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Florida Bar Examination Study Guide and Selected Answers

**July 2005
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**This Study Guide is published semiannually with essay questions
from two previously administered examinations
and sample answers.**

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PART I – ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2005 AND FEBRUARY 2006 FLORIDA BAR EXAMINATIONS

ESSAY QUESTIONS AND SELECTED ANSWERS

Part I of this publication contains the essay questions from the July 2005 and February 2006 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 handwritten answers are typed as submitted by the applicant. 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.



QUESTION NUMBER 1

JULY 2005 BAR EXAMINATION - CONTRACTS

Carrie, a 17-year-old high school student, had been baking homemade pies and cakes since she was 13 years old. On May 15, Paul contacted Carrie and asked if Carrie could provide baked goods in about two weeks for a graduation party of 300 students to be held on June 1. Paul stated that he would pay \$1500 for cakes and pies. Carrie stated that she would be more than happy to bake the cakes and pies for Paul's party. On May 27, Carrie left a message on Paul's answering machine stating that the supplies are more expensive than she expected and that she would need a total of \$2100. Paul never responded to the message.

On May 31, Carrie called to inform Paul that she had begun baking and the pies and cakes would be ready for the party. Somewhat surprised, Paul explained that he hired someone else to provide the cakes and pies because Carrie called and requested a higher price. Paul hired Cakes and Things, Inc., to provide the cakes and pies for the original contract price that he and Carrie agreed to, the sum total of \$1500. Upset by this, Carrie swore that Paul would "see her in court." In addition to the cakes and pies, Cakes and Things, Inc., agreed to provide the party hats and favors. The price of the party hats and favors was \$900.

On the day of the party, Cakes and Things, Inc., called Paul to say that his dessert order was ready, but there was bad news. Cakes and Things, Inc., discovered the day before the party that it could not provide the party hats and favors because there was a strike at the supply plant where the party hats and favors were produced. As such, the goods did not arrive on time. The entire agreement was memorialized in writing on an invoice of Cakes and Things, Inc., signed by both Paul and a Cakes and Things, Inc., representative. Angry, Paul stated that things just were not going well and he was going to cancel the party. As such, he did not need the cakes and pies.

Please discuss:

1. the issues in a suit for damages by Carrie against Paul; and,
2. the issues in a suit for damages by Paul against Cakes and Things, Inc., including any counterclaim Cakes and Things, Inc., may have.



SELECTED ANSWER TO QUESTION 1

(July 2005 Bar Examination)

1)

This is a **Contracts question**.

UCC:

This Contract (K) will be governed by the UCC, as enacted in Florida. When the K involves the sale of goods, UCC governs. The test whether the K involves goods or services is the **material purpose** test. Carrie could argue that it was for services (because she was baking the pies), food items are typically considered goods under the UCC. In addition, the K between Paul and Cakes and things will also be governed by the UCC.

For a K to be enforceable, there must be:

- OFFER
- ACCEPTANCE
- CONSIDERATION
- NO VALID DEFENSES

Offer: Invitation to enter into a K

Acceptance: manifestation of an intent to be bound

Consideration: In Florida, is either a BARGAINED FOR exchange, BENEFIT to one party or a DETRIMENT to the other.

I. Carrie v Paul

Here, Paul's offer to pay \$1,500 for cakes and pies for a graduation party is an offer. Carrie accepted the offer when she said she would be happy to bake the cakes and pies. The consideration is the \$1,500 in exchange for the pies and cakes. Therefore a valid oral K was formed on May 15.

Defenses:

SOF

An ORAL K is generally enforceable unless it falls within the STATUTE OF FRAUDS (SOF). Under the UCC, a K for the sale of goods of \$500 or more must be in writing to be enforceable. In addition, it must be SIGNED BY THE PARTY TO BE CHARGED and CONTAIN ALL ESSENTIAL TERMS. The UCC is liberal in including GAP FILLERS where terms are not included, but the K must include the QUANTITY.

There are defenses to the SOF in the UCC:

- *Part Performance*
- *Specially manufactured goods*
- *Acceptance or Completed Performance*
- *Judicial Pleadings*

Here, Paul (P) will assert that Carrie's (C) K is not enforceable because it falls within the SOF (it is for more than \$500). Carrie will defend stating that she performed under the K and should be considered an exception to the SOF. She had begun baking the pies and cakes. The court may consider whether her baking the pies was justified given the attempted call for more money and receiving no response.

Therefore, it is likely that the SOF may not be a problem.

MINORITY

A MINOR (under 18) lacks the CAPACITY to K. A K entered into between a minor and adult is VOIDABLE at the MINOR'S option. It is fully enforceable against the adult. If the minor is emancipated or if the K is RATIFIED after the minor turns 18, then lack of capacity is no defense. Adult may be able to enforce K for necessities (shelter, food etc.)

Here, P may assert that the K is VOID because C is a minor (17-years old). However, only C can void the K and here C is enforcing the K. Necessity is not a defense since the K is not for C's necessities. The fact that she had been baking since 13 is of no consequence if she is not emancipated legally.

ANTICIPATORY REPUDIATION

Anticipatory Repudiation (AR) is when one party calls and unequivocally indicates an unwillingness to perform his obligations under the K BEFORE his obligations for performance have come due. If there is an AR, then the non-breaching party at his option may:

- *Consider it as an offer to rescind the K and excuse his performance*
- *Sue Immediately on the K*
- *Ignore the AR and continue to encourage the nonbreaching party to perform*
- *Wait until the K is actually breached and sue*

Right to assurances: *If one party believes that a party will not be able to perform (but has not received a complete AR), then the party is entitled to SEEK ASSURANCES from the other party. If the other potentially breaching party does not respond or give assurances, then the other party may be entitled to continue under AR as if the K was breached.*

Here, P will argue that C's call was a REPUDIATION and he was justified in treating his obligation as excused and the K rescinded. He would argue that his failure to return to call would lead a reasonable person to believe that he had chosen this option and would not perform. He would support it by the fact that the new price was extremely higher (1500 v 2100), that he did not believe it was reasonable for someone to perform at a loss of \$600.

C will argue that it was not an UNEQUIVOCAL repudiation because she stated that she WOULD NEED a total of \$2100 because supplies were more expensive but never did she state she would not perform. She would argue that this was an attempt to MODIFY the K. Under the UCC, one could modify the K without additional consideration if done in good faith but the modification is still subject to the SOF.

C would also argue that P could have sought ASSURANCES from C if he had doubts about her performance.

Here, it is unlikely that the court would find C's phone call a repudiation and that Paul was not justified or excused from his performance to pay.

BREACH OF K

To prove a breach of K, the party must prove that the other party has an absolute obligation to perform and has failed to do so.

C will argue that Paul breached the K (under AR discussed above) when he told her on May 31 that he had hired someone else and would not pay for the cakes. C will argue that unlike the May 27 call, this was UNEQUIVOCAL repudiation and she was entitled to immediately sue on the K.

DETRIMENTAL RELIANCE

If the court finds that there is no K, it may grant the party relief under a theory of PROMISSORY ESTOPPEL OR DETRIMENTAL RELIANCE. Elements for (PER) are:

- *Promise*
- *Unjust enrichment by D if P is not granted relief*
- *Reliance by P that is foreseeable, detrimental and reasonable*

Here, C will assert that she detrimentally relied upon the promise made by P that he would pay her to bake cakes and pies. She will argue that P made a promise to pay. She relied upon that promise by beginning baking of the pies and cakes. Her reliance was both reasonable and foreseeable and P is unjustly enriched.

P will argue that it was not reasonable for her to rely upon the promise since she did not hear from him after the phone call. In addition he will argue that he is not unjustly enriched because C did not complete performance; she did not deliver the pies to P for the party. C will argue that the only reason she did not deliver was because he called and cancelled the K.

Damages

There is a duty to mitigate when one party breaches a K (i.e. attempt to resell the goods).

C will likely recover the cost of the K price-any money she received in selling the cakes/pies under breach of K. Under PER, she would recover the out-of-pocket expenses she incurred.

C would have to sue with the help of a guardian unless she turned 18 in the meantime.

II. PAUL V CAKES AND THINGS (CT)

Under Common Law, whether a party was EXCUSED from performance depended on whether the breach was MINOR or MATERIAL. If material, then the party is excused from performance; i.e. he is not obligated to pay at all. If minor, then the nonbreaching party must complete performance, but may recover damages for the minor breach (must pay K price minus the cost to buy replacement).

Under UCC, there is PERFECT TENDER rule, where one party may reject goods for any reason if it does not comply strictly with the K in a single transaction (not installation K).

The elements of K (discussed above) are met. There was an offer and acceptance as indicated by their WRITTEN K on an invoice of CT. There was consideration of \$1500 for cakes and \$900 for party hats and favors. SOF is not applicable because it was in writing.

P will argue that CT BREACHED the K when it could not produce the party hats and favors. He will argue that this is a MATERIAL BREACH and therefore he is excused from performing. P also will argue that under the perfect tender rule, he could reject for any reason if it did not comply and he rejected when CT said they could not deliver the hats.

Since CT did not call until the day of the party, CT obligation to perform was that day and P does not have to rely upon the doctrine of AR.

IMPRACTICABILITY

Party may be EXCUSED from performance if their performance is impractical (UCC) or impossible (common law), it is impractical when performance would be

- *Unreasonably difficult or expensive*

- *The event was unanticipated at the time of the K*
- *Event occurs after the K is executed*
- **UCC** notes expressly provide for strikes and embargoes as a reason why a K may be impractical.

Impracticability is a subjective test (whether it would be impractical to this D).

Impossibility: *is a higher standard to meet. It is an objective test whether anyone would be able to perform giving the event arriving after execution.*

CT will argue that they were EXCUSED from performance under the doctrine of either impracticability or impossibility. CT would argue that a strike at the supply plant was not anticipated at time of K and that it makes performance unreasonably difficult because there are no hats to produce. Furthermore, no one, not just them, would be able to execute this part of the K.

It is likely that the court would accept the strike as an excuse and excuse CT from producing the hats.

DIVISIBLE K

A K is divisible when it can be divided into sections with each person having an obligation for that division.

Here, CT will argue that the K was divisible because it provided for \$1500 for the cakes and pies and \$900 for the party hats and favors. P could still pay the \$1500 for the cakes and pies and not pay the \$900.

Court would likely find that K was divisible.

DAMAGES

P would not be able to recover under a breach of K.

III. CT v PAUL

CT could countersue for breach of K. CT would argue that P breached the K when he said he was canceling the party and did not need the cakes and pies. This will be an unequivocal rejection of the goods.

As stated above, the court would likely find that the K was divisible. CT would also have a duty to mitigate and could recover their EXPECTATION DAMAGES (what they would have received had the K performed). They will likely recover the K price minus money received from mitigating.

Q QUESTION NUMBER 2

JULY 2005 BAR EXAMINATION - FAMILY LAW

Wilma, a successful architect, married her bookkeeper, Hudson. Hudson worked full-time until the birth of their son, Chad. Thereafter, Hudson worked part-time at Wilma's firm, so he could care for Chad. After nine years, Wilma and Hudson began having marital difficulties. Without consulting an attorney, in contemplation of separating, Wilma and Hudson agreed in writing to the following:

To equally divide all marital assets and debts;

To waive any claim for alimony and child support; and,

To have rotating custody of Chad.

The parties remained together for another six months. Hudson then moved to a modest two-bedroom apartment nearby. Wilma became upset, fired Hudson, and did not allow him visitation or communication with Chad. Wilma, through her attorney, filed for divorce seeking custody, child support, and supervised visitation.

Hudson, through his attorney, counter-petitioned to vacate the parties' agreement because he was under emotional stress when entering into the agreement, and sought alimony, custody, child support, and attorney's fees. Hudson is currently unemployed.

As the Judge's staff attorney, prepare a memorandum regarding:

- (1) Should the agreement be set aside?
- (2) What should the outcome of the case be regarding alimony, child support, custody, and visitation, given the parties' agreement?
- (3) Does Hudson have a claim for attorney's fees?



SELECTED ANSWER TO QUESTION 2

(July 2005 Bar Examination)

This memo will address whether the post-nuptial agreement between the parties should be set-aside, what the outcome of the case should be re: alimony, child support, custody, and visitation in light of the agreement, and whether Hudson has a claim for attorneys fees.

First, I will address whether Hudson may be awarded attorneys fees. In Florida dissolution of marriage actions, a spouse may petition the court for an order to make the other spouse pay his/her attorneys fees for the divorce. Whether the court will award a spouse attorneys fees is based on need & ability to pay. If a needy spouse can show that he/she is in need of attorney fees & that in order to have representation that is on the same level of the other spouse, a court may award that party reasonable attorney fees. In this case, Hudson will have an excellent case for attorney fees against Wilma because he is unemployed and therefore can show a financial need. In addition, Wilma has the ability to pay because she is a successful architect & is still employed. Therefore, Hudson is likely to succeed on his claim for attorney fees.

Issue 1 – Should the Agreement be set aside. Under FL Law, parties may validly enter into POST-NUPTIAL AGREEMENTS or prenuptial agreements. A post-nuptial agreement is where the parties MUTUALLY & VOLUNTARILY agree to enter into a contract post-marriage to divide assets, determine child related issues, or any other issue the parties desire, that will take affect upon dissolution of the marriage. In determining whether a post-nuptial agreement is valid, the court will consider the following:

- was the agreement between the parties voluntary & made without any duress or undue influence*
- did the parties have an opportunity to consult independent counsel*
- was there an imbalance of power between the parties such that one party has much greater leverage over the other party*
- if a party waived probate rights, was there full financial disclosure to the waiving party*

In addition, a party may validly waive any claim to alimony via a post-nuptial agreement, as long as the waiver is EXPRESS & completely VOLUNTARY. However, a party cannot waive the right to child support, because child support is a right INDIVIDUAL to a minor child because he/she has the right to support until age 18 or up to 19 if he/she is still in high school.

Based on the above factors, the court will analyze the agreement between Wilma & Hudson. Hudson is arguing that the agreement should be set aside because he was under emotional distress when entering into the agreement. Emotional distress alone, without any undue influence or duress is not enough to set aside a valid post-nuptial agreement. Hudson may be able to claim that since he worked for Wilma & he feared being potentially fired if he didn't sign the agreement, that he was under ECONOMIC DURESS, which his attorney is basically calling "emotional stress." If there was economic duress that rose to the level of giving Hudson no choice but to sign the agreement, then he may argue that it should be set aside. On the other hand, Wilma may argue that the agreement was completely voluntary, that the agreement was FAIR, in that it equally divided marital assets and granted rotating custody, and that there was no economic duress. In light of the previous discussion, the court may uphold the agreement if there were no circumstances suggesting in validation.

Issue 2: What should the outcome of the case be in light of the Parties' Agreement

If the court finds that the post-nuptial agreement is valid, then the court will look to see what the parties actually agreed on, and then the court will modify the agreement as necessary to conform with FL law.

Marital Asset & Debts

Under FL law, in the absence of an agreement between parties, the presumption is that the court will divide marital assets/liabilities under an Equitable DISTRIBUTION scheme, presumptively a 50/50 division. Unless a party proves a special equity (contribution beyond a normal marital contribution), the court will divide the assets equally. The parties have agreed in their post-nuptial to equal division, which complies with the law.

Alimony

As previously discussed, a party may validly waive a claim to alimony in a post-nuptial agreement. Alimony is awarded based on need & ability to pay. There are 4 types of alimony: Permanent Periodic Alimony, Rehabilitative Alimony, Temporary Alimony, and Lump Sum Alimony. Permanent Periodic Alimony is used for a spouse that does not have the ability to be self-sufficient and usually applies when the parties have been married long term (i.e. at least 16 years). Rehabilitative Alimony is appropriate when a party has the ability to become SELF-SUFFICIENT via education or vocational training. Lump Sum Alimony is ONLY appropriate when there are special circumstances such as the threat that the payor spouse might die or become physically unable to continue paying alimony. Lump Sum Alimony is a VESTED right once it has been awarded. Temporary Alimony is alimony paid to a needy spouse during pendency of divorce proceedings.

If the post-nuptial agreement is upheld in this case, the court will not award Hudson alimony because he has EXPRESSLY WAIVED his right to alimony. On the other hand, if the agreement is not upheld, then Hudson will likely be entitled to Temporary Alimony & Rehabilitative Alimony. Rehabilitative Alimony will allow Hudson enough time to find another job & to become self-sufficient. There is no showing in the facts that Hudson is entitled to lump sum alimony. Although EXTREME HOSTILITY between the parties can be enough for an award of Lump Sum Alimony, there must be a substantial showing that Lump Sum Alimony is necessary before a court will award it.

Child Support

Child support is a right that CANNOT be waived in a post-nuptial agreement. Every child under age 18 or up until 19 if still in high school has a right to be supported financially from BOTH parents. An award of child support in FL is determined by applying the Statutory CHILD SUPPORT GUIDELINES, which is based on income of both parents, & other statutory factors such as disabilities & health care needs of the child, the parents other child support obligations, etc. Therefore, the party in this case who is awarded primary residential responsibility will be awarded child support, in spite of the post-nuptial agreement.

Custody & Visitation

Child custody and visitation in FL is based on the following factors: ability of each parent to support the child & provide the child necessities, the preferences of the child, the preferences of the parent, and the parent most-likely to encourage visitation with the non-custodial parent, and the child's connections with a particular parent.

If the post-nuptial agreement is upheld, the court will analyze whether the BEST INTEREST of the child is served by the parties' custody & visitation agreement. If the child's best interests are not served, the court WILL modify the agreement in order to comply with the child's best interest. In this case, rotating custody is probably not in the child's best interests. FL courts presumptively disfavor rotating custody. In FL, one parent is usually the Primary Residential Parent, while both parents usually retain shared parental responsibility for major decisions regarding the child's education, religion, etc. Since Hudson primarily cared for Chad during his first 9 years of life, the child probably has a stronger bond with Hudson. Furthermore, Wilma has refused to allow Hudson any visitation or communication with Chad, which is a strong factor indicating Hudson should have primary residential responsibility and that Wilma should have liberal visitation.

Neither party in this case should have supervised visitation, because there is no showing that the child's best interests have been harmed or will be harmed by either parent.

Conclusion

The court should award Hudson primary residential responsibility because it is in Chad's best interests. Wilma should be awarded liberal, unsupervised visitation & she should pay Hudson child support.

Q

QUESTION NUMBER 3

JULY 2005 BAR EXAMINATION - TORTS/ETHICS

Three friends – Abel, Baker, and Charlie – went hiking in a state park in Florida. During the hike, the friends became lost and wandered onto Blackacre, a 100-acre parcel of wooded land owned by Owner, a private individual. There was no fence, sign, or other marking to indicate the hikers were entering private land.

Shortly after the hikers entered Blackacre, Abel fell into a deep hole in the ground and severely injured his head. The hole was part of an abandoned well that had become overgrown with brush and hidden from sight. Baker and Charlie were unable to raise Abel from the bottom of the hole. Baker ran off to seek help while Charlie remained with Abel.

While looking for help, Baker came upon a sign that read “Private Land. Keep Off.” Baker disregarded the sign and continued on his way, soon coming upon the residence of Owner. Baker told Owner about Abel’s accident, but Owner refused Baker’s request to use Owner’s telephone to call for help. Owner ordered Baker to leave Blackacre immediately, and directed Baker to a path off the property. The path led Baker to a wooden bridge located on Blackacre. While crossing the bridge, which had not been maintained for several years, Baker fell through some rotten boards and broke his leg.

When Baker did not return to the scene of Abel’s accident, Charlie decided to seek help himself. Charlie left Abel, choosing a different path from the one Baker had taken. As he ran, Charlie discarded his lighted cigarette in some brush. The smoldering cigarette eventually started a fire that destroyed 20 acres of timber on Blackacre.

After leaving Blackacre, Charlie found a telephone and called for help. When medical personnel reached Abel, they found him dead of his injuries. It was determined that Abel’s life could have been saved if help had arrived sooner.

Owner has retained you to advise him regarding any potential causes of action he might have against Abel, Baker, and Charlie. Identify/discuss the causes of action Owner may file and identify/discuss the defenses Abel, Baker, and Charlie would raise to Owner’s causes of action.

Furthermore, Owner has retained you to advise him regarding any potential causes of action Abel, Baker, and Charlie might have against him. Identify/discuss the defenses Owner would raise to Abel, Baker, and Charlie’s causes of action.

As part of the contract for representation, Owner wants you to agree to pay the cost of any litigation (that is attorney’s fees and court costs). You would be repaid only if Owner recovers money in the litigation. Discuss whether such an arrangement is permitted.

SELECTED ANSWER TO QUESTION 3

(July 2005 Bar Examination)

Question 3, Part 1: Owner v. Abel, Baker, & Charlie (ABC)

Preliminary Matters

In Florida, a prima facie case in torts requires the Plaintiff (P) to show all of the following. A duty running from the Defendant (D) to the P. A breach of that duty. Causation in fact (but for the D's action) and legal/proximate cause (foreseeable P). Substantial Damages. Florida has adopted a pure comparative negligence approach to allocating tort losses. Under this system, any P who is less than 100% responsible can potentially recover. Florida has adopted joint and several liability, although it is now limited by statute.

Issue – Initial Trespass to Land

Issue – Attractive Nuisance (inapplicable)

Issue – Further Trespass. Necessity Defense

Issue – Negligence: Starting the Fire

Issue – Comparative Negligence Defense (if owner had allowed B to use the phone)

Trespass to Land

A, B, & C are trespassers. Trespass to land is the intentional entry onto land of another without consent. ABC entered voluntarily, even though they were not aware of crossing the boundary. This is sufficient to establish the intentional tort of trespass to land. The fact that the land was not fenced or marked would not provide a valid excuse. However, their initial trespass was unintentional and harmless, so Owner would only be entitled to “nominal damages” (probably a dollar).

Attractive Nuisance

Florida's attractive nuisance doctrine applies to children who are “lured onto” another's land by an artificial element. Here, we do not know if ABC are children, but there is no indication that they were “lured” onto the property by the well. Rather, they were lost and did not know the well was there.

Further Trespass, Necessity

After C fell into the well, B continued to trespass on O's land. He found a sign noting that the land was private property, but disregarded the warning. As such, he is an intentional trespasser and might be subject to more damages. However, he probably has a valid defense of necessity. In order to save C's life, he would be privileged to enter the land and seek assistance.

Negligence in Starting the Fire

A could be sued in negligence for starting the fire that destroyed 20 acres of timber. The prima facie negligence case is defined above. Here, A would have a duty to act as a reasonably prudent person (judged by the objective “reasonable person”). His breach of this duty seems clear when he discarded a “lighted cigarette” in the brush. Reasonable people, and even Smokey the Bear, know that throwing a lighted cigarette into brush in the woods may result in a fire. Cause is established because “but for” A’s action no fire would have started and it was perfectly foreseeable that if he started a fire, someone’s property would be destroyed. Finally, damages are apparent. The value of the timber is readily determinable. Since there is no indication that he meant to start the fire, punitive damages would probably not be available. An important defense for A could be Owner’s comparative negligence. Owner’s refusal to call for help for C delayed the arrival of rescuers. If this had not happened, A might not have been near any flammable brush with a cigarette. If so, part of the fault for the fire could be ascribed to Owner, and A’s liability for damages could be reduced.

Part 2, A, B, & C v. Owner

Issue – Duty owed to Trespassers (known vs. unknown)

Issue – Duty to Warn of Bridge

Issue – Duty to Allow Use of Phone

Issue – Wrongful Death, Suit by A’s estate; A’s survivors

Duty owed to Trespassers

The duty owed by a landowner to a person on his land is dependent upon the status of the person on the land. Greater duties are owed to invitees than to licensees than to trespassers. Trespassers are further classified as known or unknown. The general duty owed to unknown trespassers is to not inflict any affirmative harm (e.g. no spring guns). Since they are unknown, by definition, there is no duty to warn them of hazards on the property. In contrast some trespassers are known, and they are owed the additional duty of warning of any hidden trap on the property. Here it seems likely that Owner did not have actual knowledge of ABC’s presence. However, Owner could be charged with constructive knowledge if he knew that people frequently wandered onto his property from the adjoining state park.

If he did not have knowledge, actual or constructive, of the trespassers he would not owe any duty to them. Conversely, if he had actual or constructive knowledge of the trespasser, his duty would be to warn them of the hidden dangerous condition. Here that could easily be done by clearing the brush away from the well and placing a small fence around the hole (or even a conspicuous sign). Owner would not legally have to correct the condition for trespassers benefit, but he might have to do so for the benefit of his invitees. That could easily be done with a fence or by covering the hole.

Duty to Warn of Defective Bridge

B has a good claim in negligence against Owner. B was still a trespasser when he fell through the bridge, but he was clearly a known trespasser. He was following a path at the direction of Owner. Owner should have known of the defective bridge and had a duty to warn B of the hazard. Owner breached this duty, that breach directly and legally caused B's injuries. B can claim compensatory economic damages (lost wages, medical expenses, etc.) as well as pain and suffering. He may also plead that Owner's conduct was grossly negligent (or even intentional) and make a claim for punitive damages (outcome of the claim would depend on additional facts).

Wrongful Death

Ordinarily there is no duty to render assistance to an injured person absent some special relationship (e.g., parent/child, employer/employee, etc.) and Owner would be free to walk by A and leave him in a hole. However, as a landowner, he probably owed a duty to assist in the rescue of A when he became aware that A was injured by a condition existing on his property. While Owner would not be responsible for the initial injury, the facts state that A "could have been saved" if more timely aid had been rendered. Owner's refusal to call for help breached the duty owed to A. That breach may have led to A's death. If proved, then Owner will be liable for wrongful death. A's estate can sue for economic damages (e.g. loss of future earnings, burial costs) and A's survivors may have separate claims for loss of companionship and support, etc.

IIED

B might make out an Intentional Infliction of Emotional Distress (IIED) claim. IIED requires extreme and outrageous conduct by the D resulting in emotional injuries to the P. Here, Owner's conduct in refusing to allow B to make a call for help while his friend lay mortally injured is certainly outrageous.

Part 3, Professional Responsibility

Issue – Contingent Fee Agreement

Issue – Payment of Litigation Costs

Owner seeks legal services under a contingent fee structure. Contingent fees are permissible in Florida for all matters except dissolution of marriage, child custody, and criminal defense. As such, it is permissible to accept this torts case on a contingency basis. All contingent fee agreements must be in writing and signed by the client and attorney. The client must be given a statement of his rights. The agreement should conform to the guidelines established by the bar providing a range of fees from 15% - 40%. The actual fee would depend upon the amount in controversy, the award, if the matter is settled/goes to trial, or if an admission of liability is made. If there is any fee sharing, it must be fully disclosed.

An attorney may pay the costs of litigation for an indigent client. For other clients, the attorney may advance these costs pending the outcome of the case. Collection only upon successful outcome is allowed. Any advance must be limited to allowed fees and costs. The attorney may not advance living expenses or other unrelated amounts.

QUESTION NUMBER 1

FEBRUARY 2006 BAR EXAMINATION – CONTRACTS/ETHICS

Sam advertised for sale a parcel of land he owned in Polk County, Florida. The land was not located near any major roadway, and thus was not desirable for development. Sam negotiated with Bill, and mailed him the following signed memorandum: “To Bill: I am willing to sell you my land in Polk County consisting of about 20 acres for \$30,000. Dated May 9, 2005.” Bill wanted assurance that Sam would not sell to someone else while Bill inspected the land. On May 10, Sam told Bill: “I promise not to revoke the offer, sell the land to anyone else, or raise the price for 10 days to give you the opportunity to examine the land.” Bill replied, “I will go to Polk County to inspect the land and get back to you within 10 days.”

Bill traveled to Polk County and examined the land. He returned home on May 13 and withdrew \$30,000 from his savings account. He took the \$30,000 to Lois, an attorney. He instructed Lois to hold the funds for him as he expected to purchase a parcel of land from Sam and wanted her to represent him in the purchase. Lois did not inform Bill that she had previously represented Sam on the purchase and sale of various real estate investments, including Sam’s purchase of the Polk County parcel. Lois did not discuss her fees with Bill. She deposited Bill’s check into her bank account entitled, “Lois K. Jones, Attorney-at-Law, P.A.” On May 14, Bill signed and mailed a letter to Sam stating, “I have examined the land and I accept your offer.”

On May 13, Sam learned that the county planned to build an interstate highway extension next to the parcel, which would drastically increase its value. Sam immediately dispatched a signed letter to Bill stating, “The Polk County deal is off.” Bill did not receive the letter until May 16.

On May 15, Bill stopped by Lois’s office and said, “I’ve changed my mind about purchasing Sam’s land. I’m willing to assign you my contract for \$500.” Lois had just learned from Sam about the planned highway construction, but did not share this information with Bill. She readily agreed and paid Bill \$500 in cash. Lois also gave Bill a check for \$29,750, explaining that she had deducted a \$250 fee for the initial consultation from Bill’s \$30,000 deposit.

Two weeks later, Bill learned about the highway extension and immediately sought your advice about any rights he may have regarding the Polk County land. Please advise Bill on any relevant legal issues and include the reasoning for your advice. Among the issues you should consider and address are:

- Did Bill ever have a valid contract for the purchase of the land?
- If Bill had a valid contract for the purchase of the land, was that contract validly assigned to Lois, so that Sam, Bill, and Lois all must honor the assignment?

- What legal theories should Bill assert if he wants to rescind the purported assignment to Lois?

Also discuss and analyze any ethical issues raised by the conduct of Lois.

SELECTED ANSWER TO QUESTION 1 **(February 2006 Bar Examination)**

1. *Did Bill have a valid contract for the purchase of the land?*

In order for a valid contract to exist, there must be an offer (objectively discernable), acceptance of that offer and consideration to support the bargain. In a land sale contract, the agreement must be in writing to satisfy the Statute of Frauds. Here, Bill's letter to Sam appears to be an offer, if viewed objectively. Sam may argue that the land is not adequately described ("My land in Polk County consisting of about 20 acres"), but the fact that Bill inspected the land weighs in favor of a meeting of the minds. Also relevant is whether Sam owns any other property in Polk County.

Assuming an offer does exist, it remains open for a reasonable time unless revoked by Sam prior to acceptance. Here, the option was not supported by consideration, and since the common law applies, the offer is revocable. Bill, however, accepted the offer upon mailing the letter on May 14th because absent an express method of acceptance by Sam, Bill can accept his offer with a promise. Here, multiple counterparts satisfy the Statute of Frauds, because Sam's letter is signed by him & acceptance occurred via the Mailbox Rule. Sam's revocation is only effective upon Bill's receipt, and acceptance occurred prior to May 16th. Sam may also argue that "I am willing to sell" is not a promise, but his later promise "not to revoke the offer" suggests otherwise, so offer & acceptance should be found here. Moreover, reliance by Bill (he examined the land) argues in his favor as consideration supporting the option, which he successfully accepted on Sam's terms (mirror image). On balance, a contract appears to be established from an objective standpoint.

2. *Was the contract validly assigned?*

Generally, contracts are assignable absent express language to the contrary. Here, however, Lois withheld material information from Bill. Generally, there is no duty to disclose where a party should be able to ascertain the facts, but here Lois is in a special relationship with Bill – attorney & client. Bill's expectation is that the land "was not desirable for development" and if Lois knew that Bill's expectation was such, she should have informed him. Otherwise, Bill may successfully contend that the contract for assignment should be rescinded on grounds of unilateral mistake. As a result, the assignment should not be deemed effective. Generally, however, where an effective assignment exists, all parties are bound by it.

3. *Legal theories to rescind assignment:*

As stated above, Bill's best argument is unilateral mistake where the non-mistaken party – here, Lois – knows of the other parties false assumptions. Generally, assignments are upheld. In this case, if there was no special relationship between L & B & if there was no mistake on Bill's part, the rights under the contract would be assignable to Lois. Another argument that might be asserted to defeat the assignment is that duties were also delegated with the right & Sam did not assume the credit risk of Lois. Here, however that argument would fail, since there is no credit agreement between S & B. Bill might also contend that assignment of a land sale contract must be in writing to

satisfy the Statute of Frauds. Here, Lois's payment of \$500 would not satisfy the "partial performance" exception, so Bill may also be successful in abrogating the assignment on those grounds.

Ethical Issues:

Lois is representing Bill, a client with interests adverse to one of her former clients. The risk here is that Lois will use information she obtained in the representation of Sam to his detriment in the representation of Bill. The Rules of Professional Conduct ("RPC") prohibit such use of confidential information. While the sale of this land is not the same transaction in which L represented S, it is substantially related and Lois can only undertake to represent Bill if she reasonably believes that such representation will not be adversely affected and she obtains written consent from Sam after consultation.

In order to comply with the RPC, Lois needed to disclose her fees to Bill in writing. Moreover, she should only have deposited Bill's funds in a trust account. Here, the account is not designated as a trust account, which may cause L's personal funds to be commingled with those of Bill. Such a violation may result in L's disbarment. Interest from short-term deposits in a trust account must benefit the Florida Bar Foundation.

Another ethical issue is L's entrance into a transaction with Bill, which also ostensibly resulted in her being in a transaction with a former client. In order for L to enter a transaction with Bill, the transaction must be fair and reasonable, Lois must make full disclosure to Bill, and Bill must be given the opportunity to consult with outside counsel. If, after all those steps are taken, Bill consents to the transaction, Lois may enter the contract with him. Here, however, the transaction is not fair to either Bill or Sam, since Lois is receiving a huge benefit from land appreciation in consideration of only \$500. Moreover, Lois withheld material information (i.e. she did not make full disclosure) and it's even possible that she used confidential information as to the value of the land that she obtained while representing Sam previously. In addition to being grounds for having the assignment rescinded, these violations are also grounds for disciplinary action against Lois under the RPC.

Finally, Lois would be permitted to offset fees due to her from funds held in trust, so long as Bill does not dispute the amount owed. Otherwise, Lois is not entitled to the funds & must make accountings to Bill & deliver his property to him. To the extent that Lois wrongfully refuses to return Bill's money, a constructive trust may be imposed in favor of Bill.

Q UESTION NUMBER 2

FEBRUARY 2006 BAR EXAMINATION – FLORIDA CONSTITUTIONAL LAW

After an extensive study of juvenile crime, the City of Tampa adopted a municipal ordinance that imposes a mandatory curfew on minors between the hours of 1:00 a.m. and 6:00 a.m. The ordinance provides for criminal penalties, including incarceration. The ordinance states dual purposes of preventing criminal activity by minors and preventing criminal activity upon minors.

At 2:00 a.m., Juvenile, a sixteen-year-old Tampa resident, was driving home from a political rally when a tire on Juvenile's car went flat. Juvenile parked the car along the roadside. A passing motorist saw the disabled car and concluded that the driver might need assistance. The motorist called 911.

Within minutes, Officer, a Tampa police officer, arrived at the scene. Officer found Juvenile standing next to the parked car and asked, "What happened?" Juvenile responded, "I have a flat. I don't have any pot, either."

Officer placed Juvenile under arrest for violating the curfew. Before placing Juvenile into the rear of the patrol car, Officer searched Juvenile and discovered a baggie containing marijuana in Juvenile's pocket. Officer then arrested Juvenile for both possession of marijuana, a misdemeanor under Florida law, and violating the curfew, a municipal ordinance.

You have been retained to represent Juvenile. Discuss the challenges and defenses that Juvenile may make under the Florida Constitution. Do not discuss whether the City of Tampa is located within a chartered or non-chartered county and the impact such factor may have in a challenge to the ordinance.



SELECTED ANSWER TO QUESTION 2

(February 2006 Bar Examination)

In Florida, municipalities are vested with house rule powers such that they can regulate and exercise traditional municipal powers. These powers include the ability to pass municipal ordinances which affect people in the municipality. Such ordinances may not conflict with the laws of the Florida legislature or impinge upon the Florida Constitution (of course the same applies for the U.S. constitution and federal laws). The supremacy clause restricts overreaching ordinances.

Juvenile (J) has several grounds of complaint under the Florida Constitution. First, Florida has expressly protected its citizens right to privacy, a right which is included in the Declaration of Rights. This protection of privacy goes beyond the protections afforded by the US Constitution, and affords Floridians the right to be left alone. Of course, this right is not absolute and some activities may be regulated even though the regulation may infringe upon the right of privacy. Because the right to privacy is a fundamental right, laws and ordinances that affect it are subject to strict scrutiny. The burden is on the government to show that the regulation is narrowly tailored to achieve a compelling governmental purpose.

The curfew at issue is subject to this strict scrutiny review. The government will argue that it conducted an “extensive study” of juvenile crime and there after determined that the curfew as narrowly tailored to prevent both crime by and upon juveniles. The city certainly has a compelling interest in protecting the health, safety, and welfare of its citizens (and even more certainly, juveniles). However, J will argue that the curfew is not narrowly tailored so as to address this compelling interest. J will argue that the same purpose can be achieved by less restrictive means and that accordingly the curfew should be struck down. The government bears the burden and thus must overcome the presumption that the curfew is suspect.

J would next assert a violation of the Equal Protection Clause. Florida’s constitution prohibits laws discriminating of people based on their gender, race, national origin or physical disability, unless the law meets strict scrutiny review. Other classifications, such as age, need to meet the much more deferential rational basis test. Here, the burden is on the movant to show that the ordinance or law is not rationally related to a legitimate government purpose. This burden lends a presumption to the validity of the law and is difficult to overcome.

J will argue that the curfew fails this test. He will say that simply preventing juveniles from being out during certain hours bears no rational relation to city’s interest of protecting juveniles and protecting people from juveniles. The City’s “exhaustive” study is likely enough to counter this argument. Because J has the burden, he would likely fail to meet it.

J would next argue that the ordinance may be invalid on its face. The supremacy clause strikes down conflicting local ordinances. The Florida Constitution seeks

uniformity of criminal laws throughout the state. This protects Floridians and all others from unknowingly being criminally liable in one place for actions that are permissible elsewhere. Accordingly, J will argue that the imposition of criminal penalties, including incarceration, may not stand. The city would argue that the criminal penalties further the City's interest in juveniles, but would likely fail. An ordinance could be permissible that did not impose such criminal penalties.

J may also argue that his right to be free from illegal search and seizure has been violated. Florida's constitution closely tracks the US constitution in this area. J will allege that officer (O) had no probable cause to search him and thus the marijuana found would be inadmissible against him. J will argue that the simple fact that he had violated the City's curfew did not give rise to a search of his person. O and the city will argue that the search was for either protective purposes (the so called stop and frisk) or that there was probable cause. Either is likely present here, especially given J's unsolicited statement that he didn't have any pot.

J will argue that his statement may not be used against him citing his privilege against self-incrimination. Again, Florida's constitution closely tracks the federal constitution here. J will argue that he should have been read his Miranda rights by O prior to any questioning. O will argue that J was not in custody and that his question ("What happened?") was not intended to, nor did O reasonably believe it would, result in an incriminating statement. Of course, J said that he did not have pot, but it would be strange to think such a statement would be made if J did not indeed have pot. In the alternative, O will argue that J's statement was unsolicited and therefore Miranda rights had not yet attached.

J may also argue that his due process rights have been violated. Florida's constitution protects its citizens from invasion of their life, liberty or pursuit of happiness without due process of law. J will argue that he has a liberty interest in being on the streets at any hour, and that the curfew impermissibly impinges on that interest. This argument is unlikely to succeed because the procedure would be examined under rational basis review. J would nonetheless argue that he should have an opportunity to be heard prior to arrest and that the "mandatory" nature of the curfew is impermissible.

Finally, J may argue his freedom of speech and the right to assembly have been impaired. Florida's constitution protects the right of its citizens to gather and speak without substantial interference. The fact that J was on his way back from a political rally would lend credence to this argument. He would assert that his fundamental rights had been infringed upon (to assemble and speak) and that strict scrutiny review should apply. The city would have the burden again, but may prevail due to the interest in health, safety and welfare.

Q QUESTION NUMBER 3

FEBRUARY 2006 BAR EXAMINATION – TORTS/ETHICS

As was his custom, Mr. Duke dropped by The Pub on his way home from work. After having had some drinks, he decided to have a look at the wine cellar. The cellar was off-limits to customers. The door at the top of the stairs leading to the wine cellar was marked “Employees Only,” and Mr. Duke did not seek the permission of any of the staff. The Pub’s proprietor, Owner, however, noticed Mr. Duke get up and head toward the cellar door but did nothing to stop him. Halfway down the steps, Mr. Duke lost his balance and leaned heavily on the stair railing, which was in severe disrepair. The railing gave way and Mr. Duke fell, breaking his leg.

Ms. Goff was walking past The Pub when she heard Mr. Duke’s screams. She ran down to the cellar and attempted to carry Mr. Duke back up the stairs to treat his injured leg. In the process, Ms. Goff accidentally knocked Mr. Duke’s head into a wall, causing Mr. Duke to pass out.

In the meantime, Owner called an ambulance. Mr. Duke was transported to Hospital. In the emergency room, Mr. Duke regained consciousness and complained to the ER physician, Doctor, of an excruciating headache and double vision. Doctor ignored these complaints, concentrating his attention on the injured leg. One hour later, Mr. Duke suffered a major stroke, resulting in paralysis on the left side of his body.

Two weeks after the accident, Mr. Duke’s wife comes to consult with your law firm after having received an e-mail with the following subject line: “Need a lawyer?” The e-mail was sent by your firm advising Wife of the firm’s expertise in the area of personal injury law. Wife’s e-mail was part of a mass mailing based on a list obtained from the hospital of recently admitted patients whose injuries were the likely result of an accident.

You are asked to prepare a memorandum discussing each of the following issues:

1. What potential causes of action does Mr. Duke have against Owner, Ms. Goff, Doctor, and Hospital? Include in your discussion possible defenses and any critical factual issues that should be investigated further.
2. What damages are available and how are they apportioned under Florida law?
3. What ethical considerations, if any, are involved in the way Mr. Duke’s wife was first contacted by your law firm?

SELECTED ANSWER TO QUESTION 3

(February 2006 Bar Examination)

This memorandum will discuss the potential causes of action Mr. Duke ("Duke") has against Owner ("Owner"), Ms. Goff ("Goff"), Doctor ("Doc") and Hospital ("Hospital"). When discussing each potential cause of action, I will also address possible defenses that might be asserted by any of the potential defendants and identify critical factual issues we should investigate further.

This memorandum will discuss the damages available to Duke and how Florida law might apportion the damages among the defendants.

Finally this memorandum will discuss the ethical considerations involved in the way Duke's wife was contacted by our law firm.

The potential causes of action Duke might assert against each defendant, the defense (if any) each defendant might assert Duke, and areas for further investigation include: For Duke to succeed against any possible defendant, Duke must demonstrate the defendant owed a duty to Duke, defendant breached that duty, the breach was the cause, both proximate & legal, of Duke's injury & damages. The facts indicate Duke was a customer of the Pub, and was a regular customer. The facts also indicate that the stair railing was in severe disrepair. But for Owner's failure to maintain the stair railing, Duke would not have fallen & broken his leg.

Duke vs. Owner: As owner of the Pub, O owed a duty to his patrons to keep the public areas of the premises reasonably safe, and to warn his patrons of any dangers. Because his patrons are public invitees, Owner must make reasonable investigations & maintain his premises in good repair.

Owner will probably raise 2 defenses: (1) the wine cellar was off limits to customers so Duke was a trespasser and (2) Duke was intoxicated. Regarding the status of Duke as a trespasser, Owner might argue that the door at the top of the stairs was clearly marked "Employees Only." Duke did not seek permission to enter. Once Duke opened the door, Duke was a trespasser & Owner had no duty to warn Duke of any dangers. Owner will probably not be able to deflect responsibility onto Duke because Owner saw Duke head to the cellar door & did nothing to stop him. This indicates Owner knew Duke would be a trespasser & Owner's duties to known trespassers require warning trespassers of known manmade dangers that might cause bodily injury (i.e. the stair railing). Since stairs in severe disrepair, Owner probably had responsibility to employees to fix in 1st place.

Owner might assert that Duke was intoxicated & contributed to his injuries. The facts indicate that halfway down the stairs, Duke lost his balance. If Duke lost his balance due to intoxication, and it is determined that this caused more than 50% responsibility, under FL law, Duke is not entitled to recover. This is an area for further factual

investigation to determine how many drinks Duke had that evening, both to deal with any contributory negligence issues & also because it might allow Duke to assert another possible cause of action against Owner.

Under FL law, tavern keepers owe a duty to not serve known minors (hopefully not Mr. Duke, esp. since named), to protect patrons and to not serve known drunks. If Duke drank too much, as regular customer, he would be known to Owner & Owner would have responsibility for Duke's intoxication.

Duke vs. Goff: Goff had no duty to rescue Duke (if anyone has duty to rescue, it must be because of preexisting relationship such as husband/wife or because act of rescuer caused injury – in this case, if anyone had duty it was Owner who did act by calling an ambulance). Once a person decides to act, that person must act reasonably. In this case, Goff responded by choice to Duke's screams. In carrying out her rescue of Duke by carrying him up the stairs (probably not a wise decision to move Duke with an injured leg), she accidentally knocked his head into a wall causing him to pass out.

Goff breached her duty to act reasonably by moving Duke & knocking his head. Many states have Good Samaritan laws that protect rescuers from negligent actions in the course of a rescue, holding rescuers liable only for gross negligence, intentional misconduct, or willful & wanton behavior. The policy is to encourage people to take affirmative acts when they are generally under no duty to do so. Florida's Good Samaritan Statute, however does hold rescuers liable for their negligence.

But for Goff moving Duke, Duke's leg injury might not have been so bad, nor would Duke have passed out.

Duke vs. Doctor: Florida's Good Samaritan Statute extends protection to Emergency Room ("ER") doctors as well. Florida protects ER docs so long as their conduct is not reckless. In pursuing an action against Doctor, it will be important to conduct a factual investigation to determine whether Doctor acted recklessly by ignoring Duke's complaints of headache & double vision. To do so, we will need to investigate the standard of care appropriate of ER docs in this particular community.

Duke will argue that Doc was reckless in ignoring that Duke passed out & that when he regained consciousness he had a headache & double vision. Duke will argue that these are obvious signs of a stroke and that had Doctor paid attention, the stroke could have been prevented or damage caused by stroke mitigated.

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)