

Florida Board of Bar Examiners

ADMINISTRATIVE BOARD OF THE SUPREME COURT OF FLORIDA

Florida Bar Examination Study Guide and Selected Answers

February 2017
July 2017

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 2017 AND JULY 2017 FLORIDA BAR EXAMINATIONS

ESSAY QUESTIONS AND SELECTED ANSWERS

Part I of this publication contains the essay questions from the February 2017 and July 2017 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 2017 BAR EXAMINATION – FLORIDA CONSTITUTIONAL LAW

The Charter Review Commission of Blue County, a Charter County, put the following Charter Amendment on the ballot, and it was approved by the electorate:

A Citizens Review Board (CRB) is established to investigate all allegations of officer misconduct and excessive force by the Blue County Sherriff's Office (BCSO) and its deputies. Said CRB has the power to subpoena officers, take testimony and make determinations on disciplinary actions which the Sheriff must take. The CRB shall be appointed by the Mayor and consist of five individuals who must be electors of Blue County. The identities of the members of the CRB are to be kept confidential, and the work of the CRB shall not be disclosed in order to protect the privacy of all parties. In addition to the establishment of the CRB, the County Commission shall have one additional seat, and all future amendments to this charter must pass by a 60 percent vote of the electors of Blue County.

When interviewed by the local paper after the CRB was formed following the election, the Mayor refused to identify the members of the CRB, and said the CRB was necessary to instill confidence in the operation of the BCSO because the Sheriff is an independent constitutional officer and the Mayor felt oversight was necessary. The reporter interpreted this comment to mean that the Mayor thought the Sheriff was corrupt, and published an article with the headline "Mayor calls Sheriff corrupt."

Article 21 of Blue County's Charter sets forth the process for amending the Charter as follows:

A Charter Review Commission shall be convened every four years to consider amendments to this Charter. All amendments must be approved by majority vote of the electors of Blue County.

The Sheriff objects to the creation of the CRB and sues the county. The Sheriff is outraged by the article and sues the Mayor for the "corrupt" comment. The Newspaper sues Blue County because it wants more details about the CRB and

access to its deliberations and the documents it creates. Sheriff wants to challenge everything he can in the Charter amendment.

Your firm represents Newspaper. A reporter for Newspaper is gathering information for an investigative story which will include all potential claims of Sheriff. A senior partner asks you to prepare a legal memorandum discussing the following under the Florida Constitution and Florida Law:

- a) potential claims of Sheriff against Blue County;
- b) potential claims of Sheriff against Mayor;
- c) potential claims of Sheriff against Newspaper; and,
- d) potential claims of Newspaper against Blue County.

SELECTED ANSWER TO QUESTION 1 **(February 2017 Bar Examination)**

Sheriff v. Blue County

Sheriff can probably prevent Blue County from placing the Charter Amendment on the ballot because it is unconstitutional.

Constitutional Officers

There are only a handful of constitutional officers in each county. They include the Sheriff, the Clerk of the County Court, and the Property Appraiser. These officers of the county, even in a non-charter county, have independent authority granted to them by the Florida Constitution. Any disciplinary issues for individual officers are handled at the state level. For example, the Governor is the entity that removes a Sheriff. A Charter County may enact laws that alter the standard provisions of a non-charter county, like constitutional officers.

Sheriff will claim that there is no provision within the County Charter that makes the Sheriff no longer a constitutional officer. Although the Sheriff is not completely independent, the check against the Sheriff is properly held within the legislature, the judiciary, and the state executive: not the county. The Charter Review Commission (CRC) will claim that this is a measure that can be put in front of the county electors for revision of the Charter and that the Charter is allowed, under the Home Rule Powers Act, to alter rules in favor of local governance. Sheriff will claim that this goes beyond the Home Rules Powers Act because it relates to a charter county and not to a municipality or a non-chartered county. He will add that the CRC may put forward an amendment but not one that contradicts the Florida Constitution.

Sunshine Law

Under the Sunshine Law, actions by any governmental entity must be disclosed to the public. Even communications between the county board and the county's lawyer must be disclosed to the public. This includes local boards that are granted governmental authority, as in activities that would normally be associated and reserved for government action like investigations and levying fines.

Applying the Sunshine Law to the CRC Amendment, the Sheriff will claim that the secrecy of the Citizens Review Board (CRB) fails the law. First, Sheriff will claim that CRB's members must be published. Mayor claimed that those names should be private to preserve independence. Nonetheless, Sheriff will correctly note that the secrecy of a board with governmental authority, shown by the appointment by the Mayor and the powers to subpoena and force the Sheriff to take certain actions, violates the Sunshine Law.

CRC will counter that Florida is a more expansive privacy law than the US Constitution. Art I Sec 22 allows for greater privacy for individual Florida citizens in their private lives. Sheriff will contradict that this privacy does not extend to government agents. These government agents endowed with public authority are not covered by Florida's privacy statute that has traditionally been used to protect privacy in other matters like In re T.W.

Art V and Local Government Encroachment

Article V spells out the jurisdiction of the courts in Florida. It states that the legislature is not empowered to endow judicial power to the executive beyond levying certain (as in specific) legal fines. The exception is that the legislature can establish a civil traffic infraction quasi-court system. When a governmental entity, a branch of government, takes some authority from what is rightly endowed in another branch then that is considered encroachment. Encroachment by local government, like administrative entities taking on judicial functions, has been and will be considered unconstitutional. (Broward County)

Sheriff will point out that the CRB has the power to "subpoena officers, take testimony and make determinations on disciplinary actions which the Sheriff must take." First, Sheriff will note that this goes against the independent constitutional officer analysis supra: the Sheriff is an independent county officer whose functions are separate from the County Administration and discipline of the Sheriff is endowed in the legislature, the state executive, and the court system. Second, the CRB will take on subpoena powers, a judicial function that the county administration is encroaching upon. The CRB would also issue injunctions toward the Sheriff, whether to take or not take certain actions. These injunctory powers are an issue of the courts of equity and cannot be considered by the county administration which supra is only licensed to levy certain legal fines and not equitable actions.

CRC will claim that the Charter allows the County to change county administration for the good of local governance. Sheriff will add, however, that the County Charter must abide by the constitution and that local government encroachment upon the judiciary has been and will be declared unconstitutional. If Sheriff wanted to create an internal review board that had secret proceedings to discipline officers and the power to recommend actions to the Sheriff, then that would pass constitutional muster because it is an internal governance action by the Sheriff. That is not, however, what the CRB has set up.

Mayoral Appointment

In local government in which quasi-legal decisions are made, like in traffic fines, it is unconstitutional for the Mayor to have an intimate process in the administration. For example, it has been held unconstitutional when a mayor served as the county fines determiner and also was able to allocate that money from the fines. This governmental entwinement between the city/county's executive and the judicial system will be struck down.

Here, Sheriff will claim that the CRB consists of members appointed solely by the Mayor. This is unconstitutional because the Mayor is entwined with judicial decisions for which the county's executive is barred from becoming entwined with. The CRC will counter that the Mayor is not taking any part in allocating any fines and so falls short of the prohibition on judicial powers. Sheriff will claim that committees endowed with county governmental power are to be elected by the county at large, like school board and county commission, rather than by appointment. Mayor will claim that the CRB does not have independent authority as it only can take action through the Sheriff. The Sheriff will add that its only actions are in unconstitutionally ordering the Sheriff to take action.

Ultimately, because of the Sunshine Law and the local government encroachment that occurs under the CRB, this amendment will be probably be held unconstitutional and the Sheriff will prevail.

Sheriff v. Mayor

Sheriff will sue Mayor for defamation and probably fail.

Defamation definition

In Florida defamation requires a defamatory statement against an ascertainable specific party, fault of defendant, falsity of the statement, publication, actual damages, and defamatory intent (burden changes depending upon circumstances). Slander is an oral defamatory statement against the party. Florida does not recognize slander per se, which would automatically give damages to any comment impugning the party's profession, trade, chastity if a women, or horrendous disease (leprosy or venereal). The defamatory statement must be a statement of fact rather than an opinion. A public official, if speaking in her official capacity, has an immunity for statements made. A public person in a public matter must prove that the statement is false and indicates gross negligence on the part of the speaker, or a reckless disregard for the truth or knowledge that the statement is false.

The Sheriff, as a public official, would clearly be considered a public person thus Sheriff must show gross negligence on the part of the Mayor. Before getting to the Mayor's response, the statement itself is not clear but the gist seems to be that the Mayor "felt oversight was necessary." First, this is a statement that was published when the Mayor said it in an interview with the newspaper. The statement, in the context of the CRB, was directed at the Sheriff and the department and so was directed toward a specific party. In Florida, actual damages are not presumed when the statement is published in the press. Additionally, Sheriff cannot claim slander per se supra. Therefore, Sheriff will have to show that his ability to complete his duties as Sheriff were compromised by the statement. Re defamatory intent, it is unclear whether Mayor genuinely thought that the Sheriff needed oversight. The Mayor could easily have information that warrants that opinion.

The Mayor may be able to hide under the privilege of a public official. The Mayor's statement to the local paper will probably not be considered a legal duty like a legislator in the legislature but the Mayor's comments were made regarding a County Charter Amendment and the Mayor was speaking in his capacity as a Mayor. Sheriff may be able to attack this privilege and get in the statement because the Mayor was not speaking in a public forum or as part of the ceremony of the Mayoral capacity but was instead giving an interview that was not part of the ministerial duties of Mayor.

The Mayor's best argument is that the statement was not a defamatory statement because it was merely an opinion and not a statement of fact. If the Mayor had said that the oversight was necessary because the Sheriff was taking bribes on the side, then that would be a defamatory fact. The Mayor, instead, stated that the Mayor "felt," a weak opinion word, that the department needed oversight.

Without a true defamatory statement, the defamation action will probably fail. Additionally, if the Sheriff takes the case to court the Sheriff will have to prove the falsity of the statement. It is difficult for the Sheriff to prove that the Mayor did not "feel" that the department needed oversight. Even if that were the case then the Sheriff would have to prove competence in the department which would be difficult to prove in court to a point that it proves an opinion statement incorrect. Sheriff would have to have documentation, likely outside of the Mayor's testimony, that would show that the Mayor did not think that the department needed oversight. In order to achieve the burden that the Mayor stated a defamatory fact against the Sheriff in gross negligence as to the veracity of the claim, the Sheriff would run against the same evidentiary hurdle.

Ultimately, the Sheriff will probably fail in his case because the statement was an opinion rather than a defamatory statement of fact and because the Sheriff will have a hard evidentiary hurdle in proving defamatory intent (fault of defendant).

Sheriff v. Newspaper

Sheriff will also sue Newspaper for defamation and probably fail. Defamation has the same requirements and definitions as supra. In dealing with media there are some special rules in Florida. First, before making a defamatory action, the plaintiff must serve a notice to the media outlet 5 days before filing the action. The media outlet then has 10 days within which to publish a retraction if it feels there needs to be one. If the media outlet publishes the retraction then there is a rebuttable presumption against actual malice; if the outlet does not publish then there is a rebuttable presumption of actual malice. Actual malice per New York Times v. Sullivan is required for a public person to make a claim against a media outlet. In such a case, the plaintiff must show actual malice which is shown by the media outlet knowing the claim was false and printing it anyway or with reckless disregard to the veracity of the statement which can be evidenced by knowing that it was substantially certain that the statement was false and considering that fact but publishing the statement anyway.

In this case Sheriff will have an easier time establishing defamatory statement since "Sheriff corrupt" is impugning the integrity of the Sheriff far more than an opinion regarding the need for oversight. Sheriff will also claim that the statement was not an accurate portrayal of the Mayor's statements (which may hurt his action against Mayor). Mayor simply expressed an opinion which Newspaper latched onto as a statement of fact of corruption that goes beyond the opinion that the Mayor expressed.

Although this statement as written does not regard a specific fact showing corruption, Sheriff can claim that it does impugn the reputation of the Sheriff with a specific allegation. The Sheriff, however, will still have the same evidentiary issues against proving actual malice as Sheriff had against Mayor: must show that Newspaper knew what the Mayor said was false or substantially certain to be false and ran it anyway. Sheriff may be able to show damage by the Newspaper's article but such damage in Florida is not presumed when printed. That is because in Florida libel, or defamatory statements in print, are not afforded automatic presumption of damages like in other states.

Additionally, Sheriff must serve Newspaper 5 days before he files his suit. If Sheriff does not then he forfeits his action. Newspaper will have 10 days to consider whether to retract the statement but because there are no facts pointing to actual malice then Sheriff will probably fail even with the rebuttable presumption that no retraction means actual malice.

Sheriff will probably not be able to win on a defamation case against Newspaper.

Newspaper v. Blue County

Sunshine Law (much but not all analysis is similar to Sheriff's claim)

Under the Sunshine Law, actions by any governmental entity must be disclosed to the public. Even communications between the county board and the county's lawyer must be disclosed to the public. This includes local boards that are granted governmental authority, as in activities that would normally be associated and reserved for government action like investigations and levying fines.

Applying the Sunshine Law to the CRC Amendment, the Newspaper will claim that the secrecy of the Citizens Review Board (CRB) fails the law. First, Newspaper will claim that CRB's members must be published. Mayor claimed that those names should be private to preserve independence. Nonetheless, Newspaper will correctly note that the secrecy of a board with governmental authority, shown by the appointment by the Mayor and the powers to subpoena and force the Sheriff to take certain actions, violates the Sunshine Law. Second, Newspaper will claim that the government proceedings, like a board meeting, must be made open to the public.

The secret meeting amounts to a preliminary injunction against the Sunshine Law. In order to create secret meetings then the government must achieve the same burden as putting a gag order on court proceedings: there must be an overriding necessity for privacy, there must be no alternative means of accomplishing the goal, and the measure must be narrowly tailored to serve the purpose. This measure, keeping the proceedings in complete secrecy and subpoena powers, harkens to a grand jury. Grand jury proceedings are secret but that is constitutionally protected. Boards by the county are not thus endowed.

*CRC will counter that Florida is a more expansive privacy law than the US Constitution. Art I Sec 22 allows for greater privacy for individual Florida citizens in their private lives. Newspaper will contradict that this privacy does not extend to government agents. These government agents endowed with public authority are not covered by Florida's privacy statute that has traditionally been used to protect privacy in other matters like *In re T.W.**

Ultimately, Newspaper will probably be able to be given more information about CRB because of the Sunshine Law.

Q QUESTION NUMBER 2

FEBRUARY 2017 BAR EXAMINATION – REAL PROPERTY/ETHICS

A woman owns property and she gives the property to her two adult sons, Scott and Doug. The deed states that the brothers take the property with a right of survivorship. This is not homestead property. Without Scott's knowledge or consent, Doug gets a loan from Tom and pledges the property as collateral. Doug fails to make several payments and dies before the loan is paid off. Tom says he'll foreclose if Scott doesn't repay the loan, but Scott refuses.

For \$10 in consideration, Scott deeds the property to his niece, Nancy, for life and then to Tom and a local charity in equal shares. The property has a small house, and Nancy spends \$25,000 to convert it into two offices. Nancy orally agrees to rent these offices to Tom and to an attorney for five-year terms, with rent to be paid quarterly. In exchange for reduced rent, the attorney agrees to collect the rent payments, use it to pay the property taxes, and hold the balance for Nancy. The attorney deposits Tom's quarterly rent payments into his firm's operating account and maintains a sufficient balance in the account to cover the rent owed by the firm.

The attorney forgets to pay the taxes due in the first year. Nancy does not pay the taxes either. Instead, she waits and buys a tax certificate for the amount of unpaid taxes. Two years later, she applies for and receives a tax deed.

Nancy claims that she now owns the property outright based on the tax deed. She wants to evict Tom and the attorney, but they refuse to leave until the five years have expired. In the alternative, Nancy demands that Tom and the charity reimburse her for the amount she spent to improve the property. Tom claims that he can foreclose on the property based on the loan to Doug. The charity wants to avoid the controversies and seeks a partition against Tom.

Nancy contacts your firm seeking legal advice. Prepare a memo that discusses each party's interest in the property and the likely outcomes for the competing claims to the property and the claims for eviction, reimbursement, and partition. Also discuss any ethical issue arising from the attorney's conduct.

SELECTED ANSWER TO QUESTION 2

(February 2017 Bar Examination)

TO: Partner

FROM: Associate

DATE: February 21, 2017

SUBJECT: Nancy's Case

The purpose of this memorandum is to inform you of each party's interest in the property regarding the Nancy's case.

1. Issue: Was the deed from woman to Scott and Doug valid?

Rule: In order for a deed to be valid under Florida law, it must be attested by two witnesses, contain an accurate description of the land and properly delivered. In order for a deed to be properly delivered, physical delivery is not required. Delivery to a third party on behalf of the recipient is enough to constitute delivery under Florida law.

Application: In the instant case, the facts do not provide whether or not the deed was attested by two witnesses or contained a description of the property. More facts would need to be provided in order to establish whether or not the deed was properly executed in compliance with Florida law. However, the deed in the instant case was properly delivered as the woman conveying the land through the deed physically delivered the deed to her sons, Scott and Doug. Upon receiving the deed from their mother, the deed was properly delivered.

Opposing Argument: The opposition would argue that the deed was not properly executed if it was not signed by two attesting witnesses or contain an accurate description of the property to be conveyed. If the deed was not executed properly, the delivery would not matter because the deed would be void on its face.

Again, this argument is contingent upon receiving more facts from our client.

Conclusion: The court would likely hold, absent any facts to the contrary, that the deed was properly delivered so long as the deed was valid on it's face.

2. Issue: What interest do Doug and Scott hold in the property?

Rule: In order to hold property as Joint Tenants with Rights of Survivorship, four unities must be present. (1) Time (2) Title, (3) Interest, (4) Possession. This means that the parties taking interest in the property must take the interest at the same time, by the same title, with the same interest in the property, and have equal possession to the property. Additionally, specific language must be found in the deed in order to create a Joint Tenancy, such as "with rights of survivorship." Without that specific language, Florida law assumes the creation of a Tenancy in Common.

Application: Due to the language in the deed, Doug and Scott hold the property as Joint Tenants with Rights of Survivorship. The mother specifically placed the words, "with rights of survivorship" in the deed and therefore created a Joint Tenancy with Rights of Survivorship between Doug and Scott. Additionally, Doug and Scott received the deed from mother at the same (1) time, via the same (2) title, with the same (3) interest in the property and both obtained (4) possession to the land. Therefore, a joint tenancy with rights of survivorship was created.

Opposing Argument: The opposition might argue that the facts do not specifically indicate that the deed was delivered to Doug and Scott at the time. However, this argument will fail because the deed need not be physically delivered to both people at the same time to properly convey the Joint Tenancy with Right of Survivorship. It must merely convey in the deed at the same time in order to satisfy the requirements.

Conclusion: The court will most likely find that the woman validly conveyed a Joint Tenancy with Rights of Survivorship to her sons, Doug and Scott.

3. Issue: Can Tom foreclose on the property based on the loan to Doug?

Rule: A Joint Tenancy with Rights of Survivorship (JT) allow either party to encumber their interest in the land as they wish. This means that either party may take out a mortgage and use their interest in the land as collateral, or may allow creditors to place a lien on the property. However, such an encumbrance does not alter the other party's interest in the JT so long as the JT is in a lien theory state. A lien theory state, like Florida, allows either party of a JT do to whatever it desires with their interest in the property without severing the JT. However, in title theory states, placing a mortgage or a lien on the property or conveying the interest to someone else automatically severs the JT and the JT becomes a Tenancy in Common.

Additionally, in lien theory states, because an encumbrance placed on the land by one member of the JT does not hinder the other holder's interest, if the encumbered holder dies before paying back the mortgage or the lien, the creditor cannot collect from the unencumbered holder.

Application: Due to the fact that Florida is a lien theory state, when Doug pledges the property as collateral to Tom, this did not severe the JT. Additionally, because Doug did not repay his loan to Tom before he died, his interest passed by right of survivorship to Scott and therefore Scott owned the entire property in fee simple.

Due to the fact that Scott owned the entire property in fee simple and was not encumbered by an mortgage, lien, or other levy, Tom will not be able to recover from Scott because the debt was not Scott's and Doug did not pay it back before dying.

In JT's in lien theory states like Florida, debts do not pass with the land. Once the debtor dies and his interest passes to the other holder, the debt is dissolved and the creditor is left without recourse.

Opposing Argument: Tom will argue that he is entitled to repayment of the loan because the encumbrance on the land severed the JT and created a tenancy by the entirety (TIC). This argument would win if Florida was a Title theory state. However, Florida is a lien theory state and thus Tom's argument will fail.

Conclusion: The court will likely hold that Tom will not be able to foreclose on the property because Scott owns the property in fee simple and it is unencumbered based on Florida's lien theory and its applicability to JT's.

4. Issue: Is the oral agreement to rent the property between Nancy, Tom, and an attorney enforceable?

Rule: The sale and lease of land falls under the Statute of Frauds (SOF) and thus must be reduced into a signed writing in order to be enforceable. The signed writing must include the names and signatures of the parties to be charged, an adequate description of the land, and a sale price if it is determinable.

Application: In the instant case, Nancy entered into an oral agreement with Tom and an attorney to lease land to them for a period of 5 years and would collect rent from them quarterly. This would be considered a lease of land and therefore falls directly under the SOF. Therefore, the oral agreement between the three parties is invalid and unenforceable because it was not reduced into a signed writing.

Opposing Argument: Nancy would argue that the SOF was not necessary in the instant case because of partial performance. The attorney and Tom had already lived on the property for a year and therefore partially performed. This argument will fail however, and the court will require the lease between the parties to be reduced into a writing to be enforceable.

Conclusion: The court will find the oral lease between the parties is unenforceable because it does not comply with the Statute of Frauds.

5. Issue: What type of lease do the parties have in the instant case?

Rule: A periodic tenancy is created when parties agree to rent for a set period of time with payment at set intervals. In order to terminate a periodic tenancy Florida has very specific rules. If the tenancy is year to year the notice must be given 6 months in advance. Quarter to quarter = 3 months. Month to month = one month. Week to Week = one week.

Application: In this case, the parties has a periodic tenancy. In order to terminate a periodic tenancy, the termination of the period tenancy proper notice must be given by either party who is terminating. This was not the case in the instant case. Therefore, Tom and the Charity could sue for damages.

Conclusion: The court would likely find intent to terminate the tenancy was not properly given in the instant case.

6. Issue: Can Nancy receive reimbursement from Tom and the charity?

Rule: As a life estate holder with interests that will follow your interest, you have a duty to not commit waste on the property. There are three different types of waste: (1) Actual (2) Permissive (3) Ameliorative. Actual waste is exploiting the natural resources that are already on the land. The owner of the property is not permitted to over-use the resources on the land so as to drain the land of its natural resources unless the land is only good for that reason, the land owner was given permission to do so, or it was previously used for that reason. However, if it was previously used for that reason, the current land owner is restricted to only using what is already there under the Open Mines Doctrine. This means that the landowner cannot open new mines for excavation but must work with what is already pre-existing.

Permissive waste refers to keeping the land in good condition. The land owner has a duty to maintain the land in a good condition. This just mends any ordinary wear and tear on the premises and not allow the land to go into disrepair. This also means paying taxes on the land.

Finally, Ameliorative Waste refers to waste that improves the value of the land. The landowner must not make substantial changes to the land that improves the value of the land.

Application: In the instant case, Nancy commits ameliorative waste when she spent \$25,000 converting the small house on the property into two small offices. While this improved the value of the land, it interfered with the rights of the subsequent owners of the property and therefore is considered waste. Therefore, Nancy will not be permitted to recover any amount from Tom and the Charity. In fact, Tom and the Charity might be able to recover from Nancy because Nancy committed waste against the property, subsequently impairing their interest in the land.

Opposing Argument: Nancy will argue that the \$25,000 office space greatly improved the value of the land and also provides for rental income and therefore does not count as ameliorative waste. Additionally, she will argue that Tom benefitted from the office because he already began using the office as business space and therefore has not been harmed by it. This argument will fail however because although the building may have increased the value of the property and may not have harmed either Tom or the Charity, the rules of waste are in place so that a preceding owner cannot substantially interfere with the rights of subsequent owners and ameliorative waste does just that.

Conclusion: Nancy will not be able to recover the \$25,000 from Tom or the Charity because she committed ameliorative waste on the property.

7. Issue: Can Nancy evict the attorney and Tom?

Rule: An eviction can occur when a tenant violates the rules of the leasehold, such as not paying rent or committing waste. Waste can be either (1) Actual (2) Permissive or (3) Ameliorative as described above. A tenant can also be evicted when a tenant is considered a holdover of the lease. A holdover occurs when a tenant stays beyond their rental period in which case the landlord may charge the tenant double rent.

Application: In the instant case, Nancy may in fact evict both Tom and the attorney because they did not have a valid and enforceable lease under the SOF. Therefore, they do not have a right to remain on the property because they are not considered tenants by a valid leasehold. However, they could both properly recover damages for the fact that the lease was improperly executed and they reasonably relied on the validity of the lease in order to obtain a space for 5 years in order to acquire office space.

Opposing Argument: Nancy will argue that Tom and the attorney are not entitled to any type of damages because they received a benefit from their rental payments by having a place to conduct their business and the fact that the lease did not comply with the SOF was not a unilateral mistake it was a bilateral mistake and therefore, all parties should be held responsible.

Conclusion: The court will likely find that Nancy can in fact evict the attorney and Tom.

8. Issue: What ethical issues will arise from the attorney's conduct in the instant case?

Rule: An attorney cannot operate a side business along with her firm.

Application: In the instant case, by collecting rent from the tenants in exchange for lower rent, the attorney is acting in an improper fashion and is in essence operating a side business by acting as a landlord.

Additionally, attorney may not take money from individuals and use it for personal gain if it is not earned through legal services in which they have contracted for.

Additionally, the attorney is putting rent money from the Tom, which rightfully belong to Nancy, in her firm's account. This is improper and is a violation of the ethical code. She did not earn this money from legal representation in which was contracted for between herself and Tom. Therefore this is an issue.

Conclusion: The attorney's conduct in the instant case will be found to be improper.

9. Issue: Partition

Rule: Judicial partition is available only after the interest has passed to charity and

Tom

Application: They cannot partition the land when Nancy has a life estate interest and she has full possession

They can once Charity and Tom have TIC in the land

Conclusion: Judicial partition will not be allowed until the rights have vested.

Q UESTION NUMBER 3

FEBRUARY 2017 BAR EXAMINATION – TRUSTS/FAMILY LAW AND DEPENDENCY/ETHICS

Five years ago Husband and Wife married in Tampa. A month after the wedding, Husband's father devised 10 acres of commercial land in Hillsborough County, Florida, to Husband as a wedding gift. Since the wedding, Husband started a business called "Enterprises." The company excelled, and Husband decided to sell it. He sold it for one million dollars.

Husband decided to make a trust called the "Land Trust." He created this trust in 2012. In the presence of two attesting witnesses, Husband signed a deed which stated:

Husband hereby transfers this 10 acres of commercial land in Hillsborough County to Husband as trustee of the 'HW Land Trust.' Said trustee to manage said property until such time as the trustee determines that a sale is appropriate, at which time he shall make monthly payments of the proceeds in his discretion to Wife. The property of this trust and its distributions shall be unreachable to any and all creditors.

On the same day, Husband and Wife also transferred the one million dollars from the sale of "Enterprises" into a bank account. Husband and Wife both signed a document filed with the bank stating:

This one million dollars is now property of the "Money Trust." Husband and Wife are co-trustees and co-beneficiaries of this trust. The co-trustees shall pay the co-beneficiaries each individually \$5,000 per month until such money is gone. Husband and Wife hold their interest subject to a spendthrift trust.

Two weeks ago, Sonny and his Mother knocked on the door of the residence of Husband and Wife. Sonny is six years old. Mother claimed that Husband is the father of Sonny and is requesting child support from Husband. Husband never knew of Sonny before this day. After seeing Sonny, Husband has no doubt that Sonny is in fact his son. However, Husband has refused to pay Mother any child support.

One year ago, Wife obtained a loan from Credit Co. for another business venture that failed. Wife has recently neglected to pay the remaining balance of \$100,000. Credit Co. recently contacted Wife seeking repayment on the loan but to no avail.

Both Mother and Credit Co. have come to your law office seeking assistance. Draft a memorandum addressing the following issues:

1. The validity of the trusts and their provisions, including the following:
 - a. Assuming paternity, what trust assets, if any, are available for Sonny's child support; and,
 - b. What trust assets, if any, are available to Credit Co. to recover the remaining balance owed on Wife's loan.
2. Whether you would have any ethical issues representing both Mommy and Credit Co. with their respective claims.

SELECTED ANSWER TO QUESTION 3

(February 2017 Bar Examination)

To: Partner

From: Junior Associate

Re: validity of Land Trust and Money Trust

Validity of a Trust

H likely created a valid trust. To create a valid express trust the following elements must be satisfied: capacity, present intent to create trust, trustee with duties, trust property (res), ascertainable beneficiaries, and a valid trust purpose. Under Florida law, a trust is presumed to be revocable unless otherwise stated in the terms of the trust.

Capacity

To satisfy capacity, the settlor should be 18 years or older and manifest the same capacity as required to create a will. He must know the nature and extent of his property, the natural objects of his bounty, and the effect of the disposition.

Present Intent

Next, the settlor must demonstrate a present intent to transfer property to a trustee. This should create a legal obligation and should not be a hope/wish or any use of precatory language.

Trustee with duties

Third, there must be a trustee(s) with duties. However, a trust will not fail for lack of a trustee as a court can appoint one. Also, unless it's a lifetime transfer in trust, a sole trustee may not also be a sole beneficiary. Otherwise, legal (trustee) and equitable (beneficiary) titles merge and the trust fails. A trustee can be removed if 1) he violates a breach of trust 2) fails to administer the trust effectively 3) there's a change in circumstances 4) all qualified beneficiaries agree to remove the trustee.

Trust Res

Must include valid trust property that is identifiable from other property.

Ascertainable Beneficiaries

The beneficiaries must be identifiable persons with a present or future interest in the trust. However, there are exceptions for unborn children and charitable trusts.

Valid Trust Purpose

Trust can be for any valid purpose as long as it is not illegal or against public policy.

Validity of Land Trust (declaration of trust)

Here, it likely that Husband (H) created a valid declaration of trust (settlor does not depart with the trust property but retains it for himself) for Land Trust. H seems to have the capacity to create the trust as he understood the nature and extent of his property, the commercial land gifted to him by his father; he understood the natural objects of his bounty, Wife (W), and the effect of the disposition he was making-distributions to W. Furthermore, he had the present intent to create the trust as he signed a deed in the presence of two witnesses transferring the 10 acres of land in trust. This likely created a legal obligation rather than a hope/wish. W is an ascertainable beneficiary and the purpose of the trust is to make monthly payments of the monthly proceeds to W. This is not illegal nor against public policy. Moreover, although a trust does not necessarily have to be in writing, trusts involving the transfer of real property must be in writing and attested to by two subscribing witnesses as H did here in the deed. Nevertheless, the failure to have the trust in writing is not fatal as the court would likely impose a constructive trust. Therefore, H likely created a valid trust.

Discretionary trust

Also, H appointed himself as a trustee with duties, which is the discretion to distribute to W. Because the trust is discretionary, H can make distributions at his discretion and therefore, creditors of the beneficiary cannot reach the trust property unless a distribution is made to beneficiary, W. It is not likely that Sonny (S) would be able to reach the trust property unless the court found that H as both settlor and trustee of a revocable trust allows the trust res to be reached to satisfy the support payments for S as creditors of the settlor in a revocable trust can reach the trust property of the settlor even with a spendthrift provision. If so, S would be able to reach the res in Land Trust to satisfy support payments.

Spendthrift Provision

Furthermore, H made a spend thrift provision in the trust. A spendthrift provision prevents the voluntary or involuntary transfer of a beneficiaries trust interest. Thereby, limiting the ability of creditors to attach to the beneficiaries interest. However, there are a few exceptions that apply under Florida law: child/spousal support payments, judgment creditors, Fed or Florida government, a settlor who is also beneficiary of the trust.

Here, Credit Co. has a claim against W for balance owed on W's loan. Generally, due to the spendthrift clause, Credit Co. would not be able to reach W's interest unless it was maybe a judgment creditor. Furthermore, because H has the discretion to distribute the proceeds, Credit Co would likely not be able to attach the property. It could only attach W's interest once H makes a distribution.

Validity of Money Trust

Money trust is likely a valid trust. Both H and W have the capacity to transfer the property in trust into a bank account. They had the present intent to transfer the property in trust into the bank account. They are co-trustees with duties and that is to pay themselves as co-beneficiaries \$5k per month until the money is gone. There is valid trust res in the amount of one million dollars from the sale of Enterprises with a valid purpose to pay \$5k per month until money is gone.

Totten Trust

Money trust may also be a valid Totten trust. A Totten trust uses a bank account to deposit funds for the benefit of another, beneficiary. Here, H and W arguably created a valid Totten trust for their benefit.

Mandatory Trust

The language of this trust likely creates a mandatory trust where the trustee has to make mandatory distributions (in this case, \$5k per month to each). Because of the mandatory trust, H and W would have to make the distributions and upon doing so, M and Credit Co would likely be entitled to those distributions.

Spendthrift provision

Despite the spendthrift provision, M would likely still be able to reach H and W's interest in the trust even if there were no mandatory distributions because of the exception under Florida law as H is a beneficiary of the trust. Credit Co would likely not be able to reach the interest because it does not fall under one of the exceptions to spendthrifts under Florida Law. It is recommended that Credit Co possibly obtain a judgment against W to attach the trust property under this exception.

Ethical Issues - Conflict of Interest

An attorney may not represent a client in a matter if his independent professional judgment would be materially limited by his responsibility to another client unless attorney reasonably believes he could provide competent representation and the client(s) consent in writing after a consultation. When two or more clients are seeking to be represented by the same attorney, they must be made aware of the implications of doing so. Here, Mommy (M) and Credit Co have come to my office to seek representation in the matters against H and W. As long as my independent professional judgment is not materially limited by my responsibility in representation of both M and Credit Co, I could do so without running afoul of the rules if I reasonably believe I could competently represent both and they consent in writing after a consultation in which I share with both the implications of representing both.

Q QUESTION NUMBER 1

JULY 2017 BAR EXAMINATION – FAMILY LAW AND DEPENDENCY

Molly was nineteen-years-old and single while living in Orlando when she gave birth to a baby boy named Sonny on April 1 of last year. Five days later, she decided that being a nineteen-year-old single mother was too much to handle so she left Sonny at a fire station along with Sonny's birth certificate and a blanket. The birth certificate listed the baby's name and listed Molly as the mother; it did not have any entry in the father section.

Nine months before Sonny's birth, Molly was having sexual relations with Fred and her ex-boyfriend, Xavier. Fred was also nineteen-years-old at the time of Sonny's birth. Molly was positive that Fred was the father and informed him accordingly before taking Sonny to the fire station. However, Fred refused to believe that he fathered Sonny. Fred believed that Xavier was the father. Accordingly, Fred made no attempt to look for Sonny after Molly took him to the fire station.

Proceedings to terminate parental rights pending adoption commenced last year with the filing of a petition to terminate parental rights in Orange County Circuit Court. The Circuit Court thereafter granted the petition and entered an order terminating the parental rights of Sonny's biological parents. Neither Fred nor Molly received any notice of the proceedings to terminate their parental rights. Fred's parents also did not receive any notice. Thirteen months have now passed since the Circuit Court entered the order terminating the parental rights of Sonny's biological parents.

Terry and Pat, a same-sex couple from Orlando, are petitioning to adopt Sonny. Sonny has been living with the couple for the last six months. Fred and Molly are now married. After entry of the court order, Fred and Molly decided to search for Sonny and found where he was living. They went to see him at Terry and Pat's home. Fred sees that Sonny resembles him and is now sure that he is Sonny's father.

Both Fred and Molly fell in love with Sonny. They want to become a family with Sonny. Both are willing to do whatever is necessary to contest the termination of parental rights. Fred's parents, who have never seen Sonny, would also like to be a part of Sonny's life and would also like to contest the termination of parental rights. Fred, Molly, and Fred's parents have come to your law office requesting advice. Please write a memo discussing the legality of the order terminating parental rights in relation to the following issues:

1. Molly's lack of notice and her likely success in contesting the termination of parental rights.
2. Fred's lack of notice and his likely success in contesting the termination of parental rights. Do not discuss any issues associated with the Putative Father Registry.
3. The lack of notice to Fred's parents and their success in contesting the termination of parental rights.
4. Whether Terry and Pat can adopt Sonny.

Do not discuss any potential rights that Xavier may have.

SELECTED ANSWER TO QUESTION 1 **(July 2017 Bar Examination)**

To: Managing Partner
From: Junior Partner
Re: Adoption of Baby Sonny

1. Molly's Lack of Notice

Molly will likely be unsuccessful in contesting the termination of parental rights.

In order for an adoption to take place, the biological parents' rights must be completely terminated so that the adoptive parents are able to legally adopt the child. Legal adoption means that for all intents and purposes, the child becomes the biological child of the adoptive parents. The adoptive parents have all the same legal rights to the child as natural parents, such as the fundamental rights to raise the child as they see fit, and the ability of the child to take from his parents under intestacy statutes. The biological parents lose all rights to the child, as if the child never was born to them.

In order for this action to take place, there must be a hearing to terminate parental rights prior to the adoption. Under Florida Rules, biological parents are entitled to Due Process for this proceeding. This means that they are entitled to an attorney at all stages of the parental rights termination, and they are entitled to notice of the hearing. If the biological parents cannot afford an attorney, the state will provide one for them. The parents are each entitled to a separate attorney, and a Guardian Ad Litem is appointed to represent the best interests of the child. If the biological parents choose to, they may knowingly, intelligently, and voluntarily waive the right to counsel either on the record in court, or in writing signed by two witnesses.

At the time of the proceedings, each parent is also entitled to notice to attend the hearing. Here, Molly was never given notice of the proceedings. Molly will argue that this is an infringement of her fundamental rights as the biological mother, and could be grounds to set aside the original termination of parental rights. The State will argue that Molly voluntarily chose to leave the child at a fire station after only having the child for 5 days. While she left Sonny with his birth certificate with her name on it, the State will argue that her abandonment of the child was sufficient for the State to forgo giving her notice of the hearing. Essentially, the State will argue that she voluntarily chose to give up her rights to the child when she left Sonny at the fire station. Abandonment (when a parent neglects to care for the child and willingly leaves the child on its own) is sufficient grounds for the State to initiate a proceeding to terminate parental rights.

The State will also argue that Sonny has been living in a stable environment with Terry and Pat for the last six months and that they want to adopt the child. When deciding matters concerning children, the court will look to the best interests of the child to determine the best course of action. Generally, the court will be hesitant to remove a child from a stable environment with loving caretakers absent a showing that grave injury will be suffered.

In the unlikely event that the court chooses to overturn the original termination of parental rights, the court will likely still need to determine whether Molly is fit to be a parent after abandoning Sonny at 5 days old at a fire station. If the original termination is overturned for lack of notice to Molly, there will be another hearing for termination of parental rights (Molly does not automatically get to have Sonny back). The court may determine again that Molly is unfit to be a parent by showing of clear and convincing evidence, in which case the termination will be re-entered. If the court is unable to show Molly's unfitness by clear and convincing evidence, the court may choose instead to adopt a case plan for Molly to abide by. A case plan is a list of steps a parent must take to be considered a fit parent once a child has been sheltered (taken by the State for fear of harm to the child because of the parents). Such steps include going to drug treatment programs, parenting programs, and having supervised visits with the child. Since Molly has not established herself in Sonny's life until recently, the case plan may include a slow immersion program to have Sonny get used to living with Molly instead of Pat and Terry. Additionally, because she voluntarily abandoned Sonny at 5 days old, the case plan may include asking Molly to attend parenting sessions. Once the case plan has been successfully completed, the child is generally placed back with the parent. If the parent chooses not to participate in the case plan, that can be used as evidence to have the parental rights terminated.

While Molly has a strong argument since she was not provided notice of the termination of parental rights hearing, the court will likely be hesitant to set the order aside. Because Molly voluntarily abandoned the child with only his birth certificate, the court may determine that even had Molly attended the hearing, she would have had her rights terminated for abandoning a 5-day old child anyway. Additionally, the court will consider the fact that Molly is just now trying to set aside the order, 13 months after it was entered. In light of all these factors, the court will likely conclude that the best interests of the child require allowing Sonny to remain with Terry and Pat.

2. Fred's Lack of Notice

Fred has even less of a case than Molly does. In Florida, there is a presumption that a child born during a valid marriage is the biological child of the husband. The only way to rebut that presumption is to show impossibility, such as the father being unable to have children or the father not being around at the time of conception. Here, Fred and Molly were not married when Sonny was born, so there is no marital presumption at play. In cases where the child is born outside of marriage, there is a presumption that the father is the one named on the birth certificate. Unfortunately, Fred was not listed on the birth certificate either. In order for a biological father to establish himself in this situation, the father must have willingly chosen to be in the child's life. If the child is less than 6 months old, this includes helping the mother with her pregnancy, aiding in the payment of hospital bills, and assuming responsibility for caring for the child. If the child is 6 months or older, the father must take substantial steps to establish a relationship with the child. The court will look to the amount of time the father spent with the child given the father's work schedule, the amount of support the father gave the child, the amount of time spent communicating with the child outside of visiting the child (such as telephone calls, skype sessions, etc.), and whether a relationship between father and the child was actually established.

In this case, Fred did not even attempt to communicate with the child until the child was over a year old. When Molly told Fred the child was his, Fred refused to believe it. He provided no aid to the child or to Molly's pregnancy. Additionally, Molly warned him that she was leaving the child at the fire station, but Fred did nothing to stop her. Given that Fred is not on the birth certificate, the State had no way to know who Sonny's father was, so they did not have to provide him notice. Absent a showing of any kind of relationship with the child until the child was over 6 months old, the court will not set aside a termination of parental rights in favor of Fred.

In the event that the court decides to give Fred a chance to contest the termination, Fred would have to establish paternity. Today, this can be done through the use of a DNA paternity test. If the results of the test show more than a 98% match of DNA with the child and father, the court will establish paternity. Again, this seems like an unlikely course of action given the child's age when Fred decided to get involved in his life.

3. Fred's Parent's Lack of Notice

Likewise, Fred's parents likely do not have a case to contest the termination of parental rights. Because Fred was not on the birth certificate and he did not otherwise establish himself as Sonny's father, the State likely did not have to provide him notice. Since he was not established as Sonny's father, Fred's parents were not entitled to notice of the proceeding either.

Moreover, grandparents generally are not entitled to notice of a hearing for termination of parental rights. However, when there is a question as to the biological parents' ability to care for the child, the preference is to have the child be placed with a family member before proceeding to someone outside the family. In the event that the court chooses to establish Fred's paternity, Fred's parents may be able to petition to care for the child if the court still does not award Fred custody of the child.

It seems more likely, however, that the court will not set aside Fred's termination of parental rights, so Fred's parents likely will not succeed in contesting the termination.

4. Whether Terry and Pat Can Adopt Sonny

After Obergefell legalized same-sex marriage, same-sex couples became entitled to many of the same fundamental rights as heterosexual married couples, such as the right to marriage, divorce, and adoption. Even before same-sex marriage was legalized, same-sex couples were entitled to legally adopt a child. In determining whether a person is able to adopt a child, the court looks at the fitness of the person to be a parent, his/her home environment, his/her work schedule, his/her ability to provide for the child, and many other factors. Adoptions may be granted for married couples or single parents.

When a person/family applies to adopt a child, the State conducts a background check on all members of the household who are aged 12 or older. After the background check comes back clear, the State then interviews the parents-to-be, and conducts a home study to ensure a safe environment for the child. Following a successful home study, the parents wait until a child is placed with them. The child is placed with them for a

period of time, generally around 6 months or longer, to ensure the match is a success. This time is called "adoptive placement", and during this time the parents-to-be and the child make sure that everyone is happy with the placement. The State makes routine checks on the child to ensure everything is going well. Finally, once the placement seems appropriate, the parents-to-be may petition for the adoption to be finalized. The judge generally grants this petition in chambers, so long as it is clear that the adoption is in the best interests of the child.

Sonny has been living with Terry and Pat for the past 6 months. It appears the background check, interview, and home study went well, as Sonny is currently in his adoptive placement. Once Terry and Pat feel comfortable moving forward with their adoption petition, they will likely be able to proceed, assuming the termination of parental rights is not overturned with respect to either Molly or Fred. In the unlikely event that the termination is overturned and requires another hearing, Terry and Pat will be unable to adopt Sonny unless and until the court enters another termination of parental rights.

Q QUESTION NUMBER 2

JULY 2017 BAR EXAMINATION – FLORIDA CONSTITUTIONAL LAW/FLORIDA RULES OF PROFESSIONAL CONDUCT

For the last few years the downtown area of the City of Metro has been a popular location for juveniles to congregate, especially during late evening and early morning hours. Over the prior six months Metro experienced a significant increase in residential and commercial burglaries in its downtown area, and a large percentage of the individuals who were arrested for these crimes were juveniles. Ann, who is mayor of Metro and a member of the Metro City Council, asked Bob, a member of the Metro City Council, to a social gathering at her house to celebrate her son's high school graduation. During this event Ann took Bob aside and privately mentioned to him that she was concerned about the recent downtown crime activity. Ann and Bob then excused themselves from the graduation celebration and privately discussed this matter. During this discussion Ann and Bob agreed that the crimes were likely the result of too many juveniles congregating in the downtown area with nothing to do and this situation could improve with the imposition of a curfew on juveniles who gather in the downtown area. The following day Bob instructed City Council staff to prepare a draft of a new juvenile curfew ordinance for ratification at the upcoming City Council meeting.

During the next duly noticed City Council meeting staff presented the new juvenile curfew ordinance to the City Council members. The legislative findings of this proposed ordinance read:

- (1) The City of Metro hereby finds and determines as a matter of fact that the City of Metro's downtown area remains faced with an unacceptable level of crime caused by juveniles which threatens its peaceful residents, visitors, and its businesses.
- (2) The City of Metro finds that fighting crime effectively requires an effort to focus on those age groups that are committing, or that are susceptible to being induced into committing, such crime. Consequently, it is the intent of the City of Metro to create and implement a juvenile curfew ordinance aimed at reducing juvenile crime and the direct and indirect consequences thereof.

The proposed ordinance made it unlawful for persons under the age of seventeen to remain in any public premises within the downtown area between the hours of 11:00 p.m. and 6:00 a.m. and a fine was assessed for violating this ordinance.

During the public comment portion of this City Council meeting many Metro residents objected to this proposed ordinance, including many juveniles who stated that they like to 'hang out' in the downtown area between 11:00 p.m. and 6:00 a.m. Many of these juveniles also said that they would spread the word among other juveniles and

may even organize demonstrations and do “other stuff.” Cathy, a Metro resident, stated that she did not support the proposed ordinance and, as written, it was likely unlawful. Cathy operates a youth center in the downtown area that is open until 1:00 a.m. After this feedback, the City Council members collectively agreed to table a vote on the ordinance until the next scheduled meeting.

Ann sought advice from Dan, a senior partner at your law firm. Ann explained to Dan the circumstances that led to the idea of the juvenile curfew, including her conversation with Bob at her home. Ann also expressed concern regarding the legality of the ordinance based on Cathy’s comments during the last City Council meeting. Ann also stated to Dan that she is concerned that the juveniles who congregate in the downtown area are “planning something” and she wanted to know whether she could direct the Metro police department to intercept and listen to their wireless cellular telephone communications to “see what they are up to.”

Ann provided Dan with a copy of the proposed ordinance and the minutes of the last City Council meeting. Upon reading the minutes Dan realized that he had recently represented Cathy in transactions involving the operation of her youth center in downtown Metro.

Dan asks you to prepare a memorandum that discusses the legality of Ann’s actions and the proposed juvenile curfew ordinance under the Florida constitution. Dan advises that your memorandum should include suggestions for strategies of how to revise the legislative findings of the proposed ordinance so that it passes constitutional muster. Dan also asks you to address whether his prior representation of Cathy presents any issues associated with the representation of Ann.

SELECTED ANSWER TO QUESTION 2
(July 2017 Bar Examination)

MEMORANDUM

To: Dan, Senior Partner

From: Associate

Re: Proposed Juvenile Curfew Ordinance

This memo will address three areas: 1) the legality of Ann's actions, 2) the legality of the ordinance, and 3) Dan's conflict due to prior representation of a possible plaintiff, each in turn.

1) Legality of Ann's Actions

Sunshine Law- Ann's Meeting with Bob

The first action that is at issue is the discussion that led to the creation of the ordinance at Ann's house. Florida Sunshine Law states that all meetings of public officers in the state where the officers are discussing business must be open to the public, the records must be public record, and notice must be provided to the public ahead of time so they have the opportunity to attend the meeting. There are only a few constitutional exceptions for this rule, and one of them is informal meetings between state legislators where there are fewer than 3 legislators, or not 2 legislators and the governor, where the meeting was planned in advance and business was discussed. Other than those exceptions, all types of informal meetings between state officials must be in public and with notice, including if they are informal. Informal meetings between city council members do not fall under the exception here, and only would if they were considered legislators.

Here, Ann's meeting with Bob originated in an informal way because she invited Bob to Ann's son's high school celebration. Ann will argue that it was not even an informal meeting because it was a "social gathering" and she had not invited Bob there to discuss business but rather to celebrate. However, Ann did discuss business at the meeting because she took Bob aside to tell him she was concerned about the recent downtown activity. Furthermore, Bob and Ann excused themselves from the celebration to go and privately discuss the matter. Ann might argue she should fall under the exception because she and Bob are city council members and create the legislation that goes through the city. She would argue that she and Bob are only 2 of them and it was not planned, so it should not need to be public and notice was not needed. Yet even if the first discussion would have been not planned, she and Bob planned to speak about it privately because they then excused themselves. So even if they fell under this exception, which they likely don't because they are not legislators, then the court would even find that the subsequent meeting when they left was planned. Ann would also try to argue that the Florida constitution has privacy expressly in the constitution as a fundamental right, and as such her conversation in her own home at her son's party

should not be public record and did not meet notice, but that would be unsuccessful because of the Florida Sunshine Law. Therefore, Ann's actions of meeting with Bob and discussing the proposed ordinance was unconstitutional because no notice was provided to the public, and business was discussed. Therefore, the conversation is not protected and they will need to testify to that conversation if need be, which could be helpful for any plaintiffs because they specifically discussed targeting juveniles.

Ann's Plan to Listen in on Juveniles

Ann's proposed action of asking the police to listen in on juveniles would likely violate their fundamental rights to privacy. The Florida Constitution expressly states that there is a right to privacy, arguably making it even stronger than the U.S. Constitution right to privacy. The Florida Constitution also almost mirrors the Fourth Amendment of the U.S. Constitution in its rights to be free in one's person, effects, and property. Both the 4th amendment and the Florida Constitution give persons the right to be free from unreasonable searches and seizures. A search is reasonable if there is a warrant for the search based on a valid search warrant, which is granted by a neutral magistrate judge based on probable cause. Probable cause for these warrants show a reasonable belief that evidence of a crime will be discovered, and probable cause is based on a totality of the circumstances test. Any search done without a warrant is deemed unreasonable unless there is an exception--exceptions include: exigent circumstances, automobile searches, search incident to arrest, stop + frisk, plain view, consent, or hot pursuit. In order for a search to occur, a person must have a reasonable expectation of privacy in regard to the item or place searched.

Here, the juveniles would likely claim a violation of their Florida constitutional rights of right to privacy by an unreasonable search if the police listened in on their phone calls. Juveniles likely have a reasonable expectation of privacy in their phone calls and what they say on those calls because they are their private cell phones. Ann might argue that they would be overheard on those cell phones anyways, but eavesdroppers are not usually successful in Florida at claiming the right to privacy was waived through that. The person with the privacy right had to have intent to not keep that information private or at least knowledge of the eavesdropper and the possibility of that. Juveniles will argue they had no indication there would be someone listening in on their calls. Furthermore, the police department could likely not get a warrant to listen in based on probable cause. The only thing they would be listening for is what "they are up to" and any plans to protect. And protesting is a first amendment right, and freedom of speech is expressly included in the Florida Constitution. Therefore, they would only be listening to plans for valid actions that are not crimes. None of the exceptions would seem to fit under this because there are no indications that there will be any injuries or risk of harm to anyone. Ann might argue that the juvenile at the public comment session indicated they would "do other stuff." Yet that statement is so vague that it is unlikely a magistrate would find that to be probable cause of a crime occurring under the totality of the circumstances. Furthermore, Ann would argue it is not a search because it is still listening. But listening to private conversations is still a search, especially intercepting and listening through the police department.

Therefore, Ann's plan to have the police act as an agent of the council and intercept phone calls would be unconstitutional under the fourth amendment. The juveniles might even argue that listening to the speech is also an equal protection

violation because they would be violating a fundamental right only for a specific part of the population --juveniles. Anytime that some people are being treated differently than others, an equal protection violation occurs. More on equal protection will be discussed later based on the ordinance. But age is not a strict scrutiny suspect classification in Florida. Age is usually recognized under the rational basis test. The juveniles would need to show that there is no legitimate interest and no rationally related means for this. But this is a government-friendly standard and this would not be the juvenile's strongest equal protection argument because there might be a legitimate interest in searching minors for this purpose. Minors already have fewer privacy rights due to school searches, so this isn't their strongest claim but the privacy violation would be strong and unconstitutional.

2) Legality of the Ordinance

The first issue is whether the city council even has the right to create a law such as this. Cities, also known as municipalities if incorporated, which this one seemingly is, have the right to create ordinances based on police powers and the state in general for the health, safety, welfare, and morals of Floridians. Municipalities in chartered counties can create laws that supplement the general and special laws that the state legislature has created. On the other hand, unchartered counties would not be able to do so they are limited specifically to those general and special laws. But municipalities can create laws for the police power of protecting their citizens and Ann will argue that this falls into it because it is specifically to fight crime and reduce juvenile crime and the consequences thereof.

Overbroad

The first argument that juveniles or any plaintiff with standing might make is that the ordinance is overbroad. An ordinance may not be overbroad in that it encompasses a large amount of activity--both constitutional and unconstitutional and does not provide any exceptions or limits to that broad restriction. Juveniles will argue this is overbroad because it punishes free speech of being somewhere and that it provides no exceptions --what if there is an emergency? What if they are accompanied by a parent? What if they are going to the library for school? The ordinance is likely unconstitutional because it is overbroad. But furthermore it also might be vague. An ordinance may be vague because it may not specify how someone could be punished for something. It seems to be just by existing and being outside downtown at that time. My suggestion to make this better would be to include express provisions of exceptions and to include in the reasoning stronger emphasis on what type of activities they are trying to prevent. Yet that might be a content specific restriction of speech which will be discussed briefly later. Furthermore, it does not even specify what a juvenile is--it would need to state the age of majority or a specific age to be less vague.

Equal Protection

The juveniles will argue that the ordinance violates equal protection because it is a curfew ordinance only for juveniles. Persons under a specific age (we aren't sure what because the ordinance is vague) are being discriminated against and told they cannot be out in public in the downtown area because of their age. Equal Protection applies to protect members of a suspect class in Florida and those suspect classes include race, religion, national origin, and physical disability. Under strict scrutiny, the state must show there is a compelling reason and that the actions are necessary to reach that. All

other classifications are under the rational basis test likely because there is no specifically delineated intermediate scrutiny. Under rational basis, the challenger must show that there is no rational basis to achieve a legitimate interest the state has. Plaintiffs under rational basis often lose because there are often legitimate purposes and rational means of attaining them. Since age is not a suspect classification, the juveniles would argue that even under rational basis there is no legitimate reason, but Ann might be successful in fighting back. Ann will argue the reasons in the legislative findings specifically state the reasons for doing so. But my suggestion would be to make those reasons more clear and put more evidence of juvenile crime late at night. Because as they stand, the findings just say that there is an unacceptable level of crime by juveniles and fighting crime requires focusing on those groups. While fighting crime is a legitimate reason, the legislative findings might not be strong enough to show banning ALL juveniles for that time frame is rational. But the juveniles might win if they argue intermediate scrutiny should be applied for age since age is intermediate scrutiny under the federal constitution. Then the STATE would have the burden of showing the ordinance is substantial means to reach an important purpose.

First Amendment

The juveniles might also argue that this violates their first amendment rights to freedom of speech and association by limiting when they may be outside and doing activity downtown which can be seen as speech. However, Ann might argue this is simply a time, place, manner restriction. These restrictions on speech must be to achieve an important interest and have narrowly tailored means to achieve that interest, as well as including an alternative avenue of speech. Ann would argue fighting crime is important, and that these are narrowly tailored means because it is just for that time period and any other time juveniles can be downtown. However, the juveniles will be successful in arguing that is not narrowly tailored because it is a large block of time and it is excluding ALL juveniles. I would suggest again strengthening the legislative findings to include reasons why all juveniles need to be restricted and why this time period because the time place manner restrictions are more of an intermediate scrutiny like the first amendment rights under the federal constitution, so Ann will need more to get past this hurdle. And the juveniles might bring a due process claim based on a fundamental right of freedom of speech. But due process applies when all people are deprived of life, liberty, or property, so since only juveniles are here their better avenue is equal protection.

Impairment of Contracts Clause

Lastly, the ordinance might be unconstitutional because the Florida constitution along with the US constitution also has an impairment of contracts clause. The state may not impair any existing obligations under current contracts by passing a law that would affect that contract. Private contracts have a lower burden if the state can justify the evil it is trying to remedy, and public contracts have a higher burden, but even so this would affect contracts. The council is aware that this might affect contracts because it was told in the public comment period that Cathy for example has a business she runs that depends on juveniles being there from 11-1 p.m. since it is open until 1 p.m. And her business likely has vendors and staff members who get paid, which are contracts. Therefore businesses like Cathy could sue for the impairment of existing contracts through this ordinance.

Who has Standing to Bring a Suit

The second issue is, given all of these constitutional arguments, who would have standing to bring the suit? Either the juveniles or property owners of businesses where juveniles frequent would have standing to bring a suit against the city for this. Florida has conventional standing and it is very similar to federal standing. To have standing, a plaintiff must show 1) Injury in fact (both a particularized injury to a specific person and a concrete injury where there would be actual injury to the person) 2) Causation, and 3) Redressability (which means the result of the suit such as holding the ordinance unconstitutional would prevent the harm). The juveniles clearly have standing because they are the ones who would be directly affected by this- they are the particular injured party and they can show a concrete injury by their freedom to associate and freedom to move around and be outside would be eliminated. But business owners such as Cathy would also be able to bring suit. Cathy owns a youth center downtown that is open to 1:00 a.m. so she would claim a particular injury because no juveniles would be able to come to her youth center after 11 p.m. That is 3 hours unaccounted for and she likely has staff that needs to be paid and possibly even vendors she has contracts with. She could show causation because that would be the only reason the juveniles were not in there. And she could show redressability because overturning the ordinance would resolve the problem of juveniles not coming to her center at those hours. In addition, Cathy might even try to argue the equal protection claims and other constitutional causes of action the juveniles have because she runs a youth center downtown and she would try to assert third party standing on behalf of others. She might be successful if she could prove that the juveniles would not bring it themselves--and since they are minors she might be successful in that.

In conclusion, there are a myriad of constitutional issues that Ann would need to either remedy or face suit for.

3) Dan's Prior Representation of Cathy

As established above, Cathy might be a plaintiff because she likely has standing. So Dan's prior representation of Cathy could present issues including conflict of interest and confidentiality. An attorney may not represent another party if a conflict of interest exists that might materially affect the representation of the new client. The only time the attorney can do so with a conflict of interest is if he reasonably believes it will not affect his judgment or representation, and if the client consents in writing to the conflict of interest. But furthermore, with conflicts because of former clients, the attorney must not represent a new client that is adverse to a former client unless he reasonable believes it will not materially affect the representation and he gets informed consent from the FORMER client as well. Since Cathy is suing the council, it will be unlikely that she will give consent. And furthermore, they cannot represent a client who is directly adverse to another client, so his representation of Ann would be unethical and prohibited by the Florida Rules likely.

Even if he were permitted to represent Ann and Cathy had consented, he must make sure to keep all information confidential about his former representation of Cathy. Confidentiality continues past the representation of a client unless that client waives confidentiality and consents. Confidentiality covers all information learned in the representation of a client, not just conversations (which are covered by attorney client privilege and are an evidentiary rule not an ethical rule). Therefore, Dan must keep all of

Ann's information confidential. And Dan would not be able to use anything he learned in the prior representation in this new representation of Ann.

Q QUESTION NUMBER 3

JULY 2017 BAR EXAMINATION – ARTICLES 3 AND 9 OF THE UNIFORM COMMERCIAL CODE

Debbie owns ten antique cars and decides to open a car museum. Her uncle lends her \$10,000, and she gives him an antique car. They sign a promissory note for the loan, and it states that Uncle will hold the car as collateral. They mail the car's title to the Department of Highway Safety and Motor Vehicles, and Uncle receives a new title listing him as a lien holder.

Several months later, Debbie opens the Old Time Car Museum by getting a \$500,000 loan, this time from First Bank. Debbie signs a promissory note that says the loan is secured by all of her business and personal assets as described in a financing statement. Debbie files a financing statement naming herself as the debtor and listing as collateral all cars and all merchandise for sale in the museum, whether now owned or later acquired.

In the museum's gift shop, Debbie agrees to sell, on consignment, gas station antiques that are owned by Carlos. They execute a security agreement stating that the merchandise is owned by Carlos and only placed on consignment. Debbie will retain 25 percent of sales as her commission. Carlos files a financing statement naming Debbie as the debtor and describing the antiques on consignment. Debbie sells an antique gas pump for \$5000 and accepts a personal check made payable to "Debbie Debtor, Carlos Consignor." Debbie signs the check by herself and cashes it at First Bank. She never pays Carlos his 75 percent share.

With little money and loan payments due, Debbie advertises several cars for sale (not including the car used as collateral for the loan from Uncle). She sells one car for \$25,000. The buyer gives Debbie a cashier's check from First Bank. The cashier's check was purchased by William and payable to Car Buyer. Car Buyer endorses the cashier's check and makes it payable to Debbie. Debbie deposits the cashier's check and writes checks for her loan payments. But, due to an unrelated dispute with Car Buyer, William places a stop payment order on the cashier's check. First Bank then refuses to honor the cashier's check. Without these funds, Debbie's loan checks are returned. Debbie's loans with Uncle and First Bank are now in default.

Debbie has retained your firm, and a senior partner has asked you to prepare a legal memorandum addressing the following questions:

1. Describe the claims to the cars and antiques that can be made by Uncle, First Bank, and Consignor.
2. Describe any claims that either Debbie or Carlos have against First Bank.

SELECTED ANSWER TO QUESTION 3

(July 2017 Bar Examination)

MEMORANDUM

This memorandum will address the issues relating to the cars and antiques made by Uncle, First Bank, and Consignor; and the claims that either Debbie or Carlos have against First Bank.

CLAIMS TO CARS and ANTIQUES by UNCLE, FIRST BANK AND CONSIGNOR

1. Category of Collateral

*The first issue is whether Uncle, First Bank or Consignor has any claims to the cars and antiques in the museum. Under **Article 9** of the Uniform Commercial Code, certain transactions are subject to regulation under Article 9. This includes pertinent to this memorandum transactions for security interest agreements, consignments, and leases that are actually sales in disguise. Parties who have a security interest under Article 9 must follow a series of regulations in order to have priority over another party in the same collateral. First, it is important to determine what the collateral of the security interest include. There are **four tangible collaterals**: (1) equipment (2) inventory (3) consumer goods (4) farming equipment. Equipment is the default rule which is all collateral that is used during one's business. Inventory is the sale or lease of goods and also includes goods that are easily depleted or replenished. Consumer goods are goods that are used for personal or household use. Lastly, farming goods are the goods that are used in the use of a farm. There are also **intangible collateral** which involves (1) negotiable instruments (2) documents such as bill of sales (3) investments (4) non-consumer bank accounts (5) commercial tort actions (6) general intangibles that involve trademark or patents. The collateral is categorized based on the debtor's usage of the goods.*

Here, Debbie's ten antique cars are most likely equipment because they are held as for show in her car museum. She is not using them for sale to anyone or for lease by anyone, so they are not inventory. However, they may be categorized as inventory later on because Debbie decides to sell them because she has little money and loan payments are due. However, for the purposes of the collateral given to Uncle and First Bank, the cars are categorized as equipment. Furthermore, they are not consumer goods because she is not using them for personal use but rather is using them throughout her business. As such, they will most likely be identified as equipment. The gas station antiques that are sold on consignment are inventory collateral because they are for the sale or lease of goods in one's business. Although they are owned by Carlos, they are given on consignment to Debbie, who will sell the goods for Carlos. As such, the gas station antiques merchandise is inventory.

2. Attachment

*The next issue after identifying the collateral is to identify whether the party has a **secured interest in the collateral**. A security interest becomes secured when there is **attachment**. Attachment occurs when there is (i) an authorized security agreement (ii)*

for value (iii) and the debtor owns the right to the collateral. The security interest agreement must be signed by the debtor, and must properly and reasonably identify the collateral. Under the security agreement, the debtor's name must be indicated properly under the agreement because the search will occur according to the debtor's name under the index-search of the registry. Otherwise, it may be deemed to be "substantially misleading" if it is not recorded under the debtor's name.

In regard to Uncle: Uncle does not have a security agreement with Debbie but rather perfects with his certificate of title (discussed below). Uncle gives value for the interest because he gives Debbie \$10,000 in exchange for one of the antique cars.

In regard to First Bank: Debbie files a financing statement naming herself as debtor and there is no security agreement otherwise indicated. First Bank gives value for the security interest because it gives Debbie \$500,000 loan for opening up the Museum. This may be problematic if First Bank did not file because it is the secured interest, rather than Debbie. However, it seems that because Debbie listed herself as the debtor, she may be easily located as the debtor under the index-search. Furthermore, First Bank obtains a security interest in "after-acquired" property. These are permissible under Article 9-- and they (discussed below) are subject to certain perfection rules. However, when obtained in either a security interest agreement or financing statement, after-acquired property clauses are permissible. In fact, courts will presume these clauses in items that are readily depletable or replenished in a business.

In regard to Carlos: Carlos and Debbie execute a security agreement that stated the merchandise is owned by Carlos and placed on consignment. Carlos gives value for the security interest by stating that Debbie can obtain 25 percent of her sales as her commission. Although executory promises are not sufficient as value, it must be a completed executory promise in order for there to be value. Carlos will argue that by giving Debbie an interest in the consignment goods, there has been valid consideration.

3. Perfection

The next issue is whether the parties **perfected their security interest.** Perfection can occur in one of five manners: (i) possession (ii) control (iii) filing a financing statement (iv) certificate of title (v) automatic perfection. Automatic perfection only arises when there is a perfected security interest in the good that is the basis of the security agreement. Possession can perfect when the secured interest creditor maintains the goods that are the subject of the security interest. Possession is rare, however, because most of the time, the debtor needs the good that has the security interest. Investments and Non-consumer bank accounts may only be perfected by control. Cars must only be perfected by certificate of title, unless they are used for inventory purposes--then filing a financing statement is required given the quantity of cars involved. Proceeds of the aforementioned are automatically perfected for 20 days and no other conduct is required if the same office rule applies or if the proceeds are case proceeds. After-acquired goods of the same collateral in a financing statement is maintained unless it is consumer goods in which case it is perfected if the debtor acquires the goods within 10 days or it is not permitted when it is a commercial tort action. When using a financing statement, the debtor must sign the financing statement, and there must be adequate description of the collateral and it must be filed with the Florida Registry of Secured Transactions.

Here, **in regard to Uncle**: His interest is perfected by certificate of title. As discussed above, the cars are used for Debbie's car museum and as such, as equipment. Thus, perfection occurs by creating a certificate of title.

In regard to First Bank: First Bank has an interest in "business and personal assets as described in a financing statement" which in turn is Debbie's "all cars and all merchandise for sale in the museum whether now owned or later acquired." First Bank must perfect by filing a financing statement and by filing a certificate of title for the cars because it has a security interest in equipment and inventory. Since the cars are equipment, perfection occurs by the certificate of title. Furthermore, the collateral that is for sale as part of Debbie's museum is inventory (the consignment goods), so First Bank must file a financing statement to perfect. Since First Bank has a security agreement which states "after-acquired" collateral, they will have an automatic security interest in the after-acquired collateral. First Bank files its financing statement, Debbie is properly named and the collateral is properly labeled as "all cars and all merchandise for sale in the museum." Such categorical descriptions of collateral is permissible.

In regard to Carlos: Carlos, who has a security interest in the collateral which is on sale for consignment, has filed a financing statement. The financing statement is appropriate to perfect his interest.

4. Priority

The next issue is who has priority to which collateral. Priority issues arise when there are either perfected secured creditors or unperfected secured creditors, or if it involves a buyer in the ordinary course of business. Priority between a perfected security interest and a perfected security, the general rule is the first to file or the first to perfect. When it involves a perfected secured interest over an unperfected secured interest, the perfected secured interest always has priority. When there is a purchase money security interest, there are special rules. A purchase money security interest in collateral other than inventory or livestock has priority over secured interests in the same goods if they have perfected when the debtor receives the goods and gives an authorized notification to all other secured interests in the goods. When there is a security interest in goods other than inventory or livestock, the collateral must be perfected before the debtor receives the goods or 20 days after the debtor receives the goods.

Here, as between Uncle and First Bank, First Bank will try to argue that it has a priority interest in the antique car that was given to Uncle as collateral. However, Uncle will argue that he perfected before First Bank. Uncle will win with regard to the one car because he did file the certificate of title and then **months later** First Bank came into the picture. As a result, Uncle has priority in the one car.

As between First Bank and Carlos, with regard to "all merchandise for sale in the museum," First Bank will argue that because it filed the financing statement first and maintained the "after-acquired" clause, it had perfected its interest in the consignment goods which are inventory. Carlos will argue that it was required to give notice to all secured interests in the goods even if it had the after-acquired clause because it was goods that were acquired as a result of inventory and First Bank never gave an authenticated notice to other creditors. Carlos may have a good argument that First

Bank maintains a security interest in the goods at the time the financing statement was entered into, but because it never perfected on the after-acquired goods by filing and giving notice, First Bank did not perfect as to the after-acquired goods. Furthermore, Carlos would argue that he has a purchase money security interest in the consignment goods--which as discussed, perfect automatically for 20 days and no further action is needed if cash proceeds or same-office rule. As such, Carlos will have priority over First Bank.

As against a buyer in ordinary consumer goods,

5. Repossession

Carlos may try to recover the goods by instituting repossession against Debbie's debtors who took the collateral.

CLAIMS THAT DEBBIE HAS AGAINST FIRST BANK

The first issue here is whether the cashier's check was negotiable and if so, was the check required to be paid by First Bank. A draft transaction usually involves three people, the drawer, the drawee bank and the indorsers. The drawer is the one who makes the promise to pay on the check (also known as a type of draft), the indorser is one who indorses the check and can also sometimes also be the payee in the transaction. The drawee bank is the one who gives the money upon presentment. A cashier's check is a type of draft that has been authorized by the drawee bank--indicating that it promises to pay and in fact, relieves the drawer from liability when there is a dishonor of presentment. A cashier's check is also bearer paper because it generally does not require one's signature in order to be negotiable. To be negotiable, the draft must be (i) in writing (ii) unconditional promise to pay (iii) on demand or at a definite time (iv) with or without interest (but not permitted on checks to have interest) (v) payable to order or bearer paper (vi) a fixed amount of money (vii) signed by the drawer (viii) without any unauthorized undertakings. It is important to note that if a draft or note is not properly negotiable, general contract rules apply. Although obligations are suspended under the note or draft, an indorser may sue based on the contract obligations if it is not negotiable.

Once it is determined that a draft is negotiable, it must be determined if it is properly negotiated. There must be (i) entitlement to endorse the check and (ii) genuine and authentic signatures.

A payee may bring an action against a drawee bank when there has been (i) presentment (ii) dishonor of presentment. Presentment is a demand for payment. Dishonor of presentment occurs when the drawee bank refuses to make a payment on the draft.

Here, it seems that William is the drawer on the check. First Bank is the drawee bank on the check. Debbie is the payee of the check. Car Buyer is the initial on the check. The check is arguably negotiable because it is bearer paper; it is arguably for \$25,000 since that is the amount that was sold for the car. Furthermore, it is a fixed amount and checks are presumed to be payable on demand, even if there is no date given on the check. It is presumably signed by the drawer but also by the drawee bank as the authorized promisor of the check. There seem to be no unauthorized undertakings and

as a result, there is a negotiable instrument.

Next, it was properly negotiated because the indorser, Car Buyer, signed it and indorsed it to Debbie. It had the genuine and authentic signatures of the indorser and as a cashier's check, it was bearer paper so it only needed to be transferred to be properly negotiated. As such, it was properly negotiated.

The next issue here is whether there was a breach of **presentment warranties or transfer warranties** when the check was presented to First Bank for payment. Presentment warranties are warranties that (i) there is no knowledge that the signatures are not authentic (ii) there is no alteration and (iii) there is entitlement to enforce the draft. Transfer warranties include (i) there is no knowledge of insolvency proceedings (ii) there is no alteration (iii) there is entitlement to enforcement (iv) the signatures are authentic (v) there is no claim or defenses that are present.

In regard to Debbie: Debbie will argue that First Bank breached its presentment warranties when she presented the check for payment. She will argue that she had good title to the check as it was properly transferred from Indorser and that First Bank, who authorized the check to make it a cashier's check, made a promise to pay once it authorized the check. Furthermore, Debbie will argue that it had no right to permit the stop payment on the order because the cashier's check acts like cash once it has been authorized--thus, William was not permitted to put a stop payment on it. A stop payment, if done orally, is authorized up to 14 days. If a written stop order payment is done, it is valid for up to 6 months. Furthermore, she will argue that she made a valid presentment which First Bank dishonored. Dishonor of payment may hold the payee bank liable. First Bank may try to argue that the note was not properly negotiable, but as a cashier's check authorization, First Bank was liable. As such, Debbie will have a valid claim for breach of presentment warranties against First Bank.

CLAIMS THAT CARLOS HAS AGAINST FIRST BANK

Please note the rules above. As discussed above, the draft transaction involves three parties. It is also possible that a draft such as a check requires two payee signatures. If the check, which is presumably an order paper, requires two payee signatures, the note is not payable unless both signatures are present. If the check states that it is payable to bearer paper, then it is freely negotiable and the signature of the payee can be anyone. When a check indicates that there are two payees, it is permissible, and the check is held by the payees as **tenants in common**. In fact, if the check states how the payment should be divided up (for example, it states that it should be 25% to Debbie and 75% to Carlos), it will not be valid.

Here, the check is **order paper** because it is payable to "Debbie Debtor, Carlos Consignor." Carlos will argue that First Bank required his signature prior to permitting Debbie from cashing the check. A check that is a personal check and is made payable to two payees requires BOTH signatures unless the draft indicates that the signature is for "or." He will argue that his signature was required and as a result, it was not "properly payable" There is a properly payable action when the check was fraudulently conveyed by either forgery or alteration. Here, although there is neither, the check required his signature as the consignor. First Bank will argue that the fact that there was a comma rather than an "AND" indicated that only Debbie's signature was required. As

a result, if First Bank can prove that only Debbie's signature was required because it was an "or" for the indorsement signatures rather than an "and", then Carlos will have no claim against First Bank. However, Carlos has a stronger argument that his signature was required.

Next, Carlos can try to claim under the contract obligations of the check that First Bank was not permitted to honor the check. He may claim a "not properly payable action" against First Bank and will argue that the check was improperly converted. **Conversion** is a remedy permitted by the courts for an indorser who was entitled to payment but did not receive the payment. Conversion is the substantial interference of one's property. However, with conversion, the indorser must have actual possession over the check. If Carlos never received the check, he does not have a proper conversion action against First Bank. It does not suffice that he only claim conversion but not actually receive the action.

Carlos may try to argue unjust enrichment or argue restitution (to disgorge ill-gotten gains) against Debbie for maintaining the 75 percent that was for Carlos under contract theories of remedies.

PART II - SAMPLE MULTIPLE-CHOICE QUESTIONS AND ANSWERS

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

The answers appear on page 46.

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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ANSWER KEY FOR MULTIPLE-CHOICE QUESTIONS

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