

Florida Board of Bar Examiners

ADMINISTRATIVE BOARD OF THE SUPREME COURT OF FLORIDA

Florida Bar Examination Study Guide and Selected Answers

**July 2012
February 2013**

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

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PART I – ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2012 AND FEBRUARY 2013 FLORIDA BAR EXAMINATIONS

ESSAY QUESTIONS AND SELECTED ANSWERS

Part I of this publication contains the essay questions from the July 2012 and February 2013 Florida Bar Examinations and one selected answer for each question.

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

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

ESSAY EXAMINATION INSTRUCTIONS

Applicable Law

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

Acceptable Essay Answer

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

Q QUESTION NUMBER 1

JULY 2012 BAR EXAMINATION – CONTRACTS/ETHICS/FLORIDA CONSTITUTIONAL LAW

On January 30, Buyer made an offer to buy Seller's Florida home for \$200,000, which Seller owned in his name and where he lived without his wife and children for three months annually. On February 2, Seller made a counteroffer to Buyer in the amount of \$225,000, which provided that Seller would hold the offer open for ten days. Seller's offer required Buyer to deliver a deposit in the amount of \$25,000 upon Buyer's execution of Seller's offer, but Seller's offer was not supported by any separate consideration. On February 4, Buyer made an offer in the amount of \$212,500. Seller did not respond to Buyer's February 4 offer. All offers and counteroffers were made in writing.

On February 6, Buyer signed Seller's February 2 counteroffer in the amount of \$225,000, which also contained all other material contract terms for the sale. Buyer's Attorney then delivered the contract to Seller's Attorney with the requisite \$25,000 deposit check. In accordance with Seller's instructions, Seller's Attorney deposited the check into Seller's Attorney's trust account, which account included funds from other clients as well as from Seller's Attorney's own business venture. The balance of Seller's Attorney's trust account was over \$750,000 at the time.

On February 8, Seller sent Buyer a written amendment to the \$225,000 contract that increased the purchase price to \$250,000 and also listed certain personal property items included with the sale. Buyer executed the amendment but wrote in four additional personal property items to be included as well. Buyer then placed her initials by all four additional personal property items and returned the executed amendment to Seller. Seller initialed some but not all of Buyer's additions and returned the amendment to Buyer without otherwise indicating Seller's acceptance of those terms. Buyer then proceeded to prepare for closing.

The contract's remedies provision entitles Seller to keep Buyer's deposit (with interest) if Buyer defaults, however, upon Seller's default, Buyer is entitled to either a return of the deposit (with interest) or specific performance.

Seller has refused to proceed with the sale. Please discuss Buyer's potential claims, Seller's defenses, and the likely outcome on this matter. Please also address any ethical issues presented in this case.

SELECTED ANSWER TO QUESTION 1

(July 2012 Bar Examination)

This question concerns a contract for the sale of real property which is governed by common law rather than the UCC. To have a valid contract, there must be an OFFER, ACCEPTANCE, CONSIDERATION and NO VALID DEFENSES. Contracts for the sale of real property are subject to the statute of frauds. Under the statute of frauds, contracts for the sale of real property must be in writing and signed by the party to be charged in order to be enforceable.

The main issue is whether a valid contract was formed between buyer and seller.

BUYER'S JANUARY 30 OFFER

This is a valid offer. If accepted by Seller, a valid contract would have been formed. However, the offer was not accepted (see below)

SELLER'S FEBRUARY 2 COUNTEROFFER

A counteroffer is considered a rejection of the original offer and the making of a new offer. By making a counteroffer, the Seller effectively rejected Buyer's January 30 offer (which terminates the offer) and made a new offer with different terms. The mirror image rule dictates that an acceptance must match exactly the terms of the offer in order to be an effective acceptance. Because Seller's counteroffer changed the terms of Buyer's original offer, the mirror image rule is not satisfied, and Buyer's original offer is rejected.

Issue – is Seller's promise to keep the offer open for 10 days enforceable? Rule – In Florida, consideration can be either a legal benefit to one party OR a legal detriment to the other. A promise to keep an offer open for a specified amount of time is considered an option contract and is only enforceable if valid consideration exists for the option. This is different than under the UCC which uses the firm offer rule if the seller is a merchant. The UCC firm offer rule does not apply here. Application – Buyer will argue that Seller's counteroffer included an option to contract to keep the offer open for 10 days. Seller will argue that the promise to keep the offer open was not supported by valid consideration. Conclusion – Here, there does not appear to be any additional consideration for the option contract, so the promise to keep the offer open is not enforceable.

BUYER'S FEBRUARY 4 COUNTEROFFER

A counteroffer is considered a rejection of the previous offer and the making of a new offer. By making a counteroffer, Buyer effectively rejected Seller's February 2 counteroffer (which terminates the offer) and made a new offer with different terms. The mirror image rule dictates that an acceptance must match exactly the terms of the offer in order to be an effective acceptance. Because Buyer's counteroffer changed the terms of Seller's previous counteroffer, the mirror image rule is not satisfied, and Seller's February 2 counteroffer is rejected.

Issue – did Seller accept Buyer’s February 4 Counteroffer? Rule – The terms of the offer control the method of acceptance. Silence is generally not considered acceptance. Application – Here, Seller’s failure to respond would not be considered acceptance. Conclusion – Seller did not accept Buyer’s February 4 Counteroffer.

BUYER’S FEBRUARY 6 SIGNATURE

The January 30 offer and February 2 counteroffer were both rejected. The February 4 counteroffer was not actually rejected, but it was also not accepted.

Issue – Did Buyer accept Seller’s February 2 counteroffer? Rule – Once an offer is rejected by the offeree, it can’t later be accepted. Application – Buyer will argue that by signing the February 2 counteroffer on February 6, he effectively accepted Seller’s Counteroffer. Seller will argue that Buyer rejected the February 2 counteroffer by making the February 4 counteroffer. Conclusion – Seller’s argument is stronger – Buyer cannot accept Seller’s February 2 counteroffer because he already rejected it.

Issue – Did Buyer make a new offer to Seller by sending back the signed February 2 counteroffer with the deposit check? Application – Seller will argue that Buyer could not accept the February 2 counteroffer on February 6 because he already rejected it. Buyer will argue that by returning the signed February 2 counteroffer with the deposit check, he effectively made a new counteroffer which Seller was free to accept or reject.

Conclusion – here, Buyer’s argument is stronger and this will probably be considered a new counteroffer.

SELLER’S ACCEPTANCE

Issue – Did Seller accept Buyer’s February 6 offer? Rule – The terms of the offer control the method of acceptance. If not specified in the offer, the offeree may accept by any reasonable method. Application – Seller will argue that he did not accept because he did not affirmatively manifest assent to the contract. Buyer will argue that Seller accepted by instructing his attorney to deposit the check and by later sending an amendment to the contract. Conclusion – Buyer’s argument is stronger and Seller will be considered to have accepted Buyer’s February 6 counteroffer. Therefore, Buyer and Seller have a valid contract as of February 6 for the sale of the house for \$225,000.

FEBRUARY 8 AMENDMENT

Issue – Is the February 8 Amendment valid? Rule – at common law, contract modifications must be supported by new consideration. In Florida, consideration is a bargained for exchange and can be a legal benefit to one party or a legal detriment to the other. The terms of acceptance must match the terms of the offer under the mirror image rule. Application – The February 8 amendment consisted of a price increase in exchange for certain listed personal property. Therefore, the consideration requirement is satisfied. However, Seller will argue that the terms of the acceptance were different than the terms of the offered amendment because Buyer wrote in four additional items of personal property, and that this constituted a counteroffer. Seller’s initialing of some but not all of the items constituted another counteroffer which was never accepted by Buyer. Seller’s argument is stronger – although there is valid consideration for the

amendment, there was never a meeting of the minds due to the mirror image rule, so the amendment is probably not included in the contract.

HOMESTEAD PROPERTY

Issue – is this property subject to homestead protection? Rule – homestead property is subject to special rules designed to protect the spouse of the owner. Homestead property cannot be sold without the consent of the owner's spouse. Application – this is probably not homestead property because it is not the Seller's primary residence – he only lives there for one quarter of the year. Further, his wife and children do not live in the home. Conclusion – this house is not subject to homestead protection and Seller can sell it without his wife's consent.

BREACH

Issue – did Seller breach the contract? Rule – There is a valid enforceable contract if there is an offer, acceptance, consideration and no defenses. Application – Seller will argue that there is no valid contract for the reasons discussed above. Buyer will argue that there is a valid contract for the reasons discussed above. The contract is in writing and satisfies the statute of frauds. Seller has no valid defenses. Conclusion, as discussed above, there is a valid contract for the sale of the house at \$225,000, and Seller's refusal to proceed with the sale is a breach of that contract.

BUYER'S CLAIMS

Buyer will sue Seller for breach of contract. Buyer can seek the return of his \$25,000 deposit plus damages resulting from the breach, OR specific performance. Specific performance is an equitable remedy that is available when remedies at law are insufficient. Remedies at law are insufficient when the subject of the contract is unique, such as real property. Therefore, Buyer would likely win in a suit for specific performance. Alternatively, Buyer would be entitled to the return of his \$25,000 plus any damages caused by Seller's breach. Damages would be calculated based on the market value of the property at the time of the breach minus the contract amount.

However, as discussed above, the February 8 amendment will not be enforceable. The contract price will remain 225,000 (NOT 250,000) and the personal property will not be included.

ETHICAL ISSUES

Attorneys are prohibited from comingling their personal funds with funds belonging to clients (funds in the trust account). Exception – attorney's may place enough of their own funds in their trust account to cover small bank fees. Attorneys are prohibited from allowing overdraft protection on their trust accounts. Here, Seller's attorney has committed a serious ethical violation by comingling his trust account with the funds from his own private business venture. Attorney is subject to discipline for this violation.

Q QUESTION NUMBER 2

JULY 2012 BAR EXAMINATION – FLORIDA CONSTITUTIONAL LAW/REAL PROPERTY

Ann, Bob, Cynthia, and Derek inherited equal one-fourth shares of an abandoned building in Florida. Shortly after receiving her one-fourth share, Ann transferred it by deed to her husband, Anthony, and herself “as husband and wife.” Bob, although married to Barbara, retained his share in his own name. Cynthia is single. Derek is divorced.

Subsequently, a child was severely injured while playing in the building. The owners have been advised by their defense counsel to expect a large judgment against them. There is no applicable liability insurance.

Ann and Anthony own a mobile home on a one acre lot in the city of Apopka, Florida, where they live six months out of the year. The remaining six months of the year they live with their oldest daughter in North Carolina. They also have a modest savings account in the name of Anthony and Ann, “as husband and wife.”

Bob and Barbara own and live in a very luxurious home on a 10 acre lot in unincorporated Brevard County. They also have a savings account in the name of Bob and Barbara, “as husband and wife.” Additionally, they have a collection of valuable artwork they have accumulated during their marriage.

Cynthia owns and lives in a condominium in Clearwater. She and her boyfriend, Carl, also own a half-acre undeveloped, vacant parcel of land in Citrus County as joint tenants with a right of survivorship. They are getting married next month and intend to build their marital home on the Citrus County lot.

Derek lives in a rental apartment in Daytona Beach, but still owns in fee simple his former marital home in Deltona. His ex-wife and their two minor children (ages 5 and 8) still live there.

You have been retained by the owners to advise them of the status of their above-mentioned assets should collection efforts be eventually undertaken as a result of this pending judgment. Do not discuss the asset of the abandoned building where the child’s injury occurred. Prepare a memorandum setting forth your advice. Do not discuss any bankruptcy laws in your memorandum.

SELECTED ANSWER TO QUESTION 2

(July 2012 Bar Examination)

Memorandum

Because Florida has done away with joint and several liability, each landowner will likely have a judgment entered against them for 1/4 of the amount of the total judgment, unless the jury finds that one party had a greater responsibility. The property is likely to be held by tenancy in common between the 4 grantees. The owners hold the property as tenants in common as follows:

1/4 ownership by Ann (A)

1/4 ownership by Bob (B)

1/4 ownership by Cynthia (C)

1/4 ownership by Derek (D)

After a judgment is rendered in Florida, it is not a lien on real property unless a certified copy of the judgment is recorded in the county in which the real property is located. Additionally, a judgment is not a lien on personal property unless a certified copy is filed with the Secretary of State and a Judgment Lien Certificate is issued. The Judgment then becomes a lien on all non-exempt personal property located in the state that is now or in the future owned by the judgment debtor. Assuming that the judgment is properly recorded with the Secretary of State and in the counties where the various pieces of real property are located, the following is the likely result.

Collection Efforts Against A:

Generally a testamentary gift or inheritance by one spouse during a marriage is considered non-marital and held only by that spouse. However, in Florida, property that is acquired during a marriage in the name of both spouses is presumed to be held in Tenancy by the Entirety (TBE). TBE is a form of joint ownership that is similar to joint tenancy in that it includes the right of survivorship and requires the unity of (1) title; (2) interest; (3) time; (4) instrument. Additionally, property held in TBE is exempt from the execution and forced sale of creditors of only one spouse. The TBE ownership is considered that of a marriage and can only be severed by death, divorce, consent of both parties to the marriage to sell or mortgage, or execution by a joint creditor.

When A transferred her 1/4 share to Anthony and herself, a presumption arose that the property was held in TBE, unless the parties expressly provided otherwise. In Florida, a straw-man is not required to transfer property from one spouse and create a TBE. Because it was held in TBE when the child was injured, both A and Anthony are likely to be held liable for the judgment. As such, property held by them as TBE may be subject to execution by the creditor and forced sale.

The money that is held in the savings account is in both names and presumed to be held in TBE. Therefore, without some reason for its protection, the money may be garnished by the judgment creditor. However, in Florida, wages of the head of household are exempt from garnishment for 6-months after they are received, even if placed in a bank. If the funds are commingled, they lose their protection to the extent they cannot be traced. Therefore, one of the parties would have a right to claim exempt the money that could be traced to their wages if they so claim after a writ of garnishment

is issued and they can establish that they are the head of household (which requires a showing of providing 50% or more support to a dependent, the other spouse in this instance). Additionally, in Florida, homestead exemptions (not real property) include a \$1,000 exemption for personal property. Therefore, they may claim this exemption as well.

A should also argue the mobile home on the one acre lot in Apopka is the couples homestead. Article X Section 4 of the Florida Constitution exempts from execution and forced sale by creditors up to 1/2 acre of contiguous land within a municipality and up to 160 acres of contiguous property outside of a municipality if the property is a homestead. To establish a homestead, an individual must be a Florida resident and must have intent to establish that place as their home and actually live there. There is a strong presumption of protection of homestead and courts construe the law to permit the claiming of a homestead where the facts can establish one. Once homestead is established, it may be abandoned if the homesteader leaves the property with the intent to no longer make it their regular abode.

In the instant case, A and Anthony may have a few issues with the homestead. First, the property is located within a municipality and is more than 1/2 acre. Therefore, at least some of the property may not be protected as homestead. However, as stated above, the courts liberally construe the homestead rights in Florida, and the result will likely be that, if it is found that the property is within a municipality and more than one acre, the court will partition off 1/2 acre for execution and sale and allow the couple to keep the remaining 1/2 acre as their homestead.

Secondly, the couple does not live in the home full-time. They split their time nearly 50/50 between North Carolina and the property. If the homestead was established prior to the couple's custom of visiting their daughter during the summer, it is likely that the court will find that their actions were insufficient to find an abandonment. Even if they have never continually lived in the home, the ownership, taken with other factors including their cohabitation in the home for a number of months and the fact that they return to the home without their daughter every winter, will still likely be enough to establish the homestead and, therefore, protect the property from the creditor.

Finally, whether the mobile home is titled separately or is annexed to the property is an important question. If it is titled separately, it may be considered a motor vehicle that does not qualify as a homestead. If it is, the couple may attempt to claim the exemption for a personal vehicle up to \$2000, but the court will likely determine that a mobile home does not qualify. If the title has been retired, however, it is sufficiently annexed to the property to be considered part of the homestead estate.

If the court does not find the home is homestead property, the TBE ownership will not protect the couple because the judgment creditor is a joint creditor. Therefore, the lien will attach when it is filed in the property records and the creditor may execute and foreclose the lien, effecting a judicial sale. The couple will have the right, however, to pay off the lien before the sale under the doctrine of equitable redemption.

Bob's Property:

B did not transfer his ownership in the abandoned building to his wife and, for the reasons discussed above, it is likely that he will be considered the sole owner of the

property (inheritance by spouse during marriage is not marital property and no transfer to spouse occurred in facts). Therefore, child is not a joint creditor of their marriage. Because the child is not a joint creditor, the property held by the couple in TBE is not subject to execution by a creditor of B's alone. Therefore, the savings account which is presumed to be owned in TBE (See above) will likely not be subject to garnishment by the child. If it is, the same arguments may be made regarding Florida protections for head of household wages and personal exemption (see above).

If the home in Brevard is owned in TBE or in Barbara's name, it cannot be executed on and sold (see above). Even if it is owned solely by B, however, the home will still be a protected homestead (see above for analysis). The facts state that the home is less than 160 acres and is in an unincorporated area. While it may be "luxurious" there is no value limitation on a homestead in Florida. Any value that is put into the homestead property is protected from being reached by creditors. Both B and his wife have likely established the property as their homestead, and it therefore protects the house from execution, but even if only one had a homestead right, that would be sufficient (see discussion in section regarding D, below).

The Artwork is likely not protected by the homestead (although it may be exempted up to \$1000 for their personal property exemption). However, if property is acquired during the marriage with marital funds it is presumed to be marital property and held as TBE. If the artwork qualifies as marital property owned in TBE, it will also be exempt from sale of a creditor of B only.

Cynthia's Property:

The condo in Clearwater is likely C's homestead. Florida courts' have applied the homestead to a number of types of homes (one case held that a houseboat was sufficient to qualify as a homestead if it was immobile). So long as the other requirements of establishing a homestead exist (see above) the condo will be exempt from sale.

The 1/2 acre of land in Citrus County owned as Joint tenancy (JT), however, will not qualify as a homestead. A party may have only one homestead and it is a requirement that party live there and establish homestead prior to the attaching of the lien by a judgment creditor (lien attached at time of recording as explained above). The facts indicate that C does not live on the property, and it is vacant. However, because the property is held as JT, the creditor may only attach C's interest. Her boyfriend's interest will be unaffected by the attachment. Because Florida is a lien theory state, the lien will not sever the JT and the creditor must execute and sue for partition to sever the JT. If C marries before the certified copy is recorded in Citrus County, they could retitle the property in both names after the marriage and created a TBE, this would likely protect the entire property (see above) but may cause issues with Florida's Uniform Fraudulent Transfer Act if it was done with actual or constructive intent to defraud the creditor, especially because Carl would not be considered a bona fide purchaser for value (BFP) because he did not pay for the interest and would therefore not cut off the rights of the creditor to reverse the transaction.

Derek's Property:

Derek had established a homestead in the home in Deltona, however, he likely abandoned it when he moved out and got an apartment. Because he is in a rental apartment, that is not a homestead as he has no interest that could be attached by the creditor. If he abandoned the Deltona homestead, he will not be able to claim it as HIS homestead (see above). However, the Homestead rights created by the Florida Constitution are construed to protect the "family home." Therefore, the property is likely the homestead of D's ex-wife and child. A person, especially a minor child doesn't have to own the property to have homestead protections, the protections simply must exist prior to the lien on the property. Here, the fact that the minor's and the ex-wife live in the home will be enough to protect the home from sale based on their homestead rights, at least until they abandon the homestead. Florida follows a notice statute for interest in land and the creditor may argue his lien is sufficient because there was no notice that the homestead rights existed in the children or wife. He will argue he is a BFP that took without notice. In Florida, if there is a property right not recorded, it gives rise to the presumption that a subsequent BFP took without notice. However, case law requires a BFP to go inspect the property and here, that would have shown the children and ex living there. Further, the judgment creditor is not a BFP and therefore will not win in as against the wife and children upon a claim that he took the property without notice, because he did not give value. Judgment creditors, in Florida, are not considered BFPs. A court may grant the judgment creditor a lien, but prohibit him from foreclosing until the children reach the age of majority or they abandon the homestead. Therefore, D's home is probably protected, additionally, because he has no homestead of his own, D is likely entitled to exempt an additional \$5K of personal property from execution under Ch. 222, Fla. Stat.

Q

QUESTION NUMBER 3

JULY 2012 BAR EXAMINATION – TRUSTS

Samuel is a Florida resident. Five years ago, Samuel finalized a divorce and is now single. Samuel has two adult children, Brenda and Brian, from his prior marriage.

Two years ago, Samuel called his friend, Thomas, and left the following message on Thomas's voicemail: "Thomas, you have been such a great friend since we were 11 years old. You are the only person that I can trust. So I am going to give you all of my ACME stock to hold in trust for my two children until the stock is gone. I want you to liquidate the stock, as necessary. Please make monthly distributions of \$10,000 to Brian. As for Brenda, you can make \$10,000 monthly distributions to her in your discretion. You can also make \$5,000 distributions to one charity in your discretion as you may deem appropriate. Brian and Brenda cannot voluntarily or involuntarily transfer their interests in this trust. Also, this trust will be irrevocable. Will you do me this favor?"

That same day, Thomas called back Samuel and, without modification, accepted Samuel's request to hold the stock in trust. Samuel did not put anything in writing, but Thomas did save the voicemail. Upon Thomas's acceptance, Samuel immediately transferred all of his ACME stock, valued at \$5 million dollars, to Thomas. Thomas immediately began making \$10,000 monthly distributions to both Brenda and Brian. Six months ago, Thomas began making \$5,000 monthly distributions to his favorite charity called "Charity Foundation." At that time, Thomas also began taking a 10 percent fee on the distributions (or \$2,500 per month) as compensation for his time and payment of his expenses related to the management of the trust.

Credit Co. recently obtained a judgment against Samuel, Brian, and Brenda for monies owed on a defaulted loan. Brenda has also fallen behind in her court-ordered support payments to her ex-husband, Hubert. Credit Co. and Hubert are seeking to exercise their rights to collect. Brenda and Brian are demanding that Thomas cease making distributions to Charity Foundation.

Thomas came to your law firm seeking advice on how to proceed in light of the various claims and demands being made. The senior partner requests that you prepare a legal memo with your reasoning and conclusions as to the following issues:

- the validity of the trust;
- the claim of Credit Co.;
- the claim of Hubert;
- the demand of Brenda and Brian to cease distributions to Charity Foundation; and
- the 10 percent fee being taken by Thomas.

SELECTED ANSWER TO QUESTION 3

(July 2012 Bar Examination)

LEGAL MEMORANDUM

TO: Senior Partner

FROM: Junior Associate

DATE: July 24, 2012

RE: Reasoning and Conclusion as to Questions Raised by Thomas

There are two types of trusts: (1) express and (2) implied. Express trusts are created by the settlor's expressed intention to create the trust relationship and are generally categorized as private or charitable trusts. The trust relationship is a legal relationship where one party holds legal title to property, pursuant to a fiduciary duty to manage and distribute the trust property for the benefit of a third party. Private trusts are for certain identifiable beneficiaries, where a charitable trust must be for a reasonably large unidentifiable group of the public and must be for a charitable purpose. Implied trusts are not really trusts but equitable remedies imposed by the courts. A resulting trust is a reversionary interest based on the presumed intent of the settlor. A constructive trust is imposed to prevent unjust enrichment due to fraud or wrongful conduct. Under a constructive trust, the trustee's only duties are to deliver the trust property to the person who would have taken it absent the wrongful conduct. Trusts in Florida are revocable unless expressly irrevocable.

1. The Validity of the Trust

A valid private trust requires: (1) a settlor; (2) who delivers (3) legal title to trust property; (4) to a trustee with enforceable duties; (5) for the benefit of beneficiaries; (6) with the present intent to create a trust relationship; and (7) a valid purpose. A settlor is a property owner with the capacity to convey property. Here, Samuel is the settlor. Nothing in the facts suggests that he cannot convey his stock. If an inter—vivos (created during the settlor's lifetime) trust is created in favor of a third party, then the settlor must deliver the property to the trustee. No delivery is needed when the trust is testamentary (effective at death) or when the settlor is the trustee. Here, Samuel was attempting to create an inter-vivos trust in favor of third parties (his two children) and so delivery was necessary. Samuel did in fact deliver property; his stocks, to Thomas (T). Trust property must be certain and identifiable, it cannot be a mere expectancy. Any property capable of being conveyed will satisfy this requirement. Here, Samuel's interest in his stock was certain and identifiable, and he delivered legal title of it to T. T was named the trustee and he had enforceable duties. A trust must have a trustee of legal age and capacity to enter into K's. Here, there is nothing to indicate that T was not an adult or lacked capacity. A trust will not fail for lack of a named trustee, or if the trustee disclaims the position or resigns. Instead, if another person is named in the trust instrument they will be appointed trustee, or a court will appoint one. Also, a settlor can be both the settlor and trustee. The only prohibition is on a person being the sole

trustee and the sole beneficiary, as there must be someone to enforce the trustee's fiduciary duties. Here, T appears to be a valid trustee. A trustee must also have duties. Here, T had three duties: (1) to make mandatory distributions to Brian; (2) to make discretionary distributions to Brenda; and (3) to select a charity to give distributions to in his discretion. Next, Samuel named specific and identifiable beneficiaries. Therefore, it appears it was his goal to create a private and not a charitable trust. A trust must contain ascertainable beneficiaries. A class can satisfy this requirement, as long as its members are definite. Here, naming Brenda and Brian satisfied this requirement. Samuel also told T he could select a charity of his choice to make a distribution to. This appears not to be an ascertainable beneficiary. However, under Florida law, a settlor may give the trustee discretion to select a beneficiary from an indefinite group of beneficiaries. Here, Samuel gave T the ability to select a specific charity (which will be ascertainable) from an indefinite group (charities). This is valid under Florida law as long as T exercises it within a reasonable time. Here, T exercised this power after a year and a half. Brenda and Brian may have an argument that this was not a reasonable amount of time. If they succeed in this argument, then a court would impose a constructive trust in their favor, as they would have been the ones to take the property if the power was not granted (see rule for constructive trust above). The settlor must have the present intent to create a trust relationship; this means he must intend to convey legal ownership on one party to manage the property for the benefit of the other. Here, Samuel appears to have intended to give his stock to T to manage on behalf of Brian and Brenda. An argument could also be made though that he lacked the requisite intent. His words "will you do me this favor?" could be construed as prefatory language which does not satisfy the intent element. However, a court would likely find this language was dealing with whether T would serve as trustee, and was not prefatory language. Lastly, a trust must have a valid purpose. This is liberally construed and means it must be a legal purpose and cannot violate public policy. Examples of trust purposes that have been found to violate public policy are: (1) restraints on the ability to enter into a marriage; (2) restraints on freedom to practice one's religion; (3) encouraging divorce; and (4) encouraging the commission of a crime. Here, Samuel's purpose for the trust appears to have been to provide support to his children and protections from their creditors by creating a spendthrift trust (see discussion below). This is likely a valid purpose.

Although this is likely a valid trust, there are several issues that should be discussed as to its enforceability. First, the Rule Against Perpetuities (RAP) applies to trusts in Florida. In Florida, unvested interests in a trust will fail unless: (1) they are certain to vest within 21 years of a life in being at the time the instrument becomes effective; or (2) it actually vests within **360** years of creation. Here, Brenda and Brian's interests are vested because they are ascertainable named beneficiaries and there are no conditions precedent to them taking their interest. Consequently, RAP does not apply. Next certain trusts must be in writing and satisfy the Statute of Frauds. A trust conveying an interest in **real property** must be in writing and satisfy the Statute of Frauds. Here, if the trust was for real property it would likely be invalid, as it was an oral trust captured on T's answering machine. However, it was for bonds. An oral trust for personal property can be valid in Florida if shown by clear and convincing evidence. Although normally this is a high burden, it could likely be established here because T saved the voicemail. Further, nothing in the facts indicate that Samuel died, and therefore he could testify as to his intent to create a trust, satisfying the clear and convincing

requirement. Lastly, testamentary trusts or revocable trusts containing testamentary disposition must be in writing and satisfy the formalities of the Statute of Wills. Here, if this requirement applied, the trust would fail as it was created pursuant to an oral voice mail, was not in writing and was not made before two subscribing witnesses. However, this trust was inter-vivos, as Samuel is still alive, and did not make any dispositions contingent upon his death. Therefore, it likely was not required to satisfy the Statute of Wills.

Lastly, it appears that Samuel attempted to create a spendthrift trust. A spendthrift trust prevents voluntary or involuntary alienation by a beneficiary of his interest. This is included because the general rule is that a beneficiary can freely transfer his interest in the trust, subject to any conditions on it. To be valid, the provision must prohibit both voluntary **and** involuntary restraints on alienation. The effect is that the beneficiary cannot voluntarily convey his interest, and the beneficiary's creditors cannot reach his interest. Here, Samuel prohibited both voluntary and involuntary alienation, therefore creating a valid spendthrift provision. Although spendthrift provisions are restraints on alienation, they are valid and enforceable in Florida. The exception to this is that they are not enforceable against the settlor's creditors. A settlor's creditors can reach trust assets if it is a revocable trust or an irrevocable trust where the trustee has discretion to make distributions to the settlor. Here, as an irrevocable trust in favor of third parties (Brenda and Brian) Samuel's creditors would have no recourse against the trust property. In conclusion, Samuel's trust is likely a valid, enforceable, irrevocable trust in favor of a third party with a valid spendthrift provision.

2. The Claim of Credit Co.

Credit Co. has a claim against Samuel, Brian and Brenda which it wishes to enforce against the trust property. As to its judgment against Samuel, any spendthrift provision would be invalid (see rule above). However, Samuel did not attempt to create a spendthrift provision in his favor, as the trust is exclusively for the benefit of Brian and Brenda. He also expressly made it irrevocable. Consequently, Credit Co. has no claim against the trust as a creditor of Samuel. Next, Credit Co. wishes to reach the trust property as to its judgment against Brian and Brenda. Generally, a creditor of a beneficiary can reach whatever amount the beneficiary is **entitled** to. Here, if there was no spendthrift provision, Credit Co. would be able to reach the 10,000 a month distribution to Brian, because Brian was entitled to this (T had no discretion). On the other hand, when a trustee has the sole discretion of whether to make a distribution to a beneficiary, neither the beneficiary, or in turn his creditor, have any right to reach the trust res until it is actually distributed to the beneficiary. On these facts, even without a spendthrift, Credit Co. could not reach Brenda's distribution because she had no right to it; it was within the sole discretion of T whether to distribute it. However, it appears Samuel created a valid spendthrift provision (see rule above). Therefore, Credit Co. could not reach the assets of Samuel, Brian, or Brenda. However, it can reach the assets when they are distributed to the beneficiaries.

3. The Claim of Hubert

Hubert, Brenda's ex-husband is seeking to reach the trust res to satisfy arrearages in support payments owed by creditors. The general rule, is that creditors, such as Hubert, cannot reach a trust Beneficiary's interest in the trust if there is a valid spendthrift provision (see rule above). However, there is an exception to this protection for child support or alimony arrearages. Therefore, Hubert would not be prevented from reaching the trust res by the spendthrift provision. The problem is, that Brenda is not entitled to distributions. Any distributions to be made to Brenda are to be within the sole discretion of T. Therefore, Hubert cannot compel the distributions. I would advise T that whether to make a distribution to Hubert is within his sole discretion, and his decision will likely not be second-guessed by the court.

4. The demand of Brenda and Brian to cease distributions to Charity Foundation

The distribution to the charity foundation of 5,000 a month is likely permitted by the trust. Samuel advised T that he could make a 5,000 a month distribution to a charity of his choice. It is permissible to allow a trustee to select a beneficiary under Florida law (see rule above). However, Brenda and Brian could argue that this power was not exercised in a reasonable time. T waited a year and a half to exercise this power. If Brian and Brenda could show this was not a reasonable time, then a court would likely find that T no longer had the power. If T did not stop making distributions, and a court found the power did not exist any longer, the beneficiaries would have the right to get an order to compel T to stop making them.

5. The 10 percent fee being taken by Thomas

Trustees are entitled to reasonable compensation for administering a trust. The amount paid to the trustee is deducted from the trust res, ½ from principal and ½ from income. The amount of compensation can be set forth in the trust instrument. Here, the settlor's message did not set an amount. It seems that charging a 10 percent fee would be considered unreasonable. Additionally, this could be seen as a reach of T's fiduciary duty to the trust and trust beneficiaries.

A trustee owes various duties to the trust. He must act as a reasonably prudent trustee, exercising reasonable care in his administration of the trust. He must invest prudently, which is judged under the prudent investor rule. Also, he has a duty of loyalty to the trust and the trust beneficiaries. This means the trustee owes an undivided duty of loyalty to the trust and beneficiaries. The duty absolutely prohibits any self-dealing, and when committed, it constitutes an absolute wrong. The only question will be damages. Here, the beneficiaries could likely recover damages, in an action which is called surcharge. They could recover the profits the trustee was making as a result of his breach. T could raise various defenses such as: (1) the beneficiaries consented; (2) he was released by 2/3 of the trust beneficiaries; (3) his breach was ratified; or (4) reasonable reliance on the trust instrument. However, none of these defenses appear to be viable on these facts. Likely, a court would find that the fee T took was a violation of his duty of loyalty and that the beneficiaries are entitled to damages. Generally,

damages for breach of the duty of loyalty are the greater of: (1) replacing the trust property to what it would have been absent the breach; or (2) recovering the profit the trustee made from the self-dealing. Here, it seems appropriate for a court to restore to the trust res the amount in excess of a reasonable fee that the T paid himself.

If the T continued to make such distributions, Brenda and Brian as beneficiaries could seek removal of T. A court will remove a trustee for: (1) incapacity; (2) unfitness; (3) breach of duty; (4) friction between the trustee and beneficiaries that makes it impossible to carry out the trust purpose. Here, Brenda could have an argument that by seeking to have T return the unlawful fees he took, would negatively impact the likelihood that he would make "discretionary" distributions to her.

Q QUESTION NUMBER 1

FEBRUARY 2013 BAR EXAMINATION – CONTRACTS

Bud's Specialty Goods (Bud's) has been manufacturing garage door openers in Jacksonville, Florida, for 20 years and has sold about 10,000 openers per year for the last 10 years and provided two remote control units (RCUs) to the buyer with each opener. The vendor, which had been providing RCUs to Bud's, recently went out of business and Bud's entered into a new contract with Sayles Electronics (Sayles) also located in Jacksonville. The contract was written and contained the following terms:

1. Sayles agreed to provide all the RCUs required by Bud's for a period of two years at a price of \$20 per unit. The RCUs would be delivered to Bud's in Jacksonville by Sayles or its contractor.
2. Bud's agreed to pay for each shipment of RCUs within 20 days of receipt.
3. In the event Sayles is unable to provide all the RCUs required by Bud's, liquidated damages in the amount of \$10 per unit for each RCU not supplied will be paid by Sayles to Bud's.
4. In any action to enforce the agreement, the parties agreed to litigate in the Circuit Court in and for Duval County, Florida. The prevailing party will be entitled to recover reasonable attorney's fees from the non-prevailing party in the event of such litigation.
5. Paragraph 8 of the contract concerned the method of communicating orders from Bud's to Sayles, but a space to enter the method was inadvertently left blank.

The contract was signed by the president of Sayles and faxed to the president of Bud's, whose secretary filed it without obtaining any signature of anyone from Bud's. The parties performed the contract as written for one year.

At the end of the first year, the price of electronic components used in the RCUs rose dramatically and Sayles discovered that it was losing money on each unit sold to Bud's. Sayles faxed an offer to continue shipping RCUs to Bud's at a new price of \$35 per unit but Bud's faxed back a rejection and notification that it expected Sayles to perform the contract as written. Bud's also informed Sayles that it required double the number of RCUs previously ordered per month because of a housing boom in Jacksonville. Sayles immediately stopped shipping RCUs to Bud's.

Discuss the causes of action, claims, and damages that are available to Bud's. Discuss any defenses and counterclaims that are available to Sayles. Discuss the enforceability of provision 4 of the contract pertaining to attorney's fees.

SELECTED ANSWER TO QUESTION 1 **(February 2013 Bar Examination)**

Applicable Law

Article 2 of the UCC applies to sales of goods. Goods are all things moveable. RCU are moveable and thus, are a good so the UCC article 2 applies.

Formation

For a contract to be enforceable there must be offer, acceptance, consideration or a valid substitute, and no defenses.

An offer is a manifestation of intent to commit to a contract. It must have specific and definite terms. Under the UCC a quantity must be stated. Here, the quantity is all Bud's required. This is a requirements contract and is a valid quantity term.

Acceptance is mutual assent to the contract. Here, Sayles agreed to the contract by signing the contract. Also, acceptance can be by performance and Sayles performed for one year under the contract.

Consideration is a bargained for exchange of legal detriment. Florida also allows for a benefit to suffice as well. Here, Sayles agreed to provide all RCU's for two years and Bud agreed to pay \$20 per unit. This is sufficient consideration.

Statute of Frauds may be asserted as a defense. The statute of frauds requires that contracts for the sale of goods of \$500 or more must be in writing. The writing must contain the essential terms of quantity and signed by the party to be charged. Here, we have a writing. The writing was signed by the president of Sayles but not by Bud. If Bud is the party enforcing the agreement, which here he is, his signature is not required to be an enforceable writing. Sayles will argue that because the writing is not signed by Bud it cannot be enforced against them, however, because only the party charged needs to sign, this agreement will likely fail. Also, performance is another way to satisfy the statute of frauds. Here, Bud will assert that the parties have been performing for one year in a two year contract and thus, even if the court finds that the writing is not enough, the performance of the parties should be enough to satisfy the statute.

Also, the contract will not fail because the communication method was left open. Sayles may try to argue that this is an essential term which is necessary to enforce the agreement. However, under the UCC whenever there is a term left open to be determined the UCC has gap fillers which can allow the court to imply a term into the contract. Thus, this argument will likely fail.

Breach of Contract. Bud will argue that Sayles breached the contract. A breach occurs where a party does not get the substantial benefit of the bargain or a breach is so material that it substantially impairs the non-breaching party. Here, Bud will argue Sayles breached the contract when they stopped shipping RCU's to Buds. This is a substantial and material breach of the contract because Buds provides two RCU units to the buyer with each opener sold and Bud sells 10,000 openers per year.

However, Sayles will defend by arguing that Bud breached the contract when he substantially increased his requirements. Under the UCC a seller may be excused from performing under a requirements contract if the other party substantially increases their requirements. Here, Sayles will argue that when Bud doubled the number of RCU's previously ordered per month, he was excused from performance. Bud will argue that by the terms of the contract Sayles was required to supply all of Bud's RCU's and thus, should perform as obligated. However, this argument is likely to fail because Sayles is excused from performing.

Sayles will also argue that they tried to modify the contract. Under the UCC a modification need only be done in good faith. Sayles will argue that they tried to modify in good faith for the price increase because the price of components rose dramatically. However, generally price increases are not enough to excuse a party from performing.

Sayles may also try to argue that they are excused from performing because it was impossible or impracticable to do so. Enforcement of an agreement is impossible when there is no way a party can perform under a contract. It is impractical when there is an unforeseen occurrence that renders performing very difficult. Again Sayles will probably lose under this argument because price increases are generally foreseeable. Sayles will argue that they should not be forced to perform a contract where they lose money, however, courts generally find that that is a risk parties take when doing business and that he markets can fluctuate. Sayles will likely lose on this argument.

Damages. There are a number of remedies available to Bud. First under the UCC Bud may elect to get cover. Bud may get the difference between contract price and the cost to buy RCU's from a new seller. Bud may also get market price which is the difference between the contract price and the fair market value of RCU's. Bud may want expectation damages. The purpose of these damages are to put the plaintiff in the position he would be in as if the contract had been performed. He may also get incidental damages, which is just any additional cost or expense Bud incurred as a result of Sayles' breach. Bud may also get consequential damages if Sayles was aware of the potential for consequential damages and they were foreseen. Also, the contract provided for liquidated damages. If the court finds the contract enforceable, Bud may elect liquidated damages. Liquidated damage clauses must be reasonable. Here, Bud could get \$10 per unit for each unit not supplied by Sayles. This clause is likely unreasonable. Sayles would be forced to pay 50% of the contract price per RCU they don't supply. 50% is very high, reasonable liquidated damages usually should not exceed 20%.

Sayles might argue this provision is so unreasonable it is unconscionable. An agreement is unconscionable when it is so onesided that a court should not enforce it. This is likely not unconscionable but the clause is unreasonable and thus should not be enforced.

Also, Sayles will argue they did not breach the contract because they sent an offer to modify the price to \$35 per unit and this request was in good faith. However, Bud timely rejected this modification/new offer thus, it was invalid because there was no acceptance. Also, Bud would argue there was no consideration because Sayles was already under a duty to perform at \$20 per unit.

Under the UCC Bud could also try for equitable remedies. Equitable remedies are appropriate when damages at law are inadequate.

Specific performance is appropriate when the good is rare or unique. Here RCU's are not rare or unique. So this is inappropriate. Also other remedies like rescission, & reformation are inappropriate.

Attorneys fees. A party may contract for reasonable attorney's fees. Under the FRPC fees must not be excessive and must be based on the amount of work, a lawyer's skill, what is normally charged in the area. Here if the fees are reasonable a party may contract for prevailing party fees.

Also, circuit court is appropriate for actions at law exceeding \$15,000. Here, Bud may have a claim in excess of that and may go to circuit court. Parties may not stipulate venue, it must be where defendant resides, business located, or cause of action occurred.

Also as stated earlier terms of contract may be implied. Course of dealing, custom and usage, as well as prior dealings may be looked to by the court as a supply of terms. Here, Sayles argument that method of communication was blank may be implied by the three ways above. Here, Sayles faxed an offer and Bud faxed a rejection. Thus, the court may imply the term of communication of orders is to be by fax since both parties have used that in their course of dealing and performance.

Q QUESTION NUMBER 2

FEBRUARY 2013 BAR EXAMINATION – FAMILY LAW/FLORIDA CONSTITUTIONAL LAW

Mary and Frank were divorced eight years ago in Pennsylvania. The parties have two minor children whose current ages are 10 and 12. The Pennsylvania Judgment of Divorce granted the parties shared decision making for the children, as well as joint and rotating custody, with the children spending one full week with Mary and then one full week with Frank, on a rotating basis. Frank was ordered to pay five hundred dollars per month to Mary as support for the children.

Shortly after the Pennsylvania Judgment of Divorce was entered, Frank disclosed to Mary that he had developed an addiction to an illegal narcotic and was going to be admitted to a rehabilitation and drug treatment facility. Of his own volition, Frank has not had any contact with the minor children since he disclosed his drug addiction to Mary. Frank did not successfully complete the rehabilitation program and several months later, moved to California exactly one year after entry of the Judgment of Divorce.

Two years after entry of the Pennsylvania Judgment of Divorce, Mary and both children moved to Florida, and have been residing in Florida for six years. Mary has been solely responsible for caring for the children including attending to all medical, dental, and educational appointments, and has also coached both children's soccer teams. Frank has not made an effort to have any involvement in these aspects of the children's lives. Mary has kept Frank advised of the children's address and telephone number since entry of the Pennsylvania Judgment.

Frank has informed Mary he plans to move to Florida in two weeks and has found a home he wants to purchase. Frank still pays the child support regularly and does not owe any past due support. The Pennsylvania Judgment of Divorce has not been modified, and no other actions have been filed in any state.

Mary has retained your firm to modify the Judgment of Divorce to (1) modify the timesharing so Frank no longer has timesharing on a week to week basis, (2) allow Mary to make all major decisions for the children without any input from Frank, and (3) to increase the amount of child support being paid by Frank. Mary believes that Frank still has a drug problem.

Identify and discuss all of the issues that may come up including jurisdictional issues. State your advice to Mary as to how these issues will probably be decided. Assume that the Pennsylvania Judgment of Divorce was properly registered in Florida as soon as Mary moved to Florida.

SELECTED ANSWER TO QUESTION 2

(February 2013 Bar Examination)

Jurisdiction of the Court

The issue is whether the court will have jurisdiction to address Mary's case if she files her Petition for Modification in Florida.

In order for a party to file this type of action in a Florida court, the party has to be living in the state for at least 6 months. In order for the court to have personal jurisdiction over the opposing party being served, the party must either be a resident of the state, or there must be a basis for personal jurisdiction pursuant to Florida's long arm statute. Florida's long arm statute analyzes the party's contracts in this state, for example, whether the party owns property or does sufficient business in the state.

When an action involves a child, jurisdiction will be based upon the Uniform Child Custody Jurisdiction Enforcement Act ("UCCJEA"). The state that issued the first order regarding the child will always have continuing jurisdiction to modify it. However, jurisdiction could also be established in the state where the child and at least one parent have resided for the last 6 months. If this cannot be established, Florida could still take jurisdiction if no other state wanted to take jurisdiction of the case.

Here, Mary and the two minor children have been residing in Florida for the past six years. Mary meets the 6 month period requirement in order for her to file her Petition for Modification in Florida. Frank has expressed that he will be moving to Florida in two weeks and has found a home he wants to purchase. If he does not, in fact, move to Florida, then Mary would need to find a way to exercise long arm jurisdiction over Frank. If he purchases the home in Florida without moving, this would likely be sufficient. However, if he does, indeed, move to Florida, then the court would have personal jurisdiction over him to proceed.

Frank lived in California a year after the entry of divorce, but the children have never resided there. It is unlikely that California would even be considered under the UCCJEA to litigate this case involving the children. Pennsylvania, the original state that issued a judgment over the children, would have continuing jurisdiction to modify the order. But Florida would be just as appropriate considering Mary and the children's strong presence in the state for the 6-year period.

For these reasons, the Florida court would exercise jurisdiction over the case, and Mary may proceed.

Modification of Time Sharing

The issue is whether Mary will be successful in obtaining a modification of time sharing.

In Florida, the court enters what is called a parenting plan in order to address every detail regarding time sharing. This parenting plan includes the time each parent will spend with the child, the extracurricular activities the child will participate in, travel arrangements for time sharing, who makes decisions over the children, whether those decisions will be shared, and every other issue that would affect the well being of the children and affect their best interests. This parenting plan is normally referred to in the parents' Marital Settlement Agreement when there is a divorce, and is, therefore, incorporated into the Final Judgment.

In order to state a proper claim for modification of time sharing, the party seeking the modification must allege a substantial change in circumstances that is permanent, involuntary, material, and unforeseeable at the time of entry of the Final Judgment. The best interests of the child always govern. Although Florida statutes provide a lengthy list of factors that are considered when analyzing the best interest of the child, the usual factors that are mostly used by the court are continuity for the child, how likely the other parent is to encourage and foster a meaningful relationship with the other parent, the child's preference (which is weighed heavily when the child is still a minor, but older and able to express himself regarding his wants and needs), the ability of each parent to care for the child, and any past history of substance abuse, or any other type of abuse.

In this case, Mary will allege that a substantial change in circumstances has occurred that is permanent, involuntary, material, and unforeseeable at the time of the Final Judgment. She has lived in Florida with the children, away from Frank, for a period of six years. The family component between both parents and the children involuntarily broke down when Frank became addicted. The change is material, in that Frank had joint and rotating custody with Mary, and he has not had any contact whatsoever with the children in years. Additionally, the fact that Frank would go from seeing the children and being a parent equally with Mary, to someone who is sick with addiction and unable to properly care for, or even see, the children was unforeseeable at the time of the Final Judgment.

The court would consider the best interests of the children, and in analyzing the continuity of the children, it would take note of the fact that the children have continuously been with Mary for years, without any sign of their father. Frank has not made any effort to be involved in the children's lives, but Mary has constantly kept him informed of the children's address and telephone number, encouraging an open door of contact between the children and the father. The preference of the children would also weigh heavily in this case. The children are 10 and 12, which means that they are likely able to voice their opinions and desires clearly and intelligently, as opposed to a younger child who would not have the necessary maturity to do so. Also, Frank's history of substance abuse would also be a substantial factor, especially considering that Mary still believes that Frank's drug problem is ongoing.

Considering all of these factors, it is likely that Mary's request for a modification of time sharing would be granted.

Modification of Shared Parental Responsibility

The issue is whether Mary will be successful in obtaining a modification of shared parental responsibility.

In Florida, there are three types of parental responsibility. Shared parental responsibility is when both parties are charged with equal decision-making over the children. Anything related to the children, including their medical treatment, schooling, and upbringing would be jointly decided by both parents. This is the norm, as both parent's have a constitutional right in Florida to participate in the upbringing of their children and in the joy of child rearing.

Sole parental responsibility is given to only one parent when it is found that the other parent is a detriment to the children, or is otherwise unfit and unable to provide care for them. This vests all of the power to decision-making over the children in one parent.

There is also parallel shared parental responsibility, where the responsibility is split, but according to subject. This is especially applicable when one parent has a special skill that should entitle him or her to handle decisions relating to that skill. For example, if one parent is a doctor, the court could allow that one parent to make all of the decisions regarding the children's medical care. The other parent, who could be a teacher, for example, could handle decision-making in the area of the children's schooling. This gives the parents shared parental responsibility, but according to topic and subject, rather than as a whole.

In order to modify time-sharing, the court has to weigh the parents' constitutional right to participate in the upbringing of their children and balance it against the weight of the best interests of the children. The standard for determining the best interests of the children is described above. The person seeking the modification has to allege a substantial change in circumstances, as well as factors that would render the parent unfit and detrimental to the children.

In this case, Mary and Frank were granted shared parental responsibility by the Pennsylvania court. However, much has changed since that determination was made. Frank was addicted to illegal narcotics, spent time in a rehabilitation and drug treatment facility, and did not successfully complete that program. On his own volition, he has refused to have any contact with the children, and moved far to another state, away from them. Mary has been forced to take over all of the decision making for the children, including their medical, dental, and educational appointments, and coaching both their soccer teams.

Frank could allege that Mary relocated with the children without his consent. Mary left Pennsylvania without entering into a written agreement with Frank, expressing his consent, the arrangement for travel, and his signature. If Mary had not been able to obtain his consent, she would have had to send Frank written notice, including the proposal for time sharing upon the move, updating any undisclosed facts, the date of the proposed move, and the description of the location she was moving to with the children. If Frank then did not agree, she could have filed a Petition for Relocation in the Pennsylvania court, which had continuing jurisdiction over the matter since it entered the original Final Judgment of Dissolution of Marriage.

However, Mary will claim that none of this applies. Relocation is appropriate when the parent wants to move the children at least 50 miles away from the original location where the children resided. However, Frank moved substantially more than 50 miles away from the children before she even contemplated her move. Further, after his move to California, Frank made no effort to have any involvement in the children's lives, and never raised any objection to the move.

In consideration of these factors, the court would grant a modification of shared parental responsibility to Mary.

Modification of Child Support

The issue is whether Mary will be successful in obtaining a modification of child support.

In Florida, both parents are obligated to contribute to the support of their children, regardless of whether they are married, separated, divorced, or were never married at all. Child support is primarily based on need and ability to pay. The court will look at the respective income of both parties, the health insurance that is being paid for the child, the necessary child care costs, and the time sharing being exercised by both parents.

Florida has statutory guidelines regarding what child support should be based on the parents' income. If one parent is spending more than 30% of the time with the child, then child support is calculated using a "gross up" method, which gives that parent with the substantial amount of time sharing a higher amount. A court can deviate only up to 5% away from the child support guidelines after considering relevant factors, and with specific findings of fact, that would justify the deviation.

In order to seek a modification of child support, the party seeking the modification must allege a substantial change in circumstances. The change would need to be one of the factors that is used to calculate child support: income, health care costs, child care costs, and/or time sharing. The modification would date back to the date of the filing of the petition. This means that, if child support is modified to a higher amount, the difference between the established amount and the new higher amount would be collectable from each month from the filing of the petition through the date that judgment is entered.

In this case, child support was calculated in Pennsylvania. We did not know what the respective incomes of the parties were, nor what the health care and child care costs were. However, we do know that time sharing was equally shared. Mary and Frank had joint and rotating custody, with time sharing being split every week. The children were with Frank one full week, and with Mary one full week, on a rotating basis. Based on this arrangement, Frank was ordered to pay \$500 per month to Mary for the support of the children.

Now, two years after entry of the Pennsylvania judgment, the children have been with Mary full time. This gives her 100% of the time sharing, leaving Frank with \$0. Mary must provide financially for the children on a constant basis, with no extra contribution from Frank. Although he still pays child support regularly and owes no past due support, Mary is still obligated to find the money to support the children for every week of the year, not every other week as she had to before.

If Frank does move to Miami, and does seek time sharing with the children, it is unlikely that he will have the same rotating schedule he had before. There are allegations of drug abuse, and he has not seen the children in years. The court would likely impose a limited time sharing schedule, at least to begin with, until the children are once again accustomed to their father, and until it can be clarified as to whether he is truly rehabilitated and safe for the children. Time sharing may even be supervised during this time period, and thereafter if he continues to be unfit to care for the children.

Based on these changes, the court would grant Mary a modification of child support to increase the support she gets from Frank.

Q

QUESTION NUMBER 3

FEBRUARY 2013 BAR EXAMINATION – TORTS

Financial Advisor (Advisor) strongly recommended to Buyer to purchase an investment. Relying on Advisor's advice that it was safe, Buyer purchased the investment. A week later, the investment became worthless. Buyer contacted Advisor demanding recompense. When Advisor refused, Buyer contacted Advisor's supervisor and complained about Advisor's incompetence. Buyer also accused Advisor of taking kickbacks.

Buyer and Advisor encountered each other at a restaurant. Buyer loudly complained about his losses and Advisor's competence. Advisor made an obscene gesture. Buyer moved his arm back as if to strike Advisor. Stepping back, Advisor slipped and fell down. Advisor had some minor bruising not needing medical attention.

Buyer organized a demonstration outside Advisor's employer with over fifty other people who lost substantial sums following Advisor's investment advice. Daily News, a local newspaper, published a short article on the front page of the local section:

BUYER SEEKS ADVISOR'S OUSTER

Over fifty people lost money following Advisor's investment advice. During a speech, Buyer claimed that Advisor is incompetent and should be fired. Buyer accused Advisor of taking kickbacks. Advisor declined to comment.

Advisor came to your law firm seeking legal advice. Advisor indicated that the publicity resulted in him losing his job. Advisor was evasive about the compensation he received for his investment transactions. Claiming confidentiality, Advisor refused to discuss whether he received any compensation from a third party for the sale of the investment purchased by Buyer.

The senior partner of your law firm directs you to prepare a memorandum addressing potential lawsuits Advisor could bring against Buyer and Daily News in state court. In your memo, also address any defenses that could be raised, the likely outcome of any litigation, and any ethical issues related to the filing of any litigation. Do not discuss any complaints that Buyer could file against Advisor with private, state, or federal regulatory agencies.

SELECTED ANSWER TO QUESTION 3

(February 2013 Bar Examination)

Claims Against Buyer (B)

1. **Defamation/Slander**

Advisor (A) could bring a claim for defamation against B. Defamation requires proof of a statement of fact, publication of the statement, falsity, damages and the required level of culpability. Where the plaintiff is a public figure or public official, actual malice is required, which is knowledge of the statement's falsity or reckless disregard for the truth. For a private plaintiff, only negligence is required.

Where the defamation is oral (slander), actual damages must be shown unless it is "slander per se." Slander per se is where the defamatory statement relates to a person's business, accuses a woman of being unchaste, accuses someone of moral turpitude or of having a loathsome disease.

B contacted A's supervisor and called A incompetent and accused A of taking kickbacks. He also repeated these statements at the demonstration outside A's office. These are statements of fact (at least the kickbacks comment) that were published (publication only requires telling a third party). A will claim they were false and that B was at least negligent since he did not investigate the statements before calling the supervisor. A also will claim that he was damaged because he ultimately lost his job.

B will argue that the statements were opinions, that they were true and that he has a qualified privilege when reporting to a supervisor of A and when exercising his First Amendment rights on a matter of public concern. B also will claim that he was not negligent. Negligence requires a Duty, Breach of the duty, causation and damages.

B will argue that he owed no duty to A since A was his advisor. Alternatively, he will argue that any duty was not breached since he was only telling the supervisor the truth and asserting his First Amendment rights. Finally, he will argue that his comments were not the cause in fact or proximate cause of A being fired. Case in fact requires that but for the breach, the damages would not have occurred and proximate cause requires that the damages were a foreseeable result of the breach and no superseding cause cut off the defendant's liability.

B will argue that his statements were neither the but for cause or the proximate cause. B will argue that Daily News' (News) publication was the but for cause and was an intervening event that cut off his liability.

A will argue that B owed a duty to treat him respectfully and to go to him first with any concerns. He breached that duty by reporting A to his supervisor and organizing the demonstration. A also will argue that the statements were both the but for cause and the proximate cause of A losing his job since News would not have published the article absent Bs demonstration and statements.

B also could argue that the matter was one of public interest and thus it must be shown that he had actual malice. FL interprets this as desiring to harm the plaintiff (rather than the NY Times Actual Malice described above). B will argue that he only desired to protect future investors and had no malice. He also will defend based on truth. A was evasive with the law firm about his compensation so he may not be able to prove falsity.

2. Assault and Battery

A could have claims of assault and/or battery against B.

Assault is an intentional tort, which requires a showing that the defendant intentionally placed the plaintiff in a reasonable apprehension of an immediate offensive contact or touching. When B ran into A at a restaurant, B loudly complained and moved his arm back as if to strike A. A will claim this was an assault as he was put in reasonable apprehension that he was about to be hit. It clearly was intentional on B's part.

B will claim that A's fear was not reasonable and that A assaulted him first by making an obscene gesture. B has no defense of consent here since A clearly did not consent. It appears A saw B's movement and thus, assuming his apprehension was reasonable, he will succeed in the assault claim.

Battery is an intentional and offensive touching of the plaintiff's person or something connected to it. A will claim that B's movement caused him to fall, was clearly intentional and thus constituted a battery.

B will argue that he never actually touched A or anything connected with A and thus has an absolute defense to battery. Assuming B did not touch A, A will lose the battery claim.

If A is successful with either claim, he does not need to show damages. He has no medical expenses, but could recover for his pain and suffering from the bruising. He also could try to claim punitive damages.

Punitive damages are available where the defendant acted with gross negligence or intentional or willful misconduct. They are generally limited to the greater of 3 times compensatory damages or \$500,000 unless the defendant was intoxicated, the plaintiff was elderly, or the defendant intended to harm the plaintiff.

A will claim that B was grossly negligent and acted with an intent to harm and thus is entitled to punitive damages without cap.

B will argue that he never intended to harm A since he did not hit him and was not even grossly negligent.

3. Intentional Infliction of Emotional Distress

A could sue based on intentional infliction of emotional distress, which requires: extreme and outrageous conduct on the part of defendant, intending to cause emotional distress of plaintiff, that in fact causes emotional distress.

A could argue that either the assault and/or the statements to supervisor and at the demonstration were extreme and outrageous, made with the intent to cause A emotional distress and so caused such emotional distress.

B will argue that his only intent was to “right a wrong” and protect others from A’s incompetent advice. He also will argue that his actions were not so extreme and outrageous as to “shock the conscience.” B likely will have a valid defense and A will lose this claim.

4. Negligent Infliction of Emotional Distress

This claim is similar to IIED above (#3) but only requires a showing of negligence rather than intent. A will fail with this claim as well though because it requires some physical symptoms, which A does not seem to have suffered as a result of any emotional distress.

5. Invasion of Privacy/Disclosure of Public Facts

FL does not recognize a separate tort of False Light, but does recognize invasion of privacy in disclosing private facts. A can try to make this claim against B. A will claim that B invaded A’s private by disclosures made at the demonstration. This tort requires publication of private facts. B will argue that the facts were not private and that he has a defense because it was a matter of public concern since he and at least 50 others lost money. Since the facts were not private and the matter was of public concern, A will not likely succeed.

Comparative Negligence/Damages

B will claim comparative negligence. FL has adopted pure comparative negligence which allows a plaintiff to recover regardless of any fault (i.e. plaintiff can be 99% at fault and still recover). FL also abolished joint and several liability for tortfeasors. Thus, B will claim negligence on the part of News and on A and argue to reduce his liability by the others’ fault. Each defendant is only liable for their percentage of fault as long as they can prove the others’ fault. All defendants do not need to be before the court to reduce damages. Thus, B will claim he is only liable for his share of the fault and that the negligence is mostly on the part of A and News.

Claims Against Daily News (News)

1. Defamation/Libel

A can sue News for defamation. Defamation requires proof of a statement of fact, publication of the statement, falsity, damages and the required level of culpability. Where the plaintiff is a public figure or public official, actual malice is required, which is knowledge of the statements falsity or reckless disregard for the truth. For a private plaintiff, only negligence is required. Here, the statements were printed, rather than oral, so the claim would technically be for libel, which requires no showing of actual damages.

To sue a media defendant for libel, however, FL requires that the plaintiff first provide notice to the defendant of its intent to sue and then give the defendant 10 days to retract the statement. If the media defendant retracts and the original statement was made in good faith, the plaintiff can recover only actual damages.

Since News is a media defendant, A cannot sue without first notifying News and giving it 10 days to retract. If it does, A can only recover actual damages.

If A sues, he will still need to show that the statements were factual, published, false and at least negligence on the part of News. The article clearly contains facts – over 50 people lost money and reporting B's speech. It also clearly was published since it was contained in an article in the newspaper. A will claim it was false. A also will claim that the newspaper was negligent because a newspaper has a duty to report truthfully and investigate its claims, it breached that duty with this article and that caused A's damages. A will claim that the article was both the but for and proximate cause of him losing his job.

News will argue that the statements are true. Assuming it fact-checked the statement about 50 people losing money, this will be a valid defense. It also will claim truth as to B's statements. Truth will be an absolute defense. News will also claim a qualified privilege to report newsworthy events, which this clearly was as a matter of public concern. Finally, it will claim that it owes a duty to report truthfully only and it did not breach that duty.

2. Invasion of Privacy/Disclosure of Public Facts

FL does not recognize a separate tort of False Light, but does recognize invasion of privacy in disclosing private facts. A can try to make this claim but will likely be unsuccessful since the facts were not private. They were statements of people's losses and repeating statements made by B at a public demonstration with 50 others present. Since the facts were not private and the matter was of public concern, A will not likely succeed.

Damages

A will claim that he has been damaged by loss of his job and lost future earnings as well as loss of his reputation. News will claim that it acted in good faith and will retract owing only actual damages, if any. It also will argue no liability as stated above.

News will claim comparative negligence. FL has adopted pure comparative negligence which allows a plaintiff to recover regardless of any fault (i.e. plaintiff can be 99% at fault and still recover). FL also abolished joint and several liability for tortfeasor. Thus, B and News will claim negligence on the part of the other and on A to try to reduce their liability by the others' fault. Each defendant is only liable for their percentage of fault as long as they can prove the others' fault. All defendants do not need to be before the court to reduce damages.

Punitive damages are available where the defendant acted with gross negligence or intentional or willful misconduct. They are generally limited to the greater of 3 times compensatory damages or \$500,000 unless the defendant was intoxicated, the plaintiff was elderly, or the defendant intended to harm the plaintiff.

A will claim that News was grossly negligent and thus is entitled to punitive damages.

News will argue that it was not acting intentionally or with gross negligence and thus that A is not entitled to any punitive damages.

Ethical Concerns

A has been evasive about his transactions and refuses to discuss the claimed “kickbacks” claiming confidentiality. I would be concerned that A may not tell the truth in the course of any litigation. The RPC requires candor with the tribunal. This prohibits knowingly filing any false statements or pleadings or making any false statements before the tribunal. An attorney must sign all pleadings and state that they are made in good faith. In addition, an attorney cannot counsel a client to commit any crimes, including perjury. While the attorney can advise the client as to consequences of such acts, he must try to dissuade the client from taking such action.

A has not been candid with the law firm about his transactions, and thus may not be honest in the litigation. An attorney cannot prepare a complaint and other pleadings on this basis.

An attorney may not file a frivolous claim that has no legal basis. Without knowing all of the facts, it will be hard to determine whether A has a valid claim and to be able to certify that the claims are not frivolous.

An attorney cannot represent and must withdraw if a client is using the lawyer to commit a crime. The lawyer could not represent A if A were using the lawyer to commit perjury. In such a case, the lawyer either cannot take the case or, if he already has, must try to withdraw. If he cannot withdraw, he must disclose the perjury to the court.

If the client is committing the crime without the lawyer’s services, the lawyer is not required to withdraw but may unless the court orders her not to.

An attorney must maintain confidentiality both with prospective clients and after representation ends. Therefore, even if the law firm does not take on A as a client, anything A told the lawyer must be kept confidential. This does not apply however to any statements relating to a future crime or if necessary to protect others from harm. If any such statements were made by A to lawyer, they must be disclosed.

I would urge A to be candid and explain the issues involved if he continues to not be forthcoming. I would explain that his statements will be confidential, but also my duty of candor to the court. If he either will not be forthcoming or makes it clear that he plans to make false claims and/or perjure himself, I will try to convince him otherwise, but if that fails, I will not take on representation of A.

PART II - SAMPLE MULTIPLE-CHOICE QUESTIONS AND ANSWERS

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

The answers appear on page 44.

MULTIPLE-CHOICE EXAMINATION INSTRUCTIONS

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

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

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

23 SAMPLE MULTIPLE-CHOICE QUESTIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ANSWER KEY FOR MULTIPLE-CHOICE QUESTIONS

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