Florida Board of Bar Examiners

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Florida Bar Examination
Study Guide and Selected Answers

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

Future scheduled release dates: August 2016 and March 2017

TABLE OF CONTENTS

PART I – ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2014\5 AND JULY 2015 FLORIDA BAR EXAMINATIONS

ESSAY QUESTIONS AND SELECTED ANSWERS

Part I of this publication contains the essay questions from the February 2015 and July 2015 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 2.

ESSAY EXAMINATION INSTRUCTIONS

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.

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 on the examination as they relate to the issue presented by the question. The legal principles and rules governing the issues presented by the question should be stated concisely and succinctly without undue elaboration.
- Application and Reasoning - The answer should demonstrate your capacity to reason logically by applying the appropriate rule or principle of law to the facts of the question as a step in reaching a conclusion. This involves making a correct preliminary determination as to which of the facts given in the question are legally important and which, if any, are legally irrelevant insofar as the applicable rule or principle is concerned. The line of reasoning adopted by you 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 undue elaboration or equivocation. An answer which consists entirely of conclusions, unsupported by statements or discussion of the rules or reasoning on which they are based, is entitled to little credit.
- Suggestions
    - Do not anticipate trick questions or attempt to read in hidden meanings or facts not clearly expressed by the questions.
    - Read and analyze the question carefully before commencing your answer.
    - Think through to your conclusion before writing your opinion.
    - 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 2015 BAR EXAMINATION – FAMILY LAW AND DEPENDENCY

Husband and Wife were married in Orlando, Florida 15 years ago. The parties moved out of Florida after their marriage and resided together in different locations due to Husband's military service. Husband retired from the military four months ago, after serving 20 years. The parties moved back to Orlando, Florida with their two minor children, Son, age 14, and Daughter, age 3. The parties purchased a home, and titled the home in Wife's name. Husband immediately found a job as a supervisor for a security company earning $88,000 per year. Husband also receives $4,000 per month from his military pension. Wife, a college graduate, has not worked outside the home for 15 years.

Right after they moved to Florida, Husband had an affair with his former high school girlfriend. Despite Husband's efforts to keep this affair secret, Wife discovered the affair one month after they moved to Orlando. Wife immediately filed a dissolution of marriage seeking alimony; exclusive use, possession, and ownership of the home; and half of Husband's military pension.

Husband comes to your office seeking representation on his divorce with Wife. He prefers not to get divorced, and wants to know if there is anything he can do to dismiss the case so he can work on the marriage. However, if he is not successful in getting the case dismissed, he would like to have equal time with Son and Daughter. He would also like to sell his home and split the proceeds with Wife. He does not want Wife to get any of his pension or alimony. Prepare a memorandum of law evaluating the merits and likely outcomes of each spouse's position.

SELECTED ANSWER TO QUESTION 1

(February 2015 Bar Examination)

Jurisdiction *- The Husband may be able to challenge the court's jurisdiction. Generally, a court will have subject matter jurisdiction over an action for dissolution of marriage if the petitioner has been a resident of the state of Florida for 6 months prior to the filing of the petition. Venue will be proper in the county where the parties last resided as Husband and Wife or in the county where they live at the time of filing. Here the parties were only living in Florida for one month when the Wife filed for divorce. So it would appear that the court may not have subject matter jurisdiction. The parties, however, were originally married and lived in Orlando 15 years ago. They then moved around for years until they returned to Florida for good one month ago. The Wife may be able to show that the parties maintained their residence in Florida and only moved due to Husband's military service, without establishing their residence in another state. If the Wife can show that she was a resident of Florida, she may be able to succeed on this. The Wife would have to allege in her petition that she was a resident of the state for at least six months prior to filing. She may prove this by proving her driver's license showing when it was issued by providing an affidavit of someone who has known her and known her residency status for the six months prior to filing. Because the parties now live within the jurisdiction of the court, the court does have personal jurisdiction over them.*

Grounds for Dissolution of Marriage *- If the Husband is not successful on challenging the court's subject matter jurisdiction, the Wife's Petition for Dissolution of marriage will proceed. Florida is a no-fault divorce state. As such, there are only two grounds for divorce: the marriage is irretrievably broken and mental incompetence of three years or more. As there are no facts to indicate that mental incompetence is an issue, only the first ground applies here. Since the Husband does not wish to get a divorce, he may deny the Wife's allegation that the marriage is irretrievably broken. The court may then grant a stay of proceedings for up to three months and may also order the parties to go to counseling. However, this is not mandatory. The judge will not force the parties to go to counseling if they do not wish to go. Husband will not be able to dismiss the case on these grounds. Once the court determines that the marriage is irretrievably broken, divorce will be granted.*

Equitable Distribution *- During the divorce proceedings the court will look at the assets of the parties and distribute them among the parties. The court will first separate marital from non-marital assets and distribute only those assets that it determines to be marital. Marital assets are interspousal gifts and other assets the parties obtained during the marriage, with marital funds or due to marital efforts, regardless of whether they are jointly titled or titled in the name of one spouse alone. This includes tangible assets and vested and non-vested intangible assets such as retirement accounts and pensions. Non-marital assets are assets that were acquired by either party prior to the marriage, or gifts, bequests or devises given to one spouse alone by someone other than their spouse. Other assets or compensation received in exchange for non-marital assets as well as passive appreciation (appreciation due only to market forces) of non-marital assets retains its non-marital character. However, active appreciation (appreciation due to the marital effort of either spouse) is marital. Parties also have to*

be careful to maintain their separate property separate and not comingle it with marital assets. Non-marital assets remain with their respective owners.

The court starts from the position that distribution should be 50/50 unless there is some reason shown to support an unequal distribution. Some factors the court will consider in determining whether there are grounds for unequal distribution are the age, physical, mental and emotional health of the parties, their earnings and earning capacity, their education, whether either party been unemployed, whether either of the parties have been the primary caretaker of the children, and the assets of the parties. Of course the court has discretion to consider any other factor that it deems appropriate to do equity between the parties. While the court does not consider alleged infidelity as a grounds for divorce, it may consider it in equitable distribution, especially if there has been dissipation of marital assets as a result. The court may award specific assets to one or each of the parties and it may also order cash equalizer payments.

Marital Home *- Generally, a home purchased by a married person is titled in the name of Husband and Wife as tenants by the entireties, but that is not the case here. The facts indicate that the home was purchased during the marriage in the name of the Wife alone. This fact however, will not change the determination of the asset. The home was purchased during the marriage. There are also no facts to indicate that it was purchased with anything other than marital funds. As such, this asset will be considered marital. The Wife wants to keep exclusive use possession and ownership of the marital home, while the Husband would like the home sold. The court will look at the parties' desire to keep the home, the age of the minor children, and whether it is financially feasible to award the home to the Wife. The Wife will argue that it is in her and the children's best interest to maintain continuity during this time. However, the Husband will argue that it is not financially feasible. Since the Wife has not been employed outside the home for 15 years, it may be difficult to prove that it is financially feasible for her to keep the home. This determination may come down to the money aspect.*

Pension *- Marital assets include vested and non-vested retirement accounts and pensions. The Husband receives a military pension for his 20 years of service. The Husband and the Wife have been married for 15 years. The Wife will argue that she is entitled to half of his entire pension. Even though they have been married for 15 years and the pension likely began to accrue when the Husband started his service 20 years ago, the Wife will be entitled to at least some portion of the pension. The Husband may argue that she is not entitled to any of it because it was due to his separate employment, however, this argument will fail. The Husband's income and pension which accrued during the marriage are marital. At the very least the Wife will be entitled to half of what accrued during the marriage. Since the parties may settle their dispute as to equitable distribution, if the Husband really wants to keep his entire pension, he could offer he keep it in exchange for the Wife keeping the house. However, if they go before the judge it is likely that at least some portion if not all of it will be considered marital.*

Alimony *- The Wife has requested alimony. There are different types of alimony in Florida. Alimony pendente lite, bridge the gap, rehabilitative, durational and permanent. Alimony pendente lite is also known as suit money and is available to either party during a divorce. This is a temporary award of alimony designed to help the recipient maintain the status quo during the pendency of the divorce. Bridge the gap alimony is a short*

term alimony award designed to help the recipient make the transition from being married to being single. This award may not exceed 2 years and it is non-modifiable, but it terminates upon the death or remarriage of the parties. Rehabilitative alimony is also a short term award. It is designed to help the recipient obtain necessary education or work experience in order to become self-supportive. This award is for a set period of time and comes along with an educational or training plan. It is modifiable upon a substantial change in circumstances and may be terminated upon the death, remarriage of the recipient, or if the recipient fails to follow the plan. Durational alimony is awarded where permanent alimony is not appropriate. This is generally for short term marriages (less than 7 years) to moderate term marriages (between 7 and 17 years of marriage). Durational alimony is awarded for a set period of time not to exceed the length of the marriage. Permanent alimony is awarded when the recipient is unable to financially support him/herself. This is generally more appropriate for long term marriages (those exceeding 17 years). It may also be awarded in moderate term marriages upon a showing of need and ability to pay by clear and convincing evidence, or in short term marriages supported by a written finding by the court of exceptional circumstances.

In determining an award of alimony the court determines the recipient's need and the payor's ability to pay. The court will also consider the age, physical, mental and emotional health of the parties, their earnings and earning capacity, their education, whether either party has been unemployed, whether either of the parties have been the primary caretaker of the children, the age of the children, and the assets of the parties. The court will also look at marital misconduct such as infidelity, dissipation of marital assets, or abuse. Since there are no facts to indicate that the Husband dissipated marital assets, the court may not weigh his infidelity too heavily. The Wife will argue that she has the need and the Husband has the ability to pay alimony. She will likely get alimony pendente lite during the pendency of the divorce in order to maintain the status quo for herself and the children. She also has a good case for rehabilitative and durational alimony. The Husband will argue that the Wife is a college graduate and able to go out and get a job. However, because the Wife has been unemployed for the past 15 years and has served as the children's primary caretaker, he will not likely succeed on this argument. The Wife will at the very least be able to get rehabilitative alimony to allow her time to update her skills and reenter the workforce. The court will also consider the fact that the youngest child is only 3 years old and may need the Wife home for some time.

***Parental Responsibility** - The court starts from the position that parents should have shared parental responsibility. This means that both parents should share equally in the rights, responsibilities, and joys of raising their children. Generally, courts will award shared parental responsibility unless it will be detrimental to the child. The standard court will use in making such a determination is the best interest of the children. Each party has a right to participate in making decisions for health, education, religious, and other needs of their children. Each party must seek the participation of the other in making such decisions. The court will enter a parenting plan. This parenting plan will govern the relationship of the parties with their children. There are no facts here to show that it will be detrimental to the children if the parties share parental responsibility.*

***Timesharing** - Timesharing must also be awarded in the parenting plan. This includes overnight and holiday visitation and it is also awarded based on the best interest of the*

children. The Court starts from the position that each parent should get 50/50 timesharing with the children, unless it has reason to award more or less time to one parent. There are no presumptions that either mother or father are better suited to have primary timesharing. The court will look at factors such as the age of the children, the desire of the children (if they are old enough to express it), the fact that the mother has been the primary caretaker of the children, whether the father's work schedule will interfere with his ability to enjoy timesharing with the children, and any other factor the court deems necessary to support the best interest of the children. The Husband will request equal time with the children. Since there is nothing in the facts to indicate that it would not be in the best interest of the children, he may be entitled to it. The Wife will argue that she has been the children's primary caretaker and it would be in the children's best interest to maintain some continuity for them. The court's determination will likely come down to whether the father's work schedule permits him to enjoy considerable timesharing and whether it is in the best interest of the children that the Wife gets primary timesharing.

***Child Support** - Child support is calculated irrespective of timesharing and parental responsibility. Whether or not a parent enjoys timesharing or parental responsibility, they are still responsible for supporting their children. Child support calculations are based on statutory guidelines. The amount is based on the net income of the parties, the number of children, and the amount of timesharing each parent enjoys. The court may deviate upward or downward from the guidelines by 5%. A greater deviation would have to be supported by written findings. A parent that enjoys 20% or more overnight timesharing will also be able to get a reduction in child support. In addition to making a child support calculation, the court will have to indicate in the parenting plan which parent will be responsible for providing health care coverage for the children and how uncovered medical expenses and other out of pocket expenses will be divided. If the Wife is awarded alimony, this will be the basis of her income for child support purposes. The Husband will likely be ordered to pay child support.*

QUESTION NUMBER 2

FEBRUARY 2015 BAR EXAMINATION – FEDERAL CONSTITUTIONAL LAW/TORTS/ETHICS

John Jones, a student at Southern High School, which is a public school, created a webpage on his parents' computer suggesting that his math teacher should be killed. The website was publically available, and no password was needed to access the site. John uploaded a photograph of the teacher from the school district website and added a hand drawn picture of a gun firing a bullet at the teacher's head. Beneath the picture were printed the words, "Mr. Smith must die." John invited any student to join the group, to express their hatred of Mr. Smith, and to contribute funds to hire a hit man.

Numerous students viewed the webpage and it was discussed extensively at school. At least a dozen of John's friends posted comments expressing their approval of the webpage and "liking" the photograph. Some of the students accessed the webpage at school and showed it to others at school. Many students were frightened by the webpage. Within a few days, a student notified Mr. Smith about the webpage and provided him with a copy of the photograph. Mr. Smith forwarded the information to school officials. Mr. Smith felt so threatened that he had to take a leave of absence, and school officials replaced him with a substitute teacher for the remainder of the school semester.

Southern's principal interviewed John, who acknowledged that he created the webpage and the photograph. Although John expressed regret, he stated it was "just a joke." After an investigation, the principal suspended John for five days, pending a hearing before the superintendent. Ultimately, a hearing officer appointed by the superintendent found that the photograph and webpage were threatening and were not a joke.

Specifically, the hearing officer found the webpage violated the school district's student policy on harassment and intimidation. The policy defines harassment or intimidation in part as "any intentional gesture or intentional written, physical, or verbal act that a reasonable person under the circumstances should know would have the effect of … harming a student or staff member." The policy provided that violators could be suspended after investigation by school officials. The student policy also provided for additional penalties including being denied the ability to participate in extracurricular activities and other school-sponsored social activities or events. The hearing officer recommended that John be suspended for the remainder of the semester and be prohibited from participating in extracurricular activities and from attending any after-hours school functions. The superintendent agreed and imposed the recommended discipline.

John's parents have come to your firm seeking advice, and the senior partner has asked you to provide a memorandum addressing the following:

1. John's parents want to sue school officials and the school district for violation of both John's and their rights. Discuss the federal constitutional claims that John and his parents may have and any defenses likely to be raised.

2. Mr. Smith, the teacher, has sued John and his parents in state court for intentional infliction of emotional distress and negligent parental supervision. Discuss what defenses John and his parents may have to these claims.

3. Any ethical considerations related to this representation.

SELECTED ANSWER TO QUESTION 2

(February 2015 Bar Examination)

TO: SENIOR PARTNER
FROM: ASSOCIATE
RE: JOHN AND MR. SMITH

INTRODUCTION
This memorandum will discuss the federal constitutional claims that John and his parents may have, any defenses, and also Mr. Smith's claims against John's parents for intentional infliction of emotional distress and negligent parental supervision. The first issue that must be evaluated is whether or not John's parents have standing. In order to have standing, a Plaintiff must show an injury in fact. The injury must be actual and imminent, and not just speculative. Additionally, the injury must be one that is capable of redress by the courts. A third party can bring the claims of another when that injured person, for some reason, is incapable of bringing the claim on their own, or if the claim is one that is capable of repetition yet evading review. In this fact pattern, the son has directly suffered an injury of his rights by being suspended, and it is an injury that is capable of redress by the court. Because his parents did not suffer the injury themselves, they must bring the claim in their son's name.

The next issue we need to determine before we can proceed is whether there has been action by the state. Under the Federal Constitution, in order for an individual to assert that their rights have been violated under the 14th Amendment, they must show that their rights have been violated by a state actor, as the 14th amendment does not protect the violation of rights by private actors. As a public school, John can argue that the school is an agent of the state, and that his rights have been violated by government employees. Just because a government provides funding for a school does not automatically implicate them as government actors. The question is how involved the state is with the school, and if they are advancing the schools denial of certain rights or simply taking a neutral stance to it.

Although states enjoy protection from being sued by a citizen under the doctrine of sovereign immunity, most states waive this right in relation to certain cases.

I. JOHN'S CLAIMS

VIOLATION OF 1ST AMENDMENT RIGHTS
Under the Federal Constitution, the 1st Amendment grants citizens the freedom of speech, which a basic and fundamental right to the Constitution. This freedom is not absolute. The constitution does not protect hate speech. The government has the power to regulate certain forms of speech, such as imment lawless action, fighting words, obscenity, defamation, and commercial speech. Those are categories of speech that are not protected by the first amendment, and that the government is free to regulate. Normally, any restriction on a person's freedom of speech that is based on the person's expressive conduct is judged under the standard of strict scrutiny. Strict scrutiny means that in order for a law to be found constitutional, it must be narrowly tailored to a compelling state interest and be the least restrictive means possible. In analyzing

whether a breach of a person's freedom of expression has taken place, it is necessary to first evaluate where the speech has taken place. Case law has drawn a distinction between public areas, which are known and historically popular for being a place where people express themselves, such as at a park, or a courthouse, where citizens are afforded the most protection under the constitution. There are also nonpublic areas, such as someone's front lawn, and there are also semipublic areas, such as government buildings like the IRS. In public areas, the government has the right to implement certain time, place and manner restrictions. These restrictions must be content neutral, and must be substantially related to an important government interest. They need not be the least restrictive means, and must leave open alternative forums for the expression to take place.

John and his parents can argue that John was engaging in his constitutionally protected first amendment right to freedom of speech when he created the website. While the school could argue that this type of expression constitutes imminent lawless action or fighting words, that argument will most likely fail. Imminent lawless action exists when a person's express invites an immediate breach of the peace. Imminent lawless action can occur when a person is on a podium in a public place yelling, trying to get everyone that walks by to band together and immediately overthrow the government. Fighting words are words that are said directed to a specific person, in order to get them to engage in a fight, such as swearing obscenities in their face. As a webpage, John's language constitutes neither of the aforementioned. Under the First Amendment, John is entitled to his opinion about his teacher. His parents could argue that John did not directly harass, intimate, or try to get the classroom to attack him while he was in school, and that he was just expressing his disdain for the professor. The school will argue that by putting the words, "Mr. Smith must die" that the student was engaging in behavior that constitutes hate speech akin to fighting words. The school will argue that they have a compelling interest in thwarting physical violence on campus before it occurs, and under the parent locus doctrine, schools must step into the shoes of the parents while the children are at schools and regulate their behavior accordingly.

John and his parents can also argue that his fundamental right to freedom of speech has been violated via the Substantive Due Process clause of the 14th amendment, which makes the 1st amendment applicable to the states. Under a due process analysis, because freedom of speech is a fundamental right, the school's actions would be judged under a strict scrutiny standard. John could also argue that his fundamental right to access to the courts has been violated as well via the procedural due process clause, since he has been suspended without being heard by the court. This argument will most likely fail, as the school provided him with a hearing where it was determined that the website and the photograph was not a joke.

John and his parents can argue against the student policy by saying that it is a content based restriction on speech and should be evaluated by strict scrutiny. While content based rules will be measured under strict scrutiny, rules that are content neutral, and apply to everyone the same across the board no matter what type of expression is being regulated, will only be judged by a standard of rational basis, and will only be struck down if it is ambiguous or arbitrary. A law passes the rational basis test if it is rationally related to a legitimate government interest. The burden is on the challenger in this instance, as opposed to strict scrutiny, where the burden is on the government. The

government will argue that the legislation is neutral on its face and therefore the rational basis test should be applied. The government will argue that the regulation, at the very least rationally related to the safety of children in public schools, and that the school has an interest in maintaining the health and safety of its students. The parents can counter argue by saying that the law is irrational and arbitrary because it does not spell out exactly what time of behavior is prohibited. Additionally, even if the law is content neutral, the law cannot be vague or overbroad. A law is vague when it does not provide people with notice of what behavior is prohibited by the law, and a law is overbroad if it prohibits more speech than necessary to achieve its goal.

Even if the rule is found to be content based, which is unlikely, the school will have a valid argument that the law is related to a compelling interest of safety in schools, especially in light of recent violent events that have taken place across the country in high schools. The school will also argue that the rule is the least restrictive means because it provides students with an investigation and a hearing to determine whether the threat was serious and what subsequent action should be taken. The school would most likely prevail under this argument, if the speech by John had taken place during school. While the constitution does grant citizens freedom of speech, schools are granted the power of greater restraint for speech that takes place in school and by their students. The parents and John can argue that the school's right to regulate speech does not apply to a website that John created on his own while not in school, and that his right to participate in school activities should be effected by the speech he makes while not on school premises. The parents can argue that the harassment and intimidation did not take place on the school grounds, and by punishing their child, the law is overbroad in its application. Additionally, the parents can argue that the law is vague because it does not define exactly what constitutes harm against a student or staff member. The parents could also argue that the rule is over inclusive, as not only does it allow the child to be punished, but it also allows them to be excluded from other extracurricular activities which have nothing to do with the initial harassment. The school would argue that these rules are necessary to keep the school safe.

II. MR. SMITH'S CLAIMS

In order to have a claim for intentional infliction of emotional distress, a plaintiff must prove that the defendant's intentional or reckless outrageous behavior caused the plaintiff extreme emotional distress. Outrageous behavior is behavior that is so outrageous that it goes beyond all bounds of common decency. This is judged by an objective standard. Although IIED is an intentional tort, the defendant can be guilty of it if he was reckless, meaning that he acted with a conscious disregard that his behavior would produce a certain result. Although the plaintiff need not prove physical injury, he does need to prove that there has been some manifestation of the distress. It is not enough that the Plaintiff sometimes has difficulty sleeping or as a result of the incident, he can't focus or concentrate.

John's parents would probably argue that John did not intend to cause the teacher emotional distress, and that he was simply expressing his constitutionally protected viewpoints. The teacher will argue that John did this recklessly, as any reasonably person could conclude that by posting a webpage on the internet expressing his hatred for him, severe emotional distress would be a normal result. Many students law the

webpage, liked it, and as a result, Mr. Smith had to take a leave of absence. Mr. Smith could argue that it is so outrageous that a student would publish a picture of him with a gun firing a bullet at his head, and that this action was beyond all realm of common decency. Although Mr. Smith would not need to prove actual damages in order to recover for IIED, in this instance he could, if he was able to prove he lost income from not being able to work during that time.

Under common law, a parent is not liable for the torts of their children. But, a parent can be found guilty of negligence directly attributed to them if they have a duty to watch over their children and fail to or if they are aware of their child's dangerous propensities and fail to warn people of them or to protect others from them. Mr. Smith would have to prove that the parents had a duty to supervise the child, that they breached this duty, that the breach of this duty was the actual and proximate cause of his injury, and also that he suffered damages. In the fact pattern, the parents may have breached their duty to supervise John if the parents knew or should have known that he had a serious intent to hurt his professor, or if he had a history of creating websites like this. The parents will argue again, that their child was engaging in his fundamental right to freedom of speech, and that as a high school student, he requires less supervision than younger children and was free to partake in this action.

III. ETHICAL ISSUES

For ethical issues, I would remind the parents that if I take their child on as a client, my main priority as an attorney is to their child. Although their child is a minor, if the child is my client, I owe the child a duty of confidentiality and loyalty, not the parents. Even if the parents pay for the representation, the child is my client and I will have to remain loyal to the child and will not be able to violate the attorney client privilege or allow them to make any of the major decisions or determine the scope of litigation. This may be a concern for the parents in the event their desires are in conflict with the child's. If the parents want me to represent them altogether, I would have to decide whether it would be possible to represent them together while concurrently maintaining my duties to each individually.

I would also have to ensure my fees were reasonable and fair, considering my experience, the nature and extent of the case, the reasonable fee for this type of case, any cases I would have to reject by taking this case and the amount of research and time involved.

QUESTION NUMBER 3

FEBRUARY 2015 BAR EXAMINATION – REAL PROPERTY

Buyer, a widower with one grown child, Son, entered into a contract to purchase Blackacre from Seller. The purchase price was to be paid in equal monthly installments over twenty years, with interest at five percent per annum. Upon full payment of the purchase price, Seller agreed to give Buyer a warranty deed to the property. Within that same contract, Buyer also borrowed money under the same financing terms from Seller to build a home. Buyer duly recorded his contract in the county's official records and, when he completed the home, he moved in, applied for, and received a homestead exemption.

Blackacre is landlocked within Seller's property, but Seller gave Buyer authorization to use an old, no longer used railroad right-of-way that runs along the edge of the property so Buyer could access his property from the public road. The relevant portion of the purchase contract reads, "Buyer is hereby authorized to use the railroad right-of-way that runs along the edge of my property to access Buyer's property." Shortly after the sale was finalized, Buyer paved the right-of-way, and to safeguard Seller's pets, built a fence around his new "driveway."

A few years later, Buyer remarried and helped his wife, hereafter Wife, raise her teenager, Daughter. After several years of marriage, Buyer executed and recorded a quit-claim deed conveying Blackacre to himself and Wife. He also legally adopted Daughter. Daughter, an adult, obtained a job, and assisted her parents in paying for their home. Daughter is single and has no children.

Buyer validly executes a will in which he left "all that I own to Wife or, in the event she should predecease me, to Daughter." Several months later, Buyer, Wife, and Daughter were all involved in an automobile accident. Wife died on the scene, Buyer died after two days, and Daughter survived.

Daughter comes to your office for legal advice. Since the automobile accident, she has received a letter from Seller claiming several payments are still owed on Blackacre and on the home. Seller further claims that Buyer did not have legal title to the property or a legal right to cross Seller's property. Daughter has also been contacted by Son who seeks to be awarded ownership of Blackacre. Daughter wants your advice in both identifying the problems she may face and suggesting how they might be best resolved. Prepare a memorandum addressing the status of Blackacre. Also discuss the claims of Seller and Son and the likely outcomes of those claims.

SELECTED ANSWER TO QUESTION 3

(February 2015 Bar Examination)

Memorandum
To Daughter
From Attorney

The first question is who has the right to Backacre. When parties enter into a contract to buy property, the doctrine of equitable conversion provides that the buyer is the owner of the property and has the risk of loss as of the signing the contract. In this case, a contract was formed, and even though Buyer was making installments over 20 years, he is still deemed the owner of Blackacre. If the Buyer had received a Deed, then all terms of the contract would have merged into the deed, but there was no deed from Seller to Buyer. Since this was a contract regarding the sale of property, it needed to be in writing, which it was, under the Statute of Frauds.

Since Buyer was the equitable owner of the property as of the signing and recording of the contract, he had the right to assign or devise his interest in Blackacre. When Buyer executed and recorded a quitclaim deed to himself and his wife, it was proper and the property was automatically owned by Buyer and Wife as tenancies by the entirety with the right of survivorship. When property is conveyed to a husband and wife during their marriage, it is presumed to be a tenancy by the entirety. This quitclaim deed was proper because Florida has eliminated the need to have a strawman in order to have a tenancy by the entirety. Since it was a tenancy by the entirety, the ownership would automatically pass to the other spouse upon death of either spouse.

In this case, the Buyer validly executed a will conveying all of his property to wife, but if she predeceased him, then to Daughter, who he had already adopted. The will was validly executed and it will also be assumed that the description of "all that I own" is sufficiently descriptive to be a valid will. Florida has accepted this as a sufficient description of property in wills. In this case, Buyer Wife and daughter were in an accident at the same time. Florida has adopted the uniform simultaneous death act, which states that if 2 people die at the same time, it is presumed for purposes of devising their property that they survived the other. Florida has not adopted the rule that the spouse must survive the other spouse by 120 hours in order to take it out of the act. Here, the facts are clear that the wife died at the scene and Buyer survived for 2 days. Therefore, the act is not even applicable here.

Since Wife died first, it is clear that the ownership in Blackacre automatically passed to Buyer because a tenancy by the entirety has a right of survivorship. When Buyer died 2 days later, his will would come into play. Buyer clearly left everything to Daughter in his will. There is no indication that Buyer specifically wanted to disinherit his grown son. However, in order to stop property from going to somebody, the only way to do it is to devise all of your property. In this case, Buyer did that be devising all that he owns to his Daughter. The fact that Buyer adopted daughter is not significant because he can leave his property to whoever he wants if it is in a validly executed will.

The son really doesn't have an argument to ownership of Blackacre. He is not a pretermitted child because he is a grown child and he was clearly born prior to Buyer executing his will. He could try to argue that Blackacre is homestead property, which cannot be devised by either spouse without the other's consent. However, this only applies where there is a surviving spouse and a minor child. Clearly, there is no minor child involved here as both son and Daughter are adults. There is also no surviving spouse since Wife predeceased Buyer. Therefore, Buyer was free to devise his interest in Blackacre, which he properly did to Daughter.

With regard to the claims by Seller for unpaid installments under the contract, Seller can certainly enforce the contract so that Daughter has to continue making the payments and make up any back payments. However, Seller is probably wrong that Daughter does not have title to Blackacre. As discussed above, even though Buyer never got a Deed to the property, there was a written contract and it was recorded in the County's records. Under equitable conversion, Buyer did have title to Blackacre once the contract was signed. If Seller is unsuccessful in asserting that he still has title to Blackacre, then he might want to argue that the contract serves as a mortgage on the property. Florida is a lien state, meaning that a mortgage acts as a lien on the property. The mortgagee (in this case Seller) does not have title to the property, just a lien. Seller could enforce his lien by filing a foreclosure action, or if Daughter is unable to make the payments to Seller, then Seller might be able to sue for breach of contract. He might bring an action to quiet title to have title deemed in Seller's name. If Daughter doesn't have any money to pay the Seller, she may wish to argue that Seller's lien on Blackacre should be exonerated out of the residuary of Buyer's estate. We do not know whether Buyer had any other assets at the time of his death, but nonetheless, Florida does not allow for exoneration of liens unless it is explicitly stated in the decedent's will. It does not appear that this was in Buyer's will, so Daughter will not be able to have the lien exonerated out of his other assets, if any. I would advise Daughter that she will want to come up with the money to pay Seller so that she doesn't get sued or Seller can't bring any foreclosure action or action to quiet title.

With regard to the right to cross Seller's property, Daughter will want to argue that there is an express easement in the contract that was recorded. This would be an easement appurtenant since there is a servient estate and dominant estate. Blackacre would be the dominant estate since the easement runs over Seller's property and benefits Blackacre. Seller's property is the servient estate. Daughter will argue that the easement remains valid even after Buyer died because the easement runs with the land. It clearly touches and concerns land, it was probably intended to run with the land, there is horizontal and vertical privity because Buyer and Seller had a written contract, and Buyer conveyed the property to his daughter. In addition, Buyer expended a substantial sum in reliance on the easement by paving the right of away and by building the fence around the driveway. Even if Daughter is not successful in arguing there is an express easement, she may also argue that there is an easement by necessity. An easement by necessity arises where one property is divided and that creates a situation where there is no other way to access a public road. This is exactly what happened here since Blackacre was landlocked and this right of way was the only way to access Buyer's property from the public road. An easement by necessity can terminate if that necessity is no longer there, such as a new road being built, but that is not indicated here. Daughter could also argue that there is an easement by prescription, which

essentially means an easement by adverse possession. In order for this easement to arise, there must have been access that was hostile or adverse, continuous, open and obvious, and for the statutory period. In Florida, that period is 7 years. Here, it appears that all of the elements could be met except the adverse or hostile requirement. This is because Seller clearly gave Buyer the right to use the easement in the contract. There cannot be an easement by prescription where the servient owner gave consent, which here he did. The use of the easement was open because he made use of the right of way as a usual owner would, by paving the right of way and building the fence. Nonetheless, even though there may not be an easement by prescription since it was not adverse or hostile, it is likely Daughter will prevail in arguing that there is either an express easement or easement by necessity.

QUESTION NUMBER 1

JULY 2015 BAR EXAMINATION – CONTRACTS/ETHICS

Amy owned and advertised for sale vacant lot A vacant lot B, and vacant lot C at $100,000 each. On February 15, Colleen gave Amy a signed written offer to buy lot A for $70,000. On February 17, Amy gave Colleen a written counter offer stating that she would accept $80,000 for lot A, but Colleen needed to accept this counter offer on or before March 1. On February 20, Amy, without receiving a response from Colleen to her February 17 counter offer, gave Colleen another written counter offer stating that she would accept $85,000 for lot A, but Colleen had, again, only until March 1 to accept this counter offer. On February 22, Colleen gave Amy another written offer to buy lot A for $75,000. Amy did not respond to this offer by Colleen. On February 25, Colleen contacted Amy stating that she agreed to accept her February 17 counter offer for lot A for $80,000. Colleen also mailed Amy a countersigned copy of Amy's written counter offer along with a $10,000 deposit check. Amy accepted this check but she eventually wrote "VOID" on the check instead of cashing it. On March 1, Amy contacted Colleen advising her that she was not going to sell her lot A and Colleen responded that she would file a lawsuit against her. On March 2, Amy sold lot A for $100,000.

On March 15, Amy received from Dawn a signed written contract offer to purchase lot B. Dawn's offer directed Amy to accept this offer by mailing her a countersigned copy of the contract back to her. The contract that Dawn used for her offer contained a clause that read: "This contract shall be binding when signed by both parties." Amy wanted some time to think about Dawn's offer, so she took it with her when she left on vacation on March 18.

While on vacation Amy decided to accept Dawn's offer to purchase lot B and she signed the contract on March 20; however, Amy decided to wait until she arrived home from vacation before she mailed the countersigned contract back to Dawn. On March 19, Dawn changed her mind about buying lot B, so she mailed a letter to Amy revoking her prior purchase offer. This letter arrived at Amy's house on March 21. When Amy arrived home from vacation on March 22, she picked up Dawn's letter. Amy contacted Dawn to let her know that she accepted her offer on March 20, but Dawn refused to move forward with the purchase of lot B.

Edwin contacted Amy stating that he was interested in purchasing lot C only if he could build a three story home on this property. Amy was not aware of any zoning restrictions that would prevent the construction of a three story home on this property. Amy stated to Edwin that she believed he could build a three story home on lot C, and Amy subsequently entered into a contract with Edwin to sell lot C for $100,000. This contract contained a clause that read: "This contract represents the entire agreement between the buyer and seller and any modifications to this contract are not binding unless they are in writing and signed by buyer and seller." Shortly after Amy and Edwin signed this purchase contract Edwin discovered that the local zoning ordinances prohibit the construction of any home on lot C over two stories. Edwin spoke with Amy stating that

this property was not worth $100,000 to him because of this new zoning restriction. Amy told Edwin that she would agree to accept $50,000, but Edwin and Amy did not write up a new contract. At the closing Amy refused to sell Edwin lot C for $50,000. Edwin threatened to file a lawsuit against Amy.

Amy comes to your law firm for legal advice. Amy asks whether she can sell any of her vacant lots to your law firm at a discount in order to pay for her legal fees. Senior Partner believes that some of Amy's vacant lots may be a good location for another branch of your law firm. Senior Partner asks you to draft a memorandum that discusses:

1) the causes of action that Colleen may have against Amy, the legal theories Colleen may use to support these causes of action, the likelihood that Colleen's causes of action will prevail, and the measure of damages for these causes of action;

2) the causes of action that Amy may have against Dawn, the legal theories Amy may use to support these causes of action, and the likelihood that Amy's causes of action will prevail;

3) the causes of action that Edwin may have against Amy, the legal theories that Edwin may use to support these causes of action, and the likelihood that Edwin's causes of action will prevail; and,

4) whether your law firm can acquire any of these properties at a discount as compensation for rendering legal services.

SELECTED ANSWER TO QUESTION 1
(July 2015 Bar Examination)

Memorandum

To: Senior Partner
From: Junior Associate

This memorandum will address the issues pertaining to three lots (A, B, C) which our Client, Amy, is attempting to sell. The issues involved in the attempted sale of Amy's lots involve contracts, and since these contracts involve the sale of land, they are governed by the common law, and not the UCC, which governs the sale of goods. Goods are defined as movable items at the time of sale, and thus, land is not considered a good.

Colleen vs. Amy

Colleen may try to assert a breach of contract claim against Amy. For the following reasons, her claim will fail.

In order to have a valid contract, there must be an offer, acceptance, consideration, and no valid defenses. An offer is the manifestation of an intent to be bound by the terms expressed in the offer, and provides the offeree the power of acceptance. Consideration must be in the form of legal detriment OR benefit (Florida being in a minority of states on this matter) to both parties.

In order to analyze the causes of action Colleen may have against Amy, we must analyze the timeline of events.

1) Amy advertising Lot A for sale.

Generally, advertisements are considered an invitation to negotiate, and not an actual offer. The only exception is where there is specific language which indicates how to complete the sale (such as a store advertisement stating "First come, first served"). Since this is not the case here, Amy's advertisement of Lot A for $100,000 is not an offer.

2) February 15 communication from Colleen to Amy

This first written communication from Colleen to Amy which offered to buy Lot A for $70,000 is an offer. Had Amy accepted this offer, a contract would have been formed for the sale of Lot A for $70,000. However, the facts indicate that this offer was not accepted (discussed below).

3) February 17 counteroffer from Amy to Colleen.

On Feb. 17, Amy submitted a counteroffer to Colleen in the amount of $80,000. She further stated that this counteroffer needed to be accepted no later than March 1. A

counteroffer works to reject a prior offer and becomes a new offer. The prior offer (in this case, Colleen's offer to purchase the lot for $70k) is terminated.

4) February 20 second offer from Amy to Colleen

Without any response from Colleen, Amy submitted a subsequent offer for $85,000 again with the requirement that it be accepted by March 1.

5) February 22 counteroffer from Colleen

Colleen's counteroffer on February 22 to buy Lot A for $75,000 worked to reject all previous offers from Amy. While Amy stated that her previous offers must be accepted by March 1, this did not mean that these offers from Amy would remain open through March 1. In order to keep an offer open for a set period of time under common, there must be separate consideration in order to form what's known as an option contract. An option contract cannot be revoked until the time set forth in the offer/option. Here, there was no option contract because the facts do not indicate that any consideration was provided to Amy in order to leave her offers open until March 1. Amy's language that her offers must be accepted by March 1 simply indicates that the offers would be revoked after March 1. However, the offer was able to be revoked or terminated (either by Amy's express acts, or as in this case, Colleen's counteroffer) at any time prior to March 1. Accordingly, as of February 22, the only offer on the table and able to be accepted was Colleen's counteroffer made on February 22 to buy Lot A for $75,000.

6) Colleen's purported acceptance on February 25 of Amy's offer to buy Lot A for $80,000

As discussed above, Colleen's counteroffer on February 22 worked to reject and terminate Amy's counteroffer of $80,000. Thus, she could not later accept this offer and form a contract based on this acceptance absent a further counter offer from Amy for this amount.

Colleen may argue that a valid contract was formed nonetheless because she signed the counteroffer and because she sent a check for $10,000. However, both of these arguments will fail. First, because Amy's counteroffer had been rejected after Colleen made a subsequent counteroffer for $75,000, Colleen had no power to accept the offer for $80k.

Second, Amy will be able to successfully assert the defense of the Statute of Frauds against Amy. The Statute of Frauds requires certain types of contracts to be in writing and signed by the party to be charged. Contracts for the sale of real estate, the sale of goods amounting to $500 or more, contracts in contemplation of marriage, contracts guaranteeing the debt of another, and contracts that cannot be completed in less than one year must be in writing and signed by the party to be charged. The party to be charged is the party against whom the contract is being enforced.

In this situation, Colleen would be suing Amy, and thus, Colleen would need to show a signed writing from Amy. For real estate contracts, this writing must contain the name of the parties, the sale price, and the description of the land. Alternatively, in a real estate

contract, the Statute of Frauds may be satisfied by showing two of the following three facts: 1) payment of purchase price; 2) physically possession of the land; and 3) improvements to the land.

Here, Colleen would be unable to show the Statute of Frauds was satisfied. First, the signed counteroffer from Amy for $75k was not a valid offer. Therefore, Colleen had no power to accept this offer, and thus, this offer cannot serve as a signed writing. Second, the check Colleen provided for $10,000 was not payment of the full purchase price, was not signed by Amy, and presumably did not include a description of the land or include the sale price. While in certain cases partial payment can satisfy one of the three items discussed above in satisfaction of the Statute of Frauds, that is only the case where the partial payment was expressly contemplated in the contract (for example, if the contract provided for $10,000 down payment). That is not the case here, and thus Colleen cannot show payment. Plus, Amy voided the check. Finally, Colleen did not take possession of Lot A or make improvements on Lot A. Therefore, she cannot satisfy the statute of frauds. Thus, Amy will be successful in her defense of this claim in that there was no contract, and she will not be required to convey Lot A to Colleen.

Had Colleen been able to successfully establish the formation of a contract, she would be entitled to either specific performance or money damages. Specific performance is where a court orders a party to comply with the terms of the contract. Specific performance is available only where there are unique goods involved and where money damages are inadequate. Land is always a unique good, and therefore, specific performance is typically available. However, since this is an equitable remedy, the right to specific performance (which would require Amy to convey Lot A to Colleen) is cut off by Amy's later sale of the property, provided that it was sold to a bona fide purchase for value who took without notice. The facts indicate that the lot was sold for $100k, which was Amy's original advertised price, so there was value in the purchase. Furthermore, nothing in the facts indicates that the subsequent buyer was on any notice (whether constructive, actual, or inquiry) that there may have been someone with a superior right to the land from Amy. Colleen was not physically present on the property, nor was anything recorded in the deed books. Therefore, specific performance would not be available in this case.

Money damages would be in the form of either restitution or expectation. Restitution puts the parties back in the position they were prior to the contract, and expectation puts them in the position they would have been had the contract not been breached. Here, restitution would require the return of Colleen's check for $10k. Expectation would allow Colleen to recover what she would have paid under the contract ($75K) and the market value at the time of the breach.

<u>Amy v. Dawn</u>

Amy may try to pursue a claim for breach of contract against Dawn. However, such a claim is unlikely to succeed.

The facts with Amy and Dawn are simpler. Dawn submitted a written offer to Amy on March 15 to purchase Lot B. This offer direct Amy that acceptance could be only by mailing a countersigned copy of the contract back to Dawn. An offeror may control how

she wishes for the offer to be accepted, and therefore this would be proper. Since Dawn stated that acceptance would occur upon mailing of the signed counteroffer, the Mailbox Rule applies, which states that acceptance occurs upon placing acceptance in the mail, and not upon receipt of the acceptance.

Here, the facts state that Amy never sent the signed contract back to Dawn. She signed the contract on March 20, but she never mailed it. In fact, on March 19, Dawn sent a letter revoking her prior offer. An offer may be revoked expressly by the offeror, by the death of the offeror, or by acts of the offeror which the offeree knew or should have known about. A revocation of an offer is effective when received (as opposed to an acceptance under the Mailbox Rule, which is effective when mailed). The facts state that the revocation was received by Amy on March 21 or 22, depending on whether receipt is deemed the day it arrived at Amy's house or the date Amy actually retrieved the letter. This does not matter, since as discussed below, Amy did not properly accept the offer. Amy contacted Dawn on March 20 to tell her she was accepting Dawn's offer. Since the facts do not indicate that she accepted the offer by mailing a signed contract, this acceptance would not be effective, since as discussed above, Dawn's offer provided a specific manner of accepting the offer. However, had Amy <u>mailed</u> the signed contract on March 20, then a valid contract would have been formed, since Amy did not receive Dawn's revocation under March 21, meaning the offer would have been accepted prior to Dawn revoking it.

Therefore, Amy will be unlikely to succeed in her breach of contract claim.

<u>Edwin v. Amy</u>

Edwin may be able to assert a breach of contract claim and a claim for fraudulent misrepresentation against Amy.

Here, the facts state that a contract was entered into by Edwin and Amy purporting to sell Lot C for $100k. The contract contained an integration clause (providing that it contains the entire agreement).

A subsequent oral agreement was then entered into purporting to sell the same lot for $50k instead of the original $100k. The enforceability of both of these agreements will be expressed in turn.

The first contract contemplated the fact that Edwin wanted to build a 3-story home on Lot C, even though zoning laws prohibited homes over two stories tall. Here it appears that neither party knew of the zoning restriction, and therefore, there was a mutual mistake concerning a material fact central to the contract. Accordingly, either party would be able to rescind this $100k contract, which it appears they did when they attempted to enter into a subsequent agreement for $50k.

Edwin will try to argue there was a misrepresentation, which requires a misrepresentation of a material fact, scienter on the part of the party making the misrepresentation, justified reliance, and damages. Here, Edwin cannot rely on this claim because there was no scienter when Amy stated she believed Edwin could build a 3-story home. Plus, all parties, including Edwin, are charged with constructive

knowledge of all applicable laws, in that he could have easily obtained this information himself.

Edwin will also lose on his breach of contract claim for the $50k oral agreement. As discussed in the Amy v. Colleen discussion, the $50,000 agreement does not satisfy the statute of frauds, as it involves the sale of land and there is no writing signed by the party to be charged. Edwin will argue that the original $100,000 agreement was simply modified, and he is attempting to enforce that modified agreement. However, when a contract is modified, the statute of frauds must still be satisfied if the modification falls under the statute. Here, the modification is still for the sale of land. Therefore, there must be a signed writing containing the purchase price (which does not exist here for the $50k agreement) or there must be two of the three of payment, possession, and improvements. It does not matter that a contract states all modifications must be in writing; common law controls here, and in any event, the modification was not in writing but needed to be (or at least needed to satisfy the statute of frauds). As the statute of frauds has not been satisfied for the $50k agreement, no agreement exists for the $50k agreement, and Edwin will be unsuccessful on his breach of contract claim against Amy.

<u>Law Firm issues</u>

An attorney may enter into business deals with a client so long as the deal is fair and reasonable and the client is able to discuss the terms of the deal with outside counsel.

Here, two issues arise in our contemplation of acquiring Amy's properties at a discount. First, our fees must be reasonable and reflect our skill and experience, the difficulty of the matters involved, our actual time spent on the matter, etc. Here, it probably would not make sense to take these properties at a discount since we will not know until after the representation is completed how much our fees are.

Second, acquiring these properties at a discount may not be fair and reasonable, since we would not be paying fair market value for the properties.

Finally, we would be acquiring an interest in the potential litigation itself, which could pose a number of problems and potentially require us to testify in the various lawsuits. This could also create a conflict of interest and affect our advocacy on behalf of Amy, since we would now have a vested interest in the litigation and personal stake in the outcome. This is prohibited by the Rules of Professional Conduct.

I recommend we decline to acquire any of the properties.

QUESTION NUMBER 2

JULY 2015 BAR EXAMINATION – CRIMINAL LAW, CONSTITUTIONAL CRIMINAL PROCEDURE, AND JUVENILE DELINQUENCY/ETHICS

Police suspect that Vic is selling drugs, but they do not have sufficient evidence for an arrest or search warrant. Two officers go to Vic's house and knock on his door, intending to ask him some questions. Donna answers the door and says that "no one else is home." One officer immediately hears moaning in the house and pushes past Donna to go inside. The police see Vic on the floor next to a bag of heroin, a needle syringe, and a ledger. Donna then says she "found Vic like this but was scared to call for help." Vic dies before medical help arrives.

Donna is arrested. In the patrol car, she says, without prompting, that she "only delivered the heroin and did not intend for Vic to overdose." She also says she heard voices telling her what to do.

At the police station, a detective informs Donna of her constitutional rights, and Donna agrees to talk to the police. The detective asks Donna about ledger entries showing that she delivered heroin to Vic and that he owed her a lot of money. Donna says that "Vic did not always pay for the drugs" she delivered. The detective presses for details, but Donna then says she "would rather not talk about it." The detective keeps asking, and Donna says that "no one steals from me and gets away with it." Donna then starts rocking in her chair and arguing with invisible people.

An autopsy later shows that Vic died from a heroin overdose and that he had marks on his wrists indicating his hands had been tied together recently. Donna's fingerprints are the only fingerprints found on the syringe.

The newspaper reports that a defense attorney was hired by an anonymous donor to represent Donna. The attorney said he would get a million dollar "bonus" if Donna were acquitted.

Discuss the potential charges against Donna related to Vic's death; her potential defenses raised by the facts; and, substantive pretrial motions that the defense might file, explaining the grounds and the State's likely responses. Also discuss the ethical considerations arising from the defense attorney's offer to represent Donna.

SELECTED ANSWER TO QUESTION 2
(July 2015 Bar Examination)

Potential Charges Against Donna

The state attorney would file these charges in circuit court as murder is a felony charge. Further, the state attorney can file either by indictment or information. Based on the evidence that Vic's wrists were tied, and that Donna's fingerprints are the only fingerprints found on the syringe, there are several legal theories under which the state attorney may try to charge Donna with. The first would be first degree murder. A first degree murder is one that is deliberate and pre-meditated. There must be sufficient time before the killing upon which the killer or defendant reflected about the murder, i.e., it was pre-planned. The State Attorney's office would base this charge on Donna's statement that Vic owed her a lot of money, Vic did not always pay, and that no one steals from me and gets away with it - evidencing that Donna may have pre-planned the murder because Vic owed her a lot of money. In addition, Donna initially lied to the police saying no one was home, evidencing that she planned to keep Vic moaning until he passed away. Further, the facts that Vic's hands were tied up may be evidence that she tied him up and injected him with enough heroin to overdose.

If there is no pre-mediation or deliberation however, the state attorney may try and make the first degree murder charge stick by showing the murder is a result of Donna's possession of a controlled substance. Florida also accepts the common law rule that a Felony Murder will be a first degree murder. This would depend on whether or not possession of a controlled substance is one of the pre-numerated felonies to fall under this category

Under the common law Murder is the taking of a human's life with a depraved heart. Florida has adopted the common law definition and further calls murder that is not premediated or deliberate as "second degree murder." Depraved heart is evidenced by (1) intent to kill; (2) intent to commit serious bodily injury; (3) super reckless disregard of the dangers to human life; or (4) as a result of a non-pre-numerated felony. Here, there are several theories the state prosecutor could sue for murder including: either that Donna by tying Vic up and then pushing a needle syringe of heroin into his body was a super reckless disregard of human life; and/or that she knew Vic was addicted to drugs and it was super reckless for her to deliver heroin to an addict. Further the state attorney will argue that Donna should have called the police and that this failure to call was a super reckless act which caused Vic's death. Donna will argue that she was scared however this will be raised in her defense attorney's case in chief.

The last theory of murder would be involuntary manslaughter - evidenced by (1) a killing committed during a misdemeanor or a crime not classified as a felony; or (2) reckless indifference to life that lead to death of a human. This would probably be the theory to sue on if the first degree murder charge of second degree murder charge does not have enough evidence to support. Based on the reckless indifference in providing heroin or by selling a controlled substance.

Another charge would be Possession of a Controlled Substance: Florida makes it a crime to knowingly transport, sell or possess a controlled substance. Here, Donna not

only admitted that she sold the drugs to Vic but her finger-prints were found on the syringe that was used.

Battery: if the murder charges do not fit, but it is found that Donna did tie up Vic's wrists - a battery in Florida is a specific intent crime, unlike common law, under which the state attorney must prove that the defendant intended to commit an offensive or harmful contact with the plaintiff. Here, the state attorney may argue that tying Vic's wrist up was a harmful and offensive contact, and that inserting him with a syringe was a harmful or offensive contact.

For all of these crimes there must be a voluntary act, with the appropriate mens rea, and clear causation element. For the murder charges, the state attorney must prove that Donna's voluntary acts with her requisite mens rea was the cause of Vic's death. Further, the state attorney will want to file all possible charges because under double jeopardy an acquittal of either a lesser included offense or a higher degree of the offense will bar any and all lesser or higher degrees of offenses in separate proceedings. Double Jeopardy attaches in a criminal proceeding when the jury is sworn in. Further, any crime that contains the same elements as another crime means double jeopardy has attached.

Potential Defenses

Insanity: M'Naughten theory - must be proved by clear and convincing evidence and raised by the defendant with the burden of proof on the defendant. Insanity means that the defendant did not have the legal capacity of mind at the time the crime was committed to be charged. The M'Naughten theory follows that because of a disease of the mind the defendant did not know her actions were wrong [did not know right from wrong]; or did not understand the unlawfulness of her actions. This defense would be raised based on Donna starting to rock her chair and arguing with invisible people. However, the burden is on Donna and her attorney to prove that at the time of the actions she was insane.

Donna will also try and argue that the state cannot meet its burden proving the requirements for murder - because Vic is the one who inserted the heroin in himself, and that Donna played no part in his death and further that the evidence seized and her statements violated her constitutional rights [as discussed below] and therefore the state has no evidence to support the charges. The Heroin and needle were not found on Donna's person but on Vics.

Pre-trial motions:

Suppression of Evidence: Fourth Amendment Violation - Unreasonable Search & Seizure

The Florida constitution interprets the Fourth Amendment in conformity with the Federal Constitution and as interpreted by the United States Supreme Court. This means that Florida has adopted the protection against unreasonable searches and seizures and further has adopted the exclusionary rule disallowing any evidence that violates these rights. However, even with the exclusionary rule, the decision to suppress

evidence will ultimately be up to the judge, however because this is a criminal case, judges tend to suppress the evidence to avoid any prejudicial effects.

In order to file a motion to suppress for unreasonable search and seizure the defendant must have standing: there must be conduct by the government (a police offer) and in an area where the defendant had a reasonable expectation of privacy. A defendant has a reasonable expectation of privacy in their home, or in the home where they are an overnight guest. A defendant does not have a reasonable expectation of privacy in the home of another where they are not staying. Further a defendant cannot raise the reasonable expectation of privacy of a third party. Government's actions must specifically violate her right.

Here, technically speaking the Police did violate Vic's protection against unreasonable search and seizure. Generally, the police must have a valid search warrant and arrest warrant to search and arrest a defendant at his own home. To have a valid search warrant the warrant must be based on an affidavit of the police that there is probable cause, specifically describe the area being searched and the item to be seized, and be given by a neutral and detached magistrate. Here, when the police went to Vic's door and Donna answered without any evidence that she had the consent to allow them to search the home; they violated Vic's Fourth Amendment rights. There are several exceptions to the warrant requirement such as extingent circumstances - evidence that the defendant is either trying to flee, will destroy evidence; or reasonable danger to life; consent by someone who has the authority to allow the police to enter the house specifically someone who resides there, a search incident to an arrest, an automobile exception and the plain-view doctrine. Here, the police would argue that there were extingent circumstances when they heard Vic moan because they thought someone was danger. Further, once they were in the home on extigent circumstances the ledger, bag of heroin and needle syringe were in plain view and thus because clearly evidence of a crime were allowed to be seized. Regardless, as Vic has died, he cannot raise these constitutional issues.

Donna will thus try and argue the above, that the police's presence in the home and then seizure of the ledger, bag of heroin and needle syringe were unconstitutional and must be excluded because they violated a reasonable expectation of privacy. However, this expectation of privacy only goes to Vic. The statute will argue that Donna does not get to raise this constitutional argument against unreasonable searches and seizures because it was not her home. There is no evidence she was an overnight guest, only that she sold drugs. Therefore, this motion to suppress would probably be declined for lack of standing for failure to have a reasonable expectation of privacy and the state would win on its response.

<u>Suppression of Statements: Fifth Amendment Violations of Right Against Self-Incrimination</u>

The Florida constitution also interprets the Fifth Amendment Right against Self-Incrimination in conformity with the Federal Constitution. The Fifth Amendment protections are not crime specific and are only enforceable upon government/ police custody and interrogation. If a defendant does not know she is being interrogated by a government officer the statements will be considered voluntary. The right against self-

incrimination means that at the time of an arrest, or when a defendant is taken into custody with an interrogation a defendant must be given her Miranda Rights which are: you have the right to remain silent, anything you can say or do may be used against you in the court of law, you have a right to an attorney, and if you can't afford one, then one will be provided for you. When Donna was arrested there is no evidence that she was given her Miranda Rights. At this stage in a proceeding - an arrest where a Defendant is taken into custody her miranda rights should have been given. Therefore Donna's statement "only delivered the heroin and did not intend for Vic to overdose" will probably be suppressed. The state may try and argue that although custody had occurred there was no interrogation requiring recital of the Miranda rights, however at this stage when a defendant is handcuffed the Miranda Rights are customary and the state would probably lose.

At the police station the facts say a detective informed Donna of her constitutional rights - we can assume this was probably a proper Miranda statement. A defendant upon receiving Miranda may either request an attorney, which request must be granted and questioning must seize until the attorney arrives, or the defendant re-instates the questioning on her own, or may invoke her right to remain silent. The right to remain silent must be unequivocal and clear. If a defendant invokes her right to remain silent the police must seize questioning for her crime, and upon waiting a few hours may regive the Miranda warnings. Here, Donna agreed to talk to the police thus waiving her fifth amendment right to silence and self-incrimination. The statement that "Vic does not always pay for drugs" and when Detective asked about the ledger will probably be admitted, unless Donna can prove her being informed of her constitutional rights was not the proper Miranda recital. Donna will argue that when she said "I would rather not talk about it" that she claimed her right to remain silent and that the detectives violated this right when they kept questioning her. However, the state will argue that Donna's request was not clear and equivocal and therefore, the detectives had every right to keep asking questions until she made a clear request.

Donna will also try and argue the statements were not voluntary. Because she was incompetent to be questioned. Discussed below in the motion.

<u>Motion: Incompetent to Proceed:</u> this motion reflects that Donna during the time of her proceeding is not competent to proceed in trial. If a defendant is found incompetent on the request of the defendant's attorney, the state prosecutor or the court, the judge will stay the proceedings and order the defendant be evaluated by no more than 3 but no less than two mental health experts. The court will routinely check Donna's competency status. If by the end of five years there is no evidence that Donna will ever gain competency she may be released. However, for a crime of murder, and based on an assessment report from the mental health experts, if she is a clear danger to herself, society or at risk of murdering again she may be committed. Donna will also use this motion to argue her statements were not voluntary at all.

If the evidence is suppressed: Donna's attorney will file a petition to have the charges dismissed for lack of probable cause, i.e. evidence to support the claims.

<u>Ethical Considerations</u>

An attorney's fees must be reasonable and communicated preferably in writing at the beginning or before representation. An attorney in either a contingency fee arrangement or for an indigent defendant may provide the fees and expenses for litigation. A contingency fee agreement means that the lawyer's ultimate fee will be based on the results of the litigation. A contingency fee agreement must be in writing, and must clearly explain how the fee will be calculated based on different resolutions. Further, the client in a personal injury suit must be given the client's statement of rights identifying that a client can terminate the agreement within three days. However, the Florida Bar forbids certain type of representations in a contingency fee arrangement, these are (1) criminal representation and (2) family law matters such as divorce, alimony or child custody. AS this representation would be for a criminal defendant, this type of contingency fee arrangement is not allowed because the contingency rests on the defendant's ultimate freedom. Therefore, the attorney may not get a million dollar bonus if Donna were acquitted.

Further, a lawyer must maintain professional and independent judgment. This means avoiding any conflict of interest. A lawyer may have another person pay for the clients representation as long as (1) the lawyer's professional and independent judgment will not be tainted and his full priority will be that of the client being represented; (2) the client consents and understands that someone will be paying; and (3) the lawyer's duty of confidentiality is maintained. Here, an anonymous donor hired the lawyer to represent Donna; the lawyer therefore must meet all these requirements in order for the representation to be valid.

QUESTION NUMBER 3

JULY 2015 BAR EXAMINATION – TORTS/ETHICS

City purchases a used car manufactured by AutoCo from Dealer, one of AutoCo's licensed dealerships. AutoCo later issues a recall notice warning City that the car contained a hidden safety defect, arising from inadequate testing, that prevents its driver air bag from deploying in an accident, and urging City to have it repaired. City's employees forget to have the recall repairs performed, and instead substantially modified the driver air bag in other ways.

Five months later, Employee jumps into the car and races home. Due to excessive speed, Employee misses a curve and the car slams head-on into a brick wall. During the accident, the car's driver air bag does not deploy and Employee suffers fatal injuries. However, no defects in the car caused the accident. Employee leaves behind Spouse and seven minor children.

Twenty-two months after the accident, Spouse approaches Attorney to discuss a potential lawsuit. Attorney agrees to file a lawsuit for what Attorney describes is a "standard attorney fee of 50 percent of any recovery" and Spouse agrees to this arrangement. Attorney immediately pulls out a one-paragraph representation contract to pursue a wrongful death lawsuit, which references the "standard attorney fee of 50 percent," which Spouse signs on the spot; no other documents are signed by Spouse. Two days later, Spouse tries to back out of the signed contract, but Attorney refuses to cancel the agreement. Attorney devotes the next several months to this matter without alerting any potential defendant, and files a very detailed wrongful death lawsuit twenty-nine months after the accident, seeking $5,000,000 from each defendant.

Prepare a memo evaluating the claims of Spouse, AutoCo's defenses, and any ethical issues for Attorney arising from this situation.

SELECTED ANSWER TO QUESTION 3
(July 2015 Bar Examination)

MEMO

To: File

From: Attorney

RE: Claims of Spouse, AutoCo & Ethical Issues

I. Spouse's ("S") Claims

A. S v. Dealer

S will not likely succeed in a strict liability claim against Dealer. Strict liability applies when the activity is abnormally dangerous, a defect is present, or animals are involved. Here, there is a defect present. A defect can either be a design defect, manufacturing defect, or failure to label. A seller of items, who sells the defective item in its usual course of business is generally strictly liable for defects. Here, there was a safety defect that was hidden. A merchant is not liable for a defect unless they knew of or should have known of the defect. Here, the safety defect was hidden. It does not matter that Dealer was not in privity with employee or S; privity of contract is not required for strict liability claims. As such, Dealer is not likely strictly liable.

S would not likely succeed in a negligence claim against Dealer. Negligence requires duty, breach, causation (legal & proximate cause), and damages.

Duty - owed to all foreseeable plaintiffs to act as a reasonably prudent person under the same or similar circumstances. Here, D had a duty to sell the car to the city as a reasonably prudent dealer would under the same or similar circumstances. D did not know of the defect, so was under no duty to inform the city of the defect.

Breach - when defendant's conduct falls below the duty owed. Here, S may try and argue that D's duty was breached when failing to warn the City of the defect. However, Dealer did not know of the defect, so had no duty to warn.

As there was no breach of the duty owed, no negligence will be brought on dealer.

B. S. v. AutoCo ("A")

S will likely succeed in a strict liability claim (defined above) against A. Here, the strict liability claim will be based in negligence (defined above).

A had a duty to act as a reasonably prudent car manufacturer. This duty was owed not only to those that purchase the cars, but also to foreseeable plaintiffs.

A breached this duty (defined above) when failing to adequately test the car and allowing a product to enter the stream of commerce with a defect. A will argue that the duty was not breached, because they alerted the City as soon as possible once the hidden defect was discovered. However, urging to have a defect repaired is not sufficient to circumvent liability. Additionally, A may be liable under strict liability for allowing a defective product to leave its facility and enter the stream of commerce with a defect.

Causation - A must be the legal causation (the but-for causation) and the proximate cause (that the damage incurred by Employee ("E") was foreseeable). Here, S will argue that but-for the safety defect in the car, E might not have died. Additionally, that it was foreseeable that failure for a driver's airbag to deploy would possibly result in death.

Damages - Defendant must incur actual damages, not just economic loss. Here, E suffered actual damages in his death. Florida allows for recovery of compensatory damages in the form of economic (lost wages, medical bills) and non-economic (pain & suffering, loss of consortium). Florida, unlike a majority of states, allows recovery of pain & suffering in wrongful death actions for the surviving spouse and any minor children. Here, E leaves behind a spouse and 7 minor children.

It is unlikely that S can recover punitive damages. In Florida, punitive damages must be plead with specificity to the trier of fact, who must find by clear & convincing evidence, that the individual is guilty of intentional misconduct or gross negligence. For an employer or other individual to be liable for punitive damages due to a contractual or agency relationship, the principal (or A in our situation) must have either 1) condoned or ratified the conduct; 2) participated in conduct that lead to the injuries; or 3) been grossly negligent. Here, there are no facts that support by clear & convincing evidence that there was gross negligence or intentional misconduct by A.

C. <u>S v. City ("C")</u>

S may bring a claim against C for vicarious liability. Vicarious liability is holding an individual accountable/liable for the acts of its agent or employee. S will argue that C was vicariously liable for the negligence of its employees.

Duty - defined above. Here, C had a duty to provide safe cars to its employees.

Breach - defined above. Here, C breached this duty when C received notice of a hidden safety defect and was urged to have it repaired, but failed to repair the defect.

Causation - legal & proximate cause (both defined above). S will argue that but-for C's failure to replace/repair the defect, E would not be dead. Also, that the damages on E were foreseeable since C knew that the driver airbags were not working properly. C can argue that it is not liable because E was not working or on a detour (slight deviation from his employment obligations), but was rather on a frolic (large deviation from the scope of duty). Employers are not liable for torts that occur during a frolic that are outside the scope of employment.

C will likely be vicariously liable for the tortious acts of its other employees who substantially modified the driver airbags. Vicarious liability exists when an employer is liable for the acts of its employees that fall within the scope of employment and/or are done for the benefit of the employer. Here, employees forgot to have the repairs performed, despite A urging C to have the repairs performed. Moreover, the employees substantially modified the driver airbag in other ways. If these modifications were within the scope of these employee's job or were done for the benefit of C (their employer), C may likely be liable. If the employee's conduct in modifying the air bag was grossly negligent (evidencing a reckless disregard for human life), and C condoned, ratified, or participated in the negligent conduct, C and the employees may be liable for punitive damages.

Damages - defined above. Here, E suffered fatal injuries as a result. C can argue that it is immune from liability under sovereign immunity. Florida enacted governmental immunity in accordance with the federal government, but is liable for damage to property and people. The government is liable for injuries that are a result of operational duties, but not planning. Here, the government was not in a planning activity, but operational since it failed to have the defective car repaired. City may argue that it planned to have the car repaired and that it is not liable since it is a planning activity, but this will not likely succeed. If C is held liable, there liability will be mitigated under Florida's comparative negligence standard (as discussed below) and the governmental immunity. The government may only liable for $200k per person or $300k per occurrence. Anything in excess must be approved by the legislature.

II. Defenses

A. A's Defenses

A will argue that it did not breach it's duty. A did not know of the safety defect, but once found, notified and urged C to have the car repaired. C's failure to have the car repaired is a superseding cause (an unforeseeable intervening cause that breaks the chain of causation and liability); however, failure to repair a defect is a foreseeable intervening cause that was created by A - so unlikely to prevail. A will argue that E's injuries were not foreseeable, because it was not foreseeable that a user would use the car to race and drive at reckless speeds. A may try and argue negligence per se (assuming there are speed limits). However, this would only serve to mitigate A's damages, and would not be a bar to recovery. Moreover, in Florida, only penal statutes are sufficient for negligence per se - where the duty is defined by statute and intended to protect a specific class of people from specific harms. If there is no penal aspect to a statute, it is merely prima facie of negligence.

A can also argue that it is not strictly liable because C's employees substantially modified the air bags. A manufacturer is not liable for substantial modifications if the modifications are unforeseeable at the time of production. Here, the employees substantially modified the driver air bag and E's fatal injuries were not caused by any defects in the car. A may still be liable for negligence in failing to adequately test each car it manufactures.

A can also argue against total damages. Florida is a pure comparative negligence state. Plaintiff can bring a claim as long as they are not 100% at fault. Any fault of plaintiff will be apportioned by the jury or judge and will be calculated considering all parties involved in the accident - whether they are a named party or not. Here, S is seeking $5M from each party. A can seek to mitigate damages and apportion fault due to C's failure to repair the car, C's employee's substantial modification of the driver airbags, and E's driving at excessive speeds. A may also be able to mitigate total damages due to the Florida seat-belt defense. Facts do not indicate whether E was wearing a seatbelt. If A can prove that: 1) E had an operational seat belt available, 2) E failed to use the seat belt, and 3) failure to use the seatbelt increased the damages incurred, the judge will instruct the jury to apportion fault to E.

III. Ethics

A fee must be reasonable and not clearly excessive. Court's look to factors such as the skill required, result obtained, competency & diligence of the attorney, fee charged in the community for similar representation, and time involved in representation to determine if a fee is reasonable. Contingent fees are allowed except in family or criminal law issues, with the exception that they are allowed to recover for past due alimony. Florida statutes proscribe set percentages, and anything above those percentages is presumed in excess, but is rebuttable.

Contingent fee must be in writing containing specific requirements (break down of fees if the case settles, goes to trial, appeal, calculation of fees before or after costs are taken out), signed by the client & attorney, a copy provided to the client for their records, and the client has three days which to retract their acceptance of the fee agreement. Here, attorney's "standard fee" of 50% is clearly in excess of the percentage proscribed by the Florida statutes. S signs the one-paragraph boiler plate agreement (likely failing to contain the required information of fee allocation and breakdown) on the spot, without further review or questions. The facts do not state, but I am assuming that S did not receive a copy of the signed agreement, which is a breach of the Florida rules of professional conduct. S attempted to withdraw from the agreement after two-days, but attorney refused to allow this. Despite S's valid withdrawal, attorney continued doing work for 7 months, incurring substantial legal fees for S.

Additionally, S may have a claim against attorney for failing to file suit within the statute of limitations. Tort actions generally must be brought within two years of their occurrence. After that time, the claims are barred by the statute of limitations. Here, S went to attorney with two months left before the claims would be barred. Attorney did not file the claim for another 7 months, and the claim would likely be barred by the statute of limitations. If it is barred, S can claim a breach of attorney's fiduciary relationship, and attorney's incompetence and bring a malpractice claim against attorney. If attorney has filed the claims within the statute of limitations, S may still bring a claim for malpractice due to S's informing attorney of withdrawing from the agreement. S's withdrawal excused attorney from representation and terminated their relationship. Attorney essentially filed suit on behalf of a client attorney does not represent. This can not only lead to a malpractice suit from S, but sanctions from the court and the Board of Bar Examiners for filing a frivolous suit.

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. Some of the multiple-choice items on the Florida prepared portion of the examination will include a performance component. Applicants will be required to read and apply a portion of actual Florida rules of procedure, statutes and/or court opinions that will be included in the text of the question. The questions and answers may not be reprinted without the prior written consent of the Florida Board of Bar Examiners.

The answers appear on page 47.

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. The person on each side of you should have a booklet with a different colored cover. Please determine that the person on each side of you is using a different colored cover. If he or she is using an examination booklet with the same colored cover, please notify a proctor at once.

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.

23 SAMPLE MULTIPLE-CHOICE QUESTIONS

1. After the close of the pleadings both plaintiff and defendant duly made motions for summary judgment. Which of the following statements is correct?

   (A) Summary judgment can be entered only after all discovery has been completed.
   (B) Motion for summary judgment is the proper motion on the ground that plaintiff's complaint fails to state a cause of action.
   (C) Since both parties have filed summary judgment motions that assert there are no genuine issues of material fact, summary judgment for plaintiff or defendant will be granted.
   (D) If plaintiff's proofs submitted in support of his motion for summary judgment are not contradicted and if plaintiff's proofs show that no genuine issue of material fact exists, summary judgment will be granted even if defendant's answer denied plaintiff's complaint.

   Questions 2 – 3 are based on the following fact situation.

   West is arrested and charged with first degree murder and attempted armed robbery. At trial, the State called the emergency room physician who testified that the victim told him that "West tried to steal his gold neck chain and shot him." The defense objected and argued that the testimony was inadmissible hearsay. The State argued that the statement that West tried to steal the victim's chain was not hearsay and was admissible as a statement of identification. The State further argued that the statement that the victim was shot was admissible as a statement for purpose of medical treatment.

2. Based upon the legal arguments presented, the court should rule

   (A) the statement that West tried to steal the victim's chain is admissible and the statement that the victim was shot is inadmissible.
   (B) the statement that the victim was shot is admissible and the statement that West tried to steal the victim's chain is inadmissible.
   (C) both statements are admissible.
   (D) both statements are inadmissible.

3. Following the testimony of the physician, the State offered into evidence a copy of the report of the investigating police officer setting forth the officer's observations at the scene of the crime. The evidence is

   (A) admissible as a recorded recollection.
   (B) admissible as a public report.
   (C) inadmissible because it is hearsay not within any exception.
   (D) inadmissible because the original report is required.

4. Which statement best describes the profit sharing relationship of a general partnership where the partners have agreed only on voting percentage and the voting shares are unequal?

   (A) Partners share in proportion to their contributions to the capital and assets of the partnership.
   (B) Partners share in proportion to their voting percentage.
   (C) Partners share equally.
   (D) Partners cannot share until they unanimously agree upon a distribution.

5. Billy was charged with grand theft. The trial began on a Thursday afternoon. The jury was impaneled, sworn and released for the day. Since Friday was the Fourth of July, the judge asked the jurors to return on Monday. The trial began again on Monday morning at 8:30. By late evening the judge had instructed the jury. Due to the lateness of the hour, the jurors were sequestered for the evening to allow them to get an early start the next morning. The jurors returned Tuesday morning and were unable to reach a verdict. Unable to reach a verdict, the trial judge allowed the jurors to go home that evening. On Wednesday morning, the jury assembled and returned a verdict of guilty.

   On appeal, which of the following is Billy's strongest issue for seeking a reversal?

   (A) The fact that the jurors did not begin to consider evidence until several days after they were impaneled.
   (B) The fact that the jury was allowed to go home after being sworn.
   (C) The fact that the jury took several days to return a verdict.
   (D) The fact that the jury was allowed to go home after they began deliberations.

6. Nancy Quinn had two sons, Earl Quinn and Brent Quinn, before she married Al Green in 2004. In 2006, 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, 2008, Nancy and Al were divorced, but Nancy never got around to making a new will. Nancy died on May 1, 2010, 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 purchases 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. A defendant charged with first-degree murder shall be furnished with a list containing names and addresses of all prospective jurors

    (A) upon court order.
    (B) upon request.
    (C) upon request and showing of good cause.
    (D) under no circumstances.

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.

Questions 13 - 14 are based on the following fact situation.

Vehicles driven by Murphy and Goode collide at an intersection where a traffic light is present. Before the filing of any lawsuit, Murphy tells Goode that he ran the red light and they offer to settle the claim for $500. Goode refuses to accept it. Murphy then sues Goode for his personal injuries and property damage and Goode, who was not injured, counterclaims for property damage.

13. At trial, Goode's attorney calls his client to the stand and asks 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. Goode testifies that his neighbor told him that her friend, a school principal, witnessed the accident and that the principal, still under the stress of the excitement of having viewed the accident, had told her exactly what he saw. His attorney then asks Goode what the neighbor said to him about the accident. Before Goode can testify further, Sellers interjects a hearsay objection. The court should

    (A) sustain the objection if the principal is not available to testify.
    (B) sustain the objection because the neighbor's statement is hearsay and no exception applies.
    (C) overrule the objection because excited utterance exception to the hearsay rule applies.
    (D) overrule the objection because the spontaneous statement exception to the hearsay rule applies.

15. Tom and Laura had three adult children. After a bitter divorce, Tom was sure Laura would disinherit their son, Bif. Tom executed a new will that provided bequests for all three children, but stated, “in the event my ex-wife, Laura, revokes her will in existence on the date of our divorce, I leave my entire estate to my son, Bif.” Laura did revoke the will referred to in Tom’s will but did not disinherit Bif. At Tom’s death, what distribution and reason given below are correct?

    (A) Tom’s estate passes to his three children because will provisions are not binding if they are conditioned on events outside testator’s control.
    (B) Tom’s estate passes to his three children because will provisions are not binding if they are conditioned on future events.
    (C) Tom’s entire estate belongs to Bif because Laura revoked her will and the provision regarding that event controls distribution.
    (D) Tom’s estate passes by intestate succession because the mistake regarding the contents of Laura’s new will voids Tom’s testamentary intent.

16. Rainbow Corporation has outstanding 1,000 shares of voting common stock and 1,000 shares of nonvoting preferred. The preferred has a liquidation preference equal to its par value of $100 per share plus a three percent noncumulative dividend. Rainbow submits to its stockholders a proposal to authorize a new class of preferred stock with redemption rights that would come ahead of the old preferred stock. At a shareholders' meeting, 700 common and 400 preferred vote in favor of the proposal. Which of the following statements is correct?

    (A) The proposal is validly approved because overall a majority of the outstanding shares did approve.
    (B) The proposal is invalidly approved because a majority of the preferred shareholders did not approve.
    (C) The vote of the preferred stockholders does not matter because it was nonvoting stock.
    (D) The proposal is invalidly approved because a two-thirds vote of each class is required.

17. In the absence of a provision to the contrary in the articles of incorporation, the directors of a corporation elected for a specified term

    (A) can be removed from office at a meeting of the shareholders, but only for cause and after an opportunity to be heard has been given to the directors.
    (B) can be removed from office at a meeting of the shareholders, with or without cause.
    (C) can be removed from office at a meeting of the shareholders, but only for cause.
    (D) can be removed from office prior to the expiration of their term only by a decree of the circuit court in an action by the shareholders.

18. Defendant was seen leaving Neighbor's yard with Neighbor's new $10 garden hose. Neighbor called the police, who charged Defendant with the second-degree misdemeanor of petit theft by issuing him a notice to appear in the county courthouse one week later.

    Defendant appeared at the scheduled place and time and asked the judge to appoint a lawyer to represent him. The judge found Defendant to be indigent. The judge

    (A) must appoint Defendant a lawyer.
    (B) must appoint Defendant a lawyer if the State subsequently charges Defendant by information.
    (C) need not appoint Defendant a lawyer if the judge states in writing that Defendant will not go to jail for more than six months if convicted.
    (D) need not appoint Defendant a lawyer if the judge states in writing that Defendant will not go to jail at all if convicted.

19. Before Sue and Harry were married, Harry signed an agreement waiving “all claims” to Sue’s estate. Harry received advice of counsel prior to signing the agreement. After Sue dies, Harry learned for the first time that Sue owned over $1,000,000 worth of stock, Sue’s validly executed will leaves her entire estate to her mother. Which of the following is true?

    (A) Harry is entitled to homestead property because he did not specifically waive his right to homestead.
    (B) Harry is entitled to his elective share of Sue’s estate because she did not make a fair disclosure of her estate.
    (C) Harry is entitled to the family allowance because family allowance cannot be waived.
    (D) Harry is not entitled to any share of Sue’s estate.

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. Mary, a wealthy St. Petersburg widow, executed her first and only will on May 15, 1990 and died on August 18, 1990. Her will provided that her estate be divided equally between her only child, Joan, and the Salvation Army of Largo. How will Mary's estate actually be distributed?

    (A) 100% to Joan.
    (B) 100% to Joan if she files a timely petition requesting that the devise to the Salvation Army be avoided.
    (C) 50% to Joan and 50% to the Salvation Army.
    (D) 50% to Joan and the income from the remaining 50% to Joan for life, remainder to the Salvation Army, if Joan files a timely petition protesting the devise to the Salvation Army.

ANSWER KEY FOR MULTIPLE-CHOICE QUESTIONS

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