

# Florida Board of Bar Examiners

ADMINISTRATIVE BOARD OF THE SUPREME COURT OF FLORIDA

## Florida Bar Examination Study Guide and Selected Answers

**February 2009**

**July 2009**

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

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

### **FEBRUARY 2009 AND JULY 2009 FLORIDA BAR EXAMINATIONS**

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

Part I of this publication contains the essay questions from the February 2009 and July 2009 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 handwritten answers are typed as submitted by the applicants. The answers are reproduced here with the consent of their authors and may not be reprinted.

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

## ESSAY EXAMINATION INSTRUCTIONS

### Applicable Law

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

### Acceptable Essay Answer

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

# **Q** QUESTION NUMBER 1

## **FEBRUARY 2009 BAR EXAMINATION - CONTRACTS**

Albert is a distributor of widgets. He purchases widgets from widget makers and sells them to factories. Widgets are standard goods used in factories. Mindy owns such a factory.

Albert and Mindy signed a contract with a term of one year that commenced in January. The contract provided that Albert would make monthly deliveries of 10,000 widgets to Mindy's factory at a price of \$6 per widget. Delivery was to occur on the first of each month. At the time of contract, Albert's cost for widgets was \$5. The market price for widgets was \$6.

Albert delivered 8,000 widgets in April and 7,000 widgets in May. Mindy accepted and paid for the widgets. On May 10th, Mindy contacted Albert regarding the shortages. Albert stated his cost for widgets had risen to \$6. Mindy and Albert signed an addendum changing the contract price to \$7 per widget. Albert delivered 15,000 widgets on June 15th. Mindy accepted and paid for the widgets.

Mindy then heard rumors that Albert was on the verge of bankruptcy. On June 20th, Mindy sent Albert a letter demanding he provide written assurances that he could perform. Mindy stated that she would not accept any further deliveries without such assurances.

Albert did not make the July delivery and did not respond to the demand for assurances. On July 25th, Mindy informed Albert she was canceling the contract. Since mid-June, the market price for widgets has been \$7.

Your firm has been contacted by Albert. Albert wants to know the following:

- what causes of action he may have against Mindy;
- what defenses might be raised; and
- what damages would be available to him.

Please prepare a legal memorandum addressing these points.

## **SELECTED ANSWER TO QUESTION 1** **(February 2009 Bar Examination)**

*This memo will discuss what causes of action Albert (A) will have against Mindy (M), what defenses might be raised, and what damages would be available to him.*

### **Applicable Law**

*This contract is for the sale of goods and as such is governed by the UCC. Both of the parties here are merchants so there will be special rules for them under the UCC.*

### **K Formation**

*To have a contract there must be offer, acceptance, consideration, and no valid defenses. Here the facts state that there was signed written contract between A and M, so it appears they are satisfied. The contract is for a term of one year, but because it is split up into separate payments and delivery dates each month, this would most likely be considered an installment contract.*

### **Defenses to Formation**

*The defenses to formation are inadequate consideration, mistake, duress, incapacity, intoxication. None of those defenses apply to this fact pattern.*

### **Defenses to Execution**

*Statute of Frauds -- Under the UCC for a K for sale of goods to be valid it must be in writing, signed by the party charged, and must state a quantity, and give adequate language to indicate there is a contract. We have a signed writing and it states the quantity and gives most terms. This would satisfy the SOF and neither party would be able to challenge there was no contract based in SOF. Further, SOF can be satisfied by delivery of goods in a K for sale of goods and here we have had delivery and payment for several months.*

### **Installment K**

*When a K can be broken up into separate portions where each portion has performance by each side it can be deemed an installment K. Here, delivery was to be monthly with payments also being monthly. This contract can be broken down into 12 separate installments. A would want to argue that this was an installment contract. As such, a breach of one installment would not be a breach of the entire contract. Further, a breach of one installment may be cured by further installments.*

### **Material v. Minor Breach**

*When determining a breach it can either be material or minor. To determine if it is material or minor you look to see if the non-breaching party received the benefit of the bargain. To determine that you look to see how much benefit has been given, likelihood the other party will perform, the cost of the other party having to perform. If there has been a material breach of the contract that the non-breaching party does not have to*

perform their portion of the K and will recover any damages they incur in order to mitigate or cover for the breaching parties breach. Here, A will argue that M materially breached the K on July 25<sup>th</sup> when she informed him she was canceling the K. The K was for 12 months and she was canceling it halfway through the K. Also, she had received 6 deliveries already and he was one month late on these deliveries. M will argue that A breached the K when he did not deliver the widgets for July and his breach was material. This breach would most likely be deemed minor because it was only one month out of 12. Further, as stated above, this would most likely be determined to be an installment K and as such A should be able to cure this installment on a later installment. Also, M accepted the later shipment of cured goods and as such A had fully performed for his part of the K. A is likely to succeed in this argument and M would be the breaching party in this scenario.

### **Perfect Tender**

M will argue that A had already breached the K earlier when he failed to produce all 10K widgets on two separate months. Under the UCC perfect tender rule a party must deliver the goods in perfect condition on the exact quantity and quality as stated in the K. If the delivering party does not, then they have breached the contract and the non breaching party may accept the goods, reject the goods, or accept any commercially reasonable units and sue for the rest. Here, even if the court found that A breached the perfect tender rule, M accepted the goods. As such she ascended to the contract. Further, under an installment contract A was allowed to cure this shipment with a future shipment and he did with his June shipment of 15K. M would lose this argument as well and A would be deemed to not have breached.

### **Impracticability or Impossibility**

If M argued that A breached the contract earlier when he did not deliver the correct amount in the beginning as stated above. A could argue that it became impracticable because of the change in price of widgets and he would lose money. Impracticability occurs when there is an event that makes performance of one party very difficult and the happening of that event was not foreseen by the parties. Here a raise in price of widgets by \$1 would be foreseeable. This would not be a good defense for A.

### **Anticipatory Repudiation and Adequate Assurances**

Albert can argue that M breached their contract when she informed him that she would no longer accept deliveries without assurances. A can argue that this was an anticipatory repudiation. Anticipatory repudiation occurs when one party communicates unequivocally that they will not perform their part of the bargain before their time of performance has arrived. If AR occurs then the non-breaching party has 4 options: (1) treat the K as a total breach and sue immediately, (2) wait for the performance date and sue, (3) treat the contract as rescinded, or (4) do nothing and encourage the other party to perform. Here, A would assert that M's statement that she not accept further deliveries without assurances was an anticipatory breach and as such he was allowed to perform one of his 4 options. M will argue that she learned that A was on the verge of bankruptcy and was just requesting adequate assurances that the K would be performed. If a party learns that another party may have difficulty performing their

portion of the contract they are allowed to suspend their performance and request that the other party give them assurances that the contract will be performed. The other party (A here) needs to respond within a reasonable time and give M adequate assurances that they can perform. Here, A did nothing. He did not respond to the demand and he did not perform his portion of the contract. As such, A was entitled to suspend her performance and treat it as a breach by M. A will argue he had performed every part of the K up until now and so M had no reason to doubt he will perform. Under the law M is allowed to use outside information they obtained in deciding whether or not to try and get assurances. A will argue that her statements went beyond requesting assurances, but a party seeking assurances is allowed to suspend their performance until they receive the assurances. Also, A will argue that M canceled the K in July without waiting for assurances. Over 30 days is not a reasonable time to respond and M would be excused most likely. A would argue though that since this is an installment contract he is able to cure the July sale with further installments and planned on doing so. If A can give M adequate assurances now and make the deliveries the court would most likely be willing to allow it to enforce the K

## **Damages**

When looking at damages the court looks to put the parties in the position they would have been had the K been fulfilled. A party has a duty to try and mitigate the damages. Under the UCC a seller has several options to them when the Buyer breaches. A can sue for the K price of the goods or he can obtain the difference in the K price and the fair market value of the goods. He could also get any consequential damages or incidental damages that occurred from M's breach. Consequential damages are only available if at the time of the contract the damages were foreseeable as would happen in the case of a breach. Incidental include attorney's fees or any damages as a result of A or M trying to cover or mitigate their damages.

Here A would argue that he is entitled for the fair market value of his goods times the quantity each month. M would argue that A breached the contract and she should be entitled to cover and get the difference in the price between her covering of damages and the value of the K with A.

The court would look at the FMV of the goods at the time of the breach. Here the court will have to determine when the K was actually breached. If they determine it was breached in mid June or beyond then the FMV would be \$7, but if it was before then it would be \$6. Also, what the K price was would have to be determined. The original K price was for \$5. A will argue that the contract was adequately modified to \$6. Normally parties have to give consideration to modify a K, but under the UCC a party need not give consideration as long as the modification was done in good faith. Here the price went up and A requested an alteration. M agreed to the alteration and they reaffirmed it in writing. Since this is sale of goods over \$500 the modification would have to be in writing as was the case here. As such the K was modified and the K price used in determining damages would be \$6 a widget.

*A would need to try and sell his widgets to other parties to mitigate his damages. If A was a volume seller though and he could obtain as many widgets as he would need to perform other K and this K he could try and obtain damages under loss volume seller. Under the loss volume seller he would be awarded the profit he would have made off of this sale. They would deduct the overhead and expenses from the K and that would be A's profit.*

*Equity -- under equity certain damages as allowed in monetary damages would not suffice. SP is only allowed in cases where the goods are unique, here we have widgets and they are not unique. As such, A would not be entitled to specific performance of this contract because money damages would suffice.*

## **Q** QUESTION NUMBER 2

### **FEBRUARY 2009 BAR EXAMINATION – FLORIDA CONSTITUTIONAL LAW/FAMILY LAW**

Henry owned a home where he resided. He also owned a commercial office building where he ran his business. After Henry married Wendy, Wendy moved into his home. Wendy helped Henry operate his business until the couple had their son, Chris. After Chris's birth, Wendy stayed home to care for Chris and to maintain and improve the home. After Chris turned 10, Henry left Wendy and Chris, and moved into his mother's home. Wendy and Chris continued to live in Henry's home. Henry later filed for divorce.

After filing for divorce, Henry borrowed \$20,000.00 from his mother, and secured the loan with a mortgage on his home. Henry did not have any witnesses present when he signed the mortgage. Wendy was unaware of the loan and the mortgage.

Without the knowledge of Wendy and Henry's mother, Henry recently sold both his home and the commercial office building to Buyer. Wendy learned of the sale when she was served with an ejectment suit from Buyer regarding both properties. Shortly thereafter, Henry's mother filed a petition to foreclose on her mortgage on the home. Titles for Henry's home and the commercial office building are in Henry's name only.

Wendy retains your law office. As to each of the following pending actions, provide an analysis of Wendy's state constitutional, statutory, and judicially recognized rights and the probable outcome of each action:

- the ejectment action by Buyer;
- the foreclosure action by Henry's Mother; and
- the petition for divorce action by Henry.

## SELECTED ANSWER TO QUESTION 2

### (February 2009 Bar Examination)

*This memorandum will discuss Wendy's state constitutional, statutory, and judicially recognized rights and the probable outcome of each of the following actions: 1) the ejectment action by Buyer; 2) the foreclosure action by Henry's Mother; and 3) the petition for divorce action by Henry.*

#### *I. HOMESTEAD*

*The overriding issue in the ejectment action, and the foreclosure action is Florida's constitutional Homestead provisions. Homestead is defined as up to ½ acre of land in a municipality, and up to 160 contiguous acres of land outside a municipality. The Florida Constitution expressly gives rights to spouses and minor children under the Homestead provisions, and the provisions are designed for the protection of spouses and minor children. A person may only have one homestead, and must establish the homestead (by showing the home is the primary residence, voter registration, etc.). A homestead property, even if owned solely in one spouse's name, may not be conveyed or devised away from the other spouse or the spouse's minor children. Any conveyance of an interest in the homestead property must be consented to by both spouses. If it is not, the conveyance is void.*

#### *II. The Ejectment Action by Buyer*

*This case turns on whether or not the home was homestead. The commercial building was not homestead, and so it can be conveyed by Henry without Wendy's consent or knowledge (however, as to be discussed below, she may be entitled to a portion of the proceeds of the sale of the commercial building under the equitable distribution of marital property in the divorce proceedings). If the home is considered homestead, which it almost certainly would be considered because it was the primary residence of Henry and Wendy during the marriage and continues to be the primary residence of Wendy during the divorce proceedings (note it does not matter under homestead protection that the house is owned solely in Henry's name or that it was acquired before they were married, it is homestead if it is found to be their primary residence), the conveyance from Henry to Buyer is void. The conveyance is void regardless of whether Buyer had notice or not.*

*The conveyance is void because Henry conveyed the property to Buyer without Wendy's knowledge or consent which the homestead provisions of the Florida Constitution forbid.*

*If the house is not homestead, then Wendy may have a problem. Florida has a pure notice recording statute – any subsequent purchaser for value without notice shall have superior rights in the property conveyed over previous purchasers who did not record prior to the conveyance to the subsequent purchaser. If a purchaser is found to be a bona fide purchaser (BFP) for value without notice – actual, constructive/record, or inquiry – that BFP has superior title. Wendy was not a purchaser of this property and her name is not on the deed – therefore she would not qualify as a BFP for value because she did not purchase the property. Buyer knew of Henry's recording, did not know of Mother's mortgage because it was not recorded, and so normally would be a BFP. However, in equity, Wendy may be able to argue that Buyer had a duty to inspect*

*the property for any inhabitants, and if any were there which were not the seller, the buyer is on inquiry notice that someone may have title to the property other than seller and buyer must ask the inhabitants what title they hold, why they are on the property, and is presumed to have notice of anything that such an inquiry would produce. Wendy might argue that Buyer was on inquiry notice and had he asked Wendy he would have been alerted to the possibility that the property was homestead and therefore would have had notice that it could not be conveyed to him without her consent. Buyer will argue that he is a BFP for value, and that Wendy is not, and so his interest should be superior.*

*Wendy is likely to prevail here and will not have to vacate the home because of the homestead protection provided for in Florida's constitution. She may have to leave the commercial building, but again would likely be entitled to proceeds from the sale under the divorce proceeding.*

### *III. The Foreclosure Action by Henry's Mother*

*If the home is found to be homestead, as described above - any property up to ½ acre within a municipality and 160 contiguous acres outside a municipality, that is the primary residence of the owner(s) – it is protected by the Florida Constitution against void mortgages as well. Generally, a mortgage on homestead property is enforceable against the property because it falls into one of the three exceptional kinds of creditors that can reach homestead property – mortgagees, those holding mechanics liens, and property tax lien holders. Here, the mortgage, even though on the land, was not for the purchase or improvement of the land – and so, even if it was attained validly, it would not be exercisable against the homestead property (Mother would not be able to foreclose on the property because the loan does not arise from the purchase or improvement of the land, even though it is secured by the land). A mortgage on a homestead property of two spouses must be consented to by both spouses, if it is not, it is void. ANY conveyances of title to homestead property must be joined by and consented to by each spouse of the property or it is void. A mortgage is a transfer of interest in real property, even under Florida's lien theory jurisdiction because while it does not convey actual title, it does convey a lien on the property, which is an interest in the property.*

*Wendy will argue that she had no knowledge of the mortgage and did not consent to it, and therefore the mortgage is void. If the mortgage is void, Mother's foreclosure action would fail. If the home is not homestead, Mother's foreclosure action would likely stand unless Buyer is found to be a BFP for value under Florida's pure notice recording statute because the mortgage was not recorded and there is no facts that Buyer had notice of it, therefore Buyer is a BFP for value and takes the property not subject to the mortgage.*

*NOTE – in each of the above causes of action – the fact that the divorce proceeding was commenced by Henry before he conveyed the mortgage to Mother and the home to Buyer is irrelevant – the divorce proceeding was not final, the distribution of the property had not yet occurred, THE PARTIES WERE STILL MARRIED – so homestead would still apply and the commencing of the divorce proceeding would be no defense.*

#### *IV. The petition for divorce action by Henry*

*I would counsel Wendy that the petition for divorce action will include an equitable distribution of marital assets, her petition for alimony, the custody or parental responsibility determination by the court for Chris, and the award of child support.*

*A spouse, who is a resident of Florida for at least 6 months prior to petitioning for divorce, may petition the court for a divorce on the following grounds: the marriage is irretrievably broken, or the other spouse has been adjudicated mentally incompetent and has remained so for the past 3 years prior to petition. Henry would have stated the irretrievably broken grounds for divorce. This divorce would not be entitled to summary proceedings in county court because there is real property and a minor child (Chris) and so it must be filed in Circuit Court.*

##### *A. Equitable Distribution of Marital Assets*

*Upon the petition for divorce, the Court is required under Florida law to distribute the marital assets under the Equitable Distribution Doctrine. In order to do so, the Court must first distinguish between marital and non-marital assets – the latter are kept by the individual owner spouse. Non-marital assets are those which were acquired before the marriage, and individual gifts to one spouse only (inheritance for example). Marital assets are those that were acquired during the marriage, the value of improvement of real property during the marriage (even if the home itself is non-marital, as is the case here), interspousal gifts, all income and earnings during the marriage. The court must divide the property equitably, and will generally attempt to achieve a 50/50 split, half to each spouse. However the court is allowed to alter the distribution percentage if equity so requires. The court will consider factors such as the following:*

- the standard of living of the spouses during the marriage*
- the economic status of each spouse*
- the physical and emotional health of each spouse*
- the contributions made to the marriage by each spouse, both economic and emotional*
- the length of the marriage*
- anything else equity requires*

*Here, the court will determine that the house and the commercial office building are non-marital assets belonging to Henry because he acquired them before the marriage. The \$20,000 loan may or may not be marital property, it was after Henry filed for divorce and the court may find either way.*

*While the home and the commercial building are non-marital assets – the improvements made to each by Wendy during the marriage are marital assets. Therefore, Wendy would be entitled to a portion of the value of these contributions. If the commercial building was sold, Wendy should be entitled to a portion of the proceeds. All income earned during the marriage would also be divided.*

*The facts show that Wendy worked for a while then stayed home to support and improve the home, care for Chris, and allow Henry to work in the business. The standard of living she became accustomed to in being able to stay home with Chris will be considered, also, her contributions to the home and the business (both through support and actual improvements) would be considered along with Henry's contributions through his income while working at the business. The length of the marriage is not exactly clear, it is at least 10 years since Chris was born after they were married and Henry filed for divorce after Chris turned 10 – the longer the marriage, the more likely a court will deviate from a 50/50 split. If the marriage was only for 10 years, the court will likely stay close to the 50/50 split in dividing the above marital property – if it was more than 10 years and closer to 15, for example, the court would likely defer and grant a different proportion based on the above factors.*

*Finally, under special equity, if Wendy receives primary residential custody of Chris, she may be entitled to and usually would be granted the house for the period from the divorce until Chris reaches the age of majority or graduates from high school.*

#### *B. Alimony*

*I would advise Wendy that we should petition for alimony. Alimony is the extension of the spousal obligation to support the other spouse. Florida courts are allowed to grant one or more of the following four types of alimony:*

- 1. temporary – during the pending divorce proceeding (up to 3 months if the court extends for contested proceedings)*
- 2. lump sum – designed to be a liquidated amount of the total support that would be paid to the spouse for the spouse's life expectancy*
- 3. permanent periodic payment – these are periodic payments made on usually a monthly basis, that are permanent until the spouse remarries or dies (or potentially lives with another person who is supporting the spouse)*
- 4. rehabilitative – designed to reimburse the spouse for illness or education – if the spouse gave up work or schooling for the marriage, may be reimbursed so that they can reenter school*

*The court, in its equitable discretion, will consider the following factors when making an alimony decision:*

- the standard of living of the spouses during the marriage*
- the economic status of each spouse*
- the employment status of each spouse*
- the physical and emotional health of each spouse*
- contributions made to the marriage*
- the ability of the petitioning spouse to support his or herself*
- the need for a spouse to go back to school or go to school in order to become employable again*
- anything else equity requires*

*Here, Wendy should petition for temporary alimony, since she is not working and her unemployment is due to the sacrifice she made for the marriage, her choice to stay home to support the household. The court is liberal in granting temporary alimony and would most likely grant it here. She should also petition for permanent period payment because she is not working and requires support, she would most likely receive this because, again, she stopped working for the marriage, and she would also petition for rehabilitative support if she can show she needs to go back to school to attain education in order to be employable.*

#### *C. Shared Parental Responsibility/Custody*

*The court would next have to determine the custody or shared parental responsibility for Chris, the parties' minor child. In Florida, the court will follow the Best Interest of the Child standard (BIC) in determining the custody arrangement of the minor child. The court prefers to grant both parents shared parental responsibility (responsibility shared for the child as well as decisions in the child's upbringing, etc. shared) and will generally grant primary residential custody to one parent and liberal, reasonable visitation to the nonresidential parent. The court, in determining the BIC, uses the following factors:*

- the desires of the parties (and minor child if 12 years old or older)*
- the economic and emotional stability of the parents*
- the ability to provide a loving environment for the child*
- the likelihood that placement with one parent would result in that parent inhibiting or creating obstacles to the other parent's visitation*
- history of domestic abuse*
- any other matters equity requires*

*Here there is no evidence of domestic abuse or that either party will not provide adequate visitation to the other. Because Wendy has stayed at home with Chris from the time he was born until the present, she is likely to receive primary residential custody. The court is likely to award shared parental responsibility to both parties and liberal, reasonable visitation to Henry.*

#### *D. Child Support*

*Finally, any nonresidential parent is obligated under Florida law to pay child support. The Florida statute sets out the Child Support Guidelines and is based on the income of each parent and the number of children. Here, Henry is clearly able to pay, as he has been working (though if he sold the business to Buyer he may be unemployed and argue that he cannot pay – however, Wendy can argue that he sold the business after filing for divorce with intent to lower child support and alimony obligations, and if so, the court will not consider the sale and will rule Henry is able to pay) and so he will be ordered to pay child support to Wendy based on the statutory guidelines.*

# **Q**

## **QUESTION NUMBER 3**

### **FEBRUARY 2009 BAR EXAMINATION – TORTS**

Florida Hurricane Shutters, Inc. (hereinafter FHS) designs, manufactures, and sells shutters to prevent broken windows and other damage to the homes of Florida residents caused by hurricane force winds.

Smith, the owner of a valuable home situated near the Florida coast, purchased a set of hurricane shutters from FHS and properly installed them on the exterior of his home. Approximately one year later, a hurricane with wind speeds of 100 miles per hour struck the area where Smith's home was located. The shutters were correctly locked in position over Smith's windows but they failed. Windows were broken and the structure and its contents sustained substantial damage. Smith's arm was broken when he was struck by a china cabinet which was knocked over by the hurricane's winds inside the home. Smith's home was uninsured.

The sales contract between Smith and FHS provided that the shutters were guaranteed to protect structures from hurricane force winds. A storm is considered a hurricane when winds reach 75 miles per hour. A brochure prepared by FHS sales staff and given to Smith when he was deciding whether to purchase the shutters stated that the shutters protected structures in winds up to 130 miles per hour.

Smith hired Attorney to represent him in a suit for damages against FHS. Attorney retained an expert to examine the shutters and the expert identified a design defect that, in the expert's opinion, caused the shutters to fail.

Attorney wishes to run some advertisements in area newspapers to find other property owners, who owned FHS shutters that failed, in hopes of also representing them in actions against FHS.

Discuss the claims that may be asserted by Smith against FHS and the defenses of FHS. Do not discuss the jurisdiction of the trial court. Also, what is the proper measure of Smith's damages if the liability of FHS is established? Are punitive damages available?

What are Attorney's responsibilities regarding his newspaper advertisements?

## SELECTED ANSWER TO QUESTION 3

### (February 2009 Bar Examination)

*The first issue in this question is what causes of action may exist for Smith against FHS for injuries he sustained in this action. There are several theories which may apply in this case. The first is a cause of action for strict liability in tort. Generally, a seller, designer, or manufacturer of a good is liable for any product it places in the stream of commerce which is improperly designed or constructed and thereafter causes injury. In this case, Smith will argue that FHS shutters, based on expert testimony, were improperly designed or constructed and thus FHS has placed a dangerous and defective product into the stream of commerce. The only defense that may be available to FHS is compliance with a design standard. Generally, a defendant in strict products liability actions may show that the product is certified or approved by a governmental agency which allows it to assert the proposition that it is not unreasonably dangerous. In this case, however, we have no evidence of any standards.*

*A second theory which Smith may sue FHS is negligent design or construction of the shutters. Generally, an action sounding in negligence requires there to be a duty owed to some party, a breach of that duty, a showing that the breach is the actual and proximate cause of the injury to the plaintiff, and then a result of damages from that injury. In this case, Plaintiff may argue that, even if strict liability fails, the defendant still maintained a duty to ensure that the product worked properly or was designed correctly. When the product failed, the breach occurred. The third aspect requires Smith to show that the breach was the actual and proximate cause of his injuries. Generally, a plaintiff must show that the breach was the actual cause of his injuries, i.e., but for the breach, plaintiff wouldn't have been injured, and the proximate cause, i.e., it is foreseeable from the defendant's perspective that plaintiff would be injured by this breach. There are two general views on foreseeability. The Cardozo approach holds that the plaintiff must be in the "zone" of danger to be considered foreseeable. The Andrews approach requires that a plaintiff being injured makes him foreseeable. Most jurisdictions rely on the reasonableness standard for foreseeability. In this case, there can be no doubt but that the breach was the actual cause of Smith's injuries. Smith will also argue that he is foreseeable because if the shutters break, the windows will likely break exposing the home, and those in it, to injury. FHS may argue that it is not foreseeable for someone to stay home during a hurricane, but will likely not prevail. FHS may also argue that the China cabinet was a superseding intervening cause of Plaintiff's personal injuries. Generally, a superseding intervening cause is some action or event that occurs which cuts off defendant's liability. Unfortunately for FHS, the cabinet fell due to the wind, thus the "intervening" action was caused by FHS negligence. While FHS likely can't argue that it was not foreseeable for an individual to remain at home in a hurricane, it can likely argue that it is comparatively negligent. Thus, if the jury would find that Smith was negligent by staying home, his award could be reduced by the percentage of his fault as attributed by the jury.*

*Another cause of action which Smith may assert is fraudulent misrepresentation. Generally, the tort of misrepresentation occurs when a party negligently, or fraudulently, asserts or withholds knowledge to or from the buyer which he knows, or should know, is false, the buyer relies on that information, and is damaged. In this case, Smith will argue that the brochure stated the shutters would withstand 130 mph winds and that he*

*relied on the fact when buying the shutters. FHS would then argue that he cannot prove reliance, which is an essential element of misrepresentation.*

*Smith may also sue FHS for breach of the implied warranty of merchantability. Generally, the implied warranty of merchantability holds that there are no defects in the products as sold. In this case, Smith would argue that the product was defective and thus the warranty has been breached. The only defense for FHS is that the bill of sale may have disclaimed this warranty, but this is unclear from the facts.*

*Smith may also claim that FHS breached the implied warranty of fitness. Generally, the implied warranty of fitness doctrine holds that merchant sellers warrant that the product is fit for the general use for which it is intended. As above, Smith will argue that the shutters most assuredly weren't fit as they broke. Again, FHS may have disclaimed this warranty but it is unclear from the facts.*

*Finally, Smith may sue FHS for the breach of the express warranty of fitness for a particular purpose. Generally, when a merchant seller knows the particular purpose for which a buyer is intending to use a product, and thereafter warrants that the product is fit for that purpose, if the product fails, the seller is liable. Here, Smith will argue that the guarantee was express and the wind speed in the brochure illustrated the seller knew the particular purpose for which these shutters were bought. FHS only real defense would be if it could prove that Smith did not rely on those representations when he bought the product.*

*As a blanket defense to all claims, FHS could assert comparative fault on Smith's behalf for negligent installation. If FHS can show that Smith improperly installed the windows and this was the sole proximate cause, or even a contributing cause to the failure of the shutters, Smith's damages may be reduced or he may be adjudicated more than 50% at fault which in Florida, is a pure comparative fault state, extinguishes his liability.*

*Should FHS be found liable, Smith has several remedies available. He can seek actual (compensatory) damages for the cost of repair to his house, windows, cabinets, and replacement shutters. He can also recover his medical bills, and for any time he lost from work while injured. He may also seek special damages for things such as loss of consortium (wife), pain & suffering, disfigurement, and loss of a normal life. Generally, this amount is limited to \$500,000 or 3X compensatory damages.*

*Generally, a party may only seek punitive damages where there is reckless, malicious, or wanton disregard for the rights and safety of others manifested by the intent of the defendant or his actions or inactions. Even then, they can only be requested through a hearing. Based on these facts, it is unlikely punitive damages are available as there is no outrageous conduct highlighted. If it were found that defendant had knowledge of the defect and the injuries it could (or had) caused, they may be available.*

*Generally, attorney advertisements are protected speech. But the contract may be regulated by the rules of professional conduct. An attorney ad may not be misleading, must be labeled as an advertisement, must not claim expert or certified status when one does not exist, and must not guarantee money or results. It must include the name of the attorney making the ad or law firm, the number to call, and facts to alert the public that it is a legal advertisement. Thus, the attorney should create an ad that is headlined as a legal advertisement. He should then let the public know what particular thing he is looking for and include his name, firm name, and telephone number. He should also include the fact that an attorney client relationship may not be formed merely by placing*

*a call. He should refrain from using any pictures or symbols other than the scales of justice or law books, and should not include celebrity endorsements of any kind. If he does all of the above, he should remain in compliance with the rules of professional conduct.*

# **QUESTION NUMBER 1**

## **JULY 2009 BAR EXAMINATION – CONTRACTS/ETHICS**

One week before her 18th birthday, Mary saw the following ad in the prior week's local newspaper:

"Owner of Red Model T Sports Car Interested in Selling  
\$300  
Contact Seller c/o ABC Food Co., Main Street, Anytown, Florida"

Mary, who always wanted that particular car, told her Dad about the ad. Dad, although hesitant, told Mary that he is a customer of ABC Food Co. (Company), that the Company is reliable and because Dad enjoys fixing cars as a hobby, he would be willing to help Mary fix up the car, if necessary. Because the ad is a week old, Mary convinced Dad that they must send in the purchase price immediately. Dad then gave Mary a check in the amount of \$300, payable to Company, to buy the car. In her excitement, Mary simply mailed Dad's check, without any explanatory notation, directly to Company.

The Company's bookkeeper received the check in the mail with Dad's name. The bookkeeper deposited the check and credited the amount against Dad's overdue outstanding balance due the Company.

Two weeks later, Mary contacted Seller about the car. Seller told Mary he has no record of her responding to the ad and that in any event the ad was incorrect and the purchase price was \$3,000. Seller told Mary that she can have the car for \$3,000, and that he will ask his boss if the Company would return the \$300 to Dad. In addition, Seller told Mary that Mary must pay for and pick up the car by the end of the following week. Mary said "ok." A day later Seller turned down an offer to sell the car for \$2,500 from a third party.

Two days later, Dad and Mary phoned Seller and told Seller that they want the car for the \$300 already paid. Seller told Dad and Mary that a deal is a deal and that he expected Mary to pay him the \$3,000 for the car. Mary replied, "good luck" and hung up the phone. A week later Seller sold the car to another buyer for \$2,000.

In the meantime, Dad contacted Attorney, a sole practitioner, about the car transaction with Seller. Attorney indicated that she knows the Company well because her previous law firm represented the Company, and Attorney had worked on collection matters on behalf of the Company. Dad is impressed with Attorney and retained her.

Please discuss:

1. The validity of the contract to purchase the car.
2. Claims of Mary and Dad; and counterclaims of Seller.
3. Any ethical issues concerning Attorney.

## **SELECTED ANSWER TO QUESTION 1** **(July 2009 Bar Examination)**

### Essay #1

*This memorandum will discuss the validity of the K to purchase the car, the claims of Mary and Dad, and the counterclaims of Seller. It will also address any ethical issues concerning Attorney.*

#### **Validity of K to purchase car**

*This first issue to be decided is whether the **common law (CL)** or the **Uniform Commercial Code (UCC)** governs the transaction in this case. The UCC governs transactions that involve the sale of goods and the CL governs transactions that do not deal with the sale of goods and can apply to K's for services. Here, the transaction is for the sale of a car, which is considered a good, so the UCC will govern this transaction. The next consideration is whether the parties are merchants, since the UCC applies special rules to merchants. A merchant is one who regularly deals in goods of the kind sold. Here, it does not appear that either party is a merchant. Seller seems to be selling her own car, and Mary is young and not a merchant engaged in any sort of business.*

*The next issue is whether the **Statute of Frauds (SOF)** will apply. The SOF requires that certain K's be in writing, signed by the party to be charged. This is to prevent fraudulent transactions. SOF applies to K's for: (1) K's for marriage, (2) a K that is for longer than a year, (3) Land sale K's, (4) executory K's (future K's), (5) sale of goods over \$500, (6) guarantors, (7) suretyships, and in FL, a few other K's, such as a K for newspaper subscriptions. Here, the first possible transaction was for the sale of a car for \$300, and therefore, would not be required to be in writing. However, the 2<sup>nd</sup> attempt at the transaction was for the sale of the car for \$3,000, which would be required to be in writing and signed by the party to be charged. Also, a K may be taken outside the scope of the SOF if there is Partial Performance or under the UCC, especially manufactured goods.*

*The next issue in determining the validity of the K, is whether there was a valid **formation of a K**. For valid formation, there must be an offer, acceptance, consideration, and no valid defenses to formation.*

An **offer** is an expression of an intent to invite acceptance, which must include the essential terms, and puts the power of acceptance in the offeree. Here, Mary may argue that the advertisement that she read in the paper was an offer. However, advertisements are usually considered to be mere invitations for offers. Therefore, there would not be an offer at that point. Therefore, when Mary sent the check payable to Company to buy the car, this was an attempted offer in response to Seller's invitation for offers. An offer is effective upon receipt. However, the offer was not clear in its terms, as it was signed by Dad, not payable to the Seller, but to the company she worked for, and had no explanatory notation as to what the money was for. Therefore, the Company probably acted reasonably when it credited the \$300 against Dad's overdue outstanding balance due to the Company. Therefore, at this point, there still does not appear to be a valid K.

The first possible real offer would have been when Mary contacted Seller 2 weeks later and Seller told Mary that she could have the car for \$3,000. This was a clear offer that invited acceptance, and did. Since this was probably the first real offer, it would not be considered a modification. Modifications to K's under the CL require consideration, but under the UCC do not require consideration. Therefore, if a K had already been formed, this still would have been a valid modification, as this is a sale of a car governed by the UCC. However, this appears to be merely an offer at this point.

Since Seller claims that the price was meant to be \$3,000 instead of \$300, there might be an issue of **Mistake**. There are 2 kinds: (1) Mutual Mistake and (2) Unilateral Mistake. Unilateral mistakes are those such as typographical error, computations, etc. However, this is only a defense if the non-mistaken party knew or should have known of the mistake. If this is the case, then the mistaken party is the one who may seek Rescission of the K, treating the K as if it never was formed. Mutual Mistake is only a defense if both parties were mistaken, but not as to price.

An **acceptance** is a manifestation of assent to the terms of the offer, either by express communication to the offeror of acceptance, or by conduct that is conformity with the performance that the offer invited. When the offer asks for a promise in return, it is a Bilateral K; when the only way to accept is by performance, it is a Unilateral K, whereby beginning performance makes the K irrevocable. Since here, this would have been a Bilateral K, since performance was not the requested mode of acceptance, Mary's sending the check in did not make the K irrevocable, or form a K. However, when seller verbally offered her the car, and Mary said "ok" this was a manifestation of assent to the terms of the offer and will likely be considered a valid acceptance. Under the UCC, acceptance need not be the "mirror image" of the offer, as under the CL.

**Consideration** is a bargained for exchange, and in FL, it merely requires a legal detriment to one party or a benefit to another, or both. Here, there was consideration, since there was money to be exchanged for a car, which is a legal detriment to Mary and a benefit to the Seller.

Therefore, a K appears to have been formed for the sale of the car for \$3,000.

There are possible valid defenses to formation here however, as discussed below.

### **Claims of Mary and Dad and Counterclaims of Seller**

Mary and Dad may have a claim for **Specific Performance** if money damages would not be an adequate remedy. Specific performance is reserved for items that are unique in nature, such as land and antiques. Here, the car may not be considered unique. Even if it is, Mary and Dad will probably not be able to get Specific Performance, since the car has already been sold to another buyer. FL protects **Bona Fide Purchasers (BFP)** for value who have no notice of a prior sale or title defects. The facts do not tell us enough to determine if the buyer here was a BFP or not.

An argument that Seller may have in counter claim, is that Mary and Dad **Anticipatorily repudiated** the K. This is when a party breaches the K, clearly and unequivocally before performance is due. Here, Mary's expression of "good luck" and hanging up the phone to Seller after Seller telling her she needed to pay and pick up the car by the end of the following week, appears to be clear and unequivocal that she was refusing to perform. Therefore, Seller had the option to either sue immediately for breach of K, wait for the date of performance to see if she performed, then sue for damages if she didn't or try and mitigate (cover) Seller's damages in the meantime, by reselling the car, which she did here.

If Seller is going to be counterclaiming against Mary and Dad for damages of breach of K, Mary and Dad will argue that the **SOF** was not met and therefore, they have a **valid defense to K formation**. Here, the K was required to be in writing, since it was for the sale of goods for more than \$500, here a car for \$3,000. As mentioned above, the SOF requires that certain K's be in writing, signed by the party to be charged. This is to prevent fraudulent transactions. SOF applies to K's for: (1) K's for marriage, (2) a K that is a for longer than a year, (3) Land sale K's, (4) executory K's (future K's), (5) sale of goods over \$500, (6) guarantors, (7) suretyships, and in FL, a few other K's, such as a K for newspaper subscriptions. There was also no partial performance that evidences an intent to sell and buy the car.

Mary and her Dad may argue that Mary was a minor when she attempted to K, and therefore would be under an **incapacity**, which is a valid **defense to formation**. However, Seller may argue that she was a minor when she first sent the check in, but 2 weeks had passed before the next contact. After a week, Mary became 18 and no longer incapacitated, and therefore could contract on her own, or reaffirm an existing K that she entered into while a minor. However, it would be Mary's choice whether to reaffirm or whether to get out of the K.

Seller may also counterclaim for **Expectancy damages**, which are K damages to put the non-breaching party in the place they would have been, had the K been performed. This means that Seller could seek damages in the amount of \$1,000, since this is the difference between the K price with Mary, and the amount Seller got in reselling the car and mitigating her damages.

If a defense to formation is successful in negating the K, Seller may argue **Promissory Estoppel**, since she relied on Mary's acceptance, by turning down another offer on the car a day later. Promissory Estoppel is when the promisor makes a promise, that they could reasonably believe would lead to reliance on the part of the other party, the other party did in fact rely on the promise, and that party suffered a detriment due to their detrimental reliance. It is an equitable tool to disgorge Unjust Enrichment, and the remedy for Promissory Estoppel, is Restitution. Restitution is a type of damages that puts the party who relied, back in the position they would have been had they not relied. Therefore, Seller may counterclaim for the money that she turned down in reliance on Mary's supposed acceptance of the K. This would probably be in the amount of \$500, since the K with Mary was for \$3,000, she turned down an offer for \$2,500.

### **Ethical Concerns**

The **Rules of Professional Responsibility** govern ethical issues for attorneys. Here, there is a possible ethical concern of a **conflict of interest**. A lawyer may not represent a client in a matter where the clients interests are **directly adverse** to those of another client they have. They also may not represent clients where the attorney's representation would be **materially limited** (such as not zealously representing one client for fear of hurting another client's case).

There are also rules regarding **Former clients** and an attorney's representation. An attorney, if they do represent one client against a former client, may not use any information they obtained **confidentially** through prior representation of that client.

Here, Attorney has previously represented the Company, whom Seller works for. This may not be a conflict of interest since the suit is not against the company. However, if the attorney reasonably believes that his representation would be affected by representing Mary and Dad against a former client, he should decline representation of this matter.

## **Q** QUESTION NUMBER 2

### **JULY 2009 BAR EXAMINATION – FAMILY LAW**

Husband, a salaried executive, married Wife, an hourly worker. Before their marriage, Husband owned a home in New York. Days before their wedding, Husband gave Wife a prenuptial agreement stating that Wife would waive alimony and any interest in his home. After reviewing the document, Wife signed it.

After 17 years of marriage, Husband, who was 70, decided to retire to Florida. Husband sold his New York home for \$750,000.00, and terminated his 26 years of employment with Work, Inc. Wife, who was 45, was able to immediately find a similar job in Florida making \$13.00 per hour, and allowing her to contribute to a 401K Plan.

The parties purchased a home in Florida for \$1,000,000.00 using their joint savings, which included the proceeds from the sale of Husband's home. The home was titled jointly to the parties as husband and wife.

After living in Florida for 9 months, Husband filed for divorce when he learned Wife was unfaithful. Husband sought a special equity in the parties' home, all of his 401k through Work, Inc., and half of all other assets. After filing the petition, Husband moved into a nursing home in Florida.

Wife suspects that Husband has dementia. She comes to you seeking advice regarding the following issues:

1. Can the dissolution action be suspended or dismissed?
2. Can the prenuptial agreement be set aside?
3. Does Wife have any rights with respect to the marital home, taking into account Husband's claim of special equity?
4. Does Wife have any rights with respect to her 401K and the Husband's 401K? and
5. Does Wife have any rights to alimony, should the prenuptial agreement be set aside by the court?

Discuss fully each issue including Wife's likelihood of success as to each issue. Assume Florida law applies.

## **SELECTED ANSWER TO QUESTION 2**

### **(July 2009 Bar Examination)**

1. Can the dissolution action be suspended or dismissed?

Florida is a no fault divorce state. In order to dissolve a marriage, all that is required is that the marriage be irretrievably broken. If one party does not want to end the marriage and there are no minor children, the court can order counseling and continue the proceedings for 3 months to see if a reconciliation can be effected. If the wife does not want the divorce, she can go to counseling but the divorce will be granted if a reconciliation cannot be effected. In addition, if a party is mentally incompetent for more than 3 years, a divorce can be obtained even if the marriage is not irretrievably broken. The wife may argue that the husband has dementia and therefore lacks capacity to dissolve the marriage. The court will have to determine if Husband lacks the capacity to enter into a divorce. If he does and remains so incapacitated, a divorce may be granted after 3 years. If he is not lacking capacity then the divorce will proceed after the period of counseling.

2. Can the prenuptial agreement be set aside?

Prenuptial agreement in a writing that satisfies the Statute of Frauds will be upheld so long as there was no undue influence, fraud or duress in entering into the agreement. There is sufficient consideration for the agreement by the agreement to enter into the marriage. There may be indicia of undue influence, fraud or duress if the timeframe between presenting the agreement and signing it is short or if the spouse did not have an opportunity to consult counsel. Here, it appears the prenuptial agreement was presented to Wife by Husband just a few days before the wedding. In addition, the Wife reviewed the prenuptial on her own without advice of counsel. The Wife could argue that there was not full financial disclosure when she entered into the agreement. This is generally not necessary for the prenuptial agreements except in cases where the contesting spouse was really treated unfairly in the agreement. It is valid to waive alimony and the interest in his non-marital home in the agreement. Since the wife currently earns only \$13 an hour, she will not be able to maintain her standard of living evidenced by living in a \$1 million dollar home. Because of the large disparity in the financial resources of the parties when they entered into the marriage and throughout, the agreement will not be deemed fair. The court will probably set aside the agreement based on the factors and will award the wife permanent periodic alimony as discussed in the alimony section below.

If, at the time of entering into the agreement, the terms are so one sided as to make it unconscionable, the agreement will be set aside. The court may not find enough for unconscionability but there is enough indicia of undue influence to at least set aside the waiver of alimony.

3. Does the wife have any rights with respect to the marital home, taking into account husband's claims of special equity.

Florida is an equitable distribution state, the marital assets will be divided 50/50 unless there is a claim for unequal distribution. The court must first determine what the marital assets are. Marital assets include: (1) anything acquired during the marriage by either one or both spouses, except for a gift, bequest, descent to one spouse; (2) enhancement of or appreciation in value of non-marital assets because of the contribution from one or both of the spouses or because of contribution of marital funds; (3) interspousal gifts; and (4) benefits accrued during the marriage in retirement plans, 401K, pension plans and profit sharing plans.

Florida courts follow the statutory guidelines for equitable distribution. Factors taken into account to make the equitable distribution are: (1) contribution of each spouse to the marriage, (2) contribution of each spouse to care and education of children, (3) contribution of each spouse to homemaking services, (4) the financial sources and resources of each spouse, (5) the duration of the marriage, (6) the need for a spouse to maintain an asset free from interference from the other spouse.

The house in Florida was purchased with the couple's joint savings and it was titled jointly in both names. In Florida, there is a presumption that property that is titled in both names of husband and wife owned as tenants by the entirety is marital property to be divided equally 50/50. The home was purchased with money in a joint account, the joint account is marital property. Any funds that Husband put into the account from the sale of his non-marital home have now been commingled and will be considered a gift to the other spouse. The Husband will argue that he should get special equity in the home because of his contribution from non-marital assets to the purchase. Special equity has been abolished in Florida. He can file a claim for unequal distribution of marital assets. This claim will likely fail because the home will be presumed to be owned 50/50 because it is titled jointly and held as tenants by the entirety. Since the proceeds of the sale of the Husband's non-marital home were commingled, he will not be able to get any unequal distribution for the proceeds from the home sale and it will be deemed a give to the Wife.

In addition, in Florida, a natural person who owns a home can claim a homestead in the home if there is residence, they are entitled to protection for ½ acre within a municipality and up to 160 contiguous acres outside a municipality. The homestead cannot be sold, gifted or mortgaged without the consent of both spouses. So Husband cannot in any way protect the home or convey it away from the spouse without her consent. After a divorce the house will be held as a tenancy in common and it will be the homestead of the spouse who is awarded the house or they will each get the proceeds if it is sold but it must be sold with consent of both spouses. It may also be argued that since the Husband moved to a nursing home, he has abandoned the homestead and the homestead now belongs to the wife. This argument will fail because the Wife still lives there and she is still married so she will still need the Husband's consent if she wanted to mortgage, sell, or gift the house.

4. Does Wife have any rights with respect to her 401K and the husband's 401K?

As stated earlier, the benefits accrued in the 401K during the marriage will be considered marital assets and will be subject to equitable distribution. The wife will be able to get half of the benefits accrued in her husband's 401K during the marriage.

If the husband had benefits that accrued prior to the marriage in the 401K, he would be able to keep those.

5. Does Wife have any rights to alimony, should the prenuptial agreement be set aside?

Alimony is awarded based on each spouse's need and ability to pay. In Florida, there are statutory guidelines for alimony awards. There are four types of alimony that can be awarded in Florida:

Temporary Alimony during the pending litigation of the dissolution. It cannot be waived by agreement.

Permanent Periodic Alimony available for the maintenance and support of a spouse that does not have the ability to be self-sustaining. It can be modified upon a substantial change of circumstances. This type of alimony can be waived in a prenuptial agreement.

Rehabilitative Alimony is for the education and training of a spouse that needs it to become self-sufficient.

Lump Sum Alimony is a definite sum paid one time or in periodic installments, it is final and can be used to achieve an equitable distribution of property. It is final and payable even if the payor spouse dies.

The factors that a Florida court considers to determine an award of alimony are: (1) Standard of living during the marriage, (2) Duration of the marriage, (3) Age, physical and mental condition of the parties, (4) Financial sources and resources of the parties, (5) Education and career sacrifices made by either spouse, (6) Contribution to the marriage in the form of homemaking services, care of children and contribution to the marriage, and (7) any other factor that will promote equity.

The court may also look at adultery on the part of one party in making the alimony determination but only if it resulted in depletion of the marital assets. There is no indication here that there was any depletion of marital assets but it will be taken into account as a factor if there was depletion.

Here the wife is 45 years old and works in a job that pays \$13.00 an hour. She does not appear to have any non-marital assets since she began contributing to the 401K when she was already married. Given her age, she is able to continue working and there is no indication that she has any disabilities that may affect her. Because of the disparity in financial resources between the husband and wife, the court will determine that permanent periodic alimony should be awarded and set aside the prenuptial agreement. She will also be awarded temporary alimony during the pendency of the dissolution proceedings.

# **Q**

## **QUESTION NUMBER 3**

### **JULY 2009 BAR EXAMINATION – FL CON LAW**

Wanda Woods comes to your office for help with her debts. After an interview and review of public records you discover the following:

Wanda Woods lives in a mobile home on six acres of property in rural Citrus County. The recorded deed to the property is in the name of Wanda's father, Frank Woods. Frank Woods died in 1990 without a will, leaving behind his wife, Molly Woods, and their two minor daughters, Wanda, age 10, and Sally, age 8, at the time. When Molly died intestate in 2001, Wanda had already moved out, but Sally still lived at home. Molly had health care bills totaling \$10,000 when she died. Sally moved out shortly after her mother died. Wanda was living in an apartment at the time, but was evicted for non-payment of rent and a judgment for \$3000 was entered against her and recorded in 2003. Wanda then moved into the mobile home by herself.

In 2004, Wanda married Howard who moved into the mobile home with Wanda. Wanda went to Banking Company in 2005, borrowed \$20,000 secured by a mortgage on the property, and used the proceeds to make repairs to the home. Although Howard never signed the mortgage, both Wanda and Howard paid on the mortgage until 2006 when Wanda and Howard got a divorce. Wanda still lives on the property with their two-year-old son, Sammy.

Banking Company has now filed a foreclosure complaint against Wanda. Wanda has someone who is willing to buy the property for \$150,000. She offered to give your law firm a mortgage on her interest in the property in lieu of a cash payment for her legal fees.

Please prepare a legal memorandum discussing the interests each party holds in the subject property. In your memo, include an evaluation of the title, possible claims against the property, and her offer to pay your firm.

## **SELECTED ANSWER TO QUESTION 3**

**(July 2009 Bar Examination)**

*Under the Florida Constitution natural persons who own Florida property and make it their primary residence are entitled to homestead exemption on 1/2 acre of land inside municipalities and up to 160 contiguous acres of property outside the municipality. The homestead protection is for land and property owned by the parties; it may include apartment and condominiums, but a mobile home as in this example may not carry the “permanency” of the land required for homestead since a mobile home could be readily mobile. Under these facts however it seems that the mobile home is a homestead. It’s been permanently in this location since before 1990 when Frank died. Homestead protects the property from claims of creditors as long as those claims are not “related to the land.” Claims such as mortgages to purchase the home or to improve the land are “related to the land” and are therefore exempt from the homestead protection. However 3<sup>rd</sup> party judgments not related to the land such as judgments for accidents and personal loans cannot be satisfied by placing a lien on homestead property, the remedy of such creditors remains to be satisfied either personally by the debtor or through non homestead property. Homestead also seeks to protect the family. Under homestead a homestead property automatically inures to the family of the deceased regardless of a will or other bequest provision to the contrary and regardless of whose name the property is titled under. If there is a surviving spouse and surviving minor children the property passes to the spouse as a life estate and to the children upon the death of that spouse. Here If Frank’s house was his homestead the property automatically passed to Molly for her life upon Frank’s death, the facts indicate that Wanda was 10 and Sally was 8 when Frank died, and as minor children they would obtain the rest of the estate upon the death of their mother.*

*If Molly’s hospital obtained a judgment against her the hospital would not be able to attach a judgment on the home because as homestead property it would be exempt from the judgment of creditors not attached to the land. However if Molly left any money behind the hospital bill would be satisfied from said assets after paying the funeral expenses.*

*When Molly died both Wanda and Sally obtained a remainder fee absolute as tenants in common to the home. As such they would each be entitled to complete use of the property. Wanda is entitled to reside in the mobile home. Tenants in common are also entitled to sell their interest or attach liens on them and their interest also pass through intestacy. In Florida any conveyance or title to be held with rights of survivorship must expressly state said wish.*

*The facts state that creditors obtained a judgment against Wanda for unpaid rent which was recorded in 2003. In order to qualify for Homestead exemption the party must own and make the homestead property their primary residence and should claim the property as homestead before the creditors lien attaches to it. Wanda owns the property along with Sally. The judgment against her was entered and recorded in 2003. Wanda will argue that she is entitled to homestead exemption for the 3000 credit because the judgment was for a credit that did not concern this mobile home, and as such the landlord should not be entitled to put a lien on her half of the property. The other party will argue that Wanda was not living in the home at the time the judgment was entered and therefore it was not her permanent residence, they will also argue that she did not claim it as her homestead before the judgment attached since Wanda moved in to the home after the judgment was entered making the home susceptible to the claim of the landlord judgment against her. The creditor in this claim is likely to succeed against Wanda.*

*Wanda is entitled to complete use and ownership of the land, for an undivided one half interest. She would be entitled to place a lien on her half of the property even without Sally's consent. However, if Wanda and Howard made their interest in the property their homestead, it does not matter that Wanda held title to the property in her name only, Howard would still have to consent to any encumbrances on their half interest in the land making the encumbrance invalid against the property. The bank also took with notice of the debt of Wanda against the former landlord since they recorded their judgment in 2003, the bank would have notice in 2005 that there was already in existence an encumbrance on the home.*

*The bank however will argue that the funds from the mortgage were used for improvements on the land and as such are enforceable against Wanda and the land despite of the homestead exemption. Wanda will argue that since she was married to Howard when she mortgaged the house, the bank needed his consent in order to encumbrance the land and their subsequent divorce does not affect requirement, since at the time of the mortgage they were validly married. The bank will argue that Howard received the benefit of the mortgage and made payments on the loan evidencing his acquiescence and acceptance of the encumbrance, making the mortgage valid. If the bank forecloses on the loan, the new purchaser would take subject to the prior loan, and the foreclosure sale would simply pay the judgment of the bank foreclosing on the land first. All previous judgments would continue with the land. However the judgment that attaches here seems to be personal to Wanda.*

*Wanda has a right before judgment on foreclosure is rendered to pay all back dues on the land and bring it current before the extreme measure of foreclosure is rendered. This is called equitable redemption. If Wanda succeeds in selling the home, she could satisfy the judgment of both creditors on the day that title is to pass to the new buyer pay the judgments with those fees. In addition any money left over from the sale will carry with it the homestead protection against any other future creditors up until she reinvests the money in another homestead property. However, the protection will only be up to the amount Wanda spends in reinvesting in the future home.*

*However, Wanda can only sell her half of the interest to the land. Her sister Sally still has a right to half of the land. Sally could join the sale however and they could share the proceeds. Only one half of the property will be subject to the creditors claims, and only Wanda's half would have the homestead protection since Sally has not lived in that property she might be deemed to have abandoned her homestead. Her half of the proceeds will not carry homestead protection.*

#### *Adequacy of payment*

*Florida lawyers can generally obtain a contingency dependent on the outcome of a civil litigation. Said contingency fees however must be disclosed to the client and contain an expression of all of the clients rights under it. The lawyer if possible should also advise the client of the terms and to seek independent counsel advice. The terms of the contingency must also be fair to the client and cannot be excessive.*

*Wanda here is offering a mortgage on her property in order to secure the services.*

*Accepting the mortgage on the home of a client is not likely to be ethical since it involves a sort of business deal with the client that making client too susceptible to their vulnerable positions in order to secure legal counsel. Business negotiations with clients are not prohibited per se by the rules as long as they are in writing, are fair, and the lawyer provides for the client with an opportunity to seek separate counsel on the deal. However, in this case the interests of the lawyer are too commingled with the interest of the client. Having the lawyer's interest attached to the land at issue and which is the subject of the litigation as a way to secure payment for the lawyer's service puts the lawyer and the client's interest at risk of the lawyer seeking to protect his interest rather than the interest of the client. As such this payment arrangement will be objectionable under the rules.*

## **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 43.

## **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)