.

    Benny is also the beneficiary of an irrevocable trust established for his support by his late mother. The trustee has a duty to make quarterly payments of $2,500 to Benny from the income generated from the trust assets. The trust also includes a valid spendthrift provision.

    CreditBank has threatened to sue Benny. Benny seeks your advice about whether CreditBank can reach the payments that Benny receives from the trust if it obtains a judgment. Which is correct?

    (A) CreditBank can force the trustee to make the quarterly payments directly to CreditBank until the debt is satisfied.
    (B) CreditBank can reach payments made from the trust only after the trustee has distributed them to Benny.
    (C) CreditBank cannot reach the quarterly payments.
    (D) Benny can voluntarily transfer his interest in the trust to CreditBank to avoid litigation.

43. Sanders created a revocable trust for the support of her nephew, Nelson. Sanders appointed Turner as trustee and contributed to the trust the publicly traded holdings of her brokerage account, which had a value of $1,000,000. The payments that Nelson receives from the trust come from income generated by trust assets or the proceeds of selling trust assets.

    Turner hired a financial advisor to assist with managing the trust's assets. The value of the securities in the trust held steady for three years. Over that time, Turner monitored the securities' performance and provided annual accountings to Nelson.

    In the three months since Turner last provided an accounting to Nelson, the value of the securities held by the trust dropped by 50%.

    Nelson has been asking Turner whether downturns in certain segments of the stock market have affected the trust, but Turner has not responded. Nelson seeks your advice about whether he can take any action against Turner. Which is correct?

    (A) Because the trust remains revocable, only Sanders may request that the court remove Turner as trustee.
    (B) Turner's hiring of a financial advisor was a breach of trust because a trustee may not delegate one of her duties to a third party.
    (C) The substantial diminution in value of the trust assets, standing alone, does not establish a breach of trust.
    (D) Nelson does not have standing to bring an action for breach of trust or to request an accounting because he is not a qualified beneficiary.

44. Davis asked Lender for a $50,000 loan. Lender was willing to loan the $50,000 to Davis, provided that Davis use her grandmother's antique furniture as collateral.

    Lender asks for your legal advice in connection with the proposed transaction. Which of the following is necessary for Lender to obtain an enforceable security interest in the collateral?

    (A) Davis must authenticate a security agreement that adequately describes the collateral.
    (B) Davis must file a financing statement that adequately describes the collateral.
    (C) Lender must take possession of the collateral.
    (D) Lender must send Davis a writing confirming that the furniture will be used as collateral for the loan.

45. Nephew told Aunt that he was considering dropping out of college after a difficult first semester. To convince him to stay in college, Aunt promised to Nephew that she would pay him $5,000 if he graduated from college within four years. Aunt signed and dated a sheet of paper stating: "I promise to pay Nephew $5,000 on the day that he graduates from college, so long as he graduates within four years."

    Is the sheet of paper a negotiable instrument under Article 3 of the Uniform Commercial Code?

    (A) Yes, because it is a written promise to pay a fixed amount of money.
    (B) Yes, because it is functionally equivalent to a promissory note.
    (C) No, because the promise to pay is conditional.
    (D) No, because the promise to pay is not payable to bearer.

46. Smith owns a store that sells musical instruments. Smith obtained a $40,000 loan from Lender to fund renovations to the store. Smith and Lender signed an agreement stating that the loan was secured by "all of Smith's assets." Smith signed the agreement with a pen, while Lender used an electronic image of Lender's signature.

    Which is true?

    (A) Smith authenticated the agreement under Article 9 of the UCC, but Lender did not.
    (B) Lender authenticated the agreement under Article 9 of the UCC, but Smith did not.
    (C) The reference to "all of Smith's assets" in the security agreement did not adequately describe the collateral.
    (D) Lender must perfect to obtain a security interest in the collateral.

ANSWER KEY FOR MULTIPLE-CHOICE QUESTIONS

Question Number	Correct Answer
1	(A)
2	(A)
3	(C)
4	(A)
5	(B)
6	(B)
7	(A)
8	(A)
9	(A)
10	(A)
11	(D)
12	(D)
13	(A)
14	(B)
15	(C)
16	(B)
17	(D)
18	(C)
19	(D)
20	(B)
21	(B)
22	(A)

23	(B)
24	(B)
25	(B)
26	(B)
27	(C)
28	(C)
29	(A)
30	(C)
31	(A)
32	(C)
33	(D)
34	(C)
35	(B)
36	(C)
37	(D)
38	(D)
39	(D)
40	(B)
41	(D)
42	(B)
43	(C)
44	(A)
45	(C)
46	(C)