

Florida Board of Bar Examiners

ADMINISTRATIVE BOARD OF THE SUPREME COURT OF FLORIDA

Florida Bar Examination Study Guide and Selected Answers

**July 2008
February 2009**

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

Future scheduled release dates: March 2010 and August 2010

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

Copyright © 2009 by Florida Board of Bar Examiners

All rights reserved.

TABLE OF CONTENTS

PART I – ESSAY QUESTIONS AND SELECTED ANSWERS	1
ESSAY EXAMINATION INSTRUCTIONS.....	2
JULY 2008 BAR EXAMINATION - REAL PROPERTY/ETHICS	3
JULY 2008 BAR EXAMINATION - TORTS	8
JULY 2008 BAR EXAMINATION - TRUSTS.....	18
FEBRUARY 2009 BAR EXAMINATION - CONTRACTS	22
FEBRUARY 2009 BAR EXAMINATION – FLORIDA CONSTITUTIONAL LAW/FAMILY LAW.....	27
FEBRUARY 2009 BAR EXAMINATION – TORTS.....	33
PART II - SAMPLE MULTIPLE-CHOICE QUESTIONS AND ANSWERS.....	37
MULTIPLE-CHOICE EXAMINATION INSTRUCTIONS	38
23 SAMPLE MULTIPLE-CHOICE QUESTIONS	40
ANSWER KEY FOR MULTIPLE-CHOICE QUESTIONS	49

PART I – ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2008 AND FEBRUARY 2009 FLORIDA BAR EXAMINATIONS

ESSAY QUESTIONS AND SELECTED ANSWERS

Part I of this publication contains the essay questions from the July 2008 and February 2009 Florida Bar Examinations and one selected answer for each question.

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

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

ESSAY EXAMINATION INSTRUCTIONS

Applicable Law

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

Acceptable Essay Answer

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

Q QUESTION NUMBER 1

JULY 2008 BAR EXAMINATION - REAL PROPERTY/ETHICS

Partner at your law firm asks you to analyze the following situation.

Landowner owned real estate known as the Ranch. A year before his death, Landowner delivered a deed to his Brother granting his Brother the Ranch as a gift. The deed conformed to all requirements for a valid deed. Thereafter, Landowner was diagnosed with cancer.

Desperate for money to pay for medical treatment, Landowner contacted Investor. Investor was Landowner's accountant. Investor suggested that Investor be allowed to purchase the Ranch from Landowner. Landowner told Investor that he gave the Ranch to his Brother. Investor checked the county records and found no deed was recorded.

Investor then purchased the Ranch from Landowner for about fifty percent of the Ranch's fair market value. At the time of purchase, Landowner delivered a deed to Investor granting the Ranch to Investor. The deed conformed to all requirements for a valid deed.

At the time the deed was delivered to Investor, Brother had cleared much of the Ranch's land to prepare for construction. Investor recorded his deed. Two weeks later, Brother recorded his deed. Landowner died shortly thereafter.

During his consultation with the law firm, Investor told Partner he would be willing to "forget" that Landowner told him Landowner gave the property to Brother.

Please prepare a legal analysis of the following issues:

- What cause of action does Investor have in claiming title to the Ranch?
- What defenses might be raised by Brother?
- Who is likely to prevail?

Also address any ethical concerns that appear likely to arise should the firm undertake to represent Investor.

SELECTED ANSWER TO QUESTION 1

(July 2008 Bar Examination)

1)

This memo will address the causes of action Investor (“I”) has against Landowner’s Brother (“B”) in claiming superior title to the Ranch (“R”). It will further address the defenses that B will raise in response, in an attempt to have a determination in his favor, as well as who is likely to prevail on both grounds. Lastly, this memo will address the ethical considerations present with our client, I, informing us he will be willing to “forget” a material fact that is in B’s favor.

Conveyance to Brother

The first issue is whether or not the conveyance of R to B is valid. In order for a conveyance of land to be valid, it must be executed in accordance with the statute of frauds, naming the parties, adequate description of the land, and the signature of the party to be charged. In Florida, attestation of two witnesses is also required. The facts state that the deed conformed to all requirements of a valid deed, so we can assume this part is met. Further, the delivery element is also met, as the facts state that the deed was actually delivered to B. Additionally, in order for a conveyance to be valid, there need not be consideration. The fact that this was a gratuitous conveyance is of no effect, and at the moment delivery was completed, B had valid legal title to R.

Conveyance to Investor

The next issue is whether or not the conveyance of R to I is valid. Again the facts state that the deed conformed to all requirements for a valid deed, so we can assume that on its face the conveyance was proper. However, this conveyance arose from a contract between I and L, transfer of the land for 50% of the FMV, and thus may still be unenforceable under contract theory/defenses. There are a couple of issues of concern with the conveyance to I which are amplified by the fact that I was L’s accountant, creating a fiduciary duty on I towards L.

Undue Influence – B will first argue that the conveyance from L to I should be set aside because I, as L’s accountant, took advantage of that fiduciary relationship creating a K that resulted from undue influence. Investor KNEW that L not only had cancer, but also that he was desperate for money to pay for medical treatment. It was not L who offered to sell the R to I, it was I who suggested that he be allowed to purchase the R from L. And this is on top of the fact that L actually informed I that he had already conveyed it to his brother. Although accountants are not bound by the rules of professional conduct that lawyers are bound by, because of the special relationship between a fiduciary and the client the law is willing to recognize a presumption of undue influence in such a situation. The facts show that this was not a fair and reasonable contract by any means, that the I purchased the land for only 50% of its fair market value – despite the fact that L was really in need of the money. I will have little defense to this and there will be a strong argument that the K was voidable due to undue influence.

Possible fraud/misrepresentation – The facts are not clear if L knew that he was only receiving 50% of the FMV. The conveyance made to B was as a gift, so we do not know if he had had the land appraised or had any knowledge of the price. Because I knew of L's dire situation, we will want to know if I, as his accountant, represented to him that he was getting a good deal – or if I was paying a fair price. We may also want to advise B (as possible personal representative of L's estate) of causes of action in tort related to breach of fiduciary duty in this regard.

Unconscionability – Lastly, B will argue that the contract and conveyance to I is simply unconscionable. A court may set aside a contract if the circumstances are such that would shock the conscience of the court. These are pretty strong facts in favor of B. Again, I, as a fiduciary, knew of L's cancer, need for money, and took advantage of that by enticing him to sell the land for only half of its fair market value.

Notice Statute

At common law, such multiple conveyances were settled by a first in time, first in right application. However, Florida is what is considered a notice jurisdiction. This means that regardless of who is first in time, we will protect a subsequent good faith purchaser for value, so long as they took without notice. In order for I to prevail over B, he must seek protection under this statute as he is the subsequent purchaser. If he is able to seek protection here, he will be able to prevail over B in a quiet title action and he will retain sole valid legal title to the land. This will be a difficult hurdle for I to cross, and B will argue both that I took with notice and that he was not a purchaser for value.

In order to take without notice, a buyer must have neither actual, inquiry, or constructive notice. Actual notice means that the buyer either has been told, has seen, or has any other personal knowledge of a prior conveyance. Inquiry notice is notice that would be imputed to the buyer had he made reasonable inquiry into the situation, either by looking up unrecorded transactions or questioning a person in possession of the land. Lastly, constructive notice is imparted to a purchaser if the prior conveyance has been properly recorded. In Florida, whereas proper recording is constructive notice, a lack of recording creates a PRESUMPTION of NO NOTICE. When this happens the burden is on the prior purchaser to show actual notice. B must then prove that I knew about the conveyance. The facts state that L told investor that he did in fact give the ranch to his B. This would be sufficient, although the burden is now on B to show it. He could introduce evidence if the L told him this (Florida has abolished the Dead Man's Statutes) or he could get I to admit it through a request for admission or through testimony. Further, if I brings any conversation between himself and L up in evidence, B would be able to introduce other evidence of such conversation.

Additionally, because of the accountant-client relationship, it can be argued that L's accountant would also have actual knowledge of a conveyance of real property as it surely effects the assets and liabilities of L! As a side issue, I will most likely want to argue accountant-client privilege with regards to preventing any testimony or evidence concerning conversations regarding the conveyance of this land. However, we need to be aware that any such privilege would apply only to confidential communications in I's accountant capacity, and not with regard to any transaction between the two.

If B is unable to prove that this conversation or information took place, he will argue that I also had inquiry notice. Here, at that time the deed was delivered to I, B had cleared much of R's land to prepare for construction. Had I gone to the land to view it before purchasing, he would have seen B's presence, as well as possibly construction crews, land clearing, and other evidence of B's ownership. I will argue that B, as L's brother, was there only helping L in preparing the land. However, the court will most likely impute inquiry notice to I as had he asked B about his presence and actions with the land, B would have informed him that he owned it.

Additionally, B will argue that I was not a purchaser for value. The conveyance from L to I was only for fifty percent of the R's fair market value. B will argue that this should not be sufficient however I will respond that courts are not inclined to question consideration, so long as it is present.

Effect of the Notice Statute

Although I recorded first, because the court is likely to find that he was not a bond fide purchaser of the property (through both actual and inquiry notice), he will not take protection under the statute. The effect of him not falling within the statute, is that his subsequent purchaser is not protected and we technically fall back under the first in time, first in right and B's interest in the property is protected. This is irregardless of the fact that he did not record until after I. However, if I were to attempt to convey the land again anyone conveyed to would not be a good faith purchaser because B's subsequent recording now yields constructive notice on any future purchaser.

Conclusion

B most likely will prevail. He has very strong arguments with regard to setting aside the conveyance itself on the grounds of undue influence and unconsciousability. Furthermore, if L told him about I's knowledge of the conveyance to B or it can be proven that I, as L's accountant was aware of the conveyance, he will have evidence to show actual knowledge; but even without this evidence, he should be able to convince the court that I should have inquiry notice. As a result, I has no protection under the recording statute and B will prevail.

Ethical Considerations

During the consultation with our firm, I informed us that he was willing to "forget", i.e., lie that L ever told him that the R was first conveyed to his brother. First and foremost, a lawyer in Florida is under no duty to disclose adverse facts to the tribunal. However, this does not give a lawyer or his client free rein to misrepresent facts to a tribunal, or to opposing counsel. A lawyer has an ethical duty not only to act with candor towards the tribunal, but also to prevent such misrepresentations from occurring. If we were to take I on as a client and filed pleadings with the court, we could not represent that this fact did not occur. When a lawyer signs pleadings, he is subject to ethical obligations that everything put forth therein is true and in good faith. This would be cause for sanctions against both I and our firm, in a 50/50 split. We would not be able to claim we relied in good faith on our client, because he has told us that it is not the truth.

Further, if this case went to hearing, or even trial, we would have to affirmatively counsel I that he must tell the truth and that he may not tell the falsity he wishes to assert. Furthermore, we would need to explain the ethical obligations we are under. If he fails to take our advice, we would have to move the court to allow us to withdraw as I's counsel. If the court would not allow this, we would have to disclose such a misrepresentation to the court. Although, we are not close to trial yet, this is something we should take into consideration when choosing to represent this client - to spare the trouble later on if he insists on lying.

Q QUESTION NUMBER 2

JULY 2008 BAR EXAMINATION - TORTS

Betty went to Health Food Store and asked an employee for assistance with the selection of herbal remedies. Carl, the cashier, was not assigned to that section, had not been trained in its inventory, and had been specifically told by his employer not to give advice about the products. Nonetheless, he told Betty that he knew "all about" herbal medicine. Betty said that she had never used any herbs and wanted him to recommend a remedy for arthritis. Carl gave her a bottle of "Power Pills" and told her that they were great for arthritis.

The label on "Power Pills" identified them as a "food supplement" designed to give "an energy boost." The label included a list of herbal ingredients and a recommended dose of one pill, three times a day. "Power Pills" are manufactured by HerbCo.

When Betty went home later that day, she told her friend and visiting houseguest, Fran, about "Power Pills." Fran, who also had arthritis, wanted to try them, so Betty agreed to share her pills. Fran took the pills at the recommended dose, but Betty decided to take five times that amount on the theory that "more is better."

Betty and Fran continued to take the pills until they were gone. Shortly thereafter, Betty developed heart palpitations that required hospitalization. Her physician informed her that "Power Pills" contain an assortment of stimulants designed to give an energy boost; none of the ingredients has any application to arthritis pain. In fact, one of the ingredients in "Power Pills" interacted with her prescription blood pressure medicine to cause the palpitations. Betty will need surgery to repair damaged heart tissue. Around this time, Fran began to feel light-headed and confused. Extensive blood tests by her doctor showed high levels of mercury in her blood.

Betty and Fran have requested that your firm represent both of them. You have been asked to prepare a memo discussing the possible causes of action and defenses.

SELECTED ANSWER TO QUESTION 2

(July 2008 Bar Examination)

ISSUE 1:

May I jointly represent Betty and Fran?

RULE:

A lawyer may concurrently represent clients if their representations do not create conflicts and the concurrent representation will not force the lawyer to represent one client to the detriment of the other client.

ANALYSIS:

Here, Betty and Fran have come to me as potential plaintiffs in consumer tort actions against Carl, Health Food Store (HFS), and HerbCo. Betty did give Fran half of the Power Pills, which might suggest some liability on Betty's part to Fran, but Betty is not a merchant, she has no expertise in prescribing medicine, and she does not appear to have acted negligently – that is, breached a duty of due care to Fran, said breach causing Fran's damages. Here, Betty seems to have acted as a reasonably prudent person in similar circumstances – relying on Carl's recommendations and relaying what she had learned from Carl to Fran.

CONCLUSION:

Betty and Fran are not currently in conflict and do not appear to be likely to become adverse to one another. The defendants may attempt to assert slightly different defenses against each woman, but this should not make Betty and Fran adverse to one another or require me to represent one to the detriment of the other. Hence, I should be able to represent both Betty and Fran.

ISSUE 2: *Betty/Fran v. Carl*

Should we go after Carl as a defendant?

RULE:

Certain consumer torts are actionable against both a manufacturer and a distributor of that manufacturer's products, and said sales of such products are necessarily performed via employees of the distributor. In addition, the distributor, here, HFS, have both implied and express warranties, some made through their employees, such as Carl.

ANALYSIS:

While Carl, an employee of HFS, may have taken upon himself to make a recommendation to Betty and thereby anything he might have said could be held as a statement/admission by HFS, Carl is only a cashier and presumably does not enjoy a lavish income or have extensive resources – making him a less than desirable defendant, especially compared with the relatively deep pockets of HFS and HerbCo.

CONCLUSION:

We may name Carl as a co-defendant, merely to subject him to the jurisdiction and powers of the court.

ISSUE 3:

Joiner of parties.

RULE:

A plaintiff may join any defendants whose allegedly tortious conduct arose from the same transaction and/or occurrences (T/O) and such defendants will be held liable to their proportion of fault. Florida has abolished joint and several liability, which means that each defendant pays his % of plaintiff's recovery proportionate to the defendant's % of fault. Florida also follows a pure comparative liability rule, which means that a plaintiff's recovery will be proportionately reduced by his percentage of fault in causing the harm of which he complains. However, if a jury finds that a plaintiff is more than 50% at fault and also finds that plaintiff's 50+% is due to voluntary intoxication, plaintiff will recover nothing.

ANALYSIS:

Here, Betty and Fran complain of injurious effects from ingesting Power Pills, manufactured by HerbCo and sold by HFS through Carl. There is a single transaction, the purchase of Power Pills, and a single occurrence, the ingestion of Power Pills.

CONCLUSION:

Betty and Fran should be able to join Carl, HFS, and HerbCo in a single action.

ISSUE 4: Betty/Fran v. HFS: Implied a warranty of merchantability

Did HFS breach the implied warranty of merchantability?

RULE:

Each merchant, a person occupied in the regular distribution and sale of products, impliedly warrants that the products that they sell are "merchantable" - that is fit for regular consumption and for the uses to which the products are usually put. In Florida, this implied warranty extends to not only the purchaser, but the purchaser's family and household guests.

This implied warranty may be negated through an express disclaimer, using such words as "as is" or "this product is sold with no express or implied warranties."

ANALYSIS:

Here, Betty and Fran will argue that HFS is in the regular business of selling food supplements such as Power Pills. Power Pills is a product that HFS regularly sells. Betty bought Power Pills, which places her in the position of the consumer of the product and Fran was a household guest of Betty at the time Betty gave Fran some of the Power Pills. Moreover, both Betty and Fran (subject to proof of causation) claim that the Pills made them sick.

HFS will argue that Betty and Fran took the pills, not for an energy boost, but for arthritis and that they did not make usual use of the product.

Betty and Fran will counter that the implied warranty merely holds that the product is safe and will not injure the consumer, and that the Pills did injure them.

CONCLUSION:

A product like Power Pills, sold by a merchant like HFS, contains an implied warranty of merchantability and there is no evidence that HFS expressly disclaimed this implied warranty. Moreover, Betty, as the direct consumer, and Fran, as the consumer's household guest, are protected under this implied warranty. Subject to proving causation, Betty and Fran should recover under this cause of action.

ISSUE 5: BETTY/FRAN V. HFS: Warranty for a particular purpose

Did HFS breach the warranty fit for a particular purpose?

RULE:

A merchant will be held liable if:

- 1. a consumer appraises a merchant of a particular need,*
- 2. the merchant recommends a particular product to meet that particular need,*
- 3. the consumer relies on the merchant's recommendation*
- 4. the consumer purchases the product*
- 5. the consumer uses the product*
- 6. the product does not perform the particular use*
- 7. the consumer is injured thereby, either directly or, in the fullness of time in which the consumer uses the product.*

The merchant will also be liable to anyone who obtains the product from the consumer who relied on the merchant's recommendation and uses the product.

ANALYSIS:

Betty and Fran will argue that Betty told Carl that Betty was looking for an arthritis medicine and that she did not know which supplement to buy. They will also argue that Carl, knowing of Betty's requirements, undertook to recommend Power Pills specifically for the purpose of relieving arthritis pain and that Betty, relying solely on Carl's recommendation, purchased the Pills, took the Pills, and shared the Pills with Fran. HFS will argue that it specifically instructed Carl not to recommend products to customers, that when he made the recommendation to Betty he was acting outside the scope of his employment, and that HFS should not be held liable for Carl's statements.

VICARIOUS LIABILITY:

An employer will be held liable for the acts of its employees if:

- 1. the employee's act was done within the scope of the employee's duties*
- 2. the employee's acts were not willful or wanton, unless the employer authorized or otherwise authorized the willful/wanton conduct*
- 3. normally, employers are not liable for their employee's torts against the body of a person (battery, false imprisonment, etc.), but an employer may be held liable for such torts if physical contact with customers is a part of the employee's job (e.g. bouncer at a nightclub).*

Here, HFS will argue that Carl was specifically told not to recommend products to consumers, that is, HFS will argue that the scope of Carl's employment was expressly delimited to not give recommendations and, therefore, when he ventured to give a recommendation, he was acting outside of the scope of his employment and HFS should therefore not be held liable for Carl's statements.

Betty and Fran will counter that Betty had no reason to know that Carl was not qualified or authorized to make recommendations and therefore, HFS should be held liable to them as a merchant of the Pills.

CONCLUSION:

HFS will probably prevail because it specifically delimited Carl's scope of employment and Carl exceeded that scope by making the recommendation.

ISSUE 6: BETTY/FRAN V. HFS: Express warranty

Did HFS breach an express warranty made by Carl about the effectiveness of the Pills?

RULE:

A merchant may be held liable to a customer if the merchant:

- 1. makes an express warranty about a product and its characteristics/performance (not mere puffery)*
- 2. and the product does not live up to the express warranties.*

ANALYSIS:

Betty and Fran will argue that Carl made express warranties about the Pills, especially about their effectiveness regarding arthritis, and that the Pills did not conform to this warrant.

HFS will, once again, argue, that it should not be held liable for Carl's statements.

VICARIOUS LIABILITY:

An employer will be held liable for the acts of its employees if:

- 4. the employee's act was done within the scope of the employee's duties*
- 5. the employee's acts were not willful or wanton, unless the employer authorized or otherwise authorized the willful/wanton conduct*

6. normally, employers are not liable for their employee's torts against the body of a person (battery, false imprisonment, etc.), but an employer may be held liable for such torts if physical contact with customers is a part of the employee's job (e.g. bouncer at a nightclub).

Here, HFS will argue that Carl was specifically told not to recommend products to consumers, that is, HFS will argue that the scope of Carl's employment was expressly delimited to not give recommendations and, therefore, when he ventured to give a recommendation, he was acting outside of the scope of his employment and HFS should therefore not be held liable for Carl's statements.

Betty and Fran will counter that Betty had no way of knowing that Carl lacked the authority to make such recommendations and that they should be protected under an equitable fairness theory.

CONCLUSION:

HFS will probably prevail under the vicarious liability theory because the trier of fact will probably find that Carl did exceed the scope of his employment by making express warranties about the Pills.

BETTY-FRAN V. HFS: MISREPRESENTATION

Did HFS commit misrepresentation when Carl sold the Pills to Betty?

RULE:

A merchant commits misrepresentation when he:

1. knowingly makes false statements about a product
2. with the intention of inducing a customer to buy the product
3. the misrepresentation does induce the customer to buy the product,
4. and the customer's reliance was justifiable
5. and the customer is injured there from.

ANALYSIS:

Betty will argue that Carl knew that the Pills did not help arthritis, that he knowingly recommended the Pills to make a sale, that Betty, knowing nothing about food supplements, reasonably/justifiably relied on Carl's misrepresentation, and that she was injured there from.

HFS will argue that Carl's misrepresentations were outside of his scope of employment, see vicarious liability above, and Carl will argue that he honestly believed that Power Pills were good for arthritis, thereby negating the intent element of this cause of action.

CONCLUSION:

HFS/Carl will probably prevail because it appears from the facts that Carl did indeed think Power Pills would have helped Betty and therefore Carl lacked the requisite knowing and intent elements for a misrepresentation action.

BETTY-FRAN V. HFS/HERBCO: Strict products liability

Are HFS and HerbCo liable to Betty and Fran under a strict products liability theory and did anything Betty and Fran do or not do relieve these defendants of liability?

RULE

A manufacturer and distributor of a product will be held strictly liable for injuries caused by that product if:

- 1. the product was unreasonably dangerous*
- 2. the product left the manufacturer in this dangerous condition*
- 3. the distributor did not alter the product*
- 4. the product was dangerously defective in one or more of 3 ways:*
 - defectively manufactured*

the product was properly designed but somehow was made defectively in the manufacturing process

[safeguards against defective manufacturer are no defense to this claim]

defectively designed

the product was defectively designed making it unreasonably dangerous

[and there was no other economically reasonable way of making the product to serve its intended use at a commercially reasonable price]

defective warnings

the product was properly designed and manufactured but the product lacked warning labels and/or instructions that would have put an average consumer on notice of dangerous aspects of the product

[such warnings must be conspicuous, legible, clear, and understandable]
- 5. the consumer made foreseeable use of the product*

[such use does not have to be the intended use, just foreseeable use]
- 6. the product caused injury*
- 7. the consumer suffered harm*

[mere economic loss to the product is not enough to prevail in this claim, there must be damage to the consumer or the consumer's property; if there is only damage to the product itself, the proper cause of action is breach of contract]

ANALYSIS:

Betty/Fran will argue that HerbCo manufactured an unreasonably dangerous product, i.e., Power Pills that caused palpitations in Betty and mercury poisoning in Fran, that the product reached Betty via HFS in an unaltered condition [presumed unless evidence shows that the distributor somehow altered the product], that the product lacked sufficient warnings, that Betty and Fran made foreseeable use, and that both were injured from their use.

HFS and HerbCo's best defenses will be that Betty's taking five times the recommended dosage did not make foreseeable use of the Power Pills.

Betty will counter that it is wholly foreseeable that someone would think that if 1 pill is good, 5 pills must be even better.

HFS/HerbCo could also argue that Betty assumed the risk [that is, Betty was apprised of the risks and knowing of the risks chose to proceed with the conduct anyway], namely that the Pills clearly stated a recommended dosage and Betty knowingly exceeded this limitation.

Betty will counter that assumption of the risk only avails if the plaintiff is fully aware of all the potential risks and still goes ahead, but that the Pills' recommended dosage did not warn of heart palpitations as a possible negative event.

HFS/HerbCo's best defense against Fran is that the Power Pills did not cause Fran's mercury poisoning.

A plaintiff must show both actual causation, that but for the defendant's conduct the plaintiff would not have been injured, and proximate causation, that is, plaintiff's injury is the kind of foreseeable risk that this defendant should be held liable for.

The eggshell plaintiff

A defendant takes his plaintiff as he finds them. Hence, the defendant will be held liable for any harm to the plaintiff that arises from his tortious act and is attributable to plaintiff's condition. Defendant's liability may be limited or severed through unforeseeable intervening acts, but rescuers and medical malpractice and injuries arising from treatment are foreseeable and therefore are not superseding intervening acts but they might lessen defendant's % of fault.

Fran must prove causation. If she does this, she should be able to prevail against both HFS/HerbCo since Florida has abolished the privity requirement for strict products liability and has extended liability for all foreseeable users of the product in question.

HFS/HerbCo can also argue comparative liability – that is, both Betty and Fran were partly to blame for their injuries.

Here, a jury might find that Betty's 5-fold ingestion, while foreseeable was nonetheless blameworthy and award her a portion of the fault for her injuries. Even if she is found to be 90% at fault, she will still recover 10% of any damages that the jury awards.

Here, the facts show that Fran followed the recommended dosage and therefore it does not seem likely that a jury will find Fran comparatively liable for her injuries.

Note:

HFS, if found at fault and if charged with damages, could likely recover contribution and indemnification from HerbCo because HFS merely distributed the Power Pills from HerbCo without altering the product, but these parties probably have a contribution/indemnification provision in their distribution agreement.

ISSUE 7: BETTY/FRAN V. HFS/HERBCO: NEGLIGENCE

Were HFS/HERBCO negligent in manufacturing and distributing Power Pills?

RULE:

Negligence occurs when there is:

1. a duty

persons have a duty to act as a hypothetical reasonably prudent person would act under similar circumstances

here, HerbCo had a duty to act like a reasonably prudent manufacturer and make sure it did not place dangerous products into the stream of commerce

Here, HFS had a duty to act as a reasonable distributor and not sell dangerous products

2. *a breach of that duty*

a breach occurs when a defendant does something that a reasonable person would not do or fails to do something that a reasonable person would have done

Here, if HerbCo manufactured a dangerous product and such manufacturer was something that a reasonable manufacturer would not have done, then HerbCo could be found to have breached this duty.

Here, HFS would have breached its duty if selling Power Pills was not something a reasonable store would have done.

3. *causation*

actual causation

but for the defendant's breach the plaintiff would not have been injured

proximate causation

plaintiff was a foreseeable plaintiff and his injuries are the kind of risk the law seeks to protect such foreseeable plaintiffs from

4. *damages*

compensatory

for pain and suffering, medical expenses, loss of work, loss of consortium

punitive/exemplary damages

to punish a willful/wanton defendant for outrageous behavior, act as a deterrent for him and others

punitives are capped at 3 times compensatories

do not have to have compensatories to get punitives

no cap on punitives if defendant intentionally harmed plaintiff or defendant was intoxicated or under the influence of drugs at the time

ISSUE 8: BETTY/FRAN V. HFS: NEGLIGENCE HIRING

Was HFS negligent in hiring Carl and did said negligence cause B/F's injuries?

RULE:

An employer can be held for negligent hiring if the employer knowingly hires a person who is not qualified for the job or the person has a record of behavior that makes him a danger to the employer's customers/charges.

Negligent hiring is one of the rare civil torts in which the character of the defendant is at issue and therefore the court will allow evidence as to character otherwise banned from consideration in most torts.

ANALYSIS:

Here, we have no facts about Carl's past, but we do have the fact that HFS expressly forbade Carl from making product recommendations to customers. This explicit prohibition may indicate that HFS knew something about Carl and his propensities, even before he started to work for HFS. Indeed, discovery may reveal that Carl's employment was predicated on an understanding that he would not make product recommendations. Hence, if Betty/Fran can show that HFS knew about Carl's proclivity for making spurious recommendations and also knew that Carl could not help himself from making such recommendations, B/F may be able to show that HFS was negligent in hiring Carl; that is, a reasonable employer in HFS's position would not have hired Carl. HFS could counter that, even if it knew of Carl's proclivity for making bad recommendations when it hired Carl, it explicitly and unequivocally forbade Carl from making recommendations and thereby took the necessary steps that any reasonable store would take to eliminate harm from such a hiring.

CONCLUSION:

There is simply not enough facts to support a negligent hiring claim at this time.

Q **QUESTION NUMBER 3**

JULY 2008 BAR EXAMINATION - TRUSTS

Marge and Dave were married five years ago. Dave has two children from a prior marriage who are now adults. The settlement agreement incorporated into the divorce decree from his first marriage required Dave to maintain an existing \$300,000 insurance policy on his life but to designate his children, instead of his ex-wife, as the sole beneficiaries. The divorce decree also provided that Dave would keep this insurance in effect until the youngest child reached the age of 21.

Marge and Dave decided to set up a trust. They conveyed \$1 million of specific stocks and bonds to the trust. The trust provides that the income from the trust is payable to Marge and Dave for ten years. At the earlier of either the end of ten years or Marge's and Dave's deaths, the trust income is payable to Dave's children for ten years. At the end of that ten-year period, the trust shall terminate, all trust property shall be sold, and the proceeds shall be distributed equally among Dave's children. Marge and Dave are designated as co-trustees. Upon their death or inability to serve, Marge's favorite brother, Guy, is named as successor trustee. In the event of Guy's death, National Bank is named as successor trustee.

Marge and Dave bought a small apartment building valued at \$2 million, telling the seller that the property will be in the trust. They titled the property in Guy's name "as trustee."

Shortly thereafter, Marge, Dave, and Guy all died in a car crash. Guy's will left all of his property to the Charitable Foundation. Foundation and Dave's children make competing claims to the apartment building. Several apartments are empty. National Bank asks the court for permission to rent the empty apartments to its out-of-town employees.

Dave had only one insurance policy at the time of his death. The policy had been maintained by Dave since his divorce and it was for \$300,000. The policy named Dave's ex-wife as the sole beneficiary. The ex-wife and the children have made competing claims to the life insurance proceeds.

The children want to terminate the trust now. The children ask to be appointed as successor trustees in place of National Bank, citing to the empty apartments as a reason to replace National Bank. Meanwhile, the youngest child, who is 19 years old, confessed to tampering with the brakes of Marge and Dave's car. Pursuant to a plea of no contest, the youngest child was convicted of second degree murder of Marge, Dave, and Guy.

Discuss fully all the pertinent issues and their likely outcomes regarding the characteristics of the trust, the beneficiaries, the trustees, and disposition of the apartment building and the life insurance proceeds.

SELECTED ANSWER TO QUESTION 3

(July 2008 Bar Examination)

First, I will address the life insurance proceeds.

Settlement agreements in a divorce are enforceable according to their terms.

In this case, it appears that the agreement was breached when Dave (D) named ex-wife the sole beneficiary.

When a promise is breached, courts can impose a constructive trust. Constructive trusts are meant to equitably allocate trust property under five situations: Theft, breach of fiduciary duty, homicide, breach of promise, and fraud. The court will consider extrinsic evidence to determine the rightful beneficiaries of the trust.

In this case, D breached a promise to name his children as beneficiaries. Courts normally do not impose a constructive trust for breach of promise unless there is an implied duty, such as that arising from a close familial relationship.

D's children had such a close relationship and will successfully argue that D's ex-wife will not be the sole beneficiary.

But, the homicide conviction of D's youngest means that his share will be placed in either a constructive trust for his heirs or passed to D's oldest child.

D's youngest could argue that second-degree murder in Florida is only depraved heart murder, not premeditated murder, and as such he is not guilty of homicide. This argument will fail.

Second, I will address the characteristics of the trust.

A valid trust requires 7 elements: settler, intent, trustee, beneficiary, sole trustee can't be sole beneficiary, trust property, & a valid purpose.

There are two kinds of express trusts: private and charitable. And trusts can be either inter-vivos or testamentary. Finally, trusts are presumed revocable unless expressly stated otherwise.

Marge (M) & D's trust met the 7 elements and was validly formed when the \$1 million of stocks and bonds were conveyed.

The ten-year term is valid, and the second ten-year term is also valid. The final disposition does not violate the Rule Against Perpetuities because it will vest within 21 years of the lives in being or within 360 years.

The naming of successor trustees is also valid if National Bank has trustee powers under Florida law. Also, Guy need not be a Florida resident because he is related to the settlers. In addition, if a trustee is necessary, recent statutes provide that court first look to the trust document, then to a beneficiary, before making an appointment.

An issue arises with the purchase of the apartment. A trustee cannot purchase real property without authorization in the trust or order of a court. But, the property can be titled in the name of trustee and kept as a trust asset – the asset being principal and the rent being trust income.

If the trust so provided, D&M could purchase the property and title it in G's name. This would be a purchase money trust. Were this transaction to fail, it would equal a resulting trust in favor of the trust itself.

Resulting trusts are not actual trusts but instead imposed by courts to dispose of a purchase money trust, to pass a beneficiary's interest if her gift lapses, and to dispose of the corpus of a trust.

In this case, the purchase of the property will either be valid under the trust document, or it will be passed to the trust as a resulting trust.

The Beneficiaries

M's and D's interests ended with their deaths. Florida has a simultaneous death act where each spouse is considered to have predeceased the other, but this would have no effect on the outcome.

D's children are entitled to the income for 10 years. Before M's & D's death, the children had a vested remainder subject to open. But their interest vested.

D's youngest will not collect any income or proceeds of the trust. A beneficiary's wrongful conduct causes his interest to end. Instead, it passes in intestate shares, in this case to D's youngest child's mother (D's ex-wife) or any heirs.

D's oldest will collect half of the income and half of the corpus in 10 years.

The trustees

Trustees have a duty of loyalty and care to the trust. This means that they must give an accurate reporting, defend the trust against claims, not commingle funds, diversify trust investments, make the trust profitable, & not self-deal.

The trust document properly appointed National Bank, and no co-trustee need be appointed unless the trust document so requires.

Trustees cannot be removed except by court order in cases of a breach of fiduciary duty, conflict of interest, or hostility with the beneficiaries.

*As successor trustee, National Bank is in charge of the trust assets, including the apartment building (discussed further, *infra*).*

National Bank may have committed a breach of fiduciary duty if it rented the apartment units to its employees. This would breach the duty against self-dealing, even though National Bank has a duty to either fill the empty units or dispose of the property. The court cannot grant permission to self-deal.

But, the bank has yet to rent the apartments, meaning that it has not breached its fiduciary duty.

As a result, the beneficiary (only D's oldest) cannot yet seek to replace the trustee.

The Apartment Building

*The building is trust property because G only acquired it as trustee. As discussed *supra*, the apartment either belongs to the trust as per the document, or it belongs to the trust via a resulting trust.*

As a trust asset, National Bank must use the rent income as trust income, and pay for the building maintenance out of the trust income and principal. If the building is sold, the proceeds are added to trust principal.

Foundation appears to be a valid beneficiary of G's will, but the building never belonged to G sufficient for G to include it in his will. This defeats Foundation's claim.

D's oldest has no claim at this point because the building is a trust asset. D does have a claim to rent income as a beneficiary of the trust.

Final Issues

D's oldest will not be able to terminate the trust. A trust can be terminated upon the agreement of the trustee and all beneficiaries. But a court will not terminate the trust contrary to its express language.

The trust specifically names a term of 10 years. It is highly unlikely that a court will go against the settlers' express intent of a 10-year term. As a result, D's oldest will fail in his petition to terminate the trust.

In addition, I have eliminated D's youngest from mention as a beneficiary because his murder conviction deprives him of any claim as a beneficiary.

D's children could not be appointed trustees. Not only is D's youngest prohibited by law because of his murder conviction, but bank has yet to commit any act meriting removal. In addition, if D's oldest were appointed, then he would be the sole trustee and beneficiary, which is prohibited by law.

Venue: Circuit Court

Q QUESTION NUMBER 1

FEBRUARY 2009 BAR EXAMINATION - CONTRACTS

Albert is a distributor of widgets. He purchases widgets from widget makers and sells them to factories. Widgets are standard goods used in factories. Mindy owns such a factory.

Albert and Mindy signed a contract with a term of one year that commenced in January. The contract provided that Albert would make monthly deliveries of 10,000 widgets to Mindy's factory at a price of \$6 per widget. Delivery was to occur on the first of each month. At the time of contract, Albert's cost for widgets was \$5. The market price for widgets was \$6.

Albert delivered 8,000 widgets in April and 7,000 widgets in May. Mindy accepted and paid for the widgets. On May 10th, Mindy contacted Albert regarding the shortages. Albert stated his cost for widgets had risen to \$6. Mindy and Albert signed an addendum changing the contract price to \$7 per widget. Albert delivered 15,000 widgets on June 15th. Mindy accepted and paid for the widgets.

Mindy then heard rumors that Albert was on the verge of bankruptcy. On June 20th, Mindy sent Albert a letter demanding he provide written assurances that he could perform. Mindy stated that she would not accept any further deliveries without such assurances.

Albert did not make the July delivery and did not respond to the demand for assurances. On July 25th, Mindy informed Albert she was canceling the contract. Since mid-June, the market price for widgets has been \$7.

Your firm has been contacted by Albert. Albert wants to know the following:

- what causes of action he may have against Mindy;
- what defenses might be raised; and
- what damages would be available to him.

Please prepare a legal memorandum addressing these points.

SELECTED ANSWER TO QUESTION 1 **(February 2009 Bar Examination)**

This memo will discuss what causes of action Albert (A) will have against Mindy (M), what defenses might be raised, and what damages would be available to him.

Applicable Law

This contract is for the sale of goods and as such is governed by the UCC. Both of the parties here are merchants so there will be special rules for them under the UCC.

K Formation

To have a contract there must be offer, acceptance, consideration, and no valid defenses. Here the facts state that there was signed written contract between A and M, so it appears they are satisfied. The contract is for a term of one year, but because it is split up into separate payments and delivery dates each month, this would most likely be considered an installment contract.

Defenses to Formation

The defenses to formation are inadequate consideration, mistake, duress, incapacity, intoxication. None of those defenses apply to this fact pattern.

Defenses to Execution

Statute of Frauds -- Under the UCC for a K for sale of goods to be valid it must be in writing, signed by the party charged, and must state a quantity, and give adequate language to indicate there is a contract. We have a signed writing and it states the quantity and gives most terms. This would satisfy the SOF and neither party would be able to challenge there was no contract based in SOF. Further, SOF can be satisfied by delivery of goods in a K for sale of goods and here we have had delivery and payment for several months.

Installment K

When a K can be broken up into separate portions where each portion has performance by each side it can be deemed an installment K. Here, delivery was to be monthly with payments also being monthly. This contract can be broken down into 12 separate installments. A would want to argue that this was an installment contract. As such, a breach of one installment would not be a breach of the entire contract. Further, a breach of one installment may be cured by further installments.

Material v. Minor Breach

When determining a breach it can either be material or minor. To determine if it is material or minor you look to see if the non-breaching party received the benefit of the bargain. To determine that you look to see how much benefit has been given, likelihood the other party will perform, the cost of the other party having to perform. If there has been a material breach of the contract that the non-breaching party does not have to

perform their portion of the K and will recover any damages they incur in order to mitigate or cover for the breaching parties breach. Here, A will argue that M materially breached the K on July 25th when she informed him she was canceling the K. The K was for 12 months and she was canceling it halfway through the K. Also, she had received 6 deliveries already and he was one month late on these deliveries. M will argue that A breached the K when he did not deliver the widgets for July and his breach was material. This breach would most likely be deemed minor because it was only one month out of 12. Further, as stated above, this would most likely be determined to be an installment K and as such A should be able to cure this installment on a later installment. Also, M accepted the later shipment of cured goods and as such A had fully performed for his part of the K. A is likely to succeed in this argument and M would be the breaching party in this scenario.

Perfect Tender

M will argue that A had already breached the K earlier when he failed to produce all 10K widgets on two separate months. Under the UCC perfect tender rule a party must deliver the goods in perfect condition on the exact quantity and quality as stated in the K. If the delivering party does not, then they have breached the contract and the non breaching party may accept the goods, reject the goods, or accept any commercially reasonable units and sue for the rest. Here, even if the court found that A breached the perfect tender rule, M accepted the goods. As such she ascended to the contract. Further, under an installment contract A was allowed to cure this shipment with a future shipment and he did with his June shipment of 15K. M would lose this argument as well and A would be deemed to not have breached.

Impracticability or Impossibility

If M argued that A breached the contract earlier when he did not deliver the correct amount in the beginning as stated above. A could argue that it became impracticable because of the change in price of widgets and he would lose money. Impracticability occurs when there is an event that makes performance of one party very difficult and the happening of that event was not foreseen by the parties. Here a raise in price of widgets by \$1 would be foreseeable. This would not be a good defense for A.

Anticipatory Repudiation and Adequate Assurances

Albert can argue that M breached their contract when she informed him that she would no longer accept deliveries without assurances. A can argue that this was an anticipatory repudiation. Anticipatory repudiation occurs when one party communicates unequivocally that they will not perform their part of the bargain before their time of performance has arrived. If AR occurs then the non-breaching party has 4 options: (1) treat the K as a total breach and sue immediately, (2) wait for the performance date and sue, (3) treat the contract as rescinded, or (4) do nothing and encourage the other party to perform. Here, A would assert that M's statement that she not accept further deliveries without assurances was an anticipatory breach and as such he was allowed to perform one of his 4 options. M will argue that she learned that A was on the verge of bankruptcy and was just requesting adequate assurances that the K would be performed. If a party learns that another party may have difficulty performing their

portion of the contract they are allowed to suspend their performance and request that the other party give them assurances that the contract will be performed. The other party (A here) needs to respond within a reasonable time and give M adequate assurances that they can perform. Here, A did nothing. He did not respond to the demand and he did not perform his portion of the contract. As such, A was entitled to suspend her performance and treat it as a breach by M. A will argue he had performed every part of the K up until now and so M had no reason to doubt he will perform. Under the law M is allowed to use outside information they obtained in deciding whether or not to try and get assurances. A will argue that her statements went beyond requesting assurances, but a party seeking assurances is allowed to suspend their performance until they receive the assurances. Also, A will argue that M canceled the K in July without waiting for assurances. Over 30 days is not a reasonable time to respond and M would be excused most likely. A would argue though that since this is an installment contract he is able to cure the July sale with further installments and planned on doing so. If A can give M adequate assurances now and make the deliveries the court would most likely be willing to allow it to enforce the K

Damages

When looking at damages the court looks to put the parties in the position they would have been had the K been fulfilled. A party has a duty to try and mitigate the damages. Under the UCC a seller has several options to them when the Buyer breaches. A can sue for the K price of the goods or he can obtain the difference in the K price and the fair market value of the goods. He could also get any consequential damages or incidental damages that occurred from M's breach. Consequential damages are only available if at the time of the contract the damages were foreseeable as would happen in the case of a breach. Incidental include attorney's fees or any damages as a result of A or M trying to cover or mitigate their damages.

Here A would argue that he is entitled for the fair market value of his goods times the quantity each month. M would argue that A breached the contract and she should be entitled to cover and get the difference in the price between her covering of damages and the value of the K with A.

The court would look at the FMV of the goods at the time of the breach. Here the court will have to determine when the K was actually breached. If they determine it was breached in mid June or beyond then the FMV would be \$7, but if it was before then it would be \$6. Also, what the K price was would have to be determined. The original K price was for \$5. A will argue that the contract was adequately modified to \$6. Normally parties have to give consideration to modify a K, but under the UCC a party need not give consideration as long as the modification was done in good faith. Here the price went up and A requested an alteration. M agreed to the alteration and they reaffirmed it in writing. Since this is sale of goods over \$500 the modification would have to be in writing as was the case here. As such the K was modified and the K price used in determining damages would be \$6 a widget.

A would need to try and sell his widgets to other parties to mitigate his damages. If A was a volume seller though and he could obtain as many widgets as he would need to perform other K and this K he could try and obtain damages under loss volume seller. Under the loss volume seller he would be awarded the profit he would have made off of this sale. They would deduct the overhead and expenses from the K and that would be A's profit.

Equity -- under equity certain damages as allowed in monetary damages would not suffice. SP is only allowed in cases where the goods are unique, here we have widgets and they are not unique. As such, A would not be entitled to specific performance of this contract because money damages would suffice.

Q QUESTION NUMBER 2

FEBRUARY 2009 BAR EXAMINATION – FLORIDA CONSTITUTIONAL LAW/FAMILY LAW

Henry owned a home where he resided. He also owned a commercial office building where he ran his business. After Henry married Wendy, Wendy moved into his home. Wendy helped Henry operate his business until the couple had their son, Chris. After Chris's birth, Wendy stayed home to care for Chris and to maintain and improve the home. After Chris turned 10, Henry left Wendy and Chris, and moved into his mother's home. Wendy and Chris continued to live in Henry's home. Henry later filed for divorce.

After filing for divorce, Henry borrowed \$20,000.00 from his mother, and secured the loan with a mortgage on his home. Henry did not have any witnesses present when he signed the mortgage. Wendy was unaware of the loan and the mortgage.

Without the knowledge of Wendy and Henry's mother, Henry recently sold both his home and the commercial office building to Buyer. Wendy learned of the sale when she was served with an ejectment suit from Buyer regarding both properties. Shortly thereafter, Henry's mother filed a petition to foreclose on her mortgage on the home. Titles for Henry's home and the commercial office building are in Henry's name only.

Wendy retains your law office. As to each of the following pending actions, provide an analysis of Wendy's state constitutional, statutory, and judicially recognized rights and the probable outcome of each action:

- the ejectment action by Buyer;
- the foreclosure action by Henry's Mother; and
- the petition for divorce action by Henry.

SELECTED ANSWER TO QUESTION 2

(February 2009 Bar Examination)

This memorandum will discuss Wendy's state constitutional, statutory, and judicially recognized rights and the probable outcome of each of the following actions: 1) the ejectment action by Buyer; 2) the foreclosure action by Henry's Mother; and 3) the petition for divorce action by Henry.

I. HOMESTEAD

The overriding issue in the ejectment action, and the foreclosure action is Florida's constitutional Homestead provisions. Homestead is defined as up to ½ acre of land in a municipality, and up to 160 contiguous acres of land outside a municipality. The Florida Constitution expressly gives rights to spouses and minor children under the Homestead provisions, and the provisions are designed for the protection of spouses and minor children. A person may only have one homestead, and must establish the homestead (by showing the home is the primary residence, voter registration, etc.). A homestead property, even if owned solely in one spouse's name, may not be conveyed or devised away from the other spouse or the spouse's minor children. Any conveyance of an interest in the homestead property must be consented to by both spouses. If it is not, the conveyance is void.

II. The Ejectment Action by Buyer

This case turns on whether or not the home was homestead. The commercial building was not homestead, and so it can be conveyed by Henry without Wendy's consent or knowledge (however, as to be discussed below, she may be entitled to a portion of the proceeds of the sale of the commercial building under the equitable distribution of marital property in the divorce proceedings). If the home is considered homestead, which it almost certainly would be considered because it was the primary residence of Henry and Wendy during the marriage and continues to be the primary residence of Wendy during the divorce proceedings (note it does not matter under homestead protection that the house is owned solely in Henry's name or that it was acquired before they were married, it is homestead if it is found to be their primary residence), the conveyance from Henry to Buyer is void. The conveyance is void regardless of whether Buyer had notice or not.

The conveyance is void because Henry conveyed the property to Buyer without Wendy's knowledge or consent which the homestead provisions of the Florida Constitution forbid.

If the house is not homestead, then Wendy may have a problem. Florida has a pure notice recording statute – any subsequent purchaser for value without notice shall have superior rights in the property conveyed over previous purchasers who did not record prior to the conveyance to the subsequent purchaser. If a purchaser is found to be a bona fide purchaser (BFP) for value without notice – actual, constructive/record, or inquiry – that BFP has superior title. Wendy was not a purchaser of this property and her name is not on the deed – therefore she would not qualify as a BFP for value because she did not purchase the property. Buyer knew of Henry's recording, did not know of Mother's mortgage because it was not recorded, and so normally would be a BFP. However, in equity, Wendy may be able to argue that Buyer had a duty to inspect

the property for any inhabitants, and if any were there which were not the seller, the buyer is on inquiry notice that someone may have title to the property other than seller and buyer must ask the inhabitants what title they hold, why they are on the property, and is presumed to have notice of anything that such an inquiry would produce. Wendy might argue that Buyer was on inquiry notice and had he asked Wendy he would have been alerted to the possibility that the property was homestead and therefore would have had notice that it could not be conveyed to him without her consent. Buyer will argue that he is a BFP for value, and that Wendy is not, and so his interest should be superior.

Wendy is likely to prevail here and will not have to vacate the home because of the homestead protection provided for in Florida's constitution. She may have to leave the commercial building, but again would likely be entitled to proceeds from the sale under the divorce proceeding.

III. The Foreclosure Action by Henry's Mother

If the home is found to be homestead, as described above - any property up to ½ acre within a municipality and 160 contiguous acres outside a municipality, that is the primary residence of the owner(s) – it is protected by the Florida Constitution against void mortgages as well. Generally, a mortgage on homestead property is enforceable against the property because it falls into one of the three exceptional kinds of creditors that can reach homestead property – mortgagees, those holding mechanics liens, and property tax lien holders. Here, the mortgage, even though on the land, was not for the purchase or improvement of the land – and so, even if it was attained validly, it would not be exercisable against the homestead property (Mother would not be able to foreclose on the property because the loan does not arise from the purchase or improvement of the land, even though it is secured by the land). A mortgage on a homestead property of two spouses must be consented to by both spouses, if it is not, it is void. ANY conveyances of title to homestead property must be joined by and consented to by each spouse of the property or it is void. A mortgage is a transfer of interest in real property, even under Florida's lien theory jurisdiction because while it does not convey actual title, it does convey a lien on the property, which is an interest in the property.

Wendy will argue that she had no knowledge of the mortgage and did not consent to it, and therefore the mortgage is void. If the mortgage is void, Mother's foreclosure action would fail. If the home is not homestead, Mother's foreclosure action would likely stand unless Buyer is found to be a BFP for value under Florida's pure notice recording statute because the mortgage was not recorded and there is no facts that Buyer had notice of it, therefore Buyer is a BFP for value and takes the property not subject to the mortgage.

NOTE – in each of the above causes of action – the fact that the divorce proceeding was commenced by Henry before he conveyed the mortgage to Mother and the home to Buyer is irrelevant – the divorce proceeding was not final, the distribution of the property had not yet occurred, THE PARTIES WERE STILL MARRIED – so homestead would still apply and the commencing of the divorce proceeding would be no defense.

IV. The petition for divorce action by Henry

I would counsel Wendy that the petition for divorce action will include an equitable distribution of marital assets, her petition for alimony, the custody or parental responsibility determination by the court for Chris, and the award of child support.

A spouse, who is a resident of Florida for at least 6 months prior to petitioning for divorce, may petition the court for a divorce on the following grounds: the marriage is irretrievably broken, or the other spouse has been adjudicated mentally incompetent and has remained so for the past 3 years prior to petition. Henry would have stated the irretrievably broken grounds for divorce. This divorce would not be entitled to summary proceedings in county court because there is real property and a minor child (Chris) and so it must be filed in Circuit Court.

A. Equitable Distribution of Marital Assets

Upon the petition for divorce, the Court is required under Florida law to distribute the marital assets under the Equitable Distribution Doctrine. In order to do so, the Court must first distinguish between marital and non-marital assets – the latter are kept by the individual owner spouse. Non-marital assets are those which were acquired before the marriage, and individual gifts to one spouse only (inheritance for example). Marital assets are those that were acquired during the marriage, the value of improvement of real property during the marriage (even if the home itself is non-marital, as is the case here), interspousal gifts, all income and earnings during the marriage. The court must divide the property equitably, and will generally attempt to achieve a 50/50 split, half to each spouse. However the court is allowed to alter the distribution percentage if equity so requires. The court will consider factors such as the following:

- the standard of living of the spouses during the marriage*
- the economic status of each spouse*
- the physical and emotional health of each spouse*
- the contributions made to the marriage by each spouse, both economic and emotional*
- the length of the marriage*
- anything else equity requires*

Here, the court will determine that the house and the commercial office building are non-marital assets belonging to Henry because he acquired them before the marriage. The \$20,000 loan may or may not be marital property, it was after Henry filed for divorce and the court may find either way.

While the home and the commercial building are non-marital assets – the improvements made to each by Wendy during the marriage are marital assets. Therefore, Wendy would be entitled to a portion of the value of these contributions. If the commercial building was sold, Wendy should be entitled to a portion of the proceeds. All income earned during the marriage would also be divided.

The facts show that Wendy worked for a while then stayed home to support and improve the home, care for Chris, and allow Henry to work in the business. The standard of living she became accustomed to in being able to stay home with Chris will be considered, also, her contributions to the home and the business (both through support and actual improvements) would be considered along with Henry's contributions through his income while working at the business. The length of the marriage is not exactly clear, it is at least 10 years since Chris was born after they were married and Henry filed for divorce after Chris turned 10 – the longer the marriage, the more likely a court will deviate from a 50/50 split. If the marriage was only for 10 years, the court will likely stay close to the 50/50 split in dividing the above marital property – if it was more than 10 years and closer to 15, for example, the court would likely defer and grant a different proportion based on the above factors.

Finally, under special equity, if Wendy receives primary residential custody of Chris, she may be entitled to and usually would be granted the house for the period from the divorce until Chris reaches the age of majority or graduates from high school.

B. Alimony

I would advise Wendy that we should petition for alimony. Alimony is the extension of the spousal obligation to support the other spouse. Florida courts are allowed to grant one or more of the following four types of alimony:

- 1. temporary – during the pending divorce proceeding (up to 3 months if the court extends for contested proceedings)*
- 2. lump sum – designed to be a liquidated amount of the total support that would be paid to the spouse for the spouse's life expectancy*
- 3. permanent periodic payment – these are periodic payments made on usually a monthly basis, that are permanent until the spouse remarries or dies (or potentially lives with another person who is supporting the spouse)*
- 4. rehabilitative – designed to reimburse the spouse for illness or education – if the spouse gave up work or schooling for the marriage, may be reimbursed so that they can reenter school*

The court, in its equitable discretion, will consider the following factors when making an alimony decision:

- the standard of living of the spouses during the marriage*
- the economic status of each spouse*
- the employment status of each spouse*
- the physical and emotional health of each spouse*
- contributions made to the marriage*
- the ability of the petitioning spouse to support his or herself*
- the need for a spouse to go back to school or go to school in order to become employable again*
- anything else equity requires*

Here, Wendy should petition for temporary alimony, since she is not working and her unemployment is due to the sacrifice she made for the marriage, her choice to stay home to support the household. The court is liberal in granting temporary alimony and would most likely grant it here. She should also petition for permanent period payment because she is not working and requires support, she would most likely receive this because, again, she stopped working for the marriage, and she would also petition for rehabilitative support if she can show she needs to go back to school to attain education in order to be employable.

C. Shared Parental Responsibility/Custody

The court would next have to determine the custody or shared parental responsibility for Chris, the parties' minor child. In Florida, the court will follow the Best Interest of the Child standard (BIC) in determining the custody arrangement of the minor child. The court prefers to grant both parents shared parental responsibility (responsibility shared for the child as well as decisions in the child's upbringing, etc. shared) and will generally grant primary residential custody to one parent and liberal, reasonable visitation to the nonresidential parent. The court, in determining the BIC, uses the following factors:

- the desires of the parties (and minor child if 12 years old or older)*
- the economic and emotional stability of the parents*
- the ability to provide a loving environment for the child*
- the likelihood that placement with one parent would result in that parent inhibiting or creating obstacles to the other parent's visitation*
- history of domestic abuse*
- any other matters equity requires*

Here there is no evidence of domestic abuse or that either party will not provide adequate visitation to the other. Because Wendy has stayed at home with Chris from the time he was born until the present, she is likely to receive primary residential custody. The court is likely to award shared parental responsibility to both parties and liberal, reasonable visitation to Henry.

D. Child Support

Finally, any nonresidential parent is obligated under Florida law to pay child support. The Florida statute sets out the Child Support Guidelines and is based on the income of each parent and the number of children. Here, Henry is clearly able to pay, as he has been working (though if he sold the business to Buyer he may be unemployed and argue that he cannot pay – however, Wendy can argue that he sold the business after filing for divorce with intent to lower child support and alimony obligations, and if so, the court will not consider the sale and will rule Henry is able to pay) and so he will be ordered to pay child support to Wendy based on the statutory guidelines.

Q

QUESTION NUMBER 3

FEBRUARY 2009 BAR EXAMINATION – TORTS

Florida Hurricane Shutters, Inc. (hereinafter FHS) designs, manufactures, and sells shutters to prevent broken windows and other damage to the homes of Florida residents caused by hurricane force winds.

Smith, the owner of a valuable home situated near the Florida coast, purchased a set of hurricane shutters from FHS and properly installed them on the exterior of his home. Approximately one year later, a hurricane with wind speeds of 100 miles per hour struck the area where Smith's home was located. The shutters were correctly locked in position over Smith's windows but they failed. Windows were broken and the structure and its contents sustained substantial damage. Smith's arm was broken when he was struck by a china cabinet which was knocked over by the hurricane's winds inside the home. Smith's home was uninsured.

The sales contract between Smith and FHS provided that the shutters were guaranteed to protect structures from hurricane force winds. A storm is considered a hurricane when winds reach 75 miles per hour. A brochure prepared by FHS sales staff and given to Smith when he was deciding whether to purchase the shutters stated that the shutters protected structures in winds up to 130 miles per hour.

Smith hired Attorney to represent him in a suit for damages against FHS. Attorney retained an expert to examine the shutters and the expert identified a design defect that, in the expert's opinion, caused the shutters to fail.

Attorney wishes to run some advertisements in area newspapers to find other property owners, who owned FHS shutters that failed, in hopes of also representing them in actions against FHS.

Discuss the claims that may be asserted by Smith against FHS and the defenses of FHS. Do not discuss the jurisdiction of the trial court. Also, what is the proper measure of Smith's damages if the liability of FHS is established? Are punitive damages available?

What are Attorney's responsibilities regarding his newspaper advertisements?

SELECTED ANSWER TO QUESTION 3

(February 2009 Bar Examination)

The first issue in this question is what causes of action may exist for Smith against FHS for injuries he sustained in this action. There are several theories which may apply in this case. The first is a cause of action for strict liability in tort. Generally, a seller, designer, or manufacturer of a good is liable for any product it places in the stream of commerce which is improperly designed or constructed and thereafter causes injury. In this case, Smith will argue that FHS shutters, based on expert testimony, were improperly designed or constructed and thus FHS has placed a dangerous and defective product into the stream of commerce. The only defense that may be available to FHS is compliance with a design standard. Generally, a defendant in strict products liability actions may show that the product is certified or approved by a governmental agency which allows it to assert the proposition that it is not unreasonably dangerous. In this case, however, we have no evidence of any standards.

A second theory which Smith may sue FHS is negligent design or construction of the shutters. Generally, an action sounding in negligence requires there to be a duty owed to some party, a breach of that duty, a showing that the breach is the actual and proximate cause of the injury to the plaintiff, and then a result of damages from that injury. In this case, Plaintiff may argue that, even if strict liability fails, the defendant still maintained a duty to ensure that the product worked properly or was designed correctly. When the product failed, the breach occurred. The third aspect requires Smith to show that the breach was the actual and proximate cause of his injuries. Generally, a plaintiff must show that the breach was the actual cause of his injuries, i.e., but for the breach, plaintiff wouldn't have been injured, and the proximate cause, i.e., it is foreseeable from the defendant's perspective that plaintiff would be injured by this breach. There are two general views on foreseeability. The Cardozo approach holds that the plaintiff must be in the "zone" of danger to be considered foreseeable. The Andrews approach requires that a plaintiff being injured makes him foreseeable. Most jurisdictions rely on the reasonableness standard for foreseeability. In this case, there can be no doubt but that the breach was the actual cause of Smith's injuries. Smith will also argue that he is foreseeable because if the shutters break, the windows will likely break exposing the home, and those in it, to injury. FHS may argue that it is not foreseeable for someone to stay home during a hurricane, but will likely not prevail. FHS may also argue that the China cabinet was a superseding intervening cause of Plaintiff's personal injuries. Generally, a superseding intervening cause is some action or event that occurs which cuts off defendant's liability. Unfortunately for FHS, the cabinet fell due to the wind, thus the "intervening" action was caused by FHS negligence. While FHS likely can't argue that it was not foreseeable for an individual to remain at home in a hurricane, it can likely argue that it is comparatively negligent. Thus, if the jury would find that Smith was negligent by staying home, his award could be reduced by the percentage of his fault as attributed by the jury.

Another cause of action which Smith may assert is fraudulent misrepresentation. Generally, the tort of misrepresentation occurs when a party negligently, or fraudulently, asserts or withholds knowledge to or from the buyer which he knows, or should know, is false, the buyer relies on that information, and is damaged. In this case, Smith will argue that the brochure stated the shutters would withstand 130 mph winds and that he

relied on the fact when buying the shutters. FHS would then argue that he cannot prove reliance, which is an essential element of misrepresentation.

Smith may also sue FHS for breach of the implied warranty of merchantability. Generally, the implied warranty of merchantability holds that there are no defects in the products as sold. In this case, Smith would argue that the product was defective and thus the warranty has been breached. The only defense for FHS is that the bill of sale may have disclaimed this warranty, but this is unclear from the facts.

Smith may also claim that FHS breached the implied warranty of fitness. Generally, the implied warranty of fitness doctrine holds that merchant sellers warrant that the product is fit for the general use for which it is intended. As above, Smith will argue that the shutters most assuredly weren't fit as they broke. Again, FHS may have disclaimed this warranty but it is unclear from the facts.

Finally, Smith may sue FHS for the breach of the express warranty of fitness for a particular purpose. Generally, when a merchant seller knows the particular purpose for which a buyer is intending to use a product, and thereafter warrants that the product is fit for that purpose, if the product fails, the seller is liable. Here, Smith will argue that the guarantee was express and the wind speed in the brochure illustrated the seller knew the particular purpose for which these shutters were bought. FHS only real defense would be if it could prove that Smith did not rely on those representations when he bought the product.

As a blanket defense to all claims, FHS could assert comparative fault on Smith's behalf for negligent installation. If FHS can show that Smith improperly installed the windows and this was the sole proximate cause, or even a contributing cause to the failure of the shutters, Smith's damages may be reduced or he may be adjudicated more than 50% at fault which in Florida, is a pure comparative fault state, extinguishes his liability.

Should FHS be found liable, Smith has several remedies available. He can seek actual (compensatory) damages for the cost of repair to his house, windows, cabinets, and replacement shutters. He can also recover his medical bills, and for any time he lost from work while injured. He may also seek special damages for things such as loss of consortium (wife), pain & suffering, disfigurement, and loss of a normal life. Generally, this amount is limited to \$500,000 or 3X compensatory damages.

Generally, a party may only seek punitive damages where there is reckless, malicious, or wanton disregard for the rights and safety of others manifested by the intent of the defendant or his actions or inactions. Even then, they can only be requested through a hearing. Based on these facts, it is unlikely punitive damages are available as there is no outrageous conduct highlighted. If it were found that defendant had knowledge of the defect and the injuries it could (or had) caused, they may be available.

Generally, attorney advertisements are protected speech. But the contract may be regulated by the rules of professional conduct. An attorney ad may not be misleading, must be labeled as an advertisement, must not claim expert or certified status when one does not exist, and must not guarantee money or results. It must include the name of the attorney making the ad or law firm, the number to call, and facts to alert the public that it is a legal advertisement. Thus, the attorney should create an ad that is headlined as a legal advertisement. He should then let the public know what particular thing he is looking for and include his name, firm name, and telephone number. He should also include the fact that an attorney client relationship may not be formed merely by placing

a call. He should refrain from using any pictures or symbols other than the scales of justice or law books, and should not include celebrity endorsements of any kind. If he does all of the above, he should remain in compliance with the rules of professional conduct.

PART II - SAMPLE MULTIPLE-CHOICE QUESTIONS AND ANSWERS

Part II of this publication contains sample questions of the Florida multiple-choice portion of the examination. Some of the multiple-choice items on the Florida prepared portion of the examination will include a performance component. Applicants will be required to read and apply a portion of actual Florida rules of procedure, statutes and/or court opinions that will be included in the text of the question. Sample items 21 to 23 are examples of multiple-choice items with performance elements included. The questions and answers may not be reprinted without the prior written consent of the Florida Board of Bar Examiners.

The answers appear on page 50.

MULTIPLE-CHOICE EXAMINATION INSTRUCTIONS

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

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

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

23 SAMPLE MULTIPLE-CHOICE QUESTIONS

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

2. Pete Smith is the active partner and Bill Jones is the silent partner in a general partnership known as "Pete Smith Plumbing." After six years of being uninvolved in the management of the partnership business, Bill purchases 100 toilets for the business. Pete is incensed because it will probably take years to use up the inventory of so many toilets and seeks your advice. The best advice is
 - (A) Bill can bind the partnership by his act.
 - (B) silent partners are investors only and cannot bind the partnership.
 - (C) unless his name is in the partnership name, third persons are "on notice" that he is unauthorized to contract for the partnership.
 - (D) Bill, as a silent partner, is not authorized to purchase and, therefore, the sale may be set aside.

3. Defendant was seen leaving Neighbor's yard with Neighbor's new \$10 garden hose. Neighbor called the police, who charged Defendant with the second-degree misdemeanor of petit theft by issuing him a notice to appear in the county courthouse one week later.

Defendant appeared at the scheduled place and time and asked the judge to appoint a lawyer to represent him. The judge found Defendant to be indigent. The judge

- (A) must appoint Defendant a lawyer.
- (B) must appoint Defendant a lawyer if the State subsequently charges Defendant by information.
- (C) need not appoint Defendant a lawyer if the judge states in writing that Defendant will not go to jail for more than six months if convicted.
- (D) need not appoint Defendant a lawyer if the judge states in writing that Defendant will not go to jail at all if convicted.

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

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

- (A) The fact that the jurors did not begin to consider evidence until several days after they were empaneled.
 - (B) The fact that the jury was allowed to go home after being sworn.
 - (C) The fact that the jury took several days to return a verdict.
 - (D) The fact that the jury was allowed to go home after they began deliberations.
6. Kendall and Thornton agree to form a partnership, but both agree that only Kendall will manage the business and make all business decisions and execute all contracts with third parties. After that time, Thornton then enters into a long-term service contract for the partnership with Clark, who does not know of the internal agreement. The contract of Thornton with Clark is
- (A) enforceable, as the partners' agreement cannot withhold statutory authority of a general partner to bind the partnership.
 - (B) enforceable, as Clark has no knowledge of Thornton's lack of authority.
 - (C) unenforceable, as Thornton is unauthorized to execute the contract by the partner agreement.
 - (D) unenforceable, as Clark had an obligation to confirm Thornton's authority prior to entering into a service contract with the partnership.

7. The State of Florida is prosecuting a former police officer for extortion of money from prostitutes. One of the State's witnesses is Sally. Sally has an adult conviction for vehicular homicide. She was charged with driving a car in a reckless manner resulting in the death of her sister, a passenger in the car. Sally pleaded nolo contendere, was adjudicated guilty and received a suspended sentence although she could have received a sentence of state imprisonment up to 5 years. At trial, evidence of this conviction is
- (A) admissible to impeach Sally because vehicular homicide carries a maximum penalty in excess of 1 year.
 - (B) inadmissible to impeach Sally because she never admitted her guilt since she entered a plea of nolo contendere.
 - (C) inadmissible to impeach Sally because she received a suspended sentence.
 - (D) inadmissible to impeach Sally because she is only a witness and not the criminal defendant.
8. A defendant charged with first-degree murder shall be furnished with a list containing names and addresses of all prospective jurors
- (A) upon court order.
 - (B) upon request.
 - (C) upon request and showing of good cause.
 - (D) under no circumstances.
9. Cooper is suing March for money damages. Because he believes portions of March's deposition are highly favorable to his case, Cooper's attorney intends to read parts of the deposition at trial instead of calling March to the stand. March objects to Cooper's use of the deposition at trial. What is the court's likely ruling?
- (A) Cooper may use the deposition at trial, but, if requested, he must read all parts that in fairness ought to be considered with the part introduced.
 - (B) Cooper may use the deposition at trial, but only to contradict or impeach March's prior inconsistent statements or pleadings.
 - (C) Cooper may not use the deposition at trial, as March is able to testify and no exceptional circumstances exist.
 - (D) Cooper may not use the deposition at trial, as this would make March his witness and immune to impeachment.
10. Jan sues the Chicago Times for defamation in a Florida circuit court. At trial, Jan wishes to offer into evidence a copy of the edition of the Times containing the allegedly libelous article. Before the newspaper may be admitted, Jan must
- (A) call as a witness an employee of the Times to testify that the proffered newspaper was in fact published by the Times.
 - (B) have a certification affixed to the newspaper signed by an employee of the Times attesting to its authenticity.
 - (C) establish that the newspaper has been properly certified under the law of the jurisdiction where the newspaper was published.
 - (D) do nothing because the newspaper is self-authenticating.

11. Defendant was arrested on February 1 and released one month later on March 1 after being charged with a felony. On December 1 of the same year as his arrest, he filed a motion to discharge since no trial or other action had occurred to that point. The court held a hearing 3 days after the motion was filed. Defendant should be
- (A) discharged because more than 175 days passed between arrest and the filing of the motion to discharge.
 - (B) discharged because more than 175 days passed between his release from jail and the filing of the motion to discharge.
 - (C) brought to trial within 90 days of the filing of the motion to discharge.
 - (D) brought to trial within 10 days of the hearing on the motion to discharge.
12. Bill, a single man, owned pasture land in Deerwoods, Florida, which he leased to a tenant. He also owned a condominium in Miami, which he held for investment. In his will, he devised the pasture land to his son Tommy and the condominium to his daughter Julie. All other assets would pass equally to Tommy and Julie.
- Bill met Kathy and married her after she executed a valid prenuptial agreement relinquishing all rights she might otherwise enjoy by marrying Bill. On their Miami honeymoon they drove by the condominium and Kathy declared she'd love to live there. Bill was so happy with Kathy that after the honeymoon he signed and delivered to Kathy a deed conveying the condominium to himself and Kathy as an estate by the entirety and made plans to live in the condominium as soon as the tenant vacated. Bill died the next day. How are the foregoing assets distributed?
- (A) Kathy gets the condominium regardless of the prenuptial agreement, Tommy takes the pasture land and Tommy and Julie split the rest of the estate.
 - (B) Due to Kathy's prenuptial agreement, Tommy receives the pasture land, Julie gets the condominium and Tommy and Julie split the rest of the estate.
 - (C) Kathy gets the condominium, but because Bill had originally indicated his intent to devise equally to his children, Tommy and Julie will split the remaining estate.
 - (D) Regardless of the prenuptial agreement, Kathy is a pretermitted spouse. Since Bill leaves surviving lineal descendants who are not Kathy's, Kathy receives 50% of the estate, Tommy gets the pasture land, and Tommy and Julie split the residue of the estate.
13. Anderson and Parker decide to form a corporation which will locate missing children. Which of the following would be a proper name for the corporation?
- (A) ANDERSON
 - (B) FBI Consultants, Incorporated
 - (C) Private Eye Partners
 - (D) Child Finder Company

14. At trial, during the plaintiff's case-in-chief, the plaintiff called as a witness the managing agent of the defendant corporation, who was then sworn in and testified. Defense counsel objected to the plaintiff's questions either as leading or as impeaching the witness. In ruling on the objections, the trial court should
- (A) sustain all the objections and require the plaintiff to pursue this type of interrogation only during the plaintiff's cross-examination of this witness during the defendant's case-in-chief.
 - (B) sustain the leading question objections but overrule the other objections because a party is not permitted to ask leading questions of his own witness at trial.
 - (C) sustain the impeachment questions but overrule the other objections because a party is not permitted to impeach his own witness at trial.
 - (D) overrule all the objections because the witness is adverse to the plaintiff and therefore may be interrogated by leading questions and subjected to impeachment.
15. Rainbow Corporation has outstanding 1,000 shares of voting common stock and 1,000 shares of nonvoting preferred. The preferred has a liquidation preference equal to its par value of \$100 per share plus a 3 percent noncumulative dividend. Rainbow submits to its stockholders a proposal to authorize a new class of preferred stock with redemption rights that would come ahead of the old preferred stock. At a shareholders' meeting, 700 common and 400 preferred vote in favor of the proposal. Which of the following statements is correct?
- (A) The proposal is validly approved because overall a majority of the outstanding shares did approve.
 - (B) The proposal is invalidly approved because a majority of the preferred shareholders did not approve.
 - (C) The vote of the preferred stockholders does not matter because it was nonvoting stock.
 - (D) The proposal is invalidly approved because a two-thirds vote of each class is required.

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

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

- (A) only Bob Wilson is liable.
 - (B) Bob Wilson and Ted Lamar are liable jointly.
 - (C) Bob Wilson is liable for the entire amount and Ted Lamar is liable only to the extent the debt cannot be collected from Bob Wilson.
 - (D) only the de facto partnership arising from the relationship between Wilson and Lamar is liable.
17. At the close of all the evidence in a jury trial, Defendant moves for a directed verdict. After much argument, the court denies the motion. Subsequently, the jury returns a verdict for Plaintiff.

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

- (A) Yes, because Defendant has raised new grounds.
 - (B) Yes, because Defendant had ten days after the jury returned its verdict within which to move to set aside the verdict.
 - (C) No, because the court denied the motion for directed verdict rather than reserving ruling.
 - (D) No, because the court entered final judgment for Plaintiff before the motion to set aside the verdict was filed.
18. In the absence of a provision to the contrary in the articles of incorporation, the directors of a corporation elected for a specified term
- (A) can be removed from office at a meeting of the shareholders, but only for cause and after an opportunity to be heard has been given to the directors.
 - (B) can be removed from office at a meeting of the shareholders, with or without cause.
 - (C) can be removed from office at a meeting of the shareholders, but only for cause.
 - (D) can be removed from office prior to the expiration of their term only by a decree of the circuit court in an action by the shareholders.

19. Mary, a wealthy St. Petersburg widow, executed her first and only will on May 15, 1990 and died on August 18, 1990. Her will provided that her estate be divided equally between her only child, Joan, and the Salvation Army of Largo. How will Mary's estate actually be distributed?
- (A) 100% to Joan.
 - (B) 100% to Joan if she files a timely petition requesting that the devise to the Salvation Army be avoided.
 - (C) 50% to Joan and 50% to the Salvation Army.
 - (D) 50% to Joan and the income from the remaining 50% to Joan for life, remainder to the Salvation Army, if Joan files a timely petition protesting the devise to the Salvation Army.
20. Regarding a deposition in a civil suit, which of the following is/are true?
- I. A deposition of a person against whom another person contemplates filing an action may be compelled by the party contemplating the action, without leave of court, before the action is filed.
 - II. A deposition of the defendant in an action may be taken by the plaintiff without service of a subpoena on the defendant.
 - III. A deposition may be taken even though all the testimony secured by it will be inadmissible at the trial.
- (A) II only.
 - (B) I and II only.
 - (C) II and III only.
 - (D) I, II, and III.

SAMPLE MULTIPLE-CHOICE QUESTIONS WITH PERFORMANCE TEST COMPONENT

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

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

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

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

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

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

ANSWER KEY FOR MULTIPLE-CHOICE QUESTIONS

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