Florida Board of Bar Examiners

ADMINISTRATIVE BOARD OF THE SUPREME COURT OF FLORIDA

Florida Bar Examination
Study Guide and Selected Answers

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

Future scheduled release dates: August 2017 and March 2018

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PART I – ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2015 AND FEBRUARY 2016 FLORIDA BAR EXAMINATIONS

ESSAY QUESTIONS AND SELECTED ANSWERS

Part I of this publication contains the essay questions from the July 2015 and February 2016 Florida Bar Examinations and one selected answer for each question.

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

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

ESSAY EXAMINATION INSTRUCTIONS

Applicable Law

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

Acceptable Essay Answer

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

QUESTION NUMBER 1

FEBRUARY 2016 BAR EXAMINATION – CRIMINAL LAW, CONSTITUTIONAL CRIMINAL PROCEDURE AND JUVENILE DELINQUENCY/ETHICS

Alex and Bill have an ongoing arrangement whereby they steal copper from construction sites and sell it to Charlie, the owner of Construction Supply Inc. (CSI). Charlie has agreed to buy the copper they bring to him for $1 per pound. Charlie tells Alex that there is a home undergoing a complete renovation and the home is vacant during construction. Charlie further tells Alex that because it is an older home, it is likely full of copper plumbing. Charlie also tells Alex, "A large shipment of copper wire was delivered to the site this morning and is stored in the carport area of the home, so tonight would be a good time to stop by the location."

Alex and Bill drive a pick-up truck to the house that night. Alex opens a small door and goes into the crawl space under the home to remove whatever copper plumbing he can find. Bill goes to the carport to remove the copper wiring delivered earlier that day.

Harry, the owner of the home, is actually living through the renovation in a back room of the house. Harry hears noise outside and some rumbling underneath the house, so, armed with a shotgun, Harry goes out to look around. When he sees the empty truck, he calls 911, but continues to look around. Harry finds Bill in the carport loading the copper wire onto a cart. Harry yells, "Stop or I'll shoot! Put your hands up." Harry sees something shiny in Bill's hand that he thinks is a gun, and shoots and kills Bill with one shot.

Alex is still out of sight and under the house. He hears the shot and then the sound of police sirens approaching. Before he could determine if there was any copper plumbing in the crawl space, Alex leaves the crawl space under the house and starts to run away. Harry sees him and takes a shot at him, but Alex escapes.

The police arrive and Harry describes Alex as a white male well over six feet tall, heavy-set, clean-shaven, and over 50 years old. Harry also says, "I didn't get a good look at his face because it all happened so fast." Five minutes later, Alex is stopped by the police who saw him running just blocks from the crime scene. The police arrest Alex and properly read him the Miranda warnings.

Alex is taken to jail. A line-up is quickly arranged so Harry can try to identify Alex as the person he saw fleeing from the scene. The line-up consisted of three people: Subject 1 was Alex, whose appearance matches the description given by Harry; Subject 2 was heavy set, age 32, with a beard; and, Subject 3 was a slender, white male, 5'6'', age 25.

All three subjects have dark brown hair and brown eyes. Harry, without really looking at the faces, says “well this is easy” and immediately identifies Alex as the person running from the scene. When confronted with this eye witness identification by police immediately after the line-up, Alex says it was all Charlie’s idea to steal the copper, and gives a formal statement implicating Charlie in the crime.

When he found out that Bill had been shot and Alex had been arrested, Charlie called Luke, Charlie’s business attorney who has represented CSI for many years, generally providing contract advice and handling construction litigation matters. Charlie tells Luke the following: “Luke, I’m in big trouble. Two guys I work with steal copper for me to resell. One of the two guys has been shot dead while pulling off a job and the police caught the second guy. He ratted me out and told the police everything.” Charlie wants Luke’s help with his criminal issues. Charlie also reminds Luke that Luke must complete the contract between Charlie’s company and a copper recycling company wherein Charlie’s company would agree to supply copper to the recycling company for $3 per pound.

What crimes are likely to be charged against Alex and Charlie and what must be proven to convict them? How is the court likely to rule on Alex’s motion to suppress the live line-up results and to prevent Harry from an in-court identification of Alex? How is the court likely to rule on the admissibility of Alex’s statement to the police? What ethical issues does Luke face and what should he do?

SELECTED ANSWER TO QUESTION 1

(February 2016 Bar Examination)

To: Note to File

From: Associate

Re: Alex & Charlie's Charges, Defenses, and Ethical Issues

This memo will discuss the likely charges against Alex and Charlie and what must be proven to convict them, Alex's motion to suppress, the admissibility of Alex's statement to the police, and any ethical issues Luke may face.

Charges against Alex

Alex may be likely be charged with conspiracy. In Florida conspiracy is an agreement between two or more persons to commit an unlawful act. In order to convict for conspiracy there must be some overt act in the furtherance of the crime. The facts indicate that Bill and Alex have an ongoing arrangement whereby they steal copper from construction sites and sell it to Charlie. These facts create an agreement between Alex and Bill to work together to steal the copper to sell to Charlie. Additionally, after Charlie advised Alex and Bill of a location to steal copper, Alex and Bill drive a pickup truck to the house that night. Alex opens a small door and goes into the crawl space under the home to remove whatever copper plumbing he can find. Driving to the house alone is an overact act in the furtherance of the conspiracy and enough facts for a prosecutor to convict Alex of conspiracy.

Alex may be charged with Burglary. At common law burglary is the breaking and entering of the dwelling house of another at night with the intent to commit a felony once inside. Modern statutes eliminate the dwelling and at night requirements. Here, Alex acting with the intent to go into the home and steal copper, opens a small door, which satisfies the breaking requirement, enters the dwelling. The facts indicate Alex goes into the crawl space to remove whatever copper plumbing he can find. The fact that Alex flees before he could determine if there was any copper plumbing in the crawl space is immaterial Alex's actions already satisfied the prima facie elements of burglary when he entered the crawl space with the intent to steal the copper.

In a conspiracy any crimes committed in the furtherance of the conspiracy may be charged against all conspirators as if they are principals in the first degree by their participation in the conspiracy and as such Alex may be charged with Larceny based on the following facts. Larceny is the intentional taking and carrying away the personal property of another with the intent to deprive them thereof. As noted above, there was a conspiracy between Alex, Bill and Charlie, when Alex and Bill arrived at Harry's house Bill goes to the carport, which may or may not be in the home, if it's outside the charge will be larceny since there is no breaking and entering. Bill begins to load the copper wire onto a cart. Moving the copper wire even an inch with the intent to steal it or deprive Harry thereof is enough to make out a prima facie case for Larceny. Alex and Charlie as co-conspirators are guilty of crimes in the furtherance of the conspiracy to

steal and sell copper wire.

Alex may be charged with Felony Murder. Felony murder is when during the commission of an enumerated felony, burglary, arson, robbery, etc. a murder is committed in the furtherance. When Harry saw Bill he yelled stop or I'll shoot, Harry saw what he thought was a gun and shot and killed Bill. While Bill was acting in the furtherance of the conspiracy, modern statues do not impose criminal liability when co-conspirators or bystanders are murdered in the course of the conspiracy by persons other than those participating in the conspiracy. Alex and Charlie would likely not face liability for Bill's murder and neither would Harry given Florida's Stand Your Ground Laws, and imperfect self-defenses available to Harry.

Charges against Charlie

Charlie may be likely be charged with conspiracy. As noted above, conspiracy is an agreement between two or more persons to commit an unlawful act in order to convict for conspiracy there must be some overt act in the furtherance of the crime. The agreement between Bill and Alex would not be enough to convict Charlie of Conspiracy. In addition to their agreement to steal the copper to sell to Charlie, and Charlie's agreement to buy the copper, Charlie tells Alex that there is a home undergoing construction and since it is older it will be full of copper plumbing and notifies Alex of a large shipment of copper to the site that morning and where it was stored and identified that night as a good night to stop by the location. Charlie has an agreement with at least Alex to steal copper wire in order for Charlie to sell it in his Construction Supplier Inc. The sale alone of the stolen good would likely not be enough to convict Charlie of conspiracy but identifying the location and advising when to commit the robbery is enough to indicate Charlie's participation in the conspiracy and the phone call with instructions satisfies the overt act requirement.

Charlie could likely be charged with solicitation. Solicitation is an inchoate crime where the defendant enlists or asks another person to commit a crime. The request alone is enough to make a prima facie case for solicitation. Charlie called Alex and told him there was a home undergoing renovations and about the amount of copper to be found on site and indicated tonight would be a good time to stop by. This phone call is enough to make out a prima facie case for solicitation. Charlie will argue that he cannot be charged with solicitation since solicitation being an inchoate crime merges into the complete offense that he will be charged with.

Charlie may be charged as an accessory before the fact which is when any person aids another in the future commission of a crime. The aid here was the location of the wire, and instructions on when to go steal it. This is also an inchoate crime which merges into the completed offense and would merge with the conspiracy and theft charges.

In a conspiracy any crimes committed in the furtherance of the conspiracy may be charged against all conspirators as if they are principals in the first degree by their participation in the conspiracy and as such Charlie may be charged with Burglary and Larceny.

Alex's motion to suppress

Alex will argue that the motion to suppress should be suppressed and his argument will be that the line-up was impermissibly suggestive. A line up is impermissibly suggestive when the subjects in the line-up are so different from the witness's description of the subject and the actual subject that the identification is tainted by pointing to the obvious choice since the others are not close to the description. Here, Harry described the suspect as a white male, over six feet tall, heavy set, clean shaven, and over 50 years old. The line-up consisted of Alex (who met the description), a 32 year old heavy set man with a beard, and a slender white male 5'6", 25 years old. During the interview Harry mentioned he did not get a good look at his face. The subject with the beard clearly does not fit the description and the young man who is slender and 5'6" is not close to the description either. Alex will not have a difficult time making the argument that the line-up was impermissibly suggestive especially when during the line-up Harry notes "well this is easy." Harry's motion to suppress the line up as impressively suggestive will likely be granted.

The in court identification will likely be allowed. After an impermissibly suggestive line up a victim may be permitted to identify the defendant in court if the witness actually observed the suspect outside of the line-up. Here, Harry saw Alex running away from the house he did not get a good look at his face but he saw his build and enough to know that he was clean shaven. This is likely enough to permit an in court identification by Harry.

Admissibility of Alex's statement to the police,

Confessions are constitutional if during a custodial interrogation the defendant has been read his miranda rights and voluntarily waives them. When Alex was arrested he was read his miranda rights. Then taken to jail, then placed in a line up, when confronted with the eye witness identification Alex confessed that it was all Charlie's idea to steal the copper, and gives a formal statement implicating Charlie in the crime. The facts do not indicate that Alex invoked his right to counsel once the police read his miranda rights. The facts indicate that a line up was quickly arranged so there may not have been a lot of time between when Alex was mirandized and when he made the confession. The facts do not indicate that Alex gave the confession under duress. This statement is likely admissible against Alex at a future criminal trial.

This statement is likely inadmissible against Charlie as it was made by a co-conspirator not during the course of the conspiracy.

Ethical issues Luke may face

When a lawyer is representing a client, and after the lawyer passes the bar they are presumed to have a certain competency level. However, Luke as a business attorney should be concerned with if he is competent to represent Charlie in a criminal matter since that does not appear to be his area of practice. A lawyer can become competent in an area through study or working with another lawyer in the area law.

In regard to the criminal case, the fact that Charlie confessed to Luke is not problematic as he is still entitled to a defense. The contract that Luke is working on for Charlie with a third party is where the ethical concern lies. Luke is not required and may not disclose privileged information provided to him by his client; however, this is an ongoing criminal enterprise if Charlie continues to sell the copper. A lawyer may not participate knowingly, when the use of his services is in the furtherance of an ongoing criminal enterprise, here, to sell stolen copper. Luke should not represent Charlie in the copper contract unless he can verify that the copper is not stolen.

QUESTION NUMBER 2

FEBRUARY 2016 BAR EXAMINATION – FEDERAL CONSTITUTIONAL LAW

During its last session, the Florida Legislature passed a bill banning all advertising in Florida of citrus grown outside the state. Legislators who supported enactment of the statute gave two reasons for supporting the bill. First, many legislators cited examples of some out-of-state citrus growers making false or misleading claims in advertising that Florida citrus was treated with more harmful pesticides than citrus grown outside Florida. Second, the advertising ban would give a competitive advantage to Florida citrus farmers, who were at risk of going out of business after an unusually cold growing season.

The bill was signed into law shortly after its passage by the legislature. The new statute, titled the "Florida Citrus Grower Protection Act," provided that a violation was a second degree misdemeanor.

FarmCo, a large commercial grower of oranges in California, has contacted a senior partner at your law firm to discuss challenging the statute on constitutional grounds. FarmCo has never advertised its oranges in Florida, but had been in negotiations with local radio and television stations in Florida before the statute was enacted. Based on its success in other areas of the country, FarmCo projects that its radio and television advertising campaign would increase its sales in Florida. However, with the new statute in place, FarmCo has halted any plans to start advertising its oranges in Florida because it is afraid of being criminally prosecuted.

Senior partner asks you to prepare a memorandum analyzing whether FarmCo can bring a successful lawsuit to have the statute declared unconstitutional based on the United States Constitution.

SELECTED ANSWER TO QUESTION 2

(February 2016 Bar Examination)

To: Sr. Partner
From: Jr. Associate
Re: Whether Client FarmCo Can Bring a Successful Lawsuit Challenging the Constitutionality of the Statute

You have asked me to address whether our client, FarmCo ("FarmCO" "Farmco" or "client"), from bring suit to successfully challenge the new Florida statute banning all advertising in Florida or citrus growers outside the state.

The first issue involves clients ability to initiate the suit in the first place. Farmco would need standing to do so in a court with proper jurisdiction and would need to sue a defendant capable of being sued. This would be primarily a federal question claim as discussed below (although client could also bring suit for e.g. tortious interference with a contract or with business relations), but client could bring suit in Florida state court, a court of general jurisdiction. The State of Florida itself cannot be sued in federal court, but can be sued in state court. Client likely would want to sue in federal court, which is likely to be more receptive to a suit against the state or a state official. The bill here was signed into law and therefore will be enforced, presumably by some administrative or executive agency or official. They can be sued in federal court, so long as no money is requested to be paid from the state treasury. But the statute has not yet been enforced against our client. Thus raises the more critical issue of justiciability and standing. A plaintiff must have standing to sue. Standing requires an injury in fact, causation and redressability. Here, causation and redressability and more easily satisfied: the statute at least arguably has caused or can be seen to have caused client not to advertise in Florida, and the court can redress the injury with declaratory relief regarding the constitutionality of the statute. But it is unclear whether client has suffered an injury: he has yet to advertise, and so has not withdrawn any advertising, and has not been subjected to any administrative action or criminal sanction (here, the statute does carry criminal sanction). However, because this case raises federal First Amendment issues (applied to the states via the Fourteenth Amendment), courts apply a lower bar for causation. Laws that prospectively prevent speech and challengeable where the injury is apparent qua chilling speech or likely to recur. The statute here directly targets our client and prevent speech client otherwise would have made, as the facts state that the statute has chilled speech as the client has decided no halt advertising for fear of criminal prosecution under the statute. Further, because this case could also raise tortious interference with a business relationship - an expectant relationship in this case - which will fail because of the statute, client may be able to argue that it has suffered injury for loss of the business opportunity. Also note that as we would be requesting declaratory and injunctive relief (non-application of the statute), we would need to establish the threat of future injury - which the availability and threat of criminal sanction should satisfy.

The statute raised First Amendment concerns. The First Amendment protected the freedom of speech. Economic speech, such as advertisements, has long been recognized as protected (in fact, many of the cases addressing this issue in the Eleventh Circuit involve the Florida Bar and attorney advertising). Advertising that is

inherently false and misleading, however, is not protected speech - that is, under a First Amendment analysis, is may be prohibited completely. All other regulations of commercial speech must meet intermediate scrutiny - which means that the government interest at issue must be important and the law narrowly tailored to achieve those ends (as opposed to strict scrutiny for speech generally, which would be that the government interest is compelling and the law necessary and the least restrictive means to achieve that interest). The court cannot inject its own reasons into the analysis; rather, it must assess the law based on the reasons provided or reasonably articulated by the legislature. The government bears the burden to establish the importance of the interest and the narrow tailoring of the law to that interest. The statute here likely fails on all accounts. While false or misleading claims in advertising are regulateable and may be completely prohibited, the legislature has not advanced that all or even most or even some significant percentage of out of state advertising regarding citrus is false or misleading. That is, prohibiting false or misleading advertising is permissible. But the government has neither established based on the reason it proffers that there is any such interest here at play because it bases the statute on merely "some examples" of false or misleading advertising. At the very least, even if that interest were found to be important in this context, the law is not all properly tailored to achieve its purposes. The legislature could simply have banned and/or fined all actually false or misleading advertising. The second reason provided - economic protectionism by providing in-state citrus growers a competitive advantage - is not considered an important governmental interest capable of supporting an abridgement of free speech in the First Amendment context. Client therefore has very strong grounds to challenge the statute as a prospective violation of its commercial speech.

The statute likely also violates the Privileges and Immunities clause, because it seeks to discriminate or distinguish on the basis of in- versus out-of-state residents on the issue of economic activity/livelihood. States may not discriminate on the basis of state residence absent a compelling and legitimate governmental interest and if the mechanism employed is narrowly tailored and required to achieve that end. This law clearly does that, and, as discussed above, the ends set out are not compelling and means not proper. However, only real person citizens can raise a privileges and immunities protection claim, and the facts suggest that FarmCo is a company (reciting that it is a "large commercial grower of oranges in Florida"). However, it is possible that "FarmCo" is a d/b/a name, and that the real party in interest is an individual citizen who could raise this claim.

The statute further raises the issue of regulating interstate commerce: advertising for sale of citrus from one state to another. The federal Constitution empowers Congress and the federal government to regulate commerce between the several states, between the US and foreign states and between the US and Native American tribes. There is no indication in the facts here that the federal government has spoken directly to the issue of advertising in the citrus space, although, common knowledge would implicate the Supremacy Clause as well, which provides that federal law is supreme vis-a-vis contrary state law (or state law requiring abridgement of the federal law) where the federal law is in an area properly within federal power to act (such as, here, regulating interstate commerce) - as the FDCA and other federal statutes clearly govern this space, rendering the statute invalid for attempting to regulate an area governed by federal law. Regardless, a state statute implicates the Commerce Clause even where

the federal government has not spoken, i.e., the dormant commerce clause, because it seeks to regulate interstate commerce and distinguishes on the basis of state residency/in- versus out- of state. A state statute violates the dormant commerce clause in such a context if it fails to meet the rigorous strict scrutiny test discussed above. And as discussed above, economic protectionism - at least where the state itself is not preferring in-state businesses - is not a compelling interest. Neither is the false advertising issue compelling here, as it is not properly tailored.

The statute may also implicate the Contracts Clause. The federal constitution prohibits a state from passing a law abrogating private contract rights. However, to fall afoul of the Contracts Clause, the contract needs to be in existence - a state law is not violative if it prevents the realization of future and not yet existent contracts. The facts here recite that client is in the negotiations phase. This suggests that no contract for advertising services yet exists, making this a poor basis for suit.

The statute also arguably implicates the federal constitutional requirement that states provide every person equal protection under the law. Laws that categorize and provide differential treatment on the basis of those categorizations are suspect. However, laws that categorize on economic bases - for example, laws that non-licensed doctors cannot practice medicine - are subject only to rational basis review - that the law serve some justifiable governmental purpose and that the law be reasonably or rationally related to achieving that purpose (with the burden on the plaintiff, not the government, as was above). This law does discriminate on the basis of state residency (in-Florida versus out-), but, if subjected to rational basis review, would likely pass muster. Preventing false advertising and providing economic support are reasonable governmental interests, and the law would achieve those ends. This would not be a strong basis for suit.

Taken together, FarmCo has a strong basis to sue an appropriate government defendant in an appropriate forum for violating its First Amendment rights to free speech and for violating the commerce clause and/or dormant commerce clause; may, if the facts allow, raise a privileges and immunities claim, but would likely be unable to raise an equal protection or contracts clause claim, to declare the statute unconstitutional.

QUESTION NUMBER 3

FEBRUARY 2016 BAR EXAMINATION – UCC ART. 3 AND ART. 9/RULES OF PROFESSIONAL CONDUCT

Sam met Broker at the nursing home where Sam resides. Broker convinced Sam to make an investment of $40,000. Sam, who suffers from paralysis, asked Broker to write out a check in the amount of $25,000, because it was all of the money he had in his account. Broker wrote out a check to himself on Sam's account with Bank in the amount of $25,000. Because Sam cannot sign his name, Sam affixed his thumbprint on the check.

Broker also had Sam affix his thumbprint in lieu of his signature on the following note for the remaining $15,000:

> I, Sam, promise to pay to the order of Broker the sum of $15,000 within 3 days of the date of this note, or provide him title and keys to my 2010 Porsche automobile, if I am not able to make timely payment.

The next day Broker gave Sam's note to Nephew as a gift for his 18th birthday. He also signed his name on the back of Sam's check and cashed it with Clerk at Instant Check Cashing, Inc. ("ICCI"), where Broker has been doing business for years. Clerk is surprised by the large amount of the check, and questioned Broker about it. Upon request, Broker gave Clerk Sam's phone number. Clerk contacted Sam to make inquiries and verifications regarding the transaction. After calling Sam five times and leaving several voice messages for Sam, Clerk cashed the check, and charged Broker a 7 percent fee. Broker took the money and skipped town.

Sam's daughter, Sally, visited her father and became concerned that Broker was scamming her father and convinced Sam to make a stop payment on the check and rescind the note. Sam immediately contacted Bank to make a stop payment on the check, and also contacted Broker. The check was returned to ICCI. Sam was unable to speak with or locate Broker. Nephew contacted Sam to obtain payment under the note. ICCI also contacted Sam to collect payment for the draft.

Attorney overheard Sam and Sally discuss Sam's legal and financial problems, and offered to help. Attorney revealed that he previously defended Broker on a burglary charge ten years ago. However, he felt comfortable he could help Sam and verbally agreed to represent him for a nonrefundable flat fee of $5,000.

Sally, on Sam's behalf, comes to your firm for a second opinion with regard to how to proceed. Prepare a memo that addresses the following:

- Nephew’s claims against Sam, including possible defenses;
- ICCI’s claims against Sam, including possible defenses; and,
- Any issues raised with regard to Attorney’s representation of Sam.

SELECTED ANSWER TO QUESTION 3

(February 2016 Bar Examination)

I) Nephew's claims against Sam.

Nephew has the right to enforce the note against Sam. However, Nephew is not a "holder in due course" so Sam will have both personal and real defenses available to him.

First, we must determine whether note is a negotiable instrument, governed by the UCC, or merely a common law contract. A negotiable instrument is a written, signed, unconditional promise to pay to order or bearer a fixed sum of money on demand or at a definite time which states no unauthorized undertakings. Under the UCC, if a negotiable instrument is "negotiated" to a "holder in due course," he takes free of "personal defenses" and subject only to real defenses.

Although the note meets many of the requirements of negotiable instrument, it is not one. Sam's thumbprint would be considered a signature, so the note was written, signed, and payable to the order of Broker. However, because the note was payable in "title and keys to my 2010 Porsche," it was not payable in money. Alternatively, this could be viewed as an impermissible condition destroying negotiability. If Sam "was not able to make timely payment, he would provide keys in lieu of money."

If the note were a negotiable instrument, it could be transferred by "negotiation." An instrument payable to the order of a person is negotiated by a transfer of possession plus endorsement. There is no indication Uncle endorsed, so the note was apparently not negotiated.

Finally, Nephew would not be a holder in due course even if this note had been negotiated. A holder in due course (HDC) is a person who takes an instrument for value, in good faith and without notice of any claims or defenses. Good faith is defined as honesty in fact and observance of commercial standards of fair dealing. Nephew did not give value, so he cannot be an HDC. Instead, he is merely a donee.

As a result we look to Nephew's rights in contract. The promissory note, because it isn't negotiable, would be governed by the common laws of contract. All contracts are assignable, unless they state otherwise. Broker's gift of the note to his nephew was merely a gratuitous assignment. Note that it is unclear whether Broker successfully assigned note to nephew. Note is payable "to the order of Broker." Thus, it is order paper. Broker could have endorsed it specifically to nephew (in which case it would have continued to be order paper) or could have endorsed it in blank (making it bearer paper. This would have been relevant had it been a negotiable instrument. Since it is not, it appears that Broker merely assigned his rights to receive payment under the note to nephew.

A third party assignee is entitled to enforce a contract. However, Sam will have available to him all defenses he would have available against Broker.

Sam's most likely defense that he would assert would be fraud in the inducement, a personal defense. We know that Sam lives in a nursing home, so depending on his mental state, he may also have a defense of incapacity. Finally, Sam may argue that the note was unconscionable or that he signed under duress. Each of these is discussed in turn. Each of them is a personal defense.

Finally, he may argue a unilateral mistake of fact if he didn't fully understand the nature or risk of the investment. Although unilateral mistake of fact is not generally a defense, it may be invoked when one party to a contract has a superior knowledge about the contract matter and actively conceals such knowledge from the innocent party.

If Sam is successful in arguing unconscionability, he may also raise the equitable defense of unclean hands on the basis that Broker coerced him into signing the note.

Sam will likely seek a remedy of recession, and possibly restitution for any loss suffered.

II) ICCI'S Claims against Sam

The check, unlike the note, is a negotiable instrument. The parties to the instrument are the Payee (Broker) and the Drawer (Sam). (Note – with respect to the earlier note, Sam was a maker.) Also, checks are a form of draft, which are three-party instruments. The third "party" is Sam's bank, as the drawee. The check meets all the requirements discussed above with respect to negotiability. The Payee is not a holder in due course, but a transferee maybe. It appears here that ICCI may be an HDC because it took for value, in the way of the 7% fee it charged. Although Sam will argue that ICCI's actions of calling him and surprise regarding the amount of the check constitute "notice," he will likely not succeed. A person takes "without notice" so long as he doesn't have reason to know of any alterations, fraud or that the instrument is overdue. The mere fact that the check was large was probably not sufficient to put bank on notice.

We assume that Broker negotiated check by transferring possession and endorsement because it is an order instrument, though the facts aren't explicit on this pint.

Since we assume ICCI is an HDC, it will take free of personal defenses. The only real defenses available to it are fraud in the factum (where drawer didn't have knowledge of what he was signing and was reasonably excused therefore), forgery alteration, infancy (if a state law defense), incapacity, illegality, duress, discharge in bankruptcy, or that the statute of limitations has passed. Therefore, Sam might assert incapacity and duress against ICCI. Further, he might assert illegality if there is any indication that Broker violated securities law in the transaction. If Sam is forced to pay ICCI, he may seek recovery from Broker. If ICCI doesn't succeed in getting payment from Sam, it might seek recovery from Broken on a theory of breach of presentment and transfer warranties.

III. Attorney representation of Sam

Attorney's conduct raises 3 issues: (1) solicitation, (2) conflict with a former client, and (3) fee negotiations.

(1) An attorney may not solicit a person with whom the attorney does not have a pre-existing relationship for his personal financial gain. In tort actions (which may be present here between Sam and Broker), an attorney may not solicit an injured party within 30 days of the injury. Attorney's conduct violated the non-solicitation rules because he approached Sam on overhearing of his troubles.

(2) Conflict. An attorney cannot represent a client in a matter adverse to a former client that relates to the attorney's prior representation. This conflict could be waived by broker in writing. It's not clear that Attorney's representation of Sam is in any way related to the prior representation of Broker, so this may not be an issue. The Attorney would need to determine whether he had received any confidential information in the course of the prior representation that would be relevant to the current representation. If so, there may be a conflict.

(3) Although an attorney and client can agree in advance to a fee structure, any fee must be fair and reasonable to the client considering the nature of the work, skill and experience of the attorney, time pressures, and novelty and complexity of the issues. Fees should be disclosed upfront, which the Attorney probably did. However, because this was a non-refundable flat fee, he should have disclosed the fee in writing. Because this fee is considered earned on receipt, Attorney could deposit it into his own account and need not put it in his client trust account (because it was a flat fee for the engagement and non-refundable).

QUESTION NUMBER 1

JULY 2016 BAR EXAMINATION – CONTRACTS

Professor is a surgeon and expert on artificial limbs. A private university in Florida offers Professor a job at its medical school, and she agrees. The University issues a press release stating Professor will teach surgical procedures for artificial limbs and conduct research in that area, with the University owning any patents she develops during this time; Professor will be paid $250,000 a year for five years and cannot be terminated except for cause upon 90 days' notice. Professor signs a copy of the press release and delivers it to the University President's office on her first day.

Three months later, Bill, a local businessman who knows that Professor did her early work in DNA research, writes a letter to Professor offering to produce and sell DNA test kits developed by Professor in her spare time. Attached to the letter is a licensing agreement giving Bill exclusive rights to Professor's future patents for DNA test kits. The licensing agreement also provides Bill will pay Professor $5,000 for each idea that is produced, and Professor will receive 25 percent interest in the company if any item is produced in the next five years. Also attached to the letter is a schedule of infomercials for Professor to tape and a form stating that Professor will not work in a similar field for ten years after the sale of her interest in the company.

Professor mails the entire package back to Bill. At the bottom of his letter, she writes, "We'll see how it goes," and signs her name. On the licensing agreement, she changes the $5000 fee to $75,000.

Within the first year, Professor develops and patents a home test kit to identify cancer genes. Bill starts production and sends her a $5000 check. Professor calls Bill and tells him he owes her $70,000. Bill sends a second check for $10,000, and Professor cashes both checks. Professor never tapes any infomercials. Bill uses a controversial advertising campaign that targets the fear of cancer, and the company makes a million dollars.

After the first year, the University fires Professor without notice. In the termination letter, the University refers to the marketing controversy but also claims ownership of the patent for the DNA test kit. Professor finds a buyer for 25 percent of the company, but Bill denies that she has any ownership interest. Without income from the University or the company, Professor accepts a job with a different company to produce DNA test kits for pets. Bill threatens to sue Professor if she works for this company.

Professor consults you for advice. She is uncertain about her rights and responsibilities with regard to the University, Bill's company, and the patent for the DNA test kit. Write a memo analyzing the likely claims, defenses, and outcomes for each of the parties.

SELECTED ANSWER TO QUESTION 1
(July 2016 Bar Examination)

Memo
To: Professor
From: Lawyer:
Re: Right and Obligations re University and Bill

Professor v University

The first issue is whether Professor and University entered into a valid contract.

The agreement is for services - teaching as well as intellectual property (development of patents) and therefore is subject to the common law.

Contract Formation:

A contract is an agreement or set of promises that is enforceable by law. For there to be a valid contract there must be mutual assent, which is a valid offer and acceptance of clear terms that both parties intend to be bound by, supported by consideration and no valid defenses.

Consideration is a bargained for exchange for something of legal value or a detriment to one party to the benefit of the other.

A contract that is for a specified term beyond 1 year and cannot be performed in less than 1 year is subject to the Statute of Frauds (SOF). SOF requires the agreement to be in writing, signed by the party against whom enforcement will be sought. A writing can be in more than one document as long as it is clear it is referring to the essential terms of the agreement, and the signature can be by any method that indicates the party sought to be bound, such as a company seal or letter head.

Here there was an offer by the University and an acceptance by the Professor. There was consideration because the University promised to pay 250,000 and to provide her with employment and P undertook several obligations in exchange - to conduct research and teach.

The offer and acceptance do not appear to be in writing, so the University could claim that it is not bound by the agreement. However, the press release is a writing because the press release contains all of the essential terms of the agreement, the amount Professor (P) will be paid, the duration of the agreement, the duties she will perform, (teaching and developing a patent for artificial limbs and surgical procedures) and how the agreement may be terminated other than its natural expiration, and the University (U) will have identified itself on the press release. P signed and returned the press release to the U. Substantial performance will also defeat a SOF defense under the Common law.

The P was fired without notice, which is contrary to the terms of the agreement. U will

argue that it is not bound by the terms because there was no writing. However, P can argue that even if there is no writing and the SOF was not met, she substantially performed and therefore the SOF requirement is overcome. P can also claim promissory estoppel that by announcing in public the terms of the agreement the University could foresee that P would rely on the agreement and she did justifiably rely and therefore it would be unjust for the University to be enriched at P's expense. Therefore justice would require the obligations of the University to P to be enforced.

The parties will argue that the agreement was ambiguous. When there is mutual ambiguity or mutual mistake that goes to an essential element of the agreement, and both parties were unaware of the ambiguity or mistake, the agreement may be rescinded and each party shall be entitled to claim in restitution anything they gave of value. If one of the parties is aware of the ambiguity or mistake and the other party is not, the contract may be enforced in favor of the party that was not aware of the ambiguity or mistake.

Here there is ambiguity as to the what is meant by just cause and what type of patents are intended to be covered by the agreement.

Contracts that limit a party's ability to compete are valid as long as signed by both parties and are reasonable as to the geographic scope, subject matter and time limits. Limitations on patents are deemed reasonable if the limit is 5 years or less. This is a rebuttable presumption. Here the contract was for 5 years so it will be deemed a reasonable limitation on P. An employee may be required to give ownership of intellectual property to employer during employment if developed for employer during scope of employment. Therefore the patent limitation is valid. However, if the Court finds that there is no valid signing by the U, the non-compete clause will not be enforceable.

U will say that P breached the agreement because the agreement stated that any patents developed during her employment belonged to the University. P can argue that a reasonable interpretation of the agreement is that such patents related only to the work done within the scope of the employment - i.e. within the time she was at the university and not on her personal time and also the subject matter - surgical procedures and research into artificial limbs - not all patents.

Parol Evidence (PE) is evidence of oral agreements prior or contemporaneous with the agreement and are usually not permitted if the written agreement is fully integrated, i.e. that it is a full expression of their agreement. However, PE is allowed under the Common law if there is an ambiguity or the agreement is not fully integrated, or to supplement the agreement as long as it does not materially contradict the terms of the agreement.

P can bring in extrinsic evidence to clarify the scope of the patent obligation and what was meant by "for cause".

In any event the U cannot on the one hand claim there is no agreement or that it is not bound by its terms and on the other actually claim ownership to the patent she developed, as part of the agreement.

Under the terms of the agreement she is entitled to notice. The University is a Private University and not a Public entity so P will not be able to argue any kind of substantive or procedural due process violations by the University as this applies only to State Actors and only in that case could she claim the right to notice and a hearing but here the contract terms specifically refer to the need for a notice.

The development of the patent by P was on her own time and with a different subject to the patents developed under employment with U. Therefore U was not entitled to terminate her employment. The marketing campaign was also not related and therefore U is in breach to the P.

The U will be required to pay P any damages she suffered as a result of the breach, in other words the compensation she would be entitled to for the duration of the contract, less any mitigation she was able to do, by other employment. An employee should attempt to mitigate damages by seeking alternate employment.

Professor v Bill

See above re contract formation issues. An offer may be accepted by the manner indicated in the offer or by any reasonable manner. Performance is by implication, (conduct) an acceptance. Bill (B) sent P an offer in writing with a license agreement. The agreement is a mixed agreement of intellectual property (patents and licensing of the kits) and a contract for the sale of goods. The UCC covers the sale of goods which are tangible movable property. DNA kits are movable goods and therefore subject to the UCC. SOF applies to contracts for sale of goods that are more than $500 in value. It is not clear what the value of the testing kits are. When a contract is mixed goods and services the law applicable to the greater in value will apply. If the value of the kits is higher then the UCC will apply, otherwise the Common Law. However, a license for IP needs to be in writing.

Under the CL the mirror image rules requires that an acceptance match the offer exactly. Any changes are deemed to rejection and a counter offer. P signed the agreement but changed its terms by changing the fee. We'll see how it goes is an expression that may be interpreted as a conditional acceptance which is therefore also a rejection. However, once P began to perform the contract, B could argue that he reasonably relied that she had accepted and on her intention to perform in good faith. Furthermore, by cashing the checks, Bill can argue she accepted the initial terms of the offer.

Under the UCC, which could apply to the text kit but not the patent, amended terms are only accepted if they do not materially change the offer, or the offer was not expressly conditional to acceptance of its terms or the offeror does not object within 10 days.

Accord and Satisfaction. When there is a dispute as to a debt, a party that offer a lower amount in satisfaction of the debt and writes paid in full fully performs and is discharged. P will argue that there is a dispute as to the value of the fees and that B did not write on the check payment in full, so her cashing of the check does not signify that she accepted a lower amount.

***Contract modification requires consideration**.*

As above there is ambiguity in the agreement with B. The exclusivity of the DNA test kits could be for people only or to include pets. PE could be used to clarify this ambiguity as under the UCC more liberal rules as to the use of PE, including the course of performance of the parties, course of dealings and even trade usage, even if the agreement is not ambiguous on its face.

Professor will argue that there was never a valid agreement because there was no valid offer and acceptance. Otherwise she can argue that Bill did not object to her changed terms and therefore owes her the balance of the $70,000. She will argue that either there is no agreement and therefore she is entitled to the patent or there is an agreement and Bill must pay the amount she indicated.

***See above re covenant not to compete**:*

The agreement with Bill can be blue penciled by the Court (i.e. reformed to conform to the reasonable limits) as 10 years is to long for a covenant not to compete after sale of interest. Prohibition of competition after sale of interest is presumed unreasonable if longer than 7 years. It is also presumed unreasonable with respect to IP if 10 years or more. Therefore the non-compete clause in this agreement is unenforceable as it is written.

A party is entitled not to perform if the other party has yet to perform. Because P did not make the infomercial, B can argue that she has yet to fully perform and therefore her rights have not yet vested, additionally her ownership interest only vests if the item is successfully produced in the next 5 years. It is not clear that the item was produced therefore P would not be entitled to the ownership interest.

P will not be successful in claiming ownership in the company but may have ownership in the patent if extrinsic evidence shows that the non-compete clause was only for similar jobs and anyway the non-compete clause is too broad and the court would either not enforce or reform to more reasonable limits.

QUESTION NUMBER 2

JULY 2016 BAR EXAMINATION – FEDERAL CONSTITUTIONAL LAW

Concerned about failing schools, a Florida congressperson introduced Federal legislation on the first day of the Congressional session. The Act stated in pertinent part:

> Title: This Act may be cited as the Support for School Children and Equality Act of 2014.
>
> Section 1. In general. The legislatures of each of the United States may empower its public school districts to provide for separate girls only and boys only learning centers in the school systems.
>
> Section 2. Purpose. The purpose of this Act is to prevent distractions among students and provide for equal opportunities.

Prior to the Act's passage, educational activist groups obtained permits and had peaceful rallies against the Act. The rallies had multiple speakers speaking against the Act at the parkland in front of the U.S. Capitol, the area at the U.S. Capitol set aside for use by the public for such assemblies. The Capitol police had a strong presence at the rallies and without cause or warning used tear gas on peaceful protesters to disperse the crowds and shut down the rallies. Following this show of force by the Capitol police dispersing some of the peaceful rallies, the educational activist groups filed a lawsuit against the Capitol police.

Before the Act could become law, the State of Florida also objected to the Act and filed suit in Federal Court seeking to have the Act declared unconstitutional.

Despite the rallies and lawsuit, the Act continued through Congress and was eventually passed by the House and the Senate. Prior to passage of the Act, amendments were added providing full funding to the President's educational priorities. The Act was then submitted to the President, who did not support the Act, for signature with one week before adjournment of the session.

Prepare a memo discussing only:

1. The potential federal constitutional issues and likely outcome of the suit filed by the rally organizers against the Capitol police;

2. The potential federal constitutional issues and likely outcome of the suit filed by the State of Florida;

3. The President's options with regard to the Act, and the likely outcomes of using those options to address the Act; and,

4. Assuming the Act becomes law, discuss the constitutionality of the law.

SELECTED ANSWER TO QUESTION 2
(July 2016 Bar Examination)

Memorandum of Law

Re: Federal response to Speech, FL v. US, Presidential options, Challenges to the act once valid

1. Federal Violations of Free Speech Rights

a. Protester's standing

In a constitutional forum, the plaintiffs must show that they have standing to sue. Standing is an actual injury or threat of an injury that is concrete and particularized and not speculative or hypothetical. They must show that there was causation for the violation of their rights flowing from the state actor which impacted their exercise of a protected right. Finally they must also show that a favorable ruling would lead to a redressible result, that it would do something to cure the violation.

Here the plaintiffs were likely engaged in protected speech and associational conduct and had their rights violated by the governments actions to suppress their speech. Because they suffered an actual injury, they satisfy the injury in fact requirement. Their injury directly stems from the conduct of the government's workers, the capitol police, and as such they satisfy causation. Finally, a declaratory judgment or any other judgement against the government would do some to redress their violations. As such the protestors have standing to sue.

b. Constitutional Challenge

The US and FL constitutions both protect the right to freedom of speech and association as protected expression. These rights are deemed to be fundamental to our citizen's pursuit of ordered liberty. They are among the most fundamental of any of our rights and as such are protected by a strict scrutiny analysis whenever there is any infringement on such speech. Speech is regulatable, and there can be legal and other consequences for speech, this is not directly prohibited by the constitution. However, any infringements on the right are subject to rigorous review. When speech takes place in a public forum, such as a park or sidewalk, or another area traditionally held open to the public for speech and associational activities, any regulation on protected speech must be a valid time, place, or manner restriction, without the intent to suppress speech. When the restriction is content based or viewpoint based, this triggers a strict scrutiny analysis. When people are engaging in protected, as in non-illegal or a lesser protected category of speech such as obscenity, any government action that suppresses the speech will be analyzed under strict scrutiny. To survive a strict scrutiny challenge, the government must show that they have a compelling governmental interest, which they brought into effect with a narrowly tailored act that was the least restrictive means. With speech this means that they must leave open alternative channels of dialogue and not act to suppress speech. Any challenge to a constitutional right inflicted by a governmental actor, such as the police is protected, whereas private persons are not bound to respect the constitutional rights of others in such a strict manner.

Here the protestor's obtained a valid permit from the government to protest in the area, and thus this implicates the 1st amendment's speech and associational rights. Any person may petition the government for a redress of grievances, and peaceful assembly is explicitly protected under our constitution. Here there is no evidence whatsoever that the protestors violated their permits, were dangerous or disruptive, or that they engaged in dangerous speech or threatening actions. Because they were in a location that is traditionally reserved for free speech and assembly, this will be deemed to have occurred in a public forum. IF the government cannot show that there was some threatened violence or some other justification, this speech and association will be protected under the constitution. The government must show that they had a compelling governmental interest in putting down the protest, that was unrelated to the content of the speech and assembly, and that their actions were narrowly tailored and the least restrictive means. Simply by showing force, the police did not violate anyone's rights. However, when the capitol police, a state actor to which constitutional prohibitions attach, put down the protest using tear gas and other force, without apparent cause, they likely violated the rights of the protestors to peaceably assemble and petition their government for redress. Unless the government can show a compelling interest, such as protecting secret service protectees who were in eminent danger of violence, or show that their actions were the least restrictive means possible, they will likely be found to have violated the constitutional rights of the protestors.

C. Possible tort

Federal tort claim act has waived the US's sovereign immunity for suit in tort. The act has not waived immunity as to torts such as false imprisonment, and defamation. However, it will cover and does not prevent a suit based on an employee's negligent act. The protestors may validly argue that there was negligence committed by the capitol police that lead to injury or harm.

2. FL Suit

The state of FL may sue, through its attorney general from relief from unconstitutional legislation. To prevail they must have standing and also assert a cognizable case against the government. The government is not immune from suits by the states in federal court, and the proper forum for an action between the state of FL and the United States would be the US Supreme Court who has original jurisdiction under the constitution to hear a case between a state and the federal government. Any legislation that is constitutional at the federal level and conflicts with state legislation preempts the state legislation to the extent of any conflict. Federal acts which require a state to enact legislation may be unconstitutional as a commandeering of a state legislature to act. This is because of the protections of federalism in the US constitution which prohibit the federal government from requiring states to enact legislation. However the Feds may condition certain funding on the passage of constitutional legislation. The US constitution requires standing, in addition to having a live case and controversy to allow a federal court to adjudicate the action.

Here FL may seek to challenge the act as unconstitutional. They are a state and may allege that this act seeks to require it to pass laws, or alternatively that the act changes the local policies of the state relating to education and does so without authority. As such they do present a compelling argument that they are threatened with a concrete and non-hypothetical injury to their state sovereignty. They will show that the threatened act stems from federal government action, regardless of the fact that a FL rep introduced the legislation, this is still federal action. Finally they will show that there is a likelihood that a favorable suit could enjoin the act or have it declared unconstitutional. Facially the state has a compelling argument for standing to sue in the US Supreme Court.

However, the state of FL will likely be unable to challenge the law at this point, because it does not appear that the litigation is ripe for suit. Here there is a law that is still a bill. This is because to become a law the president of the United States must sign the legislation, or the congress must repass the legislation over the president's signature. Unlike the state of Florida, the President may simply choose not to act on a bill, and do what is known as a pocket veto by letting the bill go unsigned at the end of legislative session. Because this bill has not been signed by the president, or repassed over a veto, this is not a valid and enforceable law of the United States. As such, any injury that the state has would likely be deemed to be hypothetical at this point. Although it would be imminent, because the act is not law, there is no live case and controversy. Without a life case and controversy An article III federal court is without subject matter jurisdiction to entertain the case. As such, the state of FL may have a cause of action in the future, but as of now the case is not ripe and is subject to dismissal. As such, at this point, the state is likely to lose.

3. Presidential Options

Legislation of the United States works similarly to state legislation. There must be bicameralism, which means that the bill must originate in one house and pass in both houses by a simple majority. Additionally there must be presentment, where the passed bill is presented to the president for signature. A president may choose to sign or veto a bill, and in the event of a veto, the congress may repass the legislation over the president's veto by a 2/3 majority. Legislation that has not passed by one of these two methods is not current and enforceable legislation.

Here the president has the option to sign or veto the legislation. If he chooses not to sign it, the bill will not become law. This is called a pocket veto. Without regard to this, the president must simply sign or veto the bill in its entirety. The facts detail that the president has some problems with the bill. While the president may use some of his informal channels of communication with the house and senate, the president does not have the ability to strike out a portion of the law that he does not like. This is called a line item veto, and became unconstitutional during the 20th century. As such, the president may tender his objections via a pronouncement or informal means, but his options do not include the ability to strike out problematic portions of the bill. If he chooses to veto the legislation the house and senate may repass the legislation with a 2/3 vote, and the bill would become law without his signature. The president, unlike the FL governor is without the power to ask the Supreme Court for an advisory opinion on the matter. Although he could ask hypothetically, the court would decline to issue an

opinion because there is a bar on advisory opinions of the federal court. Such cases are not deemed life cases and controversies that enable the court to issue an opinion.

4. Constitutionality of the act

a. equal protection

The federal government is restricted by the US constitution, it's amendments, and Federal court cases that have interpreted the constitution. Through the fourteenth amendment to the United States constitution, there is a prohibition on the states from depriving any citizen of the due process of laws. This applies to both procedural acts of the government, and also substantive protections of fundamental rights guaranteed by the constitution. When the government acts to discriminate or restrict a fundamental right with regard to all citizens this potentially violates substantive due process protections. Where the government seeks to act on the basis of a suspect classification such as race, religion or national origin, the legislation must meet strict scrutiny, as detailed above. When the government seeks to treat people disparately on the basis of a quasi-suspect classification, such as gender or legitimacy the act must survive intermediate scrutiny. This level of review requires the government to show that they have an important government interest, and that the restriction or action is substantially related to bringing this into effect. While the fourteenth amendment due process clause facially only applies to states, Federal jurisprudence has interpreted it to also be applicable to the federal government, with regard to the same protections that the 5th amendment guarantees.

Here the act may be challenged on the basis that it seeks to separate children in an education setting based on their gender. Although the act only enables the states to act, it is a federal act, and thus directly implicates federal action, and also could allow states to act in violation of the 14th amendment. The US Supreme Court has held in Brown v. Board of education that the right to an equal and valuable education is a fundamental right of US children. Therefore, because this act seeks to discriminate on the basis of gender to bring in regard to this fundamental right, the government must survive an intermediate scrutiny analysis. This means that they must show that they have an important governmental interest, and that the action they chose is substantially related to bring this into effect. The stated interest here is to prevent distractions among school children. This may be challenged on the ground that it is not an important interest of the federal government, but rather is in the state's plenary powers to regulate education within their borders. This could be considered an important governmental interest, but the government would likely fail to show that their action was substantially related to bringing this about. IF they are successful, it is primarily because substantially related, is a lower standard than narrowly tailored in strict scrutiny. The action needn't be the most restrictive means. Accordingly, constitutionality on this basis depends upon the extent that the court sees the government's actions as substantially relating to the goal of preventing distraction in education.

Additionally, this act does not seek to create a protected classification, which is not a power that congress has. Rather it seeks to allow states to legislate in an area, which is permissible, however it is still problematic for other reasons.

b. Commandeering clause

The Federal constitution contains an explicit prohibition from the federal government ordering a state to pass legislation by command of the federal government. The idea is that this implicates the implicit separate of powers between the federal government and states known as federalism. When Federal legislation requires a state to pass laws, they are unconstitutional. However, the federal government may legislate to clarify that states do have certain authority if it stops short of a command. Additionally, if such an act is an enablement and not a command to legislate, the federal government may validly condition certain discretionary funding given to the states through the taxing and spending powers of the US government in article I of the constitution, but they may not act wholly coercively.

Here the State of FL and other impacted states would have an argument that this legislation seeks to commandeer state legislatures to pass legislation. This argument however would likely fail. This is because the act simply reads that the legislatures of the states may act, and does not require them to act. As discussed earlier, this may be problematic on the grounds that it seeks to allow the states to discriminate on the basis of sex, it only enables action and does not require action. There is no evidence of coercive funding schemes, and there is no requirement to act.

QUESTION NUMBER 3

JULY 2016 BAR EXAMINATION – TORTS/ETHICS

Amy purchased an old house at a beachside community. Most of the newer houses in this City community are constructed with power generators because weather related storms frequently cause interruptions in the City's electricity service. The house that Amy purchased did not have a generator. Amy asked her close friend Bob, who is a licensed general contractor, if he could install a power generator for her new house. Bob, after inspecting Amy's new house, advised Amy that he could install a generator but, due to the age of her house, he would need to order a customized generator directly from a manufacturer. Amy agreed to hire Bob and she asked him to install the generator while she was away on vacation. Bob then ordered the power generator that he needed from Manufacturer. Manufacturer sells these specialized generators only to authorized dealers and licensed contractors.

Two months before Bob made this order, Manufacturer implemented a corporate policy to sell these particular types of generators with critical installation instructions printed directly on the generator. Manufacturer adopted this labeling policy because it had received complaints from many contractors stating that the customized generators were difficult to install; some of these complainants also stated that they inadvertently installed an important component of the generator, called the modulator, backwards and this mistake caused the generator to spark when in operation. Despite Manufacturer's labeling policy, the generator that Manufacturer shipped to Bob was not marked with installation instructions. Bob was not aware that the generator that he ordered from Manufacturer could cause electrical sparks if its modulator was not properly installed.

One week after Bob installed the power generator, Amy turned it on when her electricity service went out during a thunderstorm. The generator exploded shortly after Amy turned it on and this explosion caused a fire and significant damage to her house. The City fire inspector determined that the explosion was caused by electrical sparks from the power generator that ignited the fuel line to the generator. This fire inspector also determined that the modulator component of the generator was installed backwards. The explosion at Amy's house also caused some of the windows at her neighbor Dave's house to shatter.

Amy arrives at your law office and states that she is interested in seeking compensation for the damages to her house as a result of the explosion caused by Manufacturer's power generator. She does not want to sue her close friend Bob but she wants to know what legal recourse she may have against Manufacturer. Assume that any potential claim against Bob was disclosed to Amy and she voluntarily waived making a claim against Bob. Amy is also concerned that Dave may sue her for the damages that the explosion caused to his house.

Amy wants to know if she can pay your legal fees associated with suing Manufacturer by equally splitting with you any monetary recovery that you receive from Manufacturer. Prepare a memorandum for Amy that discusses:

1. the legal causes of action that Amy may assert against Manufacturer, including any defenses that Manufacturer may have in connection with these claims, and the likelihood of Amy prevailing in these lawsuits;

2. the causes of action that Dave may have against Amy; and

3. whether you can accept Amy's proposed fee arrangement for your legal services.

SELECTED ANSWER TO QUESTION 3
(July 2016 Bar Examination)

Amy has several tort claims against Manufacturer based on strict product liability, negligence, and warranty. (Warranty is more of a contract action.)

Claims against Manufacturer: Amy would have a strong argument that Manufacturer is liable under a strict product liability theory. For liability to stand, she would need to show that Manufacturer is in the business of making and selling such products, that the product is unreasonably dangerous to an average consumer, causation, and damages.

Here Manufacturer is indeed in the business of making and selling such products. It might try to argue that it only sells to authorized dealers and licensed contractors and that Amy doesn't have standing to sue, but this argument would fail. Privity is not required in strict liability and all that is required that she is a foreseeable plaintiff.

That a power generator product is prone to sparking when installed incorrectly and when it is confusing to put together, that very well could be construed as unreasonably dangerous.

This doesn't appear to be a manufacturing defect (where just a few units were defective). Rather, this could be a design defect. To prevail, Amy would need to show an alternative design that would not unduly increase cost or impede functionality.

If it were not possible to design around this issue, the Manufacturer would have a duty to warn and/or instruct.

It appears as if it usually did so based on confusion by contractors/installers, but didn't in this case.

Under design defect is failure to warn or instruct. Amy has a strong case of showing duty/breach under strict liability.

Regarding causation, her injury satisfies actual causation – but for the defect/failure, the explosion would not have occurred.

She also would be able to show proximate cause. That the generator would be installed in a consumer's house is foreseeable, and the installation issue is also foreseeable, as the company had notice of the difficulty installing the unit and the confusion about installing the part backward.

Amy also clearly has damages – significant damages to her house by fire when the unit sparked.

Manufacturer might try to file a third party complaint against Bob, as this arose out of the same transaction and occurrence. It will argue that his action contributed to the fire and under Florida's pure comparative negligence rule, its liability would be reduced. It

also would argue he is liable under product liability as an authorized dealer.

Note, Florida has abolished joint and several liability for negligence and strict liability, so the damages would be apportioned by the court. If Bob were not impleaded, any amount of liability he had under strict liability or negligence would reduce what Amy could collect. So she might want to file a claim against Bob for strict liability or negligence too. She could argue he breached a duty to her for not installing the generator correctly. He might argue he acted reasonably given it wasn't labeled and all of the installation confusion.

Amy also could sue Manufacturer for negligence. The elements are duty, breach of duty, causation (actual and proximate) and damages. Manufacturer owes a duty to its customers, even end users, so there is clearly a duty to act like a reasonable product manufacturer in the same or similar circumstances.

Either by negligent design or negligently forgetting to attach the installation label (against company policy); there was a breach of duty of care. That there was a labeling policy would not absolve Manufacturer as the negligence of one employee. Could be imputed to it through respondeat superior.

As discussed above, the negligence of Manufacturer is the best for actual cause of the fire and damage and also the proximate cause of the fire. A court most likely would not see the bad installation as an intervening and superseding cause because the installation problems were very foreseeable. And again, that there were damages is very clear.

Amy also might be able to sue under the warranty of merchandise liability. This is probably a harder case, however, because here courts do require privity to the buyer and their immediate household/guests. This is because this claim has its roots more in contracts than torts.

Bill may have a successful counterclaim if implead by Manufacturer in this basis (or warranty of fitness for a particular purpose or express warranty, if there were any).

As discussed, Manufacturer would point to Bill's comparative negligence as a defense and try to reduce its liability. It may have some success here if he didn't act like a reasonable prudent contractor regarding the installation. But again, this would be hard to show with all of the complaints about installation.

The Manufacturer might also point to Amy's own comparative negligence, but there is no indication she acted negligently – she merely turned on the generator when the power went out.

The Manufacturer might be able to reduce its liability under the collateral source doctrine – in Florida – unlike the federal system – damages can sometimes be reduced by the amount of insurance a plaintiff had for the damages.

Amy might seek punitive damages, but would need to show intentional misconduct or gross negligence. She might succeed under the latter. If she did, then she could

generally recover no greater than 3 times compensatory damages or $500,000.

In any event, Amy would likely recover compensatory damages to repair her house and replace the generator and may be able to recover punitive damages. But the amount she recovers from Manufacturer could be reduced by Bob's comparative negligence because of Florida's abolishment of joint and several liability for negligence.

Dave's suit against Amy: Dave would try to sue Amy for negligence, both her own and that of Bob. It would be hard, as discussed above, to show Amy was negligent in operating the generator, but Dave could argue that (1) she negligently hired Bob to do the work if he was not qualified, and (2) that she is liable for his negligence under a respondeat superior theory.

Taking negligent hiring first, although Bob is her friend, he seemed to know what he was doing in seeking out a special generator. Also, since Manufacturer only sells to authorized dealers and licensed contractors, he was likely both. As such, it is unlikely that Bob was negligently hired.

It would also be hard for Dave to sue Amy under respondeat superior because Bob was an independent contractor rather than an employee. To succeed under this theory for an independent contractor, Dave would need to show something unreasonably dangerous, which just is not the case here.

Dave might have more success against Bob or Manufacturer on strict product liability and negligence theories. He would likely be a forcible plaintiff for both to whom a duty is owed.

In conclusion, Dave will probably not be successful against Amy, but should consider other defendants such as Bob and Manufacturer.

Contingent Fee/Legal Services: An attorney must charge a fair fee for his or her services based upon the complexity of the case, the amount of time it will take, what other similar attorneys charge, the attorney's experience, etc. An excessive fee is one that a reasonable attorney would look down upon.

Contingency fees are permitted in civil cases except for domestic matters like alimony and child support. Contingency fees are not permitted in criminal cases.

This is a non-domestic, civil case, so Amy and I could agree upon a reasonable contingency fee. Florida sets a sliding scale for 15% to 40% depending on how far the case gets and the damages from the case. 50% would fall outside of this normal range and as such, I should agree to a lower contingency fee.

All contingency fees must be in writing and signed. I would also need to provide Amy with a client's bill of rights, disclose any fees and whether they would come out before or after the fee is calculated, and advise her that she can get out of the agreement three days after signing.

PART II - SAMPLE MULTIPLE-CHOICE QUESTIONS AND ANSWERS

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

The answers appear on page 46.

MULTIPLE-CHOICE EXAMINATION INSTRUCTIONS

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

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

2. The person on each side of you should have a booklet with a different colored cover. Please determine that the person on each side of you is using a different colored cover. If he or she is using an examination booklet with the same colored cover, please notify a proctor at once.

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

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

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

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

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

8. Use the instruction sheet to cover your answers.

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

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

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

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

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

23 SAMPLE MULTIPLE-CHOICE QUESTIONS

1. After the close of the pleadings both plaintiff and defendant duly made motions for summary judgment. Which of the following statements is correct?

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

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

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

2. Based upon the legal arguments presented, the court should rule

   (A) the statement that West tried to steal the victim's chain is admissible and the statement that the victim was shot is inadmissible.
   (B) the statement that the victim was shot is admissible and the statement that West tried to steal the victim's chain is inadmissible.
   (C) both statements are admissible.
   (D) both statements are inadmissible.

3. Following the testimony of the physician, the State offered into evidence a copy of the report of the investigating police officer setting forth the officer's observations at the scene of the crime. The evidence is

   (A) admissible as a recorded recollection.
   (B) admissible as a public report.
   (C) inadmissible because it is hearsay not within any exception.
   (D) inadmissible because the original report is required.

4. Which statement best describes the profit sharing relationship of a general partnership where the partners have agreed only on voting percentage and the voting shares are unequal?

   (A) Partners share in proportion to their contributions to the capital and assets of the partnership.
   (B) Partners share in proportion to their voting percentage.
   (C) Partners share equally.
   (D) Partners cannot share until they unanimously agree upon a distribution.

5. Billy was charged with grand theft. The trial began on a Thursday afternoon. The jury was impaneled, sworn and released for the day. Since Friday was the Fourth of July, the judge asked the jurors to return on Monday. The trial began again on Monday morning at 8:30. By late evening the judge had instructed the jury. Due to the lateness of the hour, the jurors were sequestered for the evening to allow them to get an early start the next morning. The jurors returned Tuesday morning and were unable to reach a verdict. Unable to reach a verdict, the trial judge allowed the jurors to go home that evening. On Wednesday morning, the jury assembled and returned a verdict of guilty.

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

   (A) The fact that the jurors did not begin to consider evidence until several days after they were impaneled.
   (B) The fact that the jury was allowed to go home after being sworn.
   (C) The fact that the jury took several days to return a verdict.
   (D) The fact that the jury was allowed to go home after they began deliberations.

6. Nancy Quinn had two sons, Earl Quinn and Brent Quinn, before she married Al Green in 2004. In 2006, Nancy made her first and only will, leaving half her estate to "my husband, Al Green" and one-fourth to each of her two sons. On February 15, 2008, Nancy and Al were divorced, but Nancy never got around to making a new will. Nancy died on May 1, 2010, and she was survived by Al, Earl, Brent, and her father, Norman Ritter. Which of the following statements regarding the distribution of Nancy's estate is correct?

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

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

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

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

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

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

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

10. A defendant charged with first-degree murder shall be furnished with a list containing names and addresses of all prospective jurors

    (A) upon court order.
    (B) upon request.
    (C) upon request and showing of good cause.
    (D) under no circumstances.

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

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

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

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

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

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

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

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

14. Goode testifies that his neighbor told him that her friend, a school principal, witnessed the accident and that the principal, still under the stress of the excitement of having viewed the accident, had told her exactly what he saw. His attorney then asks Goode what the neighbor said to him about the accident. Before Goode can testify further, Sellers interjects a hearsay objection. The court should

    (A) sustain the objection if the principal is not available to testify.
    (B) sustain the objection because the neighbor's statement is hearsay and no exception applies.
    (C) overrule the objection because excited utterance exception to the hearsay rule applies.
    (D) overrule the objection because the spontaneous statement exception to the hearsay rule applies.

15. Tom and Laura had three adult children. After a bitter divorce, Tom was sure Laura would disinherit their son, Bif. Tom executed a new will that provided bequests for all three children, but stated, “in the event my ex-wife, Laura, revokes her will in existence on the date of our divorce, I leave my entire estate to my son, Bif.” Laura did revoke the will referred to in Tom’s will but did not disinherit Bif. At Tom’s death, what distribution and reason given below are correct?

    (A) Tom’s estate passes to his three children because will provisions are not binding if they are conditioned on events outside testator’s control.
    (B) Tom’s estate passes to his three children because will provisions are not binding if they are conditioned on future events.
    (C) Tom’s entire estate belongs to Bif because Laura revoked her will and the provision regarding that event controls distribution.
    (D) Tom’s estate passes by intestate succession because the mistake regarding the contents of Laura’s new will voids Tom’s testamentary intent.

16. Rainbow Corporation has outstanding 1,000 shares of voting common stock and 1,000 shares of nonvoting preferred. The preferred has a liquidation preference equal to its par value of $100 per share plus a three percent noncumulative dividend. Rainbow submits to its stockholders a proposal to authorize a new class of preferred stock with redemption rights that would come ahead of the old preferred stock. At a shareholders' meeting, 700 common and 400 preferred vote in favor of the proposal. Which of the following statements is correct?

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

17. In the absence of a provision to the contrary in the articles of incorporation, the directors of a corporation elected for a specified term

    (A) can be removed from office at a meeting of the shareholders, but only for cause and after an opportunity to be heard has been given to the directors.
    (B) can be removed from office at a meeting of the shareholders, with or without cause.
    (C) can be removed from office at a meeting of the shareholders, but only for cause.
    (D) can be removed from office prior to the expiration of their term only by a decree of the circuit court in an action by the shareholders.

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

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

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

19. Before Sue and Harry were married, Harry signed an agreement waiving “all claims” to Sue’s estate. Harry received advice of counsel prior to signing the agreement. After Sue dies, Harry learned for the first time that Sue owned over $1,000,000 worth of stock, Sue’s validly executed will leaves her entire estate to her mother. Which of the following is true?

    (A) Harry is entitled to homestead property because he did not specifically waive his right to homestead.
    (B) Harry is entitled to his elective share of Sue’s estate because she did not make a fair disclosure of her estate.
    (C) Harry is entitled to the family allowance because family allowance cannot be waived.
    (D) Harry is not entitled to any share of Sue’s estate.

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

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

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

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

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

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

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

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

23. Mary, a wealthy St. Petersburg widow, executed her first and only will on May 15, 1990 and died on August 18, 1990. Her will provided that her estate be divided equally between her only child, Joan, and the Salvation Army of Largo. How will Mary's estate actually be distributed?

    (A) 100% to Joan.
    (B) 100% to Joan if she files a timely petition requesting that the devise to the Salvation Army be avoided.
    (C) 50% to Joan and 50% to the Salvation Army.
    (D) 50% to Joan and the income from the remaining 50% to Joan for life, remainder to the Salvation Army, if Joan files a timely petition protesting the devise to the Salvation Army.

ANSWER KEY FOR MULTIPLE-CHOICE QUESTIONS

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