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Florida Bar Examination Study Guide and Selected Answers

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

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PART I – ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2021 AND JULY 2021 FLORIDA BAR EXAMINATIONS

ESSAY QUESTIONS AND SELECTED ANSWERS

Part I of this publication contains the essay questions from the February 2021 and July 2021 Florida Bar Examinations and one selected answer for each question.

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

Applicants are given three hours to answer each set of three essay questions. Instructions for the essay examination appear on page 4.

ESSAY EXAMINATION INSTRUCTIONS

Applicable Law

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

Acceptable Essay Answer

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



QUESTION NUMBER 1

FEBRUARY 2021 BAR EXAMINATION – FAMILY LAW/ETHICS/PROFESSIONALISM

Wife seeks your advice about the break-up of her fourteen-year marriage to Husband. When they met, Wife had a two-year-old son and Husband had just adopted his one-year-old niece after her parents died. Wife was starting her singing career and Husband was a successful land developer. At his urging, they signed a premarital agreement where both parties waived their rights to all support if they divorced. Shortly after they married, Husband bought a house in Pensacola. Husband did not adopt Wife's son, and Wife did not adopt Husband's daughter.

Wife's career took off, and she began to travel. Husband's business slowed down during the recession, and he became a stay-at-home dad. Wife was hired to be the house singer for a popular club in Miami, and she stayed at an elderly aunt's condo in the city. Husband and the children visited her in Miami for months at a time. However, after the children started school, the visits became shorter and less frequent. The children are now 16 and 15 and have a close relationship with each other.

Husband and the children spent last summer in Miami with Wife. While the family was together in Miami, Wife's aunt died. In her will, the aunt left Wife the Miami condo and \$500,000.

Husband and children went home at the end of August. Husband demanded that Wife return to Pensacola. Wife refused, and Husband filed for divorce. Shortly after filing the petition, he took out a large loan to start a new company. His petition seeks the following relief: (1) alimony for five years; (2) primary custody of both children and child support; (3) exclusive possession of the parties' home until the children graduate from high school with Wife paying the mortgage and taxes on the house; and (4) equal distribution of the Miami condo, the \$500,000 inheritance, and the loan. Husband has agreed to pay his attorney a contingent fee based on his recovery of alimony, and Husband seeks to have Wife pay his attorney's fees.

Wife objects to all of Husband's requests, but she would prefer to work things out without litigation. Wife is concerned that Husband's attorney has made frivolous claims and will continue to do so to harass her. Wife has learned that a scandal magazine in Miami offered Husband's attorney money to be interviewed for an article about the parties' divorce.

Write a memo examining the merits of Husband's claims and Wife's potential objections. Also address any ethical considerations that apply to Husband's attorney.

SELECTED ANSWER TO QUESTION 1 **(February 2021 Bar Examination)**

To: Wife

From: Counselor

Re: Merits of husband's claims, wife's potential objections, and some ethical considerations

The Husband looks to bring claims that the wife will have valid objections to. Further, there are a few serious ethical considerations on the end of the husband's attorney. Below I will discuss the Merits of husband's claims to alimony, primary custody, child support, exclusive use of the home, wife paying for the home, and equal distribution of the money devised to the wife. Within each claim I will address the wife's potential objections. Further I will discuss the ethical considerations of the contingency fee to be paid to the husband's attorney and the effect of frivolous claims and harassment.

Merits of the husband's claims

Divorce

In Florida, divorce will be awarded if the marriage is irretrievably broken. Florida is a no fault state and the grounds for divorce need not be any more than an irretrievably broken marriage. If both spouses agree the marriage is irretrievably broken, the court will likely award the divorce without hesitation on this cause. However, if one party believes the divorce to be irretrievably broken and the other party claims otherwise and/or request counseling, the court may, within its broad discretion, either order counseling prior to awarding the divorce, or may continue the proceedings to allow time for the parties to cool off and rethink the marriage prior to awarding final judgement. When a couple is divorced, the judge will further distribute property in an equitable manner (see below) and order alimony, child support, and custody, if applicable.

The divorce petition will need to contain the grounds of the divorces (as spoken about above), it must establish jurisdiction (discussed below), the request of the parties (how they would like the judge to rule), and a signature attesting to the truth of the statements within. Jurisdiction is determined based on where the parties reside. If the parties reside in separate places, the court in which the parties were living for 6 months or more at the time of filing will be valid jurisdiction. If there are children involved, the children's residence will be the likely residence for determining jurisdiction, if they have lived there for more than 6 months. If they have not lived there for 6 months, the proper jurisdiction will be the previous place of residence in which they lived for more than 6 months.

With the divorce petition, the filing party will have to attach any relevant supporting forms, and receive a summons from the court to order service upon the other party. The other party will need to be served within 90 days of filing and the filing party will need to

file the certificate of service once completed. The divorce should be filed in a county court.

Premarital agreements are essentially a contract between the parties regarding how a divorce will be handled. A contract may be oral unless it is for certain things that fall under the statute of frauds. Marriage agreements do fall under the statute of frauds which means it will need to be written. The writing will need the essential terms, the parties, and a signature of the party to be "charged." A premarital agreement may contain any agreement the parties choose as long as the agreements are legal. The agreements will be invalid if made under duress or fraud.

Further, child support cannot be waived as it belongs to the child, not the parent. Alimony may be waived, but the court will not allow this waiver if it will act to put the spouse in need on state welfare.

Here, the parties were married for 14 years and have no children in common. The facts do not specifically state anything regarding the petition for divorce of the stated grounds. I will assume the grounds stated, jurisdiction, and service were all done properly in this case. The facts state, "the husband demanded the wife return to Pensacola" and the wife refused. This is likely an irretrievably broken marriage since they do not live together or agree where to live. But the court will not look into the reasons why the marriage is broken, they will only ensure the grounds are stated and the parties in fact feel it is irretrievably broken. The couple lived in Pensacola together and the facts stated the kids were two and one when they married and are now 16 and 15, therefore, it is safe to say they lived in Pensacola for more than 6 months and jurisdiction would be proper in Pensacola for this reason. Further, the facts suggest the wife does not necessarily live in Miami but stays with family so she can work there. However, a court may determine she lives in Miami, but because the husband still lives in Pensacola, jurisdiction will still be held to be proper there.

The premarital agreement is likely valid. Nothing in the facts suggest that it was signed under duress or fraud or that it is invalid in anyway. Since premarital agreements may waive alimony, it is unlikely the husband will receive any alimony support from the wife because the agreement states both parties waived their rights to all support if they divorced. Alimony will further be discussed below.

The court will award the divorce in this case along with equitable distribution (discussed below) and no alimony.

Alimony

In Florida, there are a few types of alimony, including: Pendente lite (alimony during the divorce proceedings), rehabilitative (alimony to allow the spouse support while renewing any necessary licenses or work skills needed to support themselves), bridge the gap (alimony to allow time for the spouse to transition from being married with financial support to being single and self-supporting), durational (alimony to allow for support for a specified period of time), permanent(alimony for the duration of one's life or, typically,

until the receiving spouse marries or lives with a supporting partner). When alimony is determined, it is based on a need and ability. In determining if the court should award alimony, the court will look to the parties need for financial support and the other parties ability to pay the same. The court will further look towards the length of the marriage. A marriage of less than 7 years is considered a short-term marriage, a marriage of 7-17 years is considered a mid-length marriage, and a marriage of longer than 17 years is considered a long-term marriage.

Typically, duration alimony and permanent alimony will not be awarded for a short-term marriage unless there are exceptional circumstances. A mid-term marriage may be eligible for all but permanent marriage, depending on the circumstances (unless exceptional circumstances apply). A durational alimony, rehabilitative alimony, and bridge the gap alimony will have a set end time. Rehabilitative alimony will require the party in need to have goals and expected deadlines in which to accomplish those goals and that will help the court determine the length (not to exceed 2 yrs.) of the alimony.

Here, the husband likely eligible for pendentia lite and possibly (but not likely) a bridge the gap or a rehabilitative alimony. The facts state the husband is a stay at home dad therefor he will easily show a need for the support during the proceedings (pendentia lite) and the facts further state the wife is a successful singer and was recently given \$500,000 and therefore has the ability to pay the alimony. All through the premarital agreement waived all support if they divorce, this may still be awarded to help the parties proceed with the divorce fairly. It would not be in the best interest of the parties to allow only one party access to a lawyer when the other party can easily afford to help the other party during the proceedings. Because the parties waived their rights to support, it is unlikely the husband will receive any support past the divorce proceedings. The facts suggest he had a career prior to the marriage and nothing suggest his inability to work or support himself thereafter. It is not likely a lack of alimony will place him on public welfare and therefore, because he waived his right to support, he will not be awarded alimony past pendentia lite.

Child Custody and Support

When two parties have children in common, the court will determine (if the parties could not agree) legal and physical custody. Legal custody generally starts at joint legal custody and will only be changed if the judge finds it to be in the best interest of the child. Physical custody will come with a parenting plan to ensure the parents each have access to raise and care for their child. The physical custody and the parenting plan (if not agreed upon by the parties) will be determined by the court using the best interest of the child factors. The court enjoys broad discretion over these matters and the order will not be overturned on appeal unless there is a showing of abuse of discretion. The appeals courts shy away from overturning family law orders because the presiding judge will best be able to determine the relevant factors as they see the parties in person and know their local area and needs best. Child support will be determined based on state guidelines. Any deviation from the guidelines by more than 5% will require the judge to show finding to support the deviation.

All though the parties cannot legally waive the rights to child support because it belongs to the child, the parties here have no children in common. Neither party adopted the other parties' child and therefore, no custody or support order will be entered for the children and there is no need to go over the best interest factors or the child support guidelines in this case.

Equitable Distribution

Florida follows an equitable distribution framework (this does not always mean equal). The court will do its best (if the parties cannot agree) to equitably distribute all marital assets and return non marital assets to the party who owned them when entering the marriage. Marital assets include any asset the couple obtained together, or assets one spouse obtained during the marriage. Exceptions apply such as a non-marital gift or assets devised to one spouse only. Typically, any assets brought into the marriage will be distributed back out to the spouse who entered with that asset. Some exceptions apply, for example, if a spouse comes into the marriage with a house and the house is improved during the marriage or used as the marital home, this will likely be distributed equally among the parties. At the very least, the court will distribute any increase in value equally among the parties. A further consideration to be made here is Florida homestead act. Any property that is used your primary residence will be protected up to 160 acres of contiguous land (if outside of a municipality) and any home on that land or up to 1 acre of land and home if it is in a municipality. Under the homestead act, not only are the parties protected from certain creditors, with exceptions, the parties are protected from the spouse selling the home without the other spouses permission. This right can be waived in a premarital agreement.

Marital assets in this case is the house in Pensacola because it was purchased after the marriage began. This house will be equitably distributed or may be awarded to the husband since him and the children have lived their without the wife for so long. if the house is given to him exclusively, he will take on the mortgage on his own as well to ensure this is equitable.

The loan, obtained after the filing of the divorce is likely not marital and the devised gifts of the condo and the \$500,000 were devised only to the wife and will not be considered marital. All non-marital assets will remain with the spouse they belong to.

The Pensacola house will fall under

Mediation

Mediation is a form of alternative dispute resolution and may be used in place of a court proceeding. There attendees will be the parties and their lawyers and a neutral mediator. Any offer or statements in mediation are confidential and cannot be used in court, unless discoverable some other way.

The wife would like to stay out of court. They may make all agreement in mediation and have a judge sign the order in a procedural manner instead of battling this in court. I

would advise the wife that she may offer some assets the court may not give the husband in order settle outside of court if she feels it is important to stay out of court. I would ensure she understood the rules but also explain the courts discretion in these matters and that it is always nice to settle out of court to ensure you have your hand in the divorce as much as possible.

Fees

A spouse may ask the court to award the other spouse to pay their attorney fees if they are unable to do so and the court may validly order the same. If the husband is awarded pendentia lite, this likely will not be awarded because he will already be using support money to pay for these fees. Otherwise, he may be awarded fees in this case if he can show a need and the others ability to pay.

Ethical Considerations

A lawyer may not take a contingent fee for proceedings based on the amount of alimony or child support they obtained for the client. However, if there is already an order, the attorney may accept a contingent fee to collect the already determined amount, but this is not a valid form of payment while attempting to obtain the original order. Further, a lawyer may not make frivolous claims only to harass a party. The signature block the lawyers signs on each pleading tells the court that the filing is not done in for frivolous purposes and the lawyer may be sanctioned for acting outside of the bounds of this rule.

The facts state the husband's lawyers are charging a contingent fee based on how much alimony and child support is awarded. This is a clear violation of the Florida rules of professional reasonability. Further the facts suggest the lawyer has submitted frivolous claims only to harass the wife. The lawyer may be sanctioned for this and the wife may be awarded attorney's fees to any work her lawyer will need to do to combat any frivolous claims.



QUESTION NUMBER 2

FEBRUARY 2021 BAR EXAMINATION – TRUSTS/FLORIDA CONSTITUTIONAL LAW/ETHICS

Sam inherited \$500,000 and decided to create a trust with the funds. He prepared a document that read:

I create a trust called “Sam’s Trust” and name myself as trustee. My daughter, Alice, and I each shall receive \$3,000 monthly from the trust.

Later that week, Sam deposited the \$500,000 into a new bank account that identified him as trustee. Sam told Alice about the trust and began making the required distributions.

Six months later, Alice told Sam that she flunked out of college. Alice confessed that she had spent the monthly distributions on parties and vacations and lost focus on her studies. Sam was furious. Sam told Alice that he would pay for her education, but not support an irresponsible lifestyle. He went home and prepared a document that read:

I create a trust called “Sam’s Second Trust” and name myself as trustee. I shall receive \$3,000 monthly from the trust. The trustee will make distributions to Alice for her well-being in the trustee’s discretion.

The right of any person to receive any amount, whether of income or principal, shall not be alienated, assigned or encumbered, and shall not be subject to any legal process or control by creditors or others.

Sam then closed the bank account that he had used as trustee to that point. He took the remaining funds and put them in a new account that identified him as trustee for Sam’s Second Trust.

Over the next year, Alice lived with friends and began using credit cards for nightlife and travel. Sam disapproved, and he sent her no distributions. Alice eventually told Sam that she had incurred \$35,000 in credit card debt with CreditCo. In her efforts to resolve the debt, Alice told CreditCo that she was owed payments from Sam’s trust. CreditCo contacted Sam and threatened legal action.

One week later, Sam’s dog severely bit Neighbor in the lobby of his apartment building. Sam had rented an apartment temporarily because he sold his home of the last 20 years. Sam kept the proceeds of the sale in a brokerage account separate from his other assets, and he intended to reinvest the proceeds in a smaller house, which will be complete in one month.

Neighbor has now threatened Sam with a lawsuit and demanded amounts that far exceed Sam's personal liability coverage. Sam is concerned about whether Neighbor can reach the assets of the trust or the brokerage account or both, if Neighbor is successful in a lawsuit.

An attorney colleague from another firm, Lauren, referred Sam to you. Sam explained the situation with Alice and Neighbor and asked you to represent him. After the meeting, Lauren called and proposed that you pay her a referral fee of 10% from any fees that you collect from Sam. Lauren has no experience in this area and does not want to assume responsibility for the representation.

Prepare a memorandum that addresses:

1. Whether "Sam's Trust" and "Sam's Second Trust" are valid trusts;
2. Whether CreditCo can reach trust assets or distributions to satisfy the \$35,000 debt;
3. Whether Neighbor can reach trust assets or the brokerage account; and
4. Whether Lauren's referral fee proposal raises any ethical concerns.

SELECTED ANSWER TO QUESTION 2

(February 2021 Bar Examination)

SAM'S TRUST

Sam's Trust is valid.

A valid trust is formed when a settlor with capacity has present intent to create a trust, has a trustee with duties, has identified beneficiaries (if a private trust), settlor has the right to the trust property and the trust is for a valid purpose. A trust need not be in writing unless it conveys real property or is a testamentary trust. Delivery of the trust res is required unless a self-proclaimed trust.

Here, there is no indication that Sam, the settlor, has any issue with capacity. He has a present intent to create the trust as indicated by the document he prepared and that he began making distributions to himself and Alice. The trustee with duties is himself and the duties are to make \$3k distributions to himself and Alice monthly. The identified beneficiaries are Sam and Alice. Sam has the right to the trust property as it was \$500k he inherited. There is no indication the trust was made for an invalid purpose.

Note: Merger occurs when the settlor of a trust is a sole beneficiary and the trustee. It is not an issue that Sam is the settlor and the trustee because he is not the only beneficiary - Alice is also a beneficiary; thus, the trust does not fail due to merger.

Sam's Trust is valid.

SAM'S SECOND TRUST

Sam's Second Trust is valid.

A valid trust is formed when a settlor with capacity has present intent to create a trust, has a trustee with duties, has identified beneficiaries (if a private trust), settlor has the right to the trust property and the trust is for a valid purpose. A trust need not be in writing unless it conveys real property or is a testamentary trust. Delivery of the trust res is required unless a self-proclaimed trust. Trusts are presumed revocable unless the instruments says otherwise. Settlers may revoke or modify the trust during their lifetime.

This trust is also valid for all the same reasons as the first trust (see above). The only difference between this trust and the first trust is that Sam has added a discretionary and a spendthrift clause which has altered Sam's duties as a trustee. Alice may assert that this was not in her best interest as a trust beneficiary; however, since Sam is both the settlor and the trustee, he can freely revoke or modify as he has done here.

Spendthrift Clause: *A spendthrift clause is one that prevents beneficiaries of a trust from voluntarily or involuntarily alienating their interest in a trust. This type of provision in a trust prevents a beneficiary's creditors from attaching to their interest in the trust. Exception applies to the following creditors who can attach notwithstanding a spendthrift provision: child support, alimony, gov't creditors/taxes. Also, a settlor cannot shield himself from his own creditors with a spendthrift provision.*

Here, there is a spendthrift clause because the document has limited "the rights of any person to receive any amount, whether income or principal, shall not be alienated . . ." which prevents beneficiaries from voluntary and involuntary alienation. This provision in the trust would only protect Alice from her creditor's claims. Sam is not protected because he is the settlor of this revocable trust (revocable because it does not state otherwise).

Discretionary: *A provision in a trust that makes distributions discretionary is valid. The trustee has broad discretion as to when to make distributions when there is a discretionary clause. Discretionary clauses also insulate beneficiaries from creditors because they have no RIGHT to distribution; thus, their creditors have no right to compel a trustee to distribute.*

Here, Sam has broad discretion when to make distributions to Alice. The provision only applies to her as the trust document so states.

Sam's Second Trust is valid.

CREDIT CO. CLAIM

Credit Co. has no valid claim to Alice's interest in the trust.

Credit Co. cannot attach because there is a spendthrift clause in the trust that prevents voluntary and involuntary alienation (see above for definition of spendthrift). Credit Co. is not one of the creditors within the exceptions since the debt owed by Alice is for \$35

spent on travel and night life.

Thus, Credit Co. has no valid claim to Alice's interest in the trust.

NEIGHBOR CLAIM

TRUST ASSETS

Neighbor can reach the trust assets.

A settlor cannot create a revocable trust to shield himself from his own creditors. As discussed above, Sam cannot protect himself from his creditor by using a spendthrift clause.

Sam may attempt to assert that he had no knowledge of his dog's propensity for viciousness; However, Florida does not have a 1 free bite rule. Owners are liable for injuries when a dog bite for the first time regardless of its propensities. Sam may however have Neighbor's claim reduced if neighbor's own negligence attributed to the injury in any way. Florida uses pure comparative negligence scheme; thus, neighbor's fault and Sam's fault would be apportioned based on their percentage of fault. Regardless, neighbor is not prevented from reaching the trust assets

Neighbor can reach Sam's interest in the trust res.

BROKERAGE

Neighbor likely cannot reach the brokerage funds.

In Florida, homestead exemption applies to prevent creditors from attaching to the interest of an owner of homestead property. The scope of homestead protection extends to 1/2 acre of land within the municipality (including the residence only) and up to 160 contiguous acres outside the municipality (including improvements). Exceptions to the homestead protection include creditors such as: mortgage on the property, mechanic's liens, and property taxes. The proceeds from the sale of a homestead are also protected so long as the owner intends to reinvest in another homestead within a

reasonable time. Once reinvested, the surplus, if any, from the sale of homestead property is not protected - it is a general asset to which creditors may freely attach.

Here, Sam recently sold his home and was staying in a hotel temporarily. If Sam's home was homestead property, his interest in the proceeds from the sale are protected because he kept them in a separate brokerage and intended to reinvest. But, Sam indicated he intends to reinvest in a smaller home. If this reinvestment leads to Sam having surplus after buying a new homestead, then that surplus will become a general asset unprotected by homestead exemption; thus, neighbor can attach to any surplus after the reinvestment.

Neighbor likely cannot reach the brokerage funds unless there is surplus after Sam reinvests or if he does not actually reinvest within a reasonable time.

LAUREN'S REFERAL FEE

I would be subject to discipline for giving Lauren a 10% referral fee.

Generally, referral fees are not permitted. An attorney may not give or receive monetary benefits for referring clients. Fee sharing however is allowed. Attorneys can freely share fees if attorneys are in the same firm or if in different firms but will share the work equally and the fee is fair and reasonably. If the attorneys are in separate firms and will not share the work equally, the agreement must be in a writing signed by client, explain the fee sharing % to the client, both attorneys must be jointly and severally liable to the client and be equally available to the client, and the fee must be reasonable. The reasonableness of a fee is determined based on the experience of the attorney, the standard rate in the area, complexity of the case and the amount of time attorney dedicates to the case. There is an additional requirement for personal injury and property damage cases which requires that the primary attorney must do 75% of the work on the case; this can be modified to the court to an equal share of work.

Here, the referral fee is not permitted. Fee sharing is also not permitted under the circumstances because Lauren wants 10% but she does not want to do any of the work. Additionally, she is an attorney from another firm with no experience in the field and does not want to accept any responsibility. Further, part of the case is personal injury (neighbor's injury) and the type of agreement she seeks is prohibited.

I would be subject to discipline for giving Lauren a 10% referral fee.



QUESTION NUMBER 3

FEBRUARY 2021 BAR EXAMINATION – FEDERAL CONSTITUTIONAL LAW

The United States Government has enacted the “Driving Under the Influence Prevention Act,” known as “DUIPA.” The statute directs the Department of Transportation to reduce a State’s federal highway funding by 10% unless the State requires all men under age 34 to take an 8-hour course about the dangers of drinking and driving before obtaining or renewing a driver’s license.

In support of DUIPA, Congress found that driving under the influence interferes with the United States Government’s interest in providing safe travel on interstate highways. It also found that alcohol-related crashes substantially affect the national economy by increasing medical costs for injured persons, car insurance costs for all drivers, and law enforcement and emergency costs for local governments. These findings were based on studies by the National Transportation and Highway Safety Administration, which yielded the following statistics:

1. In 2018, 1.8 million Americans were involved in crashes in which a driver’s blood alcohol content was above 0.08;
2. In 2017, drivers under the age of 34 were responsible for 67% of fatal DUI crashes, even though drivers under age 34 comprise only 34% of drivers; and
3. In 2017, men were responsible for 80% of fatal DUI crashes, even though men only comprise 50% of drivers.

Several members of the Florida Legislature have stated publicly that passing a bill to implement DUIPA is a top priority. The President of the Florida Senate told a local newspaper: “We would be crazy not to pass this bill. Federal highway funds are the source for 30% of the Florida Department of Transportation’s budget.”

A partner in your law firm has received a call from a client who is interested in bringing a constitutional challenge to the federal DUIPA statute. Prepare a memorandum that discusses the issues raised by DUIPA under the **United States Constitution**. For this memorandum, assume that the potential plaintiff has standing and do not discuss the 21st Amendment.

SELECTED ANSWER TO QUESTION 3
(February 2021 Bar Examination)

MEMO

To: Partner

From: ExamTaker

Date: 2/21/21

RE: DUIPA

Standing

The plaintiff has standing to bring this claim. In the United States and in Florida, an individual must have standing in order bring a claim to challenge the constitutionality of a government action. The Constitution of the United States provides that U.S. courts are only permitted to hear cases and controversies. In order for a claim to be a case or controversy, the plaintiff bringing the claim must have standing. Under Lujan v. Defenders of Wildlife, to have standing, a plaintiff must have suffered an actual or imminent injury. An actual injury is one that is concrete and not imagined. An imminent injury is one that is sure to happen, not just merely possible. The plaintiff's injury must be causally connected to the government's action. There must, therefore, be a causal chain linking the plaintiff's injury directly to the government's action. Finally, the plaintiff's injury must be redressable. A favorable ruling from the court must cure Plaintiff's injury.

Here, the facts state that our plaintiff has standing. That means that Plaintiff has suffered an actual or imminent injury that is causally connected to DUIPA and his or her (probably his) injury is redressable. Therefore, there is a case or controversy that allows Plaintiff to bring this claim.

Taxing and Spending

DUIPA is a proper exercise of Congress's power to tax and spend. Article I of the Constitution provides for the plenary power of the United States Congress. Among these powers is the power to tax and spend for the general welfare. The Congress of the United States is thus afforded plenary, or nearly absolute, power to levy taxes from the states in order to raise revenue for actions that are rationally related to the general welfare.

Furthermore, Congress is permitted to spend money from the federal treasury in order to provide for the general welfare. Congress's spending power also extends to its power to allocate funds to the several states to serve the general welfare in the states. While Congress is prohibited from commandeering state resources or instrumentalities (see below), Congress, under its spending power, is permitted to condition spending on states' adherence to government initiatives. However, all of Congress's powers are subject to laws against discrimination, as well be explained below.

Here, the United States Congress is properly exercising its spending power. Congress has conditioned the receipt of federal funds by the states based upon a valid government purpose. Specifically, Congress has stated that it will reduce State's federal highway funding by 10% unless the State enacts certain laws. While Congress cannot force states to enact laws, under the anti-commandeering principal (see below), Congress can condition funding on the enactment of law. Congress's purpose for conditioning the spending is rationally related to providing for the general welfare - providing safe travel on interstate highways and preventing alcohol-related crashed which substantially affect the national economy by increasing medical costs for injured persons, car insurance costs for all drivers, and law enforcement and emergency costs for local governments. Because DUIPA properly conditions receipt of funds on a rational government purpose for providing for the public welfare, it is a valid exercise of the taxing and spending power. However, all of Congress's powers are subject to laws against discrimination, as well be explained below. So, while the purpose and method of DUIPA is a valid exercise of Congress's power to tax and spend, it is subject to anti-discrimination laws and is in violation of them, as discussed below.

Commerce

DUIPA is a proper exercise of Congress's commerce power. Like its taxing and spending power, Congress has a near-plenary power to regulate interstate commerce in the United States under the Commerce Clause of Article I. This includes the power of Congress to set limitations on the use of commerce and the means and instrumentalities of interstate commerce that are rationally related to a legitimate government purpose. Means and instrumentalities of interstate commerce include roads, waterways, and vehicles. In addition to regulating interstate commerce itself, the Commerce Clause also permits Congress to regulate non-commercial activities that substantially impact interstate commerce in the aggregate. However, all of Congress's powers are subject to laws against discrimination, as well be explained below.

Here, Congress is properly exercising its Commerce powers. Congress reasonably determined that alcohol-related crashes, which are the focus of DUIPA, substantially impact interstate commerce because they increase medical costs for injured persons, car insurance costs for all drivers, and law enforcement and emergency costs of local government. Therefore, Congress is acting within its authority in regulating the activity, because it substantially impacts interstate commerce. Furthermore, the law properly regulates interstate highways, which are national roadways, and instrumentalities of interstate commerce, namely vehicles like cars. Congress has the power to regulate means and instrumentalities of interstate commerce, so Congress is acting within its authority under the Commerce Clause in regulating such means and instrumentalities.

Therefore, DUIPA is mostly a proper exercise of Congress's extensive powers under the Commerce Clause. That said, while the purpose and method of DUIPA is a valid exercise of Congress's commerce power, it is subject to anti-discrimination laws and is in violation of them, as discussed below.

Equal Protection

DUIPA violates the equal protection clause of the Fourteenth Amendment, incorporated to the United States government by the Fifth Amendment. The Fourteenth Amendment to the United States Constitution, which was passed in response to the abolition of slavery and Jim Crow in the United States, is written and intended to abolish discrimination based on who a person is. While the Fourteenth Amendment explicitly targets the states and not the federal government, the Supreme Court has ruled that the Fourteenth Amendment equal protection clause is applicable to the federal government by way of the due process clause of the Fifth Amendment, which applies specifically to the federal government. The equal protection clause of the Fourteenth Amendment provides that every United States citizen is to be permitted equal protection of the laws. The Supreme Court has identified several classes of persons who are afforded special protection because of their membership in the class, and therefore, laws that discriminate against persons based on this class status are given heightened scrutiny when reviewed by the courts for constitutionality. Laws that unequally impact persons based on race, national origin, or alienage are given strict scrutiny. Strict scrutiny provides that the government must prove that the law is necessary to achieve a compelling governmental interest and narrowly tailored to achieve that interest. Strict scrutiny is an incredibly high bar and laws are usually struck down under strict scrutiny. Laws that unequally impact persons based on gender and illegitimacy are given intermediate scrutiny.

Intermediate scrutiny provides that the government must prove that the law is substantially related to an important government interest. Finally, all other laws that target persons based on class status are given rational basis review. Under rational basis review, the challenger of the law must prove that the law is not rationally related to a legitimate government interest. This is an incredibly low bar for the government and laws reviewed under rational basis are generally upheld.

Here, DUIPA targets persons based on gender and age, because it applies only to men under age 34. The portion of the law targeting men will be given intermediate scrutiny, because it is a law that applies differently to persons on the basis of their gender.

Therefore, the government must prove that the law is substantially related to an important government interest. The government will argue that providing for safe travel on interstate highways and preventing adverse affects to the national economy are important government interests. The court will agree. However, the government must also prove that the law is substantially related to achieving the purposes of preventing alcohol-related crashes and protecting the national economy. The government will put forth the facts that demonstrate that men are responsible for a disproportionate amount of alcohol-related crashes (80% of alcohol-related crashed attributable to men, even though men comprise only 50% of drivers). However, a mere disproportionate impact will not be sufficient to overcome intermediate scrutiny. Women still contribute to 20% of alcohol-related crashes and are not subject to this law. Therefore, the court will strike down the law, or at least the portion that singles out men, of violative of the equal protection clause of the Fourteenth Amendment.

The plaintiff can also argue that DUIPA target persons based on age, in violation of the equal protection clause. Age is not a suspect class identified by the Supreme Court as requiring heightened scrutiny. Therefore, the court will review the portion of the law that discriminates based on age, requiring only those under 34 to take a class, under rational basis review. The plaintiff will have to prove that the age clause is not rationally related to a legitimate government interest. The government has a legitimate interest in providing safe travel on interstate highways, preventing alcohol-related crashes, and preventing adverse effects on the national economy. The law is rationally related to that, particularly since drivers under the age of 34 make up 67% of fatal DUI crashes, despite comprising only 34% of drivers. Therefore, the age clause will be upheld under the equal protection clause.

Due Process

DUIPA violates the Due Process Clause of the Fifth Amendment. The due process clause of the Fifth Amendment provides that the federal government may not deprive U.S. citizens of life, liberty, or property without due process of law. "Due process of law" has been defined as "the process that is due," which generally includes notice and a hearing before the termination of rights. The Supreme Court of the United States has identified two types of two process: substantive and procedural. Procedural due process provides that the government may not deprive persons of life, liberty, or property without due process of law. Citizens have property rights to public jobs, benefits, and licenses. Substantive due process provides that a person may not be deprived of a fundamental right without due process of law. Fundamental rights include the right to vote, the right to free speech, the right to privacy, and the right to interstate travel. The right to privacy includes the rights to contraception, abortion, marriage, procreation, educational of children, and child-rearing. Substantive due process violations are analyzed under strict scrutiny, so the government must prove that the law is necessary to achieve a compelling state interest and narrowly tailored to that interest.

Here, Plaintiff can argue that DUIPA violates procedural due process by depriving citizens of a property right - the right to a driver's license - without due process of law, because if a man under age 34 does not complete the 8-hour course, he will not be able to obtain or renew his driver's license. The man is not afforded a hearing prior to the denial of a license. The government will argue that there is no property right to driver's licenses. If the government wins this argument, the law will be upheld under procedural due process.

Plaintiff can also argue that DUIPA violates substantive due process by depriving citizens of a fundamental right - namely the right to interstate travel - without due process of law. Men under 34 will not be able to get a license, and therefore will not be able to drive between states, if they do not complete the course. They are not afforded a hearing on this matter. The government will argue that a driver's license is not necessary for interstate travel, because there are other means of interstate travel besides driving, including buses, trains, planes, and passengers. However, the court will find that the law restricts the right to interstate travel and therefore will analyze the portion of law depriving citizens of driver's license under strict scrutiny. The government will argue that it has a compelling interest to provide for state travel, protect the national economy, and provide alcohol-related crashes. The court will agree. The government will then argue that the law is necessary to achieve this interest and narrowly tailored to achieve this interest. The court will not agree. The law does not contain sufficient narrowing principles to make it narrowly tailored to achieve the

government's compelling interest. Instead, it applies blanketly to all men under 34. It does not take into account a driver's record or history and does not provide driver's with a hearing. Therefore, this portion of the law will be struck down under strict scrutiny as violating substantive due process.

Federalism

Police Powers

DUIPA violates the principles of federalism. Federalism provides that the powers of government in the United States are to be divided between the states and the federal government. The states are not to encroach on the federal government's power (e.g. the Supremacy Clause makes federal laws supreme over state laws) and the federal government is not to encroach on the states' power (e.g. the Tenth Amendment gives all powers not specifically assigned to the federal government to the states). States, not the federal government, have police powers. This means that states are afforded the sole power of legislating for the general health, welfare, and safety of their citizens. The states' police power generally includes the rights of states to provide for education, criminal laws, police, firefighting, licensure, etc.

Here, Plaintiff can argue that DUIPA violates federalism by encroaching on states' police power and ordering the states to adopt a law, which is commandeering the states' legislature, and ordering state Departments of Motor Vehicles to offer an 8-hour class, which is commandeering the DMV. First, the states, not the federal government, have the power to regulate driver's licenses, as that is part of the states' police power.

Therefore, Plaintiff can argue that the law unlawfully encroaches on state police power. Second, Plaintiff can argue that the law requires the states to adopt DUIPA or risk losing highway funding. This is a substantial risk, particularly in Florida, as the Senator pointed out that the state needs to enact the law because 30% of its funding from the federal government.

Anti-Commandeering

Furthermore, under federalism principles, the federal government may not commandeer the instrumentalities of the states. In other words, the federal government may not order utilize their legislatures or agencies to enforce a federal law. This rule was developed by the Supreme Court in the case of Brady, where the federal government tried to force

states to use their police forces to conduct backgrounds checks on potential gun owners in order to enforce a federal gun regulation.

QUESTION NUMBER 1

JULY 2021 BAR EXAMINATION – CONTRACTS/ETHICS

On March 1, Bella, an art dealer, called Sharon, a renowned nature photographer, and said, "I am interested in purchasing your photograph of Florida panthers hunting at night that I saw at your exhibition last summer. What is the price?" Sharon replied, "I will sell it to you for \$22,000." Bella replied, "OK, it's a deal; send me the paperwork this week."

The photograph Bella had seen at the exhibition was named "Panthers One." Four months after Bella saw Panthers One at Sharon's art exhibition, Sharon photographed panthers again and exhibited one of these photographs, which she named "Panthers Two."

On March 10, Sharon sent Bella a document typed on Sharon's letterhead:

"I agree to sell Bella my panther photograph for \$32,000. Payment to be made by April 10. In the event that either party fails to perform this contract, the non-breaching party shall be entitled to damages in the amount of \$5,000." Sharon did not sign the document. She added a handwritten note "Please sign and return to me." Sharon's assistant, who typed the letter, erred in typing \$32,000 instead of \$22,000. Sharon did not notice the error.

On March 15, Bella received the document. Bella did not notice the price was \$32,000. She did not sign or return the document to Sharon.

On April 10, Bella arrived at Sharon's studio and tendered \$22,000. Sharon tendered to Bella the photograph called "Panthers Two," which Bella rejected. Sharon terminated the transaction and demanded \$5,000 based on the March 10 letter.

On May 14, Bella retained the services of Laura, a lawyer. Laura has an associate named Andrew. Five years ago, while associated with Laura, Andrew represented Sharon in the formation of a limited liability company for her photography business and in other matters involving the company. Laura knew of Andrew's prior work for Sharon, but did not disclose it to Bella.

Prepare a memorandum discussing Bella's potential claims, any arguments that Sharon may raise, and the likely outcome of the matter. Also discuss any ethical issues posed by Laura's representation of Bella.

SELECTED ANSWER TO QUESTION 1 **(July 2021 Bar Examination)**

MEMORANDUM DISCUSSING BELLA'S POTENTIAL CLAIMS

The UCC applies to the transaction.

The UCC (Article 2) applies to all transactions in goods, defined as moveable things. Because a painting is a moveable thing, the UCC applies to this transaction.

There was a valid contract formed when Bella replied "it's a deal."

Formation requires (1) an offer; (2) acceptance; (3) consideration; and (4) no defenses to formation or enforcement. An offer is an objective manifestation of an intent to enter into an agreement on specified terms. Acceptance is a manifestation of assent and a desire to be bound to the terms of the offer. Under the common law mirror image rule, acceptance needed to be to the exact terms of the offer. Under the UCC, however, acceptance need not be to the exact terms so long as there is a sufficient match between the terms of the offer and acceptance to constitute a meeting of the minds. (The acceptance is not effective if it is conditional, however; it is a counteroffer in that circumstances: a rejection and new offer.) Consideration is a bargained for exchange of a legal benefit or legal detriment. Here, Sharon's first statement was not an offer, it was a mere invitation to deal because stating that she was interested in purchasing the painting did not manifest an intent to be bound by specific terms. Sharon's response, however, was an offer because she specifically stated that she will sell the painting to Sharon for 22,000, manifesting an intent to enter into an agreement on specific terms. Bella then accepted the offer when she stated "it's a deal." Her additional request that Sharon send her the paperwork was not a condition to acceptance, it was a supplemental request. Her acceptance was unconditional; therefore, it was effective. There was bargained-for consideration because the promise to convey the painting and the return promise to convey 22,000 was a bargained-for exchange of items of legal value.

Bella can assert a claim that Laura breached her duty under the contract.

Under the UCC, the perfect tender rule generally applies (unless it is an installment contract). When a seller tenders goods that fail to conform in any way to the underlying contract, the buyer typically has three options. She may (1) accept the goods; (2) reject the goods; or (3) accept in part and reject in part. The buyer is entitled to sue for damages for any non-conforming goods, regardless of whether they are accepted. Here, the terms of the agreement were for Panther 1 specifically because when Sharon stated she would sell "it," she was referencing the specific painting that Bella "saw at [her] exhibition last summer." Therefore, the terms of the agreement called for tender of Panther 1. When Sharon failed to tender Panther 1, she breached the terms of the agreement by violating the perfect tender rule.

Sharon will argue the statute of frauds was not satisfied, but this argument will fail.

Under the UCC, a contract for a price of \$500 or more must be in writing to satisfy the statute of frauds. The writing must be signed by the party to be charged and manifest the essential terms of the contract (typically by identifying the parties, the goods, a quantity, and a price). Generally, the writing must contain a quantity term (courts may fill in most other terms by implementing reasonable terms, so long as there is a meeting of the minds). The signature requirement is broadly construed; any document authenticated by attaching an insignia is considered signed. When both parties are merchants, there is a special rule surrounding confirmatory memos. A confirmatory memo between two merchants that is sent by one to the other and identified will bind the party to whom it was sent if the party does not object in a reasonable time (10 days). A merchant need not read the contents of the memo; the memo is effective upon receipt of possession. Here, both parties are merchants because Bella is an art dealer, Sharon is a nature photographer, and the good in question is a photograph. Furthermore, the writing was probably signed by Sharon because it was typed on her letterhead (a sufficient authentication). And, under the merchant's confirmatory memo rule, it was likely sufficient to bind Bella as well because it was received on March 15 and the facts do not indicate that any objection was made by April 10 (nearly a month later). It is irrelevant that Bella did not notice the price or sign the document. Because Bella is a merchant who received it while being aware of its contents and failing to object, it will bind her. Furthermore, the writing is sufficient because it set forth the essential terms of the agreement by stating "my panther photograph." It also identified the parties.

Sharon may also try to argue there was never any effective acceptance because Bella did not sign and return the memo, but this argument will fail.

Generally, acceptance must be in any reasonable form that manifests an intent to be bound. However, any conditions the offeror puts on effective acceptance are generally enforceable. Therefore, Sharon will try to argue that her offer to sell the paintings was contained in the writing and Bella failed to accept by not signing and returning the letter as per Sharon's conditions. However, the contract was already formed prior to the drafting of the memo when Bella manifested an intent to be bound. Therefore, she did not have to sign the document to accept the offer.

Sharon will argue the fact that the writing contained the wrong price and did not specify the photo indicates that Sharon was not in breach, but this argument will also fail.

The parol evidence rule bars use of contemporaneous oral or written agreements that contradict a writing evidencing an agreement (or supplement a complete integration). However, oral agreements are admissible to clarify ambiguities (or supplement partially integrated agreements). A patent ambiguity is one that appears on the face of the document; a latent ambiguity is not apparent on the face of the document. Furthermore, scrivener's errors can be corrected through the equitable remedy of reformation if the writing does not reflect the mutually agreed-on terms of the agreement. Here, the writing appears to contain a latent ambiguity because it references Sharon's "panther photograph" but does not specify which one. At that point in time, Sharon had at least two. Therefore, evidence of the parties oral agreement regarding which painting will be admissible to clarify the ambiguity. Furthermore, the parties had a mutual

understanding that the price would be \$22,000. Reformation will be appropriate in this circumstance because there was a meeting of the minds in regard to the price term that was not accurately reflected in the writing. Reformation will be appropriate to correct the error of Sharon's assistant.

The \$5,000 liquidated damages clause was likely valid, but Laura will not be able to collect on it because she is the breaching party.

A liquidated damages clause is a clause providing for a specific remedy upon breach of a contract in lieu of legal damages. The typically, legal damages in a contract action are designed to compensate the non-breaching party by putting them in the position they would be in had the contract been performed (expectation damages). For sale of goods contracts, this typically includes incidental damages as well as the non-breaching party's loss in value. A liquidated damages clause is enforceable when prospective damages are too speculative. They must be reasonable in light of the anticipated and actual cost of the breach. Lastly, the clause must not function as a penalty. Here, the typical legal remedy would be difficult because quantifying the value of Panther 1 is difficult. Therefore, it was likely reasonable to enter into an agreement on damages. The court will scrutinize the amount, however, because \$5,000 is significant in proportion to the \$22,000 price. It must be considered a reasonable estimation of damages to the nonbreaching party. Even if, however, the court upholds the clause as reasonable (and not a penalty), Sharon will not be entitled to the \$5,000 because she is the breaching party.

Bella will also argue she is not bound by the liquidated damages clause because it is a material alteration to the contract. Between two merchants, terms included in a confirmatory memo are sometimes included as part of the contract when not objected to (the battle of the forms). Although when one of the party is not a merchant all deviations are considered mere proposals, if the change is nonmaterial it often comes into the contract without being specifically agreed to. Here, Bella will argue that the liquidated damages clause was a material alteration that she did not agree to. Sharon, however, will argue that Bella should have objected and she is bound by the terms of the memo because she did not object and both parties are merchants.

In regard to unique goods, the equitable remedy of specific performance is often appropriate. Specific performance is only available when the legal remedy would be insufficient. Here, Bella could argue that the legal remedy would be insufficient because it is too difficult to quantify the monetary value of the picture. The picture could be considered a unique good, and specific performance would be the only way to make Bella whole in that case. However, Bella may have waived specific performance by not objecting to the liquidated damages clause. She will probably not get specific performance.

Sharon may argue that she deserved a chance to cure any defect identified by Bella.

Under the UCC, if a seller tenders non-conforming goods before the goods are due, the buyer must allow a reasonable opportunity to cure (typically, up until the date the goods are due). However, if the nonconforming goods are tendered on the due date, the seller does not have a right to cure unless the seller had reason to believe the goods

would be accepted. Here, Sharon will argue she had reason to believe the goods would be accepted because the tendered photograph was a photo of a panther. But this argument will likely fail because Bella specifically asked for the photograph she saw at the exhibition "last summer" and the tendered picture had been taken four months later. Therefore, she did not have a reason to believe Bella would accept the goods, and Bella was within her rights to reject them outright. In any event, Sharon is the one who terminated transaction despite the fact that she was in breach.

Ethical Issues

Laura should have disclosed Andrew's prior work for Sharon and obtained informed consent from both Sharon and Bella.

An attorney must avoid conflicts of interest. Specifically, an attorney must not (1) represent an adverse client to ones own or (2) take on representation when loyalty to another client is likely to materially limit the lawyer ability to effectively represent the client. The attorney's duty extends to clients represented by the attorney in the past. An attorney must not (1) represent a materially adverse party in the same or substantially related matter as the one in which the lawyer represented the former client in or (2) use any information learned as a result of the representation against the former client (unless it has become generally known). Conflicts of interest are generally imputed to a lawyer's firm. Some conflicts of interest can be cured by screening the lawyer with the conflict. A lawyer can cure the conflict of interest only if (1) the lawyer reasonably believes he or she can effectively take on the representation, (2) the conflict is not disallowed by laws or the FRPC, (3) the lawyer is not on two sides of the same litigation, and (4) the lawyer obtains informed consent. Here, Andrew's conflict of interest is likely imputed to the firm. Andrew and Laura should disclose the situation and obtained informed consent in writing from both Sharon and Laura. Even though this is not the same or a substantially related matter (because Andrew helped Sharon in the formation of an LLC for the photography business rather than with a specific sale), Andrew may have gained knowledge in relation to his representation of Sharon that he must not use against Sharon. Therefore, in addition to obtaining everyone's informed consent, Andrew should be screened from Laura's representation.

A lawyer's duty of confidentiality extends to all information obtained in the course of representation and may not be breached. It extends indefinitely. Here, Andrew owes Laura the duty not to disclose any information he gained during the representation. If this duty (imputed to the firm) would limit the firms effective representation of Bella, it should decline the representation.

Q QUESTION NUMBER 2

JULY 2021 BAR EXAMINATION – CRIMINAL LAW/CONSTITUTIONAL CRIMINAL PROCEDURE

Mary and her boyfriend, David, had a heated argument in their house after they accused each of infidelity. David struck Mary. He also hurt Mary's three-year-old son by throwing him to the ground. Mary locked herself and her son in the bathroom and called 911. She told the 911 operator what David had done to her and her son, described what David was wearing, and said that she feared for their safety because David was still furious and kept a gun in the home.

Officers Jones and Smith were dispatched to respond to the 911 call. As the officers drove to the house, the 911 operator relayed what Mary reported. When they arrived, Officer Jones went around to the home's backyard while Officer Smith knocked at the front door. There was no fence or other barrier around the backyard.

Officer Smith heard a child crying inside the home. He announced that the police were at the front door and demanded that someone open the door. As soon as Officer Smith made the announcement, the lights in the home were turned off. No one came to the front door.

David tried to leave through a bedroom window on the back side of the house. Officer Jones saw David, who matched the description that the 911 operator provided. Officer Jones ordered him to show his hands and get on the ground. David scurried back inside and shut the window.

Officer Jones went to the front of the house and told Officer Smith that he saw David trying to leave through a back window. Officer Smith drew his gun, kicked in the front door, and the officers entered the home.

The officers did not see David when they first entered the house. Officer Jones went into one of the home's two bedrooms. He did not find David, but saw a handgun, a cell phone and a small plastic bag containing white powder on top of a bedside table. Based on his experience and training, Officer Jones believed the powder was cocaine.

Officer Jones told Officer Smith that there was no one in the bedroom. Officer Smith then went into the house's other bedroom. He found David hiding under the bed, handcuffed him, and arrested him.

Once the officers believed that David no longer posed a threat, they announced that it was safe to come out of the bathroom. When Officer Jones interviewed Mary about what happened, he asked her if the cell phone that he had found belonged to David. She said, "It's David's. I've never used it." Officer Jones noticed that the cell phone was not password-protected. He opened the phone's messages application and

reviewed messages in which David told others that Andy was his cocaine supplier and gave out Andy's phone number.

The officers returned to the police station and told their supervisor about the incident. They explained that they had not obtained a warrant. They also wanted to conduct wiretap surveillance of Andy's phone based on what Officer Jones saw in David's text messages. Lab results have confirmed that the plastic bag found at the house did contain cocaine.

Discuss whether the officers' conduct, including the request to conduct wiretap surveillance, raises any issues under the U.S. Constitution.

SELECTED ANSWER TO QUESTION 2

(July 2021 Bar Examination)

Federal Constitutional protections in criminal cases are derived primarily from three places in the Bill of Rights. The 4th Amendment guarantees the people the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. It also requires that probable cause be obtained for a warrant to be issued. The 5th Amendment deals with the right against self-incrimination, and the right to a trial by jury. It also deals with Miranda rights, which attach as soon as the police begin interrogation. Miranda Rights are the right to remain silent, that anything you say can be used against you, you have a right to an attorney, and one will be appointed to you at no charge if you cannot afford one. The invoking Miranda rights must be unequivocal and unambiguous. Interrogation is defined as any sort of questioning that is likely to illicit an incriminating response. Once someone invokes their Miranda rights, ALL questioning must cease. The 5th Amendment is general, not offense specific. The 6th Amendment deals with the right to counsel. Here, since we are not at the trial stage, there is no 6th Amendment right to counsel, which attaches at the start of proceedings for that arrest. The 6th Amendment is offense specific. We are also not discussing the interrogation or Miranda rights of David or Andy, so the 5th Amendment will not be discussed.

Warrant Requirement

In general, a warrant is required before a search is conducted of someones home. This warrant must be backed up by probable cause, and describe with sufficient particularity the item(s) and area(s) to be searched for and/or seized. Once the particular item is found, the search must cease. The police are allowed to perform a protective sweep if they have reason to believe that someone else might be in the home. There are several exceptions to the warrant requirement, which will be discussed below.

Exigent Circumstances

When exigent circumstances are involved, police are not required to obtain a warrant prior to an entry into a home. Examples of exigent circumstances include a high risk that evidence will be destroyed, someone is actively being hurt or is in danger, or there is a fleeing felon who could be dangerous. In the case at hand, Mary has told the 911 operator that David keeps a gun in the home. She has also articulated her fears of David and the fear that her child is going to be harmed. David has hurt Mary and the son, so there is reason to believe he would hurt them again. When police saw David, matching the 911 description, enter back into the house, they knew that the person they were after was inside, and was likely armed and dangerous. The child crying also creates a reasonable belief that someone is in danger. David will counter this logic, and say that since both Mary and her son were locked in the bathroom, they were not in danger, and therefore exigent circumstances would not apply. However, the police did not know this, and still had reason to believe that harm was going to occur, considering the totality of the circumstances of the child screaming, a firearm being in the home, and the lights being turned off. Therefore, the entry into the home to secure David was likely not an illegal entry, and was allowed due to exigent circumstances.

Consent

Consent is another exception to the warrant requirement. If a person consents to the entry or to the search, then there is no warrant that is required. The fact pattern says that the house belongs to both Mary and David. In this case, Mary would be allowed to consent to entry to the home, especially in regards to common areas that both Mary and David share. Under this theory, the entry into the home would be allowed also.

Curtilage

The court has ruled that you have a reasonable expectation of privacy to your home, as well as the curtilage of your home, which is the immediate area surrounding your home. In other words, a police officer is not permitted to get right up next to your house and peer through your window. This would be considered a search for the purpose of the 4th Amendment. However, there was no barrier around the house, and the backyard appears to be wide open. Additionally, since this was in response to a call for help, this entry into the backyard is likely not illegal.

Open Fields

Courts have held that a person does not have a reasonable expectation of privacy to "open fields" even if around their house, so the warrant requirement does not apply. Here, it is not clear how large the backyard of the house is. If it were small and fenced in, the court might hold that it was part of the curtilage of the house. But, even if it was fenced in and large, the court would hold no reasonable expectation of privacy. This is shown by many cases of police entering into fields of marijuana and using this marijuana as evidence to obtain probable cause to search a residence. Here, it would depend on how large the backyard was if open fields were to apply.

Protective Sweep

As previously mentioned, when looking for an individual, police are allowed to perform a protective sweep inside the home. They are allowed to look in any place that the person might be reasonably hiding. This would include inside a closet, but not inside of a box in the top of the closet. Once the person the police are looking for is located, the search must stop. The two police officers fanning out and searching for David is valid.

Plain View

Pursuant to a legal entry into a building, anything that is within the officers plain view would be considered legal to be seized if it is readily apparent on the objects fact that the object is contraband or illegal. For instance, if police are looking for a stereo, and the stereo in the home looks exactly like the one that was stolen, they would NOT be allowed to manipulate the stereo to look for a serial number and research the number. The court has held that this is invalid. Based on the officers experience, it was readily apparent to him that the white powder was cocaine, therefore the cocaine would fall under the plain view doctrine as contraband, and be admissible, assuming the court deems the initial entry legal.

Cell Phone Contents

The Supreme Court has held that a person does not have a reasonable expectation of privacy to certain things that have been exposed to someone else. This is known as the third party doctrine. As pertaining to cell phones, the Court held that "pings" that phones give off as to location are not considered private, and therefore not subject to the warrant requirement. When seizing an object after arrest, the police are allowed to examine the object ON ITS FACE. In one well-known case, when the police opened up a box of cigarettes and found contraband, the court rules that it was a warrantless search. The court has applied the same logic to the data inside of cell phones. While police can examine the outside of the phone, they cannot enter it without a warrant. While the government will argue that since there was no passcode, he did not have a reasonable expectation of privacy, this logic will fail. Regardless of a passcode, David still has a reasonable expectation of privacy to the contents inside of his cell phone. The government might also argue consent, however this logic will not hold water. Mary told the police officers that the cell phone belonged to David, and that she had never used it. Therefore, Mary not only lacked actual authority, but she clearly did not have apparent authority either. Therefore, the officers cannot say that they acted reasonably when they searched the phone. As to David, the contents of his cell phone will be inadmissible against him. Mary did not have the right, the apparent right, or consent of David to allow the officers to search his text messages. The police might could obtain a warrant to search the messages, if they can show probable cause. However, a simple bag of cocaine will likely not be enough to establish this.

Wiretapping Surveillance

Under the "fruit of the poisonous tree" doctrine, information that is obtained through an illegal search is not allowed to be used to obtain additional information. This doctrine was established by the court to restrict the temptation to conduct illegal searches simply to get one valuable piece of information. If the wiretap was going to be against David based on the illegal search of his phone, then David would have grounds to say that the wiretapping is based off of fruit of the illegal search. However, the police want to wiretap Andy. Coupled with the information within the phone, along with the positive test for cocaine inside the bag, the police do have probable cause to get a warrant to wiretap Andy. Andy will try to claim that since part of the information the police used to obtain probable cause was from an illegal search, that the wiretapping is also illegal. This will not work. The courts have held that one person cannot claim the 4th Amendment privilege on behalf of another. Only the person who had their rights violated can make this claim. So, while David did have his rights violated, Andy did not, so he cannot claim fruit of the poisonous tree. Additionally, since Andy was not the one texting David, the police will likely be successful on their claim that Andy had no reasonable expectation of privacy to the text messages that David sent, as David could have done almost anything he pleased with them, including turning them over to the police. Clearly Andy did not mind his phone number being distributed.

Summary

In summary, the entry into the backyard by the officer is likely not an illegal entry, since the police were responding to an emergency and there was no fence, coupled with the open fields doctrine. Since the police saw David, who was wanted, flee back into the house against police command, and the police had reason to believe he was armed and that people might be harmed, they had proper exigent circumstances to kick in the front door. Since the cocaine was found in plain view while still actively searching for David, it will be admissible against David. Mary lacked actual and apparent authority to consent to the search of David's text messages. Since a warrant was required for this search, they will be inadmissible against David. However, since a third party cannot assert the violation of a 4th Amendment right on behalf of someone else, even though the search was illegal, Andy will not be able to suppress it, and the text messages will likely be able to be used as evidence of probable cause to get a warrant to wiretap Andy. Andy has no reasonable expectation of privacy to the content that David texts other people.

Q QUESTION NUMBER 3

JULY 2021 BAR EXAMINATION – FAMILY LAW

After three years of proceedings, a trial court in North County, Florida, entered a judgment of dissolution of marriage of Mother and Father. The judgment incorporated the parties' mediated settlement agreement. Mother and Father had been married nine years before the judgment. Mother, Father, and Child were residents of North County since Child's birth five years ago and throughout the proceedings.

Under the agreement, Mother was given majority parenting time of Child, and Father was obligated to pay monthly child support and monthly permanent alimony to Mother. The agreement specifically provided that there would be no modification of the amount of alimony or of child support. The agreement was silent on the opportunity to reconsider time-sharing. It also did not address the ability to recover attorneys' fees and costs in any future proceeding.

Eight years after entry of the judgment, Father moved from North County to a town across the state line in Georgia. He is now 15 miles farther away from Mother's and Child's home. His new home is larger and fancier than his previous home, and Child has remarked to Mother about how much he likes Father's home. Mother is concerned that Father may try to modify the time-sharing order in North County court so that he would have majority parenting time with Child. She is also concerned that Father may try to modify the time-sharing order in a Georgia court because he is now a Georgia resident.

Mother also is interested in filing a petition to increase child support. She believes that Father's income has nearly tripled since the judgment of dissolution was entered. Additionally, three years ago, Child was diagnosed with a learning disability, resulting in greatly increased educational expenses incurred and paid by Mother on Child's behalf. Over those three years, Father has voluntarily made occasional payments in excess of the required child support amount to pay additional expenses for Child. Mother has never remarried and has struggled financially over the years. Her income has remained consistent since the dissolution proceedings and is very low in comparison with Father's. She is concerned about an extended dispute in the courts, and wants increase in the child support amount to date back as far as possible.

Mother also regrets the decision to waive modification of alimony and asks if it can be revisited. She also wants to know whether Father can be ordered to pay her attorneys' fees in the anticipated proceeding.

Draft a memorandum that addresses the points below.

1. Analyze the merits, and state the likely outcome, of litigation in the North County court about: (a) Father's request to modify time-sharing; (b) Mother's request to

modify child support; (c) Mother's request to modify alimony; and (d) Mother's request for attorney's fees.

2. Assume that Father attempts to modify the time-sharing order in a Georgia court. Assume further that Georgia, like Florida, has adopted the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"). Analyze whether the UCCJEA would grant a Georgia court jurisdiction to modify the time-sharing order.

SELECTED ANSWER TO QUESTION 3 **(July 2021 Bar Examination)**

MEMORANDUM

To: Senior Attorney

From: Associate

Re: Mother and Father's Dissolution of Marriage Order and Modifications

Litigation in North County Court

Father's Request to Modify Time-Sharing

In Florida, the default time-sharing set-up is an equal sharing of time, since it is presumed that parents should equally share the joys, responsibilities, and rights of raising a child. This default can be deviated from when that would be in the best interests of the child (i.e., equal time-sharing would be detrimental) and/or the parties agree to it, as the parties' agreement can be adopted into a dissolution of marriage order as it was here. When a dissolution of marriage order includes provisions regarding time-sharing, those provisions may be modified upon a showing of a substantial change in circumstances from the time when the order was entered.

Here, Father's move may count as a substantial change in circumstances. Although parent without majority time-sharing is typically only required to get the consent of the other party or court approval when the parent moves 50 mi or more away, a move of lesser distance may still be considered a substantial change in circumstances. Further, in modifying the time-sharing order, the court will consider multiple factors contributing to the best interests of the child, including promotion of continuity in the child's life, each parent's commitment to facilitating time-sharing with the other parent, proximity of other family/support system, avoidance of disruption in the child's education, etc. The court may also consider the child's preference if the child is sufficiently mature.

The move of 15 miles probably isn't a substantial enough change in circumstances, especially since Father's opportunities to spend time with Child shouldn't be changed much by the distance. Even if it is considered a substantial change in circumstances, it is unlikely that the "child's best interest" factors fall in favor of giving Child more time-sharing. Although Child has expressed interest in having more time at Father's home, the facts indicate that Child is only 5 years old, which is unlikely to be considered sufficient maturity for consideration of the Child's preference, especially since Child's opinion seems to be based largely on how big and fancy Father's house is. There is no indication that there is additional family/support near Father's new home, nor that any of the resources there would make the home more proper for helping Child deal with his new diagnosis. Changing the time-sharing schedule would likely disrupt Child's life and, especially, education with new resources likely being implemented due to Child's learning disability, with little apparent justification. Therefore, the court is unlikely to grant any potential request from Father to modify time-sharing such that Father has majority time-sharing. (Note that adjustment of time-sharing would likely result in

correlated adjustment in parental responsibility, which would also need to be based on a substantial change in circumstances and similar best interest factors to those noted above.)

Mother's Request to Modify Child Support

Like with time-sharing, modification of child support also requires showing a substantial change in circumstances. A change in income that would lead to a 15% or \$50 increase in child support obligations is typically found to be a substantial change in circumstances. If Mother is correct and Father's income has nearly tripled, a 15% or \$50 increase would likely be found, and the court would likely grant modification of the child support order to have Father pay more child support. Notably, child support is intended to put a child in a position to receive the same split/amount of resources from the parents as the Child would if the parents had remained married, a goal which would be met by increasing the child support Father must pay if his income has come anywhere close to tripling.

The new learning disability diagnosis will also be considered a substantial change. Child support is meant to include support for a child's particular educational needs, which in this case have increased. Since Child's education is now more expensive, circumstances have substantially changed since child support was originally ordered, a fact which Father seems to have acknowledged through his voluntary payments. Therefore, the educational needs of Child will also justify an increase in child support from Father (and Father's past voluntary payments will not be deductions from future payments, though they also might not be usable as evidence of increased need).

Although the dissolution order contained a clause stating that child support could not be modified, this clause will likely be unenforceable as to child support. The beneficiary of child support is the child, so parents may not waive child support on a child's behalf nor agree to a reduction below the amount to which a child is entitled. The anti-modification clause would result in the latter since it would prohibit child support from being increased to be congruent with Child's needs and best interests. Therefore, the anti-modification clause will not be enforced to prohibit an increase in the child support Father is obligated to pay.

While a court can modify child support, it may not do so retroactively. Therefore, Mother will be unsuccessful in back-dating any increase in required child support from Father. If Father is behind on any child support, he will have to pay those amounts (and may be required to pay at the increased level, though this is unlikely since that would be a retroactive application of the increase).

Mother's Request to Modify Alimony

As an initial matter, unlike child support, alimony is a spouse's benefit to waive, so the clause prohibiting modification may be enforceable to prevent Mother from modifying alimony. Such a clause may be enforceable if it is reasonable and agreed to by both parties, both of which it appears to have been here. Therefore, Mother may not be allowed to modify alimony.

If the anti-modification provision is not enforced, Mother may be able to modify alimony

if she can show a substantial change in circumstances has occurred since the order set the alimony. Since alimony is largely based on a balance between the payee spouse's need and the payor spouse's ability to pay, Father's alleged large increase in income would qualify as a substantial change in circumstances. Mother's income, however, has not changed, so she cannot show substantial change based on her need.

Florida allows several types of alimony. Whether and in what amounts alimony is awarded depends on several factors, including the length of the marriage, the standard of living during the marriage, the parties' respective financial positions, the parties' respective ages, the parties' respective contributions to the marriage (including child-rearing), the parties' levels of education, and whether the parties sacrificed career and/or educational opportunities during the marriage to contribute to the marriage. Pendente lite alimony, discussed below, can be awarded during litigation to make sure the spouses are on equal footing. Bridge-the-gap alimony is awarded to help a party transition from married life to single life. That likely would not apply here since Mother has been single for 8 years (since the parties' original dissolution of marriage), so she is not in a transition period. Another type of alimony is rehabilitative alimony, which is awarded to help the payee spouse obtain the education, job training, etc. necessary to become self-supporting. The facts do not suggest that there has been a substantial change in circumstances that makes the education and job training Mother has less sufficient for her self-support now than it was when the dissolution order was granted, so the court is unlikely to modify the order to newly grant rehabilitative alimony. If neither of those types of alimony are appropriate, a court may award permanent alimony, but this is usually only awarded for marriages of long duration (those lasting more than 17 years). Mother and Father had a marriage of moderate duration (7-17 years) since it lasted 9 years, so permanent alimony is unlikely to be awarded, especially considering the facts do not indicate there is an overwhelming need. If none of the above types of alimony fit at all, a court may grant durational alimony, which is alimony lasting for the same length of time for which the marriage lasted. Here, the marriage lasted 9 years and it has been 8 years since the dissolution, so at most Mother might be able to get 1 year of durational alimony until it has been 9 years (the length of the marriage) since dissolution. Again, that alimony modification will only be made if the anti-modification clause is found unenforceable and Mother can show that Father's income has increased to the extent of being a substantial change in circumstances that would justify alimony modification. Overall, Mother is unlikely to succeed in modifying alimony so that Father is required to pay her more spousal support.

Mother's Request for Attorney's Fees

If an agreement incorporated into a dissolution of marriage order contains provision for attorney fees to be paid by one party to another, such an agreement is enforceable if reasonable. Here, however, there was no such provision in the parties' agreement or the ensuing order. Mother may still be able to get attorney fees from Father if Mother can show she has a substantial need and Father has the ability to pay, which seems likely since Mother's income is far lower than Father's. (This would be similar to pendente lite alimony, which is awarded in dissolution of marriage cases to ensure the parties are on equal footing.) Mother may also be able to get attorney fees from Father if Mother is considered the prevailing party in her petition(s).

Father's Attempt to Modify Time-Sharing in Georgia Court and Application of UCCJEA

In order to modify a court order regarding custody (including time-sharing, as is at issue in this case) of a child, a court must have jurisdiction. In states that have adopted the UCCJEA, as Georgia (GA) and Florida (FL) have under these facts, the UCCJEA controls what state has jurisdiction. Under the UCCJEA, a court that originally issued an order has exclusive continuing jurisdiction to modify that order. Here, the North County trial court entered the original order, so they would have exclusive continuing jurisdiction. The UCCJEA also provides for home court jurisdiction, under which the child's home state--i.e., the state where the child has lived for the past 6 months or for the child's life if the child is less than 6 months old--has jurisdiction. That, too, would lie in FL, since Child has lived in North County, FL for his entire life (and did not move to GA with Father, as visits with a non-majority time-sharing parent in another state does not make that state the place intended to be the child's permanent residence as is required for home court jurisdiction). Therefore, FL would have jurisdiction both under the continuing and exclusive jurisdiction provision of the UCCJEA and as the home state, so GA will not have jurisdiction to modify the time-sharing order. Even if neither of these applied, GA would not have jurisdiction; if no court has continuing exclusive or home state jurisdiction, a court may claim substantial connections jurisdiction if that court sits where most of the evidence regarding the custody matter is. Though Father lives in GA, virtually no other evidence regarding Child's custody seems to be outside of FL since Mother and Child have lived in FL since Child was born and even Father lived there until recently; all lived there during the original proceedings deciding on time-sharing. Evidence regarding Child's best interests, including education, medical needs, community support, and other issues will all be in FL. Child has never lived in GA and there are no facts to suggest any major life events that would affect the custody issue occurred in GA. Therefore, even if FL is not found to have continuing exclusive or home state jurisdiction (which it likely will be), GA has no basis to assert jurisdiction under the UCCJEA. The UCCJEA would not grant a GA court jurisdiction to modify the time-sharing order.

PART II - SAMPLE MULTIPLE-CHOICE QUESTIONS AND ANSWERS

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

The answers appear on pages 56 and 57.

MULTIPLE-CHOICE EXAMINATION INSTRUCTIONS

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

1. This booklet contains segments 4, 5, and 6 of the General Bar Examination. It is composed of 100 multiple-choice, machine-scored items. These three afternoon segments have the same value as the three morning segments.
2. Write your badge number in the box at the top left of the cover of your test booklet.
3. When instructed, without breaking the seal, take out the answer sheet.
4. Use a No. 2 pencil to mark on the answer sheet.
5. On the answer sheet, print your name as it appears on your badge, the date, and your badge/ID number.
6. In the block on the right of the answer sheet, print your badge/ID number and blacken the corresponding bubbles underneath.
7. **STOP.** Do not break the seal until advised to do so by the examination administrator.
8. Use the instruction sheet to cover your answers.
9. To further assure the quality of future examinations, this examination contains some questions that are being pre-tested and do not count toward your score. Time limits have been adjusted accordingly.
10. In grading these multiple-choice items, an unanswered item will be counted the same as an item answered incorrectly; therefore, it is to your advantage to mark an answer even if you must guess.
11. Mark your answers to all questions by marking the corresponding space on the separate answer sheet. Mark only one answer to each item. Erase your first mark completely and mark your new choice to change an answer.
12. At the conclusion of this session, the Board will collect both this question booklet and your answer sheet. If you complete your answers before the period is up, and more than 15 minutes remain before the end of the session, you may turn in your question booklet and answer sheet to one of the proctors outside the examination room. If, however, fewer than 15 minutes remain, please remain at your seat until time is called and the Board has collected all question booklets and answer sheets.
13. **THESE QUESTIONS AND YOUR ANSWERS ARE THE PROPERTY OF THE BOARD AND ARE NOT TO BE REMOVED FROM THE EXAMINATION AREA NOR ARE THEY TO BE REPRODUCED IN ANY FORM.**

35 SAMPLE MULTIPLE-CHOICE QUESTIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

24. Joan is seriously injured in an automobile accident at 7:00 a.m., June 22. Sunrise on that date was 6:22 a.m. Joan brings suit against Sam, the driver of the other car involved, alleging his failure to have his headlights on caused the accident.

Sam, in support of his claim that his failure to have his headlights on was not negligent, requests that the judge take judicial notice of the fact that Section 316.217, Florida Statutes, requires the use of headlights only between sunset and sunrise. Sam did not notify Joan prior to trial that he would make this request. The court

- (A) may take judicial notice if Sam shows good cause for his failure to notify Joan of his intention to make this request, and both parties are given the opportunity to present relevant information regarding the request.
- (B) must take judicial notice, because it is public statutory law of Florida.
- (C) must take judicial notice, as it is not subject to dispute because it is generally known within the territorial jurisdiction of the court.
- (D) may not take judicial notice, because Sam failed to give Joan timely notice of his intention to seek judicial notice of this fact at trial.

25. The articles of incorporation for Number One Corporation grant to its board of directors the power to take any action as authorized by law. Which of the following actions by the board of directors must also be approved by the shareholders of Number One Corporation?

- (A) Extension of the duration of Number One Corporation if it was incorporated at a time when limited duration was required by law.
- (B) Merger of Number One Corporation into another corporation with the other corporation becoming the surviving corporation.
- (C) Changing of the corporate name to Number One, Inc.
- (D) Changing of the par value for a class of shares of Number One Corporation.

26. Husband confesses to Wife that Husband robbed Bank of \$200,000. Two years later, Husband physically abuses Wife. Wife later files for divorce and seeks custody of Child. At the hearing, Wife seeks to testify as to the robbery confession. Husband may

- (A) prevent Wife from testifying, because of the Husband-Wife privilege.
- (B) prevent Wife from testifying if the statute of limitations on robbery has expired.
- (C) not prevent Wife from testifying, because only Wife can assert the Husband-Wife privilege.
- (D) not prevent Wife from testifying, because this is a proceeding brought by one spouse against the other.

27. In a pretrial motion, the defendant argues there are no genuine issues of material fact. In support of the motion, the defendant attaches several affidavits from witnesses. Which is the correct caption for the motion?
- (A) Motion to Dismiss for Failure to State a Cause of Action.
 - (B) Motion for Judgment on the Pleadings.
 - (C) Motion for Summary Judgment.
 - (D) Motion for Directed Verdict.
28. Jill makes a will leaving all of her stocks to Lou and the rest of her estate to Beth. Several weeks later, she creates a codicil to the will that devises her jewelry to Ann. Jill and Beth have a fight and Jill mistakenly rips up the codicil rather than the will. Jill dies. Which of the following is true about the distribution of Jill's estate?
- (A) Beth receives the jewelry pursuant to the terms of the will.
 - (B) Jill's estate will be distributed as intestate property because Jill revoked her will.
 - (C) Ann receives the jewelry under the terms of the codicil.
 - (D) None of the above.
29. During Defendant's first-degree murder trial, the state calls Witness to testify. Witness testifies that Defendant was not the man she saw shoot the victim. During the investigation of the murder, Witness told prosecutor that she saw Defendant shoot the victim. This prior statement was made under oath and was recorded by a court reporter, but Defendant's attorney was not present. If the state seeks to introduce Witness' prior inconsistent statement for the sole purpose of impeaching Witness, should the court allow the prior statement to be admitted into evidence?
- (A) Yes, because any party can attack the credibility of a witness by introducing a prior inconsistent statement.
 - (B) Yes, because a prior inconsistent statement given under oath can be used by any party for any purpose.
 - (C) No, because the state cannot impeach its own witness with a prior inconsistent statement.
 - (D) No, because Defendant did not have an opportunity to cross-examine Witness at the time the statement was made.
30. TAP, Inc., has fewer than 100 shareholders. The shareholders wish to enter into an agreement pertaining to the exercise of the corporate powers or the management of the affairs of the corporation. Which of the following, if adopted by the shareholders, would be contrary to public policy and, therefore, unenforceable in Florida?
- (A) An agreement that exculpates directors from all personal liability.
 - (B) An agreement that authorizes a particular shareholder to manage the affairs of the corporation.
 - (C) An agreement that requires dissolution of the corporation at the request of one of the shareholders.
 - (D) An agreement that eliminates the board of directors.

31. In a timely post-trial motion, Defendant argued for the first time that the trial court lacked subject matter jurisdiction over the case. What action should the court take?
- (A) Entertain the motion, because Defendant can assert lack of subject matter jurisdiction at any time.
 - (B) Entertain the motion, because Defendant can assert lack of subject matter jurisdiction as long as it is raised within 10 days of the judgment.
 - (C) Refuse to entertain the motion, because Defendant did not raise lack of subject matter jurisdiction in its answer.
 - (D) Refuse to entertain the motion, because Defendant did not raise lack of subject matter jurisdiction at trial.
32. Smith and Jones had planned to form a Florida corporation that would have done business as an engine repair shop. No paperwork had been filed with the Secretary of State relating to the corporation when Smith and Jones began to purchase equipment needed for the engine repair business. Together they executed and delivered a \$10,000 promissory note to Seller in the name of Engine Repair, Inc., signed by Smith "as president" and Jones "as secretary" of that nonexistent corporation. There was no personal guaranty by either Smith or Jones on the note. The corporation was never formed.
- Seller learned that the corporation was not in existence only after the debt was not timely paid. Smith was in bankruptcy by that time and Seller sued Jones personally for the entire \$10,000. Jones moved to dismiss. In its ruling, the court should
- (A) grant the motion because Smith is an indispensable party.
 - (B) grant the motion to dismiss because Jones did not personally guarantee the note.
 - (C) deny the motion because Jones signed the note purporting to act on behalf of the corporation with actual knowledge of its nonexistence.
 - (D) deny the motion because Jones' actions effectively created a corporation by estoppel.
33. Raymond had a valid Florida will devising his entire estate to his friend, Jake. Raymond and Jake had a fight, and Raymond then executed a second valid will, devising his entire estate to charities and expressly revoking the first will. Years later, Raymond and Jake reconciled and Raymond burned the second will. Raymond later died. Does Jake inherit the estate?
- (A) Yes, because burning the second will was an effective act of revocation, reviving the original will.
 - (B) Yes, because Florida law is construed to avoid intestacy.
 - (C) No, because burning the second will was an insufficient act of revocation absent additional evidence.
 - (D) No, because revocation of the second will does not revive the first one.

34. Plaintiff filed a civil complaint against Defendant four years ago. This complaint was voluntarily dismissed three years ago. Two years ago, Plaintiff filed the complaint again and voluntarily dismissed it last year. May Plaintiff successfully file the complaint again this year?
- (A) Yes, if the statute of limitations has not run.
 - (B) Yes, if the most recent complaint arose out of the conduct, transaction, or occurrence set forth in the previous complaints.
 - (C) No, because the second voluntary dismissal operated as an adjudication on the merits.
 - (D) No, because the most recent complaint is a supplemental pleading requiring permission of the court prior to filing.
35. Mary, a widow, died in Orange County, Florida during a visit with her son, James. Mary had executed a will leaving all of her property to James. Prior to her death, Mary lived in a rented apartment in Duval County, Florida, but owned vacant land in DeSoto County, Florida. Mary also had a vehicle loan due in Dade County, Florida. In which of the following counties can Mary's will be probated?
- I. Orange County.
 - II. Duval County.
 - III. DeSoto County.
 - IV. Dade County.
- (A) I only.
 - (B) II only.
 - (C) I or II only.
 - (D) I, II, III, or IV.

ANSWER KEY FOR MULTIPLE-CHOICE QUESTIONS

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

- | | |
|----|-----|
| 26 | (D) |
| 27 | (C) |
| 28 | (C) |
| 29 | (A) |
| 30 | (A) |
| 31 | (A) |
| 32 | (C) |
| 33 | (D) |
| 34 | (C) |
| 35 | (B) |