

Florida Board of Bar Examiners

ADMINISTRATIVE BOARD OF THE SUPREME COURT OF FLORIDA

Florida Bar Examination Study Guide and Selected Answers

**July 2010
February 2011**

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

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PART I – ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2010 AND FEBRUARY 2011 FLORIDA BAR EXAMINATIONS

ESSAY QUESTIONS AND SELECTED ANSWERS

Part I of this publication contains the essay questions from the July 2010 and February 2011 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 handwritten answers are typed as submitted by the applicants. 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

JULY 2010 BAR EXAMINATION – FL CON LAW

John Holmes owns, free and clear, 160 acres in the county. John and Luisa, his wife, live in a house on 140 acres with 20 acres across the street. Luisa knowingly waived all rights of any kind to the land and house in a postnuptial agreement. John's creditors obtained judgments against him for debts related to his commercial development business. The creditors are threatening levy and execution.

The Holmes want to move into town. John has entered into a contract to sell his property, and they want to buy a house on a 1/2-acre lot in town. The seller has lived there a long time, and the ad valorem property taxes are very low. John is concerned, however, about whether they will be able to pay the property taxes. Additionally, he has heard rumors that the State of Florida wants to start collecting property taxes.

John comes to you for help with the sale. John also wants to leave a life estate in the in-town property to his Canadian nephew with the remainder to his favorite charity.

Write a memo advising John regarding the property tax consequences of his proposed sale and purchase of property; creditor claims against him as they affect the proposed sale and purchase; and, his proposed estate plan for the in-town property. Do not discuss bankruptcy law or business associations law in your memo.

SELECTED ANSWER TO QUESTION 1
(July 2010 Bar Examination)

To: Partner

From: Bar Candidate

Re: John Holmes

1. *The property for sale is likely Homestead property but can likely be transferred without Luisa's consent*

The first issue is whether John's property that he is selling qualifies for the homestead exemption. To qualify as a homestead, the property must be owned by Florida residents, used as the primary residence, be no more than 160 acres of contiguous land if in an unincorporated area or ½ acre in an incorporated area. Further, only one residence can qualify as a homestead for any person. Here, the facts show that John and Luisa had been living in the house on 140 acres. There are no facts showing that this was a vacation or second home, and they are Florida residents, so this property likely qualifies for the homestead exemption. However, it will only extend up to 160 contiguous acres, so the 20 acres across the street will not be included in the homestead. Thus, the 140 acres qualify for the homestead exemption.

2. *John can likely sell the property*

The next issue is whether John can validly transfer the property without Luisa's consent. In Florida, to transfer a homestead, the owner's spouse must sign and agree to the transfer. However, a spouse's homestead rights may be waived in a valid postnuptial agreement. For a postnuptial agreement to be valid, it must be in writing, signed by both parties to the marriage, and have been made voluntarily. Also, there is no financial disclosure requirement for postnuptial agreements. Here, there are no facts one way or the other as to whether Luisa's waiver was made voluntarily, but without any evidence of duress or undue influence, a court would likely find that Luisa made a valid waiver of her homestead rights. As such, John can likely transfer the property without her consent.

3. *John's homestead exemption will likely be portable to the in-town property*

The next issue is whether the homestead exemption is transferable from the first property to the second. In Florida, the homestead protection is transferable, provided the new property meets the requirements of primary residence, owned by Florida residents, and only one property. The homestead protection will not be valued according to the new property at first, but will retain the value for the old house adjusted at a premium rate. However, as the town is likely an incorporated area, the homestead exemption will only apply to ½ acre, which would be the entire property. However, when transferring a homestead exemption, the amount exempted will be determined by the value of the new property, not the property being sold. So, if John does buy the new property, the homestead exemption from the first property will be portable to the new

property, but will only extend to value and acreage of the new property. Thus, John's homestead exemption will be transferable to the new property.

4. *The tax implications for the proposed sale are that John will retain the homestead exemption*

The next issue is whether this sale has any tax implications for John and Luisa. In Florida, homesteads qualify for tax exemptions of \$25,000 initially, plus another \$25,000 for non-school ad valorem taxes for value between \$50,000 - \$75,000. Further, property taxes on a homestead may only be increased by the less of 3% or the Consumer Price Index. Also, it is unconstitutional for the State of Florida to tax property; the only entities that can levy ad valorem taxes are 1) school districts; 2) counties; 3) municipalities; and 4) special taxing districts. Thus, the 140 acres that John wishes to sell will likely qualify for the initial tax exemption. Moreover, if John decides to buy the new property in town, as put forth above, this tax exemption will apply, and he will be taxed at the value of the property less the initial \$25,000, less another \$25,000 of property value for non-school ad valorem taxes, if the property qualifies. Further, John's property will likely not be taxed by the State of Florida, but it may be taxed by counties, municipalities (like the town he would be living in), school boards, and special taxing districts.

5. *John's creditors will probably not be able to collect judgments or force a sale of his property*

The next issue is whether John's creditors can recover judgments from John's property. Generally, homestead property is exempt from any forced sale or judgment lien. However, creditors may force a sale of a homestead if the debt is: 1) a mortgage; 2) a mechanic's lien for improvements to the property; or 3) unpaid federal or state taxes. Further, a property will not be protected from forced sale if the homestead protection came into existence after the judgments were entered or in an effort to evade creditors. However, if the creditors obtain executions against John, they may recover from proceeds of his sale. Here, the creditors seem to have obtained judgments relating to John's business, not unpaid taxes, mortgage, or mechanic's liens, so they would likely not be able to force a sale of either property. The creditors may argue that John is trying to evade creditors by buying a new home when he owes them money, but as discussed above, the homestead protection from his original property will be portable to his new property. Also, there are no facts as to when John acquired his first property, but if he acquired it before the creditor's judgments were issued, then the homestead protection would not apply to those creditors. But, there is no evidence of that here, so John's homestead protection would likely protect both the old property and the new home he wants to buy.

6. *John's estate plan for his new house is likely valid and the homestead protection will not extend to his nephew, but not to the charity*

The next issue is whether John's estate plan is valid and whether the homestead protection will pass to his heirs. In Florida, a homestead protection generally terminates on a valid devise, sale, or conveyance, but it may continue if the home is devised to the testator's spouse or children. Further, an organization or corporation may not benefit from any homestead protection; it is only for natural persons. Generally, a surviving spouse is granted a life estate in a homestead, with a vested remainder in fee simple in any minor children. Also, the Rule Against Perpetuities does not apply to life estates and vested remainders. Vested remainders are remainders which have ascertainable grantees or must vest within a certain amount of time. Assuming that Luisa's waiver was not valid, as put forth above, John may leave the house to his Canadian nephew in a life estate. However, the original homestead exemption will not continue to the nephew, and the property will be revalued and taxed at the market value. However, the nephew could create a new homestead exemption if he chooses to use the house as his primary residence. Further, the remainder in the charity is vested (as the charity is ascertainable) and is not subject to the Rule Against Perpetuities. Alternatively, if Luisa's waiver was not valid, John must obtain her consent and signature in order to devise their homestead to someone other than her. However, assuming Luisa's waiver was valid, John will be able to devise to his nephew with a remainder in the charity.

Q QUESTION NUMBER 2

JULY 2010 BAR EXAMINATION – REAL PROPERTY

Buyer executed a contract to purchase from Seller a used residential house in Summer Haven, Florida in its "AS IS" condition. Seller previously occupied the house. The contract required Seller to convey marketable title.

The contract disclosed that the house and an adjacent lot owned by Seller are served by an underground private sewer line that traverses a Neighbor's land pursuant to a valid easement granted to Seller. No other statements were made regarding the sewer system. The sewer line extends from a connection point to the city's sewer system on the Neighbor's land, crosses the Neighbor's land and the land on which the house is located, and terminates in Seller's adjacent lot.

Pursuant to the contract, the house was conveyed to Buyer by a valid Special Warranty Deed that stated: "Seller reserves the right to use a sewer line in the conveyed land for the benefit of Seller's adjacent land." The deed did not mention the easement on Neighbor's land.

After the closing, Buyer first discovered that (a) the house is encumbered by a valid lien recorded prior to Seller's acquisition of title to the house, and (b) sewage periodically overflows in the house.

Buyer determined that the sewage problem existed since the initial installation of the line. Subsequent to Buyer's acquisition, the problem became worse when Seller purchased additional property and connected the house located thereon to the sewer line. The cost to fix the sewer problem is significant.

Because an alternative direct connection point to the city's sewer system is now available to Buyer, Neighbor refuses to allow Buyer to install upgrades to the sewer line on Neighbor's property. Neighbor has also threatened to block the line to prevent the acceptance of sewage flow from Buyer's house.

Buyer seeks your legal advice. Prepare a memorandum discussing Buyer's rights and remedies against Seller only.

SELECTED ANSWER TO QUESTION 2
(July 2010 Bar Examination)

To: Senior Partner

From Junior Associate

Re: Buyer's rights and remedies

Buyer does not have a valid cause of action against Seller for breach of covenants of title regarding the lien on the property.

When parties enter into a contract for the sale of land, the Seller has a duty to deliver **marketable title**. Marketable title does not mean perfect title, it is just title that a reasonable person would accept and the property can have minor encumbrances. Buyer and Seller stipulated in their contract that the land would be sold "As Is" but Seller would deliver marketable title. Marketable title is required to be delivered at the time of closing and it means that the property is not encumbered by anything that was not previously disclosed. If there is a mortgage on the property and the proceeds from the sale will be used to pay the mortgage, marketable title can still be delivered. However, once the parties close, any covenants in the original contract merge with the deed and the Buyer is limited to recover under **covenants of title**.

Buyer will not be able to have a claim for breach of contract for failure to claim marketable title because the closing occurred already. However, Seller could argue that he has a claim under one of the covenants of title. A **general warranty deed** contains six covenants of title: 1) **covenant of seisin**, which says that the owner actually owns the property he is seeking to convey; 2) **covenant of right to convey** which means that the owner has the right to convey the property he claims to own; 3) **covenant against encumbrances**, which means that the Seller guarantees that there are no encumbrances on the property that were not previously disclosed; 4) **covenant of quiet enjoyment**, which means that the Seller will not be ousted from the property by someone claiming paramount title; 5) **covenant of warranty** which means that the Seller will defend from any suits brought by someone claiming paramount title; and 6) **covenant of further assurances**, which means if the Seller did not convey valid title, he will do whatever is necessary to do so. The first three covenants are present covenants and if breached at all, are breached at the time of closing. They do not run with the land and are only enforceable by the current Buyer. The last three covenants are future covenants that are breached, if at all, at some time in the future and they run with the land.

Buyer will argue that Seller breached the covenant against encumbrances. However, under a **special warranty deed**, Seller only covenants that he or she did not convey the land to someone else and that he or she did not encumber the land during ownership. The facts state that Seller delivered a Special Warranty Deed. However, the valid lien was recorded prior to Seller's acquisition of title to the house. Seller would argue that he did not encumber the property since the lien existed prior to his ownership. Seller will have a successful argument here and Buyer will not prevail under a claim of breach of the covenant against encumbrances.

Additionally, Florida is a **pure notice** jurisdiction. Notice can be by **actual** notice where the Buyer knows of any claims to title, **constructive** notice where the Buyer is on notice if the instrument is recorded, or **inquiry** notice where a Seller has a duty to inquire into the land. Seller will argue that Buyer had constructive notice of the lien since it was recorded. Buyer may argue that it was outside of Seller's chain of title but there is no indication of this. Seller will claim that Buyer had constructive notice of the lien and if he had a problem with it, he should have objected prior to closing. Now he has not his right. Florida statutes do not impose a duty on a Buyer to inquire into land but case law requires that a buyer make a physical inspection of the land. This would not help Seller because Buyer couldn't physically see the lien.

Buyer may argue that there was a breach of quiet enjoyment on the land because Neighbor won't let him use the sewer line anymore. This would also bring up the covenant of warranty. Buyer will argue that he cannot make necessary repairs on the easement and his access may even be blocked. Neighbor is claiming paramount title to the land and Buyer may have a cause against Seller that he has to defend Buyer in court against an action by Neighbor. Seller will argue that this covenant doesn't extend to him because of the warranty deed, but it is likely that it will be found to apply because Buyer is being ousted of use of the sewer line and Seller is the one who contracted with Neighbor for the easement. Seller will likely have to assist Buyer in bringing a case against Neighbor in court for continued use (as discussed below) of the easement and the right to make necessary repairs.

Seller will have a cause of action against Buyer for misrepresentation, fraud, and/or failure to disclose a defect.

Buyer will have a cause of action arguing that Seller breached his duty to disclose the fact that sewage periodically overflows into the house. In Florida, the seller of residential real estate has an **affirmative duty to disclose** all facts materially affecting the value of land that are known or should be known to the Seller but are not readily discoverable to Buyer upon a reasonable inspection. Something materially affects the value of land if a reasonable person would think twice about entering into the contract if the fact were known. Buyer will argue that Seller had an affirmative duty to disclose the fact that the sewage periodically overflows in the house. Buyer was able to determine that this problem existed since the initial installation of the sewer line so Seller knew or should have known about this fact. Seller had previously occupied the house and if the sewage periodically overflows it is reasonable to assume that it did so when he resided there as well. Buyer will argue that he would not have purchased the home had he known that the sewage backed up so often. He will argue that this makes the property virtually uninhabitable. Seller will argue that if Buyer had done a reasonable inspection, he would have discovered that the sewage backs up. The facts do not state whether an inspection was done, however, even if one was not done, it is likely that Buyer's argument will succeed. He may be able to **rescind** the contract and seek **restitution** of the purchase price he paid for the home. If rescission is not an option, Buyer may be able to recover **damages** for the difference in value of the home with the defect versus the amount he paid. Contract damages are measured by **expectation** interest and are meant to put the parties in the position they would have been in had the contract been performed as expected. At the very least, Buyer may be able to recover damages to fix the sewer problem. **Consequential damages** are also available in contract if they were foreseeable at the time the contract was entered into.

Buyer may also have a cause of action against Seller for misrepresentation. **Misrepresentation can be intentional or negligent.** Intentional misrepresentation requires 1) **a false statement of material fact**; 2) **scienter** or knowledge of the falsity of the fact; 3) **intent to induce** the other party to rely on the misrepresentation; 4) **justifiable reliance** by the Buyer; 5) **causation**; and 6) **damages**. Buyer will have the hardest time arguing that there was a false statement of material fact. Material fact is defined above. Seller disclosed that there was an underground sewer line but did not make any other statements about the sewer line. Seller will argue that he didn't make any false statements, he just didn't say anything. However, if Buyer is able to prove that a false statement of material fact was made, he will also likely be able to prove the rest of the elements. Seller had knowledge of the fact that the sewage periodically overflowed since he had lived on the property. Buyer will argue that Seller's statements were intentionally meant to induce him to rely on them to buy the house. Seller will again argue that he didn't make any statements so didn't have any intention to induce reliance. If statements were made, Buyer will be able to argue justifiable reliance since he moved into the property without knowledge of the sewage problem. Buyer will be able to prove that Seller's acts caused him to rely and he suffered damages as a result since the sewage keeps backing up. The damages would be the amount it will cost to fix the sewer problem. However, it is unlikely that misrepresentation will be a successful argument.

A person can have a cause of action for fraud when there is 1) **active concealment** of a latent defect in the property; 2) **an affirmative lie**; or 3) **silence when there is a duty to speak**. Scienter (knowledge of the falsity) must be proved and there must be **justifiable reliance, causation and damages**. There is no indication that Seller actively concealed the sewage problem so Buyer will not have a successful argument there. As stated above, it will be difficult for Buyer to prove that Seller made an affirmative lie since he didn't say anything other than the fact that there was an underground private sewer line. Buyer will, however, likely be successful in an argument that Seller breached his duty to speak when he remained silent about the sewage problem that he was aware of since he had lived in the home. Seller was silent to the fact that sewage overflows. Buyer will argue that he justifiably relied on the lack of statement about any problems. Seller may argue that Buyer should have asked if there were any problems with the sewage, but this will not likely be a successful argument. As a result of the failure to disclose or fix the problem, sewage continues to overflow into Buyer's home. Buyer has suffered damages since he has to clean the mess and it will be a significant cost to repair the sewage problem. Buyer will likely be successful in a fraud argument and will be able to **rescind** the contract and get the return of his purchase price (restitution) or seek **damages** for the difference in the value of the home with the defect versus without it. As stated previously, at the very least, Buyer should get compensated for the cost to repair the sewage line.

Seller will defend all of these arguments by claiming that the home had an "As Is" clause. However, the "As Is" clause most likely will not work here if the court finds that there is fraud involved or that Buyer breached his duty. However, if the court finds that the breach was not material, the "As Is" clause may preclude recovery.

Buyer will be able to enjoin Seller from using the sewer line on his new property and may recover damages for repair of the line.

Seller has an express easement to use the sewer line to the lot adjacent to Buyer's land. An **easement is the nonpossessory interest** involving the **right to use** the land of another. Easements can be created expressly or impliedly. Easements can be **affirmative** if they allow you to do something with the land or **negative** if they restrict the owner's use of his land. Easements can be **appurtenant**, which means that there is a **dominant tenement** that is benefited from use of the easement. Affirmative easements run with the land. An **in gross** easement is personal in nature and does not involve a dominant parcel of land. It appears as though Seller created an **express appurtenant easement by reservation**. The deed expressly stated that "Seller reserves the right to use a sewer line in the conveyed land for the benefit of Seller's adjacent land." The lots are next to each other and Seller's lot would be benefited so his is the dominant tenement while Buyer's is the servient tenement. Easements are created by grant or reservation. Because Seller reserved the right to use the land, this was an easement by reservation. Seller has the right to make reasonable use of the easement and must keep it in repair. If both Buyer and Seller use the easement, Buyer may also have the obligation to keep it in repair.

However, easements are restricted to reasonable use. The facts indicate that after Buyer bought the land from Seller, he bought more land and connected another house to the sewer line. Buyer will argue that this use by the extra house is **excessive** and should terminate the right to use the easement. Seller would argue that it is reasonably foreseeable extended use but this will not be a successful argument. Buyer will not be able to terminate the easement due to excessive use, but he will be able to enjoin the extra use. He will have to seek an injunction in court and Buyer will be restricted to using the easement to benefit the land described in the instrument, not the new land. Additionally, since Seller's extra use caused more damage to the sewer line, Seller will be required to pay at least some damages for the repair. Since both Buyer and Seller use the sewer line, the court will likely order that they split the repair costs.

Seller obtained an express appurtenant easement from Neighbor for use of the sewer line running across Neighbor's land. Because an appurtenant easement runs with the land, Buyer has the right to make the same use of the easement Seller had made even though the deed did not mention the easement with Seller. Buyer will be able to make necessary upgrades to the easement.

Buyer may have a claim against Seller for trespass to land

Trespass to land is the voluntary intentional physical invasion into the real estate of another. Causation must also be proved. It can be personal or by objects. Buyer will argue that the sewage coming into his home generated from Seller's home is a physical invasion. Nominal damages are available but here Buyer will be able to prove actual damages. Intend is conduct that is purposeful or done with knowledge of substantial certainty that the result will occur. Buyer will argue that Seller knew that by using the sewer system, the sewage would overflow or he at least had knowledge of substantial certainty of this. At the very least he will be able to prove that Seller's acts set the action in motion that led to the sewage overflowing.

Q QUESTION NUMBER 3

JULY 2010 BAR EXAMINATION – TRUSTS

Susan, a widow, signed a trust document that provided for creation of a trust to contain the proceeds of any life insurance policies in effect at the time of her death. The trustee was Susan's brother, Thomas. The beneficiaries were her surviving children and "others as the trustee in his discretion may deem appropriate." The beneficiaries would receive income earned on investment of the insurance proceeds for ten years, at which time the trust would terminate and the beneficiaries would receive the insurance proceeds in equal shares. The trust provided that during its duration, the interest of each beneficiary will be subject to a spendthrift provision.

Susan died five years later. At the time of her death she held a life insurance policy with a benefit of \$1 million payable to the "Susan's Spendthrift Life Insurance Proceeds Trust." She was survived by her daughter, Betty, and son, Carl.

One year after Susan's death, Betty and Carl received a letter from Thomas informing them that he has named Donna and Edith, Susan's distant cousins, as additional beneficiaries of the trust. Thomas's letter also advised Betty and Carl that his investment of most of the trust funds in a platinum mining operation was not earning an immediate return and he would not be paying the beneficiaries any income for the month but he expected large earnings from the investment in the foreseeable future.

Carl's ex-wife is seeking to reach the value of Carl's interest in the trust to collect a child support arrearage. Betty would like to obtain her share of the insurance proceeds as soon as possible to pay off the loan and note on the new boat her boyfriend purchased for his business as a sport fishing guide. If she cannot get the funds directly from the trust, she would like to assign her right to future trust benefits to the loan company that holds the note.

Betty and Carl seek the advice of Attorney. Discuss the issues that Attorney should address with Betty and Carl regarding validity of the trust, the actions of Thomas, the likelihood of success of any legal action by Carl's ex-wife, and Betty's ability to obtain her share of the proceeds before the end of the ten years specified by Susan. Also discuss whether Attorney can take the case on a contingency fee basis and whether Betty and Carl can recover any fees from Thomas personally or from the trust assets if they prevail in a legal action against Thomas.

SELECTED ANSWER TO QUESTION 3

(July 2010 Bar Examination)

Valid Trust – A trust is legal title to property in one person for the benefit of themselves or others. In order to form a valid trust there must be: a legal purpose; intent to create a trust Res, i.e. trust property; ascertainable beneficiaries; a trustee who is not the sole beneficiary and sole trustee; a settler with legal capacity and it must be in writing if the property includes real property and comply with statute of Wills if testamentary. Here, there is a legal purpose (any purpose is sufficient so long as not an illegal purpose) to devise life insurance proceeds. The intent of Susan to make a trust is clear by the fact that she created it. The trust property is the proceeds of Susan's life insurance policies in effect at the time of her death. This is a sufficient interest in proceeds to qualify as the trust Res. The beneficiaries must be ascertainable in order to form a valid private trust (as opposed to a charitable trust, which requires unascertainable beneficiaries). Here, the beneficiaries were named as Susan's "surviving children" and "others as the trustee in his discretion may deem appropriate." Florida allows a class to qualify as "ascertainable" for purposes of beneficiaries and therefore, the class of Susan's children is sufficiently ascertainable. The discretionary language giving power to the trustee would likely be considered a discretionary power of appointment, allowing the trustee to decide who else may be a beneficiary. Here, Thomas is the trustee, i.e., Thomas holds legal title to the property. Thomas is a valid trustee because he is not the sole trustee and the sole beneficiary, which would cause the trust to fail. A trustee is important, although a trust will not fail to lack of trustee, the Court will appoint a new trustee if, for some reason, Thomas can no longer serve. Susan is the settler, i.e., the person who has created the trust and there are not facts to include that she was in any way lacking capacity at the time of creating the Private Trust. Private trusts can be express, resulting, and constructive. An express trust, like the trust created here, is one where the trust is made to Settler's indications. A resulting trust is one that arises when a trust ends and fails and there is still trust property. Here, it appears a resulting trust is formed when the trust ends after 10 years, at which time the trust would terminate and the beneficiaries would receive the insurance proceeds in equal shares.

Finally, a constructive trust can be created by the Court as an equitable remedies when there has been some wrongdoing and equity would require that property be distributed in a different way as a result.

The express private trust appears to be valid and the insurance proceeds, i.e., \$1 million, is the Res, daughter, Betty and son, Carl are the ascertainable beneficiaries. This is a testamentary trust, and therefore should be in writing, signed and attested by two subscribing witnesses. The facts are not clear on whether this was followed but it will be assumed it was for the sake of analysis. The trust also includes a spend-thrift provision – to be discussed later.

Actions of Thomas – As trustee, Thomas has many duties to the beneficiaries. The trustee also has the right to reasonable compensation. Thomas' duties include a duty not to commingle his funds w/ trust funds, a duty to be fair and impartial among beneficiaries, a duty to account to beneficiaries, a duty to invest trust assets prudently and a duty not to self-deal. There is also a duty to diversify trust assets and a duty to act personally. Although in Florida a trustee can employ others to perform trustee functions. Thomas had discretion to name Donna & Edith as trust beneficiaries if he saw it to be appropriate. Betty and Carl may argue that they were not ascertainable beneficiaries at the time of the trust creation and that they therefore should not be beneficiaries. The cousins will probably be valid beneficiaries, however, since Thomas was given such power in the trust instrument, unless it appears that Thomas is trying to fraudulently get to the trust asset through one of the cousins, which would be a breach of his duties to the beneficiaries.

Thomas' investment of most of the trust funds in a platinum mining operation can be attacked by the beneficiaries based on a failure to diversify and a failure to act as a prudent investor. Thomas is likely to be found liable for a failure to diversify, since he seems to have placed most of the \$1 million in one investment. The prudent trustee rule requires a trustee to invest prudently, the measure of prudence is based on the time of the investment. A trustee with special skills or expertise is held to a higher standard under this rule. Here, the facts do not indicate if Thomas was of special skills or expertise that would require a higher standard for his actions. It is also not clear whether a platinum mining operation is a prudent investment. The beneficiaries ("B's") will argue that a prudent investor would not invest in such an operation as indicated by the fact that the investment did not create any income in the first month. Thomas will argue that it was a sound investment because he expected a large earning from the investment in the future. However, since prudence is measured at the time of investment, it is possible that the court will find that the investment was not prudent. Self-dealing is present when an investor uses trust funds to benefit himself. Here, if Thomas was not paying income to the beneficiaries because he was using the income to pay personal loans or something else to benefit himself, the court would find he was involved in self-dealing and would remove him, make him pay trust, etc.

Spend-thrift trust – A spend-thrift trust is a trust that includes a provision restricting any voluntary or involuntary transfer of beneficiaries interest in trust assets. Here, Susan included a spend-thrift clause as to all beneficiaries. Spend-thrift trusts, however, do not protect from a transfer of the interest to pay alimony, child support or government taxes or payments. Here, Carl's ex-wife would be successful in getting at Carl's interest in the trust, regardless of the spend-thrift clause because the purpose is to get her child support arrearages.

Betty, however would not likely be able to voluntarily assign her funds directly from the trust. Once Betty received her interest, she could transfer them to the loan company that holds the note on her boat. This is so because the clause protects trust assets from voluntary as well as involuntary transfers. Betty also cannot change the purpose of the trust to get the assets before the end of 10 years unless all the beneficiaries go to court and unanimously agree to modify the trust. The settler would have to consent if still living, which is not the case here.

Contingency fee for Attorney – A contingency fee agreement allows an attorney to receive a portion of the judgment damages in the case if it is successful. These agreements must be in writing and must include terms necessary to form a valid agreement. If agreed to by Betty and Carl, the attorney may take the case on contingency fee basis.

Betty & Carl's recovery from Thomas – Trust beneficiaries are 3rd party beneficiaries to a trust and trustee can be held personally liable if appropriate and decided by the court. Here, they may sue Thomas personally for his decision to invest, if it was not prudent and also if he was involved in self-dealing. They can recover atty. fees from Thomas and interest. They can also recover from the trust.

QUESTION NUMBER 1

FEBRUARY 2011 BAR EXAMINATION – FLORIDA CONSTITUTIONAL LAW

Driver's car collided with Victor's car in Beach County, Florida, and Victor was killed.

Driver is President and Chief Executive Officer of Leasco, a private corporation that leases and operates a hospital owned by Beach County. The lease provides that Leasco will pay a certain dollar amount to the county each year, indemnify it from liability arising from operation of the hospital, and one member of the county commission shall serve as a member of the seven-member board of directors of Leasco.

One month prior to the Driver/Victor collision, Leasco's board of directors, in response to complaints, held a meeting to discuss Driver's erratic behavior and possible substance abuse problems. At that time, the board decided to take a wait-and-see approach to Driver's behavior.

The Beach County Sheriff is investigating the collision and asks a circuit court judge to issue a subpoena to obtain Driver's medical records from his family doctor. Driver is given notice of the subpoena request as required by law and, speaking through his attorney, objects to the subpoena.

The personal representative of Victor's estate is considering filing a wrongful death action against Driver, Leasco, or both. The personal representative makes a public records request to Leasco, seeking copies of any minutes of meetings of the board of directors where Driver's employment status was discussed and a copy of Driver's personnel file. Leasco refuses to provide the documents.

The personal representative seeks a court order to direct Leasco to produce the documents. Driver intervenes. Driver argues that releasing his personnel file would be both unconstitutional and in violation of a law recently passed by the Florida Legislature. The recent law exempts personnel files from the disclosure as public records and the legislature made a finding that such exemption is "necessary to protect the public health, safety, and welfare."

Discuss the issues relating to the availability of the medical records, board minutes, and personnel file arising under the Florida Constitution. Also, discuss the constitutionality of the law recently passed by the Florida Legislature.

SELECTED ANSWER TO QUESTION 1 **(February 2011 Bar Examination)**

1. Availability of medical records

The first issue is whether the court can require the Driver's family doctor to release Driver's medical records. The Florida Constitution provides that all natural persons have a **right to privacy** with respect to their personal life. The right to privacy encompasses a person's health and family where there is an expectation of privacy. Therefore, a person has a right to privacy with respect to their medical records, because there is an expectation that those records will remain private absent consent to disclosure. The right to privacy is a **fundamental right** afforded by the constitution. Denial of a fundamental right is subject to **strict scrutiny**, which requires that the government prove that the denial of the right is **necessary** to achieve an **important** governmental interest and is **narrowly tailored** to achieve that important government interest. There is no clear governmental purpose here to deny Driver of his constitutional right to privacy, much less a compelling one. If the governmental purpose is completing the accident investigation, that may be compelling if the government has exposure to liability for the accident. Therefore, the government will not prevail and Driver's right to privacy may not be violated.

Additionally, the Florida Constitution provides that when a person is faced with **deprivation** of their life, liberty, or property interests, they must be afforded **due process** of the law, which requires **notice** and an opportunity to be **heard**. If Driver claims a property interest in and to his medical records, then he must be first afforded notice and a hearing before that interest may be abridged. Here, Driver was given notice of the intent to seek the medical records from his family doctor. Therefore, before he may be deprived of his interest in his medical records, the court must first give him a hearing on his objections.

2. Availability of board minutes

The next issue is whether the court can require Leasco to produce minutes of board of directors (BOD) meetings. Under the Florida Constitution, the **Sunshine Law** provides that **public bodies** are required to make public the records of any meetings between public figures, such as members of the legislature. The law does not apply to private entities. The facts state that Leasco is a private entity. However, when government becomes so **intertwined** in private activities, the private entity may be held to be a **state actor**, thus subjecting it to state regulations not applicable to private entities. When the government engages in activities in the private sector which amount to more than mere **planning** or administration, then the private entity will be considered

a state actor. Generally, the government's **merely leasing** property to a private entity is insufficient to result in the entity being regarded as a state actor. However, in this case, Leasco leases and operates a hospital that is owned by the county, Leasco has agreed to indemnify the county in connection with the operation of the hospital and has a member of the county commission serving on its BOD. These facts combined are sufficient to find that Leasco and the county have become so intertwined with regard to the hospital that Leasco has become a state actor. As a result, Leasco's BOD will be

considered a public body and will be subject to the Sunshine Law and will be required to produce the minutes of the BOD meeting.

However, Driver will argue that the substance of the BOD minutes relates to information protected by his constitutional right to privacy, and therefore cannot be subject to disclosure. At the meeting the BOD discussed Driver's possible substance abuse and erratic behavior. Although there is no arguable protection to the information about Driver's behavior while working for what is considered to be a state actor, the discussion about the substance abuse is arguably private information. Driver will argue that just because the information was discussed by the BOD does not make it subject to disclosure.

3. Validity of new law

The third issue is whether the new law exempting personnel records from public disclosure is valid. In order to be valid, a law must have a **legitimate public purpose** and must not be **overbroad** or **vague**. The stated purpose is to protect the public health, safety and welfare. States are permitted to use their **police power** to enact laws for the general purpose of protecting the health, safety and welfare of their citizens. This police power applies to county and local governments as well. Because the law does not deny or deprive any fundamental rights or discriminate on any level, it is subject to **rational basis** review, which requires that the opponent of the law prove that the law is not **rationally related** to a **legitimate** governmental purpose. The protection of the public health, safety and welfare is a legitimate governmental purpose and is permitted by its police power. Denying third parties access to government employees' personnel files is rationally related to the protection of safety, and welfare, because one could imagine that releasing personnel files could lead to violations of the employee's privacy rights and safety if their home addresses and information about their health was made public. Therefore, the law is valid and will be upheld as constitutional, because it is rationally related to the legitimate purpose of protecting health, safety, and welfare.

However, the personal representative will argue that the law is overbroad and vague. He will argue that certain personal information may be redacted from personnel files, which would allow for the privacy of individuals to remain protected while making public information that may be necessary to adjudicate legitimate claims against state actors.

4. Availability of the personnel file

The final issue is whether the court can require Leasco to produce Driver's personnel file. If the law discussed above is held to be valid, then the personnel file will be exempt from disclosure. If the law is struck down, then Driver may argue again that his privacy rights will be violated if these records are disclosed. Driver will argue that the personnel file contains private information relating to his health that must be kept private. However, the personal representative may argue that there is no expectation of privacy with regard to employment records, and therefore the disclosure of those records will not violate Driver's constitutional right to privacy. Therefore, because the right to privacy is fundamental, the Driver will prevail and his personnel records will not be subject to disclosure.

Q QUESTION NUMBER 2

FEBRUARY 2011 BAR EXAMINATION – REAL PROPERTY/FAMILY LAW

During their marriage, Wife and Husband resided in Florida. They have been married for 15 years and separated during the last six years. In May 2009, Wife filed an action for dissolution of marriage against Husband. Each party retained an attorney and the parties stipulated to entry of a mutual injunction, or restraining order, entered by the judge. By terms of that order, the parties were “mutually and strictly enjoined from sale, transfer, damaging or otherwise dissipating or disposing of any assets in this case which might be, or be claimed to be, marital assets or non-marital assets belonging to one or the other of the parties.” The order stated that the injunction was to remain in effect pending further order of the court. The order was dated June 25, 2009.

On July 7, 2009, Husband delivered a warranty deed to Friend, who had been Husband’s friend for years. The warranty deed conveyed certain property in Florida known as Blackacre. At the time of the delivery of the deed, Husband had lived on Blackacre, in a small farmhouse on a 20-acre tract, for several years and claimed homestead exemption on the land for tax purposes. In exchange for the property, Friend promised to care for Husband in his declining years. Husband died on July 10, 2010. Friend did not, however, record the warranty deed until July 12, 2010, two days after Husband had died. Wife’s name was not on the deed, nor did she sign it, and she had never lived on the property herself.

When the mutual injunction was issued, Husband also owned Rich-Acre, a valuable piece of commercial property that he purchased during the marriage. Rich-Acre was located in another county some distance from Blackacre. When Wife learned, shortly after the fact, that Husband had given Friend a deed to Blackacre, she recorded a Notice of Lis Pendens in the county where Rich-Acre was located, including in the Notice the legal description of Rich-Acre and attaching as part of the Notice a copy of the mutual injunction. Subsequent to the mutual injunction, Friend also purchased a car, a 1971 Rolls Royce, from Husband. The car was registered to “Husband or Wife.” Again, Wife did not sign any documents regarding this transaction.

Husband’s will, executed after entry of the mutual restraining order but before the conveyances of Blackacre and the Rolls Royce, explicitly excluded the following individuals: Wife; Daughter, Husband’s biological daughter from a prior marriage; and Son, Husband’s adopted son who was Wife’s biological child. Both Daughter and Son were adults at the time of Husband’s death. Aside from a specific bequest to Friend of “so much of my personal property as he may choose, up to a value of \$1,000,” the entirety of Husband’s estate, which included Rich-Acre, was devised to a charity. The dissolution action between Wife and Husband was still pending at the time of Husband’s death.

Wife has come to your law firm seeking legal advice. You are directed to prepare a written memorandum addressing these questions:

1. Was Husband's execution of the will a violation of the terms set forth in the mutual injunction?
2. Can Wife set aside Husband's deed of Blackacre to Friend because Friend did not record the deed until after Husband's death?
3. Are there any other grounds to set aside Husband's conveyance of deed to Friend?
4. If Husband's will is held to be valid, what can Wife, Daughter, and Son hope to obtain from Husband's assets following his death?
5. On what grounds can Wife regain possession of the Rolls Royce?
6. Can Wife set aside the bequest of "so much of my personal property up to a value of \$1,000" that Husband devised to Friend?
7. What is the effect of Wife having recorded a Notice of Lis Pendens against Rich-Acre?

SELECTED ANSWER TO QUESTION 2

(February 2011 Bar Examination)

1) Was Husband's (H) execution of the will a violation of the terms set forth in the mutual injunction?

A person has a right to create a will and devise his property however he sees fit, with some restrictions by statute. The mutual injunction against the sale, transfer, damaging, or otherwise dissipating or disposing of any assets in this case will not likely have any prohibition on the creating of a will. Gifts in the will can be deemed if the property is no longer in the estate at the time of the testator's death. Therefore, H's estate will argue that the will is valid and was not made in violation of the mutual injunction because he did not at the moment convey or get rid of any of his property.

However, H died before dissolution of marriage was complete and the injunction was still in place. However, this will not likely then become a violation of the mutual injunction because the mutual injunction will likely be subsequently lifted because the action for dissolution of marriage is no longer needed. Therefore, the making of the will will not likely be viewed as a violation of the terms set forth in the mutual injunction.

2) Can Wife (W) set aside H's deed of Blackacre to Friend (F) because Friend did not record the deed until after H's death?

*Florida is a **pure notice jurisdiction** which protects a **bona fide purchaser** (bfp). A purchaser is bona fide if they subsequently **pay value** for the land and have **no notice** of anyone's prior interest in the land. Therefore, the time and order of the recording of the deed is not critical to the validity of the deed. However, the recording of a deed is to give notice to the whole world of your interest in the property (record notice). Therefore, every purchaser should record their deed in order to prevent his interest in the property from being unenforceable against a subsequent bfp. A deed becomes enforceable once it is **executed and delivered** to the grantee.*

As long as the deed was executed and delivered to the grantee with H intending to transfer the property to F, the subsequent recording after the death of H will not invalidate the deed. H in fact delivered the deed on July 7 and even though he died on July 10 this will not invalidate the conveyance because F hadn't recorded yet. Therefore, W will not be able to set the deed aside because it wasn't recorded before H's death.

3) Are there any other grounds to set aside H's conveyance of deed to F?

The Florida Constitution provides homestead protection for qualified property against the forced sale by creditors. A property qualifies as a homestead if it is owned by a person, they are domiciled there, and it meets the acreage requirements. If the property is located within a municipality it protects extends to ½ acre contiguous land and its improvements. If the property is located outside the municipality it protects 160 acres of contiguous land and its improvements. If the property has homestead protection, the constitution restrains the devise of the property if there is a surviving spouse or minor children. If there is a surviving spouse and no minor children, then the decedent may convey to the surviving spouse outright. If there are a surviving spouse and surviving minor children then the decedent may not devise the property. If the decedent is not survived by a surviving spouse or minor children he may dispose of the property how he

pleases. If there is an improper devise, the property passes as it would in intestacy. Therefore, if there is a surviving spouse and one or more lineal descendants, then the surviving spouse will get a life estate and the lineal descendants will receive a vested remainder, per stirpes. If property is titled to a husband and wife, Florida presumes a tenancy by the entirety. If there is a tenancy by the entirety there is no homestead protection. If husband and wife are married and they have either a homestead or tenancy by the entirety, both spouses have to join in the conveyance or mortgage of the property.

W can claim that the conveyance to F was invalid because the property was homestead. W will argue that she is H's surviving spouse and that she did not sign the deed and therefore the devise is invalid. F will argue that W is not protected because she never lived on the property and her name was not on the deed and therefore it was not W's homestead and she was not protected. Also, F can argue that the homestead protection was for tax purpose, not for protection against creditors however this argument will likely fail because if the property meets the requirements it is homestead property as defined above. F will argue that because W and H were in the process of getting their marriage dissolved and that she is not protected as a surviving spouse and all of H's children are adults. W will argue that because the dissolution was not final that she still is entitled to the property. W will likely prevail as long as the acreage requirements are met depending on whether the property is located in or outside the municipality.

Also, W can argue that the conveyance was improper because it violated the court order prohibiting the transfer of property whether a marital or non-marital asset belonging to one of the parties, effective as of June 25. F can argue this was an unlawful restraint on devise, however this argument will not prevail because the court entered this injunction in order to assist with the dissolution of marriage.

4) If H's will is held to be valid, what can W, Daughter (D), and Son (S) hope to obtain from H's assets following his death?

W can argue that even if the will was still valid she is entitled to claim an **elective share** because the two were not legally divorced at the time of his death. An elective share allows a spouse excluded from the will to recover 30% of the elective share estate which is larger than the intestate estate. Included within the elective estate are all transfer in property within a year preceding the decedent's death, inter vivos trust, bank accounts, etc. The charity and F will argue that W should not be entitled to take anything out of the estate because she was seeking dissolution of marriage at the time of H's death.

W can also argue that executing a will distributing all of his property was a violation of the injunction prohibiting the sale, transfer, damaging, or otherwise dissipating or disposing of any assets in the case. By executing a will, W will argue that he was disposing of his assets and therefore it should be invalid. However, this argument will not likely prevail because what is included in the estate that can be devised is not determined until after the testator's death. Also, the court's injunction is not going to prohibit a person from making a will. Therefore, this argument by W will likely fail.

Since D and S are both adults they can effectively be disinherited by their parent. However, any asset that is not devised by the will passes through intestacy and can pass to the children. Also, if the devise to F in Blackacre is viewed improper it passes

by intestacy and the children will have a vested remainder, per stirpes in Blackacre. Even though D is H's biological child and S is H's adoptive child they are treated the same in Florida and therefore any interests that they do receive will be equal.

5) On what grounds can W regain possession of the Rolls Royce?

If F is a bona fide purchaser for value (subsequent purchaser without notice of any other's interest) W may not regain the actual Rolls Royce from F. It appears that F purchased the car and if it is determined that he paid fair value for the car and had no notice of the injunction prohibiting H from selling it he may retain the car. W will argue that F knew of the injunction because F was H's friend for years and knew that H and W were going through a divorce and therefore knew that H could not sell the car.

However, since the conveyance was in violation of court order, W can claim that the conveyance was invalid. Since this sale was specifically enjoined from taking place, W can argue that F holds the car in constructive trust for her. A constructive trust is an equitable remedy the court will award if someone has title to certain property through wrongdoing, and the court enforces this to disgorge unjust enrichment and give the property to the rightful owner. W can argue that the conveyance to F was done through the wrongdoing of H because it was in violation of court order, therefore W will argue for a constructive trust to be created requiring F to convey title to her.

6) Can Wife set aside the bequest of "so much of my personal property up to a value of \$1,000" that H devised to F?

A bequest in a will has to give the personal representative guidance on who gets what property. W will argue that this particular devise, if the will is held valid, gives F the discretion to choose whichever property that he wants to compose his gift and therefore it is not proper. F will argue that the devise is ok because it limits the choice of property to H's personal property and the amount to \$1,000. Also, F will argue that since the rest of the estate was devised by residue clause to the charity that he would not be invalidating anyone else's gifts through the exercise of his discretion. Depending on the size of H's estate, W could argue that F's devise should be forfeited in order for W to be able to get her elective share. However, this argument will likely fail if H was a large estate.

Therefore, if the will is held valid, then W will not likely be able to set aside the bequest to F.

7) What is the effect of W having recorded a Notice of Lis Pendens against Rich-Acre?

A recorded Notice of Lis Pendens is a lien upon a piece of property which is enforceable against any subsequent purchaser for value. Since W recorded the notice in the county where Rich-Acre is located it will give notice to any subsequent purchaser because record notice is deemed by the court as constructive notice. Also, W attached the mutual injunction to the notice to inform subsequent purchasers of the interest.

However, since the death of H, the marriage can no longer be dissolved legally through the court. Therefore, the personal representative can seek to have the Lis Pendens removed from the property because there is no need for the injunction anymore because the dissolution of marriage is no longer active because of the death of a party. Personal representative will likely succeed in having the injunction from the judge overseeing the dissolution of marriage lifted.

Therefore, if the personal representative is able to successfully get the Lis Pendens and the injunction lifted, depending on whether the will is valid will determine who receives Rich-Acre.

Q QUESTION NUMBER 3

FEBRUARY 2011 BAR EXAMINATION – TRUSTS/ETHICS

During the past year, Harry created the “Harry Trust” designating himself as sole trustee and sole beneficiary during his lifetime. The trust specifies that upon his death, Harry’s grandchildren shall receive equal shares of the 2000 shares of ABC stock held in trust with the remainder of the other specified trust assets to be distributed equally to Harry’s two children. Harry subsequently married Ann and told her that if she survives him, she will be the beneficiary of the trust for her lifetime, but upon her death, his children and grandchildren will be the sole beneficiaries. Harry then became terminally ill and sought the assistance of Ann’s son, Alan, who is an attorney, in managing his affairs.

Attorney Alan drafted an amendment that designates Alan as successor trustee of the “Harry Trust.” The amendment is properly executed by Harry and provides that upon Harry’s death, Alan as trustee may make distributions of the trust to any person that he, in his discretion, deems appropriate. Harry is grateful for Alan’s assistance. As a display of his appreciation, Harry gave 500 shares of the ABC stock from the trust to Alan individually.

When Harry dies, Ann wants Alan, as trustee, to name her the principal beneficiary of the trust. In the alternative, Ann claims that she is at least entitled to a lifetime interest in the trust based on Harry’s promise to make her a beneficiary. Harry’s children and grandchildren oppose Ann’s attempt to take any interest in the trust. They also seek to have Alan return the 500 shares of stock to the trust for distribution to the grandchildren according to the terms of the trust.

Alan seeks advice from your firm concerning distribution of the trust assets. Draft a memo to your senior partner discussing the claims Ann and the children/grandchildren may have against the trust and the likely outcome of each. Also discuss whether Alan’s actions relating to the trust raise any ethical considerations and what steps he should have taken to avoid any potential ethical violations.

SELECTED ANSWER TO QUESTION 3

(February 2011 Bar Examination)

MEMO

To: Senior Partner

From: Junior Associate

Re: Distribution of Trust Assets and Ethical Issues

Claims of Ann/children/grandchildren against the trust and likely outcomes

- Validity of the creation of the trust

In order to create a valid trust, the following requirements must be met: there must be a settlor; the settlor must have the capacity to convey (both the intent to convey and the ability to think clearly in disposing of the property); there must be trust property (the res), which must be property that the settlor has a vested interest in and cannot be solely contingent; there must be a trustee (although a trust will not fail for want of a trustee; in Florida, a court will appoint one if there is no trustee); there must be identifiable beneficiaries; and there must be a valid/legal trust purpose. A trust that is executed with the intent to dispose of property at death must further meet the requirements of the Statute of Wills (i.e., must be in writing, signed by the testator as well as two witnesses in the presence of each other). In Florida, a trust that does not indicate whether it is revocable or irrevocable is deemed to be revocable under law (so long as trust was created post-2007).

Here, we have a settlor, Harry (H). H had the capacity to convey when he made the trust, creating the trust and designating a beneficiary and trustee. However, if the settlor is both the sole trustee and the sole beneficiary of a revocable trust, the trust is said to have failed and the property is held by the settlor. In the instant case, Harry's Trust (HT) was created designating Harry (H) as the sole trustee and the sole beneficiary during his lifetime. However, because he designated that his grandchildren shall receive the stock held in trust and remainder of specific assets, it is likely that a court would find that H was not the sole beneficiary at the time the trust was created and therefore would not fail. Later, the facts indicate that he has added a successor trustee and also added a lifetime beneficiary (Ann), and therefore H would not be the "sole trustee" or the "sole beneficiary" either -- however, the children and grandchildren will contend that such additions were invalid for the reasons that will be discussed later.

Here the settlor H has trust property at the time the trust is created -- the shares of ABC stock, as well as other assets that the facts indicate were specified. There does not appear to be any invalid or illegal purpose to this trust -- it appears that H just wanted to create a vehicle to give his descendants property after his death, which is considered a valid purpose under Florida law.

Further, it seems that H was of sound mind when he created the trust, since the facts do not indicate anything to the contrary. The mental capacity of H will come up later when he attempts to amend the trust.

- Standing to challenge

Any beneficiary of a trust has standing to challenge the trust, or can assert a claim that the trust must be distributed in a particular way. Therefore, each of Ann, the children, and grandchildren of H have a right to challenge the trust and assert claims.

- Secret trust

Ann will claim that she has a right to be the beneficiary of the trust during her lifetime because of the statement that H made to Ann after they were married. This type of statement is referred to as a “secret trust” since the trust instrument itself makes no mention of Ann in the trust. The children/grandchildren will claim that Ann is not entitled to any bit of the trust assets since she was not mentioned in the trust and it appears that the purpose of the trust was to provide certain assets to the descendants of H after his passing. Ann, however, would argue that extrinsic evidence should be permitted to show that H after marrying Ann, did in fact intend to amend the trust to provide for Ann during her lifetime, and this is not inconsistent with the purpose of the trust since the kids and grandkids would still be the beneficiaries of the rest of the trust assets after Ann dies. If Ann were to prevail on this point, a constructive trust in favor of Ann would be created.

- Undue influence of Ann

The children/grandchildren might also assert that H was under the undue influence of Ann at the time that he promised her that she could be a beneficiary of the trust for lifetime and that even if he did make such statements, they should be of no effect because of the undue influence exerted by Ann. The facts do not indicate whether certain elements of undue influence were present (e.g., the bargaining power of the parties, whether Ann was in such a position that she exerted control over H and that the only reason he said he would give her any interest in the trust was as a result of exerting this influence). This would be an issue for the court to decide -- ultimately, though, it does not appear that she exerted undue influence, and appears more that H simply wanted to provide for his wife after his death, so a court would likely find for Ann at this point.

- Undue influence of Alan /capacity to convey to Alan

Even if the undue influence claim against Ann fails, the children/grandchildren might assert the same claim against the stock given to Alan and the fact that Alan was appointed a trustee.

The grandchildren and children might claim that at the time that H gave his “gift” to Alan individually, H did not have sound mind and therefore such gift should be void. H had found out that he was terminally ill prior to the conveyance to Alan. Furthermore, they would question the amendment and the power of appointment that is provided to Alan in it. They would question the fact that at the time that Alan was made trustee by the amendment, the amendment gave him the power to “make distributions of the trust to any person that he, in his discretion, deems appropriate.” This amendment is directly counter to the purpose of the trust that was originally stated. The children/grandchildren would claim that Alan used his position of power as the attorney of H to draft an amendment providing him with certain rights (the special power of appointment in favor of anyone, even himself or his mother!) that he would not have received had he not exerted his power over H and not had undue influence over H. The court would likely

side with the children and grandchildren on this issue because it might find that there was undue influence, or that Alan did not have proper capacity to convey at the time that the amendment was executed. Therefore, the court would not permit Alan to make such appointments contrary to the intention of the settlor as originally stated in the trust, and Alan would not be permitted to appoint Ann the primary beneficiary of the trust, despite her urging. Furthermore, if the gift of stock to Alan were to stand, the gift to the grandchildren would partially adeem and the grandchildren would be left with only 1500 shares (the 2000 minus the 500 that had been given to Alan) to divide among themselves. This is because the gift to the children was a specific devise of specified stock ("ABC stock") and, under Florida law, if the stock were not left in the trust at the time that the settlor died, then the gift would adeem to the extent it no longer exists. However, the court would likely side with the children/grandchildren on this point and the stock would be held in trust for the benefit of the children/grandchildren.

- Trustee's duties/removal of trustee

The children and grandchildren would likely contest the fact that Alan is a trustee (for the reasons discussed above), as well as the way that the trust has been managed by Alan and Ann and ask that they were removed as trustees. A trustee is required by law in Florida to avoid self dealing, act prudently in investment decisions and owes a duty of good faith and loyalty. A trustee who has particular experience in managing a type of asset is held to a higher standard of care than someone without such experience. In Florida, where there is more than one trustee, the trustees must make decisions jointly and are not permitted to divide up the administration of the trust among themselves without all taking an active role in trust administration. Here, the children/grandchildren might petition for the removal of Alan as a trustee because (even if the court found he were validly made a trustee, which is not likely) he has a conflict of interest that prevents him from acting fairly to the other beneficiaries. The beneficiaries might petition the court to remove Alan as a trustee and appoint a successor trustee on account of what they would claim was unfair dealing and bad faith. The court might find that Alan should be removed if Alan were in fact to exercise a power of appointment in favor of his mother, Ann, or if he did not return the stock to the trust to avoid any issues of unfair dealing.

- Overall distribution

Given the discussion of all the issues above, the most likely course of action is as follows: if all claims were made as discussed above, Alan would likely be ordered to return the stock to the trust; Ann would be made a beneficiary of the trust but only for the course of her lifetime; the amendment to the trust providing for a power of appointment to Alan would be deemed invalid.

Ethical issues

In addition to the distribution of the trust assets as discussed above, there are a number of ethical issues to consider. Under the rules of professional responsibility, Alan as an attorney must follow a prescribed course of dealing in certain situations. The fact that Alan is an attorney means that he is subject to the rules regulating the bar regardless of whether he acts in his role as an attorney or is acting in another capacity at the time he takes such actions.

When Alan took on the representation of Harry, he should have known that there would be a conflict of interest regarding his representation of Harry and the fact that Harry had just married Alan's mother, Ann. When an attorney sees a conflict of interest, that attorney is under a duty to either (i) not represent the client, if the attorney thinks that his professional judgment would be compromised through such representation, or (ii) may represent such client, if the issue is fully disclosed and the client consents upon consultation. In the given facts, it does not appear that Alan has discussed any issues with Harry prior to accepting his representation of H for H's trust. It seems from the facts that Alan has let his relationship with his mother get in the way of his professional judgment and therefore that taking on the representation of H in the first place was improper.

Further, Alan is facing an ethical issue regarding the receipt of the stock from H's trust -- this may be a violation of an attorney's ethical issues when dealing with a transaction in which the attorney is an interested party. An attorney must not engage in a transaction with a client unless the terms of the transaction are clearly stated and fair, the attorney clearly states that he does not represent the other party in the transaction, and he recommends in writing that the other party seek representation in the action. Here, Alan received an interest in the res of the trust when he received 500 shares which he knew to be trust property. The bar would likely inquire into the basis of this transaction since it raises a host of ethical issues under the rules regulating the bar.

Next, was the payment to Alan payment of his fees or was this simply a gift to Alan as a thank you? Either way, this could be problematic. If the payment to Alan was meant to be for attorney's fees, such amount should have been clearly set out at the beginning of the representation since it is not clear that Alan has ever represented H before. When an attorney takes on a new representation, the amount of attorneys' fees paid should be clearly stated (preferably in writing) and it should be fair. There are certain guidelines for contingency fees (between 15-40%) but it does not appear that this was a "contingency fee" (although one could argue that the fee was for having completed the amendment to the trust document. If the payment to Alan was a gift, there is still an ethical issue because an attorney may not receive a gift of high value in addition to his legal fees, unless such gift was provided by a direct family member. In this case, H was the husband of Alan's mom, but he was not a direct relative of Alan. Alan could face the ethics committee for having received such gift.

Last, an attorney serving as a trustee owes duties to the trust (as discussed above). Alan's dealings with the trust as trustee, as already discussed above, raise ethical considerations concerning his duty of loyalty and good faith dealing, for which he could be punished by the bar.

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. Sample items 21 to 23 are examples of multiple-choice items with performance elements included. 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.

2. 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.

3. 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.

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 empaneled, 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 empaneled.
 - (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. Kendall and Thornton agree to form a partnership, but both agree that only Kendall will manage the business and make all business decisions and execute all contracts with third parties. After that time, Thornton then enters into a long-term service contract for the partnership with Clark, who does not know of the internal agreement. The contract of Thornton with Clark is
- (A) enforceable, as the partners' agreement cannot withhold statutory authority of a general partner to bind the partnership.
 - (B) enforceable, as Clark has no knowledge of Thornton's lack of authority.
 - (C) unenforceable, as Thornton is unauthorized to execute the contract by the partner agreement.
 - (D) unenforceable, as Clark had an obligation to confirm Thornton's authority prior to entering into a service contract with the partnership.

7. 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.
8. 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.
9. 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.
10. Jan sues the Chicago Times for defamation in a Florida circuit court. At trial, Jan wishes to offer into evidence a copy of the edition of the Times containing the allegedly libelous article. Before the newspaper may be admitted, Jan must
- (A) call as a witness an employee of the Times to testify that the proffered newspaper was in fact published by the Times.
 - (B) have a certification affixed to the newspaper signed by an employee of the Times attesting to its authenticity.
 - (C) establish that the newspaper has been properly certified under the law of the jurisdiction where the newspaper was published.
 - (D) do nothing because the newspaper is self-authenticating.

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. 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.
13. Anderson and Parker decide to form a corporation which will locate missing children. Which of the following would be a proper name for the corporation?
- (A) ANDERSON
 - (B) FBI Consultants, Incorporated
 - (C) Private Eye Partners
 - (D) Child Finder Company

14. 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.
15. 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 3 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.

16. 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.
17. At the close of all the evidence in a jury trial, Defendant moves for a directed verdict. After much argument, the court denies the motion. Subsequently, the jury returns a verdict for Plaintiff.

The day after the jury returns its verdict, the court enters judgment for Plaintiff. One week later, Defendant moves to set aside the verdict and have judgment entered in accordance with its motion for directed verdict. In the motion, Defendant raises arguments that were not raised at trial. Plaintiff's counsel objects to the court even hearing the motion to set aside the verdict. Should the court consider the motion?

- (A) Yes, because Defendant has raised new grounds.
 - (B) Yes, because Defendant had ten days after the jury returned its verdict within which to move to set aside the verdict.
 - (C) No, because the court denied the motion for directed verdict rather than reserving ruling.
 - (D) No, because the court entered final judgment for Plaintiff before the motion to set aside the verdict was filed.
18. 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.

19. 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.
20. Regarding a deposition in a civil suit, which of the following is/are true?
- I. A deposition of a person against whom another person contemplates filing an action may be compelled by the party contemplating the action, without leave of court, before the action is filed.
 - II. A deposition of the defendant in an action may be taken by the plaintiff without service of a subpoena on the defendant.
 - III. A deposition may be taken even though all the testimony secured by it will be inadmissible at the trial.
- (A) II only.
 - (B) I and II only.
 - (C) II and III only.
 - (D) I, II, and III.

SAMPLE MULTIPLE-CHOICE QUESTIONS WITH PERFORMANCE TEST COMPONENT

Assume for Questions 21 - 23 that following statutes and case holding are controlling law in Florida:

Florida Statutes 47.011 Where actions may be begun. Actions shall be brought only in the county where the defendant resides, where the cause of action accrued, or where the property in litigation is located.

Florida Statutes 47.021 Actions against defendants residing in different counties. Actions against two or more defendants residing in different counties may be brought in any county in which any defendant resides.

Gates v. Stucco Corp.: The appellee contended that because the defendants were residing in Dade County at the time the cause of action accrued, it was immaterial where they resided at the time the suit was filed. The law does not support that contention. It is unimportant that the appellants resided in Dade County at the time of making of the lease or even at the time the cause of action accrued. Their rights under the venue statute are to be determined on the basis of their being residents of Broward County at the time the suit was filed in Dade County. The statute as to venue applies as of the time of the filing of the suit, and not as of the time of the accrual of the cause of action.

21. Payne is a resident of Dade County, Florida and was involved in a car accident in Broward County, Florida. Payne subsequently filed a complaint against Bryant and Davis in Dade County alleging that they negligently operated their cars resulting in permanent injuries to Payne. At the time of the accident, Bryant and Davis were both residents of Broward County. At the time the complaint was filed, Davis had moved and was living in Duval County, Florida. Bryant filed a motion to transfer the action to Broward County. What action should the court take?
- (A) Grant the motion because the cause of action accrued in Broward County.
 - (B) Grant the motion but allow Payne to select either Broward County or Duval County.
 - (C) Deny the motion because Payne resides in Dade County.
 - (D) Deny the motion if Davis consents to venue in Dade County.
22. Assume for this question only that Davis moved to Dade County after the accident and was residing in that county at the time the complaint was filed by Payne. What action should the court take in response to a motion to transfer to Broward County by Bryant?
- (A) Grant the motion because the cause of action accrued in Broward County.
 - (B) Grant the motion but only if Davis consents to the transfer to Broward County.
 - (C) Deny the motion because Payne resides in Dade County.
 - (D) Deny the motion because Davis resides in Dade County.

23. Assume for this question only that the trial court granted the motion to transfer and the action brought by Payne was transferred to Broward County. Who is responsible for payment of the service charge of the clerk of the court to which the action was transferred?
- (A) Bryant only as the party who moved for the transfer.
 - (B) Bryant and Davis as the defendants in the action.
 - (C) Payne only as the party who commenced the action.
 - (D) Clerk of the Court for Dade County as the transferring jurisdiction.

ANSWER KEY FOR MULTIPLE-CHOICE QUESTIONS

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