

Florida Board of Bar Examiners

ADMINISTRATIVE BOARD OF THE SUPREME COURT OF FLORIDA

Florida Bar Examination Study Guide and Selected Answers

**July 2013
February 2014**

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

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TABLE OF CONTENTS

TABLE OF CONTENTS	i
PART I – ESSAY QUESTIONS AND SELECTED ANSWERS	1
ESSAY EXAMINATION INSTRUCTIONS.....	2
JULY 2013 BAR EXAMINATION – CONTRACTS/UCC Art. 9.....	3
JULY 2013 BAR EXAMINATION – FLORIDA CONSTITUTIONAL LAW/ETHICS ...	9
JULY 2013 BAR EXAMINATION – TRUSTS/ETHICS	14
FEBRUARY 2014 BAR EXAMINATION – FAMILY LAW	20
FEBRUARY 2014 BAR EXAMINATION – FLORIDA CONSTITUTIONAL LAW	25
FEBRUARY 2014 BAR EXAMINATION – REAL PROPERTY/FLORIDA CONSTITUTIONAL LAW/ETHICS	30
PART II - SAMPLE MULTIPLE-CHOICE QUESTIONS AND ANSWERS.....	35
MULTIPLE-CHOICE EXAMINATION INSTRUCTIONS	36
23 SAMPLE MULTIPLE-CHOICE QUESTIONS	38
ANSWER KEY FOR MULTIPLE-CHOICE QUESTIONS	46

PART I – ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2013 AND FEBRUARY 2014 FLORIDA BAR EXAMINATIONS

ESSAY QUESTIONS AND SELECTED ANSWERS

Part I of this publication contains the essay questions from the July 2013 and February 2014 Florida Bar Examinations and one selected answer for each question.

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

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

ESSAY EXAMINATION INSTRUCTIONS

Applicable Law

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

Acceptable Essay Answer

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

Q QUESTION NUMBER 1

JULY 2013 BAR EXAMINATION – CONTRACTS/UCC Art. 9

Developer planned to construct a shopping center in central Florida and solicited bids from contractors. Contractor desired to bid on the project and sent an email to various subcontractors soliciting bids. The e-mail instructed that all subcontractors' bids must be delivered in writing to Contractor's office by 3:00 PM on May 15.

At 2:45 PM on May 15, Pete Paver hand-delivered a bid for asphalt paving work in the amount of \$200,000. Paver's bid was the lowest and Contractor used it in computing its final bid. The next lowest bids were \$315,000 and \$325,000. Later that day, Paver realized he had made a clerical error in calculating his cost of materials and immediately called Contractor to advise he was changing his bid to \$300,000. Contractor advised Paver it was too late as the final bid had already been submitted. Paver refused to perform the work and Contractor was forced to use the next lowest bidder.

Developer awarded the general contract to Contractor to build the shopping center for \$5 million. The general contract provided: "This contract constitutes the parties' entire agreement. This contract cannot be amended, modified, or added to in any respect except by a writing signed by both parties."

During construction, a sink hole opened up under the property and caused a portion of the partially completed structure to collapse. Neither Contractor nor Developer had sink hole insurance. Contractor estimated it would cost \$1 million to replace the damaged portion. Contractor called Developer. During their phone conversation, Contractor stated that he would not finish the project unless Developer promised to pay Contractor an additional \$1 million. Developer agreed.

In the meantime, Paver is short on cash. On July 1, Paver obtained a \$5,000 loan from his Bank. Paver signed a promissory note and orally agreed to give Bank a security interest in his deposit account at Bank. On August 1, Paver borrowed \$10,000 from Lender. Paver signed a security agreement giving Lender a security interest in Paver's "equipment, whether now owned or hereafter acquired." Lender filed a proper financing statement against "equipment" on September 10. On October 1, Paver wrote a check on his deposit account at Bank for the purchase of a new grader for his business. Bank discovered the transaction and filed a proper financing statement against Paver's equipment on October 15. Paver defaulted on both loans.

Thirteen months after breaking ground, Contractor completed the shopping center. Developer refused to pay Contractor any amount over \$5 million. Contractor comes to the law firm where you are a law clerk. Contractor wants to sue Developer. Contractor also wants to sue Paver for \$115,000, the difference between the amount of Paver's original bid and the amount Contractor had to pay for the paving work.

A senior partner at your firm asks you to draft a memorandum that discusses the following issues:

1. Contractor's rights, if any, against Developer and any defenses.
2. Contractor's rights, if any, against Paver and any defenses.
3. Any rights of Bank and Lender in the grader purchased by Paver.

SELECTED ANSWER TO QUESTION 1 **(July 2013 Bar Examination)**

Contractor v. Developer:

Contractor may want to bring a breach of contract action against Developer. To be enforceable, the contract must have an offer, an acceptance, consideration, and no valid defenses to formation or performance.

Developer solicited bids for contracts. This was an invitation to send in an offer. Contractor (“C”) submitted a bid. This constituted C’s offer – his expression of willingness to be bound by these terms. Developer (“D”) awarded C the contract. D accepted C’s offer. An acceptance is a manifestation of intent to contract under the terms of the offer. In Florida, consideration to support a contract may be a legal benefit to one party, or a legal detriment to the other. Under common law and the UCC, valid consideration consists of a bargained-for exchange. As this is a construction contract and not a contract for the sale of goods, the UCC’s rules do not apply. C’s promise to build the shopping center for \$5 million and D’s promise to pay \$5 million constitutes valid consideration to support a Florida contract. The parties general contract also contained a clause that all changes thereto must be in a signed writing. In order to succeed in a breach of contract action, C must show that D’s agreement to pay an additional \$1 million was binding, and that D breached this contract.

D will argue that the oral modification to the contract is invalid under the Statute of Frauds and the parties’ contract. Under the Statute of Frauds, certain contracts must be in writing, such as surety agreements, services contracts exceeding one year, and sale of goods exceeding \$500. Under the Statute of Frauds, the present construction contract does likely not need to be in writing, as it could be performed w/in a year. In addition, courts will generally not preclude proper modification of a contract based on a writing-only clause, where the parties manifest the intent to subsequently change the contract and the modification is properly effected. The Statute of Frauds & the writing-only clause would not bar modification of the parties’ contract.

D will also argue that the parties had a fully integrated writing that may not be contradicted or supplemented with parol evidence, such as evidence of the agreement to increase the contract price by \$1 million. Parol evidence, however, is only prohibited to contradict or supplement, an integrated contract with prior writings or prior and contemporaneous oral agreements. Evidence of conditions precedent, mistakes, or of subsequent modifications may be considered where necessary.

D will also argue that the parties had a valid, binding contract for \$5 million and that C had a pre-existing duty to complete the shopping center for that amount. This is likely a strong argument for D. Under the common law, contract modifications must be supported by separate consideration. A pre-existing duty to perform is not adequate consideration to support a contract modification. In contrast, under the UCC, a good faith modification suffices, w/o additional consideration. Here, the parties orally agreed on an additional \$1 million to C. C however was under a pre-existing duty to complete the shopping center for \$5 million, and C does not appear to have been given additional consideration.

C could argue, in defense, that the sinkhole constituted an impossibility or impracticability which excused his performance under the original contract, and that a subsequent contract for \$6 million was created. Generally, a contractor must complete his project w/o additional compensation if the partially completed structure is destroyed through no fault of either party. The sinkhole appears to have been a natural event, not caused by either party. On the other hand, if a natural event destroys the entire plot of land upon which the structure is being constructed, both the contractor and the owner will likely be excused from performing under the contract. In such a case, performance would be objectively impossible. The defense of impossibility is considered on an objective basis, or whether a party can reasonably perform. In this case, a portion of the structure collapsed, although the sinkhole opened up underneath the property. If the remainder of the lot of land was destroyed, C could alleged impossibility. However, C could complete the project, so impossibility is likely not available.

If C wishes to allege impracticability, he would have to show that an unforeseen event, the non-occurrence of which was a presumption of the parties materially altered his performance to such an extent that performance is excused. An increase of \$1 million in a \$5 million dollar project may not suffice to create impracticability, particularly where only the structure, and not the property itself, was partially destroyed.

C could also argue that the parties clearly did not anticipate the sinkhole as neither one had sinkhole insurance. However, this risk was likely born by C. C may wish to claim that the lack of provisions regarding insurance rendered the general contract incomplete, and therefore unenforceable under common law. A contract generally needs to contain all essential terms, including identification of the parties, the price, manner of payment, and the obligations, and be signed by the party to be changed. Provisions regarding insurance or the failure of the party to obtain insurance, will likely not render a contract unenforceable.

C's best argument will be that the sinkhole rendered performance under the original contract impracticable or impossible. His agreement to fill the sinkhole could constitute additional consideration in exchange for D's promise to pay another \$1 million dollars. In Florida, even a slight deviation of performance will qualify as separate consideration to support modification. D thus breached this new contract and C was damaged.

C v. Paver (P)

C wants to sue P for the \$115,000 difference in P's original bid and the next lowest bid that C used. P's bid of \$200,000 constituted an offer to perform. C included this offer in his bid, but could not accept it until D accepted C's bid! The bid package rendered P's bid irrevocable. Consideration is generally required to release the parties from a bid.

P rescinded his bid apparently before D accepted C's bid. P will argue that the parties did not have a binding contract at that point and that he was free to revoke. C could counter that P's bid became irrevocable once C submitted it to D and that P should have know that C would rely on his bid.

P may argue that, even if the parties had an irrevocable offer or a contract, his error in calculating the bid relieved him of obligation to perform. Generally, a unilateral error by one party does not stand as a hindrance to contract formation. However, where the other party knows or should have known of the error, he will not be allowed to snap up the benefit of the mistaken agreement. P may have a strong argument that his was so much lower than the next lowest bid – a difference of \$115,000 – that C was put on notice of his error. Indeed, the difference between the next two bids was only \$10,000. If P is successful in arguing that C is not entitled to damages on a contract theory, C may prevail on a quasi-contract claim.

Where the parties did not enter into a binding contract, an aggrieved party may obtain relief based on promissory estoppel or detrimental reliance. To prevail on detrimental reliance, the injured party must show a promise from the breaching party that was intended to create reliance, justifiable reliance is that promise, and that injustice would occur if the injured party is not awarded damages. C could argue that P made his bid with the knowledge and intent that C would rely on it. C did rely on it when he submitted his bid using P's bid, and C's bid was accepted, causing C to incur damages. If C can argue on a reliance basis, he should receive restitution for the damages suffered in reliance.

C's damages under a contract theory would be tailored to protect his expectation. Compensatory damages are awarded to a non-breaching party to put them in the position they would have been in absent a breach. Compensatory and expectation damages can include incidental and consequential and liquidated damages, where appropriate. Punitive damages are generally not awarded in contract actions. When a non-breaching party reasonably covers, as is his duty, he will be entitled to the difference between the contract price and the cover price, plus any incidental or consequential damages. C will argue that the difference between the contract price (\$200,000) and the next lowest bid (\$315,000) is \$115,000.

P can counter that C has a duty to mitigate his damages by covering in a commercially reasonable manner. P can argue that C failed to do so. P offered to complete the work for \$300,000, which is still \$15,000 below the next lowest bidder that C used. P will argue that C had no reason to use this other bidder and that C is not entitled to \$115,000. P will also argue that there was no enforceable contract and, thus, C is not entitled to contract damages. C may counter that there was a contract that was breached by P and that C justifiably had faith in P's ability to perform. C was therefore commercially reasonable in covering with another subcontractor.

C may also wish to argue a quasi-contract claim against developer. C could show that, even if no binding contract existed between C and D for the additional \$1 million, that promissory estoppel or detrimental reliance allows C to recover. C could argue that D made a promise upon which C justifiably relied and justice requires that D not be enriched without compensating C. C could also argue that he completed the shopping center in reliance on getting paid, and that this reliance was reasonable and justifiable, and that D will be unjustly enriched should damages to C not be awarded. C should seek restitution. D will counter that C was under a pre-existing duty to complete for \$5 million. However, a court may find that D will be unjustly enriched as C would not have finished the shopping center but for D's promise to pay him an extra \$1 million.

Bank and Lender v. Paver ("P")

Bank and Lender would both like to foreclose on P's grader in satisfaction of his defaulted obligations. Bank and Lender will argue that they have a security interest in the grader. A security interest is a right in a secured party-creditor to certain personal property of the debtor (collateral) to secure an obligation upon default – a security interest must attach and, as against other secured parties, must be perfected.

A security agreement generally attaches when the parties enter a written security agreement that reasonably identifies the collateral, the secured party gives value, and the debtor has the power to convey the collateral.

P signed a promissory note with Bank, an unqualified promise to pay a specific amount of money on demand or at a specified time. Bank and P did not, however, sign a security agreement.

A security agreement in certain types of collaterals can only be created by possession control. An interest in a non-consumer deposit account attaches in the Bank with control over it. Control can be achieved when the bank maintains the account or when the bank and the creditor sign an agreement conveying control of the account to the bank. Bank's interest in P's account may have attached on July 1, when Bank made the loan, as Bank maintains the account. If the account is a consumer account, however, no security interest may attach in it.

Lender and P signed a security agreement for P's equipment on August 2. Equipment is a claim of movables used in the debtor's business. The agreement also had an after-acquired property clause, which validly gives lender an interest in after-acquired equipment of P. Lender filed its UCC-1 on September 10. At this point, lender's interest was perfected as against other secured parties with competing interests. Financial statements must identify the debtor, the creditor, and the collateral. Priority in the collateral is generally given to the creditor who is first to file or perfect.

Once a security interest has been created, it will continue in any proceeds automatically for 20 days. Perfection will continue after that only if the same offer rule applies or if the proceeds are identifiable, cash proceeds or if the creditor files another UCC-1. Here, the grader D proceeds of the bank account and it is equipment covered by lender's agreement. Bank's interest will not continue automatically because it's interest in the account arose by control and its interest in the grader arises only by filing a UCC-1. For equipment the UCC-1 must be filed within 20 (twenty) days of the debtor's receipt of the equipment. Bank filed a UCC-1 on the equipment on October 15. It is unclear when P obtained the equipment, presumably on October 2 when he wrote the check. Thus Bank's interest, perfected on July 1 would continue in their favor if the Bank filed its UCC-1 w/in 20 days of P's receipt of the same.

This would allow Bank a priority interest in the grader against lender, whose UCC-1 was not filed until September 10. If Bank's interest did not stay perfected, however, the lender will have priority.

QUESTION NUMBER 2

JULY 2013 BAR EXAMINATION – FLORIDA CONSTITUTIONAL LAW/ETHICS

Worried about the recent oil disaster, Florida's governor (Governor) issued a proclamation for a special legislative session which stated in pertinent part:

That the Legislature is convened for one week for the sole and exclusive purpose of considering legislation to reduce the negative impacts of off-shore drilling.

On the last day of the special session under Governor's proclamation, Representative Polk (from Polk County) drafted and convinced the House to consider a bill to limit medical malpractice litigation in Polk County. Representative Hardee (from Hardee County) agreed to vote in favor of the bill in exchange for a provision increasing the state's tax revenue by requiring a yearly ad valorem tax on motor vehicles registered in Polk County. Ultimately, the House and Senate properly passed the following bill:

AN ACT relating to Polk County, medical malpractice lawsuits, and ad valorem tax on motor vehicles.

Be it Enacted by the Legislature of the State of Florida:

Section 1. The provisions of this act shall be applicable only to Polk County, Florida.

Section 2. Anyone desiring to file a medical malpractice lawsuit must post a bond with the clerk of court in the amount of \$1,000,000 before filing a complaint alleging medical malpractice.

Section 3. Any motor vehicle registered in Polk County shall be subject to a yearly ad valorem tax of .5 percent of the vehicle's fair market value; the ad valorem taxes collected shall be deposited into the state's general revenue account.

Immediately after the bill's passage, the legislature adjourned for the summer months. The bill was properly presented to Governor on the same day as its passage. Disgusted with the legislature's refusal to address the off-shore drilling issue, Governor went on a three week vacation. Governor never approved and signed the bill, nor did Governor veto the bill.

Two months after Governor's vacation ended, Plaintiff suffered a serious injury as a result of a botched operation done by Doctor. Plaintiff has sought Attorney's

representation for a medical malpractice action in Polk County. Attorney and Plaintiff orally agreed to Attorney's representation for a contingency fee of 50 percent. Plaintiff does not have \$1,000,000 to post with the Polk County Clerk of Court.

Prepare a memo addressing first whether the bill ever became law. Then assume the bill did become law and discuss the constitutionality of the law and its provisions under the Florida Constitution. In your memo, also include a discussion of any ethical considerations for Attorney that arise from Plaintiff's efforts to seek representation.

SELECTED ANSWER TO QUESTION 2

(July 2013 Bar Examination)

(1) Whether the Bill Became a Law

As a preliminary matter, the Governor has the authority under the Florida Constitution to call a special legislative session. Special legislative sessions must be limited in scope, and in the absence of the requisite vote of the members of the House and Senate (2/3 vote), no new matters may be addressed during a special session, other than those for which the special session was called.

Here, the facts are unclear regarding whether a proper vote was held to address the issue of medical malpractice litigation and taxes on motor vehicles. Absent such a vote of approval in both the House and Senate, the legislature was not empowered to consider any matters other than the impact of oil drilling. However, if the requisite approval was achieved in the House and Senate, then the consideration of this bill was valid.

Assuming that the bill was valid, it did become a law because the Governor did not exercise his veto power. When a bill is submitted to the Governor for signature or veto, the Governor has 7 days (or 15 days if submitted at the end of session) to exercise his veto power. Because the Governor never exercised his veto power within this time, the bill became a law on its effective date.

(2) Constitutionality of the Act

Formalities. *Each law must comply with certain constitutional formalities in order to be valid. First, the Act includes a short title that sufficiently describes the subject matter of the law. Second, there is an enacting clause. Finally, the purpose for the act was likely in accordance with the legislature's authority to pass laws for the general welfare, health, safety, and morals of the public, as the purpose of the bill deals with litigation efficiency and raising revenue (though the means by which these purposes are achieved are questionable, as discussed below). However, the Act likely violates the single-subject rule. To comply with the Florida Constitution, a law must cover only one subject. Each component part or aspect of a law must have some natural relation to an overall scheme. Here, the legislature would not likely be able to show that ad valorem taxation of vehicles is naturally related to enhancing the efficiency of med mal litigation. Thus, the single subject rule is likely violated.*

Section 1. *Section 1 indicates that this is a special law. A special law, unlike a general law, is a law that only applies to particular geographic areas in the state. Special laws are permitted, so long as voters in the effective area are given notice of the proposed law and a referendum is held. Additionally, a special law (as well as a general law of local application, which does not require notice and referendum, but applies to certain areas based on a classification scheme such as population) cannot cover certain subject matter that the Florida Constitution expressly prohibits. Such prohibited subject matter includes taxation, elections, petit juries, conditions precedent to bringing civil or criminal claims, venue rules, and rules of evidence.*

Here, section 1 expressly applies only to Polk County, so this is a special law. The facts do not indicate that the notice and referendum requirements were met. Therefore, this section is invalid.

Section 2. Section 2 suffers from several constitutional infirmities, including an improper infringement of the fundamental right of access to courts, a possible equal protection problem, and prohibited special law subject matter.

Access to Courts: The Florida Constitution provides that the right to access to courts will not be infringed upon and that justice will be administered without sale, denial, or delay. When the legislature significantly burdens this right in a manner that amounts to abolishing a cause of action, a reasonable alternative must be provided unless the legislature can make the difficult showing that a public necessity exists and that no alternative can reasonably be established (*Kluger v. White Test*).

Here, Section 2 violates the prohibition of justice being administered without "sale," and the excessive amount of bond that is required constructively abolishes a medical malpractice cause of action for anyone who can't afford to pay what amounts to a one million dollar filing fee. Even if the legislature could show that a compelling public interest--such as judicial efficiency--was present, there are certainly reasonable alternatives other than the imposition of a one million dollar bond that would promote the interest. Moreover, Courts are especially hostile when faced with access to courts problems that don't involve any element of voluntariness on the part of the public. The involuntary nature of Section 2 is yet another justification for striking this section down as an unconstitutional infringement of the fundamental right of access to courts.

Prohibited Subject Matter. As discussed above, conditions precedent to filing a civil or criminal suit are among those subjects expressly prohibited from special laws and general laws of local application in the text of the Florida Constitution. Requiring residents of one county to post bond before bringing a civil malpractice claim violates this prohibition, as posting bond is a condition precedent to filing a complaint based on the plain language of Section 2.

Equal Protection. Section 2 also implicates equal protection concerns. The Florida Constitution prohibits discrimination against individuals based on race, alienage, gender, religion, and physical handicap. Any discrimination on these bases will be subject to strict scrutiny (compelling interest + narrow tailoring). Wealth is not a suspect classification subject to heightened scrutiny; instead, when legislation draws lines between people based on wealth, the standard of scrutiny applied is rational basis (rational relationship to a legitimate government interest). The Supreme Court of the United States as well as the Florida Supreme Court have both recognized, however, that when discrimination against the poor involves a fundamental right, heightened scrutiny should be applied.

Here, Plaintiff can argue first that even the rational basis test is not met here, as there is no rational relationship between judicial efficiency and the posting of a one million dollar bond in a particular class of civil cases. The legislature may assert that the high costs of med mal legislation justifies such a significant bond, and that the low threshold of rational basis review should not be used to strike down legislative judgment

when any feasible relationship is asserted. Plaintiff can argue, however, that this involves more than just wealth discrimination--it involves the fundamental right to access to courts, which therefore requires heightened scrutiny. This section would not likely survive heightened scrutiny, as the legislature would be required to show a compelling interest and careful tailoring to achieve that interest.

Due Process. Finally, the Florida Constitution expressly protects the right of both procedural and substantive due process. Substantive due process involves the protection of fundamental rights, and procedural due process protects against unconstitutional deprivations of protected interests without notice and hearing, and protects the right to a fair trial. Infringements of either aspect of due process implicates strict scrutiny review. Here, Plaintiff can argue that, as discussed above, her fundamental right to access to courts has been unconstitutionally burdened, and that the legislature will not be able to make the requisite showing to survive strict scrutiny. Plaintiff may also argue that procedural due process involves an inherent guarantee of the right to a fair trial--a right that is meaningless if a plaintiff can't never step foot in the court house due to an excessive bond requirement.

Section 3. Section three is also constitutionally invalid because it involves taxation, which is on the list of prohibited subject matter for special laws and general laws of local application laid out in the express text of the Florida Constitution. Additionally, the State is not empowered to collect ad valorem taxes. Here, the Act provides that the county would be collecting ad valorem taxes, which is permissible--however, the funds would go straight to the state. Plaintiff can argue that this tax is therefore constructively imposed by the state since the state retains all of the revenue. Therefore, because the state cannot collect ad valorem taxes, this provision should be unconstitutional. Moreover, ad valorem taxes are imposed on real property--not personal property, such as motor vehicles.

(3) Ethical Issues

The contingency fee arrangement is likely problematic under the Florida Rules of Professional Conduct. Contingency fee arrangements are permissible in most civil litigation, with the exception of domestic relations cases such as child support, divorce, etc. Contingency arrangements are required to be in writing, must be signed by the client, and must lay out how the fee will be calculated. The client is also entitled to a final calculation in writing at the end of representation. However, contingency arrangement are also subject to the general rules regarding the reasonableness of fees. A lawyer cannot charge an unreasonable fee. Factors that contribute to whether a fee is reasonable or not include the lawyer's education and experience, the amount of time spent on the case, and the complexity of the issues. A lawyer who attempts to retain 50% of the recovery in a case is likely not a reasonable fee. This contingency fee arrangement would not likely be valid.

Q QUESTION NUMBER 3

JULY 2013 BAR EXAMINATION – TRUSTS/ETHICS

Three years ago, Anne's wealthy father set up the "Anne Family Trust." The trust instrument provided for the following:

- ✓ Anne's father and business partner as co-trustees;
- ✓ Anne's father and his wife, Jane, as beneficiaries for their lifetime;
- ✓ Anne as beneficiary upon the deaths of Anne's father and his wife, Jane; and
- ✓ Anne's son as contingent beneficiary if Anne should predecease her father and his wife, Jane.

The trust was funded with various assets, including Anne's father's \$10 million life insurance policy. Shortly after the trust was created, the business partner died and Anne's father named Anne as co-trustee. Anne's father managed the trust. Anne did not participate in any aspect of the trust management nor receive any income from the trust.

Six months ago, Anne's father and Jane divorced and, last month, Anne's father died. The only remaining property in the trust at the time of her father's death was the life insurance policy. Jane claims that Anne's father told Jane that the trust would pay her \$25,000 a month after he died.

Anne wants access to the insurance proceeds to meet her living expenses but she also wants to be sure that the money is protected through a trust for the benefit of her son, who has no steady job and sizeable debts. Anne also has a pregnant pet Labrador and wants to be sure the dog and her puppies are taken care of in the event anything happens to Anne.

Anne's son wants to be named as co-trustee. Anne is concerned that if he is a co-trustee, his creditors will be able to reach the assets, but she wants assistance in handling her affairs.

Anne has retained you. In addition to advising her on the issues related to the trust, she wants you to serve as trustee.

Draft a memo discussing the following:

1. The validity of the Anne Family Trust;
2. Potential claims or challenges to the creation and/or management of the trust;

3. The current status of the trust;
4. Steps Anne can take to protect her assets and satisfy concerns regarding her son and the pregnant Labrador; and
5. Ethical issues of serving as trustee.

SELECTED ANSWER TO QUESTION 3

(July 2013 Bar Examination)

VALIDITY OF TRUST

The issue is whether there was the creation of a valid trust.

To have a valid express inter vivos trust you must have (1) a settlor; (2) intent to create a trust; (3) a trustee; (4) definite and ascertainable beneficiaries; (5) proper trust "res"; (6) and a legal purpose. While a settlor may also be a beneficiary of a trust, they may not be the sole trustee and beneficiary. If a trust is testamentary in nature, it must be executed with will formalities. While generally allowed to be oral, the statute of frauds does require that trust involving transfers of real property be in writing. A trustee may be anyone 18 years of age or older who has the legal capacity to enter into legally enforceable contracts. Beneficiaries must be definite and ascertainable. Even if beneficiaries are a class, members must be readily ascertainable (unless a charitable class, in which the opposite is true). Future proceeds from existing contracts are valid as trust property as they are certain to be realized. Any purpose which is legal in nature is considered proper purpose for the creation of a trust.

The trust was set up by Anne's father who seemingly had the capacity to do so (as the facts do not indicate otherwise) as well as the intent per the terms of the written instrument providing for the terms the trustee was to be bound by. Anne's father named both himself and his business partner as co-trustees and identified himself and his wife, Jane, as lifetime beneficiaries with Anne becoming a beneficiary upon the death of both himself and Jane or Anne's Son, should Anne predecease himself or Jane. Since Anne's father was not the sole trustee and beneficiary this was valid. The beneficiaries are all ascertainable as they are mentioned by name. The trust was funded with a number of assets, including a \$10 million life insurance policy, which was proper as it was the rights to a future payout from the policy. Additionally, the purpose of the trust is legal as it seeks to provide for Anne's father and all named beneficiaries for their lifetimes.

A valid express inter vivos trust was created by Anne's father as all elements of a valid trust have been met.

CLAIMS OR CHALLENGES TO CREATION AND MANAGEMENT

The issue is whether there are any claims by Jane as to the creation and management of the trust.

If a trust has co-trustees, it will not fail if one or even both of the trustees subsequently die or withdraw. The court will appoint a trustee in replacement or the settlor may appoint a new trustee. A trust is also presumed to be a revocable trust, during the lifetime of the settlor, unless expressly stated otherwise or until the settlor dies. The divorce of a settlor and their wife will eliminate any interest the ex-spouse had prior to divorce if considered a will substitute. While this can be separately contracted around, the contesting party, i.e., the ex-spouse, must prove by clear and convincing evidence

of such intention. Since a trust can be a will substitute, if it is such it must comply with will formalities (i.e., 2 attesting witnesses signing in the presence of each other and the testator). Also, trust beneficiaries are subject to the statute of frauds in that a trust benefit must vest or fail within 21 years of a life or being, or actually vest or fail within 360 years of creation.

Jane may try and claim that when business partner died the trust terms were violated. However, this is an invalid argument as a trust does not automatically fail for lack of a particular trustee and a co-trustee can withdraw/die and the other trustee will continue on or the court will appoint a trustee. While the trust was likely revocable during the lifetime of Anne's father, at which time it could have been changed or amended or even terminated, it became irrevocable upon his death. Thus, Jane's claim that she was entitled to \$25,000 a month after Anne's father died will likely be denied as there was no writing made during father's lifetime stating this and the trust can no longer be amended to include such a provision. Additionally, Jane may have lost all interest in the trust if it was seen as a will substitute due to her divorce from Anne's father. Since divorce seeks to operate as if an ex-spouse has predeceased the testator, she will not be entitled to any further benefit from the trust. Jane could claim, though, that the will should not be treated as a will-substitute, and if it is, then could challenge it as it does not appear to have been executed with will formalities. Even in absence of the trust being found a will-substitute, the fact that the terms of the trust state to "Anne's father and his wife, Jane," may be construed to mean that Jane's taking under the trust was conditioned on her being Anne's father's wife. It could also be claimed that the will violated the statute of frauds, however this will likely fail due to Florida's revised provision of vesting or failing with 360 years (extended from the previous 90 years provision).

CURRENT STATUS

The issue is what is the current status of the trust.

When the trustee of a trust also becomes the sole beneficiary of the trust, there is no separation of equitable and legal title and thus the trust will fail. If the trust fails for this reason, the trust property will be disbursed to the beneficiary, who will also be the trustee.

The trust likely ended when Anne's father died. This is because, after the death of the business partner, Anne's father named her as a co-trustee along with himself. If the divorce from Anne's father meant that Jane was no longer considered a beneficiary of the trust, then the only remaining trustee's at that time were Anne, her father and a contingent beneficiary in Anne's son. However, upon Anne's father's death, Anne became the only beneficiary as the condition to Son's becoming a beneficiary failed as Anne did not predecease father, and Jane was no longer relevant to the trust. Thus, since Jane was the sole trustee and sole beneficiary upon father's death, the trust would have terminated and Jane would receive the remaining property, the life insurance policy.

The trust terminated upon the death of Anne's father effectively transferring the life insurance policy to Anne.

PROTECTION OF ASSETS

The issue is whether Anne can protect the life insurance policy.

The creation of an irrevocable trust protects the settlor from the reach of creditors as to the trust property. However, if it is found that the creation of the trust was made for the purpose of solely defrauding a settlor's creditors, the trust will fail.

Anne would be able to set up a new trust and expressly make it irrevocable. As long as Jane is not the sole trustee and beneficiary of the new trust, the act of making it irrevocable would protect the trust assets from being reached by the creditors of Jane. However, it is determined that this was done solely to defraud creditors, it would not be enforceable. Additionally, creditors of the trustee cannot reach trust assets to which the trustee is responsible for. Thus, if Jane wishes to make Son co-trustee she may without worrying about Son's creditors reaching the trust assets in his capacity as trustee.

Anne can create an irrevocable trust to protect the assets.

SON

The issue is how can Jane protect Son as beneficiary of a new trust.

A trust can include spendthrift provisions that can prevent a beneficiary from being able to voluntarily or involuntarily transfer their interest in the trust, i.e., they cannot assign their right to disbursements. Additionally, the creditors of a spendthrift beneficiary cannot reach the trust property. They can only place a claim to the beneficiaries interest in the trust once the property has actually being disbursed. An exception to this applies to state creditors and claims for spousal support and child support. These special creditors can still reach the assets prior to disbursement.

Anne can create a trust with a spendthrift provision that would effectively bar his creditors from reaching trust assets of his until they are distributed to him. He would not be able to assign his rights to the property and only those creditors that fall into an exception would be able to reach the assets.

Anne can include a spendthrift provision protecting Son.

LABRADOR

In Florida, honorary trusts are allowed. An honorary trust may be set up for the purpose of providing for a pet once the settlor has died, or to take care of a grave site. The statute of frauds applies to honorary trusts set up for pets and the trust will only continue for as long as the last pet who was alive at the time of the settlor's death has also deceased.

Anne can create an honorary trust to provide for her Labrador that would last until the death of her Labrador as well as the puppies of the Labrador if they were born prior to Anne's death.

Anne can create an honorary trust for her Labrador.

ETHICAL ISSUES

An attorney can enter into business transactions with a client only when they have fully disclosed their intentions and the terms of the transaction are fair and reasonable and the attorney has advised the client to seek advice from outside counsel. Additionally, an attorney cannot create an instrument in which they will be a substantial beneficiary of and cannot accept any gifts for doing so.

I would be able to serve as trustee so long as the terms of the arrangement were fair and I advised Anne to seek independent counsel in reaching the decision. Additionally, I could not be a beneficiary under the trust terms which I created on behalf of Anne.

Q QUESTION NUMBER 1

FEBRUARY 2014 BAR EXAMINATION – FAMILY LAW

Harry and Wendy, both 40, are divorcing after 16 years of marriage. Both parties agree that their marriage is irretrievably broken. Furthermore, it is undisputed that the dissolution action was filed in the proper court.

The financial affidavits of the parties reveal the following income: \$5000 a month from Harry's salary as an Air Force officer; and, \$1000 a month to Wendy from her mother's trust. In addition, the financial affidavits disclose the following assets: \$50,000 in Wendy's separate bank account, which came from her mother's trust; and, the \$400,000 beach house in northwest Florida they live in. Harry bought the house two months before their wedding for \$165,000 with \$15,000 down. The 15-year mortgage was paid off using his salary.

Harry has mostly been overseas while Wendy took care of the home and the twin boys, born four years ago. Harry's parents live nearby and help with the twins.

After being stationed near home, Harry filed for dissolution of marriage. He wants equal time-sharing and he waives child support. When overseas in the future, he wants his parents to keep the twins. Harry claims sole ownership of the house and half of the bank account. He objects to any payment of child support and alimony to Wendy.

Wendy is worried that Harry will take the twins overseas. Wendy has never worked before, but she has a job offer in Mobile, Alabama, 100 miles away. She wants to move there with the twins. The job includes housing but little pay. Wendy seeks alimony, child support, half of the house, the bank account, and for Harry to keep her as his life insurance beneficiary.

You are the law clerk for the judge who has been assigned this case. The judge asked you to prepare a memorandum identifying and analyzing the contested issues including the recommended course of action that the judge should take when addressing each issue.

SELECTED ANSWER TO QUESTION 1 **(February 2014 Bar Examination)**

To: Judge

From: Applicant

Date: February 25, 2014

Re: Harry and Wendy Divorce

I. Harry and Wendy may properly divorce.

The first issue is whether Harry and Wendy may properly divorce.

Florida has eliminated fault based divorce. In Florida, a couple may divorce if 1) the marriage is irretrievably broken down or 2) if one spouse becomes mentally incompetent. For a divorce predicated on an irretrievable breakdown, only one spouse need believe that the marriage is irretrievably broken. Moreover, the court may continue the proceedings for 3 months to allow for the couple to reconcile.

For a court to have subject matter jurisdiction over a divorce, only one party need be a Florida resident.

In this case, both parties agree that their marriage is irretrievably broken. Thus, the divorce has a proper basis. Second, the facts state that the dissolution was filed in the proper court, and nothing in the facts indicated that jurisdiction is in dispute.

Therefore, Harry and Wendy may properly proceed with their divorce.

II. Alimony

The next issue is what, if any alimony is available and to whom.

In Florida, both spouses are responsible to financially support one another. Alimony is determined based on the financial needs of one spouse and the ability of the other spouse to pay. There are several different types of alimony that are currently available in Florida: 1) Temporary alimony--this type of alimony is used for the spouse needing the support while the dissolution proceedings are going on; 2) Bridge-the-gap alimony--this type of alimony is used to bridge the gap from married life to single life; 3) Rehabilitative Alimony--this type of alimony is provided so that the needing spouse may develop the necessary skill set via education and training so that they could find proper employment 4) Durational Alimony--this type of alimony is designated for a specific period of time. However, it is not available for marriages that have not lasted for at least 17 years; 5) Permanent alimony--this type is fixed.

Many factors are considered in determining whether to provide alimony. Some of these factors include age of each spouse, duration of marriage, current income of each spouse, other sources of income for each spouse.

In this case, Harry and Wendy are both 40 years old. They are divorcing after 16 years of marriage. Thus durational alimony is not available. Wendy has never worked before-- she has been a stay at home mother. Thus, she would certainly require some sort of financial support at this juncture. Harry, on the other hand, earns \$5,000 per month. Moreover, since Wendy is only 40, there is still time, with proper education and training for her to obtain gainful employment. However, at this moment, she requires some financial support, and Harry can afford to pay for such support. Wendy does have income, the 1,000 per month from her mother's trust. However, that is likely not enough to live on. As such, Wendy will likely be entitled to temporary alimony, bridge the gap alimony, or rehabilitative alimony. Once, Wendy is "on her feet" she may no longer require or be entitled to the alimony.

Therefore, at this juncture, the judge she award Wendy at least one, if not more, of the first three types of alimony.

III. Child Support

The next issue is whether Wendy is entitled to child support.

Both spouses have an obligation to support their children. Florida uses an income based share plan to awarding child support. The court is entitled to deviate 5% from the guidelines without siting reason.

Here, Harry earns 5,000 per month, whereas Wendy does not work. Depending on how the parenting plan (discussed below) comes out, Wendy will likely be entitled to some level of child support. That of course, may change depending on the parenting plan, and whether the twins end up spending more than 40% of their time with Harry.

Harry says that he "waives child support." Child support cannot be waived in any sort of agreement (i.e. prenuptial/ postnuptial). Thus this waiver would be deemed ineffective.

Therefore, the court should probably award Wendy some sort of child support, depending on the parenting plan.

IV. The Parenting Plan

The next issue is how to determine the parenting plan.

In Florida, the court develops what is known as a parenting plan. This plan includes two portions: 1) Time Sharing and 2) Parental Responsibility. There is a presumption that the child should spend equal time with each parent. However, the superseding factor is always, what is in the best interest of the child. Under a time sharing plan, both parents should have equal time with each parent. However, certain factors may come into play, such as who raised the children, where they go to school, where they want to stay (if they are at an age where they could understand such a decision). There are many other factors in making this determination. The second prong, Parental Responsibility, includes two types--ultimate responsibility and parallel parenting. Under ultimate responsibility, each spouse is solely responsible for a certain responsibility (i.e. schooling or medical). Under parallel parenting, those responsibilities are shared.

In this case, Wendy has spent the majority of the time raising the children. Moreover, Harry is an air force officer and spends most of his time overseas. Thus, on these facts alone, it seems that Wendy is in a much better position to have more time with the twins. Harry claims that while he is overseas, his parents should keep the twins. However, the biological parents have a right over the grandparents of the child, unless, as mentioned before it is in the best interest of the children for them to stay with Harry's parents. The children are only 4, and thus they probably cannot express where they would want to be.

As far as parental responsibility, it also seems that Wendy would be better suited, in as much as Harry is often overseas. As discussed above, Harry's plan, while overseas is to put the responsibility on his parents. But, as mentioned above, Wendy would have rights that supersede Harry's parents, unless it is not in the best interest of the twins.

Therefore, the court should recommend that Wendy is entitled to her time with the twins while Harry is overseas. It is also likely that she will bear the greater parental responsibility. This ruling will also affect the amount of child support that should be awarded.

V. Wendy's Intent to Relocate

The next issue is, whether Wendy should be entitled to relocate with the twins.

If one spouse intends to move more than 50 miles away, he or she bears the initial burden of proof. She must show, that based on numerous factors, such as job opportunity, child's choice (depending on age), and other such factors. If moving, the moving spouse must provide the new address, how time sharing will continue to work, among other requirements. The burden then shifts to the opposing spouse, to show why the move would be improper.

Here, Wendy has a job opportunity in Mobile, Alabama, which is 100 miles away, thus exceeding the 50 mile threshold. Wendy will argue that after being jobless for her whole life, this may be the only job available to her. The problem there is that although she will have housing, she will have little pay. And the court must determine if the twins could be properly taken care of on a minimal pay. However, given that opportunity, in conjunction with the fact that Harry is often overseas and unable to care for the twins, this move may be in the best interest of the twins. Harry of course, will argue that his parents will take care of the twins. Unless, however, he could show that Wendy is incapable of taking care of them, she takes precedent over Harry's parents.

Therefore, based on the facts here, the court should allow Wendy to move with the twins.

VI. Distribution of Assets

The next issue is how the assets should be distributed.

Florida utilized equitable distribution. Under this doctrine, distribution of assets is not necessarily controlled by title. The assets are first identified, then assessed, and then distributed in an equitable manner. How the assets are distributed (i.e. what portion to whom) is determined by a variety of factors, namely income, need, duration of marriage, among others. Assets that are separate include those that were owned by the respective spouse prior to the marriage, or gifts or devises to one specific spouse before or during the marriage. Assets acquired during the marriage, or any appreciation (due to some sort of contribution from the other spouse, not just by virtue of the market) to separate assets during the marriage are considered marital assets. It is the marital assets that are then assessed and divided.

A. \$50,000 bank account

The bank account is a separate account, and was funded from the proceeds of her mother's trust. There is no indication that Wendy and Harry have agreed to make this a joint account. Nor are there any facts to indicate that marital funds were commingled. Thus, this account appears to be separate property, which should not go into the equitable distribution pool, and Wendy should keep it in its entirety.

B. The House

The House was purchased before the marriage for 165K with 15K down. The mortgage was then paid off using his salary. The 15K down, because it was before the marriage will be considered Harry's. This was not purchased together. However, the remaining balance, i.e. \$150, 000 which was mortgaged is a bit more complicated. The mortgage was paid entirely from Harry's salary. Therefore, the fact that Wendy did not contribute to paying the mortgage, is a factor that weighs in favor of the house remaining Harry's. However, Wendy, by acting as homemaker, and caretaker for the couple's children, is what allowed for Harry to work and earn the money to pay the mortgage. Therefore, Wendy, indirectly, has contributed to the mortgage payments. Therefore, the 150K value should be considered marital property and equitably divided. The remaining increase in value, i.e. the 245K increase, is, without any other facts provided, due to market changes. Thus, since that increase is not due to the contributions of Wendy, Harry would be entitled to that value.

Therefore, 150K worth of the home should be equitably divided, whereas, the remaining 250K should belong to Harry. To have this take affect the home may be sold and proceeds divided, or one spouse may retain the home, and make the necessary payment to the non-staying spouse.

C. Life Insurance

The next issue is whether Wendy should be kept as Harry's life insurance beneficiary.

By virtue of the divorce, Wendy will, by operation of law, no longer remain the beneficiary of Harry's life insurance policy. Life insurance policies are essentially will substituted, which terminate by law upon divorce.

Therefore, Wendy should not remain the beneficiary of Harry's life insurance policy.

Q QUESTION NUMBER 2

FEBRUARY 2014 BAR EXAMINATION – FLORIDA CONSTITUTIONAL LAW

You are an assistant county attorney for a rural county in Florida. Some county residents keep pigs as pets, and three commercial pig farms are located in the county. At a public workshop, a county commissioner announces a proposed ordinance to protect from "swine flu." Swine flu is spread through close contact or direct touch between either pigs or humans.

The proposed ordinance would provide as follows: (1) Code enforcement officers are directed to collect and destroy all noncommercial pigs within ten days of the federal Center for Disease Control (CDC) confirming swine flu has occurred anywhere in the United States. (2) If the CDC confirms swine flu has occurred in Florida, the officers will collect and destroy all commercial pigs. (3) The residents' pigs are declared a threat to public health, and the county will not pay compensation to the owners; however, if the commercial pigs are destroyed, the county will pay the owners not more than \$25 per pig. (4) To locate pigs, the officers are allowed to enter private property without a search warrant, but they cannot enter houses. (5) Ownership of a pig is considered commercial if the owner derives at least \$5000 of annual income from the pigs.

Many residents praised this ordinance as a necessary protection. Pig owners objected. The commercial farms claimed that unregulated chickens and bird flu present a greater threat. One commercial farm located in the county said its organically raised pigs were worth over \$500 each.

Prepare a memo for the County Attorney that analyzes the potential challenges to the proposed ordinance under the Florida Constitution.

SELECTED ANSWER TO QUESTION 2

(February 2014 Bar Examination)

Issues presented: The issue presented is to determine the constitutional challenges under the Florida Constitution that a county ordinance will encounter regarding its mandate of destruction of pigs in order to protect its citizens from swine flu.

Police power: County will first argue that its swine ordinance is proper under its recognized police powers to protect the health, well-fare, and safety of its citizens. Farmers and pet owners will ultimately argue that the ordinance should fail under Florida constitutional law where the ordinance is overbroad, vague, and not rationally related to a legitimate public purpose (see below). Pig Farmers' counter arguments are below:

Destruction of non-commercial pigs: Non-commercial owners of pigs alike will first argue that provision one of the ordinance amounts to an unconstitutional taking. Pursuant to its powers of eminent domain, the state and local governments may take, appropriate, or physically invade private property for a justifiable public purpose with just compensation due and owing to the owner of that property. Eminent domain also covers the taking of personal property. The county will argue that it is justified in destroying the pigs because of public safety (the prevention of a deadly disease) pursuant to its police powers and that no compensation is due and owing to these non-commercial pig owners because: 1. the county is destroying a public nuisance that poses an immediate and serious threat of illness and/or injury to the public; and 2. these are non-commercial pigs with no value to be compensated.

Non-commercial pig owners will first argue that this provision of the ordinance is unconstitutionally overbroad; the county will be destroying both sick and healthy pigs in violation of the owners' constitutional rights. These owners will also argue that the provision is vague because, while a commercial pig is specifically defined, a non-commercial pig is not, which will not allow the common citizen to understand how to comply with the law. Moreover, these owners will argue that this provision is not rationally related to a legitimate public purpose because there are non-commercial pigs that do not have swine flu whose death will not benefit the public in any way.

Regarding the taking aspect, these owners will argue that pigs that are not ill are not a public nuisance. Under Florida constitutional law, there is no requirement for compensation when, through use of eminent domain powers, government destroys an immediate and serious threat to public health, wellness, or safety. Nonetheless, the owners of pigs that aren't sick will still face destruction of their pigs under this ordinance and, in turn, they will argue that no public threat exists where these pigs don't carry this disease. Additionally, they will argue (likely successfully) that just compensation based on the fair market value of the pig is in fact owing where these owners paid money to acquire these pigs and to raise and keep them and where the pigs are not justifiably being destroyed because they're not sick.

These pig owners will also argue a violation of equal protection (because other unregulated farm animals that pose dangers to society are not being destroyed) and their due process rights (the deprivation of a property interest). Under Florida's equal protection laws (which strongly mirror the U.S. Constitution), no citizen may be deprived the equal protection of the laws. Where a fundamental right is being impinged upon or a

traditionally suspect class is at issue (race, religion, national origin and, in Florida, physical disability), strict scrutiny analysis applies whereby the government has the burden of proof of showing that its law is narrowly tailored to meet a compelling government interest. The owners will argue that their fundamental right to maintain their property (non-commercial pigs) is being infringed by the government's destruction where other owners of livestock for non-commercial purposes are not being treated in the same manner. The government will argue that there is no fundamental right to own a pig and that, if anything, a right to own a pig is an economic right that is not fundamental. The county probably wins on this argument. In turn, rational basis scrutiny will apply where the owners must show that the law is not rationally related to a legitimate public interest. Because swine flu is only transferred by pigs, and not by other livestock, and because it is potentially deadly, the county can show a legitimate government interest. Still, if the county cannot show that the law is rationally related to that interest, it will lose. It is unlikely that that will be the case here as the elimination of pigs who are both sick and potential carriers of the disease is likely the easiest and fastest way to eliminate the threat of illness.

Under the due process provisions in the Florida constitution, no person will be denied life, liberty, or a property interest by the government without the due process of law which, at a minimum, requires notice and a hearing. The owners will argue that strict scrutiny again should apply where they have a fundamental right to maintain their own property (the pigs) without interference by the government. The county will argue that this isn't a fundamental right and rational basis scrutiny should apply (see above). If the court does determine that a property right is involved, owners will argue that they are entitled to notice and a hearing before their pigs are destroyed. The court should balance here: 1. the private interests at stake; 2. the procedural safeguards in place to protect those interests; and 3. the government's interest in efficiency of administration. On balance, the property owners may be entitled to a notice and a hearing where their pigs are being destroyed whether or not they are sick and they should be able to plead their case to a court for non-destruction.

Failing a takings challenge, these owners might also argue inverse condemnation. Inverse condemnation applies when there is no physical taking and no eminent domain triggered, but the government enacts a regulation that essentially deprives the property owner of all economic value of his property. Just compensation is due for that infringement based on the fair market value of the property. Here, because the county is physically taking and destroying the pigs, a takings challenge is the stronger argument rather than inverse condemnation.

Destruction of commercial pigs: Commercial pigs owners will have the same arguments based on: 1. unconstitutional taking; 2. violation of the equal protection clause; 3. violation of procedural and substantive due process; and 4. that the ordinance is vague, overbroad, and not rationally related to a legitimate public purpose.

Taking (see above): The collection and destruction of all commercial pigs will consider a taking. It is unconstitutional for the county to deny just compensation to these owners as a result. Just compensation should be based on the fair market value of these pigs. Nonetheless, if the county can prove that these pigs are a serious and immediate threat to the public because of swine flu, the pigs could be considered a public nuisance, and their destruction will be non-compensable under an exercise of the county's police powers. If the county does pay compensation, a cap of \$25 per pig is unconstitutional

as just compensation where an owner of commercial pigs is one who garners \$5,000 of annual income from the pigs. The just compensation should be based on the fair market value of the pig as determined in relevant markets and through trade usage. The county can look to the fact that one commercial farmer located in the county has organically raised pigs worth at least \$500. In turn, for organically raised pigs, \$500 should inform the starting point for the fair market value of equivalent swine being destroyed.

For the same reasons above, inverse condemnation would be a weaker argument where a physical taking (destruction) is occurring.

Equal protection (see above): These owners will argue that the ordinance violates their equal protection rights. Again, the county will argue that no fundamental rights or suspect classes are at issue and that the ordinance will survive rational basis scrutiny as a result. These pig owners will argue that they have a fundamental right to keep and make productive their personal property (the pigs), but this is more of an economic right than a fundamental right and commercial pig farmers are not part of a suspect class. Therefore, rational basis scrutiny will apply and the county will probably prevail on an equal protection challenge. The farmers would also argue equal protection because the ordinance targets large pig farms where commercial pig farmers making less than \$5,000 a year will be unaffected by the ordinance altogether (unless they also own the pigs for non-commercial reasons).

Substantive and procedural due process (see above): Again, these owners will argue that a fundamental property right is being taken away from them by the arbitrariness of the county. The owners will argue that strict scrutiny applies. Because these pigs are commercial in nature, these owners may have a stronger argument than the non-commercial pig owners because it substantially affects their ability to make a living. In turn, if strict scrutiny applies, the county will have to show that the decision to collect and destroy all commercial pigs is the most narrowly tailored means of achieving an insulation of the public from the dangers of swine flu. Farmers here would argue that it is not the least restrictive means; the most restrictive means is to locate the pigs that are actually sick and either destroy them or quarantine them (or at least to establish some type of standards to determine ill pigs), but that to kill the perfectly healthy, money-generating pigs is a violation of due process. The farmers will concurrently argue that large pig farms (those making more than \$5,000 a year off of their pig stock) are arbitrarily being targeted and that there is no data, logic, or reason to demonstrate why only commercial pig farmers of this size should suffer under this law (as opposed to smaller ones). The county in turn stands to lose on this challenge. Additionally, these owners, like the non-commercial owners, will argue that they're entitled to notice and a hearing before destruction of their livestock to plead their case against deprivation.

Overbroad, vague, and no rational relation (see above): These owners will argue that the provision related to commercial pigs is overbroad. The county, through its law, will be attacking healthy as well as non-healthy pigs thereby depriving these farmers of valuable livestock that they would otherwise have available to them. Additionally, farmers will argue that the ordinance is vague because of the definition of a commercial farmer. The farmers will argue that this definition of a commercial farmer is total arbitrary because there are other commercial farmers of pigs who generate less than \$5000 of annual income a year from their pigs who will be unaffected by the ordinance unless they're also commercial owners of the pigs. These farmers will also argue that there is no relation of this law to a legitimate public purpose where healthy pigs are

being killed without any standard by which to determine if they're in fact sick in an overabundance of caution.

Violations of right to privacy and the 4th amendment: Lastly, all affected farmers will argue that the ordinance deprives them of the right to privacy and violates their 4th amendment rights due to unlawful searches and seizures. Under Florida's constitution, the right to privacy is express and fundamental and, therefore, considered to be stronger than the protections set forth by the U.S. Constitution. Farmers would argue that the county's physically coming onto their property (despite not being permitted into their homes) violates their express right of privacy to be free in their private lives from government interference. Because this is a fundamental right, strict scrutiny applies. The county must show that this provision is narrowly tailored to meet a compelling government interest. The county claims that swine flu prevention is absolutely necessary, which it likely is because it is a serious illness that is highly contagious between humans and pigs. Nonetheless, farmers could just as easily take their pigs by vehicle to a designated slaughter house to comply with the law. It is highly unlikely that this ordinance is the most narrowly tailored means by which to accomplish the identification of sick pigs. In turn, the county probably loses on this provision under a right to privacy challenge.

The 4th amendment, both under the Florida constitution and the U.S. Constitution, protects persons from unlawful searches and seizures. Specifically, under the Florida constitution, people are entitled to be secure in their homes, effects, persons, and papers. Farmers will argue that the ordinance provision that allows the county to enter their properties without a lawful search warrant issued from an impartial magistrate violates their 4th amendment rights under the Florida constitution. The farmers would argue that they have a reasonable expectation of privacy in their private properties as extension of their homes. The farmers would further argue that the county should have to develop probable cause (a reasonable belief that the suspect in question has engaged in criminal conduct) in order to obtain the warrant or that the search only be allowed pursuant to one of the recognized exceptions to the search warrant requirement. The county would argue that this is not a criminal issue triggering 4th amendment search and seizure rights, but that it is a public health regulatory matter and immediate emergency, and that no warrant would be required regardless and, even if it is, exigent circumstances exist because of the rate and pace of disease. The farmers would counter that, even if for public health (and essentially civil health purposes), a warrant should still issue to ensure that the county does not overstep its authority to locate the sick pigs. Nonetheless, a court could reasonably find that, because the county is not allowed to enter into the homes of these farmers and/or that a public health crisis exists, that no reasonable expectation of privacy exists and, therefore, a warrant shouldn't issue. Still, if the court deems that the farmers maintain a reasonable expectation of privacy over the entire piece of property, the court may order that the county obtain a search warrant before being able to enter onto the premises to destroy the pigs.

Q QUESTION NUMBER 3

FEBRUARY 2014 BAR EXAMINATION – REAL PROPERTY/FLORIDA CONSTITUTIONAL LAW/ETHICS

Owner has owned certain property (Blackacre) for thirty years. Owner now plans to redevelop Blackacre and she has encountered four issues involving Blackacre's property lines.

First, Owner has recently discovered an issue with the southern boundary of Blackacre in light of a new survey. When Owner purchased Blackacre, it was described in her recorded deed as "Lot 1" of a certain platted subdivision. Several years later, the current owners (Southern Owners) of the property located to the South of Blackacre (Southern Property) acquired the Southern Property pursuant to a recorded deed reading "Lot 2" of the same subdivision. Ten years ago, Southern Owners constructed a fence along the boundary line between Lots 1 and 2 shown in old surveys, although Southern Owners apparently knew the fence was constructed inward of their property line.

A new survey recently revealed that the previous surveys were incorrect. The new survey correctly shows that a narrow strip of land running along Blackacre's southern portion but located outside of Southern Owner's fence (Southern Strip) is actually located within Lot 2 rather than Lot 1. Since purchasing Blackacre, Owner has mistakenly but in good faith believed that the Southern Strip was located within Blackacre's southern boundary until the new survey revealed the error. Owner never enclosed the Southern Strip, but at all times used, improved, and maintained the Southern Strip in a normal manner as a part of her backyard.

Second, the property located to the north of Blackacre (North Property) includes a private roadway that is adjacent to Blackacre's northern boundary (North Road), which Owner has used regularly since purchasing Blackacre to gain access to northern portion of Blackacre. The owner of the North Property (North Owner) recently built a fence and gate on North Property's southern boundary, thereby restricting Owner's ability to use North Road to access Blackacre via its northern entrance, however an alternate route to the east remains available to Owner to access Blackacre. Prior to this time, Owner used the North Road across the Northern Property without any objection and with no express permission from North Owner.

Third, Owner required an additional strip of land from vacant property located to the east of Blackacre (East Property), titled solely in the name of “John Smith, a married man,” to accommodate her intended development. Accordingly, Owner recently reached an agreement with John Smith on the sale of this strip (East Strip), and the respective parties then closed on its conveyance to Owner, evidenced by a deed of the East Strip duly executed by Mr. Smith.

Fourth, Owner needs an easement over the property located to the west of Blackacre (West Property). When Owner contacted the West Property’s owner (West Owner), West Owner agreed to grant the easement but informed Owner that he did not want to incur the expense of hiring an attorney and thus requested that Owner direct her attorney to draft the easement and send it to West Owner for his signature.

Discuss the issues raised and Owner’s rights to the various portions of the North, South, and East Properties addressed above. Also discuss any ethical issues involved with Owner’s attorney’s role in preparing and delivering the requested easement to West Owner for execution. Do not discuss any other issues pertaining to the easement and the West Property.

SELECTED ANSWER TO QUESTION 3

(February 2014 Bar Examination)

This question raises the issue of adverse possession regarding lot 2, the Southern Property, easement by necessity and by prescription regarding the North Property, the validity of the conveyance of the East Strip, and the ethics of preparing the deed for an unrepresented party.

The Southern Property:

In order to prevail for a claim of adverse possession, the adverse claimant must prove that her use was open and notorious, hostile and under a claim of right, continuous for the statutory period, and exclusive under the common law. The period of time for common law is 20 years.

An adverse claimant may also claim adverse possession pursuant to statute under color of title or without color of title. To prove under color of title the adverse claimant must record the deed with the county clerk which purports to vest title in the adverse claimant. To prevail on a claim without color of title the adverse claimant must make a return with the tax assessor and pay the taxes on the property claimed. Both under color of title and without color of title require the claimant to be in possession for 7 years.

In this case, while owner was in exclusive possession of the property, as evidenced by her cultivation, her possession was not hostile. She was under the mistaken belief that the property was hers and she was not claiming the property against the interest of the Southern owner. While her possession was also open and notorious, that is, visible to the Southern owners and continuous for the period of time that she cultivated, she has not satisfied the element of hostility. The facts do provide the time period she was in possession but that is not a necessary piece of information since she did not satisfy one element. She will not prevail on a claim for adverse possession under the common law standard.

Owner has also not satisfied the requirements to claim adverse possession under the statute. She did not record a deed purporting to vest title to her, nor she did she make a return and pay the taxes. Owner has not satisfied the requirements for adverse possession and therefore will not be vested with title to the strip between lot 1 and lot 2.

The Northern Property:

Owner may claim that she has a prescriptive easement or an easement by necessity over the Northern Property. In order to prove an easement by necessity, owner will have to prove that she has no other access to a public road and must cross the Northern Property. Owner may sue the Northern owner and he may be entitled to compensation. Once the compensation is paid, the easement is established.

In this instance, owner has an alternate route to access her property, therefore there is no easement by necessity. Even if she had an easement by necessity, the easement ends once the necessity ends.

Under the common law, an easement by necessity may exist over one property if the land was previously in common ownership and subdivided. If the subdivision leaves one property landlocked, the other will have an easement for ingress and egress.

In this instance, lot 1 did not come out of common ownership with the Northern Property. Further, there is no necessity because she has an alternate route.

Owner will not prevail on a claim for easement by necessity.

Owner must prove that her use of the road was open and notorious and continuous for 20 years in order to establish an easement by prescription. She must also prove it was hostile and adverse to the Northern owner's interest.

In this instance, her use appears to be hostile and adverse to the Northern owner since it was without permission. Further, it appears that the use was open and notorious as he did not object. If the reason why he did not object is due to his lack of knowledge of her use, she may not have satisfied the element of open and notorious use unless the owner knew or had reason to know of her use.

The establishment of her right to an easement by prescription depends on whether owner knew or had reason to know of her use and the use for the statutory period of 20 years.

East Property:

This question raises the issue of the validity of the conveyance from John Smith to owner. The recital of "a married man" raises the issue of whether his spouse has any rights in the property that should have been conveyed at the time of the conveyance to owner. If property is owned by a person, solely, it may still be subject to the rights of the spouse if it is Homestead property. The Homestead is property at which the owners resides as his primary residence.

In this instance, the property is vacant land and therefore could not be the primary residence of John Smith and his wife. The spouse, therefore, has no rights that need to be conveyed.

The conveyance from John Smith to owner is valid.

The Deed to West Property:

The conveyance of the deed which was prepared by the attorney for owner and sent to the owner of West raises the issue of how an attorney may act toward an unrepresented party.

An attorney may indicate to the unrepresented party that he is disinterested. That is, the attorney must disclose to the unrepresented party that he is acting in the best interests of his client and not the interests of the other party. Further, an attorney may not represent the interests of 2 clients whose interests conflict unless the attorney believes he can fairly represent both and both clients consent in writing.

In this instance, the West owner asked that the attorney prepare the deed and send it to him. The deed should be sent only with the express understanding that the attorney represents owner only and that the West owner is not his client. Attorney should also suggest that the West owner consult an attorney before signing the deed.

Provided the West owner expressly understands that he is not the client of owner's attorney and that he can consult his own attorney, the deed can be prepared and sent to West owner.

PART II - SAMPLE MULTIPLE-CHOICE QUESTIONS AND ANSWERS

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

The answers appear on page 46.

MULTIPLE-CHOICE EXAMINATION INSTRUCTIONS

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

1. This booklet contains segments 4, 5, and 6 of the General Bar Examination. It is composed of 100 multiple-choice, machine-scored items. These three afternoon segments have the same value as the three morning segments.
2. The person on each side of you should have a booklet with a different colored cover. Please determine that the person on each side of you is using a different colored cover. If he or she is using an examination booklet with the same colored cover, please notify a proctor at once.
3. When instructed, without breaking the seal, take out the answer sheet.
4. Use a No. 2 pencil to mark on the answer sheet.
5. On the answer sheet, print your name as it appears on your badge, the date, and your badge/ID number.
6. In the block on the right of the answer sheet, print your badge/ID number and blacken the corresponding bubbles underneath.
7. STOP. Do not break the seal until advised to do so by the examination administrator.
8. Use the instruction sheet to cover your answers.
9. To further assure the quality of future examinations, this examination contains some questions that are being pre-tested and do not count toward your score. Time limits have been adjusted accordingly.
10. In grading these multiple-choice items, an unanswered item will be counted the same as an item answered incorrectly; therefore, it is to your advantage to mark an answer even if you must guess.
11. Mark your answers to all questions by marking the corresponding space on the separate answer sheet. Mark only one answer to each item. Erase your first mark completely and mark your new choice to change an answer.
12. At the conclusion of this session, the Board will collect both this question booklet and your answer sheet. If you complete your answers before the period is up, and more than 15 minutes remain before the end of the session, you may turn in your question booklet and answer sheet to one of the proctors outside the examination room. If, however, fewer than 15 minutes remain, please remain at your seat until time is called and the Board has collected all question booklets and answer sheets.

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

23 SAMPLE MULTIPLE-CHOICE QUESTIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ANSWER KEY FOR MULTIPLE-CHOICE QUESTIONS

<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)