

Florida Board of Bar Examiners

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Florida Bar Examination Study Guide and Selected Answers

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

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PART I – ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2012 AND JULY 2012 FLORIDA BAR EXAMINATIONS

ESSAY QUESTIONS AND SELECTED ANSWERS

Part I of this publication contains the essay questions from the February 2012 and July 2012 Florida Bar Examinations and one selected answer for each question.

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

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

ESSAY EXAMINATION INSTRUCTIONS

Applicable Law

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

Acceptable Essay Answer

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

Q **UESTION NUMBER 1**

FEBRUARY 2012 BAR EXAMINATION – FLORIDA CONSTITUTIONAL LAW

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. The admissibility of the cocaine

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

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

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

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

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

Q QUESTION NUMBER 2

FEBRUARY 2012 BAR EXAMINATION – REAL PROPERTY/TORTS/ETHICS

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

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

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

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

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

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

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

SELECTED ANSWER TO QUESTION 2

(February 2012 Bar Examination)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Q

QUESTION NUMBER 3

FEBRUARY 2012 BAR EXAMINATION – TORTS

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

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

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

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

SELECTED ANSWER TO QUESTION 3

(February 2012 Bar Examination)

False Imprisonment

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

Shopkeeper’s Privilege

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

Conversion

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

Defamation/Slander

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

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

Battery

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

Assault

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

Intentional Infliction of Emotional Distress

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

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

Malicious Prosecution

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

Respondent Superior/Vicarious Liability

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

Q QUESTION NUMBER 1

JULY 2012 BAR EXAMINATION – CONTRACTS/ETHICS/FLORIDA CONSTITUTIONAL LAW

On January 30, Buyer made an offer to buy Seller's Florida home for \$200,000, which Seller owned in his name and where he lived without his wife and children for three months annually. On February 2, Seller made a counteroffer to Buyer in the amount of \$225,000, which provided that Seller would hold the offer open for ten days. Seller's offer required Buyer to deliver a deposit in the amount of \$25,000 upon Buyer's execution of Seller's offer, but Seller's offer was not supported by any separate consideration. On February 4, Buyer made an offer in the amount of \$212,500. Seller did not respond to Buyer's February 4 offer. All offers and counteroffers were made in writing.

On February 6, Buyer signed Seller's February 2 counteroffer in the amount of \$225,000, which also contained all other material contract terms for the sale. Buyer's Attorney then delivered the contract to Seller's Attorney with the requisite \$25,000 deposit check. In accordance with Seller's instructions, Seller's Attorney deposited the check into Seller's Attorney's trust account, which account included funds from other clients as well as from Seller's Attorney's own business venture. The balance of Seller's Attorney's trust account was over \$750,000 at the time.

On February 8, Seller sent Buyer a written amendment to the \$225,000 contract that increased the purchase price to \$250,000 and also listed certain personal property items included with the sale. Buyer executed the amendment but wrote in four additional personal property items to be included as well. Buyer then placed her initials by all four additional personal property items and returned the executed amendment to Seller. Seller initialed some but not all of Buyer's additions and returned the amendment to Buyer without otherwise indicating Seller's acceptance of those terms. Buyer then proceeded to prepare for closing.

The contract's remedies provision entitles Seller to keep Buyer's deposit (with interest) if Buyer defaults, however, upon Seller's default, Buyer is entitled to either a return of the deposit (with interest) or specific performance.

Seller has refused to proceed with the sale. Please discuss Buyer's potential claims, Seller's defenses, and the likely outcome on this matter. Please also address any ethical issues presented in this case.

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

This question concerns a contract for the sale of real property which is governed by common law rather than the UCC. To have a valid contract, there must be an OFFER, ACCEPTANCE, CONSIDERATION and NO VALID DEFENSES. Contracts for the sale of real property are subject to the statute of frauds. Under the statute of frauds, contracts for the sale of real property must be in writing and signed by the party to be charged in order to be enforceable.

The main issue is whether a valid contract was formed between buyer and seller.

BUYER'S JANUARY 30 OFFER

This is a valid offer. If accepted by Seller, a valid contract would have been formed. However, the offer was not accepted (see below)

SELLER'S FEBRUARY 2 COUNTEROFFER

A counteroffer is considered a rejection of the original offer and the making of a new offer. By making a counteroffer, the Seller effectively rejected Buyer's January 30 offer (which terminates the offer) and made a new offer with different terms. The mirror image rule dictates that an acceptance must match exactly the terms of the offer in order to be an effective acceptance. Because Seller's counteroffer changed the terms of Buyer's original offer, the mirror image rule is not satisfied, and Buyer's original offer is rejected.

Issue – is Seller's promise to keep the offer open for 10 days enforceable? Rule – In Florida, consideration can be either a legal benefit to one party OR a legal detriment to the other. A promise to keep an offer open for a specified amount of time is considered an option contract and is only enforceable if valid consideration exists for the option. This is different than under the UCC which uses the firm offer rule if the seller is a merchant. The UCC firm offer rule does not apply here. Application – Buyer will argue that Seller's counteroffer included an option to contract to keep the offer open for 10 days. Seller will argue that the promise to keep the offer open was not supported by valid consideration. Conclusion – Here, there does not appear to be any additional consideration for the option contract, so the promise to keep the offer open is not enforceable.

BUYER'S FEBRUARY 4 COUNTEROFFER

A counteroffer is considered a rejection of the previous offer and the making of a new offer. By making a counteroffer, Buyer effectively rejected Seller's February 2 counteroffer (which terminates the offer) and made a new offer with different terms. The mirror image rule dictates that an acceptance must match exactly the terms of the offer in order to be an effective acceptance. Because Buyer's counteroffer changed the terms of Seller's previous counteroffer, the mirror image rule is not satisfied, and Seller's February 2 counteroffer is rejected.

Issue – did Seller accept Buyer’s February 4 Counteroffer? Rule – The terms of the offer control the method of acceptance. Silence is generally not considered acceptance. Application – Here, Seller’s failure to respond would not be considered acceptance. Conclusion – Seller did not accept Buyer’s February 4 Counteroffer.

BUYER’S FEBRUARY 6 SIGNATURE

The January 30 offer and February 2 counteroffer were both rejected. The February 4 counteroffer was not actually rejected, but it was also not accepted.

Issue – Did Buyer accept Seller’s February 2 counteroffer? Rule – Once an offer is rejected by the offeree, it can’t later be accepted. Application – Buyer will argue that by signing the February 2 counteroffer on February 6, he effectively accepted Seller’s Counteroffer. Seller will argue that Buyer rejected the February 2 counteroffer by making the February 4 counteroffer. Conclusion – Seller’s argument is stronger – Buyer cannot accept Seller’s February 2 counteroffer because he already rejected it.

Issue – Did Buyer make a new offer to Seller by sending back the signed February 2 counteroffer with the deposit check? Application – Seller will argue that Buyer could not accept the February 2 counteroffer on February 6 because he already rejected it. Buyer will argue that by returning the signed February 2 counteroffer with the deposit check, he effectively made a new counteroffer which Seller was free to accept or reject.

Conclusion – here, Buyer’s argument is stronger and this will probably be considered a new counteroffer.

SELLER’S ACCEPTANCE

Issue – Did Seller accept Buyer’s February 6 offer? Rule – The terms of the offer control the method of acceptance. If not specified in the offer, the offeree may accept by any reasonable method. Application – Seller will argue that he did not accept because he did not affirmatively manifest assent to the contract. Buyer will argue that Seller accepted by instructing his attorney to deposit the check and by later sending an amendment to the contract. Conclusion – Buyer’s argument is stronger and Seller will be considered to have accepted Buyer’s February 6 counteroffer. Therefore, Buyer and Seller have a valid contract as of February 6 for the sale of the house for \$225,000.

FEBRUARY 8 AMENDMENT

Issue – Is the February 8 Amendment valid? Rule – at common law, contract modifications must be supported by new consideration. In Florida, consideration is a bargained for exchange and can be a legal benefit to one party or a legal detriment to the other. The terms of acceptance must match the terms of the offer under the mirror image rule. Application – The February 8 amendment consisted of a price increase in exchange for certain listed personal property. Therefore, the consideration requirement is satisfied. However, Seller will argue that the terms of the acceptance were different than the terms of the offered amendment because Buyer wrote in four additional items of personal property, and that this constituted a counteroffer. Seller’s initialing of some but not all of the items constituted another counteroffer which was never accepted by Buyer. Seller’s argument is stronger – although there is valid consideration for the

amendment, there was never a meeting of the minds due to the mirror image rule, so the amendment is probably not included in the contract.

HOMESTEAD PROPERTY

Issue – is this property subject to homestead protection? Rule – homestead property is subject to special rules designed to protect the spouse of the owner. Homestead property cannot be sold without the consent of the owner's spouse. Application – this is probably not homestead property because it is not the Seller's primary residence – he only lives there for one quarter of the year. Further, his wife and children do not live in the home. Conclusion – this house is not subject to homestead protection and Seller can sell it without his wife's consent.

BREACH

Issue – did Seller breach the contract? Rule – There is a valid enforceable contract if there is an offer, acceptance, consideration and no defenses. Application – Seller will argue that there is no valid contract for the reasons discussed above. Buyer will argue that there is a valid contract for the reasons discussed above. The contract is in writing and satisfies the statute of frauds. Seller has no valid defenses. Conclusion, as discussed above, there is a valid contract for the sale of the house at \$225,000, and Seller's refusal to proceed with the sale is a breach of that contract.

BUYER'S CLAIMS

Buyer will sue Seller for breach of contract. Buyer can seek the return of his \$25,000 deposit plus damages resulting from the breach, OR specific performance. Specific performance is an equitable remedy that is available when remedies at law are insufficient. Remedies at law are insufficient when the subject of the contract is unique, such as real property. Therefore, Buyer would likely win in a suit for specific performance. Alternatively, Buyer would be entitled to the return of his \$25,000 plus any damages caused by Seller's breach. Damages would be calculated based on the market value of the property at the time of the breach minus the contract amount.

However, as discussed above, the February 8 amendment will not be enforceable. The contract price will remain 225,000 (NOT 250,000) and the personal property will not be included.

ETHICAL ISSUES

Attorneys are prohibited from comingling their personal funds with funds belonging to clients (funds in the trust account). Exception – attorney's may place enough of their own funds in their trust account to cover small bank fees. Attorneys are prohibited from allowing overdraft protection on their trust accounts. Here, Seller's attorney has committed a serious ethical violation by comingling his trust account with the funds from his own private business venture. Attorney is subject to discipline for this violation.

Q QUESTION NUMBER 2

JULY 2012 BAR EXAMINATION – FLORIDA CONSTITUTIONAL LAW/REAL PROPERTY

Ann, Bob, Cynthia, and Derek inherited equal one-fourth shares of an abandoned building in Florida. Shortly after receiving her one-fourth share, Ann transferred it by deed to her husband, Anthony, and herself “as husband and wife.” Bob, although married to Barbara, retained his share in his own name. Cynthia is single. Derek is divorced.

Subsequently, a child was severely injured while playing in the building. The owners have been advised by their defense counsel to expect a large judgment against them. There is no applicable liability insurance.

Ann and Anthony own a mobile home on a one acre lot in the city of Apopka, Florida, where they live six months out of the year. The remaining six months of the year they live with their oldest daughter in North Carolina. They also have a modest savings account in the name of Anthony and Ann, “as husband and wife.”

Bob and Barbara own and live in a very luxurious home on a 10 acre lot in unincorporated Brevard County. They also have a savings account in the name of Bob and Barbara, “as husband and wife.” Additionally, they have a collection of valuable artwork they have accumulated during their marriage.

Cynthia owns and lives in a condominium in Clearwater. She and her boyfriend, Carl, also own a half-acre undeveloped, vacant parcel of land in Citrus County as joint tenants with a right of survivorship. They are getting married next month and intend to build their marital home on the Citrus County lot.

Derek lives in a rental apartment in Daytona Beach, but still owns in fee simple his former marital home in Deltona. His ex-wife and their two minor children (ages 5 and 8) still live there.

You have been retained by the owners to advise them of the status of their above-mentioned assets should collection efforts be eventually undertaken as a result of this pending judgment. Do not discuss the asset of the abandoned building where the child’s injury occurred. Prepare a memorandum setting forth your advice. Do not discuss any bankruptcy laws in your memorandum.

SELECTED ANSWER TO QUESTION 2

(July 2012 Bar Examination)

Memorandum

Because Florida has done away with joint and several liability, each landowner will likely have a judgment entered against them for 1/4 of the amount of the total judgment, unless the jury finds that one party had a greater responsibility. The property is likely to be held by tenancy in common between the 4 grantees. The owners hold the property as tenants in common as follows:

1/4 ownership by Ann (A)

1/4 ownership by Bob (B)

1/4 ownership by Cynthia (C)

1/4 ownership by Derek (D)

After a judgment is rendered in Florida, it is not a lien on real property unless a certified copy of the judgment is recorded in the county in which the real property is located. Additionally, a judgment is not a lien on personal property unless a certified copy is filed with the Secretary of State and a Judgment Lien Certificate is issued. The Judgment then becomes a lien on all non-exempt personal property located in the state that is now or in the future owned by the judgment debtor. Assuming that the judgment is properly recorded with the Secretary of State and in the counties where the various pieces of real property are located, the following is the likely result.

Collection Efforts Against A:

Generally a testamentary gift or inheritance by one spouse during a marriage is considered non-marital and held only by that spouse. However, in Florida, property that is acquired during a marriage in the name of both spouses is presumed to be held in Tenancy by the Entirety (TBE). TBE is a form of joint ownership that is similar to joint tenancy in that it includes the right of survivorship and requires the unity of (1) title; (2) interest; (3) time; (4) instrument. Additionally, property held in TBE is exempt from the execution and forced sale of creditors of only one spouse. The TBE ownership is considered that of a marriage and can only be severed by death, divorce, consent of both parties to the marriage to sell or mortgage, or execution by a joint creditor.

When A transferred her 1/4 share to Anthony and herself, a presumption arose that the property was held in TBE, unless the parties expressly provided otherwise. In Florida, a straw-man is not required to transfer property from one spouse and create a TBE. Because it was held in TBE when the child was injured, both A and Anthony are likely to be held liable for the judgment. As such, property held by them as TBE may be subject to execution by the creditor and forced sale.

The money that is held in the savings account is in both names and presumed to be held in TBE. Therefore, without some reason for its protection, the money may be garnished by the judgment creditor. However, in Florida, wages of the head of household are exempt from garnishment for 6-months after they are received, even if placed in a bank. If the funds are commingled, they lose their protection to the extent they cannot be traced. Therefore, one of the parties would have a right to claim exempt the money that could be traced to their wages if they so claim after a writ of garnishment

is issued and they can establish that they are the head of household (which requires a showing of providing 50% or more support to a dependent, the other spouse in this instance). Additionally, in Florida, homestead exemptions (not real property) include a \$1,000 exemption for personal property. Therefore, they may claim this exemption as well.

A should also argue the mobile home on the one acre lot in Apopka is the couples homestead. Article X Section 4 of the Florida Constitution exempts from execution and forced sale by creditors up to 1/2 acre of contiguous land within a municipality and up to 160 acres of contiguous property outside of a municipality if the property is a homestead. To establish a homestead, an individual must be a Florida resident and must have intent to establish that place as their home and actually live there. There is a strong presumption of protection of homestead and courts construe the law to permit the claiming of a homestead where the facts can establish one. Once homestead is established, it may be abandoned if the homesteader leaves the property with the intent to no longer make it their regular abode.

In the instant case, A and Anthony may have a few issues with the homestead. First, the property is located within a municipality and is more than 1/2 acre. Therefore, at least some of the property may not be protected as homestead. However, as stated above, the courts liberally construe the homestead rights in Florida, and the result will likely be that, if it is found that the property is within a municipality and more than one acre, the court will partition off 1/2 acre for execution and sale and allow the couple to keep the remaining 1/2 acre as their homestead.

Secondly, the couple does not live in the home full-time. They split their time nearly 50/50 between North Carolina and the property. If the homestead was established prior to the couple's custom of visiting their daughter during the summer, it is likely that the court will find that their actions were insufficient to find an abandonment. Even if they have never continually lived in the home, the ownership, taken with other factors including their cohabitation in the home for a number of months and the fact that they return to the home without their daughter every winter, will still likely be enough to establish the homestead and, therefore, protect the property from the creditor.

Finally, whether the mobile home is titled separately or is annexed to the property is an important question. If it is titled separately, it may be considered a motor vehicle that does not qualify as a homestead. If it is, the couple may attempt to claim the exemption for a personal vehicle up to \$2000, but the court will likely determine that a mobile home does not qualify. If the title has been retired, however, it is sufficiently annexed to the property to be considered part of the homestead estate.

If the court does not find the home is homestead property, the TBE ownership will not protect the couple because the judgment creditor is a joint creditor. Therefore, the lien will attach when it is filed in the property records and the creditor may execute and foreclose the lien, effecting a judicial sale. The couple will have the right, however, to pay off the lien before the sale under the doctrine of equitable redemption.

Bob's Property:

B did not transfer his ownership in the abandoned building to his wife and, for the reasons discussed above, it is likely that he will be considered the sole owner of the

property (inheritance by spouse during marriage is not marital property and no transfer to spouse occurred in facts). Therefore, child is not a joint creditor of their marriage. Because the child is not a joint creditor, the property held by the couple in TBE is not subject to execution by a creditor of B's alone. Therefore, the savings account which is presumed to be owned in TBE (See above) will likely not be subject to garnishment by the child. If it is, the same arguments may be made regarding Florida protections for head of household wages and personal exemption (see above).

If the home in Brevard is owned in TBE or in Barbara's name, it cannot be executed on and sold (see above). Even if it is owned solely by B, however, the home will still be a protected homestead (see above for analysis). The facts state that the home is less than 160 acres and is in an unincorporated area. While it may be "luxurious" there is no value limitation on a homestead in Florida. Any value that is put into the homestead property is protected from being reached by creditors. Both B and his wife have likely established the property as their homestead, and it therefore protects the house from execution, but even if only one had a homestead right, that would be sufficient (see discussion in section regarding D, below).

The Artwork is likely not protected by the homestead (although it may be exempted up to \$1000 for their personal property exemption). However, if property is acquired during the marriage with marital funds it is presumed to be marital property and held as TBE. If the artwork qualifies as marital property owned in TBE, it will also be exempt from sale of a creditor of B only.

Cynthia's Property:

The condo in Clearwater is likely C's homestead. Florida courts' have applied the homestead to a number of types of homes (one case held that a houseboat was sufficient to qualify as a homestead if it was immobile). So long as the other requirements of establishing a homestead exist (see above) the condo will be exempt from sale.

The 1/2 acre of land in Citrus County owned as Joint tenancy (JT), however, will not qualify as a homestead. A party may have only one homestead and it is a requirement that party live there and establish homestead prior to the attaching of the lien by a judgment creditor (lien attached at time of recording as explained above). The facts indicate that C does not live on the property, and it is vacant. However, because the property is held as JT, the creditor may only attach C's interest. Her boyfriend's interest will be unaffected by the attachment. Because Florida is a lien theory state, the lien will not sever the JT and the creditor must execute and sue for partition to sever the JT. If C marries before the certified copy is recorded in Citrus County, they could retitle the property in both names after the marriage and created a TBE, this would likely protect the entire property (see above) but may cause issues with Florida's Uniform Fraudulent Transfer Act if it was done with actual or constructive intent to defraud the creditor, especially because Carl would not be considered a bona fide purchaser for value (BFP) because he did not pay for the interest and would therefore not cut off the rights of the creditor to reverse the transaction.

Derek's Property:

Derek had established a homestead in the home in Deltona, however, he likely abandoned it when he moved out and got an apartment. Because he is in a rental apartment, that is not a homestead as he has no interest that could be attached by the creditor. If he abandoned the Deltona homestead, he will not be able to claim it as HIS homestead (see above). However, the Homestead rights created by the Florida Constitution are construed to protect the "family home." Therefore, the property is likely the homestead of D's ex-wife and child. A person, especially a minor child doesn't have to own the property to have homestead protections, the protections simply must exist prior to the lien on the property. Here, the fact that the minor's and the ex-wife live in the home will be enough to protect the home from sale based on their homestead rights, at least until they abandon the homestead. Florida follows a notice statute for interest in land and the creditor may argue his lien is sufficient because there was no notice that the homestead rights existed in the children or wife. He will argue he is a BFP that took without notice. In Florida, if there is a property right not recorded, it gives rise to the presumption that a subsequent BFP took without notice. However, case law requires a BFP to go inspect the property and here, that would have shown the children and ex living there. Further, the judgment creditor is not a BFP and therefore will not win in as against the wife and children upon a claim that he took the property without notice, because he did not give value. Judgment creditors, in Florida, are not considered BFPs. A court may grant the judgment creditor a lien, but prohibit him from foreclosing until the children reach the age of majority or they abandon the homestead. Therefore, D's home is probably protected, additionally, because he has no homestead of his own, D is likely entitled to exempt an additional \$5K of personal property from execution under Ch. 222, Fla. Stat.

Q

QUESTION NUMBER 3

JULY 2012 BAR EXAMINATION – TRUSTS

Samuel is a Florida resident. Five years ago, Samuel finalized a divorce and is now single. Samuel has two adult children, Brenda and Brian, from his prior marriage.

Two years ago, Samuel called his friend, Thomas, and left the following message on Thomas's voicemail: "Thomas, you have been such a great friend since we were 11 years old. You are the only person that I can trust. So I am going to give you all of my ACME stock to hold in trust for my two children until the stock is gone. I want you to liquidate the stock, as necessary. Please make monthly distributions of \$10,000 to Brian. As for Brenda, you can make \$10,000 monthly distributions to her in your discretion. You can also make \$5,000 distributions to one charity in your discretion as you may deem appropriate. Brian and Brenda cannot voluntarily or involuntarily transfer their interests in this trust. Also, this trust will be irrevocable. Will you do me this favor?"

That same day, Thomas called back Samuel and, without modification, accepted Samuel's request to hold the stock in trust. Samuel did not put anything in writing, but Thomas did save the voicemail. Upon Thomas's acceptance, Samuel immediately transferred all of his ACME stock, valued at \$5 million dollars, to Thomas. Thomas immediately began making \$10,000 monthly distributions to both Brenda and Brian. Six months ago, Thomas began making \$5,000 monthly distributions to his favorite charity called "Charity Foundation." At that time, Thomas also began taking a 10 percent fee on the distributions (or \$2,500 per month) as compensation for his time and payment of his expenses related to the management of the trust.

Credit Co. recently obtained a judgment against Samuel, Brian, and Brenda for monies owed on a defaulted loan. Brenda has also fallen behind in her court-ordered support payments to her ex-husband, Hubert. Credit Co. and Hubert are seeking to exercise their rights to collect. Brenda and Brian are demanding that Thomas cease making distributions to Charity Foundation.

Thomas came to your law firm seeking advice on how to proceed in light of the various claims and demands being made. The senior partner requests that you prepare a legal memo with your reasoning and conclusions as to the following issues:

- the validity of the trust;
- the claim of Credit Co.;
- the claim of Hubert;
- the demand of Brenda and Brian to cease distributions to Charity Foundation; and
- the 10 percent fee being taken by Thomas.

SELECTED ANSWER TO QUESTION 3

(July 2012 Bar Examination)

LEGAL MEMORANDUM

TO: Senior Partner

FROM: Junior Associate

DATE: July 24, 2012

RE: Reasoning and Conclusion as to Questions Raised by Thomas

There are two types of trusts: (1) express and (2) implied. Express trusts are created by the settlor's expressed intention to create the trust relationship and are generally categorized as private or charitable trusts. The trust relationship is a legal relationship where one party holds legal title to property, pursuant to a fiduciary duty to manage and distribute the trust property for the benefit of a third party. Private trusts are for certain identifiable beneficiaries, where a charitable trust must be for a reasonably large unidentifiable group of the public and must be for a charitable purpose. Implied trusts are not really trusts but equitable remedies imposed by the courts. A resulting trust is a reversionary interest based on the presumed intent of the settlor. A constructive trust is imposed to prevent unjust enrichment due to fraud or wrongful conduct. Under a constructive trust, the trustee's only duties are to deliver the trust property to the person who would have taken it absent the wrongful conduct. Trusts in Florida are revocable unless expressly irrevocable.

1. The Validity of the Trust

A valid private trust requires: (1) a settlor; (2) who delivers (3) legal title to trust property; (4) to a trustee with enforceable duties; (5) for the benefit of beneficiaries; (6) with the present intent to create a trust relationship; and (7) a valid purpose. A settlor is a property owner with the capacity to convey property. Here, Samuel is the settlor. Nothing in the facts suggests that he cannot convey his stock. If an inter—vivos (created during the settlor's lifetime) trust is created in favor of a third party, then the settlor must deliver the property to the trustee. No delivery is needed when the trust is testamentary (effective at death) or when the settlor is the trustee. Here, Samuel was attempting to create an inter-vivos trust in favor of third parties (his two children) and so delivery was necessary. Samuel did in fact deliver property; his stocks, to Thomas (T). Trust property must be certain and identifiable, it cannot be a mere expectancy. Any property capable of being conveyed will satisfy this requirement. Here, Samuel's interest in his stock was certain and identifiable, and he delivered legal title of it to T. T was named the trustee and he had enforceable duties. A trust must have a trustee of legal age and capacity to enter into K's. Here, there is nothing to indicate that T was not an adult or lacked capacity. A trust will not fail for lack of a named trustee, or if the trustee disclaims the position or resigns. Instead, if another person is named in the trust instrument they will be appointed trustee, or a court will appoint one. Also, a settlor can be both the settlor and trustee. The only prohibition is on a person being the sole

trustee and the sole beneficiary, as there must be someone to enforce the trustee's fiduciary duties. Here, T appears to be a valid trustee. A trustee must also have duties. Here, T had three duties: (1) to make mandatory distributions to Brian; (2) to make discretionary distributions to Brenda; and (3) to select a charity to give distributions to in his discretion. Next, Samuel named specific and identifiable beneficiaries. Therefore, it appears it was his goal to create a private and not a charitable trust. A trust must contain ascertainable beneficiaries. A class can satisfy this requirement, as long as its members are definite. Here, naming Brenda and Brian satisfied this requirement. Samuel also told T he could select a charity of his choice to make a distribution to. This appears not to be an ascertainable beneficiary. However, under Florida law, a settlor may give the trustee discretion to select a beneficiary from an indefinite group of beneficiaries. Here, Samuel gave T the ability to select a specific charity (which will be ascertainable) from an indefinite group (charities). This is valid under Florida law as long as T exercises it within a reasonable time. Here, T exercised this power after a year and a half. Brenda and Brian may have an argument that this was not a reasonable amount of time. If they succeed in this argument, then a court would impose a constructive trust in their favor, as they would have been the ones to take the property if the power was not granted (see rule for constructive trust above). The settlor must have the present intent to create a trust relationship; this means he must intend to convey legal ownership on one party to manage the property for the benefit of the other. Here, Samuel appears to have intended to give his stock to T to manage on behalf of Brian and Brenda. An argument could also be made though that he lacked the requisite intent. His words "will you do me this favor?" could be construed as prefatory language which does not satisfy the intent element. However, a court would likely find this language was dealing with whether T would serve as trustee, and was not prefatory language. Lastly, a trust must have a valid purpose. This is liberally construed and means it must be a legal purpose and cannot violate public policy. Examples of trust purposes that have been found to violate public policy are: (1) restraints on the ability to enter into a marriage; (2) restraints on freedom to practice one's religion; (3) encouraging divorce; and (4) encouraging the commission of a crime. Here, Samuel's purpose for the trust appears to have been to provide support to his children and protections from their creditors by creating a spendthrift trust (see discussion below). This is likely a valid purpose.

Although this is likely a valid trust, there are several issues that should be discussed as to its enforceability. First, the Rule Against Perpetuities (RAP) applies to trusts in Florida. In Florida, unvested interests in a trust will fail unless: (1) they are certain to vest within 21 years of a life in being at the time the instrument becomes effective; or (2) it actually vests within **360** years of creation. Here, Brenda and Brian's interests are vested because they are ascertainable named beneficiaries and there are no conditions precedent to them taking their interest. Consequently, RAP does not apply. Next certain trusts must be in writing and satisfy the Statute of Frauds. A trust conveying an interest in **real property** must be in writing and satisfy the Statute of Frauds. Here, if the trust was for real property it would likely be invalid, as it was an oral trust captured on T's answering machine. However, it was for bonds. An oral trust for personal property can be valid in Florida if shown by clear and convincing evidence. Although normally this is a high burden, it could likely be established here because T saved the voicemail. Further, nothing in the facts indicate that Samuel died, and therefore he could testify as to his intent to create a trust, satisfying the clear and convincing

requirement. Lastly, testamentary trusts or revocable trusts containing testamentary disposition must be in writing and satisfy the formalities of the Statute of Wills. Here, if this requirement applied, the trust would fail as it was created pursuant to an oral voice mail, was not in writing and was not made before two subscribing witnesses. However, this trust was inter-vivos, as Samuel is still alive, and did not make any dispositions contingent upon his death. Therefore, it likely was not required to satisfy the Statute of Wills.

Lastly, it appears that Samuel attempted to create a spendthrift trust. A spendthrift trust prevents voluntary or involuntary alienation by a beneficiary of his interest. This is included because the general rule is that a beneficiary can freely transfer his interest in the trust, subject to any conditions on it. To be valid, the provision must prohibit both voluntary **and** involuntary restraints on alienation. The effect is that the beneficiary cannot voluntarily convey his interest, and the beneficiary's creditors cannot reach his interest. Here, Samuel prohibited both voluntary and involuntary alienation, therefore creating a valid spendthrift provision. Although spendthrift provisions are restraints on alienation, they are valid and enforceable in Florida. The exception to this is that they are not enforceable against the settlor's creditors. A settlor's creditors can reach trust assets if it is a revocable trust or an irrevocable trust where the trustee has discretion to make distributions to the settlor. Here, as an irrevocable trust in favor of third parties (Brenda and Brian) Samuel's creditors would have no recourse against the trust property. In conclusion, Samuel's trust is likely a valid, enforceable, irrevocable trust in favor of a third party with a valid spendthrift provision.

2. The Claim of Credit Co.

Credit Co. has a claim against Samuel, Brian and Brenda which it wishes to enforce against the trust property. As to its judgment against Samuel, any spendthrift provision would be invalid (see rule above). However, Samuel did not attempt to create a spendthrift provision in his favor, as the trust is exclusively for the benefit of Brian and Brenda. He also expressly made it irrevocable. Consequently, Credit Co. has no claim against the trust as a creditor of Samuel. Next, Credit Co. wishes to reach the trust property as to its judgment against Brian and Brenda. Generally, a creditor of a beneficiary can reach whatever amount the beneficiary is **entitled** to. Here, if there was no spendthrift provision, Credit Co. would be able to reach the 10,000 a month distribution to Brian, because Brian was entitled to this (T had no discretion). On the other hand, when a trustee has the sole discretion of whether to make a distribution to a beneficiary, neither the beneficiary, or in turn his creditor, have any right to reach the trust res until it is actually distributed to the beneficiary. On these facts, even without a spendthrift, Credit Co. could not reach Brenda's distribution because she had no right to it; it was within the sole discretion of T whether to distribute it. However, it appears Samuel created a valid spendthrift provision (see rule above). Therefore, Credit Co. could not reach the assets of Samuel, Brian, or Brenda. However, it can reach the assets when they are distributed to the beneficiaries.

3. The Claim of Hubert

Hubert, Brenda's ex-husband is seeking to reach the trust res to satisfy arrearages in support payments owed by creditors. The general rule, is that creditors, such as Hubert, cannot reach a trust Beneficiary's interest in the trust if there is a valid spendthrift provision (see rule above). However, there is an exception to this protection for child support or alimony arrearages. Therefore, Hubert would not be prevented from reaching the trust res by the spendthrift provision. The problem is, that Brenda is not entitled to distributions. Any distributions to be made to Brenda are to be within the sole discretion of T. Therefore, Hubert cannot compel the distributions. I would advise T that whether to make a distribution to Hubert is within his sole discretion, and his decision will likely not be second-guessed by the court.

4. The demand of Brenda and Brian to cease distributions to Charity Foundation

The distribution to the charity foundation of 5,000 a month is likely permitted by the trust. Samuel advised T that he could make a 5,000 a month distribution to a charity of his choice. It is permissible to allow a trustee to select a beneficiary under Florida law (see rule above). However, Brenda and Brian could argue that this power was not exercised in a reasonable time. T waited a year and a half to exercise this power. If Brian and Brenda could show this was not a reasonable time, then a court would likely find that T no longer had the power. If T did not stop making distributions, and a court found the power did not exist any longer, the beneficiaries would have the right to get an order to compel T to stop making them.

5. The 10 percent fee being taken by Thomas

Trustees are entitled to reasonable compensation for administering a trust. The amount paid to the trustee is deducted from the trust res, ½ from principal and ½ from income. The amount of compensation can be set forth in the trust instrument. Here, the settlor's message did not set an amount. It seems that charging a 10 percent fee would be considered unreasonable. Additionally, this could be seen as a reach of T's fiduciary duty to the trust and trust beneficiaries.

A trustee owes various duties to the trust. He must act as a reasonably prudent trustee, exercising reasonable care in his administration of the trust. He must invest prudently, which is judged under the prudent investor rule. Also, he has a duty of loyalty to the trust and the trust beneficiaries. This means the trustee owes an undivided duty of loyalty to the trust and beneficiaries. The duty absolutely prohibits any self-dealing, and when committed, it constitutes an absolute wrong. The only question will be damages. Here, the beneficiaries could likely recover damages, in an action which is called surcharge. They could recover the profits the trustee was making as a result of his breach. T could raise various defenses such as: (1) the beneficiaries consented; (2) he was released by 2/3 of the trust beneficiaries; (3) his breach was ratified; or (4) reasonable reliance on the trust instrument. However, none of these defenses appear to be viable on these facts. Likely, a court would find that the fee T took was a violation of his duty of loyalty and that the beneficiaries are entitled to damages. Generally,

damages for breach of the duty of loyalty are the greater of: (1) replacing the trust property to what it would have been absent the breach; or (2) recovering the profit the trustee made from the self-dealing. Here, it seems appropriate for a court to restore to the trust res the amount in excess of a reasonable fee that the T paid himself.

If the T continued to make such distributions, Brenda and Brian as beneficiaries could seek removal of T. A court will remove a trustee for: (1) incapacity; (2) unfitness; (3) breach of duty; (4) friction between the trustee and beneficiaries that makes it impossible to carry out the trust purpose. Here, Brenda could have an argument that by seeking to have T return the unlawful fees he took, would negatively impact the likelihood that he would make "discretionary" distributions to her.

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)