Florida Board of Bar Examiners

ADMINISTRATIVE BOARD OF THE SUPREME COURT OF FLORIDA

Florida Bar Examination
Study Guide and Selected Answers

July 2022
February 2023

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

Future scheduled release dates: March 2024 and August 2024

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

TABLE OF CONTENTS

PART I – ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2022 AND FEBRUARY 2023 FLORIDA BAR EXAMINATIONS

ESSAY QUESTIONS AND SELECTED ANSWERS

Part I of this publication contains the essay questions from the July 2022 and February 2023 Florida Bar Examinations and one selected answer for each question.

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

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

ESSAY EXAMINATION INSTRUCTIONS

Applicable Law

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

Acceptable Essay Answer

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

QUESTION NUMBER 1

JULY 2022 BAR EXAMINATION – CRIMINAL LAW AND CONSTITUTIONAL CRIMINAL PROCEDURE

Kevin, a stockbroker, embezzled money from his clients' accounts. Kevin's supervisor, Mark, noticed unusual transactions in Kevin's accounts and began investigating them.

Fearing discovery, Kevin decided to burn down Mark's house to kill him. On December 18 at 11:00 pm, Kevin drove to a gas station two miles away from Mark's home and purchased some gasoline and matches. Kevin opened the door to the screened-in rear patio, entered, and set a patio chair ablaze. Immediate regret set in, and Kevin decided he no longer wanted to burn down Mark's house. Kevin put out the flames and left, grateful he had not damaged Mark's home. However, Kevin did not realize that the chair was still smoldering; it eventually caught fire again and the flames destroyed Mark's house.

Kevin thought that Mark was home when he lit the fire, but Mark was at the office working late. On the same night around 11:15 pm, Mark returned home and saw Kevin's vehicle leaving his neighborhood. Mark found his house on fire and called the police. Officer Peters arrived, and Mark told Peters about seeing Kevin leaving the neighborhood, the fire, and the suspected embezzlement.

Peters investigated Kevin and obtained an arrest warrant, based on probable cause, for Kevin on embezzlement charges. Peters went to Kevin's home, knocked on the door, and was greeted outside by Kevin and his girlfriend, Sarah, who lived with Kevin. Kevin was handcuffed and arrested. Kevin told the officers, "You cannot come inside my house!" Looking at Sarah, Kevin yelled, "Don't let them search the house!"

Kevin was placed in a patrol vehicle, and Peters approached him. Peters told Kevin he had the right to remain silent, that anything he said would be used against him in court, and that he had the right to have an attorney present during questioning. Peters then asked Kevin where he was on December 18 at 11 pm, and Kevin replied, "It wasn't me! I put out the chair fire!" Kevin was then taken to jail.

Peters told Sarah that Kevin was arrested only for embezzlement, but that he believed Kevin also had burned down someone's house. Peters asked Sarah if he could search the house for evidence related to the embezzlement charge.

Sarah agreed. As a result of this search, Peters seized incriminating documents related to the embezzlement charge. Sarah also agreed to assist Peters by making a recorded phone call to Kevin to elicit information about whether Kevin had burned down a house.

The next day, Kevin attended his first appearance for the embezzlement charge, where he was appointed an attorney at his request. After Kevin left the courthouse, Peters had Sarah call Kevin on a recorded line. During the call, Sarah asked, “Did you burn down someone’s house?!” Kevin admitted that he started to burn down the house but quickly put out the fire. Sarah hung up the phone. A few minutes later, Peters called Kevin back and told him about the previously recorded conversation. Peters then told Kevin, “It’s all out there now; you may as well confess to the embezzlement too.” Kevin confessed and told Peters about the money he embezzled.

Prepare a memorandum that discusses the following:

A. Assume Florida’s criminal statutes are based on common law crimes. Discuss any crimes **other than embezzlement** with which Kevin can be charged and any defenses to those crimes.

B. Discuss the legality of the search of Kevin’s home and whether evidence obtained during the search would be admissible against Kevin.

C. Discuss the admissibility of the statements Kevin made: (1) to Peters in the patrol car immediately after his arrest; and (2) to Sarah and to Peters the next day on the phone.

SELECTED ANSWER TO QUESTION 1

(July 2022 Bar Examination)

A: Possible Crimes

Kevin could potentially be charged with burglary, arson, and attempted murder.

Burglary: *Burglary is a specific intent offense. At common law, burglary was defined as the (1) breaking and (2) entering (3) of a dwelling (4) at nighttime (5) with intent to commit a felony therein. Today, modern courts have abolished the requirement that the crime occur at nighttime or that the structure is a dwelling. Now, burglary typically requires either the unlawful breaking and entering of a residential or commercial structure that is not a public place during business hours with the intent to commit a felony therein, or unlawfully remaining in a building after it closes with intent to commit a felony therein. Breaking occurs when an individual uses any force to open any access to the building (window, door). Breaking does not occur when a door is wide open, but will occur if any force is used to open the door. Further, burglary still occurs even if the defendant doesn't actually commit the felony--he need only have the intent to commit the felony therein. Here, Kevin opened the door to a screened-in patio, which would satisfy the breaking and entering elements. Kevin entered the building when he crossed the threshold to the screened-in patio. Kevin entered the building with intent to commit murder and/or arson. Kevin intended to commit arson when he set the chair on fire, and intended to murder Mark when he entered the building. The elements of burglary thus are met. Kevin may argue that a mistake of fact made it impossible for him to commit the offense of murder, but mistakes of fact will not negate the intent element of this crime and Mark did commit arson while in the house, so this will not serve as a defense. Further, Kevin may argue that he abandoned the burglary after he entered the building, but as previously mentioned, burglary is committed once a defendant crosses the threshold with intent to commit a felony therein. Thus, no defenses exist for this charge and he would likely be convicted.*

Arson: *Arson is a general intent malice offense. At common law, Arson was the reckless or intentional setting aflame of the dwelling of another. Today, arson is committed when an individual recklessly or intentionally sets fire to any building, not just homes. Though scorching of a building wouldn't constitute arson, charring will suffice. Here, Kevin used gasoline and matches to set fire to a portion of Mark's house (the chair), which resulted in a fire that destroyed Mark's house. Kevin may argue that he shouldn't be convicted of arson because he put out the fire before he left and never intended to burn down the house. However, this is likely a weak offense. Kevin intended to burn down the house when he lit the fire, and changed his mind only after he'd lit the fire. Thus, Kevin wouldn't likely be able to claim that he didn't intend to burn down the house. Kevin will likely be found guilty of arson because the fire he lit was the actual and proximate cause of Mark's house burning down--but for Kevin starting the fire, the house wouldn't have burnt down when it did, and a foreseeable consequence of lighting the fire could be that the house burns down. Thus, Kevin will likely be found guilty of arson. If Kevin isn't found guilty of arson, he could be convicted of attempted arson. Attempt is an incohate offense and requires specific intent to*

commit the offense. Here, Kevin went to a gas station and bought matches, then brought those items into his house with the intent to burn it down. Purchasing the matches would constitute a substantial step towards arson, and Kevin had the specific intent to commit arson, so he would likely be guilty of attempted arson OR arson (because the crimes merge).

Attempted murder: *Attempt is an incohate offense. To be guilty of attempt, one must commit a "substantial step" towards committing the crime. At common law, murder is the unlawful killing of another with malice aforethought. Murder may be committed if the defendant (1) intentionally kills or causes great bodily harm to another, (2) a killing during the course of an enumerated felony (battery, arson, assault, robbery, rape, kidnapping, drug trafficking), (3) murder in connection with drug trafficking, and (4) "depraved heart murder", which is a killing involving reckless indifference to human life. Murder also requires actual and proximate causation. Actual causation means that but for the defendant's act, the crime wouldn't have occurred when it did. Proximate causation requires the harm to be foreseeable. Here, attempted murder would require the specific intent to kill, and would require a substantial step to achieve that objective. Kevin determined he was going to kill Mark before he arrived, which shows his intent to kill. Further, he took substantial steps by purchasing gasoline and matches to kill him, and then took a substantial step by crossing the threshold of his house to light it on fire, thinking Mark was in the house. Kevin may claim that he abandoned the crime, which would require complete repudiation and a total abandonment of the crime before a substantial step is committed. However, Kevin had already started lighting things on fire in Mark's house. Therefore, Kevin would likely be found guilty of attempted murder.*

B: Legality of the Search

Both the 4th Amendment to the US constitution and Florida's constitution, which mirrors the 4th amendment, prohibit unreasonable searches and seizures of individual's persons, houses, papers, and effects without a warrant issued with probable cause, absent an applicable exception. Warrantless searches of a home are presumptively unlawful. 4th amendment protection is especially strong in constitutionally protected areas, like the home. Law enforcement is prohibited from unreasonable searches in the curtilage of the home or inside it. Exceptions to the warrant requirement to search a home include: (1) exigent circumstances justifying the search (2) rendering emergency aid to an individual inside the home (3) prohibiting an individual inside from destroying transitory evidence, (4) searches incident to lawful arrest, and (5) consent searches. Consent may be given to search a home by the person who owns the home or lives in the home and is old enough to consent, and anyone who has "apparent authority," meaning the officer reasonably believes that the individual can grant them authority to search the house. If one resident rejects consent, an officer may not search the home at that time. However, if officers arrest the individual for other reasons and return to the house and gain consent from another occupant, they may search the home with the individual's consent. Here, officers lacked a search warrant and would need an exception for the search to be valid. He would argue that because he did not provide consent for his girlfriend to allow the officers to search his home that the search was invalid. However, officers returned back to the house after he had been arrested lawfully pursuant to a warrant and obtained consent from his girlfriend, who lived with him at the

house. Therefore, the officers likely conducted a lawful search. The scope of their search was limited to the consent given--which related to the embezzlement charge. Therefore, officers were permitted to look in the house anywhere that evidence for the embezzlement charge could possibly be, and they seized evidence related to the embezzlement charge. Thus, the search was likely lawful.

C: Admissibility of Statements

Patrol Car Statements

The Federal 5th Amendment (5A) and Florida constitutions provide a prophylactic measure meant to prohibit officers from coercing defendants into making incriminating statements through a doctrine called Miranda. Miranda only applies to government action. Miranda applies to statements made under custodial interrogation. A statement made by a defendant after he is placed under custodial interrogation will be inadmissible unless he is provided Miranda warnings, which include that (1) D has a right to remain silent, (2) anything he says will and can be used against him (3) he has the right to an attorney, (4) if he cannot afford an attorney, one will be appointed for him. "custody" means a reasonable person wouldn't feel free to leave, and conditions are similar to a traditional arrest. These warnings don't need to be verbatim, but should at least give the gist. "interrogation" means statements by law enforcement that they should know are likely to elicit an incriminating response. Any statement obtained in violation of Miranda will be inadmissible. Miranda does not apply to spontaneous statements. The right to remain silent and the right to counsel must be invoked. If invoked, the right to remain silent must be scrupulously honored and the right to counsel must be provided before the defendant makes any statements.

Here, Kevin was put in a patrol car, which is clearly similar to a traditional arrest, so he was likely in custody. Further, he was asked by the cop where he was on the date of the crime and his whereabouts could be incriminating. Thus, he was likely subject to custodial interrogation and should have received Miranda before being questioned. Kevin received the first three of the warnings, but was not told that if he couldn't afford an attorney that one would be appointed for him. Thus, he didn't receive Miranda and his statements could probably be inadmissible. Officers will likely say that his statement that wasn't a response to his question was a spontaneous statement not elicited by officers, however, the statement was made in response to a question on where he was that night would probably make the statement not spontaneous and it would be inadmissible.

Phone Call Statements

The 6th Amendment right to counsel attaches when the defendant is formally charged and prohibits officers from communicating with the defendant without counsel present. The 6th Amendment is offense-specific. Defendant has a right to have counsel present at every critical stage of the case. Once the defendant is appointed an attorney, officers and agents of the officer are prohibited from communicating with the defendant to elicit incriminating responses from him. The right to counsel must be invoked by the defendant and may be waived if the defendant communicates. The defendant had counsel and could have been said to invoke the right to counsel.

Here, Sarah was acting as an "agent" when she agreed to talk on a recorded line and assist the officer to elicit information about whether he burned down the house. Sarah asked, "did you burn down the house?" which would be likely to elicit an incriminating response from the defendant, Kevin. However, Kevin had only been charged with embezzlement, and not arson so the 6th amendment doesn't apply. Kevin may argue that the 5th amendment protects him, but defendants must unambiguously and unequivocally invoke the right to remain silent and the right to counsel for it to apply. Further, the 5th amendment only applies to government action. Because Sarah was being used as an agent, government action may be met, however, the phone call wouldn't qualify as a custodial interrogation because the "custodial" aspect wasn't met--a reasonable person would feel free to terminate and he wasn't in jail. Thus, the phone call with Sarah is likely admissible.

If the defendant invoked his right to counsel, the statements may be inadmissible. Though the phone call with the officer would probably be admissible under the 6th amendment, it could qualify as a coerced statement, which is inadmissible. Statements must be voluntary to be admissible, but statements where the officer uses undue coercion on the defendant may prevent the statement from being admissible. Using Kevin's girlfriend to call him, then calling him back saying it's "all over now" would probably constitute undue coercion, and his confession would likely be inadmissible.

QUESTION NUMBER 2

JULY 2022 BAR EXAMINATION – FEDERAL AND FLORIDA CONSTITUTIONAL LAW

The Gulf County Board of Commissioners has received complaints about political signs relating to an upcoming election posted on residents' property. Specifically, several residents have installed bright lights to draw attention to their signs at night. One complaint is that the lighted signs are unsightly and unnecessary, as street lights in the neighborhood already make the signs visible at night. Another complaint is that the signs are unsafe because they distract motorists. In the last month, four auto accidents have occurred in residential neighborhoods in which at least one driver claimed to be distracted by a brightly lit political sign.

Smith, Jones, and Green are three of the five members of the Gulf County Board of Commissioners. Last weekend, Smith had a birthday party for her five-year-old son, and Jones and Green attended. During the party, Smith pulled Jones and Green aside to talk about the sign-related complaints. In that conversation, they discussed three ideas for enacting a county ordinance that would address the residents' complaints:

- Proposal 1: Residents may not install lighting for political signs on their property.

- Proposal 2: Residents may not install lighting for any signs on their property.

- Proposal 3: Residents may install lighting for signs on their property, but only after receiving a license from a special committee. The committee would only grant the license for lighting that is not unreasonably hazardous and comports with the aesthetic of the surrounding neighborhood.

Smith, Jones, and Green agreed that instead of fining violators, the county's police should enforce the new ordinance by simply confiscating any lighting equipment that does not comply. They believe that removing non-compliant lighting equipment immediately will reduce the risk of distracted driving.

Before moving forward with formal action, Smith seeks your legal opinion on the constitutionality of the foregoing proposals.

Prepare a memo that addresses the following:

1. Discuss whether each of the three foregoing proposals, and the suggested method of enforcement, are consistent with the **United States** Constitution.

2. Discuss whether Smith's conversation with Jones and Green at the birthday party raises any issues under the **Florida** Constitution.

SELECTED ANSWER TO QUESTION 2

(July 2022 Bar Examination)

MEMORANDUM

To: Partner

From: Examinee

Re: Constitutionality of Lighting Proposals

(1) Constitutionality of Proposals 1-3

The following proposals are analyzed in accordance with the Federal Constitution.

(A) Proposal One is Unconstitutional

(A.1) Proposal One is an impermissible content-based restriction on speech

The First Amendment of the Constitution provides citizens freedom of speech. This protection is considered a fundamental right. Content-based restrictions on speech are restrictions that are based solely on the content of the speech itself; it permits or forbids speech based on the message or subject matter being discussed. Content-based restrictions are highly disfavored and therefore must survive strict scrutiny, which means that the government has the burden of proving that the regulation is narrowly tailored to achieve a compelling interest, and it is the least restrictive means of achieving that purpose.

Here, proposal one forbids residents from installing lighting only on their property only for political signs. Signs that contain messages about any other subject matter are not restrict. As such, this is a content-based restriction. This proposal will likely not survive strict scrutiny because it is not narrowly tailored to achieve a compelling government interest; here, the interest at stake is ensuring the safety of automobile drivers in the area and reducing accidents that occur because of distractions that the signs create. There are numerous other means/ways to ensure the safety of automobile drivers, such as reducing speed limits and adding speed bumps to the road. Further, this regulation isn't narrowly tailored to achieve this purpose because it allows for other lit signs to remain posted and only forbids the posting of political signs; allowing other lit signs to remain posted is not narrowly tailored to achieve the goal of preventing roadway accidents. As such, this proposal will fail as an impermissible content-based restriction

(A.2) Proposal One is Vague and Overbroad

Vague regulations on speech are regulations that are ambiguous and don't provide definite standards that allow for citizens to know how to comply with them sufficiently. As such, they are struck down as a violation of the first amendment. Here, forbidding "political signs" is impermissibly vague because it does not sufficiently apprise citizens of what kind of signs

constitute "political" signs; it is unclear whether that just pertains to elections, or if it also encompasses political ideology, thought-processes, campaign financing, etc. This proposal is unconstitutionally vague and will can be struck down on those grounds.

Further, this proposal is also overbroad; overbroad regulations punish more people that necessary by pulling too many people into the group that is to be regulated. These types of regulations are also unconstitutional. As stated above, it's unclear what constitutes a "political" sign; if the regulation was intended to target political signs only that relate to the upcoming election, then it is overbroad as it also will ban other political speech that is unrelated to the upcoming election. As such, this proposal is also unconstitutionally broad.

(A.3) Proposal One Could be challenged on Equal Protection Grounds

The Equal Protection guaranteed by the Federal Constitution prohibits the government from discriminating against a specific class of people and not others. Depending on the class at issue influences what type of scrutiny is employed in analyzing the constitutionality of the regulation.

Here, Proposal One arguably discriminates against politicians, to the exclusion of any other class, by prohibiting political signs only. However, politicians are not a suspect class under the Equal Protection Clause, so the regulation is subject to rational basis review. Rational Basis Review requires the person challenging the regulation to prove that the regulation is not rationally related to a legitimate government interest. Here, the government has an interest in maintaining the safety of public roadways by reducing the lighting/distractions created by signs bordering the street. This interest of the government is legitimate, and restricting these signs is would likely be rationally related to this interest. As such, an argument to strike down Proposal One on Equal Protection grounds would likely fail.

(B) Proposal Two is likely a permissible time/place/manner restriction

Proposal two regulates lighting for any and all sign placed on property. This is likely a permissible time/place/manner regulation. Time/place/manner regulations on speech are ones that are focused on the timing/placement of speech rather than the content/viewpoint of the speech. Time/place/manner restrictions are permissible so long as (1) they are content-neutral, (2) serve an important government interest, and (3) leave open alternative channels of communication. Said differently, these restrictions are subject to a form intermediate scrutiny.

Here, the proposal is content-neutral because it regulates all types of speech contained on signs rather than just specific categories of speech that are placed on sighs. The government interest at stake here is public safety on the roadways and reducing the number of accidents that occur as a result of signs that are posted on the side of the road. Keeping the roadways safe is an important government interest. Further, this regulation leaves open alternative channels of communication because citizens are still able to post signs elsewhere (for example in public parks, bulletin boards, and TV/radio commercial ads). As such, individuals are still permitted to speak on these topics in a variety of forums within the

jurisdiction. As such, Proposal Two is likely a permissible time/place/manner restriction on speech that will be upheld

(C) Proposal Three contains Unconstitutional prior restraints

Prior restraints on speech are regulations that prevent or burden speech from happening before it has occurred. Generally speaking, prior restraints on speech are disfavored. Proposal three contains a licensing restraint that would require citizens to receive a license prior to installing lighting signs on their property. Prior restraints may be upheld so long as the standards for the restraints contain definite standards and don't allow for unfettered discretion in its application. Definite standards require that precise procedures be followed so that the people/public officials issuing the licenses do not have any room to exercise discretion in deciding whether to issue the license.

In this case, the licensing requirement requires that individuals obtain a license from a special committee that will only grant the license if the lighting is not "unreasonable hazardous" and "comports with the aesthetic of the surrounding neighborhood." These standards are not sufficiently definite; they leave open amble room for unfettered discretion by the special committee in deciding whether to issue the licenses. As a result, the special committee essentially retains the power to deny a license based on content, viewpoint, ambiguous aesthetic standards, and a slew of other discretionary criteria. This could result unequal, discriminatory practices in the issuing of these licenses. As a result, proposal three's prior restrains are likely not permissible under the Constitution.

(D) Enforcement of the New Ordinance

Smith, Jones, and Green proposed that in order to enforce the new Ordinance, the county's police can confiscate any lighting equipment that does not comply with the Ordinance. This enforcement provision would likely constitute a violation of individuals Procedural Due Process rights and an unconstitutional taking.

(D.1) This Enforcement Provision Violates Due Process

The Federal Constitution provides, under the 5th amendment, that all persons are not to be intentionally deprived of life, liberty, and property without the due process of law. This provision is applicable to the states via the 14th amendment. Procedural due process requires that individuals, prior to being deprived of any rights, are entitled to notice, a hearing in front of a neutral magistrate, and the right to be heard prior to being deprived of any of their Constitutional rights.

In this case, allowing the county police to confiscate individual's personal property (lighting equipment) in the event that they violate the county ordinance. Confiscating an individual's personal property is depriving them of their property; to allow for this to occur automatically without affording citizens the right to (1) notice, (2) the right to be heard, and (3) a hearing in front of a neutral magistrate is in violation of Due Process. As such, this enforcement provision is in violation with the Due Process principals and is therefore unconstitutional.

(D.2) This Enforcement Provision would Result in an Unconstitutional Taking

Under the Takings Clause of the Constitution, any individual who is deprived of their property by the government is entitled to reasonable compensation. Individuals are entitled to notice before their property is taken for public use. Under the Takings Clause, a person can be deprived of their property if the government either (1) physically takes up a portion, or all, of their property, or (2) regulates the property to such an extent that the property does not retain any economic value.

Here, this enforcement provision would allow for the physical deprivation of a person's property by confiscating all personal lighting equipment. If this were to occur, then any individual who has their property taken would be entitled to reasonable compensation. This isn't delineated in this enforcement provision, nor is any notice described in the enforcement provision. Therefore, it is likely an unconstitutional taking.

The government could argue that this enforcement provision is a constitutional forfeiture. A forfeiture allows for the government to obtain an individual's property without notifying them prior to taking the property, if the government believes that the property is being used in furtherance of a criminal act. Here, the government could argue that any lighting that violates the county ordinance is being used to further a criminal act, and therefore individuals aren't entitled to notice before their property is taken because confiscating the property is a constitutional forfeiture. However, a violation of this ordinance as set forth is not a criminal act. Further, there is no risk that evidence would be destroyed by providing people with warnings prior to taking their property in these cases. Therefore, the argument that this is a constitutional forfeiture is not likely to succeed

(2) Smith's Conversation with Jones and Green Violated the Open Government Requirement in the Declaration of Rights In the Florida Constitution and Violated Florida's Sunshine Law

There are a number of rights that are enumerated under the Florida Constitution's Declaration of Rights ("DOR"). Generally speaking, the DOR is Florida's equivalent to the US Constitution's Bill of Rights and most, if not all, of the rights under the DOR are regarded as so important/fundamental that any regulations on these rights must pass strict scrutiny review, which means that the government has the burden of proving that the regulation is narrowly tailored to achieve a compelling interest, and it is the least restrictive means of achieving that purpose.

The right to Open Government is one rights enumerated under the DOR. Open Government means that citizens have the right to remain apprised of actions taken by public officials and conversations in furtherance of those actions. Further, under the Florida Sunshine Law, any meeting between two or more public officials in which the officials discuss their official duties and actions that will affect the public must be noticed to the public, and the public has the right to attend. The word "meeting" is construed broadly; although public officials are allowed to attend social functions together without running afoul of this, if the official start discussing their official duties or actions that will affect the public pursuant to their duties, then any decisions made during those conversations will not be considered binding.

Here, the conversation between Smith, Jones, and Green at the birthday party violated the Open Government requirement of the FL Constitution and the FL Sunshine Law because they are all public officials (as members of the Gulf County Board of Commissioners) and were discussing their official duties and potential actions to be taken that are of public interest and public importance. As such, any decisions made during this conversation will not be considered binding.

QUESTION NUMBER 3

JULY 2022 BAR EXAMINATION – REAL PROPERTY/CONTRACTS/ETHICS

Natalia and Mitchell decided to buy their first home. They found their dream home and noticed that it was located in a flood zone. The sellers provided Natalia and Mitchell with a disclosure form which included the question: "Has flooding affected the property?" In response, the sellers answered: "No."

Natalia and Mitchell offered to purchase the home for $300,000. The sellers accepted the offer. Natalia and Mitchell hired an inspector who came out to the premises and reported that the home appeared to be in good condition, and the sale closed shortly thereafter.

Natalia asked an alarm company to install an alarm system in the home the day after they moved in. The alarm company's technician arrived and presented her with a 5-year contract with the following early termination penalty provision: "If you terminate your contract before the expiration of its five-year term, an early termination fee of 80% of your total remaining balance on the five-year contract will be due immediately."

Natalia was not sure if she would like the alarm company's service and did not want to be penalized for an early termination. She crossed out the early termination penalty provision and any reference to a five-year term, and then signed the contract. The technician took the signed contract back, placed it in a folder in his vehicle, and installed the alarm system.

Five days after Natalia and Mitchell moved into the home, they awakened to their furniture soaking in a foot of water inside the home. They looked outside their living room window and saw that their two cars in the driveway were flooded with water.

Two of Natalia's and Mitchell's new neighbors came by the home that morning. The neighbors explained that flooding was a regular problem on their street. The neighbors said that the sellers who sold the home to Natalia and Mitchell frequently complained about the flooding problem and were often seen walking through flood water in the home's front yard with their pants rolled up.

Natalia and Mitchell were furious. The next day, they moved in with Natalia's parents, and Natalia called the alarm company about canceling the contract. The alarm company insisted that Natalia owed them the early termination penalty fee of 80% of the five-year contract.

Natalia and Mitchell sought an attorney to advise them about their rights with respect to the sellers and the alarm contract. They consulted with Smith, the sole lawyer in the Smith Law Firm. Natalia and Mitchell saw an advertisement online for the Smith Law Firm

in which Smith was identified as the “founding member” of the firm. The advertisement also stated: “Cheated? I will get your money back!” During the consultation, Smith explained that he had handled similar matters since he began practicing 2 years ago. Smith also told Natalia and Mitchell that in order for him to accept the representation, they would have to agree to submit any disputes regarding legal fees to mandatory arbitration.

Prepare a memorandum that addresses: (1) the claims, defenses, and possible remedies in a lawsuit by Natalia and Mitchell against the sellers; (2) whether Natalia and Mitchell have any legal obligation to pay the early termination fee to the alarm company; and (3) any ethical considerations raised by Smith’s conduct.

SELECTED ANSWER TO QUESTION 3

(July 2022 Bar Examination)

Memorandum

This memorandum will address the claims and defenses Natalia and Mitchell have pertaining to the purchase of the home and the service agreement with the alarm company. Additionally issues regarding the representation of the attorney involved will be addressed.

Natalia and Mitchell v Sellers

Duty to Disclose

Under Florida law, a seller as a duty to disclose known material defects in a property that are not easily discoverable by a buyer. These latent defects must be those that are significant and that would make a buyer reconsider had he or she known of the defect. A defect that is observable or one when the buyer knew or should have known fall outside of this duty. Here the facts indicate that the buyer's home was flooded soon after moving into. Sellers did not disclose whether there was a history of flooding at the time of contract. However, the facts also indicate that the buyers noticed that the property was in a flood zone. Seller would argue that they were on notice that the property could be flooded given its location in the flood zone and therefore no duty existed. However, buyers would argue that a property being in a flood zone versus having a history of flooding are two separate issues. Neighbors allege that the sellers knew of the flooding problem as they frequently complained. Because there was a history of flooding that is material, sellers were under a duty to disclose.

Active Concealment

In Florida, a seller is prohibit from actively concealing defects in a property. A seller cannot take steps to conceal the discovery of known material defects. Here the sellers provided a disclosure which stated that the property did not have a history of flooding. This information was false as the neighbors state that the sellers often complained about the flooding in the property. The flooding issue is a material defects. The sellers would argue that the flooding was not concealed as it was located in the flood zone and the buyers could have asked the neighbors for information if they had sought to inquire. However because the buyers did inquire to the seller and the seller affirmatively replied no, the buyers have a claim for active concealment against sellers.

Intentional Misrepresentation

Intentional Misrepresentation occurs where one party intentionally misrepresent facts to another party. Here Sellers stated that the property did not have a history of flooding. This disclosure was false given the evidence mentioned above. We can presume it was intentional since the neighbors stated that the sellers often complained of the issue. Therefore Buyers have a cause of action against sellers for intentional misrepresentation.

Negligent Misrepresentation

A negligent misrepresentation exists when a party, has a duty, usually in a professional capacity, is negligent in disclosing or not disclosing facts that the other party relied on to their detriment. There the inspector informed the buyers that the home was in good condition. The buyers relied on that representation and purchased a home with flooding issues which will result in a lot of expenses. The inspector had a duty to conduct due diligence on the home which would have revealed the flooding issue. Therefore the buyers have a claim for negligent misrepresentation against the inspector.

Remedy

The buyers legal remedy or equitable remedies will depend on the type of deed provided because any promise contained in the sales contract merge with the deed. There are two types of deeds, quit claim deeds and warranty deeds. A quit claim deeds makes no guaranties as to the quality of title or on the property. While a warranty deed contains 6 covenants which are: seisin, right to convey, warranty against encumbrances (breached at time of closing), warranty of further assurances, warranty of quiet enjoyment and warranty of warranty (breached after closing). We would need to know the type of deed to see whether there's a remedy at law (damages) or equity (specific performance to enforce a promise, or recission for lack of meeting of the minds).

Early Termination Fee

Contracts for services are governed by the common law. For a contract to be valid we need an offer, acceptance, and consideration. An offer is the outward manifestation of an intent to enter into a contract with certain and definite terms communicated to the offeree. Acceptance occurs when the offeree communicates an intent to enter into a contract. Consideration is a bargain for exchange. In Florida consideration needs a benefit or legal detriment. Under the mirror image rule, acceptance must mirror the terms of the offer. Any change in the terms result in a counter offer. A counteroffer is a rejection of the original offer and places the power of acceptance of the new terms in the hands of the initial offeree. Acceptance can also take place with performance

Here the contract is for the installation of an alarm system on the property in exchange for $300K (bargain for exchange). The company provided a standard agreement and Natalia decided to cross out a section regarding the early termination fees and signed the agreement. That constitute a counter-offer. The company took the contract back, did not object, and performed accordingly. Although the company will claim that the strikethrough was not authorized, it failed to object and performed. Therefore Natalia will prevail on the issue of the terms of the contract accepted.

Statute of Frauds

Statute of Frauds requires that certain contracts be in writing, contain essential terms, and signed by a party to be signed. These contracts are contracts that cannot be completed within 1 years, contract for marriages, contracts for the sale of land, executorships, guarantees, and the sale of goods over $500. Here the contract is for 5 years and therefore needs to be signed. Natalia will claim that is cannot be enforced because it wasn't signed by the company. However since it contains her signature as the party to be charged it complies with the statute of frauds.

Liquidated Damages

Natalia can argue that the early termination fee is not liquidate damages and is a penalty. Liquidated damages must reasonable and a reasonable forecast of the damages in the future. To accelerate payment does not provide sufficient basis for a damages. Natalia will prevail on proving that the fee is a penalty and unenforceable.

Attorney Advertisement

The Florida Rules of Professional Responsibility states that advertisements must contain a disclosure in red that it is an advertisement on the envelope and first page. The add cannot guarantee results or make misrepresentations. Here the lawyer guaranteed money back and represents himself as a founding member when he has only practiced for 2 years. Therefore these are violation of the rules. The mandatory arbitration provision is permissible as long as the client is provided a copy of the clients rights and given an opportunity to review. The client must be informed that she can retract in 3 day.

QUESTION NUMBER 1

FEBRUARY 2023 BAR EXAMINATION – CONTRACTS/ETHICS

Ridley the Rhino ("Ridley") is a popular YouTube character. Ridley's videos use songs to encourage children to brush their teeth and help their parents with housework. Some Ridley videos have more than 150 million views.

ToyCo has a license from Ridley's creator to make talking Ridley dolls. ToyCo also has an order from MegaMart, a national retailer, for 50,000 units on the condition that ToyCo deliver them by November 1 for the holiday season.

ToyCo's factory can produce all of the components of a talking Ridley doll except for a computer chip necessary for sound effects.

On March 1, ToyCo contacted ChipCo, a leading chip manufacturer, about buying 50,000 sound effect chips. ToyCo informed ChipCo that it needed the chips by July 1 in order to meet the deadline for the MegaMart order. ChipCo said that it would look into whether it could deliver the chips with a July 1 delivery date for $10 per unit if ToyCo submitted a purchase order by email within the next week.

The same day, ToyCo emailed ChipCo a purchase order for 50,000 sound effect chips at $10 per unit, delivered by July 1, with payment due within 30 days. The purchase order was on a standard ToyCo form which stated: "ToyCo reserves all rights with respect to remedies for seller's nonperformance." The next day, ChipCo emailed to ToyCo a confirmation with ChipCo's logo, which read:

CHIPCO CONFIRMATION

Order Date: March 1
Customer: ToyCo
Quantity and price: 50,000 sound effect chips at $10 per chip
Deliver by July 1; Buyer's payment due within 30 days

STANDARD TERMS AND CONDITIONS

1. Jury trial waiver. Buyer and Seller agree to waive a jury trial in any dispute relating to Buyer's Order.

2. Limitation of liability. ChipCo shall not be liable to Buyer for damages of any nature that exceed $10,000.

ChipCo and ToyCo did not communicate further about the order until May 1. On May 1, ChipCo notified ToyCo that it could not deliver the chips until September 1. ChipCo did not provide a reason for the delay and has not responded to ToyCo's calls.

Upon receiving the letter, ToyCo contacted Chip World, another chip supplier. Chip World told ToyCo that delivering the sound effect chips by July 1 required a premium price because of the short notice. Chip World said that if ToyCo would pay $20 per chip and place an order by May 5, it would deliver the chips by July 1.

On May 2, ToyCo contacted your law firm. ToyCo wants to fulfill the MegaMart order, but first seeks advice about its rights against ChipCo.

A conflict check reveals that another lawyer at your firm represented ChipCo in a worker's compensation claim arising from an employee slip-and-fall at a ChipCo factory. The firm has not represented ChipCo since the case settled three years ago.

Prepare a memorandum as follows:

1. Discuss whether ToyCo and ChipCo entered into an enforceable contract. Also, discuss ToyCo's potential claims against ChipCo, any defenses that ChipCo may assert, and any remedies that may be available to ToyCo.

2. Discuss any ethical considerations raised by your firm's representation of ToyCo.

SELECTED ANSWER TO QUESTION 1

(February 2023 Bar Examination)

MEMORANDUM

From: Examinee

To: Partner

Re: ToyCo's Claims & Ethical Considerations

I. ToyCo & ChipCo - Validity & Enforceability of Contract

Validity of March 1 Contract

Contracts concerning real property and services are governed by the common law, whereas contracts for the sale of moveable goods are governed by the UCC. Since the alleged contract at issue is one for the sale of computer chips (moveable goods), Section 2 of the UCC applies. A valid and enforceable contract requires both mutual assent (offer and acceptance) and consideration. A valid offer is an objective manifestation of the offer or to enter into an agreement creating the power of acceptance in the offeree. An acceptance is an objective manifestation of intent to be bound by the terms of the offer. In Florida, consideration can be both a benefit and a legal detriment to the promisor. Additionally, the terms of a contract must be reasonably certain and a contract must contain the essential elements. For UCC contracts, the only essential element is quantity.

While under the common law, the acceptance must mirror the terms of the offer, under the UCC an acceptance containing different/additional terms will not automatically invalidate the contract. If two merchants enter into a contract under the UCC, and the acceptance contains terms that are additional to the offer, the additional terms will be incorporated as part of the contract unless: 1) the additional terms materially alter the terms of the offer; 2) the other party objects to the additional terms within a reasonable time; or 3) the offer limits acceptance to the terms of the offer. If the acceptance contains conflicting terms with the offer, then the "battle of the forms" approach apply and the conflicting terms will be knocked out. A merchant is a commercial entity that deals in goods of the kind at issue. Here, both ToyCo and ChipCo are merchants. Therefore, the special UCC rules regarding additional and conflicting terms would apply.

Here, a valid contract was most likely formed on March 1 when ToyCo sent its purchase order for 50,000 chips at $10 per unit. ChipCo's communication to ToyCo must likely did not constitute an offer, because ChipCo only said that it would "look into" whether it "could" deliver the chips. Because ChipCo stipulated that a potential offer would be open to consideration if sent by email "within the next week", ChipCo's communication was only

an invitation to negotiate. ToyCo's email that same day constituted a valid offer under the UCC. It contained the specific quantity of chips, at $10 per chip and reserving all rights regarding to remedies stemming from non- performance.

A valid acceptance was sent by ChipCo in its confirmation. However, ChipCo's acceptance contained both an additional term and a conflicting term. The additional term is the waiver of jury trial, and the conflicting term is the limitation of liability, which conflicts with ToyCo's offer including its reservation of all rights and remedies. In Florida, parties have a fundamental, constitutional right to a jury trial, which is also protected by the US Constitution. This would most likely constitute a "material" term. Since both parties are merchants, and the additional term (Clause 1) is material, a court would likely not enforce that specific term. However, the underlying contract would still be enforceable. Therefore, a valid contract was formed, but without the term waiving jury trial.

The limitation of liability clause conflicts with the provision in the offer, and would also qualify as "material". ToyCo will argue that the battle of the forms approach should apply, and the term should be knocked out - thus subjecting any issue related to damages to the gap-filling provisions of the UCC. However, ChipCo will argue that ToyCo's non-communication and failure to seasonably object to the term constitutes an acceptance of that term. A court would probably find that because the limitation of liability is a material term that conflicts with the offer, such a limitation is most likely unenforceable.

Defenses to Enforcement

ChipCo could argue that the Statute of Frauds (SOF) should preclude enforcement of the contract. Under the SOF, a contract for the sale of goods worth $500 or more must be in writing and signed by the party to be charged (in this case, ChipCo.). A writing does not have to be a formal contract, but can simply be written evidence of a contract. Additionally, a handwritten or electronic signature is not required in order to satisfy the "signing" requirement. Even a company's logo or letterhead will satisfy the signature requirement. Here, ChipCo sent a written confirmation, which acknowledged the quantity - thereby satisfying the writing requirement and containing the essential term under the UCC. Furthermore, the fact that the confirmation included ChipCo's logo would be sufficient for the signature requirement. Therefore, ChipCo. would not succeed in an SOF defense.

II. ToyCo's Potential Claims against ChipCo & Defenses

Anticipatory Repudiation

A breach of contract is material when the breaching party fails to substantially perform according to the terms of the contract. A breach of contract can occur when one party repudiates the contract before performance is due. A repudiation must be clear and unequivocal, otherwise the non-repudiating party may only demand further assurances. The repudiating party may retract the repudiation, unless: 1) the non-repudiating party has relied on the repudiation to its detriment; 2) has sued for breach of contract; or 3) has

accepted the repudiation. In the case of repudiation, the non-repudiating party must suspend performance in order to avoid further loss to the repudiating party.

Here, ChipCo repudiated the contract by its notification on May 1 that it would not be able to perform delivery until September 1. ChipCo provided no reason for the delay, and did not answer ToyCo's calls. Therefore, ToyCo could successfully argue that ChipCo repudiated the contract. Even though ChipCo communicated that it would be able to deliver the chips by September 1 at the earliest, this would be a material breach of contract as the contract specifically called for delivery by July 1.

ChipCo could argue that ToyCo's anticipatory repudiation was unacceptable, and that its communication did not constitute a clear and unequivocal repudiation of the contract. However, such an argument would most likely succeed. ChipCo did not provide a reasonable alternative, nor did it make a good faith effort to respond to ToyCo's calls. Even if ToyCo was looking for demands for further assurances, those demands seemed futile. Because time was of the essence, ToyCo had a valid and reasonable basis for going forward with an alternative supplier. In fact, ToyCo's contract with Chip World should be considered as a fulfillment of any obligation on the part of ToyCo to operate in good faith and mitigate damages.

Defenses

ChipCo. could argue that ToyCo. did not affect payment. Payment was due on April 30th, per the terms of the contract. According to the UCC, payment is due before performance of delivery. Because the delivery date was specifically set out in the contract, and ToyCo. Did not perform per the contract, ChipCo. could argue that a material breach was committed and therefore its own performance was suspended. However, ToyCo. could argue that ChipCo.'s subsequent conduct did not resemble the good faith required of sellers under the UCC.

III. Remedies Available to ToyCo.

Restitution

If ToyCo. already paid part of the purchase price, or the full purchase price, ToyCo. would be entitled to restitution of any amount paid, as it did not receive any chips from Chip Co.

Remedy - Cost of Cover

Expectation damages are meant to place the parties in a position as if the contract had been performed, and to give the parties the benefit of the bargain. The non-breaching party has no "duty" to mitigate damages (i.e., failure to mitigate does not operate as a bar to recovery), but if there is a failure to mitigate damages then this could reduce the amount of damages. If a seller breaches a contract, then the buyer is entitled to

expectation damages. If the buyer must replace the goods, the damages are measured as the difference between the contract price and the cost for replacement.

Here, ToyCo. will argue that it is entitled to the difference between the contract price and the price it ultimately paid under its contract with Chip World. The total contract price with ChipCo. was $500,000 (50,000 chips x $10 per chip). The cost of the alternative supply amounted to $1 million (500,000 chips x $20 per chip). Therefore, ToyCo. will argue that it is entitled to the difference - i.e., $500,000. If this alternative contract was reasonable, and a court would find that it was sufficient mitigation of damages, which it probably would be, then this is the amount ToyCo. would be entitled to.

Lost Profits

Consequential damages are recoverable under the UCC. Consequential damages that include lost profits are available only if at the time of contacting the breaching party knew or had reason to know of the nature of potential losses, and such losses were a foreseeable event as the result of breach at the time of contracting. Here, the facts do not indicate whether Chip World's supply of chips were of similar or identical quality to the chips that would have been supplied by Chip Co. Chip Co is a leading chip manufacturer, so perhaps the quality would be diminished. If for some reason the dolls become less marketable due to the integration of lesser-quality chips, ToyCo could argue that Chip Co should be liable for any lost profits. However, because the facts are unclear in this regard, and because such damages seem speculative, ToyCo would probably not be able to effectively raise such a claim.

Defenses

ChipCo. could argue that the damages provision operates as liquidated damages, and is therefore the extent of damages that ToyCo could ultimately recover. However, as discussed above, that provision is most likely not part of the contract to begin with and therefore invalid and unenforceable. If the liquidated damages clause were valid and enforceable, which it is most likely not, then ToyCo. would only be able to recover $10,000.

IV. Ethical Considerations

Conflict Of Interest

A lawyer has the duty to provide diligent and competent representation to its clients. Part of providing diligent representation is avoiding conflicts with former, prospective, or current clients. A conflict exists when representing one client would impede effective representation of another client, or would involve the disclosure of confidential information that must be protected. Normally, a lawyer cannot provide representation to a prospective client concerning the same or a substantially related matter in which that lawyer represents a former or current client with adverse interests. Within a firm setting, a

conflict that one lawyer has in a firm is imputed to the other lawyers working at the firm. Therefore, the fact that another lawyer in the firm represented ChipCo. would be imputable to other lawyers in the firm.

If a conflict does exist, then a firm may still provide representation if: 1) diligent and competent representation can be provided to both affected clients; 2) the representation does not involve representing both clients with adverse interests to one another in the same proceeding before a tribunal; and 3) both clients provide their written and informed consent.

Here, even though another lawyer represented ChipCo., that representation concerned a completely unrelated matter - a slip and fall case, as opposed to a contracts dispute case. Therefore, any confidential information acquired as concerns ChipCo. would probably not be at issue in the current case. Thus, representation of ToyCo would most likely be possible.

QUESTION NUMBER 2

FEBRUARY 2023 BAR EXAMINATION – CRIMINAL LAW AND CONSTITUTIONAL CRIMINAL PROCEDURE

Late one night, David was driving his motorcycle. At a red light, David's friend, Jake, pulled up beside him on his motorcycle. They signaled to each other to race when the light changed. When the light turned green, both motorcycles sped off. They were both traveling more than twice the 45 mph speed limit and weaving around cars with David slightly ahead. David suddenly noticed a tall, dark object moving across the roadway just before he struck it. David almost lost control of his motorcycle, but continued driving to his home nearby. Once he arrived in his garage, he noticed damage to his motorcycle, including broken pieces and what looked like blood.

The next day, David got a ride to work. A colleague told David that she witnessed a collision just down the street the prior evening. She explained that a woman in dark clothing was running across the traffic lanes, but that two motorcycles were racing and one hit the woman. The woman died at the scene.

After hearing this, David texted Jake two messages: "I need to know if you talked to the police about me," and, "Did you tell the police I killed that woman last night?"

Police officers investigating the incident set out to talk with all the registered owners of motorcycles in the area. They intended to knock on the doors of owners' residences and see if anyone would speak to them voluntarily. David was standing on the sidewalk in front of his apartment smoking when he saw a police officer driving towards him. The officer also saw David, whom he recognized from a driver's license photo as the registered owner of the next motorcycle on his list.

The officer parked in the parking lot and approached David. As he grew closer, the officer smelled marijuana. When the officer was about ten feet away from David, he was sure the smell was coming from David's cigarette, so he told David not to move. David did not have a prescription for the marijuana. He threw the cigarette on the sidewalk, put his hands in the air and began to walk backward towards his open front door, while the officer repeatedly told him to stop.

David ducked into his home, and the officer followed him. In the kitchen, the officer took David down and told him he was under arrest for misdemeanor marijuana possession and resisting without violence. While the officer was handcuffing David, he noticed two grams of marijuana on the kitchen counter, which he collected as evidence. The officer then went outside and collected the cigarette that David tossed on the sidewalk. The officer performed a field test on the cigarette and the suspected marijuana from the kitchen, revealing that both were positive for marijuana.

Right before placing David in the patrol car, the officer searched David and recovered David's cell phone from his pocket. Looking through the unlocked phone, the officer found David's two texts to Jake. Without saying anything, the officer held the phone up to David displaying the texts. David exclaimed, "She was in the middle of the street! I didn't see her! I never meant to hurt anyone!"

While David was taken to the jail, a different police officer arrived at Jake's home, as he was also a registered owner of a motorcycle in the area. Jake voluntarily allowed the officer inside his home and told the officer everything about the previous evening.

Prepare a memorandum addressing the following:

1. In Florida, vehicular homicide is defined as "the killing of a human being … caused by the operation of a motor vehicle in a reckless manner likely to cause the death of, or great bodily harm to, another." Fla. Stat. § 782.071. Vehicular homicide "does not require that that person knew that the accident resulted in injury or death." *Id*. Discuss whether the facts would support convicting David and Jake of vehicular homicide.

2. Discuss whether the actions of law enforcement violated the **U.S. Constitution** and how the court should rule on any constitutional challenges.

SELECTED ANSWER TO QUESTION 2

(February 2023 Bar Examination)

I. Whether David and Jake can be convicted of vehicular homicide

Under the relevant Florida statute, to commit vehicular homicide one must (1) operate a motor vehicle in a reckless manner likely to cause the death of or great bodily harm to another and (2) such action must result in the killing of a human being. Further, one need not know that the accident resulted in injury or death.

a. David

David would likely be convicted for vehicular homicide. First, he in fact killed a woman when he hit her with his motorcycle. Thus the only question as to him is whether he was driving in a reckless manner. A court/jury would likely find that he was driving in a reckless manner as he was traveling at extremely high speeds (more than twice the 45 mph speed limit) and weaving around cars late at night (when visibility is reduced). This contact constitutes reckless behavior because driving at these speeds at night and weaving in and out of cars includes a high risk of accident/hitting someone with the motorcycle, which can kill or seriously injure a person. Because David was driving recklessly when he hit and killed the woman, he could be convicted.

b. Jake

Even though Jake was not driving the motorcycle that hit and killed the woman, he may also be liable for voluntary manslaughter either under a theory of conspiracy or aiding and abetting.

Florida retains the traditional rules for conspiracy where there must be a meeting between two people to engage in an illegal act. In other words, both of the participants of a conspiracy must actually have the intent to engage in the prohibited conduct. Under Florida law, no overt act is required to complete the crime of conspiracy. For those who enter into a conspiracy, each party can be convicted of both the underlying conspiracy and any crimes that occur doing the undertaking of the conspiracy.

Here, a prosecutor could argue that when Jake pulled up next to David, the each signaled to each other to race when the light was changed. Although they did not use words, they apparently understood the signs they made to each other (indicating a race) and both had the requisite intent to engage in the race. Thus they can be guilty of a conspiracy to either (1) drive reckless, which is a crime or (2) drag race, which is also likely a crime. Because David committed the crime of vehicular homicide while carrying out the conspiracy, his co-conspirator (Jake) can also be convicted of that crime as Jake had not pulled out of the conspiracy (clearly indicated that he no longer desired to race) at the time of the accident. In fact, it appears that Jake was actively racing David at the time David hit and killed the woman.

Alternatively, a prosecutor could try to convict Jake on an accomplice theory. Under Florida law, an accomplice can be held liable to the same extent as the principle (David) if the accomplice offers encouragement to the principle who is committing the crime. Here, Jake encouraged David to race when he pulled up next to him and was also encouraging David to drive recklessly when Jake was racing David. Thus, Jake may also be liable because he "caused" David to drive in a reckless manner by racing him which led to the woman's death.

II. Constitutional issues relating to law enforcement's interactions with David and Jake

There are several potential constitutional issues with how the law enforcement interacted with David in carrying out David's arrest that could limit the evidence that law enforcement could use against David in either a marijuana or vehicular homicide prosecution.

Under the 4th amendment to the Unite State's condition, people in the United States cannot be subject to unreasonable searches or seizures. The key question is reasonableness. Whether a search or seizure is reasonable will depend on whether the government has probable cause to believe a crime has been committed or that evidence of illegal activity will be found (there is a less exacting standard for Terry stops, reasonable suspicion, which allows law enforcement to pat down a suspect if they have reasonable suspicion they have a dangerous weapon). Any evidence that is obtained as a result of an illegal search or seizure may be suppressed during the suspect's prosecution.

a. David's initial arrest

The general rule is that police do not need an arrest warrant to arrest someone in a public place so long as there is probable cause that they have committed a crime. Here, David was in a public place (the sidewalk in front of his apartment) and smoking marijuana (without a valid prescription) when the officer started to approach him. When the officer approached David, smelled marijuana, and became "sure the smell was coming from David's cigarette," he had probable cause to believe that David was committing the crime of marijuana possession, which is a misdemeanor (because the punishment for the crime does not carry the potential sentence of a year or more in jail). Thus, at this point the officer had a right to arrest David even though the officer did not have an arrest warrant.

Before the officer could arrest David, however, David ran back into his apartment. The officer than followed David into the apartment, without either a search or arrest warrant (since David lived there, the officer would generally only need an arrest warrant, not a search warrant, to enter into the apartment to make the arrest). David would argue that this arrest was unlawful and violated his 4th amendment rights because the officer did not have a valid arrest or search warrant and therefore any evidence of crimes found as a result of the illegal arrest (the marijuana inside the apartment, the incriminating messages on the phone) are "fruit of the poisonous tree" and therefore could not be admitted as evidence in his trial. The fruit of the poisonous tree doctrine is meant to have a deterrent effect on law enforcement so that they do not violate the 4th amendment and provides that

any evidence collected as a result of an illegal arrest/search cannot be used as evidence. However, there are several exceptions to this doctrine; in other words, even if the search/seizure was illegal, the officer still may be able to use that evidence (more on this later).

The officer would argue that he had an exception to the warrant requirement: the hot pursuit exception. Under this exception, officers do not need a warrant when they are in hot pursuit of a felon who enters into a building. Here, the officer's invocation of this exception would likely fail as marijuana possession is a misdemeanor and thus the officer should have sought an arrest warrant before entering David's apartment. The officer could also argue he/she did not need a warrant because of another exception, if he thought that David was entering the apartment to destroy evidence. The prosecution/officer would argue that David had already failed to comply with the officer's request, already attempted to get rid of evidence when he threw the marijuana cigarette on the ground, and therefore the officer had a reasonable belief that David was entering the apartment to destroy more evidence. This exception would likely not apply because the officer did not hear sounds like flushing, which could indicate that David was trying to destroy evidence. Finally, the officer could argue that he did not need a warrant because David left the door to his apartment open and there is no indication David closed it when he fled the officer. If the door was open, the officer could argue he did not need a warrant/it was implicit consent on David's part for the officer to enter. This may be the governments best argument but its result is likely a close call. A court would likely find the officer still needed to ask for explicit permission or get a warrant before entering.

Although the arrest likely violated David's constitutional rights, this does not mean he can't be prosecuted. The question is whether any evidence found as a result of his illegal arrest could be suppressed.

b. The marijuana inside the apartment

If an officer is legally inside someone's home, they do not need a warrant to seize any illegal items/evidence of a crime that is in plain view under the plain view exception. If the officer was legally inside David's apartment, it would appear the plain view exception applies to the officer's seizure of the 2 grams of marijuana on the kitchen table (in other words he did not need a warrant to seize this). This is because it was immediately apparent to the officer that the marijuana was illegal without the officer having to touch/move the marijuana.

However, because the officer was not legally inside David's apartment as described above, the officer cannot rely on the plain view exception. Rather, the seizure of this marijuana is a fruit of the poisonous tree of the officer's illegal entry into David's apartment and therefore would likely be excluded as evidence in David's marijuana prosecution.

c. The marijuana on the sidewalk

After arresting David, the officer went back outside and retrieved the marijuana cigarette that David had thrown on the ground. This evidence would not be excluded. This is because the officer's seizure of the marijuana cigarette did not violate David's 4th amendment rights. The 4th amendment's prohibition on searches/seizures applies only to those areas where a defendant has a reasonable expectation of privacy (e.g, the home). David had no reasonable expectation of privacy on the public sidewalk thus the officer did not need a warrant before seizing the marijuana cigarette. Because there is no 4th amendment violation, this marijuana cigarette can be used as evidence in David's prosecution.

d. The contents of the cellphone

Here, there are potentially two issues related to the government trying to use David's incriminating text's to Jake as part of their prosecution of David for vehicular homicide. First, the phone was seized as a result of David's illegal arrest in his apartment (without an arrest warrant) and therefore it is the fruit of the poisonous tree. However, one of the exceptions to the fruit of the poisonous tree exception is inevitable discovery, i.e., the evidence would inevitably been seized regardless of the illegal conduct. Here, the officer would likely have obtained the phone even if he had properly got an arrest warrant and then arrested David. And the officer could have legally searched David as a search incident to lawful arrest. Because law enforcement would have eventually gotten the phone, a court likely would not exclude this evidence under the fruit of the poisonous tree doctrine.

The second issue, is that the officer went through David's phone without first obtaining a search warrant. Although officers generally may search a person as a search incident to a lawful arrest, courts have held that due to modern technology and the amount of information we have on our cell phones (especially smartphones) people have a reasonable expectation of privacy in their phones and police generally need a warrant to search a phone. David would argue that even if the officer could legally seize his phone, the officer needed a search warrant before going through the phone, which he did not have. Therefore, David would argue the texts must be suppressed under the fruit of the poisonous tree doctrine because the officer searched his phone without a warrant. Law enforcement would argue that while generally people have a privacy interest in their phone, David did not because he did not include any passcodes on his phone that was needed to unlock it. Because the phone was not password protected, David would not have a reasonable expectation of privacy and thus the 4th amendment does not apply. This may be a close call as a court may still find one has a reasonable expectation of privacy in an unlocked phone, but ultimately, this likely won't matter as the evidence would come in even if it was illegally obtained under the inevitable discovery doctrine. Law enforcement would argue that they would have eventually sought a warrant for the phone as they spoke with Jake, who told them "everything" which presumably includes the texts David sent and that they also would have found the blood on David's motorcycle connecting him to the death. After this evidence, law enforcement would have probable cause to get a warrant to search David's phone and find the text. Because the police

would have inevitably found these texts anyways, they will likely come into evidence regardless of whether the initial search/seizure was lawful.

e. David's confession

Law enforcement would likely also try to admit David's statement that "She was in the middle of the Street! I didn't see her!" as evidence he committed the crime. David could try to exclude the evidence due to a violation of his miranda rights. Under the 5th amendment to the U.S. Constitution, any person who is in custody and undergoing interrogation must first be given miranda rights, otherwise, anything they say can be excluded. A proper miranda warning give a suspect notice that they have a right to remain silent, anything they do can and will be used against them in court, that they have a right to an attorney, and if they cannot afford an attorney one will be provided for them. Here, the officer never gave David a miranda right before David made the statement. Thus, if David can show he was (1) in custody and (2) the statement was a result of custodial interrogation, he can have his statement suppressed.

Whether someone is in custody depends on whether a reasonable person in their situation would have a reasonable expectation they could leave. At this point, he had already been placed in handcuffs in his apartment and was about to be placed in the patrol car. Thus he was in custody.

Whether something is an interrogation is whether the police make a statement or action that reasonably would make the suspect make incriminating statements. Here, although the police did not ask a question, the officer did show David the incriminating texts with the likely intent (and result) of David making the incriminating statements.

Because this was a custodial interrogation, and because the officer did not first read David his miranda rights, David's statement/confession would likely be excluded from evidence.

f. Jake's confession

It should also be noted that Jake's confession is admissible. Jake voluntarily let police inside his home (consent is an exception to the search/seizure requirement), there is nothing indicating that Jake was in custody, and Jake voluntarily told the officer about the prior evening. Thus, Jake's statements are admissible both as against Jake and David.

QUESTION NUMBER 3

FEBRUARY 2023 BAR EXAMINATION – TORTS/ETHICS

Betty and George were getting married. They hired Cutie Catering to prepare and serve food and beverages at the event. Betty told the company that none of the food at the wedding could contain peanuts because Betty's 6-year-old niece, Nancy, had a peanut allergy.

Shortly before the wedding, Cutie Catering was setting up tables with snacks for guests after the ceremony. One of the tables had a plate with a variety of cookies, some of which were peanut butter cookies. Cutie Catering had inadvertently switched the cookie plate for Betty's wedding with the cookie plate for another event.

While Cutie Catering was setting up the tables, Betty's Aunt Martha arrived with a plate of cookies as a wedding gift. Aunt Martha was unaware of Nancy's peanut allergy, and her cookies contained peanuts as well. Cutie Catering's employees allowed Aunt Martha to leave her cookies next to Cutie Catering's food.

Nancy then arrived at the wedding with her mother. While her mother was conversing with the guests, Nancy went over to the catering tables. Nancy ate one of Aunt Martha's cookies and one of Cutie Catering's peanut butter cookies.

The ceremony began soon thereafter. Nancy stood with the bridesmaids near Betty during the ceremony. As Betty and George took their vows, Nancy had a severe, peanut-related, allergic reaction. Her face swelled, she had difficulty breathing, and she collapsed. Nancy fell into Betty, who fell awkwardly and sprained her ankle. Betty and her guests were terrified and paramedics were called. Nancy recovered after the paramedics gave her emergency treatment. Nancy told her mother that she ate the cookies, which led to the discovery of the peanut-containing cookies from Aunt Martha and Cutie Catering.

The Miami Word, a local news outlet, heard about the incident and posted a story on its website with the headline: "Worst Caterer Ever: Cutie Catering Poisons Child, Ruins Wedding." The story reported that Nancy collapsed because of food poisoning from spoiled ingredients or unsanitary food preparation conditions.

Cutie Catering seeks advice from your law firm. Cutie Catering received a letter from Betty's lawyer threatening a lawsuit for damages. The letter argues that Betty has incurred medical expenses and lost wages as a dance instructor because of her sprained ankle. It also contends that Betty could not audition for the lead role in a musical production and has lost income because of that opportunity. Further, the letter maintains

that Betty is distraught after seeing Nancy suffer and because Cutie Catering ruined her wedding.

Cutie Catering was referred to your firm by Lawyer, who works in another firm. Lawyer has proposed that your firm pay her 10% of any fees earned as a referral fee, but she would otherwise not be involved in the matter.

1. Discuss the merits of potential tort claims by Betty against Cutie Catering and any arguments that Cutie Catering may assert against the claims.

2. Discuss the merits of a defamation claim by Cutie Catering against the Miami Word.

3. Discuss any ethical issues raised by the proposed representation.

SELECTED ANSWER TO QUESTION 3

(February 2023 Bar Examination)

I. Betty vs. Cutie Catering Claims

a. Negligence

Rule: In order to maintain a claim of negligence, the plaintiff must prove duty, breach, causation, and damages.

Duty:

Rule: People in Florida have a duty to all foreseeable plaintiffs. The duty is to act as a reasonable prudent person, and this is an objective standard.

Here, Cutie Catering (CC) owed a duty to Betty, as well as anyone else at the wedding, to act like a reasonable, prudent catering company at the wedding. They had the duty to use reasonable care in preparing and setting out the food for the guests. Thus, Betty can meet the first element of negligence.

Breach:

Rule: When a person deviates from the applicable standard of care, they are in breach.

Here, the facts say that CC "inadvertently" mixed up the cookies at Betty's wedding and the cookies for a different wedding, and thus put peanut butter cookies on the catering table. CC did this despite being explicitly warned that Nancy, Betty's niece, had a peanut allergy and that there could be no food with peanuts in it. As such, CC is in breach of the duty to act with ordinary reasonable care.

Causation:

Rule: In Florida, there is causation if there is both cause in fact and proximate cause. But for causation is actual causation, but-for the defendant's negligence, plaintiff would not have been harmed. However, when there are two or more actors responsible for indivisible injury, the actual cause test is met as long as the defendant's actions were a "substantial factor" in causing harm to the plaintiff. Proximate cause focuses on foreseeability. The question is whether the harm that resulted was a foreseeable consequence of the act that made defendant's actions negligent in the first place.

Here, Betty will argue that both cause in fact and proximate cause are present. CC could argue in response that it was ot the but-for cause, because Aunt Martha also brought peanut butter cookies and Nancy ate hers as well as CC's. Furthermore, CC will argue that it was Nancy falling on Betty that caused the harm. In response, Betty will argue that both CC and Aunt Martha's actions were indivisible and that each was a substantial factor in causing the harm. Moreover, Nancy getting sick and falling on Betty was the direct result of both CC and Aunt Martha's actions in leaving out the peanut butter cookies. As such, actual cause is met

because CC's actions were a substantial factor in harming Betty through Nancy.

The court will also find that proximate cause is met. The type of harm from negligently putting out peanut butter cookies is precisely what occurred to Nancy: that is, a child with a peanut allergy eating it and having an allergic reaction. It is further foreseeable that someone having an allergic reaction could fall on the person next to them, and harm them with the same way that Betty was harmed.

Damages:

Rule: In Florida, the measure of damages for negligence is compensatory damages. Compensatory damages are the damages necessary to put plaintiff back into the position they were in before the negligence occurred in order to make them whole. There must be a physical harm or harm to property. Pure economic loss is insufficient for negligence. However, should the plaintiff prove the requisite injury, then they are entitled to noneconomic damages like pain and suffering, but also economic damages like medical expenses and lost wages.

Here, Betty sprained her ankle and thus has the requisite personal injury. Thus, Betty has sufficiently proven all elements of negligence. Accordingly, she can recover for her medical expenses and lost wages. However, the lost income from the leading role is too remote to award as damages. This is because Betty merely had an interest in auditioning for the role, and had not actually secured the role.

b. Vicarious liability

In addition to the negligence analysis above, Betty may also prove vicarious liability against CC to prove negligence.

Rule: An employer is liable to an employee who causes harm to another when they were acting within the course and scope of their employment.

Here, the employees were the ones who inadvertently left out the peanut butter cookies. In addition, the facts say that the employees of CC "allowed" Aunt Martha to place her cookies on the CC's catering table next to their cookies. Accordingly, even if CC has not mixed up their cookies, they still would have been responsible for Aunt Martha's cookies ending up on the table, which led to the allergic reaction of Nancy, and thus CC can be liable because the facts show that CC's employees were acting within the scope of their employment.

c. Joint and Several Liability

CC, may try and argue that Aunt Martha is also at fault and that Betty should sue her.

Rule: At common law, a defendant could be held jointly and severally liable with co-tortfeasors. This meant that the plaintiff could go after anyone defendant for all of the harm and the defendant could then sue the co-defendant for their portion of the damages. However, Florida has abolished joint and several liability. As such, each defendant is only liable for their own proportional share of the harm.

Here, CC will only be sued based on the percentage of fault that is allocated to it, and will not be held jointly and severally liable with Aunt Martha.

d. Defenses to Negligence

Contributory/Comparative Negligence

CC, may argue that Betty and/or Aunt Martha were contributorily, or comparatively negligent.

Rule: Florida is a pure comparative fault jurisdiction. This means that the Plaintiff can still recover even if they were more at fault than the defendants. The plaintiff's share of fault would reduce their overall recovery, however, if the plaintiff were legally drunk and more than 50% at fault, then they would be barred from recovering.

Here, CC may argue that Aunt Martha was also negligent and thus the overall percentage of fault is reduced for CC. This is likely correct, and CC can have its portion of fault reduced. Furthermore, CC may argue that Betty was negligent as well. CC could argue that it was negligent to invite Aunt Martha without telling her about Nancy's allergies. It may have been negligent of Betty not to double-check the catering table. Furthermore, if Betty had been drinking at the wedding and it was proven that she was legally drunk, she may not recover anything.

Intervening and Superseding Causes

CC may try arguing that the peanut butter cookies brought by Aunt Martha and Nancy falling onto Betty which caused her sprained ankle are superseding causes and thus not foreseeable.

Rule: After the defendant's negligence, the defendant will be liable for all harm that is foreseeable. Foreseeable harm is called an intervening cause. Superseding causes, however, are not foreseeable and cut off the defendant's liability. Superseding causes are things like acts of god, intentional torts by third parties, and crimes by third parties. Negligence of others is foreseeable.

Here, CC will not be able to argue that Aunt Martha's conduct in brining peanut butter cookies or Nancy's allergic reaction to it are superseding causes cutting off CC's liability to Betty. This is because Aunt Martha was at best negligent, and Nancy's reaction to eating something she was allergic too was foreseeable.

e. NIED

Betty may also try to bring a claim for negligent infliction of emotional distress (NIED).

Rule: If a defendant places a plaintiff in the zone of danger, then a plaintiff may recover for sever emotional distress is there is a physical impact, or there is a physical manifestation of symptoms. If the plaintiff is a bystander, then there is still a way to recover for NIED. That is, the bystander plaintiff must have been closely related to the victim, the plaintiff must have

been in the presence of the victim, and the plaintiff must have perceived the injury.

Here, Plaintiff is closely related to Nancy, as Nancy is Betty's niece. She was there next to Nancy during the ceremony, and she personally perceived her severe allergic reaction. CC may argue that there was no physical impact or a zone of danger against Nancy. Rather, Nancy suffered from an allergic reaction due to the peanut butter cookies. However, a court may find that this is sufficient for bystander NIED liability provided the other elements are met. The reaction to the allergy sounded quite gruesome, with the swelling face and the collapsing, and the facts state that this made the guests terrified. However, there are no facts showing that Betty manifested any physical symptoms, and that will preclude recover.

Thus, Betty cannot recover for NIED.

f. IIED

Rule: To recover for Intentional infliction of emotional distress (IIED), the plaintiff needs to prove that the defendant acted intentionally or recklessly with extreme and outrageous conduct to cause Plaintiff severe emotional distress, and that plaintiff did suffer severe emotional distress. Extreme and outrageous conduct is conduct outside the bounds of civilized society. In addition, Plaintiff does not need to manifest physical symptoms.

Here, Betty may try and argue that CC is liable under an IIED cause of action. However, she will not be able to prevail. The facts do not show that CC was intentional or reckless by putting out the peanut butter cookies. At best, CC was negligent. Therefore, Betty could not recover for IIED.

g. Battery

Rule: To bring a battery claim, the plaintiff needs to show that the defendant intentionally caused a harmful or offensive contact with Plaintiff or plaintiff's person, and that such contact occurred.

Here, Betty may argue that it was CC's actions that caused Nancy to fall onto Betty which caused her to sprain her ankle. However, the facts do not show that the actions by CC were intentional. Thus, she will not be able to recover for battery.

II. CC vs. Miami World re: Defamation

Rule: In Florida, a statement is defamatory if it is a false statement of fact (not opinion) of and concerning the plaintiff, which harms the plaintiff's reputation with publication and fault. Publication means that the statement was heard and understood by a third party. The level of fault depends on whether the plaintiff was a public figure. Finally, there are special rules for media defendants.

Defamatory statement:

Here, the elements of a defamatory statement are met. First, the first part of the statement "Worst Caterer Ever" is opinion. The statement that "Cutie Catering Poisons Child, Ruins Wedding" is about CC, the plaintiff, and it would certainly harm the plaintiff's reputation. It was printed in the newspaper, and thus publication is met. Miami World could argue that the statement was true, which is an absolute defense to defamation. This is because Miami could technically argue that the allergic reaction was essentially food poisoning. However, CC can very likely rebut this with the report in the story which specified that the "poisoning" was due to spoiled ingredients and unsanitary food preparation. Nothing in the facts suggests that this is true, and therefore CC can prove that Miami made a false, defamatory statement.

Fault:

The requisite level of fault turns on whether CC is a public or private figure

Rule: A public figure must prove that the defendant made the defamatory statement with actual malice: that is, knowledge that the statement was false or reckless disregard for the truth. If plaintiff is a private figure, than all they must prove is negligence. A public figure is generally a celebrity or someone who holds themselves out to the public or involves themselves in topics of public concern.

Here, it would be hard for Miami World to argue that CC is a public figure. They are a wedding catering company and there are no facts indicating that they put themselves out there or inject themselves into the public eye. As such they need only prove negligence. The fact that the story got the facts completely wrong is most likely sufficient proof of negligence.

Libel vs Slander

Rule: Libel is printed defamation, slander is spoken. Slander requires actual proof of damages, unless slander per se, while. Libel does not require such proof. However, libel by a media defendant does require proof of damages, and damages are never presumed. Furthermore, against a media defendant, the plaintiff can send a request for a retraction, and, if the media defendant complies, then plaintiff is limited only to actual damages.

Here, the defamatory statement is printed in a newspaper and thus libel. In addition, as a media defendant, Miami World should have been contacted for a retraction by CC. Moreover, there are no facts indicating that CC suffered actual, pecuniary loss. Thus, because Miami World is a media defendant, CC will not prevail absent some evidence of actual harm.

III. Ethical Concerns re: Referral fee

Rule: the RPC forbids mere referral fees. Fee sharing is okay, as long as there is proper division of fees with the other lawyer, there is an agreement with the client setting out the joint representation, and the agreement sets out the proportionate share and division of the work.

Here, Lawyer is merely seeking a 10% referral fee. She would not otherwise be involved in the matter. This violates the RPC and therefore Lawyer's proposal must be turned down. This is because there would be no actual division of work and there would not be a true joint representation.

PART II - SAMPLE MULTIPLE-CHOICE QUESTIONS AND ANSWERS

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

The answers appear at the end of this section.

Applicable Law

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

MULTIPLE-CHOICE EXAMINATION INSTRUCTIONS

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

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

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

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

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

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

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

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

8. Use the instruction sheet to cover your answers.

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

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

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

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

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

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

46 SAMPLE MULTIPLE-CHOICE QUESTIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

    Which is true?

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

ANSWER KEY FOR MULTIPLE-CHOICE QUESTIONS

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

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