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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 2019 AND JULY 2019 FLORIDA BAR EXAMINATIONS

ESSAY QUESTIONS AND SELECTED ANSWERS

Part I of this publication contains the essay questions from the February 2019 and July 2019 Florida Bar Examinations and one selected answer for each question.

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

Applicants are given three hours to answer each set of three essay questions. Instructions for the essay examination appear on page 4.

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 2019 BAR EXAMINATION – TRUSTS

In 2015, Sally executed a trust agreement for the benefit of her only child Ben, who is 35 years old and unable to manage money. Sally transferred \$500,000 and deeded a commercial building in trust to Ted, naming Ted as trustee. The trust provides that the income be distributed to Ben during his lifetime and the remainder to Ben's children living at the time of Ben's death. The trust provides that Sally can revoke the trust in a writing signed by her and delivered to the trustee. The trust states:

The trustee shall distribute to my son, Ben, such amounts of income as the trustee, in the trustee's sole and complete discretion, deems appropriate for Ben's health, support or maintenance. Such income shall be paid to the beneficiary personally and to no other, whether claiming by the beneficiary's authority or otherwise.

The commercial building produced a 3 percent return. Ted sold the building to himself and invested the proceeds in a low-risk venture that yielded 5 percent. Ted paid less than fair market value, but reasoned that the increased investment return would benefit the trust in the long run. Ted hired his wife, a certified public accountant, to perform accounting services for the trust and paid her at her normal rate.

In 2016, Ben married Wilma. Six months ago, they were divorced and Wilma was awarded alimony. Sally was outraged when she learned of the alimony award. Sally called Ted and instructed: "I hereby revoke the trust. I will confirm my revocation in a letter." Sally died the following week without writing the letter.

Ben has demanded that Ted transfer the entire trust assets, free of trust, to the administrator of Sally's estate. Ben claims the trust was revoked. In the alternative, he argues the trust should be terminated. Ted refuses to terminate the trust. Wilma has demanded Ted pay her alimony due out of the trust income or principal. Ben has no children, living or deceased.

Ben seeks your advice as to the merits of his and Wilma's claims. Prepare a memo evaluating the validity of the trust, claims, and likely outcomes from this situation.

SELECTED ANSWER TO QUESTION 1

(February 2019 Bar Examination)

MEMORANDUM

TO: Senior Partner

FROM: Associate

Re: Ben and Wilma's Claims

Ben has asked for my legal advice regarding the merits of his and his ex-wife Wilma's claims, including in particular an analysis of the validity of the trust his mother Sally executed as settlor for his benefit in 2015. This memorandum analyzes each of those three issues discrete: (1) the validity of the trust (including whether it was revoked by Sally before her death), (2) Ben's claims, and (3) Wilma's claims.

1. Validity of the Trust

In order to be a valid trust, a trust must be executed with the proper formalities; by someone with capacity to execute the trust; with trust assets ("res"); with the intent to place those assets in trust; for a lawful purpose; for a beneficiary; and administered by a named trustee.

With respect to formalities, if a trust has testamentary effect, it must comply with the formalities for a will, and if it disposes of real property, it must comply with the statute of frauds as applicable to all real property transfers. This trust is not testamentary, and it is not irrevocable, therefore the will formalities--namely, signature by the testator as well as two witness signatories in the testator's presence--do not apply, and there is no indication that the trust agreement was otherwise improperly executed. However, because the trust involves a deed of real estate--the commercial building--from Sally to you, therefore the statute of frauds must be satisfied. The statute of frauds requires a signed writing by the party against whom it is to be enforced, which in this case is Sally. The facts do not reveal whether or not Sally signed the trust document here, and so, if she did not, that would call into question the validity of the trust with respect to the grant of real property.

Turning to the requirements for all trusts, first, the capacity to create a trust requires that Sally, as the settlor, have understood the effect of the document as well as her natural bounty; because the trust is revocable, it need not meet the higher standard for capacity applicable to wills and irrevocable trusts. There is no indication that Sally lacked that capacity. Second, the trust must have a res, or assets, within it, with the limited exceptions of pour-over trusts or life insurance trusts. Here, the trust had \$500,000 and the deed to a commercial building, therefore it immediately had trust property and satisfies the res requirement without needing to resort to the exceptions for life insurance or pour-over trusts. Third, Sally must have had the intent to place the assets in trust, which can be inferred from the trust document itself. The trust document clearly states that the trust property is to be distributed to Ben "and to no other," which appears

to satisfy the intent requirement by clearly stating that the trust property is for the benefit of Ben. Fourth, the trust must be for a lawful purpose. Here, the purpose of placing assets in trust for one's issue is lawful. Fifth, the trust must be administered by a trustee. It is to be administered by Ted, and therefore satisfies this requirement as well.

The next question is whether Sally revoked the trust agreement, as Ben has claimed. Trusts may lawfully be made revocable or irrevocable. Because the trust was made revocable, Sally did have the power to revoke as provided in the trust. The trust, however, contained the express condition that it could only be revoked "in a writing signed by" Sally. Although there are certain trust terms which are not enforceable--such as a term barring a beneficiary from challenging the trust--constraints on the means of revocability are lawful. Therefore, because Sally expressly provided in her trust that it could only be revoked in a signed writing by her, her phone call to Ted instructing that she revoked the trust was not effective to revoke it. Indeed, the hallmark of trust creation and revocation is settlor intent, and here, Sally's intent in creating the trust was that it only be revocable in writing. As she died one week following her phone call to Ted, without confirming her intent to revoke in writing as the trust required and as she stated she would, it is just as possible that Sally did not actually intend to revoke the trust when she died as that she did so intend. Thus, again, a court would almost certainly find that the trust has not been revoked.

In sum, the trust appears to have satisfied the requirements for trust creation, and not to have been revoked, and therefore is valid.

2. Ben's Claims

Ben has claimed that the trust was revoked by Sally. As analyzed above with respect to trust validity, that claim is likely to fail. Ben has two remaining sets of claims: claims for breach of fiduciary duty against Ted as trustee, and a claim that the trust should be terminated. The first is likely to succeed, but the second is not.

Regarding breach of fiduciary duty, as trustee, Ted, owed two sets of duty to Ben as beneficiary: a duty of loyalty, and a duty of reasonable care in the administration of trust assets. With respect to the duty of loyalty, it is a per se violation for a trustee to engage in self-dealing. Therefore, Ted breached his duty of loyalty when he sold, to himself, the building held in trust for Ben. It is immaterial that the building yielded a lower return, 3 percent, than the low-risk venture Ted chose for the building, which earned 5 percent--that fact would matter if Ted had sold the building to a third party, but he did not. Moreover, even if it were not a per se breach of the duty of loyalty for a trustee to engage in self-dealing of this nature, the duty of reasonable care would be judged at the time of the transaction, not based on the actual returns, under the business judgment rule, asking whether it was commercially reasonable (not optimal) when undertaken. In any case, Ted paid less than fair market value for the building, which would have been a breach even if it had not been self-dealing, since he gained advantage for himself at the expense of the beneficiary. In sum, even if Ted's decision to sell the building for a low-risk investment yielding 5% return satisfied the business judgment rule--which it probably did--the self-dealing component likely constitutes a breach of the duty of loyalty.

Ben also has a claim that Ted breached his fiduciary duty by hiring his wife, a CPA, to perform accounting services for the trust. The rule regarding self-dealing for hiring a trustee's relatives is slightly different than the rule for when the trustee hires himself: hiring one's relatives to perform services for the trust creates a rebuttable presumption of a breach, but is not a per se violation. Here, Ted paid his wife her normal rate for her professional services. And, it must be noted, it is entirely appropriate for a trustee to pay a reasonable fee for professional services on behalf of the trust, such as accounting. Therefore, assuming that his wife's normal rate was reasonable, Ted could probably overcome the rebuttable presumption that he breached his fiduciary duty by hiring his wife as the trust's CPA.

We now turn to Ben's claim that the trust should be terminated. A trust can be terminated when consistent with the Settlor's intent. So long as the settlor is living, this may be done by consent of all the beneficiaries and the settlor. However, Sally, the settlor, is dead. When the settlor has died, the trust may be terminated by unanimous consent of the trust beneficiaries so long as doing so would not conflict with a "material purpose" of the trust. Among material purposes for trusts are spendthrift clauses, or other clauses designed to limit the discretion of the beneficiary to dissipate trust assets.

The main legal issue respecting Ben's claim for trust termination, therefore, is whether the trust contains a "material purpose" that would be violated by terminating it and distributing the assets to Ben. First, the trust provides that money is to be distributed as appropriate for Ben's "health, support or maintenance." A court might find that this provision is broad enough not to impose a meaningful constraint on the trustee, in which case, it would not be a material purpose constraining termination of the trust. Second, the trust provides that the income "shall be paid to the beneficiary personally and to not other, whether claiming by the beneficiary's authority or otherwise." There is some question whether this constitutes a proper "spendthrift clause," which is a clause preventing the beneficiary from alienating his or her interest in the trust, voluntarily or involuntarily. Spendthrift clauses constitute a "material purpose" barring trust termination without the settlor's permission. Since this particular provision prohibits payment to anyone else besides the beneficiary, with or without the permission of the beneficiary, it would appear to contain the alienation by Ben of trust assets in any way, and thus constitute a spendthrift clause. If the court finds that this is a proper spendthrift clause, it will probably bar termination of the trust by Ben. Third and finally, the trust provides that, at Ben's death, it should be distributed to Ben's children living at the time of Ben's death. Although Ben does not have any children now, he may have them before he dies, and, if that were to occur, Sally's intent as settlor appears to have been to ensure that these children take the remaining trust assets. If the trust were terminated, then that purpose too would be dishonored. Finally, it is worth noting that the purpose of the trust appears to have been, in part, to help Ben manage money since he is unable to do so himself. Finding that the trust's spendthrift clause is material, as well as the reservation that the balance of assets be paid at Ben's death to his children, is consistent with Sally's intent in creating the trust.

In sum, Ben has a strong claim against Ted for breach of fiduciary duty based on his sale of the building to himself, but not based on his hiring his wife as a CPA. Ben can recover personally against Ted for the difference between the fair market value of the

building and what paid, as well as any other damages flowing from the decision to sell the building. Ben may also seek the Court's permission to remove Ted as trustee, and will likely succeed. However, a court is likely to stop short of terminating the trust if it rules, as I would predict, that the trust contains the material purposes of a proper spendthrift clause and the creation of a remainder in any future children Ben may have.

3. Wilma's Claim

Wilma is seeking to be paid alimony out of trust income. Assuming that a court were to hold that the trust contains a valid spendthrift clause, the general rule is that a creditor of the beneficiary cannot reach trust assets. However, there are a few limited exceptions to this rule, including for tax liens and alimony. Besides Wilma is seeking only alimony, her attempt to be paid out of trust income for her alimony will probably succeed so long as her alimony is valid in the first place. However, she will face some difficulty in collecting, because the trust makes the distribution of trust income to Ben entirely a discretionary matter for the trustee. Even exception creditors, such as Wilma, cannot force a trustee to distribute income when such distributions are purely discretionary. Thus, although Wilma be able to obtain a lien on any trust distributions made to Ben, she cannot force those distributions to occur, and her attempt to obtain income paid out of trust principal will likely fail.

Wilma's claim faces an additional potential vulnerability: her alimony award may be void in the first place, if her marriage to Ben was improper. We are told that Ben is 35 and unable to manage money. If Ben lacks the capacity to manage money for himself, he may also lack the capacity to have gotten married in the first place. A marriage involving someone who lacks the capacity to marry is void ab initio, and therefore can be annulled. In fact, incapacity is one of only two grounds--the other being bigamy--that a marriage may be voided without even a court's permission, and can be sought to be voided by anyone, not merely one of the parties to the marriage. Thus, Ted (or any trustee who replaces him if he is found to have violated his fiduciary duty and replaced by a successor trustee), could seek to void the marriage by annulment. An annulled marriage is treated as if it never happened, and therefore, among other things, no alimony can be awarded with the limited exception of alimony pendente lite, i.e., alimony to support the spouse during the process of dissolving the marriage.

Finally, even if the marriage is not annulled, Wilma is potentially vulnerable to a claim that her alimony award is improper. We are told that she married Ben in 2016, and they divorced 6 months ago, i.e., sometime in 2018. The marriage lasted 2-3 years. Such a marriage is considered to have been of a short duration under Florida law, pursuant to which marriages under 7 years are short duration, marriages longer than 17 years and long duration, and everything in between is a moderate duration. Short-term marriages normally do not qualify for permanent alimony, and, where they qualify for durational alimony, the duration is typically limited to the duration of the marriage. The other common type of alimony is Bridge-the-Gap, which helps a dependent ex-spouse adjust to singledom but which is limited to 2 years in length. Without knowing the type of alimony that Wilma was awarded, or any facts about the marriage, it is impossible to analyze whether the alimony award itself was appropriate or should be challenged in court. But suffice to say, based on the facts as we currently know them, that the alimony award is almost certainly no longer than 3 years. That being the case, a

trustee, acting for Ben's interests as beneficiary, could likely thwart Wilma's efforts to obtain any alimony simply by using the trustee's discretion not to make distributions during those 3 or fewer years, if possible and in the best interests of Ben's health, support, or maintenance.

CONCLUSION

In conclusion, the trust appears to be valid and unrevoked, and Ben will probably not be able to terminate it. However, he does have a strong claim against Ted for breach of fiduciary duty, and may be able to have Ted replaced as trustee. Meanwhile, Wilma's alimony award makes her an exception creditor able to access the trust despite its spendthrift provision, however she will face difficulties in collecting because she cannot make a claim against trust principal or force discretionary distributions from the trust.

Q QUESTION NUMBER 2

FEBRUARY 2019 BAR EXAMINATION – UCC ART. 3 AND ART. 9/PROFESSIONALISM

Bonnie decided to start her own food truck business. Bonnie created Bonnie Bons LLC, purchased an old food truck, and decided to take out a loan to repair the food truck.

Bonnie went to LoanCo to seek a \$50,000 loan. She brought the title of her food truck, a detailed list of the equipment that she wanted to purchase, a mechanic's estimate for the cost of repairing the food truck, and samples of her Bonnie Bons desserts. The Manager agreed to give Bonnie Bons LLC the \$50,000 loan in exchange for executing a Promissory Note and Security Agreement.

The security provision of the Security Agreement provided as follows:

The Promissory Note, which is incorporated by reference, is secured by all of Bonnie Bons LLC's assets, including but not limited to Bonnie Bons LLC's food truck, the title for which is attached to this agreement as Schedule A. Should Bonnie Bons LLC default, LoanCo has all rights and remedies under the UCC.

After the Manager attached the title and list of the equipment Bonnie wanted to purchase to the Security Agreement, Bonnie—on behalf of Bonnie Bons LLC—executed the Security Agreement and the Promissory Note. One week later, LoanCo filed a financing statement that included the same description of the collateral that was in the Security Agreement.

Bonnie made the repairs to the food truck and installed the equipment described on the list she gave LoanCo. Unfortunately, not all of the equipment fit as Bonnie hoped, so the food truck had to undergo modifications that made it impossible to remove the equipment without damaging the food truck.

Bonnie Bons was an overnight success. Rather than repaying the loan, Bonnie bought a second food truck to expand her business.

However, Bonnie failed to maintain the second food truck and was cited for several health code violations. After an extremely poor on-site inspection, the local health inspector shut down the second food truck. Bonnie Bons' reputation was ruined.

Bonnie was so distraught from her failing business that she missed a curve in the road and ran her original food truck into a tree. Bonnie and all of the equipment in the food truck were fine, but the food truck could no longer be driven. Bonnie had the truck towed back to her house, and locked it in her garage.

Unable to operate either food truck, Bonnie defaulted on her monthly loan payments with \$40,000 still owed. LoanCo tried unsuccessfully to contact Bonnie about the default. Finally, LoanCo's Manager received this letter from Bonnie's Attorney:

Leave Bonnie alone! She's been through a lot recently and isn't ready to deal with you yet. If you don't stop harassing her you'll never get your money or the food truck. And if you even think about suing her I'll bury you so deep in motions and draw this case out so long neither us will be around to see the end of it. The amount of money it'll cost you to collect a dime from Bonnie will pale in comparison to how much this litigation will cost you.

Attorney

LoanCo wants to know its options moving forward to enforce the terms of the Security Agreement and Promissory Note. Please prepare a memorandum that addresses the following:

1. Discuss whether LoanCo has a valid security interest in any of Bonnie Bons LLC's assets. If LoanCo does have a valid security interest, discuss whether LoanCo has perfected its interest.
2. Discuss the methods, if any, by which LoanCo may legally gain possession of those assets.
3. What rights would LoanCo have in collateral for which LoanCo takes possession?
4. Discuss the causes of action, other than to foreclose its security interest, that LoanCo may have against Bonnie Bons LLC.
5. What professionalism issues does Attorney's letter to Manager raise?

SELECTED ANSWER TO QUESTION 2

(February 2019 Bar Examination)

To: LoanCo

From: Bar Applicant

Re: Claims to Bonnie Bons, LLC

MEMORANDUM

1. LOANCO'S SECURITY INTEREST IN BONNIE BON'S ASSETS

The first issue is whether LoanCo has a valid security interest in Bonnie's assets.

*A security interest is an interest in collateral that arises under Article of the Uniform Commercial Code. In order to be valid, a security interest requires (1) a security agreement, (2) attachment, and (3) perfection. A security agreement must be in an authenticated writing (signed), contain words of grant, and reasonably described the collateral in sufficient terms (ultrageric terms are insufficient, however generally U.C.C. terms are fine). Attachment forms the link between the security agreement and the collateral itself. Attachment occurs upon the later of when (1) the debtor has rights in the collateral, (2) the Creditor gives value for the transaction, and (3) the execution of a valid security agreement. The method of perfection depends, nearly entirely, upon the form of the collateral. A security interest in automobiles, cars, etc. is usually perfected by indicating the security interest on the certificate of title itself. A security interest in equipment arises when the equipment (which is any good that is not inventory, farm equipment, or consumer goods) is perfected by the filing of a financing statement. A financing statement must (1) contain the name of the debtor, (2) contain the name of the creditor, (3) contain the a description of the collateral (ultrageric terms are fine or terms such as used by the U.C.C.). Lastly, an accession is any personal property attached to another piece of personal property which merges into the former (such as a bike seat and a bike). A security interest in a truck, constitutes a security interest in all accessions affixed thereto. Lastly, a security interest also attaches to any **proceeds** of the collateral; that is, other items or funds gained by the sale, or use of the collateral itself.*

In application, the security agreement between LoanCo and Bonnie Bons, LLC ("hereinafter, Bonnie") appears to be valid. It is in a writing executed by Bonnie, contains words of grant ("the Promissory Note is secured by all of [Bonnie's] assets") and contains a sufficient description of the collateral. The simple use of the term "assets" is insufficient to create any security interest; however, the use of the description of "Bonnie's food truck in the agreement is likely a sufficient identification of the collateral. The collateral duly attached as Bonnie already had title to the truck, LoanCo gave value to finance the transaction, and there existed a security agreement as stated above. Lastly, it does not appear that LoanCo properly perfected their security interest. Specifically, a security interest in the truck must be notated on the certificate of

title itself to be adequately protected. While the financing statement is great, it is insufficient to perfect as against collateral covered by a certificate of title. However, notwithstanding, the security interest is still, in and of itself, valid, just merely not against other creditors. Duly, when Bonnie places the equipment into the truck, and modified it so that such equipment could not be removed without damaging the truck, the equipment, as accessions became part of the secured interest in the truck.

As a result, LoanCo validly created a security interest but that interest was not properly perfect so as to be valid against other creditors.

2. POSSESSION AND REPOSSESSION OF SECURED COLLATERAL

The next issue is whether LoanCo is entitled to possession of the secured collateral.

Generally, upon the default of a secured debtor. The creditor may exercise a right of repossession. Thus, upon a default of the underlying obligation the creditor may retake possession of the collateral for its own account, provided it can be done without a breach of the peace. A breach of the peace is not specifically defined in the U.C.C. but is generally construed as to mean the potential for violence or flagrant disruption of civilized society. Any entry by a secured creditor into the home of a debtor to retake possession of collateral is per se a breach of the peace (and in the best interests of the creditor given Florida's stand your ground laws). As such, to repossess any collateral within the home of a debtor, the Creditor must resort to remedies to replevy the good.

Subsequent to the crash of the first vehicle, Bonnie towed the truck back home and locked it in her garage. Thus, once Bonnie defaulted upon the terms of the promissory note, LoanCo was entitled to take possession of the collateral provided it could be done without a breach of the peace. However, as the truck was locked in her garage, it would be a per se breach of the peace for LoanCo to try to take. Instead, LoanCo must result to typically forms of judicial process and procedure and seek to obtain a duly entered Writ of Replevin.

As such, LoanCo may not repossess the collateral as doing so would be a breach of the peace, and must replevy the truck.

3. RIGHTS SUBSEQUENT TO POSSESSION

The next issue concerns LoanCo's rights after possession of the Food Trust.

In Florida, a secured creditor, upon obtaining possession of the collateral through repossession or by Writ of Replevin, has the ability to Sell the collateral at public or private sale, and apply the balance gained through the sale to the sums owed by the debtor. A sale of this nature must be commercially reasonable which requires, inter alia, notice to the debtor of the date, time and location of the sale. If a sale is commercially unreasonable, the creditor may not be able to recover a deficiency. Under Article 9 of the U.C.C., there is a presumption that any public sale of the collateral would have resulted in full payment of the debt, thus, in the event the sale price is insufficient to cover the debt, the burden shifts to the secured creditor to show that the sale was

commercially reasonable. After any such sale, the creditor may hold the Debtor personally responsible for the remaining balance via an in personam deficiency action. Lastly, a debtor has a right of redemption which cannot be waived (unless its waived, in writing after default). Thus, a debtor may exercise the right of redemption by paying the full balance due on the promissory note, together with fees and assessments accruing thereby, and recover the chattel.

Once the replevin action, mentioned above, is successful as against Bonnie. LoanCo has the ability to sell the truck at private or public sale in a commercially reasonable manner. Thus, LoanCo must give Bonnie adequate notice of their intention to sell the property and must include the time, date, and location of the sale. Lastly, Bonnie has a right of redemption which cannot be waived. Thus, Bonnie may exercise the right of redemption by paying the full balance due on the promissory note, together with fees and assessments accruing thereby, and recover the chattel. In the event Bonnie does not exercise the right of redemption, Loan co may sell the property and request a deficiency judgment holding Bonnie liable for the difference in the sales price and the balanced owed, provided Loanco proves the same is reasonable.

As such, after possession, LoanCo may sell the truck and hold Bonnie liable for the difference.

4. CAUSES OF ACTION AGAINST BONNIE BONS, LLC

The next issue is whether Loan co may assert any further actions against Bonnie's Bons, LLC. They may, with each such potential option being discussed more in depth, below.

a. Breach of Contract

In Florida breach of contract occurs when there is a valid contract (proven with an offer, acceptance, and consideration), a breach of that contract, and subsequent damages. A security agreement is, in and of itself, a contract, and a party may be held liable for any breach of such an agreement. Under the terms thereof, a party may be entitled to damages commensurate with their expectation interest--the position they would have been in had the contract been fully performed.

As such, Bonnie breached the security agreement by failing to pay when due under the terms of the incorporated promissory note. In doing so, Bonnie materially breached the agreement. LoanCo suffered damages in that it had not be entitled to be paid the full balance of the money it is owed.

Thus, a court will likely find that Bonnie breached the Security Agreement for which LoanCo is entitled to recover damages.

b. Breach of Promissory Note (U.C.C. 3)

Under Article 2 of the Uniform Commercial Code, a promissory note is a negotiable instrument. A negotiable instrument is an unconditional promise to pay a fixed sum of

money, at a definite time, to order or bearer, and contains no additional collateral promises. A promissory note is a type of commercial paper whereby a maker promises to pay a set sum of money to a Holder of the note, the payee. Upon maturity or breach of the applicable obligations under the note, the Holder therefore, provided they are entitled to enforce it, may make demand upon the Maker of the note for payment. In the event the Maker dishonors the note (by failing to pay it), the Holder may seek judicial redress in Florida's Courts.

Bonnie executed a promissory note in favor of LoanCo as is evident by the facts. When Bonnie failed to tender payment on the same pursuant to its terms, she breached the promissory note. Once breached, if the terms of the Note permit (the facts are silent whether the note has an acceleration clause), LoanCo may accelerate the balance due on the loan and claim the same to be immediately due and payable. If Bonnie fails to pay on the note, then LoanCo may seek a money judgment against Bonnie as provided by law.

As such, LoanCo will likely be successful in maintaining a claim against Bonnie on the basis of the breached note.

c. Negligent Impairment of Security & Waste

Negligence is a cause of action which requires, (1) duty, (2) breach, (3) causation (both proximate and in fact) and (4) damages. A driver has a duty to use reasonable care to protect foreseeable plaintiffs from harm. A holder of a security interest in the car being driven is a foreseeable plaintiff for any damage sustained to the car as a result of its being driven. A breach occurs where the defendant fails to use reasonable care. Cause in fact is when the injury would not have occurred, but for the negligence, and lastly proximate cause is met provided the injury is a foreseeable result of the breach. There must, as is obvious, be damages.

LoanCo may attempt to allege that Bonnie negligently impaired the value of its security when Bonnie negligently missed the curve because she was distraught. Bonnie owed a duty of reasonable care to protect the truck (the collateral) from harm. Bonnie breached that duty when she drove carelessly. But for the actions of Bonnie the value of the collateral would not have been impaired. It is foreseeable, without doubt, that the impairment of a secured interest in a motor vehicle is a foreseeable result of failing to drive that motor vehicle with due care. LoanCo suffered damages in that the value of the Truck was substantially decreased by way of Bonnie's actions, thus impairing the value of its security.

As a result of the foregoing, Loanco will recover against Bonnie for Negligent Impairment of Security.

5. PROFESSIONALISM ISSUES

The next issue concerns the ethical implications of Attorney's Conduct.

Firstly, attorneys have the obligation to be truth, honest, and fair to opposing counsel and opposing parties as clearly set forth in the Florida Rules of Professional Conduct and the preamble to the rules themselves ("to opposing counsel, I declare civility"). Moreover, an attorney has an affirmative obligation under the Rules to refrain from making frivolous arguments. Frivolous arguments are those in which there is no basis in either fact, or law, for the argument, and the argument is not made in good faith for the alteration, extension, reversal, or modification of existing law. Arguments made solely for the purpose of delay are obviously frivolous. Lastly, an attorney should not undertake an course of action solely calculated to embarrass or harass another.

Attorney's letters to manager raise several implications. First, it appears as though Attorney is breach his duty of civility to opposing counsel and opposing parties by threatening to bury them in litigation without due case to do so, and to drag out litigation solely for the purposes of harassing, annoying, or causing undue harm to an opposing litigant. Verily, making multiple motions solely for the purpose of "drawing the case out so long" is patently frivolous as any such motion for only be made for the purpose of delaying the administration of justice.

As such, Attorney may be subject to discipline if he proceeds with his course of conduct and files frivolous motions to defeat LoanCo's action.

Q

QUESTION NUMBER 3

FEBRUARY 2019 BAR EXAMINATION – TORTS/ETHICS

As part of its new marketing program, Supermarket offered a service that would deliver digital coupons to its customers' cell phones upon entering any of Supermarket's stores. Paula registered for the service and used it often.

Paula was shopping at Supermarket and received a message from Supermarket containing new coupons. As she walked down the frozen food aisle, she scrolled through the coupons on her phone. In looking at the coupons, Paula did not see a large puddle of melted ice cream in the aisle. Paula slipped on the puddle and her head hit the floor.

A Supermarket employee arrived right after the fall and helped Paula to her feet. Paula said she felt dazed and asked the employee to call her husband, Harold, to drive her home. Harold arrived shortly thereafter and picked up Paula. While driving back to Paula's and his house, Harold began typing a text message. While Harold was texting, the car swerved to the right and hit the curb, causing Paula to bang her head against the window.

After suffering headaches, Paula consulted a doctor and was diagnosed with a severe concussion. Paula has been unable to work because of her persistent headaches. Paula has lost income and incurred medical expenses, and now seeks to recover damages from Supermarket.

Paula was referred to you by Lawyer, who does not practice personal injury law. Lawyer proposes that your firm would solely litigate Paula's case, and pay Lawyer a referral fee equal to 10 percent of any fee you earn on the case.

Prepare a memo that discusses the claims and defenses involved in Paula's proposed lawsuit against Supermarket. In the memo, include a discussion of the ethical issues involved in Lawyer's fee proposal.

SELECTED ANSWER TO QUESTION 3

(February 2019 Bar Examination)

Negligence Premises Liability

The issue is whether Paula may bring a cause of action for negligence under the theory of premises liability when she suffered injuries to her head after falling in the store and, for the injuries, suffered as a result of the subsequent car collision.

Negligence is (1) duty, (2) breach, (3), causation, and (4) damages. Because the facts indicate the Paula was injured in a supermarket the rules of premises liability for commercial business owners apply. To successfully breach a cause of action for negligence, Paula has the burden of establishing the following.

(1) Duty - *The issue is whether the defendant, Supermarket, owed a duty to Paula. Generally, a duty is owed to all foreseeable victims.*

The classification of the plaintiff will establish the specific standard of care owed by Supermarket. Florida has abolished the distinction between licensees and invitees. Rather, victims who are on the premises lawfully and have not exceeded the scope of their invitation on the property (ex. trespassers), are all classified as invitees.

The duty to invitees is to: keep the premises reasonably safe for the benefit of the invitee, warn of latent or non-readily observable defects known to the landowner, and make reasonable inspections to and make safe any dangerous conditions on the land.

Further, commercial business owners owe a heightened duty of care to victims than residential commercial landowners are required. Business owners must also keep the premises free from any moveably or transitory substances and unreasonably dangerous artificial or natural conditions to any invitee on the property AND others adjacent to the premises.

Here, Paula was a customer of the store when she was slipped and fell. Paula will argue that, considering she he was a frequent shopper and user of the stores digital coupon program, Paula was a foreseeable victim of which the Supermarket owed a duty. In this regard it is likely that Paula will satisfy this element.

(2) Breach - *The issue is whether Supermarket breached that duty to Paula, as an invitee, when she slipped and fell on the melted ice cream on the floor.*

As discussed above, business owners owe a duty to keep the premises free from transitory substances. Likewise, the supermarket also owed a duty to make reasonable inspections to uncover such dangerous conditions. It is not necessary then that the supermarket had actual notice of the condition as long as it could have been uncovered by reasonable inspection.

This rule is appropriate in the facts at hand because a supermarket aisle is full of transitory substances that will likely fall to the ground and become slippery, which is a hazard to customers. In this regard, Paula will assert that this duty was breached the ice cream is a transitory substance, and the supermarket failed to make reasonable inspections to discover the defect because it was melted on the ground in the frozen aisle. The facts then indicate that a food usually found in the frozen aisle, likely fell from the freezer, while still frozen, and was on the ground long enough for it to melt. This indicates that the store could have uncovered the spill by reasonable inspection.

Furthermore, the fact that the employee arrived to the aid of Paula "right after the fall" indicates that there was an employee nearby that could have uncovered and made safe the condition. This duty to owed to invitees, extends to agents or employees of the defendant, and the employee is clearly within this role.

(3)-(4) Causation/Damages

The most problematic issue that Paula will have is proving that Supermarkets breach was the legal and proximate cause of the injuries to her head.

Causation is the legal and factual cause of their injuries. "But for" test is the factual cause. Proximate cause is the natural and foreseeable event of Defendant's acts.

Paula will have a more difficult time proving that the full extent of her injuries were the proximate cause of the Supermarkets negligence. There are two injuries that must be considered.

First head injury - Here, the first head injury occurred in the store and the act of slipping on the melted ice cream was a legal and proximate cause of these injuries. In proving the first head injury is the proximate cause of the injuries. Plaintiff can further assert that because the Supermarket offered the digital program to its customers, it is foreseeable that a customer will be paying attention to their phone while shopping the store, and not see a spill on the ground. (See contributory negligence defense below).

Second head injury - The issue here is whether the later head injury in the vehicle was the naturally and foreseeable result of Supermarkets conduct.

The rule generally is that the nature of injuries must be foreseeable and not the result of an intervening or superseding cause of the injuries. Meanwhile, the extent of the injuries do not have to be foreseeable in severity. Under the eggshell plaintiff theory, a defendant takes the victim in whatever the fragility of the condition.

Here, it is hard to determine whether the nature of the injuries to the plaintiff is the result of the Supermarkets breach. Both impacts were to the plaintiffs head and her injuries are a headache which is the natural and probable result of a head injury.

Here, the husband's negligence in the driving, is a superseding cause that resulted in the same injuries as the slip and fall. Therefore, it is difficult to determine whether the

extent of the injuries are a result of the original slip or fall. If this is the case it must only be shown that the supermarkets conduct was a "substantial factor" in her injuries.

In this regard, the supermarket will likely offer evidence that the injuries to her head as a result of the fall were of a different nature than the second injuries to her head that were incurred and the two can be distinguished therefore limiting liability in the extent of the damages incurred.

However, Paula will likely argue that her injuries were increased as a result of the fall and argue that further injuries are within the scope of foreseeable required of proving proximate cause. In this argument, Paula may be persuasive because as mentioned the further severity of injuries caused by defendant's negligence have been found to be the natural and foreseeable consequence of a defendant's negligence.

Defenses -

Supermarket may assert the following defenses -

(1) Comparative negligence - Florida courts have adopted the pure comparative negligence method. Under this, the supermarket may assert that Paula was comparatively negligent when she was walking through the supermarket. The supermarket may also assert that the husband's negligence while driving made him liable for the injuries.

(Note: FL Courts have gone away with the implied assumption of risk defense. Supermarket may wish to assert it because Paula impliedly assumed the risk of looking at her phone while walking. However, this defense is unavailable.

Remedies -

The issue here is based on the determination of the element of causation and how much Paula can recover from supermarket. If a court finds that she must recover. In a negligence suit, a Plaintiff may recover compensatory damages as a result of any medical expenses and pain and suffering. Punitive damages are ordinarily not available unless more blameworthy conduct is at issue, like fragile plaintiffs or intentional torts.

If the court determines that Paula has met the burden of proving causation to the full extent of her injuries she may be awarded medical expenses incurred, lost earnings, and lost earning's capacity. If Paula is the primary "breadwinner" her husband may also sue for the loss of income and support from Paula.

The supermarket may assert any of the defenses above in order for the plaintiff to lose damages under the theory of pure comparative negligence. And Plaintiff will recover minus the extent of her negligence, regardless if she was over 50% at fault unlike partial comparative negligence Jx.

If the husband is found to be a partial cause of the damages, Supermarket could incur the full liability under joint and severable liability and may subsequently recover from the husband.

Ethics Violations -

The issue is whether attorney may be committing any ethical violations by giving another attorney a referral fee.

Fee agreements must always be reasonable. When contingencies are involved they must be in writing. Further, any agreement to share money with another law firm must be in writing, signed by the client, stating the terms of the arrangement, and in most cases making the parties jointly or severally liable, or defining the arrangement by the amount of work done.

Generally, an attorney may invoke the help of another attorney when they are unfamiliar with an area of law. However, this is not the case here. The facts indicate that they are not working together on the case but only using a "referral" relationship.

Referral fees have been scrutinized by Bar associations especially where the percentages of recovery are involved. Because the arrangement is taken from the amount retained for fees by the attorney, I would argue that it may not result in a clear ethical violation. If it were taken from the full recovery, it would bring up more ethical violations. In any event, if she is to avoid committing an ethical violation the best course of action is to inform the client in writing of the arrangement.

Q QUESTION NUMBER 1

JULY 2019 BAR EXAMINATION – FLORIDA CONSTITUTIONAL LAW/PROFESSIONALISM

You are an attorney working in the Florida Office of Senate Legal Counsel. Your duties include providing legal assistance to Florida Senators on matters regarding their official duties.

Senator Smith comes to your office requesting legal advice about a bill that she wants to introduce during the next legislative session; this bill intends to enact the Protections Against Tattoos And Piercings Act or “PATAPA.”

Senator Smith provides you with some background information about PATAPA. She recently hosted a private social gathering at her house and the invitees included Senators Jones and Harris. During this event, Senator Smith took Senators Jones and Harris aside for a private conversation and told them that there had been a significant increase in the licensure of tattoo establishments and body piercing salons in Florida. Senator Smith explained to these two other senators that she believed this increased licensure activity reflected an increase in the number of Florida residents seeking tattoos and body piercings. Senator Smith also expressed to Senators Jones and Harris her concern that individuals were having their bodies tattooed or pierced without appreciating the medical risks. Her concerns arose from recent research findings by the Florida Department of Health about long-term adverse effects of tattoos and piercings. Senator Smith also wanted to encourage physicians to accommodate requests by their patients to remove tattoos and body piercings by reducing the medical malpractice and other tort liability associated with these medical procedures. Senators Jones and Harris agreed with Senator Smith and for the next hour they discussed the content of a bill that they could co-sponsor.

Provisions of PATAPA include:

- 1) Mandatory Consultation and Acknowledgement.** An operator of a tattoo or body piercing establishment is prohibited from tattooing and/or body piercing a customer without receiving documented evidence (in a form prescribed by the Department of Health) of the following:
 - (A)** A licensed physician has explained to the customer the significant medical risks that a reasonable person would consider material to deciding whether to receive a tattoo and/or body piercing.
 - (B)** The customer acknowledges the risks (identified above) and has voluntarily decided to receive tattoos and/or body piercings.

- 2) **Mandatory Delay.** An operator of a tattoo establishment or body piercing salon must satisfy the Mandatory Consultation and Acknowledgement requirements at least 24 hours before performing tattooing and/or body piercing on a customer.
- 3) **Limitation on Noneconomic Damages.** No physician shall be liable for more than \$50,000 in noneconomic damages with respect to causes of action for personal injury or wrongful death arising from the removal of tattoos and/or body piercings. Noneconomic damages refer to nonfinancial losses, including pain and suffering, inconvenience, physical impairment, mental anguish, and other nonfinancial losses that a claimant is entitled to recover under general law.

Before joining the Florida Office of Senate Legal Counsel you were in a private law practice where you represented tattoo establishments in connection with licensure matters.

Prepare a memorandum to Senator Smith that addresses: (1) the Florida Constitutional law issues raised by PATAPA, including any issues raised by the meeting with Senators Jones and Harris; and (2) whether your prior representation of tattoo establishments raises any issues for your legal advice to Senator Smith.

SELECTED ANSWER TO QUESTION 1 **(July 2019 Bar Examination)**

To: Senator Smith

From: Attorney

RE: PATAPA

Date: July 2019

Sunshine

Under the sunshine laws, all meetings at which public officials discuss public business must be noticed and open to the public. Records of such meetings must also be accessible to the public. The public has a right to government information under the Florida constitution. There is an exception to the sunshine law meeting requirements for unplanned meetings between state legislators. This exception applies to meetings between 2 state legislators or one state legislator and the governor.

The meeting among the 3 senators would likely fall into the exemption because it started at a social gathering rather than a planned meeting, and they are state legislators. However, because 3 senators were present rather than 2, this exceeds the limit for the exception. The sunshine law would apply. The procedure of this meeting is constitutionally invalid and should have been noticed and open to the public. Alternatively, Smith could have met with Jones and Harris each separately.

Privacy

Sections 1 and 2 implicate the right to privacy. Under the Florida constitution, the right to privacy is expressly protected. This protection has been interpreted as stronger than the Federal constitutional right to privacy. People have a right to be let alone and free from unreasonable government intrusion into their lives. Privacy is a fundamental right.

The restrictions implicate the right to privacy because they impact what a person may do with her body. The courts may use an undue burden standard here. If the courts use this standard, the statute will likely be upheld. Mandatory consultation and acknowledgment provisions similar to section 1 have been upheld in undue burden abortion cases, and mandatory delay provisions like that in section 2 have also been upheld as not placing an undue burden on the right to privacy. The outcome may be different here because the Florida Constitution has greater protections for privacy.

Due Process

The Florida and federal constitutions guarantee procedural and substantive due process. Procedural due process requires notice and a hearing. Tattoo parlors may argue that their procedural due process rights were violated if this new law impacts their licenses and ability to do business without notice and a hearing. This is not a strong argument because the provisions apply to all and are not taking licenses away from some.

Substantive due process

When a fundamental right is implicated, strict scrutiny applies. Under strict scrutiny, the government must show that the law is necessary to further a compelling state interest. For all other rights, only rational basis review is required, under which the plaintiff must show that the law is not rationally related to any legitimate government interest. Legitimate government interests under the state's general police powers include providing for the health, safety, welfare, and morals of the people.

Strict scrutiny applies here because privacy is a fundamental right, and as discussed above, privacy is implicated because this law places restrictions on people putting what they want into and onto their bodies. Tattoo parlors could also argue that this implicates another specifically enumerated right in the Florida constitution, the right to work and to be rewarded for one's labor. Although generally discussed in terms of unionization, the parlours could argue that it should apply here because of the substantial interference with business it could cause

To win under strict scrutiny, the state will need to show that the purpose of the statute is compelling. The purpose is certainly legitimate because it is based on health. To know whether the purpose is compelling we would need to learn more about the findings in the Florida Department of Health report and see how serious they are. The state could make a good case that the statute is necessary to the purpose. It must be the least restrictive means. They can argue that the first two provisions for education and delay are narrowly tailored to the purpose of making sure that people are educated about the tattoo and piercing decisions and the risks involved. A full ban would have been much more restrictive. The third section, limiting malpractice for tattoo removal, is more difficult to tie to the purpose of promoting health and risk aware decision making. Removal has its own risks, and it is not clear that promoting removal in this way at all decreases the long term health risks of tattoos found in the study.

Equal protection

A law that treats similarly situated people differently implicates equal protection. The only strict scrutiny classifications are race, religion, national origin, and physical disability. This law implicates none of the strict scrutiny categories. Rational basis review would apply. As discussed above, the law is rationally related to health and would likely be upheld on this basis. Even the third provision could arguably be upheld as promoting the welfare or morals of tattoo removal by trying to make it more accessible.

However, treating people differently under section 3 based on the amount of damages they suffer may be held to not meet even rational basis scrutiny. The Florida Supreme court has struck down medical malpractice caps on this reasoning before.

Free Speech

This law arguably burdens speech, protected under the FL Constitution. Free speech is a fundamental right. This law providing additional procedures for tattooing messages on one's body is arguably a time, place, manner restriction on speech. As such, it must be content neutral and narrowly tailored to a compelling state interest. This is content neutral because it places no restrictions on what images, words or piercings may be put on someone's body. A content neutral restriction on speech must leave open alternative avenues of communication. Alternative methods of communication are open because the tattooed can receive medical advice and wait and still get the tattoo after the 24 hour period and in the meantime may wear whatever messages they want on their clothing among other avenues of expression.

The state could also argue that it is not a speech restriction at all but rather a conduct restriction that incidentally burdens speech/expression. The conduct regulated is the act of tattooing and piercing. This is a weaker argument.

Impairment of contracts

The state may not interfere with contracts already in place without a good reason. If people have contracts to get tattoos in the future, this may be implicated. the scrutiny here is low because the state is not a party to a contract and seeking to get out of it, so this is a small issue.

Access to Courts

Under the FL constitution, all people shall have access to the courts for redress of any injury without sale, denial, or delay. No cause of action shall be abolished unless there is an overpowering public necessity and no alternative means of meeting it under the Kluger test. A reasonable alternative must be provided.

Section 3 removes the cause of action for noneconomic damages of negligently performed tattoo removal. There are no facts indicating an overpowering public necessity such as a severe scarcity of physicians willing to perform the procedures. There are other alternatives of increasing access to the procedure, such as subsidizing it. The state can argue that suing for economic damages alone is a reasonable alternative. The state probably loses here.

Professional responsibility

Conflict of interests

A lawyer may not represent a client whose interests are materially adverse to those of a previous client unless the lawyer reasonably believes her representation will not be affected, the representation is not prohibited by law, and the client provides informed consent confirmed in writing.

If I reasonably believe that I can adequately represent the senator in this matter despite my previous representation of the tattoo parlours (whose interests are adversely impacted by the law), then I may explain the conflict to her and receive her consent.

Lawyers may not work on the same or a related matter where the new client has interests materially adverse to the former client. My previous representation dealt with licensing, so I could argue the bill is not materially related.

There is also a lowered conflict standard for lawyers moving in and out of government work because of the volume of cases. Conflicts are generally for personal involvement only. I may be able to argue that I should only be conflicted out if one of the parlours I actually worked for sues rather than just because their interests are generally adverse.

Confidentiality

I would also need the consent of the tattoo parlours if I learned any information in the course of my representation that would be useful in the current representation and is not public knowledge. Duties to a former client continue indefinitely. If I have knowledge that is confidential about the tattoo parlours that would now help the senator, I may not use it without the consent of the parlours. Because they would almost certainly not consent, this would negatively impact my representation of the senator. I would not take the case.

Q QUESTION NUMBER 2

JULY 2019 BAR EXAMINATION – REAL PROPERTY

Sal owns residential real estate in Palm Beach County, Florida. There is a small pond on Sal's property that he occasionally uses for fishing and boating. His neighbor, Nancy, owns the adjacent property. After letting Nancy use his pond for a number of years, Sal granted Nancy an easement over a portion of his property, for the benefit of Nancy's property, to allow access to and use of the pond for recreational fishing and boating. The deed granting the easement complied with all required formalities, and Nancy recorded the deed in the Palm Beach County public records.

Two years later, Sal decided to sell his property. Bill wanted to buy Sal's house, and instead of getting traditional bank financing, Sal agreed to make a loan to Bill for a portion of the purchase price. Based on that understanding, Sal accepted Bill's cash down payment and agreement to pay the remainder of the purchase price in monthly installments over ten years. Bill and Sal then validly executed a deed to the property, a promissory note, and a mortgage containing those terms. The mortgage also provided that the full amount of the debt would be due immediately if Bill sold the house. The deed and mortgage were recorded in the Palm Beach County public records immediately after being executed.

After owning the property for three years, Bill decided to move to Orange County, Florida, and gave the house to his aunt, Alice, as a gift. Alice recorded the validly executed quitclaim deed that she received from Bill in the Palm Beach County public records, but Alice did not sign any other documents. Bill never informed Sal that he transferred the title to the house to Alice, and kept making his usual mortgage payments. After living at the house for four years, and without Sal's or Bill's knowledge, Alice moved out and leased the house to a tenant, Tara. Tara signed a long-term lease with Alice. Around the same time, Bill stopped making payments to Sal.

After Bill missed his second payment, Sal drove down to the house to confront Bill about the missed payments, but instead found Tara. Tara told Sal that she was leasing the house from Alice, that she was not going to move to a new home, and did not know Bill.

Sal then went by to see Nancy, who told Sal the whole story. She also told Sal that she had made some extra money by offering boat rides on the pond, and offered to split it with him. Sal was furious. The next day, Sal checked the public records and found the deed from Bill to Alice. Sal also looked through his own documents, but could not find the original promissory note or mortgage that Bill signed, only copies.

Sal now wants to sue for damages, foreclose on the house, kick Tara out, and terminate Nancy's ability to use the pond. Prepare a memorandum addressing Sal's rights with respect to Bill, Alice, Tara, and Nancy. Also explain to Sal how he could enforce those rights.

SELECTED ANSWER TO QUESTION 2

(July 2019 Bar Examination)

Legal Damages

Sal has two instruments that are the foundation of damages in law: Bill's promissory note and Nancy's easement.

Breach of Bill's promissory note

Sal may recover damages for Bill's failure to pay the note.

Bill stopped paying on his promissory note and is liable for damages to Sal for the breach. A promissory note is a contract and breaching it can give rise to either legal damages or--if applicable--foreclosure of any collateral used to secure the note. Foreclosure is discussed separately, below.

Here, Bill and Sal executed a valid promissory note secured by a mortgage on the property. Sal agreed to periodic payments and failed to make two payments; he is thus liable for those payments plus interest, plus any other payments missed before filing the action on the note.

While the terms include a due-on-sale clause--accelerating the note amount due--Bill has not actually sold the property, but merely gave it to Alice. Thus, the due-on-sale clause has yet to be triggered. Bill is only liable for the amounts outstanding plus interest from the time Sal brings an action on the note, unless the note has some other acceleration clause.

Furthermore, Bill's transfer of the property to Alice has no impact on Bill's obligation on the note. Sal can still enforce the note against Bill because he is personally liable and Sal never released Bill or executed a novation. Because Alice made no agreement with Bill or Sal regarding the note, Alice has no obligations under the note to either Bill or Sal.

Sal's failure to retain the original note should not affect his rights to the note because the note was properly recorded. Sal should be able to recover from Bill the amounts unpaid on the note plus interest, as determined at the filing of the action. If Bill continues to not pay, Sal can institute further actions to recover the future unpaid amounts, as future failures to pay are considered separate, additional breaches by Bill.

Surcharge for Nancy's easement

Sal has no current right to surcharge for Nancy's easement over-use.

An express easement is created when parties agree to allow a dominant estate a specific use on a servient estate. A person using an express easement beyond the stated use is liable for surcharge for the value of the over-use. Here, Nancy was granted an easement only for recreational fishing and boating. Nancy began using the easement for a commercial venture: charging people for boat rides. This is beyond the recreational fishing and boating use permitted, so Nancy may be liable to surcharge. Furthermore, this is an easement appurtenant: an easement granted for the benefit of Nancy's property, not Nancy personally.

Thus, the easement is intended as a benefit for the user of Nancy's estate and not to line Nancy's pockets. This is further evidence that Nancy's use of the easement should be subject to surcharge.

However, the liability for surcharge would run to the dominant estate holder. At the time of Nancy's overuse, the estate was owned by either Bill or Alice. Sal has no right to the easement because Sal validly conveyed the property. Only if Nancy had some overuse prior to Sal's conveyance would Nancy be liable to Sal.

If Sal becomes owner via a foreclosure sale (see next section), then Sal could pursue Nancy for any overuse of the pond easement that occurs after Sal becomes owner.

Foreclosure

Sal has a right to foreclose on the property.

A mortgage may be foreclosed by the mortgagee if the mortgagor fails to pay their obligations on the note secured by the mortgage. Sal, the mortgagee, executed a valid mortgage and note with Bill, the mortgagor. Bill failed to pay on the note; Sal has the right to foreclose on the property.

A mortgage is a property interest that attaches to the land until terminated. Florida is a notice jurisdiction state: a property interest (like a mortgage) is only valid against subsequent purchasers for value if they have notice or the prior interest is recorded. Here, the mortgage is recorded and is thus valid against any subsequent purchasers for value. But Alice is not even a purchaser of value, just a donee; in any event, Alice would take the property subject to the prior recorded security interest--Sal's mortgage. The fact that Alice had no notice of the prior interest is irrelevant, because the interest was recorded and is valid under Florida law.

Sal would be able to foreclose regardless of Alice's current ownership. Florida is a "lien theory" state, so Sal would need to initiate an action against Alice as the current property owner to foreclose the property. The judge would then order a foreclosure sale auction. The proceeds would go first to Sal, who has the only mortgage on the property. Any remainder would go to Alice as the current owner. If there was a deficiency--the proceeds of the sale were insufficient to pay Bill's debt--then Sal could pursue Bill only for the deficiency. As explained above, only Bill had liability on the note so only is liable for the resulting deficiencies arising from the foreclosure not paying Bill's debt.

Sal's failure to retain the original mortgage should be irrelevant because the mortgage was properly recorded.

Sal could elect to purchase the house at the foreclosure sale, giving Sal ownership of the property. This is required for Sal to pursue remedies against Tara and Nancy, as described below (surcharge is described above, also).

Eviction of Tara

Sal has no current right to evict Tara.

The right to evict a tenant belongs to the estate owner. Unless otherwise agreed, only material breaches of a lease will permit eviction. Minor breaches only permit damages as a breach of contract. Absent a breach or other lease terms, a tenant cannot be evicted.

Here, Tara is a tenant with a signed, long-term lease with Alice. Alice is the estate owner and thus has privity with the tenants. Sal currently has no rights to enforce eviction because Sal does own the estate; Sal has no privity with Tara. Furthermore, there are no facts indicating Tara has breached--materially or otherwise--her lease, so there are no grounds for eviction.

Purchasers of property at a foreclosure sale have the option of terminating existing tenants with 30 day notice or honoring existing leases.

Sal could acquire the property via foreclosure, give Tara 30 days notice, and then evict if Tara fails to vacate the property.

Terminate Nancy's easement

Sal currently has no right to terminate Nancy's easement because Sal does not own the property. If Sal acquires the property via foreclosure, Sal probably still could not terminate the easement.

An express easement is generally irrevocable absent all parties' agreement. However, overusing the easement may give rise to a surcharge action--see above for discussion. Nancy's use appears to be beyond the use expressed in the easement, because she has turned a recreational easement for Nancy's property into a commercial venture.

Sal could also seek an injunction forcing Nancy to conform her use to the use expressed in the easement.

Termination of the easement by judicial decree could likely only be done in equity if Sal could prove that Nancy's commercial use is irrevocably harming Sal and that Sal's legal remedy (for surcharge) is inadequate. The judge would look at the extent of the use by Nancy and how it is damaging the property or lake.

Q QUESTION NUMBER 3

JULY 2019 BAR EXAMINATION – CRIMINAL LAW, CONSTITUTIONAL CRIMINAL PROCEDURE, AND JUVENILE DELINQUENCY/FLORIDA CONSTITUTIONAL LAW/EVIDENCE

Dean, who was age 18, met Vicki on a free adult dating website. The two began to communicate through email. Over the next two weeks, they exchanged pictures and eventually exchanged phone numbers. They agreed that Dean would take Vicki on a date to a local coffee shop outside of Dean's apartment complex. When they got to the coffee shop, Dean playfully asked to see Vicki's identification. Vicki produced identification falsely reflecting that she was 18, when her true age was 15. Vicki said with a giggle, "What? You don't believe that I am 18?" Dean responded, "Well, I do now!" The two talked for hours. Dean invited Vicki over to his apartment, and Vicki accepted. The two had sexual intercourse.

When Vicki's parents arrived home, they called Vicki's cell phone, but she did not answer. Using the GPS tracking, they tracked Vicki to Dean's apartment and took her home without incident. Vicki's parents suspected that Vicki may have had sex with Dean and began to press Vicki for the truth. She eventually told them. Vicki's parents called the police.

Detective Jones went to Dean's apartment. At first, Dean was cooperative and invited the detective into his home. Detective Jones informed Dean that the detective was investigating an allegation of sex with a minor. Dean immediately exclaimed, "I am invoking my right to remain silent!" The detective then asked, "Why Dean? Have something to hide?" Dean did not respond, and Detective Jones then left saying, "Yeah, that's what I thought."

The next day, Detective Jones returned to Vicki's home and informed her parents that Dean would not speak about the incident. However, the detective asked if Vicki would send a text message to Dean. Vicki agreed. In the text, Vicki told Dean that she was only 15 years old. Dean responded, "You're what?! I can't believe that I had sex with a 15 year old! You told me that you were 18! You even had an adult driver's license for crying out loud! I thought that we were two consenting adults."

Dean is charged with lewd or lascivious battery, which is commonly known as statutory rape. At Dean's trial, the court ordered that witnesses would be excluded from the proceeding so that they could not hear the testimony of other witnesses. The first witness called to testify was Detective Jones. Vicki entered the courtroom and heard part of Detective Jones' testimony. When Dean's attorney noticed that Vicki was in the courtroom, Dean's attorney objected, moved to exclude Vicki from the courtroom, and moved for a mistrial. The court excused the jury, held a hearing on the motion to exclude Vicki, and took the motion for mistrial under advisement.

Detective Jones resumed his testimony. The prosecution tried to introduce testimony from Jones about Dean's invocation of his right to remain silent and Jones' response. The prosecution then tried to introduce the portion of the text conversation where Dean said: "I can't believe I had sex with a 15 year old!" Dean's attorney objected to both.

Prepare a memorandum that addresses the following:

- 1) Discuss whether, on these facts, Dean has committed lewd or lascivious battery.
- 2) Discuss how the court should rule on the objection to testimony about what Dean said to Detective Jones and Jones' response.
- 3) Discuss how the court should rule on the objection to introducing a portion of the text messages between Vicki and Dean.
- 4) Discuss how the court should rule on the motion to exclude Vicki from the courtroom during Detective Jones' testimony.
- 5) Assume the court grants the motion for mistrial. Discuss the effect, if any, that granting a mistrial would have on trying Dean again on the same charge.

SELECTED ANSWER TO QUESTION 3

(July 2019 Bar Examination)

1. Lewd or Lascivious Battery

The facts of the alleged crime are not in dispute. Dean, an 18 year old adult, had sexual intercourse in his apartment with Vicki, a 15 year old child. Dean was charged with lewd or lascivious battery, also known as statutory rape. A defendant commits statutory rape by engaging in sexual intercourse or acts with a child under the age of majority. The age of majority is 18.

If the elements of the crime do not have a scienter or mens rea requirement, it would be considered a strict liability crime. Thus, Dean would certainly be guilty, because he did in fact engage in intercourse with a child. Dean would not be able to use the defense of lack of knowledge or intent to commit the act.

Battery generally is a crime that is committed by knowingly or intentionally making unlawful or harmful contact against a person. Dean is charged with lewd or lascivious battery. Thus, Dean would have a defense if the elements of the crime require the act to have either been intentional or knowingly. Statutes that do not impose strict liability include elements of mens rea or scienter. Mens rea is the intent to commit the crime. Scienter is the requirement that the act banned by the statute be committed knowingly. Before they engaged in intercourse, Dean playfully asked to see Vicki's identification. Vicki produced false identification that apparently reflected that she was 18 years old. Dean responded that he knew she was 18, before taking her to his apartment. After, they engaged in the sexual acts, Detective Jones had Vicki send Dean a text reflecting her true age. Dean responded that he believed that she was an 18 year old consenting adult and that he could not believe he had sex with a 15 year old. Dean's defense would be that these statements clearly show a lack of intent to engage in statutory rape and/or knowledge of her true age. The prosecution would show that by asking for her ID and stating that he believed she was 18 only after seeing the fake ID, Dean either knew or was almost certain that she was underage. These two theories of the case would be put to the factfinder, either the judge or a jury, to determine the credibility of each respective theory. However, the burden would of course be on the State to prove every element of the crime beyond a reasonable doubt.

Therefore, if lewd or lascivious battery is a strict liability crime, Dean is certainly guilty. However, if the crime requires a mens rea or scienter element, Dean does have a potential defense.

2. Objection to Detective Jones's testimony

Under the Fifth Amendment of the United States Constitution, which applies to the states through the Fourteenth Amendment, defendants have the right to remain silent during custodial interrogations. In custodial interrogations, law enforcement must provide the accused with a valid Miranda warning before commencing with the interrogation. This rule applies only for custodial interrogations. The accused is in

custody if a reasonable person would believe that they are not free to leave. This belief is akin to being taken into a police station for questioning. An interrogation is any questioning by law enforcement that is reasonably aimed at eliciting any incriminating information from the accused.

Here, Detective Jones went to Dean's apartment and was voluntarily admitted inside by Dean. The detective informed him of the purpose of his questions and Dean immediately invoked his right to remain silent. Detective Jones had not yet given Dean his Miranda warnings. Dean is probably not in custody and thus the Fifth Amendment protection does not apply. He voluntarily allowed the detective into his apartment. Further, it is also not an interrogation because Detective Jones has yet to ask a question. Generally, any voluntary statement made before Miranda Warnings are admissible when made voluntarily. Because there are no due process concerns about the voluntariness of the statement, nor has Dean's Sixth Amendment right to have counsel present attached because no formal charges have been brought. Thus, the statement cannot be barred under the Fifth Amendment because it was not a custodial interrogation.

However, Dean's attorney should object that by allowing the statement in, the detective would prejudice Dean's invocation of his constitutional right. During a trial, the prosecutor is specifically barred from using a defendant's failure to take the stand or make a statement, both constitutionally protected rights, during his closing argument to the jury. It is simply too prejudicial to the constitutional rights of the accused. Dean's attorney should argue that Detective Jones cannot make reference the statement for the same reason. Thus, by allowing the statement in, Dean's Fifth Amendment right to remain silent would be violated by having his attempt to invoke it wielded against him like a sword.

Finally, although Dean's statement is admissible under the Florida rules of evidence because it was an admission by a party opponent, the minimal probative value of the statement is clearly outweighed by the unfair prejudice. Additionally, the detective's statement is inadmissible because it was hearsay--an out of court statement asserted for the truth of the matter--there is no applicable exception and thus the statement should be barred. Thus, Detective Jones's statement is clearly inadmissible and Dean's statement is probably inadmissible.

3. Objection to the text messages

Detective Jones recruited Vicki, the victim in this case, to send Dean a text message stating her true age in order to invoke an incriminating response. The prosecution wants to introduce a only portion of Dean's response which stated, "I can't believe I had sex with a 15 year old."

The same rules mentioned above regarding interrogations under the Fifth Amendment apply here. The Fifth Amendment only applies to state action, and thus normally only in a criminal case to law enforcement. However, Detective Jones is using Vicki as an agent of the state. Therefore, Dean is still entitled to Fifth Amendment rights. Dean is still clearly not in custody. Additionally, the Fifth Amendment only applies to statements made to the accused by someone the accused reasonably believes is law enforcement

or working for law enforcement. Here, he was responding to a text from the child he had recently engaged in intercourse with. Therefore, he did not know or believe he was speaking to law enforcement. Dean could argue that by sending him the text message he was coerced into replying and thus had his Fourteenth Amendment rights violated. However, his response was clearly completely voluntary. Thus, the text message did not violate Dean's constitutional rights.

But, even if the statement is admissible, under the Florida rules of evidence, if a portion of a statement is admitted, the other party is entitled to introduce the remainder of the statement out of fairness, notwithstanding any rule that would otherwise bar the admission of the rest of the statement. It is very clear that the prosecution wants to avoid admitting the portion where Dean states that he believed that Dean and Vicki were two adults who engaged in consensual sex. This is the heart of Dean's case and, if a portion of the statement is admitted, the defense must be allowed to admit the rest of the text message. This is particularly true in a case regarding sexual battery where the defendant is attempting to prove that the encounter was consensual. It would certainly violate Dean's due process rights under the Fourteenth Amendment to rule otherwise.

4. Motion to exclude Vicki from the courtroom

Vicki is the alleged victim in Dean's case. She, along with every other witness, was removed from the courtroom by the judge for the trial. In Florida, victims are guaranteed due process rights under the State Constitution with regard to the criminal proceedings to which they are a party. These rights include due process rights such as notice of all proceedings, the right to be heard at relevant crucial proceedings, and the right to be present at the proceedings. Thus, Vicki had the right to be present during Dean's trial. In this case, the court had every witness removed from the courtroom so as to not hear the testimony of other witnesses. While trials and pre-trial proceedings are open to the public in Florida, the judge does retain the discretion to sequester witnesses. However, this is countered by the victim's constitutional right to be present in the courtroom during the trial. In order for the judge to remove the victim, they must find that their presence would substantially interfere with the constitutional rights of the defendant. The judge has made no such finding in this case and there are no relevant facts to support such a finding. The victim's mere presence in the courtroom is definitely not prejudicial enough. Thus, the judge was wrong to exclude Vicki. After this order, however, Vicki re-entered the courtroom during Detective Jones's testimony and Dean's attorney objected. Because she has a constitutional right to be in the room, the judge should overrule the objection and Vicki should be allowed to remain in the courtroom.

5. Impact of the granting of a motion for mistrial

Criminal defendants have the due process right under the Fifth Amendment of the United States Constitution that they may not be placed in jeopardy twice for the same offense. This rule applies to the states through the Fourteenth Amendment. Jeopardy attaches in a jury trial when the jury panel has been sworn in. Jeopardy attaches in a bench trial when the judge commences the proceedings. It is not clear whether this is a jury trial or a bench trial, but because the trial has clearly proceeded, jeopardy has clearly attached.

Once jeopardy attaches, a defendant may not be trial again for a charge if the factfinder makes a finding that the defendant is not guilty of that specific charge. Additionally, a defendant may not face trial again on that charge if on appeal a court of appeals finds that there was insufficient evidence to support the charge. However, if the trial is either abandoned for a mistrial, the defendant can be placed in jeopardy again for the charge. Additionally, if the case is appealed and a court of appeals overturns the case for any reason other than the sufficiency of the evidence, the defendant may be trial again. Thus, if Dean is successful in moving for a mistrial because the victim was in the courtroom, the prosecution may charge him again for the same exact charges.

PART II - SAMPLE MULTIPLE-CHOICE QUESTIONS AND ANSWERS

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

The answers appear on pages 53 and 54.

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. Write your badge number in the box at the top left of the cover of your test booklet.
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.**

35 SAMPLE MULTIPLE-CHOICE QUESTIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

24. Joan is seriously injured in an automobile accident at 7:00 a.m., June 22. Sunrise on that date was 6:22 a.m. Joan brings suit against Sam, the driver of the other car involved, alleging his failure to have his headlights on caused the accident.

Sam, in support of his claim that his failure to have his headlights on was not negligent, requests that the judge take judicial notice of the fact that Section 316.217, Florida Statutes, requires the use of headlights only between sunset and sunrise. Sam did not notify Joan prior to trial that he would make this request. The court

- (A) may take judicial notice if Sam shows good cause for his failure to notify Joan of his intention to make this request, and both parties are given the opportunity to present relevant information regarding the request.
- (B) must take judicial notice, because it is public statutory law of Florida.
- (C) must take judicial notice, as it is not subject to dispute because it is generally known within the territorial jurisdiction of the court.
- (D) may not take judicial notice, because Sam failed to give Joan timely notice of his intention to seek judicial notice of this fact at trial.

25. The articles of incorporation for Number One Corporation grant to its board of directors the power to take any action as authorized by law. Which of the following actions by the board of directors must also be approved by the shareholders of Number One Corporation?

- (A) Extension of the duration of Number One Corporation if it was incorporated at a time when limited duration was required by law.
- (B) Merger of Number One Corporation into another corporation with the other corporation becoming the surviving corporation.
- (C) Changing of the corporate name to Number One, Inc.
- (D) Changing of the par value for a class of shares of Number One Corporation.

26. Husband confesses to Wife that Husband robbed Bank of \$200,000. Two years later, Husband physically abuses Wife. Wife later files for divorce and seeks custody of Child. At the hearing, Wife seeks to testify as to the robbery confession. Husband may

- (A) prevent Wife from testifying, because of the Husband-Wife privilege.
- (B) prevent Wife from testifying if the statute of limitations on robbery has expired.
- (C) not prevent Wife from testifying, because only Wife can assert the Husband-Wife privilege.
- (D) not prevent Wife from testifying, because this is a proceeding brought by one spouse against the other.

27. In a pretrial motion, the defendant argues there are no genuine issues of material fact. In support of the motion, the defendant attaches several affidavits from witnesses. Which is the correct caption for the motion?
- (A) Motion to Dismiss for Failure to State a Cause of Action.
 - (B) Motion for Judgment on the Pleadings.
 - (C) Motion for Summary Judgment.
 - (D) Motion for Directed Verdict.
28. Jill makes a will leaving all of her stocks to Lou and the rest of her estate to Beth. Several weeks later, she creates a codicil to the will that devises her jewelry to Ann. Jill and Beth have a fight and Jill mistakenly rips up the codicil rather than the will. Jill dies. Which of the following is true about the distribution of Jill's estate?
- (A) Beth receives the jewelry pursuant to the terms of the will.
 - (B) Jill's estate will be distributed as intestate property because Jill revoked her will.
 - (C) Ann receives the jewelry under the terms of the codicil.
 - (D) None of the above.
29. During Defendant's first-degree murder trial, the state calls Witness to testify. Witness testifies that Defendant was not the man she saw shoot the victim. During the investigation of the murder, Witness told prosecutor that she saw Defendant shoot the victim. This prior statement was made under oath and was recorded by a court reporter, but Defendant's attorney was not present. If the state seeks to introduce Witness' prior inconsistent statement for the sole purpose of impeaching Witness, should the court allow the prior statement to be admitted into evidence?
- (A) Yes, because any party can attack the credibility of a witness by introducing a prior inconsistent statement.
 - (B) Yes, because a prior inconsistent statement given under oath can be used by any party for any purpose.
 - (C) No, because the state cannot impeach its own witness with a prior inconsistent statement.
 - (D) No, because Defendant did not have an opportunity to cross-examine Witness at the time the statement was made.
30. TAP, Inc., has fewer than 100 shareholders. The shareholders wish to enter into an agreement pertaining to the exercise of the corporate powers or the management of the affairs of the corporation. Which of the following, if adopted by the shareholders, would be contrary to public policy and, therefore, unenforceable in Florida?
- (A) An agreement that exculpates directors from all personal liability.
 - (B) An agreement that authorizes a particular shareholder to manage the affairs of the corporation.
 - (C) An agreement that requires dissolution of the corporation at the request of one of the shareholders.
 - (D) An agreement that eliminates the board of directors.

31. In a timely post-trial motion, Defendant argued for the first time that the trial court lacked subject matter jurisdiction over the case. What action should the court take?
- (A) Entertain the motion, because Defendant can assert lack of subject matter jurisdiction at any time.
 - (B) Entertain the motion, because Defendant can assert lack of subject matter jurisdiction as long as it is raised within 10 days of the judgment.
 - (C) Refuse to entertain the motion, because Defendant did not raise lack of subject matter jurisdiction in its answer.
 - (D) Refuse to entertain the motion, because Defendant did not raise lack of subject matter jurisdiction at trial.
32. Smith and Jones had planned to form a Florida corporation that would have done business as an engine repair shop. No paperwork had been filed with the Secretary of State relating to the corporation when Smith and Jones began to purchase equipment needed for the engine repair business. Together they executed and delivered a \$10,000 promissory note to Seller in the name of Engine Repair, Inc., signed by Smith "as president" and Jones "as secretary" of that nonexistent corporation. There was no personal guaranty by either Smith or Jones on the note. The corporation was never formed.
- Seller learned that the corporation was not in existence only after the debt was not timely paid. Smith was in bankruptcy by that time and Seller sued Jones personally for the entire \$10,000. Jones moved to dismiss. In its ruling, the court should
- (A) grant the motion because Smith is an indispensable party.
 - (B) grant the motion to dismiss because Jones did not personally guarantee the note.
 - (C) deny the motion because Jones signed the note purporting to act on behalf of the corporation with actual knowledge of its nonexistence.
 - (D) deny the motion because Jones' actions effectively created a corporation by estoppel.
33. Raymond had a valid Florida will devising his entire estate to his friend, Jake. Raymond and Jake had a fight, and Raymond then executed a second valid will, devising his entire estate to charities and expressly revoking the first will. Years later, Raymond and Jake reconciled and Raymond burned the second will. Raymond later died. Does Jake inherit the estate?
- (A) Yes, because burning the second will was an effective act of revocation, reviving the original will.
 - (B) Yes, because Florida law is construed to avoid intestacy.
 - (C) No, because burning the second will was an insufficient act of revocation absent additional evidence.
 - (D) No, because revocation of the second will does not revive the first one.

34. Plaintiff filed a civil complaint against Defendant four years ago. This complaint was voluntarily dismissed three years ago. Two years ago, Plaintiff filed the complaint again and voluntarily dismissed it last year. May Plaintiff successfully file the complaint again this year?
- (A) Yes, if the statute of limitations has not run.
 - (B) Yes, if the most recent complaint arose out of the conduct, transaction, or occurrence set forth in the previous complaints.
 - (C) No, because the second voluntary dismissal operated as an adjudication on the merits.
 - (D) No, because the most recent complaint is a supplemental pleading requiring permission of the court prior to filing.
35. Mary, a widow, died in Orange County, Florida during a visit with her son, James. Mary had executed a will leaving all of her property to James. Prior to her death, Mary lived in a rented apartment in Duval County, Florida, but owned vacant land in DeSoto County, Florida. Mary also had a vehicle loan due in Dade County, Florida. In which of the following counties can Mary's will be probated?
- I. Orange County.
 - II. Duval County.
 - III. DeSoto County.
 - IV. Dade County.
- (A) I only.
 - (B) II only.
 - (C) I or II only.
 - (D) I, II, III, or IV.

ANSWER KEY FOR MULTIPLE-CHOICE QUESTIONS

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

26	(D)
27	(C)
28	(C)
29	(A)
30	(A)
31	(A)
32	(C)
33	(D)
34	(C)
35	(B)