

Florida Board of Bar Examiners

ADMINISTRATIVE BOARD OF THE SUPREME COURT OF FLORIDA

Florida Bar Examination Study Guide and Selected Answers

**July 2018
February 2019**

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

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PART I – ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2018 AND FEBRUARY 2019 FLORIDA BAR EXAMINATIONS

ESSAY QUESTIONS AND SELECTED ANSWERS

Part I of this publication contains the essay questions from the July 2018 and February 2019 Florida Bar Examinations and one selected answer for each question.

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

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

ESSAY EXAMINATION INSTRUCTIONS

Applicable Law

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

Acceptable Essay Answer

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

Q QUESTION NUMBER 1

JULY 2018 BAR EXAMINATION – CONTRACTS/ETHICS/PROFESSIONALISM

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

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

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

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

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

SELECTED ANSWER TO QUESTION 1

(July 2018 Bar Examination)

I. Claims and Defenses of the Parties

A. Addie v. Laurie

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

1. Breach of Contract

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

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

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

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

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

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

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

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

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

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

2. Promissory Estoppel

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

3. Restitution

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

B. Daughter v. Laurie

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

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

C. Cal v. Addie

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

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

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

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

D. Cal v. Laurie

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

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

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

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

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

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

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

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

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

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

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

Q QUESTION NUMBER 2

JULY 2018 BAR EXAMINATION – FAMILY LAW AND DEPENDENCY/ETHICS

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

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

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

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

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

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

SELECTED ANSWER TO QUESTION 2

(July 2018 Bar Examination)

1) Legal Obligation to Report

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

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

2) Attorney Obligation to Report

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

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

3) Termination of Parental Rights

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

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

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

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

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

4) Adoption of Children

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

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

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

5) Grandparent's rights

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

Q QUESTION NUMBER 3

JULY 2018 BAR EXAMINATION – FEDERAL CONSTITUTIONAL LAW

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

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

Parade Ordinance

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

Parks Ordinance

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

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

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

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

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

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

SELECTED ANSWER TO QUESTION 3

(July 2018 Bar Examination)

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

Standing

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

Sovereign Immunity

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

Parade Ordinance

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

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

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

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

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

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

Parks Ordinance Statute (1)

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

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

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

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

Parks Ordinance Statute (2)

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

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

Parks Ordinance Statute (3)

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

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

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

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

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

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

Q QUESTION NUMBER 1

FEBRUARY 2019 BAR EXAMINATION – TRUSTS

In 2015, Sally executed a trust agreement for the benefit of her only child Ben, who is 35 years old and unable to manage money. Sally transferred \$500,000 and deeded a commercial building in trust to Ted, naming Ted as trustee. The trust provides that the income be distributed to Ben during his lifetime and the remainder to Ben's children living at the time of Ben's death. The trust provides that Sally can revoke the trust in a writing signed by her and delivered to the trustee. The trust states:

The trustee shall distribute to my son, Ben, such amounts of income as the trustee, in the trustee's sole and complete discretion, deems appropriate for Ben's health, support or maintenance. Such income shall be paid to the beneficiary personally and to no other, whether claiming by the beneficiary's authority or otherwise.

The commercial building produced a 3 percent return. Ted sold the building to himself and invested the proceeds in a low-risk venture that yielded 5 percent. Ted paid less than fair market value, but reasoned that the increased investment return would benefit the trust in the long run. Ted hired his wife, a certified public accountant, to perform accounting services for the trust and paid her at her normal rate.

In 2016, Ben married Wilma. Six months ago, they were divorced and Wilma was awarded alimony. Sally was outraged when she learned of the alimony award. Sally called Ted and instructed: "I hereby revoke the trust. I will confirm my revocation in a letter." Sally died the following week without writing the letter.

Ben has demanded that Ted transfer the entire trust assets, free of trust, to the administrator of Sally's estate. Ben claims the trust was revoked. In the alternative, he argues the trust should be terminated. Ted refuses to terminate the trust. Wilma has demanded Ted pay her alimony due out of the trust income or principal. Ben has no children, living or deceased.

Ben seeks your advice as to the merits of his and Wilma's claims. Prepare a memo evaluating the validity of the trust, claims, and likely outcomes from this situation.

SELECTED ANSWER TO QUESTION 1

(February 2019 Bar Examination)

MEMORANDUM

TO: Senior Partner

FROM: Associate

Re: Ben and Wilma's Claims

Ben has asked for my legal advice regarding the merits of his and his ex-wife Wilma's claims, including in particular an analysis of the validity of the trust his mother Sally executed as settlor for his benefit in 2015. This memorandum analyzes each of those three issues discrete: (1) the validity of the trust (including whether it was revoked by Sally before her death), (2) Ben's claims, and (3) Wilma's claims.

1. Validity of the Trust

In order to be a valid trust, a trust must be executed with the proper formalities; by someone with capacity to execute the trust; with trust assets ("res"); with the intent to place those assets in trust; for a lawful purpose; for a beneficiary; and administered by a named trustee.

With respect to formalities, if a trust has testamentary effect, it must comply with the formalities for a will, and if it disposes of real property, it must comply with the statute of frauds as applicable to all real property transfers. This trust is not testamentary, and it is not irrevocable, therefore the will formalities--namely, signature by the testator as well as two witness signatories in the testator's presence--do not apply, and there is no indication that the trust agreement was otherwise improperly executed. However, because the trust involves a deed of real estate--the commercial building--from Sally to you, therefore the statute of frauds must be satisfied. The statute of frauds requires a signed writing by the party against whom it is to be enforced, which in this case is Sally. The facts do not reveal whether or not Sally signed the trust document here, and so, if she did not, that would call into question the validity of the trust with respect to the grant of real property.

Turning to the requirements for all trusts, first, the capacity to create a trust requires that Sally, as the settlor, have understood the effect of the document as well as her natural bounty; because the trust is revocable, it need not meet the higher standard for capacity applicable to wills and irrevocable trusts. There is no indication that Sally lacked that capacity. Second, the trust must have a res, or assets, within it, with the limited exceptions of pour-over trusts or life insurance trusts. Here, the trust had \$500,000 and the deed to a commercial building, therefore it immediately had trust property and satisfies the res requirement without needing to resort to the exceptions for life insurance or pour-over trusts. Third, Sally must have had the intent to place the assets in trust, which can be inferred from the trust document itself. The trust document clearly states that the trust property is to be distributed to Ben "and to no other," which appears

to satisfy the intent requirement by clearly stating that the trust property is for the benefit of Ben. Fourth, the trust must be for a lawful purpose. Here, the purpose of placing assets in trust for one's issue is lawful. Fifth, the trust must be administered by a trustee. It is to be administered by Ted, and therefore satisfies this requirement as well.

The next question is whether Sally revoked the trust agreement, as Ben has claimed. Trusts may lawfully be made revocable or irrevocable. Because the trust was made revocable, Sally did have the power to revoke as provided in the trust. The trust, however, contained the express condition that it could only be revoked "in a writing signed by" Sally. Although there are certain trust terms which are not enforceable--such as a term barring a beneficiary from challenging the trust--constraints on the means of revocability are lawful. Therefore, because Sally expressly provided in her trust that it could only be revoked in a signed writing by her, her phone call to Ted instructing that she revoked the trust was not effective to revoke it. Indeed, the hallmark of trust creation and revocation is settlor intent, and here, Sally's intent in creating the trust was that it only be revocable in writing. As she died one week following her phone call to Ted, without confirming her intent to revoke in writing as the trust required and as she stated she would, it is just as possible that Sally did not actually intend to revoke the trust when she died as that she did so intend. Thus, again, a court would almost certainly find that the trust has not been revoked.

In sum, the trust appears to have satisfied the requirements for trust creation, and not to have been revoked, and therefore is valid.

2. Ben's Claims

Ben has claimed that the trust was revoked by Sally. As analyzed above with respect to trust validity, that claim is likely to fail. Ben has two remaining sets of claims: claims for breach of fiduciary duty against Ted as trustee, and a claim that the trust should be terminated. The first is likely to succeed, but the second is not.

Regarding breach of fiduciary duty, as trustee, Ted, owed two sets of duty to Ben as beneficiary: a duty of loyalty, and a duty of reasonable care in the administration of trust assets. With respect to the duty of loyalty, it is a *per se* violation for a trustee to engage in self-dealing. Therefore, Ted breached his duty of loyalty when he sold, to himself, the building held in trust for Ben. It is immaterial that the building yielded a lower return, 3 percent, than the low-risk venture Ted chose for the building, which earned 5 percent--that fact would matter if Ted had sold the building to a third party, but he did not. Moreover, even if it were not a *per se* breach of the duty of loyalty for a trustee to engage in self-dealing of this nature, the duty of reasonable care would be judged at the time of the transaction, not based on the actual returns, under the business judgment rule, asking whether it was commercially reasonable (not optimal) when undertaken. In any case, Ted paid less than fair market value for the building, which would have been a breach even if it had not been self-dealing, since he gained advantage for himself at the expense of the beneficiary. In sum, even if Ted's decision to sell the building for a low-risk investment yielding 5% return satisfied the business judgment rule--which it probably did--the self-dealing component likely constitutes a breach of the duty of loyalty.

Ben also has a claim that Ted breached his fiduciary duty by hiring his wife, a CPA, to perform accounting services for the trust. The rule regarding self-dealing for hiring a trustee's relatives is slightly different than the rule for when the trustee hires himself: hiring one's relatives to perform services for the trust creates a rebuttable presumption of a breach, but is not a per se violation. Here, Ted paid his wife her normal rate for her professional services. And, it must be noted, it is entirely appropriate for a trustee to pay a reasonable fee for professional services on behalf of the trust, such as accounting. Therefore, assuming that his wife's normal rate was reasonable, Ted could probably overcome the rebuttable presumption that he breached his fiduciary duty by hiring his wife as the trust's CPA.

We now turn to Ben's claim that the trust should be terminated. A trust can be terminated when consistent with the Settlor's intent. So long as the settlor is living, this may be done by consent of all the beneficiaries and the settlor. However, Sally, the settlor, is dead. When the settlor has died, the trust may be terminated by unanimous consent of the trust beneficiaries so long as doing so would not conflict with a "material purpose" of the trust. Among material purposes for trusts are spendthrift clauses, or other clauses designed to limit the discretion of the beneficiary to dissipate trust assets.

The main legal issue respecting Ben's claim for trust termination, therefore, is whether the trust contains a "material purpose" that would be violated by terminating it and distributing the assets to Ben. First, the trust provides that money is to be distributed as appropriate for Ben's "health, support or maintenance." A court might find that this provision is broad enough not to impose a meaningful constraint on the trustee, in which case, it would not be a material purpose constraining termination of the trust. Second, the trust provides that the income "shall be paid to the beneficiary personally and to not other, whether claiming by the beneficiary's authority or otherwise." There is some question whether this constitutes a proper "spendthrift clause," which is a clause preventing the beneficiary from alienating his or her interest in the trust, voluntarily or involuntarily. Spendthrift clauses constitute a "material purpose" barring trust termination without the settlor's permission. Since this particular provision prohibits payment to anyone else besides the beneficiary, with or without the permission of the beneficiary, it would appear to contain the alienation by Ben of trust assets in any way, and thus constitute a spendthrift clause. If the court finds that this is a proper spendthrift clause, it will probably bar termination of the trust by Ben. Third and finally, the trust provides that, at Ben's death, it should be distributed to Ben's children living at the time of Ben's death. Although Ben does not have any children now, he may have them before he dies, and, if that were to occur, Sally's intent as settlor appears to have been to ensure that these children take the remaining trust assets. If the trust were terminated, then that purpose too would be dishonored. Finally, it is worth noting that the purpose of the trust appears to have been, in part, to help Ben manage money since he is unable to do so himself. Finding that the trust's spendthrift clause is material, as well as the reservation that the balance of assets be paid at Ben's death to his children, is consistent with Sally's intent in creating the trust.

In sum, Ben has a strong claim against Ted for breach of fiduciary duty based on his sale of the building to himself, but not based on his hiring his wife as a CPA. Ben can recover personally against Ted for the difference between the fair market value of the

building and what paid, as well as any other damages flowing from the decision to sell the building. Ben may also seek the Court's permission to remove Ted as trustee, and will likely succeed. However, a court is likely to stop short of terminating the trust if it rules, as I would predict, that the trust contains the material purposes of a proper spendthrift clause and the creation of a remainder in any future children Ben may have.

3. Wilma's Claim

Wilma is seeking to be paid alimony out of trust income. Assuming that a court were to hold that the trust contains a valid spendthrift clause, the general rule is that a creditor of the beneficiary cannot reach trust assets. However, there are a few limited exceptions to this rule, including for tax liens and alimony. Besides Wilma is seeking only alimony, her attempt to be paid out of trust income for her alimony will probably succeed so long as her alimony is valid in the first place. However, she will face some difficulty in collecting, because the trust makes the distribution of trust income to Ben entirely a discretionary matter for the trustee. Even exception creditors, such as Wilma, cannot force a trustee to distribute income when such distributions are purely discretionary. Thus, although Wilma be able to obtain a lien on any trust distributions made to Ben, she cannot force those distributions to occur, and her attempt to obtain income paid out of trust principal will likely fail.

Wilma's claim faces an additional potential vulnerability: her alimony award may be void in the first place, if her marriage to Ben was improper. We are told that Ben is 35 and unable to manage money. If Ben lacks the capacity to manage money for himself, he may also lack the capacity to have gotten married in the first place. A marriage involving someone who lacks the capacity to marry is void ab initio, and therefore can be annulled. In fact, incapacity is one of only two grounds--the other being bigamy--that a marriage may be voided without even a court's permission, and can be sought to be voided by anyone, not merely one of the parties to the marriage. Thus, Ted (or any trustee who replaces him if he is found to have violated his fiduciary duty and replaced by a successor trustee), could seek to void the marriage by annulment. An annulled marriage is treated as if it never happened, and therefore, among other things, no alimony can be awarded with the limited exception of alimony pendente lite, i.e., alimony to support the spouse during the process of dissolving the marriage.

Finally, even if the marriage is not annulled, Wilma is potentially vulnerable to a claim that her alimony award is improper. We are told that she married Ben in 2016, and they divorced 6 months ago, i.e., sometime in 2018. The marriage lasted 2-3 years. Such a marriage is considered to have been of a short duration under Florida law, pursuant to which marriages under 7 years are short duration, marriages longer than 17 years and long duration, and everything in between is a moderate duration. Short-term marriages normally do not qualify for permanent alimony, and, where they qualify for durational alimony, the duration is typically limited to the duration of the marriage. The other common type of alimony is Bridge-the-Gap, which helps a dependent ex-spouse adjust to singledom but which is limited to 2 years in length. Without knowing the type of alimony that Wilma was awarded, or any facts about the marriage, it is impossible to analyze whether the alimony award itself was appropriate or should be challenged in court. But suffice to say, based on the facts as we currently know them, that the alimony award is almost certainly no longer than 3 years. That being the case, a

trustee, acting for Ben's interests as beneficiary, could likely thwart Wilma's efforts to obtain any alimony simply by using the trustee's discretion not to make distributions during those 3 or fewer years, if possible and in the best interests of Ben's health, support, or maintenance.

CONCLUSION

In conclusion, the trust appears to be valid and unrevoked, and Ben will probably not be able to terminate it. However, he does have a strong claim against Ted for breach of fiduciary duty, and may be able to have Ted replaced as trustee. Meanwhile, Wilma's alimony award makes her an exception creditor able to access the trust despite its spendthrift provision, however she will face difficulties in collecting because she cannot make a claim against trust principal or force discretionary distributions from the trust.

Q QUESTION NUMBER 2

FEBRUARY 2019 BAR EXAMINATION – UCC ART. 3 AND ART. 9/PROFESSIONALISM

Bonnie decided to start her own food truck business. Bonnie created Bonnie Bons LLC, purchased an old food truck, and decided to take out a loan to repair the food truck.

Bonnie went to LoanCo to seek a \$50,000 loan. She brought the title of her food truck, a detailed list of the equipment that she wanted to purchase, a mechanic's estimate for the cost of repairing the food truck, and samples of her Bonnie Bons desserts. The Manager agreed to give Bonnie Bons LLC the \$50,000 loan in exchange for executing a Promissory Note and Security Agreement.

The security provision of the Security Agreement provided as follows:

The Promissory Note, which is incorporated by reference, is secured by all of Bonnie Bons LLC's assets, including but not limited to Bonnie Bons LLC's food truck, the title for which is attached to this agreement as Schedule A. Should Bonnie Bons LLC default, LoanCo has all rights and remedies under the UCC.

After the Manager attached the title and list of the equipment Bonnie wanted to purchase to the Security Agreement, Bonnie—on behalf of Bonnie Bons LLC—executed the Security Agreement and the Promissory Note. One week later, LoanCo filed a financing statement that included the same description of the collateral that was in the Security Agreement.

Bonnie made the repairs to the food truck and installed the equipment described on the list she gave LoanCo. Unfortunately, not all of the equipment fit as Bonnie hoped, so the food truck had to undergo modifications that made it impossible to remove the equipment without damaging the food truck.

Bonnie Bons was an overnight success. Rather than repaying the loan, Bonnie bought a second food truck to expand her business.

However, Bonnie failed to maintain the second food truck and was cited for several health code violations. After an extremely poor on-site inspection, the local health inspector shut down the second food truck. Bonnie Bons' reputation was ruined.

Bonnie was so distraught from her failing business that she missed a curve in the road and ran her original food truck into a tree. Bonnie and all of the equipment in the food truck were fine, but the food truck could no longer be driven. Bonnie had the truck towed back to her house, and locked it in her garage.

Unable to operate either food truck, Bonnie defaulted on her monthly loan payments with \$40,000 still owed. LoanCo tried unsuccessfully to contact Bonnie about the default. Finally, LoanCo's Manager received this letter from Bonnie's Attorney:

Leave Bonnie alone! She's been through a lot recently and isn't ready to deal with you yet. If you don't stop harassing her you'll never get your money or the food truck. And if you even think about suing her I'll bury you so deep in motions and draw this case out so long neither us will be around to see the end of it. The amount of money it'll cost you to collect a dime from Bonnie will pale in comparison to how much this litigation will cost you.

Attorney

LoanCo wants to know its options moving forward to enforce the terms of the Security Agreement and Promissory Note. Please prepare a memorandum that addresses the following:

1. Discuss whether LoanCo has a valid security interest in any of Bonnie Bons LLC's assets. If LoanCo does have a valid security interest, discuss whether LoanCo has perfected its interest.
2. Discuss the methods, if any, by which LoanCo may legally gain possession of those assets.
3. What rights would LoanCo have in collateral for which LoanCo takes possession?
4. Discuss the causes of action, other than to foreclose its security interest, that LoanCo may have against Bonnie Bons LLC.
5. What professionalism issues does Attorney's letter to Manager raise?

SELECTED ANSWER TO QUESTION 2

(February 2019 Bar Examination)

To: LoanCo

From: Bar Applicant

Re: Claims to Bonnie Bons, LLC

MEMORANDUM

1. LOANCO'S SECURITY INTEREST IN BONNIE BON'S ASSETS

The first issue is whether LoanCo has a valid security interest in Bonnie's assets.

*A security interest is an interest in collateral that arises under Article of the Uniform Commercial Code. In order to be valid, a security interest requires (1) a security agreement, (2) attachment, and (3) perfection. A security agreement must be in an authenticated writing (signed), contain words of grant, and reasonably described the collateral in sufficient terms (ultrageric terms are insufficient, however generally U.C.C. terms are fine). Attachment forms the link between the security agreement and the collateral itself. Attachment occurs upon the later of when (1) the debtor has rights in the collateral, (2) the Creditor gives value for the transaction, and (3) the execution of a valid security agreement. The method of perfection depends, nearly entirely, upon the form of the collateral. A security interest in automobiles, cars, etc. is usually perfected by indicating the security interest on the certificate of title itself. A security interest in equipment arises when the equipment (which is any good that is not inventory, farm equipment, or consumer goods) is perfected by the filing of a financing statement. A financing statement must (1) contain the name of the debtor, (2) contain the name of the creditor, (3) contain the a description of the collateral (ultrageric terms are fine or terms such as used by the U.C.C.). Lastly, an accession is any personal property attached to another piece of personal property which merges into the former (such as a bike seat and a bike). A security interest in a truck, constitutes a security interest in all accessions affixed thereto. Lastly, a security interest also attaches to any **proceeds** of the collateral; that is, other items or funds gained by the sale, or use of the collateral itself.*

In application, the security agreement between LoanCo and Bonnie Bons, LLC ("hereinafter, Bonnie") appears to be valid. It is in a writing executed by Bonnie, contains words of grant ("the Promissory Note is secured by all of [Bonnie's] assets") and contains a sufficient description of the collateral. The simple use of the term "assets" is insufficient to create any security interest; however, the use of the description of "Bonnie's food truck in the agreement is likely a sufficient identification of the collateral. The collateral duly attached as Bonnie already had title to the truck, LoanCo gave value to finance the transaction, and there existed a security agreement as stated above. Lastly, it does not appear that LoanCo properly perfected their security interest. Specifically, a security interest in the truck must be notated on the certificate of

title itself to be adequately protected. While the financing statement is great, it is insufficient to perfect as against collateral covered by a certificate of title. However, notwithstanding, the security interest is still, in and of itself, valid, just merely not against other creditors. Duly, when Bonnie places the equipment into the truck, and modified it so that such equipment could not be removed without damaging the truck, the equipment, as accessions became part of the secured interest in the truck.

As a result, LoanCo validly created a security interest but that interest was not properly perfect so as to be valid against other creditors.

2. POSSESSION AND REPOSSESSION OF SECURED COLLATERAL

The next issue is whether LoanCo is entitled to possession of the secured collateral.

Generally, upon the default of a secured debtor. The creditor may exercise a right of repossession. Thus, upon a default of the underlying obligation the creditor may retake possession of the collateral for its own account, provided it can be done without a breach of the peace. A breach of the peace is not specifically defined in the U.C.C. but is generally construed as to mean the potential for violence or flagrant disruption of civilized society. Any entry by a secured creditor into the home of a debtor to retake possession of collateral is per se a breach of the peace (and in the best interests of the creditor given Florida's stand your ground laws). As such, to repossess any collateral within the home of a debtor, the Creditor must resort to remedies to replevy the good.

Subsequent to the crash of the first vehicle, Bonnie towed the truck back home and locked it in her garage. Thus, once Bonnie defaulted upon the terms of the promissory note, LoanCo was entitled to take possession of the collateral provided it could be done without a breach of the peace. However, as the truck was locked in her garage, it would be a per se breach of the peace for LoanCo to try to take. Instead, LoanCo must result to typically forms of judicial process and procedure and seek to obtain a duly entered Writ of Replevin.

As such, LoanCo may not repossess the collateral as doing so would be a breach of the peace, and must replevy the truck.

3. RIGHTS SUBSEQUENT TO POSSESSION

The next issue concerns LoanCo's rights after possession of the Food Trust.

In Florida, a secured creditor, upon obtaining possession of the collateral through repossession or by Writ of Replevin, has the ability to Sell the collateral at public or private sale, and apply the balance gained through the sale to the sums owed by the debtor. A sale of this nature must be commercially reasonable which requires, inter alia, notice to the debtor of the date, time and location of the sale. If a sale is commercially unreasonable, the creditor may not be able to recover a deficiency. Under Article 9 of the U.C.C., there is a presumption that any public sale of the collateral would have resulted in full payment of the debt, thus, in the event the sale price is insufficient to cover the debt, the burden shifts to the secured creditor to show that the sale was

commercially reasonable. After any such sale, the creditor may hold the Debtor personally responsible for the remaining balance via an in personam deficiency action. Lastly, a debtor has a right of redemption which cannot be waived (unless its waived, in writing after default). Thus, a debtor may exercise the right of redemption by paying the full balance due on the promissory note, together with fees and assessments accruing thereby, and recover the chattel.

Once the replevin action, mentioned above, is successful as against Bonnie. LoanCo has the ability to sell the truck at private or public sale in a commercially reasonable manner. Thus, LoanCo must give Bonnie adequate notice of their intention to sell the property and must include the time, date, and location of the sale. Lastly, Bonnie has a right of redemption which cannot be waived. Thus, Bonnie may exercise the right of redemption by paying the full balance due on the promissory note, together with fees and assessments accruing thereby, and recover the chattel. In the event Bonnie does not exercise the right of redemption, Loan co may sell the property and request a deficiency judgment holding Bonnie liable for the difference in the sales price and the balanced owed, provided Loanco proves the same is reasonable.

As such, after possession, LoanCo may sell the truck and hold Bonnie liable for the difference.

4. CAUSES OF ACTION AGAINST BONNIE BONS, LLC

The next issue is whether Loan co may assert any further actions against Bonnie's Bons, LLC. They may, with each such potential option being discussed more in depth, below.

a. Breach of Contract

In Florida breach of contract occurs when there is a valid contract (proven with an offer, acceptance, and consideration), a breach of that contract, and subsequent damages. A security agreement is, in and of itself, a contract, and a party may be held liable for any breach of such an agreement. Under the terms thereof, a party may be entitled to damages commensurate with their expectation interest--the position they would have been in had the contract been fully performed.

As such, Bonnie breached the security agreement by failing to pay when due under the terms of the incorporated promissory note. In doing so, Bonnie materially breached the agreement. LoanCo suffered damages in that it had not be entitled to be paid the full balance of the money it is owed.

Thus, a court will likely find that Bonnie breached the Security Agreement for which LoanCo is entitled to recover damages.

b. Breach of Promissory Note (U.C.C. 3)

Under Article 2 of the Uniform Commercial Code, a promissory note is a negotiable instrument. A negotiable instrument is an unconditional promise to pay a fixed sum of

money, at a definite time, to order or bearer, and contains no additional collateral promises. A promissory note is a type of commercial paper whereby a maker promises to pay a set sum of money to a Holder of the note, the payee. Upon maturity or breach of the applicable obligations under the note, the Holder therefore, provided they are entitled to enforce it, may make demand upon the Maker of the note for payment. In the event the Maker dishonors the note (by failing to pay it), the Holder may seek judicial redress in Florida's Courts.

Bonnie executed a promissory note in favor of LoanCo as is evident by the facts. When Bonnie failed to tender payment on the same pursuant to its terms, she breached the promissory note. Once breached, if the terms of the Note permit (the facts are silent whether the note has an acceleration clause), LoanCo may accelerate the balance due on the loan and claim the same to be immediately due and payable. If Bonnie fails to pay on the note, then LoanCo may seek a money judgment against Bonnie as provided by law.

As such, LoanCo will likely be successful in maintaining a claim against Bonnie on the basis of the breached note.

c. Negligent Impairment of Security & Waste

Negligence is a cause of action which requires, (1) duty, (2) breach, (3) causation (both proximate and in fact) and (4) damages. A driver has a duty to use reasonable care to protect foreseeable plaintiffs from harm. A holder of a security interest in the car being driven is a foreseeable plaintiff for any damage sustained to the car as a result of its being driven. A breach occurs where the defendant fails to use reasonable care. Cause in fact is when the injury would not have occurred, but for the negligence, and lastly proximate cause is met provided the injury is a foreseeable result of the breach. There must, as is obvious, be damages.

LoanCo may attempt to allege that Bonnie negligently impaired the value of its security when Bonnie negligently missed the curve because she was distraught. Bonnie owed a duty of reasonable care to protect the truck (the collateral) from harm. Bonnie breached that duty when she drove carelessly. But for the actions of Bonnie the value of the collateral would not have been impaired. It is foreseeable, without doubt, that the impairment of a secured interest in a motor vehicle is a foreseeable result of failing to drive that motor vehicle with due care. LoanCo suffered damages in that the value of the Truck was substantially decreased by way of Bonnie's actions, thus impairing the value of its security.

As a result of the foregoing, Loanco will recover against Bonnie for Negligent Impairment of Security.

5. PROFESSIONALISM ISSUES

The next issue concerns the ethical implications of Attorney's Conduct.

Firstly, attorneys have the obligation to be truth, honest, and fair to opposing counsel and opposing parties as clearly set forth in the Florida Rules of Professional Conduct and the preamble to the rules themselves ("to opposing counsel, I declare civility"). Moreover, an attorney has an affirmative obligation under the Rules to refrain from making frivolous arguments. Frivolous arguments are those in which there is no basis in either fact, or law, for the argument, and the argument is not made in good faith for the alteration, extension, reversal, or modification of existing law. Arguments made solely for the purpose of delay are obviously frivolous. Lastly, an attorney should not undertake an course of action solely calculated to embarrass or harass another.

Attorney's letters to manager raise several implications. First, it appears as though Attorney is breach his duty of civility to opposing counsel and opposing parties by threatening to bury them in litigation without due case to do so, and to drag out litigation solely for the purposes of harassing, annoying, or causing undue harm to an opposing litigant. Verily, making multiple motions solely for the purpose of "drawing the case out so long" is patently frivolous as any such motion for only be made for the purpose of delaying the administration of justice.

As such, Attorney may be subject to discipline if he proceeds with his course of conduct and files frivolous motions to defeat LoanCo's action.

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QUESTION NUMBER 3

FEBRUARY 2019 BAR EXAMINATION – TORTS/ETHICS

As part of its new marketing program, Supermarket offered a service that would deliver digital coupons to its customers' cell phones upon entering any of Supermarket's stores. Paula registered for the service and used it often.

Paula was shopping at Supermarket and received a message from Supermarket containing new coupons. As she walked down the frozen food aisle, she scrolled through the coupons on her phone. In looking at the coupons, Paula did not see a large puddle of melted ice cream in the aisle. Paula slipped on the puddle and her head hit the floor.

A Supermarket employee arrived right after the fall and helped Paula to her feet. Paula said she felt dazed and asked the employee to call her husband, Harold, to drive her home. Harold arrived shortly thereafter and picked up Paula. While driving back to Paula's and his house, Harold began typing a text message. While Harold was texting, the car swerved to the right and hit the curb, causing Paula to bang her head against the window.

After suffering headaches, Paula consulted a doctor and was diagnosed with a severe concussion. Paula has been unable to work because of her persistent headaches. Paula has lost income and incurred medical expenses, and now seeks to recover damages from Supermarket.

Paula was referred to you by Lawyer, who does not practice personal injury law. Lawyer proposes that your firm would solely litigate Paula's case, and pay Lawyer a referral fee equal to 10 percent of any fee you earn on the case.

Prepare a memo that discusses the claims and defenses involved in Paula's proposed lawsuit against Supermarket. In the memo, include a discussion of the ethical issues involved in Lawyer's fee proposal.

SELECTED ANSWER TO QUESTION 3 **(February 2019 Bar Examination)**

Negligence Premises Liability

The issue is whether Paula may bring a cause of action for negligence under the theory of premises liability when she suffered injuries to her head after falling in the store and, for the injuries, suffered as a result of the subsequent car collision.

Negligence is (1) duty, (2) breach, (3), causation, and (4) damages. Because the facts indicate the Paula was injured in a supermarket the rules of premises liability for commercial business owners apply. To successfully breach a cause of action for negligence, Paula has the burden of establishing the following.

(1) Duty - *The issue is whether the defendant, Supermarket, owed a duty to Paula. Generally, a duty is owed to all foreseeable victims.*

The classification of the plaintiff will establish the specific standard of care owed by Supermarket. Florida has abolished the distinction between licensees and invitees. Rather, victims who are on the premises lawfully and have not exceeded the scope of their invitation on the property (ex. trespassers), are all classified as invitees.

The duty to invitees is to: keep the premises reasonably safe for the benefit of the invitee, warn of latent or non-readily observable defects known to the landowner, and make reasonable inspections to and make safe any dangerous conditions on the land.

Further, commercial business owners owe a heightened duty of care to victims than residential commercial landowners are required. Business owners must also keep the premises free from any moveably or transitory substances and unreasonably dangerous artificial or natural conditions to any invitee on the property AND others adjacent to the premises.

Here, Paula was a customer of the store when she was slipped and fell. Paula will argue that, considering she he was a frequent shopper and user of the stores digital coupon program, Paula was a foreseeable victim of which the Supermarket owed a duty. In this regard it is likely that Paula will satisfy this element.

(2) Breach - *The issue is whether Supermarket breached that duty to Paula, as an invitee, when she slipped and fell on the melted ice cream on the floor.*

As discussed above, business owners owe a duty to keep the premises free from transitory substances. Likewise, the supermarket also owed a duty to make reasonable inspections to uncover such dangerous conditions. It is not necessary then that the supermarket had actual notice of the condition as long as it could have been uncovered by reasonable inspection.

This rule is appropriate in the facts at hand because a supermarket aisle is full of transitory substances that will likely fall to the ground and become slippery, which is a hazard to customers. In this regard, Paula will assert that this duty was breached the ice cream is a transitory substance, and the supermarket failed to make reasonable inspections to discover the defect because it was melted on the ground in the frozen aisle. The facts then indicate that a food usually found in the frozen aisle, likely fell from the freezer, while still frozen, and was on the ground long enough for it to melt. This indicates that the store could have uncovered the spill by reasonable inspection.

Furthermore, the fact that the employee arrived to the aid of Paula "right after the fall" indicates that there was an employee nearby that could have uncovered and made safe the condition. This duty to owed to invitees, extends to agents or employees of the defendant, and the employee is clearly within this role.

(3)-(4) Causation/Damages

The most problematic issue that Paula will have is proving that Supermarkets breach was the legal and proximate cause of the injuries to her head.

Causation is the legal and factual cause of their injuries. "But for" test is the factual cause. Proximate cause is the natural and foreseeable event of Defendant's acts.

Paula will have a more difficult time proving that the full extent of her injuries were the proximate cause of the Supermarkets negligence. There are two injuries that must be considered.

First head injury - Here, the first head injury occurred in the store and the act of slipping on the melted ice cream was a legal and proximate cause of these injuries. In proving the first head injury is the proximate cause of the injuries. Plaintiff can further assert that because the Supermarket offered the digital program to its customers, it is foreseeable that a customer will be paying attention to their phone while shopping the store, and not see a spill on the ground. (See contributory negligence defense below).

Second head injury - The issue here is whether the later head injury in the vehicle was the naturally and foreseeable result of Supermarkets conduct.

The rule generally is that the nature of injuries must be foreseeable and not the result of an intervening or superseding cause of the injuries. Meanwhile, the extent of the injuries do not have to be foreseeable in severity. Under the eggshell plaintiff theory, a defendant takes the victim in whatever the fragility of the condition.

Here, it is hard to determine whether the nature of the injuries to the plaintiff is the result of the Supermarkets breach. Both impacts were to the plaintiffs head and her injuries are a headache which is the natural and probable result of a head injury.

Here, the husband's negligence in the driving, is a superseding cause that resulted in the same injuries as the slip and fall. Therefore, it is difficult to determine whether the

extent of the injuries are a result of the original slip or fall. If this is the case it must only be shown that the supermarkets conduct was a "substantial factor" in her injuries.

In this regard, the supermarket will likely offer evidence that the injuries to her head as a result of the fall were of a different nature than the second injuries to her head that were incurred and the two can be distinguished therefore limiting liability in the extent of the damages incurred.

However, Paula will likely argue that her injuries were increased as a result of the fall and argue that further injuries are within the scope of foreseeable required of proving proximate cause. In this argument, Paula may be persuasive because as mentioned the further severity of injuries caused by defendant's negligence have been found to be the natural and foreseeable consequence of a defendant's negligence.

Defenses -

Supermarket may assert the following defenses -

(1) Comparative negligence - Florida courts have adopted the pure comparative negligence method. Under this, the supermarket may assert that Paula was comparatively negligent when she was walking through the supermarket. The supermarket may also assert that the husband's negligence while driving made him liable for the injuries.

(Note: FL Courts have gone away with the implied assumption of risk defense. Supermarket may wish to assert it because Paula impliedly assumed the risk of looking at her phone while walking. However, this defense is unavailable.

Remedies -

The issue here is based on the determination of the element of causation and how much Paula can recover from supermarket. If a court finds that she must recover. In a negligence suit, a Plaintiff may recover compensatory damages as a result of any medical expenses and pain and suffering. Punitive damages are ordinarily not available unless more blameworthy conduct is at issue, like fragile plaintiffs or intentional torts.

If the court determines that Paula has met the burden of proving causation to the full extent of her injuries she may be awarded medical expenses incurred, lost earnings, and lost earning's capacity. If Paula is the primary "breadwinner" her husband may also sue for the loss of income and support from Paula.

The supermarket may assert any of the defenses above in order for the plaintiff to lose damages under the theory of pure comparative negligence. And Plaintiff will recover minus the extent of her negligence, regardless if she was over 50% at fault unlike partial comparative negligence Jx.

If the husband is found to be a partial cause of the damages, Supermarket could incur the full liability under joint and severable liability and may subsequently recover from the husband.

Ethics Violations -

The issue is whether attorney may be committing any ethical violations by giving another attorney a referral fee.

Fee agreements must always be reasonable. When contingencies are involved they must be in writing. Further, any agreement to share money with another law firm must be in writing, signed by the client, stating the terms of the arrangement, and in most cases making the parties jointly or severally liable, or defining the arrangement by the amount of work done.

Generally, an attorney may invoke the help of another attorney when they are unfamiliar with an area of law. However, this is not the case here. The facts indicate that they are not working together on the case but only using a "referral" relationship.

Referral fees have been scrutinized by Bar associations especially where the percentages of recovery are involved. Because the arrangement is taken from the amount retained for fees by the attorney, I would argue that it may not result in a clear ethical violation. If it were taken from the full recovery, it would bring up more ethical violations. In any event, if she is to avoid committing an ethical violation the best course of action is to inform the client in writing of the arrangement.

PART II - SAMPLE MULTIPLE-CHOICE QUESTIONS AND ANSWERS

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

The answers appear on pages 51 and 52.

MULTIPLE-CHOICE EXAMINATION INSTRUCTIONS

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

1. This booklet contains segments 4, 5, and 6 of the General Bar Examination. It is composed of 100 multiple-choice, machine-scored items. These three afternoon segments have the same value as the three morning segments.
2. Write your badge number in the box at the top left of the cover of your test booklet.
3. When instructed, without breaking the seal, take out the answer sheet.
4. Use a No. 2 pencil to mark on the answer sheet.
5. On the answer sheet, print your name as it appears on your badge, the date, and your badge/ID number.
6. In the block on the right of the answer sheet, print your badge/ID number and blacken the corresponding bubbles underneath.
7. **STOP.** Do not break the seal until advised to do so by the examination administrator.
8. Use the instruction sheet to cover your answers.
9. To further assure the quality of future examinations, this examination contains some questions that are being pre-tested and do not count toward your score. Time limits have been adjusted accordingly.
10. In grading these multiple-choice items, an unanswered item will be counted the same as an item answered incorrectly; therefore, it is to your advantage to mark an answer even if you must guess.
11. Mark your answers to all questions by marking the corresponding space on the separate answer sheet. Mark only one answer to each item. Erase your first mark completely and mark your new choice to change an answer.
12. At the conclusion of this session, the Board will collect both this question booklet and your answer sheet. If you complete your answers before the period is up, and more than 15 minutes remain before the end of the session, you may turn in your question booklet and answer sheet to one of the proctors outside the examination room. If, however, fewer than 15 minutes remain, please remain at your seat until time is called and the Board has collected all question booklets and answer sheets.
13. **THESE QUESTIONS AND YOUR ANSWERS ARE THE PROPERTY OF THE BOARD AND ARE NOT TO BE REMOVED FROM THE EXAMINATION AREA NOR ARE THEY TO BE REPRODUCED IN ANY FORM.**

30 SAMPLE MULTIPLE-CHOICE QUESTIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

27. In a pretrial motion, the defendant argues there are no genuine issues of material fact. In support of the motion, the defendant attaches several affidavits from witnesses. Which is the correct caption for the motion?
- (A) Motion to Dismiss for Failure to State a Cause of Action.
 - (B) Motion for Judgment on the Pleadings.
 - (C) Motion for Summary Judgment.
 - (D) Motion for Directed Verdict.
28. Jill makes a will leaving all of her stocks to Lou and the rest of her estate to Beth. Several weeks later, she creates a codicil to the will that devises her jewelry to Ann. Jill and Beth have a fight and Jill mistakenly rips up the codicil rather than the will. Jill dies. Which of the following is true about the distribution of Jill's estate?
- (A) Beth receives the jewelry pursuant to the terms of the will.
 - (B) Jill's estate will be distributed as intestate property because Jill revoked her will.
 - (C) Ann receives the jewelry under the terms of the codicil.
 - (D) None of the above.
29. During Defendant's first-degree murder trial, the state calls Witness to testify. Witness testifies that Defendant was not the man she saw shoot the victim. During the investigation of the murder, Witness told prosecutor that she saw Defendant shoot the victim. This prior statement was made under oath and was recorded by a court reporter, but Defendant's attorney was not present. If the state seeks to introduce Witness' prior inconsistent statement for the sole purpose of impeaching Witness, should the court allow the prior statement to be admitted into evidence?
- (A) Yes, because any party can attack the credibility of a witness by introducing a prior inconsistent statement.
 - (B) Yes, because a prior inconsistent statement given under oath can be used by any party for any purpose.
 - (C) No, because the state cannot impeach its own witness with a prior inconsistent statement.
 - (D) No, because Defendant did not have an opportunity to cross-examine Witness at the time the statement was made.
30. TAP, Inc., has fewer than 100 shareholders. The shareholders wish to enter into an agreement pertaining to the exercise of the corporate powers or the management of the affairs of the corporation. Which of the following, if adopted by the shareholders, would be contrary to public policy and, therefore, unenforceable in Florida?
- (A) An agreement that exculpates directors from all personal liability.
 - (B) An agreement that authorizes a particular shareholder to manage the affairs of the corporation.
 - (C) An agreement that requires dissolution of the corporation at the request of one of the shareholders.
 - (D) An agreement that eliminates the board of directors.

ANSWER KEY FOR MULTIPLE-CHOICE QUESTIONS

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

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