

Florida Board of Bar Examiners

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Florida Bar Examination Study Guide and Selected Answers

**February 2014
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**This Study Guide is published semiannually with essay questions
from two previously administered examinations
and sample answers.**

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PART I – ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2014 AND JULY 2014 FLORIDA BAR EXAMINATIONS

ESSAY QUESTIONS AND SELECTED ANSWERS

Part I of this publication contains the essay questions from the February 2014 and July 2014 Florida Bar Examinations and one selected answer for each question.

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

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

ESSAY EXAMINATION INSTRUCTIONS

Applicable Law

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

Acceptable Essay Answer

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

Q QUESTION NUMBER 1

FEBRUARY 2014 BAR EXAMINATION – FAMILY LAW

Harry and Wendy, both 40, are divorcing after 16 years of marriage. Both parties agree that their marriage is irretrievably broken. Furthermore, it is undisputed that the dissolution action was filed in the proper court.

The financial affidavits of the parties reveal the following income: \$5000 a month from Harry's salary as an Air Force officer; and, \$1000 a month to Wendy from her mother's trust. In addition, the financial affidavits disclose the following assets: \$50,000 in Wendy's separate bank account, which came from her mother's trust; and, the \$400,000 beach house in northwest Florida they live in. Harry bought the house two months before their wedding for \$165,000 with \$15,000 down. The 15-year mortgage was paid off using his salary.

Harry has mostly been overseas while Wendy took care of the home and the twin boys, born four years ago. Harry's parents live nearby and help with the twins.

After being stationed near home, Harry filed for dissolution of marriage. He wants equal time-sharing and he waives child support. When overseas in the future, he wants his parents to keep the twins. Harry claims sole ownership of the house and half of the bank account. He objects to any payment of child support and alimony to Wendy.

Wendy is worried that Harry will take the twins overseas. Wendy has never worked before, but she has a job offer in Mobile, Alabama, 100 miles away. She wants to move there with the twins. The job includes housing but little pay. Wendy seeks alimony, child support, half of the house, the bank account, and for Harry to keep her as his life insurance beneficiary.

You are the law clerk for the judge who has been assigned this case. The judge asked you to prepare a memorandum identifying and analyzing the contested issues including the recommended course of action that the judge should take when addressing each issue.

SELECTED ANSWER TO QUESTION 1
(February 2014 Bar Examination)

To: Judge

From: Applicant

Date: February 25, 2014

Re: Harry and Wendy Divorce

I. Harry and Wendy may properly divorce.

The first issue is whether Harry and Wendy may properly divorce.

Florida has eliminated fault based divorce. In Florida, a couple may divorce if 1) the marriage is irretrievably broken down or 2) if one spouse becomes mentally incompetent. For a divorce predicated on an irretrievable breakdown, only one spouse need believe that the marriage is irretrievably broken. Moreover, the court may continue the proceedings for 3 months to allow for the couple to reconcile.

For a court to have subject matter jurisdiction over a divorce, only one party need be a Florida resident.

In this case, both parties agree that their marriage is irretrievably broken. Thus, the divorce has a proper basis. Second, the facts state that the dissolution was filed in the proper court, and nothing in the facts indicated that jurisdiction is in dispute.

Therefore, Harry and Wendy may properly proceed with their divorce.

II. Alimony

The next issue is what, if any alimony is available and to whom.

In Florida, both spouses are responsible to financially support one another. Alimony is determined based on the financial needs of one spouse and the ability of the other spouse to pay. There are several different types of alimony that are currently available in Florida: 1) Temporary alimony--this type of alimony is used for the spouse needing the support while the dissolution proceedings are going on; 2) Bridge-the-gap alimony--this type of alimony is used to bridge the gap from married life to single life; 3) Rehabilitative Alimony--this type of alimony is provided so that the needing spouse may develop the necessary skill set via education and training so that they could find proper employment 4) Durational Alimony--this type of alimony is designated for a specific period of time. However, it is not available for marriages that have not lasted for at least 17 years; 5) Permanent alimony--this type is fixed.

Many factors are considered in determining whether to provide alimony. Some of these factors include age of each spouse, duration of marriage, current income of each spouse, other sources of income for each spouse.

In this case, Harry and Wendy are both 40 years old. They are divorcing after 16 years of marriage. Thus durational alimony is not available. Wendy has never worked before-- she has been a stay at home mother. Thus, she would certainly require some sort of financial support at this juncture. Harry, on the other hand, earns \$5,000 per month. Moreover, since Wendy is only 40, there is still time, with proper education and training for her to obtain gainful employment. However, at this moment, she requires some financial support, and Harry can afford to pay for such support. Wendy does have income, the 1,000 per month from her mother's trust. However, that is likely not enough to live on. As such, Wendy will likely be entitled to temporary alimony, bridge the gap alimony, or rehabilitative alimony. Once, Wendy is "on her feet" she may no longer require or be entitled to the alimony.

Therefore, at this juncture, the judge she award Wendy at least one, if not more, of the first three types of alimony.

III. Child Support

The next issue is whether Wendy is entitled to child support.

Both spouses have an obligation to support their children. Florida uses an income based share plan to awarding child support. The court is entitled to deviate 5% from the guidelines without siting reason.

Here, Harry earns 5,000 per month, whereas Wendy does not work. Depending on how the parenting plan (discussed below) comes out, Wendy will likely be entitled to some level of child support. That of course, may change depending on the parenting plan, and whether the twins end up spending more than 40% of their time with Harry.

Harry says that he "waives child support." Child support cannot be waived in any sort of agreement (i.e. prenuptial/ postnuptial). Thus this waiver would be deemed ineffective.

Therefore, the court should probably award Wendy some sort of child support, depending on the parenting plan.

IV. The Parenting Plan

The next issue is how to determine the parenting plan.

In Florida, the court develops what is known as a parenting plan. This plan includes two portions: 1) Time Sharing and 2) Parental Responsibility. There is a presumption that the child should spend equal time with each parent. However, the superseding factor is always, what is in the best interest of the child. Under a time sharing plan, both parents should have equal time with each parent. However, certain factors may come into play, such as who raised the children, where they go to school, where they want to stay (if they are at an age where they could understand such a decision). There are many other factors in making this determination. The second prong, Parental Responsibility, includes two types--ultimate responsibility and parallel parenting. Under ultimate responsibility, each spouse is solely responsible for a certain responsibility (i.e. schooling or medical). Under parallel parenting, those responsibilities are shared.

In this case, Wendy has spent the majority of the time raising the children. Moreover, Harry is an air force officer and spends most of his time overseas. Thus, on these facts alone, it seems that Wendy is in a much better position to have more time with the twins. Harry claims that while he is overseas, his parents should keep the twins. However, the biological parents have a right over the grandparents of the child, unless, as mentioned before it is in the best interest of the children for them to stay with Harry's parents. The children are only 4, and thus they probably cannot express where they would want to be.

As far as parental responsibility, it also seems that Wendy would be better suited, in as much as Harry is often overseas. As discussed above, Harry's plan, while overseas is to put the responsibility on his parents. But, as mentioned above, Wendy would have rights that supersede Harry's parents, unless it is not in the best interest of the twins.

Therefore, the court should recommend that Wendy is entitled to her time with the twins while Harry is overseas. It is also likely that she will bear the greater parental responsibility. This ruling will also affect the amount of child support that should be awarded.

V. Wendy's Intent to Relocate

The next issue is, whether Wendy should be entitled to relocate with the twins.

If one spouse intends to move more than 50 miles away, he or she bears the initial burden of proof. She must show, that based on numerous factors, such as job opportunity, child's choice (depending on age), and other such factors. If moving, the moving spouse must provide the new address, how time sharing will continue to work, among other requirements. The burden then shifts to the opposing spouse, to show why the move would be improper.

Here, Wendy has a job opportunity in Mobile, Alabama, which is 100 miles away, thus exceeding the 50 mile threshold. Wendy will argue that after being jobless for her whole life, this may be the only job available to her. The problem there is that although she will have housing, she will have little pay. And the court must determine if the twins could be properly taken care of on a minimal pay. However, given that opportunity, in conjunction with the fact that Harry is often overseas and unable to care for the twins, this move may be in the best interest of the twins. Harry of course, will argue that his parents will take care of the twins. Unless, however, he could show that Wendy is incapable of taking care of them, she takes precedent over Harry's parents.

Therefore, based on the facts here, the court should allow Wendy to move with the twins.

VI. Distribution of Assets

The next issue is how the assets should be distributed.

Florida utilized equitable distribution. Under this doctrine, distribution of assets is not necessarily controlled by title. The assets are first identified, then assessed, and then distributed in an equitable manner. How the assets are distributed (i.e. what portion to whom) is determined by a variety of factors, namely income, need, duration of marriage, among others. Assets that are separate include those that were owned by the respective spouse prior to the marriage, or gifts or devises to one specific spouse before or during the marriage. Assets acquired during the marriage, or any appreciation (due to some sort of contribution from the other spouse, not just by virtue of the market) to separate assets during the marriage are considered marital assets. It is the marital assets that are then assessed and divided.

A. \$50,000 bank account

The bank account is a separate account, and was funded from the proceeds of her mother's trust. There is no indication that Wendy and Harry have agreed to make this a joint account. Nor are there any facts to indicate that marital funds were commingled. Thus, this account appears to be separate property, which should not go into the equitable distribution pool, and Wendy should keep it in its entirety.

B. The House

The House was purchased before the marriage for 165K with 15K down. The mortgage was then paid off using his salary. The 15K down, because it was before the marriage will be considered Harry's. This was not purchased together. However, the remaining balance, i.e. \$150, 000 which was mortgaged is a bit more complicated. The mortgage was paid entirely from Harry's salary. Therefore, the fact that Wendy did not contribute to paying the mortgage, is a factor that weighs in favor of the house remaining Harry's. However, Wendy, by acting as homemaker, and caretaker for the couple's children, is what allowed for Harry to work and earn the money to pay the mortgage. Therefore, Wendy, indirectly, has contributed to the mortgage payments. Therefore, the 150K value should be considered marital property and equitably divided. The remaining increase in value, i.e. the 245K increase, is, without any other facts provided, due to market changes. Thus, since that increase is not due to the contributions of Wendy, Harry would be entitled to that value.

Therefore, 150K worth of the home should be equitably divided, whereas, the remaining 250K should belong to Harry. To have this take affect the home may be sold and proceeds divided, or one spouse may retain the home, and make the necessary payment to the non-staying spouse.

C. Life Insurance

The next issue is whether Wendy should be kept as Harry's life insurance beneficiary.

By virtue of the divorce, Wendy will, by operation of law, no longer remain the beneficiary of Harry's life insurance policy. Life insurance policies are essentially will substituted, which terminate by law upon divorce.

Therefore, Wendy should not remain the beneficiary of Harry's life insurance policy.

Q QUESTION NUMBER 2

FEBRUARY 2014 BAR EXAMINATION – FLORIDA CONSTITUTIONAL LAW

You are an assistant county attorney for a rural county in Florida. Some county residents keep pigs as pets, and three commercial pig farms are located in the county. At a public workshop, a county commissioner announces a proposed ordinance to protect from "swine flu." Swine flu is spread through close contact or direct touch between either pigs or humans.

The proposed ordinance would provide as follows: (1) Code enforcement officers are directed to collect and destroy all noncommercial pigs within ten days of the federal Center for Disease Control (CDC) confirming swine flu has occurred anywhere in the United States. (2) If the CDC confirms swine flu has occurred in Florida, the officers will collect and destroy all commercial pigs. (3) The residents' pigs are declared a threat to public health, and the county will not pay compensation to the owners; however, if the commercial pigs are destroyed, the county will pay the owners not more than \$25 per pig. (4) To locate pigs, the officers are allowed to enter private property without a search warrant, but they cannot enter houses. (5) Ownership of a pig is considered commercial if the owner derives at least \$5000 of annual income from the pigs.

Many residents praised this ordinance as a necessary protection. Pig owners objected. The commercial farms claimed that unregulated chickens and bird flu present a greater threat. One commercial farm located in the county said its organically raised pigs were worth over \$500 each.

Prepare a memo for the County Attorney that analyzes the potential challenges to the proposed ordinance under the Florida Constitution.

SELECTED ANSWER TO QUESTION 2

(February 2014 Bar Examination)

Issues presented: The issue presented is to determine the constitutional challenges under the Florida Constitution that a county ordinance will encounter regarding its mandate of destruction of pigs in order to protect its citizens from swine flu.

Police power: County will first argue that its swine ordinance is proper under its recognized police powers to protect the health, well-fare, and safety of its citizens. Farmers and pet owners will ultimately argue that the ordinance should fail under Florida constitutional law where the ordinance is overbroad, vague, and not rationally related to a legitimate public purpose (see below). Pig Farmers' counter arguments are below:

Destruction of non-commercial pigs: Non-commercial owners of pigs alike will first argue that provision one of the ordinance amounts to an unconstitutional taking. Pursuant to its powers of eminent domain, the state and local governments may take, appropriate, or physically invade private property for a justifiable public purpose with just compensation due and owing to the owner of that property. Eminent domain also covers the taking of personal property. The county will argue that it is justified in destroying the pigs because of public safety (the prevention of a deadly disease) pursuant to its police powers and that no compensation is due and owing to these non-commercial pig owners because: 1. the county is destroying a public nuisance that poses an immediate and serious threat of illness and/or injury to the public; and 2. these are non-commercial pigs with no value to be compensated.

Non-commercial pig owners will first argue that this provision of the ordinance is unconstitutionally overbroad; the county will be destroying both sick and healthy pigs in violation of the owners' constitutional rights. These owners will also argue that the provision is vague because, while a commercial pig is specifically defined, a non-commercial pig is not, which will not allow the common citizen to understand how to comply with the law. Moreover, these owners will argue that this provision is not rationally related to a legitimate public purpose because there are non-commercial pigs that do not have swine flu whose death will not benefit the public in any way.

Regarding the taking aspect, these owners will argue that pigs that are not ill are not a public nuisance. Under Florida constitutional law, there is no requirement for compensation when, through use of eminent domain powers, government destroys an immediate and serious threat to public health, wellness, or safety. Nonetheless, the owners of pigs that aren't sick will still face destruction of their pigs under this ordinance and, in turn, they will argue that no public threat exists where these pigs don't carry this disease. Additionally, they will argue (likely successfully) that just compensation based on the fair market value of the pig is in fact owing where these owners paid money to acquire these pigs and to raise and keep them and where the pigs are not justifiably being destroyed because they're not sick.

These pig owners will also argue a violation of equal protection (because other unregulated farm animals that pose dangers to society are not being destroyed) and their due process rights (the deprivation of a property interest). Under Florida's equal protection laws (which strongly mirror the U.S. Constitution), no citizen may be deprived the equal protection of the laws. Where a fundamental right is being impinged upon or a

traditionally suspect class is at issue (race, religion, national origin and, in Florida, physical disability), strict scrutiny analysis applies whereby the government has the burden of proof of showing that its law is narrowly tailored to meet a compelling government interest. The owners will argue that their fundamental right to maintain their property (non-commercial pigs) is being infringed by the government's destruction where other owners of livestock for non-commercial purposes are not being treated in the same manner. The government will argue that there is no fundamental right to own a pig and that, if anything, a right to own a pig is an economic right that is not fundamental. The county probably wins on this argument. In turn, rational basis scrutiny will apply where the owners must show that the law is not rationally related to a legitimate public interest. Because swine flu is only transferred by pigs, and not by other livestock, and because it is potentially deadly, the county can show a legitimate government interest. Still, if the county cannot show that the law is rationally related to that interest, it will lose. It is unlikely that that will be the case here as the elimination of pigs who are both sick and potential carriers of the disease is likely the easiest and fastest way to eliminate the threat of illness.

Under the due process provisions in the Florida constitution, no person will be denied life, liberty, or a property interest by the government without the due process of law which, at a minimum, requires notice and a hearing. The owners will argue that strict scrutiny again should apply where they have a fundamental right to maintain their own property (the pigs) without interference by the government. The county will argue that this isn't a fundamental right and rational basis scrutiny should apply (see above). If the court does determine that a property right is involved, owners will argue that they are entitled to notice and a hearing before their pigs are destroyed. The court should balance here: 1. the private interests at stake; 2. the procedural safeguards in place to protect those interests; and 3. the government's interest in efficiency of administration. On balance, the property owners may be entitled to a notice and a hearing where their pigs are being destroyed whether or not they are sick and they should be able to plead their case to a court for non-destruction.

Failing a takings challenge, these owners might also argue inverse condemnation. Inverse condemnation applies when there is no physical taking and no eminent domain triggered, but the government enacts a regulation that essentially deprives the property owner of all economic value of his property. Just compensation is due for that infringement based on the fair market value of the property. Here, because the county is physically taking and destroying the pigs, a takings challenge is the stronger argument rather than inverse condemnation.

Destruction of commercial pigs: Commercial pigs owners will have the same arguments based on: 1. unconstitutional taking; 2. violation of the equal protection clause; 3. violation of procedural and substantive due process; and 4. that the ordinance is vague, overbroad, and not rationally related to a legitimate public purpose.

Taking (see above): The collection and destruction of all commercial pigs will consider a taking. It is unconstitutional for the county to deny just compensation to these owners as a result. Just compensation should be based on the fair market value of these pigs. Nonetheless, if the county can prove that these pigs are a serious and immediate threat to the public because of swine flu, the pigs could be considered a public nuisance, and their destruction will be non-compensable under an exercise of the county's police powers. If the county does pay compensation, a cap of \$25 per pig is unconstitutional

as just compensation where an owner of commercial pigs is one who garners \$5,000 of annual income from the pigs. The just compensation should be based on the fair market value of the pig as determined in relevant markets and through trade usage. The county can look to the fact that one commercial farmer located in the county has organically raised pigs worth at least \$500. In turn, for organically raised pigs, \$500 should inform the starting point for the fair market value of equivalent swine being destroyed.

For the same reasons above, inverse condemnation would be a weaker argument where a physical taking (destruction) is occurring.

Equal protection (see above): These owners will argue that the ordinance violates their equal protection rights. Again, the county will argue that no fundamental rights or suspect classes are at issue and that the ordinance will survive rational basis scrutiny as a result. These pig owners will argue that they have a fundamental right to keep and make productive their personal property (the pigs), but this is more of an economic right than a fundamental right and commercial pig farmers are not part of a suspect class. Therefore, rational basis scrutiny will apply and the county will probably prevail on an equal protection challenge. The farmers would also argue equal protection because the ordinance targets large pig farms where commercial pig farmers making less than \$5,000 a year will be unaffected by the ordinance altogether (unless they also own the pigs for non-commercial reasons).

Substantive and procedural due process (see above): Again, these owners will argue that a fundamental property right is being taken away from them by the arbitrariness of the county. The owners will argue that strict scrutiny applies. Because these pigs are commercial in nature, these owners may have a stronger argument than the non-commercial pig owners because it substantially affects their ability to make a living. In turn, if strict scrutiny applies, the county will have to show that the decision to collect and destroy all commercial pigs is the most narrowly tailored means of achieving an insulation of the public from the dangers of swine flu. Farmers here would argue that it is not the least restrictive means; the most restrictive means is to locate the pigs that are actually sick and either destroy them or quarantine them (or at least to establish some type of standards to determine ill pigs), but that to kill the perfectly healthy, money-generating pigs is a violation of due process. The farmers will concurrently argue that large pig farms (those making more than \$5,000 a year off of their pig stock) are arbitrarily being targeted and that there is no data, logic, or reason to demonstrate why only commercial pig farmers of this size should suffer under this law (as opposed to smaller ones). The county in turn stands to lose on this challenge. Additionally, these owners, like the non-commercial owners, will argue that they're entitled to notice and a hearing before destruction of their livestock to plead their case against deprivation.

Overbroad, vague, and no rational relation (see above): These owners will argue that the provision related to commercial pigs is overbroad. The county, through its law, will be attacking healthy as well as non-healthy pigs thereby depriving these farmers of valuable livestock that they would otherwise have available to them. Additionally, farmers will argue that the ordinance is vague because of the definition of a commercial farmer. The farmers will argue that this definition of a commercial farmer is total arbitrary because there are other commercial farmers of pigs who generate less than \$5000 of annual income a year from their pigs who will be unaffected by the ordinance unless they're also commercial owners of the pigs. These farmers will also argue that there is no relation of this law to a legitimate public purpose where healthy pigs are

being killed without any standard by which to determine if they're in fact sick in an overabundance of caution.

Violations of right to privacy and the 4th amendment: Lastly, all affected farmers will argue that the ordinance deprives them of the right to privacy and violates their 4th amendment rights due to unlawful searches and seizures. Under Florida's constitution, the right to privacy is express and fundamental and, therefore, considered to be stronger than the protections set forth by the U.S. Constitution. Farmers would argue that the county's physically coming onto their property (despite not being permitted into their homes) violates their express right of privacy to be free in their private lives from government interference. Because this is a fundamental right, strict scrutiny applies. The county must show that this provision is narrowly tailored to meet a compelling government interest. The county claims that swine flu prevention is absolutely necessary, which it likely is because it is a serious illness that it is highly contagious between humans and pigs. Nonetheless, farmers could just as easily take their pigs by vehicle to a designated slaughter house to comply with the law. It is highly unlikely that this ordinance is the most narrowly tailored means by which to accomplish the identification of sick pigs. In turn, the county probably loses on this provision under a right to privacy challenge.

The 4th amendment, both under the Florida constitution and the U.S. Constitution, protects persons from unlawful searches and seizures. Specifically, under the Florida constitution, people are entitled to be secure in their homes, effects, persons, and papers. Farmers will argue that the ordinance provision that allows the county to enter their properties without a lawful search warrant issued from an impartial magistrate violates their 4th amendment rights under the Florida constitution. The farmers would argue that they have a reasonable expectation of privacy in their private properties as extension of their homes. The farmers would further argue that the county should have to develop probable cause (a reasonable belief that the suspect in question has engaged in criminal conduct) in order to obtain the warrant or that the search only be allowed pursuant to one of the recognized exceptions to the search warrant requirement. The county would argue that this is not a criminal issue triggering 4th amendment search and seizure rights, but that it is a public health regulatory matter and immediate emergency, and that no warrant would be required regardless and, even if it is, exigent circumstances exist because of the rate and pace of disease. The farmers would counter that, even if for public health (and essentially civil health purposes), a warrant should still issue to ensure that the county does not overstep its authority to locate the sick pigs. Nonetheless, a court could reasonably find that, because the county is not allowed to enter into the homes of these farmers and/or that a public health crisis exists, that no reasonable expectation of privacy exists and, therefore, a warrant shouldn't issue. Still, if the court deems that the farmers maintain a reasonable expectation of privacy over the entire piece of property, the court may order that the county obtain a search warrant before being able to enter onto the premises to destroy the pigs.

Q QUESTION NUMBER 3

FEBRUARY 2014 BAR EXAMINATION – REAL PROPERTY/FLORIDA CONSTITUTIONAL LAW/ETHICS

Owner has owned certain property (Blackacre) for thirty years. Owner now plans to redevelop Blackacre and she has encountered four issues involving Blackacre's property lines.

First, Owner has recently discovered an issue with the southern boundary of Blackacre in light of a new survey. When Owner purchased Blackacre, it was described in her recorded deed as "Lot 1" of a certain platted subdivision. Several years later, the current owners (Southern Owners) of the property located to the South of Blackacre (Southern Property) acquired the Southern Property pursuant to a recorded deed reading "Lot 2" of the same subdivision. Ten years ago, Southern Owners constructed a fence along the boundary line between Lots 1 and 2 shown in old surveys, although Southern Owners apparently knew the fence was constructed inward of their property line.

A new survey recently revealed that the previous surveys were incorrect. The new survey correctly shows that a narrow strip of land running along Blackacre's southern portion but located outside of Southern Owner's fence (Southern Strip) is actually located within Lot 2 rather than Lot 1. Since purchasing Blackacre, Owner has mistakenly but in good faith believed that the Southern Strip was located within Blackacre's southern boundary until the new survey revealed the error. Owner never enclosed the Southern Strip, but at all times used, improved, and maintained the Southern Strip in a normal manner as a part of her backyard.

Second, the property located to the north of Blackacre (North Property) includes a private roadway that is adjacent to Blackacre's northern boundary (North Road), which Owner has used regularly since purchasing Blackacre to gain access to northern portion of Blackacre. The owner of the North Property (North Owner) recently built a fence and gate on North Property's southern boundary, thereby restricting Owner's ability to use North Road to access Blackacre via its northern entrance, however an alternate route to the east remains available to Owner to access Blackacre. Prior to this time, Owner used the North Road across the Northern Property without any objection and with no express permission from North Owner.

Third, Owner required an additional strip of land from vacant property located to the east of Blackacre (East Property), titled solely in the name of "John Smith, a married man," to accommodate her intended development. Accordingly, Owner recently reached an agreement with John Smith on the sale of this strip (East Strip), and the respective parties then closed on its conveyance to Owner, evidenced by a deed of the East Strip duly executed by Mr. Smith.

Fourth, Owner needs an easement over the property located to the west of Blackacre (West Property). When Owner contacted the West Property's owner (West Owner), West Owner agreed to grant the easement but informed Owner that he did not want to incur the expense of hiring an attorney and thus requested that Owner direct her attorney to draft the easement and send it to West Owner for his signature.

Discuss the issues raised and Owner's rights to the various portions of the North, South, and East Properties addressed above. Also discuss any ethical issues involved with Owner's attorney's role in preparing and delivering the requested easement to West Owner for execution. Do not discuss any other issues pertaining to the easement and the West Property.

SELECTED ANSWER TO QUESTION 3

(February 2014 Bar Examination)

This question raises the issue of adverse possession regarding lot 2, the Southern Property, easement by necessity and by prescription regarding the North Property, the validity of the conveyance of the East Strip, and the ethics of preparing the deed for an unrepresented party.

The Southern Property:

In order to prevail for a claim of adverse possession, the adverse claimant must prove that her use was open and notorious, hostile and under a claim of right, continuous for the statutory period, and exclusive under the common law. The period of time for common law is 20 years.

An adverse claimant may also claim adverse possession pursuant to statute under color of title or without color of title. To prove under color of title the adverse claimant must record the deed with the county clerk which purports to vest title in the adverse claimant. To prevail on a claim without color of title the adverse claimant must make a return with the tax assessor and pay the taxes on the property claimed. Both under color of title and without color of title require the claimant to be in possession for 7 years.

In this case, while owner was in exclusive possession of the property, as evidenced by her cultivation, her possession was not hostile. She was under the mistaken belief that the property was hers and she was not claiming the property against the interest of the Southern owner. While her possession was also open and notorious, that is, visible to the Southern owners and continuous for the period of time that she cultivated, she has not satisfied the element of hostility. The facts do provide the time period she was in possession but that is not a necessary piece of information since she did not satisfy one element. She will not prevail on a claim for adverse possession under the common law standard.

Owner has also not satisfied the requirements to claim adverse possession under the statute. She did not record a deed purporting to vest title to her, nor she did she make a return and pay the taxes. Owner has not satisfied the requirements for adverse possession and therefore will not be vested with title to the strip between lot 1 and lot 2.

The Northern Property:

Owner may claim that she has a prescriptive easement or an easement by necessity over the Northern Property. In order to prove an easement by necessity, owner will have to prove that she has no other access to a public road and must cross the Northern Property. Owner may sue the Northern owner and he may be entitled to compensation. Once the compensation is paid, the easement is established.

In this instance, owner has an alternate route to access her property, therefore there is no easement by necessity. Even if she had an easement by necessity, the easement ends once the necessity ends.

Under the common law, an easement by necessity may exist over one property if the land was previously in common ownership and subdivided. If the subdivision leaves one property landlocked, the other will have an easement for ingress and egress.

In this instance, lot 1 did not come out of common ownership with the Northern Property. Further, there is no necessity because she has an alternate route.

Owner will not prevail on a claim for easement by necessity.

Owner must prove that her use of the road was open and notorious and continuous for 20 years in order to establish an easement by prescription. She must also prove it was hostile and adverse to the Northern owner's interest.

In this instance, her use appears to be hostile and adverse to the Northern owner since it was without permission. Further, it appears that the use was open and notorious as he did not object. If the reason why he did not object is due to his lack of knowledge of her use, she may not have satisfied the element of open and notorious use unless the owner knew or had reason to know of her use.

The establishment of her right to an easement by prescription depends on whether owner knew or had reason to know of her use and the use for the statutory period of 20 years.

East Property:

This question raises the issue of the validity of the conveyance from John Smith to owner. The recital of "a married man" raises the issue of whether his spouse has any rights in the property that should have been conveyed at the time of the conveyance to owner. If property is owned by a person, solely, it may still be subject to the rights of the spouse if it is Homestead property. The Homestead is property at which the owners resides as his primary residence.

In this instance, the property is vacant land and therefore could not be the primary residence of John Smith and his wife. The spouse, therefore, has no rights that need to be conveyed.

The conveyance from John Smith to owner is valid.

The Deed to West Property:

The conveyance of the deed which was prepared by the attorney for owner and sent to the owner of West raises the issue of how an attorney may act toward an unrepresented party.

An attorney may indicate to the unrepresented party that he is disinterested. That is, the attorney must disclose to the unrepresented party that he is acting in the best interests of his client and not the interests of the other party. Further, an attorney may not represent the interests of 2 clients whose interests conflict unless the attorney believes he can fairly represent both and both clients consent in writing.

In this instance, the West owner asked that the attorney prepare the deed and send it to him. The deed should be sent only with the express understanding that the attorney represents owner only and that the West owner is not his client. Attorney should also suggest that the West owner consult an attorney before signing the deed.

Provided the West owner expressly understands that he is not the client of owner's attorney and that he can consult his own attorney, the deed can be prepared and sent to West owner.

Q QUESTION NUMBER 1

JULY 2014 BAR EXAMINATION – CONTRACTS/UNIFORM COMMERCIAL CODE/ETHICS

Manufacturer is a leading golf club manufacturer. It has a new line of titanium driver, the TI Bomb. The titanium driver represents the latest in golf technology for achieving the maximum distance for a golf ball when making long shots. Retailer is a retailer of high end golf equipment, and its owner, Retail Owner, is well known in the industry. Competitor is a new retailer to the market, and is trying to cut into the Retailer's market share.

Retailer learned of Manufacturer's latest driver technology while at a golf show, liked the \$200 wholesale price, and immediately sent a signed purchase order to Manufacturer that said, "Please ship 1000 TI Bomb drivers, \$200 each, with a two percent discount if paid within 10 days, or total net amount due in 30 days." Upon receipt of the purchase order, Manufacturer ships 500 drivers with its own signed order form that said, "500 drivers, \$200 each, the other 500 will be shipped upon full payment of \$200,000, so long as that payment is received within three days of receipt of this initial shipment of 500 clubs." Five days after Retailer received the 500 clubs, Retailer sent a note payable on demand to the order of Manufacturer in the amount of \$196,000 (\$200,000 minus the two percent discount). Upon receipt of the note, Manufacturer immediately indorsed it over to its titanium supplier (Supplier) to pay for previous purchases of titanium.

After the 500 clubs arrived to Retailer, Manufacturer, knowing that the market price has now doubled on the new TI Bomb driver, calls Retailer on the phone and says, "You shorted me \$4000 and I will not ship the other 500 drivers because you did not pay in full. The current price is \$400 per driver." Retail Owner himself calls Manufacturer from another trade show and says, "I paid in full, send my clubs or return the note," to which Manufacturer responds, "Too late, it has already been used to pay Supplier." Employee of Competitor is eavesdropping on the conversation and hears Retail Owner say, "You had no right to use my note to pay Supplier without sending me the merchandise." Competitor, based upon Competitor Owner's knowledge of the conversation and seeing an opportunity to create problems for Retailer, immediately contacts Supplier and purchases the note from Supplier for \$190,000 without disclosing anything to Manufacturer. Supplier endorses the note over to Competitor. Competitor then presents the note to Retailer and demands immediate payment of \$196,000.

Incensed, Retail Owner goes immediately in search of an attorney, and contacts Larry Legal (Larry) in the Tampa office of a very large national firm (Firm). He knows Larry is a golf fanatic and, to save on legal fees, Retail Owner verbally offers him 10 percent of the TI Bomb drivers he may ultimately recover from Manufacturer. Larry is so excited about the prospect of representing Retailer, and getting some of the hot new drivers, that he immediately takes the representation and begins work. Manufacturer is also a client of Firm, and one of the partners in another office of Firm actually serves as Manufacturer's general counsel.

Discuss Retailer's legal rights with respect to Manufacturer, Supplier, and Competitor, and the likely results including damages, if any, against each should there be litigation. Also discuss any ethical issues that arise for Larry and Firm.

SELECTED ANSWER TO QUESTION 1 **(July 2014 Bar Examination)**

This essay presents two issues: contracts and commercial paper. Each will be addressed in turn.

I. Whether there was a valid contract?

*The threshold issue we must determine is the applicable law. This contract regards the sale of a TI Bomb, a titanium golf driver, which is a good--an item moveable at the time of identification for a contract. As a result, this contract will be governed by the **UCC Article 2**. It's also important to note that the parties to this particular transaction are **merchants**. UCC applies special rules to merchants and some of these rules are triggered when merchants are dealing with one another as in the present case. Here, Manufacturer is a leading golf club manufacturer and Retailer is a high end golf equipment retailer.*

*In order to have a valid contract you must have **mutual assent (offer and acceptance), consideration, and no valid defenses**. Retailer will try to raise a breach of contract action against the Manufacturer. In order to prevail on a breach of contract action, Plaintiff must be able to establish that there was a valid contract and that the parties were under an absolute duty to perform and either failed to perform or performed inadequately under the contract.*

OFFER:

An offer consists of a manifestation of assent to enter into a contract. It must contain a promise to enter into a contract and a contract for the sale of goods requires a quantity term and the parties (essential terms test). The test of determining whether a valid offer has been made is whether the offeree would reasonably believe that his acceptance of the offer would create a binding contract.

Here, Retailer sent a signed purchase offer to the Manufacturer that offered to purchase 1000 TI Bomb drivers for \$200 each with a 2% discount if paid within 10 days or total net due within 30 days. This is a valid offer for the sale of goods because it has a quantity term and identifies the parties to the transactions. Furthermore, it is signed by the Retailer.

ACCEPTANCE:

Next, we must determine whether this offer was accepted. Generally, the offeror is the master of his offer and he can revoke the offer at any time prior to acceptance. Acceptance is when the offeree manifests his assent to enter into the contract. Acceptance, if not expressly agreed otherwise, may be done by any reasonable means.

Here, the manufacturer shipped 500 drivers with its own offer form that said: "500 drivers, \$100 each, the other 500 will be shipped upon full payment of \$200,000 so long as that payment is received within 3 days of receipt of this initial shipment of 500 clubs." This action poses several issues.

First, UCC 2-207, the "**battle-of-the-forms**" provision, will govern the communications between these two merchants. While under the common law, the mirror image rule applies to offer and acceptance, UCC 2-207 governs communications between parties governing their offer/acceptance. Here, we have a communication between two merchants and Manufacturer's response was a "seasonable expression of acceptance", in others words acceptance was not expressly conditioned on the Retailer accepting the manufacturer's terms. Manufacturer may try to argue that his language in the correspondence provisioning that "so long as payment is received within 3 days..." is language which made acceptance expressly conditioned thereon. However, the magic language for expressly conditional terms was not used. A court would likely find that there was acceptance of the Retailers offer.

Next, we must determine which terms were incorporated into the contract. Generally, the terms of the offer govern. Since we are dealing with merchants we look at whether the terms materially change the contract. Here, the variation of the term provided that payment would need to be provided within 3 days and that the rest of the shipment would be sent immediately thereafter. The price and quantity terms are the same and generally goods must be paid for upon receipt. Therefore, the Manufacturer would argue that his terms will govern the contract because they did not materially change the terms of the agreement. Retailer on the other hand will counter that his terms expressly provided for the payment terms (within 30 days or within 10 days with 2% discount). Therefore, Retailer will argue that this was a material change to the terms of the contract. Retailer will also argue that even if the court should find that the terms to the contract were not materially altered, Retailer objected to those terms in its initial correspondence. The UCC comments highlight that when one of the merchants has expressly provided for the terms in its initial communication then there is an objection to that term being changed by the response to the communication. Generally, the objection must be made within 10 days. Here, Manufacturer will argue that the Retailer did not object to the terms merely because of his initial communication and that the court should consider their course of performance. Here, Retailer immediately paid the \$196,000, and the Manufacturer requested immediate payment.

Under the UCC, **acceptance can be by shipment of non-conforming goods**. If the seller of goods would like his shipment not to be an acceptance, it must be accompanied by a notice of accommodation. If it were accompanied with a notice of accommodation, then we would have a counter offer instead of acceptance and breach. Here, Manufacturer may try to argue that his communication, if not considered a counter offer in writing, should be considered a notice of accommodation. However, the language of the communication suggests that it was not a notice of accommodation. Therefore, the court will likely find that by shipping the 500 drivers to Retailers, Manufacturer accepted and breached the contract.

Manufacturer may also try to argue **divisibility of contract** by arguing that there were 2 separate contracts, for the first 500 clubs and then for the second 500 clubs. While this is something that the court may consider, the Court will likely determine that there was a valid offer and acceptance for the sale of 1000 TI Bomb Drivers for \$200 each with 2% discount and payment due immediately.

Consideration:

In Florida, there must be "bargained for exchange" of "legal value" for there to be a binding contract. Legal value in Florida, which follows the minority position, is that legal value is legal benefit or detriment to one of the parties. Here, the parties bargained for the amount to be paid and for the goods. Retailer was benefitted by having the clubs and to his detriment gave a promissory note of \$196,000. Manufacturer was benefitted by having the note that he could then negotiate to its supplier and to its detriment had to provide inventory to the Retailer. Therefore, there was consideration.

Retailer may argue that there was a failure of consideration here because he did not receive the rest of his clubs, the other 500 clubs. This will become important when being raised as a defense against a holder in due course or a holder of the promissory note. Failure of consideration is a personal defense and will be raised below.

No valid defenses:

Statute of frauds requires that certain contracts be in writing and signed by the party against whom enforcement is sought. Here, this is a contract for the sale of goods for \$200,000. Contracts for the sale of goods in the amount of \$500 or more are required to be in writing, contain a quantity term, and be signed by the party against whom enforcement is sought. Here, there are written communications between the parties that have been signed by both. Even if the Manufacturer or Retailer were to argue that their own communications do not satisfy the writing requirement, under the UCC there is the "merchant's confirmatory memo exception." Under this exception, if the merchant receives a memo from the other party confirming the terms of the agreement and does not object within a reasonable time, this writing may be used against him/her/it to satisfy the Statute of Frauds.

Modification of Contract:

Here, Manufacturer may try to argue that there was a modification of the contract that provided the price for the drivers would be \$400 each. Under the UCC, in contrast to the common law, there does not need to be additional consideration to support a contract modification. Rather, the UCC simply requires that the contract modification be made in good faith. Here, the parties will argue as to whether the modification was made in good faith. Manufacturer will argue that it was in good faith because of the change of the price of these particular drivers it was commercially impracticable for him to perform this contract which required him to give the goods for half of their value. Retailer will counter that this modification was not in good faith but rather was a move of extortion--trying to get the Retailer to pay double the price to try to make more money on the particular transaction. Since the facts show that Manufacturer "knowing the market price has not doubled on the new TI Bomb Driver called and said 'You shorted me \$4000 and I will not ship the other 500 drivers because you did not pay in full.'" This point is arguable on both sides as the Manufacturer may allege that due to the Retailer's breach of not paying the full purchase price this modification was done in good faith. Retailer will argue that Manufacturer was simply trying to get double the price for the same goods knowing that the market price had doubled.

Breach:

Breach of contract occurs when the plaintiff has performed and the other party is under an absolute duty to perform and has failed to perform or has performed inadequately.

Here, Retailer will allege that he had rendered full performance payment of the contract and had not received the full benefit of his bargain as Manufacturer has withheld the last 500 clubs. Manufacturer will argue that he was excused for performance and there was no breach. UCC follows the perfect tender rule.

Damages:

Florida awards expectation damages for the party to get the benefit of his or her bargain. Here, they can try to argue unique goods to get specific performance but if these are available in the market place, then the court will allow the Retailer to recover 500 X the market price at the time of breach= here \$400. So his damages will be \$90,000.

Competitor v. Retailer: (COMMERCIAL PAPER ISSUE)

This is two-party paper, a promissory note, and Retailer is the Maker, while the payee was the Manufacturer. Competitor is a holder of the note (holder in due course under the shelter doctrine) and the supplier was a holder in due course and indorser of the instrument.

This note meets the form-based/formal test for negotiability. It is a signed, writing, that is an unconditional promise to pay a fixed sum of money on demand or at a definite time to order or bearer and has no additional undertakings.

Here, the note was signed by Retailer's owner. As the owner of the Retailer, he had the apparent authority to bind the company on the note. A signature requires a present intent to authenticate and that was present here. We also know that it was a writing, it must be permanent and portable. Here, it has transferred possession so we will assume for argument's sake that it was on a piece of paper.

Here, there is no conditional language on the face of the document. It was for a fixed sum of money (\$196,000) and it was payable in dollars which is a recognized currency. You have to be able to determine the amount due from the face of the instrument and that is available here. Next, we know it is payable on demand and the fact that it is undated does not destroy negotiability.

This is order paper because it was "payable to the order of Manufacturer." When an instrument is payable to a particular person or organization it is order paper. Lastly, a negotiable instrument must be "a courier without luggage." Here, there was no other language on the instrument that made it subject or conditional on anything else, therefore it meets this requirement.

Next, must determine if it was properly negotiated. When it went from Manufacturer--> Supplier it was order paper. To negotiate order paper you must indorse the instrument and transfer possession. Here, it was indorsed and transferred and therefore it was negotiated. Therefore, Supplier was a holder.

When it went from Supplier --> Competitor it was bearer paper because we are not told of the type of indorsement that was placed on it. If it was a blank indorsement, then the mere transfer of possession of bearer paper properly negotiates it making the person to whom it was properly negotiated a holder.

Is Manufacturer a holder in due course? Manufacturer gave value, acted in good faith, and took without notice of overdue/dishonor/defenses. Therefore, Manufacturer was a holder in due course.

Here, Retailer did not take the instrument in good faith because he knew of the failure of consideration and the underlying dispute between the parties because he obtained the note. Therefore, Retailer had notice of the defense. However, he may qualify as a holder in due course under the "shelter doctrine." Under the Shelter doctrine, if the holder receives the instrument (has it negotiated) from someone who enjoyed holder in due course status, he will also enjoy the holder in due course status.

A holder in due course is important because only real defenses may be raised against a holder in due course and personal defenses cannot be raised. Real defenses include fraud in the factum, forgery, incapacity to the extent a contract is void under the state law, adjudicated incapacitated, duress, statute of limitations etc. Personal defenses include failure of consideration, fraud in the inducement, and breach of contract.

If Competitor is a holder in due course, then the maker of the instrument (here, Retailer) must pay the instrument according to its terms at the time of issuance, his defenses of failure of consideration or breach of contract against the Manufacturer may not be raised against the holder in due course. It appears as though, Retailer will have to pay competitor the \$196,000 since it's a note payable on demand and he is a holder in due course.

Even if Competitor is not a holder in due course, he would still be a holder who is entitled to enforce the instrument. The difference would be that Retailer would raise the personal defenses against Manufacturer against the Competitor.

By endorsing the instrument, the Supplier becomes liable to pay the instrument according to its terms at the time of indorsement. Therefore, if Retailer dishonors the note, upon presentment and notice of dishonor to Retailer, Competitor will try to recover from the Supplier who indorsed the note and is secondarily liable on it.

Professional Responsibility issues:

Here, there are two main professionalism concerns. First, a lawyer may not undertake to represent a client if doing so will adversely affect his or her professional judgment and independence. Additionally, a lawyer may not take to represent a client if that client's interest are materially adverse to another client unless the lawyer: 1) reasonably believes that he/she may provide competent and diligent representation two both clients, 2) the representation is not prohibited by law, 3) the clients provide their informed consent, and 4) the representation does not require the lawyer to assert a position that is directly adverse to another client.

Under the Florida Rules of Professional Conduct, a lawyer may not have a "pecuniary interest" in the litigation. Here, Larry Lawyer has been offered 10% of the TI Bomb driver he may ultimately recover. Therefore, he has a pecuniary interest in the litigation.

Larry Lawyer may try to argue that this is simply a contingency fee agreement. In Florida, contingency fees are only prohibited in criminal/family law cases. Contingency fee agreements must be in writing and must provide the method of calculation of recovery. Any recoveries in excess of the percentages provided in the FRPC are considered excessive.

However, this fee agreement was not in writing, and the client did not receive a copy of the client's rights. Therefore, the court will likely find that this is not a valid contingency fee agreement.

If it's not a contingency fee agreement and there is no non-refundable retainer, the agreement need not be in writing. However, the court will likely find it unreasonable for the lawyer to have a stake in the subject matter of the litigation and that this representation is prohibited by law.

Additionally, the adverse party to the litigation "Manufacturer" is a client of the firm in another office. However, that partner's disqualification will be imputed to the entire firm. Normally an imputed conflict may be avoided, if the lawyer avoids more exposure to the information than necessary, is timely screened from the matter, and does not share in the fee. However, even if they were to screen the other attorney, this particular representation would require asserting a position in court that is directly adverse to the other client (Retailer v. Manufacturer). As a result, Larry Lawyer should decline representation of Retailer Owner.

Q

QUESTION NUMBER 2

JULY 2014 BAR EXAMINATION – TORTS/CONTRACTS/ETHICS

Seller, the owner of a piano store, placed an advertisement to sell a baby grand piano. The advertisement stated:

6-month-young Topnotch baby grand piano
must sell due to downsizing of store
\$60,000

Buyer, a very successful businessman, wanted to learn how to play a musical instrument. Because he wanted only the best, he decided to buy a Topnotch brand baby grand piano. Buyer knew that new Topnotches sell for \$75,000, and that they do not depreciate rapidly in value. He responded immediately to Seller's ad because he thought the piano was a real bargain.

The parties completed the sale at the asking price. The bill of sale, signed by both parties, stated: "Baby grand piano, as is, \$60,000." The bill of sale did not specify the brand of piano.

The day after the piano was delivered to Buyer, he had the piano tuned. The tuner laughed when he saw the inside of the piano. Although the piano had the Topnotch name and logo embossed on it, he told Buyer that it was really an Offbrand piano. After purchasing the new Offbrand piano for its fair market value of \$6,000, the Seller had changed the nameplate and logo on it. Attorney, who was Seller's personal friend, had been with Seller when he bought the Offbrand piano but did not participate in the resale of it to Buyer.

Buyer now plans to file suit against Seller. Prepare a memo discussing the civil claims that Buyer may bring against Seller, Seller's defenses, possible remedies, and which party should prevail. Include in your response a discussion of the ethical issues involved in whether Attorney should represent Seller in the civil suit brought by Buyer. Do not include any issues of criminal law.

SELECTED ANSWER TO QUESTION 2

(July 2014 Bar Examination)

This memorandum discusses civil claims that Buyer may bring against the Seller, any possible defenses of Seller, and possible remedies and outcomes, as well as ethical issues arising from Attorney's representation of Seller.

Buyer v. Seller - piano contract

A. Contract Formation, UCC Statute of Frauds, the Bill of Sale & Admissibility of Extrinsic Parol Evidence

Here, the prima facie elements of valid contract existed: a valid offer creating a power of acceptance in the offeree, acceptance indicating a intent to be bound, and consideration (a legal detriment or benefit and bargained-for exchange). This contract was for the sale of goods subject to Article 2 of the Uniform Commercial Code (UCC), because a grand piano is moveable personal property or chattel (i.e., a good). Since the exchange was for more than \$500, the UCC Statute of Frauds applies, meaning that in order for the contract to be enforced, there must be a (1) writing or memorandum; (2) signed by the party to be charged; and (3) containing information sufficient to indicate the a contract was made. Here, the UCC Statute of Frauds is satisfied by the bill of sale signed by both parties. Although the bill of sale did not specify the brand of piano, this does not make the contract unenforceable. The UCC Statute of Frauds is liberal, requiring only the parties and the general good as an essential term. The UCC's flexibility is attributable to: (1) its "gap-filling" provisions, which fill gaps in the contract with default rules relating to price, shipment, risk of loss, etc.; and (2) its treatment of parol evidence. The UCC allows parol evidence, even of an integrated contract, unless the parties "certainly would have" included a term in the written agreement. Here, the bill of sale does not specify the brand of piano, but extrinsic parol evidence (e.g., the advertisement) is admissible evidence to prove what the parties intended. Thus, Buyer's prospective suit is not limited by "four corners" of the bill of sale.

B. Contract Defenses and Buyer's Remedies

1. Buyer's Claim of Fraudulent Misrepresentation and Breach of Warranty

The facts given here raise an issue of contract defenses. We turn to issues of Buyer's claims relating to the piano's real status as a much cheaper Offbrand piano (fair market value of \$6,000) rather than, as advertised, a much more valuable Topnotch piano (fair market value of \$75,000 and contract price of \$60,000). Buyer has two cognizable claims in this case: an affirmative fraudulent misrepresentation and a breach of warranty.

Here, Buyer can bring an action against Seller for an affirmative fraudulent misrepresentation. Fraudulent misrepresentation exists when a party (1) misrepresents a material fact; (2) in a way amounting to fraud; (3) inducing reliance from the other party; (4) to the other party's detriment, causing damages. Here, Seller, in his advertisement, promised a "6-month-young Topnotch baby grand piano," yet what was

delivered was an Offbrand piano. Here, Seller made an affirmative misrepresentation of material fact, and the material fact was a basis of the bargain. The misrepresentation was material: brand an important and significant element of the deal, and Buyer, the businessman, wanted only the best piano. Seller's fraudulent conduct was also intentional: Seller knowingly changed the nameplate and logo on the piano to defraud Buyer. The Buyer relied on Seller's misrepresentation, to his detriment. Finally, Buyer never ratified the contract; as the facts indicate, Buyer immediately objected upon discovery of the misrepresentation and plans to seek legal remedies.

Buyer can also raise the defenses of a breach of warranty. There are three major kinds of warranties relating to the sale of goods. An express warranty is created by a particular express representation, statement, model, design, or sample, indicating that the good to be sold is of a particular status or quality (but not a general recommendation or commendation of any good). Here, the baby grand piano was expressly advertised as a "6-month-young baby grand piano." Thus, a trier-of-fact could reasonably find a breach of warranty here, where the piano that was promised (Topnotch) was not what was rendered (Offbrand). This is the strongest warranty argument.

The second warranty is the implied warranty of merchantability. This warranty applies only to goods sold by merchants; here, Seller is the owner of a piano store and so is a merchant. The implied warranty of merchantability is a warranty that the goods sold are fit for their ordinary purpose. Here, there may or may not be a breach of the implied warranty of merchantability. The Offbrand piano is likely playable and so might be considered "fit for an ordinary purpose." However, if the Topnotch piano is distinct in style, quality, or any other way, then a breach of the implied warranty of merchantability might be found. This argument is weaker than the express warranty argument, but possibly still viable.

The third warranty is that of an implied warranty of fitness of a particular purpose. This warranty applies to sales of goods by both merchants and non-merchants when the seller knows that the goods are purchased for a particular purpose, and the buyer relies on seller's skill or judgment in order to choose a good. Here, there is no indicating that the Buyer relied on Seller's selection of a good, or that Seller knew of Buyer's desire for "only the best" baby grand piano. Thus, the other two warranty arguments are stronger than the implied warranty of fitness for a particular purpose.

2. Seller's Defenses of Disclaim of Warranty, Unilateral Mistake, and Duress

In response to Buyer's claims of breach of warranty and fraudulent misrepresentation, Seller may raise several defenses. This first is that of disclaimer of warranty. Warranties may be disclaimed, but generally such disclaimers must be specific and not hidden. When a disclaimer of a warranty contradicts an express warranty, moreover, the contradiction is resolved in favor of upholding the warranty. A generalized disclaimer, such as "as-is," is often insufficient. This particularly applies to consumer goods (goods for personal or household use), such as a baby grand piano. Because Seller here made an express representation, and never affirmatively withdrew from that representation before the contract was executed, a court would likely find that no effective breach of warranty occurred.

In any suit by Buyer, the Seller could raise the issue of unilateral mistake, asserting that Buyer acted wrongfully in buying a Topnotch piano for \$60,000 when he knew that it was worth \$75,000. This claim will fail. Generally, absent some misrepresentation, fraud (in the inducement or in the factum), the existence of an fiduciary or confidential relationship (e.g., attorney-client, trustee-beneficiary, director-shareholder), or non-disclosure when disclosure is required (e.g., state statute requiring disclosure of known latent defect in home), each party bears the risk that the purchase price may more or less than the good is worth; i.e., its fair market value. Although Seller knew that the Topnotch piano was a great deal, his taking advantage of the deal is permissible. In the absence of one of the particular situations listed above, a unilateral mistake generally only creates a voidable contract where the other party made misleading misrepresentations (i.e. misleading partial disclosures) and when the misrepresentation would make the deal unconscionable. Here, \$15,000 off fair market value is not unconscionable. Thus, Seller cannot successfully assert unilateral mistake in the absence of any fraud, special relationship, or facts not indicated, and cannot raise Buyer's conduct to show unclear hands. Moreover, Seller is a sophisticated party: as the owner of a piano store, he surely has knowledge relating to pianos, and a court would be unlikely to find that Buyer took advantage of him in any impermissible way.

Seller could also argue economic duress, as the advertisement indicated "must sell due to downsizing of store." Seller also cannot assert economic duress relating to the downsizing of his store, because such a defense is not typically recognized. Duress typically arises when a party compels another party to enter into a contract through unlawful force, threat of force (e.g., against one's person, family, etc.), or improper threats (e.g., of a meritless civil suit, or of criminal prosecution even when such prosecution would be warranted). The mere existence of financial or economic distress is not enough to justify allowing Seller to rescind the contract.

3. Remedies

Generally, the default remedy under both the common law and the UCC is expectancy (or expectation) damages, which aim to give the non-breaching or innocent party the benefit of his bargain. As an alternative, in appropriate cases the non-breaching party may be able to recover restitutionary damages, reliance damages, or specific performance. Liquidated damages that are not penalties also may be enforceable, although this issue does not arise here. Also, a contract is voidable at the election of the party who entered into the contract as the result of a fraud, misrepresentation, or nondisclosure amounting to fraud (i.e., rescission is a remedy). Generally, punitive damages are not recoverable in contract, unless there is an independent tort committed. Note that under the doctrine of election of remedies, a party cannot get a "double recovery" - he cannot choose, for example, both restitutionary and expectancy damages.

Here, assuming Buyer prevails on his arguments for fraudulent misrepresentation and breach of warranty, which is likely, Buyer may seek to void the contract and rescind the contract. This would involve a restitutionary recovery of the \$60,000 price paid by Seller to Buyer, and likely the return of the Offbrand piano to the Seller. This would place Buyer back in the position he was in pre-contract. Alternatively, Buyer could seek damages for breach of warranty through damages in the amount of the difference

between what was promised (a six-month-old Topnotch baby piano) and what was actually rendered (a new Offbrand piano). The fair market value of a Topnotch piano is \$75,000, while the fair market value for the Offbrand pianos is \$6,000; thus, Buyer could be entitled to \$69,000 in money damages from the seller (the difference in value). Alternatively, it could be decided that giving the Buyer the "benefit of the bargain" is more equitable, and since the purchase price of this particular piano advertised as a Topnotch was \$60,000, then Buyer would be entitled to the difference (\$15,000).

Buyer can also elect UCC buyer's remedies of "cover" - i.e., Buyer could seek to purchase a reasonably equivalent good (i.e., a six-month old Topnotch baby grand piano), and then sue for the difference, if any, between the cost of the genuine Topnotch and the cost of the \$60,000 fake "Topnotch" that Seller sold to him. It is likely that Buyer can effectively use cover and recover from Seller, who sold him the piano as a steep discount. If Buyer purchases a genuine Topnotch at its market price (\$75,000), he can cover the difference from the \$60,000 price: approximately \$15,000.

Buyer could also seek reasonably certain and foreseeable consequential and incidental damages arising from Seller's breach: this could include, for example, the cost of delivery of a new piano, or telephone costs for communicating with prospective sellers.

Finally, Buyer could also seek specific performance of the bargain. Specific performance is where a court uses its equitable power through a court order or decree to enforce the terms of a bargain. Usually, specific performance is reserved for unique goods that have no replacement on the open market, such as contracts for the sale or purchase of land or an interest in land. Specific performance is not available where there are adequate legal remedies (e.g., money damages) or rescission of the contract. Even if Seller actually has in his inventory a genuine six-month-old Topnotch baby piano, a court would probably not order specific performance, because money damages or rescission constitute an adequate remedy at law. Moreover, Topnotch baby pianos are presumably available on the open market, and so the good is not "unique."

Attorney's representation of Seller - ethical issues

The ethical duties of Florida lawyers are outlined in the decisions of the Florida Supreme Court, the Florida Rules of Professional Responsibility, the Ideals and Goals of Professionalism, the Oath of Admission to the Florida Bar, the Creed of the Florida Bar, and other documents. All Florida lawyers must comply with the professional responsibility obligations, and are subject to discipline for non-compliance. Here, the ethical duty at issue concerns Attorney's prospective representation of Seller. The facts state that Attorney is Seller's personal friend and was with Seller when he bought the Offbrand piano, but did not participate in its resale to buyer.

Here, Attorney did not participate in a crime or fraud with the Seller, so the obligation to avoid crime-fraud is not at issue here. Moreover, there is no ethical rule against representing one's personal friend, although an attorney should be cautious to separate the attorney role from the friend role, especially in matters relating to the duty of undivided loyalty and the duty of confidentiality. However, Attorney's possible role as a fact witness in the matter is a problem. As a person who witnessed Seller purchase the Offbrand piano, Attorney could conceivably be called to testify (at trial or in a deposition)

about what he saw as a fact witness. An Attorney must avoid any conflict between his duty of candor to the tribunal and his duty of confidentiality to a client. Therefore, Attorney should decline representation of his friend, the Seller, and advise Seller to seek new legal counsel.

Q

QUESTION NUMBER 3

JULY 2014 BAR EXAMINATION – TRUSTS

Stan Settlor was a resident of Orlando, Florida, for the last 10 years. He volunteered at a homeless shelter in Orlando called New Beginnings. Long ago, Stan received help from a homeless shelter before graduating from college and succeeding in business.

Last year, Stan used his new smart phone to make a video recording. Stan began the recording by identifying himself and the date. Stan then stated the following:

I am making a five million dollar trust for the benefit of New Beginnings. A homeless shelter once helped me, and I'm giving back. I would like New Beginnings to be around for generations to come. I am appointing my best friend, Tom Trustee, as the trustee. Tom, I would like you to make \$500 monthly payments to New Beginnings, but you have absolute discretion to pay them whatever and whenever you think. Tom, I want your trusteeship to be really stress-free. Just keep the five million dollars in the savings account that I will create. Of course, you deserve compensation for being trustee. How does \$10,000 per month sound, buddy? As a condition of this trust, you can't be liable for anything, no matter how bad. Another condition is that New Beginnings cannot contest this trust nor sue my friend, Tom, for any acts committed as trustee. If anyone contests anything about this trust or sues Tom, the trust shall terminate and Tom shall return the balance of any remaining trust assets to me or to my son if I am dead. This trust is irrevocable.

Immediately after making the recording, Stan went to Bank and made a five million dollar deposit into a savings account. He called it New Beginnings Trust Account. Tom, a Florida resident, received full access to the account. Two weeks later, Stan emailed the video recording to Dan, the director of New Beginnings and also to Tom. Tom accepted the appointment. Stan never reduced the terms of the video recording to writing.

Earlier this year, Stan died and was survived by his son. Tom has not made one payment to New Beginnings since the creation of the trust, but has not missed a payment to himself. Recently, the poor economy has affected New Beginnings' ability to pay its bills. Dan had tried to contact Tom numerous times about what was happening with the trust, but Tom refused contact. Dan has since permanently closed New Beginnings and retired to Iowa. The Florida Attorney General has learned of what occurred and would like to do something.

Tom seeks your advice as his counsel. Prepare a memo that discusses whether Stan created a valid trust, and whether the trust provisions are valid. Discuss what duties, if any, Tom has breached as trustee. In addition, evaluate whether the Attorney General has any legal basis to intervene, and the likely outcome(s) if someone files suit.

SELECTED ANSWER TO QUESTION 3

(July 2014 Bar Examination)

Is The Trust Valid?

A trust is a fiduciary relationship between a trustee (one who has legal title) for the benefit of the beneficiaries (hold equitable title). There are express trusts (can be private or charitable), resulting trusts (those that are created when there is a reversionary interest for the settlor), and constructive trusts (created to prevent unjust enrichment (as a result of fraud, misrepresentation, illegality, etc.))

In order to have a valid trust there needs to be a Settlor with capacity to convey, the settlor has to have the present intent to place the property in trust (can be written or oral) and it cannot contain precatory language (I wish, hope, desire), a trustee (must be 18 years or older and have capacity to enter into a contract, be of sound mind) that has been assigned duties by the settlor, an ascertainable beneficiary by the time the trust is to come into enjoyment (if the assigned beneficiary does not disclaim his interest he is presumed to have accepted the trust), valid property or res, valid trust purpose. In addition the sole trustee must not be the sole beneficiary and the trust must vest from 21 years of the death of a life in being at the time the trust was created or within 360 years (Florida requirement, unless the trustee was written prior to December 31 2000, then it must vest within 90 years.

Here we have Stan as a Settlor who has capacity to convey (18 and of sound mind) because nothing in the facts indicate that he is not at least 18 and of sound mind. Stan created his trust orally, this poses no problem as long as it can be proven by clear and convincing evidence and here it can because we have an actual recording of Stan's trusts showing his intentions. Also, Stan possesses clear and convincing present intent to create the trust because he made the recording and "immediately after making the recording he went to the bank and made a \$5 million deposit into a savings account, there was also no precatory language used because Stan stated he was making a 5 million dollar trust for the Benefit of New Beginnings. We also have a trustee-Tom Trustee (important to note that a trust would not fail for lack of trustee the court would just appoint one in his place if he was removed, quit, or died). Stan also named a beneficiary New Beginnings, an ascertainable beneficiary or class of beneficiaries. There is also valid res because res can be tangible property or intangible property and the 5 million in the savings account would satisfy the res requirement and because the trust is to be a discretionary trust that gives Tom the power to pay when he wants.

Stan created a valid express private trust. In Florida if a trust doesn't say it is irrevocable it is presumed to be revocable. Although Stan did not reduce the terms of the trust into writing it is a valid express private trust because in Florida a trust would need to be in writing if it fell under Statute of Frauds or if it was for real property. Also, Tom sent New Beginnings Stan's video and there is no indication that they disclaimed their interest as beneficiaries, thus they are the rightful beneficiary of the trust.

Are Trust Provisions Valid?

Discretionary Trust Provision-A discretionary trust is one where the Trustee has discretion on how to make trust distributions for the beneficiaries. The Trustee shall do so following the instructions or duties assigned by the Settlor (Settlor's intent). A discretionary trust also prevents a Beneficiary from demanding a distribution. The trustee has sole discretion as long as he follows the settlor's intent.

Here Stan instructed for Tom to make \$500 monthly payments to New Beginnings but you have absolute discretion to pay them whenever and whatever you want. (contradictory)

Payment Provisions to Trustee (Tom)

A trustee shall be allowed to receive reasonable compensation from the trust. A reasonable compensation, if not stated by the trust, would be one that when you take into account the skill of the trustee, the time spent administering the trust, and the amount of the trust would be reasonable. Stan simply states "How does 10,000 per month state, buddy?" Tom will argue that this is a reasonable fee when considering that the trust contains 5 million. However, this fee would be found to be unreasonable because New Beginnings could argue that Tom has done nothing to further the trust (no investing, not even making payments to New Beginnings) The court would find that 10,000 a month is unreasonable and reduce it to a more reasonable amount.

Exculpatory Clause

Exculpatory clauses in trust can relieve the trustee of liability. However, if the exculpatory clause is found to have been a result of undue influence or the clause is one that prevents the trustee from being liable for bad faith/reckless behavior the exculpatory clause will be found invalid.

New Beginnings cannot sue Trustee provision or trust will terminate.

This provision will likely be found invalid because a trustee or beneficiary can bring actions to remove or bring actions of breach of trust against the trustee if there is reason to do so. This is likely to be an invalid condition (termination of trust if action brought against Tom) and the trust shall be construed as valid and the condition shall be ignored/removed. Unless, it is found that the condition is found to be a condition that Settlor required to be kept to or the trust would not be created (nothing in the facts indicate this). Thus this condition will be voided.

Has Tom breached his duties as a trustee (mention duties)

A trustee has duties to administer the trust with good faith and in a prudent manner, he has a duty of loyalty (no self-dealing), duty of impartiality (take the needs of beneficiaries into consideration), duty to earmark trust and prevent commingling, duty to report, duty to preserve and make trust productive, and duty to act as a prudent investor.

Here New Beginnings could have brought suit and stated that Tom breached his duty of acting in good faith, acting in a prudent manner, duty of impartiality against New Beginnings. New Beginnings (or if found to be a charitable trust the Attorney General could argue) could argue that Tom did not act in good faith or in a prudent manner and he did not act impartially because he did not pay the 500 dollars that settlor required him to pay to New Beginnings every month and as a result New Beginnings closed (after trying to contact trustee numerous times) and Trustee did not fail to pay himself although he failed to pay New Beginnings. Tom Trustee will be found to have violated his duties to New Beginnings and will be found in breach.

When it is found that a trustee breached his duties, the court shall award specific performance, order an injunction to prevent Trustee from continuing breach, order to pay damages or to restore property (whichever is greater) or he shall be removed as trustee (Trust would not fail for this because court could appoint another). Tom Trustee would have been removed if breach severe enough or he would have been ordered to render specific performance and make his payments. Tom could argue that he had discretion in making his payments because the trust also stated he could make the payments whenever he wants, he is likely not to succeed on this because Stan cared for New Beginnings and wanted it to continue to exist.

New Beginnings (or attorney general if charitable) could have asked for removal of Tom Trustee.

Qualified beneficiaries (settlor or co-trustees) can ask the court to remove trustees and the court will do so if it finds that keeping trustee is detrimental to the administration of the trust if 1) lack of co-trustee cooperation 2) failure or unwillingness to run/administer the trust 3) substantial change in circumstance 4) breach of trust duty.

Here New Beginnings could have argued for removal because Tom Trustee failed to administer the trust because he failed to make the 500 dollar monthly payments ordered by Trustee. New Beginnings (or attorney general) would have succeeded on this claim.

Termination of a trust (creation of resulting trust)

A trust can/will terminate when the trust indicates it shall terminate (achieved its purpose) or if beneficiaries, trustee, and/or settlor consent and ask for it. In this case the trust purpose terminates because New Beginnings closed down. The facts do not indicate how long it took but it is unlikely that the 5 million dollars have been completely spent. Because the trust purpose was to provide aid to New Beginnings and New Beginnings has closed a resulting trust for the benefit of settlor's estate or settlor's son shall be created. A resulting trust occurs when the trust purpose has been achieved, the trust terminates for a valid or invalid reason, there is no assigned beneficiary or it can be found, the trust terminates and there is excess corpus.

Because the trust has terminated a resulting trust shall be created in Stan's estate (since Stan died, it shall go to his son). Thus, the final status of the trust is a resulting trust for the benefit of Stan's son.

Does the Attorney General have any legal basis to intervene and likely outcome (charitable trust).

The Attorney General (run/in charge of charitable trusts) has the power demand action from/for charitable trust. Charitable Trusts are those who have ascertainable beneficiaries (usually look at the General Public) and must be for a Charitable purpose (furtherance of religion, education, government, health). Charitable Trusts are also not subject to the Rules against Perpetuities (can last forever, indefinite).

The attorney general could argue that Stan intended to create a charitable trust because Stan intended for the proceeds to go to New Beginnings a homeless shelter in Orlando, Florida. If the Attorney General were to succeed on his argument a court would likely find that this is an improper charitable trust because New Beginnings is ascertainable. In this case, the court could apply Cy-pres (when a court finds that the Settlor intended a charitable purpose and if that charitable trust is found to be a general charitable purpose rather than a specific one, in this case specifically intended for New Beginnings, the court would appoint a new charitable beneficiary "as near as possible" as to the settlors intent). However, it is unlikely that this trust shall be found to be a charitable one for the aforementioned and because New Beginnings is an ascertainable beneficiary.

PART II - SAMPLE MULTIPLE-CHOICE QUESTIONS AND ANSWERS

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

The answers appear on page 48.

MULTIPLE-CHOICE EXAMINATION INSTRUCTIONS

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

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

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

23 SAMPLE MULTIPLE-CHOICE QUESTIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ANSWER KEY FOR MULTIPLE-CHOICE QUESTIONS

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