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Florida Bar Examination Study Guide and Selected Answers

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

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PART I – ESSAY QUESTIONS AND SELECTED ANSWERS

OCTOBER 2020 AND FEBRUARY 2021 FLORIDA BAR EXAMINATIONS

ESSAY QUESTIONS AND SELECTED ANSWERS

Part I of this publication contains the essay questions from the October 2020 and February 2021 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 4.

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

OCTOBER 2020 BAR EXAMINATION – FEDERAL CONSTITUTIONAL LAW/TORTS

The State of Florida passed a statute that read as follows:

No media outlet shall print, publish, or broadcast, or cause or allow to be printed, published, or broadcast, in any instrument of mass communication the name, address, or other identifying fact or information of the suspect of any theft prior to a judicial determination of guilt. Violation of this statute shall constitute a second degree misdemeanor, and any victim injured by violation of this statute shall be entitled to sue for damages.

After the statute went into effect, Vera, a newscaster for an Orlando television station, was arrested for theft by shoplifting.

Rick, a reporter for a local newspaper, the Orlando Star, covers the Orlando crime beat. Rick routinely obtained police reports each morning from the police department. The day after the arrest, Rick obtained a copy of the report detailing Vera's shoplifting arrest. The police department clerk forgot to redact Vera's name, and Rick immediately recognized Vera as a local television newscaster. Rick also recognized Vera's name because she once declined his request to go on a romantic date.

Rick wrote a story about the crime that mentioned Vera by name, and the story ran in the next day's Orlando Star. The story consisted of statements in the police report, and Rick added no further details. At the time, the Orlando Star had a circulation of approximately 200,000 people.

Rick also called a friend at a television station in Miami where Vera used to work as a beat reporter. Rick tells his friend about Vera's arrest, that Vera was using drugs, and that the theft was to support Vera's cocaine addiction. Rick had no reason to believe that Vera was using drugs and seriously questioned whether she was, but he assumed that drug use was the only explanation for the theft based on her position and popularity in the community. Rick also told his friends the story about Vera as a way of getting back at Vera for declining his romantic advance.

One week after the Orlando Star article, Vera's shoplifting charge was dismissed because the merchant misidentified Vera in store surveillance video. Vera, in fact, was in Miami visiting friends when the theft took place.

Vera read the story in the Orlando Star, and some of her former coworkers called her to express their sympathy. One of them told Vera that she heard about her cocaine

addiction from Rick and knew about a good drug rehabilitation center that could assist Vera. Vera has never used cocaine.

Vera has contacted you about potential claims that she might have against Rick and the Orlando Star. Prepare a memorandum that addresses the following:

1. Discuss the likely outcome of a claim by Vera against the Orlando Star under the statute set forth above. Your analysis should address any defenses that the Orlando Star may raise under the United States Constitution.
2. Discuss whether Vera has any common law claims against Rick and the Orlando Star. Your analysis should address any defenses that Rick and the Orlando Star may raise, including defenses under the United States Constitution.

SELECTED ANSWER TO QUESTION 1 **(October 2020 Bar Examination)**

Vera v. Orlando Star Under Statute

Vera can bring a claim under the Florida statute against the Orlando Star for damages for violation of the statute because the statute creates a private cause of action.

In order to bring a claim under the statute, Vera must have standing. Standing requires: (1) injury in fact; (2) causation; and (3) redressability. Injury in fact requires a particularized injury--one that effects the plaintiff in an individual way--and a concrete injury--one that exists in fact. Causation requires a causal connection between the injury and the complained of conduct. Redressability requires a showing that a decision in the plaintiff's favor will be capable of remedying her grievance. Here, Vera suffered a particularized injury because her coworkers and the public who read the Orlando Star article think she shoplifted; this injury does in fact exist because people have brought it up to her, offering their sympathies. Further, Vera's name was published as a suspect of theft before a judicial determination of guilt, which directly violates the statute. There is a causal connection between her injury and the Orlando Star's conduct--but for their publication of the story in violation of the statute, Vera would not have suffered any injury. Vera's injury is redressable by an award of damages. As such, Vera has standing to bring suit against the Orlando Star for violating the statute.

In response to Vera's suit for damages in violation of the statute, the Orlando Star will argue that the statute is unconstitutional, and thus they cannot be liable under it. The Orlando Star will argue that the statute violates the First Amendment's right to freedom of speech and that the law is unconstitutionally vague and overbroad. The Orlando Star will also argue that the statute violates equal protection.

First Amendment

The First Amendment protects the right to freedom of speech and press. Regulations that infringe on this right are often unconstitutional unless they fall into a category of speech that the government can regulate (i.e., false commercial speech, fighting words, obscenity, etc.) or survive strict scrutiny--the government can show that the regulation is necessary to achieve a compelling state purpose. The government can regulate the conduct associated with speech with reasonable time, place, and manner restrictions. If the restriction applies in a public forum or a designated public forum, to be valid, the restriction must be content neutral and substantially related to an important government interest. If the restriction applies in a non-public forum or a limited public forum, to be valid, it must be viewpoint neutral and reasonably related to a legitimate government interest. In addition to regulation of conduct, the government can regulate content; however, content based restrictions are presumptively unconstitutional. To be valid, a content based restriction must be necessary to serve a compelling state purpose and narrowly tailored to achieve that purpose. Content neutral regulations, on the other hand, must be substantially related to a legitimate government purpose and leave open alternative means of communication.

Here, the Orlando Star will argue that the statute is an unconstitutional content based restriction on speech. The Orlando Star will argue that the statute restricts the content of the speech they can publish, restricting them from publishing information that is in the public record. In a challenge to this statute on these grounds, the burden would be on the government to show that it is necessary to serve a compelling state purpose. The Orlando Star will argue that this law is not necessary because it punished protected speech. In response, the government will argue that the law serves to protect those wrongfully accused of minor crimes, like theft, from being subject to public ridicule before a determination of guilt has been made and prevents the false spread of information. The government will argue that this law is necessary to achieve the purpose of preventing the spread of false information. However, there is no proof that this is necessarily the purpose of the restriction, and absent such, it is unlikely that the law will survive strict scrutiny.

In addition to arguing that this law is an unconstitutional content based restriction, the Orlando Star will argue that the law is unconstitutionally overbroad. A law is overbroad under the First Amendment when it punishes both protected and unprotected speech in its plainly legitimate sweep. Here, the law punishes protected speech--printing of information in public records. As such, it is likely overbroad.

Equal Protection

The Equal Protection Clause prohibits discrimination on the basis of classifications. Where a law discriminates on the basis of a suspect classification, strict scrutiny is applied--the government must show that the law is necessary to achieve a compelling state interest. Where a law discriminates on the basis of a quasi-suspect classification (gender and illegitimacy), intermediate scrutiny is applied--the government must show that the law is substantially related to an important government purpose. Where the law discriminates on the basis of a non-suspect classification, such as age or wealth, rational basis applies--the challenger must prove the law is not rationally related to a legitimate government purpose. The Orlando Star will argue that the law discriminates on the basis of being a newspaper reporter. This, however, is not a suspect classification, and is only subject to rational basis. The burden would fall on the Orlando Star to show that there is no rationally related legitimate purpose served by the statute. However, because the burden is quite low and the statute likely serves a purpose of protecting harm to private persons by the spread of misinformation, the statute likely passes rational basis. Thus, the statute is constitutional on equal protection grounds.

If the Orlando Star prevails on its defenses that the law is unconstitutional, Vera will not prevail against the newspaper under the statute.

Vera v. Rick & Orlando Star Under Common Law

Vera will likely bring a claim against both Rick and the Orlando Star for defamation. In addition, she will bring a claim against Orlando Star for invasion of privacy.

Defamation

In order to prove a case of defamation, the plaintiff must prove: (1) false statement of fact; (2) identification of the plaintiff as the subject; (3) publication to a third party; (4) fault on the part of the defendant--for a private person, negligence, and for a public figure express malice--reckless disregard for the truth of the statement or knowledge of its falsity; (5) defamatory effect of the statement; and (6) damages.

Vera v. Rick (Defamation)

Vera will bring a defamation claim against Rick for the statements made that she was "using drugs, and that the theft was to support [her] cocaine addiction." Vera will be able to show the statement is of a fact because Rick claimed she used drugs and committed theft to support her alleged habit. She will also be able to show the statement of fact is false because she does not have a cocaine addiction, nor did she commit a theft because she was in Miami at the time of the theft. As to identification, Vera was very clearly identified as the subject of the statement Rick made to his friend. Further, the statement was published to a third party because Rick made the statement to his friend, and thereafter told other people. If Vera is a private person, she must only show that Rick was negligent in making the statement. Vera can easily show that Rick was negligent in making his statement because "Rick had no reason to believe that Vera was using drugs and seriously questioned whether she was." However, because she is a news station reporter, Rick will argue that she is a public figure by saying that people know who she is because she is always in the limelight due to her reporting. If that is the case, she must show that Rick acted with a reckless disregard for the truth of the statement. Vera can easily show that Rick acted with reckless disregard because, as mentioned above, Rick questioned whether his own statement was true. Further, the statement had a defamatory effect because her coworkers expressed their sympathies and told her they knew of a good drug rehab center. The statement had a damaging effect on Vera's reputation because her coworkers and others knew of the false statement. Here, the statement is slander, which is spoken defamation. To recover damages for slander, Vera must prove special damages, unless the statement was slander per se. Vera could argue that the statement was slander per se in that it claimed she committed a crime of moral turpitude, however, whether theft and using drugs are a crime of moral turpitude is unlikely. As such, Vera must prove special damages in order to recover against Rick.

In response to Vera's claim of defamation, Rick will claim that his statements were privileges under the qualified privilege as reporting on official reports. The qualified privilege, however is not absolute and can be lost if the statement does not fall within the privilege or is made with actual malice--where the primary motive is an intent to injure the plaintiff. Vera will argue that Rick's statement is not within the privilege because nowhere within the police report was there any information about a potential drug use by Vera. Further, when Rick made the statement about Vera's alleged drug use, he was not acting in his capacity as a reporter. As such, the statement does not fall within the privilege. However, even if the statement does fall within the privilege, Vera can show that Rick acted with actual malice when he made the statement. Rick acted with actual malice because he told "his friends the story about Vera as a way of getting back at [her] for declining his romantic advance." This shows actual malice because the primary motive was an intent to injure Vera--get back at her for rejecting him. As a result, if Vera can prove special damages, she is likely to prevail on a defamation claim against Rick.

Vera v. Orlando Star (Defamation)

Where the defendant is the media, at least 5 days prior to the filing of a lawsuit, the plaintiff must give the defendant written notice, specifying the alleged defamatory statement. Upon receipt, the defendant then has 10 days to fully retract the statement, and if the statement was made in good faith and there is a retraction, the plaintiff may only recover actual damages. If Vera were to pursue a lawsuit against the Orlando Star, prior to filing she must comply with the notice requirements and specify the article with the alleged defamatory statement. If she does that, in her complaint, she must thereafter prove the elements of defamation. Vera will argue that the article about the crime was false because she did not in fact commit the crime. The story mentioned Vera by name, and thus identified her as the subject. The article was published to a third party--Orlando Star's approximately 200,000 subscribers. Vera will struggle to prove fault regardless of whether she is treated as a public figure or private person. Fault will be hard to prove because the story was published in reliance on the police report, which can be relied on as being true. Further, there was no act of negligence in relying on the report, nor a reckless disregard to the truth of the report. However, Vera will argue that the statute seeks to prevent the spread of false information because not all arrests result in guilty convictions. The statement had a defamatory effect because Vera's coworkers and friends assumed she was arrested for shoplifting. And Vera suffered damages because of the statements. Because the story is written, and is thus libel, general damages are presumed. However, because the defendant is the media, if the statement was made in good faith, which it was albeit the statute, Vera will only be able to recover actual damages, if it is retracted.

In response to a defamation claim, the Orlando Star will argue that the statement is protected under the qualified privilege, as a report on official proceedings. The Orlando Star will likely prevail on this argument because the story was a report on a police report which likely falls in the privilege. Further, the newspaper did not act with actual malice in reporting the story because the Orlando Star "routinely obtain[s] police reports each morning from the police department."

As a result, Vera is unlikely to prevail on a defamation claim against the Orlando Star, so long as they retract the statement.

Invasion of Privacy

Vera will likely bring a claim against the Orlando Star for invasion of privacy. Included in the tort of invasion of privacy is intrusion into plaintiff's private affairs or seclusion. Intrusion into plaintiff's private affairs requires an actual intrusion into something that a reasonable person would keep private. Here, Vera will argue that by publishing her name in the story, the Orlando Star intruded into her private affairs because Vera had not yet been convicted or tried for the crime. She will further argue that this intrusion was unreasonable because the Orlando Star had no reason to believe she did or did not commit the crime and that the charges were subsequently dismissed. She will argue that dealing with a potential criminal charge is private and something that a newspaper has no interest in reporting on, especially for such a minor crime like shoplifting. The Orlando Star will counter that the information was public record and thus, they did not intrude on any private part of Vera's life. In response, Vera will argue that the statute prevents such publication of her name. However, the Orlando Star will argue that obtaining her name was a mistake of the clerk, and they are not at fault for such. As a result, Vera will likely not prevail.

Q QUESTION NUMBER 2

OCTOBER 2020 BAR EXAMINATION – REAL PROPERTY/ETHICS

Ten years ago, Luis loaned Hank \$200,000 to help Hank buy a house in Florida. As part of the transaction, Hank gave Luis a mortgage on the property and signed a promissory note that obligated Hank to make monthly payments over 30 years. The transaction followed all required formalities. Hank resided in the house and properly declared it his homestead.

Hank then met Willa. They began dating, and Willa eventually moved into Hank's home. Two years ago, Willa and Hank were married. One month after the marriage, Hank decided to make Willa a co-owner of the home. In the presence of two witnesses, he signed a deed that described the homestead property, listed himself as the sole grantor, and named Willa and himself as grantees. The deed also provided that after Hank and Willa passed away, the property would convey to Willa's son, Sam. Hank recorded the deed.

After the marriage, Hank and Willa created a joint checking account. Once the account was established, all mortgage and property tax payments came from the joint account.

One year ago, Hank confessed to Willa that he had been gambling online for some time, and amassed \$50,000 in credit card debt with CreditCo. Hank explained that although the joint account had \$25,000 in it, he did not pay the debt from the joint account because he did not want Willa to know about it. Hank and Willa had a significant argument and decided to separate. Willa moved to a neighboring county, signed a 12-month lease on a new apartment, and changed her address on her driver's license.

After the separation, no one made the monthly mortgage payments on the property. Luis decided to file a foreclosure action and, before filing, discovered the deed that Hank had executed. Luis named Hank, Willa, and Sam as defendants. Further, because the property's value had decreased below the outstanding loan balance, Luis' complaint sought a deficiency judgment against Hank, Willa, and Sam.

Willa and Hank seek your advice on Luis' foreclosure lawsuit and the potential litigation with CreditCo. Hank is also concerned that CreditCo will sue him and try to force a sale of the home or garnish the funds in the joint bank account if it obtains a judgment. In addition, Hank and Willa now want a divorce, and want to know how, if at all, a divorce would affect Luis' and CreditCo's ability to reach their assets. To reduce their legal expenses, they have asked you to represent them both.

Prepare a memo addressing the following:

1. Discuss Hank's, Willa's, and Sam's respective interests, if any, in the home; and Hank's and Willa's interests in the bank account.
2. Discuss the likely outcome of Luis' lawsuit.
3. Discuss the likely outcome of a lawsuit by CreditCo to reach the home or the bank account to satisfy Hank's debt.
4. Discuss whether a divorce would affect Luis' and CreditCo's ability to reach Hank's and Willa's home and the funds in the bank account.
5. Discuss any ethical concerns raised by the proposed joint representation of Hank and Willa.

SELECTED ANSWER TO QUESTION 2

(October 2020 Bar Examination)

Homestead Property

Homestead property requires that a person have a qualifying ownership interest (legal or equitable title, must be a present interest) and the home is used by the owner or their dependents as their primary residence. Homestead property is limited to 1/2 acre within a municipality and 160 contiguous acres outside a municipality. A married owner of homestead property may not alienate, encumber, or devise the property without his spouse's consent to anyone but their spouse or minor child. The spouse will take a life estate with a vested remainder in minor children per stirpes. Or the spouse may elect to take a one half interest as a tenant in common with a minor child.

Here, Hank is the legal and equitable owner of the home. Hank resided in the house as well as his wife Willa. So long as the home is within the acreage limitations, it is homestead property.

Homestead protections last until it is abandoned. A person abandons their homestead when they have another permanent residence.

Here, Willa abandoned the homestead protections when she moved to a neighboring county, signed a new lease, and changed her address, demonstrating her intent to use the apartment as her permanent residence.

Hank, Willa, and Sam's Interests in the home

Transfer of deed

A deed transfer need not satisfy the statute of frauds but the grantor must have the present intent to transfer, it must be in writing, signed by the grantor, name the grantee, contain a reasonable description of the property, and be witnessed by two attesting witnesses. Recording a deed is a presumption of the intent to transfer.

Here, Hank signed a written deed that named himself and Willa as grantees. It contained a description of the homestead property and was in the presence of two witnesses. Hank then recorded the deed, evidencing his intent to transfer the property. Thus, the transfer of the property to himself and Willa was valid.

A vested remainder is a future interest and exists when there are no conditions precedent to the grantee receiving the property.

Here, Sam has a vested future interest as he will receive the property upon the death of Hank and Willa. It is also valid since the deed formalities were met. However, the conveyance to Sam if he is not a minor child may not be valid if Willa did not consent.

Hank and Willa own the property in fee simple absolute.

Tenancy by the entirety

A tenancy by the entirety is a joint tenancy with a right of survivorship between a married couple and requires five unities of time title possession interest and person. Upon death of one tenant their interest goes to the other tenant. One tenant may not alienate or encumber the property without consent of the other. The tenancy terminates upon divorce, death, or consent of both parties. A tenancy by the entirety is presumed in Florida when property is transferred in the name of both spouses, or one spouse transfers title to the property to himself and his spouse. No strawman is required.

Here, Hank originally owned the property prior to his marriage to Willa. He then conveyed the property to himself and his wife Willa in both their names. Accordingly, a tenancy by the entirety is presumed and Hank and Willa owned the property as a tenancy by the entirety.

A joint bank account in the name of both husband and wife is also presumed to be owned as a tenancy by the entirety. Accordingly, Hank and Willa own the bank account as a tenancy by the entirety,

As stated, a divorce terminates a tenancy by the entirety and creates a tenancy in common but not separation.

Here, although Hank and Willa separated, they still own both the account and home as a tenancy by the entirety until they actually become divorced.

Florida presumes that a person who receives property takes subject to a mortgage on the property if the deed is silent. The property will remain subject to foreclosure but the transferee will not be liable for the mortgage. The mortgagor remains liable to the lender.

Here, Willa (and Sam) take subject to the mortgage.

Luis's Lawsuit

A valid contract requires offer, acceptance, and consideration.

Luis offered Hank a loan of 200,000 to buy a home, Hank accepted, consideration existed in the form of 200,000 and the note.

Luis may file a breach of contract action against Hank for failing to make payments on the note.

Foreclosure

A mortgagee may foreclose on property when the underlying obligation to which it relates is in default, typically due to a failure to make payments.

Here, Luis has is the mortgagee and may foreclose on the property because Hank's promissory note relating to the mortgage is in default due to his failure to pay monthly payments.

To foreclose on property Florida requires the plaintiff show standing. He must show that he is the owner of the note and obtained ownership prior to the foreclosure action. Ownership may be proven through an unbroken chain of self authenticating assignments. He must also name the parties to the foreclosure action.

Here, Luis is the owner of the note as he received it from Hank and obtained the note 10 years ago prior to foreclosure. Thus, he has standing to foreclose. He also had notice through the deed that Willa and Sam had ownership interests and properly named them as parties to the lawsuit.

Hank may argue that the home is homestead and thus protected from forced sale. However, homestead does not apply to liens that attached before the homestead protections were created. Further, it does not apply to mortgages incurred for purchase or improvement of the home.

Here, Luis's mortgage occurred prior to Hank declaring it as homestead property. Further, it was incurred for Hank to purchase the home. Thus, Hank will not be able to claim homestead protections.

Luis will be successful in his foreclosure action.

Foreclosure of a senior interest at a judicial sale eliminates all junior interests on the property so long as notice is given to the junior interest. Whether an interest is junior or senior is determined by the first in time first in right rule.

Deficiency

Florida allows for deficiency judgments. If the foreclosure of the mortgaged property is not enough to cover the amount of the debt that it relates to, the mortgagee may recover the deficiency from the mortgagor.

Here, since the foreclosure on the home is not enough to cover the 200,000 note due to the reduction in property value, Luis will be able to recover the rest from Hank. (Luis will not be able to recover from Wilma since she took subject to the mortgage)

Purchase money mortgage

A purchase money mortgage exists when the mortgagee gave the loan that allowed the mortgagor to purchase the property. A purchase money mortgage has a superior interest over other creditor interests.

Here, Luis loaned Hank the 200,000 that he used to purchase the home. Thus, Luis has a purchase money mortgage.

CreditCo's access to the home and account

Homestead property is protected from forced sale from creditors unless it fits into a exception for mortgages for the purchase or improvement of the home, taxes due, or construction liens.

Here, the home is homestead and Creditco is not an exception creditor and will not be able to force a sale of the home for Hank's debt.

One tenant may not encumber property that is held as a tenancy by the entirety without consent or being joined by their spouse. Creditors of one spouse may not reach property held as a tenancy by the entirety by both spouses.

Here, CreditCo will not be able to reach the joint account because Willa was unaware of the debt and did not consent to it. Further, Hank did not even use the joint account for the credit card debt. CreditCo is thus a creditor of Hank alone and will not be able to reach the joint account held as a tenancy by the entirety.

Divorce

CreditCo

As stated a divorce terminates a tenancy by the entirety and creates a tenancy in common.

If Hank and Willa become divorced the account will be held as a tenancy in common and CreditCo will be able to reach Hank's interest in the account. However, since it is not a creditor of Willa, it will not be able to reach her portion.

Divorce will not terminate Hank's homestead protections so long as he continues to reside in the home. Thus, Credit co will still be unable to reach the home.

Luis

However, Luis's ability to foreclose on the home will be unaffected. Although Willa took subject to the mortgage, Luis is still free to foreclose on the home. Luis will be unable to reach Wilma's portion of the account however since she did not assume the mortgage.

Ethical Issues

Conflict of interest

An attorney owes each client a duty of loyalty and independent judgment. An attorney may not represent two parties who are directly adverse to each other, or if there is a substantial risk that an attorney's representation of one or more clients will be materially limited by his duties to another. A conflict may exist between current clients, former clients, as well as the attorney's own interests. However, an attorney may still represent the clients if he reasonably believes he may provide competent and diligent representation to all parties, the representation is not prohibited by law, and each client gives their informed consent in writing.

Here, both Hank and Willa have been named in lawsuit by Luis. Although they are not directly adverse, a defense raised by Hank or Willa may not be in the best interest of the other. Thus, there is a substantial risk my representation to one or the other may be materially limited. However, I may still represent both parties if I believe I may provide competent representation to both and Hank and Willa give informed consent in writing, since the representation is not prohibited by law. If at some point Hank or Willa files a cross claim against the other and they become directly adverse, I will have to withdraw from representation.

Misc.

A deed need not be recorded to be valid but recording sets up a priority between competing claims to a property. Florida is a pure notice jurisdiction and provides that a subsequent purchaser for value has priority if he takes without notice of a prior unrecorded interest. Notice can be actual, constructive (if it is recorded) or inquiry. Florida requires a purchaser conduct a good faith reasonable investigation of the property to determine if there are any other interests.

Luis has notice since he discovered the recorded deed.

QUESTION NUMBER 3

OCTOBER 2020 BAR EXAMINATION – CONTRACTS

SunCo needed a marketing manager to help with launching CoolShades, a new line of sunglasses. SunCo interviewed Bob and offered him a \$75,000 salary. Bob told SunCo that he would consider the offer, but that another employer had offered him a comparable salary with a bonus opportunity for hitting sales targets. SunCo's president told Bob that if sales of CoolShades reached \$1 million within 18 months, then SunCo would pay Bob a bonus equal to 5% of the total sales of CoolShades. Bob replied, "You have a deal."

The next day, Bob quickly reviewed and signed an employment agreement that stated his salary, but did not include any language about a bonus. The agreement provided that Bob agreed not to compete with SunCo in Florida for at least six months after leaving SunCo. The agreement also stated:

This agreement constitutes the complete agreement between the parties with respect to the subject matter contained herein and revokes and supersedes all prior or simultaneous representations, discussions, negotiations, and agreements, whether written or oral.

In his first two months on the job, Bob struggled to generate sales of CoolShades. He then noticed his daughter following Abby on social media. His daughter explained that Abby was a 21-year-old "influencer" with 480,000 followers and that some companies would pay Abby to endorse their products or post photographs of her using their products.

Bob sent Abby a message through her social media account which said, "Hey Abby! I'm a manager at SunCo. We have new sunglasses for you to share with your followers. If you post at least five pictures of you wearing CoolShades and include our slogan, "These Shades are Cool," in your caption, SunCo. will pay you \$20,000. What do you say?"

Abby received hundreds of direct messages daily and didn't immediately notice Bob's message. One month after Bob sent the direct message, Abby saw the message for the first time. She sent Bob a reply which said, "Bob, sounds great. Please send the \$20,000 right away." Abby posted five more selfies in her CoolShades and a link to SunCo's website. Her followers began posting favorable comments about CoolShades, and sales increased substantially. Bob was thrilled with the increased web traffic through Abby's link.

When Abby demanded payment, SunCo refused because she never included the

slogan in her captions. SunCo. decided to pay Abby something to avoid negative publicity, and sent her a check for \$5,000. The check came with a letter to Abby that said the check was “in Full Settlement of your Claims against SunCo.” The check stated “Payment in Full” on the memo line. Abby cashed the check immediately after receiving it, but has continued to ask SunCo for the balance of the \$20,000 and has threatened a lawsuit to recover it.

Six months after Abby posted about the sunglasses, CoolShades sales reached \$1,000,000. Bob asked SunCo’s president for the 5% bonus. The president said that she did not recall the conversation about the bonus and refused to pay. Bob was furious, quit immediately, and told the president that he would see her in court.

Bob soon found a similar position with SpecsCo, a Florida-based competitor of SunCo. Shortly after hiring Bob, SpecsCo’s sales increased because Bob recommended that SpecsCo use influencers. SunCo now seeks to prevent Bob from working for SpecsCo.

Prepare a memorandum for a senior lawyer in your firm that discusses: (1) Abby’s claims against SunCo; (2) Bob’s claims against SunCo; and (3) SunCo’s claims against Bob. You should assume that Bob had authority to enter into an agreement with Abby and disregard any issues related to FTC regulations on sponsored social media posts.

SELECTED ANSWER TO QUESTION 3

(October 2020 Bar Examination)

TO: Senior Lawyer

FROM: Associate

RE: Abby, Bob, and Sun Co.

Governing Law. Important to note at the outset that these are both contracts for personal services therefore the common law of contracts will govern the disputes. Whereas the UCC would govern a contract for the sale of goods.

(1) Abby's Claims Against Sun Co.

Abby will bring a cause of action against Sun Co. for breach of contract and for the \$15,000 balance on the original agreement with Sun Co. The first issue is whether Abby and Sun Co. had a valid contract. A valid contract requires offer, acceptance, consideration, and no valid defenses. An offer manifests the power of acceptance in the offeree, the offeree must know of the offer, and the offer controls the manner of acceptance. Acceptance is the manifestation of assent to the terms of the contract and can be done in any reasonable way and within a reasonable time unless the offer specifies. Finally, consideration is the bargained for exchange of legal value. Here, Abby will assert that Bob's direct message was an offer to contract for 5 pictures with specific text in exchange for \$20,000. Abby will argue that she accepted the offer when she replied to the message with "sounds great. Please send \$20,000 right away." Sun Co. will argue that she did not accept within a reasonable time because she waited six months to accept the offer and therefore, no contract was formed. Abby will argue that this is not an unreasonable time to discover direct messages on social media and that there was no time limit in the offer. Abby's acceptance was likely valid. Next, the consideration was the posting of photos with specific text in exchange for \$20,000. Therefore, a valid contract was formed.

The next issue is whether there are any valid defenses to formation. In order for a valid contract to be enforceable there must not be any valid defenses. Here it does not appear that there are any valid defenses. The statute of frauds requires certain contracts to be in writing signed by the party to be charged but that will not apply here since it is a personal service contract that can be completed in less than a year and even if it cannot full performance removes the contract from the statute of frauds. There is no lack of mutual assent. Therefore, there are no valid defenses to enforcement.

The next issue is whether Sun Co. breached its contract with Abby. Abby will argue that Sun Co. breached the contract when it did not pay full consideration. Under the common law a contract is breached when one party has an absolute duty to perform and the duty has not been discharged. Material breach, where a party is denied the substantial benefit of the bargain, discharges the other parties duties under the contract. Minor breach, where a party receives the substantial benefit of the bargain though imperfect

performance, does not but allows for damages for defective performance. Additionally, the plaintiff will need to show that they are ready will and able to perform. Sun Co. will argue that Abby breached because she did not include the specified text in the posts and therefore their duty to pay has been discharged. Abby will argue that if anything this is minor breach and Sun Co. still has a duty to perform and is only entitled to damages for defective performance which will be small since sales increased so rapidly. Abby will prevail on this argument.

The next issue is whether the \$5,000 check discharged Sun Co.'s duty to Abby. Checks are negotiable instruments when they are written and signed unconditional promise or order to pay a fixed sum of money on demand or at a definite time containing no unauthorized undertaking. Negotiable instruments are governed by Article 3 of the Uniform Commercial Code. The UCC allows for an accord and satisfaction to discharge the duty of a party to the contract when there is a disputed debt and a check is sent stating full satisfaction. When a check stating full satisfaction is cashed by the other party it is accepted as completed performance and discharges the other parties duties. The only exception is for such a check to be sent to a commercial entity or bank which is not the case here. Here, the debt was disputed since Abby did not perform according to the terms of the contract. Abby cashed the check therefore she accepted the accord and satisfaction and discharged Sun Co. of the duty to pay \$20,000. Therefore, Abby will not be able to recover the \$15,000.

(2) *Bob's Claims Against Sun Co.*

The next issue is whether Bob has a cause of action against Sun Co. for breach of his employment contract. Again, the elements of a valid contract are explained above in subsection (1). Bob will argue that Sun Co. gave him an offer for employment as a marketing manager. Bob will argue accepted that offer when he stated "you have a deal." The consideration was \$75,000 annual salary for Bob's work with a bonus option depending on performance. Therefore, there is a valid contract that was reduced to a writing and signed by both parties.

The next issue is whether there are any defenses to formation. There is a statute of frauds defense that Sun Co. can assert. Contracts that cannot be completed in less than one year must be in writing and signed by the party to be charged. Here, the bonus option spans over 18 months. However, Bob will argue that the contract could be performed in less than a year but has a maximum of 18 months. Additionally, Bob will argue that full performance is an exception to the statute of frauds provision for contracts that cannot be completed in one year and Bob completed performance by meeting the agreed upon measure of sales. Bob will likely prevail on that argument since the measure is whether it could be completed within one year, not whether it was and since he completed performance. Additionally, the employment contract itself does satisfy the statute of frauds as it was reduced to a writing and signed by both parties.

The next issue is the terms of the contract. The parol evidence rule bars extrinsic evidence from before or contemporaneous to formation from coming in as a term to the contract. If the contract is a final integration, i.e. it contains a merger clause, than only

evidence that explains the meaning of the contract, of industry standard, of the parties course of dealing, or substantiates a defense to formation may come in. If it is a partial integration than extrinsic evidence will be permitted unless it materially alters the terms of the contract. Here, the facts indicate that there is a merger clause showing that the written contract entered between Bob and Sun Co. was a final integration. Since this contract was a final integration extrinsic evidence will only be permitted to explain meaning of the contract, to dispute formation, industry standard or course of dealing. Here, Sun Co. will argue that the contract was a final integration and the option to pay Bob a bonus of 5% of a million dollars in sales is a material alteration to the contract and one that the parties would likely have included if it existed. Bob will maybe argue that it is customary in the business to make such bonus options orally and therefore the evidence should be permitted. Sun Co. will likely prevail under the Parol Evidence Rule because the extrinsic evidence would materially change the contract unless Bob can show that it is customary or in some other way gives meaning to ambiguous terms in the contract.

The next issue is whether Sun Co. breached its contract with Bob. Under the common law a contract is breached when one party has an absolute duty to perform and the duty has not been discharged. Material breach, where a party is denied the substantial benefit of the bargain, discharges the other parties duties under the contract. Minor breach, where are party receives the substantial benefit of the bargain though imperfect performance, does not but allows for damages for defective performance. Additionally, the plaintiff will need to show that they are ready will and able to perform. Bob will argue that he Sun Co. breached by not paying his bonus. Bob will only be successful if he can overcome the parol evidence rule to include the bonus term in his contract. Otherwise, Sun Co. is not in breach.

Bob may try to argue that he should be paid the bonus under a promissory estoppel theory as he relied to his detriment on the promised bonus by turning down other gainful employment options.

(3) Sun Co.'s Claims Against Bob.

Sun Co. seeks to enforce the non-compete agreement it has with Bob and prevent Bob from working at Specs Co. It is important to note at the outset that specific performance of employment contract is usually not permitted as it creates 13th amendment concerns, however, injunctions to enforce valid non-compete agreements will be enforced.

The issue is whether the non-compete agreement is enforceable. A covenant not to compete must be (1) aimed a protecting a valid business interest; (2) reasonable in terms of time and geographic scope; and (3) must not be contrary to public policy. Here, Bob will argue that restricting him from working in the entire state of Florida is unreasonable and that the covenant does not protect a valid business interest because it is not a function unique to Sun Co. to market goods on social media. Bob will not be able to argue that the time is unreasonable as six months is presumptively reasonable in Florida. Sun Co. will argue that its marketing strategies are a legitimate business

interest and that the state of Florida is not an unreasonable scope as it is big market for sunglasses. Sun Co. will likely succeed in enforcing the non-compete agreement.

The next issue is whether Bob can get out of the employment contract overall and the non-compete agreement. Bob may argue that he has a valid defense to formation of the contract due to fraudulent misrepresentation. If a party is induced to contract by a fraudulent misrepresentation it is voidable by the injured party. Bob will argue that Sun Co. fraudulently misrepresented that he would be eligible for a bonus in order to induce his assent to the employment contract. If he is successful, Bob may rescind the contract. Bob will look to restitution to recover the value of the benefit conferred if his employment contract is set aside.

Ultimately, it is likely that Sun Co. will be able to enforce the valid non-compete agreement. Though Bob may be successful in having the entire contract set aside under a formation defense of fraudulent misrepresentation.



QUESTION NUMBER 1

FEBRUARY 2021 BAR EXAMINATION – FAMILY LAW/ETHICS/PROFESSIONALISM

Wife seeks your advice about the break-up of her fourteen-year marriage to Husband. When they met, Wife had a two-year-old son and Husband had just adopted his one-year-old niece after her parents died. Wife was starting her singing career and Husband was a successful land developer. At his urging, they signed a premarital agreement where both parties waived their rights to all support if they divorced. Shortly after they married, Husband bought a house in Pensacola. Husband did not adopt Wife's son, and Wife did not adopt Husband's daughter.

Wife's career took off, and she began to travel. Husband's business slowed down during the recession, and he became a stay-at-home dad. Wife was hired to be the house singer for a popular club in Miami, and she stayed at an elderly aunt's condo in the city. Husband and the children visited her in Miami for months at a time. However, after the children started school, the visits became shorter and less frequent. The children are now 16 and 15 and have a close relationship with each other.

Husband and the children spent last summer in Miami with Wife. While the family was together in Miami, Wife's aunt died. In her will, the aunt left Wife the Miami condo and \$500,000.

Husband and children went home at the end of August. Husband demanded that Wife return to Pensacola. Wife refused, and Husband filed for divorce. Shortly after filing the petition, he took out a large loan to start a new company. His petition seeks the following relief: (1) alimony for five years; (2) primary custody of both children and child support; (3) exclusive possession of the parties' home until the children graduate from high school with Wife paying the mortgage and taxes on the house; and (4) equal distribution of the Miami condo, the \$500,000 inheritance, and the loan. Husband has agreed to pay his attorney a contingent fee based on his recovery of alimony, and Husband seeks to have Wife pay his attorney's fees.

Wife objects to all of Husband's requests, but she would prefer to work things out without litigation. Wife is concerned that Husband's attorney has made frivolous claims and will continue to do so to harass her. Wife has learned that a scandal magazine in Miami offered Husband's attorney money to be interviewed for an article about the parties' divorce.

Write a memo examining the merits of Husband's claims and Wife's potential objections. Also address any ethical considerations that apply to Husband's attorney.

SELECTED ANSWER TO QUESTION 1 **(February 2021 Bar Examination)**

To: Wife

From: Counselor

Re: Merits of husband's claims, wife's potential objections, and some ethical considerations

The Husband looks to bring claims that the wife will have valid objections to. Further, there are a few serious ethical considerations on the end of the husband's attorney. Below I will discuss the Merits of husband's claims to alimony, primary custody, child support, exclusive use of the home, wife paying for the home, and equal distribution of the money devised to the wife. Within each claim I will address the wife's potential objections. Further I will discuss the ethical considerations of the contingency fee to be paid to the husband's attorney and the effect of frivolous claims and harassment.

Merits of the husband's claims

Divorce

In Florida, divorce will be awarded if the marriage is irretrievably broken. Florida is a no fault state and the grounds for divorce need not be any more than an irretrievably broken marriage. If both spouses agree the marriage is irretrievably broken, the court will likely award the divorce without hesitation on this cause. However, if one party believes the divorce to be irretrievably broken and the other party claims otherwise and/or request counseling, the court may, within its broad discretion, either order counseling prior to awarding the divorce, or may continue the proceedings to allow time for the parties to cool off and rethink the marriage prior to awarding final judgement. When a couple is divorced, the judge will further distribute property in an equitable manner (see below) and order alimony, child support, and custody, if applicable.

The divorce petition will need to contain the grounds of the divorces (as spoken about above), it must establish jurisdiction (discussed below), the request of the parties (how they would like the judge to rule), and a signature attesting to the truth of the statements within. Jurisdiction is determined based on where the parties reside. If the parties reside in separate places, the court in which the parties were living for 6 months or more at the time of filing will be valid jurisdiction. If there are children involved, the children's residence will be the likely residence for determining jurisdiction, if they have lived there for more than 6 months. If they have not lived there for 6 months, the proper jurisdiction will be the previous place of residence in which they lived for more than 6 months.

With the divorce petition, the filing party will have to attach any relevant supporting forms, and receive a summons from the court to order service upon the other party. The other party will need to be served within 90 days of filing and the filing party will need to

file the certificate of service once completed. The divorce should be filed in a county court.

Premarital agreements are essentially a contract between the parties regarding how a divorce will be handled. A contract may be oral unless it is for certain things that fall under the statute of frauds. Marriage agreements do fall under the statute of frauds which means it will need to be written. The writing will need the essential terms, the parties, and a signature of the party to be "charged." A premarital agreement may contain any agreement the parties choose as long as the agreements are legal. The agreements will be invalid if made under duress or fraud.

Further, child support cannot be waived as it belongs to the child, not the parent. Alimony may be waived, but the court will not allow this waiver if it will act to put the spouse in need on state welfare.

Here, the parties were married for 14 years and have no children in common. The facts do not specifically state anything regarding the petition for divorce of the stated grounds. I will assume the grounds stated, jurisdiction, and service were all done properly in this case. The facts state, "the husband demanded the wife return to Pensacola" and the wife refused. This is likely an irretrievably broken marriage since they do not live together or agree where to live. But the court will not look into the reasons why the marriage is broken, they will only ensure the grounds are stated and the parties in fact feel it is irretrievably broken. The couple lived in Pensacola together and the facts stated the kids were two and one when they married and are now 16 and 15, therefore, it is safe to say they lived in Pensacola for more than 6 months and jurisdiction would be proper in Pensacola for this reason. Further, the facts suggest the wife does not necessarily live in Miami but stays with family so she can work there. However, a court may determine she lives in Miami, but because the husband still lives in Pensacola, jurisdiction will still be held to be proper there.

The premarital agreement is likely valid. Nothing in the facts suggest that it was signed under duress or fraud or that it is invalid in anyway. Since premarital agreements may waive alimony, it is unlikely the husband will receive any alimony support from the wife because the agreement states both parties waived their rights to all support if they divorced. Alimony will further be discussed below.

The court will award the divorce in this case along with equitable distribution (discussed below) and no alimony.

Alimony

In Florida, there are a few types of alimony, including: Pendente lite (alimony during the divorce proceedings), rehabilitative (alimony to allow the spouse support while renewing any necessary licenses or work skills needed to support themselves), bridge the gap (alimony to allow time for the spouse to transition from being married with financial support to being single and self-supporting), durational (alimony to allow for support for a specified period of time), permanent(alimony for the duration of one's life or, typically,

until the receiving spouse marries or lives with a supporting partner). When alimony is determined, it is based on a need and ability. In determining if the court should award alimony, the court will look to the parties need for financial support and the other parties ability to pay the same. The court will further look towards the length of the marriage. A marriage of less than 7 years is considered a short-term marriage, a marriage of 7-17 years is considered a mid-length marriage, and a marriage of longer than 17 years is considered a long-term marriage.

Typically, duration alimony and permanent alimony will not be awarded for a short-term marriage unless there are exceptional circumstances. A mid-term marriage may be eligible for all but permanent marriage, depending on the circumstances (unless exceptional circumstances apply). A durational alimony, rehabilitative alimony, and bridge the gap alimony will have a set end time. Rehabilitative alimony will require the party in need to have goals and expected deadlines in which to accomplish those goals and that will help the court determine the length (not to exceed 2 yrs.) of the alimony.

Here, the husband likely eligible for pendentia lite and possibly (but not likely) a bridge the gap or a rehabilitative alimony. The facts state the husband is a stay at home dad therefor he will easily show a need for the support during the proceedings (pendentia lite) and the facts further state the wife is a successful singer and was recently given \$500,000 and therefore has the ability to pay the alimony. All through the premarital agreement waived all support if they divorce, this may still be awarded to help the parties proceed with the divorce fairly. It would not be in the best interest of the parties to allow only one party access to a lawyer when the other party can easily afford to help the other party during the proceedings. Because the parties waived their rights to support, it is unlikely the husband will receive any support past the divorce proceedings. The facts suggest he had a career prior to the marriage and nothing suggest his inability to work or support himself thereafter. It is not likely a lack of alimony will place him on public welfare and therefore, because he waived his right to support, he will not be awarded alimony past pendentia lite.

Child Custody and Support

When two parties have children in common, the court will determine (if the parties could not agree) legal and physical custody. Legal custody generally starts at joint legal custody and will only be changed if the judge finds it to be in the best interest of the child. Physical custody will come with a parenting plan to ensure the parents each have access to raise and care for their child. The physical custody and the parenting plan (if not agreed upon by the parties) will be determined by the court using the best interest of the child factors. The court enjoys broad discretion over these matters and the order will not be overturned on appeal unless there is a showing of abuse of discretion. The appeals courts shy away from overturning family law orders because the presiding judge will best be able to determine the relevant factors as they see the parties in person and know their local area and needs best. Child support will be determined based on state guidelines. Any deviation from the guidelines by more than 5% will require the judge to show finding to support the deviation.

All though the parties cannot legally waive the rights to child support because it belongs to the child, the parties here have no children in common. Neither party adopted the other parties' child and therefore, no custody or support order will be entered for the children and there is no need to go over the best interest factors or the child support guidelines in this case.

Equitable Distribution

Florida follows an equitable distribution framework (this does not always mean equal). The court will do its best (if the parties cannot agree) to equitably distribute all marital assets and return non marital assets to the party who owned them when entering the marriage. Marital assets include any asset the couple obtained together, or assets one spouse obtained during the marriage. Exceptions apply such as a non-marital gift or assets devised to one spouse only. Typically, any assets brought into the marriage will be distributed back out to the spouse who entered with that asset. Some exceptions apply, for example, if a spouse comes into the marriage with a house and the house is improved during the marriage or used as the marital home, this will likely be distributed equally among the parties. At the very least, the court will distribute any increase in value equally among the parties. A further consideration to be made here is Florida homestead act. Any property that is used your primary residence will be protected up to 160 acres of contiguous land (if outside of a municipality) and any home on that land or up to 1 acre of land and home if it is in a municipality. Under the homestead act, not only are the parties protected from certain creditors, with exceptions, the parties are protected from the spouse selling the home without the other spouses permission. This right can be waived in a premarital agreement.

Marital assets in this case is the house in Pensacola because it was purchased after the marriage began. This house will be equitably distributed or may be awarded to the husband since him and the children have lived their without the wife for so long. if the house is given to him exclusively, he will take on the mortgage on his own as well to ensure this is equitable.

The loan, obtained after the filing of the divorce is likely not marital and the devised gifts of the condo and the \$500,000 were devised only to the wife and will not be considered marital. All non-marital assets will remain with the spouse they belong to.

The Pensacola house will fall under

Mediation

Mediation is a form of alternative dispute resolution and may be used in place of a court proceeding. There attendees will be the parties and their lawyers and a neutral mediator. Any offer or statements in mediation are confidential and cannot be used in court, unless discoverable some other way.

The wife would like to stay out of court. They may make all agreement in mediation and have a judge sign the order in a procedural manner instead of battling this in court. I

would advise the wife that she may offer some assets the court may not give the husband in order settle outside of court if she feels it is important to stay out of court. I would ensure she understood the rules but also explain the courts discretion in these matters and that it is always nice to settle out of court to ensure you have your hand in the divorce as much as possible.

Fees

A spouse may ask the court to award the other spouse to pay their attorney fees if they are unable to do so and the court may validly order the same. If the husband is awarded pendentia lite, this likely will not be awarded because he will already be using support money to pay for these fees. Otherwise, he may be awarded fees in this case if he can show a need and the others ability to pay.

Ethical Considerations

A lawyer may not take a contingent fee for proceedings based on the amount of alimony or child support they obtained for the client. However, if there is already an order, the attorney may accept a contingent fee to collect the already determined amount, but this is not a valid form of payment while attempting to obtain the original order. Further, a lawyer may not make frivolous claims only to harass a party. The signature block the lawyers signs on each pleading tells the court that the filing is not done in for frivolous purposes and the lawyer may be sanctioned for acting outside of the bounds of this rule.

The facts state the husband's lawyers are charging a contingent fee based on how much alimony and child support is awarded. This is a clear violation of the Florida rules of professional reasonability. Further the facts suggest the lawyer has submitted frivolous claims only to harass the wife. The lawyer may be sanctioned for this and the wife may be awarded attorney's fees to any work her lawyer will need to do to combat any frivolous claims.



QUESTION NUMBER 2

FEBRUARY 2021 BAR EXAMINATION – TRUSTS/FLORIDA CONSTITUTIONAL LAW/ETHICS

Sam inherited \$500,000 and decided to create a trust with the funds. He prepared a document that read:

I create a trust called “Sam’s Trust” and name myself as trustee. My daughter, Alice, and I each shall receive \$3,000 monthly from the trust.

Later that week, Sam deposited the \$500,000 into a new bank account that identified him as trustee. Sam told Alice about the trust and began making the required distributions.

Six months later, Alice told Sam that she flunked out of college. Alice confessed that she had spent the monthly distributions on parties and vacations and lost focus on her studies. Sam was furious. Sam told Alice that he would pay for her education, but not support an irresponsible lifestyle. He went home and prepared a document that read:

I create a trust called “Sam’s Second Trust” and name myself as trustee. I shall receive \$3,000 monthly from the trust. The trustee will make distributions to Alice for her well-being in the trustee’s discretion.

The right of any person to receive any amount, whether of income or principal, shall not be alienated, assigned or encumbered, and shall not be subject to any legal process or control by creditors or others.

Sam then closed the bank account that he had used as trustee to that point. He took the remaining funds and put them in a new account that identified him as trustee for Sam’s Second Trust.

Over the next year, Alice lived with friends and began using credit cards for nightlife and travel. Sam disapproved, and he sent her no distributions. Alice eventually told Sam that she had incurred \$35,000 in credit card debt with CreditCo. In her efforts to resolve the debt, Alice told CreditCo that she was owed payments from Sam’s trust. CreditCo contacted Sam and threatened legal action.

One week later, Sam’s dog severely bit Neighbor in the lobby of his apartment building. Sam had rented an apartment temporarily because he sold his home of the last 20 years. Sam kept the proceeds of the sale in a brokerage account separate from his other assets, and he intended to reinvest the proceeds in a smaller house, which will be complete in one month.

Neighbor has now threatened Sam with a lawsuit and demanded amounts that far exceed Sam's personal liability coverage. Sam is concerned about whether Neighbor can reach the assets of the trust or the brokerage account or both, if Neighbor is successful in a lawsuit.

An attorney colleague from another firm, Lauren, referred Sam to you. Sam explained the situation with Alice and Neighbor and asked you to represent him. After the meeting, Lauren called and proposed that you pay her a referral fee of 10% from any fees that you collect from Sam. Lauren has no experience in this area and does not want to assume responsibility for the representation.

Prepare a memorandum that addresses:

1. Whether "Sam's Trust" and "Sam's Second Trust" are valid trusts;
2. Whether CreditCo can reach trust assets or distributions to satisfy the \$35,000 debt;
3. Whether Neighbor can reach trust assets or the brokerage account; and
4. Whether Lauren's referral fee proposal raises any ethical concerns.

SELECTED ANSWER TO QUESTION 2

(February 2021 Bar Examination)

SAM'S TRUST

Sam's Trust is valid.

A valid trust is formed when a settlor with capacity has present intent to create a trust, has a trustee with duties, has identified beneficiaries (if a private trust), settlor has the right to the trust property and the trust is for a valid purpose. A trust need not be in writing unless it conveys real property or is a testamentary trust. Delivery of the trust res is required unless a self-proclaimed trust.

Here, there is no indication that Sam, the settlor, has any issue with capacity. He has a present intent to create the trust as indicated by the document he prepared and that he began making distributions to himself and Alice. The trustee with duties is himself and the duties are to make \$3k distributions to himself and Alice monthly. The identified beneficiaries are Sam and Alice. Sam has the right to the trust property as it was \$500k he inherited. There is no indication the trust was made for an invalid purpose.

Note: Merger occurs when the settlor of a trust is a sole beneficiary and the trustee. It is not an issue that Sam is the settlor and the trustee because he is not the only beneficiary - Alice is also a beneficiary; thus, the trust does not fail due to merger.

Sam's Trust is valid.

SAM'S SECOND TRUST

Sam's Second Trust is valid.

A valid trust is formed when a settlor with capacity has present intent to create a trust, has a trustee with duties, has identified beneficiaries (if a private trust), settlor has the right to the trust property and the trust is for a valid purpose. A trust need not be in writing unless it conveys real property or is a testamentary trust. Delivery of the trust res is required unless a self-proclaimed trust. Trusts are presumed revocable unless the instruments says otherwise. Settlers may revoke or modify the trust during their lifetime.

This trust is also valid for all the same reasons as the first trust (see above). The only difference between this trust and the first trust is that Sam has added a discretionary and a spendthrift clause which has altered Sam's duties as a trustee. Alice may assert that this was not in her best interest as a trust beneficiary; however, since Sam is both the settlor and the trustee, he can freely revoke or modify as he has done here.

Spendthrift Clause: *A spendthrift clause is one that prevents beneficiaries of a trust from voluntarily or involuntarily alienating their interest in a trust. This type of provision in a trust prevents a beneficiary's creditors from attaching to their interest in the trust. Exception applies to the following creditors who can attach notwithstanding a spendthrift provision: child support, alimony, gov't creditors/taxes. Also, a settlor cannot shield himself from his own creditors with a spendthrift provision.*

Here, there is a spendthrift clause because the document has limited "the rights of any person to receive any amount, whether income or principal, shall not be alienated . . ." which prevents beneficiaries from voluntary and involuntary alienation. This provision in the trust would only protect Alice from her creditor's claims. Sam is not protected because he is the settlor of this revocable trust (revocable because it does not state otherwise).

Discretionary: *A provision in a trust that makes distributions discretionary is valid. The trustee has broad discretion as to when to make distributions when there is a discretionary clause. Discretionary clauses also insulate beneficiaries from creditors because they have no RIGHT to distribution; thus, their creditors have no right to compel a trustee to distribute.*

Here, Sam has broad discretion when to make distributions to Alice. The provision only applies to her as the trust document so states.

Sam's Second Trust is valid.

CREDIT CO. CLAIM

Credit Co. has no valid claim to Alice's interest in the trust.

Credit Co. cannot attach because there is a spendthrift clause in the trust that prevents voluntary and involuntary alienation (see above for definition of spendthrift). Credit Co. is not one of the creditors within the exceptions since the debt owed by Alice is for \$35

spent on travel and night life.

Thus, Credit Co. has no valid claim to Alice's interest in the trust.

NEIGHBOR CLAIM

TRUST ASSETS

Neighbor can reach the trust assets.

A settlor cannot create a revocable trust to shield himself from his own creditors. As discussed above, Sam cannot protect himself from his creditor by using a spendthrift clause.

Sam may attempt to assert that he had no knowledge of his dog's propensity for viciousness; However, Florida does not have a 1 free bite rule. Owners are liable for injuries when a dog bite for the first time regardless of its propensities. Sam may however have Neighbor's claim reduced if neighbor's own negligence attributed to the injury in any way. Florida uses pure comparative negligence scheme; thus, neighbor's fault and Sam's fault would be apportioned based on their percentage of fault. Regardless, neighbor is not prevented from reaching the trust assets

Neighbor can reach Sam's interest in the trust res.

BROKERAGE

Neighbor likely cannot reach the brokerage funds.

In Florida, homestead exemption applies to prevent creditors from attaching to the interest of an owner of homestead property. The scope of homestead protection extends to 1/2 acre of land within the municipality (including the residence only) and up to 160 contiguous acres outside the municipality (including improvements). Exceptions to the homestead protection include creditors such as: mortgage on the property, mechanic's liens, and property taxes. The proceeds from the sale of a homestead are also protected so long as the owner intends to reinvest in another homestead within a

reasonable time. Once reinvested, the surplus, if any, from the sale of homestead property is not protected - it is a general asset to which creditors may freely attach.

Here, Sam recently sold his home and was staying in a hotel temporarily. If Sam's home was homestead property, his interest in the proceeds from the sale are protected because he kept them in a separate brokerage and intended to reinvest. But, Sam indicated he intends to reinvest in a smaller home. If this reinvestment leads to Sam having surplus after buying a new homestead, then that surplus will become a general asset unprotected by homestead exemption; thus, neighbor can attach to any surplus after the reinvestment.

Neighbor likely cannot reach the brokerage funds unless there is surplus after Sam reinvests or if he does not actually reinvest within a reasonable time.

LAUREN'S REFERAL FEE

I would be subject to discipline for giving Lauren a 10% referral fee.

Generally, referral fees are not permitted. An attorney may not give or receive monetary benefits for referring clients. Fee sharing however is allowed. Attorneys can freely share fees if attorneys are in the same firm or if in different firms but will share the work equally and the fee is fair and reasonably. If the attorneys are in separate firms and will not share the work equally, the agreement must be in a writing signed by client, explain the fee sharing % to the client, both attorneys must be jointly and severally liable to the client and be equally available to the client, and the fee must be reasonable. The reasonableness of a fee is determined based on the experience of the attorney, the standard rate in the area, complexity of the case and the amount of time attorney dedicates to the case. There is an additional requirement for personal injury and property damage cases which requires that the primary attorney must do 75% of the work on the case; this can be modified to the court to an equal share of work.

Here, the referral fee is not permitted. Fee sharing is also not permitted under the circumstances because Lauren wants 10% but she does not want to do any of the work. Additionally, she is an attorney from another firm with no experience in the field and does not want to accept any responsibility. Further, part of the case is personal injury (neighbor's injury) and the type of agreement she seeks is prohibited.

I would be subject to discipline for giving Lauren a 10% referral fee.



QUESTION NUMBER 3

FEBRUARY 2021 BAR EXAMINATION – FEDERAL CONSTITUTIONAL LAW

The United States Government has enacted the “Driving Under the Influence Prevention Act,” known as “DUIPA.” The statute directs the Department of Transportation to reduce a State’s federal highway funding by 10% unless the State requires all men under age 34 to take an 8-hour course about the dangers of drinking and driving before obtaining or renewing a driver’s license.

In support of DUIPA, Congress found that driving under the influence interferes with the United States Government’s interest in providing safe travel on interstate highways. It also found that alcohol-related crashes substantially affect the national economy by increasing medical costs for injured persons, car insurance costs for all drivers, and law enforcement and emergency costs for local governments. These findings were based on studies by the National Transportation and Highway Safety Administration, which yielded the following statistics:

1. In 2018, 1.8 million Americans were involved in crashes in which a driver’s blood alcohol content was above 0.08;
2. In 2017, drivers under the age of 34 were responsible for 67% of fatal DUI crashes, even though drivers under age 34 comprise only 34% of drivers; and
3. In 2017, men were responsible for 80% of fatal DUI crashes, even though men only comprise 50% of drivers.

Several members of the Florida Legislature have stated publicly that passing a bill to implement DUIPA is a top priority. The President of the Florida Senate told a local newspaper: “We would be crazy not to pass this bill. Federal highway funds are the source for 30% of the Florida Department of Transportation’s budget.”

A partner in your law firm has received a call from a client who is interested in bringing a constitutional challenge to the federal DUIPA statute. Prepare a memorandum that discusses the issues raised by DUIPA under the **United States Constitution**. For this memorandum, assume that the potential plaintiff has standing and do not discuss the 21st Amendment.

SELECTED ANSWER TO QUESTION 3
(February 2021 Bar Examination)

MEMO

To: Partner

From: ExamTaker

Date: 2/21/21

RE: DUIPA

Standing

The plaintiff has standing to bring this claim. In the United States and in Florida, an individual must have standing in order bring a claim to challenge the constitutionality of a government action. The Constitution of the United States provides that U.S. courts are only permitted to hear cases and controversies. In order for a claim to be a case or controversy, the plaintiff bringing the claim must have standing. Under Lujan v. Defenders of Wildlife, to have standing, a plaintiff must have suffered an actual or imminent injury. An actual injury is one that is concrete and not imagined. An imminent injury is one that is sure to happen, not just merely possible. The plaintiff's injury must be causally connected to the government's action. There must, therefore, be a causal chain linking the plaintiff's injury directly to the government's action. Finally, the plaintiff's injury must be redressable. A favorable ruling from the court must cure Plaintiff's injury.

Here, the facts state that our plaintiff has standing. That means that Plaintiff has suffered an actual or imminent injury that is causally connected to DUIPA and his or her (probably his) injury is redressable. Therefore, there is a case or controversy that allows Plaintiff to bring this claim.

Taxing and Spending

DUIPA is a proper exercise of Congress's power to tax and spend. Article I of the Constitution provides for the plenary power of the United States Congress. Among these powers is the power to tax and spend for the general welfare. The Congress of the United States is thus afforded plenary, or nearly absolute, power to levy taxes from the states in order to raise revenue for actions that are rationally related to the general welfare.

Furthermore, Congress is permitted to spend money from the federal treasury in order to provide for the general welfare. Congress's spending power also extends to its power to allocate funds to the several states to serve the general welfare in the states. While Congress is prohibited from commandeering state resources or instrumentalities (see below), Congress, under its spending power, is permitted to condition spending on states' adherence to government initiatives. However, all of Congress's powers are subject to laws against discrimination, as well be explained below.

Here, the United States Congress is properly exercising its spending power. Congress has conditioned the receipt of federal funds by the states based upon a valid government purpose. Specifically, Congress has stated that it will reduce State's federal highway funding by 10% unless the State enacts certain laws. While Congress cannot force states to enact laws, under the anti-commandeering principal (see below), Congress can condition funding on the enactment of law. Congress's purpose for conditioning the spending is rationally related to providing for the general welfare - providing safe travel on interstate highways and preventing alcohol-related crashed which substantially affect the national economy by increasing medical costs for injured persons, car insurance costs for all drivers, and law enforcement and emergency costs for local governments. Because DUIPA properly conditions receipt of funds on a rational government purpose for providing for the public welfare, it is a valid exercise of the taxing and spending power. However, all of Congress's powers are subject to laws against discrimination, as well be explained below. So, while the purpose and method of DUIPA is a valid exercise of Congress's power to tax and spend, it is subject to anti-discrimination laws and is in violation of them, as discussed below.

Commerce

DUIPA is a proper exercise of Congress's commerce power. Like its taxing and spending power, Congress has a near-plenary power to regulate interstate commerce in the United States under the Commerce Clause of Article I. This includes the power of Congress to set limitations on the use of commerce and the means and instrumentalities of interstate commerce that are rationally related to a legitimate government purpose. Means and instrumentalities of interstate commerce include roads, waterways, and vehicles. In addition to regulating interstate commerce itself, the Commerce Clause also permits Congress to regulate non-commercial activities that substantially impact interstate commerce in the aggregate. However, all of Congress's powers are subject to laws against discrimination, as well be explained below.

Here, Congress is properly exercising its Commerce powers. Congress reasonably determined that alcohol-related crashes, which are the focus of DUIPA, substantially impact interstate commerce because they increase medical costs for injured persons, car insurance costs for all drivers, and law enforcement and emergency costs of local government. Therefore, Congress is acting within its authority in regulating the activity, because it substantially impacts interstate commerce. Furthermore, the law properly regulates interstate highways, which are national roadways, and instrumentalities of interstate commerce, namely vehicles like cars. Congress has the power to regulate means and instrumentalities of interstate commerce, so Congress is acting within its authority under the Commerce Clause in regulating such means and instrumentalities.

Therefore, DUIPA is mostly a proper exercise of Congress's extensive powers under the Commerce Clause. That said, while the purpose and method of DUIPA is a valid exercise of Congress's commerce power, it is subject to anti-discrimination laws and is in violation of them, as discussed below.

Equal Protection

DUIPA violates the equal protection clause of the Fourteenth Amendment, incorporated to the United States government by the Fifth Amendment. The Fourteenth Amendment to the United States Constitution, which was passed in response to the abolition of slavery and Jim Crow in the United States, is written and intended to abolish discrimination based on who a person is. While the Fourteenth Amendment explicitly targets the states and not the federal government, the Supreme Court has ruled that the Fourteenth Amendment equal protection clause is applicable to the federal government by way of the due process clause of the Fifth Amendment, which applies specifically to the federal government. The equal protection clause of the Fourteenth Amendment provides that every United States citizen is to be permitted equal protection of the laws. The Supreme Court has identified several classes of persons who are afforded special protection because of their membership in the class, and therefore, laws that discriminate against persons based on this class status are given heightened scrutiny when reviewed by the courts for constitutionality. Laws that unequally impact persons based on race, national origin, or alienage are given strict scrutiny. Strict scrutiny provides that the government must prove that the law is necessary to achieve a compelling governmental interest and narrowly tailored to achieve that interest. Strict scrutiny is an incredibly high bar and laws are usually struck down under strict scrutiny. Laws that unequally impact persons based on gender and illegitimacy are given intermediate scrutiny.

Intermediate scrutiny provides that the government must prove that the law is substantially related to an important government interest. Finally, all other laws that target persons based on class status are given rational basis review. Under rational basis review, the challenger of the law must prove that the law is not rationally related to a legitimate government interest. This is an incredibly low bar for the government and laws reviewed under rational basis are generally upheld.

Here, DUIPA targets persons based on gender and age, because it applies only to men under age 34. The portion of the law targeting men will be given intermediate scrutiny, because it is a law that applies differently to persons on the basis of their gender.

Therefore, the government must prove that the law is substantially related to an important government interest. The government will argue that providing for safe travel on interstate highways and preventing adverse affects to the national economy are important government interests. The court will agree. However, the government must also prove that the law is substantially related to achieving the purposes of preventing alcohol-related crashes and protecting the national economy. The government will put forth the facts that demonstrate that men are responsible for a disproportionate amount of alcohol-related crashes (80% of alcohol-related crashed attributable to men, even though men comprise only 50% of drivers). However, a mere disproportionate impact will not be sufficient to overcome intermediate scrutiny. Women still contribute to 20% of alcohol-related crashes and are not subject to this law. Therefore, the court will strike down the law, or at least the portion that singles out men, of violative of the equal protection clause of the Fourteenth Amendment.

The plaintiff can also argue that DUIPA target persons based on age, in violation of the equal protection clause. Age is not a suspect class identified by the Supreme Court as requiring heightened scrutiny. Therefore, the court will review the portion of the law that discriminates based on age, requiring only those under 34 to take a class, under rational basis review. The plaintiff will have to prove that the age clause is not rationally related to a legitimate government interest. The government has a legitimate interest in providing safe travel on interstate highways, preventing alcohol-related crashes, and preventing adverse effects on the national economy. The law is rationally related to that, particularly since drivers under the age of 34 make up 67% of fatal DUI crashes, despite comprising only 34% of drivers. Therefore, the age clause will be upheld under the equal protection clause.

Due Process

DUIPA violates the Due Process Clause of the Fifth Amendment. The due process clause of the Fifth Amendment provides that the federal government may not deprive U.S. citizens of life, liberty, or property without due process of law. "Due process of law" has been defined as "the process that is due," which generally includes notice and a hearing before the termination of rights. The Supreme Court of the United States has identified two types of two process: substantive and procedural. Procedural due process provides that the government may not deprive persons of life, liberty, or property without due process of law. Citizens have property rights to public jobs, benefits, and licenses. Substantive due process provides that a person may not be deprived of a fundamental right without due process of law. Fundamental rights include the right to vote, the right to free speech, the right to privacy, and the right to interstate travel. The right to privacy includes the rights to contraception, abortion, marriage, procreation, educational of children, and child-rearing. Substantive due process violations are analyzed under strict scrutiny, so the government must prove that the law is necessary to achieve a compelling state interest and narrowly tailored to that interest.

Here, Plaintiff can argue that DUIPA violates procedural due process by depriving citizens of a property right - the right to a driver's license - without due process of law, because if a man under age 34 does not complete the 8-hour course, he will not be able to obtain or renew his driver's license. The man is not afforded a hearing prior to the denial of a license. The government will argue that there is no property right to driver's licenses. If the government wins this argument, the law will be upheld under procedural due process.

Plaintiff can also argue that DUIPA violates substantive due process by depriving citizens of a fundamental right - namely the right to interstate travel - without due process of law. Men under 34 will not be able to get a license, and therefore will not be able to drive between states, if they do not complete the course. They are not afforded a hearing on this matter. The government will argue that a driver's license is not necessary for interstate travel, because there are other means of interstate travel besides driving, including buses, trains, planes, and passengers. However, the court will find that the law restricts the right to interstate travel and therefore will analyze the portion of law depriving citizens of driver's license under strict scrutiny. The government will argue that it has a compelling interest to provide for state travel, protect the national economy, and provide alcohol-related crashes. The court will agree. The government will then argue that the law is necessary to achieve this interest and narrowly tailored to achieve this interest. The court will not agree. The law does not contain sufficient narrowing principles to make it narrowly tailored to achieve the

government's compelling interest. Instead, it applies blanketly to all men under 34. It does not take into account a driver's record or history and does not provide driver's with a hearing. Therefore, this portion of the law will be struck down under strict scrutiny as violating substantive due process.

Federalism

Police Powers

DUIPA violates the principles of federalism. Federalism provides that the powers of government in the United States are to be divided between the states and the federal government. The states are not to encroach on the federal government's power (e.g. the Supremacy Clause makes federal laws supreme over state laws) and the federal government is not to encroach on the states' power (e.g. the Tenth Amendment gives all powers not specifically assigned to the federal government to the states). States, not the federal government, have police powers. This means that states are afforded the sole power of legislating for the general health, welfare, and safety of their citizens. The states' police power generally includes the rights of states to provide for education, criminal laws, police, firefighting, licensure, etc.

Here, Plaintiff can argue that DUIPA violates federalism by encroaching on states' police power and ordering the states to adopt a law, which is commandeering the states' legislature, and ordering state Departments of Motor Vehicles to offer an 8-hour class, which is commandeering the DMV. First, the states, not the federal government, have the power to regulate driver's licenses, as that is part of the states' police power.

Therefore, Plaintiff can argue that the law unlawfully encroaches on state police power. Second, Plaintiff can argue that the law requires the states to adopt DUIPA or risk losing highway funding. This is a substantial risk, particularly in Florida, as the Senator pointed out that the state needs to enact the law because 30% of its funding from the federal government.

Anti-Commandeering

Furthermore, under federalism principles, the federal government may not commandeer the instrumentalities of the states. In other words, the federal government may not order utilize their legislatures or agencies to enforce a federal law. This rule was developed by the Supreme Court in the case of Brady, where the federal government tried to force

states to use their police forces to conduct backgrounds checks on potential gun owners in order to enforce a federal gun regulation.

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 pages 59 and 60.

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. Write your badge number in the box at the top left of the cover of your test booklet.
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.**

35 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.

24. Joan is seriously injured in an automobile accident at 7:00 a.m., June 22. Sunrise on that date was 6:22 a.m. Joan brings suit against Sam, the driver of the other car involved, alleging his failure to have his headlights on caused the accident.

Sam, in support of his claim that his failure to have his headlights on was not negligent, requests that the judge take judicial notice of the fact that Section 316.217, Florida Statutes, requires the use of headlights only between sunset and sunrise. Sam did not notify Joan prior to trial that he would make this request. The court

- (A) may take judicial notice if Sam shows good cause for his failure to notify Joan of his intention to make this request, and both parties are given the opportunity to present relevant information regarding the request.
- (B) must take judicial notice, because it is public statutory law of Florida.
- (C) must take judicial notice, as it is not subject to dispute because it is generally known within the territorial jurisdiction of the court.
- (D) may not take judicial notice, because Sam failed to give Joan timely notice of his intention to seek judicial notice of this fact at trial.

25. The articles of incorporation for Number One Corporation grant to its board of directors the power to take any action as authorized by law. Which of the following actions by the board of directors must also be approved by the shareholders of Number One Corporation?

- (A) Extension of the duration of Number One Corporation if it was incorporated at a time when limited duration was required by law.
- (B) Merger of Number One Corporation into another corporation with the other corporation becoming the surviving corporation.
- (C) Changing of the corporate name to Number One, Inc.
- (D) Changing of the par value for a class of shares of Number One Corporation.

26. Husband confesses to Wife that Husband robbed Bank of \$200,000. Two years later, Husband physically abuses Wife. Wife later files for divorce and seeks custody of Child. At the hearing, Wife seeks to testify as to the robbery confession. Husband may

- (A) prevent Wife from testifying, because of the Husband-Wife privilege.
- (B) prevent Wife from testifying if the statute of limitations on robbery has expired.
- (C) not prevent Wife from testifying, because only Wife can assert the Husband-Wife privilege.
- (D) not prevent Wife from testifying, because this is a proceeding brought by one spouse against the other.

27. In a pretrial motion, the defendant argues there are no genuine issues of material fact. In support of the motion, the defendant attaches several affidavits from witnesses. Which is the correct caption for the motion?
- (A) Motion to Dismiss for Failure to State a Cause of Action.
 - (B) Motion for Judgment on the Pleadings.
 - (C) Motion for Summary Judgment.
 - (D) Motion for Directed Verdict.
28. Jill makes a will leaving all of her stocks to Lou and the rest of her estate to Beth. Several weeks later, she creates a codicil to the will that devises her jewelry to Ann. Jill and Beth have a fight and Jill mistakenly rips up the codicil rather than the will. Jill dies. Which of the following is true about the distribution of Jill's estate?
- (A) Beth receives the jewelry pursuant to the terms of the will.
 - (B) Jill's estate will be distributed as intestate property because Jill revoked her will.
 - (C) Ann receives the jewelry under the terms of the codicil.
 - (D) None of the above.
29. During Defendant's first-degree murder trial, the state calls Witness to testify. Witness testifies that Defendant was not the man she saw shoot the victim. During the investigation of the murder, Witness told prosecutor that she saw Defendant shoot the victim. This prior statement was made under oath and was recorded by a court reporter, but Defendant's attorney was not present. If the state seeks to introduce Witness' prior inconsistent statement for the sole purpose of impeaching Witness, should the court allow the prior statement to be admitted into evidence?
- (A) Yes, because any party can attack the credibility of a witness by introducing a prior inconsistent statement.
 - (B) Yes, because a prior inconsistent statement given under oath can be used by any party for any purpose.
 - (C) No, because the state cannot impeach its own witness with a prior inconsistent statement.
 - (D) No, because Defendant did not have an opportunity to cross-examine Witness at the time the statement was made.
30. TAP, Inc., has fewer than 100 shareholders. The shareholders wish to enter into an agreement pertaining to the exercise of the corporate powers or the management of the affairs of the corporation. Which of the following, if adopted by the shareholders, would be contrary to public policy and, therefore, unenforceable in Florida?
- (A) An agreement that exculpates directors from all personal liability.
 - (B) An agreement that authorizes a particular shareholder to manage the affairs of the corporation.
 - (C) An agreement that requires dissolution of the corporation at the request of one of the shareholders.
 - (D) An agreement that eliminates the board of directors.

31. In a timely post-trial motion, Defendant argued for the first time that the trial court lacked subject matter jurisdiction over the case. What action should the court take?
- (A) Entertain the motion, because Defendant can assert lack of subject matter jurisdiction at any time.
 - (B) Entertain the motion, because Defendant can assert lack of subject matter jurisdiction as long as it is raised within 10 days of the judgment.
 - (C) Refuse to entertain the motion, because Defendant did not raise lack of subject matter jurisdiction in its answer.
 - (D) Refuse to entertain the motion, because Defendant did not raise lack of subject matter jurisdiction at trial.
32. Smith and Jones had planned to form a Florida corporation that would have done business as an engine repair shop. No paperwork had been filed with the Secretary of State relating to the corporation when Smith and Jones began to purchase equipment needed for the engine repair business. Together they executed and delivered a \$10,000 promissory note to Seller in the name of Engine Repair, Inc., signed by Smith "as president" and Jones "as secretary" of that nonexistent corporation. There was no personal guaranty by either Smith or Jones on the note. The corporation was never formed.
- Seller learned that the corporation was not in existence only after the debt was not timely paid. Smith was in bankruptcy by that time and Seller sued Jones personally for the entire \$10,000. Jones moved to dismiss. In its ruling, the court should
- (A) grant the motion because Smith is an indispensable party.
 - (B) grant the motion to dismiss because Jones did not personally guarantee the note.
 - (C) deny the motion because Jones signed the note purporting to act on behalf of the corporation with actual knowledge of its nonexistence.
 - (D) deny the motion because Jones' actions effectively created a corporation by estoppel.
33. Raymond had a valid Florida will devising his entire estate to his friend, Jake. Raymond and Jake had a fight, and Raymond then executed a second valid will, devising his entire estate to charities and expressly revoking the first will. Years later, Raymond and Jake reconciled and Raymond burned the second will. Raymond later died. Does Jake inherit the estate?
- (A) Yes, because burning the second will was an effective act of revocation, reviving the original will.
 - (B) Yes, because Florida law is construed to avoid intestacy.
 - (C) No, because burning the second will was an insufficient act of revocation absent additional evidence.
 - (D) No, because revocation of the second will does not revive the first one.

34. Plaintiff filed a civil complaint against Defendant four years ago. This complaint was voluntarily dismissed three years ago. Two years ago, Plaintiff filed the complaint again and voluntarily dismissed it last year. May Plaintiff successfully file the complaint again this year?
- (A) Yes, if the statute of limitations has not run.
 - (B) Yes, if the most recent complaint arose out of the conduct, transaction, or occurrence set forth in the previous complaints.
 - (C) No, because the second voluntary dismissal operated as an adjudication on the merits.
 - (D) No, because the most recent complaint is a supplemental pleading requiring permission of the court prior to filing.
35. Mary, a widow, died in Orange County, Florida during a visit with her son, James. Mary had executed a will leaving all of her property to James. Prior to her death, Mary lived in a rented apartment in Duval County, Florida, but owned vacant land in DeSoto County, Florida. Mary also had a vehicle loan due in Dade County, Florida. In which of the following counties can Mary's will be probated?
- I. Orange County.
 - II. Duval County.
 - III. DeSoto County.
 - IV. Dade County.
- (A) I only.
 - (B) II only.
 - (C) I or II only.
 - (D) I, II, III, or IV.

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)
24	(B)
25	(B)

26	(D)
27	(C)
28	(C)
29	(A)
30	(A)
31	(A)
32	(C)
33	(D)
34	(C)
35	(B)