

Florida Board of Bar Examiners

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Florida Bar Examination Study Guide and Selected Answers

July 2015
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This Study Guide is published semiannually with essay questions
from two previously administered examinations
and sample answers.

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PART I – ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2015 AND FEBRUARY 2016 FLORIDA BAR EXAMINATIONS

ESSAY QUESTIONS AND SELECTED ANSWERS

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

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

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

ESSAY EXAMINATION INSTRUCTIONS

Applicable Law

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

Acceptable Essay Answer

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

Q QUESTION NUMBER 1

JULY 2015 BAR EXAMINATION – CONTRACTS/ETHICS

Amy owned and advertised for sale vacant lot A, vacant lot B, and vacant lot C at \$100,000 each. On February 15, Colleen gave Amy a signed written offer to buy lot A for \$70,000. On February 17, Amy gave Colleen a written counter offer stating that she would accept \$80,000 for lot A, but Colleen needed to accept this counter offer on or before March 1. On February 20, Amy, without receiving a response from Colleen to her February 17 counter offer, gave Colleen another written counter offer stating that she would accept \$85,000 for lot A, but Colleen had, again, only until March 1 to accept this counter offer. On February 22, Colleen gave Amy another written offer to buy lot A for \$75,000. Amy did not respond to this offer by Colleen. On February 25, Colleen contacted Amy stating that she agreed to accept her February 17 counter offer for lot A for \$80,000. Colleen also mailed Amy a countersigned copy of Amy's written counter offer along with a \$10,000 deposit check. Amy accepted this check but she eventually wrote "VOID" on the check instead of cashing it. On March 1, Amy contacted Colleen advising her that she was not going to sell her lot A and Colleen responded that she would file a lawsuit against her. On March 2, Amy sold lot A for \$100,000.

On March 15, Amy received from Dawn a signed written contract offer to purchase lot B. Dawn's offer directed Amy to accept this offer by mailing her a countersigned copy of the contract back to her. The contract that Dawn used for her offer contained a clause that read: "This contract shall be binding when signed by both parties." Amy wanted some time to think about Dawn's offer, so she took it with her when she left on vacation on March 18.

While on vacation Amy decided to accept Dawn's offer to purchase lot B and she signed the contract on March 20; however, Amy decided to wait until she arrived home from vacation before she mailed the countersigned contract back to Dawn. On March 19, Dawn changed her mind about buying lot B, so she mailed a letter to Amy revoking her prior purchase offer. This letter arrived at Amy's house on March 21. When Amy arrived home from vacation on March 22, she picked up Dawn's letter. Amy contacted Dawn to let her know that she accepted her offer on March 20, but Dawn refused to move forward with the purchase of lot B.

Edwin contacted Amy stating that he was interested in purchasing lot C only if he could build a three story home on this property. Amy was not aware of any zoning restrictions that would prevent the construction of a three story home on this property. Amy stated to Edwin that she believed he could build a three story home on lot C, and Amy subsequently entered into a contract with Edwin to sell lot C for \$100,000. This contract contained a clause that read: "This contract represents the entire agreement between the buyer and seller and any modifications to this contract are not binding unless they are in writing and signed by buyer and seller." Shortly after Amy and Edwin signed this purchase contract Edwin discovered that the local zoning ordinances prohibit the construction of any home on lot C over two stories. Edwin spoke with Amy stating that

this property was not worth \$100,000 to him because of this new zoning restriction. Amy told Edwin that she would agree to accept \$50,000, but Edwin and Amy did not write up a new contract. At the closing Amy refused to sell Edwin lot C for \$50,000. Edwin threatened to file a lawsuit against Amy.

Amy comes to your law firm for legal advice. Amy asks whether she can sell any of her vacant lots to your law firm at a discount in order to pay for her legal fees. Senior Partner believes that some of Amy's vacant lots may be a good location for another branch of your law firm. Senior Partner asks you to draft a memorandum that discusses:

- 1) the causes of action that Colleen may have against Amy, the legal theories Colleen may use to support these causes of action, the likelihood that Colleen's causes of action will prevail, and the measure of damages for these causes of action;
- 2) the causes of action that Amy may have against Dawn, the legal theories Amy may use to support these causes of action, and the likelihood that Amy's causes of action will prevail;
- 3) the causes of action that Edwin may have against Amy, the legal theories that Edwin may use to support these causes of action, and the likelihood that Edwin's causes of action will prevail; and,
- 4) whether your law firm can acquire any of these properties at a discount as compensation for rendering legal services.

SELECTED ANSWER TO QUESTION 1 **(July 2015 Bar Examination)**

Memorandum

To: Senior Partner

From: Junior Associate

This memorandum will address the issues pertaining to three lots (A, B, C) which our Client, Amy, is attempting to sell. The issues involved in the attempted sale of Amy's lots involve contracts, and since these contracts involve the sale of land, they are governed by the common law, and not the UCC, which governs the sale of goods. Goods are defined as movable items at the time of sale, and thus, land is not considered a good.

Colleen vs. Amy

Colleen may try to assert a breach of contract claim against Amy. For the following reasons, her claim will fail.

In order to have a valid contract, there must be an offer, acceptance, consideration, and no valid defenses. An offer is the manifestation of an intent to be bound by the terms expressed in the offer, and provides the offeree the power of acceptance. Consideration must be in the form of legal detriment OR benefit (Florida being in a minority of states on this matter) to both parties.

In order to analyze the causes of action Colleen may have against Amy, we must analyze the timeline of events.

1) Amy advertising Lot A for sale.

Generally, advertisements are considered an invitation to negotiate, and not an actual offer. The only exception is where there is specific language which indicates how to complete the sale (such as a store advertisement stating "First come, first served"). Since this is not the case here, Amy's advertisement of Lot A for \$100,000 is not an offer.

2) February 15 communication from Colleen to Amy

This first written communication from Colleen to Amy which offered to buy Lot A for \$70,000 is an offer. Had Amy accepted this offer, a contract would have been formed for the sale of Lot A for \$70,000. However, the facts indicate that this offer was not accepted (discussed below).

3) February 17 counteroffer from Amy to Colleen.

On Feb. 17, Amy submitted a counteroffer to Colleen in the amount of \$80,000. She further stated that this counteroffer needed to be accepted no later than March 1. A

counteroffer works to reject a prior offer and becomes a new offer. The prior offer (in this case, Colleen's offer to purchase the lot for \$70k) is terminated.

4) February 20 second offer from Amy to Colleen

Without any response from Colleen, Amy submitted a subsequent offer for \$85,000 again with the requirement that it be accepted by March 1.

5) February 22 counteroffer from Colleen

Colleen's counteroffer on February 22 to buy Lot A for \$75,000 worked to reject all previous offers from Amy. While Amy stated that her previous offers must be accepted by March 1, this did not mean that these offers from Amy would remain open through March 1. In order to keep an offer open for a set period of time under common, there must be separate consideration in order to form what's known as an option contract. An option contract cannot be revoked until the time set forth in the offer/option. Here, there was no option contract because the facts do not indicate that any consideration was provided to Amy in order to leave her offers open until March 1. Amy's language that her offers must be accepted by March 1 simply indicates that the offers would be revoked after March 1. However, the offer was able to be revoked or terminated (either by Amy's express acts, or as in this case, Colleen's counteroffer) at any time prior to March 1. Accordingly, as of February 22, the only offer on the table and able to be accepted was Colleen's counteroffer made on February 22 to buy Lot A for \$75,000.

6) Colleen's purported acceptance on February 25 of Amy's offer to buy Lot A for \$80,000

As discussed above, Colleen's counteroffer on February 22 worked to reject and terminate Amy's counteroffer of \$80,000. Thus, she could not later accept this offer and form a contract based on this acceptance absent a further counter offer from Amy for this amount.

Colleen may argue that a valid contract was formed nonetheless because she signed the counteroffer and because she sent a check for \$10,000. However, both of these arguments will fail. First, because Amy's counteroffer had been rejected after Colleen made a subsequent counteroffer for \$75,000, Colleen had no power to accept the offer for \$80k.

Second, Amy will be able to successfully assert the defense of the Statute of Frauds against Amy. The Statute of Frauds requires certain types of contracts to be in writing and signed by the party to be charged. Contracts for the sale of real estate, the sale of goods amounting to \$500 or more, contracts in contemplation of marriage, contracts guaranteeing the debt of another, and contracts that cannot be completed in less than one year must be in writing and signed by the party to be charged. The party to be charged is the party against whom the contract is being enforced.

In this situation, Colleen would be suing Amy, and thus, Colleen would need to show a signed writing from Amy. For real estate contracts, this writing must contain the name of the parties, the sale price, and the description of the land. Alternatively, in a real estate

contract, the Statute of Frauds may be satisfied by showing two of the following three facts: 1) payment of purchase price; 2) physical possession of the land; and 3) improvements to the land.

Here, Colleen would be unable to show the Statute of Frauds was satisfied. First, the signed counteroffer from Amy for \$75k was not a valid offer. Therefore, Colleen had no power to accept this offer, and thus, this offer cannot serve as a signed writing. Second, the check Colleen provided for \$10,000 was not payment of the full purchase price, was not signed by Amy, and presumably did not include a description of the land or include the sale price. While in certain cases partial payment can satisfy one of the three items discussed above in satisfaction of the Statute of Frauds, that is only the case where the partial payment was expressly contemplated in the contract (for example, if the contract provided for \$10,000 down payment). That is not the case here, and thus Colleen cannot show payment. Plus, Amy voided the check. Finally, Colleen did not take possession of Lot A or make improvements on Lot A. Therefore, she cannot satisfy the statute of frauds. Thus, Amy will be successful in her defense of this claim in that there was no contract, and she will not be required to convey Lot A to Colleen.

Had Colleen been able to successfully establish the formation of a contract, she would be entitled to either specific performance or money damages. Specific performance is where a court orders a party to comply with the terms of the contract. Specific performance is available only where there are unique goods involved and where money damages are inadequate. Land is always a unique good, and therefore, specific performance is typically available. However, since this is an equitable remedy, the right to specific performance (which would require Amy to convey Lot A to Colleen) is cut off by Amy's later sale of the property, provided that it was sold to a bona fide purchase for value who took without notice. The facts indicate that the lot was sold for \$100k, which was Amy's original advertised price, so there was value in the purchase. Furthermore, nothing in the facts indicates that the subsequent buyer was on any notice (whether constructive, actual, or inquiry) that there may have been someone with a superior right to the land from Amy. Colleen was not physically present on the property, nor was anything recorded in the deed books. Therefore, specific performance would not be available in this case.

Money damages would be in the form of either restitution or expectation. Restitution puts the parties back in the position they were prior to the contract, and expectation puts them in the position they would have been had the contract not been breached. Here, restitution would require the return of Colleen's check for \$10k. Expectation would allow Colleen to recover what she would have paid under the contract (\$75K) and the market value at the time of the breach.

Amy v. Dawn

Amy may try to pursue a claim for breach of contract against Dawn. However, such a claim is unlikely to succeed.

The facts with Amy and Dawn are simpler. Dawn submitted a written offer to Amy on March 15 to purchase Lot B. This offer direct Amy that acceptance could be only by mailing a countersigned copy of the contract back to Dawn. An offeror may control how

she wishes for the offer to be accepted, and therefore this would be proper. Since Dawn stated that acceptance would occur upon mailing of the signed counteroffer, the Mailbox Rule applies, which states that acceptance occurs upon placing acceptance in the mail, and not upon receipt of the acceptance.

Here, the facts state that Amy never sent the signed contract back to Dawn. She signed the contract on March 20, but she never mailed it. In fact, on March 19, Dawn sent a letter revoking her prior offer. An offer may be revoked expressly by the offeror, by the death of the offeror, or by acts of the offeror which the offeree knew or should have known about. A revocation of an offer is effective when received (as opposed to an acceptance under the Mailbox Rule, which is effective when mailed). The facts state that the revocation was received by Amy on March 21 or 22, depending on whether receipt is deemed the day it arrived at Amy's house or the date Amy actually retrieved the letter. This does not matter, since as discussed below, Amy did not properly accept the offer. Amy contacted Dawn on March 20 to tell her she was accepting Dawn's offer. Since the facts do not indicate that she accepted the offer by mailing a signed contract, this acceptance would not be effective, since as discussed above, Dawn's offer provided a specific manner of accepting the offer. However, had Amy mailed the signed contract on March 20, then a valid contract would have been formed, since Amy did not receive Dawn's revocation under March 21, meaning the offer would have been accepted prior to Dawn revoking it.

Therefore, Amy will be unlikely to succeed in her breach of contract claim.

Edwin v. Amy

Edwin may be able to assert a breach of contract claim and a claim for fraudulent misrepresentation against Amy.

Here, the facts state that a contract was entered into by Edwin and Amy purporting to sell Lot C for \$100k. The contract contained an integration clause (providing that it contains the entire agreement).

A subsequent oral agreement was then entered into purporting to sell the same lot for \$50k instead of the original \$100k. The enforceability of both of these agreements will be expressed in turn.

The first contract contemplated the fact that Edwin wanted to build a 3-story home on Lot C, even though zoning laws prohibited homes over two stories tall. Here it appears that neither party knew of the zoning restriction, and therefore, there was a mutual mistake concerning a material fact central to the contract. Accordingly, either party would be able to rescind this \$100k contract, which it appears they did when they attempted to enter into a subsequent agreement for \$50k.

Edwin will try to argue there was a misrepresentation, which requires a misrepresentation of a material fact, scienter on the part of the party making the misrepresentation, justified reliance, and damages. Here, Edwin cannot rely on this claim because there was no scienter when Amy stated she believed Edwin could build a 3-story home. Plus, all parties, including Edwin, are charged with constructive

knowledge of all applicable laws, in that he could have easily obtained this information himself.

Edwin will also lose on his breach of contract claim for the \$50k oral agreement. As discussed in the Amy v. Colleen discussion, the \$50,000 agreement does not satisfy the statute of frauds, as it involves the sale of land and there is no writing signed by the party to be charged. Edwin will argue that the original \$100,000 agreement was simply modified, and he is attempting to enforce that modified agreement. However, when a contract is modified, the statute of frauds must still be satisfied if the modification falls under the statute. Here, the modification is still for the sale of land. Therefore, there must be a signed writing containing the purchase price (which does not exist here for the \$50k agreement) or there must be two of the three of payment, possession, and improvements. It does not matter that a contract states all modifications must be in writing; common law controls here, and in any event, the modification was not in writing but needed to be (or at least needed to satisfy the statute of frauds). As the statute of frauds has not been satisfied for the \$50k agreement, no agreement exists for the \$50k agreement, and Edwin will be unsuccessful on his breach of contract claim against Amy.

Law Firm issues

An attorney may enter into business deals with a client so long as the deal is fair and reasonable and the client is able to discuss the terms of the deal with outside counsel.

Here, two issues arise in our contemplation of acquiring Amy's properties at a discount. First, our fees must be reasonable and reflect our skill and experience, the difficulty of the matters involved, our actual time spent on the matter, etc. Here, it probably would not make sense to take these properties at a discount since we will not know until after the representation is completed how much our fees are.

Second, acquiring these properties at a discount may not be fair and reasonable, since we would not be paying fair market value for the properties.

Finally, we would be acquiring an interest in the potential litigation itself, which could pose a number of problems and potentially require us to testify in the various lawsuits. This could also create a conflict of interest and affect our advocacy on behalf of Amy, since we would now have a vested interest in the litigation and personal stake in the outcome. This is prohibited by the Rules of Professional Conduct.

I recommend we decline to acquire any of the properties.

Q QUESTION NUMBER 2

JULY 2015 BAR EXAMINATION – CRIMINAL LAW, CONSTITUTIONAL CRIMINAL PROCEDURE, AND JUVENILE DELINQUENCY/ETHICS

Police suspect that Vic is selling drugs, but they do not have sufficient evidence for an arrest or search warrant. Two officers go to Vic's house and knock on his door, intending to ask him some questions. Donna answers the door and says that "no one else is home." One officer immediately hears moaning in the house and pushes past Donna to go inside. The police see Vic on the floor next to a bag of heroin, a needle syringe, and a ledger. Donna then says she "found Vic like this but was scared to call for help." Vic dies before medical help arrives.

Donna is arrested. In the patrol car, she says, without prompting, that she "only delivered the heroin and did not intend for Vic to overdose." She also says she heard voices telling her what to do.

At the police station, a detective informs Donna of her constitutional rights, and Donna agrees to talk to the police. The detective asks Donna about ledger entries showing that she delivered heroin to Vic and that he owed her a lot of money. Donna says that "Vic did not always pay for the drugs" she delivered. The detective presses for details, but Donna then says she "would rather not talk about it." The detective keeps asking, and Donna says that "no one steals from me and gets away with it." Donna then starts rocking in her chair and arguing with invisible people.

An autopsy later shows that Vic died from a heroin overdose and that he had marks on his wrists indicating his hands had been tied together recently. Donna's fingerprints are the only fingerprints found on the syringe.

The newspaper reports that a defense attorney was hired by an anonymous donor to represent Donna. The attorney said he would get a million dollar "bonus" if Donna were acquitted.

Discuss the potential charges against Donna related to Vic's death; her potential defenses raised by the facts; and, substantive pretrial motions that the defense might file, explaining the grounds and the State's likely responses. Also discuss the ethical considerations arising from the defense attorney's offer to represent Donna.

SELECTED ANSWER TO QUESTION 2

(July 2015 Bar Examination)

Potential Charges Against Donna

The state attorney would file these charges in circuit court as murder is a felony charge. Further, the state attorney can file either by indictment or information. Based on the evidence that Vic's wrists were tied, and that Donna's fingerprints are the only fingerprints found on the syringe, there are several legal theories under which the state attorney may try to charge Donna with. The first would be first degree murder. A first degree murder is one that is deliberate and pre-meditated. There must be sufficient time before the killing upon which the killer or defendant reflected about the murder, i.e., it was pre-planned. The State Attorney's office would base this charge on Donna's statement that Vic owed her a lot of money, Vic did not always pay, and that no one steals from me and gets away with it - evidencing that Donna may have pre-planned the murder because Vic owed her a lot of money. In addition, Donna initially lied to the police saying no one was home, evidencing that she planned to keep Vic moaning until he passed away. Further, the facts that Vic's hands were tied up may be evidence that she tied him up and injected him with enough heroin to overdose.

If there is no pre-mediation or deliberation however, the state attorney may try and make the first degree murder charge stick by showing the murder is a result of Donna's possession of a controlled substance. Florida also accepts the common law rule that a Felony Murder will be a first degree murder. This would depend on whether or not possession of a controlled substance is one of the pre-numerated felonies to fall under this category

Under the common law Murder is the taking of a human's life with a depraved heart. Florida has adopted the common law definition and further calls murder that is not premediated or deliberate as "second degree murder." Depraved heart is evidenced by (1) intent to kill; (2) intent to commit serious bodily injury; (3) super reckless disregard of the dangers to human life; or (4) as a result of a non-pre-numerated felony. Here, there are several theories the state prosecutor could sue for murder including: either that Donna by tying Vic up and then pushing a needle syringe of heroin into his body was a super reckless disregard of human life; and/or that she knew Vic was addicted to drugs and it was super reckless for her to deliver heroin to an addict. Further the state attorney will argue that Donna should have called the police and that this failure to call was a super reckless act which caused Vic's death. Donna will argue that she was scared however this will be raised in her defense attorney's case in chief.

The last theory of murder would be involuntary manslaughter - evidenced by (1) a killing committed during a misdemeanor or a crime not classified as a felony; or (2) reckless indifference to life that lead to death of a human. This would probably be the theory to sue on if the first degree murder charge of second degree murder charge does not have enough evidence to support. Based on the reckless indifference in providing heroin or by selling a controlled substance.

Another charge would be Possession of a Controlled Substance: Florida makes it a crime to knowingly transport, sell or possess a controlled substance. Here, Donna not

only admitted that she sold the drugs to Vic but her finger-prints were found on the syringe that was used.

Battery: if the murder charges do not fit, but it is found that Donna did tie up Vic's wrists - a battery in Florida is a specific intent crime, unlike common law, under which the state attorney must prove that the defendant intended to commit an offensive or harmful contact with the plaintiff. Here, the state attorney may argue that tying Vic's wrist up was a harmful and offensive contact, and that inserting him with a syringe was a harmful or offensive contact.

For all of these crimes there must be a voluntary act, with the appropriate mens rea, and clear causation element. For the murder charges, the state attorney must prove that Donna's voluntary acts with her requisite mens rea was the cause of Vic's death. Further, the state attorney will want to file all possible charges because under double jeopardy an acquittal of either a lesser included offense or a higher degree of the offense will bar any and all lesser or higher degrees of offenses in separate proceedings. Double Jeopardy attaches in a criminal proceeding when the jury is sworn in. Further, any crime that contains the same elements as another crime means double jeopardy has attached.

Potential Defenses

Insanity: M'Naughten theory - must be proved by clear and convincing evidence and raised by the defendant with the burden of proof on the defendant. Insanity means that the defendant did not have the legal capacity of mind at the time the crime was committed to be charged. The M'Naughten theory follows that because of a disease of the mind the defendant did not know her actions were wrong [did not know right from wrong]; or did not understand the unlawfulness of her actions. This defense would be raised based on Donna starting to rock her chair and arguing with invisible people. However, the burden is on Donna and her attorney to prove that at the time of the actions she was insane.

Donna will also try and argue that the state cannot meet its burden proving the requirements for murder - because Vic is the one who inserted the heroin in himself, and that Donna played no part in his death and further that the evidence seized and her statements violated her constitutional rights [as discussed below] and therefore the state has no evidence to support the charges. The Heroin and needle were not found on Donna's person but on Vics.

Pre-trial motions:

Suppression of Evidence: Fourth Amendment Violation - Unreasonable Search & Seizure

The Florida constitution interprets the Fourth Amendment in conformity with the Federal Constitution and as interpreted by the United States Supreme Court. This means that Florida has adopted the protection against unreasonable searches and seizures and further has adopted the exclusionary rule disallowing any evidence that violates these rights. However, even with the exclusionary rule, the decision to suppress

evidence will ultimately be up to the judge, however because this is a criminal case, judges tend to suppress the evidence to avoid any prejudicial effects.

In order to file a motion to suppress for unreasonable search and seizure the defendant must have standing: there must be conduct by the government (a police offer) and in an area where the defendant had a reasonable expectation of privacy. A defendant has a reasonable expectation of privacy in their home, or in the home where they are an overnight guest. A defendant does not have a reasonable expectation of privacy in the home of another where they are not staying. Further a defendant cannot raise the reasonable expectation of privacy of a third party. Government's actions must specifically violate her right.

Here, technically speaking the Police did violate Vic's protection against unreasonable search and seizure. Generally, the police must have a valid search warrant and arrest warrant to search and arrest a defendant at his own home. To have a valid search warrant the warrant must be based on an affidavit of the police that there is probable cause, specifically describe the area being searched and the item to be seized, and be given by a neutral and detached magistrate. Here, when the police went to Vic's door and Donna answered without any evidence that she had the consent to allow them to search the home; they violated Vic's Fourth Amendment rights. There are several exceptions to the warrant requirement such as exigent circumstances - evidence that the defendant is either trying to flee, will destroy evidence; or reasonable danger to life; consent by someone who has the authority to allow the police to enter the house specifically someone who resides there, a search incident to an arrest, an automobile exception and the plain-view doctrine. Here, the police would argue that there were exigent circumstances when they heard Vic moan because they thought someone was danger. Further, once they were in the home on exigent circumstances the ledger, bag of heroin and needle syringe were in plain view and thus because clearly evidence of a crime were allowed to be seized. Regardless, as Vic has died, he cannot raise these constitutional issues.

Donna will thus try and argue the above, that the police's presence in the home and then seizure of the ledger, bag of heroin and needle syringe were unconstitutional and must be excluded because they violated a reasonable expectation of privacy. However, this expectation of privacy only goes to Vic. The statute will argue that Donna does not get to raise this constitutional argument against unreasonable searches and seizures because it was not her home. There is no evidence she was an overnight guest, only that she sold drugs. Therefore, this motion to suppress would probably be declined for lack of standing for failure to have a reasonable expectation of privacy and the state would win on its response.

Suppression of Statements: Fifth Amendment Violations of Right Against Self-Incrimination

The Florida constitution also interprets the Fifth Amendment Right against Self-Incrimination in conformity with the Federal Constitution. The Fifth Amendment protections are not crime specific and are only enforceable upon government/ police custody and interrogation. If a defendant does not know she is being interrogated by a government officer the statements will be considered voluntary. The right against self-

incrimination means that at the time of an arrest, or when a defendant is taken into custody with an interrogation a defendant must be given her Miranda Rights which are: you have the right to remain silent, anything you can say or do may be used against you in the court of law, you have a right to an attorney, and if you can't afford one, then one will be provided for you. When Donna was arrested there is no evidence that she was given her Miranda Rights. At this stage in a proceeding - an arrest where a Defendant is taken into custody her miranda rights should have been given. Therefore Donna's statement "only delivered the heroin and did not intend for Vic to overdose" will probably be suppressed. The state may try and argue that although custody had occurred there was no interrogation requiring recital of the Miranda rights, however at this stage when a defendant is handcuffed the Miranda Rights are customary and the state would probably lose.

At the police station the facts say a detective informed Donna of her constitutional rights - we can assume this was probably a proper Miranda statement. A defendant upon receiving Miranda may either request an attorney, which request must be granted and questioning must cease until the attorney arrives, or the defendant reinstates the questioning on her own, or may invoke her right to remain silent. The right to remain silent must be unequivocal and clear. If a defendant invokes her right to remain silent the police must cease questioning for her crime, and upon waiting a few hours may re-give the Miranda warnings. Here, Donna agreed to talk to the police thus waiving her fifth amendment right to silence and self-incrimination. The statement that "Vic does not always pay for drugs" and when Detective asked about the ledger will probably be admitted, unless Donna can prove her being informed of her constitutional rights was not the proper Miranda recital. Donna will argue that when she said "I would rather not talk about it" that she claimed her right to remain silent and that the detectives violated this right when they kept questioning her. However, the state will argue that Donna's request was not clear and equivocal and therefore, the detectives had every right to keep asking questions until she made a clear request.

Donna will also try and argue the statements were not voluntary. Because she was incompetent to be questioned. Discussed below in the motion.

Motion: Incompetent to Proceed: this motion reflects that Donna during the time of her proceeding is not competent to proceed in trial. If a defendant is found incompetent on the request of the defendant's attorney, the state prosecutor or the court, the judge will stay the proceedings and order the defendant be evaluated by no more than 3 but no less than two mental health experts. The court will routinely check Donna's competency status. If by the end of five years there is no evidence that Donna will ever gain competency she may be released. However, for a crime of murder, and based on an assessment report from the mental health experts, if she is a clear danger to herself, society or at risk of murdering again she may be committed. Donna will also use this motion to argue her statements were not voluntary at all.

If the evidence is suppressed: Donna's attorney will file a petition to have the charges dismissed for lack of probable cause, i.e. evidence to support the claims.

Ethical Considerations

An attorney's fees must be reasonable and communicated preferably in writing at the beginning or before representation. An attorney in either a contingency fee arrangement or for an indigent defendant may provide the fees and expenses for litigation. A contingency fee agreement means that the lawyer's ultimate fee will be based on the results of the litigation. A contingency fee agreement must be in writing, and must clearly explain how the fee will be calculated based on different resolutions. Further, the client in a personal injury suit must be given the client's statement of rights identifying that a client can terminate the agreement within three days. However, the Florida Bar forbids certain type of representations in a contingency fee arrangement, these are (1) criminal representation and (2) family law matters such as divorce, alimony or child custody. AS this representation would be for a criminal defendant, this type of contingency fee arrangement is not allowed because the contingency rests on the defendant's ultimate freedom. Therefore, the attorney may not get a million dollar bonus if Donna were acquitted.

Further, a lawyer must maintain professional and independent judgment. This means avoiding any conflict of interest. A lawyer may have another person pay for the clients representation as long as (1) the lawyer's professional and independent judgment will not be tainted and his full priority will be that of the client being represented; (2) the client consents and understands that someone will be paying; and (3) the lawyer's duty of confidentiality is maintained. Here, an anonymous donor hired the lawyer to represent Donna; the lawyer therefore must meet all these requirements in order for the representation to be valid.

Q QUESTION NUMBER 3

JULY 2015 BAR EXAMINATION – TORTS/ETHICS

City purchases a used car manufactured by AutoCo from Dealer, one of AutoCo's licensed dealerships. AutoCo later issues a recall notice warning City that the car contained a hidden safety defect, arising from inadequate testing, that prevents its driver air bag from deploying in an accident, and urging City to have it repaired. City's employees forget to have the recall repairs performed, and instead substantially modified the driver air bag in other ways.

Five months later, Employee jumps into the car and races home. Due to excessive speed, Employee misses a curve and the car slams head-on into a brick wall. During the accident, the car's driver air bag does not deploy and Employee suffers fatal injuries. However, no defects in the car caused the accident. Employee leaves behind Spouse and seven minor children.

Twenty-two months after the accident, Spouse approaches Attorney to discuss a potential lawsuit. Attorney agrees to file a lawsuit for what Attorney describes is a "standard attorney fee of 50 percent of any recovery" and Spouse agrees to this arrangement. Attorney immediately pulls out a one-paragraph representation contract to pursue a wrongful death lawsuit, which references the "standard attorney fee of 50 percent," which Spouse signs on the spot; no other documents are signed by Spouse. Two days later, Spouse tries to back out of the signed contract, but Attorney refuses to cancel the agreement. Attorney devotes the next several months to this matter without alerting any potential defendant, and files a very detailed wrongful death lawsuit twenty-nine months after the accident, seeking \$5,000,000 from each defendant.

Prepare a memo evaluating the claims of Spouse, AutoCo's defenses, and any ethical issues for Attorney arising from this situation.

SELECTED ANSWER TO QUESTION 3
(July 2015 Bar Examination)

MEMO

To: File

From: Attorney

RE: Claims of Spouse, AutoCo & Ethical Issues

I. Spouse's ("S") Claims

A. S v. Dealer

S will not likely succeed in a strict liability claim against Dealer. Strict liability applies when the activity is abnormally dangerous, a defect is present, or animals are involved. Here, there is a defect present. A defect can either be a design defect, manufacturing defect, or failure to label. A seller of items, who sells the defective item in its usual course of business is generally strictly liable for defects. Here, there was a safety defect that was hidden. A merchant is not liable for a defect unless they knew of or should have known of the defect. Here, the safety defect was hidden. It does not matter that Dealer was not in privity with employee or S; privity of contract is not required for strict liability claims. As such, Dealer is not likely strictly liable.

S would not likely succeed in a negligence claim against Dealer. Negligence requires duty, breach, causation (legal & proximate cause), and damages.

Duty - owed to all foreseeable plaintiffs to act as a reasonably prudent person under the same or similar circumstances. Here, D had a duty to sell the car to the city as a reasonably prudent dealer would under the same or similar circumstances. D did not know of the defect, so was under no duty to inform the city of the defect.

Breach - when defendant's conduct falls below the duty owed. Here, S may try and argue that D's duty was breached when failing to warn the City of the defect. However, Dealer did not know of the defect, so had no duty to warn.

As there was no breach of the duty owed, no negligence will be brought on dealer.

B. S. v. AutoCo ("A")

S will likely succeed in a strict liability claim (defined above) against A. Here, the strict liability claim will be based in negligence (defined above).

A had a duty to act as a reasonably prudent car manufacturer. This duty was owed not only to those that purchase the cars, but also to foreseeable plaintiffs.

A breached this duty (defined above) when failing to adequately test the car and allowing a product to enter the stream of commerce with a defect. A will argue that the duty was not breached, because they alerted the City as soon as possible once the hidden defect was discovered. However, urging to have a defect repaired is not sufficient to circumvent liability. Additionally, A may be liable under strict liability for allowing a defective product to leave its facility and enter the stream of commerce with a defect.

Causation - A must be the legal causation (the but-for causation) and the proximate cause (that the damage incurred by Employee ("E") was foreseeable). Here, S will argue that but-for the safety defect in the car, E might not have died. Additionally, that it was foreseeable that failure for a driver's airbag to deploy would possibly result in death.

Damages - Defendant must incur actual damages, not just economic loss. Here, E suffered actual damages in his death. Florida allows for recovery of compensatory damages in the form of economic (lost wages, medical bills) and non-economic (pain & suffering, loss of consortium). Florida, unlike a majority of states, allows recovery of pain & suffering in wrongful death actions for the surviving spouse and any minor children. Here, E leaves behind a spouse and 7 minor children.

It is unlikely that S can recover punitive damages. In Florida, punitive damages must be plead with specificity to the trier of fact, who must find by clear & convincing evidence, that the individual is guilty of intentional misconduct or gross negligence. For an employer or other individual to be liable for punitive damages due to a contractual or agency relationship, the principal (or A in our situation) must have either 1) condoned or ratified the conduct; 2) participated in conduct that lead to the injuries; or 3) been grossly negligent. Here, there are no facts that support by clear & convincing evidence that there was gross negligence or intentional misconduct by A.

C. *S v. City ("C")*

S may bring a claim against C for vicarious liability. Vicarious liability is holding an individual accountable/liable for the acts of its agent or employee. S will argue that C was vicariously liable for the negligence of its employees.

Duty - defined above. Here, C had a duty to provide safe cars to its employees.

Breach - defined above. Here, C breached this duty when C received notice of a hidden safety defect and was urged to have it repaired, but failed to repair the defect.

Causation - legal & proximate cause (both defined above). S will argue that but-for C's failure to replace/repair the defect, E would not be dead. Also, that the damages on E were foreseeable since C knew that the driver airbags were not working properly. C can argue that it is not liable because E was not working or on a detour (slight deviation from his employment obligations), but was rather on a frolic (large deviation from the scope of duty). Employers are not liable for torts that occur during a frolic that are outside the scope of employment.

C will likely be vicariously liable for the tortious acts of its other employees who substantially modified the driver airbags. Vicarious liability exists when an employer is liable for the acts of its employees that fall within the scope of employment and/or are done for the benefit of the employer. Here, employees forgot to have the repairs performed, despite A urging C to have the repairs performed. Moreover, the employees substantially modified the driver airbag in other ways. If these modifications were within the scope of these employee's job or were done for the benefit of C (their employer), C may likely be liable. If the employee's conduct in modifying the air bag was grossly negligent (evidencing a reckless disregard for human life), and C condoned, ratified, or participated in the negligent conduct, C and the employees may be liable for punitive damages.

Damages - defined above. Here, E suffered fatal injuries as a result. C can argue that it is immune from liability under sovereign immunity. Florida enacted governmental immunity in accordance with the federal government, but is liable for damage to property and people. The government is liable for injuries that are a result of operational duties, but not planning. Here, the government was not in a planning activity, but operational since it failed to have the defective car repaired. City may argue that it planned to have the car repaired and that it is not liable since it is a planning activity, but this will not likely succeed. If C is held liable, there liability will be mitigated under Florida's comparative negligence standard (as discussed below) and the governmental immunity. The government may only liable for \$200k per person or \$300k per occurrence. Anything in excess must be approved by the legislature.

II. Defenses

A. A's Defenses

A will argue that it did not breach its duty. A did not know of the safety defect, but once found, notified and urged C to have the car repaired. C's failure to have the car repaired is a superseding cause (an unforeseeable intervening cause that breaks the chain of causation and liability); however, failure to repair a defect is a foreseeable intervening cause that was created by A - so unlikely to prevail. A will argue that E's injuries were not foreseeable, because it was not foreseeable that a user would use the car to race and drive at reckless speeds. A may try and argue negligence per se (assuming there are speed limits). However, this would only serve to mitigate A's damages, and would not be a bar to recovery. Moreover, in Florida, only penal statutes are sufficient for negligence per se - where the duty is defined by statute and intended to protect a specific class of people from specific harms. If there is no penal aspect to a statute, it is merely prima facie of negligence.

A can also argue that it is not strictly liable because C's employees substantially modified the air bags. A manufacturer is not liable for substantial modifications if the modifications are unforeseeable at the time of production. Here, the employees substantially modified the driver air bag and E's fatal injuries were not caused by any defects in the car. A may still be liable for negligence in failing to adequately test each car it manufactures.

A can also argue against total damages. Florida is a pure comparative negligence state. Plaintiff can bring a claim as long as they are not 100% at fault. Any fault of plaintiff will be apportioned by the jury or judge and will be calculated considering all parties involved in the accident - whether they are a named party or not. Here, S is seeking \$5M from each party. A can seek to mitigate damages and apportion fault due to C's failure to repair the car, C's employee's substantial modification of the driver airbags, and E's driving at excessive speeds. A may also be able to mitigate total damages due to the Florida seat-belt defense. Facts do not indicate whether E was wearing a seatbelt. If A can prove that: 1) E had an operational seat belt available, 2) E failed to use the seat belt, and 3) failure to use the seatbelt increased the damages incurred, the judge will instruct the jury to apportion fault to E.

III. Ethics

A fee must be reasonable and not clearly excessive. Court's look to factors such as the skill required, result obtained, competency & diligence of the attorney, fee charged in the community for similar representation, and time involved in representation to determine if a fee is reasonable. Contingent fees are allowed except in family or criminal law issues, with the exception that they are allowed to recover for past due alimony. Florida statutes proscribe set percentages, and anything above those percentages is presumed in excess, but is rebuttable.

Contingent fee must be in writing containing specific requirements (break down of fees if the case settles, goes to trial, appeal, calculation of fees before or after costs are taken out), signed by the client & attorney, a copy provided to the client for their records, and the client has three days which to retract their acceptance of the fee agreement. Here, attorney's "standard fee" of 50% is clearly in excess of the percentage proscribed by the Florida statutes. S signs the one-paragraph boiler plate agreement (likely failing to contain the required information of fee allocation and breakdown) on the spot, without further review or questions. The facts do not state, but I am assuming that S did not receive a copy of the signed agreement, which is a breach of the Florida rules of professional conduct. S attempted to withdraw from the agreement after two-days, but attorney refused to allow this. Despite S's valid withdrawal, attorney continued doing work for 7 months, incurring substantial legal fees for S.

Additionally, S may have a claim against attorney for failing to file suit within the statute of limitations. Tort actions generally must be brought within two years of their occurrence. After that time, the claims are barred by the statute of limitations. Here, S went to attorney with two months left before the claims would be barred. Attorney did not file the claim for another 7 months, and the claim would likely be barred by the statute of limitations. If it is barred, S can claim a breach of attorney's fiduciary relationship, and attorney's incompetence and bring a malpractice claim against attorney. If attorney has filed the claims within the statute of limitations, S may still bring a claim for malpractice due to S's informing attorney of withdrawing from the agreement. S's withdrawal excused attorney from representation and terminated their relationship. Attorney essentially filed suit on behalf of a client attorney does not represent. This can not only lead to a malpractice suit from S, but sanctions from the court and the Board of Bar Examiners for filing a frivolous suit.

Q QUESTION NUMBER 1

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

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

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

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

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

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

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

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

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

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

SELECTED ANSWER TO QUESTION 1 **(February 2016 Bar Examination)**

To: Note to File

From: Associate

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

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

Charges against Alex

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

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

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

steal and sell copper wire.

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

Charges against Charlie

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

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

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

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

Alex's motion to suppress

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

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

Admissibility of Alex's statement to the police,

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

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

Ethical issues Luke may face

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

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

Q QUESTION NUMBER 2

FEBRUARY 2016 BAR EXAMINATION – FEDERAL CONSTITUTIONAL LAW

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

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

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

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

SELECTED ANSWER TO QUESTION 2

(February 2016 Bar Examination)

To: Sr. Partner

From: Jr. Associate

Re: *Whether Client FarmCo Can Bring a Successful Lawsuit Challenging the Constitutionality of the Statute*

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

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

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

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

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

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

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

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

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

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

Q QUESTION NUMBER 3

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

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

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

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

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

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

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

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

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

SELECTED ANSWER TO QUESTION 3

(February 2016 Bar Examination)

I) *Nephew's claims against Sam.*

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

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

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

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

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

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

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

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

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

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

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

II) ICCI'S Claims against Sam

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

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

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

III. Attorney representation of Sam

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

- (1) *An attorney may not solicit a person with whom the attorney does not have a pre-existing relationship for his personal financial gain. In tort actions (which may be present here between Sam and Broker), an attorney may not solicit an injured party within 30 days of the injury. Attorney's conduct violated the non-solicitation rules because he approached Sam on overhearing of his troubles.*
- (2) *Conflict. An attorney cannot represent a client in a matter adverse to a former client that relates to the attorney's prior representation. This conflict could be waived by broker in writing. It's not clear that Attorney's representation of Sam is in any way related to the prior representation of Broker, so this may not be an issue. The Attorney would need to determine whether he had received any confidential information in the course of the prior representation that would be relevant to the current representation. If so, there may be a conflict.*
- (3) *Although an attorney and client can agree in advance to a fee structure, any fee must be fair and reasonable to the client considering the nature of the work, skill and experience of the attorney, time pressures, and novelty and complexity of the issues. Fees should be disclosed upfront, which the Attorney probably did. However, because this was a non-refundable flat fee, he should have disclosed the fee in writing. Because this fee is considered earned on receipt, Attorney could deposit it into his own account and need not put it in his client trust account (because it was a flat fee for the engagement and non-refundable).*

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 47.

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) |