Florida Board of Bar Examiners

ADMINISTRATIVE BOARD OF THE SUPREME COURT OF FLORIDA

Florida Bar Examination
Study Guide and Selected Answers

February 2024
July 2024

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

Future scheduled release dates: August 2025 and March 2026

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

No part of this publication may be reproduced or transmitted in any form or by any means without the prior written consent of the Florida Board of Bar Examiners.

Copyright © 2025 by Florida Board of Bar Examiners
All rights reserved.

TABLE OF CONTENTS

PART I – ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2024 AND JULY 2024 FLORIDA BAR EXAMINATIONS

ESSAY QUESTIONS AND SELECTED ANSWERS

Part I of this publication contains the essay questions from the February 2024 and July 2024 Florida Bar Examinations and one selected answer for each question.

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

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

ESSAY EXAMINATION INSTRUCTIONS

Applicable Law

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

Acceptable Essay Answer

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

QUESTION NUMBER 1

FEBRUARY 2024 BAR EXAMINATION – CONTRACTS/TORTS/ETHICS

Eugene and Phyllis went to Carol's jewelry shop to pick out an engagement ring for Phyllis. Phyllis told Carol that she wanted a rare yellow diamond and gave Carol a list of the qualities she wanted for the diamond. Carol did not have any yellow diamonds in stock, but she contacted her diamond broker and obtained a quote for a yellow diamond that would fit Phyllis' request.

Carol then presented Eugene with a contract to purchase a 2-carat yellow diamond that met Phyllis' specifications for $20,000, with the diamond to arrive within two weeks. The contract included the $20,000 figure in error. $20,000 was the per-carat price. Carol intended to sell the 2-carat diamond for $40,000.

When Eugene saw the price in the contract, he noticed that the price was much lower than he expected based on his research about yellow diamonds. Despite that, Eugene made no comments about the price and Eugene and Carol signed the contract.

The next day, Carol discovered her error. She called Eugene and told him that they would need to revise the contract to reflect the correct selling price. Eugene objected and told Carol he expected her to honor the original agreement.

Carol then contacted Stephanie, her biggest customer, to see if Stephanie was interested in purchasing the yellow diamond. Carol told Stephanie about the dispute with Eugene and Phyllis over the pricing error in the contract. Carol was delighted to learn that Stephanie would buy the diamond for the full price when it arrived.

Carol informed Eugene and Phyllis that she was selling the yellow diamond to Stephanie at the intended valuation, so they should not come to pick it up in two weeks. Eugene and Phyllis begged Carol to reconsider but she refused.

Eugene and Phyllis come to Lawyer for legal advice. They want to sue Carol immediately and want to know if they can get the yellow diamond. Thus far, they have been unable to find a yellow diamond that meets Phyllis' specifications anywhere else. They also ask about whether Stephanie can be sued for interfering with their contract with Carol. Phyllis is adamant about bringing a lawsuit, but Eugene is unsure about whether he wants to be a plaintiff in litigation.

Eugene and Phyllis also provided Lawyer with a check for $3,000 as an advance for fees and costs. Lawyer gave the check to her assistant to deposit. The assistant deposited the check in Lawyer's firm's operating account to help pay upcoming law firm expenses.

Prepare a memorandum as follows:

A. Discuss the merits of a breach of contract claim against Carol, including whether Phyllis can bring the claim herself. Your discussion should address defenses that Carol may raise and available remedies.

B. Discuss the merits of a tortious interference claim against Stephanie.

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

SELECTED ANSWER TO QUESTION 1

(February 2024 Bar Examination)

MEMORANDUM OF LAW

I. Breach of Contract Claim

A. APPLICABLE LAW

Where the principal purpose of a contract concerns the purchase and sale of goods, both the common law of contracts and Article II of the Uniform Commercial Code (the "UCC") apply to govern the contract. To the extent of any conflicts between the two bodies of law, the UCC controls. Here, the principal purpose of the contract concerns the purchase and sale of a goods, defined under the UCC as any "movable" tangible personal property. Because the matter at hand concerns the sale of yellow diamonds, the UCC will govern in connection with rules of formation, interpretation and construction, modification and remedies and similar matter related thereto.

B. FORMATION

For contractual rights to attach, there must be (i) an offer showing an intent to be bound by a contract, (ii) acceptance constituting a manifestation of mutual assent, (iii) consideration: a bargained for exchange of legal value, and (iv) no defenses to formation. Under the UCC statute of frauds ("SOF"), contracts for the sale of goods with a purchase price in excess of $500 must be in a writing which establishes that a contract has been formed and signed by the party to be charged.

Offer & Acceptance & Consideration

Here, after explaining the specifications of the diamond they sought, Eugene ("E") and Phyillis ("P") were presented with a written offer to purchase a yellow diamond in exchange for $20,000. Both Carol and Eugene signed the contract which set forth all the material terms, with the diamond to arrive in two weeks and thus satisfying the statute of frauds requirement. Both parties offered an exchange to their detriment (E providing $20,000 in exchange for P's yellow diamond). Thus, the consideration prong of the test has been satisfied. Whether a valid and enforceable contract has been formed ultimately turns on whether there exists any defenses to formation (infra, below).

In respect of the foregoing, it is likely that a valid and enforceable contract has been formed, subject to possible defenses Carol might raise (infra).

Standing of a Third Party Beneficiary

Where a contract specifically indicates the existence of a third party beneficiary, the third party beneficiary is entitled to seek to enforce the agreement once the third party's rights have vested. A third party's rights vest upon their knowledge of the contract and the

obligor's duty to perform. Generally, the contract must expressly state the third party beneficiary in order for such rights to attach.

Here, the contract was entered into by and between Carol and Eugene. Notably, Phyillis, for whom the diamond was for, was not a party to the contract. If Eugene ultimately refuses to be a party to the litigation, Carol will certainly argue that Phyillis lacks standing to sue on the grounds that she is not a party to the contract. On the other hand, Phyillis will argue that Eugene and Phyllis went to the store together and that Carol had actual knowledge of the intended beneficiary. Carol may seek to exclude the foregoing argument on Parole Evidence Rule grounds.

Under the Parole Evidence Rule, a fully integrated contract prohibits the admission of extrinsic evidence to prove any other terms to a contract except to show the existence of a condition precedent or to shed light on an ambiguous term. Parole evidence does not bar extrinsic evidence showing modification or termination of an agreement. A partially integrated will permit additional terms that are collateral but do not otherwise contradict any terms contained in the contract. Here, the facts are unclear as to whether the agreement is partially or fully integrated. However, if the agreement is only partially integrated, the Court may well admit evidence of Carol's express knowledge that the contract was for the benefit of Phyllis since it neither contradicts any provision under the contract and is a mere collateral issue under the overall contract. Admissible Parole evidence does not typically permit evidence of a party's subjective intent.

Under the circumstances, it is likely that Phyillis will have standing to sue in her own right as a third party beneficiary.

Defenses to Formation

Statute of Frauds

Under the UCC statute of frauds ("SOF"), contracts for the sale of goods with a purchase price in excess of $500 must be in a writing which establishes that a contract has been formed and signed by the party to be charged. Here, both parties signed the written agreement to purchase a $20,000 yellow diamond. Accordingly, the statute of frauds requirement has been satisfied and Carol cannot assert this as a defense.

Mutual Mistake

Where both parties are mutually mistaken as to a basic assumption upon which the a contract is formed, the adversely affected party may seek to rescind for a lack of a meeting of the minds. Acceptance generally requires complete acceptance of each term of an offer (Although this rule applies more to common law of contracts than UCC). Absent a complete meeting of the minds, there is a strong argument that a contract was not actually formed. Provided, however, this defense is not available when a party assumes the risk of a mistake. That is, mutual mistakes as to value are generally insufficient, particularly where a party was in a better position to ascertain its value. Moreover, Parole evidence

(discussed infra) does not typically permit evidence of a party's subjective intent and thus, Carol likely will not be able to offer evidence that she intended to sell at a higher price.

Here, Carol will argue that that no contract was formed for lack of a meeting of the minds because of a clerical error in the contract. Carol intended the purchase price to be $40,000 rather than the stated price of $20,000. On the other hand, P & E will argue that, because Carol, as a merchant with respect to gemstones (and presumably the expert), together with the fact that Carol drafted the contract, P & E will argue that she bore the risk of her mistake. P & E might even argue that they relied on the stated purchase price to bolster their argument (though the facts do not indicate this per se). Carol might respond by suggesting it would be unconscionable to enforce a clerical mistake of this magnitude that was remedied with notice to the affected counterparty within 24 hours.

Because a Court will likely find that Carol was in a better position to ensure the correct price, a court will likely prohibit Carol from asserting the defense of mutual mistake.

Unilateral Mistake

Where one party to a contract is mistaken as to a material provision thereof, and where the counterparty knew of the mistake, or should have known of the mistake and fails to bring the mistake to the other's attention, the adversely affected party may seek to set aside the contract as voidable. A party to a contract is generally deemed to be aware of the counterparty's mistake when the mistake is "obvious and palpable."

Here, E noticed that the price was much lower than he expected based on his independent research of yellow diamonds. Moreover, E failed to make any mention of this fact. E will likely argue that it was a pleasant surprise and that he relied on the expertise of Carol as a dealer in gemstones. The facts do not indicate that E has any experience with diamonds and he will likely argue that he lacked any ability to assess the credibility of the information he reviewed. He will also argue that the yellow diamond he purchased had particular specifications which might not have been taken into account in the research he read. On the other hand, Carol will argue that the mistake was obvious and palpable and that E's failure to raise such a blatant error in pricing not only establishes E's bad faith but should permit her to void the contract.

While a jury might find either way, it is probably the case that Carol would prevail given P's knowledge of the significantly reduced price relative to his independent research and failure to bring this to the attention of Carol.

Unconscionability

D. BREACH

Substantial Performance

Where a party to valid and enforceable contract fails to substantially perform on a

contract, that party material breaches the contract, excusing the nonbreaching party from performance and entitling the nonbreaching party to seek damages. Whether a party has materially breached a contract often turns on a six factor test, including, in relevant part, (i) the degree of benefit conferred, (ii) the willfulness of the breach by the breaching party, and (iii) whether the party intends to complete performance. Whether a party has materially breached a contract is a question of fact.

Here, Carol likely breached under anticipatory repudiation.

Anticipatory Repudiation

Where a party repudiates a contract by a communication that unequivocally declares an intent not to carry out performance, the counterparty may treat the same as an anticipatory repudiation which constitutes a material breach of contract. A repudiation is irrevocable unless (i) the counterparty indicates they are treating the repudiation as final, (ii) the repudiating party actually performs or (iii) the nonbreaching party materially changes positions in reliance of the breach.

Here, Carol contacted P and E the day after signing the contract informing them that she provided the wrong price. Carol refused to honor the original contract term and ultimately sold the diamond to her best customer Stephanie. Therefore, it is likely that Carol materially breached the contract by anticipatory repudiation.

Carol will argue that she did not repudiate the contract, but rather attempted to modify it. Under the UCC, a contract may be modified so long as its made in good faith and the other party fails to object within a reasonable time. Here, however, P & E immediately objected to any purported modification of the contract price to $40,000. Therefore, Carol cannot argue that her subsequent communication constituted a mere modification of contract. Because Carol subsequently sold the diamond to her best customer, she cannot escape an argument for anticipatory repudiation and material breach.

F. REMEDIES

Generally, damages are designed to compensate a party for their expectation damages. In effect, this requires placing the party in a position as if the contract had been properly performed. Under the UCC, Buyer's have an array of remedies potentially available to them for redress of breach of contract, including the possibility of cover damages (cover price of replacement goods less original contract price), reliance damages (which aim to place a party in the position they were in prior to entering into a contract), market damages (Market price of replacement goods less original contract price) and diminution in value damages. Where goods are particularly unique and the Buyer is unable to find a suitable substitute or replacement, Buyers may have a valid claim in equity to seek specific performance of the contract.

Here, because E and P have, "thus far" been unable to find a yellow diamond that meets the requisite specifications, P and E may have a strong claim to seek enforcement of the

contract at its original contract price of $20,000.

In the alternative, if P and E are able to secure a replacement at some point soon, the appropriate measure of damages is likely cover damages plus incidental and consequential costs incurred. In other words, P and E should recover any increase in price they need to pay for a replacement diamond, plus costs associated with securing a seller, less any avoidable costs as a result of Carol's breach.

The most likely remedy available to P and E would be specific performance, unless the Court finds that remedy unconscionable under the circumstances or otherwise found a legitimate defense to formation. Notwithstanding, it is likely that P and E will prevail in their prayer for relief for specific performance of the contract.

II. Tortious Interference

To establish a claim for tortious interference, it must be proved by a preponderance of the evidence, that a third party knew of the existence of another business arrangement and intentionally engaged in conduct to thwart the consummation or continuation of the same and succeeded in connection therewith.

Here, while Stephanie had some degree of knowledge of the business relationship between Carol and P & E, P & E (the "Plaintiffs") will probably have a difficult time establishing tortious interference. Stephanie merely had knowledge of a pricing dispute with two other customers (who's specific identities she likely was entirely unaware). The facts do not indicate any bad faith on the part of Stephanie, just that accepted the offer to purchase the diamond for full price.

Therefore, without more, P & E will likely not prevail on a tortious interference claim against Stephanie.

III. Ethical Issues

A. DUTY NOT TO COMINGLE FUNDS; LIABILITY FOR SUPERVISEES

Under the Florida Rules of Professional Conduct (the "Rules"), attorneys' must properly account and handle the funds of their clients. As fiduciaries, and together with a lawyer's duty of loyalty to the client, the lawyer must refrain from comingling client funds and attorney funds. Attorney's typically maintain two separate accounts, including a trust account and an operating account. The trust account (e.g., IOLTA account) is designed as a "parking space" for client funds which have yet to be earned. Florida permits lawyers to maintain a single trust account for all clients provided the lawyer keeps a detailed accounting of each client's funds held in the account. As a lawyer incurs costs and accrues legal fees for his or her services in connection with the representation, the lawyer is permitted to move funds from the trust account into the operating account. On the other hand, funds which are received as nonrefundable availability retainers, for example, or funds earned following conclusion of a matter pursuant to which the lawyer is entitled to

receive a contingent fee where said fee amount is not the subject of dispute, are properly deposited into the lawyer's operating account. In sum, the trust account holds unearned legal fees while the operating account holds funds earned.

Here, Eugene and Phyllis drew a $3000 check payable to Lawyer as an advance for legal fees and costs in anticipation of litigation in connection with their dispute with Carol regarding the yellow diamond. These fees have not yet been earned and should be deposited into the attorney's trust account. Because the Rules provide that lawyers must direct those at their firm or under their direct supervision to comply with the Rules, the Lawyer is responsible for the assistant's failure to properly deposit the check into the lawyer's Trust Account.

Therefore, the lawyer has violated has obligations not to comingle funds because his assistant deposited unearned advanced legal fees and costs to the attorney's operating account instead of his trust account.

QUESTION NUMBER 2

FEBRUARY 2024 BAR EXAMINATION – CRIMINAL LAW AND CONSTITUTIONAL CRIMINAL PROCEDURE

While on patrol, Officer Oscar observed a vehicle with a broken license tag light. Due to this infraction, Officer Oscar initiated a traffic stop on the vehicle driven by Dan with front seat passenger, Pat.

As Officer Oscar walked up to the vehicle, Pat tried to exit the vehicle and leave the scene. Officer Oscar identified himself, ordered Pat to return to the vehicle, and told him he was not free to leave. When asked for his license, Dan retrieved it from a backpack that was located in the backseat, telling Officer Oscar: "Let me grab my wallet from my bag."

Officers Ben and Ken arrived while Officer Oscar was writing his traffic ticket. Officer Ken was a "K9" officer who had with him a dog that was certified to detect the odor of narcotics. Officer Ken walked the dog around Dan's vehicle to sniff for narcotics. The dog gave a positive alert for the odor of narcotics. Officer Oscar informed Dan that his vehicle would be searched based on the dog's positive alert.

Dan and Pat were removed from the vehicle and detained. After Dan was removed, Officer Oscar asked Dan: "May I search your pockets to make sure you don't have anything you're not supposed to?" Dan replied: "Sure, go ahead." Officer Oscar located a plastic bag containing cocaine in Dan's pocket.

Officer Ben began to search Pat's pockets when Pat said: "Hey, don't search me!" Officer Ben told Pat, "I am just searching your pockets to make sure you don't have anything you're not supposed to." Officer Ben continued searching the pockets and located three plastic bags containing heroin.

Dan and Pat were handcuffed and properly advised of their Miranda warnings. Dan and Pat invoked their right to remain silent and were placed in the back of the patrol car while Dan's vehicle was searched. While in the back of the patrol car, Dan told Pat: "They're going to find the drugs in my backpack. I'm going to jail for sure." Officer Ben stood by the patrol car listening to the two men talk and captured Dan's statement to Pat about the drugs on his body camera. Dan was not aware that Officer Ben was standing nearby or heard what Dan said.

During the search of the vehicle, Officer Oscar located one bag of cocaine in the backpack in the backseat where Dan's wallet was located. The officers also searched the trunk of

the vehicle. In the trunk, the officers found a duffel bag that contained another plastic bag of cocaine.

Officer Oscar arrested Dan and Pat and took them to the police station. On the way, Officer Oscar told Dan and Pat: “We found all the drugs in the car. Just tell me who the drugs belong to and they might go easier on you for cooperating.” Dan panicked, apologized to Officer Oscar, and said: “I know I shouldn’t have had all that cocaine in my bags.” Pat told Officer Oscar: “I already told you, I’m not saying anything.”

Your supervisor in the State Attorney’s Office asked for your help with this case. Prepare a memorandum analyzing whether Dan and Pat can properly be charged with possession of the drugs found in: (A) Dan’s pocket; (B) Pat’s pocket; (C) the backpack; and (D) the trunk. Your memorandum should discuss the legality of the searches and seizures described in the facts and the admissibility of Dan’s and Pat’s statements.

SELECTED ANSWER TO QUESTION 2

(February 2024 Bar Examination)

Memorandum

To: Supervisor

From: ASA

RE: Dan and Pat

This Memorandum will address whether Dan and Pat can be charged with possession of the drugs found in Dan's pocket, Pat's pocket, the backpack and the trunk as well as the admissibility of Dan's and Pat's statements.

Seizure of Dan and Pat

Police must have reasonable suspicion or probable cause to effectuate a traffic stop. During a traffic stop, all occupants of the vehicle are considered to be seized. Although an officer generally must have particularized suspicion for an individual, courts have determined that an officer can constitutionally prevent occupants from leaving the area.

Here, the vehicle that Dan as driving had a broken license plate tag. This gave Officer Oscar probable cause that a traffic law had been broken, and he could lawfully effectuate a traffic stop. When Pat then tried to leave the area, Officer Oscar told him to stay and to remain in the vehicle. He had the right to make Pat stay during the duration of the stop.

Open Air K-9 Sniff

In Florida, an officer is permitted to have a K-9 police dog conduct an open air sniff of the air surrounding the vehicle so long as the sniff is done while the traffic stop is being completed. The sniff cannot delay the traffic stop beyond that time that the traffic stop should be completed. However, if a permitted open air sniff is conducted and does lead the K-9 to alert, that has been held to be sufficient probable cause that the vehicle contains contraband.

Here, the K-9 conducted an open air sniff while Officer Oscar was writing the traffic ticket. This would be permitted under Florida law. Dan and Pat may argue that the open air sniff unreasonably delayed the stop. However, based on the facts given, a court would likely find that the open air sniff was permissible.

Searches and Seizures

The Fourth Amendment to the United States Constitution as well as Article 1 Section 12 of the Florida Constitution prevent unreasonable searches and seizures. Searches without a warrant are presumed to be unreasonable unless they fall under certain enumerated

exceptions. Some of these exceptions include consent, automobile exception, exigent circumstances, and plain view exception. The automobile exception provides that people have a lesser expectation of privacy in a vehicle due to its more public nature than, say, a residence, and because it is easily moved. Consequently, in Florida, police may search an automobile when they have probable cause. They do not need a warrant.

Here, when the K-9 gave a positive indication that gave the police probable cause to search. They had the right to have Dan and Pat exit the vehicle and to briefly detain them in an investigatory detention in order to dispel their fears as to whether there was evidence of a crime located within the vehicle.

Search of Dan's Pocket- Consent

As discussed earlier, consent is a valid exception to the warrant requirement. Consent after an unlawful detention is presumed to be coerced. However, valid consent given during a lawful intention allows the police to search, even when they would not otherwise be permitted to. Consent must be freely given and not the result of duress or coercion. Consent may be withdrawn at any time, and it may be limited to certain things or areas.

Here, the police asked Dan permission to search his pockets. As discussed earlier, this was during a lawful detention. Dan did not hesitate and said "sure, go ahead." This gave Officer Oscar the consent he needed, and he conducted a lawful search of Dan's pocket's. Consequently, if Dan attempts to have the bag of cocaine suppressed, a court would likely deny his motion.

Search of Pat's Pocket- Terry Frisk

During a lawful traffic stop, police may conduct a cursory search of a suspect's person, known as a Terry frisk, if the officer has a reasonable basis to believe that the suspect is armed and dangerous. The suspicion must be particularized, and cannot be based on merely a hunch. The search can only be to dispel a believe that the suspect is armed. It must be limited in its scope. If the officer does not feel what it likely to be a weapon, or anything else that is immediately incriminating based on the plain feel doctrine, then the search must be terminated.

Here, Pat did not consent to a search of his person. He actually objected to the search. The officer replied "I am just searching your pockets to make sure you don't have anything you're not supposed to." If Pat files a motion to suppress the three bags of heroin that were found on him, his motion will likely be granted. Officer Ben did not have any objectively reasonable grounds to believe that Pat was armed and dangerous. Therefore, this search was likely unlawful.

Fruit of the Poisonous Tree

Under the doctrine of fruit of the poisonous tree, evidence that is unlawfully obtained will be suppressed and not able to be used in the State's case in chief at trial. However, if the

police obtained the same evidence by another lawful means, the evidence will not be suppressed.

Inevitable Discovery

If police would have inevitably discovered evidence, then a court likely will not suppress the evidence. Here, a court would likely find that the evidence in Pat's pocket would have been found during a search incident to arrest for the cocaine found at least in the trunk of the vehicle. Police can arrest multiple individuals for the same item when they have constructive possession of the item. Based on the fact that Pat's pockets would have been searched at arrest, a court would likely not suppress the bags of heroin found in his pocket.

The Backpack and Duffle Bag

When police are permitted to search a vehicle based on probable cause, they may search the entire vehicle and any containers in the vehicle. Here, police searched the backpack as well as the trunk. They were permitted to conduct such searched, and that evidence can be used against either Dan or Pat, or both of them.

Constructive Possession

A person need not be in actual physical possession of an item to be convicted of possessing that item. A person may be convicted for constructive possession of an item. Constructive possession is the intent to exercise dominion and control of an item. Here, Ben will likely be charged with the drugs that were found in the backpack. This is because he had actually reached into the backpack to get his wallet, signaling to the officer that the backpack belonged to him, or at least the items in the backpack were his. Additionally, he made a statement in the patrol vehicle claiming ownership of the drugs in the backpack. So he will likely solely be charged with the backpack's contents.

Regarding the drugs found in the duffle bag in the trunk, police will likely look inside the duffle bag for any clues as to who the bag belongs to. This could possibly be receipts, identification cards, or mail. If no such identifying items are found, both Pat and Dan will likely be charges with the drugs in the duffle. And both could be convicted of possessing the same items, as discussed previously.

Expectation of Privacy

In order to challenge a search, a person must have a reasonable expectation of privacy in the area being searched. The expectation must be one that society is prepared to recognize. A passenger in a vehicle typically cannot claim an expectation of privacy, except in those items in which he has a possessory interest. Here, Pay may not be able to challenge the search of the duffle or backpack, unless he admits and can show that those items belong to him.

Miranda

The Fifth Amendment protects individuals from being forced to be a witness against themselves when compelled by state actors. Police officers are state actors. Admissions made after being interrogated while in custody are presumed to be coerced unless the individual was warned of their Miranda rights. That is, they must be warned that they have the right to remain silent, that anything they say can be used against them, that they have the right to an attorney, and that an attorney will be provided for them if they cannot afford one. Miranda is only required during custodial questioning. A person is in custody if a reasonable person in his position would not feel free to leave. Questioning may be actual questions, or it may be statements that are designed to illicit incriminating information.

Here, both Dan and Pat were given Miranda warnings. They invoked their rights to remain silent and then were placed into the patrol vehicle. They then spoke to each other where Dan told Pat that the police were going to find the drugs in his backpack. This statement was made while Dan was in custody, as he was in the patrol vehicle, and he was not free to leave. A reasonable person certainly would not feel free to leave. However, Dan made this statement to Pat voluntarily. The officers were not questioning them, so no Miranda violation was committed. The statement was also not made under duress or coercion.

Dan also cannot claim that there was an invasion of privacy with the statement that he made. He does not have a reasonable expectation of privacy in the back of a patrol car. Therefore, Dan's statement will likely be admissible and able to be used against him.

Conclusion

In conclusion, all of the evidence will likely be admissible. The drugs found in Dan's pocket may be suppressed based on an unlawful Terry frisk, but the court could let that in as an inevitable discovery. Dan's statement will also likely not be suppressed because it was freely given and not coerced.

QUESTION NUMBER 3

FEBRUARY 2024 BAR EXAMINATION – US CONSTITUTIONAL LAW/TORTS

Commissioner Miller is a Lee County commissioner. When she was elected, she created a Facebook page to facilitate hearing from citizens. The page included the statement: "I want to hear from Lee County citizens: requests, criticisms, compliments, or just your thoughts!" The page identified Commissioner Miller as a "Government Official" and included a "News Feed" of posts, in reverse chronological order, from Commissioner Miller.

In the News Feed, Commissioner Miller posted notifications about upcoming board meetings and official actions by the board of commissioners. She also used the News Feed to explain her positions on matters relevant to her work as a county commissioner. The News Feed allowed other Facebook users to reply to her posts with their own comments, which were visible to anyone viewing the Facebook page.

Last week, the Lee County board of commissioners voted to approve a real estate developer's plan to build a resort hotel on beachfront property. The plan was controversial because of concerns about the project's environmental impact. Commissioner Miller voted for the project after making public statements opposing it.

Smith learned about the vote while watching the news on TV. He was upset with the outcome and was stunned by Commissioner Miller's vote. He went on Commissioner Miller's Facebook page and posted: "Commissioner Miller is corrupt! She sold out our environment to real estate developers in shady dealings. The truth will come out: She cannot be trusted!"

The next day, Smith logged on to Facebook to see if anyone had commented on his post. When he tried to access Commissioner Miller's page, Facebook notified him that he had been banned from the page. This meant that he could no longer post comments or view posts on the page.

Later that day, Smith received an email from a lawyer on behalf of Commissioner Miller. The email stated:

> Commissioner Miller's Facebook page is intended to promote civil discourse about legitimate issues in Lee County. Commissioner Miller has no obligation to host defamatory content on her Facebook page. Because of your defamatory remarks about Commissioner Miller, she has banned you from her Facebook page for 30 days. Commissioner Miller reserves all rights, including banning you permanently from her Facebook page and pursuing a civil action against you, should you continue to defame her.

Smith seeks your legal advice. He wants to bring a lawsuit challenging Commissioner Miller's decision to ban him from her Facebook page. He also wants to know whether there is any merit to a defamation lawsuit against him. You asked Smith whether he knew of improper behavior by Commissioner Miller. Smith replied: "I don't know about any bribe or secret meeting, but I'm not stupid. Politicians don't just change their minds like that. I'm convinced that the whole story will come out eventually and I plan on continuing to post my views on Miller's page when the ban ends."

Prepare a memorandum as follows:

A. Discuss whether Smith can satisfy the case-or-controversy requirement under Article III of the U.S. Constitution if Smith brings a federal lawsuit.

B. Discuss whether Miller violated the U.S. Constitution by banning Smith from the Facebook page.

C. Discuss the merits of a defamation claim by Miller against Smith.

SELECTED ANSWER TO QUESTION 3

(February 2024 Bar Examination)

Memorandum

To: Smith

From: Me

Re: You and Comm'r Miller

You asked whether you would have standing to bring a federal lawsuit in federal court, whether you have a claim that Miller violated your constitutional rights under the U.S. Constitution, and whether Miller has a defamation claim available against you. In short, you will be able to show that the case-or-controversy requirement is met and you will be able to succeed in claiming that the First Amendment was violated (as well as a violation of the Florida Constitution, which you did not ask about). And Miller does not have a defamation claim against you.

1) Standing

The United States Constitution describes the judicial power as covering cases or controversies. This generally means that federal courts cannot provide advisory opinions. One key element of the case-or-controversy requirement is that a party have "standing" to bring their case. This means that a plaintiff must allege to a court that they have suffered a cognizable, concrete injury that was caused, is being caused by, or will reasonably certainly be imminently caused by the defendant and that the sought court action would be likely to redress such injury.

Injuries do not need to by physical, but they must be actually cognizable and concrete, and they must have happened, be happening, or be reasonably certain to imminently happen. Violations of constitutional rights are recognized as valid injuries, including First Amendment violations. Here, you will be claiming that your right under the First Amendment to the United States Constitution to political speech and to petition your government for grievances was violated, which is an injury recognized under Uzegbuenam and the Trump v Twitter case. You have suffered this injury by being blocked, you are continuing to suffer this injury while you are blocked, and you are reasonably certain to again be blocked after the probationary period ends because you intend to continue posting your views on the page. Because Miller actually and proximately caused that injury by being the one that violated your rights specifically, the causation requirement is met as well. And redressability is met because a federal court could issue an injunction requiring Miller to unblock you and cease his violation of your constitutional rights and to pay nominal damages (because actual damages will be impossible to prove here) for the violations heretofore committed.

Because the probationary period is so short (only 30 days) it is very possible that the

probationary period will end before any lawsuit becomes viable. While there is a general mootness doctrine that results in cases being dismissed if a change in circumstances has rendered the case no longer viable, you will continue to be entitled to nominal damages even if you are no longer entitled to an injunction. And regardless, you should remain entitled to an injunction under the exception to mootness for issues capable of repetition yet evading review, given that you intend to continue posting similar statements and you can expect future similar actions to be taken.

Though you did not ask about Florida courts, you would likely have standing there as well, either in the circuit courts or through invoking the Florida Supreme Court's discretionary original jurisdiction over writs of quo warranto petitions under Pooser, Whiley, and Thompson as a Florida citizen and taxpayer.

2) Constitutional Merits Claim

The First Amendment to the United States Constitution, as incorporated by the Fourteenth Amendment to the same, protects individuals' rights to freedom of speech, religion, association, petition for grievances, and one more thing not relevant here. Congress [and the states] shall make no law infringing on those rights. This covers actions beyond formal laws and prevents individual government actors' discretionary actions from violating those same rights as well. Because counties are constitutional subdivisions of the State and thus are state actors, and because Miller is a County Commissioner, he is an individual government actor here. The United States Court of Appeals for the Second Circuit has even held that individual officeholders cannot block or otherwise prevent their individual constituents from accessing and commenting on their public social media posts, as a general rule. Though we are in the Eleventh Circuit and the court in your case is not bound by this decision, out-of-circuit appellate decisions are highly persuasive when not contradicted by local precedent.

Here, Miller created a limited public forum when he created a public Facebook page, used for public purposes, indicating she was a public official, and held out as a means of interacting with said public official. She then restricted your access to that public forum based on the content of your speech. That violates the First Amendment.

The government cannot provide for a prior restraint from or punishment for speech in a public forum based on its content outside of very limited exceptions such as incitement to imminent violence, fighting words, defamation, true threats, etc. The only of these that might be relevant here is defamation, which, as described below, does not apply here. If the government wants to engage in content-based discrimination it must satisfy the strictest scrutiny; its restriction must be narrowly tailored (meaning the least restrictive means possible) to a compelling government interest (which is the highest level of interests recognized by the doctrine). Miller, as the government here, does not have a compelling interest in preventing you from expressing disagreement with her public votes or accusing her of not properly doing her job. And even if she did, the least restrictive means available would likely be responding to and indicating why you are wrong. As a result, she cannot satisfy this required scrutiny and violated your rights by blocking you.

Miller might claim that this is a time, place, or manner restriction, which require a less exacting scrutiny, but he will fail in doing so. The government can reasonably regulate the times, places, or manners in which speech is made, but those restrictions must be content neutral and they must be narrowly tailored (meaning reasonably proportionate) to an important government interest. As noted above, however, these were content-based restrictions; Miller said so through his lawyer in the notice that you were blocked.

Again, you did not ask about Florida law so I will not go into detail, but you can also likely bring a substantive due process claim for violation of your right under the Declaration of Rights to instruct your government officials because, as described above, strict scrutiny has not been satisfied.

3) Defamation

Miller will not be able to bring a successful defamation claim against you. Defamation is a tort that protects people from false and damaging statements made against them. A plaintiff can bring a defamation claim when the defendant has spoken (either orally (slander) or in writing (libel)) about facts concerning the plaintiff in a way that unjustifiably harms the reputation of the plaintiff. Truth is an absolute defense to a defamation action. And mere opinions cannot be defamatory. Further, there exists slander per se, which, in Florida, allow a plaintiff to shift the burden to the defendant when the allegedly defamatory speech is a claim that the plaintiff violated the law, is unfit to conduct their business, etc.
And furthermore, there is a heightened standard according to NY Times v Sullivan that requires public officials, celebrities, and other people of public importance to satisfy a heightened burden to prove defamation. A public official such as Miller needs to show that a defendant was acting with "actual malice" when they made the allegedly defamatory statements. This means that the defendant actually knew that his statement was false or acted with reckless disregard for the truth.

Here, you cannot make out a defense of actual truth of your statement because you do not have any evidence to that end. But it is unlikely you will be found to have possessed actual malice. First, you do not have actual knowledge that your statement that he is corrupt is false. Indeed, you genuinely believe it is true. Second, though Miller will argue that you spoke with reckless disregard for the falsity of your statements, she will not be able to show that that standard has been met. You have a good faith belief that he is being improperly influenced because her public statements before the vote indicated that she would do one thing, and (in an industry that is known to have had brushes with corruption, real estate) voted the opposite way without providing any justification (as she typically would do on the page). The claim for corruption was likely not made with reckless disregard for the truth and the actual malice standard cannot be met. Further, your statement that she "cannot be trusted" is mere opinion that is not actionable anyway.

4) Conclusion

In sum, you will be able to bring your constitutional claim in federal court in accordance

with the Article III judicial power. You will likely be successful in bringing a First Amendment claim against her. And she will likely not be successful in bringing a defamation claim against you.

QUESTION NUMBER 1

JULY 2024 BAR EXAMINATION – CRIMINAL LAW & CONSTITUTIONAL CRIMINAL PROCEDURE/ETHICS

David robbed a courier delivering $15,000 in $20 bills to a business. During the robbery, David shot the courier in the leg. Several witnesses saw the event.

After an investigation, the police obtained a valid arrest warrant for David for armed robbery. A team of police officers led by Officer Jones went to David's known residence. From outside the house, Officer Jones announced that the police had a warrant for David's arrest and ordered everyone to exit the house.

Five people exited, including David, who was arrested and handcuffed. Officer Jones told David and the other people that a team of officers was going to enter the home to secure it. Officer Jones asked David if there was anyone else in the house, or anything in the house that could harm the officers. David said nothing. Officer Jones said to David: "If there's anything that could hurt my team before we go in…" David interrupted Officer Jones and said that there was a firearm in a bedroom drawer.

Officer Jones authorized the team to enter the home. They did not search for the firearm. Instead, they searched closets, behind doors, under beds, and in other places where a person could have been hiding. They found no one else in the home.

David was transported to a police field office where he was interviewed. Officer Smith read David a complete Miranda warning from his department's pre-printed card.

When Officer Smith read that David had a right to have a lawyer present for questioning, David said, "hold on, hold on." Officer Smith paused, but then completed administering the standard warning. Next, Officer Smith asked if David was willing to answer questions without a lawyer present, to which David stated, "I don't really agree with that one."

Officer Smith replied that she wasn't asking if David agreed, she was just telling David that he had a right to have an attorney present during questioning. Officer Smith added: "If you decide to have an attorney present, we're not going to talk about the case until then. But if you want to talk now, we can talk now." Officer Smith added: "You can agree to talk now and always change your mind later."

David replied, "I understand." Officer Smith asked David whether that meant David would speak to Officer Smith without an attorney. David responded, "Yes."

In response to Officer Smith's questions, David denied the robbery. David admitted telling Officer Jones that there was a firearm in a bedroom, but David denied that the firearm

belonged to him. When Officer Smith asked David about firearms in the house, he again stated that there was a gun "in a drawer" in "the last room to the right." He also agreed that the last room to the right was the bedroom that he occupied.

While David was at the police station, officers remained at the residence attempting to obtain a search warrant. Along with the factual basis used to obtain the arrest warrant, the search warrant application added David's statements to police before and after he received the Miranda warning.

The search warrant was issued and the police searched the house. The police seized $12,000 in $20 bills that were in the freezer. The police also found the firearm from the bedroom drawer that David had mentioned to Officer Jones. Both items were within the authorized scope of the warrant.

David was brought to his first appearance on the armed robbery charge, appointed an attorney, and was released after posting bond. David had dinner with his friend, Sarah. He told Sarah about the armed robbery charge and admitted to her that he was at the business where the crime happened.

David did not know that Sarah was facing criminal charges herself. Sarah contacted Prosecutor about arranging a deal in exchange for cooperation. Prosecutor told Sarah that if she could obtain valuable information from David about the armed robbery, Prosecutor would agree to dismiss Sarah's charges. Sarah then met with David again, asked him more questions, and David confessed the robbery.

Prosecutor emailed Sarah's witness statement to David's attorney along with a plea offer. Prosecutor said that the plea offer would expire in one week and would not be renewed. Because David's attorney was distracted by other cases, the offer expired before the attorney relayed it to David.

Prepare a memorandum of law for the trial court judge as follows:

A. Discuss the admissibility of David's statements to the police before and after the Miranda warning.

B. Discuss the legality of the police searches of David's house and the admissibility of the cash and the firearm found in the house.

C. Discuss the admissibility of David's statements to Sarah.

D. Discuss any ethical or constitutional issues raised by David's attorney's conduct.

SELECTED ANSWER TO QUESTION 1

(July 2024 Bar Examination)

To: Trial Court Judge From: Clerk

Re: David's Armed Robbery Charge

A. Admissibility of David's Statements to Police before and after Miranda Warning:

Miranda Violations:

The issue is whether David's statements to the police are admissible. The Fifth Amendment to the United States Constitution guarantees the right to counsel before formal charges have commenced. Miranda warnings include (1) the right to remain silent, (2) the right to counsel, (3) the fact that anything you say may be used against you, and (4) that if you cannot afford an attorney, one will be appointed for you. Miranda Warnings only apply when the individual is placed under custodial interrogation. Custody means that a reasonable person would not feel free to leave. Interrogation means that the police officers are asking questions likely to have an incriminating response. If a statement is made in violation of Miranda, the exclusionary rule applies. Thus, the statement will be suppressed and the government may not use it against an individual. Voluntary statements need not get Miranda warnings to be admissible.

"There was a firearm in the bedroom drawer."

Here, David was arrested and handcuffed. This is custody because a reasonable person would not feel free to leave. David was asked if there was anyone else in the house or anything that could hurt the officers. While this question is likely to produce an incriminating response and may be seen as testimonial, it is also likely justified in the name of officer safety. An officer is not asking about the circumstances of the crime or anything else like that, he is simply asking whether it is safe to enter the home to conduct a protective sweep. Thus, David's initial statement that there was a firearm in the bedroom drawer is likely not in violation of Miranda.

Waiver of Miranda:

The issue is whether David's statements to the police at the station are admissible. The Fifth Amendment to the United States Constitution guarantees the right to counsel before formal charges have commenced. Miranda warnings include (1) the right to remain silent, (2) the right to counsel, (3) the fact that anything you say may be used against you, and (4) that if you cannot afford an attorney, one will be appointed for you. Miranda Warnings only apply when the individual is placed under custodial interrogation. Custody means that a reasonable person would not feel free to leave. Interrogation means that the police officers are asking questions likely to have an incriminating response. If a statement is

made in violation of Miranda, the exclusionary rule applies. Thus, the statement will be suppressed and the government may not use it against an individual. The issue is whether David validly waived his Miranda warnings. An individual may waive their Miranda rights if that waiver is knowing, intelligent, and voluntary. If an individual invokes their right to counsel, it must be scrupulously honored. If an individual invokes their right to remain silent, all questioning must stop until the individual has returned back to their regular life for at least 14 days.

Here, David was taken to the police field office where he was interviewed. At this point, David was in handcuffs and transported by the police to the police station. A reasonable person would not feel free to leave, and he was in custody. Additionally, he was interviewed. Thus, this is likely to produce an incriminating response. At this point, David received his full Miranda warnings. However, the government will argue that David waived the warnings. To invoke Miranda protections, the statement must be clear and unequivocal. When David was told about his right to counsel, he said "hold on." This is not an invocation of the rights nor is it a waiver. Next, David said "I don't really agree with that one." This is not a clear statement, and does not show that he is invoking his right to counsel. He was just stating that he did not agree. Thus, the government was likely permitted to continue questioning. Eventually, David said "I understand" and began answering questions. Although David will say that this was not a waiver and that it was not completely knowing, intelligent, and voluntary, it is likely to be construed by the court as a waiver. Thus, his next statements about the robbery, firearm, and bedroom are likely admissible.

B. Legality of Police Searches and Admissibility of Cash and Firearm:

Protective Sweep and Arrest:

The issue is whether the first search of David's home were unreasonable searches in violation of the Fourth Amendment. The Fourth Amendment to the United States Constitution guarantees all individuals the right to be free from unreasonable searches and seizures. An unreasonable search occurs when a government actor violates an area where an individual has a reasonable expectation of privacy. To conduct a valid search, the government must have a warrant based on probable cause issued by a neutral and detached magistrate. Probable cause means that it is reasonably likely the crime occurred. Arrests in public are generally permissible. An arrest in the home requires a warrant based on probable cause issued by a neutral and detached magistrate. Probable cause means that it is reasonably likely the crime occurred. An arrest in the home may be valid if there are exceptions to the warrant requirement such as exigent circumstances, fleeing felon, or an emergency. Warrants must be current, not stale, based on good faith, and must be limited to items or people specified within. If an officer has an arrest warrant, they may not search the home because they do not have a search warrant. However, one exception to the warrant requirement for homes is a search incident to arrest. The officers may search an individual and their immediate grab area. Another exception is the protective sweep. If an officer believes that there are other individuals in the home that

may be dangerous, the officer may search for the other individuals in places where the individuals could be. This is justified by officer safety concerns.

Here, the police obtained a valid arrest warrant for David for armed robbery. This means that the warrant was based on probable cause, issued by a neutral and detached magistrate. The team went to David's known residence, which is required for an arrest in the home. The officers knocked and announced, which is also required. The officers ordered all of the people out of the home. They can argue that this was for officer safety.

The officers then asked Jones if there was anyone in the home. Jones did not respond to this question. Thus, the officers did not know whether there was anyone else inside the home. As a result, the officers were permitted to conduct a protective sweep for officer safety. The officers found no one else in the home, but only searched behind doors, under beds, and in other places where a person could have been hiding. This was not an illegal search. The arrest was also legal pursuant to a warrant based on probable cause issued by a neutral and detached magistrate.

Search #2

The issue is whether the second search of David's home was unreasonable in violation of the Fourth Amendment. The Fourth Amendment to the United States Constitution guarantees all individuals the right to be free from unreasonable searches and seizures. An unreasonable search occurs when a government actor violates an area where an individual has a reasonable expectation of privacy. To conduct a valid search, the government must have a warrant based on probable cause issued by a neutral and detached magistrate. Probable cause means that it is reasonably likely the crime occurred. Warrants must be current, not stale, based on good faith, and must be limited to items or people specified within. The police may only look in areas where the contraband may reasonably be located. Anything beyond that exceeds the scope of the warrant and is unconstitutional. However, one exception to the warrant requirement for homes is a search incident to arrest. The officers may search an individual and their immediate grab area. Another exception is the protective sweep. If an officer believes that there are other individuals in the home that may be dangerous, the officer may search for the other individuals in places where the individuals could be. This is justified by officer safety concerns. The search warrant may not be based upon information obtained in violation of the Constitution.

Here, the second search was pursuant to a search warrant. It must have been issued by a neutral and detached magistrate, based on probable cause. The search warrant may not be based upon information obtained in violation of the Constitution. Because the police validly obtained David's statements, they were able to search the home. They were able to search the home for the firearm where it was specified and for evidence of the armed robbery. David will argue that the search exceeded the scope of the warrant because they looked inside the freezer. However, the search was likely valid because that is a place where the evidence of the robbery (money) could reasonably be. Thus, this search was likely valid as it was authorized by the scope of the warrant.

C. Admissibility of David's Statement to Sarah:

Right to Counsel

The issue is whether David's statements to Sarah violated his right to counsel. The Sixth Amendment to the United States Constitution guarantees an individual the right to counsel in criminal cases. This is also expressly guaranteed in the Florida Constitution. This right to counsel attaches after formal proceedings have begun. The government may not question an individual without their counsel present. It is automatically invoked, the accused need not invoke it.

Here, David was brought before a judge at first appearance and appointed counsel. Thus, the Sixth Amendment clearly attaches. David's first statements to Sara did not violate the Sixth Amendment because they were made on his own. Additionally, Sara was not yet working for the prosecutor so it was not government action. However, David's second statements to Sara where he confessed the robbery were pursuant to Sara's immunity agreement. Thus, Sara was a government actor. As a result, those statements should not be used against David because they would violate the Sixth Amendment.

D. Discuss any ethical or constitutional issues raised by David's Attorney's Conduct:

Obligation to Convey Plea Offers

The Issue is whether David's attorney violated any ethical rules by failing to convey the plea offer before it expired. In Florida, attorneys have an obligation to convey plea offers to their clients. It is ultimately up to the client to make certain decisions in their cases, such as whether or not to accept a plea, whether the client wishes to testify, or certain other decisions. An attorney must convey a plea offer to a client regardless of whether it is a good offer. An attorney may provide counsel to the client about whether it is in the client's best interests, but the final decision rests with the client. Here, Prosecutor emailed Sarah's witness statement to David's attorney along with a plea offer. The plea offer expired in one week and would not be renewed. Thus, David's attorney had an obligation to convey the plea to the client and to counsel him on whether it was a good deal for him. David's attorney's failure to counsel David is an ethical violation.

It is within the prosecutor's rights to say that the plea expires in one week and will not be renewed. However, it is best practice to convey the plea offer to the attorney personally by phone or on the record.

Duty of Competence and Diligence

The issue is whether David's attorney violated any ethical rules by failing to convey the plea offer before it expired. In Florida, attorneys have a duty of competence and diligence to their clients. Attorneys must keep in contact with their clients and keep them apprised of developments in their client's cases. Attorneys must check their emails and respond to

clients and opposing counsel within a reasonable time. Here, Prosecutor emailed Sarah's witness statement to David's attorney along with a plea offer. The plea offer expired in one week and would not be renewed. The attorney had a duty to David to keep David updated and to answer emails. This is likely an ethical violation of competence and diligence. However, the attorney will argue that he was distracted by other cases. Regardless, the attorney must provide each client with a duty of diligence and competence.

Ineffective Assistance of Counsel

The Sixth Amendment to the United States Constitution guarantees an individual the right to counsel in criminal cases. This is also expressly guaranteed in the Florida Constitution. The right to counsel includes the right to effective assistance of counsel. An individual may raise an ineffective assistance of counsel claim when their attorney has performed in a deficient way that is not up to community standards. This deficiency must have actually prejudiced the client in such a way that but for the deficiency, there is a reasonable probability that the outcome would have been different. Here, Prosecutor emailed Sarah's witness statement to David's attorney along with a plea offer. The plea offer expired in one week and would not be renewed. If David ultimately takes a less favorable plea or is sentenced to a longer term of incarceration, he may be able to argue ineffective assistance of counsel. David will have to show a reasonable probability that if his attorney had presented him the plea offer, then he would have taken it. Additionally, he must show that his outcome is worse. Thus, depending on the outcome, David may be able to raise ineffective assistance of counsel in violation of the Sixth Amendment.

QUESTION NUMBER 2

JULY 2024 BAR EXAMINATION – FAMILY LAW/FLORIDA CONSTITUTIONAL LAW/ETHICS

Henry and Wanda were married in 2000 in Maine. After the wedding, the couple bought a home and resided in Palm Beach County, where they raised their two children.

During the marriage, Wanda's career has provided the vast majority of the couple's earnings, and she has generally controlled the couple's finances.

Wanda founded a successful technology company in 1998, of which she has always been the majority owner and CEO. The company's value has grown considerably while Wanda has been CEO, and many industry experts credit the company's growth to her leadership. Given the company's success, Wanda is a well-known public figure. Wanda's interest in the company is currently valued at $100 million, and that interest was valued at $4 million at the time of Henry and Wanda's wedding. Wanda's salary has varied throughout her time at the company, but it has been in excess of $5 million per year since 2010. Wanda and Henry live a lavish lifestyle, including frequent travel and expensive meals.

Henry has not consistently worked during the marriage and is currently unemployed. Instead, he has generally stayed home to attend to the couple's children and the family home while Wanda worked long hours at the office. Henry graduated from college with a history major, but has never worked in that field and has no graduate degree. Before Wanda's career took off, Henry had an office job with an annual salary of $50,000.

Henry has a bank account solely in his name that had $15,000 in it when Henry and Wanda married. During the marriage, Henry used the account to pay for some of his personal expenses. He would receive money from Wanda occasionally and deposit it into the account. There is currently $20,000 in the account.

In 2017, Wanda's father died. He left Wanda $1 million in his will.

Two years ago, the couple began experiencing problems in their marriage, and Wanda decided to move to Austin, Texas, where her company maintains an office. She has lived there ever since. Henry still lives in the couple's marital home in Palm Beach County. The couple's two children are now adults and live on their own.

Henry intends to file a petition for dissolution of marriage. Although Henry does not have access to significant sums of money, he seeks to retain Lawyer to represent him in the divorce proceedings. Henry seeks alimony from Wanda. In addition, Henry states that Wanda is concerned about the media obtaining information about her personal finances

through the divorce. He believes that Wanda will not want to make any public financial disclosures during the proceedings.

At a meeting with Lawyer, Henry expressed his concern about not being able to pay Lawyer's hourly billing rate if the case requires significant litigation. Lawyer proposed a fee arrangement under which Lawyer would receive a 25% share of any judgment that Henry receives in the divorce. Henry asked whether there are any alternatives to Henry paying Lawyer's hourly rate or the 25% fee arrangement.

Prepare a memo that addresses the following:

A. Whether the parties' assets will be considered marital or non-marital in the divorce.

B. The likelihood of Henry receiving alimony from Wanda.

C. Whether Henry can obtain a dissolution of marriage in Florida, given Wanda's Texas residence.

D. Under Florida law, each party to divorce proceedings must file a financial affidavit with the court that sets forth assets and liabilities. Assume that Wanda requests to file her financial affidavit under seal. Discuss any issues raised under the Florida Constitution by such a request.

E. Discuss any ethical issues raised by Lawyer's proposed 25% fee arrangement and any alternatives to Henry paying Lawyer's hourly rate or the 25% fee arrangement.

SELECTED ANSWER TO QUESTION 2

(July 2024 Bar Examination)

To: Lawyer

From: Junior Lawyer

RE: Memorandum regarding Henry and Wanda's marital issues and questions

(1) Henry (H) and Wanda's (W) assets (marital versus non-marital)

Marital Assets: Equitable Distribution

When dividing a couple's assets in Florida upon the dissolution of a marriage, Florida follows the equitable distribution approach, which presumes a 50/50 split between the spouses. Marital assets include: 1) assets or debt acquired by either spouse during the marriage or in both spouse's name during the marriage, 2) appreciation or enhancement of non-marital assets by contributions or efforts of either spouse during the marriage, 3) payment of debt on non-marital assets with marital funds during the marriage, 4) accrual of benefit plans during the marriage (401ks, life insurance, etc.), and 5) property held as a tenancy by the entirety whether acquired before or after marriage. Non-marital assets include: 1) assets acquired before the marriage and kept separate, 2) inheritances, bequests, devises, to one spouse, in their sole name during the marriage and kept separate, 3) property exchanged for non-marital assets, and 4) passive appreciation in separate investment accounts.

H and W's home

Here, H and W's home in Palm Beach County will be considered a marital asset, as it was acquired in H and W's name after the marriage, and both of them resided in it, presumably creating a tenancy by the entirety. Regardless, it was an asset acquired after the marriage, and thus, will be considered a marital asset.

H's Bank Account

Here, H's bank account will be considered a marital asset as well, as although H had acquired the account before the marriage with $15,000 in it, he did not keep the account separate, as he deposited money he received from W into the account, and thus, commingled it with marital funds. At most, H could argue that he's entitled to keep the $15,000 before the marriage, as this was assets acquired before the marriage. However, as discussed, H did not keep them separate, as he deposited marital funds from W into his account, and thus, the court will consider the bank account marital property.

W's Company

W's company valued at $4 million will be able to be kept separate from marital assets, but the increase in value after the marriage will be considered marital assets, as W increased the company's worth through her efforts as a CEO. Thus, the valuation of the company at $4 million will entitle W to keep the $4 million from being valuated as a marital asset, but the increases in the company's worth after marriage for the years that they were married will be considered a marital asset, as it was an asset acquired by a spouse, W, during the marriage.

W's inheritance

W's inheritance will be a non-marital asset, as it was property acquired through an inheritance, in the name of one spouse, W, during the marriage, and presumably kept separate. If W didn't keep the $1 million separate from W's father, it will be considered a marital asset. However, if she kept the $1 million separate, it will be considered a separate asset as it wasn't an interspousal gift, it was an inheritance in her sole name from her father, falling into non-marital property.

(2) Henry's likelihood of alimony from Wanda

H has a very high likelihood of receiving alimony from W.

Alimony in Florida is awarded on a spouse's need and the other spouse's ability to pay. Alimony is not awarded based on fault (except for adultery and its economic impact on the marriage, discussed below). Permanent alimony has been abolished in Florida. Alimony is no longer a taxable event either for both spouse's, so a court will be more likely to award lesser alimony. There are 4 types of alimony: 1) Pendente Lite (suit money), temporary alimony awarded dissolution proceedings to maintain the status quo, 2) Bridge The Gap, alimony awarded to help transition one spouse from married to independent economic life, and cannot exceed 2 years, and is not modifiable in duration or amount, and is terminable upon the death of either spouse or the remarriage of the receiving spouse, 3) Rehabilitation alimony, alimony awarded to help one spouse obtain job qualifications or education to support themselves independently following the divorce, and cannot exceed 5 years, and involves a spouse submitting a written plan detailing their planned rehabilitation program for job training/education, and it's modifiable upon a substantial change in circumstances, completion of the plan, or non-compliance with the plan, and 4) Durational alimony, alimony awarded based on the length of the marriage, and not available to marriages less than 3 years, it cannot exceed the length of a: 1) 50% of a short-term marriage (less than 10 years), 2) 60% of a moderate term marriage (10-20 years), 3) 75% of a long-term marriage (20 years or more), and is extendable only upon an exceptional change in circumstances proven by clear and convincing evidence. Factors a court considers in determining what types of alimony to award include: 1) duration of the marriage, 2) job qualifications/education level of both spouses, 3) independent assets/economic circumstances of both spouses, 4) both spouse's economic and non-economic contributions towards the marriage, 5) which spouse will be the custodial parent of the children, 6) age/health of both spouses (ability to go back to work), and 7) adultery

and its' economic impact on the marriage (if any) and 8) sacrifices of either spouse for the marriage.

Here, H will be successful in being awarded potentially all four types of alimony. For Pendente lite, the facts indicate that H doesn't have funds to petition during the dissolution proceeding, and W has the ability to pay due to her high net worth as a CEO, and H hasn't worked at all in years due to taking care of the children. Thus, H will certainly argue for pendente lite alimony during the dissolution proceedings and will be awarded pendente lite alimony due to his need and W's ability to pay with her millions of dollars in her company and her success as a CEO.

Bridge the gap: H will also argue for bridge the gap alimony, and will likely be awarded it, as H hasn't worked in presumably nearly 20 years, taking care of the children, and before the marriage, H had an office job with an annual salary of $50,000. H should argue that he's entitled to bridge the gap alimony, as the living conditions during the marriage indicate they lived a "lavish lifestyle, including frequent travel and expensive meals," thus, a court will be more inclined to award bridge the gap alimony to H to help transition his living standards from his living standard during the marriage independent economic life. The facts indicate that W is disproportionately much more wealthy than H, so H has a strong case for arguing for bridge the gap alimony to help ease the transition to independent economic life.

Rehabilitation Alimony: H should also argue that despite that he has a history major degree from college, H hasn't worked in nearly 20 years during their marriage, and before the marriage he only had an office job with an annual salary of $50k. If H submits a detailed plan to the court involving his plan to obtain job training or education credentials such as obtaining a graduate degree, he will likely be able to obtain rehabilitative alimony. H stopped working to take care of the children during the marriage and to support W's career, thus, he made sacrifices, and noneconomic contributions taking care of the children. Moreover, H has never worked in the history field, where his degree is in, thus, a court may be more inclined to award rehabilitative alimony because the likelihood of H obtaining a job in that field after never working in it are slim.

Durational Alimony: H should also petition for durational alimony. Here, the marriage indicates that it is around 20 years, so H should be able to petition for long-term alimony. H can demonstrate a need, and W has the ability to pay. Their disproportionate wealth between them will support his request for alimony. Thus, as discussed above, H has a strong case for durational alimony. The award could not exceed 75% of the long-term marriage (20+years). If the marriage is moderate term, it could not exceed 60% of the length of their marriage, the facts do not directly indicate what the exact length of their marriage is.

In sum, H has a strong case for all types of alimony, he has sacrificed his education and career for the marriage, taken care of the children, and has minimal independent wealth, and W has the ability to work, is a high-powered CEO worth millions, and therefore will very likely be awarded all types of alimony.

(3) Henry's request for dissolution of marriage in Florida

Florida is a no-fault state. There are two grounds for dissolution of marriage: 1) one spouse indicates the marriage is irretrievably broken (spouses have fallen out of love) or 2) one spouse has been mentally incapacitated for 3 years. The only defense to divorce is a denial of the grounds, a court may order continuation proceedings or marital counseling/mediation in lieu of a divorce. All dissolution proceedings are heard in the Circuit Court in Florida. Circuit Courts have subject matter jurisdiction over divorce proceedings if the petitioning spouse has been a permanent resident of Florida 6 months prior to the commencement of the proceeding, the court need not have jurisdiction over the other spouse (it doesn't matter if the other spouse isn't a resident of Florida). Venue is proper in the county where the divorce occurred or where the petitioner is resided.

Here, H will be able to obtain a dissolution of marriage in Florida even though W moved to Texas. H is still a permanent resident of Florida, so the Circuit Court will have subject matter jurisdiction over the case, and venue will be proper in the County where H and W resided, Palm Beach County. H has resided in Palm beach County more than 6 months before the proceeding, and he's still a permanent resident. Thus, W's residence is irrelevant, and H will be able to properly have the divorce commenced and proceeded in Florida.

(4) Financial affidavit issues under the Florida Constitution (right to privacy)

W's request for her financial affidavit raises issues under the fundamental right of Access to Public Records right in Florida. W could argue that this invades her right to privacy (also a fundamental right).

<u>Access to Records</u>

The Florida Constitution expressly provides the fundamental right to Access Public and Court records, specifically for the media and newspapers. Regulations that attempt to prevent the right to access public court records will be subject to strict scrutiny, as there is a presumption of making court records publicly accessible for media and newspaper accessibility. The Sunshine law is an extension of the Right to Access court records, and provides that all governmental meetings of public officials shall be open and duly noticed to the public.

Here, W's request that she not make any public financial disclosures during the proceeding will potentially violate the right to access court records in Florida, a fundamental right. W will likely not be successful in challenging this, as she is a public CEO of a very successful technology company, and the Florida Constitution gives a very strong presumption for the access to court records for media companies. Closure of these records is only allowed if there is a public necessity and no other way to meet that necessity. W hasn't demonstrated any public necessity justifying closure, and therefore, she will likely have to make public financial disclosures during the proceedings, as withholding such disclosures would violate the fundamental right to access court records,

and the media will be allowed to access such records. As discussed below, W is a well-known public figure, her company's assets seem to be public, and thus, the right to access records will prevent W from failing to make public financial disclosures during the dissolution proceedings, and she will have to make them, and they will be available to the media.

The only way W could file under seal is if she proves a public necessity justifying such exemption, and the seal is no broader than necessary to accomplish that necessity, however this will likely fail. She may be able to argue it violates her right to privacy (discussed below), but the right to access records for media in Florida will prevail.

Right to Privacy

W could argue that this violates her right to privacy, also a fundamental right under the Florida Constitution. The right to privacy provides individuals with the right to be free from governmental intrusion into their daily lives, granting them a reasonable expectation of privacy in their day to day lives. Any regulation that attempts to deprive one of their fundamental right is subject to strict scrutiny, and the government has the burden to prove the law is necessary to achieve a compelling governmental interest, and the least restrictive means to do so.

W could argue that by requiring her to make financial affidavits that sets forth her assets and liabilities, the court is depriving of her fundamental right to privacy due to her public status as a CEO and the media's likely disclosure of her financial assets following W's disclosure. However, this argument will likely fail, as discussed above, the Right to Access Records in Florida is a very strong presumption for the media, and denial of such records is usually held to be unconstitutional absent an exceptional circumstance. W could argue that this is an exceptional circumstance, as normally media companies do not look at financial disclosures of couples in divorce, and this violates W's right to privacy. However, because it appears that W is already a well-known public figure, the valuation of her company is presumably public, the court will likely find that this isn't a violation of her right to privacy, and the access to records fundamental right will prevail.

As an aside, if W refuses to make public financial disclosures, the court can hold her in contempt, or any other tool available to the court.

(5) Ethical issues of Lawyer

Contingency Fees

Lawyer's proposed ethical arrangement is impermissible.

Contingency fees are impermissible in criminal cases or family cases where the amount is contingent on alimony, divorce settlement, or child support. Contingency fees between 15-40% are permissible, however, because contingency fees in family law matters where the amount is contingent on divorce settlements and alimony, this is impermissible.

Attorney's proposed contingency fee is prohibited under the ethical rules of Florida, as the contingency fee is contingent on the amount of divorce money that H would receive from W, which will presumably include alimony as it states "any judgment" that H receives in the divorce. Thus, the proposed arrangement is an impermissible contingency fee.

Alternative: Attorneys' fees during dissolution of marriage

H has an alternative to obtain attorneys' fees. H can petition the court to require W to pay for his attorneys' fees.

A Circuit court has broad discretion to award attorneys' fees during a dissolution of marriage proceeding. Specifically, a Circuit court may award attorneys' fees to the petitioner if they demonstrate a concrete need for such fees (due to inability of funds), and the other spouse has the ability to pay and supply the necessary funds. Factors the court will consider are the expected length of the dissolution proceeding, both party's financial assets, and either party's delay tactics/inability to cooperate.

Here, H should petition the court to ask for attorney's fees from W, and have W supply the funds to pay H's Attorney for the dissolution proceedings. H will be able to demonstrate he has a need, as H hasn't worked in years as he was taking care of the children, and that W has the ability to pay, as W is significantly more wealthy than H as a CEO of a very successful company with millions as her net worth. Moreover, it seems that W may intend to delay the dissolution proceedings by refusing to make public financial disclosures about her net worth, and the court may be more included to award H attorneys' fees.

Thus, H has a valid alternative, he should petition the court and ask for attorneys' fees from W to pay provide the necessary funds to Attorney for the dissolution proceeding.

QUESTION NUMBER 3

JULY 2024 BAR EXAMINATION – REAL PROPERTY/TORTS/ETHICS

Tenant, a 90-year-old widow, lives in a single-family rental home in Seminole County, Florida. Recently, Tenant noticed a large crack in the ceiling of the kitchen. Tenant was concerned because two years ago, a similar crack appeared in the master bedroom. The bedroom ceiling then collapsed during a thunderstorm.

While Landlord promptly repaired the bedroom ceiling collapse, Landlord has not responded to Tenant's attempts to contact him about the kitchen ceiling crack. Tenant sent Landlord a letter via first-class mail two weeks ago about the ceiling crack and enclosed photos. In the letter, Tenant also told Landlord that she intended to withhold rent until Landlord fixed the kitchen ceiling crack and terminate the lease if necessary. Since sending the letter, Tenant has left three unreturned voicemails with Landlord.

In addition to the kitchen ceiling crack, there is a pothole that is approximately one foot wide in the home's driveway. Landlord showed the pothole to Tenant when Tenant first rented the home and promised to fix it. Landlord never fixed the pothole, even though Tenant periodically reminded him about it. Tenant avoided the pothole whenever she walked or drove on the driveway.

Last month, however, Neighbor walked up the driveway to give Tenant a piece of mail that had been mistakenly delivered to Neighbor's mailbox. Neighbor had walked up the driveway to bring misdelivered mail to Tenant's home several times over the years. Tenant always thanked Neighbor for bringing Tenant her mail.

This time, Neighbor did not see the pothole because she was watching a video message on her phone. Neighbor tripped on the pothole and injured her knee.

Neighbor limped back home and her husband drove her to the emergency room. A doctor diagnosed Neighbor with a severely sprained knee and recommended that she use crutches for at least two weeks.

Tenant then received a letter from Neighbor's lawyer. The letter demanded that Tenant and Landlord reimburse Neighbor for a $3,000 emergency room bill. The letter also demanded $5,000 in lost wages from Tenant and Landlord because Neighbor, a massage therapist, was unable to work while she recovered from the knee injury.

Tenant contacted Attorney about the matters involving Landlord and Neighbor. Regarding Tenant's dispute with Landlord, Attorney confirmed that the lease between Tenant and Landlord incorporated the Florida Statutes on landlord/tenant matters in all material respects. The lease does not expire until six months from now.

Tenant also told Attorney that she did not pay her rent for this month because of the ceiling crack, even though the rent was due five days ago.

During a conflict check, Attorney found that another lawyer in Attorney's firm prepared a will for Landlord five years ago.

Prepare a memorandum that addresses the following:

A. Discuss Tenant's rights against Landlord as to the kitchen ceiling crack.

B. Discuss whether Tenant's withholding of rent gives Landlord the right to bring an eviction lawsuit against Tenant. Your discussion should also address any defenses Tenant may have in an eviction lawsuit and whether Tenant would be required to pay rent during the pendency of a lawsuit.

C. Analyze whether Neighbor has a valid claim against Tenant or Landlord and any applicable defenses.

D. Discuss whether any ethical issues preclude Attorney from representing Tenant in a lawsuit against Landlord.

SELECTED ANSWER TO QUESTION 3

(July 2024 Bar Examination)

TO: Lawyer

FROM: Bar Examiner

A. T v. L--Ceiling Crack

In Florida, there are 4 types of tenancies. Tenancy at will, for years, sufferance, and periodic. Here, this is a tenancy for years which requires a writing and that termination date be, there are two implied covenants that are applicable to a residential lease.

Implied warranty of quiet enjoyment is an implied promise that the tenant will not be disturbed in the use and enjoyment of the property. The covenant is breach by actual, partial, or constructive eviction. To establish a claim for constructive eviction, the tenant must show that there was a substantial interference, that they notified the tenant who has not fixed the problem within a reasonable time and then vacate the premises. Here, the Tenant will argue that the crack is the kitchen ceiling crack in combination with the bedroom ceiling crack is a substantial interference with her ability to use the premises, and that she attemoted numerous times to contract the landlord and given him notice of the other crack but he failed to fix the issues. The landlord would argue that the ceiling crack is not a substantial interference because she has not had not stop using the premises of the kitchen, and that she does not have a cause of action because she is still in possession. Overall, because she is still in possession, there is no claim of constructive eviction.

Implied warranty of habitability is an implied promise in residential leases only that is not waivable and provides that the premises are suitable for basic human habitability. It is breached when there is a condition such as no running water or plumbing that makes the premises inhabitable. If this occurs, the tenant may engage in any of the following: repair and reduce their rent, terminate the lease and vacate, withhold rent until the problem is fixed, remit their payment that is deducted for the cost of repairs. Here, Tenant will argue that the Landlord has breached this warranty because there is a crack in the ceiling of the kitchen, the bedroom ceiling has already collapsed during a thunderstorm, and there is a pothole in the driveway. all of which, are conditions that are not suitable for basic human occupancy by a 90 years old woman because they indicate that there is some structural defect in the home. Moreover, this is Florida, a home's roof should be able to withstand thunderstorms. Given this, the tenant is permitted to withhold rent. the landlord will argue that the premises is suitable for human occupancy because she has been living there for 2 years without any injuries and that she cannot withhold payment because he was never notified of the defect. However, the tenant can argue that she tried to tell him the issue and he ignored it. Moreover, she is entitled to withhold the rent because of the breach.

Landlord duty to make reasonable repairs attributable to ordinary wear and tear.

B. Withholding rent and eviction.

In Florida, if a landlord and tenant have a dispute that is less than $50,000 it must be filed in county court. If the landlord is seeking to evict the tenant for the non-payment of rent, and the tenant has any other defense other than the non-payment of rent, then she can withhold the rent but the withheld rent must be deposited with the court to be held in escrow during the pendency of the litigation, and any other rents that accrue during the litigation must also be deposited into the account as the action progresses.

Generally, a tenant has 3 duties: (1) not commit waste, (2) not to use the premises for illegal purposes, and (3) duty to pay rent. If the tenant breaches the duty to pay rent, then the landlord may terminate the lease and sue to evict the tenant, but they cannot engage in any self-help. All eviction proceedings must go through the judicial process.

Here, the Landlord will argue that the tenant breached their duty to pay rent by withholding their rent, thereby giving him the right to sue for eviction. However, as explained above, if the landlord brings a claim for withheld rent against the tenant, then she will serve as a defense and compulsory counterclaim (a defense that must be brought because it arises out of the same transaction or occurrence as the underlying claim) that she withheld rent because the implied warranty of habitability was breached. If this is her claim then she can withhold the rent but she will have to pay the rent to court the amount withheld and the amount that accumulates during the suit and he court will hold it in escrow. On the other hand, if the tenants brings suit first, then the landlord will assert that the duty to pay rent was breached a move to evict her. However, in Florida, retaliatory eviction is not allowed. Thus, if the court determines that the implied warranty was breached, and awards her the costs of rent, the landlord cannot later evict her as retaliation for bringing suit.

C. Neighbor's claim against Tenant and Landlord

As applied to both the Tenant and Landlord, Florida has abolished joint and several liability. Instead, modified comparative fault is used whereby the judgement is entered against each defendant for their percentage of fault and the plaintiff can only recover that amount which will also be reduced by their percentage of fault so long as they are 50% or less negligent. If the plaintiff is 51% negligent, then the claim is barred.

Negligence: to prevail on a negligence claim, the neighbor will have to show duty, breach, causation, and damages.

(1) Duty: Generally, one only owes a duty to foreseeable plaintiffs, meanings those that are foreseeability likely to be harmed by the defendant's negligence. The duty is the duty to use reasonable care under the circumstances. This is an objective standard. Additionally, as applied to land owner duties, which is at issue here because there was a condition on land that caused harm to the neighbor (the pothole). In Florida, landowners includes possessors' and owners of property. Generally, a uninvited licensee is someone who enters onto the property of another as a guest for their owner purpose but is not invited to come onto the property, and an invited licensee is someone who enters onto the

property of another with the owner's consent. The duty that is owed to uninvited licensees is the duty to warn of known latent defects, not engage in intentional or grossly negligent conduct. The duty that is owed to invited licensees is the duty to warn and make safe dangerous conditions on the land.

***Tenant**: Here, the neighbor will argue that as to the tenant, she was an invited licensee and was owed a duty to use reasonable care to make the premises safe. Neighbor will argue that her "invited" status is implied from the prior conduct of bringing mail to the tenant up the driveway and that she always appreciated it, thereby creating the reasonable impression that she was invited to keep bringing her mail. Thus, she owed her a duty to make the premises safe and warn of nonobvious dangerous conditions.*

***Landlord**: here, the landlord will argue that as to him, he only owed a duty to warn of non-obvious dangerous because while he owns the property he never invited her to come onto it. Thus, she is an uninvited licensee.*

(2) Breach: A breach occurs when one falls short of the standard of care. here, the neighbor can show that as to both (1) the tenant breached her duty by not using reasonable measures to make the pothole safer when she knew it was on the premises, and (2) that the Landlord either failed to warn of the dangerous known condition which breached his duty. As to this, he will argue that the danger was open and obvious and there was no danger to warn of it. The neighbor could try to argue that his actions in not fixing it were grossly negligent, however he does not owner her a duty to fix the premises, and his actions were not grossly negligent with respect to the neighbor. Thus, a breach can be shown for the tenant but not the landlord.

(3) Causation: causation requires but-for causation and proximate cause. But-for causation is a counter-factual test whereby one asks "but for the defendant's negligence, would the accident have occurred." Proximate cause is foreseeability test whereby liability extends to all harm that flows directly from the negligent act do long as the harm suffered was within the pool of risk that the defendant's negligent act causes and intervening acts that are not unforeseeable.

***Tenant**: Here, but-for her negligent failure to fix the pothole, the neighbor would not have fallen, and proximate cause it met because the harm suffered (injured knee) is within the pool of risk that makes it negligent to not fix a pothole.*

***Landlord**: (although, the claim likely fails because of breach, the analysis will continue). Here, but-for his negligent failure to warn of the defect, the neighbor would have known of the pothole and not fallen in. Landlord will argue that the neighbor's own negligence was the but-for cause and even with the warning she would not have seen it because she was watching a video on her phone. This explained more below in contributory negligence as a defense but he could raise this here. There is proximate cause, because the new injury is within the pool of risk that failure to warn of the pothole creates.*

(4) Damages: the following are the damages that could be recovered.

Compensatory damages are damages intended to place the victim they would be in if the negligent harm had not occurred. This includes past and present economic harm and non-economic harm. Here, neighbor could recover the medical expenses and lost wages, and any emotional harm suffered punitive damages are only recoverable if it can be shown by clear and convincing evidence that the defendant was grossly negligent or intentional and there is a cap of 3x compensatory damages or 500k, whichever is greater. Here, the facts do not indicate that this would be recoverable because as of now there was nothing to show gross negligence.

Defenses:

Comparative Negligence is a defense to negligence claim. If the neighbor choses to sue each one separately, then the tenant and/or landlord can must plead and prove the other's negligent to reduce their own percentage of fault. Here, the landlord will argue that he was not negligent but he tenant was for the above reasons, he bears the burden of proving this, but this would be a good defense because the tenant knew she often came on the property to deliver made and her negligent act of not repairing the driveway was the cause. The tenant will argue, that she is less at fault than the tenant because she acted reasonably under the circumstances to try to have the driveway repairs but the landlord ignored her messages.

As to both of them, they will both argue that the neighbor's was contributory negligent to reduce here recovery or even bar her claim if a jury finds she is 51% or more at fault, because she had a duty to use reasonable care while on the property and she failed to act like a reasonable person by walking onto the driveway, not paying attention, and missing the open and obvious nature of a 1 foot wide pot hole on the property, which a reasonable person would likely have been paying enough attention to see.

D. Ethical Issues

Under the rules of professional conduct, there if any one lawyer in a firm has a conflict of interest it is imputed to the entire firm. as applied to former clients, a lawyer shall not represent another client in the same or substantially related matter if the lawyer has confidential information that could be used to the disadvantage of the former client, and the new client's interest are materially adverse, unless the client gives informed consent in writing. if the lawyer in a firm is conflicted, the other lawyer may still represent the client if they screen the other lawyer, do not apportion him a fee, and provide the former client with notice that the procedures were followed. Here, the other lawyer is the firm would have a conflict because financial information about the Landlord was likely produced during the will creation which could be used to his disadvantage in this landlord tenant dispute. However, assuming that this lawyer did not participate in the matter or does not have any confidential information, he can represent tenant if the other lawyer is screened, given no fee, and the firm gives notice of the conflict to the landlord.

PART II - SAMPLE MULTIPLE-CHOICE QUESTIONS AND ANSWERS

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

The answers appear at the end of this section.

Applicable Law

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

MULTIPLE-CHOICE EXAMINATION INSTRUCTIONS

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

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

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

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

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

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

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

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

8. Use the instruction sheet to cover your answers.

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

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

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

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

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

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

46 SAMPLE MULTIPLE-CHOICE QUESTIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

    Which is true?

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

ANSWER KEY FOR MULTIPLE-CHOICE QUESTIONS

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

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