

Florida Board of Bar Examiners

ADMINISTRATIVE BOARD OF THE SUPREME COURT OF FLORIDA

Florida Bar Examination Study Guide and Selected Answers

February 2005

July 2005

**The Study Guide will be published semiannually with essay questions
from two previously administered examinations
and sample answers.**

Future scheduled release dates: August 2006 and March 2007

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PART I – ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2005 AND JULY 2005 FLORIDA BAR EXAMINATIONS

ESSAY QUESTIONS AND SELECTED ANSWERS

Part I of this publication contains the essay questions from the February 2005 and July 2005 Florida Bar Examinations and one selected answer for each question.

The answers received high scores and were written by applicants who passed the examination. The handwritten answers were typed as submitted. The answers are reproduced here with the consent of their authors and may not be reprinted.

Applicants are given three hours to answer each set of three essay questions. Instructions for the essay examination appear on page 2.

ESSAY EXAMINATION INSTRUCTIONS

Applicable Law

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

Acceptable Essay Answer

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

QUESTION NUMBER 1

FEBRUARY 2005 BAR EXAMINATION – FLORIDA CONSTITUTIONAL LAW

After hearing complaints from its constituents and from judges regarding delays in the court system caused by large numbers of lawsuits between stockbrokers and clients, especially in larger metropolitan areas, the Florida Legislature enacted the "Stockbroker Litigation Relief Act" (the Act). The legislation was timely signed into law by the Governor. The essential terms of the Act are:

1. Each dispute must be submitted to non-binding mediation before a complaint may be filed. Any contract term to the contrary, existing or future, is void.
2. Any stockbroker/client lawsuit heard by a court shall be tried without a jury. Any demand for a jury trial shall be stricken by the court on its own motion.
3. All stockbroker/client lawsuits shall be given lowest priority on the court's calendars and shall only be tried when there are no other civil or criminal cases on the court's docket ready to be tried.
4. The low priority set forth in paragraph 3 may be overcome by the payment of an "advancement fee" of \$2500. If the "advancement fee" is paid, the case shall be given the same priority as other civil cases. The "advancement fee" is not waivable on grounds that the party seeking the relief is unable to pay the fee.
5. The Act shall immediately take effect in all counties that have a population of 500,000 or more according to the most recent census. For counties of 499,999 persons or less according to the most recent census, the Act will go into effect if approved in a county-wide referendum.

You have been retained to represent Cleo, who contends that Stockbroker negligently handled her finances and breached their contract, resulting in loss of Cleo's entire life savings of \$200,000. Cleo resides in Sunshine County, Florida that has a population of over one million per the most recent census. The contract between Cleo and Stockbroker did not contain a provision requiring mediation.

Cleo wants to oppose the Act and sue Stockbroker immediately in court. Advise Cleo by discussing fully the arguments that can be made under the Florida Constitution in opposition to the Act including the likely outcome of these arguments.



SELECTED ANSWER TO QUESTION 1

(February 2005 Bar Examination)

I represent Cleo. Cleo would like to sue a stockbroker that she claims negligently handled her finances and breached her contract. Cleo wants to sue and, therefore, wants to challenge the constitutionality of the Stockbroker Litigation Relief Act (“SLRA”). I will discuss the arguments that can be made under the Florida Constitution in opposing the Act and the likely outcome.

Cleo must have standing to challenge the law. As she entered into a stockbroker contract and has been harmed as a result she has standing. This is also true given she lives in a county with a population where the law will immediately go into effect.

For a law to be valid in Florida it must be Constitutional, clearly written, not overbroad and for a lawful purpose. It must deal with only one subject, which must be described in its title. It must contain an enacting clause. It must also be properly signed. And it must not conflict with any federal law.

The law was signed by the governor. The facts state it was timely signed and I will therefore assume that it was properly executed in all ways.

The law deals with only one subject, thus complying with the “One Subject Rule” as set forth above. The one subject is stockbroker lawsuits.

The title “Stockbroker Litigation Relief Act” appears to adequately state the purpose of the law in the title.

I will address general Constitutional Arguments relating to the entire Act, as well as arguments relating to the specific clauses below.

Clause No. 1

Clause number one states that each dispute must be submitted to non-binding mediation before a complaint may be filed and declares and contract term to the contrary, existing or future, void. This clause may be challenged on two grounds: Access to Courts and Right to Contract.

The Florida Constitution declares that access to the judicial courts is to be available for every person to address all legal wrongs. Clause number one significantly limits a potential plaintiff's access to courts by forcing them into non-binding mediation. Thus, an argument could be made that clause number one is unconstitutional as infringing a Florida citizen's right to access to the courts. However, this argument is unlikely to succeed in light of the Kruger doctrine. The Kruger court held that access to the courts may be limited if 1) there is a compelling public necessity, and 2) other reasonable means of redress are available. Here, there appears to be a compelling public necessity to limit Stockbroker lawsuits as there have been a number of complaints by local constituents. Additionally, alternative means of redress remains as the mediation is non-binding, therefore allowing potential plaintiffs to still access the court system following mediation. Therefore, the first part of clause number one is likely constitutional under this argument.

The Florida Constitution also states that a citizen's right to contract to should not be infringed upon, especially with respect to contracts already in existence. Here, clause number one states that all contracts to the contrary, existing or future, are void. Because future contracts are included, a good argument exists that the second part of clause number one is unconstitutional as infringing upon previously entered into contracts. This may also infringe on S's right to work but this is unlikely.

Clause No. 2

This clause may be attacked on three grounds: as an unlawful Bill of Attainder, infringing on separation of powers and infringing on a citizen's right to jury trial.

A Bill of Attainder is legislation that attempts to impose a punishment on someone without the benefit of a judicial determination. Therefore there is an argument that Clause No. 2 makes the statute an unlawful Bill of Attainder. This argument is unlikely to succeed, however, as it appears that a bench trial may still be had.

All Florida citizens are guaranteed the right to a jury trial by the Constitution. Clause two infringes upon this right and is, therefore, likely unconstitutional.

By stating that the Court must strike the right to jury on its own motion, it can also be argued that clause number two infringes on the separation of powers between that legislative and judicial branches of government. Per the constitution, one branch cannot meddle in the other branch's affairs. The legislature is to make the laws and the judiciary is to interpret and uphold the laws. Here, it appears that the legislature is intermeddling with the Court's right to control its docket and create its own rules. However, the legislature often creates laws governing these types of matters so this argument is unlikely to prevail.

Clause No. 3

Clause number three also appears to unconstitutionally limit a citizen's right to access to the courts, making stockbroker/client lawsuits take a back burner if you will to all other matters, civil or criminal. Although, since there is still access, this argument is unlikely to succeed.

This clause also appears to violate the separation of powers doctrine by the legislature controlling the court's dockets. The clause is likely unconstitutional on separation of power grounds.

Clause No. 4

Clause number four also prevents access to courts by charging an exorbitant "advancement fee" if one wishes to gain equal footing with other cases. It is not waivable for inability to pay. The Florida Constitution guarantees all persons access to the courts, including indigent defendants. Many courts' fees are waived for indigents to allow for this access, which is the public policy of the court system. Therefore, without providing for relief for indigents, this clause unlawfully blocks their access to the courts.

In addition, by singling out indigents from those that can pay, the clause can be challenged on Equal Protection grounds. The constitution provides that the state cannot take life, liberty or property without due process and equal protection of the law. This clause discriminates against indigent defendants. As there is no suspect class, fundamental right or quasi-suspect class involved, the law must bear a rational relationship to a legitimate government purpose. This clause does not as all people should be granted access to the Courts.

Clause No. 5

In Florida, there are two types of laws, general and special. General laws apply to the entire state, to all people. Special laws apply only to specific persons, places. General laws can be of "local application," if they apply to the whole state but are limited by population. Clause number five applies the Act to counties with populations over 500,000. Therefore, this law is either a general law of local application or a special law. Special laws must be enacted with prior notice or via referendum. If the Act is a general law of local application it will be deemed valid. If it is deemed a special law, it will likely be unconstitutional as only certain persons have to vote by referendum and not all persons affected. Because it appears to the entire state and is limited only by population, it appears to be a general law of local application and would likely be deemed constitutional under this analysis.

General Arguments

This law may also be challenged on these additional grounds: Privileges and Immunities, Equal Protection, Commerce Clause, Due Process.

The privileges and immunities clause states that a state cannot discriminate against non-citizens. Here, however, the Act appears to apply to all stockbrokers, whether in state or not. Therefore this argument is likely to fail.

The equal protection clause states that the government cannot deprive a person of life, liberty and property without due process of law. The Act applies only to stockbrokers. Therefore, an argument can be made that equal protection of law is not given to stockbrokers. Why apply the Act to them and not any other profession? There are two tests for equal protection in Florida: strict scrutiny and minimal scrutiny (rational relation). Florida does not apply intermediate scrutiny. Strict scrutiny applies to suspect classes and fundamental rights. Because stockbrokers are not a suspect class and the right to work, although important, is not a fundamental right, strict scrutiny does not apply. The rational basis test states that the Act must be rationally related to a legitimate government purpose. Because stockbroker lawsuits appears to be a problem, the law as a whole meets this test as it is rationally related to this problem.

Under the Commerce Clause, laws may not discriminate against or unduly burden interstate commerce. As the law appears to apply equally to all stockbrokers, in state or out, it does not discriminate against out of state commerce. However, one can argue that it burdens out of state commerce by imposing undue restrictions on stockbrokers, thus making it unlikely that they will offer services to Florida citizens. This is a close question and will best be left up to the Court.

There are two types of due process, substantive and procedural. Substantive requires that laws are fair. Procedural requires a notice and hearing if a personal life, liberty or property is to be infringed upon. To test substantive due process, the Court would utilize the rational basis test, above, and likely reach the same conclusion. The procedural due process clause does not appear to apply here.

Sections of the above law are likely to be found unconstitutional. If so, those portions may be stricken and the remainder reenacted into law through proper procedures.

Q QUESTION NUMBER 2

FEBRUARY 2005 BAR EXAMINATION – REAL PROPERTY

In a written lease, Landlord agreed to rent a duplex to Teresa "for one year, payable at \$500 per month," beginning August 1. Teresa paid Landlord a security deposit of \$250. On August 1, Teresa was unable to move in because the duplex was still occupied by Bud, whose lease had expired on July 31. Bud eventually moved out on August 31, and Teresa moved in on September 1.

During September, high winds caused by a storm broke a window and blew several shingles off the roof. Rain entered through the broken window and roof, damaging the walls and carpet, and ruining Teresa's sofa. Teresa demanded that Landlord fix the roof and window. Landlord replied that repairs were Teresa's responsibility.

The adjacent duplex unit, also owned by Landlord, was occupied by a rock group. The group rehearsed at least four times a week during the hours of 7:00 p.m. to midnight. The group's loud rehearsals prevented Teresa from sleeping and interfered with her law studies. Teresa complained repeatedly to Landlord, but the noise continued. On October 30, Teresa moved out without notifying Landlord and without having paid any rent. Teresa told her classmate, Sally, she could move into the apartment for \$500 a month rent. Sally moved in November 1. Sally has not paid any rent to either Landlord or Teresa.

On November 15, Landlord consults the law office where you are clerking. Landlord wants to collect money from whomever he can. Landlord also has someone who is willing to pay \$600 rent per month for the duplex. Landlord also wants Sally to be thrown out immediately. Prepare a legal memorandum discussing fully the rights and remedies available to Landlord and any defenses available to Bud, Teresa, and Sally.



SELECTED ANSWER TO QUESTION 2

(February 2005 Bar Examination)

Landlord and Teresa have executed a valid contract, complying with the Statute of Frauds, for a tenancy of years because it has a fixed period of time. Since Teresa was to begin the lease on August 1, Landlord has a duty to give her possession on this date or he is in breach. Due to this breach, Teresa could avoid the contract with Landlord because he is in a material breach. Landlord did not provide her possession because he had a previous tenant holding over after the lease term expired. In Florida if Bud holds over after the lease expires without the landlord's permission a tenancy at sufferance is created. Landlord can demand for Bud to move out, although not resorting to self help measures. Landlord must go to county court seeking to regain possession, after giving the proper notice to Bud (3 days for nonpayment of rent and seven days for any other noncompliance). After this time Landlord can obtain an eviction. Landlord will also be able to receive double rent for the period that Bud held over after the lease expired and Landlord demanded possession.

Landlords generally have a duty to repair in Florida. This can be altered by contract and placed on the tenant if the lease concerns a single-family dwelling or a duplex, but cannot be altered for other multi-family dwelling homes. The lease between Teresa and Landlord is silent about repairs according to the facts and thus the duty to repair would default to Landlord. This duty to repair means that, among other things, Landlord must provide a proper roof, working windows with screens, steps, heat in the winter, hot running water and a stove and refrigerator that works. Landlord is in breach of his duty to repair since he did not fix the broken window or roof problems after the tenant demanded and gave him notice of the problems. Note, even if Teresa had not told him of the problems, the landlord has a duty to make reasonable inspections to make sure the home is habitable. There is nothing in the facts to show that Teresa would not let Landlord on the property to make the necessary repairs, rather the facts show that Landlord refused. Landlord is thus going to be responsible for the damage to the walls and carpeting and to her sofa. The tenant cannot try to increase her damages and not mitigate them. For example, if Teresa hated her sofa she cannot move it to the spot where water is coming in to collect from landlord. However nothing in the facts lead us to believe Teresa did this.

The landlord has an implied duty to provide a habitable home. Landlord breached this duty by not fixing the window and roof. The landlord also has an implied duty to provide quiet enjoyment.

Teresa could arguably say that landlord breached this duty by permitting the rock band to play in a duplex at midnight. Landlord will argue that he did not have the seven days notice to fix the problem. Teresa, however, from the facts complained "repeatedly." She will thus argue that she was constructively evicted from her home and left immediately and is thus not required to give notice or pay the rent. Landlord will argue that notice is required before moving out. He may point to a provision in the lease requiring up to 60 days if there was a provision. If the courts strike the lease, possibly because landlord was in breach about providing possession on Aug. 1, he will still argue that a periodic tenancy was formed and that the period is monthly because she is to make monthly payments. If this were the case, Landlord will argue that Teresa had to give him at least 15 days before she moved out.

Teresa then allowed Sally to move in without getting permission from Landlord. Landlord may point to a provision in the lease prohibiting assignments and subleases to get Sally out. However, these provisions are narrowly construed and the courts will not read them into the lease if they are not present. If the lease contained those provisions, Landlord can waive them if he gave permission or collected rent or in any other way approved the arrangement. Unless otherwise indicated, once he waives it then it continues to be waived for all subsequent assignments or subleases.

Assuming that no provisions were in the lease, it is necessary to determine whether Teresa assigned or subletted her apartment because each arrangement will provide a difference in who Landlord can pursue. If Teresa gave Sally her apartment for the entire time remaining on the lease, it is an assignment but if it is only for a limited period of time it is a sublease. A conveyance of land provide the landlord with two different grounds to pursue damages: breach of contract and breach of conveyance. Teresa will be liable for the entire term of the lease under breach of contract principles regardless of whether new people move into her apartment with her permission during her leasehold (i.e. Sally). This is because Teresa is in privity of contract with the landlord by signing the lease. If she assigned her lease to Sally then Sally is in privity of estate with Landlord for as long as she is occupying the home. Once she leaves (for example, if Sally assigns to someone else) the landlord cannot pursue Sally for rent because she is no longer in privity of estate. If, on the other hand, Teresa sublet her apartment to Sally then it is considered that Teresa still has privity of estate rather than Sally. Thus Landlord would have no privity with Sally and could not pursue her for rent.

If Sally moves out and the duplex is vacant, Landlord has a duty to mitigate damages during Teresa's lease by having the higher paying person rent the apartment. Landlord can pursue Teresa for any balance of damages after mitigating and taking into account the security deposit already paid by Teresa. The landlord will have to give 15 days notice to Teresa of his intent to keep the security deposit & tell why, then wait 30 days to see if Teresa objects.

Q QUESTION NUMBER 3

FEBRUARY 2005 BAR EXAMINATION – TORTS

Patron entered MegaMart during regular business hours, intending to purchase certain items in the garden department. On her way to the garden department, Patron passed through the paint department where Employee was in charge that day. One can of paint thinner was damaged and was leaking, creating a puddle in the aisle. Patron slipped in the puddle and fell, injuring her knee. Employee saw Patron on the floor but did not assist her and shouted at her that MegaMart would not be responsible for an accident caused by a customer's own clumsiness.

Shaken, Patron began to leave the store but returned to the paint department to ask to see the store manager. Patron observed Employee exiting the sales floor through a door marked "Employees Only." Patron followed Employee through the door and found Employee in the employees' break room. Patron and Employee argued and Employee struck Patron with his fist, breaking her jaw. Her jaw was wired shut for six weeks to allow the fracture to heal. Patron was laid off from her job as a medical receptionist for the six weeks' period because she was unable to perform her duties. It was later determined that Patron had torn a knee ligament from her fall at MegaMart, requiring surgery and extensive rehabilitation.

Employee had worked for MegaMart for six months. Because he normally worked in the electronics department, he was never trained on how to handle spills on the floor. Employee's application for employment with MegaMart showed that he had recently left a job with Electronics, Inc. on grounds of disagreement with a supervisor over working hours. In fact, Employee was fired from Electronics, Inc. for physically attacking a dissatisfied customer. Employee's personnel file at MegaMart does not contain any notation that Electronics, Inc. was contacted by anyone at MegaMart before or after Employee was hired.

Patron has retained Partner at the law firm where you are clerking. Prepare a legal memorandum for Partner discussing the causes of action and claims for non-punitive damages that Patron would have against Employee and MegaMart and the defenses that would be available to each defendant. Also discuss the standard for being awarded punitive damages in Florida and whether punitive damages would be available against Employee. Do not discuss whether punitive damages would be available against MegaMart.



SELECTED ANSWER TO QUESTION 3

(February 2005 Bar Examination)

TO: Partner

FROM: Associate

Re: Patron vs. MegaMart and Employee

This memorandum will discuss the possible causes of action and claims for non-punitive damages that Patron (P) could have against Employee (E) and Megamart (M) and the defenses that would be available to each defendant.

This memorandum further discusses the standard for being awarded punitive damages in Florida and whether punitive damages would be available against E.

P v. E

1. *Negligence for removing the puddle of paint or warn patrons*

P could have a cause of action in negligence against E. To show a prima facie case in negligence P must show that (i) E had a duty to P, that (ii) E breached that duty, that (iii) the breach was the actual and proximate cause for Ps injuries, and (iv) damages to Ps person or property.

Here E had a duty to periodically inspect the aisles for dangerous conditions that might harm the patrons. Everyone is owed a duty to act as an average, prudent, reasonable person under the circumstances. Patrons during regular business hours are invitees and owed a higher duty of care, which includes to inspect the premises for unsafe conditions and once discovered, make the condition safe or warn of the condition. Here, E was in charge of the paint department where the leaking can of paint thinner was located and the puddle appeared. This was a dangerous condition and E had a duty to inspect the aisles for these types of conditions.

E would content that P would have to prove that E breached that duty. The facts do not show in which time sequence the puddle appeared and if there was any time between the appearance of the puddle and the accident during which E could have inspected the isle and discover the condition. But the nature of paint and paint thinners and the way they are stored and handled let the storekeeper reasonably expect spillage to happen.

E did not warn of the puddle or make the condition safe by wiping it away and thus breached his duty to P.

E's breach must have been the actual and proximate cause of P's injury. But for E's breach of duty, P would not have slipped and fallen and the injury to his knee is an injury that was foreseeable to happen from a slip and fall accident in the store. Therefore, E's negligence was the actual and proximate cause of P's damages.

P must have suffered damages to his person or property. P injured his knee which is sufficiently severe and permanent as to be recognized as compensable damages under Florida law.

Therefore, a *prima facie* case of negligence against E can be shown.

E could only defend by raising the defense of contributory negligence. If the puddle of paint thinner was clearly visible to P and P could have avoided stepping into this puddle and slipping, then his action could lead the fact finder to attribute some fault to P thus relieving E of some of his liability. Florida follows pure comparative negligence, therefore, any fault on P's side will reduce the liability of E proportionally. However, E will not be relieved of liability unless P's fault was 100%, which is unlikely, since paint thinner is a clear liquid which is not easily detectable when it is spilled on the floor.

2. Intentional infliction of emotional distress for shouting.

P could have an action against E for intentional infliction of emotional distress. P would have to show that E engaged in outrageous conduct towards P, that E intended this conduct, that his conduct caused severe distress to P and that it was foreseeable and intended by E to cause such distress in P.

E shouted in a store where other patrons would likely hear his shouting at P. Shopkeepers owe a higher duty of care toward the patrons and shouting at a patron in the store in front of the other patrons could arguably be outrageous conduct. But for the shouting, P would not have been "shaken" which was foreseeable. However, being "shaken" probably does not rise to the level of distress that is actionable under Florida law. Some physical manifestations would have to occur. Here it does not seem that P suffered more severe distress than being "shaken," and he especially did not suffer a physical injury that could be traced to the shouting, thus P would likely fail with this cause of action.

3. Defamation

P could sue E for defamation. P would have to show a publication of a false fact by E to others that concerned P. E's shouting that the store would not be responsible for an accident caused by a customer's own clumsiness was probably easily audible by the other customers and intended to be heard by others in the store; therefore E made a statement of fact to others that concerned P. The statement was false, because P did not fall because of his clumsiness, but rather because of E's negligence, therefore, the statement was false. However, P would have to demonstrate actual damages suffered from the defamation. Here, P did not suffer any actual damages from this conduct and thus his action for defamation will likely fail.

4. Negligent infliction of emotional distress

P did not suffer any actionable damages due to E's shouting and thus cannot recover for negligent infliction of emotional distress.

5. Battery

P could bring an action against E for battery. Battery is the intentional offensive touching of another without that person's consent. P would have to show that this touching was the actual and proximate cause of injuries to P's person.

E hit P with his fist, breaking her jaw. E intentionally brought about a movement of his fist which struck P's jaw. But for E hitting P, P would not have suffered a broken jaw and this injury was foreseeable. The injury was also sufficiently permanent and severe to make it actionable. P did not consent to being hit, thus a *prima facie* case for battery can be established.

E could argue that P was a trespasser, because he had entered the employees' break room, which was clearly marked for "Employees Only," and that E was defending the property of the storeowner. However, the defense of property must be proportional and reasonable and cannot exceed the scope permissible had the storeowner himself tried to evict P from the premises. Striking a customer in the face to remove him from the employees' break room is certainly excessive force and not permissible in defense of property such as this.

E could argue provocation. If P was the initial aggressor, that E could have acted in self-defense. Nothing in the facts tells us that P had threatened E with physical force, therefore, this defense will likely also fail. The altercation could have been started by E, in which case E would have been the initial aggressor not entitled to self-defense until he had stopped his aggression and communicated that to P.

E will likely be liable for battery.

P v. M

1. Respondent Superior

P could sue M under the theory of respondent superior for the tortuous acts committed by E.

Employers are liable for the tortuous acts of their employees within the ordinary scope of employment. Here, E committed negligence and battery during the working hours and while working in the store against a lawful patron of the store. E was acting within his scope of employment and M will be vicariously liable for E's tortuous acts; at least for E's negligence.

M will argue that M should not be liable for the battery, because this was an intentional tort, not committed during the scope of employment, but rather during an employment break. M will argue that while E was in the employee break room he was on a frolic on his own and tortuous acts committed while on a frolic should not be attributed to M. This argument will likely fail. Considering the time and purpose of E being in the break room and the short distance from the business premises, it is arguable that employees on their break in this room are still acting within the scope of their employment, since every employee will have to take a break during the day and the employer allows his employees to use this room during short breaks, but the breaks are during the regular business hours on the premises of the employer.

M will prevail however with its argument that it should not be liable for intentional torts of its employees under respondent superior unless M has reason to know of the violent temper of E.

2. Negligent training and supervision of E

P could assert a claim in negligence against M for negligent supervision and training of E. M was under a duty to act as an ordinary prudent person under the circumstances and employer train their staff and should train their staff concerning their responsibilities of removing dangerous conditions in the store. M had not trained E during the six months of his employment which was a breach of M's duty of reasonable care. But for the lack of training, P would not have slipped and fallen and suffered the foreseeable injuries. Therefore, M is directly liable for negligence.

3. Negligent hiring of E

P could assert another count of negligence for negligent hiring of E. M owed P a duty of reasonable care in the selection of its employees. E had been fired from his previous job because he had physically attacked a dissatisfied customer. M breached its duty by not contacting the former employer as to the reason for E's termination. Had M discovered the reason, he would have likely not hired him or at least trained and supervised him more closely. But for the negligence in not checking E's background, E would not have been hired and would not have attacked P during the break and committed the battery. It was foreseeable that E would be in contact with dissatisfied customers during the regular employment and that E might be violent again. The damages that P suffered are attributable to M's negligence; therefore M is liable for negligent hiring of E.

M would defend that during the six months of employment E had not shown any violent behavior towards customers that would have put M on notice, but the duty arose at the time of hiring of E and is therefore not a viable defense.

Damages:

For the actions above, P could demand economic and non-economic damages in the form of lost wages, past, present and future medical cost, and for pain and suffering. The six weeks of lost wages as medical receptionist are compensable as well as the reasonable award for the pain and suffering during the time of recovery. Furthermore, the medical bills for the hospitalization and follow-up medical care.

Punitive damages

In an action against E, the standard for recovery of punitive damages is as follows: Punitive damages must be pleaded with specificity and the pleading must show intentional or grossly reckless conduct of the tortfeasor towards the plaintiff.

Here E's battery is an intentional tort for which punitive damages would be available. In 1999, Florida enacted the tort reform act according to which punitive damages are capped at the higher of 3 times the compensatory damages or \$500,000. Must plead sufficient fact to establish intentional conduct and that there is a bona fide argument for punitive damages. Here, punitive damages would be available against E for his intentional battery of P.

Q QUESTION NUMBER 1

JULY 2005 BAR EXAMINATION - CONTRACTS

Carrie, a 17-year-old high school student, had been baking homemade pies and cakes since she was 13 years old. On May 15, Paul contacted Carrie and asked if Carrie could provide baked goods in about two weeks for a graduation party of 300 students to be held on June 1. Paul stated that he would pay \$1500 for cakes and pies. Carrie stated that she would be more than happy to bake the cakes and pies for Paul's party. On May 27, Carrie left a message on Paul's answering machine stating that the supplies are more expensive than she expected and that she would need a total of \$2100. Paul never responded to the message.

On May 31, Carrie called to inform Paul that she had begun baking and the pies and cakes would be ready for the party. Somewhat surprised, Paul explained that he hired someone else to provide the cakes and pies because Carrie called and requested a higher price. Paul hired Cakes and Things, Inc., to provide the cakes and pies for the original contract price that he and Carrie agreed to, the sum total of \$1500. Upset by this, Carrie swore that Paul would "see her in court." In addition to the cakes and pies, Cakes and Things, Inc., agreed to provide the party hats and favors. The price of the party hats and favors was \$900.

On the day of the party, Cakes and Things, Inc., called Paul to say that his dessert order was ready, but there was bad news. Cakes and Things, Inc., discovered the day before the party that it could not provide the party hats and favors because there was a strike at the supply plant where the party hats and favors were produced. As such, the goods did not arrive on time. The entire agreement was memorialized in writing on an invoice of Cakes and Things, Inc., signed by both Paul and a Cakes and Things, Inc., representative. Angry, Paul stated that things just were not going well and he was going to cancel the party. As such, he did not need the cakes and pies.

Please discuss:

1. the issues in a suit for damages by Carrie against Paul; and,
2. the issues in a suit for damages by Paul against Cakes and Things, Inc., including any counterclaim Cakes and Things, Inc., may have.



SELECTED ANSWER TO QUESTION 1

(July 2005 Bar Examination)

1)

This is a **Contracts question**.

UCC:

This Contract (K) will be governed by the UCC, as enacted in Florida. When the K involves the sale of goods, UCC governs. The test whether the K involves goods or services is the **material purpose** test. Carrie could argue that it was for services (because she was baking the pies), food items are typically considered goods under the UCC. In addition, the K between Paul and Cakes and things will also be governed by the UCC.

For a K to be enforceable, there must be:

- OFFER
- ACCEPTANCE
- CONSIDERATION
- NO VALID DEFENSES

Offer: Invitation to enter into a K

Acceptance: manifestation of an intent to be bound

Consideration: In Florida, is either a BARGAINED FOR exchange, BENEFIT to one party or a DETRIMENT to the other.

I. Carrie v Paul

Here, Paul's offer to pay \$1,500 for cakes and pies for a graduation party is an offer. Carrie accepted the offer when she said she would be happy to bake the cakes and pies. The consideration is the \$1,500 in exchange for the pies and cakes. Therefore a valid oral K was formed on May 15.

Defenses:

SOF

An ORAL K is generally enforceable unless it falls within the STATUTE OF FRAUDS (SOF). Under the UCC, a K for the sale of goods of \$500 or more must be in writing to be enforceable. In addition, it must be SIGNED BY THE PARTY TO BE CHARGED and CONTAIN ALL ESSENTIAL TERMS. The UCC is liberal in including GAP FILLERS where terms are not included, but the K must include the QUANTITY.

There are defenses to the SOF in the UCC:

- *Part Performance*
- *Specially manufactured goods*
- *Acceptance or Completed Performance*
- *Judicial Pleadings*

Here, Paul (P) will assert that Carrie's (C) K is not enforceable because it falls within the SOF (it is for more than \$500). Carrie will defend stating that she performed under the K and should be considered an exception to the SOF. She had begun baking the pies and cakes. The court may consider whether her baking the pies was justified given the attempted call for more money and receiving no response.

Therefore, it is likely that the SOF may not be a problem.

MINORITY

A MINOR (under 18) lacks the CAPACITY to K. A K entered into between a minor and adult is VOIDABLE at the MINOR'S option. It is fully enforceable against the adult. If the minor is emancipated or if the K is RATIFIED after the minor turns 18, then lack of capacity is no defense. Adult may be able to enforce K for necessities (shelter, food etc.)

Here, P may assert that the K is VOID because C is a minor (17-years old). However, only C can void the K and here C is enforcing the K. Necessity is not a defense since the K is not for C's necessities. The fact that she had been baking since 13 is of no consequence if she is not emancipated legally.

ANTICIPATORY REPUDIATION

Anticipatory Repudiation (AR) is when one party calls and unequivocally indicates an unwillingness to perform his obligations under the K BEFORE his obligations for performance have come due. If there is an AR, then the non-breaching party at his option may:

- *Consider it as an offer to rescind the K and excuse his performance*
- *Sue Immediately on the K*
- *Ignore the AR and continue to encourage the nonbreaching party to perform*
- *Wait until the K is actually breached and sue*

Right to assurances: *If one party believes that a party will not be able to perform (but has not received a complete AR), then the party is entitled to SEEK ASSURANCES from the other party. If the other potentially breaching party does not respond or give assurances, then the other party may be entitled to continue under AR as if the K was breached.*

Here, P will argue that C's call was a REPUDIATION and he was justified in treating his obligation as excused and the K rescinded. He would argue that his failure to return to call would lead a reasonable person to believe that he had chosen this option and would not perform. He would support it by the fact that the new price was extremely higher (1500 v 2100), that he did not believe it was reasonable for someone to perform at a loss of \$600.

C will argue that it was not an UNEQUIVOCAL repudiation because she stated that she WOULD NEED a total of \$2100 because supplies were more expensive but never did she state she would not perform. She would argue that this was an attempt to MODIFY the K. Under the UCC, one could modify the K without additional consideration if done in good faith but the modification is still subject to the SOF.

C would also argue that P could have sought ASSURANCES from C if he had doubts about her performance.

Here, it is unlikely that the court would find C's phone call a repudiation and that Paul was not justified or excused from his performance to pay.

BREACH OF K

To prove a breach of K, the party must prove that the other party has an absolute obligation to perform and has failed to do so.

C will argue that Paul breached the K (under AR discussed above) when he told her on May 31 that he had hired someone else and would not pay for the cakes. C will argue that unlike the May 27 call, this was UNEQUIVOCAL repudiation and she was entitled to immediately sue on the K.

DETRIMENTAL RELIANCE

If the court finds that there is no K, it may grant the party relief under a theory of PROMISSORY ESTOPPEL OR DETRIMENTAL RELIANCE. Elements for (PER) are:

- *Promise*
- *Unjust enrichment by D if P is not granted relief*
- *Reliance by P that is foreseeable, detrimental and reasonable*

Here, C will assert that she detrimentally relied upon the promise made by P that he would pay her to bake cakes and pies. She will argue that P made a promise to pay. She relied upon that promise by beginning baking of the pies and cakes. Her reliance was both reasonable and foreseeable and P is unjustly enriched.

P will argue that it was not reasonable for her to rely upon the promise since she did not hear from him after the phone call. In addition he will argue that he is not unjustly enriched because C did not complete performance; she did not deliver the pies to P for the party. C will argue that the only reason she did not deliver was because he called and cancelled the K.

Damages

There is a duty to mitigate when one party breaches a K (i.e. attempt to resell the goods).

C will likely recover the cost of the K price-any money she received in selling the cakes/pies under breach of K. Under PER, she would recover the out-of-pocket expenses she incurred.

C would have to sue with the help of a guardian unless she turned 18 in the meantime.

II. PAUL V CAKES AND THINGS (CT)

Under Common Law, whether a party was EXCUSED from performance depended on whether the breach was MINOR or MATERIAL. If material, then the party is excused from performance; i.e. he is not obligated to pay at all. If minor, then the nonbreaching party must complete performance, but may recover damages for the minor breach (must pay K price minus the cost to buy replacement).

Under UCC, there is PERFECT TENDER rule, where one party may reject goods for any reason if it does not comply strictly with the K in a single transaction (not installation K).

The elements of K (discussed above) are met. There was an offer and acceptance as indicated by their WRITTEN K on an invoice of CT. There was consideration of \$1500 for cakes and \$900 for party hats and favors. SOF is not applicable because it was in writing.

P will argue that CT BREACHED the K when it could not produce the party hats and favors. He will argue that this is a MATERIAL BREACH and therefore he is excused from performing. P also will argue that under the perfect tender rule, he could reject for any reason if it did not comply and he rejected when CT said they could not deliver the hats.

Since CT did not call until the day of the party, CT obligation to perform was that day and P does not have to rely upon the doctrine of AR.

IMPRACTICABILITY

Party may be EXCUSED from performance if their performance is impractical (UCC) or impossible (common law), it is impractical when performance would be

- *Unreasonably difficult or expensive*

- *The event was unanticipated at the time of the K*
- *Event occurs after the K is executed*
- **UCC** notes expressly provide for strikes and embargoes as a reason why a K may be impractical.

Impracticability is a subjective test (whether it would be impractical to this D).

Impossibility: *is a higher standard to meet. It is an objective test whether anyone would be able to perform giving the event arriving after execution.*

CT will argue that they were EXCUSED from performance under the doctrine of either impracticability or impossibility. CT would argue that a strike at the supply plant was not anticipated at time of K and that it makes performance unreasonably difficult because there are no hats to produce. Furthermore, no one, not just them, would be able to execute this part of the K.

It is likely that the court would accept the strike as an excuse and excuse CT from producing the hats.

DIVISIBLE K

A K is divisible when it can be divided into sections with each person having an obligation for that division.

Here, CT will argue that the K was divisible because it provided for \$1500 for the cakes and pies and \$900 for the party hats and favors. P could still pay the \$1500 for the cakes and pies and not pay the \$900.

Court would likely find that K was divisible.

DAMAGES

P would not be able to recover under a breach of K.

III. CT v PAUL

CT could countersue for breach of K. CT would argue that P breached the K when he said he was canceling the party and did not need the cakes and pies. This will be an unequivocal rejection of the goods.

As stated above, the court would likely find that the K was divisible. CT would also have a duty to mitigate and could recover their EXPECTATION DAMAGES (what they would have received had the K performed). They will likely recover the K price minus money received from mitigating.

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QUESTION NUMBER 2

JULY 2005 BAR EXAMINATION - FAMILY LAW

Wilma, a successful architect, married her bookkeeper, Hudson. Hudson worked full-time until the birth of their son, Chad. Thereafter, Hudson worked part-time at Wilma's firm, so he could care for Chad. After nine years, Wilma and Hudson began having marital difficulties. Without consulting an attorney, in contemplation of separating, Wilma and Hudson agreed in writing to the following:

- To equally divide all marital assets and debts;
- To waive any claim for alimony and child support; and,
- To have rotating custody of Chad.

The parties remained together for another six months. Hudson then moved to a modest two-bedroom apartment nearby. Wilma became upset, fired Hudson, and did not allow him visitation or communication with Chad. Wilma, through her attorney, filed for divorce seeking custody, child support, and supervised visitation.

Hudson, through his attorney, counter-petitioned to vacate the parties' agreement because he was under emotional stress when entering into the agreement, and sought alimony, custody, child support, and attorney's fees. Hudson is currently unemployed.

As the Judge's staff attorney, prepare a memorandum regarding:

- (1) Should the agreement be set aside?
- (2) What should the outcome of the case be regarding alimony, child support, custody, and visitation, given the parties' agreement?
- (3) Does Hudson have a claim for attorney's fees?



SELECTED ANSWER TO QUESTION 2

(July 2005 Bar Examination)

This memo will address whether the post-nuptial agreement between the parties should be set-aside, what the outcome of the case should be re: alimony, child support, custody, and visitation in light of the agreement, and whether Hudson has a claim for attorneys fees.

First, I will address whether Hudson may be awarded attorneys fees. In Florida dissolution of marriage actions, a spouse may petition the court for an order to make the other spouse pay his/her attorneys fees for the divorce. Whether the court will award a spouse attorneys fees is based on need & ability to pay. If a needy spouse can show that he/she is in need of attorney fees & that in order to have representation that is on the same level of the other spouse, a court may award that party reasonable attorney fees. In this case, Hudson will have an excellent case for attorney fees against Wilma because he is unemployed and therefore can show a financial need. In addition, Wilma has the ability to pay because she is a successful architect & is still employed. Therefore, Hudson is likely to succeed on his claim for attorney fees.

Issue 1 – Should the Agreement be set aside. Under FL Law, parties may validly enter into POST-NUPTIAL AGREEMENTS or prenuptial agreements. A post-nuptial agreement is where the parties MUTUALLY & VOLUNTARILY agree to enter into a contract post-marriage to divide assets, determine child related issues, or any other issue the parties desire, that will take affect upon dissolution of the marriage. In determining whether a post-nuptial agreement is valid, the court will consider the following:

- *was the agreement between the parties voluntary & made without any duress or undue influence*
- *did the parties have an opportunity to consult independent counsel*
- *was there an imbalance of power between the parties such that one party has much greater leverage over the other party*
- *if a party waived probate rights, was there full financial disclosure to the waiving party*

In addition, a party may validly waive any claim to alimony via a post-nuptial agreement, as long as the waiver is EXPRESS & completely VOLUNTARY. However, a party cannot waive the right to child support, because child support is a right INDIVIDUAL to a minor child because he/she has the right to support until age 18 or up to 19 if he/she is still in high school.

Based on the above factors, the court will analyze the agreement between Wilma & Hudson. Hudson is arguing that the agreement should be set aside because he was under emotional distress when entering into the agreement. Emotional distress alone, without any undue influence or duress is not enough to set aside a valid post-nuptial agreement. Hudson may be able to claim that since he worked for Wilma & he feared being potentially fired if he didn't sign the agreement, that he was under ECONOMIC DURESS, which his attorney is basically calling "emotional stress." If there was economic duress that rose to the level of giving Hudson no choice but to sign the agreement, then he may argue that it should be set aside. On the other hand, Wilma may argue that the agreement was completely voluntary, that the agreement was FAIR, in that it equally divided marital assets and granted rotating custody, and that there was no economic duress. In light of the previous discussion, the court may uphold the agreement if there were no circumstances suggesting in validation.

Issue 2: What should the outcome of the case be in light of the Parties' Agreement

If the court finds that the post-nuptial agreement is valid, then the court will look to see what the parties actually agreed on, and then the court will modify the agreement as necessary to conform with FL law.

Marital Asset & Debts

Under FL law, in the absence of an agreement between parties, the presumption is that the court will divide marital assets/liabilities under an Equitable DISTRIBUTION scheme, presumptively a 50/50 division. Unless a party proves a special equity (contribution beyond a normal marital contribution), the court will divide the assets equally. The parties have agreed in their post-nuptial to equal division, which complies with the law.

Alimony

As previously discussed, a party may validly waive a claim to alimony in a post-nuptial agreement. Alimony is awarded based on need & ability to pay. There are 4 types of alimony: Permanent Periodic Alimony, Rehabilitative Alimony, Temporary Alimony, and Lump Sum Alimony. Permanent Periodic Alimony is used for a spouse that does not have the ability to be self-sufficient and usually applies when the parties have been married long term (i.e. at least 16 years). Rehabilitative Alimony is appropriate when a party has the ability to become SELF-SUFFICIENT via education or vocational training. Lump Sum Alimony is ONLY appropriate when there are special circumstances such as the threat that the payor spouse might die or become physically unable to continue paying alimony. Lump Sum Alimony is a VESTED right once it has been awarded. Temporary Alimony is alimony paid to a needy spouse during pendency of divorce proceedings.

If the post-nuptial agreement is upheld in this case, the court will not award Hudson alimony because he has EXPRESSLY WAIVED his right to alimony. On the other hand, if the agreement is not upheld, then Hudson will likely be entitled to Temporary Alimony & Rehabilitative Alimony. Rehabilitative Alimony will allow Hudson enough time to find another job & to become self-sufficient. There is no showing in the facts that Hudson is entitled to lump sum alimony. Although EXTREME HOSTILITY between the parties can be enough for an award of Lump Sum Alimony, there must be a substantial showing that Lump Sum Alimony is necessary before a court will award it.

Child Support

Child support is a right that CANNOT be waived in a post-nuptial agreement. Every child under age 18 or up until 19 if still in high school has a right to be supported financially from BOTH parents. An award of child support in FL is determined by applying the Statutory CHILD SUPPORT GUIDELINES, which is based on income of both parents, & other statutory factors such as disabilities & health care needs of the child, the parents other child support obligations, etc. Therefore, the party in this case who is awarded primary residential responsibility will be awarded child support, in spite of the post-nuptial agreement.

Custody & Visitation

Child custody and visitation in FL is based on the following factors: ability of each parent to support the child & provide the child necessities, the preferences of the child, the preferences of the parent, and the parent most-likely to encourage visitation with the non-custodial parent, and the child's connections with a particular parent.

If the post-nuptial agreement is upheld, the court will analyze whether the BEST INTEREST of the child is served by the parties' custody & visitation agreement. If the child's best interests are not served, the court WILL modify the agreement in order to comply with the child's best interest. In this case, rotating custody is probably not in the child's best interests. FL courts presumptively disfavor rotating custody. In FL, one parent is usually the Primary Residential Parent, while both parents usually retain shared parental responsibility for major decisions regarding the child's education, religion, etc. Since Hudson primarily cared for Chad during his first 9 years of life, the child probably has a stronger bond with Hudson. Furthermore, Wilma has refused to allow Hudson any visitation or communication with Chad, which is a strong factor indicating Hudson should have primary residential responsibility and that Wilma should have liberal visitation.

Neither party in this case should have supervised visitation, because there is no showing that the child's best interests have been harmed or will be harmed by either parent.

Conclusion

The court should award Hudson primary residential responsibility because it is in Chad's best interests. Wilma should be awarded liberal, unsupervised visitation & she should pay Hudson child support.

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QUESTION NUMBER 3

JULY 2005 BAR EXAMINATION - TORTS/ETHICS

Three friends – Abel, Baker, and Charlie – went hiking in a state park in Florida. During the hike, the friends became lost and wandered onto Blackacre, a 100-acre parcel of wooded land owned by Owner, a private individual. There was no fence, sign, or other marking to indicate the hikers were entering private land.

Shortly after the hikers entered Blackacre, Abel fell into a deep hole in the ground and severely injured his head. The hole was part of an abandoned well that had become overgrown with brush and hidden from sight. Baker and Charlie were unable to raise Abel from the bottom of the hole. Baker ran off to seek help while Charlie remained with Abel.

While looking for help, Baker came upon a sign that read “Private Land. Keep Off.” Baker disregarded the sign and continued on his way, soon coming upon the residence of Owner. Baker told Owner about Abel’s accident, but Owner refused Baker’s request to use Owner’s telephone to call for help. Owner ordered Baker to leave Blackacre immediately, and directed Baker to a path off the property. The path led Baker to a wooden bridge located on Blackacre. While crossing the bridge, which had not been maintained for several years, Baker fell through some rotten boards and broke his leg.

When Baker did not return to the scene of Abel’s accident, Charlie decided to seek help himself. Charlie left Abel, choosing a different path from the one Baker had taken. As he ran, Charlie discarded his lighted cigarette in some brush. The smoldering cigarette eventually started a fire that destroyed 20 acres of timber on Blackacre.

After leaving Blackacre, Charlie found a telephone and called for help. When medical personnel reached Abel, they found him dead of his injuries. It was determined that Abel’s life could have been saved if help had arrived sooner.

Owner has retained you to advise him regarding any potential causes of action he might have against Abel, Baker, and Charlie. Identify/discuss the causes of action Owner may file and identify/discuss the defenses Abel, Baker, and Charlie would raise to Owner’s causes of action.

Furthermore, Owner has retained you to advise him regarding any potential causes of action Abel, Baker, and Charlie might have against him. Identify/discuss the defenses Owner would raise to Abel, Baker, and Charlie’s causes of action.

As part of the contract for representation, Owner wants you to agree to pay the cost of any litigation (that is attorney’s fees and court costs). You would be repaid only if Owner recovers money in the litigation. Discuss whether such an arrangement is permitted.

SELECTED ANSWER TO QUESTION 3

(July 2005 Bar Examination)

Question 3, Part 1: Owner v. Abel, Baker, & Charlie (ABC)

Preliminary Matters

In Florida, a prima facie case in torts requires the Plaintiff (P) to show all of the following. A duty running from the Defendant (D) to the P. A breach of that duty. Causation in fact (but for the D's action) and legal/proximate cause (foreseeable P). Substantial Damages. Florida has adopted a pure comparative negligence approach to allocating tort losses. Under this system, any P who is less than 100% responsible can potentially recover. Florida has adopted joint and several liability, although it is now limited by statute.

Issue – Initial Trespass to Land

Issue – Attractive Nuisance (inapplicable)

Issue – Further Trespass. Necessity Defense

Issue – Negligence: Starting the Fire

Issue – Comparative Negligence Defense (if owner had allowed B to use the phone)

Trespass to Land

A, B, & C are trespassers. Trespass to land is the intentional entry onto land of another without consent. ABC entered voluntarily, even though they were not aware of crossing the boundary. This is sufficient to establish the intentional tort of trespass to land. The fact that the land was not fenced or marked would not provide a valid excuse. However, their initial trespass was unintentional and harmless, so Owner would only be entitled to “nominal damages” (probably a dollar).

Attractive Nuisance

Florida's attractive nuisance doctrine applies to children who are “lured onto” another's land by an artificial element. Here, we do not know if ABC are children, but there is no indication that they were “lured” onto the property by the well. Rather, they were lost and did not know the well was there.

Further Trespass, Necessity

After C fell into the well, B continued to trespass on O's land. He found a sign noting that the land was private property, but disregarded the warning. As such, he is an intentional trespasser and might be subject to more damages. However, he probably has a valid defense of necessity. In order to save C's life, he would be privileged to enter the land and seek assistance.

Negligence in Starting the Fire

A could be sued in negligence for starting the fire that destroyed 20 acres of timber. The prima facie negligence case is defined above. Here, A would have a duty to act as a reasonably prudent person (judged by the objective “reasonable person”). His breach of this duty seems clear when he discarded a “lighted cigarette” in the brush. Reasonable people, and even Smokey the Bear, know that throwing a lighted cigarette into brush in the woods may result in a fire. Cause is established because “but for” A’s action no fire would have started and it was perfectly foreseeable that if he started a fire, someone’s property would be destroyed. Finally, damages are apparent. The value of the timber is readily determinable. Since there is no indication that he meant to start the fire, punitive damages would probably not be available. An important defense for A could be Owner’s comparative negligence. Owner’s refusal to call for help for C delayed the arrival of rescuers. If this had not happened, A might not have been near any flammable brush with a cigarette. If so, part of the fault for the fire could be ascribed to Owner, and A’s liability for damages could be reduced.

Part 2, A, B, & C v. Owner

Issue – Duty owed to Trespassers (known vs. unknown)

Issue – Duty to Warn of Bridge

Issue – Duty to Allow Use of Phone

Issue – Wrongful Death, Suit by A’s estate; A’s survivors

Duty owed to Trespassers

The duty owed by a landowner to a person on his land is dependent upon the status of the person on the land. Greater duties are owed to invitees than to licensees than to trespassers. Trespassers are further classified as known or unknown. The general duty owed to unknown trespassers is to not inflict any affirmative harm (e.g. no spring guns). Since they are unknown, by definition, there is no duty to warn them of hazards on the property. In contrast some trespassers are known, and they are owed the additional duty of warning of any hidden trap on the property. Here it seems likely that Owner did not have actual knowledge of ABC’s presence. However, Owner could be charged with constructive knowledge if he knew that people frequently wandered onto his property from the adjoining state park.

If he did not have knowledge, actual or constructive, of the trespassers he would not owe any duty to them. Conversely, if he had actual or constructive knowledge of the trespasser, his duty would be to warn them of the hidden dangerous condition. Here that could easily be done by clearing the brush away from the well and placing a small fence around the hole (or even a conspicuous sign). Owner would not legally have to correct the condition for trespassers benefit, but he might have to do so for the benefit of his invitees. That could easily be done with a fence or by covering the hole.

Duty to Warn of Defective Bridge

B has a good claim in negligence against Owner. B was still a trespasser when he fell through the bridge, but he was clearly a known trespasser. He was following a path at the direction of Owner. Owner should have known of the defective bridge and had a duty to warn B of the hazard. Owner breached this duty, that breach directly and legally caused B's injuries. B can claim compensatory economic damages (lost wages, medical expenses, etc.) as well as pain and suffering. He may also plead that Owner's conduct was grossly negligent (or even intentional) and make a claim for punitive damages (outcome of the claim would depend on additional facts).

Wrongful Death

Ordinarily there is no duty to render assistance to an injured person absent some special relationship (e.g., parent/child, employer/employee, etc.) and Owner would be free to walk by A and leave him in a hole. However, as a landowner, he probably owed a duty to assist in the rescue of A when he became aware that A was injured by a condition existing on his property. While Owner would not be responsible for the initial injury, the facts state that A "could have been saved" if more timely aid had been rendered. Owner's refusal to call for help breached the duty owed to A. That breach may have led to A's death. If proved, then Owner will be liable for wrongful death. A's estate can sue for economic damages (e.g. loss of future earnings, burial costs) and A's survivors may have separate claims for loss of companionship and support, etc.

IIED

B might make out an Intentional Infliction of Emotional Distress (IIED) claim. IIED requires extreme and outrageous conduct by the D resulting in emotional injuries to the P. Here, Owner's conduct in refusing to allow B to make a call for help while his friend lay mortally injured is certainly outrageous.

Part 3, Professional Responsibility

Issue – Contingent Fee Agreement

Issue – Payment of Litigation Costs

Owner seeks legal services under a contingent fee structure. Contingent fees are permissible in Florida for all matters except dissolution of marriage, child custody, and criminal defense. As such, it is permissible to accept this torts case on a contingency basis. All contingent fee agreements must be in writing and signed by the client and attorney. The client must be given a statement of his rights. The agreement should conform to the guidelines established by the bar providing a range of fees from 15% - 40%. The actual fee would depend upon the amount in controversy, the award, if the matter is settled/goes to trial, or if an admission of liability is made. If there is any fee sharing, it must be fully disclosed.

An attorney may pay the costs of litigation for an indigent client. For other clients, the attorney may advance these costs pending the outcome of the case. Collection only upon successful outcome is allowed. Any advance must be limited to allowed fees and costs. The attorney may not advance living expenses or other unrelated amounts.

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 43.

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 outside the examination room to one of the proctors. 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)