

# **Florida Board of Bar Examiners**

ADMINISTRATIVE BOARD OF THE SUPREME COURT OF FLORIDA

## **Florida Bar Examination Study Guide and Selected Answers**

**July 2003  
February 2004**

**The Study Guide will be published semiannually with essay questions from two previously administered examinations and sample answers.**

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

## **JULY 2003 AND FEBRUARY 2004 FLORIDA BAR EXAMINATIONS**

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

Part I of this publication contains the essay questions from the July 2003 and February 2004 Florida Bar Examinations and one selected answer for each question.

The answers received high scores and were written by applicants who passed the examination. The handwritten answers were typed as submitted. The answers are reproduced here with the consent of their authors and may not be reprinted.

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

## ESSAY EXAMINATION INSTRUCTIONS

### INFORMATION RELATIVE TO ANSWERING BAR EXAMINATION QUESTIONS

#### 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**

## **JULY 2003 BAR EXAMINATION - FAMILY LAW**

Two years ago, Wanda (a nurse) and Howard (a paramedic) met at the hospital where they both work, the only hospital in their community. Wanda was a single parent with a two-year-old son named Sam. Howard and Wanda were married last year.

Prior to their marriage, Wanda and Howard owned separate homes. Before the wedding ceremony, Wanda sold her home and kept the proceeds of the sale in a separate bank account. Wanda and Sam moved into Howard's home. After they moved in, she and Howard remodeled the kitchen, the bathroom and put in new landscaping. The remodeling efforts increased the value of the home by \$15,000.

Immediately after the marriage, Howard (with Wanda's consent) filed a petition to adopt Sam. Sam's birth certificate identified Mark as the father. When Sam was a baby, Mark denied paternity and left Florida and his whereabouts were unknown to Wanda. In fact, Howard and Wanda hired a private investigator to locate Mark without success. The judge granted the adoption. Once the adoption was complete, Wanda quit her job to become a housewife at Howard's insistence.

Howard recently decided that he no longer wanted to be married. Howard told Wanda to leave, but that he wanted custody of his adopted son, Sam. Wanda, however, took Sam and moved in with her mother. Wanda applied for a position with the hospital where she worked prior to her marriage to Howard, but all the positions were taken. The hospital's human resource manager has promised to let her know if a position becomes available. In the meantime, Wanda is taking classes at the local college to receive a degree in Health Education.

Howard has filed a petition for divorce. Howard seeks half of the proceeds from the sale of Wanda's home. Howard requests that he be allowed to keep his home worth approximately \$100,000. Howard also requests that he be allowed to keep the following property: the proceeds of a joint savings account totaling \$10,000 and some stocks he acquired prior to the marriage. Howard also seeks sole custody of Sam.

Shortly after the filing of Howard's divorce petition, Mark returned. He has informed Wanda that he never should have left and should have never denied that he was Sam's father. With Wanda's consent, a paternity test is performed that establishes that Sam is indeed Mark's son. Mark argues that the adoption was not valid and he intends to assert his paternity rights.

Wanda seeks your legal advice. Prepare a memorandum of law discussing the following issues:

- (1) How will the property be distributed?
- (2) Whether Wanda has a claim for alimony?
- (3) Whether the adoption of Sam by Howard is valid?
- (4) Who should be granted custody of Sam?
- (5) Whether Wanda has a claim for child support from Howard or Mark or both?





## **SELECTED ANSWER TO QUESTION 1** **(July 2003 Bar Examination)**

*This is a memorandum about family law.*

*The first issue is how should the marital property be distributed upon dissolution of Wanda's and Howard's marriage. Under Florida law, marital property is distributed under the doctrine of equitable distribution. Equitable distribution requires that property is divided 50/50 unless justice requires otherwise. In Florida, marital property includes: (1) assets accrued during the marriage; (2) interspousal gifts; (3) pension plans, etc. In determining the distribution of property the court considers the following factors:*

- *the background of the parties*
- *letting the spouse go to school*
- *longevity of the marriage*
- *saving the marital home for the kids*
- *the health of the parents*
- *interruption of careers*

*Here, marital property includes (1) the increased value of Howard's home and (2) the joint savings account. It is unlikely that the proceeds from Wanda's home will be considered marital property because she sold the home prior to the marriage and kept the proceeds in a separate bank account.*

*Additionally, so long as Howard kept the stock he acquired prior to the marriage separate from the marital assets, they too are not marital property. Finally, since Howard owned his home prior to the marriage a court could find that it is not marital property. However, since the family did reside in the home during the marriage, a court could find the home marital property. Consequently, Wanda and Howard should each receive ½ of the joint checking account and ½ the increase of the home. Howard will also assert and receive a "special equity" award in the home since he owned it prior to the marriage.*

*The second issue is whether Wanda has a claim for alimony. Under Florida law, a spouse may receive alimony based on their need and the other spouse's ability to pay. Florida recognizes four types of alimony: (1) periodic permanent; (2) lump sum; (3) rehabilitative and (4) temporary. In determining whether to award alimony and the amount to be awarded, the following factors are considered:*

- *the spouse's contribution to the marriage;*
- *time needed to acquire training and education to reenter the workforce*
- *the age, emotional and physical conditions*
- *financial resources, and*
- *duration of the marriage.*

*Here, Wanda worked as a nurse prior to the marriage and quit her job to become a housewife. Consequently, a court is likely to grant her periodic alimony as well as rehabilitative. The facts do not provide much information about the wealth of Howard, but the amount will be determined based upon his ability to pay. Howard will likely argue that Wanda should not be granted rehabilitative alimony because she already has a career as a nurse. Wanda will counter that no positions are available in the nursing field so she would like to go to college.*

*If Howard has the means, a court will likely award Wanda rehabilitative alimony to receive her degree in Health Education. Finally, since Wanda is a single parent and living with her mother the court will likely award her temporary alimony until the divorce is final.*

*The third issue is whether the adoption of Sam by Howard is valid. Under Florida law, a natural person who is a Florida resident and capable of care giving may adopt child. However, homo-sexuals may not adopt in Florida. Furthermore, consent of the parents is required unless the parent abandoned the child.*

*Here, when Sam was a baby, Mark denied paternity and left Florida. His whereabouts were unknown to Wanda and private investigators were unable to locate him. Consequently, Wanda gave her consent and the court permitted Howard to adopt Sam. Since Mark abandoned Sam, his consent was not required for the adoption of Sam by Howard. Therefore, the adoption was valid and Mark has no paternity rights to assert.*

*The fourth issue is who should be granted custody of Sam. Under Florida law, the best interest of the child standard is applied in determining custody.*

*The court also considers factors such as:*

- the best interest of child*
- the child's preference*
- the health of the parties*
- institution such as schools and churches*
- pecuniary welfare*
- other siblings and*
- one's ability to comply with the court's visitation order.*

*Here, Wanda was Sam's single parent before the marriage and stayed home with him during the marriage. While the facts do not indicate Sam's age; the older he is, the more weight the court will give his preference. Under the circumstances, Wanda will likely be awarded custody and serve as the "primary residential parent." However, Florida recognizes "shared parental responsibility" which means Howard and Wanda both will make all the major decisions regarding Sam's life. Howard will also be awarded visitation.*

*The final issue is who will be required to provide Wanda support for Sam. Since the court will likely find that the adoption of Sam by Howard was valid, Howard will be*

*required to provide the support because all of Sam's ties with Mark were cut off by the adoption.*

*Under Florida law, each parent is equally responsible for the care of their child. However, the court must follow statutory guidelines in determining the amount of support Howard will be required to pay. If the judge deviates from the guidelines by 5% or more, justification must be provided in writing.*

*Here, Howard will be required to provide support to Sam until he reaches the age of 18 or until 19 if he is still in high school working towards a degree. Furthermore, if Sam has a physical or mental illness that requires him to depend on his parents, support may be required beyond the age of 18.*

## **Q** UESTION NUMBER 2

### **JULY 2003 BAR EXAMINATION - REAL PROPERTY/ETHICS**

Ten years ago, Homeowner purchased some land beside a river and built a house. Homeowner purchased the land from Boater who had owned the land for the previous 15 years. During those 15 years, Boater never developed the land but, instead, used the land on a regular basis for hunting and fishing. City recently built a bridge across the river, adjacent to Homeowner's property.

Prior to the construction of the bridge by City, the only way off of Homeowner's property was by a small road that cuts through Neighbor's property and leads to a major highway. Homeowner regularly used this road during the past 10 years to gain access to Homeowner's property. Prior to Homeowner, Boater had used the same road for 15 years.

Recently, Neighbor and Homeowner have gotten into a dispute unrelated to the use of the road. Neighbor has known about Homeowner's past use of the road. Neighbor, however, became so upset by the dispute that Neighbor constructed a fence blocking Homeowner's use of the road. Although the bridge has now provided Homeowner a new way to exit Homeowner's property, Homeowner must drive an extra 20 miles to travel to City as compared to the much shorter route if Homeowner uses the road through Neighbor's property.

The new bridge also blocks Homeowner's view of the river. The value of Homeowner's home was reduced from \$300,000 to \$200,000 because of the bridge.

Homeowner comes to your law firm for advice. Prepare an opinion letter for Partner to Homeowner discussing fully the following: Homeowner's potential legal claims against Neighbor and City; potential defenses by Neighbor and City to such claims; and, the likely outcome of legal actions by Homeowner against Neighbor and City.

Partner would also like to make an oral agreement with Homeowner to take the case on a contingency fee with Partner receiving 50 percent of any recovery. Advise Partner if such a fee agreement is proper.



## **SELECTED ANSWER TO QUESTION 2**

**(July 2003 Bar Examination)**

*First off, I would like to address the professional conduct issues involved in your suggestion to take H's case on a contingent basis and by oral agreement. I would suggest that according to the Model Rules of Professional Responsibility and their adoption in Florida, any retainer agreement between our firm and our client, H, should be in writing and signed by both the client and the attorneys who will be working on the case. This is the best way to inform our client about what we expect from him (cooperation and payment) and what he can expect from us (estimate of hours to be billed, court time, withdrawal terms, etc.). Although taking the case on contingent basis is not an issue here, as it is with criminal or domestic matters, the percentage to be taken is far too high. Generally, the amount charged on a contingent basis is 33 1/3% which can increase with the amount recovered. The written agreement should state when the fees and costs will be calculated – either before or after computing the percentage – and the client should be made aware. If we can make these alterations, we should be able to handle H's case without being subject to sanctions by the Florida Supreme Court, and without opening ourselves up to malpractice liability.*

*Regarding the case itself, it appears that H has issues with N concerning an easement and with the City concerning eminent domain or inverse condemnation. We will analyze the issue with N first.*

### **Homeowner (H) v. Neighbor (N)**

*An easement can be expressly or impliedly acquired. It may be given in a deed, obtained by necessity of use, or acquired through adverse possession (also called a prescriptive easement). Here, there is no indication that the easement was written into a deed, or that N and H own their property from a common prior owner, so it is likely that it will not be considered express. On the other hand, the easement was a necessity in that prior to the bridge being constructed, it was the only way off H's property. N would argue that H could still take a boat across to leave the property but the court will have to determine whether or not that is reasonable. A landlocked property is always granted an easement off the land by necessity – but the owner of the servient estate (the one being burdened) usually will be able to choose a reasonable location for the path across his property. The dominant estate (the one obtaining the benefit of the easement), here, H, may not claim the use due to its convenience when a viable option is available. Here, N would argue that the 20-mile deviation is not so excessive that he need retain the location of the easement on his property. H would argue that he didn't abandon the easement, and that N has not yet reasonably relied on such abandonment to justify revoking the passage and erecting a fence to block H's egress.*

*Also, the characteristic of the usage of the easement has not changed – i.e. there are not plans to expand or widen the road, thus bringing in higher traffic – so H can argue that there has been no additional burden on H. N might contend that the City’s erection of a bridge across the river, adjacent to H’s property, would increase recreational or tourist traffic and eventually the higher population from homeowners moving into the area. H would answer that no such uses have become apparent, and that the problem is not yet ripe. Because H has not shown signs of abandonment, he will argue that the continuation of the easement is a necessity; N would argue that the easement may now be terminated since there is an alternative means of ingress/egress from H’s property and as such, it is no longer “necessary.”*

*Should these arguments fail, H will likely claim that the parcel used is a prescriptive easement. The period for adverse possession of an easement in Florida is 20 years, while it is 7 for other property. Because H purchased property from B who had used it for 15 years before H’s ten-year period of possession, the prior owner’s usage may be tacked on to H’s time period to make 25 years of total prescriptive use – thus satisfying the requirements for adverse possession. For a prescriptive easement, the elements include adverse, notorious, continuous, hostile, open, and exclusive possession. Although N knew about the past use of the road, he did nothing about it. H would argue that he did it in the open and that N’s knowledge would not affect the character of the easement. However, if N gave H permission to use the easement, adverse possession would be defeated as it would no longer be hostile. The use is adverse in that H knew he was using N’s property and not his own, he did it in the open and not in secret, he held it exclusively for 25 continuous years through the tacked on usage of the prior owner, and he held it despite N’s ownership or lack of consent (hostile). Therefore, the easement will likely remain open as one acquired by adverse possession, so H would probably prevail under these facts.*

*H will probably succeed against N.*

#### Homeowner (H) v. City (C)

*The second issue is whether H may be compensated for his perceived loss to the value of his property at the action of the government, through its City. The municipality retains a sovereign immunity similar to the state in that its discretionary functions are protected (deciding whether or not to erect a bridge for the public good) while its ministerial or operational activities generally are not (failure to replace rotten planks on the bridge, exposing citizens to harm). In Florida, sovereign immunity has been waived to the extent of \$100,000 per person and \$200,000 per incident. If the municipality has taken out liability insurance, it will be responsible up to the amount of coverage (an amount up to which the City has been said to have waived its immunity). This may come into play here if H suffers damages from the construction of the bridge, but the more prevalent issue appears to be the concept of a “taking.”*

*In general, there is no right to light, air, or aesthetics of your property. Therefore, being deprived of these things does not constitute a cause of action, which can be compensated. Here, H's claim on these grounds would fail.*

*When the government institutes a regulation that has the effect of a total deprivation of the value of a citizen's property, then the citizen has a claim to the reasonable fair market value of his property which is seen as having been "taken" and necessitating compensation under due process and the Constitution, both Florida and Federal (5<sup>th</sup> Amendment right to life, liberty, and property applied to the states through the 14<sup>th</sup> Amendment and requiring fair notice and a hearing prior to the deprivation of these privileges).*

*In the present case, construction of the bridge did not result in a total deprivation of H's use, and so would not be a "taking" under principles of eminent domain. The fact that the property abuts the bridge and that there is a loss of property value of \$100,000 (or 1/3 property value) due to aesthetic loss is not enough to require compensation by the government. At some point down the line, considering changed circumstances, H may have a claim for inverse condemnation in that the government-created structure has effectively deprived him of his property value (as is the case when a noisy airport is constructed next to a residence). Should this be the case, the homeowner would likely be able to recover the amount of the damage to his property. Based on the present facts, it does not seem to rise to the level of a nuisance and so H would not be able to recover for his blocked view of the river.*

*Should the court decide that as a riparian homeowner, H should be entitled to a view of the river as part of the intrinsic value of his riverfront property, then the court may award such compensation as it deems reasonable. If the entire purpose or intended use of the property is denied, the court may award its fair market value as compensation.*

*At present, H will probably fail against C.*

# **Q**

## **QUESTION NUMBER 3**

### **JULY 2003 BAR EXAMINATION - TORTS**

Activist, a prominent women's rights activist, is a resident of Metropolitan City, Florida. She was the mother of eighteen-year-old Barry. Barry lived at home with Activist, while attending Metropolitan Community College. On Barry's 15th birthday, Activist took out an insurance policy on Barry in the amount of \$1,000,000. Activist named herself as the insurance policy's beneficiary. Two weeks after his 18th birthday, Barry died mysteriously of a heart attack.

Reporter, a reporter for the Daily Star (Metropolitan's daily newspaper), discovered the existence of the insurance policy on Barry's life. Also, Reporter gained access to the coroner's unofficial, preliminary report which stated that Barry may have died as a result of poisoning, possibly administered through Barry's food over a period of several months. Reporter spoke with Officer Ripken, an officer with the Metropolitan City Police Department. Officer Ripken did not participate in the investigation of Barry's death. Officer Ripken told Reporter the following: "I would not be surprised if Activist were to become a suspect in Barry's death and to be charged with murder by tomorrow." Reporter did not verify this information. Reporter did not speak with either the coroner or Activist. The next day, The Daily Star ran the following story on page one of its local section:

#### **PROMINENT MOM SUSPECTED IN SON'S DEATH**

Barry, the son of Activist, died yesterday of a mysterious heart attack. Activist is a prominent women's rights activist and resident of Metropolitan City. Foul play is suspected in Barry's death and Activist is a suspect. A reliable source confirmed that Activist will be charged with Barry's murder in the very near future.

Angered by the Daily Star's allegations, Activist wrote the Daily Star a scathing letter and requested a retraction. Activist was neither charged with nor arrested for Barry's death. After an autopsy, the coroner's official report stated that Barry's heart attack was caused by a rare heart condition. The Daily Star printed a retraction after release of the official autopsy report.

Activist would like to file suit against the Daily Star. She comes to you for legal representation. Discuss the cause(s) of action available to Activist along with anticipated defense(s) by the Daily Star. Discuss the likely outcome of such litigation.





## **SELECTED ANSWER TO QUESTION 3**

**(July 2003 Bar Examination)**

*This is a Florida torts essay. It involves a discussion of defamation and privacy and the defenses to such an action, including the immunities awarded to the press to print issues of public concern.*

### **DEFAMATION:**

*In Florida, in order to prove a defamation action, the Plaintiff must be able to plead and prove the following. A statement was made, by the defendant, about the plaintiff, that it was false, misleading, or detrimental to plaintiff's reputation, and that it was published to one or more person(s). In addition, libel per se will exist, and therefore give Plaintiff an easier time in proving damages in her action if the defendant has made a defamatory publication regarding such areas as: plaintiff's work, her criminal background, plaintiff's morals or her reputation for unchastity.*

*Plaintiff will want to prove the following: 1. A statement was published about her. Here a statement was published as given in the facts by the Star, her name appears in the publication. 2. The statement does in fact appear to have been printed by the Star. 3. By reference to the story appearing on page one of the local section it appears that the statement was published to more than one person. Additionally, Activist (the plaintiff) will have to show that it was a false statement and not merely an opinion and that she suffered some form of damages, although she may not have to prove actual damages if she is a private plaintiff, she may still need to prove some sort of damage to her reputation, although this should not be too difficult based upon the words that were published about her.*

*Plaintiff may be able to prove libel per se, because the statement was made concerning her criminal background as the statement tells the reader that a reliable source confirmed that Activist will be charged with the murder.*

### **Public v. Private Plaintiffs:**

*In Florida, Activist in proving her case will try to prove that she is a private plaintiff. The difference between public and private plaintiffs is that a defendant will be liable to a private plaintiff for negligence, while a public plaintiff in order to prove damages must prove actual malice.*

*Here, Plaintiff will argue that she clearly is a private plaintiff. She will argue that she is a regular woman who is mourning the loss of her son and who has a normal place in society. She will argue that a public plaintiff is someone who has achieved pervasive*

fame or notoriety and that persons such as actors and actresses, politicians and sports players are public plaintiffs and not her.

The Star however, will argue that she is a public plaintiff. The facts indicate that she is a prominent women's activist and the paper will use this fact to show that she is required to prove actual malice. Additionally, the paper will argue that she may not be able to prove actual malice because the paper published a retraction and this may be a presumption that there is no malice that is in the newspaper's favor.

If the Star is unsuccessful in proving that she is a purely public plaintiff, they may try to argue that she is a public plaintiff for certain purposes, that she has thrust herself into the limelight on certain issues. Here the paper will argue that as a women's activist she is at least a public plaintiff for certain purposes and that this is one of those situations. However, Activist will argue that this suit does not revolve around her public involvement, namely as a women's Activist, but instead revolves solely around her personal life and her criminal record.

### **Negligence in Reporting:**

A private plaintiff, if she can prove defamation in the form of libel by the printing of the article and the damage to her reputation will want to show that because she is a private plaintiff the newspaper is liable to her for their negligent actions. Here, the facts show that the reporter, discovered the insurance policy on the late Barry's life, and then gained access to the unofficial coroner's report and subsequently spoke to an officer that was not on the case, the reporter did not verify this information. These facts should be helpful to the plaintiff for proving her claim that she is a private plaintiff that only has to prove negligence to recover from the newspaper. It is a reporter's responsibility to check his facts while making his investigation into an article he is writing. It is also the responsibility of the newspaper to make sure that its employees are acting in accordance with the law. Because reporter did not check his facts, and therefore was negligent in his reporting, plaintiff may be able to recover her damages. Therefore, Activist should be able to prove that Reporter and Star had a duty to Activist and to the rest of the community to publish information that is not false or misleading, that they breached the duty when they did not check the facts, that this failure to check the facts was both the cause in fact and proximate or legal cause, as if the statement had not been published, Activist's reputation would not be damaged and that it is foreseeable that when a newspaper allows false information to be published that there will be damages and that in fact there are damages.

### **Additional Defenses:**

Star will argue that in fact the article with the information was not fact, but was merely opinion and therefore is not actionable. Star will argue that a reasonable person reading the article would not regard the statement as a statement of fact. However, Activist will argue that in fact, this does appear by the words as a statement of fact based on the information contained in the report and based upon the fact that it was published by the newspaper whom the public may view as printing the facts and not the opinions.

*The Daily Star will also argue that they have a Florida constitutionally protected right to print information that is for the public knowledge and that this right is protected both by the Federal Constitution under the First Amendment and by the Florida Constitution as well. Daily Star should also argue that they have immunity when they publish public information that the public has a right to know about. However it should be noted that this is not an absolute immunity. Instead it is a qualified immunity that still requires the paper to use it's right to publish only information that is for the public good, and not to purposefully publish false information.*

### **Media Defendant:**

*There are additional requirements when a Plaintiff desires to sue a media defendant. Five days before a prospective plaintiff wishes to file an action against a media defendant, the Plaintiff is required to send a letter with notice to the media advising them that she is about to file a lawsuit. The media defendant is then permitted 10 days to file a retraction letter. This retraction letter does not allow the media to escape all liability for damages, but instead may show a lack of malice on the part of the media defendant. Media defendant may have an additional defense in this case, if they are able to prove that they were not given proper notice of the intent to commence a lawsuit, however, they did print the retraction so this may show that they were aware of her informing them of her intent to file.*

### **Damages:**

*In a defamation case, a private plaintiff is not required to show actual damages. She can show damages by way of the damage to her reputation. Additionally, if Activist is successful in proving libel per se, she does not need to prove damages at all, as the court will rule that the damage, in this case to her reputation due to the imputation on her that she is a criminal is sufficient proven by the facts.*

*However, Activist will still want to argue that she should be entitled to punitive damages. It should be noted that in Florida, punitive damages are a little harder to prove. In Florida a Plaintiff must please and prove damages by showing that the defendant acted wanton and willfully towards her. Punitive damages are available in Florida if proven, for up to 3 times the compensatory damages or \$500,000, whichever is greater.*

*Daily Star will argue that it is not liable to Activist for the willful violations of any (as is mentioned above the retraction may help the newspaper to prove that they are not liable for malice damages/punitive damages) of its employees. Here, Star will have to argue that it did not condone, approve of, encourage, the actions of Reporter. Activist will argue, and this may be difficult for the Star to prove as the editors or upper level employees of the Star have a duty to make sure that it's reporters check their sources and that the Star should be responsible for the actions of its employees when such matters are printed.*

*The Star may make an argument if Activist is successful for indemnity from Reporter for any amount that Star has to pay because of Reporter's actions.*

## **PRIVACY:**

*In Florida, the tort of Privacy is recognized. This tort is actually comprised of 4 separate and distinct causes of action. They are 1. commercial appropriation of the plaintiff's likeness for commercial advantage, 2. public display of private facts, 3. false light and 4. intrusion on the plaintiff's seclusion.*

*This tort is recognized in Florida, and every Floridian has a constitutionally protected right to be free from government intrusion and to be left alone. In this case, it appears that Plaintiff might have a case for false light. Here, as is mentioned above, information was presented about her, to the public and she will argue that this information put her in a false light and that it damaged her reputation. The same defenses are available to the defendant in a privacy action as are available in a defamation action, and here, Activist must establish that her reputation was injured due to the publication of this information to more than just one person. Here, Activist should be able to show publication, the facts indicate that the newspaper, the Daily Star is the city newspaper, therefore it should not be difficult to prove that the false information was received by several people. In addition, proving the falsity of the information should not be too difficult as she has never been charged with the crime and the coroner's report shows that her son suffered from a rare heart condition.*

*Although the newspaper will still argue that they have a privilege to publish information to the public and that based on this privilege they are immune from suit. They will have to prove that they are immune from suits for liability in cases such as this where Activist may be able to prove that the information was serious, incorrect, and will be debilitating to her reputation and livelihood.*

*Activist will want to show the same type of damages as explained above in her case here.*

*There is probably not a cause of action for commercial appropriation as this tort usually requires that the plaintiff show that the defendant is using her name or likeness for a commercial advantage. This is usually proven by way of the use of a celebrity's likeness in an advertisement or commercial promotion.*

*Additionally, public display of private facts may not be as successful a cause of action as false light or as detailed facts were not published about plaintiff's life, but instead newspaper will argue that it was publishing information that should be made available to the public about a public crime that may have been committed or about a public person who may be involved in such an action.*

*Activist may have an argument for intrusion on her seclusion, although it appears that false light might be a better place for her claim, as it might be a clearer liability to prove as a closer connection to a defamation claim.*

*The outcome of this case is likely to be that Activist will recover under both a defamation and a privacy cause of action as a private plaintiff, and that she should be able to recover compensatory, but probably not punitive damages.*

# **Q** QUESTION NUMBER 1

## **FEBRUARY 2004 BAR EXAMINATION – CONTRACTS/ETHICS**

On October 1, Buyer saw a specialized van with a FOR SALE sign that included a telephone number and a price of "\$25,000 cash." That night, Buyer called Seller. Buyer explained that he would have to borrow the money but could get it next week. Seller provided his address to Buyer and told Buyer, "If you want the van, mail me a check for \$5000. Pay the balance by November 1." Later that day, Buyer mailed Seller a \$5000 check.

The next night, at Buyer's 18th birthday party, Buyer discussed the deal with Investor. After buying the van, Buyer planned to start a document courier service, and he had spent \$1200 on business cards, flyers and a cellular phone. Buyer projected a profit of \$50,000 in the first year. Investor was impressed with Buyer's plans and agreed to loan Buyer \$20,000 to buy the van.

On October 25, Buyer called Seller to pick up the van. Seller refused and said someone had offered him \$35,000 for the van. Seller had not cashed Buyer's check yet. Seller offered to deposit the check and give him the van if Buyer would pay Seller \$20,000 now plus \$400 a month for 25 months. Buyer laughed and said, "Yeah, right." But without a van, Buyer will not be able to start his courier service.

Investor wants to hire you to be Buyer's attorney. Investor will fund the litigation and pay you at your hourly rate. Investor wants you to recover punitive damages and attorney's fees. Investor does not want you to settle the case. Investor gives you a \$500 retainer and asks for monthly updates.

Prepare a memorandum of law addressing fully the following matters:

1. Buyer's potential claims against Seller and Seller's potential defenses.
2. Your proposed agreement with Investor including any ethical considerations.



## **SELECTED ANSWER TO QUESTION 1**

**(February 2004 Bar Examination)**

*Contracts (K)*

*In order to form a valid contract there must be an offer, acceptance, and consideration.*

*Offer – An invitation to enter into a K. The FOR SALE sign would not be considered an offer, it would be an invitation to make an offer. When Buyer called Seller that is the offer.*

*Acceptance – Manifestation of intention to enter into a K. Since Buyer was not ready and able to enter into the K, Seller will argue that he did not accept. Buyer will argue that he did accept b/c he said he would have the money next week. Since the language is unclear it is uncertain if there was a valid acceptance.*

*Option K – In order to form an option K there needs to be consideration under Common Law principles and Under the UCC there needs to be a writing by the Seller stating K will be kept open for a certain time period, but doesn't require consideration. In this case Buyer accepted when he mailed the \$5000 under the MAIL BOX RULE b/c that was the way Seller wanted acceptance. Furthermore, a valid OPTION K was created which made the offer irrevocable until November 1.*

*Consideration – Bargained for exchange, Detrimental Reliance or Benefit to Promisor. In this case the \$5000 was sufficient consideration to keep option open.*

*Minor Under 18 – A minor under 18 can contract and doesn't make the contract VOID just b/c he/she was under 18. It only makes the K VOIDABLE by the minor not the other person. Seller will argue the K is void, however, that's not the case. If Buyer still wants to go through with the K he can – it's enforceable.*

*Statute of Frauds – requires a K not able to be performed with 1 yr. to be in writing or a K for the sale of Goods over \$5000. Since the car was valued at 25,000 Seller will argue that the K is unenforceable b/c it wasn't in writing. Buyer will counter by saying he sent Seller a check for \$5000 which was in writing and signed. The SOF requires the (1) name of parties to be charged, (2) signature of parties, (3) subject matter, (4) terms, and the (5) price. SOF can be overcome by part payment and possession or improvements. In this case there was only part payment. Therefore there might be a problem with enforcing under SOF.*

*Detrimental Reliance – A court will enforce a K if a party made an offer which he knew Buyer would rely on and buyer did in fact rely to his detriment. In this case Seller knew Buyer relied on his offer.*

Option – Since there was valid consideration paid and Seller stated Buyer had until Nov. 1 the K was irrevocable. Regardless of whether or not Seller cashed the check, sending the check was valid consideration. Seller might argue b/c he did not cash it there was no acceptance. However, the court will rule that there is a valid option.

UCC – The applicable law will be the Unif. Comm. Code b/c this car is considered GOODS.

Anticipatory Repudiation – It is where someone in a valid K states they will not be performing their side of the bargain. To be a Repudiation the words must be certain. When Buyer called Seller he refused to sell the van. Buyer had the option of purchasing UNTIL Nov. 1.

Seller will argue that there wasn't a valid K and that there was only preliminary negotiations. S will argue that he gave a counter offer.

Damages – If the court determines a valid K or option was in effect, Buyer can sue immediately for the return of his \$5000 check and for any consequential, actual, and special damages. However, Buyer has a duty to mitigate damages. In order to obtain Consequential Damages Seller must have known about losses that could stem from this Breach.

Specific Performance – Since this is a specialized van Buyer will contend he wants the court to force Seller to sell b/c this van is unique. SP is available for unique property.

If Buyer doesn't want SP he can sue for actual damages, which would be the difference in price b/t this van and a comparable one. He can also obtain special damages which would be costs stemming from breach like time and money wasted looking for a new van.

Buyer will argue he will lose \$1200 on cards, flyers, and cell phone and the \$50,000 profit. Seller will argue B is not entitled to that money b/c he can mitigate. The court will probably not give B these damages unless this van is so unique that B can't do business w/o and can't find another one. Buyer might be able to recover lost profits for his business until he finds another van.

Ethical Considerations – Attorney's fees can be paid by another party but the client must be informed that the fees are being paid by someone else.

Confidential – The Attorney must keep the case confidential b/t the buyer (client) and the Attorney. He cannot disclose anything about the case unless client consents.

The Investor can have no say in the handling of the case. Only the client can. Therefore, Investor can't tell the lawyer he doesn't want the cases settled, only the client can instruct the Lawyer whether to settle. Investor is not entitled to monthly UPDATES.

Punitive Damages – are only recoverable for intentional misconduct or Gross negligence. In FL Punitive Damages are capped at 3 times Compensatory or 500,000.

*If motivated by Financial Gain then the cap is 4 times compensatory or 2 million. If an intentional tort or drugs or alcohol involved then there is no cap. Punitive will not be allowed in this contracts case.*

*Attorney's fees – Generally each party must pay their own fees. However, in Florida by statute Attorney's fees can be awarded in certain cases where Manufacturers or Sellers defraud or Breach K. In this case the court probably won't award fees.*



## **QUESTION NUMBER 2**

### **FEBRUARY 2004 BAR EXAMINATION – TORTS**

While Jogger, a young and successful physical therapist, was running, she saw Dottie, Owner's Dalmatian dog, standing on the public sidewalk in front of Jogger. Dottie had jumped the four foot fence that completely enclosed Owner's yard. Jogger did not want to deviate from her route, and as she passed Dottie, she was attacked and bitten by the dog, causing lacerations requiring stitches.

Immediately after the attack, Owner drove up to his residence. Owner exclaimed truthfully: "Dottie and I have lived here for five years and Dottie has never jumped that fence nor bitten anyone!"

Owner drove Jogger to Hospital's emergency room. On the way to Hospital, Owner was involved in an accident caused by the negligence of both Owner and a horseback rider (Rider). Jogger, who was not wearing her seat belt, was thrown about in Owner's car, and as a result, suffered serious but non-life-threatening head injuries.

Jogger was transported by ambulance to Hospital's emergency room, where she was treated by Doctor, an employee of Hospital, Inc. Doctor was intoxicated when he treated Jogger, and as a result of Doctor's intoxication, he negligently treated Jogger. Doctor's treatment caused the deterioration of Jogger's condition and her death, intestate, two weeks later. Hospital had no reason to know of Doctor's intoxication when he treated Jogger, nor any unfitness of Doctor to practice medicine.

Jogger experienced severe pain and suffering from her automobile accident injuries in the two weeks preceding her death. Jogger was survived by her current husband (Husband), with whom she had one six-year-old child (Child).

Husband is the personal representative (PR) of Jogger's estate and retains your law firm to pursue survival and/or wrongful death actions against Owner and Hospital. Neither Rider nor Doctor can be located.

Florida's survival statute, section 46.021, provides:

"No cause of action dies with the person. All causes of action survive and may be commenced, prosecuted and defended in the name of the person prescribed by law."

Florida's Wrongful Death Act, section 768.19, provides:

"When the death of a person is caused by the wrongful act, negligence...of any person...the person...(who) would have been liable in damages shall be liable for damages as specified in this act."

Section 768.20 provides:

"The (wrongful death) action shall be brought by the decedent's personal representative, who shall recover for the benefit of the decedent's survivors and estate (the) damages specified in this act (which are) caused by the injury resulting in death."

Corporations are "persons" for the purposes of the Wrongful Death Act.

Senior partner for your firm asks you to draft a legal memorandum addressing each of the following five issues:

1. What is the basic difference between the claims asserted and the damages recoverable in a survival action and a wrongful death action?
2. Against which Defendant(s) should a survival action be filed, and against which should a wrongful death action be filed?
3. With respect to Dottie's attack on Jogger, what is the best claim PR can assert against Owner? Why is this the best claim and what defense(s) can Owner assert against PR?
4. What defenses may Owner assert against PR with respect to the automobile accident?
5. What is the best claim PR can assert against Hospital? What defenses may Hospital assert against the claim, and what is the likelihood of success of those defenses?



## **SELECTED ANSWER TO QUESTION 2**

**(February 2004 Bar Examination)**

I. The basic differences b/t the claims is that Florida law permits the continuation of a lawsuit via the survival statute, though the party successively dies. The estate then carries forth the suit and damages recovered may include medical expenses, loss of wages (past), & loss of future earnings reduced to present value. A wrongful death action may be commenced to address a loss of life resulting from tortious conduct. Such is often dependent upon whether the deceased is single or married, a minor (25 or under), has surviving parents or children, in terms of claims and awarded damages. Damages may include loss of consortium for husband & a child, future earnings, medical expenses, funeral expenses, etc.

II. Husband, on behalf of the estate of wife, should file a wrongful death action against the hospital and the doctor (though he has not been located). Husband should also file suit under the survival statute against the Owner and the Rider (though also not located.)

III. The best claim the PR (husband) can assert against Owner with respect to Dottie's attack is one of strict liability. Florida law provides that a dog-bite is strict liability for the owner, regardless of whether dog had propensity to bite or a history of biting/viciousness. Therefore, owner's statement of shock to Jogger (i.e. "Dottie has never) is irrelevant. Strict Liability will be imposed against Owner for this 1<sup>st</sup> bite and any other successive bite resulting in injury. Owner's best defenses are (1) that Jogger was negligent because she had the last clear chance to avoid the dog by deviating a bit from her route, yet she assumed the risk/was contributorily negligent as she encountered the dog willfully. (2) Owner may also attempt to argue that along this negligence, she provoked the dog to bite her by running near dog. However, through both of these defenses are adequate under Florida law, neither will be successful in all likelihood & owner will be held strictly liable.

IV. Defenses that owner may assert against the PR with respect to the car accident may include: (1) Good Samaritan. Owner may claim that he should not be liable or his damages reduced b/c he was rescuing the Jogger. (However, one may also argue that he had a duty to do so given that he created the peril by his dog.) His "good samaritan" defense will fail, however, because Florida law provides that one may be liable for ORDINARY NEGLIGENCE in carrying out the rescue, not gross negligence. From the given facts, it appears Owner committed ordinary negligence in the car accident & therefore will be held liable. He assumed a duty to care for Jogger, breached that duty with his negligence which was the proximate/actual/CIF of her injury. (2) Owner may also assert the defense of (Assumption or risk)/contributory negligence because Jogger did not wear her seatbelt & such is provided for under FL law as raising a presumption

of CN. Owner may argue that Jogger's injuries were not caused by the accident itself but from the resulting impact "was thrown about in Owner's car, and AS A RESULT, suffered" injuries. This may be a viable defense for the purposes of reducing Owner's liability/damages, as Jogger would be responsible for the amount of harm which resulted from her contrib. negl. in not wearing the seatbelt. However, unless Jogger is found to be 100% responsible, which is unlikely, Owner will still be liable & must pay damages for his negligence. ("But for his negl., she wouldn't be injured" remains). (3) Owner may attempt to argue that the accident was superseding/intervening, but this will likely fail because it was completely foreseeable.

V. PR should assert a wrongful death claim against the Hospital. (He may also wish to file a negligent hiring claim, but that is not the best claim.) Here the doctor was an employee of the hospital. Therefore, an issue of vicarious liability arises (or res. superior) as there is an employer/employee relationship. PR may sue hospital (and doctor, though unavailable) for the gross negligence of its employee – the doctor. A reason why owner would not likely be found liable for Jogger's death & why a wrongful death claim would not be appropriate is because the doctor's intoxication & resulting negligence in treating Jogger was so substantial that it may be considered a superseding/intervening cause which cuts off the liability of owner. Therefore the hospital should be held liable for the actions of its employee, the doctor. Additionally, though hospital may argue that they had no knowledge of his intoxication or any unfitness, the procedure used by the hospital in completing background checks should be examined. Here, while working for the hospital, the employee doctor assumed a duty to care for Jogger, breached that duty by his negligence via intoxication which caused & resulted in Jogger's death. It is also worth arguing that doctor should be held to a heightened standard, which makes his intoxication even more of an aggravating circumstance to the point of S/L. In addition to the aforementioned defense of "no knowledge", which will fail; the Hospital may argue that when the doctor treated the woman negligently while intoxicated, that such constituted an intentional tort or gross misconduct which should remove him from the scope of employment. Hospital is not likely to succeed on these merits and as a result will be found vicar. liable for damages including: loss of consortium to husband & son, med. expenses, loss of future earnings, funeral expenses, & potential punitive damages, which may not be capped at any amount given that caps on damages are excepted for those claims where intoxication by drugs or alcohol is at issue. Hospital may attempt to recover damages through an indemnification action against the doctor.

## **Q** UESTION NUMBER 3

### **FEBRUARY 2004 BAR EXAMINATION – TRUSTS**

Senior Partner asks you, Junior Associate, to draft a trust for Settlor, a Florida resident, pursuant to Settlor's wishes. Settlor comes to the appointment with you and tells you he is terminally ill, and he wants to make the trust while he is still alive. According to Settlor, he is taking morphine pills for the pain, and he takes another two pills while in the office. He wishes to leave all his property in a trust for his twin children, who are 25 years old, and Senior Partner. The division will be a third (1/3) to Senior Partner, a third (1/3) to one child and a third (1/3) to the other child. He is afraid that his twin children are not mature enough to handle the money and does not want them to have access to the money until they are 50 years old. Senior Partner would also receive her share in 25 years. All the property would be divided at that time. Settlor is worried that one child will lose her money to her husband in a divorce scheduled for next year and the other child will lose the money while he works through a "gambling addiction." Settlor is afraid that the children will try to break the trust.

The Settlor also wants to leave nothing to his wife in the trust. He would like you to be trustee and to invest the money in the trust. He asks you to invest the money in the oil drilling company that Senior Partner owns. He tells you that his investment counselor told him that the investment in the oil drilling company was extremely risky. Draft a memo advising Senior Partner whether any problems exist in implementing any of Settlor's wishes.



## **SELECTED ANSWER TO QUESTION 3**

**(February 2004 Bar Examination)**

To: Senior Partner:  
From: Junior Associate  
Re: Trust for Settlor

*Under Florida law a Settlor can create a Trust by transferring the trust res (property) to the trustee w/the intention to create a trust for the benefit of ascertained beneficiaries. Here Settlor intends to create a trust for the benefit of his twin children and senior partner. Delivery of the trust res, w/the Settlor's intent to create the trust, to a trustee, in this case Settlor wishes that I serve as trustee, would create a trust, an express intervivos trust for the benefit of settlor's twins and senior partner.*

### **Potential Problems**

*First if the trust res includes any real property Settlor must deliver a deed to trustee (me) subscribed by two witnesses, and the trust agreement must be in writing to satisfy the statute of frauds. (The statute of frauds requires that any contract conveying an interest in property be in writing signed by the person to be charged).*

*Furthermore, a Settlor must have the capacity to contract in order to create a trust. As indicated Settlor is currently under the influence of morphine pain pills and as such his capacity to create the trust may be questioned. If found that the Settlor lacked the requisite capacity, the trust will fail and a resulting trust for the benefit of the Settlor's estate will be created.*

*Regarding the age limits on Settlor's twin children and holding Senior Partner's interest for 25 years, Settlor can accomplish this by including a fixed period of time (25 years) for the trust and designating a 1/3 interest in the remaining principal each to the twins and senior partner. By setting a fixed period of time to the trust Settlor can be assured that the beneficiaries or the trustee will not be able to terminate the trust before the termination date in the trust. (Florida law allows the beneficiaries to a trust to terminate it and obtain the principal if all agree and terminating the trust will not be contrary to a material purpose of the trust. However trusts w/spendthrift clauses and fixed periods cannot be terminated in this fashion).*

*Regarding Settlor's fear that one child will lose her money to her husband in divorce: Creditors can generally reach a beneficiary's interest in a trust unless the trust includes a spendthrift clause. By adding a spendthrift clause any creditor will not be able to attach the beneficiary's interest unless the creditor provided necessities to the beneficiary or a former spouse seeks to collect past due alimony or child support*

payments after all other avenues of recovery have been exhausted. Furthermore because the trust names the child only as the beneficiary, and not the child and her husband, her interest will be considered separate property by the divorce court, not subject to the equitable distribution of marital property.

Regarding the child w/the gambling addiction see the discussion above regarding spendthrift clauses. Once again a spendthrift clause will prevent the child's gambling creditors from obtaining her interest in the trust. However, once income or principal is in the hands of the beneficiary a creditor will be able to obtain it. As long as the principal remains in the trust w/ a valid spendthrift clause, therefore, the child's gambling creditors will not be able to reach her interest.

Regarding Settlor's wife, a spouse has a right to take an elective share upon the decedent spouse's elective estate equal to 30% of the elective estate. Property included, among other things, in an elective estate includes the Settlor's interest in a Revocable Intervivos trust.

Trusts are irrevocable unless the Settlor specifically reserves the right to modify or revoke the trust. In this case Settlor has not indicated that he wishes to maintain a right to modify or revoke the trust, therefore without reserving such right the trust will be irrevocable and outside the elective estate.

#### Ethical Considerations

Under the Rules of Professional Conduct (RPC) an attorney may not enter into a representation where there may exist the potential for a conflict of interest. In this case a potential conflict arises in that Senior Partner is a beneficiary to the trusts. Even though senior partner is not drafting the trust documents, Junior Partner's association in the same firm as Senior Partner would be the same as if Senior Partner drafted the trust. The potential conflict of interest, however, could be waived by Settlor if after consultation he consents to the representation.

Under the RPC an attorney is prohibited from entering into a contractual relationship w/a client unless the transaction is fair to the client, the attorney believes he can still represent the client, and the client is given the opportunity to consult another attorney. Settlor asks that the trustee invest the money in the trust in Senior Partner's oil company. This constitutes a transaction b/t the attorney Senior Partner (in the same firm as Junior Partner) and Settlor. Settlor will have to be informed of his ability to seek outside counsel, Junior Partner must reasonably believe that his representation will not be affected by the transaction, and the investment transaction must be fair. If not Junior Partner and Senior Partner will have violated the RPC.

Furthermore Settlor must be informed that since the investment in the oil company is very risky of what may happen under Florida law if the investment is underproductive. Under Florida law if all of the investments in a trust taken as a whole do not produce at least 3% interest per anum the beneficiaries have a right to payment of the 3% out of the trust principal (3% is based on the fair market value of the trust principal). Sine Settlor is afraid that twins and Senior Partner will get trust principal before 25 years

*have passed this is a valid concern. If the oil investments continually underperform the trust corpus will be depleted. Depending on the amount of the value of the trust property if this causes the value to drop below \$50,000 the trustee can petition the courts to terminate the trust b/c of the cost of administration. This may cause the trust to terminate before the 25-year period the Settlor desires.*



## **PART II - SAMPLE MULTIPLE-CHOICE QUESTIONS AND ANSWERS**

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

The answers appear on page 41.

## **MULTIPLE-CHOICE EXAMINATION INSTRUCTIONS**

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

1. This booklet contains segments 4, 5 and 6 of the General Bar Examination. It is composed of 100 multiple-choice, machine-scored items. These three afternoon segments have the same value as the three morning segments.
2. The person on each side of you should have a booklet with a different colored cover. Please determine that the person on each side of you is using a different colored cover. If he or she is using an examination paper with the same colored cover, please notify a proctor at once.
3. When instructed, without breaking the seal, take out the answer sheet.
4. Use a No. 2 pencil to mark on the answer sheet.
5. On the answer sheet, print your name as it appears on your badge, the date and your badge/ID number.
6. In the block on the right of the answer sheet, print your badge/ID number and blacken the corresponding bubbles underneath.
7. Then STOP. Do not break the seal until advised to do so by the examination administrator.
8. Use your pledge 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 ten minutes remain before the end of the session, you may turn in your question booklet and answer sheet outside the examination room to one of the proctors. If, however, fewer than ten minutes remain, please remain at your seat until time is called and the Board has collected all question booklets and answer sheets.

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

## 23 SAMPLE MULTIPLE-CHOICE QUESTIONS

1. After the close of the pleadings both plaintiff and defendant duly made motions for summary judgment. Which of the following statements is correct?
  - (A) Summary judgment can be entered only after all discovery has been completed.
  - (B) Motion for summary judgment is the proper motion on the ground that plaintiff's complaint fails to state a cause of action.
  - (C) Since both parties have filed summary judgment motions that assert there are no genuine issues of material fact, summary judgment for plaintiff or defendant will be granted.
  - (D) If plaintiff's proofs submitted in support of his motion for summary judgment are not contradicted and if plaintiff's proofs show that no genuine issue of material fact exists, summary judgment will be granted even if defendant's answer denied plaintiff's complaint.
  
2. Pete Smith is the active partner and Bill Jones is the silent partner in a general partnership known as "Pete Smith Plumbing." After six years of being uninvolved in the management of the partnership business, Bill purchases 100 toilets for the business. Pete is incensed because it will probably take years to use up the inventory of so many toilets and seeks your advice. The best advice is
  - (A) Bill can bind the partnership by his act.
  - (B) silent partners are investors only and cannot bind the partnership.
  - (C) unless his name is in the partnership name, third persons are "on notice" that he is unauthorized to contract for the partnership.
  - (D) Bill, as a silent partner, is not authorized to purchase and, therefore, the sale may be set aside.
  
3. Defendant was seen leaving Neighbor's yard with Neighbor's new \$10 garden hose. Neighbor called the police, who charged Defendant with the second-degree misdemeanor of petit theft by issuing him a notice to appear in the county courthouse one week later.

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

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

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

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

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

7. The State of Florida is prosecuting a former police officer for extortion of money from prostitutes. One of the State's witnesses is Sally. Sally has an adult conviction for vehicular homicide. She was charged with driving a car in a reckless manner resulting in the death of her sister, a passenger in the car. Sally pleaded nolo contendere, was adjudicated guilty and received a suspended sentence although she could have received a sentence of state imprisonment up to 5 years. At trial, evidence of this conviction is
- (A) admissible to impeach Sally because vehicular homicide carries a maximum penalty in excess of 1 year.
  - (B) inadmissible to impeach Sally because she never admitted her guilt since she entered a plea of nolo contendere.
  - (C) inadmissible to impeach Sally because she received a suspended sentence.
  - (D) inadmissible to impeach Sally because she is only a witness and not the criminal defendant.
8. A defendant charged with first-degree murder shall be furnished with a list containing names and addresses of all prospective jurors
- (A) upon court order.
  - (B) upon request.
  - (C) upon request and showing of good cause.
  - (D) under no circumstances.
9. Cooper is suing March for money damages. Because he believes portions of March's deposition are highly favorable to his case, Cooper's attorney intends to read parts of the deposition at trial instead of calling March to the stand. March objects to Cooper's use of the deposition at trial. What is the court's likely ruling?
- (A) Cooper may use the deposition at trial, but, if requested, he must read all parts that in fairness ought to be considered with the part introduced.
  - (B) Cooper may use the deposition at trial, but only to contradict or impeach March's prior inconsistent statements or pleadings.
  - (C) Cooper may not use the deposition at trial, as March is able to testify and no exceptional circumstances exist.
  - (D) Cooper may not use the deposition at trial, as this would make March his witness and immune to impeachment.

10. Jan sues the Chicago Times for defamation in a Florida circuit court. At trial, Jan wishes to offer into evidence a copy of the edition of the Times containing the allegedly libelous article. Before the newspaper may be admitted, Jan must
- (A) call as a witness an employee of the Times to testify that the proffered newspaper was in fact published by the Times.
  - (B) have a certification affixed to the newspaper signed by an employee of the Times attesting to its authenticity.
  - (C) establish that the newspaper has been properly certified under the law of the jurisdiction where the newspaper was published.
  - (D) do nothing because the newspaper is self-authenticating.
11. Defendant was arrested on February 1 and released one month later on March 1 after being charged with a felony. On December 1 of the same year as his arrest, he filed a motion to discharge since no trial or other action had occurred to that point. The court held a hearing 3 days after the motion was filed. Defendant should be
- (A) discharged because more than 175 days passed between arrest and the filing of the motion to discharge.
  - (B) discharged because more than 175 days passed between his release from jail and the filing of the motion to discharge.
  - (C) brought to trial within 90 days of the filing of the motion to discharge.
  - (D) brought to trial within 10 days of the hearing on the motion to discharge.
12. Bill, a single man, owned pasture land in Deerwoods, Florida, which he leased to a tenant. He also owned a condominium in Miami, which he held for investment. In his will, he devised the pasture land to his son Tommy and the condominium to his daughter Julie. All other assets would pass equally to Tommy and Julie.

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

- (A) Kathy gets the condominium regardless of the prenuptial agreement, Tommy takes the pasture land and Tommy and Julie split the rest of the estate.
  - (B) Due to Kathy's prenuptial agreement, Tommy receives the pasture land, Julie gets the condominium and Tommy and Julie split the rest of the estate.
  - (C) Kathy gets the condominium, but because Bill had originally indicated his intent to devise equally to his children, Tommy and Julie will split the remaining estate.
  - (D) Regardless of the prenuptial agreement, Kathy is a pretermitted spouse. Since Bill leaves surviving lineal descendants who are not Kathy's, Kathy receives 50% of the estate, Tommy gets the pasture land, and Tommy and Julie split the residue of the estate.
13. Anderson and Parker decide to form a corporation which will locate missing children. Which of the following would be a proper name for the corporation?
- (A) ANDERSON
  - (B) FBI Consultants, Incorporated
  - (C) Private Eye Partners
  - (D) Child Finder Company
14. At trial, during the plaintiff's case-in-chief, the plaintiff called as a witness the managing agent of the defendant corporation, who was then sworn in and testified. Defense counsel objected to the plaintiff's questions either as leading or as impeaching the witness. In ruling on the objections, the trial court should
- (A) sustain all the objections and require the plaintiff to pursue this type of interrogation only during the plaintiff's cross-examination of this witness during the defendant's case-in-chief.
  - (B) sustain the leading question objections but overrule the other objections because a party is not permitted to ask leading questions of his own witness at trial.
  - (C) sustain the impeachment questions but overrule the other objections because a party is not permitted to impeach his own witness at trial.
  - (D) overrule all the objections because the witness is adverse to the plaintiff and therefore may be interrogated by leading questions and subjected to impeachment.
15. Rainbow Corporation has outstanding 1,000 shares of voting common stock and 1,000 shares of nonvoting preferred. The preferred has a liquidation preference equal to its par value of \$100 per share plus a 3 percent noncumulative dividend. Rainbow submits to its stockholders a proposal to authorize a new class of preferred stock with redemption rights that would come ahead of the old preferred stock. At a shareholders' meeting, 700 common and 400 preferred vote in favor of the proposal. Which of the following statements is correct?



- (A) The proposal is validly approved because overall a majority of the outstanding shares did approve.
- (B) The proposal is invalidly approved because a majority of the preferred shareholders did not approve.
- (C) The vote of the preferred stockholders does not matter because it was nonvoting stock.
- (D) The proposal is invalidly approved because a two-thirds vote of each class is required.

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

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

- (A) only Bob Wilson is liable.
- (B) Bob Wilson and Ted Lamar are liable jointly.
- (C) Bob Wilson is liable for the entire amount and Ted Lamar is liable only to the extent the debt cannot be collected from Bob Wilson.
- (D) only the de facto partnership arising from the relationship between Wilson and Lamar is liable.

17. At the close of all the evidence in a jury trial, Defendant moves for a directed verdict. After much argument, the court denies the motion. Subsequently, the jury returns a verdict for Plaintiff.

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

- (A) Yes, because Defendant has raised new grounds.
- (B) Yes, because Defendant had ten days after the jury returned its verdict within which to move to set aside the verdict.
- (C) No, because the court denied the motion for directed verdict rather than reserving ruling.
- (D) No, because the court entered final judgment for Plaintiff before the motion to set aside the verdict was filed.

18. In the absence of a provision to the contrary in the articles of incorporation, the directors of a corporation elected for a specified term
- (A) can be removed from office at a meeting of the shareholders, but only for cause and after an opportunity to be heard has been given to the directors.
  - (B) can be removed from office at a meeting of the shareholders, with or without cause.
  - (C) can be removed from office at a meeting of the shareholders, but only for cause.
  - (D) can be removed from office prior to the expiration of their term only by a decree of the circuit court in an action by the shareholders.
19. Mary, a wealthy St. Petersburg widow, executed her first and only will on May 15, 1990 and died on August 18, 1990. Her will provided that her estate be divided equally between her only child, Joan, and the Salvation Army of Largo. How will Mary's estate actually be distributed?
- (A) 100% to Joan.
  - (B) 100% to Joan if she files a timely petition requesting that the devise to the Salvation Army be avoided.
  - (C) 50% to Joan and 50% to the Salvation Army.
  - (D) 50% to Joan and the income from the remaining 50% to Joan for life, remainder to the Salvation Army, if Joan files a timely petition protesting the devise to the Salvation Army.
20. Regarding a deposition in a civil suit, which of the following is/are true?
- I. A deposition of a person against whom another person contemplates filing an action may be compelled by the party contemplating the action, without leave of court, before the action is filed.
  - II. A deposition of the defendant in an action may be taken by the plaintiff without service of a subpoena on the defendant.
  - III. A deposition may be taken even though all the testimony secured by it will be inadmissible at the trial.
- (A) II only.
  - (B) I and II only.
  - (C) II and III only.
  - (D) I, II, and III.

**SAMPLE MULTIPLE-CHOICE QUESTIONS WITH PERFORMANCE TEST COMPONENT**

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

**Florida Statutes 47.011 Where actions may be begun.**

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

**Florida Statutes 47.021 Actions against defendants residing in different counties.**

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

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

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

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

## ANSWER KEY FOR MULTIPLE-CHOICE QUESTIONS

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