

Florida Board of Bar Examiners

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Florida Bar Examination Study Guide and Selected Answers

July 2011
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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 2011 AND FEBRUARY 2012 FLORIDA BAR EXAMINATIONS

ESSAY QUESTIONS AND SELECTED ANSWERS

Part I of this publication contains the essay questions from the July 2011 and February 2012 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 **UESTION NUMBER 1**

JULY 2011 BAR EXAMINATION – CONTRACTS/REAL PROPERTY

Contractor wanted a \$100,000 loan at seven percent so he could build a house and sell it for a profit. The Banker lied and told Contractor that he did not qualify for a bank loan, but she offered to personally loan Contractor \$100,000 for six months at a twelve percent interest rate per annum with interest and principal payable upon maturity of the note. They signed a note and a mortgage with these terms. The mortgage was properly recorded and all taxes paid. The note also provided that Banker will be entitled to attorney's fees in any collection action including foreclosure on the mortgage. Contractor signed the note and mortgage without reading them. Six months later and without the money to repay the note, Contractor asked for an extension. In discussion with Contractor, Banker confessed that Contractor originally qualified for the bank loan. Banker and Contractor then agreed on the extension and they shook hands on a three-month extension.

Three months later when the loan is due, Contractor has finished the house but has not sold it. Banker threatened foreclosure. She then suggested that Contractor sell the house to Banker's Mother for \$150,000. Contractor recognized that \$150,000 is the amount he spent to build the house and he reluctantly agreed to the price. Contractor would have liked \$180,000. Banker wrote down all the details of the sale listing her Mother as purchaser, and both Banker and Contractor signed the sale agreement.

Before closing, the parties learned that the county had abandoned plans for an expressway behind the new house. Instead, the land will be dedicated as a nature preserve. The house now appraises for \$250,000 or \$70,000 more than what the contractor would have liked. Banker and her Mother arrived at closing with a check for \$150,000, but Contractor refused to close.

In preparation for mediation between the parties, you have been asked to write a memo for the mediator. As to Contractor, Banker, and Mother, discuss their potential claims, defenses, and the likely outcomes of their claims. Do not discuss any causes of action against the bank and regulatory issues concerning the note and the mortgage.

SELECTED ANSWER TO QUESTION 1 **(July 2011 Bar Examination)**

The original contract between Contractor and Banker

In order to have a valid contract, it must be shown that there was an offer, acceptance, consideration, and that there are no applicable defenses to its enforcement. The facts indicate that the Banker and Contractor agreed to enter into a loan contract where the Banker would loan the Contractor \$100,000 for six months at twelve percent interest. The loan and interest constitute valid consideration. As such, there was a valid offer, acceptance, and consideration. However, the Contractor may argue that the loan contract should be set aside because of the Banker's fraud. Where one party induces another to enter into a contract based upon false representations, the contract will then be voidable at the election of the other party. This is different than void contracts, which can be set aside at any time. The Contractor will argue that the Banker induced the loan by her misrepresentation that the Contractor did not qualify for a loan, and that if she had not done so, he would not have entered into the contract. However, the Banker will argue that the Contractor ratified the contract by agreeing to the extension. Where a contract is voidable rather than void, the party who can elect to void the contract can also subsequently ratify it. The Banker will argue that the Contractor ratified the contract by agreeing to the extension even after disclosure of the Banker's misrepresentation. Because the Contractor was notified of the original misrepresentation, a court would likely hold that the Contractor had ratified the contract and thereby can no longer seek to void the contract.

Contractor may argue that the contract should not be enforceable because he did not read it. However, this argument should fail as parties are presumed to have read contracts to which they have signed.

The extension of the loan agreement constituted an oral modification of the original contract. In order for a modification to be valid under a non-UCC contract, there must be valid consideration for the modification. Consideration can be either a legal benefit or detriment. In the modification context, the promise to repay a debt as originally due is not sufficient consideration. However, if the debt is in any way changed, or the deadline for repayment is altered, then there will be valid consideration. The facts indicate that the parties agreed to an extension on the time when the loan will be due. However, there is no indication as to whether or not there was any alteration in the amount owed; however, if the interest continued to accrue at a higher rate during this time then that might constitute valid consideration.

Contractor will argue that the extension is not valid because it was not written. The Statute of Frauds applies to contracts regarding interests in real property. The Statute of Frauds requirements for real property transactions are as follows: it must be in writing; must sufficiently identify the land and parties involved; it must be signed by the parties; and it must be witnessed by two subscribing witnesses. Where there is a modification to a contract, whether the modification itself must be in writing depends upon whether the contract, as modified, would have to meet the Statute of Frauds. Here, because the contract as modified related to a mortgage interest on real property, it should still have to meet the Statute of Frauds. Accordingly, the Contractor should be

successful in making a defense under the Statute of Frauds in relation to the modification of the contract.

The Agreement to sell the home to Banker's Mother

The Banker will argue that there is an enforceable contract for the Contractor to sell the home to the Banker's Mother. The Banker will argue that the consideration for this agreement was Banker's foregoing her legal rights under the original contract as modified to foreclose on the Contractor's mortgage on the home. The Contractor, however, may assert various defenses. The Contractor may argue that the contract was procured by duress. Duress occurs where a party's free will has been overcome due to the circumstances surrounding the transaction, and as such, did not voluntarily enter into the contract. These circumstances can be found where one party has made an improper threat to another party that has caused that party to involuntarily enter into the contract. The Contractor will argue that the duress occurred here when the Banker threatened to foreclose on the loan and then suggested that the house be sold to Banker's Mother. The Banker will argue that there was no duress in this situation, but rather, the Contractor was simply in a bad situation and had to make a new deal. In so arguing, the Banker will state that her threat was not improper. She will argue that the threat was not improper because she had the legal right to foreclose on the contract.

The Mother will argue that she is entitled to the home under a third party beneficiary theory. In order for a party to be a third party beneficiary, it must be shown that they were contemplated as a beneficiary under the contract by the contracting parties. The facts indicate that the Banker specifically suggested that the Contractor sell the home to her Mother. Accordingly, the Mother should have a valid claim that she is a third party beneficiary as contemplated by the agreement between the original contracting parties. In order for a third party beneficiary's rights to vest, it must be shown that they were aware of the rights, they assented to the contract, they detrimentally relied on the contract, or that they have brought suit under the contract. If the third party beneficiary has done any of these things before the parties have revoked or modified, then the third party beneficiary's rights have vested and they can enforce the agreement. The Mother's rights will have vested therefore if she brings suits, if she assented, or if she has detrimentally relied (perhaps by selling her other home).

There can also be an argument made that equitable conversion applies here. Equitable conversion applies where there is a contract for the sale of real estate. Equitable title is said to pass to the purchaser after the contract is signed, with legal title remaining with the seller. Mother will argue that she already has equitable title to the property and that the Contractor should be compelled to provide the legal title as well.

The Contractor may argue that the Mother never signed the contract and as such, the contract fails to meet the Statute of Frauds requirements, which requires that the agreement be in writing, that the property and parties be sufficiently described, that the parties sign, and that there are two subscribing witnesses. The Contractor will argue that the Banker rather than the Mother signed the contract, but the Mother was listed as the purchaser. However, the Mother will argue that the party to be charged with the contract, the Contractor, did sign, and as such the contract still met the signature requirement. However, the Contractor will also argue that there were not two

subscribing witnesses to the land sale contract. Therefore, the Contractor will argue that even if the lack of the Mother's signature doesn't render the contract invalid under the Statute of Frauds, the lack of subscribing witnesses will.

The Contractor may also argue that there was a mutual mistake which should prohibit enforcement of the contract. Mutual mistake occurs where both parties have made a mistake about the contract which goes to the core material terms of the contract. It must not have been possible for either party to have known of the mistake prior to contracting. If a mutual mistake is shown, it will relieve the parties of their obligations under the contract. However, a party asserting a mutual mistake must have assumed such risks in the contract. Typically, mere differences in value are the type of risks that parties have assumed in contracting, unless the contract specifically provides otherwise. The Contractor is going to argue that there is a mutual mistake which goes to the core material aspects of the contract because the county has abandoned its plan for an expressway, which will increase the value of the home. The Contractor will point to the large disparity between the appraisal price and the contract price in making this argument. However, the Banker and Mother will argue that this is the very type of risk that parties are said to have assumed in contracting. Namely, they will argue that this is simply the risk that property may not be as valuable as what one thought it was.

Remedies

The remedy for breach of contract is typically for monetary damages at law. There are two types of compensatory damages recognized by contract law: expectation damages and reliance damages. Expectation damages seek to place the non-breaching party in the position they would have been in had the contract been performed as contemplated. Reliance damages seek to return the non-breaching party to the position they were in prior to the contract being formed, thereby returning funds and other items expended pursuant to the contract. Incidental damages seek to remedy damages incurred incident to the breach, such as inspection fees, storage fees, having to remarket property, etc. Consequential damages are those damages caused by the breach which prevents the parties from obtaining profits or other things as a result of the contract having not been performed as contemplated. Consequential damages must have been foreseeable to the contracting parties at the time of the contract.

In addition to remedies at law, parties can also seek to recover under equitable theories. Parties can seek specific performance for unique items contracted for. Land is one of the items that is considered unique, because it cannot be replaced with another piece of land. The court will award specific performance where damages at law would be inadequate and it is feasible to do so. In addition, parties can seek to recover any unjust enrichment conferred upon the other party even if the court finds that there was no validly enforceable contract under a theory of restitution.

The Banker could seek expectation damages under the loan contract. Expectation damages would include the repayment of principle plus the interest payments required under the loan. Additionally, the Banker could seek expectation damages for the Contractor's failure to sell the land to her mother. Under a land sale contract, where one party breaches, the non-breaching party can recover either specific performance or damages. Damages in land sale contracts are typically the difference between the fair

market value of the land and the contract price. This may be an attractive option here because the fair market value of the land is now significantly higher than the contract price.

The Mother is going to argue that she is entitled to specific performance because she was a third party beneficiary under a land sales contract. She will argue that performance is feasible because the court could argue the Contractor to convey the land to her.

The Contractor, if successful in arguing that the original loan contract as modified was invalid due to fraud, may seek reliance damages. The Contractor will argue that he should be returned to his pre-contract position and as such any funds paid towards the loan should be returned. The Contractor might also make a restitution argument, arguing that the Banker was unjustly enriched by the loan proceeds where the loan was fraudulently obtained.

Contractor v. Banker – Misrepresentation

Contractor may bring a tort action against Banker for misrepresentation. Misrepresentation occurs where a party makes a false statement of material fact that the plaintiff reasonably relies upon. Here, the Banker made the misrepresentation that the Contractor did not qualify for a bank loan. The Contractor will argue that he reasonably relied upon this statement because the Banker was working in his capacity as a bank employee, and that the Contractor was reasonably entitled to rely on what a bank employee said in connection to a loan application. The Contractor would argue that he would not have agreed to the terms of the private loan without the Banker's representations that he did not qualify for a bank loan. Contractor would seek actual damages in the form of the amount of the excess interest he paid to the Banker above that he would have paid for the initial loan he sought.

Attorney's Fees

The facts indicate that the contract between the Banker and the Contractor had a provision that would entitle the Banker to attorney's fees in any action. If the Banker is successful in her foreclosure action, the Banker will argue that she should be entitled to her attorney's fees. However, Florida Statute also provides that where contracts provide attorney's fees to one party, the other party may also receive attorney's fees in accordance with that provision. Therefore, if the Contractor is successful in the suit, he should also be entitled to attorney's fees.

Q QUESTION NUMBER 2

JULY 2011 BAR EXAMINATION – FAMILY LAW/ETHICS

Three years ago, Harry and Wilma moved to Florida from Maine with their Daughter. After the move, Harry received an inheritance. With his inheritance:

- Harry purchased the parties' home (which is titled jointly);
- Harry opened a money market account with \$200,000 (which he also titled jointly, as a matter of convenience and in the event that he were to die). Neither party ever withdrew or deposited any other funds into that account; and
- Harry deposited the remaining funds into his checking account (titled only in his name). Other funds in that account consisted of his income from work and tax refunds.

Harry filed for divorce, and moved out of the parties' home. Thereafter, Harry took out a loan for \$50,000, which he secured with a mortgage against the former marital home. Wilma did not sign the mortgage document, although she knew about the loan.

On a temporary basis, the Court ordered that Daughter, who was 8, would reside with Wilma five days per week, and the remaining two days with Harry. Two months later, Wilma called Harry and notified him that she had moved back to Maine with Daughter. Harry objected to the move, and threatened he would seek sole custody of Daughter.

Wilma calls you in a panic seeking your representation. For your services, she offers to pay you 15 percent of the assets awarded to her, plus \$10,000 if you are successful on the relocation issue.

Prepare a file memo that discusses the following issues:

- Custody of Daughter;
- Wilma and Daughter's relocation to Maine;
- Distribution of the home, money market account, Harry's checking account, and the \$50,000 loan;
- Impact of the mortgage in the context of family law; and
- Wilma's proposed payment for your services.

SELECTED ANSWER TO QUESTION 2

(July 2011 Bar Examination)

Custody of Daughter (D):

Florida follows a statutorily enacted scheme for timesharing (no longer called “custody”) of marital children. The timesharing plan is one part of a parenting plan. Florida requires that a parenting plan be prepared and filed with the court in any action for dissolution involving minor children of the marriage. The parenting plan must provide for how major (and some specifically-referenced minor) decisions are to be made. There is a presumption of shared decision making by both parents with respect to the minor child. Furthermore, the parenting plan also contains child support that is required to be paid for the support of the child based on Florida’s child support guidelines. There are nuances regarding child support that are important, but I will only be advising Wilma (W) on the timesharing part of the parenting plan at this time.

Florida starts with the presumption that shared timesharing is in the best interest of the child. All decisions that are contested regarding timesharing are to be made on that standard. Harry (H) has expressed interest in seeking sole custody (aka 100% timesharing) of Daughter (D). A party will only be awarded 100% timesharing with the child in the event that the other parent’s rights are terminated, or that any timesharing by the other parent would be detrimental to the child. There is nothing in these facts that should allow H to have 100% timesharing of D.

There are a number of factors that are used in determining what timesharing schedule is appropriate for a minor child if a schedule cannot be agreed upon. Included in these factors are: the age of the child; the child’s preference; one parent’s apparent ability to provide a stable living situation for the child; the parent’s ability to abide by the timesharing plan and foster consistent contact with the other parent; the geographic locations of the parents; the work schedules of the parents; and any other factors that would be in the best interest of the child. H & W would start with a presumption of shared timesharing. W may want to present evident that H works long hours; that D needs to spend more time with W; that the agreement of 5 overnights per week with W and 2 overnights per week (on the weekend) with H was an appropriate agreement given D’s school schedule or any other important factors, if true.

H will obviously try to argue that the move from Florida to Maine will make any timesharing by H effectively impossible. This, however, does not mean that W should receive no timesharing at all. There may be an agreement that is appropriate if W wishes to stay in Maine, that would allow W a majority of the timesharing (if determined to be in D’s best interest) during the school year and H the majority of the timesharing during vacations and holidays (or vice versa). This is all contingent, of course, on whether the move of D to Maine was appropriate and/or may not be prevented by the court. There does seem to be a strong possibility of a timesharing plan that will be in D’s best interest will include shared time with both W and H.

Wilma (W) and D’s relocation to Maine:

Once a petition for dissolution is filed and the non-petitioning party is properly served, a child of the marriage should not be moved from the jurisdiction of Florida courts without consent of the court. This is especially true when a timesharing plan has already been

put into effect during the pendency of the dissolution proceeding. Because it can be assumed from the fact that the court ordered a timesharing plan during the dissolution proceedings, that W was properly served and the court has personal and subject matter jurisdiction over her, she should not have taken D out of the state without consent of H or the court. Courts must approve relocation of a parent when the parent is relocating out of state. H could have petitioned the court to require the approval had he known of it before W moved back to Maine. Because W moved without the approval of the court or of H, the court may require that D be brought back to Florida. There exists in Florida, and throughout the United States, a uniform child custody jurisdiction enforcement act (UCCJEA/"the Act") that provides that all courts must abide by any order of the court that had original jurisdiction over the parties and their minor children. A Maine court could not, therefore, make any alteration to the timesharing schedule already put into effect by the Florida court.

W may want to argue that her relocation has no effect on the court's timesharing plan. She would only be able to argue this if she shows that she delivered the child to H each weekend so that he could exercise his timesharing rights. Even in this case, however, the court may find that this is not in the best interests of the child and order that D be brought back to her "stable home" with H in Florida.

Distribution of the Assets:

Florida follows a scheme of equitable distribution of assets. There is a presumption that the parties marital assets will be distributed equally in a dissolution action, but this presumption may be overcome and assets may be unequally distributed based on a number of factors. In determining equitable distribution, courts must first divide the assets into marital and non-marital classifications. Marital assets include all assets obtained by the parties during the marriage except those that were given by bequest or devise to one party. This normally includes, among other things, income on investments, earnings, gifts between spouses during the marriage, and increases in retirement and savings plans during the marriage. Non-marital assets are those that were separate before the marriage and maintained their status as separate during the duration of the marriage, as well as any inheritance, bequest or gift to one spouse during the marriage that is not somehow converted into a marital asset.

In determining whether to distribute the assets unequally, the courts may look at the following, non-exclusive list of factors: the parties contribution to the marriage (including that of rearing the children and homemaking); whether there are any minor children of the marriage; depletion of assets of the marriage by one party (i.e., on a mistress); the parties respective ability to provide for themselves after the marriage (including age, physical and mental disability, education, potential for employment) and any other factors necessary to do equity.

1) Home:

In this case, H purchased the home with his inheritance. There are more than a few reasons why this should be considered marital property and subject to equitable distribution. Although the inheritance came into the marriage after the parties were married, it would normally be considered a non-marital asset of H's. However, to the extent that the inheritance was used to purchase the home, the inheritance was effectively converted from a non-marital status into marital asset status. Furthermore, it seems the home was not a separate home of H's for use as he pleased, but it was a

marital home that was used by both H and W for the benefit of the marriage. Finally, the property was titled jointly. This effectively terminates any argument H may have that the home is a non-marital asset and not subject to equitable distribution.

W would have had a strong argument to keep the home, at least until D reached the age of majority, if she had not moved to Maine. A party may be given the marital home when a court determines that it is necessary for the benefit of a minor child and the majority timesharing parent will be living in the home. This may still be a viable option for W if she chooses to move back down to Florida and continue raising D here.

If, however, W does not want the home, but would like it to be divided, it should be equitably divided by the court. This would include, in this instance, a partition and sale. H & W own the home jointly. In Florida, this creates a presumption of tenancy by the entirety when parties are married and title a home jointly. This means that each party owns an undivided 100% interest in the home. A tenancy by the entirety can be converted to a tenancy in common if the parties divorce. This is effective at the time the divorce decree and final judgment is entered, not merely when the petition for dissolution is filed. A co-tenancy that is a tenancy in common may be monetarily divided by a partition and sale required by the court. The court may order a partition and sale and distribute the proceeds from the sale (less any mortgage exoneration issue discussed later) equally (or unequally if W or H presents evidence for an unequal distribution) to the parties.

2) Money Market Account:

The money market account was also titled jointly. Again, this creates a presumption that it belongs to both parties of the marriage. On these facts, the money market account should also be subject to equitable distribution by the court.

H will want to argue that the joint title was only done for convenience, should H die and W need funds during the pendency of estate administration. The court should consider any evidence presented by H on this fact. H may have a good argument that the property is solely his since H received it in a way that is considered non-marital (through inheritance) and W never exercised any rights over this account. The court will have to weigh the facts presented by H against the presumption that it was marital when making the final decision on whether it is subject to equitable distribution.

3) Harry's Checking Account:

The checking account also began from funds that were non-marital (the inheritance). W may, however, be able to argue that all or part of the assets in the account were later converted to marital assets. W should try to argue that because H did not sequester the funds but instead commingled the inheritance assets with marital assets (including income from work and tax refunds, which result from efforts of the marriage), H effectively made the entire account a marital asset.

H will counter by arguing that only the assets obtained from marital efforts in the account should be subject to equitable distribution. If H can show that the commingling of the funds is not fatal to the inheritance's status as non-marital by accurately tracing the inheritance funds, he may be able to overcome the marital asset argument at least to the extent of the funds from the inheritance. W does have a good argument that all or some of the assets in H's checking account are marital and subject to equitable distribution.

4) \$50,000 Loan:

If the court finds that the tenancy by the entirety was terminated when H petitioned for dissolution, he would own an undivided one-half interest in the marital home. With this, H could encumber his undivided ½ interest with the \$50,000 mortgage, and the mortgage would not be subject to equitable distribution. If, however, the court finds that W assented to the mortgage (impliedly) and agreed as a tenant by the entirety to it, the mortgage would be subject to equitable distribution and would remain the responsibility of W after the marriage.

W has a good argument against any of her interest in the home being encumbered by the mortgage because H placed the mortgage on the home after he had already filed the petition for dissolution. In Florida, any debts or assets acquired after a petition for dissolution of marriage is filed is considered the sole debt or asset of the person acquiring it.

This discussion, of course, will only be accurate depending upon whether the property is considered homestead property (discussed below).

Impact of Mortgage in the Context of Family Law:

Normally, a mortgage on a marital home will stay on the home if it was properly given during the marriage and an equitable distribution of the home is made. However, the Florida Constitution provides special rules and protections for homestead property. Homestead property is defined as up to 160 contiguous acres in a county (outside a municipality) including improvements thereon or ½ an acre inside a municipality that includes only the home thereon. Homestead property is except from forced sale by creditors, except for tax liens, mechanics liens for improvements to the property and mortgages on the property. In Florida, regardless of how the property is titled, a spouse may not mortgage or convey the home to a third party without the express written consent of the other spouse. This is important for W in this case.

If the court finds that the tenancy by the entirety had not been severed by the time that H conveyed the mortgage to the property to the mortgagor, then the mortgage for \$50,000 is void. This should be the case because at the time of the mortgage, the parties were still considered lawfully married. A marriage only ends once the final judgment of dissolution is entered. Therefore, during the pendency of a dissolution proceeding, the parties are still married. H's conveyance of the mortgage interest was technically a conveyance away from his "wife," W, who was required to sign the note conveying the mortgage in order for it to be valid. Therefore, H's conveyance of the mortgage was void, and the mortgage should not attach to the property. Notice of the mortgagor is not necessary, although the mortgagor should have had notice based on the title of the property itself.

Wilma's Proposed Payment for Services:

W's proposed payment for services in the dissolution proceeding is improper under the Florida Rules of Professional Conduct (FRPC). The FRPC states that a party must not acquire a property interest in the subject matter of the litigation. If I were to accept the payment of 15% of any assets awarded to W, this would be considered acquiring a property interest in the subject matter, of the litigation. Regardless of any contingent fee issue this may raise (discussed below), I would have to fully inform W of this interest and its implication and receive signed written consent. Furthermore, the FRPC

prevents attorneys from payment from any source that would impair the exercise of independent professional judgment. This may also be an issue if I were to take an interest in the assets awarded to W because my judgment would no longer be independent and wholly made on the behalf of my client, W.

Contingent fee arrangements are generally allowed under the FRPC. There are only two instances where contingency fee arrangements are improper: in criminal litigation and in family law litigation. Because there are severe implications of a dissolution of marriage for not only the involved parties, but also minor children, a contingency fee arrangement is barred in domestic relations cases. The offered fee of a portion of the award (if any) as well as the \$10,000 payment if I am successful on the relocation issue are both prohibited by the FRPC.

The only appropriate fee agreement for this case would be an hourly (or retainer fee coupled with hourly fees) arrangement that would pay me in return for actual services provided.

Q QUESTION NUMBER 3

JULY 2011 BAR EXAMINATION – TORTS/ETHICS

Father, Mother, and Son, age 15, are at Golf Resort for a junior golf tournament. Golf carts are allowed for parents to drive their children around the course. Father signs a Tournament Participation and Golf Cart Rental Agreement which includes a waiver and release which Father signs on behalf of Son that expressly releases Golf Resort from any and all liability for anything arising out of Son's participation in the tournament. The Agreement also has a place for Father to identify additional authorized drivers of the cart, which Father leaves blank.

On the first day of the tournament, Mother is driving the golf cart with Son as a passenger and misses a turn on the cart path because she is sending a text message. She collides with a very large, clearly visible flag pole located ten feet from the cart path. The applicable building code requires a 30 foot setback from all paths of vehicular travel. As a result of the collision, Son is thrown from the cart and suffers a severe head injury. Mother has \$100,000 in liability insurance coverage for this incident.

One week after the incident, Father receives an email from a private investigator employed by Attorney that states, "I heard about your son's accident from a friend of mine who works as a nurse in the ER. You need legal advice and I guarantee you my boss will get you big money."

Prepare a memo that discusses Son's possible causes of action against Golf Resort and Mother and the potential defenses. Also address any ethical issues raised for Attorney.

SELECTED ANSWER TO QUESTION 3
(July 2011 Bar Examination)

To: General Partner

From: Associate

Re: Son's claims for golf cart injuries

Son v. Mother

Negligence

Son has a claim against mother for negligence, which requires a duty, breach, causation, and damages.

Duty: for the actor to use the level of care as an ordinary reasonably prudent person in like circumstances.

Here mother had a duty to act as a reasonable and ordinarily prudent driver of a golf cart on a golf course. Her duty is owed to all foreseeable plaintiff's. A foreseeable plaintiff is anyone who is in the zone of danger. In this case, this would certainly include any passengers in cart, because it is foreseeable that if she breaches her duty that the passenger could be injured.

Breach: when the standard of care is not met, because defendant acted below the standard.

Here the mother breached her duty when she texted while driving and missed the turn and drove into the clearly visibly flagpole.

Causation: requires cause-in-fact and proximate cause.

Cause in fact or actual cause is determined using the "but for" texts. "But for" defendant's breach, plaintiff would not have been injured. Here, but for mother's texting and driving into the pole, son would not have been injured. Proximate cause acts as a limit on liability of plaintiff and is based on public policy concerns. A defendant will be liable for all foreseeable results stemming from his breach of duty.

Direct cause test: defendant is liable for all injuries that occur directly from her actions when there is no break in the causal chain. Here, mother drove the car into a pole, this is a direct cause because there was no intervening cause and it was the driving into the pole that directly caused the injury. Indirect cause analysis will make a defendant liable even for indirect causes of his actions, i.e., even when there are intervening forces, as long as those intervening forces are foreseeable. There really is no need for an indirect cause analysis here. Although mother could possibly argue that the negligent placing of

the pole was an intervening cause, this will likely fail as an argument. The pole was already there and obvious, and was not an intervening cause and was foreseeable.

Damages

Actual damages must be proven, which they were here as son suffered severe head injury.

Defenses

Parent-child Immunity: Parent-child immunity has been waived in Florida in cases of a child against their parent for negligence or sexual abuse. However, in the case of negligence, the immunity is only waived for damages up to the amount of any liability insurance held by the parent for the incident. Here, son could collect from mother up to \$100,000 for liability.

Comparative Negligence: Florida uses a pure comparative negligence analysis and has abolished joint and several liability. Therefore, a plaintiff can recover damages whether or not he was at fault as well. However, damages are awarded by the percentage of fault attributed to each actor and plaintiff cannot recover for any percentage that he was at fault. There is no evidence that plaintiff here was at fault. Therefore, he can likely recover his entire amount of damages. Mother's insurance will argue that Golf Resort was at fault to and that their damages should be reduced by the amount that Golf Resort was at fault.

Battery

Battery requires intent to cause harmful or offensive contact with the person of another, an act that does result in harmful or offensive touching, and causation. Battery is likely not a cause of action for son because mother did not intend to cause the harmful or offensive contact. Further, mother would probably be immune under parent-child immunity for such a cause of action.

Son v. Golf Resort

Negligence (supra)

Duty

Son was a business invitee on Golf Resort's ("GR") property, therefore, they owed him a heightened standard of care. GR had a duty to make safe and warn anything on their land, artificial or natural, that they know or should have known as dangerous and was not obvious. They also have a duty to inspect their land for hazardous and unsafe conditions thereon. Here, GR had a duty to not have a pole located so close to the cart path or warn of it. However, they could probably successfully argue that the pole was so far off the path and that it was large and obvious that they had no duty to warn of it or make safe.

Breach

They may have breached their duty by not warning or making safe their land from the pole. Alternatively, son could argue negligence per se. This doctrine makes a defendant liable for violation of a statute or ordinance that was designed to prevent against the harm or danger that was caused and that the person harmed was a member of the protected class contemplated by the statute. Here, it is likely that the purpose of the ordinance here was to protect against people driving into poles located close

roads/lanes, etc. However, GR would argue that this ordinance was intended for roads and cars and not golf carts in golf resorts. This may be a valid argument. If it is not, son would argue that he was part of the protected class, because it was intended to protect anyone in a vehicle traveling near the poles. If established, negligence per se acts as prima facie evidence of negligence, essentially established duty and breach. However, son still would need to prove causation and damages.

Causation: actual satisfied – but for the negligent placing of the pole son would not be injured.

Proximate: indirect cause – son would argue that it was foreseeable that someone would drive into the pole placed too close to the path. GR would argue that mother's negligence was an unforeseen superseding intervening cause, because the pole was 10 feet off the path and it was not foreseeable that someone would text and not pay attention and drive into the pole.

Damages: Satisfied (*supra*)

Defenses:

Comparative negligence (supra)

Assumption of the Risk: GR will argue that Son assumed the risk by signing the waiver form. Florida does not recognize implied assumption of risk, only express assumption of risk. In order to be a valid defense, GR would have to show that son (1) knew of the risk and (2) voluntarily proceeded in the face of the risk. Here there are a few issues with the assumption of risk analysis. (1) son did not sign the waiver himself, his father did. Therefore, it would be hard to say that son knew of risk and voluntarily proceeded. Because minors have capacity and standing to bring their own tort actions, GR should have also had son sign in addition to parents. (2) Mother did not sign waiver, father did. Mother was driving and not father, therefore, it could be said that no one, even if they were acting as consenting parents on behalf of their children, voluntarily assumed this risk. (3) The waiver said that it released GR from all liability arising out of son's participating in the tournament. This is a very vague and broad statement. It cannot be said that anyone who signed this actually "knew" what they were expressly assuming and voluntarily waiving. Therefore, the waiver is likely invalid and will not bar liability.

Permissive Use

Florida follows the minority and says that owners of vehicles are vicariously liable for all negligent acts caused by someone who they lend their vehicles to. In addition, it does not matter if person goes out of the scope of their permission, because Florida has also adopted the "dangerous instrumentality" doctrine that says an owner of a dangerous instrumentality, which includes cars, golf carts, etc., is liable for all injuries caused by the negligence of the person using the instrumentality. Here, GR allowed mother to use one of its vehicles and can be found vicariously liable for all damages caused by mother's actions. GR could then seek indemnification from other, because vicarious liability allows a person who is forced to pay for the acts and wrongs caused by others the ability to be fully compensated by the person who actually committed the act.

Damages

Son will be able to recover his actual damages, including past, present, and future medical expenses that deal with this injury. He can also recover for past, present, and future pain and suffering. He could also recover for lost earning, and potential future loss earnings. He probably cannot collect punitive damages because there is no evidence that anyone acted intentionally or willfully and wantonly.

Professional Responsibility

The Florida Rules of Professional Responsibility prohibit lawyers from in-person solicitation of a client for the purpose of monetary gain. In-person solicitation includes e-mail as in this case. An attorney is also prohibited from using an agent to act on his behalf to violate the Rules of P.R., as the attorney here has done. There are also special rules to deter “ambulance chasing” as is being done here. Florida has special rules when someone is personally injured. The attorney wishing to solicit the injured person must wait 30 days after the accident before contacting the person to see if they want legal representation. The proper course of action after the 30 days is for the attorney to send the injured person a letter in the mail with nothing on the envelope indicating what the person’s injuries are or at all indicating personal information about the victim’s potential case. The first line of the letter should state, “if you have already retained counsel, please disregard this letter.” It is then up to the injured person whether they wish to respond to the attorney or not.

Attorney would also be in violation, through his agent (the P.I.) of the rule that states an attorney cannot make false representations regarding their legal services or indicate that they can get a person a lot of money. Here, P.I. told father that the Attorney could “guarantee” him “big money.” Both of these statements are in violation of this rule and the attorney would be in violation of the rules.

In addition, if Father knows the name of the Attorney who solicited him and our firm believes these claims to be true, we have a duty as a lawyer in the field to report any attorney to The Florida Bar for violations of the rules of professional responsibility. We would have to report this violation to The Florida Bar, as this lawyer is violating the rules.

Attorney would be subject to discipline, including disbarment, reprimand, suspension, and fines.

Q QUESTION NUMBER 1

FEBRUARY 2012 BAR EXAMINATION – FLORIDA CONSTITUTIONAL LAW

Officer, a Florida Highway Patrol officer, observes Suspect's vehicle traveling much faster than vehicles around Suspect's vehicle. Officer uses his radar equipment that was calibrated earlier that day and determines that Suspect is traveling 90 miles per hour in an area where the posted speed limit is 35 miles per hour. Based upon his observations and the results of the radar reading, Officer initiates a traffic stop. Suspect immediately stops.

As Officer approaches Suspect's vehicle, Suspect states, "I burned a house a year ago, but I'm saving money to pay for it." Officer then requests Suspect's driver's license, and a license check reveals an outstanding arrest warrant issued a year ago for Suspect for the crime of arson. Officer places Suspect in handcuffs, advises Suspect that Suspect is under arrest, and places Suspect in the back of Officer's vehicle.

Officer then searches Suspect's vehicle. In a closed glove compartment, Officer locates a plastic bag containing cocaine.

Officer returns and tells Suspect, "I am now conducting a criminal investigation. You have the right to remain silent. Anything you say will be used against you in court. You also have the right to an attorney, and I will call your attorney if you want to talk before I question you." Suspect asks, "What good can an attorney do?" Officer responds, "None. An attorney will tell you to be quiet, and honesty is the best policy." Suspect says he does not want an attorney and, in response to Officer's questioning, provides a full confession to both the arson and possession of cocaine. Officer then contacts Suspect's aunt and informs her of the arrest and coordinates her pick up of Suspect's vehicle.

Suspect is charged with arson and possession of cocaine by the Office of the State Attorney where you are employed as an intern. Prepare a memorandum for the prosecutor of this case in which you discuss how the trial judge, applying the Florida Constitution, will likely rule on the use of the following two items during the State's case-in-chief:

1. Suspect's statements to Officer; and,
2. The cocaine found in Suspect's vehicle.

SELECTED ANSWER TO QUESTION 1 **(February 2012 Bar Examination)**

1. *I burned a house a year ago but I'm saving money to pay for it.*

The statement "I burned a house a year ago but I'm saving money to pay for it" likely can be admitted against the suspect in his criminal case. The Florida Constitution protects citizens from unreasonable searches and seizures. The constitution is generally construed in light of the Federal Constitution, and expressly provides that citizens' protection is coterminous with the outer limits of the Federal Constitution. A person is protected from government and seizures where she has a reasonable expectation of privacy in the place searched. Generally, a warrant is required for a search, seizure or arrest, subject to several exceptions. For instance, a warrant for arrest need not be used where a suspect is in public. Even when a suspect is arrested in public, police must have probable cause to arrest. Probable cause is a reasonable and genuine belief that criminal conduct is occurring or has occurred. It requires a reasonable evidentiary basis. If a police officer performs an unreasonable search or seizure, the evidence is subject to the exclusionary rule. The exclusionary rule prohibits the use of evidence in a criminal proceeding where it is the fruit of an unlawful search or seizure. The fruit of the poisonous tree doctrine prohibits the use not only of the evidence seized, but also any further evidence seized that would not have been seized but for the unlawful search and seizure. Here, the officer used his radar which was calibrated earlier that day and personally saw the suspect was speeding. He thus has probable cause for the traffic stop.

*Every criminal suspect has the right to remain silent, and the right to be from self-incrimination. Because of these rights, the U.S. Supreme Court decided in *Miranda v. Arizona* that a suspect must be given certain warnings when in custody and being interrogated. A suspect is in custody when he has a reasonable belief that he is unable to leave the police officer. He is being interrogated if he is asked a question which a reasonable person would believe was attempting to elicit a response related to the crime. Here, when officer first approached the suspect's vehicle, the suspect stated "I burned a house a year ago, but I'm saving money to pay for it." This statement was likely not protected by Officer's failure to yet administer *Miranda* warnings, because suspect was not being interrogated. Suspect could argue that he was in custody because he had been stopped by officer, but officer will likely prevail on the admissibility of the statement because it was initiated by suspect. Once the statement was given, it likely provided Officer probable cause to arrest Suspect in public, despite the lack of an arrest warrant.*

2. *Full confession to arson and possession of cocaine*

The full confession to arson and possession of cocaine likely will be suppressed. Suspect can argue that the full confession is inadmissible because it came as the fruit of an unlawful search. Because the cocaine was unlawfully seized, as explained below, the confession itself could be the fruit of the poisonous tree. Suspect would argue that, but for the officer finding the cocaine, suspect would not have confessed. This is a mixed question of law and fact that a judge would need to decide in a pre-trial hearing after a motion to suppress was filed.

Suspect also can argue that his confession must be suppressed because he was not given proper Miranda warnings. When in custody and subject to interrogation, a suspect must be provided with the warnings that (1) she has the right to remain silent; (2) anything she says can and will be used against her in a court of law; (3) she has the right to an attorney; and (4) if she cannot afford an attorney, the court will appoint one for her. Here, officer failed to provide proper warnings because he said "You have the right to an attorney if you want to talk before I question you." Officer can argue that he attempted in good faith to convey the warnings, as in Miranda. Chief Justice Warren's majority opinion made clear that police need not give a verbatim warning.

Unfortunately for the Officer, Miranda also requires, however, that the substance of the warnings be adequately conveyed. Here, officer's warning did not inform the suspect that if he cannot afford counsel, one will be provided for him at public expense. Thus, the statements he gives in response to any custodial interrogation are to be suppressed. Officer may argue that suspect was not actually in custody at the time of the confession. Because the Officer stated that he was conducting a criminal investigation and had pulled Suspect over, however, Suspect has a strong argument that a reasonable person would not feel that he had the ability to leave. Officer also may argue that he has the right to initiate friendly contact with the suspect and ask him general questions to determine whether probable cause exists. This likely fails because Officer attempted to give Miranda warnings and therefore acknowledged that he likely was placing the suspect in custody. Officer may also argue that the Suspect provided a valid waiver of his Miranda rights, so the confessions are admissible. Suspects may validly waive their rights under Miranda if the waiver is provided knowingly and voluntarily. Here, the Suspect has a strong argument that he did not provide a knowing and voluntary waiver because (1) he was given a warning that did not tell him he could have an attorney provided for him if he could not afford one; and (2) Officer told him not to get an attorney because an attorney would just "tell you to be quiet, and honesty is the best policy." Because Suspect gave confession in response to custodial interrogation without adequate Miranda warnings or a valid waiver, Suspect's confession should be suppressed.

Suspect could also argue that the questioning of him following the attempted Miranda warnings should be suppressed because he had invoked his right to counsel. The invocation of the right to counsel in response to Miranda warnings is not offense specific. This differs from the appointment of counsel under the 6th Amendment, often at a preliminary hearing. If clearly invoked, police must cease interrogation unless the suspect reinitiates contact and waives his Miranda rights. Thus, if Suspect here invoked his right to counsel, then confessions regarding both the arson and cocaine charges would be suppressed. Officer has a strong argument, though, that Suspect did not clearly invoke his right to counsel. Generally, statements asking about whether a person should get counsel are not clear invocations of the right. Here, Suspect merely asked what good can an attorney do, so Officer has a strong argument that the statements were not invocations of the right to counsel and the confessions should not be suppressed on those grounds.

3. The admissibility of the cocaine

Officer has several arguments for the admissibility of the cocaine despite him not having a warrant to seize it from the suspect's vehicle. First, officer may claim that he performed a valid search incident to lawful arrest. When a suspect is lawfully arrested, an officer may search, incident to that lawful arrest, the suspect's person and his grabbing area. This does not include trunks for cars, but may include glove compartments if they are within the reach of the suspect. The U.S. Supreme Court recently held in the Arizona case that, despite any question left after New York v. Belton, the search of a suspect's vehicle after he is already placed in the back of the police car is not incident to a lawful arrest. This is because the reasonableness of the search incident to lawful arrest is based upon the need to preserve evidence and the need to protect officers from any weapons a suspect may have on his person or in his grabbing area. As a result, Suspect would have a strong argument here that Officer's search and the cocaine found as a result of that search were unlawful and the cocaine should be suppressed. Indeed, Suspect would argue that his arrest was unlawful because it was the fruit of an unlawful arrest, but that argument likely fails because the original arrest based upon his voluntary statement regarding the prior arson gave the officer probable cause to arrest him at that time.

Officer may also argue that the cocaine would have been inevitably discovered. When evidence would have been inevitably discovered regardless of any unlawful search, it may still be admitted. Here, Officer may claim the cocaine would have inevitably been discovered regardless of the intervening full confessions because he had original probable cause to arrest the suspect and after that would have performed an inventory search of the vehicle. Officers may lawfully search vehicles when searching is a typical business practice of the law enforcement unit. Here, Suspect has a strong argument that Officer was not performing an inventory search because Officer called Suspect's aunt and had her come pick up the vehicle. Thus, Officer's police unit likely did not perform inventory searches as a matter of routine on the vehicles of those arrested.

The officer may also argue that he had probable cause to search the vehicle itself. If an officer has probable cause to search a vehicle, he may search any part of the vehicle that may contain evidence of that crime. An officer may not, however, search containers that could not reasonably hold the evidence (such as searching a lunch box when the officer has probable cause to think the suspect has a bazooka). Here, the officer located cocaine, so no issue arises as to the size of the evidence versus the container it was held in. Still, officer must have had probable cause to search the vehicle in order to validate the search, and here, officer was told that the Suspect burned a house a year ago. The Suspect thus has a strong argument that the Officer did not have probable cause to believe evidence of the burning that occurred a year ago would be in the vehicle now. Had the Officer seen the Suspect using cocaine in the vehicle, or drug paraphernalia, he would have had a stronger argument that he had probable cause to search it. Here, however, the statements about a prior arson did not provide probable cause to search for drugs.

Officer may also argue that the cocaine was the lawful search under the automobile exception. The automobile exception allows certain limited searches due to the transitory nature of automobiles. Indeed, a person has less expectation of privacy in her vehicle than in her home, due to the transitory nature of vehicles. Similarly, an officer has significant concerns regarding the potential destruction of evidence should a vehicle leave the scene of a potential crime.

At bottom, the trial judge likely will exclude the cocaine due to it being the fruit of an unlawfully obtained confession.

Q QUESTION NUMBER 2

FEBRUARY 2012 BAR EXAMINATION – REAL PROPERTY/TORTS/ETHICS

Seller, who planned to relocate, put her home as well as her nearby commercial property up for sale. Seller then entered into a Residential Contract with Residential Buyer to sell the home, which at the time was two years old. The selling price of the home was \$230,000. At the request of both Seller and Residential Buyer, Seller's attorney ("Attorney") agreed to represent both Seller and Residential Buyer and to negotiate all the terms of the sale of the home including issues of financing. Seller then entered into a separate contract for the sale of her commercial property ("Commercial Contract") to Commercial Buyer.

Both the Residential and Commercial Contracts contained the following provisions: (1) Buyer paid an initial deposit upon execution of the respective Contract, (2) the applicable property was being sold in its "as is" condition "with all faults," (3) Buyer had an inspection period to inspect the property, and (4) at the end of the inspection period, if Buyer found the property acceptable and elected to proceed to closing, Buyer was required to provide Seller with written notice together with an additional deposit, which was non-refundable to Buyer.

During the Residential Contract's inspection period, Residential Buyer noticed some plaster peeling around a dining room window frame and stains on the ceiling of several rooms. Upon inquiring with Seller, Residential Buyer was told by Seller that the window had been a minor problem that had long since been corrected and that the stains were the result of ceiling beams being moved. Seller did not address with Residential Buyer whether Seller had any previous problems with the roof or ceilings of the home, however, Seller had previously contacted Attorney about what possible rights Seller might have against homebuilder regarding problems Seller had experienced with the roof prior to entering into the Residential Contract.

At the end of the inspection period, Residential Buyer notified Seller that the home was acceptable and delivered the additional deposit. Several days later, after a heavy rain, Residential Buyer entered the home and discovered water pouring in from around the window frame and ceiling. A roofer subsequently hired by Residential Buyer found that the home's roof was inherently defective and would cost over \$30,000 to replace. Residential Buyer then filed a complaint seeking rescission of the Residential Contract and return of the deposit.

During the Commercial Contract's inspection period, after receiving no response from Seller to Commercial Buyer's inquiry on any potential other issues on the property, Commercial Buyer notified Seller that the property was acceptable and delivered the additional deposit. A week later, when Commercial Buyer contacted the adjacent property owner regarding a separate issue, the adjacent property owner told Commercial Buyer of certain other problems on Seller's property known to Seller that

Seller had failed to disclose to Commercial Buyer. Commercial Buyer then also sued Seller for rescission on the Commercial Contract and return of its deposit.

Please prepare a legal analysis of the following: (1) the legal issues surrounding the sale of the home to Residential Buyer, the parties' respective arguments, and which party is likely to prevail in that matter; (2) the legal issues surrounding the sale of the property to Commercial Buyer, the parties' respective arguments, and which party is likely to prevail in that matter; and (3) any ethical concerns involved with Attorney's role in the home sale transaction.

SELECTED ANSWER TO QUESTION 2

(February 2012 Bar Examination)

I. Can attorney in residential contract represent both Buyer and Seller?

The issue is can the same attorney represent both Buyer and Seller in a contract to purchase residential property.

Under the FL Rules of Professional Conduct an attorney, who is representing two clients in the same transaction can only do it if client's interest are not materially adverse to each other and attorney reasonably believes attorney can offer diligent and adequate representation to each party, and it can't be prohibited by law. For an attorney to represent both parties they must give both parties informed consent meaning disclosing all material facts and have each client agree to the representation in writing.

Applying this standard here, the facts state attorney wants to represent both Buyer and Seller in residential transaction. This is a problem because both parties are adverse to each other. Seller wants top price and Buyer wants lowest price therefore attorney can't adequately represent nor give diligent representation to both. Additionally, facts state that attorney has information regarding the condition of the property and did not disclose to Buyer. Attorney can't represent each party because attorney can't give competent and diligent representation to each.

Additionally, if Attorney did represent each, Buyer may have a claim of malpractice against attorney for representation.

In conclusion under the FL Rules of Professional Conduct, the attorney would not be able to represent both parties in residential agreement.

II. Is the contract between Buyer and Seller valid for residential property?

The next issue is, is there a valid agreement between resident Seller and Buyer?

Under FL law and the statute of frauds requires a contract for real property to be in writing signed by the parties and under FL law signing of deed requires two witnesses. The contract should include a description of the parties, the price and any conditions agreed on. Additionally, a contract for real property in FL can have conditions unique to each Seller and Buyer. Such as, as is clause, deposit amounts or liquidated damages.

Applying these facts to the question this is a contract for Real Property, and it is in writing evidence by the fact that the facts state that it is in writing and signed. There are additional provisions in the contract.

As such, the court would likely find that there is a valid contract for the purchase of the residential property.

III. Does Buyer have a claim against Seller for non disclosure?

The next issue is does Buyer have a claim against Seller for non-disclosure?

Under FL law a Seller of new or used residential property has a duty to disclose known material latent defects of the property that are known to the Seller and not known or reasonably attainable by Buyer. Material defects are defined as defects that if known would cause a reasonable Buyer to have second thoughts about purchasing the property. However buyers are assumed to take precautions when purchasing property such as ordinary inspections. Parties can have notice of defects in three ways: constructive, where party discovers defects; inquiry, where some act puts them on notice that they should investigate further; or actual, where they were told.

Applying these facts to the case at hand the contract states that property as is will be taken with all faults. That is a valid provision and will likely be used by Seller as a defense but Seller is still under a duty to disclose. The facts state that there was a problem with roof and water ran in. This is a material defect as water damage would likely cause extensive repairs and a reasonable Buyer would probably not have purchased had they known. Additionally, the facts state that Seller did in fact know about the problem because they contacted an attorney regarding possible claims.

Seller will likely argue that Buyer had a chance to inspect the property and property was sold as is with all faults. Seller would argue that per the contract Buyer was given opportunity and time to inspect and in fact the facts state there was an inspection. Additionally Seller would claim that Buyer had inquiry notice that there might be a problem with the window by the fact that Buyer discovered plaster peeling and discoloration around the walls. This should have put Buyer on notice and did a more intensive inspection.

As for damages if court finds in favor of Buyer, damages are measured in three ways: expectational damages, designed to put the person in a position if the K had been performed usually market price vs. K price; reliance damages, damages that are designed to give Buyer back money they spend in reliance of K; or restitution damages, which are used by the court to prevent unjust enrichment. These are known as legal damages.

An additional form of damages are known as equitable damages and are usually rescission or with real property or unique goods specific performance where court enforces the exact contract between parties. If the court finds that Seller breached the duty to disclose, they can order the contract be rescinded meaning the contract will be wiped out and Buyer will be able to get deposit back or court can order that property be fixed and Buyer is entitled to damages.

In conclusion, it is likely that a court will find that Seller breached their duty to disclose material known defects to Buyer and as such Buyer is entitled to damages.

IV. Does Buyer have a claim against Seller for fraud/misrepresentation?

Under FL law a party under a contract commits fraud or misrepresentation if the following elements are met: (1) made a false statement about a material fact; (2) made it within the knowledge that it was false or didn't know if it was true or not; (3) made the fact to induce the other party into entering into the contract; and (4) there was reliance on the party of the party and they were harmed.

Applying these facts to the case at hand the facts state that Buyer noticed problem with window and asked Seller, and Seller stated that there was a minor problem and had since been corrected. Buyer will argue that Seller said this to induce her to buy and not question more. Buyer in fact relied and was harmed. Buyer would argue if they knew about defect they would not have purchased. Seller would argue that they did not know the extent of the problems and property was sold as is and Buyer should have done better inspection.

Buyer will point out that Seller knew of facts and even consulted an attorney and knew of the extensive damage.

It is likely court will find that Seller committed fraud/misrepresentation and as such Buyer is entitled to damages as discussed earlier.

V. Does Commercial Buyer have claim against Seller for non-disclosure?

Under FL law Seller's of Commercial Property are not held to the same standard as residents and are not required to disclose defects. Parties are not living in them and therefore Buyers have a greater duty to inspect.

Applying this fact since this is a commercial property it is likely court will find that Buyer was under a duty to inspect and Seller was not required to disclose. Additionally contract was as is and party can contract how they wish. As such, it is likely contract will not be rescinded.

Q QUESTION NUMBER 3

FEBRUARY 2012 BAR EXAMINATION – TORTS

Employee of SportsCo, a sporting goods retailer located in Florida, noticed Customer walking back and forth between the main entrance of SportsCo and the parking lot. Finding Customer's behavior to be suspicious, Employee approached Customer and asked if he could help him. Customer said he needed assistance carrying purchases to his vehicle. Employee helped Customer, however, upon loading Customer's purchases into the vehicle, Employee noticed five footballs in the vehicle, still in the SportsCo retail packaging. Employee confronted Customer and asked him if he had receipts for the footballs. When Customer said no, that he had no receipts, Employee ordered Customer to accompany him to the SportsCo office.

Once in the office, Customer picked up one of the footballs, stated that he wanted to leave and that he had paid for the footballs. Employee shouted, "Yeah right! You are not going anywhere. We have a zero tolerance policy for shoplifting and a thief like you isn't getting away with this on my watch. Now sit down!" Employee then snatched the football out of Customer's hands, slightly touching Customer in the process. Customer reluctantly sat down. Employee called the police and an officer responded to SportsCo. After the police officer spoke with Employee about the incident, the officer arrested Customer. Employee signed an affidavit agreeing to testify in the prosecution of the theft charges. Customer spent the night in jail and Employee re-shelved the footballs for resale to other customers.

Customer, a newly hired employee at the local high school, felt he had a duty to report the arrest to the school district. The school district terminated his employment as a result of the arrest. Some months later, with the help of his public defender, Customer produced credit card receipts that showed that he had in fact purchased the footballs from SportsCo the day before his arrest. As a result, the State Attorney dismissed the information that had been filed against Customer. Since his arrest, Customer has suffered from anxiety and seeks weekly counseling to deal with his emotional problems.

Customer comes to you to discuss legal representation. Discuss potential causes of action available to Customer against SportsCo, their likelihood of success, and any anticipated defenses SportsCo may assert.

SELECTED ANSWER TO QUESTION 3

(February 2012 Bar Examination)

False Imprisonment

False Imprisonment is an intentional tort wherein a defendant intentionally confines an individual by force or threats of force, against their will, and wrongfully. In this instance, Employee “ordered” Customer into the office and yelled at him to “sit down.” If a reasonable person would have felt confined in the office and reasonably have believed that Employee’s aggressive behavior of yelling at Customer and ordering Customer into the office would have resulted in violence against the Customer, the Customer may be able to assert a cause of action against Employee for False Imprisonment.

Shopkeeper’s Privilege

However, in Florida, shopkeepers have a privilege that allows them to detain certain individuals in certain circumstances. In order for the shopkeeper’s privilege to apply, the shopkeeper must have a reasonable suspicion that a tort or crime has been committed and then may reasonably restrain the suspect (no force) for a reasonable time to investigate the suspected wrongdoing. In this case, Customer’s actions of walking back and forth between the store and his car does seem suspicious. Employee’s suspicion that Customer had stolen the footballs was furthered by Customer’s failure to produce receipts for the footballs in his car (it was reasonable for Employee to assume that the footballs in the store’s packaging were purchased during Customer’s visit to the store and thus would have receipts for them). If actual force or threat of force was used in restraining Customer, the shopkeeper’s privilege may have been exceeded. However, the facts do not indicate that violence was threatened and it seems that Employee reasonably asked Customer to remain in the office while the police came to investigate.

Conversion

Conversion is the tort of intentionally interfering with the property of another for the purposes of depriving him thereof. In this instance, Employee removed the footballs from Customer’s car and re-shelved them for purchase by other customers. It turns out that Customer had actually purchased the footballs and that, accordingly, they were his property. Arguably, therefore, Employee intentionally interfered with Customer’s use and possession of the footballs and is liable for conversion. However, this cause of action will likely fail as Employee can assert that he had a reasonable belief that Customer had no rights to the footballs and therefore did not intend to deprive him of his enjoyment of his property.

Defamation/Slander

Slander is a tort in which an individual/entity makes an oral representation of fact imputing wrongdoing or poor morals onto a plaintiff and made in the presence of third persons. Generally, in order for a plaintiff to recover under a theory of slander he must prove that he was damaged. However, slander per se exists when a crime of moral turpitude, such as larceny, is imputed to a plaintiff-in such a case, no damages need be proven. If Employee’s statements indicating that Customer was a shoplifter were made in the presence of third persons, Employee may be liable to Customer for

slander/defamation. However, for a defendant to be liable to a private person for slander, his statements must have been made negligently. Assuming third persons heard Employee's statements, if Employee was negligent in accusing Customer of shoplifting (i.e. larceny), Employee may be liable for slander. However, considering the circumstances discussed above (i.e. suspicious behavior and lack of receipts), Employee was probably not negligent in accusing Customer of shoplifting and hence will not be liable to customer for defamation. Customer may consider that the publication requirement was satisfied when Employee communicated his suspicions of shoplifting to the police officer. However, Employee would likely be able to successfully assert that he had a qualified privilege in making this communication to the police officer. A qualified privilege exists when a statement, otherwise defamatory, is made by an individual in good faith, with an interest in making the statement, and limited in scope to the interest he has. In this case it appears that Employee had a good faith belief that Customer had shoplifted and communicated those statements to the police officer, who had reason to receive the communications due to the investigatory nature of his job. Accordingly, Employee would likely be able to successfully assert a defense of qualified privilege for the statement made to the police officer.

Battery

Battery is the intentional tort of making an offensive and unpermitted physical contact with a plaintiff or something in the plaintiff's physical possession. Contact will be considered offensive if it would be unacceptable to a person of ordinary sensibilities. If Employee's contact with Customer when he snatched the football out of Customer's hand is "offensive," Employee may be liable to Customer for battery. However, the facts indicate that the contact with Customer was relatively slight (a mere brush) and hence will likely not be considered offensive to an individual of ordinary sensibilities. Additionally, Employee's grabbing of the football is likely not extreme enough to be considered a battery. Hence, Customer will likely not be successful in an action against Employee for battery.

Assault

Assault is the intentional tort of putting a victim in apprehension of an offensive contact-a reasonable person standard is applied in determining whether it was reasonable for a plaintiff to apprehend an offensive contact. If Employee's act of yelling at Customer, ordering him into the office, and violently snatching the football from his hands would have put a reasonable person in apprehension that there would be an offensive contact, Employee could be liable for assault. However, it seems that Employee's actions were not so severe as to rise to the level of assault and hence Employee would not be liable for it.

Intentional Infliction of Emotional Distress

Intentional infliction of emotional distress is an intentional tort wherein a defendant through extreme and outrageous conduct or communication causes emotional distress to a plaintiff. The conduct must be that which would be unacceptable to a person of ordinary sensibilities. The Employee's conduct does not seem to rise to the level of extreme and outrageous, as required by the tort of intentional infliction of emotional distress. Indeed, the Employee's conduct seems consistent with that of other employees/employers in attempting to restrain an individual that they reasonably

believe have shoplifted. Accordingly, Employee will likely not be liable to Customer for intentional infliction of emotional distress.

Malicious Prosecution

Malicious Prosecution is a tort wherein an individual prosecutes or causes another to prosecute a plaintiff with no probable cause, in bad faith, and which results in a dismissal of the prosecution against the plaintiff. Arguably, the Employee's conduct in reporting the Customer to the police and the resulting prosecution gives rise to malicious prosecution liability. However, as discussed before, the Employee had a good faith belief that Customer had shoplifted and hence causing the institution of a prosecution against him was not in bad faith and thus will not be considered malicious prosecution.

Respondent Superior/Vicarious Liability

The doctrine of respondeat superior imposes vicarious liability on an employer for torts committed by their employee during the course of the employee's employment. Generally, an employer is not vicariously liable for an employee's intentional torts, however, if the employee committed the tort for the benefit of the employer, as part of his employment, or with the express or implied authority from his employer, the employer will be liable for its employees torts. All of the above-discussed torts committed by Employee on Customer were committed during Employee's employment with SportsCo, ostensibly for their benefit (to stop shoplifting; he re-shelved the "stolen" footballs for sale to the benefit of SportsCo), and were within the scope of Employee's employment. Accordingly, to the extent that Employee is found liable for any of the discussed torts, SportsCo can be held vicariously liable for them.

PART II - SAMPLE MULTIPLE-CHOICE QUESTIONS AND ANSWERS

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

The answers appear on page 45.

MULTIPLE-CHOICE EXAMINATION INSTRUCTIONS

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

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

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

23 SAMPLE MULTIPLE-CHOICE QUESTIONS

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

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

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

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

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

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

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

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

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

11. Defendant was arrested on February 1 and released one month later on March 1 after being charged with a felony. On December 1 of the same year as his arrest, he filed a motion to discharge since no trial or other action had occurred to that point. The court held a hearing 3 days after the motion was filed. Defendant should be
- (A) discharged because more than 175 days passed between arrest and the filing of the motion to discharge.
 - (B) discharged because more than 175 days passed between his release from jail and the filing of the motion to discharge.
 - (C) brought to trial within 90 days of the filing of the motion to discharge.
 - (D) brought to trial within 10 days of the hearing on the motion to discharge.
12. Bill, a single man, owned pasture land in Deerwoods, Florida, which he leased to a tenant. He also owned a condominium in Miami, which he held for investment. In his will, he devised the pasture land to his son Tommy and the condominium to his daughter Julie. All other assets would pass equally to Tommy and Julie.
- Bill met Kathy and married her after she executed a valid prenuptial agreement relinquishing all rights she might otherwise enjoy by marrying Bill. On their Miami honeymoon they drove by the condominium and Kathy declared she'd love to live there. Bill was so happy with Kathy that after the honeymoon he signed and delivered to Kathy a deed conveying the condominium to himself and Kathy as an estate by the entirety and made plans to live in the condominium as soon as the tenant vacated. Bill died the next day. How are the foregoing assets distributed?
- (A) Kathy gets the condominium regardless of the prenuptial agreement, Tommy takes the pasture land and Tommy and Julie split the rest of the estate.
 - (B) Due to Kathy's prenuptial agreement, Tommy receives the pasture land, Julie gets the condominium and Tommy and Julie split the rest of the estate.
 - (C) Kathy gets the condominium, but because Bill had originally indicated his intent to devise equally to his children, Tommy and Julie will split the remaining estate.
 - (D) Regardless of the prenuptial agreement, Kathy is a pretermitted spouse. Since Bill leaves surviving lineal descendants who are not Kathy's, Kathy receives 50% of the estate, Tommy gets the pasture land, and Tommy and Julie split the residue of the estate.
13. Anderson and Parker decide to form a corporation which will locate missing children. Which of the following would be a proper name for the corporation?
- (A) ANDERSON
 - (B) FBI Consultants, Incorporated
 - (C) Private Eye Partners
 - (D) Child Finder Company

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

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

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

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

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

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

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

SAMPLE MULTIPLE-CHOICE QUESTIONS WITH PERFORMANCE TEST COMPONENT

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

Florida Statutes 47.011 Where actions may be begun.

Actions shall be brought only in the county where the defendant resides, where the cause of action accrued, or where the property in litigation is located.

Florida Statutes 47.021 Actions against defendants residing in different counties.

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

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

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

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

ANSWER KEY FOR MULTIPLE-CHOICE QUESTIONS

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