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

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PART I – ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2008 AND JULY 2008 FLORIDA BAR EXAMINATIONS

ESSAY QUESTIONS AND SELECTED ANSWERS

Part I of this publication contains the essay questions from the February 2008 and July 2008 Florida Bar Examinations and one selected answer for each question.

The answers selected for this publication received high scores and were written by applicants who passed the examination. The handwritten answers are typed as submitted by the applicants. The answers are reproduced here with the consent of their authors and may not be reprinted.

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

ESSAY EXAMINATION INSTRUCTIONS

Applicable Law

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

Acceptable Essay Answer

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

Q QUESTION NUMBER 1

FEBRUARY 2008 BAR EXAMINATION - CONTRACTS

Worried about the wildly fluctuating price of oil, Airline wrote to Oil Company requesting a firm price on jet fuel for one year. On December 15, 2006, Oil Company wrote to Airline, stating: "I offer to supply you with any jet fuel ordered by you during the upcoming year beginning January 1, 2007. Price: \$1.50 per gallon, to be ordered by you in minimum quantities of 50,000 barrels. Because of your past business, this offer will not be withdrawn during the year." Airline received the letter on December 20, 2006.

On December 24, 2006, Airline replied in writing: "I accept your offer." Mail was delayed during the holidays and Oil Company did not receive this communication until December 31, 2006. Because the price of oil was rising so rapidly, Airline called Oil Company on December 26, 2006, and orally stated to Oil Company's agent: "I accept your offer of December 15th." In the same telephone conversation, Airline requested the immediate shipment of 100,000 barrels. Oil Company's agent orally agreed to ship 100,000 barrels that day, but informed Airline that the price for the rush order would be \$1.70 per gallon. Oil Company delivered the fuel that day. Based on the \$1.50 price for 2007 from Oil Company, Airline cancelled all other negotiations with suppliers.

During January and February 2007, Airline ordered 200,000 barrels of fuel, the fuel was delivered, and Airline paid for it at the rate of \$1.50 per gallon. Airline also paid for the 100,000 barrels shipped in December 2006 at \$1.50 per gallon. During the first week of March 2007, severe weather destroyed a key pipeline in a major oil producing region resulting in the disruption of the world supply of oil and causing the market price of jet fuel to rise to \$2.00 per gallon. On March 7, 2007, Oil Company mailed a letter to Airline reading: "The offer dated December 15, 2006, is revoked." The letter did not arrive until March 16, 2007. Airline placed the following orders, all by mail: 50,000 barrels on March 10, 2007; 50,000 barrels on March 17, 2007; and 100,000 barrels on March 30, 2007. Oil Company received all orders 2 days after mailing, but refused to fill any of the March 2007 orders.

In April 2007, Senior Partner requests that you prepare a memorandum of law regarding this matter. In your memorandum, discuss the claims of Airline and Oil Company, as well as any defenses they might have. Do not discuss any issues related to damages.

SELECTED ANSWER TO QUESTION 1 **(February 2008 Bar Examination)**

A valid contract requires offer, acceptance, consideration, and no valid defenses. The law governing contracts depends on the subject matter of the contract. The UCC will govern contracts for the sale of goods, and Florida common law will govern contracts for the sale of services.

The subject matter of the agreement between Airline Company, (hereinafter "Airline") and Oil Company (hereinafter "Oil") is jet fuel. Jet fuel is a good and therefore the UCC will govern the agreement between Airline and Oil since it is a contract for the sale of goods.

An offer is a manifestation of intent to enter a contract by words or conduct that gives the offeree the power to accept. To be valid, an offer must have language of commitment and definiteness (i.e., details).

Acceptance is the manifestation of intent to be bound by the terms of the offer.

Consideration is a bargained for exchange. Florida follows the minority rule in that consideration can be satisfied by either a benefit or legal detriment, or both.

Under the UCC a valid contract does not have to state all material terms. Rather, a contract under the UCC is valid if it is signed by the parties and contains a quantity term.

Airline's written request to Oil was not an offer but a request for information. A request for information is not a valid offer because it does not contain language of commitment and definiteness.

Oil's reply on December 15, 2006 is a valid offer because it contained language of commitment and was definite. Oil's offer was firm in that Oil promised not to withdraw the offer during the year. Under the UCC a firm offer is valid without consideration. Firm offers are valid for 90 days unless the contract states otherwise. Under the UCC, firm offers cannot be revoked for 90 days and arguably for any time longer than 90 days if the parties so intend. In this instance, Oil offered to hold the offer open for one year. Airline accepted Oil's offer by communicating a manifestation of intent to be bound by the terms of the offer when Airline called and verbally accepted. The mailbox rule does not apply under the UCC. The mailbox rule states that an offer is accepted upon dispatch, meaning upon placing the acceptance in the mail. However, since this is a contract for the sale of goods, the mailbox rule does not apply. Therefore, the offer was accepted when Airline telephoned Oil indicating his/her intent to be bound by the terms of the offer.

The offer and acceptance created a valid contract. The type of contract created was a requirements contract. A requirements contract is a contract where the seller agrees to supply all that the buyer requires. A requirements contract is valid under the UCC even though the quantity terms are not specific. Another type of contract is an output contract which is a contract where the buyer agrees to buy all that the seller produces. However, in this fact situation an output contract was not created.

Claims of Airline Company:

Requirements Contract: A valid contract under the UCC was created between Airline and Oil. The type of contract created is a requirements contract because Oil agreed to sell Airline all that Airline required during “the upcoming year.” Airline ordered 100,000 barrels from Oil following the phone conversation accepting Oil’s offer to supply jet fuel. Airline ordered a rush shipment of 100,000 barrels. Oil replied that the price for the rush would be \$1.70 per gallon instead of the contracted price of \$1.50. Airline could argue that this was a breach of contract because under the terms of the contract the prices was set at \$1.50 per gallon. This likely would not be breach of contract by Oil given the circumstances for needing a rush shipment.

Airline relied on the contracted price of \$1.50 per gallon for year 2007. Since this was a requirements contract, Airline was reasonable in cancelling all negotiations with other suppliers for fuel.

Breach of Contract: Airline may have a breach of contract claim against Oil for revoking the contract. Oil’s attempt to revoke the offer is likely a breach since Oil’s offer to supply Airline with jet fuel was accepted orally by Airline. An offer can only be revoked before acceptance. Here, Airline would likely argue that Oil breached the contract to supply jet fuel when Airline received the letter from Oil on March 17, 2007. Revocation of an offer is effective when received. Airline would claim that he entered into a requirements contract with Oil and that Oil breached that contract by failing to supply Airline with his requirements for jet fuel in 2007.

Even if each transaction was a separate contract – arguably the letters sent to Oil and Oil’s silence would imply a contract under the letter exception available in the UCC.

Defenses:

Firm offer is not revocable under UCC. UCC permits a firm offer for 90 days or unless otherwise agreed to by the parties. In this case, Oil was obligated to keep the offer open for a year if in fact each separate transaction was a separate contract. If one year provision in the contract is not enforceable because of the defense of SOF, then 90 days ends March 15. Contracts begin on date entered regardless of time of performance.

Promissory Estoppel: Even if there was not a valid requirements contract entered into between Oil and Airline, Airline relied on Oil’s promise to sell jet fuel at a price of \$1.50 for a period of a year. Promissory Estoppel is the equitable doctrine for enforcing a contract when one party relies to his detriment on the promise of another. The key to promissory estoppel is reliance. It is Airline’s reliance on Oil’s promise to sell jet fuel for the year that may entitle Airline to promissory estoppel.

SOF: Airline would likely argue that a valid defense to the statute of frauds defense of Oil is that the UCC provides an exception to the rule that allows a silence of one party to be considered acceptance. This is the letter acceptance exception. Under this exception which again is in the UCC only – it provides that a contract is enforceable even if the contract is not signed by the party to be charged. It allows a letter signed by the plaintiff to be sufficient to enforce the contract provided there was a history of dealings between the parties. Also, a defense to SOF is where the parties substantially perform. This allows promissory estoppel to enforce the contract.

Claims of Oil Company:

K for sale of Jet fuel at a price of \$1.70:

Oil company would likely have a claim for \$1.70 price of jet fuel shipped in December. Oil would likely argue that Airline offered to purchase 100,000 barrels from Oil over the phone and that Oil accepted by shipping the barrels of jet fuel that same day. Acceptance by shipment of goods under the UCC is a valid form of acceptance. Oil would likely argue that they are entitled to the \$1.70 price since the offer to sell Airline jet fuel at the price of \$1.50 was for year 2007. As stated above, a valid contract under the UCC need not include all material terms – the quantity and signature of the parties will suffice.

Quote:

Oil would likely argue that the letter of December 15 was a price quote and not an offer. A price quote is not an offer but is for informational purposes only.

Series of Ks and Firm Offer: Oil company would likely argue that a series of contracts were entered into between Oil and Airline, not a requirements contract. Oil would likely argue that his firm offer of December 15, 2006, merely obligated him to hold the offer to purchase jet fuel open. Again, a firm offer does not require consideration under the UCC. Additionally, Oil would likely argue that the firm offer was only valid for 90 days rather than for a year. However, it is arguable that the firm offer would be held valid for one year under the UCC.

Mailbox Rule: Under UCC the mailbox rule does not apply.

Revocation: Oil would likely argue that each order from Airline was an offer. If each order was an offer, Oil would likely argue that it did not accept the offers submitted by mail. Instead, Oil would likely argue that it revoked its firm offer when it sent its letter dated March 7. However, under the UCC a firm offer is not revocable for 90 days unless the parties otherwise agree.

Impossibility of Performance: Oil would likely argue that a valid defense to contracts that were formed after the March 2007 storm destroying key pipelines made it impossible to perform. Impossibility is a valid defense when there is a severe change that the parties did not contemplate in when they entered the contract that materially effects performance. An act of god is one type of change that allows impossibility of performance to be a valid defense.

Statute of Frauds: The SOF requires certain contracts to be in writing to be enforceable. Under the UCC the SOF requirements is relaxed in that it allows a promise for the sale of goods to be enforced provided a writing contains the quantity and signature of the party to be charged. Although Airline will argue that the offers mailed in March created valid contracts under the letter doctrine exception to the SOF defense, Oil will likely argue that this exception is not applicable in this case because there was not a sufficient history of dealings between the parties. Therefore Oil's silence could not have constituted acceptance.

Anticipatory Repudiation: Oil will likely argue that even if the Airlines verbal communication to Oil in December constituted an acceptance to a requirements contract, that Airline repudiated by indicating on the phone that he cancelled the contract.

Q QUESTION NUMBER 2

FEBRUARY 2008 BAR EXAMINATION – FLORIDA CONSTITUTIONAL LAW

Representative is a duly-elected member of the Florida House of Representatives. Representative believes that wealthy individuals are unfairly treated by the courts when they are involved in dissolution of marriage litigation. As a result, Representative proposed legislation that provides for the following: where a marriage is dissolved by final judgment by the appropriate circuit court after a trial and the parties had an aggregate net worth of \$5 million or more at the time of the filing of the dissolution petition, the judgment shall not be reviewed by appeal. Instead, the Governor of the State of Florida shall conduct a de novo review of the record and circuit court's judgment and, by Executive Order, affirm or reverse the judgment.

Representative had difficulty finding sufficient support for his bill, but agreed to an amendment that increased the criminal penalty for domestic battery when the battery is witnessed by a child age 12 or under. As so amended, the bill was passed by the Florida House of Representatives and the Florida Senate, and presented to the Governor for his signature on March 9, 2007. The citation name of the legislation is "The Dissolution of Marriage Review Act" (the Act). The law is identified at the beginning of its full title as "an act relating to domestic relations." The full title is lengthy and identifies those existing provisions of the Florida Statutes which it amends or repeals.

On April 20, 2007, the Governor vetoed the Act. The Florida Legislature adjourned sine die on May 9, 2007, without taking any further action on the bill. The Act provided for an effective date of July 1, 2007.

You represent Wife, who filed a petition for dissolution of marriage on July 5, 2007. After a trial, the circuit court entered a judgment dissolving the marriage, distributing the property, and providing for alimony and child support. The family had sufficient assets for review of the judgment in accordance with the Act, and Husband has filed a petition with the Governor's office to review the judgment. Wife, however, is opposed to such review.

Discuss the challenges that Wife can make under the Florida Constitution and the likely outcomes of the challenges?

SELECTED ANSWER TO QUESTION 2

(February 2008 Bar Examination)

#1 There are a number of challenges the wife might consider. They will be addressed in order of facts presented. First there is an Equal Protection issue. This law was created to arguably protect the wealthy, but wife could argue it is to benefit the wealthy. As a class of people being treated differently, wealthy people do not fall under the categories of protection requiring strict scrutiny, discrimination based on sex, religion, ethical or race backgrounds or disability – therefore under both the US & Florida Constitutions a class based on wealth would be subject to the rational basis test. It is the goal of the law rationally related to any legitimate govt. purpose & the burden is on the plaintiff wife in this case, to prove otherwise. The govt. may argue that this law legitimately provides needed protection for a class of people that appear to receive unfair or biased treatment in the courts. This would be the only argument wife may not overcome as rational basis is an easy standard for the state to meet. Wife's best counter would be that the basis for the protection of the wealthy is not accurate & therefore the protection is not needed. She could further argue that this law discriminates against the opposing spouse but the result is likely the same.

#2 The wife's next argument is much stronger as it is based on the Separation of Powers argument as provided by the Florida Constitution. The FL Constitution provides that the 3 branches – Legislative, judicial, and executive each have their separate & specific functions and cannot be directed, encroached on or interfered with by one or both of another branch of govt. without specific authority designated in the FL Constitution. This is similar to the Separation of Powers under the US Constitution, but more specific and stringent in many regards especially in the realm of Executive branch encroachment on the Judicial branch as it appears to be the case here. The Governor, as part of the Executive branch under this law would be encroaching on the judicial branch's area of responsibility under the FL Constitution by becoming the appeal agency from the Circuit Ct. Under the FL Constitution the District Courts of Appeal have specific jurisdiction for appeals of Circuit Court judgments. Wife has a very good cause of action that this provision of the law makes it unconstitutional under the Separation of Powers provision of the FL Constitution as the executive branch would be encroaching on the judicial branches specific jurisdiction and duties. The Legislative branch has police powers to make law, but cannot pass legislation to become law that would require any branch to encroach on another branch for their duties set forth in the FL Constitution.

#3 Wife further can argue that this law denies her access to the courts. Access to the cts. is a specific right given to the people in FL under the FL Constitution. These rights are similar to the Bill of Rights found in the US Constitution but are more enumerated and specific. One of these Articles of Rights is the right to access of the courts. The FL Constitution provides that the District Ct. of Appeal shall hear appeals made from the Circuit Cts. Wife should be allowed to appeal any final judgment of her dissolution of marriage to the respective DCA. If husband wants to appeal, it should be heard by the DCA, not another court or branch of govt. The dissolution, of marriage is not a simple dissolution, i.e. there are children, child support and alimony issues, so the proper venue is the circuit ct. The proper venue for an appeal would be the respective DCA. This legislation specifically takes it out of the DCA thereby denying wife access to

the cts. State could argue that an alternate venue is provided and it is for public necessity – two reasons previously found by cts. to be somewhat compelling as counter arguments, but neither should hold water here as the venue is inappropriate under the Sep. of powers argument and no public necessity seems to be involved unless you are wealthy enough to be worth over \$5 million.

#4 Wife should further argue that the legislation itself as presented is unconstitutional. The FL Constitution provides that legislation as it is titled should have a single subject, be easily understood by the public, the title and subject of the legislation be closely related as one topic and it not be vague or overbroad. In this case wife would argue that the title “The Dissolution of Marriage Review Act” and its full title “an act relating to domestic relations” is too vague and overbroad. The intent of the legislation is understood from the facts and the law is understood from the facts. However, reading the title in and of itself could be easily interpreted as having to do with a lot of other domestic relation or family law issues – not what the facts indicate the legislation is really about. Additionally, the addition of the criminal penalty for certain domestic violence is a completely different matter that is unrelated – thereby violating the single-subject requirement. Therefore, the legislation as it is titled and written to include the unrelated criminal law, appears to violate the FL Constitution’s requirement for legislative acts be of one subject and not vague & or overbroad.

#5 Wife has an additional argument that the law was vetoed by the governor and not overridden by a vote of both houses of the legislature. In this argument the state most likely would prevail in arguing that the Governor’s veto did not occur. When the Legislature is in session, the Governor has ways in which to veto a bill upon presentment to him by the Legislature. If the Governor does not affirmatively veto the bill within the prescribed time, the bill will become law. Here the bill has an effective date of 1 July 2007. Therefore, it became law at that time. Wife would most likely not prevail in this argument. Wife most likely would prevail in her argument that this Act is unconstitutional under the FL Constitution in that it violates the Separation of Powers, denies her access to the courts and violates the Single Subject Rule as well as being vague & overbroad. Wife probably would not prevail on Equal Protection and veto arguments.

Q QUESTION NUMBER 3

FEBRUARY 2008 BAR EXAMINATION – TRUSTS

Mr. and Mrs. T are Florida residents. To avoid probate, Mr. T created a trust "for all of my property" with himself as trustee. The trust instrument provided that Mr. T had the right to revoke the trust at any time. Mr. and Mrs. T were set forth as income beneficiaries for life and, upon Mr. T's death, half of the trust property was to be "held in trust for my son, Sammy, until he reaches the age of 30." The other half was to be held by his daughter, Dana, "to be distributed, at her discretion, to the charitable institutions of her choice." The trust instrument was dated and signed at the end by Mr. T and two witnesses, all of whom signed in each others' presence.

Mr. T died without leaving a will. At the time of his death, he and Mrs. T owned their \$400,000 home as joint tenants with right of survivorship. Mr. T also held, in his name only, stocks and bank accounts that were valued at \$800,000 at the time of his death. None of these assets had been transferred to a trust.

Shortly after Mr. T's death, Mrs. T and Sammy, now 21 years old, filed a petition in probate court seeking to have all or a portion of the trust declared invalid. Attached to the petition is a typewritten note signed and dated by Mr. T prior to his death. The note reads, "I hereby amend my trust to leave all of my property to Mrs. T when I die." Dana predeceased Mr. T and she had no children.

As the law clerk to the probate judge, prepare a memorandum addressing the issues and possible outcomes.

SELECTED ANSWER TO QUESTION 3

(February 2008 Bar Examination)

CREATION: To create a valid trust in FL you need: Intent by the settlor to create a trust, a trustee (although trust won't fail for want of a trustee), trust property (res), delivery of the res to the trustee, and ascertainable beneficiaries (or charity beneficiary). The creator must also have capacity, and there is nothing in the facts that seems to negate his capacity to create the trust. Here there appears to be a valid trust (discuss the attempted modification/revocation infra). In an inter vivos trust, the settlor need not "transfer" trust property to himself if he names himself trustee (no need for a strawman). Mr. T being the sole trustee is OK, the rule is that he just cannot be the sole trustee and sole beneficiary (because then who would sue him for breach of trust). Here it appears that Mrs. T is an income beneficiary, and there are other residuary beneficiaries as well. An inter vivos trust in FL can be revocable or irrevocable depending on the language of the trust. Here the trust specifically states it is revocable (even though the default in FL is revocable unless expressly irrevocable). This means that Mr. T has no obligation to keep the terms of the trust as they are, and can amend or revoke at any time. After the trust was created, and when he died, Mrs. T found a note that purported to amend/revoke the trust agreement. While a trust agreement need not be in writing, a testamentary trust must abide by the Statute of Wills which requires two witnesses. Mrs. T might argue that this note was done during T's lifetime and that the note amended/revoked the current trust instrument when he executed it. However, this argument will likely fail because it clearly states "...in trust when I die." This is a testamentary trust and therefore must comply with the Statute of Wills, and although he signed it, he must have had two witnesses. Therefore, we probably have a valid trust under the original terms.

TERMS: Mr. and Mrs. T wanting to keep the Income interest for life is fine. But, there is a problem because the income interest for Mrs. T seems to end at the time Mr. T dies. At HIS death, he wants half of his estate to go to his son and the other half to charity...leaving nothing for Mrs. T, his wife. Under FL law, it is likely that Mrs. T will not be left without anything. The facts do not seem to indicate any type of pre or post-nuptial agreement between Mr. and Mrs. T. In the absence of such agreement, Mrs. T will be entitled to an Elective Share (and a Homestead). The facts state that Mr. and Mrs. T own a home worth \$400K. In FL, a natural person can have one Homestead in FL (must be their principal place of abode). If this house is in fact Homestead property, then it is subject to restrictions on alienation (although protected from most creditors). If a decedent is survived by a spouse or minor children, they cannot freely devise the property (except if antinuptial or similar agreement to devise away from spouse). Here there appears to be no agreement, and Mr. T was survived by his spouse. If Mr. T was also survived by minor children, then the spouse typically gets a life estate, with a vested remainder in the children. However, in our case it says that one of his children (Dora) predeceases him, and the other (Sam) was 21 "shortly" after his death. Therefore, it appears he has no minor children, and the wife would get the property in Fee Simple. However, even if this is not a Homestead, the Wife will most likely receive the property outside of the trust anyway. The facts state that they owned the property as Joint Tenants with Right of Survivorship, and therefore it is not transferable without consent of the other Joint Tenant. The court will need to find if the wife consented to

this property being put into the Inter Vivos trust, and therefore alienating her rights too. If the court finds she consented, then the property stays in the trust. If the court finds that she did not consent to it being put in the trust, then the Right of Survivorship automatically controls and she takes the property free and clear.

ELECTIVE SHARE: The wife may also argue elective share. If there is no agreement (prenup), then a spouse in FL is entitled to 30% of the elective estate. This includes money currently in a revocable trust, which is our case here. This would be another situation where it would matter if the home was a Homestead or not, because if it was it would not be included as part of her 30%. Here, there appears to be \$800K that was in his name (her share would be \$240K of that.) The rest would be split up in proportion among the son (\$280K) and the "daughter" as trustee for charities (\$280).

SON (SAMMY): At Mr. T's death, the son's rights became vested (assuming trust is valid, etc.). The instrument seems to be silent as to what the duties of the trustee are ...or even if there is a trustee. If there is not a trustee, the court will probably appoint one, the trust will not fail for want of a trustee. However, Sam may argue that there was no intention to create a trust at death despite the word "trust" used. Sam would argue that because the language is so vague, it does not offer the trustee (or appointed trustee) any rules for distributing the property, except to "hold in trust till 30." The court will look to whether the intent of Mr. T was to create a trust for Sam. Being that Sam was young and probably financially irresponsible when the trust was created, the court would probably find there was an intent to hold in trust half of the estate for Sam. The court will look at other factors to determine the duty of the trust or trustee. Maybe the court would find it most appropriate to pay income to Sam until he reached age 30, or maybe that the trustee has discretion to distribute income or principal for Sam, but only for necessities. Either way, the court would probably find a valid trust and intent for Sam.

CHARITABLE TRUST: A charitable trust, unlike a private trust, must not have specific beneficiaries. It must be for the goods of the "general public." Causes such as education, religion, science, public service are valid charitable trust beneficiaries. Here, Mr. T's grant to Dana as trustee was very broad and vague. But what about the trustee, Dana is dead. Once again a trust (testamentary) will never fail for want of a trustee. The court will most likely appoint. Mrs. T may argue that the trust terms are so vague and that no specific cause or charity is named, and therefore the trust fails. However, court may find that Mr. T just had a general purpose to promote general welfare and may leave it up to the trustee to decide. The court may find that the trust gave Dora the power to appoint the charities at her discretion, and therefore the ascertainable part would lie in Dora. Under the Restatement of Trusts, in this situation, where the beneficiaries are unascertainable and the settlor gives his intent to promote the power to appoint, the Restatement of Trusts says to allow the appointment because it is most inline with his intent. However, a majority of states at this time hold the opposite. They find that the power to appoint renders the trust invalid for purposes of unascertainable beneficiaries. FL has not ruled on their view of the situation, so I am sure Mrs. T would argue the Majority, and a representative for possible charities or Sam may argue the Restatement. However, this is a charitable trust, and they may argue that the beneficiaries are supposed to be unascertainable. The court would likely find the beneficiaries were to be appointed by Dana. However, Mrs. T may now argue that this appointment power was special and that it was only Dana that Mr. T trusted to appoint

to appropriate charitable beneficiaries. The charitable rep would obviously argue that this was a general power of appointment and the court should appoint a new trustee to appoint to charitable organizations (because this would be more in line with the intent of the testator). If the court rules this was a special power of appointment, or rules that the trust provision is too vague or lacks identifiable charities, then the result would be a resulting trust. A resulting trust would go back to Mr. T's estate.

RESULTING TRUST: Any part of this estate that fails would "result" back to the estate of Mr. T. In this case, it would pass by his will, however, the facts tell us that he did not have a will, so it would pass intestate. Assuming Sammy is the child of Mr. and Mrs. T (not from another marriage) then Mrs. T would get the first \$60K plus the remaining 50%, and Sam would get the other remaining 50% (OF WHATEVER RESULTS). If Sam is a child of Mr. T's from another marriage, then they would split 50/50 without Mrs. T taking the first \$60K.

Q UESTION NUMBER 1

JULY 2008 BAR EXAMINATION - REAL PROPERTY/ETHICS

Partner at your law firm asks you to analyze the following situation.

Landowner owned real estate known as the Ranch. A year before his death, Landowner delivered a deed to his Brother granting his Brother the Ranch as a gift. The deed conformed to all requirements for a valid deed. Thereafter, Landowner was diagnosed with cancer.

Desperate for money to pay for medical treatment, Landowner contacted Investor. Investor was Landowner's accountant. Investor suggested that Investor be allowed to purchase the Ranch from Landowner. Landowner told Investor that he gave the Ranch to his Brother. Investor checked the county records and found no deed was recorded.

Investor then purchased the Ranch from Landowner for about fifty percent of the Ranch's fair market value. At the time of purchase, Landowner delivered a deed to Investor granting the Ranch to Investor. The deed conformed to all requirements for a valid deed.

At the time the deed was delivered to Investor, Brother had cleared much of the Ranch's land to prepare for construction. Investor recorded his deed. Two weeks later, Brother recorded his deed. Landowner died shortly thereafter.

During his consultation with the law firm, Investor told Partner he would be willing to "forget" that Landowner told him Landowner gave the property to Brother.

Please prepare a legal analysis of the following issues:

- What cause of action does Investor have in claiming title to the Ranch?
- What defenses might be raised by Brother?
- Who is likely to prevail?

Also address any ethical concerns that appear likely to arise should the firm undertake to represent Investor.

SELECTED ANSWER TO QUESTION 1

(July 2008 Bar Examination)

This memo will address the causes of action Investor ("I") has against Landowner's Brother ("B") in claiming superior title to the Ranch ("R"). It will further address the defenses that B will raise in response, in an attempt to have a determination in his favor, as well as who is likely to prevail on both grounds. Lastly, this memo will address the ethical considerations present with our client, I, informing us he will be willing to "forget" a material fact that is in B's favor.

Conveyance to Brother

The first issue is whether or not the conveyance of R to B is valid. In order for a conveyance of land to be valid, it must be executed in accordance with the statute of frauds, naming the parties, adequate description of the land, and the signature of the party to be charged. In Florida, attestation of two witnesses is also required. The facts state that the deed conformed to all requirements of a valid deed, so we can assume this part is met. Further, the delivery element is also met, as the facts state that the deed was actually delivered to B. Additionally, in order for a conveyance to be valid, there need not be consideration. The fact that this was a gratuitous conveyance is of no effect, and at the moment delivery was completed, B had valid legal title to R.

Conveyance to Investor

The next issue is whether or not the conveyance of R to I is valid. Again the facts state that the deed conformed to all requirements for a valid deed, so we can assume that on its face the conveyance was proper. However, this conveyance arose from a contract between I and L, transfer of the land for 50% of the FMV, and thus may still be unenforceable under contract theory/defenses. There are a couple of issues of concern with the conveyance to I which are amplified by the fact that I was L's accountant, creating a fiduciary duty on I towards L.

Undue Influence – B will first argue that the conveyance from L to I should be set aside because I, as L's accountant, took advantage of that fiduciary relationship creating a K that resulted from undue influence. Investor KNEW that L not only had cancer, but also that he was desperate for money to pay for medical treatment. It was not L who offered to sell the R to I, it was I who suggested that he be allowed to purchase the R from L. And this is on top of the fact that L actually informed I that he had already conveyed it to his brother. Although accountants are not bound by the rules of professional conduct that lawyers are bound by, because of the special relationship between a fiduciary and the client the law is willing to recognize a presumption of undue influence in such a situation. The facts show that this was not a fair and reasonable contract by any means, that the I purchased the land for only 50% of its fair market value – despite the fact that L was really in need of the money. I will have little defense to this and there will be a strong argument that the K was voidable due to undue influence.

Possible fraud/misrepresentation – The facts are not clear if L knew that he was only receiving 50% of the FMV. The conveyance made to B was as a gift, so we do not know if he had had the land appraised or had any knowledge of the price. Because I knew of L's dire situation, we will want to know if I, as his accountant, represented to him that he was getting a good deal – or if I was paying a fair price. We may also want to advise B (as possible personal representative of L's estate) of causes of action in tort related to breach of fiduciary duty in this regard.

Unconscionability – Lastly, B will argue that the contract and conveyance to I is simply unconscionable. A court may set aside a contract if the circumstances are such that would shock the conscience of the court. These are pretty strong facts in favor of B. Again, I, as a fiduciary, knew of L's cancer, need for money, and took advantage of that by enticing him to sell the land for only half of its fair market value.

Notice Statute

At common law, such multiple conveyances were settled by a first in time, first in right application. However, Florida is what is considered a notice jurisdiction. This means that regardless of who is first in time, we will protect a subsequent good faith purchaser for value, so long as they took without notice. In order for I to prevail over B, he must seek protection under this statute as he is the subsequent purchaser. If he is able to seek protection here, he will be able to prevail over B in a quiet title action and he will retain sole valid legal title to the land. This will be a difficult hurdle for I to cross, and B will argue both that I took with notice and that he was not a purchaser for value.

In order to take without notice, a buyer must have neither actual, inquiry, or constructive notice. Actual notice means that the buyer either has been told, has seen, or has any other personal knowledge of a prior conveyance. Inquiry notice is notice that would be imputed to the buyer had he made reasonable inquiry into the situation, either by looking up unrecorded transactions or questioning a person in possession of the land. Lastly, constructive notice is imparted to a purchaser if the prior conveyance has been properly recorded. In Florida, whereas proper recording is constructive notice, a lack of recording creates a PRESUMPTION of NO NOTICE. When this happens the burden is on the prior purchaser to show actual notice. B must then prove that I knew about the conveyance. The facts state that L told investor that he did in fact give the ranch to his B. This would be sufficient, although the burden is now on B to show it. He could introduce evidence if the L told him this (Florida has abolished the Dead Man's Statutes) or he could get I to admit it through a request for admission or through testimony. Further, if I brings any conversation between himself and L up in evidence, B would be able to introduce other evidence of such conversation.

Additionally, because of the accountant-client relationship, it can be argued that L's accountant would also have actual knowledge of a conveyance of real property as it surely effects the assets and liabilities of L! As a side issue, I will most likely want to argue accountant-client privilege with regards to preventing any testimony or evidence concerning conversations regarding the conveyance of this land. However, we need to be aware that any such privilege would apply only to confidential communications in I's accountant capacity, and not with regard to any transaction between the two.

If B is unable to prove that this conversation or information took place, he will argue that I also had inquiry notice. Here, at that time the deed was delivered to I, B had cleared much of R's land to prepare for construction. Had I gone to the land to view it before purchasing, he would have seen B's presence, as well as possibly construction crews, land clearing, and other evidence of B's ownership. I will argue that B, as L's brother, was there only helping L in preparing the land. However, the court will most likely impute inquiry notice to I as had he asked B about his presence and actions with the land, B would have informed him that he owned it.

Additionally, B will argue that I was not a purchaser for value. The conveyance from L to I was only for fifty percent of the R's fair market value. B will argue that this should not be sufficient however I will respond that courts are not inclined to question consideration, so long as it is present.

Effect of the Notice Statute

Although I recorded first, because the court is likely to find that he was not a bond fide purchaser of the property (through both actual and inquiry notice), he will not take protection under the statute. The effect of him not falling within the statute, is that his subsequent purchaser is not protected and we technically fall back under the first in time, first in right and B's interest in the property is protected. This is irregardless of the fact that he did not record until after I. However, if I were to attempt to convey the land again anyone conveyed to would not be a good faith purchaser because B's subsequent recording now yields constructive notice on any future purchaser.

Conclusion

B most likely will prevail. He has very strong arguments with regard to setting aside the conveyance itself on the grounds of undue influence and unconsciousability. Furthermore, if L told him about I's knowledge of the conveyance to B or it can be proven that I, as L's accountant was aware of the conveyance, he will have evidence to show actual knowledge; but even without this evidence, he should be able to convince the court that I should have inquiry notice. As a result, I has no protection under the recording statute and B will prevail.

Ethical Considerations

During the consultation with our firm, I informed us that he was willing to "forget", i.e., lie that L ever told him that the R was first conveyed to his brother. First and foremost, a lawyer in Florida is under no duty to disclose adverse facts to the tribunal. However, this does not give a lawyer or his client free rein to misrepresent facts to a tribunal, or to opposing counsel. A lawyer has an ethical duty not only to act with candor towards the tribunal, but also to prevent such misrepresentations from occurring. If we were to take I on as a client and filed pleadings with the court, we could not represent that this fact did not occur. When a lawyer signs pleadings, he is subject to ethical obligations that everything put forth therein is true and in good faith. This would be cause for sanctions against both I and our firm, in a 50/50 split. We would not be able to claim we relied in good faith on our client, because he has told us that it is not the truth.

Further, if this case went to hearing, or even trial, we would have to affirmatively counsel I that he must tell the truth and that he may not tell the falsity he wishes to assert. Furthermore, we would need to explain the ethical obligations we are under. If he fails to take our advice, we would have to move the court to allow us to withdraw as I's counsel. If the court would not allow this, we would have to disclose such a misrepresentation to the court. Although, we are not close to trial yet, this is something we should take into consideration when choosing to represent this client - to spare the trouble later on if he insists on lying.

Q QUESTION NUMBER 2

JULY 2008 BAR EXAMINATION - TORTS

Betty went to Health Food Store and asked an employee for assistance with the selection of herbal remedies. Carl, the cashier, was not assigned to that section, had not been trained in its inventory, and had been specifically told by his employer not to give advice about the products. Nonetheless, he told Betty that he knew "all about" herbal medicine. Betty said that she had never used any herbs and wanted him to recommend a remedy for arthritis. Carl gave her a bottle of "Power Pills" and told her that they were great for arthritis.

The label on "Power Pills" identified them as a "food supplement" designed to give "an energy boost." The label included a list of herbal ingredients and a recommended dose of one pill, three times a day. "Power Pills" are manufactured by HerbCo.

When Betty went home later that day, she told her friend and visiting houseguest, Fran, about "Power Pills." Fran, who also had arthritis, wanted to try them, so Betty agreed to share her pills. Fran took the pills at the recommended dose, but Betty decided to take five times that amount on the theory that "more is better."

Betty and Fran continued to take the pills until they were gone. Shortly thereafter, Betty developed heart palpitations that required hospitalization. Her physician informed her that "Power Pills" contain an assortment of stimulants designed to give an energy boost; none of the ingredients has any application to arthritis pain. In fact, one of the ingredients in "Power Pills" interacted with her prescription blood pressure medicine to cause the palpitations. Betty will need surgery to repair damaged heart tissue. Around this time, Fran began to feel light-headed and confused. Extensive blood tests by her doctor showed high levels of mercury in her blood.

Betty and Fran have requested that your firm represent both of them. You have been asked to prepare a memo discussing the possible causes of action and defenses.



SELECTED ANSWER TO QUESTION 2

(July 2008 Bar Examination)

ISSUE 1:

May I jointly represent Betty and Fran?

RULE:

A lawyer may concurrently represent clients if their representations do not create conflicts and the concurrent representation will not force the lawyer to represent one client to the detriment of the other client.

ANALYSIS:

Here, Betty and Fran have come to me as potential plaintiffs in consumer tort actions against Carl, Health Food Store (HFS), and HerbCo. Betty did give Fran half of the Power Pills, which might suggest some liability on Betty's part to Fran, but Betty is not a merchant, she has no expertise in prescribing medicine, and she does not appear to have acted negligently – that is, breached a duty of due care to Fran, said breach causing Fran's damages. Here, Betty seems to have acted as a reasonably prudent person in similar circumstances – relying on Carl's recommendations and relaying what she had learned from Carl to Fran.

CONCLUSION:

Betty and Fran are not currently in conflict and do not appear to be likely to become adverse to one another. The defendants may attempt to assert slightly different defenses against each woman, but this should not make Betty and Fran adverse to one another or require me to represent one to the detriment of the other. Hence, I should be able to represent both Betty and Fran.

ISSUE 2: Betty/Fran v. Carl

Should we go after Carl as a defendant?

RULE:

Certain consumer torts are actionable against both a manufacturer and a distributor of that manufacturer's products, and said sales of such products are necessarily performed via employees of the distributor. In addition, the distributor, here, HFS, have both implied and express warranties, some made through their employees, such as Carl.

ANALYSIS:

While Carl, an employee of HFS, may have taken upon himself to make a recommendation to Betty and thereby anything he might have said could be held as a statement/admission by HFS, Carl is only a cashier and presumably does not enjoy a lavish income or have extensive resources – making him a less than desirable defendant, especially compared with the relatively deep pockets of HFS and HerbCo.

CONCLUSION:

We may name Carl as a co-defendant, merely to subject him to the jurisdiction and powers of the court.

ISSUE 3:

Joiner of parties.

RULE:

A plaintiff may join any defendants whose allegedly tortious conduct arose from the same transaction and/or occurrences (T/O) and such defendants will be held liable to their proportion of fault. Florida has abolished joint and several liability, which means that each defendant pays his % of plaintiff's recovery proportionate to the defendant's % of fault. Florida also follows a pure comparative liability rule, which means that a plaintiff's recovery will be proportionately reduced by his percentage of fault in causing the harm of which he complains. However, if a jury finds that a plaintiff is more than 50% at fault and also finds that plaintiff's 50+% is due to voluntary intoxication, plaintiff will recover nothing.

ANALYSIS:

Here, Betty and Fran complain of injurious effects from ingesting Power Pills, manufactured by HerbCo and sold by HFS through Carl. There is a single transaction, the purchase of Power Pills, and a single occurrence, the ingestion of Power Pills.

CONCLUSION:

Betty and Fran should be able to join Carl, HFS, and HerbCo in a single action.

ISSUE 4: Betty/Fran v. HFS: Implied a warranty of merchantability

Did HFS breach the implied warranty of merchantability?

RULE:

Each merchant, a person occupied in the regular distribution and sale of products, impliedly warrants that the products that they sell are "merchantable" - that is fit for regular consumption and for the uses to which the products are usually put. In Florida, this implied warranty extends to not only the purchaser, but the purchaser's family and household guests.

This implied warranty may be negated through an express disclaimer, using such words as "as is" or "this product is sold with no express or implied warranties."

ANALYSIS:

Here, Betty and Fran will argue that HFS is in the regular business of selling food supplements such as Power Pills. Power Pills is a product that HFS regularly sells. Betty bought Power Pills, which places her in the position of the consumer of the product and Fran was a household guest of Betty at the time Betty gave Fran some of the Power Pills. Moreover, both Betty and Fran (subject to proof of causation) claim that the Pills made them sick.

HFS will argue that Betty and Fran took the pills, not for an energy boost, but for arthritis and that they did not make usual use of the product.

Betty and Fran will counter that the implied warranty merely holds that the product is safe and will not injure the consumer, and that the Pills did injure them.

CONCLUSION:

A product like Power Pills, sold by a merchant like HFS, contains an implied warranty of merchantability and there is no evidence that HFS expressly disclaimed this implied warranty. Moreover, Betty, as the direct consumer, and Fran, as the consumer's household guest, are protected under this implied warranty. Subject to proving causation, Betty and Fran should recover under this cause of action.

ISSUE 5: BETTY/FRAN V. HFS: Warranty for a particular purpose

Did HFS breach the warranty fit for a particular purpose?

RULE:

A merchant will be held liable if:

- 1. a consumer appraises a merchant of a particular need,*
- 2. the merchant recommends a particular product to meet that particular need,*
- 3. the consumer relies on the merchant's recommendation*
- 4. the consumer purchases the product*
- 5. the consumer uses the product*
- 6. the product does not perform the particular use*
- 7. the consumer is injured thereby, either directly or, in the fullness of time in which the consumer uses the product.*

The merchant will also be liable to anyone who obtains the product from the consumer who relied on the merchant's recommendation and uses the product.

ANALYSIS:

Betty and Fran will argue that Betty told Carl that Betty was looking for an arthritis medicine and that she did not know which supplement to buy. They will also argue that Carl, knowing of Betty's requirements, undertook to recommend Power Pills specifically for the purpose of relieving arthritis pain and that Betty, relying solely on Carl's recommendation, purchased the Pills, took the Pills, and shared the Pills with Fran. HFS will argue that it specifically instructed Carl not to recommend products to customers, that when he made the recommendation to Betty he was acting outside the scope of his employment, and that HFS should not be held liable for Carl's statements.

VICARIOUS LIABILITY:

An employer will be held liable for the acts of its employees if:

- 1. the employee's act was done within the scope of the employee's duties*
- 2. the employee's acts were not willful or wanton, unless the employer authorized or otherwise authorized the willful/wanton conduct*
- 3. normally, employers are not liable for their employee's torts against the body of a person (battery, false imprisonment, etc.), but an employer may be held liable for such torts if physical contact with customers is a part of the employee's job (e.g. bouncer at a nightclub).*

Here, HFS will argue that Carl was specifically told not to recommend products to consumers, that is, HFS will argue that the scope of Carl's employment was expressly delimited to not give recommendations and, therefore, when he ventured to give a recommendation, he was acting outside of the scope of his employment and HFS should therefore not be held liable for Carl's statements.

Betty and Fran will counter that Betty had no reason to know that Carl was not qualified or authorized to make recommendations and therefore, HFS should be held liable to them as a merchant of the Pills.

CONCLUSION:

HFS will probably prevail because it specifically delimited Carl's scope of employment and Carl exceeded that scope by making the recommendation.

ISSUE 6: BETTY/FRAN V. HFS: Express warranty

Did HFS breach an express warranty made by Carl about the effectiveness of the Pills?

RULE:

A merchant may be held liable to a customer if the merchant:

- 1. makes an express warranty about a product and its characteristics/performance (not mere puffery)*
- 2. and the product does not live up to the express warranties.*

ANALYSIS:

Betty and Fran will argue that Carl made express warranties about the Pills, especially about their effectiveness regarding arthritis, and that the Pills did not conform to this warrant.

HFS will, once again, argue, that it should not be held liable for Carl's statements.

VICARIOUS LIABILITY:

An employer will be held liable for the acts of its employees if:

- 4. the employee's act was done within the scope of the employee's duties*
- 5. the employee's acts were not willful or wanton, unless the employer authorized or otherwise authorized the willful/wanton conduct*

6. normally, employers are not liable for their employee's torts against the body of a person (battery, false imprisonment, etc.), but an employer may be held liable for such torts if physical contact with customers is a part of the employee's job (e.g. bouncer at a nightclub).

Here, HFS will argue that Carl was specifically told not to recommend products to consumers, that is, HFS will argue that the scope of Carl's employment was expressly delimited to not give recommendations and, therefore, when he ventured to give a recommendation, he was acting outside of the scope of his employment and HFS should therefore not be held liable for Carl's statements.

Betty and Fran will counter that Betty had no way of knowing that Carl lacked the authority to make such recommendations and that they should be protected under an equitable fairness theory.

CONCLUSION:

HFS will probably prevail under the vicarious liability theory because the trier of fact will probably find that Carl did exceed the scope of his employment by making express warranties about the Pills.

BETTY-FRAN V. HFS: MISREPRESENTATION

Did HFS commit misrepresentation when Carl sold the Pills to Betty?

RULE:

A merchant commits misrepresentation when he:

1. knowingly makes false statements about a product
2. with the intention of inducing a customer to buy the product
3. the misrepresentation does induce the customer to buy the product,
4. and the customer's reliance was justifiable
5. and the customer is injured there from.

ANALYSIS:

Betty will argue that Carl knew that the Pills did not help arthritis, that he knowingly recommended the Pills to make a sale, that Betty, knowing nothing about food supplements, reasonably/justifiably relied on Carl's misrepresentation, and that she was injured there from.

HFS will argue that Carl's misrepresentations were outside of his scope of employment, see vicarious liability above, and Carl will argue that he honestly believed that Power Pills were good for arthritis, thereby negating the intent element of this cause of action.

CONCLUSION:

HFS/Carl will probably prevail because it appears from the facts that Carl did indeed think Power Pills would have helped Betty and therefore Carl lacked the requisite knowing and intent elements for a misrepresentation action.

BETTY-FRAN V. HFS/HERBCO: Strict products liability

Are HFS and HerbCo liable to Betty and Fran under a strict products liability theory and did anything Betty and Fran do or not do relieve these defendants of liability?

RULE

A manufacturer and distributor of a product will be held strictly liable for injuries caused by that product if:

- 1. the product was unreasonably dangerous*
- 2. the product left the manufacturer in this dangerous condition*
- 3. the distributor did not alter the product*
- 4. the product was dangerously defective in one or more of 3 ways:*
 - defectively manufactured*

the product was properly designed but somehow was made defectively in the manufacturing process

[safeguards against defective manufacturer are no defense to this claim]
 - defectively designed*

the product was defectively designed making it unreasonably dangerous

[and there was no other economically reasonable way of making the product to serve its intended use at a commercially reasonable price]
 - defective warnings*

the product was properly designed and manufactured but the product lacked warning labels and/or instructions that would have put an average consumer on notice of dangerous aspects of the product

[such warnings must be conspicuous, legible, clear, and understandable]
- 5. the consumer made foreseeable use of the product*

[such use does not have to be the intended use, just foreseeable use]
- 6. the product caused injury*
- 7. the consumer suffered harm*

[mere economic loss to the product is not enough to prevail in this claim, there must be damage to the consumer or the consumer's property; if there is only damage to the product itself, the proper cause of action is breach of contract]

ANALYSIS:

Betty/Fran will argue that HerbCo manufactured an unreasonably dangerous product, i.e., Power Pills that caused palpitations in Betty and mercury poisoning in Fran, that the product reached Betty via HFS in an unaltered condition [presumed unless evidence shows that the distributor somehow altered the product], that the product lacked sufficient warnings, that Betty and Fran made foreseeable use, and that both were injured from their use.

HFS and HerbCo's best defenses will be that Betty's taking five times the recommended dosage did not make foreseeable use of the Power Pills.

Betty will counter that it is wholly foreseeable that someone would think that if 1 pill is good, 5 pills must be even better.

HFS/HerbCo could also argue that Betty assumed the risk [that is, Betty was apprised of the risks and knowing of the risks chose to proceed with the conduct anyway], namely that the Pills clearly stated a recommended dosage and Betty knowingly exceeded this limitation.

Betty will counter that assumption of the risk only avails if the plaintiff is fully aware of all the potential risks and still goes ahead, but that the Pills' recommended dosage did not warn of heart palpitations as a possible negative event.

HFS/HerbCo's best defense against Fran is that the Power Pills did not cause Fran's mercury poisoning.

A plaintiff must show both actual causation, that but for the defendant's conduct the plaintiff would not have been injured, and proximate causation, that is, plaintiff's injury is the kind of foreseeable risk that this defendant should be held liable for.

The eggshell plaintiff

A defendant takes his plaintiff as he finds them. Hence, the defendant will be held liable for any harm to the plaintiff that arises from his tortious act and is attributable to plaintiff's condition. Defendant's liability may be limited or severed through unforeseeable intervening acts, but rescuers and medical malpractice and injuries arising from treatment are foreseeable and therefore are not superseding intervening acts but they might lessen defendant's % of fault.

Fran must prove causation. If she does this, she should be able to prevail against both HFS/HerbCo since Florida has abolished the privity requirement for strict products liability and has extended liability for all foreseeable users of the product in question.

HFS/HerbCo can also argue comparative liability – that is, both Betty and Fran were partly to blame for their injuries.

Here, a jury might find that Betty's 5-fold ingestion, while foreseeable was nonetheless blameworthy and award her a portion of the fault for her injuries. Even if she is found to be 90% at fault, she will still recover 10% of any damages that the jury awards.

Here, the facts show that Fran followed the recommended dosage and therefore it does not seem likely that a jury will find Fran comparatively liable for her injuries.

Note:

HFS, if found at fault and if charged with damages, could likely recover contribution and indemnification from HerbCo because HFS merely distributed the Power Pills from HerbCo without altering the product, but these parties probably have a contribution/indemnification provision in their distribution agreement.

ISSUE 7: BETTY/FRAN V. HFS/HERBCO: NEGLIGENCE

Were HFS/HERBCO negligent in manufacturing and distributing Power Pills?

RULE:

Negligence occurs when there is:

1. a duty

persons have a duty to act as a hypothetical reasonably prudent person would act under similar circumstances

here, HerbCo had a duty to act like a reasonably prudent manufacturer and make sure it did not place dangerous products into the stream of commerce

Here, HFS had a duty to act as a reasonable distributor and not sell dangerous products

2. *a breach of that duty*

a breach occurs when a defendant does something that a reasonable person would not do or fails to do something that a reasonable person would have done

Here, if HerbCo manufactured a dangerous product and such manufacturer was something that a reasonable manufacturer would not have done, then HerbCo could be found to have breached this duty.

Here, HFS would have breached its duty if selling Power Pills was not something a reasonable store would have done.

3. *causation*

actual causation

but for the defendant's breach the plaintiff would not have been injured

proximate causation

plaintiff was a foreseeable plaintiff and his injuries are the kind of risk the law seeks to protect such foreseeable plaintiffs from

4. *damages*

compensatory

for pain and suffering, medical expenses, loss of work, loss of consortium

punitive/exemplary damages

to punish a willful/wanton defendant for outrageous behavior, act as a deterrent for him and others

punitives are capped at 3 times compensatories

do not have to have compensatories to get punitives

no cap on punitives if defendant intentionally harmed plaintiff or defendant was intoxicated or under the influence of drugs at the time

ISSUE 8: BETTY/FRAN V. HFS: NEGLIGENCE HIRING

Was HFS negligent in hiring Carl and did said negligence cause B/F's injuries?

RULE:

An employer can be held for negligent hiring if the employer knowingly hires a person who is not qualified for the job or the person has a record of behavior that makes him a danger to the employer's customers/charges.

Negligent hiring is one of the rare civil torts in which the character of the defendant is at issue and therefore the court will allow evidence as to character otherwise banned from consideration in most torts.

ANALYSIS:

Here, we have no facts about Carl's past, but we do have the fact that HFS expressly forbade Carl from making product recommendations to customers. This explicit prohibition may indicate that HFS knew something about Carl and his propensities, even before he started to work for HFS. Indeed, discovery may reveal that Carl's employment was predicated on an understanding that he would not make product recommendations. Hence, if Betty/Fran can show that HFS knew about Carl's proclivity for making spurious recommendations and also knew that Carl could not help himself from making such recommendations, B/F may be able to show that HFS was negligent in hiring Carl; that is, a reasonable employer in HFS's position would not have hired Carl. HFS could counter that, even if it knew of Carl's proclivity for making bad recommendations when it hired Carl, it explicitly and unequivocally forbade Carl from making recommendations and thereby took the necessary steps that any reasonable store would take to eliminate harm from such a hiring.

CONCLUSION:

There is simply not enough facts to support a negligent hiring claim at this time.



QUESTION NUMBER 3

JULY 2008 BAR EXAMINATION - TRUSTS

Marge and Dave were married five years ago. Dave has two children from a prior marriage who are now adults. The settlement agreement incorporated into the divorce decree from his first marriage required Dave to maintain an existing \$300,000 insurance policy on his life but to designate his children, instead of his ex-wife, as the sole beneficiaries. The divorce decree also provided that Dave would keep this insurance in effect until the youngest child reached the age of 21.

Marge and Dave decided to set up a trust. They conveyed \$1 million of specific stocks and bonds to the trust. The trust provides that the income from the trust is payable to Marge and Dave for ten years. At the earlier of either the end of ten years or Marge's and Dave's deaths, the trust income is payable to Dave's children for ten years. At the end of that ten-year period, the trust shall terminate, all trust property shall be sold, and the proceeds shall be distributed equally among Dave's children. Marge and Dave are designated as co-trustees. Upon their death or inability to serve, Marge's favorite brother, Guy, is named as successor trustee. In the event of Guy's death, National Bank is named as successor trustee.

Marge and Dave bought a small apartment building valued at \$2 million, telling the seller that the property will be in the trust. They titled the property in Guy's name "as trustee."

Shortly thereafter, Marge, Dave, and Guy all died in a car crash. Guy's will left all of his property to the Charitable Foundation. Foundation and Dave's children make competing claims to the apartment building. Several apartments are empty. National Bank asks the court for permission to rent the empty apartments to its out-of-town employees.

Dave had only one insurance policy at the time of his death. The policy had been maintained by Dave since his divorce and it was for \$300,000. The policy named Dave's ex-wife as the sole beneficiary. The ex-wife and the children have made competing claims to the life insurance proceeds.

The children want to terminate the trust now. The children ask to be appointed as successor trustees in place of National Bank, citing to the empty apartments as a reason to replace National Bank. Meanwhile, the youngest child, who is 19 years old, confessed to tampering with the brakes of Marge and Dave's car. Pursuant to a plea of no contest, the youngest child was convicted of second degree murder of Marge, Dave, and Guy.

Discuss fully all the pertinent issues and their likely outcomes regarding the characteristics of the trust, the beneficiaries, the trustees, and disposition of the apartment building and the life insurance proceeds.



SELECTED ANSWER TO QUESTION 3

(July 2008 Bar Examination)

First, I will address the life insurance proceeds.

Settlement agreements in a divorce are enforceable according to their terms.

In this case, it appears that the agreement was breached when Dave (D) named ex-wife the sole beneficiary.

When a promise is breached, courts can impose a constructive trust. Constructive trusts are meant to equitably allocate trust property under five situations: Theft, breach of fiduciary duty, homicide, breach of promise, and fraud. The court will consider extrinsic evidence to determine the rightful beneficiaries of the trust.

In this case, D breached a promise to name his children as beneficiaries. Courts normally do not impose a constructive trust for breach of promise unless there is an implied duty, such as that arising from a close familial relationship.

D's children had such a close relationship and will successfully argue that D's ex-wife will not be the sole beneficiary.

But, the homicide conviction of D's youngest means that his share will be placed in either a constructive trust for his heirs or passed to D's oldest child.

D's youngest could argue that second-degree murder in Florida is only depraved heart murder, not premeditated murder, and as such he is not guilty of homicide. This argument will fail.

Second, I will address the characteristics of the trust.

A valid trust requires 7 elements: settler, intent, trustee, beneficiary, sole trustee can't be sole beneficiary, trust property, & a valid purpose.

There are two kinds of express trusts: private and charitable. And trusts can be either inter-vivos or testamentary. Finally, trusts are presumed revocable unless expressly stated otherwise.

Marge (M) & D's trust met the 7 elements and was validly formed when the \$1 million of stocks and bonds were conveyed.

The ten-year term is valid, and the second ten-year term is also valid. The final disposition does not violate the Rule Against Perpetuities because it will vest within 21 years of the lives in being or within 360 years.

The naming of successor trustees is also valid if National Bank has trustee powers under Florida law. Also, Guy need not be a Florida resident because he is related to the settlers. In addition, if a trustee is necessary, recent statutes provide that court first look to the trust document, then to a beneficiary, before making an appointment.

An issue arises with the purchase of the apartment. A trustee cannot purchase real property without authorization in the trust or order of a court. But, the property can be titled in the name of trustee and kept as a trust asset – the asset being principal and the rent being trust income.

If the trust so provided, D&M could purchase the property and title it in G's name. This would be a purchase money trust. Were this transaction to fail, it would equal a resulting trust in favor of the trust itself.

Resulting trusts are not actual trusts but instead imposed by courts to dispose of a purchase money trust, to pass a beneficiary's interest if her gift lapses, and to dispose of the corpus of a trust.

In this case, the purchase of the property will either be valid under the trust document, or it will be passed to the trust as a resulting trust.

The Beneficiaries

M's and D's interests ended with their deaths. Florida has a simultaneous death act where each spouse is considered to have predeceased the other, but this would have no effect on the outcome.

D's children are entitled to the income for 10 years. Before M's & D's death, the children had a vested remainder subject to open. But their interest vested.

D's youngest will not collect any income or proceeds of the trust. A beneficiary's wrongful conduct causes his interest to end. Instead, it passes in intestate shares, in this case to D's youngest child's mother (D's ex-wife) or any heirs.

D's oldest will collect half of the income and half of the corpus in 10 years.

The trustees

Trustees have a duty of loyalty and care to the trust. This means that they must give an accurate reporting, defend the trust against claims, not commingle funds, diversify trust investments, make the trust profitable, & not self-deal.

The trust document properly appointed National Bank, and no co-trustee need be appointed unless the trust document so requires.

Trustees cannot be removed except by court order in cases of a breach of fiduciary duty, conflict of interest, or hostility with the beneficiaries.

*As successor trustee, National Bank is in charge of the trust assets, including the apartment building (discussed further, *infra*).*

National Bank may have committed a breach of fiduciary duty if it rented the apartment units to its employees. This would breach the duty against self-dealing, even though National Bank has a duty to either fill the empty units or dispose of the property. The court cannot grant permission to self-deal.

But, the bank has yet to rent the apartments, meaning that it has not breached its fiduciary duty.

As a result, the beneficiary (only D's oldest) cannot yet seek to replace the trustee.

The Apartment Building

*The building is trust property because G only acquired it as trustee. As discussed *supra*, the apartment either belongs to the trust as per the document, or it belongs to the trust via a resulting trust.*

As a trust asset, National Bank must use the rent income as trust income, and pay for the building maintenance out of the trust income and principal. If the building is sold, the proceeds are added to trust principal.

Foundation appears to be a valid beneficiary of G's will, but the building never belonged to G sufficient for G to include it in his will. This defeats Foundation's claim.

D's oldest has no claim at this point because the building is a trust asset. D does have a claim to rent income as a beneficiary of the trust.

Final Issues

D's oldest will not be able to terminate the trust. A trust can be terminated upon the agreement of the trustee and all beneficiaries. But a court will not terminate the trust contrary to its express language.

The trust specifically names a term of 10 years. It is highly unlikely that a court will go against the settlers' express intent of a 10-year term. As a result, D's oldest will fail in his petition to terminate the trust.

In addition, I have eliminated D's youngest from mention as a beneficiary because his murder conviction deprives him of any claim as a beneficiary.

D's children could not be appointed trustees. Not only is D's youngest prohibited by law because of his murder conviction, but bank has yet to commit any act meriting removal. In addition, if D's oldest were appointed, then he would be the sole trustee and beneficiary, which is prohibited by law.

Venue: Circuit Court

PART II - SAMPLE MULTIPLE-CHOICE QUESTIONS AND ANSWERS

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

The answers appear on page 45.

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.

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

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

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

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

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

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

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

7. The State of Florida is prosecuting a former police officer for extortion of money from prostitutes. One of the State's witnesses is Sally. Sally has an adult conviction for vehicular homicide. She was charged with driving a car in a reckless manner resulting in the death of her sister, a passenger in the car. Sally pleaded nolo contendere, was adjudicated guilty and received a suspended sentence although she could have received a sentence of state imprisonment up to 5 years. At trial, evidence of this conviction is
- (A) admissible to impeach Sally because vehicular homicide carries a maximum penalty in excess of 1 year.
 - (B) inadmissible to impeach Sally because she never admitted her guilt since she entered a plea of nolo contendere.
 - (C) inadmissible to impeach Sally because she received a suspended sentence.
 - (D) inadmissible to impeach Sally because she is only a witness and not the criminal defendant.
8. A defendant charged with first-degree murder shall be furnished with a list containing names and addresses of all prospective jurors
- (A) upon court order.
 - (B) upon request.
 - (C) upon request and showing of good cause.
 - (D) under no circumstances.
9. Cooper is suing March for money damages. Because he believes portions of March's deposition are highly favorable to his case, Cooper's attorney intends to read parts of the deposition at trial instead of calling March to the stand. March objects to Cooper's use of the deposition at trial. What is the court's likely ruling?
- (A) Cooper may use the deposition at trial, but, if requested, he must read all parts that in fairness ought to be considered with the part introduced.
 - (B) Cooper may use the deposition at trial, but only to contradict or impeach March's prior inconsistent statements or pleadings.
 - (C) Cooper may not use the deposition at trial, as March is able to testify and no exceptional circumstances exist.
 - (D) Cooper may not use the deposition at trial, as this would make March his witness and immune to impeachment.
10. Jan sues the Chicago Times for defamation in a Florida circuit court. At trial, Jan wishes to offer into evidence a copy of the edition of the Times containing the allegedly libelous article. Before the newspaper may be admitted, Jan must
- (A) call as a witness an employee of the Times to testify that the proffered newspaper was in fact published by the Times.
 - (B) have a certification affixed to the newspaper signed by an employee of the Times attesting to its authenticity.
 - (C) establish that the newspaper has been properly certified under the law of the jurisdiction where the newspaper was published.
 - (D) do nothing because the newspaper is self-authenticating.

11. Defendant was arrested on February 1 and released one month later on March 1 after being charged with a felony. On December 1 of the same year as his arrest, he filed a motion to discharge since no trial or other action had occurred to that point. The court held a hearing 3 days after the motion was filed. Defendant should be
- (A) discharged because more than 175 days passed between arrest and the filing of the motion to discharge.
 - (B) discharged because more than 175 days passed between his release from jail and the filing of the motion to discharge.
 - (C) brought to trial within 90 days of the filing of the motion to discharge.
 - (D) brought to trial within 10 days of the hearing on the motion to discharge.
12. Bill, a single man, owned pasture land in Deerwoods, Florida, which he leased to a tenant. He also owned a condominium in Miami, which he held for investment. In his will, he devised the pasture land to his son Tommy and the condominium to his daughter Julie. All other assets would pass equally to Tommy and Julie.

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

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

13. Anderson and Parker decide to form a corporation which will locate missing children. Which of the following would be a proper name for the corporation?
- (A) ANDERSON
 - (B) FBI Consultants, Incorporated
 - (C) Private Eye Partners
 - (D) Child Finder Company
14. At trial, during the plaintiff's case-in-chief, the plaintiff called as a witness the managing agent of the defendant corporation, who was then sworn in and testified. Defense counsel objected to the plaintiff's questions either as leading or as impeaching the witness. In ruling on the objections, the trial court should
- (A) sustain all the objections and require the plaintiff to pursue this type of interrogation only during the plaintiff's cross-examination of this witness during the defendant's case-in-chief.
 - (B) sustain the leading question objections but overrule the other objections because a party is not permitted to ask leading questions of his own witness at trial.
 - (C) sustain the impeachment questions but overrule the other objections because a party is not permitted to impeach his own witness at trial.
 - (D) overrule all the objections because the witness is adverse to the plaintiff and therefore may be interrogated by leading questions and subjected to impeachment.
15. Rainbow Corporation has outstanding 1,000 shares of voting common stock and 1,000 shares of nonvoting preferred. The preferred has a liquidation preference equal to its par value of \$100 per share plus a 3 percent noncumulative dividend. Rainbow submits to its stockholders a proposal to authorize a new class of preferred stock with redemption rights that would come ahead of the old preferred stock. At a shareholders' meeting, 700 common and 400 preferred vote in favor of the proposal. Which of the following statements is correct?
- (A) The proposal is validly approved because overall a majority of the outstanding shares did approve.
 - (B) The proposal is invalidly approved because a majority of the preferred shareholders did not approve.
 - (C) The vote of the preferred stockholders does not matter because it was nonvoting stock.
 - (D) The proposal is invalidly approved because a two-thirds vote of each class is required.

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

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

- (A) only Bob Wilson is liable.
 - (B) Bob Wilson and Ted Lamar are liable jointly.
 - (C) Bob Wilson is liable for the entire amount and Ted Lamar is liable only to the extent the debt cannot be collected from Bob Wilson.
 - (D) only the de facto partnership arising from the relationship between Wilson and Lamar is liable.
17. At the close of all the evidence in a jury trial, Defendant moves for a directed verdict. After much argument, the court denies the motion. Subsequently, the jury returns a verdict for Plaintiff.

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

- (A) Yes, because Defendant has raised new grounds.
 - (B) Yes, because Defendant had ten days after the jury returned its verdict within which to move to set aside the verdict.
 - (C) No, because the court denied the motion for directed verdict rather than reserving ruling.
 - (D) No, because the court entered final judgment for Plaintiff before the motion to set aside the verdict was filed.
18. In the absence of a provision to the contrary in the articles of incorporation, the directors of a corporation elected for a specified term
- (A) can be removed from office at a meeting of the shareholders, but only for cause and after an opportunity to be heard has been given to the directors.
 - (B) can be removed from office at a meeting of the shareholders, with or without cause.
 - (C) can be removed from office at a meeting of the shareholders, but only for cause.
 - (D) can be removed from office prior to the expiration of their term only by a decree of the circuit court in an action by the shareholders.

19. Mary, a wealthy St. Petersburg widow, executed her first and only will on May 15, 1990 and died on August 18, 1990. Her will provided that her estate be divided equally between her only child, Joan, and the Salvation Army of Largo. How will Mary's estate actually be distributed?
- (A) 100% to Joan.
 - (B) 100% to Joan if she files a timely petition requesting that the devise to the Salvation Army be avoided.
 - (C) 50% to Joan and 50% to the Salvation Army.
 - (D) 50% to Joan and the income from the remaining 50% to Joan for life, remainder to the Salvation Army, if Joan files a timely petition protesting the devise to the Salvation Army.
20. Regarding a deposition in a civil suit, which of the following is/are true?
- I. A deposition of a person against whom another person contemplates filing an action may be compelled by the party contemplating the action, without leave of court, before the action is filed.
 - II. A deposition of the defendant in an action may be taken by the plaintiff without service of a subpoena on the defendant.
 - III. A deposition may be taken even though all the testimony secured by it will be inadmissible at the trial.
- (A) II only.
 - (B) I and II only.
 - (C) II and III only.
 - (D) I, II, and III.

SAMPLE MULTIPLE-CHOICE QUESTIONS WITH PERFORMANCE TEST COMPONENT

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

Florida Statutes 47.011 Where actions may be begun.
Actions shall be brought only in the county where the defendant resides, where the cause of action accrued, or where the property in litigation is located.

Florida Statutes 47.021 Actions against defendants residing in different counties.
Actions against two or more defendants residing in different counties may be brought in any county in which any defendant resides.

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

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

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

ANSWER KEY FOR MULTIPLE-CHOICE QUESTIONS

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