

# **Florida Board of Bar Examiners**

ADMINISTRATIVE BOARD OF THE SUPREME COURT OF FLORIDA

## **Florida Bar Examination Study Guide and Selected Answers**

**July 2019  
February 2020**

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

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## **PART I – ESSAY QUESTIONS AND SELECTED ANSWERS**

### **JULY 2019 AND FEBRUARY 2020 FLORIDA BAR EXAMINATIONS**

#### **ESSAY QUESTIONS AND SELECTED ANSWERS**

Part I of this publication contains the essay questions from the July 2019 and February 2020 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** UESTION 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.*

# **Q** QUESTION NUMBER 1

## **FEBRUARY 2020 BAR EXAMINATION – CONTRACTS/TORTS**

Rodney is a morning show host for WLAW, a radio station that broadcasts in Dade, Broward, and Palm Beach Counties in South Florida. Rodney's regular weekday show is the top-rated radio show in the tri-county area. Two years ago, Becky, WLAW's station manager, rewarded Rodney with a five-year contract that included a \$150,000 yearly salary.

Despite Rodney's popularity, Becky frequently reprimanded Rodney about on-air statements or jokes that she thought were in bad taste. Rodney and Becky had a particularly heated confrontation after Rodney's show on Friday, June 1.

That weekend, the management of another radio station, WDEF, contacted Rodney. WDEF offered him a three-year contract with a 50% higher salary and a \$50,000 signing bonus. The offer required that Rodney start working for WDEF immediately. Rodney told WDEF that he wanted to accept the offer because he was frustrated with Becky, but he had a noncompete clause in his WLAW contract. The clause provided that for three years after leaving WLAW, Rodney could not work in any position for another radio or television station that broadcasted in Dade, Broward, or Palm Beach Counties. Upon learning of the noncompete clause, WDEF's management told Rodney: "Sign the contract and we will let the lawyers sort it out. We want you on the air Monday!" Rodney accepted, and on Monday, June 4, he began broadcasting his show on WDEF.

Becky was stunned. To make matters worse, on June 5, one of WLAW's largest advertisers notified Becky that it would no longer do business with WLAW because Rodney had left the station. Later that week, two other significant advertisers informed Becky that they were taking their business elsewhere and did not explain why. Although Becky had been in difficult negotiations with both accounts over the previous two months, she suspects that Rodney's departure was at least a partial motivation for the advertisers' decision.

Becky scrambled to find a replacement for Rodney. On June 8, she hired Jack, another well-known radio personality in the area. Upon hearing the news that day, Rodney signed on his Twitter account and wrote to his followers: "Jack thinks he can replace me on WLAW?! He's a total jerk! He drives drunk every weekend!" Jack was convicted of driving under the influence five years ago, but stopped drinking alcohol after the incident.

Becky now seeks your legal advice about WLAW's and Jack's rights with respect to Rodney's and WDEF's conduct. Prepare a memorandum evaluating the claims that WLAW could assert against Rodney or WDEF, and the claims that Jack could assert against Rodney. Your memorandum should discuss the remedies, if any, that are available to WLAW and Jack.

**SELECTED ANSWER TO QUESTION 1**  
**(February 2020 Bar Examination)**

**Memorandum**

To: Becky

From: Bar Applicant

Date: February 25, 2020

Re: Possible Claims Arising from Rodney's and WLAW's Conduct

*I. Claims WLAW May Assert Against Rodney and WDEF*

*A. Breach of Contract*

*WLAW may assert a breach of contract claim against Rodney. Generally, employment is considered at-will unless there is an enforcement employment contract. A contract is an agreement formed following an offer, acceptance of the offer, and consideration. Here, Rodney accepted Becky's offer (on behalf of WLAW) and the two entered into an agreement. As consideration, Rodney agreed to work for WLAW for a period of five years. WLAW provided return consideration by promising Rodney five years of employment and a \$150,000 yearly salary. The Statute of Frauds requires that certain contracts must be in writing and signed by the party to be charged to be enforceable. This includes agreements that cannot be completed within one year. The Statute of Fraud applies to this agreement because the contract terms cannot be completed within one year, since both parties agreed to Rodney's five year employment. Accordingly, assuming the contract is in writing, there is a valid, enforceable contract.*

*Rodney breached the terms of the contract when he quit his job at WLAW and accepted an offer with WDEF because he promised to work for WLAW for 5 years and has terminated his employment before the expiration of this time period.*

*Although Becky will likely want to require that Rodney complete the terms of his contract, a court will not award specific performance in contracts for services. This is because specific performance for services is difficult to enforce and may be considered involuntary servitude, which is unconstitutional. Becky will want to argue that Rodney's service are unique, as demonstrated by the fact that advertisers have left the station since Rodney quit. However, even where the services are unique or are to be performed by a person with unique skills or talents, the court will not award specific performance, for the reason described above.*

*Generally, a non-breaching party to an enforceable contract is entitled to compensatory damages. Where possible, a non-breaching party can recover expectation damages, which are intended to put the non-breaching party in the position she would have been in had the contract been fully performed. Here, WLAW may recover the difference between the salary they will pay Jack each year (if it is more than Rodney's salary) for the next three years – the time remaining on Rodney's contract. WLAW may also recover incidental damages, which will include those costs incurred that were*



*reasonably foreseeable in ameliorating the breach by locating a new radio personality. This might include advertisements for a new employee, costs to run a background check or similar expenses. There are no incidental damages that we know about, but if any exist, WLAW could recover these damages.*

*WLAW will also argue it should receive consequential damages. Consequential damages are those damages arising out of the breach that were reasonably foreseeable at the time of the contract that the breaching party should have known were reasonably foreseeable as a result of the breach, including business losses. Here, WLAW has lost profits from advertising. WLAW can show that the one of WLAW's largest advertisers will no longer do business with the station because Rodney left, since that the reason the advertiser gave for leaving. Thus, WLAW can likely recover consequential damages for this loss, if they can show with reasonable certainty the amount of lost profits resulted from losing this advertiser during the three-years remaining on Rodney's contract. WLAW may not be able to recover additional consequential damages with respect to the other two advertisers. The argument for recovery with respect to these lost profits is weaker because Becky had already been in difficult negotiations with these advertisers for two months prior to Rodney's breach. Although she suspects that Rodney's departure was a partial motivation for the advertiser's decision, WLAW will need to show this is the case. If this was a partial motivation, the court may award some consequential damages recovery with respect to these lost profits.*

*Finally, WLAW will want to enforce the non-compete clause in Rodney's contract. Although restrictions on an individual's ability to be employed are disfavored. Non-complete clauses are enforceable, at least to a limited degree. The court will closely scrutinize the non-compete clause and will enforce the clause only if (i) the non-complete clause protects a legitimate business interest; (ii) it is no more restrictive than necessary to protect that interest; and (iii) it is sufficiently limited in scope and duration. Absent a showing of unique circumstances, courts will not enforce non-compete clauses for more than two years. In Florida, there is a presumption that non-compete clauses for a duration of less than 6 months are reasonable and that non-compete clauses of more than 3 years are not enforceable.*

*Here, the non-compete clause protects a legitimate business interest – direct competition from Rodney, who is a well-known radio personality in the area. The fact that advertisers would leave, shows how unique his personality and radio host abilities are. The clause only restricts Rodney from working in another position in radio or television broadcast. Rodney may argue that television broadcast does not directly compete with radio broadcast and therefore this is unenforceable as overly broad. However, a court will likely find this is sufficiently limited with respect to the work Rodney is prohibited from doing because it is the same type of work. The scope of location of the clause will likely be found sufficiently limited since Rodney is only prohibited from working in the counties where WLAW broadcasts. The main issue is whether the clause is sufficiently limited in duration. Three years may be acceptable to the court. WLAW will argue this was the remaining time on Rodney's contract anyway, and is of a sufficiently short duration. Rodney would argue that being forced to relocate or not work for 3 years is not sufficiently limited in duration. However, a court will likely enforce the non-compete and enjoin Rodney from working for WDEF, although it may*

*limit the duration to a shorter time period.*

## *B. Intentional Interference with Business Contract*

*WLAW may also have a claim against WDEF for intentional interference with business. A claim for this tort requires (i) an existing contract; (ii) the defendant knew or had sufficient knowledge to know with reasonable certainty that the contract existed; and (iii) intentional interference with the contract that causes the other party to breach. Here, there was an existing contract with Rodney, WDEF knew the contract existed, as Rodney told WDEF management that he had a non-compete clause in his current contract with WLAW, and WDEF blatantly interfered with the contract when WDEF's management told him to sign the contract anyway and the lawyers could sort out the non-compete issue later. Note that the management's actions will be imputed to WDEF under the theory of vicarious liability because the manager was an employee of WDEF at the time the tortious interference evidenced by the statement was made and he was acting within the scope of his duties as WDEF management). Thus, WLAW can likely recover economic damages resulting from WDEF's intentional interference with its business contract as well. This would include losses reasonably foreseeable from the tortious interference, including higher salary paid to replacement and lost profits, as described above.*

## *II. Jack May Assert a Claim for Defamation Against Rodney*

### *A. Defamation*

*Defamation is an actionable tort which arises when the defendant (i) makes a defamatory statement; (ii) of or concerning the plaintiff; (iii) and there is publication of the statement.*

*A defamatory statement is a statement of fact that either on its face negatively reflects on the plaintiff or where the statement would lead a reasonable person to infer a negative defamatory fact about the plaintiff. Opinions are not actionable as defamatory statement. Thus, Rodney can successfully argue that his comment that Jack is a jerk is not actionable because it is merely an opinion. However, drunk driving would be considered something that would negatively harm one's reputation. Rodney thus made a defamatory statement when he tweeted that Jack drives drunk every weekend. Rodney may argue the defense of truth. Truth is a complete defense to defamation. However, Rodney's statement that Jack drives drunk every weekend is much broader than saying he has a single, five-year old conviction for drunk driving. Further, Jack has stopped drinking since the incident so saying he continuously drives drunk and at present time is not truthful. Thus, there is a defamatory statement about Jack (the plaintiff).*

*Rodney published the statement by communicating it to individuals other than Jack. This includes all of Rodney's twitter follows and, if his account is public, all of the public who can access the tweets.*

*As a general rule, damages need not be shown to make out a prima facie case for libel, defamation published in a permanent form (e.g. in a writing or video). Damages must be proven for slander, spoken publication of defamation statement, unless the slander is*

*per se actionable because it meets one of the slander per se definitions. Slander that negatively reflects on plaintiff's business or employment is slander per se. Here, the tweet was electronically published in a permanent form on the twitter platform. Thus, this is libel and no damages need be shown to have a cause of action.*

*Generally, falsity of the statement and fault (i.e., some degree of culpable negligence or intent) need only be proven if the defamatory statement concerns a matter of public concern or a public figure. Here, it could be argued Jack is a public figure because he is radio personality, and a court will likely find this to be the case. Thus, Jack must also show the defamatory statement is false. He can do this by presenting evidence supporting the fact that he no longer drinks and therefore, is not drinking and driving every weekend. Since Jack is a public figure, Jack must show Rodney made the statement with actual malice – knowledge of its falsity or a reckless disregard of its truth or falsity. We do not have enough information to determine Rodney's knowledge. Thus, we would need more facts to determine probability of success on this element of the defamation claim.*

*Assuming Jack can show fault, he can recover for both economic damages such as lost profits. Generally non-economic damages are not awarded for defamation since the harm sought to protect is economic.*

#### *B. Intentional Infliction of Emotional Distress*

*Intentional Infliction of Emotional Distress requires (i) extreme and outrageous conduct (exceeds all bounds of decency in society); (ii) knowledge or reasonable expectation that the conduct would result in emotional distress to plaintiff; and (iii) plaintiff must actually experience emotional distress. It is unlikely Rodney's tweet, which is mere words on a platform where people express their views, opinions, and argue frequently would be considered extreme and outrageous. Moreover, although Rodney may have known or could have reasonably expected this to cause Jack emotional distress, we do not have any facts regarding whether Jack did experience emotional distress.*

## **Q** QUESTION NUMBER 2

### **FEBRUARY 2020 BAR EXAMINATION – TORTS/ETHICS**

On the evening of November 10, Val and her husband, Fred, stopped by a hardware store, Toolmart, to buy some paint for their living room. As they turned into the Toolmart parking lot, it started raining heavily. There were only a few parking spots open at the back of the lot. Val, mindful that Fred had been experiencing pain in his left knee, dropped Fred off at the front of the store while she parked the car. Fred sometimes used a cane for additional support, but decided that he did not need the cane at the store and left it in the car.

Fred waited for Val inside the store, and noticed several drenched shoppers running in from the rain and into the store. When Val arrived, Fred warned her to be careful because the floor might be wet. They spent some time selecting the paint color, paid for it, and were at the door to walk out of the store when Fred remembered that they needed some lightbulbs. They agreed that Val would go get the car while Fred went back in the store to buy the lightbulbs. Just after re-entering the store, Fred slipped on the accumulated rainwater, which aggravated the injury to his left knee.

Toolmart had hired a local company, Greenscape, to redo some landscaping in the parking lot. The parking lot had long paved rows of parking spots, with landscaped islands between each row. To help market the company, Greenscape put up small wooden advertising signs with its logo and web address in the landscaped islands between the parking rows. The signs were two feet high and two feet wide and brightly colored. Greenscape put up the signs when it began the project on November 5. Greenscape did not ask Toolmart for permission to put up the signs.

While the rain persisted, Val ran for the car. Because of the time of day, darkness began to set in. Val noticed that some of the lights in the parking lot were not turned on. She left the sidewalk and cut across one of the unlit landscaped islands using a worn footpath that shoppers often used to take a shorter route to their cars. In her hurry, she did not see a Greenscape advertising sign and tripped on it. Val severely hurt her ankle, and has been unable to work since the incident.

Val and Fred come to you for advice on whether they have any claims against Toolmart or Greenscape for their injuries. They offer to hire you and allow you to take 50% of any recovery as your fee if you agree to loan them \$2,500 to assist with their living expenses while Val is unable to work. They also want you to advance the costs and expenses of the litigation because they are unable to pay any money out of pocket to finance the lawsuit.

In addition, your law partner, Eddy, is currently litigating another personal injury case against Toolmart. Eddy told you that Toolmart made a lucrative settlement offer yesterday to resolve the case, and that Eddy has not yet reached the client to discuss

the offer. Toolmart told Eddy that a material term of the settlement offer is that your firm must agree not to bring any more lawsuits against Toolmart.

Prepare a memorandum that discusses:

1. Any claims that Fred or Val can assert against Toolmart or Greenscape;
2. Any likely defenses that Toolmart or Greenscape may raise; and
3. Any ethical issues presented by the representation terms proposed by Val and Fred or the settlement offer in Eddy's case.

## **SELECTED ANSWER TO QUESTION 2**

**(February 2020 Bar Examination)**

*To: Val and Fred*

*From: Associate*

*Re: Potential Premises Liability Claims*

### **Generally.**

*All of these actions fall under the topic of torts, specifically negligence. The elements of a claim for negligence are duty, breach, causation, and damages. A negligence claim based on a property owners liability for people using the owners property is a premises liability claim. An owner of property in Florida is responsible for ensuring the reasonable safety of its visitors.*

*The standard of care owed to a visitor depends on which type of visitor they are. Invitees are owed the highest duty of care. A premises owner has a duty to reasonably inspect the premises, warn of any unknown dangers, and protect against known dangers to invitees. Licensees are owed a lesser duty of care, and known or unknown trespassers even less. The only duty owed to an unknown trespasser is not to intentionally cause the trespasser harm. Licensees are owed the duty to warn of known hidden defects.*

*A duty can arise from a number of different relationships. Duties can be contracted for, they can be statutory, or can arise from a specific type of relationship, such as parent/child or teacher/student. As mentioned above, the duty owed to Val and Fred by Toolmart is that owed to a business invitee. A duty to a business invitee only goes to the extent of the invitation. If Fred were to wander into an employees only area and become injured he would likely not be able to bring a claim against Toolmart as he would have exceeded the scope of the invitation.*

*A duty can be breached in a variety of ways. Breach occurs when the person who owes the duty fails to competently adhere to the duty.*

*Causation includes the but for and the proximate cause. The but for cause shows that the injury would not have occurred but for defendants negligence. The proximate cause shows that the defendants negligence was the actual cause of the plaintiffs injuries.*

*Damages must be shown to complete a negligence action. Plaintiffs are entitled to recover for their actual damages, future damages and medical care, and pain and suffering. Attorneys fees can be granted based on proposals for settlement or fraud or misconduct during litigation.*

*A claim for negligence may be brought by the person who was injured. If the negligence caused the death of the defendant the defendants next of kin may bring an action for wrongful death.*

## **Fred v. Toolmart**

*Fred can bring an action for negligence against Toolmart based on his slip and fall. Fred slipped due to an accumulation of rainwater. As mentioned above, Toolmart had a duty to reasonably inspect and warn its customers of known dangers. When Fred first entered the store it was raining and he noticed several drenched shoppers. This goes to show that the store was likely on notice that it was raining outside and that water could reasonably accumulate in front of the front door. Florida courts have held various time limits a condition must exist before constructive notice is imputed on the premises owner, but these facts show that it would be reasonable to expect Toolmart to have knowledge of the wet floor. The failure to warn its customers of the wet floor or the failure to remove the water from the floor rendering the floor safe and dry was a breach of Toolmart's duty to business invitees, including Fred.*

*The wet water on the floor was the but for and proximate cause of Fred's injuries. He would not have slipped but for the water in the floor, and his injuries arose directly from that occurrence. The damage Fred suffered was the aggravation of an injury to his left knee.*

*Fred can claim damages based on the aggravation of his knee injury. Any further treatment he required could be covered. Fred's line of work is not mentioned but if he was employed at the time of the incident or capable of obtaining employment, and this injury prevented him from obtaining employment, he could attempt to collect damages for loss of future earning capacity. If he was employed at the time and the injury caused him to miss work he could pursue lost wages damages. Many plaintiffs also have an element of pain and suffering to their claims that they can seek recovery for. Depending on their age and previous relationship, Val may be able to recover for loss of consortium if the injury prevented Fred from participating in the intimate activities of married couples.*

### *Toolmart Defenses*

*Florida adheres to the open and obvious doctrine. This doctrine states that a premises owner will not be liable to an plaintiff for an injury caused by a condition that was so open or obvious to the plaintiff that the plaintiff should have used due care to avoid the accident. Toolmart will have a strong open and obvious argument here.*

*Many companies have policies where they will put out a wet floor sign at the first sign of rain, especially in Florida where this type of weather is common. If there was a wet floor sign Toolmart can argue that Fred was on notice of the slippery floor, and therefore Toolmart should not be liable for his injuries. There is a plethora of evidence Toolmart can point to impute knowledge onto Fred in the absence of a wet floor sign. Fred and Val knew it was raining heavily when they entered the parking lot, Fred noticed several drenched shoppers running into the store from the rain, and Fred warned Val of the wet floor. If Toolmart is able to prove any of these statements or observations Fred's recovery will likely be reduced.*

*Fred's damages will also be reduced because of the fact he failed to use his cane. Fred used a cane for mobility, but made the conscious decision to forego the use of his assistive device when entering Toolmart. The failure of Fred to use this assistive device will reduce his recovery.*

*Toolmart can attempt to reduce their damages due to Fred's previous knee injury. They will first argue that the slip and fall was not the proximate cause of Fred's knee injury because the injury was preexisting. If Fred can show that the injury worsened after the slip and fall or the slip and fall delayed his recovery he will still be able to recover although the injury was preexisting. Expect the defense to focus on the preexisting injury during the damages portion of the trial to attempt to reduce Fred's recovery.*

*Florida is a pure comparative negligence jurisdiction. Toolmart's liability will be reduced by whatever percentage of fault the finder of fact attributes to Fred. Based on his lack of use of his cane, the open and obvious condition, and his prior injuries the percentage of fault imputed on Fred will likely be high.*

*A motion to dismiss can be filed by Toolmart in an attempt to remove this case from litigation early on. There is a valid open and obvious argument that would completely dissolve Toolmart of any liability. As we are potentially representing Val and Fred we should begin to work on a response to this anticipated motion to dismiss as the motion to dismiss has a decent chance of prevailing based on the facts at hand.*

### **Val v. Toolmart/Greenscape**

*A premises owner has a duty to provide for the reasonable safety of their visitors. This duty cannot be contracted out or delegated to a third party, including a third party contractor like Greenscape.*

*Val will need to prove the elements of negligence to prevail in an action to recover for her damages. She will be able to show that Toolmart or Greenscape owed her a duty of reasonable care while she was in the parking lot. Toolmart or Greenscape breached that duty by failing to properly light the parking lot and by placing hazardous signs in a walkway. The Greenscape advertising sign was the but for and proximate cause of her injury. She would not have tripped but for the sign and her ankle injury was caused by that trip and fall. Val is also able to prove damages based on the severe injury to her ankle.*

*Damages that Val can recover include lost wages and loss of future earning capacity. She will also be able to recover her medical bills that she incurred as a result of her treatment. There is a right of subrogation for collateral sources in Florida, so her recovery, and that of Fred, will be reduced by the amount of the bills which were paid by that collateral source, which will be paid to said source.*

### **Toolmart/Greenscape Common Defenses**

*While Toolmart and Greenscape will have differing positions at points of this litigation, they will have a few common defenses to assert against Val. One of those defenses is that the condition was open and obvious. Val was in the parking lot during the evening,*



*and noticed darkness had set in and that a few of the lights were out. Defendants will argue that this shows Val knew of the condition which caused her injury, the darkness, and had a duty to avoid that condition. Val will push back on this defense, arguing there was no other way for her to get to her car, and that she used a worn footpath. This worn footpath, while not a paved sidewalk, is a right of way used commonly by customers of Toolmart. This is sufficient to put Toolmart on notice that the path is used by customers and therefore Toolmart had a duty to protect its customers from dangers on the path. As for the darkness, Toolmart would also have constructive notice of the lights that are out. The employees likely have to walk past the lights to enter the store, and the parking lot is an area under the control of the premises.*

*The defendants will likely be able to point to Vals knowledge of the darkness to reduce her recovery due to her comparative fault. Val should have used more care when walking at night, and should have stayed on the marked footpaths instead of straying into the worn footpath in the island. As mentioned above Florida is a pure comparative fault jurisdiction, meaning Vals recovery will be reduced by her percentage of the fault.*

#### *Toolmart Defenses*

*Toolmart will attempt to impute all liability onto Greenscape. Greenscape was hired to redo the landscaping in the parking lot, and therefore Toolmart will argue that they are the ones who are responsible for maintaining the area and ensuring the safety of patrons in that area.*

*Toolmart will also argue that it did not have notice of the dangerous condition, the signs, because it did not give Greenscape permission to put in the signs. Greenscape will push back on this by arguing the signs should have been obvious to Toolmart at some point in the five days between their installation and the incident due to their size and bright colors.*

*Under the Slavin doctrine, a subcontractor in a case like this will only be liable for latent defects. A latent defect is one that would not be found through an ordinary investigation by the property owner. This would be something like a problem with the foundation that causes a sink hole to suddenly open up. These signs are a patent defect and would not entitle Toolmart to any protections under Slavin.*

#### *Greenscape Defenses*

*Greenscape will argue that Toolmart has a nondelegable duty to provide for the safety of their customers. Toolmart will push back because the signs which caused the injury were not approved by Toolmart. Greenscape will argue that the signs were on the premises for five days and were brightly colored, therefore Toolmart had constructive notice of the presence of the signs.*

#### **Ethical Issues**

*Florida lawyers are bound by the Rules of Professional Conduct. Lawyers are expected to conform with these standards in their personal and professional lives. Violation of*

*these rules could result in discipline from the Florida bar including public admonishment, suspension from the bar, and expulsion from the bar.*

### *Representation Terms*

*The terms of the representation proposed by Val and Fred are unconscionable. A 50% contingent fee is too high. Contingent fees should generally be set around 30% unless it is a particularly complicated case or area of law. As part of this generous contingent fee proposal Val and Fred also want me to loan them \$2,500 for living expenses. A lawyer is not allowed to lend their clients money except in specific circumstances as discussed below. Loaning a client money for living expenses is not one of those specific circumstances.*

*One circumstance in which a lawyer can lend money to a client is when they are advancing the costs and expenses of the litigation. This allows the courts to remain open to everyone regardless of financial status by allowing a lawyer to front the fees for a client whom the lawyer believes has a valid case. I would be allowed to advance the fees, but not the money for living expenses.*

### *Settlement Offer*

*The fact that my partner Eddy is litigating a personal injury case against Toolmart as well does not worry me in and of itself. Two law partners are able to work on separate cases against the same defendant and there is no conflict of interest.*

*Eddy received a settlement offer from Toolmart from his client but has not informed his client. A lawyer has a duty inform his clients of all settlement offers.*

*Toolmart is attempting to enter into a contract with our firm to stop us from bringing lawsuits against Toolmart. This would work as a bar to access to the courts, which is a fundamental right granted in Florida. The settlement agreement would also be unfair to Eddy's client, in that there is a benefit conferred to Toolmart by the firm in the context of a client's case. Eddy should not impute the firms benefit into a settlement offer for a client.*

## **Q** QUESTION NUMBER 3

### **FEBRUARY 2020 BAR EXAMINATION – FLORIDA CONSTITUTIONAL LAW/PROFESSIONALISM**

Fifteen years ago, John was convicted of a felony sex offense and sentenced to five years in prison followed by a period of probation. Seven years ago and after satisfying all conditions of his sentence, John moved into an apartment building in Central City, a Florida municipality. John chose the apartment building because it was and remains the only apartment building in Central City that offers housing John can afford.

While living in Central City, John has been an exemplary citizen. Indeed, Central City's local newspaper recently published a story in which County Judge Jeff Juris commended John's community service on behalf of disabled veterans. John told friends after the article appeared that he intended to capitalize on his recent publicity and become a Central City Commissioner. The Central City charter does not set forth any qualification or eligibility requirements for city commissioners.

Two weeks ago, the Central City Board of Commissioners properly enacted a new ordinance ("Ordinance") for the expressed intent and purpose of protecting its school-aged children from harm. The Ordinance:

- a. makes it unlawful for any person ever convicted of a sex offense to reside within 500 feet of a school;
- b. makes violation of the Ordinance punishable by up to 60 days in jail and a \$1,000.00 fine;
- c. directs Central City to pay at the end of each calendar year any fines collected to those schools which had sex offenders arrested within their Ordinance-protected proximities; and,
- d. requires, in addition to any other conditions of pretrial release, arrested offenders to post a surety bond in an amount equal to \$2,000 times the number of months they were incarcerated for the underlying sex offense(s).

John's apartment building is 500 feet from a faith-based school that is affiliated with a local church. When John exited his apartment building yesterday morning, a Central City police officer arrested John for residing too close to the elementary school. Judge Juris has been assigned to John's case.

John immediately retained you to represent him in his criminal case. John told you that if he were forced to comply with the Ordinance, he would be homeless. John, who has become friendly with Jeff Juris through his community service work, gave you Judge Juris's personal telephone number and tasked you to call Judge Juris about John's case.

Prepare a memorandum addressing the following:

1. What arguments might you make that the Ordinance violates the **Florida** Constitution? Do not discuss whether the Ordinance may be preempted by a Florida Statute.
2. Discuss any legal barriers to John serving as a member of the Central City Board of Commissioners; and
3. Discuss any issues of ethics or professionalism raised by John's direction that you contact Judge Juris.

## **SELECTED ANSWER TO QUESTION 3**

**(February 2020 Bar Examination)**

### *I. Arguments that Ordinance Violates Florida Constitution*

*The Florida Constitution provides that no one shall be deprived of life, liberty, and property without due process of law. Florida's Constitutional requirements track those of the Federal Constitution. John's procedural due process rights were violated. Here, John had a property interest in his apartment building. Action by the government (City ordinance) resulted in John not being able to make use of his property. Aside from the political process, John was afforded no notice, no hearing, and no decision by an impartial decision maker before his property was, in essence, taken from him (he could no longer live there). It is also notable that John cannot afford to live anywhere else, so he has no choice but to live in these apartments; making the government taking of his property that much more apparent. John also explicitly stated to Attorney that he would be homeless if he were not permitted to live in his apartment. If the government action is considered a taking, John is entitled to compensation for the government's taking of his property (the fact pattern does not specify whether he owns or rents his apartment, but if he owns it, he may file an inverse condemnation proceeding).*

*In addition to a procedural due process concerns, there is a concern here about the government placing an inordinate burden on John's property: government action resulted in a permanent deprivation of John's reasonable expected use of his property. Florida does allow recovery when the government places an inordinate burden on property. Alternatively, damages may be awarded when government action places a burden on the property such that a property owner bears an disproportionate burden such that the public at large should be expected to bear more of that burden. Both are present here, and if John owns his apartment, the government action may be deemed to be an inordinate burden and John would be entitled to recompense.*

*There is also an equal protection clause issue presented by the ordinance. That is, the ordinance treats sex offenders differently than it treats other people. Since sex offenders are not members of a protected class, the ordinance will be subjected to rational basis review: the ordinance will be upheld if it is rationally related to a legitimate government objective. Here, the ordinance appears to be geared towards the protection of school-aged children, which is a legitimate government objective. Additionally, the ordinance is rationally related to that interest. It punishes sex offenders for living near a school. John would not likely be successful in challenging the ordinance on equal protection grounds.*

*John's substantive due process rights may be violated by the ordinance. John has a right to life, liberty, property, and privacy and the government may not deprive a person of these rights without meeting the appropriate test. Here, John's right to privacy (which is specifically provided for under the Florida Constitution as a fundamental right), was likely not violated because sex offenders can validly be required to register with a sex offender registry, and his conviction is a matter of public record.*

*John's liberty right, though, was likely violated. The right to liberty is a fundamental right, and any government regulations or laws or ordinances that infringe upon this right are subject to strict scrutiny. Under strict scrutiny, the burden is on the government to establish that the ordinance is necessary to serve a compelling government interest. The government must establish that the ordinance is the least restrictive means of accomplishing its objective under the circumstances. Here, the State can probably prove the interest served by the ordinance is a compelling one: the protection of school-aged children from sexual predators. The State will fail, though, in establishing that the ordinance is the least restrictive means of accomplishing this objective. The ordinance punishes sex offenders, regardless of how long ago their sex offense was, punishes them regardless of whether they have been found guilty beyond a reasonable doubt, and requires them to post an excessive bond. The ordinance may fail on substantive due process grounds.*

*The ordinance is also problematic because it sets excessive bail. The Florida Constitution prohibits setting excessive bail. In fact, everyone jailed for an offense other than a capital or life felony has a right to pretrial release so long as they do not pose a risk of flight or failing to show up for their court date, they do not pose a risk to the judicial process or to the community at large. The bond condition in this ordinance requires a mandatory surety bond of \$2,000 times the number of months a person was previously incarcerated, which is excessive. The bond is not related to a person's flight risk or their danger to the community. The bond requirement is also not related to a person's ability to actually post the bond. The bond would therefore result in more indigent and poor people being imprisoned than people who are not indigent or poor. The bond provision would this violate the Florida Constitution as an excessive bond.*

*Additionally, the bond requirement is unconstitutional on equal protection grounds. Although wealth is not a suspect class, and the requirement will therefore be analyzed under the rational basis test with the burden on John, John may be able to prove that the bond condition is not rationally related to a legitimate government objective. That is, requiring a surety bond at a cost prohibitive amount is not rationally related to the objective of seeing that school-aged children are not going to school next to sex offenders.*

*The ordinance will also likely be unconstitutional under the ex post facto clause. The ordinance punishes activity that occurred before the ordinance was enacted or before people had a reasonable chance to become aware of the requirements of the ordinance. That is, the ordinance punishes living within a certain distance of a school, with no provision that the ordinance could only be enforced for violations which occurred after the ordinance was enacted.*

*To be properly enacted, legislation must contain a short and simple statement of its purpose, contain only one subject matter, must contain a description of the law that is easy to understand, and must contain enacting language indicated that is enacted by the Florida Legislature under the authority of the State of Florida. Similar requirements may be applied to the Board of Commissioners and their ordinances. The ordinance in this case would probably meet basic requirements.*

*The fact that John was arrested for living near a faith-based school that is affiliated with a local church may raise an issue regarding whether the government is impermissibly entangled with religion. The Florida Constitution provides similar protects as the Federal Constitution does in this regard. The ordinance will be examined to determine whether it is directed toward religion and has a secular purpose, whether the government is entangled with religion, and whether the ordinance furthers or inhibits religion. Since this ordinance is not directed toward religious schools in particular, and does not advance or inhibit religion, the first two prongs are not problematic. Under the third prong, however, the ordinance as applied to John's case does involve government entanglement with religion. Since there is a clause in the ordinance requiring payment of any fines collected from sex offenders living in the area of a particular school to be paid to that school, the result in John's case will be that John's fines will be paid directly from the City to the faith-based school affiliated with a local church.*

*The government is not prohibited from spending government funds on faith-based schools so long as the government's spending is made not only to faith based schools, the spending is not for the purpose of inhibiting or advancing religion, and the government is not entangled with the religion. For example, it is permissible for the government to provide books to faith based schools as part of a program where books are provided to all schools, regardless of faith or secular nature. Here, the ordinance will benefit a faith-based school, but the ordinance also does not involve excessive government entanglement with religion. The benefit provided to the faith-based school seems to be merely incidental to the secular purpose of the ordinance.*

*The ordinance also acts as a double jeopardy violation. The ordinance results in John being punished twice for the same offense. The Florida Constitution prohibits punishment twice for the same offense. Florida specifically permits punishing someone twice under different crimes if the legislature manifested an intent to provide for separate punishments, so long as the crime does not constitute a lesser included offense, does not have all the same elements, and is not merely a different degree in severity of the same offense. This ordinance punishes sex offenders a second time, after they have been previously convicted of a sex offense, for merely being a sex offender. The former conviction for a sex offense and the latter conviction for a sex offense under this ordinance take place in separate trials and therefore would be subject to double jeopardy concerns. Additionally, the crimes contain the same elements – the elements of sex offense. However, under the Blockburger test, the ordinance will likely be found to contain an element the sex offense crime does not: living with a certain distance of a school.*

*The ordinance is also overly broad in terms of "protecting school-aged children from harm." The ordinance does not specify the harm it protects children from or provide requirements that tailor the ordinance toward that objective, if the ordinance is overly vague, it is unconstitutional because it will punish just as much lawful behavior as it will unlawful behavior.*

*Finally, the provision that sets bond could be viewed as a usurpation by the legislative body of a function of the judiciary. The judiciary is responsible for setting bond and making the determination of whether someone charged with a criminal offense is entitled to bond pending trial. By setting a mandatory bond in this statute, the City infringed on the judiciary's powers, in violation of the requirement that each body of government (legislative, executive, and judiciary) have separate powers that may not be infringed by the other body.*

*The ordinance also impermissibly created a criminal infraction. Commissioners may not establish crimes; crimes may only be declared by the State legislature. Municipalities may legislate that certain things be considered ordinance violations, but they may not be punishable by imprisonment. The fact that John was arrested while walking out of his house also weighs in favor of a finding that the punishment and bond provisions of the Ordinance go beyond being merely an ordinance and have in fact legislated the creation of a new crime. Since legislating for whether something is a crime or not is a function of the legislature, this ordinance violated the Florida Constitutional requirement that certain powers be exercised only by certain arms of the government.*

## *II. Legal Barriers to John serving on Central City Board of Commissioners*

*Florida does not permit someone who is a convicted felon to serve in government office. To be eligible for government office, an individual must not have been convicted of a felony, must be at least 18 years old, must be a resident of Florida, and must not be incompetent. John is a convicted felon, and notwithstanding the fact that the City charter does not have any provision excluding convicted felons of eligibility, John will not be able to be a commissioner unless his civil rights are restored. There is no indication that John has had his civil rights restored, so it is unlikely John will be permitted to serve on the Commission by virtue of being a convicted felon.*

## *III. Ethics Issues Raised by John's Direction to Contact Judge Juris*

*It is unethical for an attorney to paint the picture that an attorney may exercise any kind of undue influence over a judge in a matter, whether that be through personal influence or threats or anything else. Judges must remain entirely impartial in the cases they handle. It is also impermissible to capitalize upon personal relationships a party may have with a judge in order to further their case.*

*If the judge cannot be impartial, for whatever reason, they have an obligation to recuse themselves from the case. In fact, Judge Juris' relationship with John may result in Judge finding that he cannot be impartial and unbiased in the matter anyway, and removing himself from the case. If attorney were to reach out to Judge Juris about this case, Attorney would be breaching the ethical duty which prohibits attorneys from attempting to influence a judge's decision in a case.*

*Additionally, in a pending matter, communicating with a judge assigned to the case without opposing counsel present for the conversation, when that communication is about the case, is an impermissible ex parte communication. Any conversations between Attorney and the judge in this case, without opposing counsel present for the conversation, would be an impermissible ex parte communication.*



*Even though Judge Juris is not yet assigned to John's case, there is a possibility he might be. Attorneys, as well as judges, should take care to avoid the appearance of impropriety. It would appear to be improper for the attorney of a potential party to personally contract a judge who will likely be assigned to a case in order to curry favor or to advocate, ex parte, for a particular outcome in the case. This would be an ethical violation on Attorney's part.*

## **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 54 and 55.

## **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)