Florida Board of Bar Examiners

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Florida Bar Examination
Study Guide and Selected Answers

July 2021
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This Study Guide is published semiannually with essay questions from two previously administered examinations and sample answers.

Future scheduled release dates: March 2023 and August 2023

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PART I – ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2021 AND FEBRUARY 2022 FLORIDA BAR EXAMINATIONS

ESSAY QUESTIONS AND SELECTED ANSWERS

Part I of this publication contains the essay questions from the July 2021 and February 2022 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

JULY 2021 BAR EXAMINATION – CONTRACTS/ETHICS

On March 1, Bella, an art dealer, called Sharon, a renowned nature photographer, and said, "I am interested in purchasing your photograph of Florida panthers hunting at night that I saw at your exhibition last summer. What is the price?" Sharon replied, "I will sell it to you for $22,000." Bella replied, "OK, it's a deal; send me the paperwork this week."

The photograph Bella had seen at the exhibition was named "Panthers One." Four months after Bella saw Panthers One at Sharon's art exhibition, Sharon photographed panthers again and exhibited one of these photographs, which she named "Panthers Two."

On March 10, Sharon sent Bella a document typed on Sharon's letterhead:

"I agree to sell Bella my panther photograph for $32,000. Payment to be made by April 10. In the event that either party fails to perform this contract, the non-breaching party shall be entitled to damages in the amount of $5,000." Sharon did not sign the document. She added a handwritten note "Please sign and return to me." Sharon's assistant, who typed the letter, erred in typing $32,000 instead of $22,000. Sharon did not notice the error.

On March 15, Bella received the document. Bella did not notice the price was $32,000. She did not sign or return the document to Sharon.

On April 10, Bella arrived at Sharon's studio and tendered $22,000. Sharon tendered to Bella the photograph called "Panthers Two," which Bella rejected. Sharon terminated the transaction and demanded $5,000 based on the March 10 letter.

On May 14, Bella retained the services of Laura, a lawyer. Laura has an associate named Andrew. Five years ago, while associated with Laura, Andrew represented Sharon in the formation of a limited liability company for her photography business and in other matters involving the company. Laura knew of Andrew's prior work for Sharon, but did not disclose it to Bella.

Prepare a memorandum discussing Bella's potential claims, any arguments that Sharon may raise, and the likely outcome of the matter. Also discuss any ethical issues posed by Laura's representation of Bella.

SELECTED ANSWER TO QUESTION 1

(July 2021 Bar Examination)

MEMORANDUM DISCUSSING BELLA'S POTENTIAL CLAIMS

The UCC applies to the transaction.

The UCC (Article 2) applies to all transactions in goods, defined as moveable things. Because a painting is a moveable thing, the UCC applies to this transaction.

There was a valid contract formed when Bella replied "it's a deal."

Formation requires (1) an offer; (2) acceptance; (3) consideration; and (4) no defenses to formation or enforcement. An offer is an objective manifestation of an intent to enter into an agreement on specified terms. Acceptance is a manifestation of assent and a desire to be bound to the terms of the offer. Under the common law mirror image rule, acceptance needed to be to the exact terms of the offer. Under the UCC, however, acceptance need not be to the exact terms so long as there is a sufficient match between the terms of the offer and acceptance to constitute a meeting of the minds. (The acceptance is not effective if it is conditional, however; it is a counteroffer in that circumstances: a rejection and new offer.) Consideration is a bargained for exchange of a legal benefit or legal detriment. Here, Sharon's first statement was not an offer, it was a mere invitation to deal because stating that she was interested in purchasing the painting did not manifest an intent to be bound by specific terms. Sharon's response, however, was an offer because she specifically stated that she will sell the painting to Sharon for 22,000, manifesting an intent to enter into an agreement on specific terms. Bella then accepted the offer when she stated "it's a deal." Her additional request that Sharon send her the paperwork was not a condition to acceptance, it was a supplemental request. Her acceptance was unconditional; therefore, it was effective. There was bargained-for consideration because the promise to convey the painting and the return promise to convey 22,000 was a bargained-for exchange of items of legal value.

Bella can assert a claim that Laura breached her duty under the contract.

Under the UCC, the perfect tender rule generally applies (unless it is an installment contract). When a seller tenders goods that fail to conform in any way to the underlying contract, the buyer typically has three options. She may (1) accept the goods; (2) reject the goods; or (3) accept in part and reject in part. The buyer is entitled to sue for damages for any non-conforming goods, regardless of whether they are accepted. Here, the terms of the agreement were for Panther 1 specifically because when Sharon stated she would sell "it," she was referencing the specific painting that Bella "saw at [her] exhibition last summer." Therefore, the terms of the agreement called for tender of Panther 1. When Sharon failed to tender Panther 1, she breached the terms of the agreement by violating the perfect tender rule.

Sharon will argue the statute of frauds was not satisfied, but this argument will fail.

Under the UCC, a contract for a price of $500 or more must be in writing to satisfy the statute of frauds. The writing must be signed by the party to be charged and manifest the essential terms of the contract (typically by identifying the parties, the goods, a quantity, and a price). Generally, the writing must contain a quantity term (courts may fill in most other terms by implementing reasonable terms, so long as there is a meeting of the minds). The signature requirement is broadly construed; any document authenticated by attaching an insignia is considered signed. When both parties are merchants, there is a special rule surrounding confirmatory memos. A confirmatory memo between two merchants that is sent by one to the other and identified will bind the party to whom it was sent if the party does not object in a reasonable time (10 days). A merchant need not read the contents of the memo; the memo is effective upon receipt of possession. Here, both parties are merchants because Bella is an art dealer, Sharon is a nature photographer, and the good in question is a photograph. Furthermore, the writing was probably signed by Sharon because it was typed on her letterhead (a sufficient authentication). And, under the merchant's confirmatory memo rule, it was likely sufficient to bind Bella as well because it was received on March 15 and the facts do not indicate that any objection was made by April 10 (nearly a month later). It is irrelevant that Bella did not notice the price or sign the document. Because Bella is a merchant who received it while being aware of its contents and failing to object, it will bind her. Furthermore, the writing is sufficient because it set forth the essential terms of the agreement by stating "my panther photograph." It also identified the parties.

Sharon may also try to argue there was never any effective acceptance because Bella did not sign and return the memo, but this argument will fail.

Generally, acceptance must be in any reasonable form that manifests an intent to be bound. However, any conditions the offeror puts on effective acceptance are generally enforceable. Therefore, Sharon will try to argue that her offer to sell the paintings was contained in the writing and Bella failed to accept by not signing and returning the letter as per Sharon's conditions. However, the contract was already formed prior to the drafting of the memo when Bella manifested an intent to be bound. Therefore, she did not have to sign the document to accept the offer.

Sharon will argue the fact that the writing contained the wrong price and did not specify the photo indicates that Sharon was not in breach, but this argument will also fail.

The parol evidence rule bars use of contemporaneous oral or written agreements that contradict a writing evidencing an agreement (or supplement a complete integration). However, oral agreements are admissible to clarify ambiguities (or supplement partially integrated agreements). A patent ambiguity is one that appears on the face of the document; a latent ambiguity is not apparent on the face of the document. Furthermore, scriveners errors can be corrected through the equitable remedy of reformation if the writing does not reflect the mutually agreed-on terms of the agreement. Here, the writing

appears to contain a latent ambiguity because it references Sharon's "panther photograph" but does not specify which one. At that point in time, Sharon had at least two. Therefore, evidence of the parties oral agreement regarding which painting will be admissible to clarify the ambiguity. Furthermore, the parties had a mutual understanding that the price would be $22,000. Reformation will be appropriate in this circumstance because there was a meeting of the minds in regard to the price term that was not accurately reflected in the writing. Reformation will be appropriate to correct the error of Sharon's assistant.

The $5,000 liquidated damages clause was likely valid, but Laura will not be able to collect on it because she is the breaching party.

A liquidated damages clause is a clause providing for a specific remedy upon breach of a contract in lieu of legal damages. The typically, legal damages in a contract action are designed to compensate the non-breaching party by putting them in the position they would be in had the contract been performed (expectation damages). For sale of goods contracts, this typically includes incidental damages as well as the non-breaching party's loss in value. A liquidated damages clause is enforceable when prospective damages are too speculative. They must be reasonable in light of the anticipated and actual cost of the breach. Lastly, the clause must not function as a penalty. Here, the typical legal remedy would be difficult because quantifying the value of Panther 1 is difficult. Therefore, it was likely reasonable to enter into an agreement on damages. The court will scrutinize the amount, however, because $5,000 is significant in proportion to the $22,000 price. It must be considered a reasonable estimation of damages to the nonbreaching party. Even if, however, the court upholds the clause as reasonable (and not a penalty), Sharon will not be entitled to the $5,000 because she is the breaching party.

Bella will also argue she is not bound by the liquidated damages clause because it is a material alteration to the contract. Between two merchants, terms included in a confirmatory memo are sometimes included as part of the contract when not objected to (the battle of the forms). Although when one of the party is not a merchant all deviations are considered mere proposals, if the change is nonmaterial it often comes into the contract without being specifically agreed to. Here, Bella will argue that the liquidated damages clause was a material alteration that she did not agree to. Sharon, however, will argue that Bella should have objected and she is bound by the terms of the memo because she did not object and both parties are merchants.

In regard to unique goods, the equitable remedy of specific performance is often appropriate. Specific performance is only available when the legal remedy would be insufficient. Here, Bella could argue that the legal remedy would be insufficient because it is too difficult to quantify the monetary value of the picture. The picture could be considered a unique good, and specific performance would be the only way to make Bella whole in that case. However, Bella may have waived specific performance by not objecting to the liquidated damages clause. She will probably not get specific performance.

Sharon may argue that she deserved a chance to cure any defect identified by Bella.

Under the UCC, if a seller tenders non-conforming goods before the goods are due, the buyer must allow a reasonable opportunity to cure (typically, up until the date the goods are due). However, if the nonconforming goods are tendered on the due date, the seller does not have a right to cure unless the seller had reason to believe the goods would be accepted. Here, Sharon will argue she had reason to believe the goods would be accepted because the tendered photograph was a photo of a panther. But this argument will likely fail because Bella specifically asked for the photograph she saw at the exhibition "last summer" and the tendered picture had been taken four months later. Therefore, she did not have a reason to believe Bella would accept the goods, and Bella was within her rights to reject them outright. In any event, Sharon is the one who terminated transaction despite the fact that she was in breach.

Ethical Issues

Laura should have disclosed Andrew's prior work for Sharon and obtained informed consent from both Sharon and Bella.

An attorney must avoid conflicts of interest. Specifically, an attorney must not (1) represent an adverse client to ones own or (2) take on representation when loyalty to another client is likely to materially limit the lawyer ability to effectively represent the client. The attorney's duty extends to clients represented by the attorney in the past. An attorney must not (1) represent a materially adverse party in the same or substantially related matter as the one in which the lawyer represented the former client in or (2) use any information learned as a result of the representation against the former client (unless it has become generally known). Conflicts of interest are generally imputed to a lawyer's firm. Some conflicts of interest can be cured by screening the lawyer with the conflict. A lawyer can cure the conflict of interest only if (1) the lawyer reasonably believes he or she can effectively take on the representation, (2) the conflict is not disallowed by laws or the FRPC, (3) the lawyer is not on two sides of the same litigation, and (4) the lawyer obtains informed consent. Here, Andrew's conflict of interest is likely imputed to the firm. Andrew and Laura should disclose the situation and obtained informed consent in writing from both Sharon and Laura. Even though this is not the same or a substantially related matter (because Andrew helped Sharon in the formation of an LLC for the photography business rather than with a specific sale), Andrew may have gained knowledge in relation to his representation of Sharon that he must not use against Sharon. Therefore, in addition to obtaining everyone's informed consent, Andrew should be screened from Laura's representation.

A lawyer's duty of confidentiality extends to all information obtained in the course of representation and may not be breached. It extends indefinitely. Here, Andrew owes Laura the duty not to disclose any information he gained during the representation. If this duty (imputed to the firm) would limit the firms effective representation of Bella, it should decline the representation.

QUESTION NUMBER 2

JULY 2021 BAR EXAMINATION – CRIMINAL LAW/CONSTITUTIONAL CRIMINAL PROCEDURE

Mary and her boyfriend, David, had a heated argument in their house after they accused each of infidelity. David struck Mary. He also hurt Mary's three-year-old son by throwing him to the ground. Mary locked herself and her son in the bathroom and called 911. She told the 911 operator what David had done to her and her son, described what David was wearing, and said that she feared for their safety because David was still furious and kept a gun in the home.

Officers Jones and Smith were dispatched to respond to the 911 call. As the officers drove to the house, the 911 operator relayed what Mary reported. When they arrived, Officer Jones went around to the home's backyard while Officer Smith knocked at the front door. There was no fence or other barrier around the backyard.

Officer Smith heard a child crying inside the home. He announced that the police were at the front door and demanded that someone open the door. As soon as Officer Smith made the announcement, the lights in the home were turned off. No one came to the front door.

David tried to leave through a bedroom window on the back side of the house. Officer Jones saw David, who matched the description that the 911 operator provided. Officer Jones ordered him to show his hands and get on the ground. David scurried back inside and shut the window.

Officer Jones went to the front of the house and told Officer Smith that he saw David trying to leave through a back window. Officer Smith drew his gun, kicked in the front door, and the officers entered the home.

The officers did not see David when they first entered the house. Officer Jones went into one of the home's two bedrooms. He did not find David, but saw a handgun, a cell phone and a small plastic bag containing white powder on top of a bedside table. Based on his experience and training, Officer Jones believed the powder was cocaine.

Officer Jones told Officer Smith that there was no one in the bedroom. Officer Smith then went into the house's other bedroom. He found David hiding under the bed, handcuffed him, and arrested him.

Once the officers believed that David no longer posed a threat, they announced that it was safe to come out of the bathroom. When Officer Jones interviewed Mary about what happened, he asked her if the cell phone that he had found belonged to David. She said, "It's David's. I've never used it." Officer Jones noticed that the cell phone

was not password-protected. He opened the phone's messages application and reviewed messages in which David told others that Andy was his cocaine supplier and gave out Andy's phone number.

The officers returned to the police station and told their supervisor about the incident. They explained that they had not obtained a warrant. They also wanted to conduct wiretap surveillance of Andy's phone based on what Officer Jones saw in David's text messages. Lab results have confirmed that the plastic bag found at the house did contain cocaine.

Discuss whether the officers' conduct, including the request to conduct wiretap surveillance, raises any issues under the U.S. Constitution.

SELECTED ANSWER TO QUESTION 2

(July 2021 Bar Examination)

Federal Constitutional protections in criminal cases are derived primarily from three places in the Bill of Rights. The 4th Amendment guarantees the people the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. It also requires that probable cause be obtained for a warrant to be issued. The 5th Amendment deals with the right against self-incrimination, and the right to a trial by jury. It also deals with Miranda rights, which attach as soon as the police begin interrogation. Miranda Rights are the right to remain silent, that anything you say can be used against you, you have a right to an attorney, and one will be appointed to you at no charge if you cannot afford one. The invoking Miranda rights must be unequivocal and unambiguous. Interrogation is defined as any sort of questioning that is likely to illicit an incriminating response. Once someone invokes their Miranda rights, ALL questioning must cease. The 5th Amendment is general, not offense specific. The 6th Amendment deals with the right to counsel. Here, since we are not at the trial stage, there is no 6th Amendment right to counsel, which attaches at the start of proceedings for that arrest. The 6th Amendment is offense specific. We are also not discussing the interrogation or Miranda rights of David or Andy, so the 5th Amendment will not be discussed.

Warrant Requirement

In general, a warrant is required before a search is conducted of someones home. This warrant must be backed up by probable cause, and describe with sufficient particularly the item(s) and area(s) to be searched for and/or seized. Once the particular item is found, the search must cease. The police are allowed to perform a protective sweep if they have reason to believe that someone else might be in the home. There are several exceptions to the warrant requirement, which will be discussed below.

Exigent Circumstances

When exigent circumstances are involved, police are not required to obtain a warrant prior to an entry into a home. Examples of exigent circumstances include a high risk that evidence will be destroyed, someone is actively being hurt or is in danger, or there is a fleeing felon who could be dangerous. In the case at hand, Mary has told the 911 operator that David keeps a gun in the home. She has also articulated her fears of David and the fear that her child is going to be harmed. David has hurt Mary and the son, so there is reason to believe he would hurt them again. When police saw David, matching the 911 description, enter back into the house, they knew that the person they were after was inside, and was likely armed and dangerous. The child crying also creates a reasonable belief that someone is in danger. David will counter this logic, and say that since both Mary and her son were locked in the bathroom, they were not in danger, and therefore exigent circumstances would not apply. However, the police did not know this, and still had reason to believe that harm was going to occur, considering the totality of the circumstances of the child screaming, a firearm being in the home, and the lights being turned off. Therefore, the entry into the home to secure David was likely

not an illegal entry, and was allowed due to exigent circumstances.

Consent

Consent is another exception to the warrant requirement. If a person consents to the entry or to the search, then there is no warrant that is required. The fact pattern says that the house belongs to both Mary and David. In this case, Mary would be allowed to consent to entry to the home, especially in regards to common areas that both Mary and David share. Under this theory, the entry into the home would be allowed also.

Curtilage

The court has ruled that you have a reasonable expectation of privacy to your home, as well as the curtilage of your home, which is the immediate area surrounding your home. In other words, a police officer is not permitted to get right up next to your house and peer through your window. This would be considered a search for the purpose of the 4th Amendment. However, there was no barrier around the house, and the backyard appears to be wide open. Additionally, since this was in response to a call for help, this entry into the backyard is likely not illegal.

Open Fields

Courts have held that a person does not have a reasonable expectation of privacy to "open fields" even if around their house, so the warrant requirement does not apply. Here, it is not clear how large the backyard of the house is. If it were small and fenced in, the court might hold that it was part of the curtilage of the house. But, even if it was fenced in and large, the court would hold no reasonable expectation of privacy. This is shown by many cases of police entering into fields of marijuana and using this marijuana as evidence to obtain probable cause to search a residence. Here, it would depend on how large the backyard was if open fields were to apply.

Protective Sweep

As previously mentioned, when looking for an individual, police are allowed to perform a protective sweep inside the home. They are allowed to look in any place that the person might be reasonably hiding. This would include inside a closet, but not inside of a box in the top of the closet. Once the person the police are looking for is located, the search must stop. The two police officers fanning out and searching for David is valid.

Plain View

Pursuant to a legal entry into a building, anything that is within the officers plain view would be considered legal to be seized if it is readily apparent on the objects fact that the object is contraband or illegal. For instance, if police are looking for a stereo, and the stereo in the home looks exactly like the one that was stolen, they would NOT be allowed to manipulate the stereo to look for a serial number and research the number. The court has held that this is invalid. Based on the officers experience, it was readily apparent to him that the white powder was cocaine, therefore the cocaine would fall

under the plain view doctrine as contraband, and be admissible, assuming the court deems the initial entry legal.

Cell Phone Contents

The Supreme Court has held that a person does not have a reasonable expectation of privacy to certain things that have been exposed to someone else. This is known as the third party doctrine. As pertaining to cell phones, the Court held that "pings" that phones give off as to location are not considered private, and therefore not subject to the warrant requirement. When seizing an object after arrest, the police are allowed to examine the object ON ITS FACE. In one well-known case, when the police opened up a box of cigarettes and found contraband, the court rules that it was a warrantless search. The court has applied the same logic to the data inside of cell phones. While police can examine the outside of the phone, they cannot enter it without a warrant. While the government will argue that since there was no passcode, he did not have a reasonable expectation of privacy, this logic will fail. Regardless of a passcode, David still has a reasonable expectation of privacy to the contents inside of his cell phone. The government might also argue consent, however this logic will not hold water. Mary told the police officers that the cell phone belonged to David, and that she had never used it. Therefore, Mary not only lacked actual authority, but she clearly did not have apparent authority either. Therefore, the officers cannot say that they acted reasonably when they searched the phone. As to David, the contents of his cell phone will be inadmissible against him. Mary did not have the right, the apparent right, or consent of David to allow the officers to search his text messages. The police might could obtain a warrant to search the messages, if they can show probable cause. However, a simple bag of cocaine will likely not be enough to establish this.

Wiretapping Surveillance

Under the "fruit of the poisonous tree" doctrine, information that is obtained through an illegal search is not allowed to be used to obtain additional information. This doctrine was established by the court to restrict the temptation to conduct illegal searches simply to get one valuable piece of information. If the wiretap was going to be against David based on the illegal search of his phone, then David would have grounds to say that the wiretapping is based off of fruit of the illegal search. However, the police want to wiretap Andy. Coupled with the information within the phone, along with the positive test for cocaine inside the bag, the police do have probable cause to get a warrant to wiretap Andy. Andy will try to claim that since part of the information the police used to obtain probable cause was from an illegal search, that the wiretapping is also illegal. This will not work. The courts have held that one person cannot claim the 4th Amendment privilege on behalf of another. Only the person who had their rights violated can make this claim. So, while David did have his rights violated, Andy did not, so he cannot claim fruit of the poisonous tree. Additionally, since Andy was not the one texting David, the police will likely be successful on their claim that Andy had no reasonable expectation of privacy to the text messages that David sent, as David could have done almost anything he pleased with them, including turning them over to the police. Clearly Andy did not mind his phone number being distributed.

Summary

In summary, the entry into the backyard by the officer is likely not an illegal entry, since the police were responding to an emergency and there was no fence, coupled with the open fields doctrine. Since the police saw David, who was wanted, flee back into the house against police command, and the police had reason to believe he was armed and that people might be harmed, they had proper exigent circumstances to kick in the front door. Since the cocaine was found in plain view while still actively searching for David, it will be admissible against David. Mary lacked actual and apparent authority to consent to the search of David's text messages. Since a warrant was required for this search, they will be inadmissible against David. However, since a third party cannot assert the violation of a 4th Amendment right on behalf of someone else, even though the search was illegal, Andy will not be able to suppress it, and the text messages will likely be able to be used as evidence of probable cause to get a warrant to wiretap Andy. Andy has no reasonable expectation of privacy to the content that David texts other people.

QUESTION NUMBER 3

JULY 2021 BAR EXAMINATION – FAMILY LAW

After three years of proceedings, a trial court in North County, Florida, entered a judgment of dissolution of marriage of Mother and Father. The judgment incorporated the parties' mediated settlement agreement. Mother and Father had been married nine years before the judgment. Mother, Father, and Child were residents of North County since Child's birth five years ago and throughout the proceedings.

Under the agreement, Mother was given majority parenting time of Child, and Father was obligated to pay monthly child support and monthly permanent alimony to Mother. The agreement specifically provided that there would be no modification of the amount of alimony or of child support. The agreement was silent on the opportunity to reconsider time-sharing. It also did not address the ability to recover attorneys' fees and costs in any future proceeding.

Eight years after entry of the judgment, Father moved from North County to a town across the state line in Georgia. He is now 15 miles farther away from Mother's and Child's home. His new home is larger and fancier than his previous home, and Child has remarked to Mother about how much he likes Father's home. Mother is concerned that Father may try to modify the time-sharing order in North County court so that he would have majority parenting time with Child. She is also concerned that Father may try to modify the time-sharing order in a Georgia court because he is now a Georgia resident.

Mother also is interested in filing a petition to increase child support. She believes that Father's income has nearly tripled since the judgment of dissolution was entered. Additionally, three years ago, Child was diagnosed with a learning disability, resulting in greatly increased educational expenses incurred and paid by Mother on Child's behalf. Over those three years, Father has voluntarily made occasional payments in excess of the required child support amount to pay additional expenses for Child. Mother has never remarried and has struggled financially over the years. Her income has remained consistent since the dissolution proceedings and is very low in comparison with Father's. She is concerned about an extended dispute in the courts, and wants increase in the child support amount to date back as far as possible.

Mother also regrets the decision to waive modification of alimony and asks if it can be revisited. She also wants to know whether Father can be ordered to pay her attorneys' fees in the anticipated proceeding.

Draft a memorandum that addresses the points below.

1. Analyze the merits, and state the likely outcome, of litigation in the North County court about: (a) Father's request to modify time-sharing; (b) Mother's request to modify child support; (c) Mother's request to modify alimony; and (d) Mother's request for attorney's fees.

2. Assume that Father attempts to modify the time-sharing order in a Georgia court. Assume further that Georgia, like Florida, has adopted the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"). Analyze whether the UCCJEA would grant a Georgia court jurisdiction to modify the time-sharing order.

SELECTED ANSWER TO QUESTION 3

(July 2021 Bar Examination)

MEMORANDUM

To: Senior Attorney

From: Associate

Re: Mother and Father's Dissolution of Marriage Order and Modifications

Litigation in North County Court

Father's Request to Modify Time-Sharing

In Florida, the default time-sharing set-up is an equal sharing of time, since it is presumed that parents should equally share the joys, responsibilities, and rights of raising a child. This default can be deviated from when that would be in the best interests of the child (i.e., equal time- sharing would be detrimental) and/or the parties agree to it, as the parties' agreement can be adopted into a dissolution of marriage order as it was here. When a dissolution of marriage order includes provisions regarding time-sharing, those provisions may be modified upon a showing of a substantial change in circumstances from the time when the order was entered.

Here, Father's move may count as a substantial change in circumstances. Although parent without majority time-sharing is typically only required to get the consent of the other party or court approval when the parent moves 50 mi or more away, a move of lesser distance may still be considered a substantial change in circumstances. Further, in modifying the time-sharing order, the court will consider multiple factors contributing to the best interests of the child, including promotion of continuity in the child's life, each parent's commitment to facilitating time- sharing with the other parent, proximity of other family/support system, avoidance of disruption in the child's education, etc. The court may also consider the child's preference if the child is sufficiently mature.

The move of 15 miles probably isn't a substantial enough change in circumstances, especially since Father's opportunities to spend time with Child shouldn't be changed much by the distance. Even if it is considered a substantial change in circumstances, it is unlikely that the "child's best interest" factors fall in favor of giving Child more time-sharing. Although Child has expressed interest in having more time at Father's home, the facts indicate that Child is only 5 years old, which is unlikely to be considered sufficient maturity for consideration of the Child's preference, especially since Child's opinion seems to be based largely on how big and fancy Father's house is. There is no indication that there is additional family/support near Father's new home, nor that any of the resources there would make the home more proper for helping Child deal with his new diagnosis. Changing the time-sharing schedule would likely disrupt Child's life and, especially, education with new resources likely being implemented due to Child's learning disability, with little apparent justification. Therefore, the court is unlikely to

grant any potential request from Father to modify time-sharing such that Father has majority time- sharing. (Note that adjustment of time-sharing would likely result in correlated adjustment in parental responsibility, which would also need to be based on a substantial change in circumstances and similar best interest factors to those noted above.)

Mother's Request to Modify Child Support

Like with time-sharing, modification of child support also requires showing a substantial change in circumstances. A change in income that would lead to a 15% or $50 increase in child support obligations is typically found to be a substantial change in circumstances. If Mother is correct and Father's income has nearly tripled, a 15% or $50 increase would likely be found, and the court would likely grant modification of the child support order to have Father pay more child support. Notably, child support is intended to put a child in a position to receive the same split/amount of resources from the parents as the Child would if the parents had remained married, a goal which would be met by increasing the child support Father must pay if his income has come anywhere close to tripling.

The new learning disability diagnosis will also be considered a substantial change. Child support is meant to include support for a child's particular educational needs, which in this case have increased. Since Child's education is now more expensive, circumstances have substantially changed since child support was originally ordered, a fact which Father seems to have acknowledged through his voluntary payments. Therefore, the educational needs of Child will also justify an increase in child support from Father (and Father's past voluntary payments will not be deductions from future payments, though they also might not be usable as evidence of increased need).

Although the dissolution order contained a clause stating that child support could not be modified, this clause will likely be unenforceable as to child support. The beneficiary of child support is the child, so parents may not waive child support on a child's behalf nor agree to a reduction below the amount to which a child is entitled. The anti-modification clause would result in the latter since it would prohibit child support from being increased to be congruent with Child's needs and best interests. Therefore, the anti-modification clause will not be enforced to prohibit an increase in the child support Father is obligated to pay.

While a court can modify child support, it may not do so retroactively. Therefore, Mother will be unsuccessful in back-dating any increase in required child support from Father. If Father is behind on any child support, he will have to pay those amounts (and may be required to pay at the increased level, though this is unlikely since that would be a retroactive application of the increase).

Mother's Request to Modify Alimony

As an initial matter, unlike child support, alimony is a spouse's benefit to waive, so the clause prohibiting modification may be enforceable to prevent Mother from modifying alimony. Such a clause may be enforceable if it is reasonable and agreed to by both

parties, both of which it appears to have been here. Therefore, Mother may not be allowed to modify alimony.

If the anti-modification provision is not enforced, Mother may be able to modify alimony if she can show a substantial change in circumstances has occurred since the order set the alimony. Since alimony is largely based on a balance between the payee spouse's need and the payor spouse's ability to pay, Father's alleged large increase in income would qualify as a substantial change in circumstances. Mother's income, however, has not changed, so she cannot show substantial change based on her need.

Florida allows several types of alimony. Whether and in what amounts alimony is awarded depends on several factors, including the length of the marriage, the standard of living during the marriage, the parties' respective financial positions, the parties' respective ages, the parties' respective contributions to the marriage (including child-rearing), the parties' levels of education, and whether the parties sacrificed career and/or educational opportunities during the marriage to contribute to the marriage. Pendente lite alimony, discussed below, can be awarded during litigation to make sure the spouses are on equal footing. Bridge-the-gap alimony is awarded to help a party transition from married life to single life. That likely would not apply here since Mother has been single for 8 years (since the parties' original dissolution of marriage), so she is not in a transition period. Another type of alimony is rehabilitative alimony, which is awarded to help the payee spouse obtain the education, job training, etc. necessary to become self- supporting. The facts do not suggest that there has been a substantial change in circumstances that makes the education and job training Mother has less sufficient for her self- support now than it was when the dissolution order was granted, so the court is unlikely to modify the order to newly grant rehabilitative alimony. If neither of those types of alimony are appropriate, a court may award permanent alimony, but this is usually only awarded for marriages of long duration (those lasting more than 17 years). Mother and Father had a marriage of moderate duration (7-17 years) since it lasted 9 years, so permanent alimony is unlikely to be awarded, especially considering the facts do not indicate there is an overwhelming need. If none of the above types of alimony fit at all, a court may grant durational alimony, which is alimony lasting for the same length of time for which the marriage lasted. Here, the marriage lasted 9 years and it has been 8 years since the dissolution, so at most Mother might be able to get 1 year of durational alimony until it has been 9 years (the length of the marriage) since dissolution. Again, that alimony modification will only be made if the anti-modification clause is found unenforceable and Mother can show that Father's income has increased to the extent of being a substantial change in circumstances that would justify alimony modification. Overall, Mother is unlikely to succeed in modifying alimony so that Father is required to pay her more spousal support.

Mother's Request for Attorney's Fees

If an agreement incorporated into a dissolution of marriage order contains provision for attorney fees to be paid by one party to another, such an agreement is enforceable if reasonable. Here, however, there was no such provision in the parties' agreement or the ensuing order. Mother may still be able to get attorney fees from Father if Mother

can show she has a substantial need and Father has the ability to pay, which seems likely since Mother's income is far lower than Father's. (This would be similar to pendente lite alimony, which is awarded in dissolution of marriage cases to ensure the parties are on equal footing.) Mother may also be able to get attorney fees from Father if Mother is considered the prevailing party in her petition(s).

Father's Attempt to Modify Time-Sharing in Georgia Court and Application of UCCJEA

In order to modify a court order regarding custody (including time-sharing, as is at issue in this case) of a child, a court must have jurisdiction. In states that have adopted the UCCJEA, as Georgia (GA) and Florida (FL) have under these facts, the UCCJEA controls what state has jurisdiction. Under the UCCJEA, a court that originally issued an order has exclusive continuing jurisdiction to modify that order. Here, the North County trial court entered the original order, so they would have exclusive continuing jurisdiction. The UCCJEA also provides for home court jurisdiction, under which the child's home state--i.e., the state where the child has lived for the past 6 months or for the child's life if the child is less than 6 months old--has jurisdiction. That, too, would lie in FL, since Child has lived in North County, FL for his entire life (and did not move to GA with Father, as visits with a non-majority time-sharing parent in another state does not make that state the place intended to be the child's permanent residence as is required for home court jurisdiction). Therefore, FL would have jurisdiction both under the continuing and exclusive jurisdiction provision of the UCCJEA and as the home state, so GA will not have jurisdiction to modify the time-sharing order. Even if neither of these applied, GA would not have jurisdiction; if no court has continuing exclusive or home state jurisdiction, a court may claim substantial connections jurisdiction if that court sits where most of the evidence regarding the custody matter is. Though Father lives in GA, virtually no other evidence regarding Child's custody seems to be outside of FL since Mother and Child have lived in FL since Child was born and even Father lived there until recently; all lived there during the original proceedings deciding on time-sharing. Evidence regarding Child's best interests, including education, medical needs, community support, and other issues will all be in FL. Child has never lived in GA and there are no facts to suggest any major life events that would affect the custody issue occurred in GA. Therefore, even if FL is not found to have continuing exclusive or home state jurisdiction (which it likely will be), GA has no basis to assert jurisdiction under the UCCJEA. The UCCJEA would not grant a GA court jurisdiction to modify the time-sharing order.

QUESTION NUMBER 1

FEBRUARY 2022 – FLORIDA CONSITUTIONAL LAW/CONSTITUTIONAL CRIMINAL PROCEDURE/PROFESSIONALISM

Concerned about an increase in use of illegal synthetic cathinones, more commonly known as "bath salts," and their link to violent behavior, Crocodile County, Florida (a charter county) enacted an Ordinance providing that it is unlawful, and punishable by fine and up to 60 days in county jail, for any person to possess or transport bath salts within the County. A violation of the Ordinance "shall be prosecuted in the same manner as a misdemeanor." The Ordinance authorized the seizure, impoundment, and forfeiture of personal property used to commit, or obtained through, a violation of the Ordinance. The Ordinance does not address notice of the impoundment. A Crocodile County administrative agency rules on the forfeiture, and may condition return of the property on paying damages, both economic and unliquidated, to any victim.

A Crocodile County Sheriff's Deputy legally stopped Driver, and observed bath salts located in plain view on the passenger seat of Driver's vehicle. The vehicle was impounded. The State of Florida filed an information against Driver, charging Driver with possession of a controlled substance in violation of section 893.13, Florida Statutes. Driver entered into a plea agreement with the State.

Subsequently, Driver received a citation for violating the Ordinance. The citation instructed Driver to pay a fine or appear for an arraignment. The forfeiture of the vehicle remains pending.

Driver has retained you to represent him in connection with the citation and forfeiture. Driver is furious with the government, and tells you that he plans to treat opposing counsel with contempt, and expects that you do the same.

Please assume that the Ordinance is not preempted by any law, and prepare a memorandum addressing the arguments that Driver might raise under the **Florida** Constitution and the likely outcome of such arguments. Additionally, address Driver's statement regarding treatment of the government attorneys as it relates to Florida's Guidelines for Professional Conduct and Professionalism Expectations.

SELECTED ANSWER TO QUESTION 1

(February 2022 Bar Examination)

TO: Driver From: Attorney

MEMORANDUM OF LAW

Re: County Ordinance Legal Challenges.

Charter County Authority:

A charter county has to the authority to make laws for the health, safety, and welfare of their citizens, provided that the laws are not preempted by Florida state laws. A non-chartered county will only have the authority to create laws pursuant to the authority granted by the Florida legislature.

Here, Crocodile County is a chartered county so it will have the authority to create this ordinance to address the bath salt concerns. Preventing drug use is related to the health and safety of citizens.

Thus, this ordinance is within the county's power.

Does the ordinance meet the constitutional requirements for a law to be valid:

Every law in Florida must be clear, unambiguous, address a single subject in the title, and not be vague or overbroad.

Here, Driver could argue that the law is overbroad because it allows the County to seize, and the Driver will forfeit, personal property used to commit a violation of the ordinance. This language can be interpreted to mean any property that was used while transporting the bath salts, including a vehicle or electronic devices that were used for any purpose associated with the transportation. This argument would likely be successful to the extent that the Driver has forfeit his rights in his personal property that only has an attenuated connection to the transportation of bath salts.

Thus, it is likely that this language is overbroad and arguably unconstitutional.

Procedural Due Process:

The Florida Constitution provides the rights of procedural due process consistent with the U.S. Constitution: No person shall be deprived of life, liberty, or property without due process of law. This includes notice and a hearing.

Here, Driver is being deprived of his vehicle without any due process to explain the reason why he is transporting bath salts. The ordinance provides that a violation of this ordinance means a person forfeits personal property used to transport the bath salts. Driver may be able to argue that he is entitled to some type of hearing or trial to determine whether he should have to forfeit his property.

Additionally, Driver can argue that his Procedural Due process rights are violated for having to pay damages to any victim of the incident without a hearing or trial.

Lastly, there is no requirement that the government give any notice to the Driver when they seize his personal property. This is likely a violation of due process as well.

Thus, Driver may be successful in bringing a procedural due process challenge for the taking of his vehicle without notice or an opportunity to contest the grounds by which his personal property is seized.

Access to Courts:

All citizens of Florida are entitled to access the courts without denial, sale, or delay. If the law denies access to the courts in some manner, the government must provide a reasonable alternative. If the law does not provide a reasonable alternative, then the government must show that there is a public necessity and no other reasonable means of addressing that necessity.

Here, Driver could argue that the requirement of "paying damages to any victim, both economic and unliquidated," is denying him access to courts to address any potential civil litigation with a victim of the incident. Before paying damages, Driver should have the opportunity to retain counsel and resolve the dispute with a victim in court. Additionally, it doesn't appear from the facts that the ordinance has provided any reasonable alternative to address the injury.

The county could certainly argue that there is a public necessity to prevent distribution of bath salts, but the broad language of the statute, the restriction on access to the courts, and the damages payment are not likely to be justified.

Thus, the Driver would be successful in challenging the ordinance on the basis of access to courts.

Takings:

The Florida Constitution provides an even greater protection than the Fifth Amendment to the U.S. Constitution. Under the Florida Constitution, no person shall be deprived of their property without just compensation and the government may only take their property on a showing of public necessity. Additionally, property cannot be distributed to any private entity after it is taken. This provision of the FL constitution typically applies to issues of real property and not personal property.

Here, given that the language of the ordinance is broad enough to include property that is used to violate the ordinance, it may create an issue of takings if certain property is taken without just compensation. However, based on these facts, Driver's vehicle was impounded and he likely does not have a sufficient basis to receive just compensation.

Thus, this challenge would be unsuccessful.

Standing:

A citizen will have standing to challenge the search and seizure of their property if they have a reasonable expectation of privacy in the thing to be searched or seized. This provision in the FL Constitution is written in conformity with U.S. Constitution IV Amendment.

Here, Driver has a reasonable expectation of privacy in his own personal property and in his vehicle. While the expectation of privacy in your vehicle is certainly less than in your home, the privacy is sufficient to give Driver standing to challenge the search and seizure of his property.

Thus, Driver has standing.

Unreasonable Search and Seizure:

A search or seizure without a warrant is presumptively unreasonable. However, a search may be valid in a vehicle if the officer has probable cause that there is contraband in the vehicle or if there is an exception to the warrant requirement that applies, such as exigent circumstances or plain view doctrine. The vehicle exception provides that an government agent can search a vehicle if they have probable cause that there is contraband in the vehicle.

Here, it is likely that the search was valid because the deputy lawfully stopped driver and observed the bath salts in plain view. This is certainly a reasonable search and would also give the deputy probable cause to search the rest of the wherever contraband could reasonably be found. Given that bath salts is a small item that can be hidden in almost any compartment, the deputy would be justly within his power to search the entire vehicle.

Thus, this was a valid search and seizure of the bath salts.

Separation of Powers:

The Florida Constitution provides that certain powers are delegated to each of the three branches of government: the legislative, judicial, and executive.

Here, Driver could argue that the administrative agency, which is likely an executive branch government entity, is abridging the exclusive authority of the judicial branch of government. Under this ordinance, the administrative agency is allowed to condition return of personal property on paying damages to victims. This is likely an issue that should be resolved with civil litigation rather than an administrative decision.

Thus, this portion of the ordinance is likely unconstitutional if challenged on the basis of separation of powers.

Double Jeopardy:

A citizens cannot be punished for the same crime more than one time. Jeopardy attaches at the outset of any trial or upon sentencing. Jeopardy bars prosecution for the same crime in the same jurisdiction, unless the second crime has independent elements from the first crime.

Here, jeopardy has attached to Driver when he was punished for violating the Florida Statute for possession of a controlled substance. Subsequently, Driver received a citation for violating the ordinance, which arguably contains the same elements. The FL statute violation is for possession and the ordinance violation also includes possession. This is arguably an issue of double jeopardy and Driver may be able to argue that he cannot be fined for the ordinance violation. Additionally, the County is not an independent jurisdiction for purposes of double jeopardy, so the county would be bound by any prosecution in Florida.

The county can argue, however, that there is no issue of double jeopardy because the ordinance violation has the additionally element of transporting. If the citation is specific to the issue of transporting, then perhaps Driver will have no claim with respect to double jeopardy. If the citation is for possession, then double jeopardy will bar any further criminal punishment for this incident.

Professionalism and Florida Rules of Professional Conduct:

In the course of representation and communication with other attorneys, an attorney must not engage in any conduct that is considered to be unprofessional.

Here, Driver has stated that he wishes to treat opposing counsel with contempt and expects me to do the same. This type of attitude and conduct towards opposing counsel is plainly a violation of the rules of professional conduct. I would advise Driver not to engage in any reckless conduct while in court or through any communication with opposing counsel. Additionally, I advise that I would not be allowed treat opposing counsel in an unprofessional manner or I would be subject to discipline from the Florida Bar.

QUESTION NUMBER 2

FEBRUARY 2022 – TORTS/CONTRACTS

Frank spent an evening with his friends at AxeBar. AxeBar featured lanes where patrons could throw axes at bullseye targets. The axes were 14 inches long and weighed 1.5 pounds. Patrons would throw axes from 10 feet away and score points for hitting the target closer to the center. AxeBar rented out throwing lanes and offered food and alcoholic drinks at a full bar.

The throwing lanes were 30 feet away from the bar and table seating. Each lane was separated from adjacent lanes by strong chain-link fences that spanned from the floor to the ceiling. No patron could use a lane without first renting one from an AxeBar attendant.

Frank and his friends asked an attendant for a lane. The attendant asked each of them to sign a release form that included these two paragraphs:

> **RELEASE**: The undersigned agrees to release and hold AxeBar harmless for any injury caused on AxeBar's premises, including injuries caused by intentional or negligent conduct of AxeBar's employees or patrons.
>
> **ASSUMPTION OF THE RISK**: The undersigned assumes all risks associated with participating in axe throwing at AxeBar, including any risks that may arise from intentional or negligent conduct.

Frank crossed out the paragraphs titled "RELEASE" and "ASSUMPTION OF RISK," on his form, signed it, and handed it to the attendant. The attendant took the forms from Frank and his friends and assigned them a lane.

AxeBar had a company policy that all patrons must wear closed-toed shoes in axe throwing lanes. Frank was wearing flipflops, but the attendant forgot to check Frank's footwear.

Mimi was throwing axes in the lane next to Frank. Throughout the evening, Mimi would take breaks and go to the bar. Even though Mimi was only 20 years old, the bartender was her cousin and poured her tequila shots.

After her third trip to the bar, Mimi stumbled back to the axe-throwing area. She accidentally entered Frank's lane and picked up an axe. Mimi was startled when she realized that she was in the wrong lane. She dropped the axe. The axe blade landed directly on Frank's big toe and damaged it severely.

Frank seeks your advice. Draft a memorandum that addresses the following:

1. Discuss all potential claims Frank may assert against AxeBar and Mimi and AxeBar's and Mimi's potential defenses. Do not discuss Florida's dram shop liability statute.

2. Discuss whether punitive damages would be available to Frank in a lawsuit against AxeBar.

SELECTED ANSWER TO QUESTION 2

(February 2022 Bar Examination)

Frank v. Mimi

Negligence

Negligence requires the plaintiff prove, by a preponderance of the evidence, the following

1) Duty

2) Breach (Defendant fell short of that duty/standard of care)

3) Causation (both actual, known as "but for" and proximate, which concerns itself with foreeability)

4) Damages

There are, in Florida, certain defenses to negligence. First, we should note that Florida has abolished joint and several liability (and, to the extent a defendant wishes to raise the comparative negligence of a third party, she must Identify that party and their action in her pleadings. Florida is a pure comparative negligence state. This means that a plaintiff can recover even if she was negligent and her negligence caused part of here damages (even up to 99% of her damages--in that case, she would recover 1% of her damages from the defendant.

In the case at hand, Mimi had a duty of ordinary and reasonable care. Here, it appears she breached that duty by intentionally consuming alcohol while continuing to throw axes. Even without the alcohol, a person exercising reasonable and ordinary care does not drop a sharp metal ax weighing only 1.5. It's worth noting here, that Mimi is over 18, so, despite the fact that she is not old enough to drink, she is still held to the reasonable person standard and not the standard of a child (ages 5-18) which is a standard of reasonable child of similar intelligence and experience. Mimi will likely concede that she had a duty to act as a reasonable person (everyone does) but will counter that she was intoxicated and that caused her to drop the ax. This argument will fail as voluntary intoxication is not a defense to negligence especially when, as here, we have a dangerous (albeit fun) situation where patrons are involved in throwing at speed over 10 feet, sharp axes that are 1.5 lbs. and 14 inches long.

Incidentally, Frank may raise the issue of negligence per se. Negligence per se occurs when a defendant violates a law and that law was intended to protect against the harm the defendant caused. Furthermore, the plaintiff, who will raise negligence per se, must be of the class of people intended to be protected from the harm. Here, Mimi is under 21, is violating the law, and while violating the law (consuming alcohol underage) she causes damage to Frank (severely damaged toe). Frank will argue he is the person to

be protected, and argue a general class of people as all people because drinking is dangerous and individuals under 21 make reckless decisions when they are drunk. Therefore, the law is intended to protect Frank and all citizens. This will fail. The law, most likely is intended to protect the very individuals it restrict, those under 21. Here, the breach of the law did not cause the damages, Frank is not in the class to be protected, and the harm to be curbed was not likely accidental dropping of sharp objects. The negligence per se argument will likely fail. But good news for Frank, he will still likely succeed (as discussed below) on a claim for negligence and, perhaps, battery.

Mimi's breach of her duty of ordinary and reasonable care (she fell short of that duty, by drinking while axe throwing and dropping the axe on Frank's toe) as discussed above. The breach cause damages. Here, the breach caused "severe damage to Frank's toe.

Mimi's action is the "but for" cause of Frank's damage. But for her action of dropping the axe, Frank would not be damages.

Proximately, Mimi's actions and the related damages are foreseeable. It is foreseeable that a drunk person (or any person) may drop a heavy/large axe and as such, ordinary care requires caution. In any event, Fran, a fellow patron, is a foreseeable plaintiff and his damages are foreseeable. Proximate cause is satisfied by this.

Frank may recover damages against Mimi. He may recover damages for medical expenses (economic damages), for pain and suffering (non-economic damages), for lost work/wages, and for lost future wages (to be reduced to present value so as not to have an excess verdict).

Mimi has a number of defenses. First, she may argue that Frank assumed the risk of this inherently dangerous activity and by doing so, contributed to his injury. Because Florida is a pure comparative negligence state, Mimi will be able to reduce any damages by the percentage of Frank's fault. Mimi may also claim intoxication as a defense, but as we discussed, this will not be successful as she was voluntarily intoxicated and continued to have a duty to act as a reasonable person. Third, Mimi may claim that Frank violated the AxeBar's policy (or at least was negligent in wearing flip flops to an axe throwing bar) and that breach (or negligence) caused his damages. Again, this would reduce the damage award by Frank's negligence on a percentage basis. This argument by Mimi will likely fail (as it relates to violating AxeBar's policy) as Frank was not aware of the policy, had no notice of it, and there is no indication that AxeBar posted any warning signs. Fourth, Mimi may defend by impleading (or later suing) AxeBar and alleging that it was their negligence that caused Frank's damages. Because this is a pure comparative negligence state, Mimi would have to Identify AxeBar in her response (filing a cross-claim if they were sued together by Frank) and identify their negligence as the cause. Mimi's liability (because joint and several has been abolished) will be reduced by the amount AxeBar's (and Frank's) negligence contributed to Frank's injury. Lastly, she may argue that Frank released and waived all claims against her in the signed release. This claim is likely to fail for the reasons discussed below in Frank v. AxeBar).

Finally, Mimi may defend by saying that dropping an axe should not cause as much damage as a "severe" injury. However, in Florida, we take a plaintiff as we find him, even if he is in a susceptible positions (the egg shell plaintiff) and Frank may recover for all damages that are proximately and actually caused by Mimi's negligence.

Intentional torts

Mimi also, potentially intentionally (Mimi did not need to intent to cause the harm, only intend to cause her action) engage in an offensive or harmful touching of Frank. The intentional tort of battery for which there is no intoxication defense. If Mimi intended to drop the axe, she will be liable to the extent her battery (and assault, to the extent Frank perceived the pending harmful touching) caused Frank Damages.

Mimi may also be liable for trespass. Frank had possession of a lane by way of a valid license from AxeBar. Mimi (without privilege) intentionally caused her body to come onto the property for which Frank had a license. Frank could get actual damages and nominal damages as damages are not required for the intentional tort of trespass. Again, intoxication is not a defense to intentional torts and a person (Mimi) need not intend the consequence of her action, only her action.

Frank v. AxeBar

Negligence

As discussed above, Frank will need to prove Duty, Breach, Cause, and Damages.

Because Frank was on the property of AxeBar as a patron (there for AxeBar's business interests) he was an Invitee (a business invitee). As an invitee AxeBar ("AB") had a duty to warn of hazards not observable to Frank, duty to make reasonable inspections, and a duty of ordinary care. AB is vicariously liable (under the theory of respondent superior) for the actions of its employees to the extent those employees were acting within the scope of their duties at the time or the frction was caused (necessarily) by the employment duties. AB is not ordinarily vicariously liable for the intentional torts of employees or those torts committed outside the scope of duties.

Frank can argue that AB breached its duty of ordinary care by overserving Mimi (Frank may also raise the same negligence per se issue as discussed above because it is illegal for AB to sell alcohol to a person under 21. the same class to be protected, harm to be prevented analysis will apply and Frank will, again, likely fail on this.). Frank can argue that AB had a duty to ward of its policy disallowing open toed shoes. AB could have satisfied this duty by warning in writing, warning on the releases (with a signature that Frank knew and understood the policy) or verbally warning as the AB employee was supposed to do. this is a winning argument subject to Florida's pure comparative negligence rule that would reduce Frank's damages by the amount he was negligent (did not act as a reasonably prudent person would, i.e. wearing flops to an axe throwing bar) and the negligence of others not in AB's control.

The same discussion as above regarding proximate and actual cause is necessary here.

But for is easily satisfied. But for serving drinks to Mimi, she would not have mistaken the lanes, been startled, and dropped the axe.

Proximately, it is foreseeable that a drunk underage kid would drop (or worse, misthrow) an axe and injure a fellow patron. The damages and frank as a plaintiff are both foreseeable and cause is therefore satisfied.

WAIVER and other defenses

A quick aside on the waiver. This is a contract which would require, under the common law (this is not a sale of goods covered by UCC 2) that there be mutual assent, offer, acceptance, and consideration. The contract is not required to be in writing (Statute of Frauds only requires writing for certain contracts like service that will take more than 1 year). Common law requires mirror image meaning the offer and acceptance must mirror each other. By crossing out the Release and Assumption of Risk and signing, Frank made a counter offer that does not appear to have been accepted by AB (AB may argue they accepted by substantial performance -- renting lane and axes). Contracts also require consideration (something of legal value, benefit or detriment) and mutuality. Here there is a promise of forbearance (giving away rights) and, assuming there is language related to renting axe lanes, there is a promise by AB to rent the lane. In short, however, the release, under contract law is either an outstanding offer with no acceptance, or invalid under the mirror image rule, or otherwise exists without the language crossed out. Frank should make all these arguments to keep the release/waiver out.

A waiver also requires the party (AB here) disclose the danger, note that the activity is inherently dangerous and further note that it cannot be made safe even by the exercise of due caution on the part of AB. A person may waive certain rights, including those regarding damages flowing from the dangerous activity. On the other hand (even if the wavier is valid) Frank will argue that waving all rights, including injuries caused by INTENTIONAL torts and ALL negligence of AB is against public policy, is unenforceable, and will not limit Frank's ability to recover. AB will counter that this activity is dangerous, that patron's dropping axes cannot be made fully safe by AB, and the release is valid. This will likely fail as the release/waiver waives all causes of action against all people and entities and includes intentional torts and the negligence of others. For this reason, and others, Frank will likely succeed in arguing that the release/waiver is invalid.

AB may defend by also saying Frank assumed the risk, or that the potential harm to be caused by Mimi was open and obvious and he should have avoided the risk. This defense would allow AB to reduce the damage award. Frank may still recover to the extent AB was liable.

If Frank sues both AB and Mimi, they will be individually liable as Florida has abolished joint and several liability.

Punitive Damages.

Punitive damages must be plead specifically and are permitted when the trier of fact finds that the defendant acted intentionally or with gross negligence. Punitive damages are capped at the greater of $500,000 or 2X special damages. In limited circumstances when the plaintiff can show the defendant knew of the risk and decided to proceed for purely pecuniary reasons, the plaintiff may recover $2million or 4X special damages.

Here, Frank will argue AB acted with gross negligence. AB knew (via respondent superior and agency) that Mimi was underage. AB knew or should have known that serving underage minors at a axe throwing bar may cause significant injuries to patrons. Frank will argue that despite this knowledge and notice AB (through the theory of vicarious liability, as they are liable for the actions of the cousin/bartender employee who served Mimi) acted with reckless disregard for his safety, acted with gross negligence and that said negligence caused his damages, therefore, he is entitled to punitive damages. This will be up to the trier of facts but it does not appear Frank will be able to satisfy this high burden given the fact that

QUESTION NUMBER 3

FEBRUARY 2022 – TRUSTS

Sally was the mother of Anna and Bob. While Anna and Bob were in elementary school, Sally prepared a document that read:

> I hereby create a trust to provide for Anna and Bob in the event of my death. I name my childhood friend, Tom, as trustee. If I pass away before Anna and Bob attend college, the trust shall provide up to $200,000 for each's undergraduate education. Thereafter, the trust shall distribute $1,000 per month to Anna and Bob to supplement their income. This trust shall not be amended or revoked.

Sally took the document to Tom. She explained that she wanted to make sure that her children could attend any university that accepted them. She also told Tom that she wanted to help the children financially as adults, but not give them a lump sum of money. She was concerned that giving Anna and Bob too much money at once would encourage financial irresponsibility.

Tom reviewed the document and agreed to serve as trustee. Sally, Tom, and Tom's wife signed their names at the end of the document in each other's presence. Sally then properly transferred $400,000 from her investment account to Tom to hold in an account as trustee.

After the children graduated high school, Sally passed away. Tom told the children about the trust. Anna was already attending undergraduate school with a partial scholarship. Tom distributed a total of $50,000 from the trust to cover the remainder of Anna's tuition. Bob, a talented software coder, decided to forgo college and formed a successful startup technology company. The trust contemplated that up to $400,000 would be spent on the children's undergraduate tuition, but only $50,000 was actually distributed.

After Anna finished college, she and Bob met with Tom. Anna and Bob agreed that they should receive the remaining funds in the trust that had been earmarked for undergraduate tuition because Anna had graduated, and Bob had no interest in attending college. Tom, remembering his discussion with Sally, refused to distribute more than the $1,000 monthly payment set forth in the trust document. Anna and Bob also demanded that Tom provide an updated trust accounting, as it had been 18 months since Tom last provided an accounting.

Anna seeks your advice on whether she and Bob can modify or terminate the trust to get a lump sum distribution or remove Tom as trustee. Anna wants the money for a down payment on a house, and Bob wants to expand his business.

Prepare a memo that discusses whether:

1. Sally created a valid trust and whether the terms of the trust are enforceable after her death;

2. Anna and Bob can modify or terminate the trust without court involvement;

3. Anna and Bob have grounds for judicial modification or termination of the trust; and

4. Anna and Bob have grounds to remove Tom as trustee.

SELECTED ANSWER TO QUESTION 3

(February 2022 Bar Examination)

Memo: Re: Trust for Anna and Bob

In this Memorandum, the potential claims and options will be discussed as they relate to the trust created by Sally for potential clients Anna and Bob.

1. Validity of Trust and Enforceability after Sally's Death

To create a valid private express trust in Florida, a settlor must have i) capacity; ii) present intent to create a trust; iii) property, or 'res' distributed to the trust; iv) ascertainable beneficiaries; v) at least one trustee; and vi) a valid trust purpose. This trust seems to satisfy all such elements and is therefore a valid trust.

The settlor must have the proper capacity required for the type of trust created. Florida defaults to a revocable trust, unless there is clear language stating that it shall be irrevocable. An irrevocable trust will require the same capacity needed to permanently make a gift or irrevocable transfer. That is, they must understand the consequences of the instrument, awareness of what is being given and to whom, and not be under any means of duress or incapacity.

Here, Sally clearly states in her instrument that she the trust cannot be amended or revoked meaning it is irrevocable. There is no evidence that she was under any duress or illegal influence from either beneficiary, as they were just in elementary school. Her later conversations with Tom further evidence that she knew of the effects of the instrument and had rational basis for it. Therefore, she had proper capacity to make the irrevocable trust.

Present intent requires that the settlor intended to clearly make this instrument enforceable at the time it was signed, and not at a later date. Here, Sally explained the trust to tom and its effects. She then signed it with him and shortly after transferred the property into an account in the name of the trust. This would show that she likely had the necessary present intent.

The trust must have property owned by the settlor actually transferred into its possession to be valid, unless it is a testamentary pour-over trust. Here, this is a present express trust, and Sally had the $400,000 transferred from her individual investment account to an account in the name of the Tom in his role as trustee. Tom as trustee can hold equitable title to trust assets, and this is a valid transfer meeting the property requirement.

A trust must have valid ascertainable beneficiaries. Here, the trust language clearly names Sally's children. They are present beneficiaries because the first sentence says the trust is to provide for them in the event of her death. While they have additional contingent interests based on attending college, they also have the present interest in the monthly disbursements. An argument could be made that they are only contingent

beneficiaries based on Anna passing away before they attend college, but regardless of that clause they are still entitled to the monthly disbursements.

The Trustee must be named, and must be accept the role of trustee. Evidence of acceptance can be proven by their actions using the power of trustee. Here, Tom was made aware of his role of trustee, and signed the document. He also created an account in the name of the trust and accepted property for it, as well as dispersing the $50,000 for Anna's tuition. He therefore has met the trustee requirement.

A trust must have a valid purpose that is not illegal or against public policy. Here, the intent is to provide Sally's children with the means to attend college, and a protected, steady stream of income afterwards. Such is a valid trust purpose.

A trust will be valid after the death of the settlor if the trust meets the requirements of a testamentary instrument such as a will. A will requires a written instrument with the testator's signature at the bottom, as well as two witnesses. The same requirements of no duress, incapacity, or illegal influence apply. In this case, Sally signed at the bottom of the instrument. Tom and his wife, all in the presence of each other, signed as witnesses. Florida does not require that the trustee cannot serve as witness. Therefore, all requirements are met to make this a valid trust that is enforceable for distributions after her death.

Upon Sally's death, the condition precedent was met that neither had fully attended college before her death. Therefore, Tom had the valid power as trustee to pay the remaining amounts of Anna's tuition. While an argument could be made that the trust only expressly allowed the condition that tuition be paid if the child had yet to attend college before Sally's death, a court would likely look at the intent of the settlor. Here, the intent of the condition was to provide her children with the financial means to attend college. The purpose was to provide the tuition for the full extent of the undergraduate education, which routinely spans 2-4 years. Therefore, the payments for the remainder of her college tuition would be seen as valid distributions.

2. <u>Modification or Termination of the Trust without Court Involvement</u>

After the death of the settlor, an irrevocable trust may in certain circumstances be modified without court involvement, if all the trustees and beneficiaries unanimously agree that the trust no longer serves its material purposes. However, the trustee can deny such modification or termination if in good faith he or she believes that the trust still has a valid purpose.

In this case, Sally told Tom that the purpose of the trust was to ensure that her children could attend any university that accepted them. In addition to the college funds, she wanted to make sure that they were helped out financially as adults. She expressly voiced a concern about giving the children a lump sum of money, as it would encourage financial irresponsibility. The trust still has the purpose of the $1,000/month payment to each child. This is not a discretionary trust where the trustee is given discretion to determine when and how much to distribute to the beneficiaries. He is instead bound to the express terms of the monthly distribution at a set value.

The beneficiaries, Anna and Bob, unanimously want to modify or terminate the trust. However, the post-college purposes listed above are still valid purposes for the trust that Tom has good faith reason to uphold. Therefore, Tom is within his rights to deny any such modification or termination. There is no evidence that Tom is using bad faith to keep the trust going despite no purpose, such as for the purpose of collecting trustee fees. Therefore, Anna and Bob will likely be unsuccessful in their modification attempts through the trustee.

3. Judicial Modification or Termination of Irrevocable Trust

In addition to modification or termination through a trustee, beneficiaries where a settlor is deceased can seek judicial modification or termination of a trust that's purpose is materially being frustrated. The court must find that the initial purpose of the trust is not valid, not feasible, or not in the best interests of the beneficiaries based on the current situation that was not considered at the time of trust creation. The court will look to the intent of the settlor both through express trust provisions and extrinsic evidence for guidance.

In this case, Sally had intended up to $200,000 to go towards each child's education, and the remaining funds be sent in monthly installments of $1,000 to supplement their incomes. There is no other purpose to any other beneficiary than besides Anna and Bob. However, due to circumstances unrelated to any irresponsibility of the beneficiaries, only $50,000.00 was used for their undergraduate educations. Therefore, $350,000 is left for their benefit as present beneficiaries. With the current $1,000 monthly distributions, it would take 1750 months, or approximately 145 years, to fully distribute the amounts to both children. This is clearly outside the intent of the settlor at the time of the creation. Her intent for their post-college life as adults was to use the trust property to help them financially. There is no evidence that Sally intended for any funds to be available for any remainder beneficiaries after Anna and Bob. In fact, she states that the purpose is for Anna and Bob's adult lives. Therefore, the court has the ability to modify the trust to better serve this purpose.

The court is unlikely to terminate the trust and award the full amounts to Anna and Bob. Sally clearly expressed a desire for monthly disbursements to supplement their income, as evidenced by the language in the trust. Outside the trust, she expressed a concern to Tom that she didn't want them to receive lump sums of money that would encourage financial irresponsibility. The court should take these settlor intents into their decision making, and it would likely lead to them not terminating the trust and handing the remaining funds to the beneficiaries outright.

A better option the court would take is to simply increase the monthly distributions based on the large amount of funds remaining. Her concern was that they would use the funds irresponsibly. However, both beneficiaries has provided evidence of valid responsible uses of the funds - either to use to put a down payment on a house, or expand a business. Therefore, the court would be able to modify the terms of the trust to allow for a more equitable distribution of funds to the beneficiaries, likely by increasing the monthly distributions.

4. Grounds to Remove Tom as Trustee

A trustee has many duties to the beneficiaries, such as a duty of loyalty, duty to diversify assets, etc. Included in that duty of loyalty is the general standard of acting in the beneficiaries best interests. Breaches would include self-dealing, conflicts of interest, commingling funds, and failure to abide by these duties can be grounds for removal. Absent express language, beneficiaries cannot remove a trustee without cause. Trustees also have a duty to inform, which includes providing accountings of the trust to the present beneficiaries, no less than annually.

Here, there is no evidence that Tom breached his duty of loyalty to the beneficiaries. There is no evidence he had any sort of unfair self dealings, or put himself or any other interest above the beneficiaries. The fact that he was abiding by the $1,000 express monthly distribution is not evidence that he was acting against their interests. He faithfully made the required distributions for Anna's college funds, and the $1,000 monthly distributions. This is not a discretionary trust and he did not have the discretionary power to increase the payments as the beneficiaries wished. However, he did breach his duty to inform by letting 18 months lapse since providing the last accounting. While this is a breach, it is likely not sufficiently at the level to remove him as trustee, so long as he provides an accounting in a reasonable time within the notice, and does not let a pattern of such lapses occur. Anna and Tom would have to prove that his failure to inform, which was just 6 months delinquent, was an intentional act by Tom in bad faith against them.

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 57 and 58.

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.

40 SAMPLE MULTIPLE-CHOICE QUESTIONS

1. One week before the close of discovery in a civil case, Plaintiff considered voluntarily dismissing her action. Plaintiff had never voluntarily dismissed her action. Plaintiff expected that Defendant would move for summary judgment shortly after the close of discovery. Which is true?

   (A) Plaintiff may voluntarily dismiss without leave of court, but the court may assess costs against Plaintiff.
   (B) Plaintiff may voluntarily dismiss without leave of court, and Plaintiff would have to pay costs only if Plaintiff brought the same claims against Defendant again.
   (C) Plaintiff would be subject to taxation of costs only if the court entered a dismissal with prejudice.
   (D) Plaintiff would be subject to taxation of costs only if Defendant prevailed at trial.

2. Dennis was charged with burglary and grand theft. At trial, Dennis called his wife in his case-in-chief to testify that Dennis was known throughout the area where they live as an honest person. The prosecution objected. The testimony is

   (A) admissible as character evidence.
   (B) admissible as impeachment of the alleged victim.
   (C) inadmissible as improper opinion testimony.
   (D) inadmissible as improper reputation testimony.

3. Plaintiff alleges an injury was sustained when a stack of canned goods fell on her in defendant's supermarket. During its defense, the supermarket attempts to offer testimony tending to show the procedures of its supermarket as to displaying and piling canned goods for the consideration of the jury on the question of negligence. Under the Florida Evidence Code,

   (A) the evidence is irrelevant.
   (B) the evidence is admissible only if corroborated by a written policy or procedure addressing the practice.
   (C) the evidence is admissible if it is routine practice of the supermarket.
   (D) the evidence is admissible only if there is a universally accepted method used in the trade.

4. Toymakers, Inc. is a Georgia corporation transacting business in Florida. Until it obtains a certificate of authority to transact business in Florida, which of the following activities is Toymakers prohibited from doing in Florida?

   (A) Maintaining a proceeding in any court in Florida.
   (B) Defending a proceeding in any court in Florida.
   (C) Obtaining orders by mail from Florida residents which require acceptance in Georgia.
   (D) Selling its products through independent contractors in Florida.

5. Frank was arrested and charged with a felony. In response to his attorney's request for discovery, the State should provide certain information. Which of the following is the State NOT required to produce?

   (A) Results of physical or mental examinations, scientific tests, experiments or comparisons.
   (B) All portions of recorded grand jury minutes that pertain to Frank's case.
   (C) All tangible papers or objects that the State intends to use at trial, whether the papers came from Frank or not.
   (D) The names and addresses of all persons known to have information that may be relevant to the offense charged.

6. Nancy Quinn had two sons, Earl Quinn and Brent Quinn, before she married Al Green in 2014. In 2016, 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, 2018, Nancy and Al were divorced, but Nancy never got around to making a new will. Nancy died this year, 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 purchased 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. Dan was served with a subpoena to appear and testify at a civil trial by a 19-year-old process server. The process server lied about his age to get the job. The subpoena was issued by an attorney of record in the case and not by the clerk of the court.

    Dan would rather stay home than attend the trial. Dan consults with his attorney to find out if he must comply with the subpoena. The attorney should tell Dan to

    (A) comply with the subpoena to avoid the risk of being held in contempt by the court.
    (B) object to the subpoena because it should have been issued by the clerk of court, not an attorney in the case.
    (C) object to the subpoena because it was served by a 19 year old and, under Florida law, a process server must be no less than 21 years of age.
    (D) object to the subpoena because a subpoena can only be used to compel an individual to appear for a deposition or to produce documents.

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.

13. Vehicles driven by Murphy and Goode collided at an intersection where a traffic light is present. Before the filing of any lawsuit, Murphy told Goode that he ran the red light and offered to settle the claim for $500. Goode refused to accept it. Murphy sued Goode for his personal injuries and property damage and Goode, who was not injured, counterclaimed for property damage.

    At trial, Goode's attorney called his client to the stand and asked 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. Peter is the named plaintiff in a class action lawsuit alleging that a local cell phone store had engaged in unfair or deceptive trade practices in its sales of cell phones. In the complaint, Peter sought damages on behalf of himself and a class of all other customers who had purchased cell phones from the store. In order for Peter to maintain the class action, the court must find that

    (A) The class members' claims contain no questions of law or fact that affect only individual members of the class.
    (B) Peter can fairly and adequately protect and represent the interests of each class member.
    (C) Allowing separate claims from individual class members risks inconsistent or varying adjudications.
    (D) None of the above.

15. Leon died intestate owning Florida homestead property titled in his own name. He resided on the property for many years prior to his death. He is survived by his widow, Charlotte, and an adult son by an earlier marriage, Bob. Leon purchased the homestead property with his own funds during the time of his marriage to Bob's mother. Proper disposition of the homestead property is

    (A) fee simple to Charlotte.
    (B) Bob and Charlotte as tenants in common.
    (C) life estate to Charlotte, vested remainder to Bob.
    (D) Bob and Charlotte as joint tenants with right of survivorship.

16. M Corp.'s only assets are machines now in storage. One of its directors is approached by a party interested in buying all of the machines. Which is true regarding the sale of assets?

    (A) The board must consult with shareholders but can sell the machines even if a majority of the shareholders recommends against the sale.
    (B) A majority of the shareholders entitled to vote on the matter must vote in favor before M Corp. can sell the machinery.
    (C) The proposed transaction does not implicate the shareholders' appraisal rights.
    (D) Two-thirds of the board of directors must vote in favor before M Corp. can sell the machinery.

17. The court referred a civil case for mediation on April 1. On April 10, the mediator set an initial mediation conference on April 30. Plaintiff's attorney served a set of interrogatories one week before the case was referred to mediation. Which is true?

    (A) A referral to mediation tolled the time for Defendant to respond to Plaintiff's interrogatories from April 10 to April 30.
    (B) Defendant did not have to respond to the interrogatories until the mediator declared an impasse.
    (C) The referral to mediation automatically added 30 days to the time period to respond to any discovery.
    (D) The referral to mediation did not affect the time period for Defendant to respond to Defendant's interrogatories.

18. William, who solely owned a legal homestead, passed away leaving Lynn, his spouse, and Christopher, their minor child. In his will, William left the homestead to his disabled cousin, Daisy, so that Daisy may have a safe place to live. Lynn contests the devise of the homestead. How will the court rule?

    (A) By allowing the homestead to pass to Daisy.
    (B) By allowing the homestead to pass to Daisy as a life estate with a remainder to Lynn.
    (C) By awarding the homestead to Lynn.
    (D) By awarding the homestead to Lynn and Christopher in equal shares.

19. Mary's grandmother, Helga, died several weeks ago. Mary knows her grandmother had a will, but she cannot find it, nor can she find a copy of it. She knows that her grandmother left her a rather large portion of her estate valued at three million dollars. Which of the following is correct?

    (A) Since the will cannot be found, the law will treat Mary's grandmother as if she died intestate.
    (B) The content of the will can be proved through Mary's testimony.
    (C) The content of the will must be proved by the testimony of at least one disinterested witness.
    (D) The content of the will must be proved by the testimony of at least two disinterested witnesses.

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. Paula is the mother of three children. One child, William, shares Paula's passion for flying. Paula is no longer married to the three children's father, Harry. When William reached eighteen years of age, Paula gave William her bi-plane worth $120,000 and said to William, "William, I know you love this plane. I give it to you now in advance since you will inherit the plane one day anyway."

    Paula subsequently died without leaving a will. At her death, her estate was worth $240,000. Which is true regarding the disposition of Paula’s estate?

    (A) Each of Paula's children will receive $120,000, except for William who will receive nothing.
    (B) Each of Paula's three children will receive $80,000.
    (C) Harry will receive $20,000 plus one-half of the residue of the estate and the three children will share the other one-half of the residue equally.
    (D) Harry will receive $20,000 plus one-half of the residue of the estate and the children, except for William, will share the other one-half of the residue equally.

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. Plaintiff sued Defendant for conversion of stock certificates of ABC Corporation. During the subsequent civil trial, Plaintiff offers into evidence a copy of <u>The New York Times</u> to establish the price of ABC stock on the day of the alleged conversion. Defendant objects on grounds of hearsay

    Assuming that the trial judge overrules the hearsay objection, what evidence, if any, would Plaintiff need to present to authenticate the newspaper?

    (A) No evidence is required because the court overruled the hearsay objection.
    (B) No evidence is required because the document is self-authenticating.
    (C) Authentication must be established by introduction of the document accompanied by an affidavit from a records custodian at the newspaper.
    (D) Authentication must be established by introduction of the document through the testimony of a witness with knowledge that the document is what it is claimed to be.

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 made a will leaving all of her stocks to Lou and the rest of her estate to Beth. Several weeks later, she created a codicil to the will that devises her jewelry to Ann. Jill and Beth had a fight and Jill mistakenly ripped up the codicil rather than the will. Jill dies. Which 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 called Witness to testify. Witness testified 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. Andy and Donna form an LLC and are the only members. Andy contributes a tract of commercial real estate to the LLC. Donna contributes $150,000. Which is true?

    (A) Andy and the LLC are co-owners of the commercial real estate.
    (B) Donna and the LLC are co-owners of any property that is acquired with the $150,000.
    (C) The LLC is the sole owner of the commercial real estate and any property that is acquired with the $150,000.
    (D) None of the above.

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. Scott, Joyce, and Mitch formed a member-managed LLC. On January 1, Mitch dissociated from the LLC. Two years later, Mitch sent a demand letter to the LLC seeking to review the LLC's the prior year's federal income tax return. In his demand, Mitch provided 10 days' notice to review the records at the physical address of the company at 1:00 p.m. The LLC refuses to provide Mitch with this information. What is the LLC's best argument for not providing the information sought?

    (A) Mitch is no longer a member of the LLC
    (B) The tax return sought does not pertain to the time period when Mitch was a member
    (C) The demand does not provide for sufficient notice
    (D) None of the above; the LLC must allow Mitch to review the records.

36. Henry is charged with criminal mischief for destroying his wife, Whitney's, car. At trial, Whitney testifies that while in bed one night, Henry admitted destroying her car because she accidentally scratched his car. Henry objects to this testimony as protected under the husband-wife privilege. The Court will

    (A) sustain the objection, only if Henry reasonably expected that his statement to Whitney was confidential.
    (B) sustain the objection, because the husband-wife privilege allows Henry to prevent Whitney from disclosing his statement.
    (C) overrule the objection, because Henry is charged with a crime against his spouse's property.
    (D) overrule the objection, because Whitney voluntarily disclosed the communication and waived the husband-wife privilege.

37. Ava, Billie, and Courtney were traveling in the same car when a pickup truck hit their car. They were injured in the accident, and each filed a separate action against Della, the driver of the truck.

    Before trial, Della moved to consolidate the three actions into one trial. Ava consented, but Billie and Courtney objected. Which is true?

    (A) The court cannot consolidate the three actions over the objections of Billie and Courtney.
    (B) The court cannot hold separate trials on damages if it holds a consolidated trial on liability.
    (C) The court can consolidate the three actions only if all plaintiffs consent.
    (D) The court can consolidate the three actions if they involve a common question of law or fact and consolidation would not deprive a party of a substantive right.

38. Daisy was charged with driving under the influence after she crashed into Pete's car. Daisy offered to plead guilty to a reduced charge of reckless driving. The State and Daisy did not reach an agreement and went to trial. Daisy was acquitted.

    Pete sued Daisy for damages arising from the crash. At the civil trial, Pete's attorney asked Daisy if she offered to plead guilty to any criminal charge relating to the crash. Daisy's attorney objected. Which is true?

    (A) The offer to plead guilty is admissible because it is not offered for the truth of the matter asserted.
    (B) The offer to plead guilty is admissible because it is an admission by a party opponent.
    (C) The offer to plead guilty is inadmissible unless Daisy is unavailable at the civil trial because it is a declaration against interest.
    (D) The Florida Rules of Evidence state that offers to plead guilty are inadmissible.

39. At 10:00 a.m., January 15, a drugstore, Prescriptions, Inc., was robbed by two armed men wearing red handkerchiefs over their faces. A medicine bottle containing narcotic pills along with $148 in small bills was stolen.

    Steve was picked up, searched, interrogated, and fingerprinted. Steve's fingerprints matched those found at Prescriptions, Inc.

    During his deposition, Charles, a clerk at Prescriptions, Inc., gave a detailed description of the two robbers and identified a photo of Steve as one of the robbers. Steve was represented at the deposition by court-appointed counsel, who made no effort to cross-examine Charles. Charles died before trial.

    At trial, the state attempted to introduce Charles' deposition testimony. Steve objected. Which is true?

    (A) The deposition testimony is inadmissible hearsay.
    (B) The court should not admit the deposition testimony because it would violate Steve's constitutional right to confront the witnesses against him.
    (C) The deposition testimony is admissible regardless of whether Charles was available to testify.
    (D) The deposition testimony is admissible under an exception to the hearsay rule that applies only when the declarant is unavailable.

40. During an investigation, Reynolds gave an unsworn statement to a State Attorney's investigator that implicated himself and Sorensen in a criminal scheme to defraud investors. Shortly after making the statement, Reynolds was killed.

    In a subsequent trial of Sorenson for criminal fraud, the prosecution called the investigator and asked her to recount what Reynolds said during their interview. The defense objected to the testimony on hearsay grounds. The testimony is

    (A) admissible as an admission.
    (B) admissible as a statement against interest.
    (C) inadmissible because the statement was not made in furtherance of the conspiracy.
    (D) inadmissible because the investigator's testimony about Reynolds' out-of-court statement is hearsay within hearsay.

ANSWER KEY FOR MULTIPLE-CHOICE QUESTIONS

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

25	(B)
26	(B)
27	(C)
28	(C)
29	(A)
30	(C)
31	(A)
32	(C)
33	(D)
34	(C)
35	(B)
36	(C)
37	(D)
38	(D)
39	(D)
40	(B)