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Florida Bar Examination Study Guide and Selected Answers

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**The Study Guide will be published semiannually with essay questions
from two previously administered examinations
and sample answers.**

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PART I – ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2004 AND JULY 2004 FLORIDA BAR EXAMINATIONS

ESSAY QUESTIONS AND SELECTED ANSWERS

Part I of this publication contains the essay questions from the February 2004 and July 2004 Florida Bar Examinations and one selected answer for each question.

The answers received high scores and were written by applicants who passed the examination. The handwritten answers were typed as submitted. The answers are reproduced here with the consent of their authors and may not be reprinted.

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

ESSAY EXAMINATION INSTRUCTIONS

INFORMATION RELATIVE TO ANSWERING BAR EXAMINATION QUESTIONS

Applicable Law

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

Acceptable Essay Answer

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

QUESTION NUMBER 1

FEBRUARY 2004 BAR EXAMINATION – CONTRACTS/ETHICS

On October 1, Buyer saw a specialized van with a FOR SALE sign that included a telephone number and a price of "\$25,000 cash." That night, Buyer called Seller. Buyer explained that he would have to borrow the money but could get it next week. Seller provided his address to Buyer and told Buyer, "If you want the van, mail me a check for \$5000. Pay the balance by November 1." Later that day, Buyer mailed Seller a \$5000 check.

The next night, at Buyer's 18th birthday party, Buyer discussed the deal with Investor. After buying the van, Buyer planned to start a document courier service, and he had spent \$1200 on business cards, flyers and a cellular phone. Buyer projected a profit of \$50,000 in the first year. Investor was impressed with Buyer's plans and agreed to loan Buyer \$20,000 to buy the van.

On October 25, Buyer called Seller to pick up the van. Seller refused and said someone had offered him \$35,000 for the van. Seller had not cashed Buyer's check yet. Seller offered to deposit the check and give him the van if Buyer would pay Seller \$20,000 now plus \$400 a month for 25 months. Buyer laughed and said, "Yeah, right." But without a van, Buyer will not be able to start his courier service.

Investor wants to hire you to be Buyer's attorney. Investor will fund the litigation and pay you at your hourly rate. Investor wants you to recover punitive damages and attorney's fees. Investor does not want you to settle the case. Investor gives you a \$500 retainer and asks for monthly updates.

Prepare a memorandum of law addressing fully the following matters:

1. Buyer's potential claims against Seller and Seller's potential defenses.
2. Your proposed agreement with Investor including any ethical considerations.



SELECTED ANSWER TO QUESTION 1

(February 2004 Bar Examination)

Contracts (K)

In order to form a valid contract there must be an offer, acceptance, and consideration.

Offer – An invitation to enter into a K. The FOR SALE sign would not be considered an offer, it would be an invitation to make an offer. When Buyer called Seller that is the offer.

Acceptance – Manifestation of intention to enter into a K. Since Buyer was not ready and able to enter into the K, Seller will argue that he did not accept. Buyer will argue that he did accept b/c he said he would have the money next week. Since the language is unclear it is uncertain if there was a valid acceptance.

Option K – In order to form an option K there needs to be consideration under Common Law principles and Under the UCC there needs to be a writing by the Seller stating K will be kept open for a certain time period, but doesn't require consideration. In this case Buyer accepted when he mailed the \$5000 under the MAIL BOX RULE b/c that was the way Seller wanted acceptance. Furthermore, a valid OPTION K was created which made the offer irrevocable until November 1.

Consideration – Bargained for exchange, Detrimental Reliance or Benefit to Promisor. In this case the \$5000 was sufficient consideration to keep option open.

Minor Under 18 – A minor under 18 can contract and doesn't make the contract VOID just b/c he/she was under 18. It only makes the K VOIDABLE by the minor not the other person. Seller will argue the K is void, however, that's not the case. If Buyer still wants to go through with the K he can – it's enforceable.

Statute of Frauds – requires a K not able to be performed with 1 yr. to be in writing or a K for the sale of Goods over \$5000. Since the car was valued at 25,000 Seller will argue that the K is unenforceable b/c it wasn't in writing. Buyer will counter by saying he sent Seller a check for \$5000 which was in writing and signed. The SOF requires the (1) name of parties to be charged, (2) signature of parties, (3) subject matter, (4) terms, and the (5) price. SOF can be overcome by part payment and possession or improvements. In this case there was only part payment. Therefore there might be a problem with enforcing under SOF.

Detrimental Reliance – A court will enforce a K if a party made an offer which he knew Buyer would rely on and buyer did in fact rely to his detriment. In this case Seller knew Buyer relied on his offer.

Option – Since there was valid consideration paid and Seller stated Buyer had until Nov. 1 the K was irrevocable. Regardless of whether or not Seller cashed the check, sending the check was valid consideration. Seller might argue b/c he did not cash it there was no acceptance. However, the court will rule that there is a valid option.

UCC – The applicable law will be the Unif. Comm. Code b/c this car is considered GOODS.

Anticipatory Repudiation – It is where someone in a valid K states they will not be performing their side of the bargain. To be a Repudiation the words must be certain. When Buyer called Seller he refused to sell the van. Buyer had the option of purchasing UNTIL Nov. 1.

Seller will argue that there wasn't a valid K and that there was only preliminary negotiations. S will argue that he gave a counter offer.

Damages – If the court determines a valid K or option was in effect, Buyer can sue immediately for the return of his \$5000 check and for any consequential, actual, and special damages. However, Buyer has a duty to mitigate damages. In order to obtain Consequential Damages Seller must have known about losses that could stem from this Breach.

Specific Performance – Since this is a specialized van Buyer will contend he wants the court to force Seller to sell b/c this van is unique. SP is available for unique property.

If Buyer doesn't want SP he can sue for actual damages, which would be the difference in price b/t this van and a comparable one. He can also obtain special damages which would be costs stemming from breach like time and money wasted looking for a new van.

Buyer will argue he will lose \$1200 on cards, flyers, and cell phone and the \$50,000 profit. Seller will argue B is not entitled to that money b/c he can mitigate. The court will probably not give B these damages unless this van is so unique that B can't do business w/o and can't find another one. Buyer might be able to recover lost profits for his business until he finds another van.

Ethical Considerations – Attorney's fees can be paid by another party but the client must be informed that the fees are being paid by someone else.

Confidential – The Attorney must keep the case confidential b/t the buyer (client) and the Attorney. He cannot disclose anything about the case unless client consents.

The Investor can have no say in the handling of the case. Only the client can. Therefore, Investor can't tell the lawyer he doesn't want the cases settled, only the client can instruct the Lawyer whether to settle. Investor is not entitled to monthly UPDATES.

Punitive Damages – are only recoverable for intentional misconduct or Gross negligence. In FL Punitive Damages are capped at 3 times Compensatory or 500,000.

If motivated by Financial Gain then the cap is 4 times compensatory or 2 million. If an intentional tort or drugs or alcohol involved then there is no cap. Punitive will not be allowed in this contracts case.

Attorney's fees – Generally each party must pay their own fees. However, in Florida by statute Attorney's fees can be awarded in certain cases where Manufacturers or Sellers defraud or Breach K. In this case the court probably won't award fees.

Q QUESTION NUMBER 2

FEBRUARY 2004 BAR EXAMINATION – TORTS

While Jogger, a young and successful physical therapist, was running, she saw Dottie, Owner's Dalmatian dog, standing on the public sidewalk in front of Jogger. Dottie had jumped the four foot fence that completely enclosed Owner's yard. Jogger did not want to deviate from her route, and as she passed Dottie, she was attacked and bitten by the dog, causing lacerations requiring stitches.

Immediately after the attack, Owner drove up to his residence. Owner exclaimed truthfully: "Dottie and I have lived here for five years and Dottie has never jumped that fence nor bitten anyone!"

Owner drove Jogger to Hospital's emergency room. On the way to Hospital, Owner was involved in an accident caused by the negligence of both Owner and a horseback rider (Rider). Jogger, who was not wearing her seat belt, was thrown about in Owner's car, and as a result, suffered serious but non-life-threatening head injuries.

Jogger was transported by ambulance to Hospital's emergency room, where she was treated by Doctor, an employee of Hospital, Inc. Doctor was intoxicated when he treated Jogger, and as a result of Doctor's intoxication, he negligently treated Jogger. Doctor's treatment caused the deterioration of Jogger's condition and her death, intestate, two weeks later. Hospital had no reason to know of Doctor's intoxication when he treated Jogger, nor any unfitness of Doctor to practice medicine.

Jogger experienced severe pain and suffering from her automobile accident injuries in the two weeks preceding her death. Jogger was survived by her current husband (Husband), with whom she had one six-year-old child (Child).

Husband is the personal representative (PR) of Jogger's estate and retains your law firm to pursue survival and/or wrongful death actions against Owner and Hospital. Neither Rider nor Doctor can be located.

Florida's survival statute, section 46.021, provides:

"No cause of action dies with the person. All causes of action survive and may be commenced, prosecuted and defended in the name of the person prescribed by law."

Florida's Wrongful Death Act, section 768.19, provides:

"When the death of a person is caused by the wrongful act, negligence...of any person...the person...(who) would have been liable in damages shall be liable for damages as specified in this act."

Section 768.20 provides:

"The (wrongful death) action shall be brought by the decedent's personal representative, who shall recover for the benefit of the decedent's survivors and estate (the) damages specified in this act (which are) caused by the injury resulting in death."

Corporations are "persons" for the purposes of the Wrongful Death Act.

Senior partner for your firm asks you to draft a legal memorandum addressing each of the following five issues:

1. What is the basic difference between the claims asserted and the damages recoverable in a survival action and a wrongful death action?
2. Against which Defendant(s) should a survival action be filed, and against which should a wrongful death action be filed?
3. With respect to Dottie's attack on Jogger, what is the best claim PR can assert against Owner? Why is this the best claim and what defense(s) can Owner assert against PR?
4. What defenses may Owner assert against PR with respect to the automobile accident?
5. What is the best claim PR can assert against Hospital? What defenses may Hospital assert against the claim, and what is the likelihood of success of those defenses?



SELECTED ANSWER TO QUESTION 2

(February 2004 Bar Examination)

I. The basic differences b/t the claims is that Florida law permits the continuation of a lawsuit via the survival statute, though the party successively dies. The estate then carries forth the suit and damages recovered may include medical expenses, loss of wages (past), & loss of future earnings reduced to present value. A wrongful death action may be commenced to address a loss of life resulting from tortious conduct. Such is often dependent upon whether the deceased is single or married, a minor (25 or under), has surviving parents or children, in terms of claims and awarded damages. Damages may include loss of consortium for husband & a child, future earnings, medical expenses, funeral expenses, etc.

II. Husband, on behalf of the estate of wife, should file a wrongful death action against the hospital and the doctor (though he has not been located). Husband should also file suit under the survival statute against the Owner and the Rider (though also not located.)

III. The best claim the PR (husband) can assert against Owner with respect to Dottie's attack is one of strict liability. Florida law provides that a dog-bite is strict liability for the owner, regardless of whether dog had propensity to bite or a history of biting/viciousness. Therefore, owner's statement of shock to Jogger (i.e. "Dottie has never) is irrelevant. Strict Liability will be imposed against Owner for this 1st bite and any other successive bite resulting in injury. Owner's best defenses are (1) that Jogger was negligent because she had the last clear chance to avoid the dog by deviating a bit from her route, yet she assumed the risk/was contributorily negligent as she encountered the dog willfully. (2) Owner may also attempt to argue that along this negligence, she provoked the dog to bite her by running near dog. However, through both of these defenses are adequate under Florida law, neither will be successful in all likelihood & owner will be held strictly liable.

IV. Defenses that owner may assert against the PR with respect to the car accident may include: (1) Good Samaritan. Owner may claim that he should not be liable or his damages reduced b/c he was rescuing the Jogger. (However, one may also argue that he had a duty to do so given that he created the peril by his dog.) His "good samaritan" defense will fail, however, because Florida law provides that one may be liable for ORDINARY NEGLIGENCE in carrying out the rescue, not gross negligence. From the given facts, it appears Owner committed ordinary negligence in the car accident & therefore will be held liable. He assumed a duty to care for Jogger, breached that duty with his negligence which was the proximate/actual/CIF of her injury. (2) Owner may also assert the defense of (Assumption or risk)/contributory negligence because Jogger did not wear her seatbelt & such is provided for under FL law as raising a presumption

of CN. Owner may argue that Jogger's injuries were not caused by the accident itself but from the resulting impact "was thrown about in Owner's car, and AS A RESULT, suffered" injuries. This may be a viable defense for the purposes of reducing Owner's liability/damages, as Jogger would be responsible for the amount of harm which resulted from her contrib. negl. in not wearing the seatbelt. However, unless Jogger is found to be 100% responsible, which is unlikely, Owner will still be liable & must pay damages for his negligence. ("But for his negl., she wouldn't be injured" remains). (3) Owner may attempt to argue that the accident was superseding/intervening, but this will likely fail because it was completely foreseeable.

V. PR should assert a wrongful death claim against the Hospital. (He may also wish to file a negligent hiring claim, but that is not the best claim.) Here the doctor was an employee of the hospital. Therefore, an issue of vicarious liability arises (or res. superior) as there is an employer/employee relationship. PR may sue hospital (and doctor, though unavailable) for the gross negligence of its employee – the doctor. A reason why owner would not likely be found liable for Jogger's death & why a wrongful death claim would not be appropriate is because the doctor's intoxication & resulting negligence in treating Jogger was so substantial that it may be considered a superseding/intervening cause which cuts off the liability of owner. Therefore the hospital should be held liable for the actions of its employee, the doctor. Additionally, though hospital may argue that they had no knowledge of his intoxication or any unfitness, the procedure used by the hospital in completing background checks should be examined. Here, while working for the hospital, the employee doctor assumed a duty to care for Jogger, breached that duty by his negligence via intoxication which caused & resulted in Jogger's death. It is also worth arguing that doctor should be held to a heightened standard, which makes his intoxication even more of an aggravating circumstance to the point of S/L. In addition to the aforementioned defense of "no knowledge", which will fail; the Hospital may argue that when the doctor treated the woman negligently while intoxicated, that such constituted an intentional tort or gross misconduct which should remove him from the scope of employment. Hospital is not likely to succeed on these merits and as a result will be found vicar. liable for damages including: loss of consortium to husband & son, med. expenses, loss of future earnings, funeral expenses, & potential punitive damages, which may not be capped at any amount given that caps on damages are excepted for those claims where intoxication by drugs or alcohol is at issue. Hospital may attempt to recover damages through an indemnification action against the doctor.

Q UESTION NUMBER 3

FEBRUARY 2004 BAR EXAMINATION – TRUSTS

Senior Partner asks you, Junior Associate, to draft a trust for Settlor, a Florida resident, pursuant to Settlor's wishes. Settlor comes to the appointment with you and tells you he is terminally ill, and he wants to make the trust while he is still alive. According to Settlor, he is taking morphine pills for the pain, and he takes another two pills while in the office. He wishes to leave all his property in a trust for his twin children, who are 25 years old, and Senior Partner. The division will be a third (1/3) to Senior Partner, a third (1/3) to one child and a third (1/3) to the other child. He is afraid that his twin children are not mature enough to handle the money and does not want them to have access to the money until they are 50 years old. Senior Partner would also receive her share in 25 years. All the property would be divided at that time. Settlor is worried that one child will lose her money to her husband in a divorce scheduled for next year and the other child will lose the money while he works through a "gambling addiction." Settlor is afraid that the children will try to break the trust.

The Settlor also wants to leave nothing to his wife in the trust. He would like you to be trustee and to invest the money in the trust. He asks you to invest the money in the oil drilling company that Senior Partner owns. He tells you that his investment counselor told him that the investment in the oil drilling company was extremely risky. Draft a memo advising Senior Partner whether any problems exist in implementing any of Settlor's wishes.



SELECTED ANSWER TO QUESTION 3

(February 2004 Bar Examination)

To: Senior Partner:
From: Junior Associate
Re: Trust for Settlor

Under Florida law a Settlor can create a Trust by transferring the trust res (property) to the trustee w/the intention to create a trust for the benefit of ascertained beneficiaries. Here Settlor intends to create a trust for the benefit of his twin children and senior partner. Delivery of the trust res, w/the Settlor's intent to create the trust, to a trustee, in this case Settlor wishes that I serve as trustee, would create a trust, an express intervivos trust for the benefit of settlor's twins and senior partner.

Potential Problems

First if the trust res includes any real property Settlor must deliver a deed to trustee (me) subscribed by two witnesses, and the trust agreement must be in writing to satisfy the statute of frauds. (The statute of frauds requires that any contract conveying an interest in property be in writing signed by the person to be charged).

Furthermore, a Settlor must have the capacity to contract in order to create a trust. As indicated Settlor is currently under the influence of morphine pain pills and as such his capacity to create the trust may be questioned. If found that the Settlor lacked the requisite capacity, the trust will fail and a resulting trust for the benefit of the Settlor's estate will be created.

Regarding the age limits on Settlor's twin children and holding Senior Partner's interest for 25 years, Settlor can accomplish this by including a fixed period of time (25 years) for the trust and designating a 1/3 interest in the remaining principal each to the twins and senior partner. By setting a fixed period of time to the trust Settlor can be assured that the beneficiaries or the trustee will not be able to terminate the trust before the termination date in the trust. (Florida law allows the beneficiaries to a trust to terminate it and obtain the principal if all agree and terminating the trust will not be contrary to a material purpose of the trust. However trusts w/spendthrift clauses and fixed periods cannot be terminated in this fashion).

Regarding Settlor's fear that one child will lose her money to her husband in divorce: Creditors can generally reach a beneficiary's interest in a trust unless the trust includes a spendthrift clause. By adding a spendthrift clause any creditor will not be able to attach the beneficiary's interest unless the creditor provided necessities to the beneficiary or a former spouse seeks to collect past due alimony or child support

payments after all other avenues of recovery have been exhausted. Furthermore because the trust names the child only as the beneficiary, and not the child and her husband, her interest will be considered separate property by the divorce court, not subject to the equitable distribution of marital property.

Regarding the child w/the gambling addiction see the discussion above regarding spendthrift clauses. Once again a spendthrift clause will prevent the child's gambling creditors from obtaining her interest in the trust. However, once income or principal is in the hands of the beneficiary a creditor will be able to obtain it. As long as the principal remains in the trust w/ a valid spendthrift clause, therefore, the child's gambling creditors will not be able to reach her interest.

Regarding Settlor's wife, a spouse has a right to take an elective share upon the decedent spouse's elective estate equal to 30% of the elective estate. Property included, among other things, in an elective estate includes the Settlor's interest in a Revocable Intervivos trust.

Trusts are irrevocable unless the Settlor specifically reserves the right to modify or revoke the trust. In this case Settlor has not indicated that he wishes to maintain a right to modify or revoke the trust, therefore without reserving such right the trust will be irrevocable and outside the elective estate.

Ethical Considerations

Under the Rules of Professional Conduct (RPC) an attorney may not enter into a representation where there may exist the potential for a conflict of interest. In this case a potential conflict arises in that Senior Partner is a beneficiary to the trusts. Even though senior partner is not drafting the trust documents, Junior Partner's association in the same firm as Senior Partner would be the same as if Senior Partner drafted the trust. The potential conflict of interest, however, could be waived by Settlor if after consultation he consents to the representation.

Under the RPC an attorney is prohibited from entering into a contractual relationship w/a client unless the transaction is fair to the client, the attorney believes he can still represent the client, and the client is given the opportunity to consult another attorney. Settlor asks that the trustee invest the money in the trust in Senior Partner's oil company. This constitutes a transaction b/t the attorney Senior Partner (in the same firm as Junior Partner) and Settlor. Settlor will have to be informed of his ability to seek outside counsel, Junior Partner must reasonably believe that his representation will not be affected by the transaction, and the investment transaction must be fair. If not Junior Partner and Senior Partner will have violated the RPC.

Furthermore Settlor must be informed that since the investment in the oil company is very risky of what may happen under Florida law if the investment is underproductive. Under Florida law if all of the investments in a trust taken as a whole do not produce at least 3% interest per anum the beneficiaries have a right to payment of the 3% out of the trust principal (3% is based on the fair market value of the trust principal). Sine Settlor is afraid that twins and Senior Partner will get trust principal before 25 years

have passed this is a valid concern. If the oil investments continually underperform the trust corpus will be depleted. Depending on the amount of the value of the trust property if this causes the value to drop below \$50,000 the trustee can petition the courts to terminate the trust b/c of the cost of administration. This may cause the trust to terminate before the 25-year period the Settlor desires.

Q QUESTION NUMBER 1

JULY 2004 BAR EXAMINATION - CONTRACTS/ETHICS

Company manufactures and sells golf clubs. Company decided to advertise its clubs in Magazine, a monthly publication. Company began negotiating an advertising package with Magazine.

Michael, Magazine's advertising manager, faxed to Carol, Company's marketing director, Magazine's standard form advertising contract. The form indicated that Company would purchase a total of five pages of advertising, one page in each of the upcoming five consecutive issues of Magazine from May through September. The total price for the five pages was \$85,000. This price included a \$40,000 volume discount off Magazine's standard advertising rate of \$25,000 per page. Michael had orally agreed with Carol that Magazine would place a Company golf club on the cover of Magazine's August issue, but this term was not included in the form faxed to Carol. One of the standard provisions included in the form was a cancellation clause providing: "An advertiser loses any volume discounts if it does not purchase the agreed number of pages. Cancellation of reserved advertising space is treated as a breach of this agreement and will result in the advertiser paying the standard rate for pages actually used."

Upon receiving the fax, Carol typed two additional terms on the form, signed it, and faxed it back to Michael. The additional terms were:

- Magazine "guarantees a minimum circulation of 300,000 copies per month"
- Magazine will "improve its photography and covers."

Neither Michael nor anyone else at Magazine ever signed the form with Carol's additions. Instead, Michael sent Carol a fax stating Magazine was "extremely pleased that Company has decided to join our list of advertisers."

Magazine published one page of Company's advertisement in each of Magazine's May, June, July, and August issues. Company had submitted to Magazine a photo of Company's newest golf club for display on the cover of the August issue, but Magazine refused to publish the photo. Company then sent a letter to Magazine canceling the last page of advertising that Company had purchased in the September issue. As reasons for the cancellation, Company cited: (1) Magazine's failure to place a Company club on the cover of the August issue; and, (2) Magazine's failure to improve its photography and covers.

Through its attorney, Company demanded a 20 percent refund of the \$85,000 contract price that it had previously paid to Magazine. Upon receipt of the letter from Company's attorney, Magazine sent Company an invoice for \$15,000. This amount represented the difference between \$100,000, the cost of the four pages of advertising actually used by

Company at the standard rate of \$25,000 per page, and the original contract price of \$85,000 that Company already had paid.

Company refused to pay the invoice. Company claimed that it would be absurd to pay more than the contract price for fewer pages of advertising (\$100,000 for four pages rather than \$85,000 for five pages).

Magazine has retained you to evaluate the possibility of filing suit against Company to collect the \$15,000. Discuss this potential litigation including the likely defenses that Company would assert and the probable outcome of the suit.

In preparing your evaluation of Magazine's case, you discovered that Carol no longer is employed by Company. You wish to contact Carol to discuss the facts of the case without obtaining permission from Company's attorney. Include in your discussion whether you are permitted to do so.



SELECTED ANSWER TO QUESTION 1 **(July 2004 Bar Examination)**

This essay will address the possibility of Magazine filing suit against Company to collect \$15,000, Companies' possible defenses, and the probable outcome. It will also discuss whether it is appropriate for me to contact Carol w/out Company's attorneys permission.

First it must be determined what law governs this problem. The UCC does not govern because there is no sale of goods. Instead, it is a services contract and the common law governs.

Next it must be determined if a valid contract existed. A contract requires mutual assent (offer & acceptance), consideration, and no defenses.

When Michael faxed the form to Carol, this was an offer. The offer contained relevant terms (price, subject, time, etc. for performance). Because this is a services contract, the common law mirror image rule applies. When Carol added the additional terms, this was a rejection of Michael's initial offer and was a counter-offer. When Michael sent Carol the second fax, this could be seen as an acceptance of Carol's counter-offer – including the additional terms that she added.

Another issue is whether the oral agreement is included as part of the contract. This depends on whether the fax was meant to be a fully integrated contract. If it was meant to be fully integrated – i.e. all the terms were included in the writing and the oral agreement was the type of stuff that would normally be included in an agreement – then parol evidence concerning the oral agreement will not be admitted and the picture on the cover was not part of the contract.

There was consideration (detriment to one party or benefit to the other) because Company agreed to pay the money and Magazine agreed to run the advertisements.

Finally is the issue of defenses to the contract. If Magazine sues Company for breach of contract, Company might argue that there was no contract because the Statute of Frauds (S of F) was not satisfied. But the S of F does not apply to this services contract – the contract can be completed in 5 months (less than one year) so that it does not need to be in writing or signed by the party to be charged.

Company might also argue that the terms added by Carol were conditions that needed to be met before Company had a duty to perform by paying for the advertisements. Magazine could counter-argue that the provision about "improving" the photography and covers was a vague term that left the fulfillment of the condition entirely up to the tastes and opinions of Company and was therefore an unenforceable condition whose performance was excused.

Company might also argue that it legitimately cancelled the contract after Magazine did not publish the golf club on the cover but, as mentioned, this oral agreement was not part of the contract.

Company might argue that this was a divisible contract so that it would only have to pay for the ads actually published. A divisible contract requires that there be an equal number of divisions on each side of the contract – for instance five ads & five payments. That was not the case here – there was one price paid for all five of the ads. Additionally – the cancellation clause expressly shows that the contract was specifically not meant to be divisible because Company was getting a bulk discount.

Because there was a valid contract, Company breached the contract by canceling early and not paying the full contract price. Magazine would be entitled to damages from Company. Punitive damages are not normally available in contracts cases, but Magazine would be entitled to expectation damages to put them in the same position they would have been in if the other party had not breached. Here, Magazine already was paid the full contract price of \$85K. Now, Magazine is seeking \$15K because of the discount that Company received the cancellation cause is like a liquidated damages clause. Courts will enforce liquidated damages clauses if they are reasonable and it was difficult to forecast the damages at the outset. The liquidated damages clause here will, in effect, put the parties where they would have been if Company had not breached. Company got four ads. The ads were 25K each (despite the fact that it was given a discount), so Company, owing a total of 100K, now owes Magazine 15K.

A lawyer may not speak in person to a represented party concerning the subject matter of litigation without that person's lawyer's permission. The same rule applies when litigation is with a business entity and the lawyer wishes to speak to an employee – the lawyer may not do so without the permission of the business's lawyer. But here, Carol is no longer with the company. Because the litigation is against the company and not Carol, I may speak with Carol without the company's permission.

Q QUESTION NUMBER 2

JULY 2004 BAR EXAMINATION - FAMILY LAW/TORTS

Husband and Wife are both in their mid-thirties and have been married for six years. They have two children: Son, age 5, and Daughter, age 4. Husband is a dentist and has had his own dental practice for ten years and earns \$95,000 per year. Wife is a stay-at-home mother. Wife was a school teacher and earned \$35,000 per year before she stopped working after the birth of Son. The family lives in a modest home with a small mortgage that was purchased during the marriage and titled in joint names.

Husband opened a stock account two years ago from monies the parties received from a tax refund. The account is now worth \$20,000. Wife has \$20,000 of U.S. Savings Bonds her mother gave her last year.

One day Husband came home very upset because he learned that Wife was having an affair with Neighbor, when the children were at preschool. Husband punched Wife, breaking her cheek bone and causing her great pain. Son witnessed the incident.

In the past, Husband always acknowledged that Wife was a great mother. After finding out about the affair, Husband now feels he should get custody of the children if a divorce is granted. Husband does not want a divorce. Instead, he wants to go to counseling with Wife.

Wife is opposed to counseling, wants a divorce, and custody of the children. Wife wants to continue to live with the children in the marital home. Wife also wants to keep the savings bonds, receive all of the marital assets to which she is entitled, and obtain financial assistance from her Husband. Wife also wants Husband to pay for the divorce.

Wife comes to your office to discuss the filing of a divorce action. Identify and discuss with Wife all of the pertinent issues that will come up in her divorce action and include your advice as to how each of these issues will likely be decided.

In addition to the divorce action, Wife wants to sue Husband for punching her. Advise Wife as to this matter. Do not discuss any possible criminal prosecution of Husband.



SELECTED ANSWER TO QUESTION 2

(July 2004 Bar Examination)

This memorandum will discuss Wife's divorce action, including any potential claims for alimony, child support and custody. In addition, this memorandum will discuss Wife's possible cause of action against Husband resulting from the "punching" incident.

***Divorce:** Florida is a no fault divorce jurisdiction. A divorce may be granted where the parties contend that their marriage is irretrievably broken. However, where there are minor children or where one of the parties contests that the marriage is irretrievable broken, the Judge may order the parties to undergo marriage counseling. Here, where there are minor children and Husband does not want a divorce the Judge may consider ordering the parties to undergo counseling before continuing with the Divorce action.*

Distribution of the Assets

*Florida is a **equitable distribution** jurisdiction. This means that marital property is divided equally among the parties (50/50). However, where 50/50 distribution is not appropriate (i.e., where it would be inequitable for example), the court may divide the property so that it is fair and equitable to the parties. For example, the court can consider any party's interest in a particular piece of property such as a business or sentimental valued property, also the court may consider one parties desire to retain the marital home. (Note that the court can order that the primary residential parent may retain the home until the children reach the age of 18 and then order the sale of the home for equitable distribution). In order to effectuate equitable distribution, the court must first distinguish **marital and non-marital property**.*

***Marital Property** is property (including debts) during the marriage, interspousal gifts, enhancement or appreciation of non-marital property by the efforts of either spouse during the marriage.*

***Non-Marital Property** is property (including debts) acquired by either spouse before marriage, non-interspousal gifts, bequest, or devise.*

Here, Husband has a dental practice acquired prior to the marriage, but Wife may have an interest in the practice in that she may be entitled to the appreciation in value of the practice that occurred from Husband's efforts after marriage. However, Husband may have special equity in the practice and upon distribution, the judge may allow Husband to keep the entire practice since it is his business and livelihood that he has built.

The home, purchased during the marriage is presumed to be marital property, and here the facts indicate that the home is in fact marital property as it was purchased during the marriage and Wife and Husband hold as joint tenants. Husband's salary is also marital property. The stock account worth \$20,000 is marital property as it was acquired with

marital funds. However, Wife's savings bonds worth \$20,000 are a non-interspousal gift and thus are not marital property – they belong to wife as non-marital property.

The court can allow the primary residential parent to retain the marital home where it is in the best interests of the children since this also will foster continuity.

Spousal Support

Wife is requesting that Husband provide her with financial assistance. Wife may be entitled to Alimony. In Florida there are four types of Alimony. Alimony can be requested by either party in a divorce proceeding. In determining whether to award alimony the court may consider among other things:

- *the duration of the marriage*
- *age of the parties*
- *financial need*
- *adultery (however note that adultery cannot be the basis for awarding or denying alimony unless the adultery depleted marital assets)*
- *standard of living during the marriage*
- *contribution to the marriage*
- *need for rehabilitation – i.e., allow the recipient spouse support so that she/he can become self-sufficient.*

Permanent Periodic Alimony: *This type of alimony is paid to a spouse in permanent periodic payments. This type of alimony is modifiable upon a showing of substantial change in circumstances. It terminates upon the death of either party or upon the remarriage of the recipient spouse.*

Temporary Alimony: *Temporary alimony is paid during the pendency of litigation. ‘*

Lump Sum Alimony: *Lump sum alimony is paid in one lump sum. Typically it is available where there is a showing that one the spouse is in ill health and permanent periodic alimony will not serve its purpose of if there is extreme hostilities between the parties.*

Rehabilitative Alimony: *Rehabilitative alimony is alimony paid to the recipient spouse for a reasonable period of time for the purpose of rehabilitating that spouse back into the workplace so that the spouse can become self-efficient.*

Here, Wife may be awarded temporary alimony for the pendency of the litigation and rehabilitative alimony. The facts indicate that Wife was a school teacher prior to staying home with the children, thus she has the ability to become self-sufficient. In addition, Wife is in her mid-thirties and should be able to work due to her young age. Wife may

argue that she is entitled to permanent periodic alimony since she is entitled to remain in the lifestyle she lived with her husband's salary if \$95,000 a year. A teacher's salary is a dramatic change in her standard of living. However, her argument is weak. The marriage was relatively short (not meeting the long term marriage (17 years) presumption for this type of alimony). She and Husband were only married six years. In addition, she will be receiving rehabilitative alimony and she may find a job that pays more than a teacher's salary. Wife also wants attorney's fees. Wife may be entitled to such fees, however, her award of temporary alimony may assist her in this matter.

Child Custody

*Child support and custody are always determined under the **best interests of the child** standard. Both parents are responsible for the support of their children. There is no presumption in favor of any parent, Husband or Wife could be awarded custody. Always considering the best interests of the child the court may also consider among other things the following:*

- *ability of parent to provide necessities to the child (food, clothing, shelter)*
- *desirability of continuity*
- *the child's preference (if of an adequate age and understanding)*
- *the likelihood that the parent will comply with visitation and foster a loving relationship with the other parent*
- *fitness of the parent*

One parent will be the primary residential parent. This parent will retain physical custody of the children. However, regardless of who becomes the primary residential parent the court generally orders shared parental responsibility. This means that both parents have equal say in the child's medical and educational needs and access to the child's records.

Here, both parents want custody of the children and they both appear to be fit for the role of primary residential parent. Here, Wife has a strong argument for primary residential parent since she has stayed home with the children since their birth, thus continuity is best served if children are to remain in the home with her. In addition, Wife may argue that Husband is not fit to be primary residential parent. Generally a person's fitness (for example morality or physical disability) is taken into account if that parent's behavior would subject the child to harm. Here, Husband hit Wife in front of Son, thus the judge may consider this behavior harmful (physically or emotionally) to the child and deny Husband custody.

Husband may argue that Wife is morally unfit where she has committed adultery. However, this argument is likely to fail where there is no showing that the Wife's behavior is harmful to the children. Additionally, the children were never home when it happened.

Here, the children are too young for the court to consider their preference. Wife will also argue that the children should stay with her in the marital home as they may have friends in the neighborhood, although they are too young to argue that they go to school in the neighborhood.

Generally, the court will not split the children up. It is in the best interests of the children to remain together since they always have and this would force continuity for the children and also this would allow the children to have each other for support.

Also, the court may order DCF to conduct an investigation and make a suggestion to the court for the award of child custody.

Child Support

Both parents have a responsibility to support their children. In Florida child support is awarded pursuant to the statutory guidelines taking into account income and number of children. The duty of child support continues until the child reaches the age of 18 or can continue if the child has a disability or is still in high school from age 18-19. There is no obligation to continue support for the children's college education although the parties may expressly agree. Income may be imputed onto a parent if the parent is voluntarily unemployed or underemployed.

A judge may deviate from the guidelines by 5%, however a deviation beyond 5% must be accompanied by writing findings justifying such a deviation. A judge must deviate by 5% if the child spends a significant amount of time with the payer spouse.

A child support order must also contain a provision providing medical insurance for the children if it is reasonable ascertainable.

Child support is modifiable upon a showing of a substantial change in circumstances.

Wife's Suit for "Punching"

First Wife may have a suit against Husband for battery. Florida has abolished spousal immunity. Here, husband intentionally caused a harmful or offensive contact of Wife when he punched her causing damage, specifically breaking her nose. Wife can also file for an injunction based upon Florida's domestic violence provisions. If Wife was to receive a temporary restraining order against Husband, she would still be entitled to support.

Q

QUESTION NUMBER 3

JULY 2004 BAR EXAMINATION - FL CON LAW/FED CON LAW

In response to escalating school violence, the Everglades County School Board is considering adopting a multifaceted policy to address school safety. The draft policy contains the following provisions:

1. Elementary schools shall provide instruction in moral values, including, but not limited to, the study of famous moral leaders such as Buddha, Ghandi, Jesus, Martin Luther King, Jr., Mohammed, and Moses.
2. Students deemed by administrators to be at-risk for violent behavior shall be referred to counseling. At the discretion of the parent or guardian, counseling will be provided either within the public school system, or vouchers will be provided to pay up to \$2,000 per annum for private counseling with a licensed social worker, psychiatrist, psychologist, pastoral counselor, or ordained clergyperson.
3. Local school administrators shall conduct periodic unannounced searches in middle and high schools. Such searches shall involve lockers, backpacks, and purses selected on a random basis. In addition, hand-held metal detectors may also be used to check students for weapons.

Assume you are the attorney for the Everglades County School Board. Discuss the advice that you would give the School Board as to the potential Florida and Federal constitutional challenges to these provisions and the likely outcomes of such challenges.



SELECTED ANSWER TO QUESTION 3

(July 2004 Bar Examination)

The analysis of each provision is as follows:

Provision 1

This provision presents us with a Federal and Florida establishment clause problem. State action that deals somehow in religion must have a primarily secular purpose, its overall purpose or effect must be neither to inhibit or advance religion, and it must not create an excessive entanglement between religion and government. The provision is going to have problems withstanding a constitutional attack. While it appears to have a valid secular purpose, instruction on morals, the way that this purpose is being reached is probably just too sectarian in nature. Where religious teachings are used to promote a secular purpose it is necessary to show that the secular purpose could not be achieved just as well without the religious materials. In our case, the instruction of morals is a valid secular purpose but the required use of the teachings of various religious leaders to achieve the purpose is likely to be considered too religious in nature. Clothing these leaders as ‘moral’ leaders as opposed to religious leaders is just too transparent. There are some things that you simply can’t take the religion out of. As such, I would advise the school board that this provision is likely to be struck as unconstitutional. It is possible that the first phrase directing schools to provide moral value instructions could be severed and stand-alone though.

Provision 2

The problem with this provision starts with its first sentence. A challenge that is likely to be raised is that this provision is vague and overboard. A policy or regulation should be clear enough on its face to put a reasonable person on notice of what is covered. Here, the school administrators are given total discretion in determining who is “at-risk for violent behavior.” It is likely that this provision is going to be held as invalid as unconstitutionally vague under either the federal or the Florida Constitution. Another problem with this provision is the potential that state money, through the vouchers, will be used by the parents to pay a clergyperson or pastoral counsel thus violating the establishment clauses of the Florida and Federal Constitutions. Under the Federal Constitution this set up is going to be held okay. The US Supreme Court has held that these voucher programs do not violate the federal establishment clause because the money is going to the parents for a valid government purpose and that it is the parent’s choice where the money is spent and as such, there is no problem with the federal establishment clause. The US Supreme Court has allowed this “indirect” government money expenditures to religious institutions or people. However, under the Florida Constitution this provision is likely to fail. This program is similar to the school voucher

program set up by Governor Bush. The Florida Supreme Court, in evaluating that program, noted that Florida's separation of church and state was more strict than found in the Federal Constitution. The Florida Supreme Court prohibited the state's money going to religious institutions either directly or indirectly. Given this legal precedent, I would advise the school board that this second provision, although likely valid under the Federal Constitution, would probably be unconstitutional under the Florida Constitution. Again, the provision may be able to stand if a court were to sever the reference to pastoral counselors and ordained clergy persons.

Provision 3

Provision three presents us with a right of privacy issue and also a 4th Amendment unreasonable search and seizure problem. First, it should be noted that Florida's Constitution, unlike the Federal Constitution contains an express right to privacy. Given this, at times the Florida Supreme Court has interpreted Florida's right to privacy as broader than the federal right. Under the facts as presented I would advise the school board that this provision has a very good chance of being upheld. I would tell them this based on the fact that the government has a very significant interest in insuring a child's safety and insuring that government run schools are free from contraband and that students and teachers within them are safe. Although the right to privacy is great and a fundamental one, I would feel safe to say that the government's interest in safe public schools is compelling enough to allow this provision to stand.

4th Amendment Concerns

Florida's protection against unreasonable government search and seizures has been interpreted to coincide with the federal interpretation of the 4th Amendment to the US Constitution. A person with a reasonable expectation of privacy shall not be searched without a warrant, subject to exceptions, and evidence seized in violation of this right shall be excluded from criminal proceedings against the person. Given that these searches are conducted at random they may be held violative of a student's right against unreasonable search & seizures. Given that we have government action and what appears as a reasonable expectation of privacy, contraband found by these searches would be excluded under the 4th Amendment in related criminal proceedings.

In all, this final provision would likely be upheld given the government's significant interest in safety but the 4th Amendment concerns should be noted. Additionally, there is a potential that the random search of backpack & purses provision could be held to cross the line and violate the student's right to privacy. While this may be, although highly unlikely, I feel safe to say that the locker search provision would be upheld regardless given the lower expectation of privacy in a school provided locker.

LASTLY

What should have been discussed initially is discussed here. It is important to note that a school board's actions will be deemed "state action" thereby making all of the above analysis applicable. Also, it should be noted that a county's acts will be preempted by

the Florida Constitution and the Federal Constitution under the traditional hierarchy of law structure.

PART II - SAMPLE MULTIPLE-CHOICE QUESTIONS AND ANSWERS

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

The answers appear on page 40.

MULTIPLE-CHOICE EXAMINATION INSTRUCTIONS

These instructions appear on the cover of the test booklet given at the examination.

1. This booklet contains segments 4, 5 and 6 of the General Bar Examination. It is composed of 100 multiple-choice, machine-scored items. These three afternoon segments have the same value as the three morning segments.
2. The person on each side of you should have a booklet with a different colored cover. Please determine that the person on each side of you is using a different colored cover. If he or she is using an examination paper with the same colored cover, please notify a proctor at once.
3. When instructed, without breaking the seal, take out the answer sheet.
4. Use a No. 2 pencil to mark on the answer sheet.
5. On the answer sheet, print your name as it appears on your badge, the date and your badge/ID number.
6. In the block on the right of the answer sheet, print your badge/ID number and blacken the corresponding bubbles underneath.
7. Then STOP. Do not break the seal until advised to do so by the examination administrator.
8. Use your 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 ten minutes remain before the end of the session, you may turn in your question booklet and answer sheet outside the examination room to one of the proctors. If, however, fewer than ten minutes remain, please remain at your seat until time is called and the Board has collected all question booklets and answer sheets.

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

23 SAMPLE MULTIPLE-CHOICE QUESTIONS

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

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

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

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

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

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

7. The State of Florida is prosecuting a former police officer for extortion of money from prostitutes. One of the State's witnesses is Sally. Sally has an adult conviction for vehicular homicide. She was charged with driving a car in a reckless manner resulting in the death of her sister, a passenger in the car. Sally pleaded nolo contendere, was adjudicated guilty and received a suspended sentence although she could have received a sentence of state imprisonment up to 5 years. At trial, evidence of this conviction is
- (A) admissible to impeach Sally because vehicular homicide carries a maximum penalty in excess of 1 year.
 - (B) inadmissible to impeach Sally because she never admitted her guilt since she entered a plea of nolo contendere.
 - (C) inadmissible to impeach Sally because she received a suspended sentence.
 - (D) inadmissible to impeach Sally because she is only a witness and not the criminal defendant.
8. A defendant charged with first-degree murder shall be furnished with a list containing names and addresses of all prospective jurors
- (A) upon court order.
 - (B) upon request.
 - (C) upon request and showing of good cause.
 - (D) under no circumstances.
9. Cooper is suing March for money damages. Because he believes portions of March's deposition are highly favorable to his case, Cooper's attorney intends to read parts of the deposition at trial instead of calling March to the stand. March objects to Cooper's use of the deposition at trial. What is the court's likely ruling?
- (A) Cooper may use the deposition at trial, but, if requested, he must read all parts that in fairness ought to be considered with the part introduced.
 - (B) Cooper may use the deposition at trial, but only to contradict or impeach March's prior inconsistent statements or pleadings.
 - (C) Cooper may not use the deposition at trial, as March is able to testify and no exceptional circumstances exist.
 - (D) Cooper may not use the deposition at trial, as this would make March his witness and immune to impeachment.

10. Jan sues the Chicago Times for defamation in a Florida circuit court. At trial, Jan wishes to offer into evidence a copy of the edition of the Times containing the allegedly libelous article. Before the newspaper may be admitted, Jan must
- (A) call as a witness an employee of the Times to testify that the proffered newspaper was in fact published by the Times.
 - (B) have a certification affixed to the newspaper signed by an employee of the Times attesting to its authenticity.
 - (C) establish that the newspaper has been properly certified under the law of the jurisdiction where the newspaper was published.
 - (D) do nothing because the newspaper is self-authenticating.
11. Defendant was arrested on February 1 and released one month later on March 1 after being charged with a felony. On December 1 of the same year as his arrest, he filed a motion to discharge since no trial or other action had occurred to that point. The court held a hearing 3 days after the motion was filed. Defendant should be
- (A) discharged because more than 175 days passed between arrest and the filing of the motion to discharge.
 - (B) discharged because more than 175 days passed between his release from jail and the filing of the motion to discharge.
 - (C) brought to trial within 90 days of the filing of the motion to discharge.
 - (D) brought to trial within 10 days of the hearing on the motion to discharge.
12. Bill, a single man, owned pasture land in Deerwoods, Florida, which he leased to a tenant. He also owned a condominium in Miami, which he held for investment. In his will, he devised the pasture land to his son Tommy and the condominium to his daughter Julie. All other assets would pass equally to Tommy and Julie.

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

- (A) Kathy gets the condominium regardless of the prenuptial agreement, Tommy takes the pasture land and Tommy and Julie split the rest of the estate.
 - (B) Due to Kathy's prenuptial agreement, Tommy receives the pasture land, Julie gets the condominium and Tommy and Julie split the rest of the estate.
 - (C) Kathy gets the condominium, but because Bill had originally indicated his intent to devise equally to his children, Tommy and Julie will split the remaining estate.
 - (D) Regardless of the prenuptial agreement, Kathy is a pretermitted spouse. Since Bill leaves surviving lineal descendants who are not Kathy's, Kathy receives 50% of the estate, Tommy gets the pasture land, and Tommy and Julie split the residue of the estate.
13. Anderson and Parker decide to form a corporation which will locate missing children. Which of the following would be a proper name for the corporation?
- (A) ANDERSON
 - (B) FBI Consultants, Incorporated
 - (C) Private Eye Partners
 - (D) Child Finder Company
14. At trial, during the plaintiff's case-in-chief, the plaintiff called as a witness the managing agent of the defendant corporation, who was then sworn in and testified. Defense counsel objected to the plaintiff's questions either as leading or as impeaching the witness. In ruling on the objections, the trial court should
- (A) sustain all the objections and require the plaintiff to pursue this type of interrogation only during the plaintiff's cross-examination of this witness during the defendant's case-in-chief.
 - (B) sustain the leading question objections but overrule the other objections because a party is not permitted to ask leading questions of his own witness at trial.
 - (C) sustain the impeachment questions but overrule the other objections because a party is not permitted to impeach his own witness at trial.
 - (D) overrule all the objections because the witness is adverse to the plaintiff and therefore may be interrogated by leading questions and subjected to impeachment.
15. Rainbow Corporation has outstanding 1,000 shares of voting common stock and 1,000 shares of nonvoting preferred. The preferred has a liquidation preference equal to its par value of \$100 per share plus a 3 percent noncumulative dividend. Rainbow submits to its stockholders a proposal to authorize a new class of preferred stock with redemption rights that would come ahead of the old preferred stock. At a shareholders' meeting, 700 common and 400 preferred vote in favor of the proposal. Which of the following statements is correct?

- (A) The proposal is validly approved because overall a majority of the outstanding shares did approve.
 - (B) The proposal is invalidly approved because a majority of the preferred shareholders did not approve.
 - (C) The vote of the preferred stockholders does not matter because it was nonvoting stock.
 - (D) The proposal is invalidly approved because a two-thirds vote of each class is required.
16. Bob Wilson borrowed \$20,000 from Ted Lamar to open a hardware store. Ted's only interest in the business was the repayment of his 5-year unsecured loan. Bob was so grateful for the loan that he named his business "Wilson and Lamar Hardware" and purchased signs and advertising displaying this name. He also listed Bob Wilson and Ted Lamar as "partners" on his stationery. When Ted found out, he was flattered to the point that he voluntarily reduced Bob's interest rate from 9 percent to 8 percent per annum.

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

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

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

- (A) Yes, because Defendant has raised new grounds.
- (B) Yes, because Defendant had ten days after the jury returned its verdict within which to move to set aside the verdict.
- (C) No, because the court denied the motion for directed verdict rather than reserving ruling.
- (D) No, because the court entered final judgment for Plaintiff before the motion to set aside the verdict was filed.

18. In the absence of a provision to the contrary in the articles of incorporation, the directors of a corporation elected for a specified term
- (A) can be removed from office at a meeting of the shareholders, but only for cause and after an opportunity to be heard has been given to the directors.
 - (B) can be removed from office at a meeting of the shareholders, with or without cause.
 - (C) can be removed from office at a meeting of the shareholders, but only for cause.
 - (D) can be removed from office prior to the expiration of their term only by a decree of the circuit court in an action by the shareholders.
19. Mary, a wealthy St. Petersburg widow, executed her first and only will on May 15, 1990 and died on August 18, 1990. Her will provided that her estate be divided equally between her only child, Joan, and the Salvation Army of Largo. How will Mary's estate actually be distributed?
- (A) 100% to Joan.
 - (B) 100% to Joan if she files a timely petition requesting that the devise to the Salvation Army be avoided.
 - (C) 50% to Joan and 50% to the Salvation Army.
 - (D) 50% to Joan and the income from the remaining 50% to Joan for life, remainder to the Salvation Army, if Joan files a timely petition protesting the devise to the Salvation Army.
20. Regarding a deposition in a civil suit, which of the following is/are true?
- I. A deposition of a person against whom another person contemplates filing an action may be compelled by the party contemplating the action, without leave of court, before the action is filed.
 - II. A deposition of the defendant in an action may be taken by the plaintiff without service of a subpoena on the defendant.
 - III. A deposition may be taken even though all the testimony secured by it will be inadmissible at the trial.
- (A) II only.
 - (B) I and II only.
 - (C) II and III only.
 - (D) I, II, and III.

SAMPLE MULTIPLE-CHOICE QUESTIONS WITH PERFORMANCE TEST COMPONENT

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

Florida Statutes 47.011 Where actions may be begun.

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

Florida Statutes 47.021 Actions against defendants residing in different counties.

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

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

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

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

ANSWER KEY FOR MULTIPLE-CHOICE QUESTIONS

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