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from two previously administered examinations
and sample answers.

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PART I – ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2014 AND FEBRUARY 2015 FLORIDA BAR EXAMINATIONS

ESSAY QUESTIONS AND SELECTED ANSWERS

Part I of this publication contains the essay questions from the July 2014 and February 2015 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 QUESTION NUMBER 1

JULY 2014 BAR EXAMINATION – CONTRACTS/UNIFORM COMMERCIAL CODE/ETHICS

Manufacturer is a leading golf club manufacturer. It has a new line of titanium driver, the TI Bomb. The titanium driver represents the latest in golf technology for achieving the maximum distance for a golf ball when making long shots. Retailer is a retailer of high end golf equipment, and its owner, Retail Owner, is well known in the industry. Competitor is a new retailer to the market, and is trying to cut into the Retailer's market share.

Retailer learned of Manufacturer's latest driver technology while at a golf show, liked the \$200 wholesale price, and immediately sent a signed purchase order to Manufacturer that said, "Please ship 1000 TI Bomb drivers, \$200 each, with a two percent discount if paid within 10 days, or total net amount due in 30 days." Upon receipt of the purchase order, Manufacturer ships 500 drivers with its own signed order form that said, "500 drivers, \$200 each, the other 500 will be shipped upon full payment of \$200,000, so long as that payment is received within three days of receipt of this initial shipment of 500 clubs." Five days after Retailer received the 500 clubs, Retailer sent a note payable on demand to the order of Manufacturer in the amount of \$196,000 (\$200,000 minus the two percent discount). Upon receipt of the note, Manufacturer immediately indorsed it over to its titanium supplier (Supplier) to pay for previous purchases of titanium.

After the 500 clubs arrived to Retailer, Manufacturer, knowing that the market price has now doubled on the new TI Bomb driver, calls Retailer on the phone and says, "You shorted me \$4000 and I will not ship the other 500 drivers because you did not pay in full. The current price is \$400 per driver." Retail Owner himself calls Manufacturer from another trade show and says, "I paid in full, send my clubs or return the note," to which Manufacturer responds, "Too late, it has already been used to pay Supplier." Employee of Competitor is eavesdropping on the conversation and hears Retail Owner say, "You had no right to use my note to pay Supplier without sending me the merchandise." Competitor, based upon Competitor Owner's knowledge of the conversation and seeing an opportunity to create problems for Retailer, immediately contacts Supplier and purchases the note from Supplier for \$190,000 without disclosing anything to Manufacturer. Supplier endorses the note over to Competitor. Competitor then presents the note to Retailer and demands immediate payment of \$196,000.

Incensed, Retail Owner goes immediately in search of an attorney, and contacts Larry Legal (Larry) in the Tampa office of a very large national firm (Firm). He knows Larry is a golf fanatic and, to save on legal fees, Retail Owner verbally offers him 10 percent of the TI Bomb drivers he may ultimately recover from Manufacturer. Larry is so excited about the prospect of representing Retailer, and getting some of the hot new drivers, that he immediately takes the representation and begins work. Manufacturer is also a client of Firm, and one of the partners in another office of Firm actually serves as Manufacturer's general counsel.

Discuss Retailer's legal rights with respect to Manufacturer, Supplier, and Competitor, and the likely results including damages, if any, against each should there be litigation. Also discuss any ethical issues that arise for Larry and Firm.

SELECTED ANSWER TO QUESTION 1 **(July 2014 Bar Examination)**

This essay presents two issues: contracts and commercial paper. Each will be addressed in turn.

I. Whether there was a valid contract?

*The threshold issue we must determine is the applicable law. This contract regards the sale of a TI Bomb, a titanium golf driver, which is a good--an item moveable at the time of identification for a contract. As a result, this contract will be governed by the **UCC Article 2**. It's also important to note that the parties to this particular transaction are **merchants**. UCC applies special rules to merchants and some of these rules are triggered when merchants are dealing with one another as in the present case. Here, Manufacturer is a leading golf club manufacturer and Retailer is a high end golf equipment retailer.*

*In order to have a valid contract you must have **mutual asset (offer and acceptance), consideration, and no valid defenses**. Retailer will try to raise a breach of contract action against the Manufacturer. In order to prevail on a breach of contract action, Plaintiff must be able to establish that there was a valid contract and that the parties were under an absolute duty to perform and either failed to perform or performed inadequately under the contract.*

OFFER:

An offer consists of a manifestation of assent to enter into a contract. It must contain a promise to enter into a contract and a contract for the sale of goods requires a quantity term and the parties (essential terms test). The test of determining whether a valid offer has been made is whether the offeree would reasonably believe that his acceptance of the offer would create a binding contract.

Here, Retailer sent a signed purchase offer to the Manufacturer that offered to purchase 1000 TI Bomb drivers for \$200 each with a 2% discount if paid within 10 days or total net due within 30 days. This is a valid offer for the sale of goods because it has a quantity term and identifies the parties to the transactions. Furthermore, it is signed by the Retailer.

ACCEPTANCE:

Next, we must determine whether this offer was accepted. Generally, the offeror is the master of his offer and he can revoke the offer at any time prior to acceptance. Acceptance is when the offeree manifests his assent to enter into the contract. Acceptance, if not expressly agreed otherwise, may be done by any reasonable means.

Here, the manufacturer shipped 500 drivers with its own offer form that said: "500 drivers, \$100 each, the other 500 will be shopped upon full payment of \$200,000 so long as that payment is received within 3 days of receipt of this initial shipment of 500 clubs." This action poses several issues.

First, UCC 2-207, the "**battle-of-the-forms**" provision, will govern the communications between these two merchants. While under the common law, the mirror image rule applies to offer and acceptance, UCC 2-207 governs communications between parties governing their offer/acceptance. Here, we have a communication between two merchants and Manufacturer's response was a "seasonable expression of acceptance", in others words acceptance was not expressly conditioned on the Retailer accepting the manufacturer's terms. Manufacturer may try to argue that his language in the correspondence provisioning that "so long as payment is received within 3 days..." is language which made acceptance expressly conditioned thereon. However, the magic language for expressly conditional terms was not used. A court would likely find that there was acceptance of the Retailers offer.

Next, we must determine which terms were incorporated into the contract. Generally, the terms of the offer govern. Since we are dealing with merchants we look at whether the terms materially change the contract. Here, the variation of the term provided that payment would need to be provided within 3 days and that the rest of the shipment would be sent immediately thereafter. The price and quantity terms are the same and generally goods must be paid for upon receipt. Therefore, the Manufacturer would argue that his terms will govern the contract because they did not materially change the terms of the agreement. Retailer on the other hand will counter that his terms expressly provided for the payment terms (within 30 days or within 10 days with 2% discount). Therefore, Retailer will argue that this was a material change to the terms of the contract. Retailer will also argue that even if the court should find that the terms to the contract were not materially altered, Retailer objected to those terms in its initial correspondence. The UCC comments highlight that when one of the merchants has expressly provided for the terms in its initial communication then there is an objection to that term being changed by the response to the communication. Generally, the objection must be made within 10 days. Here, Manufacturer will argue that the Retailer did not object to the terms merely because of his initial communication and that the court should consider their course of performance. Here, Retailer immediately paid the \$196,000, and the Manufacturer requested immediate payment.

Under the UCC, **acceptance can be by shipment of non-conforming goods**. If the seller of goods would like his shipment not to be an acceptance, it must be accompanied by a notice of accommodation. If it were accompanied with a notice of accommodation, then we would have a counter offer instead of acceptance and breach. Here, Manufacturer may try to argue that his communication, if not considered a counter offer in writing, should be considered a notice of accommodation. However, the language of the communication suggests that it was not a notice of accommodation. Therefore, the court will likely find that by shipping the 500 drivers to Retailers, Manufacturer accepted and breached the contract.

Manufacturer may also try to argue **divisibility of contract** by arguing that there were 2 separate contracts, for the first 500 clubs and then for the second 500 clubs. While this is something that the court may consider, the Court will likely determine that there was a valid offer and acceptance for the sale of 1000 TI Bomb Drivers for \$200 each with 2% discount and payment due immediately.

Consideration:

In Florida, there must be "bargained for exchange" of "legal value" for there to be a binding contract. Legal value in Florida, which follows the minority position, is that legal value is legal benefit or detriment to one of the parties. Here, the parties bargained for the amount to be paid and for the goods. Retailer was benefitted by having the clubs and to his detriment gave a promissory note of \$196,000. Manufacturer was benefitted by having the note that he could then negotiate to its supplier and to its detriment had to provide inventory to the Retailer. Therefore, there was consideration.

Retailer may argue that there was a failure of consideration here because he did not receive the rest of his clubs, the other 500 clubs. This will become important when being raised as a defense against a holder in due course or a holder of the promissory note. Failure of consideration is a personal defense and will be raised below.

No valid defenses:

Statute of frauds requires that certain contracts be in writing and signed by the party against whom enforcement is sought. Here, this is a contract for the sale of goods for \$200,000. Contracts for the sale of goods in the amount of \$500 or more are required to be in writing, contain a quantity term, and be signed by the party against whom enforcement is sought. Here, there are written communications between the parties that have been signed by both. Even if the Manufacturer or Retailer were to argue that their own communications do not satisfy the writing requirement, under the UCC there is the "merchant's confirmatory memo exception." Under this exception, if the merchant receives a memo from the other party confirming the terms of the agreement and does not object within a reasonable time, this writing may be used against him/her/it to satisfy the Statute of Frauds.

Modification of Contract:

Here, Manufacturer may try to argue that there was a modification of the contract that provided the price for the drivers would be \$400 each. Under the UCC, in contrast to the common law, there does not need to be additional consideration to support a contract modification. Rather, the UCC simply requires that the contract modification be made in good faith. Here, the parties will argue as to whether the modification was made in good faith. Manufacturer will argue that it was in good faith because of the change of the price of these particular drivers it was commercially impracticable for him to perform this contract which required him to give the goods for half of their value. Retailer will counter that this modification was not in good faith but rather was a move of extortion--trying to get the Retailer to pay double the price to try to make more money on the particular transaction. Since the facts show that Manufacturer "knowing the market price has not doubled on the new TI Bomb Driver called and said 'You shorted me \$4000 and I will not ship the other 500 drivers because you did not pay in full.'" This point is arguable on both sides as the Manufacturer may allege that due to the Retailer's breach of not paying the full purchase price this modification was done in good faith. Retailer will argue that Manufacturer was simply trying to get double the price for the same goods knowing that the market price had doubled.

Breach:

Breach of contract occurs when the plaintiff has performed and the other party is under an absolute duty to perform and has failed to perform or has performed inadequately.

Here, Retailer will allege that he had rendered full performance payment of the contract and had not received the full benefit of his bargain as Manufacturer has withheld the last 500 clubs. Manufacturer will argue that he was excused for performance and there was no breach. UCC follows the perfect tender rule.

Damages:

Florida awards expectation damages for the party to get the benefit of his or her bargain. Here, they can try to argue unique goods to get specific performance but if these are available in the market place, then the court will allow the Retailer to recover 500 X the market price at the time of breach= here \$400. So his damages will be \$90,000.

Competitor v. Retailer: (COMMERCIAL PAPER ISSUE)

This is two-party paper, a promissory note, and Retailer is the Maker, while the payee was the Manufacturer. Competitor is a holder of the note (holder in due course under the shelter doctrine) and the supplier was a holder in due course and indorser of the instrument.

This note meets the form-based/formal test for negotiability. It is a signed, writing, that is an unconditional promise to pay a fixed sum of money on demand or at a definite time to order or bearer and has no additional undertakings.

Here, the note was signed by Retailer's owner. As the owner of the Retailer, he had the apparent authority to bind the company on the note. A signature requires a present intent to authenticate and that was present here. We also know that it was a writing, it must be permanent and portable. Here, it has transferred possession so we will assume for argument's sake that it was on a piece of paper.

Here, there is no conditional language on the face of the document. It was for a fixed sum of money (\$196,000) and it was payable in dollars which is a recognized currency. You have to be able to determine the amount due from the face of the instrument and that is available here. Next, we know it is payable on demand and the fact that it is undated does not destroy negotiability.

This is order paper because it was "payable to the order of Manufacturer." When an instrument is payable to a particular person or organization it is order paper. Lastly, a negotiable instrument must be "a courier without luggage." Here, there was no other language on the instrument that made it subject or conditional on anything else, therefore it meets this requirement.

Next, must determine if it was properly negotiated. When it went from Manufacturer--> Supplier it was order paper. To negotiate order paper you must indorse the instrument and transfer possession. Here, it was indorsed and transferred and therefore it was negotiated. Therefore, Supplier was a holder.

When it went from Supplier --> Competitor it was bearer paper because we are not told of the type of indorsement that was placed on it. If it was a blank indorsement, then the mere transfer of possession of bearer paper properly negotiates it making the person to whom it was properly negotiated a holder.

Is Manufacturer a holder in due course? Manufacturer gave value, acted in good faith, and took without notice of overdue/dishonor/defenses. Therefore, Manufacturer was a holder in due course.

Here, Retailer did not take the instrument in good faith because he knew of the failure of consideration and the underlying dispute between the parties because he obtained the note. Therefore, Retailer had notice of the defense. However, he may qualify as a holder in due course under the "shelter doctrine." Under the Shelter doctrine, if the holder receives the instrument (has it negotiated) from someone who enjoyed holder in due course status, he will also enjoy the holder in due course status.

A holder in due course is important because only real defenses may be raised against a holder in due course and personal defenses cannot be raised. Real defenses include fraud in the factum, forgery, incapacity to the extent a contract is void under the state law, adjudicated incapacitated, duress, statute of limitations etc. Personal defenses include failure of consideration, fraud in the inducement, and breach of contract.

If Competitor is a holder in due course, then the maker of the instrument (here, Retailer) must pay the instrument according to its terms at the time of issuance, his defenses of failure of consideration or breach of contract against the Manufacturer may not be raised against the holder in due course. It appears as though, Retailer will have to pay competitor the \$196,000 since it's a note payable on demand and he is a holder in due course.

Even if Competitor is not a holder in due course, he would still be a holder who is entitled to enforce the instrument. The difference would be that Retailer would raise the personal defenses against Manufacturer against the Competitor.

By endorsing the instrument, the Supplier becomes liable to pay the instrument according to its terms at the time of indorsement. Therefore, if Retailer dishonors the note, upon presentment and notice of dishonor to Retailer, Competitor will try to recover from the Supplier who indorsed the note and is secondarily liable on it.

Professional Responsibility issues:

Here, there are two main professionalism concerns. First, a lawyer may not undertake to represent a client if doing so will adversely affect his or her professional judgment and independence. Additionally, a lawyer may not take to represent a client if that client's interest are materially adverse to another client unless the lawyer: 1) reasonably believes that he/she may provide competent and diligent representation two both clients, 2) the representation is not prohibited by law, 3) the clients provide their informed consent, and 4) the representation does not require the lawyer to assert a position that is directly adverse to another client.

Under the Florida Rules of Professional Conduct, a lawyer may not have a "pecuniary interest" in the litigation. Here, Larry Lawyer has been offered 10% of the TI Bomb driver he may ultimately recover. Therefore, he has a pecuniary interest in the litigation.

Larry Lawyer may try to argue that this is simply a contingency fee agreement. In Florida, contingency fees are only prohibited in criminal/family law cases. Contingency fee agreements must be in writing and must provide the method of calculation of recovery. Any recoveries in excess of the percentages provided in the FRPC are considered excessive.

However, this fee agreement was not in writing, and the client did not receive a copy of the client's rights. Therefore, the court will likely find that this is not a valid contingency fee agreement.

If it's not a contingency fee agreement and there is no non-refundable retainer, the agreement need not be in writing. However, the court will likely find it unreasonable for the lawyer to have a stake in the subject matter of the litigation and that this representation is prohibited by law.

Additionally, the adverse party to the litigation "Manufacturer" is a client of the firm in another office. However, that partner's disqualification will be imputed to the entire firm. Normally an imputed conflict may be avoided, if the lawyer avoids more exposure to the information than necessary, is timely screened from the matter, and does not share in the fee. However, even if they were to screen the other attorney, this particular representation would require asserting a position in court that is directly adverse to the other client (Retailer v. Manufacturer). As a result, Larry Lawyer should decline representation of Retailer Owner.

Q QUESTION NUMBER 2

JULY 2014 BAR EXAMINATION – TORTS/CONTRACTS/ETHICS

Seller, the owner of a piano store, placed an advertisement to sell a baby grand piano. The advertisement stated:

6-month-young Topnotch baby grand piano
must sell due to downsizing of store
\$60,000

Buyer, a very successful businessman, wanted to learn how to play a musical instrument. Because he wanted only the best, he decided to buy a Topnotch brand baby grand piano. Buyer knew that new Topnotches sell for \$75,000, and that they do not depreciate rapidly in value. He responded immediately to Seller's ad because he thought the piano was a real bargain.

The parties completed the sale at the asking price. The bill of sale, signed by both parties, stated: "Baby grand piano, as is, \$60,000." The bill of sale did not specify the brand of piano.

The day after the piano was delivered to Buyer, he had the piano tuned. The tuner laughed when he saw the inside of the piano. Although the piano had the Topnotch name and logo embossed on it, he told Buyer that it was really an Offbrand piano. After purchasing the new Offbrand piano for its fair market value of \$6,000, the Seller had changed the nameplate and logo on it. Attorney, who was Seller's personal friend, had been with Seller when he bought the Offbrand piano but did not participate in the resale of it to Buyer.

Buyer now plans to file suit against Seller. Prepare a memo discussing the civil claims that Buyer may bring against Seller, Seller's defenses, possible remedies, and which party should prevail. Include in your response a discussion of the ethical issues involved in whether Attorney should represent Seller in the civil suit brought by Buyer. Do not include any issues of criminal law.

SELECTED ANSWER TO QUESTION 2

(July 2014 Bar Examination)

This memorandum discusses civil claims that Buyer may bring against the Seller, any possible defenses of Seller, and possible remedies and outcomes, as well as ethical issues arising from Attorney's representation of Seller.

Buyer v. Seller - piano contract

A. Contract Formation, UCC Statute of Frauds, the Bill of Sale & Admissibility of Extrinsic Parol Evidence

Here, the prima facie elements of valid contract existed: a valid offer creating a power of acceptance in the offeree, acceptance indicating an intent to be bound, and consideration (a legal detriment or benefit and bargained-for exchange). This contract was for the sale of goods subject to Article 2 of the Uniform Commercial Code (UCC), because a grand piano is moveable personal property or chattel (i.e., a good). Since the exchange was for more than \$500, the UCC Statute of Frauds applies, meaning that in order for the contract to be enforced, there must be a (1) writing or memorandum; (2) signed by the party to be charged; and (3) containing information sufficient to indicate the a contract was made. Here, the UCC Statute of Frauds is satisfied by the bill of sale signed by both parties. Although the bill of sale did not specify the brand of piano, this does not make the contract unenforceable. The UCC Statute of Frauds is liberal, requiring only the parties and the general good as an essential term. The UCC's flexibility is attributable to: (1) its "gap-filling" provisions, which fill gaps in the contract with default rules relating to price, shipment, risk of loss, etc.; and (2) its treatment of parol evidence. The UCC allows parol evidence, even of an integrated contract, unless the parties "certainly would have" included a term in the written agreement. Here, the bill of sale does not specify the brand of piano, but extrinsic parol evidence (e.g., the advertisement) is admissible evidence to prove what the parties intended. Thus, Buyer's prospective suit is not limited by "four corners" of the bill of sale.

B. Contract Defenses and Buyer's Remedies

1. Buyer's Claim of Fraudulent Misrepresentation and Breach of Warranty

The facts given here raise an issue of contract defenses. We turn to issues of Buyer's claims relating to the piano's real status as a much cheaper Offbrand piano (fair market value of \$6,000) rather than, as advertised, a much more valuable Topnotch piano (fair market value of \$75,000 and contract price of \$60,000). Buyer has two cognizable claims in this case: an affirmative fraudulent misrepresentation and a breach of warranty.

Here, Buyer can bring an action against Seller for an affirmative fraudulent misrepresentation. Fraudulent misrepresentation exists when a party (1) misrepresents a material fact; (2) in a way amounting to fraud; (3) inducing reliance from the other party; (4) to the other party's detriment, causing damages. Here, Seller, in his advertisement, promised a "6-month-young Topnotch baby grand piano," yet what was

delivered was an Offbrand piano. Here, Seller made an affirmative misrepresentation of material fact, and the material fact was a basis of the bargain. The misrepresentation was material: brand an important and significant element of the deal, and Buyer, the businessman, wanted only the best piano. Seller's fraudulent conduct was also intentional: Seller knowingly changed the nameplate and logo on the piano to defraud Buyer. The Buyer relied on Seller's misrepresentation, to his detriment. Finally, Buyer never ratified the contract; as the facts indicate, Buyer immediately objected upon discovery of the misrepresentation and plans to seek legal remedies.

Buyer can also raise the defenses of a breach of warranty. There are three major kinds of warranties relating to the sale of goods. An express warranty is created by a particular express representation, statement, model, design, or sample, indicating that the good to be sold is of a particular status or quality (but not a general recommendation or commendation of any good). Here, the baby grand piano was expressly advertised as a "6-month-young baby grand piano." Thus, a trier-of-fact could reasonably find a breach of warranty here, where the piano that was promised (Topnotch) was not what was rendered (Offbrand). This is the strongest warranty argument.

The second warranty is the implied warranty of merchantability. This warranty applies only to goods sold by merchants; here, Seller is the owner of a piano store and so is a merchant. The implied warranty of merchantability is a warranty that the goods sold are fit for their ordinary purpose. Here, there may or may not be a breach of the implied warranty of merchantability. The Offbrand piano is likely playable and so might be considered "fit for an ordinary purpose." However, if the Topnotch piano is distinct in style, quality, or any other way, then a breach of the implied warranty of merchantability might be found. This argument is weaker than the express warranty argument, but possibly still viable.

The third warranty is that of an implied warranty of fitness of a particular purpose. This warranty applies to sales of goods by both merchants and non-merchants when the seller knows that the goods are purchased for a particular purpose, and the buyer relies on seller's skill or judgment in order to choose a good. Here, there is no indicating that the Buyer relied on Seller's selection of a good, or that Seller knew of Buyer's desire for "only the best" baby grand piano. Thus, the other two warranty arguments are stronger than the implied warranty of fitness for a particular purpose.

2. Seller's Defenses of Disclaim of Warranty, Unilateral Mistake, and Duress

In response to Buyer's claims of breach of warranty and fraudulent misrepresentation, Seller may raise several defenses. This first is that of disclaimer of warranty. Warranties may be disclaimed, but generally such disclaimers must be specific and not hidden. When a disclaimer of a warranty contradicts an express warranty, moreover, the contradiction is resolved in favor of upholding the warranty. A generalized disclaimer, such as "as-is," is often insufficient. This particularly applies to consumer goods (goods for personal or household use), such as a baby grand piano. Because Seller here made an express representation, and never affirmatively withdrew from that representation before the contract was executed, a court would likely find that no effective breach of warranty occurred.

In any suit by Buyer, the Seller could raise the issue of unilateral mistake, asserting that Buyer acted wrongfully in buying a Topnotch piano for \$60,000 when he knew that it was worth \$75,000. This claim will fail. Generally, absent some misrepresentation, fraud (in the inducement or in the factum), the existence of an fiduciary or confidential relationship (e.g., attorney-client, trustee-beneficiary, director-shareholder), or non-disclosure when disclosure is required (e.g., state statute requiring disclosure of known latent defect in home), each party bears the risk that the purchase price may more or less than the good is worth; i.e., its fair market value. Although Seller knew that the Topnotch piano was a great deal, his taking advantage of the deal is permissible. In the absence of one of the particular situations listed above, a unilateral mistake generally only creates a voidable contract where the other party made misleading misrepresentations (i.e. misleading partial disclosures) and when the misrepresentation would make the deal unconscionable. Here, \$15,000 off fair market value is not unconscionable. Thus, Seller cannot successfully assert unilateral mistake in the absence of any fraud, special relationship, or facts not indicated, and cannot raise Buyer's conduct to show unclear hands. Moreover, Seller is a sophisticated party: as the owner of a piano store, he surely has knowledge relating to pianos, and a court would be unlikely to find that Buyer took advantage of him in any impermissible way.

Seller could also argue economic duress, as the advertisement indicated "must sell due to downsizing of store." Seller also cannot assert economic duress relating to the downsizing of his store, because such a defense is not typically recognized. Duress typically arises when a party compels another party to enter into a contract through unlawful force, threat of force (e.g., against one's person, family, etc.), or improper threats (e.g., of a meritless civil suit, or of criminal prosecution even when such prosecution would be warranted). The mere existence of financial or economic distress is not enough to justify allowing Seller to rescind the contract.

3. Remedies

Generally, the default remedy under both the common law and the UCC is expectancy (or expectation) damages, which aim to give the non-breaching or innocent party the benefit of his bargain. As an alternative, in appropriate cases the non-breaching party may be able to recover restitutionary damages, reliance damages, or specific performance. Liquidated damages that are not penalties also may be enforceable, although this issue does not arise here. Also, a contract is voidable at the election of the party who entered into the contract as the result of a fraud, misrepresentation, or nondisclosure amounting to fraud (i.e., rescission is a remedy). Generally, punitive damages are not recoverable in contract, unless there is an independent tort committed. Note that under the doctrine of election of remedies, a party cannot get a "double recovery" - he cannot choose, for example, both restitutionary and expectancy damages.

Here, assuming Buyer prevails on his arguments for fraudulent misrepresentation and breach of warranty, which is likely, Buyer may seek to void the contract and rescind the contract. This would involve a restitutionary recovery of the \$60,000 price paid by Seller to Buyer, and likely the return of the Offbrand piano to the Seller. This would place Buyer back in the position he was in pre-contract. Alternatively, Buyer could seek damages for breach of warranty through damages in the amount of the difference

between what was promised (a six-month-old Topnotch baby piano) and what was actually rendered (a new Offbrand piano). The fair market value of a Topnotch piano is \$75,000, while the fair market value for the Offbrand pianos is \$6,000; thus, Buyer could be entitled to \$69,000 in money damages from the seller (the difference in value). Alternatively, it could be decided that giving the Buyer the "benefit of the bargain" is more equitable, and since the purchase price of this particular piano advertised as a Topnotch was \$60,000, then Buyer would be entitled to the difference (\$15,000).

Buyer can also elect UCC buyer's remedies of "cover" - i.e., Buyer could seek to purchase a reasonably equivalent good (i.e., a six-month old Topnotch baby grand piano), and then sue for the difference, if any, between the cost of the genuine Topnotch and the cost of the \$60,000 fake "Topnotch" that Seller sold to him. It is likely that Buyer can effectively use cover and recover from Seller, who sold him the piano as a steep discount. If Buyer purchases a genuine Topnotch at its market price (\$75,000), he can cover the difference from the \$60,000 price: approximately \$15,000.

Buyer could also seek reasonably certain and foreseeable consequential and incidental damages arising from Seller's breach: this could include, for example, the cost of delivery of a new piano, or telephone costs for communicating with prospective sellers.

Finally, Buyer could also seek specific performance of the bargain. Specific performance is where a court uses its equitable power through a court order or decree to enforce the terms of a bargain. Usually, specific performance is reserved for unique goods that have no replacement on the open market, such as contracts for the sale or purchase of land or an interest in land. Specific performance is not available where there are adequate legal remedies (e.g., money damages) or rescission of the contract. Even if Seller actually has in his inventory a genuine six-month-old Topnotch baby piano, a court would probably not order specific performance, because money damages or rescission constitute an adequate remedy at law. Moreover, Topnotch baby pianos are presumably available on the open market, and so the good is not "unique."

Attorney's representation of Seller - ethical issues

The ethical duties of Florida lawyers are outlined in the decisions of the Florida Supreme Court, the Florida Rules of Professional Responsibility, the Ideals and Goals of Professionalism, the Oath of Admission to the Florida Bar, the Creed of the Florida Bar, and other documents. All Florida lawyers must comply with the professional responsibility obligations, and are subject to discipline for non-compliance. Here, the ethical duty at issue concerns Attorney's prospective representation of Seller. The facts state that Attorney is Seller's personal friend and was with Seller when he bought the Offbrand piano, but did not participate in its resale to buyer.

Here, Attorney did not participate in a crime or fraud with the Seller, so the obligation to avoid crime-fraud is not at issue here. Moreover, there is no ethical rule against representing one's personal friend, although an attorney should be cautious to separate the attorney role from the friend role, especially in matters relating to the duty of undivided loyalty and the duty of confidentiality. However, Attorney's possible role as a fact witness in the matter is a problem. As a person who witnessed Seller purchase the Offbrand piano, Attorney could conceivably be called to testify (at trial or in a deposition)

about what he saw as a fact witness. An Attorney must avoid any conflict between his duty of candor to the tribunal and his duty of confidentiality to a client. Therefore, Attorney should decline representation of his friend, the Seller, and advise Seller to seek new legal counsel.

Q

QUESTION NUMBER 3

JULY 2014 BAR EXAMINATION – TRUSTS

Stan Settlor was a resident of Orlando, Florida, for the last 10 years. He volunteered at a homeless shelter in Orlando called New Beginnings. Long ago, Stan received help from a homeless shelter before graduating from college and succeeding in business.

Last year, Stan used his new smart phone to make a video recording. Stan began the recording by identifying himself and the date. Stan then stated the following:

I am making a five million dollar trust for the benefit of New Beginnings. A homeless shelter once helped me, and I'm giving back. I would like New Beginnings to be around for generations to come. I am appointing my best friend, Tom Trustee, as the trustee. Tom, I would like you to make \$500 monthly payments to New Beginnings, but you have absolute discretion to pay them whatever and whenever you think. Tom, I want your trusteeship to be really stress-free. Just keep the five million dollars in the savings account that I will create. Of course, you deserve compensation for being trustee. How does \$10,000 per month sound, buddy? As a condition of this trust, you can't be liable for anything, no matter how bad. Another condition is that New Beginnings cannot contest this trust nor sue my friend, Tom, for any acts committed as trustee. If anyone contests anything about this trust or sues Tom, the trust shall terminate and Tom shall return the balance of any remaining trust assets to me or to my son if I am dead. This trust is irrevocable.

Immediately after making the recording, Stan went to Bank and made a five million dollar deposit into a savings account. He called it New Beginnings Trust Account. Tom, a Florida resident, received full access to the account. Two weeks later, Stan emailed the video recording to Dan, the director of New Beginnings and also to Tom. Tom accepted the appointment. Stan never reduced the terms of the video recording to writing.

Earlier this year, Stan died and was survived by his son. Tom has not made one payment to New Beginnings since the creation of the trust, but has not missed a payment to himself. Recently, the poor economy has affected New Beginnings' ability to pay its bills. Dan had tried to contact Tom numerous times about what was happening with the trust, but Tom refused contact. Dan has since permanently closed New Beginnings and retired to Iowa. The Florida Attorney General has learned of what occurred and would like to do something.

Tom seeks your advice as his counsel. Prepare a memo that discusses whether Stan created a valid trust, and whether the trust provisions are valid. Discuss what duties, if any, Tom has breached as trustee. In addition, evaluate whether the Attorney General has any legal basis to intervene, and the likely outcome(s) if someone files suit.

SELECTED ANSWER TO QUESTION 3

(July 2014 Bar Examination)

Is The Trust Valid?

A trust is a fiduciary relationship between a trustee (one who has legal title) for the benefit of the beneficiaries (hold equitable title). There are express trusts (can be private or charitable), resulting trusts (those that are created when there is a reversionary interest for the settlor), and constructive trusts (created to prevent unjust enrichment (as a result of fraud, misrepresentation, illegality, etc.))

In order to have a valid trust there needs to be a Settlor with capacity to convey, the settlor has to have the present intent to place the property in trust (can be written or oral) and it cannot contain precatory language (I wish, hope, desire), a trustee (must be 18 years or older and have capacity to enter into a contract, be of sound mind) that has been assigned duties by the settlor, an ascertainable beneficiary by the time the trust is to come into enjoyment (if the assigned beneficiary does not disclaim his interest he is presumed to have accepted the trust), valid property or res, valid trust purpose. In addition the sole trustee must not be the sole beneficiary and the trust must vest from 21 years of the death of a life in being at the time the trust was created or within 360 years (Florida requirement, unless the trustee was written prior to December 31 2000, then it must vest within 90 years.

Here we have Stan as a Settlor who has capacity to convey (18 and of sound mind) because nothing in the facts indicate that he is not at least 18 and of sound mind. Stan created his trust orally, this poses no problem as long as it can be proven by clear and convincing evidence and here it can because we have an actual recording of Stan's trusts showing his intentions. Also, Stan possesses clear and convincing present intent to create the trust because he made the recording and "immediately after making the recording he went to the bank and made a \$5 million deposit into a savings account, there was also no precatory language used because Stan stated he was making a 5 million dollar trust for the Benefit of New Beginnings. We also have a trustee-Tom Trustee (important to note that a trust would not fail for lack of trustee the court would just appoint one in his place if he was removed, quit, or died). Stan also named a beneficiary New Beginnings, an ascertainable beneficiary or class of beneficiaries. There is also valid res because res can be tangible property or intangible property and the 5 million in the savings account would satisfy the res requirement and because the trust is to be a discretionary trust that gives Tom the power to pay when he wants.

Stan created a valid express private trust. In Florida if a trust doesn't say it is irrevocable it is presumed to be revocable. Although Stan did not reduce the terms of the trust into writing it is a valid express private trust because in Florida a trust would need to be in writing if it fell under Statute of Frauds or if it was for real property. Also, Tom sent New Beginnings Stan's video and there is no indication that they disclaimed their interest as beneficiaries, thus they are the rightful beneficiary of the trust.

Are Trust Provisions Valid?

Discretionary Trust Provision-A discretionary trust is one where the Trustee has discretion on how to make trust distributions for the beneficiaries. The Trustee shall do so following the instructions or duties assigned by the Settlor (Settlor's intent). A discretionary trust also prevents a Beneficiary from demanding a distribution. The trustee has sole discretion as long as he follows the settlor's intent.

Here Stan instructed for Tom to make \$500 monthly payments to New Beginnings but you have absolute discretion to pay them whenever and whatever you want. (contradictory)

Payment Provisions to Trustee (Tom)

A trustee shall be allowed to receive reasonable compensation from the trust. A reasonable compensation, if not stated by the trust, would be one that when you take into account the skill of the trustee, the time spent administering the trust, and the amount of the trust would be reasonable. Stan simply states "How does 10,000 per month state, buddy?" Tom will argue that this is a reasonable fee when considering that the trust contains 5 million. However, this fee would be found to be unreasonable because New Beginnings could argue that Tom has done nothing to further the trust (no investing, not even making payments to New Beginnings) The court would find that 10,000 a month is unreasonable and reduce it to a more reasonable amount.

Exculpatory Clause

Exculpatory clauses in trust can relieve the trustee of liability. However, if the exculpatory clause is found to have been a result of undue influence or the clause is one that prevents the trustee from being liable for bad faith/reckless behavior the exculpatory clause will be found invalid.

New Beginnings cannot sue Trustee provision or trust will terminate.

This provision will likely be found invalid because a trustee or beneficiary can bring actions to remove or bring actions of breach of trust against the trustee if there is reason to do so. This is likely to be an invalid condition (termination of trust if action brought against Tom) and the trust shall be construed as valid and the condition shall be ignored/removed. Unless, it is found that the condition is found to be a condition that Settlor required to be kept to or the trust would not be created (nothing in the facts indicate this). Thus this condition will be voided.

Has Tom breached his duties as a trustee (mention duties)

A trustee has duties to administer the trust with good faith and in a prudent manner, he has a duty of loyalty (no self-dealing), duty of impartiality (take the needs of beneficiaries into consideration), duty to earmark trust and prevent commingling, duty to report, duty to preserve and make trust productive, and duty to act as a prudent investor.

Here New Beginnings could have brought suit and stated that Tom breached his duty of acting in good faith, acting in a prudent manner, duty of impartiality against New Beginnings. New Beginnings (or if found to be a charitable trust the Attorney General could argue) could argue that Tom did not act in good faith or in a prudent manner and he did not act impartially because he did not pay the 500 dollars that settlor required him to pay to New Beginnings every month and as a result New Beginnings closed (after trying to contact trustee numerous times) and Trustee did not fail to pay himself although he failed to pay New Beginnings. Tom Trustee will be found to have violated his duties to New Beginnings and will be found in breach.

When it is found that a trustee breached his duties, the court shall award specific performance, order an injunction to prevent Trustee from continuing breach, order to pay damages or to restore property (whichever is greater) or he shall be removed as trustee (Trust would not fail for this because court could appoint another). Tom Trustee would have been removed if breach severe enough or he would have been ordered to render specific performance and make his payments. Tom could argue that he had discretion in making his payments because the trust also stated he could make the payments whenever he wants, he is likely not to succeed on this because Stan cared for New Beginnings and wanted it to continue to exist.

New Beginnings (or attorney general if charitable) could have asked for removal of Tom Trustee.

Qualified beneficiaries (settlor or co-trustees) can ask the court to remove trustees and the court will do so if it finds that keeping trustee is detrimental to the administration of the trust if 1) lack of co-trustee cooperation 2) failure or unwillingness to run/administer the trust 3) substantial change in circumstance 4) breach of trust duty.

Here New Beginnings could have argued for removal because Tom Trustee failed to administer the trust because he failed to make the 500 dollar monthly payments ordered by Trustee. New Beginnings (or attorney general) would have succeeded on this claim.

Termination of a trust (creation of resulting trust)

A trust can/will terminate when the trust indicates it shall terminate (achieved its purpose) or if beneficiaries, trustee, and/or settlor consent and ask for it. In this case the trust purpose terminates because New Beginnings closed down. The facts do not indicate how long it took but it is unlikely that the 5 million dollars have been completely spent. Because the trust purpose was to provide aid to New Beginnings and New Beginnings has closed a resulting trust for the benefit of settlor's estate or settlor's son shall be created. A resulting trust occurs when the trust purpose has been achieved, the trust terminates for a valid or invalid reason, there is no assigned beneficiary or it can be found, the trust terminates and there is excess corpus.

Because the trust has terminated a resulting trust shall be created in Stan's estate (since Stan died, it shall go to his son). Thus, the final status of the trust is a resulting trust for the benefit of Stan's son.

Does the Attorney General have any legal basis to intervene and likely outcome (charitable trust).

The Attorney General (run/in charge of charitable trusts) has the power demand action from/for charitable trust. Charitable Trusts are those who have ascertainable beneficiaries (usually look at the General Public) and must be for a Charitable purpose (furtherance of religion, education, government, health). Charitable Trusts are also not subject to the Rules against Perpetuities (can last forever, indefinite).

The attorney general could argue that Stan intended to create a charitable trust because Stan intended for the proceeds to go to New Beginnings a homeless shelter in Orlando, Florida. If the Attorney General were to succeed on his argument a court would likely find that this is an improper charitable trust because New Beginnings is ascertainable. In this case, the court could apply Cy-pres (when a court finds that the Settlor intended a charitable purpose and if that charitable trust is found to be a general charitable purpose rather than a specific one, in this case specifically intended for New Beginnings, the court would appoint a new charitable beneficiary "as near as possible" as to the settlors intent). However, it is unlikely that this trust shall be found to be a charitable one for the aforementioned and because New Beginnings is an ascertainable beneficiary.

QUESTION NUMBER 1

FEBRUARY 2015 BAR EXAMINATION – FAMILY LAW AND DEPENDENCY

Husband and Wife were married in Orlando, Florida 15 years ago. The parties moved out of Florida after their marriage and resided together in different locations due to Husband's military service. Husband retired from the military four months ago, after serving 20 years. The parties moved back to Orlando, Florida with their two minor children, Son, age 14, and Daughter, age 3. The parties purchased a home, and titled the home in Wife's name. Husband immediately found a job as a supervisor for a security company earning \$88,000 per year. Husband also receives \$4,000 per month from his military pension. Wife, a college graduate, has not worked outside the home for 15 years.

Right after they moved to Florida, Husband had an affair with his former high school girlfriend. Despite Husband's efforts to keep this affair secret, Wife discovered the affair one month after they moved to Orlando. Wife immediately filed a dissolution of marriage seeking alimony; exclusive use, possession, and ownership of the home; and half of Husband's military pension.

Husband comes to your office seeking representation on his divorce with Wife. He prefers not to get divorced, and wants to know if there is anything he can do to dismiss the case so he can work on the marriage. However, if he is not successful in getting the case dismissed, he would like to have equal time with Son and Daughter. He would also like to sell his home and split the proceeds with Wife. He does not want Wife to get any of his pension or alimony. Prepare a memorandum of law evaluating the merits and likely outcomes of each spouse's position.

SELECTED ANSWER TO QUESTION 1 **(February 2015 Bar Examination)**

Jurisdiction - *The Husband may be able to challenge the court's jurisdiction. Generally, a court will have subject matter jurisdiction over an action for dissolution of marriage if the petitioner has been a resident of the state of Florida for 6 months prior to the filing of the petition. Venue will be proper in the county where the parties last resided as Husband and Wife or in the county where they live at the time of filing. Here the parties were only living in Florida for one month when the Wife filed for divorce. So it would appear that the court may not have subject matter jurisdiction. The parties, however, were originally married and lived in Orlando 15 years ago. They then moved around for years until they returned to Florida for good one month ago. The Wife may be able to show that the parties maintained their residence in Florida and only moved due to Husband's military service, without establishing their residence in another state. If the Wife can show that she was a resident of Florida, she may be able to succeed on this. The Wife would have to allege in her petition that she was a resident of the state for at least six months prior to filing. She may prove this by proving her driver's license showing when it was issued by providing an affidavit of someone who has known her and known her residency status for the six months prior to filing. Because the parties now live within the jurisdiction of the court, the court does have personal jurisdiction over them.*

Grounds for Dissolution of Marriage - *If the Husband is not successful on challenging the court's subject matter jurisdiction, the Wife's Petition for Dissolution of marriage will proceed. Florida is a no-fault divorce state. As such, there are only two grounds for divorce: the marriage is irretrievably broken and mental incompetence of three years or more. As there are no facts to indicate that mental incompetence is an issue, only the first ground applies here. Since the Husband does not wish to get a divorce, he may deny the Wife's allegation that the marriage is irretrievably broken. The court may then grant a stay of proceedings for up to three months and may also order the parties to go to counseling. However, this is not mandatory. The judge will not force the parties to go to counseling if they do not wish to go. Husband will not be able to dismiss the case on these grounds. Once the court determines that the marriage is irretrievably broken, divorce will be granted.*

Equitable Distribution - *During the divorce proceedings the court will look at the assets of the parties and distribute them among the parties. The court will first separate marital from non-marital assets and distribute only those assets that it determines to be marital. Marital assets are interspousal gifts and other assets the parties obtained during the marriage, with marital funds or due to marital efforts, regardless of whether they are jointly titled or titled in the name of one spouse alone. This includes tangible assets and vested and non-vested intangible assets such as retirement accounts and pensions. Non-marital assets are assets that were acquired by either party prior to the marriage, or gifts, bequests or devises given to one spouse alone by someone other than their spouse. Other assets or compensation received in exchange for non-marital assets as well as passive appreciation (appreciation due only to market forces) of non-marital assets retains its non-marital character. However, active appreciation (appreciation due to the marital effort of either spouse) is marital. Parties also have to*

be careful to maintain their separate property separate and not comingle it with marital assets. Non-marital assets remain with their respective owners.

The court starts from the position that distribution should be 50/50 unless there is some reason shown to support an unequal distribution. Some factors the court will consider in determining whether there are grounds for unequal distribution are the age, physical, mental and emotional health of the parties, their earnings and earning capacity, their education, whether either party been unemployed, whether either of the parties have been the primary caretaker of the children, and the assets of the parties. Of course the court has discretion to consider any other factor that it deems appropriate to do equity between the parties. While the court does not consider alleged infidelity as a grounds for divorce, it may consider it in equitable distribution, especially if there has been dissipation of marital assets as a result. The court may award specific assets to one or each of the parties and it may also order cash equalizer payments.

Marital Home - *Generally, a home purchased by a married person is titled in the name of Husband and Wife as tenants by the entireties, but that is not the case here. The facts indicate that the home was purchased during the marriage in the name of the Wife alone. This fact however, will not change the determination of the asset. The home was purchased during the marriage. There are also no facts to indicate that it was purchased with anything other than marital funds. As such, this asset will be considered marital. The Wife wants to keep exclusive use possession and ownership of the marital home, while the Husband would like the home sold. The court will look at the parties' desire to keep the home, the age of the minor children, and whether it is financially feasible to award the home to the Wife. The Wife will argue that it is in her and the children's best interest to maintain continuity during this time. However, the Husband will argue that it is not financially feasible. Since the Wife has not been employed outside the home for 15 years, it may be difficult to prove that it is financially feasible for her to keep the home. This determination may come down to the money aspect.*

Pension - *Marital assets include vested and non-vested retirement accounts and pensions. The Husband receives a military pension for his 20 years of service. The Husband and the Wife have been married for 15 years. The Wife will argue that she is entitled to half of his entire pension. Even though they have been married for 15 years and the pension likely began to accrue when the Husband started his service 20 years ago, the Wife will be entitled to at least some portion of the pension. The Husband may argue that she is not entitled to any of it because it was due to his separate employment, however, this argument will fail. The Husband's income and pension which accrued during the marriage are marital. At the very least the Wife will be entitled to half of what accrued during the marriage. Since the parties may settle their dispute as to equitable distribution, if the Husband really wants to keep his entire pension, he could offer he keep it in exchange for the Wife keeping the house. However, if they go before the judge it is likely that at least some portion if not all of it will be considered marital.*

Alimony - *The Wife has requested alimony. There are different type of alimony in Florida. Alimony pendente lite, bridge the gap, rehabilitative, durational and permanent. Alimony pendente lite is also known as suit money and is available to either party during a divorce. This is a temporary award of alimony designed to help the recipient maintain the status quo during the pendency of the divorce. Bridge the gap alimony is a short*

term alimony award designed to help the recipient make the transition from being married to being single. This award may not exceed 2 years and it is non-modifiable, but it terminates upon the death or remarriage of the parties. Rehabilitative alimony is also a short term award. It is designed to help the recipient obtain necessary education or work experience in order to become self-supportive. This award is for a set period of time and comes along with an educational or training plan. It is modifiable upon a substantial change in circumstances and may be terminated upon the death, remarriage of the recipient, or if the recipient fails to follow the plan. Durational alimony is awarded where permanent alimony is not appropriate. This is generally for short term marriages (less than 7 years) to moderate term marriages (between 7 and 17 years of marriage). Durational alimony is awarded for a set period of time not to exceed the length of the marriage. Permanent alimony is awarded when the recipient is unable to financially support him/herself. This is generally more appropriate for long term marriages (those exceeding 17 years). It may also be awarded in moderate term marriages upon a showing of need and ability to pay by clear and convincing evidence, or in short term marriages supported by a written finding by the court of exceptional circumstances.

In determining an award of alimony the court determines the recipient's need and the payor's ability to pay. The court will also consider the age, physical, mental and emotional health of the parties, their earnings and earning capacity, their education, whether either party has been unemployed, whether either of the parties have been the primary caretaker of the children, the age of the children, and the assets of the parties. The court will also look at marital misconduct such as infidelity, dissipation of marital assets, or abuse. Since there are no facts to indicate that the Husband dissipated marital assets, the court may not weigh his infidelity too heavily. The Wife will argue that she has the need and the Husband has the ability to pay alimony. She will likely get alimony pendente lite during the pendency of the divorce in order to maintain the status quo for herself and the children. She also has a good case for rehabilitative and durational alimony. The Husband will argue that the Wife is a college graduate and able to go out and get a job. However, because the Wife has been unemployed for the past 15 years and has served as the children's primary caretaker, he will not likely succeed on this argument. The Wife will at the very least be able to get rehabilitative alimony to allow her time to update her skills and reenter the workforce. The court will also consider the fact that the youngest child is only 3 years old and may need the Wife home for some time.

Parental Responsibility - *The court starts from the position that parents should have shared parental responsibility. This means that both parents should share equally in the rights, responsibilities, and joys of raising their children. Generally, courts will award shared parental responsibility unless it will be detrimental to the child. The standard court will use in making such a determination is the best interest of the children. Each party has a right to participate in making decisions for health, education, religious, and other needs of their children. Each party must seek the participation of the other in making such decisions. The court will enter a parenting plan. This parenting plan will govern the relationship of the parties with their children. There are no facts here to show that it will be detrimental to the children if the parties share parental responsibility.*

Timesharing - *Timesharing must also be awarded in the parenting plan. This includes overnight and holiday visitation and it is also awarded based on the best interest of the*

children. The Court starts from the position that each parent should get 50/50 timesharing with the children, unless it has reason to award more or less time to one parent. There are no presumptions that either mother or father are better suited to have primary timesharing. The court will look at factors such as the age of the children, the desire of the children (if they are old enough to express it), the fact that the mother has been the primary caretaker of the children, whether the father's work schedule will interfere with his ability to enjoy timesharing with the children, and any other factor the court deems necessary to support the best interest of the children. The Husband will request equal time with the children. Since there is nothing in the facts to indicate that it would not be in the best interest of the children, he may be entitled to it. The Wife will argue that she has been the children's primary caretaker and it would be in the children's best interest to maintain some continuity for them. The court's determination will likely come down to whether the father's work schedule permits him to enjoy considerable timesharing and whether it is in the best interest of the children that the Wife get primary timesharing.

Child Support - Child support is calculated irrespective of timesharing and parental responsibility. Whether or not a parent enjoys timesharing or parental responsibility, they are still responsible for supporting their children. Child support calculations are based on statutory guidelines. The amount is based on the net income of the parties, the number of children, and the amount of timesharing each parent enjoys. The court may deviate upward or downward from the guidelines by 5%. A greater deviation would have to be supported by written findings. A parent that enjoys 20% or more overnight timesharing will also be able to get a reduction in child support. In addition to making a child support calculation, the court will have to indicate in the parenting plan which parent will be responsible for providing health care coverage for the children and how uncovered medical expenses and other out of pocket expenses will be divided. If the Wife is awarded alimony, this will be the basis of her income for child support purposes. The Husband will likely be ordered to pay child support.

Q QUESTION NUMBER 2

FEBRUARY 2015 BAR EXAMINATION – FEDERAL CONSTITUTIONAL LAW/TORTS/ETHICS

John Jones, a student at Southern High School, which is a public school, created a webpage on his parents' computer suggesting that his math teacher should be killed. The website was publically available, and no password was needed to access the site. John uploaded a photograph of the teacher from the school district website and added a hand drawn picture of a gun firing a bullet at the teacher's head. Beneath the picture were printed the words, "Mr. Smith must die." John invited any student to join the group, to express their hatred of Mr. Smith, and to contribute funds to hire a hit man.

Numerous students viewed the webpage and it was discussed extensively at school. At least a dozen of John's friends posted comments expressing their approval of the webpage and "liking" the photograph. Some of the students accessed the webpage at school and showed it to others at school. Many students were frightened by the webpage. Within a few days, a student notified Mr. Smith about the webpage and provided him with a copy of the photograph. Mr. Smith forwarded the information to school officials. Mr. Smith felt so threatened that he had to take a leave of absence, and school officials replaced him with a substitute teacher for the remainder of the school semester.

Southern's principal interviewed John, who acknowledged that he created the webpage and the photograph. Although John expressed regret, he stated it was "just a joke." After an investigation, the principal suspended John for five days, pending a hearing before the superintendent. Ultimately, a hearing officer appointed by the superintendent found that the photograph and webpage were threatening and were not a joke.

Specifically, the hearing officer found the webpage violated the school district's student policy on harassment and intimidation. The policy defines harassment or intimidation in part as "any intentional gesture or intentional written, physical, or verbal act that a reasonable person under the circumstances should know would have the effect of ... harming a student or staff member." The policy provided that violators could be suspended after investigation by school officials. The student policy also provided for additional penalties including being denied the ability to participate in extracurricular activities and other school-sponsored social activities or events. The hearing officer recommended that John be suspended for the remainder of the semester and be prohibited from participating in extracurricular activities and from attending any after-hours school functions. The superintendent agreed and imposed the recommended discipline.

John's parents have come to your firm seeking advice, and the senior partner has asked you to provide a memorandum addressing the following:

1. John's parents want to sue school officials and the school district for violation of both John's and their rights. Discuss the federal constitutional claims that John and his parents may have and any defenses likely to be raised.
2. Mr. Smith, the teacher, has sued John and his parents in state court for intentional infliction of emotional distress and negligent parental supervision. Discuss what defenses John and his parents may have to these claims.
3. Any ethical considerations related to this representation.

SELECTED ANSWER TO QUESTION 2

(February 2015 Bar Examination)

TO: SENIOR PARTNER
FROM: ASSOCIATE
RE: JOHN AND MR. SMITH

INTRODUCTION

This memorandum will discuss the federal constitutional claims that John and his parents may have, any defenses, and also Mr. Smith's claims against John's parents for intentional infliction of emotional distress and negligent parental supervision. The first issue that must be evaluated is whether or not John's parents have standing. In order to have standing, a Plaintiff must show an injury in fact. The injury must be actual and imminent, and not just speculative. Additionally, the injury must be one that is capable of redress by the courts. A third party can bring the claims of another when that injured person, for some reason, is incapable of bringing the claim on their own, or if the claim is one that is capable of repetition yet evading review. In this fact pattern, the son has directly suffered an injury of his rights by being suspended, and it is an injury that is capable of redress by the court. Because his parents did not suffer the injury themselves, they must bring the claim in their son's name.

The next issue we need to determine before we can proceed is whether there has been action by the state. Under the Federal Constitution, in order for an individual to assert that their rights have been violated under the 14th Amendment, they must show that their rights have been violated by a state actor, as the 14th amendment does not protect the violation of rights by private actors. As a public school, John can argue that the school is an agent of the state, and that his rights have been violated by government employees. Just because a government provides funding for a school does not automatically implicate them as government actors. The question is how involved the state is with the school, and if they are advancing the schools denial of certain rights or simply taking a neutral stance to it.

Although states enjoy protection from being sued by a citizen under the doctrine of sovereign immunity, most states waive this right in relation to certain cases.

I. JOHN'S CLAIMS

VIOLETION OF 1ST AMENDMENT RIGHTS

Under the Federal Constitution, the 1st Amendment grants citizens the freedom of speech, which a basic and fundamental right to the Constitution. This freedom is not absolute. The constitution does not protect hate speech. The government has the power to regulate certain forms of speech, such as imment lawless action, fighting words, obscenity, defamation, and commercial speech. Those are categories of speech that are not protected by the first amendment, and that the government is free to regulate. Normally, any restriction on a person's freedom of speech that is based on the person's expressive conduct is judged under the standard of strict scrutiny. Strict scrutiny means that in order for a law to be found constitutional, it must be narrowly tailored to a compelling state interest and be the least restrictive means possible. In analyzing

whether a breach of a person's freedom of expression has taken place, it is necessary to first evaluate where the speech has taken place. Case law has drawn a distinction between public areas, which are known and historically popular for being a place where people express themselves, such as at a park, or a courthouse, where citizens are afforded the most protection under the constitution. There are also nonpublic areas, such as someone's front lawn, and there are also semipublic areas, such as government buildings like the IRS. In public areas, the government has the right to implement certain time, place and manner restrictions. These restrictions must be content neutral, and must be substantially related to an important government interest. They need not be the least restrictive means, and must leave open alternative forums for the expression to take place.

John and his parents can argue that John was engaging in his constitutionally protected first amendment right to freedom of speech when he created the website. While the school could argue that this type of expression constitutes imminent lawless action or fighting words, that argument will most likely fail. Imminent lawless action exists when a person's express invites an immediate breach of the peace. Imminent lawless action can occur when a person is on a podium in a public place yelling, trying to get everyone that walks by to band together and immediately overthrow the government. Fighting words are words that are said directed to a specific person, in order to get them to engage in a fight, such as swearing obscenities in their face. As a webpage, John's language constitutes neither of the aforementioned. Under the First Amendment, John is entitled to his opinion about his teacher. His parents could argue that John did not directly harass, intimate, or try to get the classroom to attack him while he was in school, and that he was just expressing his disdain for the professor. The school will argue that by putting the words, "Mr. Smith must die" that the student was engaging in behavior that constitutes hate speech akin to fighting words. The school will argue that they have a compelling interest in thwarting physical violence on campus before it occurs, and under the parent locus doctrine, schools must step into the shoes of the parents while the children are at schools and regulate their behavior accordingly.

John and his parents can also argue that his fundamental right to freedom of speech has been violated via the Substantive Due Process clause of the 14th amendment, which makes the 1st amendment applicable to the states. Under a due process analysis, because freedom of speech is a fundamental right, the school's actions would be judged under a strict scrutiny standard. John could also argue that his fundamental right to access to the courts has been violated as well via the procedural due process clause, since he has been suspended without being heard by the court. This argument will most likely fail, as the school provided him with a hearing where it was determined that the website and the photograph was not a joke.

John and his parents can argue against the student policy by saying that it is a content based restriction on speech and should be evaluated by strict scrutiny. While content based rules will be measured under strict scrutiny, rules that are content neutral, and apply to everyone the same across the board no matter what type of expression is being regulated, will only be judged by a standard of rational basis, and will only be struck down if it is ambiguous or arbitrary. A law passes the rational basis test if it is rationally related to a legitimate government interest. The burden is on the challenger in this instance, as opposed to strict scrutiny, where the burden is on the government. The

government will argue that the legislation is neutral on its face and therefore the rational basis test should be applied. The government will argue that the regulation, at the very least rationally related to the safety of children in public schools, and that the school has an interest in maintaining the health and safety of its students. The parents can counter argue by saying that the law is irrational and arbitrary because it does not spell out exactly what time of behavior is prohibited. Additionally, even if the law is content neutral, the law cannot be vague or overbroad. A law is vague when it does not provide people with notice of what behavior is prohibited by the law, and a law is overbroad if it prohibits more speech than necessary to achieve its goal.

Even if the rule is found to be content based, which is unlikely, the school will have a valid argument that the law is related to a compelling interest of safety in schools, especially in light of recent violent events that have taken place across the country in high schools. The school will also argue that the rule is the least restrictive means because it provides students with an investigation and a hearing to determine whether the threat was serious and what subsequent action should be taken. The school would most likely prevail under this argument, if the speech by John had taken place during school. While the constitution does grant citizens freedom of speech, schools are granted the power of greater restraint for speech that takes place in school and by their students. The parents and John can argue that the school's right to regulate speech does not apply to a website that John created on his own while not in school, and that his right to participate in school activities should be effected by the speech he makes while not on school premises. The parents can argue that the harassment and intimidation did not take place on the school grounds, and by punishing their child, the law is overbroad in its application. Additionally, the parents can argue that the law is vague because it does not define exactly what constitutes harm against a student or staff member. The parents could also argue that the rule is over inclusive, as not only does it allow the child to be punished, but it also allows them to be excluded from other extracurricular activities which have nothing to do with the initial harassment. The school would argue that these rules are necessary to keep the school safe.

II. MR. SMITH'S CLAIMS

In order to have a claim for intentional infliction of emotional distress, a plaintiff must prove that the defendant's intentional or reckless outrageous behavior caused the plaintiff extreme emotional distress. Outrageous behavior is behavior that is so outrageous that it goes beyond all bounds of common decency. This is judged by an objective standard. Although IIED is an intentional tort, the defendant can be guilty of it if he was reckless, meaning that he acted with a conscious disregard that his behavior would produce a certain result. Although the plaintiff need not prove physical injury, he does need to prove that there has been some manifestation of the distress. It is not enough that the Plaintiff sometimes has difficulty sleeping or as a result of the incident, he can't focus or concentrate.

John's parents would probably argue that John did not intend to cause the teacher emotional distress, and that he was simply expressing his constitutionally protected viewpoints. The teacher will argue that John did this recklessly, as any reasonably person could conclude that by posting a webpage on the internet expressing his hatred for him, severe emotional distress would be a normal result. Many students law the

webpage, liked it, and as a result, Mr. Smith had to take a leave of absence. Mr. Smith could argue that it is so outrageous that a student would publish a picture of him with a gun firing a bullet at his head, and that this action was beyond all realm of common decency. Although Mr. Smith would not need to prove actual damages in order to recover for IIED, in this instance he could, if he was able to prove he lost income from not being able to work during that time.

Under common law, a parent is not liable for the torts of their children. But, a parent can be found guilty of negligence directly attributed to them if they have a duty to watch over their children and fail to, or if they are aware of their child's dangerous propensities and fail to warn people of them or to protect others from them. Mr. Smith would have to prove that the parents had a duty to supervise the child, that they breached this duty, that the breach of this duty was the actual and proximate cause of his injury, and also that he suffered damages. In the fact pattern, the parents may have breached their duty to supervise John if the parents knew or should have known that he had a serious intent to hurt his professor, or if he had a history of creating websites like this. The parents will argue again, that their child was engaging in his fundamental right to freedom of speech, and that as a high school student, he requires less supervision than younger children and was free to partake in this action.

III. ETHICAL ISSUES

For ethical issues, I would remind the parents that if I take their child on as a client, my main priority as an attorney is to their child. Although their child is a minor, if the child is my client, I owe the child a duty of confidentiality and loyalty, not the parents. Even if the parents pay for the representation, the child is my client and I will have to remain loyal to the child and will not be able to violate the attorney client privilege or allow them to make any of the major decisions or determine the scope of litigation. This may be a concern for the parents in the event their desires are in conflict with the child's. If the parents want me to represent them altogether, I would have to decide whether it would be possible to represent them together while concurrently maintaining my duties to each individually.

I would also have to ensure my fees were reasonable and fair, considering my experience, the nature and extent of the case, the reasonable fee for this type of case, any cases I would have to reject by taking this case and the amount of research and time involved.

Q

QUESTION NUMBER 3

FEBRUARY 2015 BAR EXAMINATION – REAL PROPERTY

Buyer, a widower with one grown child, Son, entered into a contract to purchase Blackacre from Seller. The purchase price was to be paid in equal monthly installments over twenty years, with interest at five percent per annum. Upon full payment of the purchase price, Seller agreed to give Buyer a warranty deed to the property. Within that same contract, Buyer also borrowed money under the same financing terms from Seller to build a home. Buyer duly recorded his contract in the county's official records and, when he completed the home, he moved in, applied for, and received a homestead exemption.

Blackacre is landlocked within Seller's property, but Seller gave Buyer authorization to use an old, no longer used railroad right-of-way that runs along the edge of the property so Buyer could access his property from the public road. The relevant portion of the purchase contract reads, "Buyer is hereby authorized to use the railroad right-of-way that runs along the edge of my property to access Buyer's property." Shortly after the sale was finalized, Buyer paved the right-of-way, and to safeguard Seller's pets, built a fence around his new "driveway."

A few years later, Buyer remarried and helped his wife, hereafter Wife, raise her teenager, Daughter. After several years of marriage, Buyer executed and recorded a quit-claim deed conveying Blackacre to himself and Wife. He also legally adopted Daughter. Daughter, an adult, obtained a job, and assisted her parents in paying for their home. Daughter is single and has no children.

Buyer validly executes a will in which he left "all that I own to Wife or, in the event she should predecease me, to Daughter." Several months later, Buyer, Wife, and Daughter were all involved in an automobile accident. Wife died on the scene, Buyer died after two days, and Daughter survived.

Daughter comes to your office for legal advice. Since the automobile accident, she has received a letter from Seller claiming several payments are still owed on Blackacre and on the home. Seller further claims that Buyer did not have legal title to the property or a legal right to cross Seller's property. Daughter has also been contacted by Son who seeks to be awarded ownership of Blackacre. Daughter wants your advice in both identifying the problems she may face and suggesting how they might be best resolved. Prepare a memorandum addressing the status of Blackacre. Also discuss the claims of Seller and Son and the likely outcomes of those claims.

SELECTED ANSWER TO QUESTION 3

(February 2015 Bar Examination)

Memorandum
To Daughter
From Attorney

The first question is who has the right to Blackacre. When parties enter into a contract to buy property, the doctrine of equitable conversion provides that the buyer is the owner of the property and has the risk of loss as of the signing the contract. In this case, a contract was formed, and even though Buyer was making installments over 20 years, he is still deemed the owner of Blackacre. If the Buyer had received a Deed, then all terms of the contract would have merged into the deed, but there was no deed from Seller to Buyer. Since this was a contract regarding the sale of property, it needed to be in writing, which it was, under the Statute of Frauds.

Since Buyer was the equitable owner of the property as of the signing and recording of the contract, he had the right to assign or devise his interest in Blackacre. When Buyer executed and recorded a quitclaim deed to himself and his wife, it was proper and the property was automatically owned by Buyer and Wife as tenancies by the entirety with the right of survivorship. When property is conveyed to a husband and wife during their marriage, it is presumed to be a tenancy by the entirety. This quitclaim deed was proper because Florida has eliminated the need to have a strawman in order to have a tenancy by the entirety. Since it was a tenancy by the entirety, the ownership would automatically pass to the other spouse upon death of either spouse.

In this case, the Buyer validly executed a will conveying all of his property to wife, but if she predeceased him, then to Daughter, who he had already adopted. The will was validly executed and it will also be assumed that the description of "all that I own" is sufficiently descriptive to be a valid will. Florida has accepted this as a sufficient description of property in wills. In this case, Buyer Wife and daughter were in an accident at the same time. Florida has adopted the uniform simultaneous death act, which states that if 2 people die at the same time, it is presumed for purposes of devising their property that they survived the other. Florida has not adopted the rule that the spouse must survive the other spouse by 120 hours in order to take it out of the act. Here, the facts are clear that the wife died at the scene and Buyer survived for 2 days. Therefore, the act is not even applicable here.

Since Wife died first, it is clear that the ownership in Blackacre automatically passed to Buyer because a tenancy by the entirety has a right of survivorship. When Buyer died 2 days later, his will would come into play. Buyer clearly left everything to Daughter in his will. There is no indication that Buyer specifically wanted to disinherit his grown son. However, in order to stop property from going to somebody, the only way to do it is to devise all of your property. In this case, Buyer did that by devising all that he owns to his Daughter. The fact that Buyer adopted daughter is not significant because he can leave his property to whoever he wants if it is in a validly executed will.

The son really doesn't have an argument to ownership of Blackacre. He is not a pretermitted child because he is a grown child and he was clearly born prior to Buyer executing his will. He could try to argue that Blackacre is homestead property, which cannot be devised by either spouse without the other's consent. However, this only applies where there is a surviving spouse and a minor child. Clearly, there is no minor child involved here as both son and Daughter are adults. There is also no surviving spouse since Wife predeceased Buyer. Therefore, Buyer was free to devise his interest in Blackacre, which he properly did to Daughter.

With regard to the claims by Seller for unpaid installments under the contract, Seller can certainly enforce the contract so that Daughter has to continue making the payments and make up any back payments. However, Seller is probably wrong that Daughter does not have title to Blackacre. As discussed above, even though Buyer never got a Deed to the property, there was a written contract and it was recorded in the County's records. Under equitable conversion, Buyer did have title to Blackacre once the contract was signed. If Seller is unsuccessful in asserting that he still has title to Blackacre, then he might want to argue that the contract serves as a mortgage on the property. Florida is a lien state, meaning that a mortgage acts as a lien on the property. The mortgagee (in this case Seller) does not have title to the property, just a lien. Seller could enforce his lien by filing a foreclosure action, or if Daughter is unable to make the payments to Seller, then Seller might be able to sue for breach of contract. He might bring an action to quiet title to have title deemed in Seller's name. If Daughter doesn't have any money to pay the Seller, she may wish to argue that Seller's lien on Blackacre should be exonerated out of the residuary of Buyer's estate. We do not know whether Buyer had any other assets at the time of his death, but nonetheless, Florida does not allow for exoneration of liens unless it is explicitly stated in the decedent's will. It does not appear that this was in Buyer's will, so Daughter will not be able to have the lien exonerated out of his other assets, if any. I would advise Daughter that she will want to come up with the money to pay Seller so that she doesn't get sued or Seller can't bring any foreclosure action or action to quiet title.

With regard to the right to cross Seller's property, Daughter will want to argue that there is an express easement in the contract that was recorded. This would be an easement appurtenant since there is a servient estate and dominant estate. Blackacre would be the dominant estate since the easement runs over Seller's property and benefits Blackacre. Seller's property is the servient estate. Daughter will argue that the easement remains valid even after Buyer died because the easement runs with the land. It clearly touches and concerns land, it was probably intended to run with the land, there is horizontal and vertical privity because Buyer and Seller had a written contract, and Buyer conveyed the property to his daughter. In addition, Buyer expended a substantial sum in reliance on the easement by paving the right of way and by building the fence around the driveway. Even if Daughter is not successful in arguing there is an express easement, she may also argue that there is an easement by necessity. An easement by necessity arises where one property is divided and that creates a situation where there is no other way to access a public road. This is exactly what happened here since Blackacre was landlocked and this right of way was the only way to access Buyer's property from the public road. An easement by necessity can terminate if that necessity is no longer there, such as a new road being built, but that is not indicated here. Daughter could also argue that there is an easement by prescription, which

essentially means an easement by adverse possession. In order for this easement to arise, there must have been access that was hostile or adverse, continuous, open and obvious, and for the statutory period. In Florida, that period is 7 years. Here, it appears that all of the elements could be met except the adverse or hostile requirement. This is because Seller clearly gave Buyer the right to use the easement in the contract. There cannot be an easement by prescription where the servient owner gave consent, which here he did. The use of the easement was open because he made use of the right of way as a usual owner would, by paving the right of way and building the fence. Nonetheless, even though there may not be an easement by prescription since it was not adverse or hostile, it is likely Daughter will prevail in arguing that there is either an express easement or easement by necessity.

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 48.

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)