

Florida Board of Bar Examiners

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Florida Bar Examination Study Guide and Selected Answers

**July 2004
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**The Study Guide will be 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 2004 AND FEBRUARY 2005 FLORIDA BAR EXAMINATIONS

ESSAY QUESTIONS AND SELECTED ANSWERS

Part I of this publication contains the essay questions from the July 2004 and February 2005 Florida Bar Examinations and one selected answer for each question.

The answers received high scores and were written by applicants who passed the examination. The handwritten answers were typed as submitted. 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

INFORMATION RELATIVE TO ANSWERING BAR EXAMINATION QUESTIONS

Applicable Law

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

Acceptable Essay Answer

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

QUESTION NUMBER 1

JULY 2004 BAR EXAMINATION - CONTRACTS/ETHICS

Company manufactures and sells golf clubs. Company decided to advertise its clubs in Magazine, a monthly publication. Company began negotiating an advertising package with Magazine.

Michael, Magazine's advertising manager, faxed to Carol, Company's marketing director, Magazine's standard form advertising contract. The form indicated that Company would purchase a total of five pages of advertising, one page in each of the upcoming five consecutive issues of Magazine from May through September. The total price for the five pages was \$85,000. This price included a \$40,000 volume discount off Magazine's standard advertising rate of \$25,000 per page. Michael had orally agreed with Carol that Magazine would place a Company golf club on the cover of Magazine's August issue, but this term was not included in the form faxed to Carol. One of the standard provisions included in the form was a cancellation clause providing: "An advertiser loses any volume discounts if it does not purchase the agreed number of pages. Cancellation of reserved advertising space is treated as a breach of this agreement and will result in the advertiser paying the standard rate for pages actually used."

Upon receiving the fax, Carol typed two additional terms on the form, signed it, and faxed it back to Michael. The additional terms were:

- Magazine "guarantees a minimum circulation of 300,000 copies per month"
- Magazine will "improve its photography and covers."

Neither Michael nor anyone else at Magazine ever signed the form with Carol's additions. Instead, Michael sent Carol a fax stating Magazine was "extremely pleased that Company has decided to join our list of advertisers."

Magazine published one page of Company's advertisement in each of Magazine's May, June, July, and August issues. Company had submitted to Magazine a photo of Company's newest golf club for display on the cover of the August issue, but Magazine refused to publish the photo. Company then sent a letter to Magazine canceling the last page of advertising that Company had purchased in the September issue. As reasons for the cancellation, Company cited: (1) Magazine's failure to place a Company club on the cover of the August issue; and, (2) Magazine's failure to improve its photography and covers.

Through its attorney, Company demanded a 20 percent refund of the \$85,000 contract price that it had previously paid to Magazine. Upon receipt of the letter from Company's attorney, Magazine sent Company an invoice for \$15,000. This amount represented the

difference between \$100,000, the cost of the four pages of advertising actually used by Company at the standard rate of \$25,000 per page, and the original contract price of \$85,000 that Company already had paid.

Company refused to pay the invoice. Company claimed that it would be absurd to pay more than the contract price for fewer pages of advertising (\$100,000 for four pages rather than \$85,000 for five pages).

Magazine has retained you to evaluate the possibility of filing suit against Company to collect the \$15,000. Discuss this potential litigation including the likely defenses that Company would assert and the probable outcome of the suit.

In preparing your evaluation of Magazine's case, you discovered that Carol no longer is employed by Company. You wish to contact Carol to discuss the facts of the case without obtaining permission from Company's attorney. Include in your discussion whether you are permitted to do so.



SELECTED ANSWER TO QUESTION 1 **(July 2004 Bar Examination)**

This essay will address the possibility of Magazine filing suit against Company to collect \$15,000, Companies' possible defenses, and the probable outcome. It will also discuss whether it is appropriate for me to contact Carol w/out Company's attorneys permission.

First it must be determined what law governs this problem. The UCC does not govern because there is no sale of goods. Instead, it is a services contract and the common law governs.

Next it must be determined if a valid contract existed. A contract requires mutual assent (offer & acceptance), consideration, and no defenses.

When Michael faxed the form to Carol, this was an offer. The offer contained relevant terms (price, subject, time, etc. for performance). Because this is a services contract, the common law mirror image rule applies. When Carol added the additional terms, this was a rejection of Michael's initial offer and was a counter-offer. When Michael sent Carol the second fax, this could be seen as an acceptance of Carol's counter-offer – including the additional terms that she added.

Another issue is whether the oral agreement is included as part of the contract. This depends on whether the fax was meant to be a fully integrated contract. If it was meant to be fully integrated – i.e. all the terms were included in the writing and the oral agreement was the type of stuff that would normally be included in an agreement – then parol evidence concerning the oral agreement will not be admitted and the picture on the cover was not part of the contract.

There was consideration (detriment to one party or benefit to the other) because Company agreed to pay the money and Magazine agreed to run the advertisements.

Finally is the issue of defenses to the contract. If Magazine sues Company for breach of contract, Company might argue that there was no contract because the Statute of Frauds (S of F) was not satisfied. But the S of F does not apply to this services contract – the contract can be completed in 5 months (less than one year) so that it does not need to be in writing or signed by the party to be charged.

Company might also argue that the terms added by Carol were conditions that needed to be met before Company had a duty to perform by paying for the advertisements. Magazine could counter-argue that the provision about “improving” the photography and covers was a vague term that left the fulfillment of the condition entirely up to the tastes and opinions of Company and was therefore an unenforceable condition whose performance was excused.

Company might also argue that it legitimately cancelled the contract after Magazine did not publish the golf club on the cover but, as mentioned, this oral agreement was not part of the contract.

Company might argue that this was a divisible contract so that it would only have to pay for the ads actually published. A divisible contract requires that there be an equal number of divisions on each side of the contract – for instance five ads & five payments. That was not the case here – there was one price paid for all five of the ads. Additionally – the cancellation clause expressly shows that the contract was specifically not meant to be divisible because Company was getting a bulk discount.

Because there was a valid contract, Company breached the contract by canceling early and not paying the full contract price. Magazine would be entitled to damages from Company. Punitive damages are not normally available in contracts cases, but Magazine would be entitled to expectation damages to put them in the same position they would have been in if the other party had not breached. Here, Magazine already was paid the full contract price of \$85K. Now, Magazine is seeking \$15K because of the discount that Company received the cancellation cause is like a liquidated damages clause. Courts will enforce liquidated damages clauses if they are reasonable and it was difficult to forecast the damages at the outset. The liquidated damages clause here will, in effect, put the parties where they would have been if Company had not breached. Company got four ads. The ads were 25K each (despite the fact that it was given a discount), so Company, owing a total of 100K, now owes Magazine 15K.

A lawyer may not speak in person to a represented party concerning the subject matter of litigation without that person's lawyer's permission. The same rule applies when litigation is with a business entity and the lawyer wishes to speak to an employee – the lawyer may not do so without the permission of the business's lawyer. But here, Carol is no longer with the company. Because the litigation is against the company and not Carol, I may speak with Carol without the company's permission.

Q QUESTION NUMBER 2

JULY 2004 BAR EXAMINATION - TORTS

Husband and Wife are both in their mid-thirties and have been married for six years. They have two children: Son, age 5, and Daughter, age 4. Husband is a dentist and has had his own dental practice for ten years and earns \$95,000 per year. Wife is a stay-at-home mother. Wife was a school teacher and earned \$35,000 per year before she stopped working after the birth of Son. The family lives in a modest home with a small mortgage that was purchased during the marriage and titled in joint names.

Husband opened a stock account two years ago from monies the parties received from a tax refund. The account is now worth \$20,000. Wife has \$20,000 of U.S. Savings Bonds her mother gave her last year.

One day Husband came home very upset because he learned that Wife was having an affair with Neighbor, when the children were at preschool. Husband punched Wife, breaking her cheek bone and causing her great pain. Son witnessed the incident.

In the past, Husband always acknowledged that Wife was a great mother. After finding out about the affair, Husband now feels he should get custody of the children if a divorce is granted. Husband does not want a divorce. Instead, he wants to go to counseling with Wife.

Wife is opposed to counseling, wants a divorce, and custody of the children. Wife wants to continue to live with the children in the marital home. Wife also wants to keep the savings bonds, receive all of the marital assets to which she is entitled, and obtain financial assistance from her Husband. Wife also wants Husband to pay for the divorce.

Wife comes to your office to discuss the filing of a divorce action. Identify and discuss with Wife all of the pertinent issues that will come up in her divorce action and include your advice as to how each of these issues will likely be decided.

In addition to the divorce action, Wife wants to sue Husband for punching her. Advise Wife as to this matter. Do not discuss any possible criminal prosecution of Husband.



SELECTED ANSWER TO QUESTION 2

(July 2004 Bar Examination)

This memorandum will discuss Wife's divorce action, including any potential claims for alimony, child support and custody. In addition, this memorandum will discuss Wife's possible cause of action against Husband resulting from the "punching" incident.

Divorce: Florida is a no fault divorce jurisdiction. A divorce may be granted where the parties contend that their marriage is irretrievably broken. However, where there are minor children or where one of the parties contests that the marriage is irretrievable broken, the Judge may order the parties to undergo marriage counseling. Here, where there are minor children and Husband does not want a divorce the Judge may consider ordering the parties to undergo counseling before continuing with the Divorce action.

Distribution of the Assets

Florida is a **equitable distribution** jurisdiction. This means that marital property is divided equally among the parties (50/50). However, where 50/50 distribution is not appropriate (i.e., where it would be inequitable for example), the court may divide the property so that it is fair and equitable to the parties. For example, the court can consider any party's interest in a particular piece of property such as a business or sentimental valued property, also the court may consider one parties desire to retain the marital home. (Note that the court can order that the primary residential parent may retain the home until the children reach the age of 18 and then order the sale of the home for equitable distribution). In order to effectuate equitable distribution, the court must first distinguish **marital and non-marital property**.

Marital Property is property (including debts) during the marriage, interspousal gifts, enhancement or appreciation of non-marital property by the efforts of either spouse during the marriage.

Non-Marital Property is property (including debts) acquired by either spouse before marriage, non-interspousal gifts, bequest, or devise.

Here, Husband has a dental practice acquired prior to the marriage, but Wife may have an interest in the practice in that she may be entitled to the appreciation in value of the practice that occurred from Husband's efforts after marriage. However, Husband may have special equity in the practice and upon distribution, the judge may allow Husband to keep the entire practice since it is his business and livelihood that he has built.

The home, purchased during the marriage is presumed to be marital property, and here the facts indicate that the home is in fact marital property as it was purchased during the marriage and Wife and Husband hold as joint tenants. Husband's salary is also marital property. The stock account worth \$20,000 is marital property as it was acquired with

marital funds. However, Wife's savings bonds worth \$20,000 are a non-interspousal gift and thus are not marital property – they belong to wife as non-marital property.

The court can allow the primary residential parent to retain the marital home where it is in the best interests of the children since this also will foster continuity.

Spousal Support

Wife is requesting that Husband provide her with financial assistance. Wife may be entitled to Alimony. In Florida there are four types of Alimony. Alimony can be requested by either party in a divorce proceeding. In determining whether to award alimony the court may consider among other things:

- the duration of the marriage
- age of the parties
- financial need
- adultery (however note that adultery cannot be the basis for awarding or denying alimony unless the adultery depleted marital assets)
- standard of living during the marriage
- contribution to the marriage
- need for rehabilitation – i.e., allow the recipient spouse support so that she/he can become self-sufficient.

Permanent Periodic Alimony: This type of alimony is paid to a spouse in permanent periodic payments. This type of alimony is modifiable upon a showing of substantial change in circumstances. It terminates upon the death of either party or upon the remarriage of the recipient spouse.

Temporary Alimony: Temporary alimony is paid during the pendency of litigation. ‘

Lump Sum Alimony: Lump sum alimony is paid in one lump sum. Typically it is available where there is a showing that one the spouse is in ill health and permanent periodic alimony will not serve its purpose of if there is extreme hostilities between the parties.

Rehabilitative Alimony: Rehabilitative alimony is alimony paid to the recipient spouse for a reasonable period of time for the purpose of rehabilitating that spouse back into the workplace so that the spouse can become self-efficient.

Here, Wife may be awarded temporary alimony for the pendency of the litigation and rehabilitative alimony. The facts indicate that Wife was a school teacher prior to staying home with the children, thus she has the ability to become self-sufficient. In addition, Wife is in her mid-thirties and should be able to work due to her young age. Wife may

argue that she is entitled to permanent periodic alimony since she is entitled to remain in the lifestyle she lived with her husband's salary if \$95,000 a year. A teacher's salary is a dramatic change in her standard of living. However, her argument is weak. The marriage was relatively short (not meeting the long term marriage (17 years) presumption for this type of alimony). She and Husband were only married six years. In addition, she will be receiving rehabilitative alimony and she may find a job that pays more than a teacher's salary. Wife also wants attorney's fees. Wife may be entitled to such fees, however, her award of temporary alimony may assist her in this matter.

Child Custody

*Child support and custody are always determined under the **best interests of the child** standard. Both parents are responsible for the support of their children. There is no presumption in favor of any parent, Husband or Wife could be awarded custody. Always considering the best interests of the child the court may also consider among other things the following:*

- *ability of parent to provide necessities to the child (food, clothing, shelter)*
- *desirability of continuity*
- *the child's preference (if of an adequate age and understanding)*
- *the likelihood that the parent will comply with visitation and foster a loving relationship with the other parent*
- *fitness of the parent*

One parent will be the primary residential parent. This parent will retain physical custody of the children. However, regardless of who becomes the primary residential parent the court generally orders shared parental responsibility. This means that both parents have equal say in the child's medical and educational needs and access to the child's records.

Here, both parents want custody of the children and they both appear to be fit for the role of primary residential parent. Here, Wife has a strong argument for primary residential parent since she has stayed home with the children since their birth, thus continuity is best served if children are to remain in the home with her. In addition, Wife may argue that Husband is not fit to be primary residential parent. Generally a person's fitness (for example morality or physical disability) is taken into account if that parent's behavior would subject the child to harm. Here, Husband hit Wife in front of Son, thus the judge may consider this behavior harmful (physically or emotionally) to the child and deny Husband custody.

Husband may argue that Wife is morally unfit where she has committed adultery. However, this argument is likely to fail where there is no showing that the Wife's behavior is harmful to the children. Additionally, the children were never home when it happened.

Here, the children are too young for the court to consider their preference. Wife will also argue that the children should stay with her in the marital home as they may have friends in the neighborhood, although they are too young to argue that they go to school in the neighborhood.

Generally, the court will not split the children up. It is in the best interests of the children to remain together since they always have and this would force continuity for the children and also this would allow the children to have each other for support.

Also, the court may order DCF to conduct an investigation and make a suggestion to the court for the award of child custody.

Child Support

Both parents have a responsibility to support their children. In Florida child support is awarded pursuant to the statutory guidelines taking into account income and number of children. The duty of child support continues until the child reaches the age of 18 or can continue if the child has a disability or is still in high school from age 18-19. There is no obligation to continue support for the children's college education although the parties may expressly agree. Income may be imputed onto a parent if the parent is voluntarily unemployed or underemployed.

A judge may deviate from the guidelines by 5%, however a deviation beyond 5% must be accompanied by writing findings justifying such a deviation. A judge must deviate by 5% if the child spends a significant amount of time with the payer spouse.

A child support order must also contain a provision providing medical insurance for the children if it is reasonable ascertainable.

Child support is modifiable upon a showing of a substantial change in circumstances.

Wife's Suit for "Punching"

First Wife may have a suit against Husband for battery. Florida has abolished spousal immunity. Here, husband intentionally caused a harmful or offensive contact of Wife when he punched her causing damage, specifically breaking her nose. Wife can also file for an injunction based upon Florida's domestic violence provisions. If Wife was to receive a temporary restraining order against Husband, she would still be entitled to support.

Q

QUESTION NUMBER 3

JULY 2004 BAR EXAMINATION - TRUSTS

In response to escalating school violence, the Everglades County School Board is considering adopting a multifaceted policy to address school safety. The draft policy contains the following provisions:

1. Elementary schools shall provide instruction in moral values, including, but not limited to, the study of famous moral leaders such as Buddha, Ghandi, Jesus, Martin Luther King, Jr., Mohammed, and Moses.
2. Students deemed by administrators to be at-risk for violent behavior shall be referred to counseling. At the discretion of the parent or guardian, counseling will be provided either within the public school system, or vouchers will be provided to pay up to \$2,000 per annum for private counseling with a licensed social worker, psychiatrist, psychologist, pastoral counselor, or ordained clergyperson.
3. Local school administrators shall conduct periodic unannounced searches in middle and high schools. Such searches shall involve lockers, backpacks, and purses selected on a random basis. In addition, hand-held metal detectors may also be used to check students for weapons.

Assume you are the attorney for the Everglades County School Board. Discuss the advice that you would give the School Board as to the potential Florida and Federal constitutional challenges to these provisions and the likely outcomes of such challenges.



SELECTED ANSWER TO QUESTION 3

(July 2004 Bar Examination)

The analysis of each provision is as follows:

Provision 1

This provision presents us with a Federal and Florida establishment clause problem. State action that deals somehow in religion must have a primarily secular purpose, its overall purpose or effect must be neither to inhibit or advance religion, and it must not create an excessive entanglement between religion and government. The provision is going to have problems withstanding a constitutional attack. While it appears to have a valid secular purpose, instruction on morals, the way that this purpose is being reached is probably just too sectarian in nature. Where religious teachings are used to promote a secular purpose it is necessary to show that the secular purpose could not be achieved just as well without the religious materials. In our case, the instruction of morals is a valid secular purpose but the required use of the teachings of various religious leaders to achieve the purpose is likely to be considered too religious in nature. Clothing these leaders as 'moral' leaders as opposed to religious leaders is just too transparent. There are some things that you simply can't take the religion out of. As such, I would advise the school board that this provision is likely to be struck as unconstitutional. It is possible that the first phrase directing schools to provide moral value instructions could be severed and stand-alone though.

Provision 2

The problem with this provision starts with its first sentence. A challenge that is likely to be raised is that this provision is vague and overboard. A policy or regulation should be clear enough on its face to put a reasonable person on notice of what is covered. Here, the school administrators are given total discretion in determining who is "at-risk for violent behavior." It is likely that this provision is going to be held as invalid as unconstitutionally vague under either the federal or the Florida Constitution. Another problem with this provision is the potential that state money, through the vouchers, will be used by the parents to pay a clergyperson or pastoral counsel thus violating the establishment clauses of the Florida and Federal Constitutions. Under the Federal Constitution this set up is going to be held okay. The US Supreme Court has held that these voucher programs do not violate the federal establishment clause because the money is going to the parents for a valid government purpose and that it is the parent's choice where the money is spent and as such, there is no problem with the federal establishment clause. The US Supreme Court has allowed this "indirect" government money expenditures to religious institutions or people. However, under the Florida Constitution this provision is likely to fail. This program is similar to the school voucher program set up by Governor Bush. The Florida Supreme Court, in evaluating that

program, noted that Florida's separation of church and state was more strict than found in the Federal Constitution. The Florida Supreme Court prohibited the state's money going to religious institutions either directly or indirectly. Given this legal precedent, I would advise the school board that this second provision, although likely valid under the Federal Constitution, would probably be unconstitutional under the Florida Constitution. Again, the provision may be able to stand if a court were to sever the reference to pastoral counselors and ordained clergy persons.

Provision 3

Provision three presents us with a right of privacy issue and also a 4th Amendment unreasonable search and seizure problem. First, it should be noted that Florida's Constitution, unlike the Federal Constitution contains an express right to privacy. Given this, at times the Florida Supreme Court has interpreted Florida's right to privacy as broader than the federal right. Under the facts as presented I would advise the school board that this provision has a very good chance of being upheld. I would tell them this based on the fact that the government has a very significant interest in insuring a child's safety and insuring that government run schools are free from contraband and that students and teachers within them are safe. Although the right to privacy is great and a fundamental one, I would feel safe to say that the government's interest in safe public schools is compelling enough to allow this provision to stand.

4th Amendment Concerns

Florida's protection against unreasonable government search and seizures has been interpreted to coincide with the federal interpretation of the 4th Amendment to the US Constitution. A person with a reasonable expectation of privacy shall not be searched without a warrant, subject to exceptions, and evidence seized in violation of this right shall be excluded from criminal proceedings against the person. Given that these searches are conducted at random they may be held violative of a student's right against unreasonable search & seizures. Given that we have government action and what appears as a reasonable expectation of privacy, contraband found by these searches would be excluded under the 4th Amendment in related criminal proceedings.

In all, this final provision would likely be upheld given the government's significant interest in safety but the 4th Amendment concerns should be noted. Additionally, there is a potential that the random search of backpack & purses provision could be held to cross the line and violate the student's right to privacy. While this may be, although highly unlikely, I feel safe to say that the locker search provision would be upheld regardless given the lower expectation of privacy in a school provided locker.

LASTLY

What should have been discussed initially is discussed here. It is important to note that a school board's actions will be deemed "state action" thereby making all of the above analysis applicable. Also, it should be noted that a county's acts will be preempted by the Florida Constitution and the Federal Constitution under the traditional hierarchy of law structure.

QUESTION NUMBER 1

FEBRUARY 2005 BAR EXAMINATION – FLORIDA CONSTITUTIONAL LAW

After hearing complaints from its constituents and from judges regarding delays in the court system caused by large numbers of lawsuits between stockbrokers and clients, especially in larger metropolitan areas, the Florida Legislature enacted the "Stockbroker Litigation Relief Act" (the Act). The legislation was timely signed into law by the Governor. The essential terms of the Act are:

1. Each dispute must be submitted to non-binding mediation before a complaint may be filed. Any contract term to the contrary, existing or future, is void.
2. Any stockbroker/client lawsuit heard by a court shall be tried without a jury. Any demand for a jury trial shall be stricken by the court on its own motion.
3. All stockbroker/client lawsuits shall be given lowest priority on the court's calendars and shall only be tried when there are no other civil or criminal cases on the court's docket ready to be tried.
4. The low priority set forth in paragraph 3 may be overcome by the payment of an "advancement fee" of \$2500. If the "advancement fee" is paid, the case shall be given the same priority as other civil cases. The "advancement fee" is not waivable on grounds that the party seeking the relief is unable to pay the fee.
5. The Act shall immediately take effect in all counties that have a population of 500,000 or more according to the most recent census. For counties of 499,999 persons or less according to the most recent census, the Act will go into effect if approved in a county-wide referendum.

You have been retained to represent Cleo, who contends that Stockbroker negligently handled her finances and breached their contract, resulting in loss of Cleo's entire life savings of \$200,000. Cleo resides in Sunshine County, Florida that has a population of over one million per the most recent census. The contract between Cleo and Stockbroker did not contain a provision requiring mediation.

Cleo wants to oppose the Act and sue Stockbroker immediately in court. Advise Cleo by discussing fully the arguments that can be made under the Florida Constitution in opposition to the Act including the likely outcome of these arguments.



SELECTED ANSWER TO QUESTION 1

(February 2005 Bar Examination)

I represent Cleo. Cleo would like to sue a stockbroker that she claims negligently handled her finances and breached her contract. Cleo wants to sue and, therefore, wants to challenge the constitutionality of the Stockbroker Litigation Relief Act (“SLRA”). I will discuss the arguments that can be made under the Florida Constitution in opposing the Act and the likely outcome.

Cleo must have standing to challenge the law. As she entered into a stockbroker contract and has been harmed as a result she has standing. This is also true given she lives in a county with a population where the law will immediately go into effect.

For a law to be valid in Florida it must be Constitutional, clearly written, not overbroad and for a lawful purpose. It must deal with only one subject, which must be described in its title. It must contain an enacting clause. It must also be properly signed. And it must not conflict with any federal law.

The law was signed by the governor. The facts state it was timely signed and I will therefore assume that it was properly executed in all ways.

The law deals with only one subject, thus complying with the “One Subject Rule” as set forth above. The one subject is stockbroker lawsuits.

The title “Stockbroker Litigation Relief Act” appears to adequately state the purpose of the law in the title.

I will address general Constitutional Arguments relating to the entire Act, as well as arguments relating to the specific clauses below.

Clause No. 1

Clause number one states that each dispute must be submitted to non-binding mediation before a complaint may be filed and declares and contract term to the contrary, existing or future, void. This clause may be challenged on two grounds: Access to Courts and Right to Contract.

The Florida Constitution declares that access to the judicial courts is to be available for every person to address all legal wrongs. Clause number one significantly limits a potential plaintiff's access to courts by forcing them into non-binding mediation. Thus, an argument could be made that clause number one is unconstitutional as infringing a Florida citizen's right to access to the courts. However, this argument is unlikely to succeed in light of the Kruger doctrine. The Kruger court held that access to the courts may be limited if 1) there is a compelling public necessity, and 2) other reasonable means of redress are available. Here, there appears to be a compelling public necessity to limit Stockbroker lawsuits as there have been a number of complaints by local constituents. Additionally, alternative means of redress remains as the mediation is non-binding, therefore allowing potential plaintiffs to still access the court system following mediation. Therefore, the first part of clause number one is likely constitutional under this argument.

The Florida Constitution also states that a citizen's right to contract to should not be infringed upon, especially with respect to contracts already in existence. Here, clause number one states that all contracts to the contrary, existing or future, are void. Because future contracts are included, a good argument exists that the second part of clause number one is unconstitutional as infringing upon previously entered into contracts. This may also infringe on S's right to work but this is unlikely.

Clause No. 2

This clause may be attacked on three grounds: as an unlawful Bill of Attainder, infringing on separation of powers and infringing on a citizen's right to jury trial.

A Bill of Attainder is legislation that attempts to impose a punishment on someone without the benefit of a judicial determination. Therefore there is an argument that Clause No. 2 makes the statute an unlawful Bill of Attainder. This argument is unlikely to succeed, however, as it appears that a bench trial may still be had.

All Florida citizens are guaranteed the right to a jury trial by the Constitution. Clause two infringes upon this right and is, therefore, likely unconstitutional.

By stating that the Court must strike the right to jury on its own motion, it can also be argued that clause number two infringes on the separation of powers between that legislative and judicial branches of government. Per the constitution, one branch cannot meddle in the other branch's affairs. The legislature is to make the laws and the judiciary is to interpret and uphold the laws. Here, it appears that the legislature is intermeddling with the Court's right to control its docket and create its own rules. However, the legislature often creates laws governing these types of matters so this argument is unlikely to prevail.

Clause No. 3

Clause number three also appears to unconstitutionally limit a citizen's right to access to the courts, making stockbroker/client lawsuits take a back burner if you will to all other matters, civil or criminal. Although, since there is still access, this argument is unlikely to succeed.

This clause also appears to violate the separation of powers doctrine by the legislature controlling the court's dockets. The clause is likely unconstitutional on separation of power grounds.

Clause No. 4

Clause number four also prevents access to courts by charging an exorbitant "advancement fee" if one wishes to gain equal footing with other cases. It is not waivable for inability to pay. The Florida Constitution guarantees all persons access to the courts, including indigent defendants. Many courts' fees are waived for indigents to allow for this access, which is the public policy of the court system. Therefore, without providing for relief for indigents, this clause unlawfully blocks their access to the courts.

In addition, by singling out indigents from those that can pay, the clause can be challenged on Equal Protection grounds. The constitution provides that the state cannot take life, liberty or property without due process and equal protection of the law. This clause discriminates against indigent defendants. As there is no suspect class, fundamental right or quasi-suspect class involved, the law must bear a rational relationship to a legitimate government purpose. This clause does not as all people should be granted access to the Courts.

Clause No. 5

In Florida, there are two types of laws, general and special. General laws apply to the entire state, to all people. Special laws apply only to specific persons, places. General laws can be of "local application," if they apply to the whole state but are limited by population. Clause number five applies the Act to counties with populations over 500,000. Therefore, this law is either a general law of local application or a special law. Special laws must be enacted with prior notice or via referendum. If the Act is a general law of local application it will be deemed valid. If it is deemed a special law, it will likely be unconstitutional as only certain persons have to vote by referendum and not all persons affected. Because it appears to the entire state and is limited only by population, it appears to be a general law of local application and would likely be deemed constitutional under this analysis.

General Arguments

This law may also be challenged on these additional grounds: Privileges and Immunities, Equal Protection, Commerce Clause, Due Process.

The privileges and immunities clause states that a state cannot discriminate against non-citizens. Here, however, the Act appears to apply to all stockbrokers, whether in state or not. Therefore this argument is likely to fail.

The equal protection clause states that the government cannot deprive a person of life, liberty and property without due process of law. The Act applies only to stockbrokers. Therefore, an argument can be made that equal protection of law is not given to stockbrokers. Why apply the Act to them and not any other profession? There are two tests for equal protection in Florida: strict scrutiny and minimal scrutiny (rational relation). Florida does not apply intermediate scrutiny. Strict scrutiny applies to suspect classes and fundamental rights. Because stockbrokers are not a suspect class and the right to work, although important, is not a fundamental right, strict scrutiny does not apply. The rational basis test states that the Act must be rationally related to a legitimate government purpose. Because stockbroker lawsuits appears to be a problem, the law as a whole meets this test as it is rationally related to this problem.

Under the Commerce Clause, laws may not discriminate against or unduly burden interstate commerce. As the law appears to apply equally to all stockbrokers, in state or out, it does not discriminate against out of state commerce. However, one can argue that it burdens out of state commerce by imposing undue restrictions on stockbrokers, thus making it unlikely that they will offer services to Florida citizens. This is a close question and will best be left up to the Court.

There are two types of due process, substantive and procedural. Substantive requires that laws are fair. Procedural requires a notice and hearing if a personal life, liberty or property is to be infringed upon. To test substantive due process, the Court would utilize the rational basis test, above, and likely reach the same conclusion. The procedural due process clause does not appear to apply here.

Sections of the above law are likely to be found unconstitutional. If so, those portions may be stricken and the remainder reenacted into law through proper procedures.

Q QUESTION NUMBER 2

FEBRUARY 2005 BAR EXAMINATION – REAL PROPERTY

In a written lease, Landlord agreed to rent a duplex to Teresa "for one year, payable at \$500 per month," beginning August 1. Teresa paid Landlord a security deposit of \$250. On August 1, Teresa was unable to move in because the duplex was still occupied by Bud, whose lease had expired on July 31. Bud eventually moved out on August 31, and Teresa moved in on September 1.

During September, high winds caused by a storm broke a window and blew several shingles off the roof. Rain entered through the broken window and roof, damaging the walls and carpet, and ruining Teresa's sofa. Teresa demanded that Landlord fix the roof and window. Landlord replied that repairs were Teresa's responsibility.

The adjacent duplex unit, also owned by Landlord, was occupied by a rock group. The group rehearsed at least four times a week during the hours of 7:00 p.m. to midnight. The group's loud rehearsals prevented Teresa from sleeping and interfered with her law studies. Teresa complained repeatedly to Landlord, but the noise continued. On October 30, Teresa moved out without notifying Landlord and without having paid any rent. Teresa told her classmate, Sally, she could move into the apartment for \$500 a month rent. Sally moved in November 1. Sally has not paid any rent to either Landlord or Teresa.

On November 15, Landlord consults the law office where you are clerking. Landlord wants to collect money from whomever he can. Landlord also has someone who is willing to pay \$600 rent per month for the duplex. Landlord also wants Sally to be thrown out immediately. Prepare a legal memorandum discussing fully the rights and remedies available to Landlord and any defenses available to Bud, Teresa, and Sally.



SELECTED ANSWER TO QUESTION 2

(February 2005 Bar Examination)

Landlord and Teresa have executed a valid contract, complying with the Statute of Frauds, for a tenancy of years because it has a fixed period of time. Since Teresa was to begin the lease on August 1, Landlord has a duty to give her possession on this date or he is in breach. Due to this breach, Teresa could avoid the contract with Landlord because he is in a material breach. Landlord did not provide her possession because he had a previous tenant holding over after the lease term expired. In Florida if Bud holds over after the lease expires without the landlord's permission a tenancy at sufferance is created. Landlord can demand for Bud to move out, although not resorting to self help measures. Landlord must go to county court seeking to regain possession, after giving the proper notice to Bud (3 days for nonpayment of rent and seven days for any other noncompliance). After this time Landlord can obtain an eviction. Landlord will also be able to receive double rent for the period that Bud held over after the lease expired and Landlord demanded possession.

Landlords generally have a duty to repair in Florida. This can be altered by contract and placed on the tenant if the lease concerns a single-family dwelling or a duplex, but cannot be altered for other multi-family dwelling homes. The lease between Teresa and Landlord is silent about repairs according to the facts and thus the duty to repair would default to Landlord. This duty to repair means that, among other things, Landlord must provide a proper roof, working windows with screens, steps, heat in the winter, hot running water and a stove and refrigerator that works. Landlord is in breach of his duty to repair since he did not fix the broken window or roof problems after the tenant demanded and gave him notice of the problems. Note, even if Teresa had not told him of the problems, the landlord has a duty to make reasonable inspections to make sure the home is habitable. There is nothing in the facts to show that Teresa would not let Landlord on the property to make the necessary repairs, rather the facts show that Landlord refused. Landlord is thus going to be responsible for the damage to the walls and carpeting and to her sofa. The tenant cannot try to increase her damages and not mitigate them. For example, if Teresa hated her sofa she cannot move it to the spot where water is coming in to collect from landlord. However nothing in the facts lead us to believe Teresa did this.

The landlord has an implied duty to provide a habitable home. Landlord breached this duty by not fixing the window and roof. The landlord also has an implied duty to provide quiet enjoyment.

Teresa could arguably say that landlord breached this duty by permitting the rock band to play in a duplex at midnight. Landlord will argue that he did not have the seven days notice to fix the problem. Teresa, however, from the facts complained "repeatedly." She will thus argue that she was constructively evicted from her home and left immediately and is thus not required to give notice or pay the rent. Landlord will argue that notice is required before moving out. He may point to a provision in the lease requiring up to 60 days if there was a provision. If the courts strike the lease, possibly because landlord was in breach about providing possession on Aug. 1, he will still argue that a periodic tenancy was formed and that the period is monthly because she is to make monthly payments. If this were the case, Landlord will argue that Teresa had to give him at least 15 days before she moved out.

Teresa then allowed Sally to move in without getting permission from Landlord. Landlord may point to a provision in the lease prohibiting assignments and subleases to get Sally out. However, these provisions are narrowly construed and the courts will not read them into the lease if they are not present. If the lease contained those provisions, Landlord can waive them if he gave permission or collected rent or in any other way approved the arrangement. Unless otherwise indicated, once he waives it then it continues to be waived for all subsequent assignments or subleases.

Assuming that no provisions were in the lease, it is necessary to determine whether Teresa assigned or subletted her apartment because each arrangement will provide a difference in who Landlord can pursue. If Teresa gave Sally her apartment for the entire time remaining on the lease, it is an assignment but if it is only for a limited period of time it is a sublease. A conveyance of land provide the landlord with two different grounds to pursue damages: breach of contract and breach of conveyance. Teresa will be liable for the entire term of the lease under breach of contract principles regardless of whether new people move into her apartment with her permission during her leasehold (i.e. Sally). This is because Teresa is in privity of contract with the landlord by signing the lease. If she assigned her lease to Sally then Sally is in privity of estate with Landlord for as long as she is occupying the home. Once she leaves (for example, if Sally assigns to someone else) the landlord cannot pursue Sally for rent because she is no longer in privity of estate. If, on the other hand, Teresa sublet her apartment to Sally then it is considered that Teresa still has privity of estate rather than Sally. Thus Landlord would have no privity with Sally and could not pursue her for rent.

If Sally moves out and the duplex is vacant, Landlord has a duty to mitigate damages during Teresa's lease by having the higher paying person rent the apartment. Landlord can pursue Teresa for any balance of damages after mitigating and taking into account the security deposit already paid by Teresa. The landlord will have to give 15 days notice to Teresa of his intent to keep the security deposit & tell why, then wait 30 days to see if Teresa objects.

Q QUESTION NUMBER 3

FEBRUARY 2005 BAR EXAMINATION – TORTS

Patron entered MegaMart during regular business hours, intending to purchase certain items in the garden department. On her way to the garden department, Patron passed through the paint department where Employee was in charge that day. One can of paint thinner was damaged and was leaking, creating a puddle in the aisle. Patron slipped in the puddle and fell, injuring her knee. Employee saw Patron on the floor but did not assist her and shouted at her that MegaMart would not be responsible for an accident caused by a customer's own clumsiness.

Shaken, Patron began to leave the store but returned to the paint department to ask to see the store manager. Patron observed Employee exiting the sales floor through a door marked "Employees Only." Patron followed Employee through the door and found Employee in the employees' break room. Patron and Employee argued and Employee struck Patron with his fist, breaking her jaw. Her jaw was wired shut for six weeks to allow the fracture to heal. Patron was laid off from her job as a medical receptionist for the six weeks' period because she was unable to perform her duties. It was later determined that Patron had torn a knee ligament from her fall at MegaMart, requiring surgery and extensive rehabilitation.

Employee had worked for MegaMart for six months. Because he normally worked in the electronics department, he was never trained on how to handle spills on the floor. Employee's application for employment with MegaMart showed that he had recently left a job with Electronics, Inc. on grounds of disagreement with a supervisor over working hours. In fact, Employee was fired from Electronics, Inc. for physically attacking a dissatisfied customer. Employee's personnel file at MegaMart does not contain any notation that Electronics, Inc. was contacted by anyone at MegaMart before or after Employee was hired.

Patron has retained Partner at the law firm where you are clerking. Prepare a legal memorandum for Partner discussing the causes of action and claims for non-punitive damages that Patron would have against Employee and MegaMart and the defenses that would be available to each defendant. Also discuss the standard for being awarded punitive damages in Florida and whether punitive damages would be available against Employee. Do not discuss whether punitive damages would be available against MegaMart.



SELECTED ANSWER TO QUESTION 3

(February 2005 Bar Examination)

TO: Partner

FROM: Associate

Re: Patron vs. MegaMart and Employee

This memorandum will discuss the possible causes of action and claims for non-punitive damages that Patron (P) could have against Employee (E) and Megamart (M) and the defenses that would be available to each defendant.

This memorandum further discusses the standard for being awarded punitive damages in Florida and whether punitive damages would be available against E.

P v. E

1. *Negligence for removing the puddle of paint or warn patrons*

P could have a cause of action in negligence against E. To show a prima facie case in negligence P must show that (i) E had a duty to P, that (ii) E breached that duty, that (iii) the breach was the actual and proximate cause for Ps injuries, and (iv) damages to Ps person or property.

Here E had a duty to periodically inspect the aisles for dangerous conditions that might harm the patrons. Everyone is owed a duty to act as an average, prudent, reasonable person under the circumstances. Patrons during regular business hours are invitees and owed a higher duty of care, which includes to inspect the premises for unsafe conditions and once discovered, make the condition safe or warn of the condition. Here, E was in charge of the paint department where the leaking can of paint thinner was located and the puddle appeared. This was a dangerous condition and E had a duty to inspect the aisles for these types of conditions.

E would content that P would have to prove that E breached that duty. The facts do not show in which time sequence the puddle appeared and if there was any time between the appearance of the puddle and the accident during which E could have inspected the isle and discover the condition. But the nature of paint and paint thinners and the way they are stored and handled let the storekeeper reasonably expect spillage to happen.

E did not warn of the puddle or make the condition safe by wiping it away and thus breached his duty to P.

E's breach must have been the actual and proximate cause of P's injury. But for E's breach of duty, P would not have slipped and fallen and the injury to his knee is an injury that was foreseeable to happen from a slip and fall accident in the store. Therefore, E's negligence was the actual and proximate cause of P's damages.

P must have suffered damages to his person or property. P injured his knee which is sufficiently severe and permanent as to be recognized as compensable damages under Florida law.

Therefore, a prima facie case of negligence against E can be shown.

E could only defend by raising the defense of contributory negligence. If the puddle of paint thinner was clearly visible to P and P could have avoided stepping into this puddle and slipping, then his action could lead the fact finder to attribute some fault to P thus relieving E of some of his liability. Florida follows pure comparative negligence, therefore, any fault on Ps side will reduce the liability of E proportionally. However, E will not be relieved of liability unless Ps fault was 100%, which is unlikely, since paint thinner is a clear liquid which is not easily detectable when it is spilled on the floor.

2. Intentional infliction of emotional distress for shouting.

P could have an action against E for intentional infliction of emotional distress. P would have to show that E engaged in outrageous conduct towards P, that E intended this conduct, that his conduct caused severe distress to P and that it was foreseeable and intended by E to cause such distress in P.

E shouted in a store where other patrons would likely hear his shouting at P. Shopkeepers owe a higher duty of care toward the patrons and shouting at a patron in the store in front of the other patrons could arguably be outrageous conduct. But for the shouting, P would not have been "shaken" which was foreseeable. However, being "shaken" probably does not rise to the level of distress that is actionable under Florida law. Some physical manifestations would have to occur. Here it does not seem that P suffered more severe distress than being "shaken," and he especially did not suffer a physical injury that could be traced to the shouting, thus P would likely fail with this cause of action.

3. Defamation

P could sue E for defamation. P would have to show a publication of a false fact by E to others that concerned P. E's shouting that the store would not be responsible for an accident caused by a customer's own clumsiness was probably easily audible by the other customers and intended to be heard by others in the store; therefore E made a statement of fact to others that concerned P. The statement was false, because P did not fall because of his clumsiness, but rather because of E's negligence, therefore, the statement was false. However, P would have to demonstrate actual damages suffered from the defamation. Here, P did not suffer any actual damages from this conduct and thus his action for defamation will likely fail.

4. Negligent infliction of emotional distress

P did not suffer any actionable damages due to E's shouting and thus cannot recover for negligent infliction of emotional distress.

5. Battery

P could bring an action against E for battery. Battery is the intentional offensive touching of another without that person's consent. P would have to show that this touching was the actual and proximate cause of injuries to P's person.

E hit P with his fist, breaking her jaw. E intentionally brought about a movement of his fist which struck P's jaw. But for E hitting P, P would not have suffered a broken jaw and this injury was foreseeable. The injury was also sufficiently permanent and severe to make it actionable. P did not consent to being hit, thus a prima facie case for battery can be established.

E could argue that P was a trespasser, because he had entered the employees' break room, which was clearly marked for "Employees Only," and that E was defending the property of the storeowner. However, the defense of property must be proportional and reasonable and cannot exceed the scope permissible had the storeowner himself tried to evict P from the premises. Striking a customer in the face to remove him from the employees' break room is certainly excessive force and not permissible in defense of property such as this.

E could argue provocation. If P was the initial aggressor, that E could have acted in self-defense. Nothing in the facts tells us that P had threatened E with physical force, therefore, this defense will likely also fail. The altercation could have been started by E, in which case E would have been the initial aggressor not entitled to self-defense until he had stopped his aggression and communicated that to P.

E will likely be liable for battery.

P v. M

1. Respondent Superior

P could sue M under the theory of respondent superior for the tortious acts committed by E.

Employers are liable for the tortious acts of their employees within the ordinary scope of employment. Here, E committed negligence and battery during the working hours and while working in the store against a lawful patron of the store. E was acting within his scope of employment and M will be vicariously liable for E's tortious acts; at least for E's negligence.

M will argue that M should not be liable for the battery, because this was an intentional tort, not committed during the scope of employment, but rather during an employment break. M will argue that while E was in the employee break room he was on a frolic on his own and tortious acts committed while on a frolic should not be attributed to M. This argument will likely fail. Considering the time and purpose of E being in the break room and the short distance from the business premises, it is arguable that employees on their break in this room are still acting within the scope of their employment, since every employee will have to take a break during the day and the employer allows his employees to use this room during short breaks, but the breaks are during the regular business hours on the premises of the employer.

M will prevail however with its argument that it should not be liable for intentional torts of its employees under respondent superior unless M has reason to know of the violent temper of E.

2. Negligent training and supervision of E

P could assert a claim in negligence against M for negligent supervision and training of E. M was under a duty to act as an ordinary prudent person under the circumstances and employer train their staff and should train their staff concerning their responsibilities of removing dangerous conditions in the store. M had not trained E during the six months of his employment which was a breach of M's duty of reasonable care. But for the lack of training, P would not have slipped and fallen and suffered the foreseeable injuries. Therefore, M is directly liable for negligence.

3. Negligent hiring of E

P could assert another count of negligence for negligent hiring of E. M owed P a duty of reasonable care in the selection of its employees. E had been fired from his previous job because he had physically attacked a dissatisfied customer. M breached its duty by not contacting the former employer as to the reason for E's termination. Had M discovered the reason, he would have likely not hired him or at least trained and supervised him more closely. But for the negligence in not checking E's background, E would not have been hired and would not have attacked P during the break and committed the battery. It was foreseeable that E would be in contact with dissatisfied customers during the regular employment and that E might be violent again. The damages that P suffered are attributable to M's negligence; therefore M is liable for negligent hiring of E.

M would defend that during the six months of employment E had not shown any violent behavior towards customers that would have put M on notice, but the duty arose at the time of hiring of E and is therefore not a viable defense.

Damages:

For the actions above, P could demand economic and non-economic damages in the form of lost wages, past, present and future medical cost, and for pain and suffering. The six weeks of lost wages as medical receptionist are compensable as well as the reasonable award for the pain and suffering during the time of recovery. Furthermore, the medical bills for the hospitalization and follow-up medical care.

Punitive damages

In an action against E, the standard for recovery of punitive damages is as follows: Punitive damages must be pleaded with specificity and the pleading must show intentional or grossly reckless conduct of the tortfeasor towards the plaintiff.

Here E's battery is an intentional tort for which punitive damages would be available. In 1999, Florida enacted the tort reform act according to which punitive damages are capped at the higher of 3 times the compensatory damages or \$500,000. Must plead sufficient fact to establish intentional conduct and that there is a bona fide argument for punitive damages. Here, punitive damages would be available against E for his intentional battery of P.

PART II - SAMPLE MULTIPLE-CHOICE QUESTIONS AND ANSWERS

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

The answers appear on page 40.

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 outside the examination room to one of the proctors. If, however, fewer than 15 minutes remain, please remain at your seat until time is called and the Board has collected all question booklets and answer sheets.

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

23 SAMPLE MULTIPLE-CHOICE QUESTIONS

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

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

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

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

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

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

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

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

7. The State of Florida is prosecuting a former police officer for extortion of money from prostitutes. One of the State's witnesses is Sally. Sally has an adult conviction for vehicular homicide. She was charged with driving a car in a reckless manner resulting in the death of her sister, a passenger in the car. Sally pleaded nolo contendere, was adjudicated guilty and received a suspended sentence although she could have received a sentence of state imprisonment up to 5 years. At trial, evidence of this conviction is
- (A) admissible to impeach Sally because vehicular homicide carries a maximum penalty in excess of 1 year.
 - (B) inadmissible to impeach Sally because she never admitted her guilt since she entered a plea of nolo contendere.
 - (C) inadmissible to impeach Sally because she received a suspended sentence.
 - (D) inadmissible to impeach Sally because she is only a witness and not the criminal defendant.
8. A defendant charged with first-degree murder shall be furnished with a list containing names and addresses of all prospective jurors
- (A) upon court order.
 - (B) upon request.
 - (C) upon request and showing of good cause.
 - (D) under no circumstances.
9. Cooper is suing March for money damages. Because he believes portions of March's deposition are highly favorable to his case, Cooper's attorney intends to read parts of the deposition at trial instead of calling March to the stand. March objects to Cooper's use of the deposition at trial. What is the court's likely ruling?
- (A) Cooper may use the deposition at trial, but, if requested, he must read all parts that in fairness ought to be considered with the part introduced.
 - (B) Cooper may use the deposition at trial, but only to contradict or impeach March's prior inconsistent statements or pleadings.
 - (C) Cooper may not use the deposition at trial, as March is able to testify and no exceptional circumstances exist.
 - (D) Cooper may not use the deposition at trial, as this would make March his witness and immune to impeachment.

10. Jan sues the Chicago Times for defamation in a Florida circuit court. At trial, Jan wishes to offer into evidence a copy of the edition of the Times containing the allegedly libelous article. Before the newspaper may be admitted, Jan must
- (A) call as a witness an employee of the Times to testify that the proffered newspaper was in fact published by the Times.
 - (B) have a certification affixed to the newspaper signed by an employee of the Times attesting to its authenticity.
 - (C) establish that the newspaper has been properly certified under the law of the jurisdiction where the newspaper was published.
 - (D) do nothing because the newspaper is self-authenticating.
11. Defendant was arrested on February 1 and released one month later on March 1 after being charged with a felony. On December 1 of the same year as his arrest, he filed a motion to discharge since no trial or other action had occurred to that point. The court held a hearing 3 days after the motion was filed. Defendant should be
- (A) discharged because more than 175 days passed between arrest and the filing of the motion to discharge.
 - (B) discharged because more than 175 days passed between his release from jail and the filing of the motion to discharge.
 - (C) brought to trial within 90 days of the filing of the motion to discharge.
 - (D) brought to trial within 10 days of the hearing on the motion to discharge.
12. Bill, a single man, owned pasture land in Deerwoods, Florida, which he leased to a tenant. He also owned a condominium in Miami, which he held for investment. In his will, he devised the pasture land to his son Tommy and the condominium to his daughter Julie. All other assets would pass equally to Tommy and Julie.

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

- (A) Kathy gets the condominium regardless of the prenuptial agreement, Tommy takes the pasture land and Tommy and Julie split the rest of the estate.
 - (B) Due to Kathy's prenuptial agreement, Tommy receives the pasture land, Julie gets the condominium and Tommy and Julie split the rest of the estate.
 - (C) Kathy gets the condominium, but because Bill had originally indicated his intent to devise equally to his children, Tommy and Julie will split the remaining estate.
 - (D) Regardless of the prenuptial agreement, Kathy is a pretermitted spouse. Since Bill leaves surviving lineal descendants who are not Kathy's, Kathy receives 50% of the estate, Tommy gets the pasture land, and Tommy and Julie split the residue of the estate.
13. Anderson and Parker decide to form a corporation which will locate missing children. Which of the following would be a proper name for the corporation?
- (A) ANDERSON
 - (B) FBI Consultants, Incorporated
 - (C) Private Eye Partners
 - (D) Child Finder Company
14. At trial, during the plaintiff's case-in-chief, the plaintiff called as a witness the managing agent of the defendant corporation, who was then sworn in and testified. Defense counsel objected to the plaintiff's questions either as leading or as impeaching the witness. In ruling on the objections, the trial court should
- (A) sustain all the objections and require the plaintiff to pursue this type of interrogation only during the plaintiff's cross-examination of this witness during the defendant's case-in-chief.
 - (B) sustain the leading question objections but overrule the other objections because a party is not permitted to ask leading questions of his own witness at trial.
 - (C) sustain the impeachment questions but overrule the other objections because a party is not permitted to impeach his own witness at trial.
 - (D) overrule all the objections because the witness is adverse to the plaintiff and therefore may be interrogated by leading questions and subjected to impeachment.
15. Rainbow Corporation has outstanding 1,000 shares of voting common stock and 1,000 shares of nonvoting preferred. The preferred has a liquidation preference equal to its par value of \$100 per share plus a 3 percent noncumulative dividend. Rainbow submits to its stockholders a proposal to authorize a new class of preferred stock with redemption rights that would come ahead of the old preferred stock. At a shareholders' meeting, 700 common and 400 preferred vote in favor of the proposal. Which of the following statements is correct?

- (A) The proposal is validly approved because overall a majority of the outstanding shares did approve.
- (B) The proposal is invalidly approved because a majority of the preferred shareholders did not approve.
- (C) The vote of the preferred stockholders does not matter because it was nonvoting stock.
- (D) The proposal is invalidly approved because a two-thirds vote of each class is required.

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

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

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

17. At the close of all the evidence in a jury trial, Defendant moves for a directed verdict. After much argument, the court denies the motion. Subsequently, the jury returns a verdict for Plaintiff.

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

- (A) Yes, because Defendant has raised new grounds.
- (B) Yes, because Defendant had ten days after the jury returned its verdict within which to move to set aside the verdict.
- (C) No, because the court denied the motion for directed verdict rather than reserving ruling.
- (D) No, because the court entered final judgment for Plaintiff before the motion to set aside the verdict was filed.

18. In the absence of a provision to the contrary in the articles of incorporation, the directors of a corporation elected for a specified term
- (A) can be removed from office at a meeting of the shareholders, but only for cause and after an opportunity to be heard has been given to the directors.
 - (B) can be removed from office at a meeting of the shareholders, with or without cause.
 - (C) can be removed from office at a meeting of the shareholders, but only for cause.
 - (D) can be removed from office prior to the expiration of their term only by a decree of the circuit court in an action by the shareholders.
19. Mary, a wealthy St. Petersburg widow, executed her first and only will on May 15, 1990 and died on August 18, 1990. Her will provided that her estate be divided equally between her only child, Joan, and the Salvation Army of Largo. How will Mary's estate actually be distributed?
- (A) 100% to Joan.
 - (B) 100% to Joan if she files a timely petition requesting that the devise to the Salvation Army be avoided.
 - (C) 50% to Joan and 50% to the Salvation Army.
 - (D) 50% to Joan and the income from the remaining 50% to Joan for life, remainder to the Salvation Army, if Joan files a timely petition protesting the devise to the Salvation Army.
20. Regarding a deposition in a civil suit, which of the following is/are true?
- I. A deposition of a person against whom another person contemplates filing an action may be compelled by the party contemplating the action, without leave of court, before the action is filed.
 - II. A deposition of the defendant in an action may be taken by the plaintiff without service of a subpoena on the defendant.
 - III. A deposition may be taken even though all the testimony secured by it will be inadmissible at the trial.
- (A) II only.
 - (B) I and II only.
 - (C) II and III only.
 - (D) I, II, and III.

SAMPLE MULTIPLE-CHOICE QUESTIONS WITH PERFORMANCE TEST COMPONENT

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

Florida Statutes 47.011 Where actions may be begun.

Actions shall be brought only in the county where the defendant resides, where the cause of action accrued, or where the property in litigation is located.

Florida Statutes 47.021 Actions against defendants residing in different counties.

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

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

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

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

ANSWER KEY FOR MULTIPLE-CHOICE QUESTIONS

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