

Florida Board of Bar Examiners

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Florida Bar Examination Study Guide and Selected Answers

February 2013

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

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PART I – ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2013 AND JULY 2013 FLORIDA BAR EXAMINATIONS

ESSAY QUESTIONS AND SELECTED ANSWERS

Part I of this publication contains the essay questions from the February 2013 and July 2013 Florida Bar Examinations and one selected answer for each question.

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

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

ESSAY EXAMINATION INSTRUCTIONS

Applicable Law

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

Acceptable Essay Answer

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

Q QUESTION NUMBER 1

FEBRUARY 2013 BAR EXAMINATION – CONTRACTS

Bud's Specialty Goods (Bud's) has been manufacturing garage door openers in Jacksonville, Florida, for 20 years and has sold about 10,000 openers per year for the last 10 years and provided two remote control units (RCUs) to the buyer with each opener. The vendor, which had been providing RCUs to Bud's, recently went out of business and Bud's entered into a new contract with Sayles Electronics (Sayles) also located in Jacksonville. The contract was written and contained the following terms:

1. Sayles agreed to provide all the RCUs required by Bud's for a period of two years at a price of \$20 per unit. The RCUs would be delivered to Bud's in Jacksonville by Sayles or its contractor.
2. Bud's agreed to pay for each shipment of RCUs within 20 days of receipt.
3. In the event Sayles is unable to provide all the RCUs required by Bud's, liquidated damages in the amount of \$10 per unit for each RCU not supplied will be paid by Sayles to Bud's.
4. In any action to enforce the agreement, the parties agreed to litigate in the Circuit Court in and for Duval County, Florida. The prevailing party will be entitled to recover reasonable attorney's fees from the non-prevailing party in the event of such litigation.
5. Paragraph 8 of the contract concerned the method of communicating orders from Bud's to Sayles, but a space to enter the method was inadvertently left blank.

The contract was signed by the president of Sayles and faxed to the president of Bud's, whose secretary filed it without obtaining any signature of anyone from Bud's. The parties performed the contract as written for one year.

At the end of the first year, the price of electronic components used in the RCUs rose dramatically and Sayles discovered that it was losing money on each unit sold to Bud's. Sayles faxed an offer to continue shipping RCUs to Bud's at a new price of \$35 per unit but Bud's faxed back a rejection and notification that it expected Sayles to perform the contract as written. Bud's also informed Sayles that it required double the number of RCUs previously ordered per month because of a housing boom in Jacksonville. Sayles immediately stopped shipping RCUs to Bud's.

Discuss the causes of action, claims, and damages that are available to Bud's. Discuss any defenses and counterclaims that are available to Sayles. Discuss the enforceability of provision 4 of the contract pertaining to attorney's fees.

SELECTED ANSWER TO QUESTION 1 **(February 2013 Bar Examination)**

Applicable Law

Article 2 of the UCC applies to sales of goods. Goods are all things moveable. RCU are moveable and thus, are a good so the UCC article 2 applies.

Formation

For a contract to be enforceable there must be offer, acceptance, consideration or a valid substitute, and no defenses.

An offer is a manifestation of intent to commit to a contract. It must have specific and definite terms. Under the UCC a quantity must be stated. Here, the quantity is all Bud's required. This is a requirements contract and is a valid quantity term.

Acceptance is mutual assent to the contract. Here, Sayles agreed to the contract by signing the contract. Also, acceptance can be by performance and Sayles performed for one year under the contract.

Consideration is a bargained for exchange of legal detriment. Florida also allows for a benefit to suffice as well. Here, Sayles agreed to provide all RCU's for two years and Bud agreed to pay \$20 per unit. This is sufficient consideration.

Statute of Frauds may be asserted as a defense. The statute of frauds requires that contracts for the sale of goods of \$500 or more must be in writing. The writing must contain the essential terms of quantity and signed by the party to be charged. Here, we have a writing. The writing was signed by the president of Sayles but not by Bud. If Bud is the party enforcing the agreement, which here he is, his signature is not required to be an enforceable writing. Sayles will argue that because the writing is not signed by Bud it cannot be enforced against them, however, because only the party charged needs to sign, this agreement will likely fail. Also, performance is another way to satisfy the statute of frauds. Here, Bud will assert that the parties have been performing for one year in a two year contract and thus, even if the court finds that the writing is not enough, the performance of the parties should be enough to satisfy the statute.

Also, the contract will not fail because the communication method was left open. Sayles may try to argue that this is an essential term which is necessary to enforce the agreement. However, under the UCC whenever there is a term left open to be determined the UCC has gap fillers which can allow the court to imply a term into the contract. Thus, this argument will likely fail.

Breach of Contract. Bud will argue that Sayles breached the contract. A breach occurs where a party does not get the substantial benefit of the bargain or a breach is so material that it substantially impairs the non-breaching party. Here, Bud will argue Sayles breached the contract when they stopped shipping RCU's to Buds. This is a substantial and material breach of the contract because Buds provides two RCU units to the buyer with each opener sold and Bud sells 10,000 openers per year.

However, Sayles will defend by arguing that Bud breached the contract when he substantially increased his requirements. Under the UCC a seller may be excused from performing under a requirements contract if the other party substantially increases their requirements. Here, Sayles will argue that when Bud doubled the number of RCU's previously ordered per month, he was excused from performance. Bud will argue that by the terms of the contract Sayles was required to supply all of Bud's RCU's and thus, should perform as obligated. However, this argument is likely to fail because Sayles is excused from performing.

Sayles will also argue that they tried to modify the contract. Under the UCC a modification need only be done in good faith. Sayles will argue that they tried to modify in good faith for the price increase because the price of components rose dramatically. However, generally price increases are not enough to excuse a party from performing.

Sayles may also try to argue that they are excused from performing because it was impossible or impracticable to do so. Enforcement of an agreement is impossible when there is no way a party can perform under a contract. It is impractical when there is an unforeseen occurrence that renders performing very difficult. Again Sayles will probably lose under this argument because price increases are generally foreseeable. Sayles will argue that they should not be forced to perform a contract where they lose money, however, courts generally find that that is a risk parties take when doing business and that he markets can fluctuate. Sayles will likely lose on this argument.

Damages. There are a number of remedies available to Bud. First under the UCC Bud may elect to get cover. Bud may get the difference between contract price and the cost to buy RCU's from a new seller. Bud may also get market price which is the difference between the contract price and the fair market value of RCU's. Bud may want expectation damages. The purpose of these damages are to put the plaintiff in the position he would be in as if the contract had been performed. He may also get incidental damages, which is just any additional cost or expense Bud incurred as a result of Sayles' breach. Bud may also get consequential damages if Sayles was aware of the potential for consequential damages and they were foreseen. Also, the contract provided for liquidated damages. If the court finds the contract enforceable, Bud may elect liquidated damages. Liquidated damage clauses must be reasonable. Here, Bud could get \$10 per unit for each unit not supplied by Sayles. This clause is likely unreasonable. Sayles would be forced to pay 50% of the contract price per RCU they don't supply. 50% is very high, reasonable liquidated damages usually should not exceed 20%.

Sayles might argue this provision is so unreasonable it is unconscionable. An agreement is unconscionable when it is so one-sided that a court should not enforce it. This is likely not unconscionable but the clause is unreasonable and thus should not be enforced.

Also, Sayles will argue they did not breach the contract because they sent an offer to modify the price to \$35 per unit and this request was in good faith. However, Bud timely rejected this modification/new offer thus, it was invalid because there was no acceptance. Also, Bud would argue there was no consideration because Sayles was already under a duty to perform at \$20 per unit.

Under the UCC Bud could also try for equitable remedies. Equitable remedies are appropriate when damages at law are inadequate.

Specific performance is appropriate when the good is rare or unique. Here RCU's are not rare or unique. So this is inappropriate. Also other remedies like rescission, & reformation are inappropriate.

Attorneys fees. A party may contract for reasonable attorney's fees. Under the FRPC fees must not be excessive and must be based on the amount of work, a lawyer's skill, what is normally charged in the area. Here if the fees are reasonable a party may contract for prevailing party fees.

Also, circuit court is appropriate for actions at law exceeding \$15,000. Here, Bud may have a claim in excess of that and may go to circuit court. Parties may not stipulate venue, it must be where defendant resides, business located, or cause of action occurred.

Also as stated earlier terms of contract may be implied. Course of dealing, custom and usage, as well as prior dealings may be looked to by the court as a supply of terms. Here, Sayles argument that method of communication was blank may be implied by the three ways above. Here, Sayles faxed an offer and Bud faxed a rejection. Thus, the court may imply the term of communication of orders is to be by fax since both parties have used that in their course of dealing and performance.

Q QUESTION NUMBER 2

FEBRUARY 2013 BAR EXAMINATION – FAMILY LAW/FLORIDA CONSTITUTIONAL LAW

Mary and Frank were divorced eight years ago in Pennsylvania. The parties have two minor children whose current ages are 10 and 12. The Pennsylvania Judgment of Divorce granted the parties shared decision making for the children, as well as joint and rotating custody, with the children spending one full week with Mary and then one full week with Frank, on a rotating basis. Frank was ordered to pay five hundred dollars per month to Mary as support for the children.

Shortly after the Pennsylvania Judgment of Divorce was entered, Frank disclosed to Mary that he had developed an addiction to an illegal narcotic and was going to be admitted to a rehabilitation and drug treatment facility. Of his own volition, Frank has not had any contact with the minor children since he disclosed his drug addiction to Mary. Frank did not successfully complete the rehabilitation program and several months later, moved to California exactly one year after entry of the Judgment of Divorce.

Two years after entry of the Pennsylvania Judgment of Divorce, Mary and both children moved to Florida, and have been residing in Florida for six years. Mary has been solely responsible for caring for the children including attending to all medical, dental, and educational appointments, and has also coached both children's soccer teams. Frank has not made an effort to have any involvement in these aspects of the children's lives. Mary has kept Frank advised of the children's address and telephone number since entry of the Pennsylvania Judgment.

Frank has informed Mary he plans to move to Florida in two weeks and has found a home he wants to purchase. Frank still pays the child support regularly and does not owe any past due support. The Pennsylvania Judgment of Divorce has not been modified, and no other actions have been filed in any state.

Mary has retained your firm to modify the Judgment of Divorce to (1) modify the timesharing so Frank no longer has timesharing on a week to week basis, (2) allow Mary to make all major decisions for the children without any input from Frank, and (3) to increase the amount of child support being paid by Frank. Mary believes that Frank still has a drug problem.

Identify and discuss all of the issues that may come up including jurisdictional issues. State your advice to Mary as to how these issues will probably be decided. Assume that the Pennsylvania Judgment of Divorce was properly registered in Florida as soon as Mary moved to Florida.

SELECTED ANSWER TO QUESTION 2

(February 2013 Bar Examination)

Jurisdiction of the Court

The issue is whether the court will have jurisdiction to address Mary's case if she files her Petition for Modification in Florida.

In order for a party to file this type of action in a Florida court, the party has to be living in the state for at least 6 months. In order for the court to have personal jurisdiction over the opposing party being served, the party must either be a resident of the state, or there must be a basis for personal jurisdiction pursuant to Florida's long arm statute. Florida's long arm statute analyzes the party's contracts in this state, for example, whether the party owns property or does sufficient business in the state.

When an action involves a child, jurisdiction will be based upon the Uniform Child Custody Jurisdiction Enforcement Act ("UCCJEA"). The state that issued the first order regarding the child will always have continuing jurisdiction to modify it. However, jurisdiction could also be established in the state where the child and at least one parent have resided for the last 6 months. If this cannot be established, Florida could still take jurisdiction if no other state wanted to take jurisdiction of the case.

Here, Mary and the two minor children have been residing in Florida for the past six years. Mary meets the 6 month period requirement in order for her to file her Petition for Modification in Florida. Frank has expressed that he will be moving to Florida in two weeks and has found a home he wants to purchase. If he does not, in fact, move to Florida, then Mary would need to find a way to exercise long arm jurisdiction over Frank. If he purchases the home in Florida without moving, this would likely be sufficient. However, if he does, indeed, move to Florida, then the court would have personal jurisdiction over him to proceed.

Frank lived in California a year after the entry of divorce, but the children have never resided there. It is unlikely that California would even be considered under the UCCJEA to litigate this case involving the children. Pennsylvania, the original state that issued a judgment over the children, would have continuing jurisdiction to modify the order. But Florida would be just as appropriate considering Mary and the children's strong presence in the state for the 6-year period.

For these reasons, the Florida court would exercise jurisdiction over the case, and Mary may proceed.

Modification of Time Sharing

The issue is whether Mary will be successful in obtaining a modification of time sharing.

In Florida, the court enters what is called a parenting plan in order to address every detail regarding time sharing. This parenting plan includes the time each parent will spend with the child, the extracurricular activities the child will participate in, travel arrangements for time sharing, who makes decisions over the children, whether those decisions will be shared, and every other issue that would affect the well being of the children and affect their best interests. This parenting plan is normally referred to in the parents' Marital Settlement Agreement when there is a divorce, and is, therefore, incorporated into the Final Judgment.

In order to state a proper claim for modification of time sharing, the party seeking the modification must allege a substantial change in circumstances that is permanent, involuntary, material, and unforeseeable at the time of entry of the Final Judgment. The best interests of the child always govern. Although Florida statutes provide a lengthy list of factors that are considered when analyzing the best interest of the child, the usual factors that are mostly used by the court are continuity for the child, how likely the other parent is to encourage and foster a meaningful relationship with the other parent, the child's preference (which is weighed heavily when the child is still a minor, but older and able to express himself regarding his wants and needs), the ability of each parent to care for the child, and any past history of substance abuse, or any other type of abuse.

In this case, Mary will allege that a substantial change in circumstances has occurred that is permanent, involuntary, material, and unforeseeable at the time of the Final Judgment. She has lived in Florida with the children, away from Frank, for a period of six years. The family component between both parents and the children involuntarily broke down when Frank became addicted. The change is material, in that Frank had joint and rotating custody with Mary, and he has not had any contact whatsoever with the children in years. Additionally, the fact that Frank would go from seeing the children and being a parent equally with Mary, to someone who is sick with addiction and unable to properly care for, or even see, the children was unforeseeable at the time of the Final Judgment.

The court would consider the best interests of the children, and in analyzing the continuity of the children, it would take note of the fact that the children have continuously been with Mary for years, without any sign of their father. Frank has not made any effort to be involved in the children's lives, but Mary has constantly kept him informed of the children's address and telephone number, encouraging an open door of contact between the children and the father. The preference of the children would also weigh heavily in this case. The children are 10 and 12, which means that they are likely able to voice their opinions and desires clearly and intelligently, as opposed to a younger child who would not have the necessary maturity to do so. Also, Frank's history of substance abuse would also be a substantial factor, especially considering that Mary still believes that Frank's drug problem is ongoing.

Considering all of these factors, it is likely that Mary's request for a modification of time sharing would be granted.

Modification of Shared Parental Responsibility

The issue is whether Mary will be successful in obtaining a modification of shared parental responsibility.

In Florida, there are three types of parental responsibility. Shared parental responsibility is when both parties are charged with equal decision-making over the children. Anything related to the children, including their medical treatment, schooling, and upbringing would be jointly decided by both parents. This is the norm, as both parent's have a constitutional right in Florida to participate in the upbringing of their children and in the joy of child rearing.

Sole parental responsibility is given to only one parent when it is found that the other parent is a detriment to the children, or is otherwise unfit and unable to provide care for them. This vests all of the power to decision-making over the children in one parent.

There is also parallel shared parental responsibility, where the responsibility is split, but according to subject. This is especially applicable when one parent has a special skill that should entitle him or her to handle decisions relating to that skill. For example, if one parent is a doctor, the court could allow that one parent to make all of the decisions regarding the children's medical care. The other parent, who could be a teacher, for example, could handle decision-making in the area of the children's schooling. This gives the parents shared parental responsibility, but according to topic and subject, rather than as a whole.

In order to modify time-sharing, the court has to weigh the parents' constitutional right to participate in the upbringing of their children and balance it against the weight of the best interests of the children. The standard for determining the best interests of the children is described above. The person seeking the modification has to allege a substantial change in circumstances, as well as factors that would render the parent unfit and detrimental to the children.

In this case, Mary and Frank were granted shared parental responsibility by the Pennsylvania court. However, much has changed since that determination was made. Frank was addicted to illegal narcotics, spent time in a rehabilitation and drug treatment facility, and did not successfully complete that program. On his own volition, he has refused to have any contact with the children, and moved far to another state, away from them. Mary has been forced to take over all of the decision making for the children, including their medical, dental, and educational appointments, and coaching both their soccer teams.

Frank could allege that Mary relocated with the children without his consent. Mary left Pennsylvania without entering into a written agreement with Frank, expressing his consent, the arrangement for travel, and his signature. If Mary had not been able to obtain his consent, she would have had to send Frank written notice, including the proposal for time sharing upon the move, updating any undisclosed facts, the date of the proposed move, and the description of the location she was moving to with the children. If Frank then did not agree, she could have filed a Petition for Relocation in the Pennsylvania court, which had continuing jurisdiction over the matter since it entered the original Final Judgment of Dissolution of Marriage.

However, Mary will claim that none of this applies. Relocation is appropriate when the parent wants to move the children at least 50 miles away from the original location where the children resided. However, Frank moved substantially more than 50 miles away from the children before she even contemplated her move. Further, after his move to California, Frank made no effort to have any involvement in the children's lives, and never raised any objection to the move.

In consideration of these factors, the court would grant a modification of shared parental responsibility to Mary.

Modification of Child Support

The issue is whether Mary will be successful in obtaining a modification of child support.

In Florida, both parents are obligated to contribute to the support of their children, regardless of whether they are married, separated, divorced, or were never married at all. Child support is primarily based on need and ability to pay. The court will look at the respective income of both parties, the health insurance that is being paid for the child, the necessary child care costs, and the time sharing being exercised by both parents.

Florida has statutory guidelines regarding what child support should be based on the parents' income. If one parent is spending more than 30% of the time with the child, then child support of calculated using a "gross up" method, which gives that parent with the substantial amount of time sharing a higher amount. A court can deviate only up to 5% away from the child support guidelines after considering relevant factors, and with specific findings of fact, that would justify the deviation.

In order to seek a modification of child support, the party seeking the modification must allege a substantial change in circumstances. The change would need to be one of the factors that is used to calculate child support: income, health care costs, child care costs, and/or time sharing. The modification would date back to the date of the filing of the petition. This means that, if child support is modified to a higher amount, the difference between the established amount and the new higher amount would be collectable from each month from the filing of the petition through the date that judgment is entered.

In this case, child support was calculated in Pennsylvania. We did not know what the respective incomes of the parties were, nor what the health care and child care costs were. However, we do know that time sharing was equally shared. Mary and Frank had joint and rotating custody, with time sharing being split every week. The children were with Frank one full week, and with Mary one full week, on a rotating basis. Based on this arrangement, Frank was ordered to pay \$500 per month to Mary for the support of the children.

Now, two years after entry of the Pennsylvania judgment, the children have been with Mary full time. This gives her 100% of the time sharing, leaving Frank with \$0. Mary must provide financially for the children on a constant basis, with no extra contribution from Frank. Although he still pays child support regularly and owes no past due support, Mary is still obligated to find the money to support the children for every week of the year, not every other week as she had to before.

If Frank does move to Miami, and does seek time sharing with the children, it is unlikely that he will have the same rotating schedule he had before. There are allegations of drug abuse, and he has not seen the children in years. The court would likely impose a limited time sharing schedule, at least to begin with, until the children are once again accustomed to their father, and until it can be clarified as to whether he is truly rehabilitated and safe for the children. Time sharing may even be supervised during this time period, and thereafter if he continues to be unfit to care for the children.

Based on these changes, the court would grant Mary a modification of child support to increase the support she gets from Frank.

Q

QUESTION NUMBER 3

FEBRUARY 2013 BAR EXAMINATION – TORTS

Financial Advisor (Advisor) strongly recommended to Buyer to purchase an investment. Relying on Advisor's advice that it was safe, Buyer purchased the investment. A week later, the investment became worthless. Buyer contacted Advisor demanding recompense. When Advisor refused, Buyer contacted Advisor's supervisor and complained about Advisor's incompetence. Buyer also accused Advisor of taking kickbacks.

Buyer and Advisor encountered each other at a restaurant. Buyer loudly complained about his losses and Advisor's competence. Advisor made an obscene gesture. Buyer moved his arm back as if to strike Advisor. Stepping back, Advisor slipped and fell down. Advisor had some minor bruising not needing medical attention.

Buyer organized a demonstration outside Advisor's employer with over fifty other people who lost substantial sums following Advisor's investment advice. Daily News, a local newspaper, published a short article on the front page of the local section:

BUYER SEEKS ADVISOR'S OUSTER

Over fifty people lost money following Advisor's investment advice. During a speech, Buyer claimed that Advisor is incompetent and should be fired. Buyer accused Advisor of taking kickbacks. Advisor declined to comment.

Advisor came to your law firm seeking legal advice. Advisor indicated that the publicity resulted in him losing his job. Advisor was evasive about the compensation he received for his investment transactions. Claiming confidentiality, Advisor refused to discuss whether he received any compensation from a third party for the sale of the investment purchased by Buyer.

The senior partner of your law firm directs you to prepare a memorandum addressing potential lawsuits Advisor could bring against Buyer and Daily News in state court. In your memo, also address any defenses that could be raised, the likely outcome of any litigation, and any ethical issues related to the filing of any litigation. Do not discuss any complaints that Buyer could file against Advisor with private, state, or federal regulatory agencies.

SELECTED ANSWER TO QUESTION 3

(February 2013 Bar Examination)

Claims Against Buyer (B)

1. **Defamation/Slander**

Advisor (A) could bring a claim for defamation against B. Defamation requires proof of a statement of fact, publication of the statement, falsity, damages and the required level of culpability. Where the plaintiff is a public figure or public official, actual malice is required, which is knowledge of the statement's falsity or reckless disregard for the truth. For a private plaintiff, only negligence is required.

Where the defamation is oral (slander), actual damages must be shown unless it is "slander per se." Slander per se is where the defamatory statement relates to a person's business, accuses a woman of being unchaste, accuses someone of moral turpitude or of having a loathsome disease.

B contacted A's supervisor and called A incompetent and accused A of taking kickbacks. He also repeated these statements at the demonstration outside A's office. These are statements of fact (at least the kickbacks comment) that were published (publication only requires telling a third party). A will claim they were false and that B was at least negligent since he did not investigate the statements before calling the supervisor. A also will claim that he was damaged because he ultimately lost his job.

B will argue that the statements were opinions, that they were true and that he has a qualified privilege when reporting to a supervisor of A and when exercising his First Amendment rights on a matter of public concern. B also will claim that he was not negligent. Negligence requires a Duty, Breach of the duty, causation and damages.

B will argue that he owed no duty to A since A was his advisor. Alternatively, he will argue that any duty was not breached since he was only telling the supervisor the truth and asserting his First Amendment rights. Finally, he will argue that his comments were not the cause in fact or proximate cause of A being fired. Case in fact requires that but for the breach, the damages would not have occurred and proximate cause requires that the damages were a foreseeable result of the breach and no superseding cause cut off the defendant's liability.

B will argue that his statements were neither the but for cause or the proximate cause. B will argue that Daily News' (News) publication was the but for cause and was an intervening event that cut off his liability.

A will argue that B owed a duty to treat him respectfully and to go to him first with any concerns. He breached that duty by reporting A to his supervisor and organizing the demonstration. A also will argue that the statements were both the but for cause and the proximate cause of A losing his job since News would not have published the article absent Bs demonstration and statements.

B also could argue that the matter was one of public interest and thus it must be shown that he had actual malice. FL interprets this as desiring to harm the plaintiff (rather than the NY Times Actual Malice described above). B will argue that he only desired to protect future investors and had no malice. He also will defend based on truth. A was evasive with the law firm about his compensation so he may not be able to prove falsity.

2. Assault and Battery

A could have claims of assault and/or battery against B.

Assault is an intentional tort, which requires a showing that the defendant intentionally placed the plaintiff in a reasonable apprehension of an immediate offensive contact or touching. When B ran into A at a restaurant, B loudly complained and moved his arm back as if to strike A. A will claim this was an assault as he was put in reasonable apprehension that he was about to be hit. It clearly was intentional on B's part.

B will claim that A's fear was not reasonable and that A assaulted him first by making an obscene gesture. B has no defense of consent here since A clearly did not consent. It appears A saw B's movement and thus, assuming his apprehension was reasonable, he will succeed in the assault claim.

Battery is an intentional and offensive touching of the plaintiff's person or something connected to it. A will claim that B's movement caused him to fall, was clearly intentional and thus constituted a battery.

B will argue that he never actually touched A or anything connected with A and thus has an absolute defense to battery. Assuming B did not touch A, A will lose the battery claim.

If A is successful with either claim, he does not need to show damages. He has no medical expenses, but could recover for his pain and suffering from the bruising. He also could try to claim punitive damages.

Punitive damages are available where the defendant acted with gross negligence or intentional or willful misconduct. They are generally limited to the greater of 3 times compensatory damages or \$500,000 unless the defendant was intoxicated, the plaintiff was elderly, or the defendant intended to harm the plaintiff.

A will claim that B was grossly negligent and acted with an intent to harm and thus is entitled to punitive damages without cap.

B will argue that he never intended to harm A since he did not hit him and was not even grossly negligent.

3. Intentional Infliction of Emotional Distress

A could sue based on intentional infliction of emotional distress, which requires: extreme and outrageous conduct on the part of defendant, intending to cause emotional distress of plaintiff, that in fact causes emotional distress.

A could argue that either the assault and/or the statements to supervisor and at the demonstration were extreme and outrageous, made with the intent to cause A emotional distress and so caused such emotional distress.

B will argue that his only intent was to “right a wrong” and protect others from A’s incompetent advice. He also will argue that his actions were not so extreme and outrageous as to “shock the conscience.” B likely will have a valid defense and A will lose this claim.

4. Negligent Infliction of Emotional Distress

This claim is similar to IIED above (#3) but only requires a showing of negligence rather than intent. A will fail with this claim as well though because it requires some physical symptoms, which A does not seem to have suffered as a result of any emotional distress.

5. Invasion of Privacy/Disclosure of Public Facts

FL does not recognize a separate tort of False Light, but does recognize invasion of privacy in disclosing private facts. A can try to make this claim against B. A will claim that B invaded A’s private by disclosures made at the demonstration. This tort requires publication of private facts. B will argue that the facts were not private and that he has a defense because it was a matter of public concern since he and at least 50 others lost money. Since the facts were not private and the matter was of public concern, A will not likely succeed.

Comparative Negligence/Damages

B will claim comparative negligence. FL has adopted pure comparative negligence which allows a plaintiff to recover regardless of any fault (i.e. plaintiff can be 99% at fault and still recover). FL also abolished joint and several liability for tortfeasors. Thus, B will claim negligence on the part of News and on A and argue to reduce his liability by the others’ fault. Each defendant is only liable for their percentage of fault as long as they can prove the others’ fault. All defendants do not need to be before the court to reduce damages. Thus, B will claim he is only liable for his share of the fault and that the negligence is mostly on the part of A and News.

Claims Against Daily News (News)

1. Defamation/Libel

A can sue News for defamation. Defamation requires proof of a statement of fact, publication of the statement, falsity, damages and the required level of culpability. Where the plaintiff is a public figure or public official, actual malice is required, which is knowledge of the statements falsity or reckless disregard for the truth. For a private plaintiff, only negligence is required. Here, the statements were printed, rather than oral, so the claim would technically be for libel, which requires no showing of actual damages.

To sue a media defendant for libel, however, FL requires that the plaintiff first provide notice to the defendant of its intent to sue and then give the defendant 10 days to retract the statement. If the media defendant retracts and the original statement was made in good faith, the plaintiff can recover only actual damages.

Since News is a media defendant, A cannot sue without first notifying News and giving it 10 days to retract. If it does, A can only recover actual damages.

If A sues, he will still need to show that the statements were factual, published, false and at least negligence on the part of News. The article clearly contains facts – over 50 people lost money and reporting B's speech. It also clearly was published since it was contained in an article in the newspaper. A will claim it was false. A also will claim that the newspaper was negligent because a newspaper has a duty to report truthfully and investigate its claims, it breached that duty with this article and that caused A's damages. A will claim that the article was both the but for and proximate cause of him losing his job.

News will argue that the statements are true. Assuming it fact-checked the statement about 50 people losing money, this will be a valid defense. It also will claim truth as to B's statements. Truth will be an absolute defense. News will also claim a qualified privilege to report newsworthy events, which this clearly was as a matter of public concern. Finally, it will claim that it owes a duty to report truthfully only and it did not breach that duty.

2. Invasion of Privacy/Disclosure of Public Facts

FL does not recognize a separate tort of False Light, but does recognize invasion of privacy in disclosing private facts. A can try to make this claim but will likely be unsuccessful since the facts were not private. They were statements of people's losses and repeating statements made by B at a public demonstration with 50 others present. Since the facts were not private and the matter was of public concern, A will not likely succeed.

Damages

A will claim that he has been damaged by loss of his job and lost future earnings as well as loss of his reputation. News will claim that it acted in good faith and will retract owing only actual damages, if any. It also will argue no liability as stated above.

News will claim comparative negligence. FL has adopted pure comparative negligence which allows a plaintiff to recover regardless of any fault (i.e. plaintiff can be 99% at fault and still recover). FL also abolished joint and several liability for tortfeasor. Thus, B and News will claim negligence on the part of the other and on A to try to reduce their liability by the others' fault. Each defendant is only liable for their percentage of fault as long as they can prove the others' fault. All defendants do not need to be before the court to reduce damages.

Punitive damages are available where the defendant acted with gross negligence or intentional or willful misconduct. They are generally limited to the greater of 3 times compensatory damages or \$500,000 unless the defendant was intoxicated, the plaintiff was elderly, or the defendant intended to harm the plaintiff.

A will claim that News was grossly negligent and thus is entitled to punitive damages.

News will argue that it was not acting intentionally or with gross negligence and thus that A is not entitled to any punitive damages.

Ethical Concerns

A has been evasive about his transactions and refuses to discuss the claimed “kickbacks” claiming confidentiality. I would be concerned that A may not tell the truth in the course of any litigation. The RPC requires candor with the tribunal. This prohibits knowingly filing any false statements or pleadings or making any false statements before the tribunal. An attorney must sign all pleadings and state that they are made in good faith. In addition, an attorney cannot counsel a client to commit any crimes, including perjury. While the attorney can advise the client as to consequences of such acts, he must try to dissuade the client from taking such action.

A has not been candid with the law firm about his transactions, and thus may not be honest in the litigation. An attorney cannot prepare a complaint and other pleadings on this basis.

An attorney may not file a frivolous claim that has no legal basis. Without knowing all of the facts, it will be hard to determine whether A has a valid claim and to be able to certify that the claims are not frivolous.

An attorney cannot represent and must withdraw if a client is using the lawyer to commit a crime. The lawyer could not represent A if A were using the lawyer to commit perjury. In such a case, the lawyer either cannot take the case or, if he already has, must try to withdraw. If he cannot withdraw, he must disclose the perjury to the court.

If the client is committing the crime without the lawyer’s services, the lawyer is not required to withdraw but may unless the court orders her not to.

An attorney must maintain confidentiality both with prospective clients and after representation ends. Therefore, even if the law firm does not take on A as a client, anything A told the lawyer must be kept confidential. This does not apply however to any statements relating to a future crime or if necessary to protect others from harm. If any such statements were made by A to lawyer, they must be disclosed.

I would urge A to be candid and explain the issues involved if he continues to not be forthcoming. I would explain that his statements will be confidential, but also my duty of candor to the court. If he either will not be forthcoming or makes it clear that he plans to make false claims and/or perjure himself, I will try to convince him otherwise, but if that fails, I will not take on representation of A.

Q QUESTION NUMBER 1

JULY 2013 BAR EXAMINATION – CONTRACTS/UCC Art. 9

Developer planned to construct a shopping center in central Florida and solicited bids from contractors. Contractor desired to bid on the project and sent an email to various subcontractors soliciting bids. The e-mail instructed that all subcontractors' bids must be delivered in writing to Contractor's office by 3:00 PM on May 15.

At 2:45 PM on May 15, Pete Paver hand-delivered a bid for asphalt paving work in the amount of \$200,000. Paver's bid was the lowest and Contractor used it in computing its final bid. The next lowest bids were \$315,000 and \$325,000. Later that day, Paver realized he had made a clerical error in calculating his cost of materials and immediately called Contractor to advise he was changing his bid to \$300,000. Contractor advised Paver it was too late as the final bid had already been submitted. Paver refused to perform the work and Contractor was forced to use the next lowest bidder.

Developer awarded the general contract to Contractor to build the shopping center for \$5 million. The general contract provided: "This contract constitutes the parties' entire agreement. This contract cannot be amended, modified, or added to in any respect except by a writing signed by both parties."

During construction, a sink hole opened up under the property and caused a portion of the partially completed structure to collapse. Neither Contractor nor Developer had sink hole insurance. Contractor estimated it would cost \$1 million to replace the damaged portion. Contractor called Developer. During their phone conversation, Contractor stated that he would not finish the project unless Developer promised to pay Contractor an additional \$1 million. Developer agreed.

In the meantime, Paver is short on cash. On July 1, Paver obtained a \$5,000 loan from his Bank. Paver signed a promissory note and orally agreed to give Bank a security interest in his deposit account at Bank. On August 1, Paver borrowed \$10,000 from Lender. Paver signed a security agreement giving Lender a security interest in Paver's "equipment, whether now owned or hereafter acquired." Lender filed a proper financing statement against "equipment" on September 10. On October 1, Paver wrote a check on his deposit account at Bank for the purchase of a new grader for his business. Bank discovered the transaction and filed a proper financing statement against Paver's equipment on October 15. Paver defaulted on both loans.

Thirteen months after breaking ground, Contractor completed the shopping center. Developer refused to pay Contractor any amount over \$5 million. Contractor comes to the law firm where you are a law clerk. Contractor wants to sue Developer. Contractor also wants to sue Paver for \$115,000, the difference between the amount of Paver's original bid and the amount Contractor had to pay for the paving work.

A senior partner at your firm asks you to draft a memorandum that discusses the following issues:

1. Contractor's rights, if any, against Developer and any defenses.
2. Contractor's rights, if any, against Paver and any defenses.
3. Any rights of Bank and Lender in the grader purchased by Paver.

SELECTED ANSWER TO QUESTION 1 **(July 2013 Bar Examination)**

Contractor v. Developer:

Contractor may want to bring a breach of contract action against Developer. To be enforceable, the contract must have an offer, an acceptance, consideration, and no valid defenses to formation or performance.

Developer solicited bids for contracts. This was an invitation to send in an offer. Contractor (“C”) submitted a bid. This constituted C’s offer – his expression of willingness to be bound by these terms. Developer (“D”) awarded C the contract. D accepted C’s offer. An acceptance is a manifestation of intent to contract under the terms of the offer. In Florida, consideration to support a contract may be a legal benefit to one party, or a legal detriment to the other. Under common law and the UCC, valid consideration consists of a bargained-for exchange. As this is a construction contract and not a contract for the sale of goods, the UCC’s rules do not apply. C’s promise to build the shopping center for \$5 million and D’s promise to pay \$5 million constitutes valid consideration to support a Florida contract. The parties general contract also contained a clause that all changes thereto must be in a signed writing. In order to succeed in a breach of contract action, C must show that D’s agreement to pay an additional \$1 million was binding, and that D breached this contract.

D will argue that the oral modification to the contract is invalid under the Statute of Frauds and the parties’ contract. Under the Statute of Frauds, certain contracts must be in writing, such as surety agreements, services contracts exceeding one year, and sale of goods exceeding \$500. Under the Statute of Frauds, the present construction contract does likely not need to be in writing, as it could be performed w/in a year. In addition, courts will generally not preclude proper modification of a contract based on a writing-only clause, where the parties manifest the intent to subsequently change the contract and the modification is properly effected. The Statute of Frauds & the writing-only clause would not bar modification of the parties’ contract.

D will also argue that the parties had a fully integrated writing that may not be contradicted or supplemented with parol evidence, such as evidence of the agreement to increase the contract price by \$1 million. Parol evidence, however, is only prohibited to contradict or supplement, an integrated contract with prior writings or prior and contemporaneous oral agreements. Evidence of conditions precedent, mistakes, or of subsequent modifications may be considered where necessary.

D will also argue that the parties had a valid, binding contract for \$5 million and that C had a pre-existing duty to complete the shopping center for that amount. This is likely a strong argument for D. Under the common law, contract modifications must be supported by separate consideration. A pre-existing duty to perform is not adequate consideration to support a contract modification. In contrast, under the UCC, a good faith modification suffices, w/o additional consideration. Here, the parties orally agreed on an additional \$1 million to C. C however was under a pre-existing duty to complete the shopping center for \$5 million, and C does not appear to have been given additional consideration.

C could argue, in defense, that the sinkhole constituted an impossibility or impracticability which excused his performance under the original contract, and that a subsequent contract for \$6 million was created. Generally, a contractor must complete his project w/o additional compensation if the partially completed structure is destroyed through no fault of either party. The sinkhole appears to have been a natural event, not caused by either party. On the other hand, if a natural event destroys the entire plot of land upon which the structure is being constructed, both the contractor and the owner will likely be excused from performing under the contract. In such a case, performance would be objectively impossible. The defense of impossibility is considered on an objective basis, or whether a party can reasonably perform. In this case, a portion of the structure collapsed, although the sinkhole opened up underneath the property. If the remainder of the lot of land was destroyed, C could alleged impossibility. However, C could complete the project, so impossibility is likely not available.

If C wishes to allege impracticability, he would have to show that an unforeseen event, the non-occurrence of which was a presumption of the parties materially altered his performance to such an extent that performance is excused. An increase of \$1 million in a \$5 million dollar project may not suffice to create impracticability, particularly where only the structure, and not the property itself, was partially destroyed.

C could also argue that the parties clearly did not anticipate the sinkhole as neither one had sinkhole insurance. However, this risk was likely born by C. C may wish to claim that the lack of provisions regarding insurance rendered the general contract incomplete, and therefore unenforceable under common law. A contract generally needs to contain all essential terms, including identification of the parties, the price, manner of payment, and the obligations, and be signed by the party to be changed. Provisions regarding insurance or the failure of the party to obtain insurance, will likely not render a contract unenforceable.

C's best argument will be that the sinkhole rendered performance under the original contract impracticable or impossible. His agreement to fill the sinkhole could constitute additional consideration in exchange for D's promise to pay another \$1 million dollars. In Florida, even a slight deviation of performance will qualify as separate consideration to support modification. D thus breached this new contract and C was damaged.

C v. Paver (P)

C wants to sue P for the \$115,000 difference in P's original bid and the next lowest bid that C used. P's bid of \$200,000 constituted an offer to perform. C included this offer in his bid, but could not accept it until D accepted C's bid! The bid package rendered P's bid irrevocable. Consideration is generally required to release the parties from a bid.

P rescinded his bid apparently before D accepted C's bid. P will argue that the parties did not have a binding contract at that point and that he was free to revoke. C could counter that P's bid became irrevocable once C submitted it to D and that P should have know that C would rely on his bid.

P may argue that, even if the parties had an irrevocable offer or a contract, his error in calculating the bid relieved him of obligation to perform. Generally, a unilateral error by one party does not stand as a hindrance to contract formation. However, where the other party knows or should have known of the error, he will not be allowed to snap up the benefit of the mistaken agreement. P may have a strong argument that his was so much lower than the next lowest bid – a difference of \$115,000 – that C was put on notice of his error. Indeed, the difference between the next two bids was only \$10,000. If P is successful in arguing that C is not entitled to damages on a contract theory, C may prevail on a quasi-contract claim.

Where the parties did not enter into a binding contract, an aggrieved party may obtain relief based on promissory estoppel or detrimental reliance. To prevail on detrimental reliance, the injured party must show a promise from the breaching party that was intended to create reliance, justifiable reliance is that promise, and that injustice would occur if the injured party is not awarded damages. C could argue that P made his bid with the knowledge and intent that C would rely on it. C did rely on it when he submitted his bid using P's bid, and C's bid was accepted, causing C to incur damages. If C can argue on a reliance basis, he should receive restitution for the damages suffered in reliance.

C's damages under a contract theory would be tailored to protect his expectation. Compensatory damages are awarded to a non-breaching party to put them in the position they would have been in absent a breach. Compensatory and expectation damages can include incidental and consequential and liquidated damages, where appropriate. Punitive damages are generally not awarded in contract actions. When a non-breaching party reasonably covers, as is his duty, he will be entitled to the difference between the contract price and the cover price, plus any incidental or consequential damages. C will argue that the difference between the contract price (\$200,000) and the next lowest bid (\$315,000) is \$115,000.

P can counter that C has a duty to mitigate his damages by covering in a commercially reasonable manner. P can argue that C failed to do so. P offered to complete the work for \$300,000, which is still \$15,000 below the next lowest bidder that C used. P will argue that C had no reason to use this other bidder and that C is not entitled to \$115,000. P will also argue that there was no enforceable contract and, thus, C is not entitled to contract damages. C may counter that there was a contract that was breached by P and that C justifiably had faith in P's ability to perform. C was therefore commercially reasonable in covering with another subcontractor.

C may also wish to argue a quasi-contract claim against developer. C could show that, even if no binding contract existed between C and D for the additional \$1 million, that promissory estoppel or detrimental reliance allows C to recover. C could argue that D made a promise upon which C justifiably relied and justice requires that D not be enriched without compensating C. C could also argue that he completed the shopping center in reliance on getting paid, and that this reliance was reasonable and justifiable, and that D will be unjustly enriched should damages to C not be awarded. C should seek restitution. D will counter that C was under a pre-existing duty to complete for \$5 million. However, a court may find that D will be unjustly enriched as C would not have finished the shopping center but for D's promise to pay him an extra \$1 million.

Bank and Lender v. Paver ("P")

Bank and Lender would both like to foreclose on P's grader in satisfaction of his defaulted obligations. Bank and Lender will argue that they have a security interest in the grader. A security interest is a right in a secured party-creditor to certain personal property of the debtor (collateral) to secure an obligation upon default – a security interest must attach and, as against other secured parties, must be perfected.

A security agreement generally attaches when the parties enter a written security agreement that reasonably identifies the collateral, the secured party gives value, and the debtor has the power to convey the collateral.

P signed a promissory note with Bank, an unqualified promise to pay a specific amount of money on demand or at a specified time. Bank and P did not, however, sign a security agreement.

A security agreement in certain types of collaterals can only be created by possession control. An interest in a non-consumer deposit account attaches in the Bank with control over it. Control can be achieved when the bank maintains the account or when the bank and the creditor sign an agreement conveying control of the account to the bank. Bank's interest in P's account may have attached on July 1, when Bank made the loan, as Bank maintains the account. If the account is a consumer account, however, no security interest may attach in it.

Lender and P signed a security agreement for P's equipment on August 2. Equipment is a claim of movables used in the debtor's business. The agreement also had an after-acquired property clause, which validly gives lender an interest in after-acquired equipment of P. Lender filed its UCC-1 on September 10. At this point, lender's interest was perfected as against other secured parties with competing interests. Financial statements must identify the debtor, the creditor, and the collateral. Priority in the collateral is generally given to the creditor who is first to file or perfect.

Once a security interest has been created, it will continue in any proceeds automatically for 20 days. Perfection will continue after that only if the same offer rule applies or if the proceeds are identifiable, cash proceeds or if the creditor files another UCC-1. Here, the grader D proceeds of the bank account and it is equipment covered by lender's agreement. Bank's interest will not continue automatically because it's interest in the account arose by control and its interest in the grader arises only by filing a UCC-1. For equipment the UCC-1 must be filed within 20 (twenty) days of the debtor's receipt of the equipment. Bank filed a UCC-1 on the equipment on October 15. It is unclear when P obtained the equipment, presumably on October 2 when he wrote the check. Thus Bank's interest, perfected on July 1 would continue in their favor if the Bank filed its UCC-1 w/in 20 days of P's receipt of the same.

This would allow Bank a priority interest in the grader against lender, whose UCC-1 was not filed until September 10. If Bank's interest did not stay perfected, however, the lender will have priority.

QUESTION NUMBER 2

JULY 2013 BAR EXAMINATION – FLORIDA CONSTITUTIONAL LAW/ETHICS

Worried about the recent oil disaster, Florida's governor (Governor) issued a proclamation for a special legislative session which stated in pertinent part:

That the Legislature is convened for one week for the sole and exclusive purpose of considering legislation to reduce the negative impacts of off-shore drilling.

On the last day of the special session under Governor's proclamation, Representative Polk (from Polk County) drafted and convinced the House to consider a bill to limit medical malpractice litigation in Polk County. Representative Hardee (from Hardee County) agreed to vote in favor of the bill in exchange for a provision increasing the state's tax revenue by requiring a yearly ad valorem tax on motor vehicles registered in Polk County. Ultimately, the House and Senate properly passed the following bill:

AN ACT relating to Polk County, medical malpractice lawsuits, and ad valorem tax on motor vehicles.

Be it Enacted by the Legislature of the State of Florida:

Section 1. The provisions of this act shall be applicable only to Polk County, Florida.

Section 2. Anyone desiring to file a medical malpractice lawsuit must post a bond with the clerk of court in the amount of \$1,000,000 before filing a complaint alleging medical malpractice.

Section 3. Any motor vehicle registered in Polk County shall be subject to a yearly ad valorem tax of .5 percent of the vehicle's fair market value; the ad valorem taxes collected shall be deposited into the state's general revenue account.

Immediately after the bill's passage, the legislature adjourned for the summer months. The bill was properly presented to Governor on the same day as its passage. Disgusted with the legislature's refusal to address the off-shore drilling issue, Governor went on a three week vacation. Governor never approved and signed the bill, nor did Governor veto the bill.

Two months after Governor's vacation ended, Plaintiff suffered a serious injury as a result of a botched operation done by Doctor. Plaintiff has sought Attorney's

representation for a medical malpractice action in Polk County. Attorney and Plaintiff orally agreed to Attorney's representation for a contingency fee of 50 percent. Plaintiff does not have \$1,000,000 to post with the Polk County Clerk of Court.

Prepare a memo addressing first whether the bill ever became law. Then assume the bill did become law and discuss the constitutionality of the law and its provisions under the Florida Constitution. In your memo, also include a discussion of any ethical considerations for Attorney that arise from Plaintiff's efforts to seek representation.

SELECTED ANSWER TO QUESTION 2

(July 2013 Bar Examination)

(1) Whether the Bill Became a Law

As a preliminary matter, the Governor has the authority under the Florida Constitution to call a special legislative session. Special legislative sessions must be limited in scope, and in the absence of the requisite vote of the members of the House and Senate (2/3 vote), no new matters may be addressed during a special session, other than those for which the special session was called.

Here, the facts are unclear regarding whether a proper vote was held to address the issue of medical malpractice litigation and taxes on motor vehicles. Absent such a vote of approval in both the House and Senate, the legislature was not empowered to consider any matters other than the impact of oil drilling. However, if the requisite approval was achieved in the House and Senate, then the consideration of this bill was valid.

Assuming that the bill was valid, it did become a law because the Governor did not exercise his veto power. When a bill is submitted to the Governor for signature or veto, the Governor has 7 days (or 15 days if submitted at the end of session) to exercise his veto power. Because the Governor never exercised his veto power within this time, the bill became a law on its effective date.

(2) Constitutionality of the Act

Formalities. *Each law must comply with certain constitutional formalities in order to be valid. First, the Act includes a short title that sufficiently describes the subject matter of the law. Second, there is an enacting clause. Finally, the purpose for the act was likely in accordance with the legislature's authority to pass laws for the general welfare, health, safety, and morals of the public, as the purpose of the bill deals with litigation efficiency and raising revenue (though the means by which these purposes are achieved are questionable, as discussed below). However, the Act likely violates the single-subject rule. To comply with the Florida Constitution, a law must cover only one subject. Each component part or aspect of a law must have some natural relation to an overall scheme. Here, the legislature would not likely be able to show that ad valorem taxation of vehicles is naturally related to enhancing the efficiency of med mal litigation. Thus, the single subject rule is likely violated.*

Section 1. *Section 1 indicates that this is a special law. A special law, unlike a general law, is a law that only applies to particular geographic areas in the state. Special laws are permitted, so long as voters in the effective area are given notice of the proposed law and a referendum is held. Additionally, a special law (as well as a general law of local application, which does not require notice and referendum, but applies to certain areas based on a classification scheme such as population) cannot cover certain subject matter that the Florida Constitution expressly prohibits. Such prohibited subject matter includes taxation, elections, petit juries, conditions precedent to bringing civil or criminal claims, venue rules, and rules of evidence.*

Here, section 1 expressly applies only to Polk County, so this is a special law. The facts do not indicate that the notice and referendum requirements were met. Therefore, this section is invalid.

Section 2. Section 2 suffers from several constitutional infirmities, including an improper infringement of the fundamental right of access to courts, a possible equal protection problem, and prohibited special law subject matter.

Access to Courts: The Florida Constitution provides that the right to access to courts will not be infringed upon and that justice will be administered without sale, denial, or delay. When the legislature significantly burdens this right in a manner that amounts to abolishing a cause of action, a reasonable alternative must be provided unless the legislature can make the difficult showing that a public necessity exists and that no alternative can reasonably be established (*Kluger v. White Test*).

Here, Section 2 violates the prohibition of justice being administered without "sale," and the excessive amount of bond that is required constructively abolishes a medical malpractice cause of action for anyone who can't afford to pay what amounts to a one million dollar filing fee. Even if the legislature could show that a compelling public interest--such as judicial efficiency--was present, there are certainly reasonable alternatives other than the imposition of a one million dollar bond that would promote the interest. Moreover, Courts are especially hostile when faced with access to courts problems that don't involve any element of voluntariness on the part of the public. The involuntary nature of Section 2 is yet another justification for striking this section down as an unconstitutional infringement of the fundamental right of access to courts.

Prohibited Subject Matter. As discussed above, conditions precedent to filing a civil or criminal suit are among those subjects expressly prohibited from special laws and general laws of local application in the text of the Florida Constitution. Requiring residents of one county to post bond before bringing a civil malpractice claim violates this prohibition, as posting bond is a condition precedent to filing a complaint based on the plain language of Section 2.

Equal Protection. Section 2 also implicates equal protection concerns. The Florida Constitution prohibits discrimination against individuals based on race, alienage, gender, religion, and physical handicap. Any discrimination on these bases will be subject to strict scrutiny (compelling interest + narrow tailoring). Wealth is not a suspect classification subject to heightened scrutiny; instead, when legislation draws lines between people based on wealth, the standard of scrutiny applied is rational basis (rational relationship to a legitimate government interest). The Supreme Court of the United States as well as the Florida Supreme Court have both recognized, however, that when discrimination against the poor involves a fundamental right, heightened scrutiny should be applied.

Here, Plaintiff can argue first that even the rational basis test is not met here, as there is no rational relationship between judicial efficiency and the posting of a one million dollar bond in a particular class of civil cases. The legislature may assert that the high costs of med mal legislation justifies such a significant bond, and that the low threshold of rational basis review should not be used to strike down legislative judgment

when any feasible relationship is asserted. Plaintiff can argue, however, that this involves more than just wealth discrimination--it involves the fundamental right to access to courts, which therefore requires heightened scrutiny. This section would not likely survive heightened scrutiny, as the legislature would be required to show a compelling interest and careful tailoring to achieve that interest.

Due Process. Finally, the Florida Constitution expressly protects the right of both procedural and substantive due process. Substantive due process involves the protection of fundamental rights, and procedural due process protects against unconstitutional deprivations of protected interests without notice and hearing, and protects the right to a fair trial. Infringements of either aspect of due process implicates strict scrutiny review. Here, Plaintiff can argue that, as discussed above, her fundamental right to access to courts has been unconstitutionally burdened, and that the legislature will not be able to make the requisite showing to survive strict scrutiny. Plaintiff may also argue that procedural due process involves an inherent guarantee of the right to a fair trial--a right that is meaningless if a plaintiff can't never step foot in the court house due to an excessive bond requirement.

Section 3. Section three is also constitutionally invalid because it involves taxation, which is on the list of prohibited subject matter for special laws and general laws of local application laid out in the express text of the Florida Constitution. Additionally, the State is not empowered to collect ad valorem taxes. Here, the Act provides that the county would be collecting ad valorem taxes, which is permissible--however, the funds would go straight to the state. Plaintiff can argue that this tax is therefore constructively imposed by the state since the state retains all of the revenue. Therefore, because the state cannot collect ad valorem taxes, this provision should be unconstitutional. Moreover, ad valorem taxes are imposed on real property--not personal property, such as motor vehicles.

(3) Ethical Issues

The contingency fee arrangement is likely problematic under the Florida Rules of Professional Conduct. Contingency fee arrangements are permissible in most civil litigation, with the exception of domestic relations cases such as child support, divorce, etc. Contingency arrangements are required to be in writing, must be signed by the client, and must lay out how the fee will be calculated. The client is also entitled to a final calculation in writing at the end of representation. However, contingency arrangement are also subject to the general rules regarding the reasonableness of fees. A lawyer cannot charge an unreasonable fee. Factors that contribute to whether a fee is reasonable or not include the lawyer's education and experience, the amount of time spent on the case, and the complexity of the issues. A lawyer who attempts to retain 50% of the recovery in a case is likely not a reasonable fee. This contingency fee arrangement would not likely be valid.

Q QUESTION NUMBER 3

JULY 2013 BAR EXAMINATION – TRUSTS/ETHICS

Three years ago, Anne's wealthy father set up the "Anne Family Trust." The trust instrument provided for the following:

- ✓ Anne's father and business partner as co-trustees;
- ✓ Anne's father and his wife, Jane, as beneficiaries for their lifetime;
- ✓ Anne as beneficiary upon the deaths of Anne's father and his wife, Jane; and
- ✓ Anne's son as contingent beneficiary if Anne should predecease her father and his wife, Jane.

The trust was funded with various assets, including Anne's father's \$10 million life insurance policy. Shortly after the trust was created, the business partner died and Anne's father named Anne as co-trustee. Anne's father managed the trust. Anne did not participate in any aspect of the trust management nor receive any income from the trust.

Six months ago, Anne's father and Jane divorced and, last month, Anne's father died. The only remaining property in the trust at the time of her father's death was the life insurance policy. Jane claims that Anne's father told Jane that the trust would pay her \$25,000 a month after he died.

Anne wants access to the insurance proceeds to meet her living expenses but she also wants to be sure that the money is protected through a trust for the benefit of her son, who has no steady job and sizeable debts. Anne also has a pregnant pet Labrador and wants to be sure the dog and her puppies are taken care of in the event anything happens to Anne.

Anne's son wants to be named as co-trustee. Anne is concerned that if he is a co-trustee, his creditors will be able to reach the assets, but she wants assistance in handling her affairs.

Anne has retained you. In addition to advising her on the issues related to the trust, she wants you to serve as trustee.

Draft a memo discussing the following:

1. The validity of the Anne Family Trust;
2. Potential claims or challenges to the creation and/or management of the trust;

3. The current status of the trust;
4. Steps Anne can take to protect her assets and satisfy concerns regarding her son and the pregnant Labrador; and
5. Ethical issues of serving as trustee.

SELECTED ANSWER TO QUESTION 3

(July 2013 Bar Examination)

VALIDITY OF TRUST

The issue is whether there was the creation of a valid trust.

To have a valid express inter vivos trust you must have (1) a settlor; (2) intent to create a trust; (3) a trustee; (4) definite and ascertainable beneficiaries; (5) proper trust "res"; (6) and a legal purpose. While a settlor may also be a beneficiary of a trust, they may not be the sole trustee and beneficiary. If a trust is testamentary in nature, it must be executed with will formalities. While generally allowed to be oral, the statute of frauds does require that trust involving transfers of real property be in writing. A trustee may be anyone 18 years of age or older who has the legal capacity to enter into legally enforceable contracts. Beneficiaries must be definite and ascertainable. Even if beneficiaries are a class, members must be readily ascertainable (unless a charitable class, in which the opposite is true). Future proceeds from existing contracts are valid as trust property as they are certain to be realized. Any purpose which is legal in nature is considered proper purpose for the creation of a trust.

The trust was set up by Anne's father who seemingly had the capacity to do so (as the facts do not indicate otherwise) as well as the intent per the terms of the written instrument providing for the terms the trustee was to be bound by. Anne's father named both himself and his business partner as co-trustees and identified himself and his wife, Jane, as lifetime beneficiaries with Anne becoming a beneficiary upon the death of both himself and Jane or Anne's Son, should Anne predecease himself or Jane. Since Anne's father was not the sole trustee and beneficiary this was valid. The beneficiaries are all ascertainable as they are mentioned by name. The trust was funded with a number of assets, including a \$10 million life insurance policy, which was proper as it was the rights to a future payout from the policy. Additionally, the purpose of the trust is legal as it seeks to provide for Anne's father and all named beneficiaries for their lifetimes.

A valid express inter vivos trust was created by Anne's father as all elements of a valid trust have been met.

CLAIMS OR CHALLENGES TO CREATION AND MANAGEMENT

The issue is whether there are any claims by Jane as to the creation and management of the trust.

If a trust has co-trustees, it will not fail if one or even both of the trustees subsequently die or withdraw. The court will appoint a trustee in replacement or the settlor may appoint a new trustee. A trust is also presumed to be a revocable trust, during the lifetime of the settlor, unless expressly stated otherwise or until the settlor dies. The divorce of a settlor and their wife will eliminate any interest the ex-spouse had prior to divorce if considered a will substitute. While this can be separately contracted around, the contesting party, i.e., the ex-spouse, must prove by clear and convincing evidence

of such intention. Since a trust can be a will substitute, if it is such it must comply with will formalities (i.e., 2 attesting witnesses signing in the presence of each other and the testator). Also, trust beneficiaries are subject to the statute of frauds in that a trust benefit must vest or fail within 21 years of a life or being, or actually vest or fail within 360 years of creation.

Jane may try and claim that when business partner died the trust terms were violated. However, this is an invalid argument as a trust does not automatically fail for lack of a particular trustee and a co-trustee can withdraw/die and the other trustee will continue on or the court will appoint a trustee. While the trust was likely revocable during the lifetime of Anne's father, at which time it could have been changed or amended or even terminated, it became irrevocable upon his death. Thus, Jane's claim that she was entitled to \$25,000 a month after Anne's father died will likely be denied as there was no writing made during father's lifetime stating this and the trust can no longer be amended to include such a provision. Additionally, Jane may have lost all interest in the trust if it was seen as a will substitute due to her divorce from Anne's father. Since divorce seeks to operate as if an ex-spouse has predeceased the testator, she will not be entitled to any further benefit from the trust. Jane could claim, though, that the will should not be treated as a will-substitute, and if it is, then could challenge it as it does not appear to have been executed with will formalities. Even in absence of the trust being found a will-substitute, the fact that the terms of the trust state to "Anne's father and his wife, Jane," may be construed to mean that Jane's taking under the trust was conditioned on her being Anne's father's wife. It could also be claimed that the will violated the statute of frauds, however this will likely fail due to Florida's revised provision of vesting or failing with 360 years (extended from the previous 90 years provision).

CURRENT STATUS

The issue is what is the current status of the trust.

When the trustee of a trust also becomes the sole beneficiary of the trust, there is no separation of equitable and legal title and thus the trust will fail. If the trust fails for this reason, the trust property will be disbursed to the beneficiary, who will also be the trustee.

The trust likely ended when Anne's father died. This is because, after the death of the business partner, Anne's father named her as a co-trustee along with himself. If the divorce from Anne's father meant that Jane was no longer considered a beneficiary of the trust, then the only remaining trustee's at that time were Anne, her father and a contingent beneficiary in Anne's son. However, upon Anne's father's death, Anne became the only beneficiary as the condition to Son's becoming a beneficiary failed as Anne did not predecease father, and Jane was no longer relevant to the trust. Thus, since Jane was the sole trustee and sole beneficiary upon father's death, the trust would have terminated and Jane would receive the remaining property, the life insurance policy.

The trust terminated upon the death of Anne's father effectively transferring the life insurance policy to Anne.

PROTECTION OF ASSETS

The issue is whether Anne can protect the life insurance policy.

The creation of an irrevocable trust protects the settlor from the reach of creditors as to the trust property. However, if it is found that the creation of the trust was made for the purpose of solely defrauding a settlor's creditors, the trust will fail.

Anne would be able to set up a new trust and expressly make it irrevocable. As long as Jane is not the sole trustee and beneficiary of the new trust, the act of making it irrevocable would protect the trust assets from being reached by the creditors of Jane. However, it is determined that this was done solely to defraud creditors, it would not be enforceable. Additionally, creditors of the trustee cannot reach trust assets to which the trustee is responsible for. Thus, if Jane wishes to make Son co-trustee she may without worrying about Son's creditors reaching the trust assets in his capacity as trustee.

Anne can create an irrevocable trust to protect the assets.

SON

The issue is how can Jane protect Son as beneficiary of a new trust.

A trust can include spendthrift provisions that can prevent a beneficiary from being able to voluntarily or involuntarily transfer their interest in the trust, i.e., they cannot assign their right to disbursements. Additionally, the creditors of a spendthrift beneficiary cannot reach the trust property. They can only place a claim to the beneficiaries interest in the trust once the property has actually being disbursed. An exception to this applies to state creditors and claims for spousal support and child support. These special creditors can still reach the assets prior to disbursement.

Anne can create a trust with a spendthrift provision that would effectively bar his creditors from reaching trust assets of his until they are distributed to him. He would not be able to assign his rights to the property and only those creditors that fall into an exception would be able to reach the assets.

Anne can include a spendthrift provision protecting Son.

LABRADOR

In Florida, honorary trusts are allowed. An honorary trust may be set up for the purpose of providing for a pet once the settlor has died, or to take care of a grave site. The statute of frauds applies to honorary trusts set up for pets and the trust will only continue for as long as the last pet who was alive at the time of the settlor's death has also deceased.

Anne can create an honorary trust to provide for her Labrador that would last until the death of her Labrador as well as the puppies of the Labrador if they were born prior to Anne's death.

Anne can create an honorary trust for her Labrador.

ETHICAL ISSUES

An attorney can enter into business transactions with a client only when they have fully disclosed their intentions and the terms of the transaction are fair and reasonable and the attorney has advised the client to seek advice from outside counsel. Additionally, an attorney cannot create an instrument in which they will be a substantial beneficiary of and cannot accept any gifts for doing so.

I would be able to serve as trustee so long as the terms of the arrangement were fair and I advised Anne to seek independent counsel in reaching the decision. Additionally, I could not be a beneficiary under the trust terms which I created on behalf of Anne.

PART II - SAMPLE MULTIPLE-CHOICE QUESTIONS AND ANSWERS

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

The answers appear on page 46.

MULTIPLE-CHOICE EXAMINATION INSTRUCTIONS

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

1. This booklet contains segments 4, 5, and 6 of the General Bar Examination. It is composed of 100 multiple-choice, machine-scored items. These three afternoon segments have the same value as the three morning segments.
2. The person on each side of you should have a booklet with a different colored cover. Please determine that the person on each side of you is using a different colored cover. If he or she is using an examination booklet with the same colored cover, please notify a proctor at once.
3. When instructed, without breaking the seal, take out the answer sheet.
4. Use a No. 2 pencil to mark on the answer sheet.
5. On the answer sheet, print your name as it appears on your badge, the date, and your badge/ID number.
6. In the block on the right of the answer sheet, print your badge/ID number and blacken the corresponding bubbles underneath.
7. STOP. Do not break the seal until advised to do so by the examination administrator.
8. Use the instruction sheet to cover your answers.
9. To further assure the quality of future examinations, this examination contains some questions that are being pre-tested and do not count toward your score. Time limits have been adjusted accordingly.
10. In grading these multiple-choice items, an unanswered item will be counted the same as an item answered incorrectly; therefore, it is to your advantage to mark an answer even if you must guess.
11. Mark your answers to all questions by marking the corresponding space on the separate answer sheet. Mark only one answer to each item. Erase your first mark completely and mark your new choice to change an answer.
12. At the conclusion of this session, the Board will collect both this question booklet and your answer sheet. If you complete your answers before the period is up, and more than 15 minutes remain before the end of the session, you may turn in your question booklet and answer sheet to one of the proctors outside the examination room. If, however, fewer than 15 minutes remain, please remain at your seat until time is called and the Board has collected all question booklets and answer sheets.

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

23 SAMPLE MULTIPLE-CHOICE QUESTIONS

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

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

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

2. Based upon the legal arguments presented, the court should rule
 - (A) the statement that West tried to steal the victim's chain is admissible and the statement that the victim was shot is inadmissible.
 - (B) the statement that the victim was shot is admissible and the statement that West tried to steal the victim's chain is inadmissible.
 - (C) both statements are admissible.
 - (D) both statements are inadmissible.

3. Following the testimony of the physician, the State offered into evidence a copy of the report of the investigating police officer setting forth the officer's observations at the scene of the crime. The evidence is
 - (A) admissible as a recorded recollection.
 - (B) admissible as a public report.
 - (C) inadmissible because it is hearsay not within any exception.
 - (D) inadmissible because the original report is required.

4. Which statement best describes the profit sharing relationship of a general partnership where the partners have agreed only on voting percentage and the voting shares are unequal?
- (A) Partners share in proportion to their contributions to the capital and assets of the partnership.
 - (B) Partners share in proportion to their voting percentage.
 - (C) Partners share equally.
 - (D) Partners cannot share until they unanimously agree upon a distribution.
5. Billy was charged with grand theft. The trial began on a Thursday afternoon. The jury was impaneled, sworn and released for the day. Since Friday was the Fourth of July, the judge asked the jurors to return on Monday. The trial began again on Monday morning at 8:30. By late evening the judge had instructed the jury. Due to the lateness of the hour, the jurors were sequestered for the evening to allow them to get an early start the next morning. The jurors returned Tuesday morning and were unable to reach a verdict. Unable to reach a verdict, the trial judge allowed the jurors to go home that evening. On Wednesday morning, the jury assembled and returned a verdict of guilty.

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

- (A) The fact that the jurors did not begin to consider evidence until several days after they were impaneled.
 - (B) The fact that the jury was allowed to go home after being sworn.
 - (C) The fact that the jury took several days to return a verdict.
 - (D) The fact that the jury was allowed to go home after they began deliberations.
6. Nancy Quinn had two sons, Earl Quinn and Brent Quinn, before she married Al Green in 2004. In 2006, Nancy made her first and only will, leaving half her estate to "my husband, Al Green" and one-fourth to each of her two sons. On February 15, 2008, Nancy and Al were divorced, but Nancy never got around to making a new will. Nancy died on May 1, 2010, and she was survived by Al, Earl, Brent, and her father, Norman Ritter. Which of the following statements regarding the distribution of Nancy's estate is correct?
- (A) Since a divorce revokes a will made during coverture, Nancy died intestate, and Earl and Brent will each take one-half of Nancy's estate.
 - (B) Earl and Brent will each take one-half of Nancy's estate because Nancy's will is void only as it affects Al Green.
 - (C) Since Nancy did not change her will within one year after her divorce from Al, Nancy's estate will be distributed exactly as stated in her will.
 - (D) Since Nancy's will referred to Al Green specifically as her husband, Al Green will take nothing because he was not Nancy's husband at the time of her death. Earl, Brent, and Norman Ritter will each take one-third of Nancy's estate.

7. Cooper is suing March for money damages. Because he believes portions of March's deposition are highly favorable to his case, Cooper's attorney intends to read parts of the deposition at trial instead of calling March to the stand. March objects to Cooper's use of the deposition at trial. What is the court's likely ruling?
- (A) Cooper may use the deposition at trial, but, if requested, he must read all parts that in fairness ought to be considered with the part introduced.
 - (B) Cooper may use the deposition at trial, but only to contradict or impeach March's prior inconsistent statements or pleadings.
 - (C) Cooper may not use the deposition at trial, as March is able to testify and no exceptional circumstances exist.
 - (D) Cooper may not use the deposition at trial, as this would make March his witness and immune to impeachment.
8. Pete Smith is the active partner and Bill Jones is the silent partner in a general partnership known as "Pete Smith Plumbing." After six years of being uninvolved in the management of the partnership business, Bill purchases 100 toilets for the business. Pete is incensed because it will probably take years to use up the inventory of so many toilets and seeks your advice. The best advice is
- (A) Bill can bind the partnership by his act.
 - (B) silent partners are investors only and cannot bind the partnership.
 - (C) unless his name is in the partnership name, third persons are "on notice" that he is unauthorized to contract for the partnership.
 - (D) Bill, as a silent partner, is not authorized to purchase and, therefore, the sale may be set aside.
9. The State of Florida is prosecuting a former police officer for extortion of money from prostitutes. One of the State's witnesses is Sally. Sally has an adult conviction for vehicular homicide. She was charged with driving a car in a reckless manner resulting in the death of her sister, a passenger in the car. Sally pleaded nolo contendere, was adjudicated guilty and received a suspended sentence although she could have received a sentence of state imprisonment up to 5 years. At trial, evidence of this conviction is
- (A) admissible to impeach Sally because vehicular homicide carries a maximum penalty in excess of 1 year.
 - (B) inadmissible to impeach Sally because she never admitted her guilt since she entered a plea of nolo contendere.
 - (C) inadmissible to impeach Sally because she received a suspended sentence.
 - (D) inadmissible to impeach Sally because she is only a witness and not the criminal defendant.

10. A defendant charged with first-degree murder shall be furnished with a list containing names and addresses of all prospective jurors
- (A) upon court order.
 - (B) upon request.
 - (C) upon request and showing of good cause.
 - (D) under no circumstances.
11. Defendant was arrested on February 1 and released one month later on March 1 after being charged with a felony. On December 1 of the same year as his arrest, he filed a motion to discharge since no trial or other action had occurred to that point. The court held a hearing 3 days after the motion was filed. Defendant should be
- (A) discharged because more than 175 days passed between arrest and the filing of the motion to discharge.
 - (B) discharged because more than 175 days passed between his release from jail and the filing of the motion to discharge.
 - (C) brought to trial within 90 days of the filing of the motion to discharge.
 - (D) brought to trial within 10 days of the hearing on the motion to discharge.
12. At trial, during the plaintiff's case-in-chief, the plaintiff called as a witness the managing agent of the defendant corporation, who was then sworn in and testified. Defense counsel objected to the plaintiff's questions either as leading or as impeaching the witness. In ruling on the objections, the trial court should
- (A) sustain all the objections and require the plaintiff to pursue this type of interrogation only during the plaintiff's cross-examination of this witness during the defendant's case-in-chief.
 - (B) sustain the leading question objections but overrule the other objections because a party is not permitted to ask leading questions of his own witness at trial.
 - (C) sustain the impeachment questions but overrule the other objections because a party is not permitted to impeach his own witness at trial.
 - (D) overrule all the objections because the witness is adverse to the plaintiff and therefore may be interrogated by leading questions and subjected to impeachment.

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

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

13. At trial, Goode's attorney calls his client to the stand and asks him if Murphy has ever made any offers to settle the dispute. If Murphy's counsel objects, the trial court's proper ruling would be to
- (A) sustain the objection because offers to compromise a claim are inadmissible to prove liability.
 - (B) overrule the objection because the offer was made prior to the filing of a lawsuit.
 - (C) overrule the objection because only an offer to pay medical expenses is inadmissible under the Florida Evidence Code.
 - (D) overrule the objection because Murphy's statement was an admission.
14. Goode testifies that his neighbor told him that her friend, a school principal, witnessed the accident and that the principal, still under the stress of the excitement of having viewed the accident, had told her exactly what he saw. His attorney then asks Goode what the neighbor said to him about the accident. Before Goode can testify further, Sellers interjects a hearsay objection. The court should
- (A) sustain the objection if the principal is not available to testify.
 - (B) sustain the objection because the neighbor's statement is hearsay and no exception applies.
 - (C) overrule the objection because excited utterance exception to the hearsay rule applies.
 - (D) overrule the objection because the spontaneous statement exception to the hearsay rule applies.
15. Tom and Laura had three adult children. After a bitter divorce, Tom was sure Laura would disinherit their son, Bif. Tom executed a new will that provided bequests for all three children, but stated, "in the event my ex-wife, Laura, revokes her will in existence on the date of our divorce, I leave my entire estate to my son, Bif." Laura did revoke the will referred to in Tom's will but did not disinherit Bif. At Tom's death, what distribution and reason given below are correct?
- (A) Tom's estate passes to his three children because will provisions are not binding if they are conditioned on events outside testator's control.
 - (B) Tom's estate passes to his three children because will provisions are not binding if they are conditioned on future events.
 - (C) Tom's entire estate belongs to Bif because Laura revoked her will and the provision regarding that event controls distribution.
 - (D) Tom's estate passes by intestate succession because the mistake regarding the contents of Laura's new will voids Tom's testamentary intent.

16. Rainbow Corporation has outstanding 1,000 shares of voting common stock and 1,000 shares of nonvoting preferred. The preferred has a liquidation preference equal to its par value of \$100 per share plus a three percent noncumulative dividend. Rainbow submits to its stockholders a proposal to authorize a new class of preferred stock with redemption rights that would come ahead of the old preferred stock. At a shareholders' meeting, 700 common and 400 preferred vote in favor of the proposal. Which of the following statements is correct?
- (A) The proposal is validly approved because overall a majority of the outstanding shares did approve.
 - (B) The proposal is invalidly approved because a majority of the preferred shareholders did not approve.
 - (C) The vote of the preferred stockholders does not matter because it was nonvoting stock.
 - (D) The proposal is invalidly approved because a two-thirds vote of each class is required.
17. In the absence of a provision to the contrary in the articles of incorporation, the directors of a corporation elected for a specified term
- (A) can be removed from office at a meeting of the shareholders, but only for cause and after an opportunity to be heard has been given to the directors.
 - (B) can be removed from office at a meeting of the shareholders, with or without cause.
 - (C) can be removed from office at a meeting of the shareholders, but only for cause.
 - (D) can be removed from office prior to the expiration of their term only by a decree of the circuit court in an action by the shareholders.
18. Defendant was seen leaving Neighbor's yard with Neighbor's new \$10 garden hose. Neighbor called the police, who charged Defendant with the second-degree misdemeanor of petit theft by issuing him a notice to appear in the county courthouse one week later.
- Defendant appeared at the scheduled place and time and asked the judge to appoint a lawyer to represent him. The judge found Defendant to be indigent. The judge
- (A) must appoint Defendant a lawyer.
 - (B) must appoint Defendant a lawyer if the State subsequently charges Defendant by information.
 - (C) need not appoint Defendant a lawyer if the judge states in writing that Defendant will not go to jail for more than six months if convicted.
 - (D) need not appoint Defendant a lawyer if the judge states in writing that Defendant will not go to jail at all if convicted.

19. Before Sue and Harry were married, Harry signed an agreement waiving "all claims" to Sue's estate. Harry received advice of counsel prior to signing the agreement. After Sue dies, Harry learned for the first time that Sue owned over \$1,000,000 worth of stock, Sue's validly executed will leaves her entire estate to her mother. Which of the following is true?
- (A) Harry is entitled to homestead property because he did not specifically waive his right to homestead.
 - (B) Harry is entitled to his elective share of Sue's estate because she did not make a fair disclosure of her estate.
 - (C) Harry is entitled to the family allowance because family allowance cannot be waived.
 - (D) Harry is not entitled to any share of Sue's estate.
20. Bob Wilson borrowed \$20,000 from Ted Lamar to open a hardware store. Ted's only interest in the business was the repayment of his 5-year unsecured loan. Bob was so grateful for the loan that he named his business "Wilson and Lamar Hardware" and purchased signs and advertising displaying this name. He also listed Bob Wilson and Ted Lamar as "partners" on his stationery. When Ted found out, he was flattered to the point that he voluntarily reduced Bob's interest rate from 9 percent to 8 percent per annum.
- A few weeks later, Pete Smith, who had assumed that both Wilson and Lamar were operating the hardware store and was not familiar with the true situation, sold goods to Wilson and Lamar Hardware. Pete Smith has been unable to collect for the goods and he seeks your advice. Your advice to Pete is
- (A) only Bob Wilson is liable.
 - (B) Bob Wilson and Ted Lamar are liable jointly.
 - (C) Bob Wilson is liable for the entire amount and Ted Lamar is liable only to the extent the debt cannot be collected from Bob Wilson.
 - (D) only the de facto partnership arising from the relationship between Wilson and Lamar is liable.
21. During a deposition upon oral examination, a party's counsel may instruct a deponent not to answer a question for which of the following reasons?
- (A) The question asks for hearsay testimony that would be inadmissible at a trial.
 - (B) The question asks for evidence protected by a privilege.
 - (C) The question asks the deponent for an opinion concerning the ultimate legal issue in the case.
 - (D) None of the above.

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

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

- (A) Kathy gets the condominium regardless of the prenuptial agreement, Tommy takes the pasture land and Tommy and Julie split the rest of the estate.
 - (B) Due to Kathy's prenuptial agreement, Tommy receives the pasture land, Julie gets the condominium and Tommy and Julie split the rest of the estate.
 - (C) Kathy gets the condominium, but because Bill had originally indicated his intent to devise equally to his children, Tommy and Julie will split the remaining estate.
 - (D) Regardless of the prenuptial agreement, Kathy is a pretermitted spouse. Since Bill leaves surviving lineal descendants who are not Kathy's, Kathy receives 50% of the estate, Tommy gets the pasture land, and Tommy and Julie split the residue of the estate.
23. Mary, a wealthy St. Petersburg widow, executed her first and only will on May 15, 1990 and died on August 18, 1990. Her will provided that her estate be divided equally between her only child, Joan, and the Salvation Army of Largo. How will Mary's estate actually be distributed?
- (A) 100% to Joan.
 - (B) 100% to Joan if she files a timely petition requesting that the devise to the Salvation Army be avoided.
 - (C) 50% to Joan and 50% to the Salvation Army.
 - (D) 50% to Joan and the income from the remaining 50% to Joan for life, remainder to the Salvation Army, if Joan files a timely petition protesting the devise to the Salvation Army.

ANSWER KEY FOR MULTIPLE-CHOICE QUESTIONS

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