

# **Florida Board of Bar Examiners**

ADMINISTRATIVE BOARD OF THE SUPREME COURT OF FLORIDA

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

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

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

## **FEBRUARY 2006 AND JULY 2006 FLORIDA BAR EXAMINATIONS**

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

Part I of this publication contains the essay questions from the February 2006 and July 2006 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 handwritten answers are typed as submitted by the applicant. The answers are reproduced here with the consent of their authors and may not be reprinted.

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

## ESSAY EXAMINATION INSTRUCTIONS

### Applicable Law

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

### Acceptable Essay Answer

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

# **QUESTION NUMBER 1**

## **FEBRUARY 2006 BAR EXAMINATION – CONTRACTS/ETHICS**

Sam advertised for sale a parcel of land he owned in Polk County, Florida. The land was not located near any major roadway, and thus was not desirable for development. Sam negotiated with Bill, and mailed him the following signed memorandum: “To Bill: I am willing to sell you my land in Polk County consisting of about 20 acres for \$30,000. Dated May 9, 2005.” Bill wanted assurance that Sam would not sell to someone else while Bill inspected the land. On May 10, Sam told Bill: “I promise not to revoke the offer, sell the land to anyone else, or raise the price for 10 days to give you the opportunity to examine the land.” Bill replied, “I will go to Polk County to inspect the land and get back to you within 10 days.”

Bill traveled to Polk County and examined the land. He returned home on May 13 and withdrew \$30,000 from his savings account. He took the \$30,000 to Lois, an attorney. He instructed Lois to hold the funds for him as he expected to purchase a parcel of land from Sam and wanted her to represent him in the purchase. Lois did not inform Bill that she had previously represented Sam on the purchase and sale of various real estate investments, including Sam’s purchase of the Polk County parcel. Lois did not discuss her fees with Bill. She deposited Bill’s check into her bank account entitled, “Lois K. Jones, Attorney-at-Law, P.A.” On May 14, Bill signed and mailed a letter to Sam stating, “I have examined the land and I accept your offer.”

On May 13, Sam learned that the county planned to build an interstate highway extension next to the parcel, which would drastically increase its value. Sam immediately dispatched a signed letter to Bill stating, “The Polk County deal is off.” Bill did not receive the letter until May 16.

On May 15, Bill stopped by Lois’s office and said, “I’ve changed my mind about purchasing Sam’s land. I’m willing to assign you my contract for \$500.” Lois had just learned from Sam about the planned highway construction, but did not share this information with Bill. She readily agreed and paid Bill \$500 in cash. Lois also gave Bill a check for \$29,750, explaining that she had deducted a \$250 fee for the initial consultation from Bill’s \$30,000 deposit.

Two weeks later, Bill learned about the highway extension and immediately sought your advice about any rights he may have regarding the Polk County land. Please advise Bill on any relevant legal issues and include the reasoning for your advice. Among the issues you should consider and address are:

- Did Bill ever have a valid contract for the purchase of the land?
- If Bill had a valid contract for the purchase of the land, was that contract validly assigned to Lois, so that Sam, Bill, and Lois all must honor the assignment?

- What legal theories should Bill assert if he wants to rescind the purported assignment to Lois?

Also discuss and analyze any ethical issues raised by the conduct of Lois.



## **SELECTED ANSWER TO QUESTION 1** **(February 2006 Bar Examination)**

### 1. *Did Bill have a valid contract for the purchase of the land?*

*In order for a valid contract to exist, there must be an offer (objectively discernable), acceptance of that offer and consideration to support the bargain. In a land sale contract, the agreement must be in writing to satisfy the Statute of Frauds. Here, Bill's letter to Sam appears to be an offer, if viewed objectively. Sam may argue that the land is not adequately described ("My land in Polk County consisting of about 20 acres"), but the fact that Bill inspected the land weighs in favor of a meeting of the minds. Also relevant is whether Sam owns any other property in Polk County.*

*Assuming an offer does exist, it remains open for a reasonable time unless revoked by Sam prior to acceptance. Here, the option was not supported by consideration, and since the common law applies, the offer is revocable. Bill, however, accepted the offer upon mailing the letter on May 14<sup>th</sup> because absent an express method of acceptance by Sam, Bill can accept his offer with a promise. Here, multiple counterparts satisfy the Statute of Frauds, because Sam's letter is signed by him & acceptance occurred via the Mailbox Rule. Sam's revocation is only effective upon Bill's receipt, and acceptance occurred prior to May 16<sup>th</sup>. Sam may also argue that "I am willing to sell" is not a promise, but his later promise "not to revoke the offer" suggests otherwise, so offer & acceptance should be found here. Moreover, reliance by Bill (he examined the land) argues in his favor as consideration supporting the option, which he successfully accepted on Sam's terms (mirror image). On balance, a contract appears to be established from an objective standpoint.*

### 2. *Was the contract validly assigned?*

*Generally, contracts are assignable absent express language to the contrary. Here, however, Lois withheld material information from Bill. Generally, there is no duty to disclose where a party should be able to ascertain the facts, but here Lois is in a special relationship with Bill – attorney & client. Bill's expectation is that the land "was not desirable for development" and if Lois knew that Bill's expectation was such, she should have informed him. Otherwise, Bill may successfully contend that the contract for assignment should be rescinded on grounds of unilateral mistake. As a result, the assignment should not be deemed effective. Generally, however, where an effective assignment exists, all parties are bound by it.*

### 3. *Legal theories to rescind assignment:*

*As stated above, Bill's best argument is unilateral mistake where the non-mistaken party – here, Lois – knows of the other parties false assumptions. Generally, assignments are upheld. In this case, if there was no special relationship between L & B & if there was no mistake on Bill's part, the rights under the contract would be assignable to Lois. Another argument that might be asserted to defeat the assignment is that duties were also delegated with the right & Sam did not assume the credit risk of Lois. Here, however that argument would fail, since there is no credit agreement between S & B. Bill might also contend that assignment of a land sale contract must be in writing to*

satisfy the Statute of Frauds. Here, Lois's payment of \$500 would not satisfy the "partial performance" exception, so Bill may also be successful in abrogating the assignment on those grounds.

*Ethical Issues:*

*Lois is representing Bill, a client with interests adverse to one of her former clients. The risk here is that Lois will use information she obtained in the representation of Sam to his detriment in the representation of Bill. The Rules of Professional Conduct ("RPC") prohibit such use of confidential information. While the sale of this land is not the same transaction in which L represented S, it is substantially related and Lois can only undertake to represent Bill if she reasonably believes that such representation will not be adversely affected and she obtains written consent from Sam after consultation.*

*In order to comply with the RPC, Lois needed to disclose her fees to Bill in writing. Moreover, she should only have deposited Bill's funds in a trust account. Here, the account is not designated as a trust account, which may cause L's personal funds to be commingled with those of Bill. Such a violation may result in L's disbarment. Interest from short-term deposits in a trust account must benefit the Florida Bar Foundation.*

*Another ethical issue is L's entrance into a transaction with Bill, which also ostensibly resulted in her being in a transaction with a former client. In order for L to enter a transaction with Bill, the transaction must be fair and reasonable, Lois must make full disclosure to Bill, and Bill must be given the opportunity to consult with outside counsel. If, after all those steps are taken, Bill consents to the transaction, Lois may enter the contract with him. Here, however, the transaction is not fair to either Bill or Sam, since Lois is receiving a huge benefit from land appreciation in consideration of only \$500. Moreover, Lois withheld material information (i.e. she did not make full disclosure) and it's even possible that she used confidential information as to the value of the land that she obtained while representing Sam previously. In addition to being grounds for having the assignment rescinded, these violations are also grounds for disciplinary action against Lois under the RPC.*

*Finally, Lois would be permitted to offset fees due to her from funds held in trust, so long as Bill does not dispute the amount owed. Otherwise, Lois is not entitled to the funds & must make accountings to Bill & deliver his property to him. To the extent that Lois wrongfully refuses to return Bill's money, a constructive trust may be imposed in favor of Bill.*

## **Q** UESTION NUMBER 2

### **FEBRUARY 2006 BAR EXAMINATION – FLORIDA CONSTITUTIONAL LAW**

After an extensive study of juvenile crime, the City of Tampa adopted a municipal ordinance that imposes a mandatory curfew on minors between the hours of 1:00 a.m. and 6:00 a.m. The ordinance provides for criminal penalties, including incarceration. The ordinance states dual purposes of preventing criminal activity by minors and preventing criminal activity upon minors.

At 2:00 a.m., Juvenile, a sixteen-year-old Tampa resident, was driving home from a political rally when a tire on Juvenile's car went flat. Juvenile parked the car along the roadside. A passing motorist saw the disabled car and concluded that the driver might need assistance. The motorist called 911.

Within minutes, Officer, a Tampa police officer, arrived at the scene. Officer found Juvenile standing next to the parked car and asked, "What happened?" Juvenile responded, "I have a flat. I don't have any pot, either."

Officer placed Juvenile under arrest for violating the curfew. Before placing Juvenile into the rear of the patrol car, Officer searched Juvenile and discovered a baggie containing marijuana in Juvenile's pocket. Officer then arrested Juvenile for both possession of marijuana, a misdemeanor under Florida law, and violating the curfew, a municipal ordinance.

You have been retained to represent Juvenile. Discuss the challenges and defenses that Juvenile may make under the Florida Constitution. Do not discuss whether the City of Tampa is located within a chartered or non-chartered county and the impact such factor may have in a challenge to the ordinance.



## **SELECTED ANSWER TO QUESTION 2**

### **(February 2006 Bar Examination)**

*In Florida, municipalities are vested with house rule powers such that they can regulate and exercise traditional municipal powers. These powers include the ability to pass municipal ordinances which affect people in the municipality. Such ordinances may not conflict with the laws of the Florida legislature or impinge upon the Florida Constitution (of course the same applies for the U.S. constitution and federal laws). The supremacy clause restricts overreaching ordinances.*

*Juvenile (J) has several grounds of complaint under the Florida Constitution. First, Florida has expressly protected its citizens right to privacy, a right which is included in the Declaration of Rights. This protection of privacy goes beyond the protections afforded by the US Constitution, and affords Floridians the right to be left alone. Of course, this right is not absolute and some activities may be regulated even though the regulation may infringe upon the right of privacy. Because the right to privacy is a fundamental right, laws and ordinances that affect it are subject to strict scrutiny. The burden is on the government to show that the regulation is narrowly tailored to achieve a compelling governmental purpose.*

*The curfew at issue is subject to this strict scrutiny review. The government will argue that it conducted an “extensive study” of juvenile crime and there after determined that the curfew as narrowly tailored to prevent both crime by and upon juveniles. The city certainly has a compelling interest in protecting the health, safety, and welfare of its citizens (and even more certainly, juveniles). However, J will argue that the curfew is not narrowly tailored so as to address this compelling interest. J will argue that the same purpose can be achieved by less restrictive means and that accordingly the curfew should be struck down. The government bears the burden and thus must overcome the presumption that the curfew is suspect.*

*J would next assert a violation of the Equal Protection Clause. Florida’s constitution prohibits laws discriminating of people based on their gender, race, national origin or physical disability, unless the law meets strict scrutiny review. Other classifications, such as age, need to meet the much more deferential rational basis test. Here, the burden is on the movant to show that the ordinance or law is not rationally related to a legitimate government purpose. This burden lends a presumption to the validity of the law and is difficult to overcome.*

*J will argue that the curfew fails this test. He will say that simply preventing juveniles from being out during certain hours bears no rational relation to city’s interest of protecting juveniles and protecting people from juveniles. The City’s “exhaustive” study is likely enough to counter this argument. Because J has the burden, he would likely fail to meet it.*

*J would next argue that the ordinance may be invalid on its face. The supremacy clause strikes down conflicting local ordinances. The Florida Constitution seeks*

*uniformity of criminal laws throughout the state. This protects Floridians and all others from unknowingly being criminally liable in one place for actions that are permissible elsewhere. Accordingly, J will argue that the imposition of criminal penalties, including incarceration, may not stand. The city would argue that the criminal penalties further the City's interest in juveniles, but would likely fail. An ordinance could be permissible that did not impose such criminal penalties.*

*J may also argue that his right to be free from illegal search and seizure has been violated. Florida's constitution closely tracks the US constitution in this area. J will allege that officer (O) had no probable cause to search him and thus the marijuana found would be inadmissible against him. J will argue that the simple fact that he had violated the City's curfew did not give rise to a search of his person. O and the city will argue that the search was for either protective purposes (the so called stop and frisk) or that there was probable cause. Either is likely present here, especially given J's unsolicited statement that he didn't have any pot.*

*J will argue that his statement may not be used against him citing his privilege against self-incrimination. Again, Florida's constitution closely tracks the federal constitution here. J will argue that he should have been read his Miranda rights by O prior to any questioning. O will argue that J was not in custody and that his question ("What happened?") was not intended to, nor did O reasonably believe it would, result in an incriminating statement. Of course, J said that he did not have pot, but it would be strange to think such a statement would be made if J did not indeed have pot. In the alternative, O will argue that J's statement was unsolicited and therefore Miranda rights had not yet attached.*

*J may also argue that his due process rights have been violated. Florida's constitution protects its citizens from invasion of their life, liberty or pursuit of happiness without due process of law. J will argue that he has a liberty interest in being on the streets at any hour, and that the curfew impermissibly impinges on that interest. This argument is unlikely to succeed because the procedure would be examined under rational basis review. J would nonetheless argue that he should have an opportunity to be heard prior to arrest and that the "mandatory" nature of the curfew is impermissible.*

*Finally, J may argue his freedom of speech and the right to assembly have been impaired. Florida's constitution protects the right of its citizens to gather and speak without substantial interference. The fact that J was on his way back from a political rally would lend credence to this argument. He would assert that his fundamental rights had been infringed upon (to assemble and speak) and that strict scrutiny review should apply. The city would have the burden again, but may prevail due to the interest in health, safety and welfare.*

## **Q** QUESTION NUMBER 3

### **FEBRUARY 2006 BAR EXAMINATION – TORTS/ETHICS**

As was his custom, Mr. Duke dropped by The Pub on his way home from work. After having had some drinks, he decided to have a look at the wine cellar. The cellar was off-limits to customers. The door at the top of the stairs leading to the wine cellar was marked “Employees Only,” and Mr. Duke did not seek the permission of any of the staff. The Pub’s proprietor, Owner, however, noticed Mr. Duke get up and head toward the cellar door but did nothing to stop him. Halfway down the steps, Mr. Duke lost his balance and leaned heavily on the stair railing, which was in severe disrepair. The railing gave way and Mr. Duke fell, breaking his leg.

Ms. Goff was walking past The Pub when she heard Mr. Duke’s screams. She ran down to the cellar and attempted to carry Mr. Duke back up the stairs to treat his injured leg. In the process, Ms. Goff accidentally knocked Mr. Duke’s head into a wall, causing Mr. Duke to pass out.

In the meantime, Owner called an ambulance. Mr. Duke was transported to Hospital. In the emergency room, Mr. Duke regained consciousness and complained to the ER physician, Doctor, of an excruciating headache and double vision. Doctor ignored these complaints, concentrating his attention on the injured leg. One hour later, Mr. Duke suffered a major stroke, resulting in paralysis on the left side of his body.

Two weeks after the accident, Mr. Duke’s wife comes to consult with your law firm after having received an e-mail with the following subject line: “Need a lawyer?” The e-mail was sent by your firm advising Wife of the firm’s expertise in the area of personal injury law. Wife’s e-mail was part of a mass mailing based on a list obtained from the hospital of recently admitted patients whose injuries were the likely result of an accident.

You are asked to prepare a memorandum discussing each of the following issues:

1. What potential causes of action does Mr. Duke have against Owner, Ms. Goff, Doctor, and Hospital? Include in your discussion possible defenses and any critical factual issues that should be investigated further.
2. What damages are available and how are they apportioned under Florida law?
3. What ethical considerations, if any, are involved in the way Mr. Duke’s wife was first contacted by your law firm?

## **SELECTED ANSWER TO QUESTION 3**

### **(February 2006 Bar Examination)**

*This memorandum will discuss the potential causes of action Mr. Duke ("Duke") has against Owner ("Owner"), Ms. Goff ("Goff"), Doctor ("Doc") and Hospital ("Hospital"). When discussing each potential cause of action, I will also address possible defenses that might be asserted by any of the potential defendants and identify critical factual issues we should investigate further.*

*This memorandum will discuss the damages available to Duke and how Florida law might apportion the damages among the defendants.*

*Finally this memorandum will discuss the ethical considerations involved in the way Duke's wife was contacted by our law firm.*

*The potential causes of action Duke might assert against each defendant, the defense (if any) each defendant might assert Duke, and areas for further investigation include: For Duke to succeed against any possible defendant, Duke must demonstrate the defendant owed a duty to Duke, defendant breached that duty, the breach was the cause, both proximate & legal, of Duke's injury & damages. The facts indicate Duke was a customer of the Pub, and was a regular customer. The facts also indicate that the stair railing was in severe disrepair. But for Owner's failure to maintain the stair railing, Duke would not have fallen & broken his leg.*

*Duke vs. Owner: As owner of the Pub, O owed a duty to his patrons to keep the public areas of the premises reasonably safe, and to warn his patrons of any dangers. Because his patrons are public invitees, Owner must make reasonable investigations & maintain his premises in good repair.*

*Owner will probably raise 2 defenses: (1) the wine cellar was off limits to customers so Duke was a trespasser and (2) Duke was intoxicated. Regarding the status of Duke as a trespasser, Owner might argue that the door at the top of the stairs was clearly marked "Employees Only." Duke did not seek permission to enter. Once Duke opened the door, Duke was a trespasser & Owner had no duty to warn Duke of any dangers. Owner will probably not be able to deflect responsibility onto Duke because Owner saw Duke head to the cellar door & did nothing to stop him. This indicates Owner knew Duke would be a trespasser & Owner's duties to known trespassers require warning trespassers of known manmade dangers that might cause bodily injury (i.e. the stair railing). Since stairs in severe disrepair, Owner probably had responsibility to employees to fix in 1<sup>st</sup> place.*

*Owner might assert that Duke was intoxicated & contributed to his injuries. The facts indicate that halfway down the stairs, Duke lost his balance. If Duke lost his balance due to intoxication, and it is determined that this caused more than 50% responsibility, under FL law, Duke is not entitled to recover. This is an area for further factual*

*investigation to determine how many drinks Duke had that evening, both to deal with any contributory negligence issues & also because it might allow Duke to assert another possible cause of action against Owner.*

*Under FL law, tavern keepers owe a duty to not serve known minors (hopefully not Mr. Duke, esp. since named), to protect patrons and to not serve known drunks. If Duke drank too much, as regular customer, he would be known to Owner & Owner would have responsibility for Duke's intoxication.*

*Duke vs. Goff: Goff had no duty to rescue Duke (if anyone has duty to rescue, it must be because of preexisting relationship such as husband/wife or because act of rescuer caused injury – in this case, if anyone had duty it was Owner who did act by calling an ambulance). Once a person decides to act, that person must act reasonably. In this case, Goff responded by choice to Duke's screams. In carrying out her rescue of Duke by carrying him up the stairs (probably not a wise decision to move Duke with an injured leg), she accidentally knocked his head into a wall causing him to pass out.*

*Goff breached her duty to act reasonably by moving Duke & knocking his head. Many states have Good Samaritan laws that protect rescuers from negligent actions in the course of a rescue, holding rescuers liable only for gross negligence, intentional misconduct, or willful & wanton behavior. The policy is to encourage people to take affirmative acts when they are generally under no duty to do so. Florida's Good Samaritan Statute, however does hold rescuers liable for their negligence.*

*But for Goff moving Duke, Duke's leg injury might not have been so bad, nor would Duke have passed out.*

*Duke vs. Doctor: Florida's Good Samaritan Statute extends protection to Emergency Room ("ER") doctors as well. Florida protects ER docs so long as their conduct is not reckless. In pursuing an action against Doctor, it will be important to conduct a factual investigation to determine whether Doctor acted recklessly by ignoring Duke's complaints of headache & double vision. To do so, we will need to investigate the standard of care appropriate of ER docs in this particular community.*

*Duke will argue that Doc was reckless in ignoring that Duke passed out & that when he regained consciousness he had a headache & double vision. Duke will argue that these are obvious signs of a stroke and that had Doctor paid attention, the stroke could have been prevented or damage caused by stroke mitigated.*



# **Q** QUESTION NUMBER 1

## **JULY 2006 BAR EXAMINATION - FLORIDA CONSTITUTIONAL LAW**

You are an associate at a firm that represents plaintiffs. The legislature recently passed “An Act Relating to the Reform of the Courts” that was signed into law. The terms of the Act are:

- (1) The Florida Supreme Court shall have jurisdiction to review any decision of a district court of appeal affirming a final judgment exceeding one million dollars that is based upon a jury verdict.
- (2) Any rule of procedure promulgated by the Florida Supreme Court shall be presented to the governor for approval in the same manner as a bill passed by the legislature.
- (3) Any claim of medical malpractice shall be tried before an administrative hearing officer. The hearing officer shall determine fault and award damages in accordance with existing law. Any final order may be appealed to the First District Court of Appeal.
- (4) It is a second-degree misdemeanor to pass a school bus that displays a stop signal.

The Act’s history shows it was drafted over concerns of excessive jury verdicts and rules of procedure overly favorable towards plaintiffs. The Act was amended during floor debate to add Section 4. A similar amendment was made on two other bills.

Please prepare a memorandum of law analyzing the provisions of this Act including their validity under Florida law. The memorandum should only address claims that arise after the effective date of the Act.



## **SELECTED ANSWER TO QUESTION 1** **(July 2006 Bar Examination)**

*The Act passed by the Florida Legislature has several problems. If a challenge to this Act was sought, a plaintiff with proper standing would be one directly affected by one of the invalid clauses. Thus, someone who wanted to sue for medical malpractice in court but could not or someone whose case was appealed to the Florida Supreme Court via the jurisdiction of this Act. If the Act was found invalid, the District Court of Appeal in the appropriate District and then the Florida Supreme Court would have mandatory jurisdiction to hear the appeal, depending on the court the claim originated in. The problems with the various clauses are discussed by clause as follows:*

### Clause 1

*Clause one attempts to modify the appellate jurisdiction of the Florida Supreme Court. The Florida Constitution gives the Florida Supreme Court the discretionary jurisdiction to hear appeals from the District Courts of Appeal for a variety of reasons, including if two DCA opinions conflict, if they are certified to the Florida Supreme Court as of great importance, or if they affirm the validity of a Florida Statute or Constitutional provision. The Florida Supreme Court has mandatory jurisdiction of appeals arising out of the District Courts of Appeal relating to bond validation proceedings, imposition of the death penalty, and the invalidation of a statute or Constitutional provision. Clause 1, providing for Florida Supreme Court jurisdiction of a DCA case affirming a final judgment exceeding one million dollars based on jury verdict, does not fit within the Florida Supreme Court's area of discretionary jurisdiction, unless the case, as stated above, conflicts with another DCA or is certified to the Florida Supreme Court as of great public importance. The Florida legislature may not extend or enlarge the discretionary jurisdiction of the Florida Supreme Court as Constitutionally mandated. This clause is unconstitutional because it attempts to do so. In contrast, under the Federal Constitution, Congress has the power to enlarge or reduce the appellate jurisdiction of the U.S. Supreme Court, provided that it does so without excluding appellate jurisdiction of an entire subject of review.*

### Clause 2

*Clause 2 attempts to create a way to modify the creation of rules of procedure created by the Florida Supreme Court. Normally, the legislature passes a bill by a majority of each house, and then presents such a bill to the Governor to either veto or to sign. Under the Florida Constitution however, the Florida Supreme Court has the **exclusive** authority to create rules of procedure for the Florida courts. The legislature may reject such rules created by the Florida Supreme Court by a 2/3 vote, but the legislature, may not amend or modify such rules. The Florida legislature has no power to create rules of court procedure, as this power is exclusively vested in the Florida Supreme Court according to the Florida Constitution. This clause attempts to give the Governor the power to veto or accept such rules of court, according to the procedure for enacting*

other bills in the legislature. This is clearly unconstitutional because it violates Separation of Powers. The Florida legislature cannot delegate its power to reject the Supreme Court's rules by 2/3 vote to the Governor. The Florida Constitution expressly provides for this procedure. Any attempt by the Governor to veto the Florida Supreme Court's rules would violate this constitutional provision. This clause is unconstitutional and cannot be enforced. If so provided, the clause could be severed from the act if the rest of the act is determined to be valid.

### Clause 3

Clause 3 attempts to limit the use of the courts for medical malpractice actions, forcing them to be heard before an administrative hearing officer. This may be problematic because the Florida Constitution guarantees its citizens access to the courts for all actions at law. The legislature may not deny access to the courts without providing a reasonable alternative unless it can justify such an action with a compelling governmental interest, and show that such action is narrowly tailored to fit that interest. An administrative hearing may be considered a reasonable alternative, because it still allows plaintiffs to bring their actions before a quasi-judicial officer, and the law allows that any final order may be appealed. However, an administrative hearing may not be seen as a reasonable alternative, as would perhaps an arbitration or mediation type of alternative. A plaintiff might argue that such a hearing was not reasonable because it was not enough like a court.

However, if the hearing is not considered a "reasonable" alternative to trial, then the legislature must satisfy the strict scrutiny test. The legislature could probably argue that medical malpractice actions are clogging the court dockets, and that there is a compelling interest in the efficiency of the courts. The legislature may also argue that this is the most narrowly tailored option, because it still provides for some type of hearing, and allows an appeal. The process therefore would not take away a right to trial, but merely put in place a type of screening process for these types of cases. However, the facts indicate that the legislature's purpose behind the clause was excessive jury verdicts and rules of procedure overly favorable towards plaintiffs. These reasons would probably not meet the compelling interest test, unless the legislature can successfully make the argument that jury verdicts tend to favor plaintiffs and award large verdicts is compelling. This clause would probably be upheld because the clogging of court dockets has traditionally been recognized as a major problem.

In addition, a jury trial must be provided in all criminal cases and all civil cases where such a jury trial right existed at the time of the Florida Constitution's adoption. Because this right is removed by Clause 3 as to medical malpractice cases, an opponent of the legislation could argue that a jury trial right existed as to such professional negligence actions in 1845, and thus must be protected now.

Clause 3 may also run afoul of existing Florida Statutes, which mandate procedure for medical malpractice cases without mention of such an administrative hearing.

Clause 3 also attempts to vest judicial authority in an administrative hearing officer. This may offend the Separation of Powers provision in the Florida Constitution by vesting an administrative or legislative branch officer with judicial authority.

*Clause 3 also attempts to vest the First District Court of Appeal with the power to hear appeals from all cases appealed from the hearing officer for medical malpractice actions. However, the District Courts are vested with the power to hear appeals from their own districts, and one district court of appeal cannot be vested with the power to hear appeals from anywhere in Florida. This is unconstitutional.*

#### *Clause 4*

*This clause is a problem because it relates to a different subject than the rest of the Act. The Florida Constitution requires that all statutes enacted by the legislature contain only one subject. The single subject rule exists to provide notice and assure that each title adequately describes what is contained within the statute. The Act contains several provisions relating to the courts, but the Fourth provision relates to a criminal law. This would clearly not fall under the subject of court reform, and therefore would cause the act to be unconstitutional.*

*The facts also indicate that the Act was amended during floor debate to add section 4. This is improper. Pursuant to the Florida Constitution, an act may not be amended during floor debate to add a new provision. In addition, this provision violated the "single subject" rule, as stated earlier.*

*The facts also indicate that amendments were made to two other bills during floor debate of the Act. Pursuant to the Florida Constitution, the legislature may not make changes to other bills while debating one bill on the floor. This may serve to invalidate the legislation.*

# **Q**

## **QUESTION NUMBER 2**

### **JULY 2005 BAR EXAMINATION - REAL PROPERTY/CONTRACTS**

Owner owned Blackacre, a 75-acre parcel of farmland in Central County, Florida. In 2000, Owner and Farmer entered into a written lease whereby Owner leased Blackacre to Farmer for a term of thirty years in exchange for rent payments of \$20,000 per year. Each year, Farmer planted and harvested crops on Blackacre. Farmer did not reside on the land.

In 2003, Owner and Farmer amended the lease to give Farmer or his heirs the option to purchase Blackacre for \$250,000 at any time during the term of the lease. In the amendment, which was in writing and signed by Owner and Farmer, Owner acknowledged receipt of Farmer's deposit of \$1,000 to be placed in an interest-bearing trust account. The amendment provided that, upon exercise of the option, the deposit plus accrued interest would be credited to the purchase price of Blackacre. If the option was not exercised, the deposit plus interest would be returned to Farmer or his heirs. Neither the lease nor the amendment was recorded.

In 2005, Owner executed a warranty deed conveying Blackacre to Buyer, who paid Owner \$300,000. The language of the warranty deed complied with the form prescribed by Florida Statute. Before purchasing Blackacre, Buyer searched the property records of Central County and determined that record title to Blackacre was in Owner. Also prior to the purchase, Buyer inquired of Owner as to Farmer's interest in Blackacre. Owner gave Buyer a copy of the lease, but Owner did not tell Buyer about the amendment and Buyer was unaware of Farmer's option when Buyer purchased Blackacre.

In 2006, Farmer gave Buyer proper notice of the exercise of the option to purchase Blackacre and tendered to Buyer the purchase price. Buyer refused to convey Blackacre to Farmer.

Prepare a legal memorandum addressing the following issues:

1. Is Farmer's option to purchase Blackacre valid? Will Farmer be successful in enforcing the option? Discuss fully.
2. In an action by Buyer against Owner, what claim(s) are available to Buyer? Will Buyer be successful? Discuss fully. Do not discuss any claim based on negligence or an intentional tort.



## SELECTED ANSWER TO QUESTION 2

### (July 2006 Bar Examination)

*First of all, this isn't homestead property. Homestead property is 160 acres of contiguous property, but it has to be lived on. Farmer doesn't live on the property, thus any assertions from farmer saying that this is homestead property will not succeed.*

*Is farmer's option to purchase Blackacre valid?*

*Here, the lease was for 30 years so it should have been recorded even without the option on it.*

*Although, farmers lease said that it was a lease, it seemed to be much more than that.*

*This is an option contract and it must satisfy the **Statute of Frauds**. A contract for the sale of land or for an option to purchase land must be a writing, describing the property and the price to be paid, and it must be subscribed by 2 witnesses and recorded.*

*An option to purchase property should be recorded like a deed & have consideration for the option to be left open. Here in the facts, there was \$1,000 agreed upon to hold the option open. The amount for the purchase of the land is \$250,000. Here in the facts, the lease was amended to add the option and signed by the farmer and the owner. So we have a writing. It doesn't say that it described the property but the facts say that it was 75 acres so I will assume that this was in the lease and that element is met. Here in the facts, there weren't 2 witnesses to sign the option contract. The option contract was also not recorded thus later purchasers were not on record notice of the lease, however they were on inquiry notice because Farmer was on the land planting and harvesting the crops & making use of the crops.*

*Since the option contract wasn't signed by 2 witnesses, it doesn't meet the requirements in Florida to be valid. However, at this point, under the **Statute of Frauds** all that farmer needs to prove is that he has a writing, signed by the party charged (OWNER) that evidences the agreement. Farmer does meet all of these elements because he has the lease that was amended & it is signed by the owner & it evidences that he had a 30 year lease & an option to buy and now that Owner made a contract with Buyer, Owner is in breach of this contract that meets the Statute of Frauds because owner conveyed this property that he had leased & given an option contract on to another party.*

*It is likely that the **exceptions to the Statute of Frauds** which are **part performance & equitable Estoppel** are met here also. So if Farmer couldn't satisfy the Statute of Frauds he could use the exception to **recover damages or get specific performance**.*

*Under part performance, a person who increases the value of the land by working on it or building on it or paying part of the cost of it is said to have an interest in the property. Here in the facts, Farmer has increased the value of the land because he has crops on it. He has also paid the price of the option that is going to be credited toward his purchase of the property. However, Owner will argue that since the option is in an interest bearing account & will be applied to the value of the property he doesn't actually possess the option money & thus the option isn't valid. This claim is NOT likely to fail because the option contract says that the money is to be used for the value of the home and if not then it will go back to the farmer. This is a question for the court.*

*ESTOPPEL - it is likely that the farmer will be able to use the argument of equitable estoppel because he relied on owner that he at least had a 30 year right to use the property & hopefully longer if he got to purchase it. His reliance is evidenced by him growing crops on the land. He relied on Owner when he planted his crops. Owner will argue that crops are a yearly thing & he didn't rely on him for the whole 30 years in just planting 1 or 2 years of crops. It is likely that the Owner's argument will fail here. Because Farmer did rely to his detriment on Owner's agreement with him that he would be able to farm the land for 30 years or more so it is likely that a court would enforce this agreement on estoppel grounds. Owner will be equitably estopped from selling the land to Buyer even if the agreement didn't meet the Statute of Frauds.*

*However, this whole agreement can be rendered void if it violates the **rule against perpetuities**. The rule against perpetuities (RAP) applies to options to buy land. RAP as stated by John Chipman Grey says that any interest must, vest or fail to vest, within 21 years of some life in being at the creation of the interest. Here in the facts, there is no life in being stated in the creation of the option to buy property so it is measured by the common law time limit which is 21 years. Florida follows the wait and see rule which means that they can wait and see if it vests in the amount of time & the interest will be good if it vests in the amount of time. Florida also has changed the years for RAP to 90 years. Here, the interest was created in 2003 which left 27 years left on the option. Since farmer wanted to exercise his option to buy only 2 years later, the wait and see rule says that his interest vested before RAP made it void. Thus under RAP this interest is good.*

*Thus, for the above reasons, it is likely that farmer will have more than one way to prove that his option to purchase black acre is valid.*

*Will farmer be successful in enforcing the option? This question is answered by the fact that Farmer wants specific performance. He wants the land and Owner no longer has the land so whether farmer gets the land is decided by notice & recording statutes.*

*Farmer's remedy from owner will be damages since specific performance might be tricky since Owner doesn't own the property anymore.*

*Florida is a pure notice state. This means that a buyer who is a good faith purchaser takes good title if they purchase without notice of anyone else having an interest in the property. Florida has a rebuttable presumption that a person doesn't have notice when they buy land.*

*Record notice is when someone records their interest in the property & it gives notice to the whole world that they have interest in the property.*

*It was bad that Farmer didn't record his option to buy the property. He should have also recorded his lease. But he didn't so he didn't **give record notice to the world** of his interest in the land. However, he did raise crops on the land and this gives **inquiry notice** to people who are looking to buy property. When people buy property they are presumed by the law to be on all forms of NOTICE- including actual, inquiry, and record notice.*

*Here in the facts, Buyer was only on actual notice of Farmer's 30-year lease on the land. Since Buyer knew about the lease, a court might hold that inquiry notice doesn't work here. The buyer could see that someone was on the property but didn't know the interest that farmer held.*

*In general, Buyer paid valuable consideration of \$300,000 without knowing any problems on the property so he was a good faith purchaser for value.*

*RELEASE - Buyer should have asked for a release from Farmer who would be his tenant before he bought the property. Buyer should have asked Farmer what type of interest he held & in fact, under Florida law a reasonably prudent buyer should have gone to the tenant (farmer) and asked for a letter stating the farmer's interest in the land and any liabilities that Owner owed to Farmer & any other things that could be in an agreement between Owner & farmer because Buyer is still held to that agreement between the original owner and Farmer. Since Buyer is held to the agreement between the landlord who is now him & the farmer, Buyer is also held to the option that was on the lease.*

*Since buyer is held to the lease & the option as the new landlord, it is likely that Farmer will be relieved to know that he will be able to get specific performance and get his land.*

*In an action by Buyer against Owner, what claims are available to buyer?*

*Buyer has the claim of breach of contract. There was a unilateral mistake on the part of the buyer that went to the heart of the contract. Buyer thought he was buying land where he had a tenant & he could get rent for many years, but he really purchased land that could be purchased away from him.*

*Buyer can claim fraud. Owner knew that the option was on the land but he didn't tell buyer about it.*

*Buyer can claim material misrepresentation- because Owner omitted to tell buyer about the option contract and this omission counts as a lie because it went to the heart of the deal.*

*Buyer can claim fraudulent misrepresentation - If Owner can prove scienter then he can prove that Owner's omission rose to the level of fraud.*



*Buyer can also claim detrimental reliance because owner knew about the option contract and didn't tell buyer about it and caused buyer to rely upon him to his detriment which caused him to enter into the contract.*

*It is likely that buyer will win on all of these claims because owner knew about the option contract and didn't tell buyer about it yet still had Buyer enter into the contract for the sale of land.*

*Owner executed a warranty deed conveying black acre to buyer.*

*The warranty deed gave buyer 6 covenants*

*1-covenant of seizen- which warrants that the title is marketable & good & that there is nothing of record that affects the title.*

*2-covenant of warrant & defend which promises that owner will show up to defend his ownership in the property should any lawsuits arise.*

*3-covenant to convey- which promises that owner had the right to convey the property,*

*4-covenant of quiet enjoyment, which promises that no one has a lawsuit against the property & Buyer can own it in peace without worrying that he will be thrown off it.*

*5-covenant of future assurances, owner promises that he will execute all paper work or do anything in the future he needs to do regarding the property.*

*6- covenant against encumbrances which promises that Owner didn't have encumbrances or liens on the land other than what Owner has told buyer about.*

*Buyer will sue on these warranties and specifically on the covenants to convey and the covenant against encumbrances. Here in the facts, owner didn't have the right to convey ownership in the property because an option contract was on the property. Since he didn't have a right to convey the propriety free & clear of that interest, he breached that warranty & buyer will win on that warranty.*

*Buyer will also argue that owner breached the covenant against encumbrances. Here in the facts, the option contract is an encumbrance on the property that owner knew about but didn't tell buyer about. Since there was an encumbrance on the property that wasn't communicated to buyer it is a breach of the covenant against encumbrances and owner is liable to buyer for that.*

*Buyer didn't have part performance in the land & he didn't live on the land. The land is unique, but Farmer has a greater interest in the land so it is unlikely that Owner can get specific performance. However, Buyer can sue Owner for the purchase price and any reliance damages.*

# **Q**

## **QUESTION NUMBER 3**

### **JULY 2006 BAR EXAMINATION - TORTS**

On a clear, dark night in Alligator County, Florida, Plaintiff was driving his vehicle on a state road at the speed limit. He suddenly came upon a disabled dump truck stopped in his lane. Plaintiff applied his brakes. Although Plaintiff was able to avoid colliding with the dump truck, his vehicle was struck from behind by Driver. Plaintiff's vehicle was equipped with an operational seatbelt but Plaintiff was not wearing it at the time of the collision.

The next car on the scene was driven by Helper, who was able to avoid colliding with any of the other vehicles. Helper observed that Plaintiff was unconscious and Plaintiff's gas tank was leaking. Helper pulled Plaintiff from the wreckage of his car and administered first aid to him.

An ambulance was called and Plaintiff was taken to the hospital. Plaintiff was admitted to the hospital and 10 days later Dr. Surgeon performed surgery to relieve pressure on Plaintiff's brain. Plaintiff is now suffering from loss of equilibrium and partial paralysis, both of which appear to be permanent.

An investigation revealed that the dump truck was owned and operated by Trucker, who was walking to the nearest phone to get help when the accident occurred. A Florida Statute requires the operator of a disabled truck to place certain markers on the roadway to warn approaching drivers. Trucker did not have such markers with him at the time.

Plaintiff states that he recalls seeing Driver's vehicle in his mirror prior to the accident and that Driver was following too closely for the conditions, in Plaintiff's opinion.

Plaintiff's current treating physician is Dr. Practitioner who has given an opinion that Plaintiff's injuries were aggravated when Helper provided first aid to Plaintiff. Dr. Practitioner believes that Dr. Surgeon provided substandard care in performing the operation and that this is also a factor in Plaintiff's injuries.

Your firm has been retained by Plaintiff to bring an action to recover damages for his injuries. Discuss potential causes of action against Trucker, Driver, Helper, and Dr. Surgeon, and the defenses that will likely be asserted. Discuss also the doctrine of joint and several liability in Florida and whether it would apply in this case.



## SELECTED ANSWER TO QUESTION 3

### (July 2006 Bar Examination)

*This memo concerns the causes of action arising from a car accident involving two drivers and a stalled truck. Potential claims against the Trucker, Driver, Helper and the Doctor administering care will be discussed.*

*Plaintiff v. Trucker*

*In order to have a cause of action in negligence there must be a duty, breach of that duty, foreseeable harm (both factual and legal) and damages that result. Drivers on the road have the duty to act as an ordinary reasonably prudent person under the relevant circumstances. This duty does take into account physical aspects of the defendant's character, but not mental abilities, and it is applicable to all foreseeable plaintiff's within the zone of risk of the defendant's conduct. A breach exists where the defendant does not perform as a reasonably prudent person would under the circumstances, and as a result there is a foreseeable injury to a plaintiff in a foreseeable way. Legal causation serves as a foreseeability test and will actually limit the liability of the defendant where the injury that results was unforeseeable. A plaintiff is entitled to recover all compensatory damages (past and future economic and non-economic damages) and at times punitive damages if they are plead as a result of a defendant's misconduct (gross negligence, intentional damages). There may be an issue of multiple causation in this case, since both the driver and the trucker essentially created one harm that may not have been sufficient on its own.*

*According to the investigation, the Trucker (T) was the initial cause of the injuries to the plaintiff. Where there is a statute involved that proscribes the standard of care to be followed by an individual, if a violation of the statute results in harm to a plaintiff of the class intended to be protected from that type of harm, then the plaintiff is able to establish negligence per se. Here, there was a statute that applied to the conduct of T that required him to use markers when his truck is disabled on a roadway. Plaintiff is most likely the type of person intended to be protected by the statute, from this exact type of injury - car accidents. There is no indication that the trucker was working for another, however, if he was, then there would also be a potential claim under respondent superior against his employer for negligence in the scope of his employment. By not placing the markers in the road, Plaintiff (P) may argue that T breached his duty of reasonable care by failing to act as a reasonably prudent person under the circumstances, as a reasonably prudent person would have recognized the potential for an accident and have proceeded accordingly. In defense T will most likely argue against causation on the theory that there was an intervening act - the negligence of the other driver - which absolves T of liability for the injuries to P. P can counter, however, that the accident between the two drivers is a foreseeable intervening cause, since it is foreseeable that two cars would collide after coming upon the stalled truck. T would also have an argument under comparative negligence. In Florida, a driver is comparatively negligent, and his recovery offset, as a result of his failure to wear a seatbelt where one is operational within the vehicle. The facts indicate that the driver*

*failed to wear the seatbelt despite its availability. The conditions otherwise indicate that P was acting with due care in light of the conditions that night. T may also claim that he was being reasonable by leaving the truck to call for help.*

*If the P can successfully argue that T is the cause of his injuries, then T would be responsible for all reasonably foreseeable factors that aggravate the injury and would similarly be liable for any injury that results to a rescuer. This applies also to subsequent medical malpractice, as exists in this case. T would be liable for the paralysis as well as any other aggravation that resulted from the negligence of the rescuer, since it is foreseeable that when someone is placed in danger by another's negligence, that other's will come to the rescue and injure themselves of the Plaintiff.*

#### *Plaintiff v. Driver*

*In order for P to make a claim against Driver (D), the same standard of ordinary negligence, causation, and damages is applied as indicated above. D had a duty to behave as a reasonably prudent person, however, there is testimony to indicate that D was following too closely. P will argue that a reasonably prudent person would not have followed so closely considering the fact that it was dark outside, and as a result the foreseeable harm to the foreseeable plaintiff resulted. D could argue, however, that he was not the cause in fact of the injury, since the cause of P's driver was in fact the truck left on the roadway. D may also argue that the sudden erratic behavior of P on the road in response to the stalled truck was not foreseeable, and D could possibly claim that he was left with no other option than to hit P. In Florida, there is a rebuttable presumption that one who rear-ends another driver is negligent, however, that presumption can be rebutted by proof that the rear driver did not have sufficient time to stop. Here, D may claim that as a defense, and will have to provide proof of the distance between the cars and the distance available to stop at the time that the car was visible.*

*If found liable for the injuries to P, then D would be responsible for the same damages as T, and would potentially be considered a joint tortfeasor, and therefore, not liable for the full damages to the P.*

*In the way of defenses, D has a good claim that P is contributorily negligent due to the fact that he was not wearing an operational seatbelt (see above) and also that P himself was liable for the accident by cutting in front of D, if the facts so indicate.*

#### *Plaintiff v. Helper*

*The original tortfeasor is liable for injuries caused by a rescuer as a result of placing the plaintiff in the original damage. The rescuer, however, is liable for his own negligence. While there is no duty to render aid to an injured person absent some relationship (contractual, familial, business, etc.), once a person makes the choice to render assistance, they must do so as a reasonably prudent person would under the circumstances. While Florida does have a Good Samaritan statute, the statute does not provide relief for a rescuer who is not a doctor in an emergency setting or a health care provider voluntarily providing care to a non-patient in an emergency. Here, it is unlikely that Helper (H) is subject to any standard other than that of a reasonably prudent person. Having made the conscious choice to render assistance, H is now liable for the damages that result from his own negligence.*

*In his defense H may argue that he is not the cause in fact of the injury, but instead the injury is solely the result of the negligence of the doctor subsequent to the accident. Furthermore, H could argue that he did act as a reasonably prudent person due to the fact that there was gas leaking from the tank, and the danger of removing P from the vehicle was far less than the danger of leaving him there to suffer more substantial harm.*

#### *Plaintiff v. Doctor Surgeon*

*Where one sues a doctor for malpractice in Florida, there must first be a pre-suit investigation conducted prior to filing the suit. Before notice to the parties, the plaintiff must have a doctor investigate the cause of action to determine that it is legitimate, then the plaintiff must provide notice to all parties involved, 90 days prior to filing suit. The notice must include the affidavit of the investigator. During the 90 days, the statute of limitations is tolled and the defendant investigates the action and determines whether he will offer settlement, deny, or admit liability and litigate the damages. If the parties determine to litigate the damages, then they may elect to go to arbitration. If arbitration is unsuccessful, then the plaintiff has 60 days or the remainder of the statute of limitations to file suit. In arbitration as well as in court, there is a cap on the damages recoverable in malpractice cases. If the plaintiff decides to go to court on the issue of damages and forego arbitration, then the cap is 350,000 as opposed to 250,000 in arbitration. The cap in court for a disabled person in an emergency setting ranges from 1.5 million to 500,000 depending on the damages.*

*A practitioner must show that he behaved as a practitioner in similar standing according to the similar community standard, and acted accordingly as a prudent practitioner would. Florida also takes into account specialty.*

*Here P would argue that the Doctor Surgeon (DS) did not behave according to the standard, and would probably have to show that similar doctors in the community would have acted in another manner. DS will argue, and provide expert testimony to the effect that doctors conduct the care in a manner similar to DS in this case. It appears that there is information from another practitioner indicating that DS did not provide standard care, and this would be debatable between the parties.*

*Causation issues remain the same as for the other defendants involved.*

#### *Joint and Several Liability*

*The doctrine of joint and several liability was recently abolished in Florida. Each defendant in this case could be joined and the amount of damages for each allocated to that party. If there were joint and several liability, then the court would first deduct any damages attributable to the comparative negligence of the plaintiff. Florida uses a pure comparative negligence, which allows the plaintiff to recover regardless of his amount of fault. With joint and several liability, all defendants would be liable for the entire amount although the plaintiff would be entitled to only one recovery. The paying defendant would then seek contribution from the other tortfeasors.*

*Currently in Florida, without joint and several liability, the damages to each defendant would be apportioned and the plaintiff would be able to recover only that*

*amount from each defendant. If a negligent party is dropped from the case, that party may still be liable as a Fabre defendant, and the damages offset by the amount of that tortfeasor's liability.*

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

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

The answers appear on page 39.

## 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 outside the examination room to one of the proctors. If, however, fewer than 15 minutes remain, please remain at your seat until time is called and the Board has collected all question booklets and answer sheets.



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

## 23 SAMPLE MULTIPLE-CHOICE QUESTIONS

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

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

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

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

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

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

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

11. Defendant was arrested on February 1 and released one month later on March 1 after being charged with a felony. On December 1 of the same year as his arrest, he filed a motion to discharge since no trial or other action had occurred to that point. The court held a hearing 3 days after the motion was filed. Defendant should be
- (A) discharged because more than 175 days passed between arrest and the filing of the motion to discharge.
  - (B) discharged because more than 175 days passed between his release from jail and the filing of the motion to discharge.
  - (C) brought to trial within 90 days of the filing of the motion to discharge.
  - (D) brought to trial within 10 days of the hearing on the motion to discharge.
12. Bill, a single man, owned pasture land in Deerwoods, Florida, which he leased to a tenant. He also owned a condominium in Miami, which he held for investment. In his will, he devised the pasture land to his son Tommy and the condominium to his daughter Julie. All other assets would pass equally to Tommy and Julie.

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

- (A) Kathy gets the condominium regardless of the prenuptial agreement, Tommy takes the pasture land and Tommy and Julie split the rest of the estate.
- (B) Due to Kathy's prenuptial agreement, Tommy receives the pasture land, Julie gets the condominium and Tommy and Julie split the rest of the estate.
- (C) Kathy gets the condominium, but because Bill had originally indicated his intent to devise equally to his children, Tommy and Julie will split the remaining estate.
- (D) Regardless of the prenuptial agreement, Kathy is a pretermitted spouse. Since Bill leaves surviving lineal descendants who are not Kathy's, Kathy receives 50% of the estate, Tommy gets the pasture land, and Tommy and Julie split the residue of the estate.

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

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

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

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

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

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

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



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

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

Florida Statutes 47.011 Where actions may be begun.

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

Florida Statutes 47.021 Actions against defendants residing in different counties.

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

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

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

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

## ANSWER KEY FOR MULTIPLE-CHOICE QUESTIONS

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