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Florida Bar Examination Study Guide and Selected Answers

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

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PART I – ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2018 AND JULY 2018 FLORIDA BAR EXAMINATIONS

ESSAY QUESTIONS AND SELECTED ANSWERS

Part I of this publication contains the essay questions from the February 2018 and July 2018 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

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

Acceptable Essay Answer

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

Q QUESTION NUMBER 1

FEBRUARY 2018 BAR EXAMINATION – CRIMINAL LAW, CONSTITUTIONAL CRIMINAL PROCEDURE, AND JUVENILE DELINQUENCY

Defendant, who was 16 years old, drove to a 24-hour convenience store to attempt to purchase an alcoholic beverage. When Clerk would not sell to him, he announced he would just take it. As Defendant attempted to leave with the alcoholic beverage, Clerk blocked the exit doors so that Defendant could not pass. Defendant pushed Clerk to the side and exited with the beverage. Defendant then began driving home.

While Defendant was on his way home, Officer noticed that none of the brake lights on Defendant's car were functional. Officer activated his lights and sirens to initiate a traffic stop. Defendant immediately pulled off the roadway into a designated street parking spot in front a single family home, parked the car properly, turned the car off, got out and locked the doors.

Officer informed Defendant that his brake lights were not functioning. Defendant immediately handed the Officer his Florida identification card, insurance, and registration and stated, "I'm sorry, I know my license is suspended but I was only driving a few blocks, this is my house." Officer confirmed through Defendant's identification card that the house the car was parked in front of was Defendant's residence.

Officer confirmed the suspension and informed Defendant that he was under arrest for Driving While License Suspended with Knowledge (DWLS). He then handcuffed Defendant and placed him in the back of Officer's police car. Officer then took the keys to Defendant's car and searched the car. During the search, Officer found the alcoholic beverage taken by Defendant earlier and a gym bag. Inside the gym bag with the Defendant's photo gym identification, the officer found six capsules that Officer believed to be ecstasy (MDMA), an illegal drug. The officer performed a presumptive test on the capsules, which was positive for MDMA.

Officer brought the capsules over to Defendant, held them out and said, "What are these?" Defendant replied, "They're ecstasy, but I'm only holding them for a friend." Officer arrested Defendant for DWLS and Possession of MDMA.

Prepare a memorandum of law that discusses the following:

1. The most serious crime committed at the convenience store;
2. The legality of the encounter with Officer, including the likely outcomes; and
3. Whether Defendant may be charged as an adult and whether this determination affects the sentencing options available to the court.

SELECTED ANSWER TO QUESTION 1 **(February 2018 Bar Examination)**

1. The Most Serious Crime Committed

There are two general types of crimes that were committed by D at the convenience store: a property crime, and a personam crime. General types of property crimes include burglary, robbery, larceny and their aggravated forms. Burglary requires a trespass with an intent to commit a felony (Florida has removed the other common law elements, such as at night time, break and enter, and that it be a dwelling). However, D was an invitee to the convenience store and therefore not trespassing. Thus he is not guilty of burglary.

Robbery requires a theft be committed pursuant to force or the threat of force. Force that is used, after the theft of the property itself, is sufficient. The two elements must be temporal. There are also aggravating circumstances that may make the robbery an aggravated robbery or armed robbery, which is a more serious offense, than robbery itself. In Florida this includes, for example, the use of a weapon to complete the robbery. As applied to this instance, the defendant (D) attempted to purchase the alcoholic beverage. The clerk (C) said no. D then attempted to leave, but the clerk blocked the exit doors so that D couldn't pass. D then pushed clerk to the side and exited with the beverage. Had D successfully left the store before the clerk blocked him, he wouldn't be guilty of robbery. However, when the clerk blocked him, D, used force, by pushing C, to exit the store. And, at this point, the theft hadn't been completed, thus D used force to complete the theft of the alcohol. There are no aggravating circumstances present. Thus D is guilty of the felony crime of robbery.

There are also crimes against the person that were committed. A battery occurs by making an unconsented to of an individual's person that would be offensive to a reasonable person. An individual's "person" includes their clothing or anything they're wearing. In this instance, D pushed C to the side to exit the store. This was touching of C's person that would be offensive to a reasonable person. Thus, D is also guilty of battery.

2. The Legality of the Encounter with the Officer Including the Likely Outcomes

The legality of the defendant's (D's) encounter with the officer (O) is determined under the United States Constitution and the Florida Bill of Rights. In particular, the Fourth, Fifth and Sixth Amendments of the US Constitution are relevant when determining the legality of a traffic stop by an officer. The Florida Bill of Rights contains similar provisions that are interpreted in a manner consistent with the US Constitution.

(a) The first issue is whether the officer's traffic stop of D was legal. The Fourth Amendment protects against "unreasonable searches and seizures." Generally, for a

search and seizure to be valid, the officer must have a warrant. However, there are exceptions to the warrant requirement. One exception, is "Terry Stops." Under a Terry Stop, an officer may stop a suspect if they have "reasonable suspicion" to believe that a crime or violation has been committed or is about to be committed. They can detain the suspect for a reasonable period of time to conduct an investigatory detention to determine if a crime has, in fact, been committed or is about to be committed. Terry Stops allow an officer to stop a vehicle in order to conduct a investigation into whether a crime has been committed or is about to be committed. As applied to this situation, O "noticed that none of the brake lights on D's car were functional." Thus, in this instance, O had reasonable suspicion to believe that a Florida Highway and Traffic violation had been committed by D: driving without working brake lights. In conclusion, on the first issue, whether O's traffic stop of D was legal, the answer is yes because O conducted a valid Terry Stop.

(b) The second issue is the likely outcome of D's statement "I'm sorry, I know my license is suspended, but I was only driving a few blocks, this is my house." The Fifth Amendment provides a privilege against self-incrimination. To give life to this privilege, the US Supreme Court has held that officers (i) must read a suspect their "Miranda Rights" before questioning them, and that (ii) they can only question the suspect if the suspect makes a knowing, voluntarily, and intelligent waiver of his/her's Miranda Rights. The Miranda Rights require that the officer inform the suspect of "his/her right to remain silent, that anything they do or say can and will be used against them in a court of law, that they have a right to an attorney, and that they cannot afford an attorney, one will be provided for them." The reading of Miranda does not have to be expect but it must be clear and precise enough for a reasonable person to have understood what their rights are. Thus, the altering of a word or two is okay, but an officer's omission of an entire sentence, for example, would render the Miranda reading insufficient.

Any statements obtained in violation of Miranda may be subject to the Exclusionary Rule in a criminal trial. The exclusionary rule, in general, provides that statements obtained in a violation of a defendant's rights, like the privilege against self-incrimination, are excludable as evidence at the suspect/defendant's criminal trial. Thus, when an officer has placed a suspect in custody, they must immediately read them their Miranda Rights before questioning the suspect. Whether a suspect is in custody is determined by an objective test. Specifically, the question to be asked is "whether a reasonable person in the defendant's situation" would feel free to leave under the circumstances. An unprovoked statement that is voluntarily made by a suspect without prodding by an officer and before an officer has had an opportunity to read a suspect their Miranda Rights is outside the scope of Miranda protection, however, and therefore not subject to the Exclusionary Rule at trial. In this instance, D made an unprovoked incriminating statement-when D said "I'm sorry, I know my license is suspended"-to O, before O had placed D in custody and before O had an opportunity to Mirandize D. Thus, on the second issue, whether D's incriminating statement will be admissible at a criminal trial, the answer is yes, that it will be, because it was not obtained in violation of Miranda and therefore not subject to the exclusionary rule.

(c) The third issue is the legality of O's arrest of D for 'Driving While License Suspended and with Knowledge (DWLS)'. After D made the incriminating statement, O confirmed the suspension, and then informed D that he was under arrest. An officer may arrest a suspect if they have probable cause to believe that a crime has been committed. At this point, O had probable cause to believe that D was DWLS because D made an incriminating statement attesting to the fact that D was in custody and O had confirmed the suspensions himself. Thus, the arrest was legal.

(d) The fourth issue is the legality of O's search of D's vehicle, and the probability that the contraband O found will be admissible at D's criminal trial. Going back to the first issue, O's Terry Stop, when an officer conducts a Terry Stop they also have the right to conduct a limited search of the suspect for the limited purposes of the officer's safety. Specifically, a Terry Stop provides the officer the right to conduct a pat down of the suspect's person in order to see whether they are armed with any dangerous weapons, that would jeopardize the safety of the officer. This is the 'search-incident-to-arrest exception-to the general warrant requirement when conducting a search and seizure. If while conducting the pat down of the suspect's person, the officer feels something that they believe is a weapon, they may require that the suspect show them what the object is. In addition, when conducting a Terry traffic stop, anything found in plain view in the vehicle is not subject to the exclusionary rule, despite the general warrant requirement to conduct a search and seizure. This is known as the plain view exception. In this particular incident, O arrested D, placed him in the back of his police care, and then took the keys to D's car and searched the car. During the search, O found the alcoholic beverage and six capsules of what he believed was MDMA. As applied to this incident, neither the search-incident-to-arrest exception or the plain view exception provided O with constitutional grounds to search D's bag. On the search-incident-to-arrest exception, the bag wasn't on D's person and D had already been arrested. On the plain view exception, the contraband wasn't found in plain view. Thus, the search was likely unconstitutional and, therefore, may be subject to the exclusionary rule at trial.

(e) The fifth issue, is the legality of O's questioning of D and the admissibility of D's incriminating statements at trial. Under the Fruit of the Poisonous Tree Doctrine, incriminating evidence that is uncovered as a result of an unconstitutional search and seizure is subject to the exclusionary rule at trial because it is fruit from the poisonous tree (i.e. the illegal search or seizure). After O discovered the contraband, he brought the six capsules, suspected to be MDMA, over to D, held them out and said, "What are these?" D replied they're ecstasy but I'm only holding for a friend. D's statement is incriminating evidence, but it was a statement that was only made as a result of O's illegal search of D's bag. Thus, it is fruit of the poisonous tree, and likely subject to the exclusionary rule at trial.

Moreover, O had a clear obligation to Mirandize D. Not only did O fail to make a clear reading of Miranda, he failed to read D his Miranda rights at all. Thus, when O brought the capsules over to D and questioned him about them, he had an obligation to (i) read D his Miranda rights and (ii) receive a knowing, voluntarily, an intelligent waiver from D, before doing so. O didn't Mirandize D. Therefore, these incriminating statements are

likely inadmissible at trial, under the exclusionary rule, because they were obtained in violation of Miranda. Unfortunately for D the fruit of the poisonous tree doctrine doesn't work backwards, therefore his original statement that he made unprovoked to O (see the second issue (issue (b))) is not subject to the exclusionary rule.

Therefore, for a search and seizure to be valid, it must be reasonable. Reasonableness is determined by asking whether an individual has a reasonable expectation of privacy. This is a two pronged test that contains an objective and a subjective element. First, was the person's expectation of privacy objectively reasonable. Specifically, would reasonably prudent person in D's circumstances have expected that they had a right to privacy. And, second, did D have a subjective expectation of privacy. Specifically, did the defendant actually think that he had a right to privacy in this situation.

3. Whether Defendant May be Charged as an Adult and Whether This Determination Affects Sentencing Options Available to The Court

(a) The first issue is whether, D may be charged as an adult. In Florida, juvenile defendant's may be tried as an adults in some circumstances. There are circumstances when the prosecutor is mandated to do so, and there are circumstances when it is within a prosecutor's decision to do so or not. A juvenile must be tried as an adult if (i) they are over the age of 14, (ii) they committed a violent felony, and (iii) they have a past history of violent offenses. A juvenile may be tried as an adult if they are over the age of 14. In this instance, D is (i) 16, (ii) he did commit a violent felony: robbery, but we don't know if (iii) he has a past history of felony offenses. If he does, then he will be prosecuted as an adult. As it stands, however, it is merely within the prosecution's discretion to decide to do so.

(b) The second issue is whether this determination would affect the court's sentencing options. A juvenile who is convicted by the court has sentencing options that aren't available to adults. General sentencing avenues for a juvenile include (i) a non-custodial sentence, (ii) a custodial sentence. Non-custodial sentences include being allowed to live at home, subject to conditions, as well as community service or other remedial type options. Custodial sentences range from limited security detention centers, where the juvenile must return to a remand center at night, but is free to live in the community during the day, to high security juvenile detention centers where the juvenile-sentence has limited freedom. These are near equivalents to prison and incarceration. However, the juvenile is detained with other juvenile-sentences as opposed to adults, in an adult prison. Upon reaching the age of 18, the juvenile, if still serving a custodial sentence, is transferred to an adult complex.

Thus, the decision to try or not try D as a juvenile does affect the sentencing options available to the court because if D is tried as a juvenile he has a broader range of sentencing options available, and the most severe, would still involve him being incarcerated with other juveniles. However, if he is tried as an adult, these sentencing options aren't available and if he was given a custodial sentence, he would be

incarcerated with adult offenders.

Q QUESTION NUMBER 2

FEBRUARY 2018 BAR EXAMINATION – FLORIDA CONSTITUTIONAL LAW

A Florida legislator recently introduced a bill that, if passed into law, would implement a wellness program for state employees. The proposed bill states:

AN ACT relating to employee health.

WHEREAS the Legislature has determined that healthy employees are a benefit to the State because they miss less work for illness and make less frequent and less significant insurance claims,

BE IT ENACTED by the Legislature of the State of Florida:

SECTION 1. Each and every state employee, so as to reduce work-related stress, will be entitled to receive an additional hour of vacation time for each week the employee attends a stress management class or a religious service;

SECTION 2. Each and every state employee, so as to be better apprised of personal health, shall receive a free annual health appraisal from the Florida Department of Health, including a mandatory blood draw to determine cholesterol and nicotine levels;

SECTION 3. Each and every state employee, so as to avoid serious household injuries and accidents, shall receive \$100 for each firearm surrendered to the Sheriff of the county of the employee's residence; and,

SECTION 4. Each and every state employee, so as to foster better health, shall receive \$50, if such employee purchases an annual membership to a gym, fitness center, or health spa. All gyms, fitness centers, and health spas that provide discounts or reduced rates for annual memberships purchased by state employees shall be immune from lawsuits by such state employees.

You are an attorney for the Florida Senate's Committee on Health Policy, and the aforementioned bill is scheduled to come before your Committee for review. As part of the Committee's Bill Analysis, you have been asked to draft a memo identifying and analyzing any Florida Constitutional issues presented by the text of this bill.

SELECTED ANSWER TO QUESTION 2

(February 2018 Bar Examination)

I will discuss the issues Section by Section to the extent possible. A couple of preliminary matters: First, the law contains a proper enacting clause: "Be it enacted by the Legislature of the State of Florida."

Second, putting aside possible violations of rights, it seems that the law does not exceed the default, police powers by which the legislature may act, as it is reasonable related to the public health, safety, and morals of the citizens. Specifically, it aims to promise health for public employees--or at least a subset of them.

Third, the law does seem to sufficiently deal with one subject--namely the health of State employees. Fourth, the title of the law should be improved--it arguably does not sufficiently describe what the law is about, given that the law dealt with "STATE employee health," and not just employee health.

Fifth, the law arguably is a special law, and not a general law, as it seems to apply only to identified people--only State employees and those who deal with them. Or, arguable, it could be called a general law of local application, in that it applies to State employees only--a criteria--but arguably would apply to everyone IF they became a State employee--much like laws applicable to places with populations greater than X apply to every place, so long as the place has a population greater than X. If the law is a special law, then it will need to be either approved ahead of time by the affected people--State employees, gyms who deal with them, maybe--or those employees will need to be provided with notice of the law ahead of time, so that they can lobby their legislators beforehand. These restrictions do not apply if this is a general law of local application--but the criteria used, here being a State employee--must be reasonably related to the purpose of the law. Here, the criteria is so reasonably related: The law aims to protect the public workforce and public fisc, and so it focuses on those employees in ways relating to their health.

Finally, the entire law may be challenged on the ground that it violates the equal protection clause, in that it applies only to State employees and not to others. The plaintiff in such a lawsuit could be a State employee angry about the restrictions, or it could be anyone else angry they are not getting the benefits. Either way, it seems rational basis scrutiny would apply--which means that the challenger must show that the law is not rationally related to a legitimate government purpose. Strict scrutiny applies only to discriminations against suspect classification--such as race, national origin, alienage, or physical handicap, under the Florida provision. Here, no such classification is at issue, so if strict scrutiny applies it will be because the law infringes on a fundamental right--discussed section by section. As for the classification between state and non-state-employees, the Government can easily satisfy the rational basis standard: It has a legitimate interest in protecting and promoting its workforce and

protecting the public fisc (from high insurance premiums) and the law is rationally related to that by promoting a healthy workforce (good in itself and means less in the way of insurance claims).

Section 1: This provision arguably violates Florida's equivalent to the Establishment Clause. The Florida Constitution provides that religion will not be prohibited or regulated, but it also contains a Blaine Amendment providing that no funds shall be taken from the public treasury in aid of any church or sectarian institution. Here, giving workers time off to attend religious services--with that being one of only two designated options--arguably amounts to giving up public funds (the vacation presumably is paid) in support of the churches involved. That particular argument may be a stretch though, seeing as how the mere attendance of a religious service is not actually putting money in the churches' (or synagogues, etc., i refer to churches only for convenience) coffers.

In any event, Florida's Establishment Clause principles are applied much as the Federal Establishment clause. That means favoring any one particular religion is forbidden--but this law does not do this. It therefore is probably best analyzed under the so-called Lemon test, which Florida Courts borrowed from SCOTUS. That test provides that a law does not violate the Establishment Clause so long as it: (1) has a secular purpose; (2) its primary effect is not the advancement (or hindrance) of religion; and (3) it will not promote excessive government entanglement with religion. Here, the law has a secular purpose--which is improving employee health, and the Court is not likely to look much beyond the stated purpose absent some special reason for concern. And the law does not seem to promote excessive entanglement with religion. Sure, it gives Government employees free time to go to religious services if they choose, but in the past the excessive entanglement has been deemed a problem when the government itself--acting as the government-- has been forced to intrusively oversee religious organizations, to monitor them for compliance, or to actually serve them in some way, as through teaching. (The flip side can happen too; In Kiryas Joel, the federal Supreme Court held that it violated the establishment clause for a religious organization to run its own public school district.) This law does not seem to involve entanglement of the just describes sorts, and so the law likely does not violate the excessive entanglement prong of the Lemon Test. Arguably, though its effect is to impermissibly advance religion. After all, all State employees are likely to want the free hour, and for those many that will want it, the law gives them only two options--stress management class, or religious services. As a result, a substantial effect of the law likely will be to increase attendance at religious services, thus advancing religion. So Section 1 is vulnerable on establishment clause grounds.

Section 2.

Section 2 poses at least two serious constitutional problems. First, it would seem to violate the right to privacy of the affected public employees. The Florida Constitution explicitly guarantees the right to privacy, and so the right to [privacy in this State has been taken more serious even than it is taken under the federal constitution, where it is only implicit, seen as an emanation from penumbras. Thus, invasions of the right to

privacy must be justified by the Government's satisfaction of the strict scrutiny standard, which means that the law must be necessary to achieve a compelling government purpose, such that there is no less restrictive alternative by which the Government could achieve that compelling purpose.

Here, it seems that requiring employees to undergo a health appraisal by the Government, and to turn over their blood so that the Government can use it to glean health information about them infringes on the right to privacy. That's doubly true considering that, under Florida's sunshine laws, Government records are presumptively open to the public, unless the Government makes an exception (there is none in the statute here), provides a strong justification for the exception, and shows that the exception is not broader than necessary to serve that reason. Because there is no exception in Section 2, that means that employee health data could be open to the public--which seems a gross infringement on the right to privacy.

Second, the Government likely cannot show that this law is necessary to serve a compelling Government interest. First, promoting employee health is not a compelling Government interest, and neither is protection of the public fisc. The paradigmatic example is protection of the security of the State, and these purported interests do not even close to that in magnitude. Indeed, if promoting a healthy work force and reducing public expenditures were compelling Government interests, far more laws would pass strict scrutiny. Second, it seems that there are other ways that the Government could promote its interests here. Considering that Section 2 is aimed at cholesterol and smoking cessation (presumably), the Government could promote the very same interests (and the larger health and fiscal interests they serve) by providing healthy eating classes or smoking cessation classes. So, Section 2 seems to violate the right to privacy.

It also likely violates Florida's guarantee against unreasonable searches and seizures, which by design is interpreted and applies the same way as the federal Fourth Amendment, as interpreted by the Courts. The fourth Amendment provides that searches and seizures shall not be unreasonable, and that warrants shall issue only upon probable cause. Here, there is no warrant to worry about, so we need to determine only whether the blood draw is an unreasonable search or seizure, (Government action, which is a requirement, is no problem, given that the Florida Department of Health is carrying out the appraisals and the associated blood draws. A search involves either a physical trespass into property owned or possessed by the objecting party--and presumably their persons as well--or an invasion of a reasonable expectation of privacy. Here, either test would be satisfied--pulling blood from someone invades their body, and people have a reasonable expectation of privacy in their blood.

Finally, the search here is unreasonable. After all, there is no individualized suspicion in play here. Nor can thus be justified as some sort of regulatory or other search of public employees, such as examining their files or desks. The degree of intrusion alone likely makes the search unreasonable. To top it off, we have precedent to confirm this suspicion: Federal courts have held that blood draws are searches (and keeping the

blood afterward a seizure) and the Florida Supreme Court has already held that it violates the rights against unreasonable searches and seizures for the State to drug test all employees. This, it seems likely Section violates the right against unreasonable searches and seizures.

Section 3.

Section 3 also poses serious problems under the Florida Constitution. First, affected State employees may contend that this is an unconstitutional taking. The Florida Constitution, like the federal one, provides that private property may not be taken for public use without just compensation. The Government must be able to justify any such taking with an important interest, but the public use need not be actually making the property available to the public. Instead, it suffices that the public will benefit from the taking. Just compensation reflects the value of the property at its highest and best use. The value is measured by the loss to the owner, not the gain to the taker. And we do not factor in any benefits to the owner as a result of the taking in order to lower the amount received.

Here, the taking claim likely falters at the first step. A taking is a substantial (or any physical) intrusion on the owners' rights to the property. In other words, it does not cover regulations unless they deprive the property of all or nearly all economic value. Here, taking guns undoubtedly would be taking, but this law does not actually seem to require the employees to turn over their guns. Instead, it seems to try to encourage them to do so, by offering them monetary payment. As a result, any such taking claim likely will fail. But, if a taking were to be found, gun owners could argue that, depending on the value of their guns, the flat \$100 fee is not just compensation for the guns at the highest and best use. For instance, assume the employee had expensive antique firearms-- those could be worth well more than 100\$,

Second, the Florida Constitution guarantees the right to acquire property and the right not to be deprived of property without due process of law. Guns are certainly property-- a legitimate expectation is the is the threshold, and owning something satisfies that. And, this law imposes a flat fee, with no process at all. (The amount of required process is measured by determining the (1) importance of the property interest,. (2) the extent to which additional procedure would improve fact finding, and (3) the importance of the Government interest in efficiency adjudication.) But again, turning over the guns is voluntary, and so there seems not to be a deprivation. Moreover, to the extent the turning over is not voluntary, it seems the takings clause is the better mode of analysis, as it speaks directly to what to do when the Government takes private property.

Third, Section 3 arguably infringes on the right to keep and bear arms. Like its federal counterpart, the Florida constitution does protect this right. Specifically, it provides that the right of the people to keep and bear arms for self-defense and defense of the lawful authority of the State shall not be infringed. But it adds that the manner of regulating the bearing of arms can be regulated. That sounds bad for this law, arguably, but the

Courts have interpreted this provision relatively lax in practice. Specifically, they have held that guns commonly used in criminal enterprises can be banned by the legislature, that the legislature has broad authority to regulate with respect to other firearms, while suggesting that the legislature might go to far if it were to ban common firearms.

A right to bear arms challenge to this provision likely will fail. The problem for the challenge is that the law does not regulate--and certainly does not ban--the possession and bearing of arms at all. It just offers a monetary incentive to turn them over. True, in some contexts, a monetary incentive coupled with giving up a constitutional right has been held by the courts to be an unconstitutional coercion, but it is hard to believe that \$100 per firearm satisfies that test, which generally requires that the coerced individual face a choice that is so one-sided that it is no choice at all. And so it seems that Section 3 will stand against a right-to-bear-arms challenge.

Section 4.

Section 4 seems subject to challenge on two grounds. First, it provides that those fitness centers, gyms, and spas ("Gyms") that provide reduced rights to Government employees shall be immune from suit by those employees. Stated differently, it makes a plaintiff's ability to sue turn on whether or not they are a State employee. That arguably violates the Equal Protection Clause. As noted above, the distinction between State employees and others is subject to the rational basis standard, in and of itself, but this law deals with access to courts, which is a fundamental right subject to strict scrutiny, also discussed above. This law will not pass strict scrutiny, as (1) encouraging public employee health and protecting the fisc is not a compelling interest, and (2) there are less restrictive ways to pursue those interests anyway. For instance, employees could obtain the right to use publicly-owned gyms, as exist at police stations and the like, or high schools. Moreover, the Florida Supreme Court has already struck down a law that capped non-economic damages on the basis of the Defendant's identity (med mal)--holding that it violated equal protection principles, among others. The same result would seem to obtain here, where the law turns on the identity of the Plaintiff.

Second, the law arguably violates public employees' rights to due process, as it deprives them of all process. But this concept is probably best discussed in terms of the right to access the Courts, which speaks more directly to that issue.

Third, the provision making gyms immune in suits by State employees likely violates those employees' rights to access the Courts. The Florida constitution guarantees that the Courts will be open to all, without sale, denial, or delay. The Florida Supreme Court has developed the Kluger test to determine when that right has been violated. Under the Kluger test, the legislature may not close the courts by abolishing causes of action that otherwise exist unless (1) it provides a reasonable alternative or (2) the Government can show that the law serves an overriding public need that cannot be met with any other alternative. Here, as noted, the immunity provision closes the Courts to claims against participating gyms--and it does so altogether, so that they cannot bring

their tort (and other claims). Second, the proposed law proposes no alternative at all, much less a reasonable one. And, third, promoting public employee health and conserving the public fisc does not seem an overriding public justification. Fourth, even if it was, those justifications could be promoted in other ways. For instance, the State could give State employees the right to use already existing public gyms, like those at high schools or in police stations. So it seems that Section 4 violates the right to access the Courts.

Q QUESTION NUMBER 3

FEBRUARY 2018 BAR EXAMINATION – REAL PROPERTY, ARTICLES 3 AND 9 OF THE UNIFORM COMMERCIAL CODE, AND EVIDENCE

Harry and his wife, Wilma, bought a condominium in Broward County, Florida, from Sam. At the time of purchase, the condominium was encumbered by a recorded first mortgage from Sam to FirstBank. Rather than pay off the loan, Sam gave Harry and Wilma a quitclaim deed to the property, and told them to continue making payments to FirstBank until the loan was completely repaid. FirstBank was not aware of the sale of the Broward County condominium from Sam to Harry and Wilma, nor was FirstBank aware of Harry and Wilma's agreement with Sam to pay off the loan.

Shortly after Harry and Wilma bought the condominium from Sam, NewBank bought Sam's loan from FirstBank. NewBank received an assignment of the promissory note and an assignment of the mortgage from Sam to FirstBank, which was recorded in the public records of Broward County, Florida. Unfortunately, NewBank misplaced the original promissory note and mortgage, and believes those documents were discarded by mistake.

Harry and Wilma have been living in the condominium as their primary residence since the closing on the purchase from Sam. Sometime after the purchase and after NewBank bought the loan from FirstBank, Harry borrowed money from MegaBank, and in exchange, Harry gave MegaBank a promissory note and a mortgage on the condominium. Harry's wife, Wilma, was aware that Harry had borrowed the money from MegaBank; however, Wilma did not authorize or join in the execution of the mortgage to MegaBank.

Approximately six months ago, Harry and Wilma stopped making payments to NewBank and to MegaBank. They also stopped paying their condominium association dues and the association filed a lien on the condominium. In addition, five months ago, Harry was sued by Larry and Mike, each of whom had independently loaned money to Harry. Neither of these loans from Larry or Mike was secured by the condominium. Larry obtained a judgment against Harry in the Collier County Circuit Court. Larry's money judgment against Harry, which was duly recorded in the official records of Collier County, Florida, remains unpaid. The lawsuit by Mike against Harry is scheduled for trial next month.

Your client, NewBank, wants to foreclose its lien, and also wants to know what consequences, if any, result from its inability to locate the original note and mortgage that it received from FirstBank when it purchased the loan. Prepare a memo that discusses this question, including who should be named as defendant(s) in the foreclosure action. Also include a discussion of the nature of each party's encumbrance on the property, whether a foreclosure of NewBank's mortgage lien will eliminate that encumbrance, and the likely outcomes of these actions.

SELECTED ANSWER TO QUESTION 3 **(February 2018 Bar Examination)**

To: NewBank (NB)

From: Attorney

Re: Mortgage

This memo addresses NB's ability to foreclose its lien on the condominium in Broward County, including the identity and claim of the other defendants and their security interests in the property. To fully address NB's questions, it is necessary to trace the

I. Homestead Exemption

As an initial matter, Florida has a homestead exemption. This exists when a homeowner is a resident of Florida, and the property in question is either his dependent's primary residence. The exemption protects the homestead from forced sale in a foreclosure. However, the exemption does not exist for purchase money mortgages on the property, or other loans, mortgages, and construction liens used to improve the property, or actions after the failure to pay property taxes on that property. This exemption affects many of the interests on the loan.

II. Status of the Interests in the Property

A. First Bank (FB)

The first mortgage on this property was the one that FB gave to Sam. While the facts do not make clear whether Sam actually used this loan to purchase the condominium, if he did, then FB's interest in the property is a purchase-money mortgage (PMM). A PMM exists when the money that is loaned is the money that is actually used to purchase the property for which the loan was obtained. The facts also specify that this mortgage was recorded, meaning that it was properly recorded in the county where the land was located. All subsequent purchasers and security interests had at least constructive notice that FB had a mortgage on this property.

The original mortgagor was Sam. However, it appears that Sam entered into a valid contract with Harry and Wilma for them to make the remainder of the mortgage payments. Generally, when a mortgagor transfers his interest to a new buyer before the mortgage is paid off, the buyer takes the property subject to the loan. While the lender may still foreclose on the property, the buyers will not be personally liable and do not need to cover any deficiencies. However, sometimes the buyers will agree with the seller to assume liability for the mortgage. Here, the facts indicate that Sam told them to continue making payments to FB until the loan was repaid. Sam clearly intended for

Harry (H) and Wilma (W) to assume liability for the mortgage.

While the facts describe this as an "agreement," it is unclear how official the agreement was. Because it seems that there was more than a year of payments on the mortgage left and because this was a real property transaction, the Statute of Frauds requires this agreement to be in writing. H and W appear to have taken this agreement seriously, though, as they made the payments until six months ago. Presumably, then, this agreement abided by the required formalities, and H and W entered into a valid contract with S to continue making payments on the mortgage.

Finally, while FB was not a party to this agreement and was actually unaware that Sam had sold the condo to H and W, the facts do not indicate what the original mortgage contract required for assignment by either party. The facts do not indicate any restrictions on Sam's ability to transfer his interest in the property, or any penalties for doing so (such as an acceleration clause, where the mortgagor is required to pay the entire balance of the mortgage upon sale of the property). Moreover, FB was the intended beneficiary. Two parties can agree to benefit a third party, and if that third party is an intended beneficiary, then that third party can enforce the contract. Here, Sam and H and W agreed that H and W would make the mortgage payments to FB. As a result, FB is entitled to enforce the contract and its security interest in the mortgage. Because it was a mortgage on the property itself, H and W cannot use the homestead exemption to get out of a foreclosure by FB.

B. New Bank (NB)

NB then bought Sam's promissory note from FB. In doing so, it obtained a negotiable instrument. A negotiable instrument exists when (1) it is signed by the maker or drawer, (2) contains a promise to pay, (3) a specified amount of money, (4) to order or bearer, (5) payable on demand or on a specific date, (6) with no other conditions attached. Promissory notes tied to mortgages are generally negotiable instruments, and the facts do not indicate otherwise. FB transferred its interest when it assigned the note to NB. An assignment transfers the transferor's rights and duties of an obligation onto the transferee. When FB assigned the promissory note to NB, NB took on FB's rights in enforcing the note, including the ability to enforce the promissory note and foreclose on the property upon default. NB also recorded its interest in Broward County, the county where the property is located, so all subsequent purchasers and security interests have constructive notice of NB's interest in the property. Because FB would be immune from the homestead exemption and be able to foreclose on its mortgage on this property, NB would be able to as well.

C. MegaBank (MB)

The next potential interest in the timeline is MB. H took out a loan from MB and secured that loan with a promissory note and mortgage on the condominium. However, W did

not authorize or join in the loan. Because H and W are a married couple, they are tenants by the entirety. Tenancy by the entirety requires unity in time, title, interest, and possession. This means that the tenants must take an interest in the property at the same time; the land must be granted to the tenants in the same instrument, like the deed; their interests have to be equal, such that, for example, one party does not have a life estate when the other party has a fee simple; and they must have the same right to possession, so that both tenants have a 50/50 interest in the property. In Florida, married couples are presumed to be tenants by the entirety unless otherwise specified. Here, H and W bought the condo together, and their time, title, interest, and possession are all in unity. Moreover, they are married, so there is a presumption that they are tenants by the entirety.

Because only H signed the mortgage, MB only has an interest in his half of the condo. FL is a lien theory state, which means that when a tenant by the entirety encumbers the property, it does not destroy the tenancy by the entirety. A lienholder only has interest in that tenant's estate. Moreover, when a piece of property is granted to a married couple, and the deed says "and," both spouses must agree before transferring interest in the property. Here, only H agreed to this mortgage. It is not enough that W knew about it; the facts are clear that she did not authorize the mortgage or sign it. Therefore, MB's interest is not in the entire condo but only in H's half. The proceeds of any foreclosure by MB would only bring in half the value of the house. Because this was a mortgage secured by this property, MB would be able to force a sale because this loan would not fall under the homestead exemption.

Finally, the facts do not indicate that MB recorded this interest. Thus, its interest in the property has not perfected.

D. Condominium Association

Because H and W stopped making payments to the condominium association, the association filed a lien on the property. Because any suit would be in regards to fees due on this property, it would not be subject to the homestead exemption.

E. Larry and Mike

Neither Larry nor Mike have an interest in the Broward County condo. Larry has a judgment lien, while Mike does not. Larry and Mike have sued H because he failed to pay back their loans. Mike's suit against H has not even gone to trial yet, so at this time Mike does not have an interest in the property either secured or unsecured. He cannot claim any right to the property at this time.

Larry gave H an unsecured loan, so he does not have a secured interest in the property. However, he has already won in court against H and obtained a judgment against Larry. This suit was in Collier County, and Larry recorded his judgment there. While Larry may

now claim an interest in any property H has in Collier County, he will need to record the judgment in Broward County for any interest in Harry's property located there, including the condo. Moreover, as long as the condo is H and W's primary residence, it would fall under the homestead exemption and Larry and Mike would not be able to force a sale on the condo.

III. NB's Inability to Produce the Original Note and Mortgage

NB may be harmed by its inability to produce the original promissory note. To be admissible in court, the original of the promissory note must be produced. When a negotiable instrument, such as a promissory note, is lost, the lender can only enforce the note itself. A copy of the mortgage, though, is properly recorded in the county where the property is located. This mortgage may still be produced to show the debt owed on the mortgage.

IV. Defendants in the Foreclosure Action

H and W assumed the liability for the mortgage. As a result, they would be the defendants in any foreclosure action. It is unclear exactly what the agreement with Sam was, so it is possible that if they did not fully assume liability, then Sam might also be included and NB could seek payment for any deficiency from him as well.

V. Effect of the Foreclosure

When a lender forecloses on property, it must notify all junior security interests when it files suit. Generally, the foreclosure of a senior mortgage interest will extinguish not just the interest being foreclosed upon, but all other junior interests. Senior interests are still protected after a foreclosure. Here, NB's interest was junior to FB, but it took FB's place by assignment and is the most senior interest. It must notify the other junior interests, including the condominium association. The facts do not indicate whether MB recorded its mortgage. If it did, then NB must also notify MB as a junior interest. Once it does, then the current junior interests, including the condo association and MB, will be extinguished. As explained above Mike and Larry do not have an interest in the condo.

Q QUESTION NUMBER 1

JULY 2018 BAR EXAMINATION – CONTRACTS/ETHICS/PROFESSIONALISM

Addie is an investment adviser, and her best friend, Laurie, is a lawyer specializing in family law. Addie is an ongoing client of Laurie. They live in Florida and have often travelled to Las Vegas together to gamble. During one trip, Laurie mentioned that she played the Florida lottery. Laurie offered to split any of her lottery winnings with Addie if Addie would agree to do the same. Addie agreed but said that Laurie would have to handle their legal affairs when they won and that Addie would develop their investment plans. After talking more, the two friends agreed that each person would buy one ticket a week for the Saturday lottery drawings, that they would split the proceeds if either person won the Saturday lottery, and that Addie would prepare an investment plan for both while Laurie would handle all legal matters for both.

When she returned home, Addie told her 14-year-old daughter that she was playing the lottery with Laurie, and the child said that she wanted to join. Addie talked to Laurie about this, and the two friends agreed to each buy two tickets a week and to split the winnings three ways. They still agreed to swap professional services if they won, and they decided that the agreement would continue until they won the jackpot or until one person notified the other in writing that she was no longer participating.

Addie bought tickets that won small prizes twice in the next few months, and she delivered checks for one-third of the prize money to Laurie as her share of the winnings. Laurie cashed the checks. Two years later, Addie read in the newspaper that Laurie won the jackpot of \$10 million in the Saturday lottery. Addie contacted Laurie and provided Laurie with an investment plan that was prepared by Addie's colleague, Cal. Addie asked Laurie to provide various legal documents, including the forms to establish a trust account for her daughter's share of the money. Laurie refused to share the money or do any legal work; she told Addie that she thought they were just joking about splitting the lottery proceeds.

Meanwhile, Cal asked Addie to pay for the investment advice, and Addie sent Laurie the bill. Laurie refused to pay. Cal's contract with Addie stated that payment was contingent on Addie's recovery of lottery prize money, but Cal did not read the contract. He demanded that Addie and Laurie pay him. In response to Cal's demand, Laurie sent Cal an email that said: "If you think you can sue me, think again. I know how to drag a lawsuit out for years, and make you miserable."

From these facts, discuss the possible claims, the elements of such claims, and the possible defenses. Include a discussion of whether Addie can recover attorney's fees if she wins in a suit against Laurie. Also discuss whether Laurie faces any ethical issues if she is bound by the agreement, and any professionalism issues raised by Laurie's communication with Cal.

SELECTED ANSWER TO QUESTION 1

(July 2018 Bar Examination)

I. Claims and Defenses of the Parties

A. Addie v. Laurie

Addie has a few claims she can try to bring against Laurie: (1) breach of contract, (2) promissory estoppel, and (3) restitution.

1. Breach of Contract

A breach of contract claim is a legal vehicle for enforcing a promise. To succeed in a claim, a party must assert (1) an offer, (2) acceptance of the offer, and (3) consideration. Offers and acceptances are measured according to the reasonable listener standard in Florida; a statement or action will constitute an offer or acceptance if a reasonable party viewing or hearing it would conclude it was an offer or acceptance. But if the actual offeree in a given situation has reason to know the offer is not serious, then the parties will not form a contract. A promise to perform can be valid consideration for a contract. And in Florida, consideration is met if the party gives a benefit or incurs a legal detriment.

In this case, Laurie made what we could objectively view as an offer when she suggested she would trade half her possible future winnings and legal services in exchange for half of Addie's possible future winnings and adviser services. Laurie's later claim that she thought they were "just kidding" will not matter because viewed objectively, Addie (or another reasonable observer) would have concluded she was serious. Not only that, but her later acceptance of the checks from Addie severely undercuts her ability to make this argument. (It is unclear how she could even begin to explain what she believed the checks were for if not their original deal.) Likewise, Addie agreed according to the facts. Finally, we have consideration by having winnings + legal services in exchange for winnings + adviser services. Thus, it seems we have a contract.

Laurie might raise a few defenses to this initial contract. First, she might allege unilateral mistake. Unilateral mistake exists if (1) a factual mistake exists at the inception of the contract, (2) the mistake goes to a material aspect of the contract, (3) the party asserting mistake did not incur the risk of it, (4) the mistaken fact was an essential fact on which the mistaken party relied, and (5) the non-mistaken party knew of the other's mistake but did nothing or it would otherwise be unjust to enforce the contract. In this case, Laurie's claim will be that she thought they were kidding about the contract, but this will fail for the same reasons that it failed as a defense to the "offer" element of contract. In other words, the formation of the contract itself was not a "factual mistake" that would be subject to the defense.

Second, Laurie might raise illegality because this was a contract to gamble. Ordinarily, a contract to do something illegal will be void as a matter of public policy. But this defense certainly will fail here because the parties did not agree to do anything illegal; rather, they agreed to play the legal Florida lottery. In short, illegality is a nonstarter.

Third, Laurie will be unable to argue that the contract needed to be in writing. A promise must be in writing signed by the party to be charged under the statute of frauds if it (1) relates to the sale of \$500 or more in goods, (2) relates to the sale of land, (3) is a promise in consideration of marriage, (4) is a promise of suretyship, or (5) is a promise that cannot be complete within one year. In this case, the only one that might potentially work would be the "one year" provision, but that will not work. It only applies if it is impossible to complete the performance in a year, and here they were just buying tickets on a week-to-week basis with no set end point.

Importantly, we have to analyze whether the contract Laurie can try to enforce is the original 50-50 split, or whether it was the modified 33-33-33 split involving the daughter. The applicable law will depend on whether this was a contract for goods subject to the UCC or a contract for services subject to the common law. Here, it is apparent this is a contract for services; the parties agreed to gamble (a service) and then split the winnings. They were not selling each other goods. As a result, the common law applies. Under the common law, a modification to a contract must be supported by new consideration. In this case, we have new consideration because the parties went from buying one ticket per week to buying two tickets per week.

Laurie might try to raise the illegality defense to this modification. In particular, she will try to argue that they were in effect agreeing to buy lottery tickets for a minor, given that Addie's daughter is only 14. If the court finds this is the case, then the modification will be void as illegal. But Addie's counterargument will be that they were never buying the tickets for the daughter, but they instead were just buying the tickets themselves and then promising to give money to the daughter. There is, of course, nothing illegal about giving money to a child, even if that money comes from an adult-only activity like gambling. As a result, this defense likely will fail.

Laurie's second defense to the modification will be to point to the fact that Addie's daughter was a minor at the time of contracting. But this defense obviously will not work because a contract with a minor is only voidable rather than being void, and only the child has the power to void it. So if anything, only the daughter would have this argument. And moreover, even that would not work because the daughter was not a contracting party; instead, the contract was between Laurie and Addie, with the daughter only being an intended beneficiary (as discussed below in Section I.B).

(Again, the statute of frauds will not be a valid defense here.)

As a result, Addie will be able to successfully sue Laurie to recover her expectation damages on the contract, meaning she can likely recover the 1/3rd of the \$10 million for herself (assuming the modification is valid). (The 1/3rd to the daughter is discussed below.) Moreover, she will be able to recover the expected damages resulting from the legal fees she will incur to hire a replacement for Laurie to do the trust documents and such; the contract terms gave her an expectation she could receive those services, so while she won't be able to get specific performance, she will be able to get damages because those were actual, reasonable, foreseeable, and unavoidable.

2. Promissory Estoppel

Alternatively, Laurie could claim damages under a promissory estoppel theory. The elements of promissory estoppel are (1) the defendant made a representation; (2) the plaintiff reasonably, foreseeably, and detrimentally relied on the representation; and (3) the court will enforce the representation to the extent necessary to prevent injustice. Here, we have Laurie's representation that they should start buying lottery tickets. In response, Addie began buying the tickets, which was a reasonable and foreseeable thing to do under the circumstances, and it certainly caused Addie to rely to her detriment by incurring the expenses associated with buying the tickets. The problem is that the court likely would not agree to use promissory estoppel to enforce the entire 2/3rds of the winnings; rather, it would only allow her to recover her reliance damages (i.e., the amounts she spent on the tickets and possibly the amounts she sent to Addie.)

3. Restitution

Alternatively, Addie could claim restitution for the payments she sent. Restitution claims involve showing (1) the plaintiff conferred a benefit, (2) the benefit was not gratuitous or officious, and (3) the defendant had an opportunity to reject but did not. Here, Addie sent checks to Laurie, which was a measurable benefit. And she was not acting gratuitously or officiously, but rather was trying to act in accordance with the contract. Finally, Laurie did not have to deposit the checks. Thus, Addie could recover here, though this likely would involve voiding the contract first, which is not what Addie likely will want to do (given that it would be a smaller recovery).

B. Daughter v. Laurie

Daughter's claim against Laurie will be the same breach of contract claim that Addie could bring. An intended beneficiary of a contract has the ability to sue the parties to the contract to ensure its enforcement or otherwise collect damages. And the intended beneficiary's claim is subject to the same defenses as might be asserted against the parties. Here, the parties entered their modification with the intent that the daughter would benefit, which is sufficient to make her an intended beneficiary for 1/3rd of the winnings. Notably, a parent has standing to sue on behalf of his or her minor children. Thus, Addie will be able to bring the daughter's claim. As for the merits of the claim, they will all be the same as what was asserted above (in other words, Addie is likely to win for breach of contract).

It is not worth pursuing promissory estoppel or restitution because daughter has neither relied in any way according to the facts (necessary for estoppel) nor has she conferred any benefits on Laurie (necessary for restitution).

C. Cal v. Addie

Cal will want to sue Addie for breach of contract. The facts tell us that they had a contract in place, so there is no reason to analyze all the elements of a contract. That said, the facts also tell us that Addie's promise to pay was expressly conditioned on receipt of the lottery prize money. For a party to become liable on a promise, all

express conditions precedent to that promise must be fulfilled. Moreover, the default rule is that parties must comply 100% with express conditions. Here, Addie has not received the money, which means the condition is not fulfilled and she does not have to pay.

In response, Cal will try to argue that he did not read the contract. But this defense will not work. Parties are expected to read the contracts they sign, and not writing a contract will not be a defense except in circumstances in which a party would have no reason to know that a hidden term was present. In this case, that will not apply; Cal will have been expected to read his contract, and he will not be able to recover anything under a breach of contract theory.

Cal might try to assert restitution, which has the same elements described above. He certainly conferred a benefit in the form of services on Addie, and he did not do so gratuitously or officiously. Likewise, Addie had the opportunity to reject the services but she did not. The problem with this claim, however, is that restitution is an equitable claim and breach of contract is a legal claim (at least according to the old split of law and equity). There is a maxim: Equity follows the law. In other words, courts cannot award equitable relief where there is an adequate legal claim. Here, the parties entered into their contract, and Cal certainly could have protected himself by reading it before agreeing to it. As a result, there is no reason that equity should protect him, and a court will not award him equitable relief via a restitution claim. Rather, he will just need to wait for the condition precedent to occur so he will be entitled to his payment under the terms of the contract.

D. Cal v. Laurie

Cal likely does not have a valid claim against Laurie. First, he does not have a breach of contract claim because there was no privity between the parties. Laurie never approached Cal about getting the paperwork, nor did Cal approach Laurie. Rather, the only contract here was between Cal and Addie. Cal might try to assert that Laurie is an intended beneficiary of the contract, but that will not let him recover because intended beneficiaries are not subject to lawsuits for receiving their benefits.

Likewise, he cannot claim promissory estoppel because Laurie never made any representations to him on which he relied.

Finally, restitution is not available because Cal never conferred a benefit on Laurie. Rather, he conferred a benefit on Addie, which she in turn gave to Laurie. In other words, Cal is stuck trying to enforce his contract against Addie, but that is all he can do.

II. Addie's Ability to Recover Attorney's Fees from Laurie

Addie likely will not be able to recover attorney fees from Laurie. Under the American Rule, each side is responsible for its own attorney fees in legal actions. Thus, by default the answer seems to be "no." Florida does have a statute permitting recovery of fees and expenses to a prevailing party if the losing party acted in bad faith with respect to the litigation (e.g., asserting claims or defenses not supported by fact or law), though it is

unclear in this pre-litigation stage whether anything like that would be applicable. In short, the starting assumption should be that Addie cannot recover attorney fees.

III. Laurie's Ethical Issues with Respect to the Agreement

Laurie violated the Florida Rules of Professional Conduct in several ways with respect to her agreement with Addie. First, Addie was a client of Laurie, and this was a business transaction, meaning the conflict-of-interest rule of 4-1.8 will apply. Under that rule, a lawyer cannot engage in a business transaction with a client unless (1) the lawyer makes full and fair disclosure of the terms of the deal, confirmed in writing; (2) the deal is fair and reasonable to the client; and (3) the client is informed of the desirability of seeking independent counsel with respect to the transaction. In this case, we know from the facts that Laurie and Addie were clients, and the deal involved them agreeing to buy lottery tickets together. But here, there is no indication that Laurie sent any of the terms of the deal to Addie in writing. Moreover, there is no indication Laurie ever informed Addie she should seek independent counsel. Lastly, the facts seem to indicate the deal (if upheld in its intended form) was fair enough to Laurie, with each party buying half the tickets but only 1/3rd of the winnings potentially going to Laurie and the other 2/3rds effectively going to Addie (the 1/3rd going to her daughter would basically go to her in effect, by helping her child get on better financial footing thus reducing the likelihood that Addie would have to spend as much in the future).

Second, Laurie might have engaged in an unethical fee arrangement with Addie. Under the Rules of Professional Conduct, any fee must be "reasonable." In this case, the arrangement was that Laurie would exchange her legal services relating to the money in exchange for Addie's investment services. Without knowing more about the relative values of these services, we cannot be sure whether the arrangement was "unreasonable" from a fee point of view, but it still seems like the kind of situation that at best should have given Laurie pause.

IV. Laurie's Ethical Issues with Respect to the Communication with Cal

Finally, Laurie violated Florida Professional Conduct Rule 4-8.4 when she threatened Cal in the e-mail. Rule 4-8.4 prohibits attorneys from engaging in conduct such as intimidation or harassment that reflects poorly on their ability to practice law. In this case, Laurie made a threat to Cal that she would abuse the legal process by "drag[ging] a lawsuit out for years" and "mak[ing] him miserable." In short, she used her position as an attorney and her knowledge of the legal system to threaten somebody into not pursuing a potentially valid claim against her. Moreover, if she carried through in her threat, she would violate the Florida Rules of Professional Conduct by not conducting litigation in good faith.

Q QUESTION NUMBER 2

JULY 2018 BAR EXAMINATION – FAMILY LAW AND DEPENDENCY/ETHICS

Wife and Husband are divorced. Two children were born during the marriage: Daughter (age 15) and Son (age 7). Since the divorce, when Son was only a few months old, Husband has had no contact with the children and has paid no child support. Both children have lived full time with Wife and her boyfriend, except last year, when the children spent several months living with Husband's parents. While the children were with Husband's parents Wife entered an in-patient substance abuse rehabilitation program, on her own, but failed to complete it.

Uncle is concerned that Wife and her boyfriend are not providing a safe home. Uncle knows that the children live with Wife under a court-approved case plan. Uncle has repeatedly observed Wife violate the case plan by using illegal drugs. Uncle has also seen boyfriend hit Son in front of Wife hard enough to leave welts on the Son's arms. Uncle is hesitant to report the substance abuse and the hitting because he is afraid that the children would be shipped off to live with Husband, whom Son does not even remember. Uncle is also worried that Wife might not forgive him for interfering.

In addition, Uncle has recently learned, from DNA testing, that Husband is not the biological father of Daughter.

Uncle wants to adopt the children. He thinks that while Wife might consent, Husband will likely object.

Uncle emails you, a friend from college, because he knows you practice family law. In that email, Uncle recounted the foregoing facts. Please draft a return email to Uncle addressing the following items.

1. Discuss whether Uncle has a legal obligation to report to the Department of Children and Families the behavior of Wife, the boyfriend, or both, regarding the children.
2. Discuss whether you have a legal obligation to report to the Department of Children and Families what you have learned from Uncle.
3. Discuss whether there are legal grounds to terminate Wife's parental rights.
4. Assuming Wife's parental rights are terminated or she consents, does the law require anyone to consent to Uncle's adoption of the children?
5. Discuss the legal rights, if any, of Husband's parents regarding termination of Wife's parental rights or the adoption.

SELECTED ANSWER TO QUESTION 2

(July 2018 Bar Examination)

1) Legal Obligation to Report

In Florida, all citizens have a duty to report suspected cases of child abuse by using the Child Abuse Hotline. However, certain individuals have a higher standard of mandatory reporting, this includes teachers, social service workers, doctors. It can also include professionals who are involved with the children through activities, and who the children might confide in. When persons with a statutory or professional duty fail to report abuse, they may face sanctions and punishment. The general citizen however, though under a duty will not face the same penalties and sanctions.

Under Florida law, uncle would indeed have a duty to report that child abuse, but he likely would not be held to the higher standard of professionals which require mandatory reporting, unless his role and obligations to the children go beyond being a family member. If uncle lives with the children or had been given extra responsibilities over the children by the court of DCF. However, uncle should feel safe to report to the alleged abuse, as he can do so anonymously through the hotline. DCF in its follow up investigation will not reveal uncle's name, but will follow up with mother and investigate to determine if (1) there is a basis for dependency, (2) if there is basis, but services are enough, or (3) no basis. As mother is already under a case plan, DCF will find it high priority to check in on mother and children to assure case plan is being complied with.

2) Attorney Obligation to Report

Attorneys can be held to mandatory reporting standard depending on their role. If the attorney is representing the children or in some role that would have him owe a special duty, attorney will likely be a mandatory reporter. However, in his relationship with uncle, attorney must balance his duty of confidentiality to uncle and duty to report. The duty of confidentiality runs to both actual and prospective clients if attorney has met with client to possible establish a permanent representation. The duty is broader than the attorney-client privilege which applies to communications between the attorney for purposes of representation/litigation. The duty of confidentiality survives the death of the client. However, Florida's rules of professional conduct (RPC) do allow for an attorney to break his duty of confidentiality in certain situations. It is mandatory in order to prevent a crime or bodily harm attorney knows client is going to commit. It is permissive when attorney believes it is necessary in order to obey the RPC, to prevent substantial harm that is likely to be committed, when attorney is defending himself against charge from the client.

Here, attorney is not under mandatory obligation to disclose because the situation described by uncle is not one where the attorney's client (uncle) is committing a crime. However, attorney is likely going to have grounds to permissively disclose in order to satisfy his requirements under the RPC. As a family law attorney, specially, this attorney will have a duty to report crimes against children that he knows of. Attorney, like client can use the hotline method to report. Alternatively, he can advise uncle to report, and follow up to ensure that reporting is actually done.

3) Termination of Parental Rights

Termination of Parental rights is considered a serious action, and will be presided by a judge and fully adjudicated even though it is a civil proceeding. The Circuit court will have exclusive jurisdiction over such proceedings. Parents facing a TPR are protected by the Due Process clause of the United States Constitution, and by Florida Constitution. The US Constitution guarantees parents facing a TPR the right to counsel (goes beyond statutory right under Florida). Further, the government must prove its case in a TPR by clear and convincing evidence. This is a higher standard than the preponderance of the evidence standard required during Shelter and dependency proceedings. During a TPR proceeding, notice must be given to parents, to grandparents, to guardians, and to any other that has possible custody rights to the children. If the state effectively files a TPR petition, that parent's rights will no longer exist, and in the face of the law that parent will have no legal relationship to that child. TPR is an individual process, and as such each parent is independent of each other.

A TPR may be filed at any time. However, in Florida DCF must file a TPR when (1) parent has been under a case plan for more than 12 months and not met the requirements, (2) The children have been dependent for 12 months out of the last 22 months, (3) when parent has killed or attempted kill other parent or children, (4) when parent has been sentenced to incarceration, which will last through the substantial part of the child's youth, (5) parent has failed to comply substantially with case plan and (6) when it finds that there is good cause for initiating the proceeding. TPR can occur because a parent has abandoned the child, for abuse, for neglect, but this must be shown by preponderance of evidence.

DCF might have the grounds to initiate a TPR against mother in this case. First, if Uncle's allegations are true that mother is still using illegal drugs, then DCF is likely to show that mother has not complied with an a case plan. It is unclear exactly what case plan is in this situation, but based on mother's previous history, it is likely that DCF's plan addresses the drug issues. Further, DCF might be able to show that children have been dependent for the last 12 out of 22 months. This seems a bit harder, as facts state the first time children left to live with Husband's parent, mother was doing so out of her own volition, and not under DCF. It is also unclear how long the children have been dependent up to now. DCF, even if could not meet these two standards, could still file if there was good cause to initiate the TPR. Abuse in the home by boyfriend where mother fails to adequately protect the children or defend can be sufficient, especially if mother refuses to leave boyfriend.

As to the legal grounds, DCF will have to show either abuse or neglect by a preponderance of the evidence. DCF will not be able to show abandonment because despite the allegations, mother does seem to be involved with children. Abuse can be physical, psychological, or sexual. Here, the evidence is of physical abuse by the boyfriend not the mother. However, DCF can argue that this abuse is imputed on the mother as she is the one responsible for the children. Further, DCF can argue that by continuing to use illegal drugs, mother has neglected the children. DCF can likely use evidence of the boyfriend's abuse to show mother is not capable of defending, and as such has essentially neglected the children. It is unclear from these facts alone if DCF

can prove by preponderance of evidence, but there does seem to be facts that could go towards proving on legal grounds that Mother's parental rights should be terminated.

4) Adoption of Children

In Florida, anyone can be adopted, including adults. Adoptor can be either (1) married couples, (2) individual adopting as single parent, and (3) a spouse adopting the biological children of his spouse. Consent for an adoption is required by (1) the parents, (2) a child if they are over 12 years of age, and (3) state or guardian of child. Parental consent is not required if the parents' rights have been terminated, or alternatively if that parent never acknowledged paternity and child was born out of wedlock. Abandonment of the children can go towards showing abandonment, if parent never stayed in touch with children. Importantly, the Supreme Court of the United States (with Florida following this ruling) has held that when a child is born during a marriage, paternity by the husband is presumed, regardless of whether he is the actual biological child of the children.

As to Son, in order to adopt uncle would need the consent of Husband, the father to complete the adoption. Termination of the mother's rights do not terminate father's right. If uncle can locate father, father can voluntarily and knowingly consent the adoption. If Uncle cannot find father, then he can seek to initiate a termination or parental rights against him due to abandonment of the children. While DCF is regularly the agency in charge of TPR, private citizens can also initiate the proceedings. Without TPR of father's rights or the consent, adoption cannot occur.

As to Daughter, uncle needs both the Husband's consent and the daughter's consent because she is over the age of 12. Regardless of her age though, Florida does not have an age at which children have the absolute right to consent to family law proceedings.

5) Grandparent's rights

Florida gives protections to grandparents. Grandparents here would have a right to receive notice of the TPR proceedings. They also would have rights to challenge an adoption by the uncle. They have preference rights, such that they might have a better case for being assigned custody of the children. In Florida, grandparents would also be entitled to visitation rights to the children while in the mother's care, and if put into custody in anyone else's care.

Q QUESTION NUMBER 3

JULY 2018 BAR EXAMINATION – FEDERAL CONSTITUTIONAL LAW

Taking America Back (“TAB”) is an unincorporated association of individuals who have gathered in Seaside, Florida, to bring visibility to political and social justice issues including economic inequality and homelessness. TAB carries out its mission via non-violent protests known as “occupations.” These occupations include erecting tents, sharing food, sharing information with the public about U.S. political and economic policies, and peaceful demonstration via signs, placards, and speeches.

Prior to a planned rally, TAB contacted the Seaside Police Department about obtaining a permit for a march and occupation of Freedom Park, a waterfront park in Seaside. Seaside has a Parade Ordinance and a Parks Ordinance that state as follows:

Parade Ordinance

No parade or procession on any public street, and no open-air meeting upon any public property shall be permitted unless a special permit shall first be obtained. Persons desiring permits shall make written application to the police department. If issued, permits shall be printed or written, signed by the police chief, or another authorized member of the police department, and shall specify the date, time, and purpose of the parade, procession, or open-air meeting.

Parks Ordinance

- (1) Except for unusual or unforeseen circumstances, parks shall be open to the public during designated hours. Normal hours are 6:00 a.m. to 11:00 p.m., unless otherwise posted. Such hours shall be deemed extended by the Parks and Recreation Department manager as necessary to accommodate athletic events, cultural, or civic activities.
- (2) No person shall loiter, sleep, or protractedly lounge on the benches and other areas of city parks, engage in loud, boisterous, threatening, abusive, or indecent language, or engage in conduct tending to a breach of the public peace.
- (3) No unauthorized person shall erect a tent or other temporary shelter in a public park for purpose of overnight camping. No person shall live in a park beyond closing hours in any movable structure or vehicle that can be used for camping such as a tent, house trailer, camper, or the like.

TAB was told that Seaside would issue a permit to march. TAB was told to contact the Parks and Recreation Department for a permit for the use of Freedom Park.

On May 27, TAB marched without a permit and began occupying Freedom Park that evening, erecting tents, and camping overnight. The next morning the Parks and Recreation Department provided TAB with information on obtaining a permit to remain in Freedom Park overnight. TAB filled out the permit application and submitted it, but

was informed that before it would be considered, TAB had to obtain a \$1 million liability insurance policy and submit a certificate of insurance to the Parks and Recreation Department. The Police Department also advised TAB that beginning with the evening of May 29, it would begin to enforce its Parks Ordinance prohibiting overnight camping in the park if TAB did not comply with the insurance requirement.

On May 29, TAB informed Seaside it could not comply with the insurance requirement to obtain a permit. Further negotiations with the Parks and Recreation Department proved fruitless, although TAB complained that there was no procedure to waive or appeal the insurance requirement and that the insurance requirement was not contained in the Parks Ordinance. On the evening of May 29 after park closing time, the Police Department began issuing citations to individual TAB members for violating the Parks Ordinance.

TAB filed an action challenging the Seaside Ordinances. You are the clerk for the judge assigned to the case. The judge has asked you to prepare a memorandum of law analyzing TAB's federal constitutional claims and likely conclusions for each.

SELECTED ANSWER TO QUESTION 3

(July 2018 Bar Examination)

This memorandum will discuss TAB's federal constitutional law claims regarding Seaside's Parade Ordinance, and Parks Ordinance.

Standing

The first issue is whether TAB has standing. Standing requires injury in fact (i.e. a particularized, specific injury that is not suffered by the population at large, but rather, is unique to the plaintiff(s), causation, and redressability (i.e. that a decision in the plaintiff's favor would actually rectify the harm/injury). An organization can sue on behalf of its members if individual members could, in their own right, bring the claim, if the claim is related to the organization's purpose, etc. Injury need not be economic - injury/harm can occur when a fundamental right is suppressed. Thus, here, injury (suppression of free speech and violation of the 1st amendment) is satisfied). There is causation because it is Seaside's restrictive ordinances that are preventing TAB and its members from expressing their political, economic and other ideas. Further, a decision in TAB's favor (i.e. striking down the entirety or part of the ordinance(s)) would redress the injury, because TAB would then be able to express its ideas freely. Hence, TAB has standing to sue. Given that members have actually been issued citations, there is clearly a live controversy - this case is both ripe for judicial review, and is not moot.

Sovereign Immunity

Although TAB's challenges are federal, it is suing based on the Seaside Ordinances. TAB can sue Seaside because Florida has waived sovereign immunity for operational decisions. Seaside will argue this is a planning decision, but TAB will argue it is operational and that it thus is entitled to sue.

Parade Ordinance

Under home room powers, a municipality/county in FL can enact ordinances relating to the health, safety, welfare and morals of the people. However, such ordinances must not violate the FL or US Constitutions, nor be preempted with the same.

The 1st Amendment of the US Constitution (applicable to the states through the 14th) protects the freedom of speech and association and the free movement of ideas through society.

TAB can first argue that this ordinance is unconstitutional because it prevents parades or processions on any public street and meetings on any public property, unless a permit is obtained. Parks are designated public forums, i.e. areas which historically have been open for speech-related activities. (Sidewalks and streets are also examples of typical public forums). Given the history of speech associated with such places (parks are open to the community, free access, etc.), the government can only place restrictions on speech if certain tests are met. Speech related laws/ordinances can be content

based or conduct based. If they are content based, they must pass strict scrutiny: the government has the burden of proving there is an important/compelling government interest, and that the ordinance is narrowly tailored (i.e. the least restrictive means of achieving the goal). This is a heavy burden to meet. If, however, the regulation is merely conduct based, and is regulating the time, place, or manner (TPM) of speech, without regard to the actual content, a different test is used. For a conduct regulation of speech in a public forum, the law must be (1) content neutral (i.e. both viewpoint and subject matter neutral), (2) narrowly tailored (3) leave open alternative channels of communication. (Note - for non public and designated public forums, the test is even less strict - the law merely must be viewpoint neutral and be rationally related to a legitimate interest).

Here, TAB can argue that by impeding its members' ability to have processions/public meetings on public property, Seaside is suppressing speech, in violation of the 1st Amendment. TAB wants to share information on political and economic policies, and thus by prohibiting the processions/meetings, the state is essentially prohibiting free expression. However, the US Supreme Court has held that licensing requirements do not necessarily violate the Constitution, because licensing itself is a TPM. Here, the parade ordinance is not viewpoint based: it does not specify that licenses/permits will only be granted for certain viewpoints (e.g. in favor or against 1 issue, or 1 political party). However, because the permit must specify the "purpose" of the parade/procession, TAB can argue that this shows that the permitting is, in fact, at least subject matter based. If this were truly a content neutral regulation, the purpose of the parade/procession should be irrelevant, and thus unnecessary to include. Here, the state will argue that including the purpose is merely for information/records - just because a permit happens to include the purpose of the event does not mean it is content-based.

TAB can also argue that this ordinance is unconstitutional because it gives officers unfettered discretion. While licensing is permitted, if the individuals in charge are not given specific delineated standards by which to make the decisions (regarding when /whether to issue a license), this is problematic. Overall, while TAB will lose in an argument against any and all licensing requirements, it can succeed in its argument that the statute, as currently written, gives too much discretion.

Parks Ordinance Statute (1)

The requirement that parks are only open during designated hours is constitutional. Regulations that have a purpose independent of the suppression of speech can be upheld. Here, however, TAB can argue, similar to above, that there is unfettered discretion, and that the statute is not content neutral. Given that only athletic, civic and cultural activities are permissible for extensions, TAB can argue that this is not content neutral -because it is expressly excluding political activities, and thus is content based (specifically, subject matter based).

The government will counter that laws simply need not be arbitrary - that being able to be in a park late, past designated hours, is not a fundamental right, and thus rational basis scrutiny applies. If rational basis applies, TAB has the burden of proving the law is not rationally related to a legitimate government interest. The government will emphasize that

for safety reasons, it is perfectly reasonable to keep the park shut at night, especially because it is open until 11:00; the government is allowing the park to be open most of the day. If rational basis is applied, the government will succeed here. While freedom of speech and association are clearly fundamental rights, the government is allowed to regulate certain areas - even public forums- for reasons entirely unrelated to the suppression of speech.

Overall, the designated hours portion of this statute is constitutional, but the portion allowing exceptions only for athletic, cultural and civic activities may be on less sound footing. Additionally, TAB can argue that the Parks Manager "extending as necessary" gives unfettered discretion, and that the lack of standards here delineating when extensions may be given is impermissible.

Parks Ordinance Statute (2)

Not all speech is protected. Speech that is likely to incite imminent lawless activity is not protected. However, prior restraints are strongly disfavored. Here, while actually breaching the peace is prohibited, TAB has a strong argument that this statute is overbroad, vague, and unconstitutional. "Loud" and "indecent" speech IS protected by the 1st amendment, the US Supreme Court has expressly held that, for example, the state cannot prohibit an individual from wearing a jacket with the "F" word in a court room, because this is simply an expression of ideas and is not inciting imminent danger.

TAB has a strong argument that section (2) should be struck down as void for vagueness. A vague law is one which doesn't provide fair notice - i.e. that a person of average intelligence would not be able to clearly understand what is permitted and what is prohibited. Here, "tending to breach public peace" "loud," etc., (all the words in the statute) are vague and overbroad (overbreadth means it sweeps in a substantial amount of protected speech in addition to the unprotected speech). Statute 2 is invalid

Parks Ordinance Statute (3)

Statute 3 is likely constitutional. The Supreme Court has held that when there is a reason unrelated to the suppression of speech (see above) for prohibiting certain conduct, the regulation may be upheld. Just as the court can prohibit camping on the lawn of the White House/Capital building - not for the PURPOSE of prohibiting speech, but to PROTECT the lawn/park, Seaside here is entitled to prohibit camping - and this statute seems sufficiently definite, thus it is not vague.

Here, TAB can argue that the \$1 million provision violates its due process and equal protection rights. Every individual has the right to access courts, and courts should be open without denial or delay, and for redress of any injury. Here, by forcing TAB to first obtain a \$1 million insurance policy, the city is essentially prohibiting TAB from having its day in court. TAB can argue that this violates procedural due process. Procedural due process contemplates fair procedure - if life, liberty, or property is to be taken away, there must be a fair process, which involves notice, an opportunity to be heard before a neutral decision maker, the right to appeal (at least once), etc. The fact that there is no way to appeal or waive the insurance requirement is directly violative of due process. When

fundamental rights are infringed upon, the state's action/law is subject to strict scrutiny. Here, the state will argue that it has a compelling interest in insuring that its property is protected/not destroyed by protestors/campers. However, TAB will be able to successfully argue that even if this is a compelling interest, the means are not narrowly tailored. There are plenty of other, less restrictive alternatives that Seaside could use to make sure public property would not be damaged (e.g. a lesser insurance requirement). The state can emphasize that TAB unlawfully marched without waiting for a permit - however, given the issues with discretion in deciding whether to give permits (supra), TAB was not required to wait for such a permit (at least for marching).

While this is a federal constitutional case, the state may argue a Kluger v. White doctrine-style defense - that access to courts can, in fact, be restricted, so long as there is a compelling public necessity, and there is no reasonable alternative.

TAB can also argue that this violates the Equal Protection Clause. When the state regulates a suspect class, strict scrutiny is applied. Here, TAB will argue that by requiring such a large insurance policy, the law discriminates on the basis of wealth/economic status. However, the EPC does not prohibit all discrimination; rather, it only prohibits unreasonable discrimination - and wealth is not a suspect class (unlike race, alienage, national origin, etc., (including physical disability under FL constitution). given that wealth is not a suspect class, rational basis review is applied. However, even under rational basis review, TAB (who has the burden) has a strong argument that this law serves no rational purpose. There is no point in requiring such a high insurance level. While perhaps a lower insurance policy would be rational - in case park/public property were damaged by protestors, here, TAB explicitly has stated it only intends to demonstrate peacefully, and even if it had not stated that its intent is to be peaceful, such a high insurance premium is excessive.

If one or more parts of the parks ordinance is found unconstitutional, the court may be able to strike that portion, and save the rest, provided the ordinance has a savings clause. Overall, part 3 of the ordinance is fine, but the remaining portions are problematic/unconstitutional, as is the insurance requirement.

PART II - SAMPLE MULTIPLE-CHOICE QUESTIONS AND ANSWERS

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

The answers appear on pages 51 and 52.

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.**

30 SAMPLE MULTIPLE-CHOICE QUESTIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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. Husband confesses to Wife that Husband robbed Bank of \$200,000. Two years later, Husband physically abuses Wife. Wife later files for divorce and seeks custody of Child. At the hearing, Wife seeks to testify as to the robbery confession. Husband may

- (A) prevent Wife from testifying, because of the Husband-Wife privilege.
- (B) prevent Wife from testifying if the statute of limitations on robbery has expired.
- (C) not prevent Wife from testifying, because only Wife can assert the Husband-Wife privilege.
- (D) not prevent Wife from testifying, because this is a proceeding brought by one spouse against the other.

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 makes a will leaving all of her stocks to Lou and the rest of her estate to Beth. Several weeks later, she creates a codicil to the will that devises her jewelry to Ann. Jill and Beth have a fight and Jill mistakenly rips up the codicil rather than the will. Jill dies. Which of the following 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 calls Witness to testify. Witness testifies 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. TAP, Inc., has fewer than 100 shareholders. The shareholders wish to enter into an agreement pertaining to the exercise of the corporate powers or the management of the affairs of the corporation. Which of the following, if adopted by the shareholders, would be contrary to public policy and, therefore, unenforceable in Florida?
- (A) An agreement that exculpates directors from all personal liability.
 - (B) An agreement that authorizes a particular shareholder to manage the affairs of the corporation.
 - (C) An agreement that requires dissolution of the corporation at the request of one of the shareholders.
 - (D) An agreement that eliminates the board of directors.

ANSWER KEY FOR MULTIPLE-CHOICE QUESTIONS

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

26	(D)
27	(C)
28	(C)
29	(A)
30	(A)