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Florida Bar Examination Study Guide and Selected Answers

February 2011

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

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PART I – ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2011 AND JULY 2011 FLORIDA BAR EXAMINATIONS

ESSAY QUESTIONS AND SELECTED ANSWERS

Part I of this publication contains the essay questions from the February 2011 and July 2011 Florida Bar Examinations and one selected answer for each question.

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

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

ESSAY EXAMINATION INSTRUCTIONS

Applicable Law

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

Acceptable Essay Answer

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

QUESTION NUMBER 1

FEBRUARY 2011 BAR EXAMINATION – FLORIDA CONSTITUTIONAL LAW

Driver's car collided with Victor's car in Beach County, Florida, and Victor was killed.

Driver is President and Chief Executive Officer of Leasco, a private corporation that leases and operates a hospital owned by Beach County. The lease provides that Leasco will pay a certain dollar amount to the county each year, indemnify it from liability arising from operation of the hospital, and one member of the county commission shall serve as a member of the seven-member board of directors of Leasco.

One month prior to the Driver/Victor collision, Leasco's board of directors, in response to complaints, held a meeting to discuss Driver's erratic behavior and possible substance abuse problems. At that time, the board decided to take a wait-and-see approach to Driver's behavior.

The Beach County Sheriff is investigating the collision and asks a circuit court judge to issue a subpoena to obtain Driver's medical records from his family doctor. Driver is given notice of the subpoena request as required by law and, speaking through his attorney, objects to the subpoena.

The personal representative of Victor's estate is considering filing a wrongful death action against Driver, Leasco, or both. The personal representative makes a public records request to Leasco, seeking copies of any minutes of meetings of the board of directors where Driver's employment status was discussed and a copy of Driver's personnel file. Leasco refuses to provide the documents.

The personal representative seeks a court order to direct Leasco to produce the documents. Driver intervenes. Driver argues that releasing his personnel file would be both unconstitutional and in violation of a law recently passed by the Florida Legislature. The recent law exempts personnel files from the disclosure as public records and the legislature made a finding that such exemption is "necessary to protect the public health, safety, and welfare."

Discuss the issues relating to the availability of the medical records, board minutes, and personnel file arising under the Florida Constitution. Also, discuss the constitutionality of the law recently passed by the Florida Legislature.

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

1. Availability of medical records

The first issue is whether the court can require the Driver's family doctor to release Driver's medical records. The Florida Constitution provides that all natural persons have a **right to privacy** with respect to their personal life. The right to privacy encompasses a person's health and family where there is an expectation of privacy. Therefore, a person has a right to privacy with respect to their medical records, because there is an expectation that those records will remain private absent consent to disclosure. The right to privacy is a **fundamental right** afforded by the constitution. Denial of a fundamental right is subject to **strict scrutiny**, which requires that the government prove that the denial of the right is **necessary** to achieve an **important** governmental interest and is **narrowly tailored** to achieve that important government interest. There is no clear governmental purpose here to deny Driver of his constitutional right to privacy, much less a compelling one. If the governmental purpose is completing the accident investigation, that may be compelling if the government has exposure to liability for the accident. Therefore, the government will not prevail and Driver's right to privacy may not be violated.

Additionally, the Florida Constitution provides that when a person is faced with **deprivation** of their life, liberty, or property interests, they must be afforded **due process** of the law, which requires **notice** and an opportunity to be **heard**. If Driver claims a property interest in and to his medical records, then he must be first afforded notice and a hearing before that interest may be abridged. Here, Driver was given notice of the intent to seek the medical records from his family doctor. Therefore, before he may be deprived of his interest in his medical records, the court must first give him a hearing on his objections.

2. Availability of board minutes

The next issue is whether the court can require Leasco to produce minutes of board of directors (BOD) meetings. Under the Florida Constitution, the **Sunshine Law** provides that **public bodies** are required to make public the records of any meetings between public figures, such as members of the legislature. The law does not apply to private entities. The facts state that Leasco is a private entity. However, when government becomes so **intertwined** in private activities, the private entity may be held to be a **state actor**, thus subjecting it to state regulations not applicable to private entities. When the government engages in activities in the private sector which amount to more than mere **planning** or administration, then the private entity will be considered a state actor. Generally, the government's **merely leasing** property to a private entity is insufficient to result in the entity being regarded as a state actor. However, in this case, Leasco leases and operates a hospital that is owned by the county, Leasco has agreed to indemnify the county in connection with the operation of the hospital and has a member of the county commission serving on its BOD. These facts combined are sufficient to find that Leasco and the county have become so intertwined with regard to the hospital that Leasco has become a state actor. As a result, Leasco's BOD will be

considered a public body and will be subject to the Sunshine Law and will be required to produce the minutes of the BOD meeting.

However, Driver will argue that the substance of the BOD minutes relates to information protected by his constitutional right to privacy, and therefore cannot be subject to disclosure. At the meeting the BOD discussed Driver's possible substance abuse and erratic behavior. Although there is no arguable protection to the information about Driver's behavior while working for what is considered to be a state actor, the discussion about the substance abuse is arguably private information. Driver will argue that just because the information was discussed by the BOD does not make it subject to disclosure.

3. Validity of new law

The third issue is whether the new law exempting personnel records from public disclosure is valid. In order to be valid, a law must have a **legitimate public purpose** and must not be **overbroad** or **vague**. The stated purpose is to protect the public health, safety and welfare. States are permitted to use their **police power** to enact laws for the general purpose of protecting the health, safety and welfare of their citizens. This police power applies to county and local governments as well. Because the law does not deny or deprive any fundamental rights or discriminate on any level, it is subject to **rational basis** review, which requires that the opponent of the law prove that the law is not **rationally related** to a **legitimate** governmental purpose. The protection of the public health, safety and welfare is a legitimate governmental purpose and is permitted by its police power. Denying third parties access to government employees' personnel files is rationally related to the protection of safety, and welfare, because one could imagine that releasing personnel files could lead to violations of the employee's privacy rights and safety if their home addresses and information about their health was made public. Therefore, the law is valid and will be upheld as constitutional, because it is rationally related to the legitimate purpose of protecting health, safety, and welfare.

However, the personal representative will argue that the law is overbroad and vague. He will argue that certain personal information may be redacted from personnel files, which would allow for the privacy of individuals to remain protected while making public information that may be necessary to adjudicate legitimate claims against state actors.

4. Availability of the personnel file

The final issue is whether the court can require Leasco to produce Driver's personnel file. If the law discussed above is held to be valid, then the personnel file will be exempt from disclosure. If the law is struck down, then Driver may argue again that his privacy rights will be violated if these records are disclosed. Driver will argue that the personnel file contains private information relating to his health that must be kept private. However, the personal representative may argue that there is no expectation of privacy with regard to employment records, and therefore the disclosure of those records will not violate Driver's constitutional right to privacy. Therefore, because the right to privacy is fundamental, the Driver will prevail and his personnel records will not be subject to disclosure.

Q QUESTION NUMBER 2

FEBRUARY 2011 BAR EXAMINATION – REAL PROPERTY/FAMILY LAW

During their marriage, Wife and Husband resided in Florida. They have been married for 15 years and separated during the last six years. In May 2009, Wife filed an action for dissolution of marriage against Husband. Each party retained an attorney and the parties stipulated to entry of a mutual injunction, or restraining order, entered by the judge. By terms of that order, the parties were “mutually and strictly enjoined from sale, transfer, damaging or otherwise dissipating or disposing of any assets in this case which might be, or be claimed to be, marital assets or non-marital assets belonging to one or the other of the parties.” The order stated that the injunction was to remain in effect pending further order of the court. The order was dated June 25, 2009.

On July 7, 2009, Husband delivered a warranty deed to Friend, who had been Husband’s friend for years. The warranty deed conveyed certain property in Florida known as Blackacre. At the time of the delivery of the deed, Husband had lived on Blackacre, in a small farmhouse on a 20-acre tract, for several years and claimed homestead exemption on the land for tax purposes. In exchange for the property, Friend promised to care for Husband in his declining years. Husband died on July 10, 2010. Friend did not, however, record the warranty deed until July 12, 2010, two days after Husband had died. Wife’s name was not on the deed, nor did she sign it, and she had never lived on the property herself.

When the mutual injunction was issued, Husband also owned Rich-Acre, a valuable piece of commercial property that he purchased during the marriage. Rich-Acre was located in another county some distance from Blackacre. When Wife learned, shortly after the fact, that Husband had given Friend a deed to Blackacre, she recorded a Notice of Lis Pendens in the county where Rich-Acre was located, including in the Notice the legal description of Rich-Acre and attaching as part of the Notice a copy of the mutual injunction. Subsequent to the mutual injunction, Friend also purchased a car, a 1971 Rolls Royce, from Husband. The car was registered to “Husband or Wife.” Again, Wife did not sign any documents regarding this transaction.

Husband’s will, executed after entry of the mutual restraining order but before the conveyances of Blackacre and the Rolls Royce, explicitly excluded the following individuals: Wife; Daughter, Husband’s biological daughter from a prior marriage; and Son, Husband’s adopted son who was Wife’s biological child. Both Daughter and Son were adults at the time of Husband’s death. Aside from a specific bequest to Friend of “so much of my personal property as he may choose, up to a value of \$1,000,” the entirety of Husband’s estate, which included Rich-Acre, was devised to a charity. The dissolution action between Wife and Husband was still pending at the time of Husband’s death.

Wife has come to your law firm seeking legal advice. You are directed to prepare a written memorandum addressing these questions:

1. Was Husband's execution of the will a violation of the terms set forth in the mutual injunction?
2. Can Wife set aside Husband's deed of Blackacre to Friend because Friend did not record the deed until after Husband's death?
3. Are there any other grounds to set aside Husband's conveyance of deed to Friend?
4. If Husband's will is held to be valid, what can Wife, Daughter, and Son hope to obtain from Husband's assets following his death?
5. On what grounds can Wife regain possession of the Rolls Royce?
6. Can Wife set aside the bequest of "so much of my personal property up to a value of \$1,000" that Husband devised to Friend?
7. What is the effect of Wife having recorded a Notice of Lis Pendens against Rich-Acre?

SELECTED ANSWER TO QUESTION 2

(February 2011 Bar Examination)

1) Was Husband's (H) execution of the will a violation of the terms set forth in the mutual injunction?

A person has a right to create a will and devise his property however he sees fit, with some restrictions by statute. The mutual injunction against the sale, transfer, damaging, or otherwise dissipating or disposing of any assets in this case will not likely have any prohibition on the creating of a will. Gifts in the will can be deemed if the property is no longer in the estate at the time of the testator's death. Therefore, H's estate will argue that the will is valid and was not made in violation of the mutual injunction because he did not at the moment convey or get rid of any of his property.

However, H died before dissolution of marriage was complete and the injunction was still in place. However, this will not likely then become a violation of the mutual injunction because the mutual injunction will likely be subsequently lifted because the action for dissolution of marriage is no longer needed. Therefore, the making of the will will not likely be viewed as a violation of the terms set forth in the mutual injunction.

2) Can Wife (W) set aside H's deed of Blackacre to Friend (F) because Friend did not record the deed until after H's death?

Florida is a **pure notice jurisdiction** which protects a **bona fide purchaser** (bfp). A purchaser is bona fide if they subsequently **pay value** for the land and have **no notice** of anyone's prior interest in the land. Therefore, the time and order of the recording of the deed is not critical to the validity of the deed. However, the recording of a deed is to give notice to the whole world of your interest in the property (record notice). Therefore, every purchaser should record their deed in order to prevent his interest in the property from being unenforceable against a subsequent bfp. A deed becomes enforceable once it is **executed and delivered** to the grantee.

As long as the deed was executed and delivered to the grantee with H intending to transfer the property to F, the subsequent recording after the death of H will not invalidate the deed. H in fact delivered the deed on July 7 and even though he died on July 10 this will not invalidate the conveyance because F hadn't recorded yet. Therefore, W will not be able to set the deed aside because it wasn't recorded before H's death.

3) Are there any other grounds to set aside H's conveyance of deed to F?

The Florida Constitution provides homestead protection for qualified property against the forced sale by creditors. A property qualifies as a homestead if it is owned by a person, they are domiciled there, and it meets the acreage requirements. If the property is located within a municipality it protects extends to ½ acre contiguous land and its improvements. If the property is located outside the municipality it protects 160 acres of contiguous land and its improvements. If the property has homestead protection, the constitution restrains the devise of the property if there is a surviving spouse or minor children. If there is a surviving spouse and no minor children, then the decedent may convey to the surviving spouse outright. If there are a surviving spouse and surviving minor children then the decedent may not devise the property. If the decedent is not survived by a surviving spouse or minor children he may dispose of the property how he

pleases. If there is an improper devise, the property passes as it would in intestacy. Therefore, if there is a surviving spouse and one or more lineal descendants, then the surviving spouse will get a life estate and the lineal descendants will receive a vested remainder, per stirpes. If property is titled to a husband and wife, Florida presumes a tenancy by the entirety. If there is a tenancy by the entirety there is no homestead protection. If husband and wife are married and they have either a homestead or tenancy by the entirety, both spouses have to join in the conveyance or mortgage of the property.

W can claim that the conveyance to F was invalid because the property was homestead. W will argue that she is H's surviving spouse and that she did not sign the deed and therefore the devise is invalid. F will argue that W is not protected because she never lived on the property and her name was not on the deed and therefore it was not W's homestead and she was not protected. Also, F can argue that the homestead protection was for tax purpose, not for protection against creditors however this argument will likely fail because if the property meets the requirements it is homestead property as defined above. F will argue that because W and H were in the process of getting their marriage dissolved and that she is not protected as a surviving spouse and all of H's children are adults. W will argue that because the dissolution was not final that she still is entitled to the property. W will likely prevail as long as the acreage requirements are met depending on whether the property is located in or outside the municipality.

Also, W can argue that the conveyance was improper because it violated the court order prohibiting the transfer of property whether a marital or non-marital asset belonging to one of the parties, effective as of June 25. F can argue this was an unlawful restraint on devise, however this argument will not prevail because the court entered this injunction in order to assist with the dissolution of marriage.

4) If H's will is held to be valid, what can W, Daughter (D), and Son (S) hope to obtain from H's assets following his death?

W can argue that even if the will was still valid she is entitled to claim an **elective share** because the two were not legally divorced at the time of his death. An elective share allows a spouse excluded from the will to recover 30% of the elective share estate which is larger than the intestate estate. Included within the elective estate are all transfer in property within a year preceding the decedent's death, inter vivos trust, bank accounts, etc. The charity and F will argue that W should not be entitled to take anything out of the estate because she was seeking dissolution of marriage at the time of H's death.

W can also argue that executing a will distributing all of his property was a violation of the injunction prohibiting the sale, transfer, damaging, or otherwise dissipating or disposing of any assets in the case. By executing a will, W will argue that he was disposing of his assets and therefore it should be invalid. However, this argument will not likely prevail because what is included in the estate that can be devised is not determined until after the testator's death. Also, the court's injunction is not going to prohibit a person from making a will. Therefore, this argument by W will likely fail.

Since D and S are both adults they can effectively be disinherited by their parent. However, any asset that is not devised by the will passes through intestacy and can pass to the children. Also, if the devise to F in Blackacre is viewed improper it passes

by intestacy and the children will have a vested remainder, per stirpes in Blackacre. Even though D is H's biological child and S is H's adoptive child they are treated the same in Florida and therefore any interests that they do receive will be equal.

5) On what grounds can W regain possession of the Rolls Royce?

If F is a bona fide purchaser for value (subsequent purchaser without notice of any other's interest) W may not regain the actual Rolls Royce from F. It appears that F purchased the car and if it is determined that he paid fair value for the car and had no notice of the injunction prohibiting H from selling it he may retain the car. W will argue that F knew of the injunction because F was H's friend for years and knew that H and W were going through a divorce and therefore knew that H could not sell the car.

However, since the conveyance was in violation of court order, W can claim that the conveyance was invalid. Since this sale was specifically enjoined from taking place, W can argue that F holds the car in constructive trust for her. A constructive trust is an equitable remedy the court will award if someone has title to certain property through wrongdoing, and the court enforces this to disgorge unjust enrichment and give the property to the rightful owner. W can argue that the conveyance to F was done through the wrongdoing of H because it was in violation of court order, therefore W will argue for a constructive trust to be created requiring F to convey title to her.

6) Can Wife set aside the bequest of "so much of my personal property up to a value of \$1,000" that H devised to F?

A bequest in a will has to give the personal representative guidance on who gets what property. W will argue that this particular devise, if the will is held valid, gives F the discretion to choose whichever property that he wants to compose his gift and therefore it is not proper. F will argue that the devise is ok because it limits the choice of property to H's personal property and the amount to \$1,000. Also, F will argue that since the rest of the estate was devised by residue clause to the charity that he would not be invalidating anyone else's gifts through the exercise of his discretion. Depending on the size of H's estate, W could argue that F's devise should be forfeited in order for W to be able to get her elective share. However, this argument will likely fail if H was a large estate.

Therefore, if the will is held valid, then W will not likely be able to set aside the bequest to F.

7) What is the effect of W having recorded a Notice of Lis Pendens against Rich-Acre?

A recorded Notice of Lis Pendens is a lien upon a piece of property which is enforceable against any subsequent purchaser for value. Since W recorded the notice in the county where Rich-Acre is located it will give notice to any subsequent purchaser because record notice is deemed by the court as constructive notice. Also, W attached the mutual injunction to the notice to inform subsequent purchasers of the interest.

However, since the death of H, the marriage can no longer be dissolved legally through the court. Therefore, the personal representative can seek to have the Lis Pendens removed from the property because there is no need for the injunction anymore because the dissolution of marriage is no longer active because of the death of a party. Personal representative will likely succeed in having the injunction from the judge overseeing the dissolution of marriage lifted.

Therefore, if the personal representative is able to successfully get the Lis Pendens and the injunction lifted, depending on whether the will is valid will determine who receives Rich-Acre.

Q QUESTION NUMBER 3

FEBRUARY 2011 BAR EXAMINATION – TRUSTS/ETHICS

During the past year, Harry created the “Harry Trust” designating himself as sole trustee and sole beneficiary during his lifetime. The trust specifies that upon his death, Harry’s grandchildren shall receive equal shares of the 2000 shares of ABC stock held in trust with the remainder of the other specified trust assets to be distributed equally to Harry’s two children. Harry subsequently married Ann and told her that if she survives him, she will be the beneficiary of the trust for her lifetime, but upon her death, his children and grandchildren will be the sole beneficiaries. Harry then became terminally ill and sought the assistance of Ann’s son, Alan, who is an attorney, in managing his affairs.

Attorney Alan drafted an amendment that designates Alan as successor trustee of the “Harry Trust.” The amendment is properly executed by Harry and provides that upon Harry’s death, Alan as trustee may make distributions of the trust to any person that he, in his discretion, deems appropriate. Harry is grateful for Alan’s assistance. As a display of his appreciation, Harry gave 500 shares of the ABC stock from the trust to Alan individually.

When Harry dies, Ann wants Alan, as trustee, to name her the principal beneficiary of the trust. In the alternative, Ann claims that she is at least entitled to a lifetime interest in the trust based on Harry’s promise to make her a beneficiary. Harry’s children and grandchildren oppose Ann’s attempt to take any interest in the trust. They also seek to have Alan return the 500 shares of stock to the trust for distribution to the grandchildren according to the terms of the trust.

Alan seeks advice from your firm concerning distribution of the trust assets. Draft a memo to your senior partner discussing the claims Ann and the children/grandchildren may have against the trust and the likely outcome of each. Also discuss whether Alan’s actions relating to the trust raise any ethical considerations and what steps he should have taken to avoid any potential ethical violations.

SELECTED ANSWER TO QUESTION 3

(February 2011 Bar Examination)

MEMO

To: Senior Partner

From: Junior Associate

Re: Distribution of Trust Assets and Ethical Issues

Claims of Ann/children/grandchildren against the trust and likely outcomes

- Validity of the creation of the trust

In order to create a valid trust, the following requirements must be met: there must be a settlor; the settlor must have the capacity to convey (both the intent to convey and the ability to think clearly in disposing of the property); there must be trust property (the res), which must be property that the settlor has a vested interest in and cannot be solely contingent; there must be a trustee (although a trust will not fail for want of a trustee; in Florida, a court will appoint one if there is no trustee); there must be identifiable beneficiaries; and there must be a valid/legal trust purpose. A trust that is executed with the intent to dispose of property at death must further meet the requirements of the Statute of Wills (i.e., must be in writing, signed by the testator as well as two witnesses in the presence of each other). In Florida, a trust that does not indicate whether it is revocable or irrevocable is deemed to be revocable under law (so long as trust was created post-2007).

Here, we have a settlor, Harry (H). H had the capacity to convey when he made the trust, creating the trust and designating a beneficiary and trustee. However, if the settlor is both the sole trustee and the sole beneficiary of a revocable trust, the trust is said to have failed and the property is held by the settlor. In the instant case, Harry's Trust (HT) was created designating Harry (H) as the sole trustee and the sole beneficiary during his lifetime. However, because he designated that his grandchildren shall receive the stock held in trust and remainder of specific assets, it is likely that a court would find that H was not the sole beneficiary at the time the trust was created and therefore would not fail. Later, the facts indicate that he has added a successor trustee and also added a lifetime beneficiary (Ann), and therefore H would not be the "sole trustee" or the "sole beneficiary" either -- however, the children and grandchildren will contend that such additions were invalid for the reasons that will be discussed later.

Here the settlor H has trust property at the time the trust is created -- the shares of ABC stock, as well as other assets that the facts indicate were specified. There does not appear to be any invalid or illegal purpose to this trust -- it appears that H just wanted to create a vehicle to give his descendants property after his death, which is considered a valid purpose under Florida law.

Further, it seems that H was of sound mind when he created the trust, since the facts do not indicate anything to the contrary. The mental capacity of H will come up later when he attempts to amend the trust.

- *Standing to challenge*

Any beneficiary of a trust has standing to challenge the trust, or can assert a claim that the trust must be distributed in a particular way. Therefore, each of Ann, the children, and grandchildren of H have a right to challenge the trust and assert claims.

- *Secret trust*

Ann will claim that she has a right to be the beneficiary of the trust during her lifetime because of the statement that H made to Ann after they were married. This type of statement is referred to as a “secret trust” since the trust instrument itself makes no mention of Ann in the trust. The children/grandchildren will claim that Ann is not entitled to any bit of the trust assets since she was not mentioned in the trust and it appears that the purpose of the trust was to provide certain assets to the descendants of H after his passing. Ann, however, would argue that extrinsic evidence should be permitted to show that H after marrying Ann, did in fact intend to amend the trust to provide for Ann during her lifetime, and this is not inconsistent with the purpose of the trust since the kids and grandkids would still be the beneficiaries of the rest of the trust assets after Ann dies. If Ann were to prevail on this point, a constructive trust in favor of Ann would be created.

- *Undue influence of Ann*

The children/grandchildren might also assert that H was under the undue influence of Ann at the time that he promised her that she could be a beneficiary of the trust for lifetime and that even if he did make such statements, they should be of no effect because of the undue influence exerted by Ann. The facts do not indicate whether certain elements of undue influence were present (e.g., the bargaining power of the parties, whether Ann was in such a position that she exerted control over H and that the only reason he said he would give her any interest in the trust was as a result of exerting this influence). This would be an issue for the court to decide -- ultimately, though, it does not appear that she exerted undue influence, and appears more that H simply wanted to provide for his wife after his death, so a court would likely find for Ann at this point.

- *Undue influence of Alan /capacity to convey to Alan*

Even if the undue influence claim against Ann fails, the children/grandchildren might assert the same claim against the stock given to Alan and the fact that Alan was appointed a trustee.

The grandchildren and children might claim that at the time that H gave his “gift” to Alan individually, H did not have sound mind and therefore such gift should be void. H had found out that he was terminally ill prior to the conveyance to Alan. Furthermore, they would question the amendment and the power of appointment that is provided to Alan in it. They would question the fact that at the time that Alan was made trustee by the amendment, the amendment gave him the power to “make distributions of the trust to any person that he, in his discretion, deems appropriate.” This amendment is directly counter to the purpose of the trust that was originally stated. The children/grandchildren would claim that Alan used his position of power as the attorney of H to draft an amendment providing him with certain rights (the special power of appointment in favor of anyone, even himself or his mother!) that he would not have received had he not exerted his power over H and not had undue influence over H. The court would likely

side with the children and grandchildren on this issue because it might find that there was undue influence, or that Alan did not have proper capacity to convey at the time that the amendment was executed. Therefore, the court would not permit Alan to make such appointments contrary to the intention of the settlor as originally stated in the trust, and Alan would not be permitted to appoint Ann the primary beneficiary of the trust, despite her urging. Furthermore, if the gift of stock to Alan were to stand, the gift to the grandchildren would partially adeem and the grandchildren would be left with only 1500 shares (the 2000 minus the 500 that had been given to Alan) to divide among themselves. This is because the gift to the children was a specific devise of specified stock ("ABC stock") and, under Florida law, if the stock were not left in the trust at the time that the settlor died, then the gift would adeem to the extent it no longer exists. However, the court would likely side with the children/grandchildren on this point and the stock would be held in trust for the benefit of the children/grandchildren.

- Trustee's duties/removal of trustee

The children and grandchildren would likely contest the fact that Alan is a trustee (for the reasons discussed above), as well as the way that the trust has been managed by Alan and Ann and ask that they were removed as trustees. A trustee is required by law in Florida to avoid self dealing, act prudently in investment decisions and owes a duty of good faith and loyalty. A trustee who has particular experience in managing a type of asset is held to a higher standard of care than someone without such experience. In Florida, where there is more than one trustee, the trustees must make decisions jointly and are not permitted to divide up the administration of the trust among themselves without all taking an active role in trust administration. Here, the children/grandchildren might petition for the removal of Alan as a trustee because (even if the court found he were validly made a trustee, which is not likely) he has a conflict of interest that prevents him from acting fairly to the other beneficiaries. The beneficiaries might petition the court to remove Alan as a trustee and appoint a successor trustee on account of what they would claim was unfair dealing and bad faith. The court might find that Alan should be removed if Alan were in fact to exercise a power of appointment in favor of his mother, Ann, or if he did not return the stock to the trust to avoid any issues of unfair dealing.

- Overall distribution

Given the discussion of all the issues above, the most likely course of action is as follows: if all claims were made as discussed above, Alan would likely be ordered to return the stock to the trust; Ann would be made a beneficiary of the trust but only for the course of her lifetime; the amendment to the trust providing for a power of appointment to Alan would be deemed invalid.

Ethical issues

In addition to the distribution of the trust assets as discussed above, there are a number of ethical issues to consider. Under the rules of professional responsibility, Alan as an attorney must follow a prescribed course of dealing in certain situations. The fact that Alan is an attorney means that he is subject to the rules regulating the bar regardless of whether he acts in his role as an attorney or is acting in another capacity at the time he takes such actions.

When Alan took on the representation of Harry, he should have known that there would be a conflict of interest regarding his representation of Harry and the fact that Harry had just married Alan's mother, Ann. When an attorney sees a conflict of interest, that attorney is under a duty to either (i) not represent the client, if the attorney thinks that his professional judgment would be compromised through such representation, or (ii) may represent such client, if the issue is fully disclosed and the client consents upon consultation. In the given facts, it does not appear that Alan has discussed any issues with Harry prior to accepting his representation of H for H's trust. It seems from the facts that Alan has let his relationship with his mother get in the way of his professional judgment and therefore that taking on the representation of H in the first place was improper.

Further, Alan is facing an ethical issue regarding the receipt of the stock from H's trust -- this may be a violation of an attorney's ethical issues when dealing with a transaction in which the attorney is an interested party. An attorney must not engage in a transaction with a client unless the terms of the transaction are clearly stated and fair, the attorney clearly states that he does not represent the other party in the transaction, and he recommends in writing that the other party seek representation in the action. Here, Alan received an interest in the res of the trust when he received 500 shares which he knew to be trust property. The bar would likely inquire into the basis of this transaction since it raises a host of ethical issues under the rules regulating the bar.

Next, was the payment to Alan payment of his fees or was this simply a gift to Alan as a thank you? Either way, this could be problematic. If the payment to Alan was meant to be for attorney's fees, such amount should have been clearly set out at the beginning of the representation since it is not clear that Alan has ever represented H before. When an attorney takes on a new representation, the amount of attorneys' fees paid should be clearly stated (preferably in writing) and it should be fair. There are certain guidelines for contingency fees (between 15-40%) but it does not appear that this was a "contingency fee" (although one could argue that the fee was for having completed the amendment to the trust document. If the payment to Alan was a gift, there is still an ethical issue because an attorney may not receive a gift of high value in addition to his legal fees, unless such gift was provided by a direct family member. In this case, H was the husband of Alan's mom, but he was not a direct relative of Alan. Alan could face the ethics committee for having received such gift.

Last, an attorney serving as a trustee owes duties to the trust (as discussed above). Alan's dealings with the trust as trustee, as already discussed above, raise ethical considerations concerning his duty of loyalty and good faith dealing, for which he could be punished by the bar.

Q QUESTION NUMBER 1

JULY 2011 BAR EXAMINATION – CONTRACTS/REAL PROPERTY

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

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

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

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

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

The original contract between Contractor and Banker

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

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

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

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

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

The Agreement to sell the home to Banker's Mother

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

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

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

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

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

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

Remedies

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

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

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

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

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

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

Contractor v. Banker – Misrepresentation

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

Attorney's Fees

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

QUESTION NUMBER 2

JULY 2011 BAR EXAMINATION – FAMILY LAW/ETHICS

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

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

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

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

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

Prepare a file memo that discusses the following issues:

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

SELECTED ANSWER TO QUESTION 2

(July 2011 Bar Examination)

Custody of Daughter (D):

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

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

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

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

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

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

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

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

Distribution of the Assets:

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

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

1) Home:

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

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

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

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

2) Money Market Account:

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

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

3) Harry's Checking Account:

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

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

4) \$50,000 Loan:

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

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

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

Impact of Mortgage in the Context of Family Law:

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

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

Wilma's Proposed Payment for Services:

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

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

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

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

Q QUESTION NUMBER 3

JULY 2011 BAR EXAMINATION – TORTS/ETHICS

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

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

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

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

SELECTED ANSWER TO QUESTION 3
(July 2011 Bar Examination)

To: General Partner

From: Associate

Re: Son's claims for golf cart injuries

Son v. Mother

Negligence

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

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

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

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

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

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

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

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

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

Damages

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

Defenses

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

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

Battery

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

Son v. Golf Resort

Negligence (supra)

Duty

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

Breach

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

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

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

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

Damages: Satisfied (*supra*)

Defenses:

Comparative negligence (supra)

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

Permissive Use

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

Damages

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

Professional Responsibility

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

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

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

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

PART II - SAMPLE MULTIPLE-CHOICE QUESTIONS AND ANSWERS

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

The answers appear on page 45.

MULTIPLE-CHOICE EXAMINATION INSTRUCTIONS

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

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

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

23 SAMPLE MULTIPLE-CHOICE QUESTIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SAMPLE MULTIPLE-CHOICE QUESTIONS WITH PERFORMANCE TEST COMPONENT

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

Florida Statutes 47.011 Where actions may be begun.
Actions shall be brought only in the county where the defendant resides, where the cause of action accrued, or where the property in litigation is located.

Florida Statutes 47.021 Actions against defendants residing in different counties.
Actions against two or more defendants residing in different counties may be brought in any county in which any defendant resides.

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

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

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

ANSWER KEY FOR MULTIPLE-CHOICE QUESTIONS

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