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Florida Bar Examination Study Guide and Selected Answers

July 2001

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Florida Bar Examination Study Guide and Selected Answers

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PART I

JULY 2001 AND FEBRUARY 2002 FLORIDA BAR EXAMINATIONS

ESSAY QUESTIONS AND SELECTED ANSWERS

Part I of this publication contains the essay questions from the July 2001 and February 2002 Florida Bar Examinations and one selected answer for each question.

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

Applicants are given three hours to answer each set of three essay questions. Instructions for the essay examination appear on page 3.

ESSAY EXAMINATION INSTRUCTIONS

Information Relative to Answering Bar Examination Questions

Applicable Law

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

Acceptable Essay Answer

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

Q QUESTION NUMBER 1 (July 2001 Bar Examination)

When Husband and Wife divorced in Florida two years ago, they resided a mile apart. The final judgment awarded shared parental responsibility for Child (their son, age 10). Child's primary physical residence was with Wife, and Husband had access to Child on alternating weekends, one weekday evening, alternating holidays, and five weeks in the summer. There was no restriction in the judgment concerning Wife's relocation with Child to another state. The judgment contained no specific reservation of jurisdiction.

One year ago, Wife moved to Georgia with Child and enrolled him in school. Husband continued to see Child approximately one weekend per month in Georgia, but was not able otherwise to visit with Child during that time because of the distance. Wife remained in Georgia until three months ago, then moved with Child to Maine.

Husband continued to live in Florida where he filed last month for modification of the primary residence of Child, alleging as grounds that Wife's relocation of Child interfered with his right of access.

Wife contested Florida's jurisdiction and filed modification actions simultaneously in Maine and Georgia to change Husband's visitation schedule.

You are the clerk for the Florida judge before whom Husband's modification petition is pending. Judge asks you which state has jurisdiction of this matter. Judge also asks you how a Florida court should rule on Husband's modification petition. Prepare a memorandum of law addressing fully Judge's questions including the reasoning for your answers.



SELECTED ANSWER TO QUESTION 1 (July 2001 Bar Examination)

Question One: Jurisdiction

Despite the fact that the original judgment did not expressly reserve jurisdiction, Florida is still the appropriate forum. Under the Uniform Child Custody Jurisdiction Act (UCCJA), which Florida has adopted, the court which originally awarded custody will retain jurisdiction over the matter. This is to avoid snatching by one parent and fleeing to another forum to contest an order that the parent does not approve of. Also, the Maine court must give full faith and credit to the Florida judgment.

Florida has continuing jurisdiction in this case because Father (Husband) remained here. This is all that is necessary for the original court to remain the appropriate jurisdiction. Although Mother (Wife) would argue that Maine is now the appropriate forum because Child resides in Maine, this is an incorrect assertion under the UCCJA. The only way for jurisdiction to change would be if all parties no longer resided in Florida, there was an emergency in another state and jurisdiction was necessary to protect Child from harm, or the Florida courts decided that another state could more appropriately exercise jurisdiction (for convenience of parties, witnesses, etc.). Unless Florida expressly declines jurisdiction, which there is no reason to do, Maine can not accept jurisdiction because all states have adopted the UCCJA in one form or another and would be bound by the rules set forth above.

Additionally, although the facts do not make this issue clear, it is possible that Mother (Wife) fled the state with Child in order to deprive Father (Husband) of his visitation rights. If this is the case, and Father (Husband) is able to successfully assert this, no forum to which Mother (Wife) flees may entertain jurisdiction under the UCCJA or the Uniform Kidnapping Protection Act. However, it does not appear as if Father (Husband) would be successful on this claim because he continued to exercise visitation in Georgia without complaint. Nonetheless, Florida remains the appropriate forum.

Question Two: Husband's Modification Petition

The primary question in determining an initial grant of custody (in Florida, known as primary physical residence) or in modifying custody is: What is in the best interests of the child? Once the initial custody award has been made, courts will modify the judgment only upon a showing of substantial change in circumstances. This is a very high burden for Husband to meet. He would need to show an actual detriment to Child such that not changing his primary physical residence would cause him harm. Courts are generally reluctant to find this harm. Indeed, Florida courts have found that abuse to the custodial parent or drug use by the custodial parent are insufficient grounds for changing primary physical residence. Husband would basically need to allege either mental or physical abuse to child. Because child is 10 and capable of testifying, the court should be able to readily determine whether such grounds exist.

Because the original award did not restrict Wife's ability to relocate, Husband would not even have grounds to argue that she is flaunting the ruling of trial court by infringing Husband's grant of visitation. Although courts want to foster the healthy relationship between non-custodial parents and their children, custodial parents are allowed to relocate for basically any good reason. A showing by

wife that she moved to obtain a better education (for herself or child), a better job, or to be closer to family will generally be sufficient. If Husband wanted to enjoin Wife from moving with Child, he should have filed an emergency injunction action before she left Florida. In fact, Husband's acquiescence in Wife's move to Georgia (by continuing to exercise visitation there and not filing an action) might be seen as a waiver.

However, despite the fact that Husband should be unsuccessful in his petition to modify custody, the court should divide visitation and transportation costs between Husband and Wife. Husband should not have to bear the expense of travel for himself or Child for visitation alone. If the parties do not have sufficient financial means to pay for transportation, so that Husband would be completely deprived of all visitation with Child, this might be a ground for enjoining Wife's move, but probably would still be insufficient to change custody. Moreover, since Florida no longer has personal jurisdiction over Wife (she left the state a year ago), an injunction would come too late.

In conclusion, the Florida court still appropriately exercises jurisdiction over this case under the UCCJA. However, Husband's petition for modifying primary physical residence should be denied absent a showing of abuse to child. Nonetheless, this court should order Wife to continue sharing parental responsibility with Husband and to split travel expenses necessary for him to exercise visitation. The court could, in its discretion, modify visitation time to be more consistent with the actual time Husband can visit Child given the distances between them.

QUESTION NUMBER 2 (July 2001 Bar Examination)

Mr. and Mrs. Elder moved to a condominium in Florida four years ago; title to the condominium is in Mr. Elder's name only. From May through November, they live in the condominium; from December through April, they rent the property to tourists and live in a home that they jointly own in North Carolina.

This past January (while they were in North Carolina), Mrs. Elder fell and had a serious head injury. During his wife's extensive hospitalization, Mr. Elder became depressed. Al, the Elder's adult son, suggested that his father come to Florida for a visit. When Mr. Elder arrived in Florida, Al, without authority and over Mr. Elder's objection, moved him into a county-owned and operated nursing home. Mr. Elder tried to leave the nursing home on several occasions, but the staff prevented his departure. He has been placed in a wing of the facility that is kept locked.

With hospital and nursing home bills piling up and the condominium vacant since April, Mr. Elder signed the deed to the Florida condominium over to Al, and the property was sold by Al to Mr. Buyer in October of this year. The proceeds of the sale were placed in an escrow account for Mr. Elder, but the hospital and the nursing home have filed actions seeking reimbursement from the escrow account for the amounts owed.

Mrs. Elder, fully recovered, was released from the hospital in November. From her home in North Carolina, she contacts you. She opposes the sale of the condominium and she doesn't believe that her husband ever really needed to be in a nursing home. Mrs. Elder asks you to tell her what she can do about the condominium sale and what she can do about the confinement of Mr. Elder.

Prepare a memorandum that analyzes the Florida Constitutional implications of the sale of the condominium and Mr. Elder's confinement in the nursing home. Also discuss any action for compensatory or actual damages that might be available under Florida law against the nursing home, and possible defenses available to the nursing home. Do not discuss punitive damages.



SELECTED ANSWER TO QUESTION 2 (July 2001 Bar Examination)

This is a real estate, constitutional law, and torts question raising issues concerning the homestead rights in one's property under the Florida Constitution, the right to due process before being committed, and false imprisonment and the viscous liability of governments for their employees' acts.

Homestead

Under the Florida Constitution, residents of Florida may claim their primary residence as their homestead, making the residence exempt from being taken to satisfy claims of creditors, among other rights. There is no filing requirement to declare a residence as homestead property, except insofar as a filing is required with the local tax assessor to claim the homestead exemption for a reduction in valuation of the home for taxing purposes. Otherwise, the owners were living in the home with the intent that it be their primary residence, gives rise to the Homestead exemption. The homestead statutes extends to 1/2 acre of such property inside a municipality, and to up to 160 acres outside a municipality. Condominiums can be someone's homestead.

Here, the Elder's lived in the condo for 7 months each year. This is over 1/2 of the year, so they may argue that the condo was their homestead, if they affirmatively plead that the condo in Florida, and not the North Carolina home, was their primary residence. The fact that they rented the property to others while in North Carolina does not nullify the homestead status, so long as the Elder's intended to return to the condo and claim it as their primary residence. Further the fact that they intended to return to the Florida condo, and would have but for Mrs. Elder's injury and the sale of the condo is strong evidence that they had not abandoned the condo as their homestead. A homestead is abandoned only when the owners manifest an intent, expressly or impliedly, that they don't intend the property to be their homestead anymore.

Real property is presumed to be held by the entireties (the married couple) in Florida so long as the parties are married at the time the title is conveyed to one or both of the parties. This presumption arises even if only one of the party's names appears as grantee on the deed. Further, any interest in homestead property that is being conveyed requires the joinder of both spouses in the conveyance.

Therefore, in this case, Mrs. Elder owned an interest in the condo homestead even though her name did not appear on the deed, because they were married when they moved into the condominium. Thus, Mrs. Elder was required to sign any deed, conveying the property to Al, so as to signify that she consented to the conveyance and release of her rights in the homestead. She did not sign the deed, therefore, her interest was never released, and she may sue to eject the new owner and to otherwise quiet title to the condo. Mr. Elder may also argue that his signature on the deed was obtained under duress, because he is being confined against his will, but there is no need to make this argument, as Mrs. Elder's claim is strong enough.

Nursing Home Violations

For a violation of a citizen's constitutional rights to occur, there must first be an action taken by the state or one of its counties, municipalities or other divisions. Secondly, this action taken (or not taken) must be in violation of the citizen's rights as granted in the Florida or U.S. Constitutions.

Citizens are entitled to notice of a proceeding against them, and an evidentiary hearing before they are confined against their will by the state, whether the confinement is punitive or for the citizen's own safety. Here, Mr. Elder has been confined against his will and without his consent by the county government in its nursing home. While the county may attempt to argue that Mr. Elder has consented to the confinement in their defense, it is clear that his son committed him to the nursing home without his consent as manifested in his various attempts to leave. There is further no evidence that he is a danger to himself or others which could give rise to a justification for the confinement. Indeed, no hearing has ever been held to hear any such evidence or even to determine if such evidence exists. The nursing home has violated Mr. Elder's constitutional rights to due process of law before depriving him of his liberty. It has failed to hold an evidentiary proceeding before confining him against his will.

As a side note, Mr. Elder may also make a claim against the county for false imprisonment: the intentional confining of a person without their consent. A county government in Florida is vicariously liable for the torts of its employees, unless the alleged tort was caused in the planning functions of government. Here, there is evidence that the county's employees are intentionally confining Mr. Elder without his consent as evidenced by their closing and locking of the doors each time he attempted to leave. While sovereign immunity applies to planning or discretionary functions of government employees, these actions of locking the doors are operational in nature, because it is the employees' duty to safeguard the patients in the home. However, Mr. Elder's damages will be capped at \$100,000.00 for the violation. If he succeeds in a judgment for more, he will have to get a bill passed in the Florida Legislature, authorizing the higher payment.

Remedies

As stated above, the sale of the condominium may be set aside and the new owner summarily ejected. The new owner will be entitled to his money back plus any damages that he may bring in a cause of action against AI for breach of any warranties in the deed from AI to him. The new buyer may also have a claim against his title company and a claim for malpractice against his attorney (if he had one) who conducted the closing.

Mr. Elder may file a Writ of Habeas Corpus against the director of the nursing home, requesting a hearing and immediate release. He may also file, if his confinement is determined to be wrongful and against his consent, a false imprisonment action against the county. The county may raise sovereign immunity as a defense. However, this would likely only succeed in capping their damages liability and not in nullifying it. He is also entitled to receive any money back that he paid for the nursing home care. However, the nursing home would likely succeed on a claim in a certain quantum meruit against Mr. Elder if it could show that it conferred a benefit on him (shelter, food, etc.) with the expectation of being paid, and Mr. Elder did receive the benefit. However, if the confinement was wrongful, they may only recover the actual value of the care, and no profit.

The nursing home may attempt to obtain a judgment for their overdue bill and levy on the escrow account being held for Mr. Elder. However, the account consists of proceeds from the sale of the homestead which Mr. and Mrs. Elder likely intend to apply to the purchase of a new homestead, or repurchase of the old one. As such, the homestead exemption applies to the proceeds as well, and is therefore out of the nursing home's power to levy.

Q QUESTION NUMBER 3 (July 2001 Bar Examination)

Teen is 18 years old and lives with his parents in Lakeland, Florida. While Father was away, Teen took Father's truck to visit a friend who lived about 40 miles away in Orlando. Father normally allowed Teen to use his truck, but was unaware that Teen had taken it this specific time.

On the way to Orlando, Teen stopped to get a six-pack of beer at Beverage Store, where Clerk was working. Clerk did not ask Teen for any identification and sold him the beer. After drinking six beers, Teen fell asleep at the wheel and drifted over the center line, colliding with Driver's car. Driver was properly within her lane at the time of the collision. Driver was not wearing her seat belt and, although it was dark out, did not have her headlights on. Driver suffered permanent injuries.

You are an associate in a two-lawyer general practice law firm. Driver wishes to retain your firm. Neither you nor your partner has ever handled a personal injury case but you have both discussed a desire to expand the firm's practice into that area of law.

Partner has asked you to prepare a memorandum of law setting forth the claims Driver may have and the possible defenses. Partner would also like for you to address the standard for punitive damages in Florida. Lastly, Partner is considering whether to refer this case to a personal injury law firm to handle if that firm will equally split its contingent fee with your firm. Your memo should address whether such a referral is necessary and whether the proposed fee arrangement would be permissible.



SELECTED ANSWER TO QUESTION 3 (July 2001 Bar Examination)

Question 3

This is a torts question that raises issues of negligence, dangerous instrumentalities, "tavernkeeper" liability, vicarious liability, punitive damages, professional duty of competency for attorneys, and contingency fees in personal injury cases. I will address the torts first with respect to each potential defendant and then address the ethical issues.

Driver v. Teen: Driver can assert a claim of negligence against Teen. In order to recover for negligence, Driver must show that Teen owed Driver a duty of care, that Teen breached that duty, and that the breach was the proximate and actual cause of Driver's damages.

Driver should have no problem satisfying these elements. Teen owed Driver a duty to drive carefully and sober. Teen breached that duty by driving under the influence of alcohol. This breach directly caused an automobile accident which caused Driver's permanent injuries.

Driver might also be able to establish negligence automatically by proving negligence per se. Negligence per se automatically establishes negligence if Driver can show that Teen violated a statute, that Driver is a member of the class that the statute is designed to protect, and that the harm that occurred is of the type that the statute is designed to prevent. In this case, Driver can show that Teen violated a statute outlawing driving while intoxicated, which is designed to protect other drivers on the road, such as Driver, from accidents caused by intoxicated drivers such as Teen. Thus, Driver should be able to establish negligence per se against Teen.

Teen can attempt to limit his liability by showing that Driver was comparatively negligent. Florida follows pure comparative negligence rather than contributory negligence, which means that the victim will be able to recover regardless of how negligent victim was (unless victim was legally intoxicated and greater than 50% at fault). In comparative negligence, a jury will assign percentages of fault to both Driver and Teen. Driver will only recover from Teen the percentage of Driver's damages that corresponds to Teen's percentage of fault.

Here, Driver was also negligent in failing to wear a seat belt (which is not negligence per se in Florida) and in failing to use headlights in the dark (which might be negligence per se if there is a statute requiring the use of headlights in the darkness). Thus, Driver's recovery will be limited by whatever percentage of fault Driver's negligence is considered to be.

Punitive Damages Considerations: Driver will also be able to recover punitive damages against Teen. In Florida, punitive damages are available if a defendant's actions were "willful and wanton." Drinking six beers would most likely satisfy this standard. Punitive damages are normally limited to three times the amount of actual damages or \$500,000, whichever is greater. However, if the defendant was legally intoxicated, there is no limit to the amount of punitive damages. Thus, since Teen was most likely legally intoxicated, there will be no cap on the punitive damages available to Driver.

Driver v. Father: Driver will also have a cause of action against Father based on the doctrine of dangerous instrumentalities or negligent entrustment. Father can be held liable for torts caused by the use of a dangerous instrumentality such as a truck or by negligently entrusting the truck to another. Thus, even though Father was not operating the truck he can be held liable for its use either strictly (dangerous instrumentality) or negligently (elements of negligence listed supra). Father might try to defend by asserting that he did not allow Teen to drive the truck on this particular occasion, but Father's pattern of letting Teen use the truck is probably enough to establish that Father consented to Teen's use of the truck.

Driver v. Clerk: Driver could also assert a negligent claim against Clerk. While tavernkeepers or liquor store clerks are normally not liable for the intoxicated acts of their patrons, they can be held liable if they knowingly serve alcohol to someone with an alcohol problem or to a minor. While Clerk might defend by asserting that he did not know that Teen was a minor, this defense would probably not be successful because Clerk's failure to ask for identification breached a duty that he owed as a vendor of alcohol to only sell to those 21 and older. Thus, this is negligence (elements given supra) and directly and proximately led to the accident causing Driver's injuries.

Driver v. Beverage Store: Finally, Driver could assert a vicarious liability cause of action against beverage store. Beverage Store can be held vicariously liable for the torts of its employees committed in the scope of their employment. Negligently failing to ask for identification before selling alcohol is within Clerk's scope of employment. Thus, Driver should be able to recover against Beverage Store. Beverage Store is entitled to seek indemnification from Clerk of the amount Beverage Store is held liable. This will come as small consolation if Clerk does not have sufficient funds to indemnify Beverage Store.

Ethics Concerns: It is not necessary to refer this case to a personal injury law firm if it is possible for our firm to become sufficiently competent to handle this case. Attorneys have an ethical duty to only accept cases that they are competent to handle. The fact that we have never handled a personal injury case before would indicate incompetence. We can cure this incompetence either by properly educating ourselves in personal injury law or by associating ourselves with attorneys who are competent to handle the case.

Should we choose to refer this case to another firm and split a fee, we must abide by certain rules. Since this is a personal injury case, we must give Driver a Statement of Client Rights.

In addition, the contingency fee must be written and disclose the percentage for the fee and when the percentage is calculated. To split the fee, normally contingent fees must be split according to the work done. This could be altered, however, by a written agreement with the client in which both attorneys agreed to be jointly responsible to be equally available for consultation, and the agreement must disclose the basis for fee splitting.

For personal injury cases, however, the lawyer with primary responsibility must get at least 75% of the fee, which would invalidate our equal sharing arrangement, unless we got court approval for our arrangement.

Conclusion: Driver can recover against Teen based on negligence against Father either in strict liability (dangerous instrumentalities) or negligence (negligent entrustment), against Clerk for negligence, and against Beverage Store in vicarious liability.

We must either cure our incompetence to handle this case or refer it to another competent firm. Since it is a personal injury matter, equal fee sharing will probably not be permitted as the lawyer with primary responsibility must get at least 75% of the fee.

QUESTION NUMBER 1 (February 2002 Bar Examination)

Gardener, knowing how much Homeowner hates to mow his lawn, submitted to Homeowner a signed written offer to mow Homeowner's lawn every Friday for the next eight Fridays for \$40.00 per mowing payable in cash on each Saturday following the Friday on which Gardener mows Homeowner's lawn.

The contract provided: "This contract may not be orally modified."

Homeowner marked through the \$40.00 per mowing provision and changed it to \$35.00 per mowing. Homeowner also marked through the provision for payment on each Saturday and substituted a provision that Homeowner would pay Gardener on each fourth Saturday.

Homeowner signed the contract, initialed each change and gave it to Gardener.

Gardener initialed each of the changes and returned the contract to Homeowner. The next day Gardener told Homeowner that he would like to change the contract price to \$40.00 per mowing.

Homeowner said, "OK, \$40.00 per mowing, but you also have to trim."

Gardener responded, "OK, \$40.00 per mowing and trimming."

Thereafter, Gardener mowed and trimmed Homeowner's lawn on the next three consecutive Fridays. On the fourth Friday, Orlando was hit by a hurricane and Gardener did not mow and trim Homeowner's lawn until Saturday. Homeowner waved "hello" to Gardener while Gardener mowed and trimmed Homeowner's lawn on Saturday. When Gardener finished, Gardener asked Homeowner for \$160.00 for mowing and trimming Homeowner's lawn four times.

Homeowner replied, "I will not pay you anything because you breached the contract; the fourth mowing and trimming was supposed to have been done yesterday."

Gardener comes to you for advice about suing Homeowner for the \$160.00. How would you advise Gardener about: potential causes of action against Homeowner, Homeowner's potential defenses and Gardener's answers to them, and the likely outcome.



SELECTED ANSWER TO QUESTION 1 (February 2002 Bar Examination)

POTENTIAL CAUSES OF ACTION AGAINST HOMEOWNER

First, we must examine whether there was a valid contract, and if so, what the terms thereof were. The facts stipulate that Gardener ("G") made a signed written offer to Homeowner ("H"). However, the proposed terms of the contract, as set forth in the offer, were modified by H. This modification constituted a counteroffer. Both H and G assented to the terms of this counteroffer by initialling the changes of \$35.00 instead of \$40.00 and payment every fourth Saturday instead of every (each) Saturday. Thus, G accepted H's offer and there was a meeting of the minds as to these terms. The contract recited valuable consideration: the work of G mutually balanced by H's promise to pay. Thus, there was a valid, binding contract based on an offer, acceptance, and consideration.

The terms of the foregoing contract were as follows: H would pay \$140.00 (\$35X4) to G every fourth Saturday, in consideration of G's mowing the lawn every Friday.

The contract, by its express terms, prohibited any oral modification of its terms. Thus, an issue arises regarding the purported oral modification carried out by G and H the next day. They purported to agree on a modification from \$35 to \$40, along with a new duty to be accomplished by G. G would argue that the increase of price was not really a modification, but rather a collateral contract supported by new consideration: G's promise to perform an additional duty which he was not formerly obligated to perform. If G were to prevail, then the final terms of the contract were: G to mow every Friday AND trim every Friday, and H to pay \$160.00 (\$40X4) every fourth Saturday.

On the other hand, H would argue that the oral modification was invalid as contrary to the terms of the written contract. H might argue this position in order to attempt paying \$140.00 per month rather than \$160. However, it does not appear that H is attempting to advance this argument, and in any event, it appears that G would prevail on this point because the modification was supported by additional consideration.

Assuming that the contract price really was enforceable as \$160.00 every four weeks, we must address the alleged breach that occurred on the fourth Friday when the city was hit by a hurricane. (The facts state that "Orlando" was hit, and I am assuming that this scenario took place in Orlando.)

G would argue that H was the one who was at fault, rather than G, regarding the nonpayment. This is so because G's late performance probably was excused by impossibility or commercial impracticability on Friday due to the danger of mowing and trimming during a hurricane, and the impracticality of mowing wet grass during the rainstorms that commonly accompany a hurricane. G is likely to prevail on this argument. Therefore, G's late performance should be excused and further, the alleged breach probably was not material. Unless H had notified G of some special circumstances that would justify finding consequential damages under the Hadley v. Baxendale standard, I would advise G that any breach, if there was any, probably was not a material breach.

Further, G can assert waiver by H of the late performance. The facts stipulate that H waved "hello" to G while G was performing his duties on Saturday, one day late. This action by H probably constitutes waiver.

Also, G may be able to assert an equitable claim of laches, since the H failed to protest G's late performance at a time when G could have stopped working.

Accordingly, G could assert a right to obtain payment from H if H breached the contract by refusing to keep his promise of making payment. If G's late performance was excused or waived, G should obtain full payment of the \$160.

HOMEOWNER'S DEFENSES

H may claim that the contract was materially breached by G (which probably will not succeed). H will also argue that he had no intention of waiving G's timely performance by simply waving "hello." Further, as stated above, H could even argue that the contract price was supposed to be \$140 per four weeks rather than \$160.

GARDENER'S ANSWERS

G could assert that the contract was divisible, and that later performance of one day's work should not constitute a breach of any other portion of the contract (namely, the first three week's performance). G will thus argue that, at worst, he should be paid \$120 ($\40×3 weeks) for the weeks in which he did perform on time. However, the contract probably is not divisible because the payment was to be made in 4-week blocks.

Still, G can rely on the earlier arguments that the alleged breach was excused, waived, or immaterial, and thus H should owe the entire contract price for that 4-week block. Most likely, G would prevail in this assertion.

EQUITABLE ASPECTS

If for some reason the contract were to be found invalid, G should be able to assert a claim in quasi-contract and recover the fair value of the work which he actually performed, in quantum meruit.

QUESTION NUMBER 2 (February 2002 Bar Examination)

The Campus Drug Store is owned and operated by State University, which is part of the State of Florida's university system. One day, Worker, an employee of the Campus Drug Store, observed Suspect, a young woman with red hair, take a tablet of a prescribed drug for pain from behind the counter and swallow the pill. After surveying Suspect's movements through the store, Worker saw Suspect stop at the magazine counter.

Ten minutes later, Customer, also a young woman with red hair, entered the Campus Store and proceeded to look at music albums displayed on the opposite side of the magazine counter.

Meanwhile, Worker went to the office of his manager. Worker told Manager about his observation of Suspect. In an effort to apprehend Suspect, Manager accompanied Worker to a location in the store where Worker could identify Suspect. The two employees concealed themselves behind an aisle within viewing range of the magazine rack. Worker then peered around the corner, witnessed Suspect at the magazine rack, and advised Manager that Suspect was the red-haired woman standing by the magazine rack. He did not mention that there were two red-haired women standing opposite each other at the magazine rack. When Manager looked around the corner, he observed only Customer standing at the music display, which abutted the magazine rack. Unbeknownst to Manager, Suspect had disappeared from the magazine area after Worker had seen her.

At that point Manager took over the surveillance. He kept watch over Customer (instead of Suspect) while Customer browsed through the store. When Customer attempted to leave the store, Manager stopped her, accused her of shoplifting, and demanded that she accompany him to his office. Customer did so and Manager called the police, who came and arrested Customer after Manager signed a sworn complaint. In the complaint, Manager wrote that Customer had stolen and consumed a controlled substance. The arresting officer issued Customer a notice to appear in court at a later date on charges of retail theft and possession of a controlled substance. The officer then released Customer from custody.

Prior to the court date the State Attorney, while obtaining a witness statement from Worker, showed Worker a picture of Customer. Worker informed the State Attorney that Customer was not the woman Worker saw shoplifting. The State Attorney decided not to prosecute the charges against Customer.

Customer has come to you and asked for your advice concerning a potential suit against Manager and State University. Prepare a memorandum of law discussing Customer's potential causes of action under Florida law, and of the defenses Supervisor and State University may assert.



SELECTED ANSWER TO QUESTION 2 (February 2002 Bar Examination)

This question raises torts issues as well as the doctrine of sovereign immunity and vicarious liability. Customer may consider several claims against Manager and State University, including false imprisonment, defamation and malicious prosecution.

First, I will discuss some general issues of sovereign immunity. The State of Florida, including its subdivisions including the State University System, has waived its constitutional and inherent sovereign immunity in certain respects. It has waived it for operational activities (as opposed to planning level activities) for which its agents and employees owe individuals a duty of care. This fact pattern clearly demonstrates an operational level activity--the ownership and management of the campus drug store. The activities in question were not high-level planning activities but proprietary and operational activities. Besides, common law governmental immunity usually doesn't even apply to proprietary as opposed to governmental functions. Must get claims bill from leg. to exceed cap. There is a cap on the State's liability of \$100,000 per person, no punitives against state and \$200,000 per incident. The fact pattern given is likely to be considered one incident anyway. I think Florida's sovereign immunity has been waived for intentional torts with the scope of business that are the subject of vicarious liability.

This question also raises vicarious liability issues. Will the state be liable for potential intentional torts of the store manager? While employers are not usually vicariously liable for the intentional torts of their employees, there is an exception for intentional torts that are committed on behalf of the employer to carry out the employer's business. There is a good argument that the removal and restraint of potential shoplifter if tortuous falls well within this exception and the State as an employer could be held vicariously liable for the Manager's potentially tortuous behavior. Although we are not given enough facts, Customer may also consider a direct action against the State for negligent hiring. If the state conducted a reasonable background investigation of Manager that revealed no relevant offenses or info., there is a rebuttable presumption that the employer (the State) was not negligent. No presumption runs in the converse.

The first tort Customer may assert against Manager and the State is false imprisonment. False imprisonment requires an intentional confinement of a person in a bounded area. There is no requirement of damages (non-related damages are recoverable) and the required intent is the intent to confine. Here, manager stopped Customer and demanded that she accompany him to his office. While it would be a stronger prima facie case if done by a security guard, the elements are probably satisfied here. There is little evidence that Customer willingly consented to the confinement and she was bound within a bounded area.

Manager and the State could rebut with the shopkeeper's privilege. Shopkeepers are privileged to stop and investigate suspected shoplifters if there is a reasonable basis for their suspicions. The confinement and inquiry also must be reasonable in scope and manner. The question here is whether manager had a reasonable basis for his suspicions. Manager will argue that it was reasonable to rely upon the claims of the employee. He will also claim that no first hand knowledge is required of the

person who actually restrains the suspected shoplifter. Customer probably has the better argument that Manager should have done more to make sure Customer was the right person. Manager simply could have asked employee after stopping Customer initially (although any confinement no matter how short can give rise to a false imprisonment claim). This is a tough issue that would have to be resolved at trial. Manager also could argue the defense of consent, but there is little factual support in the fact pattern. In conclusion, Customer has a good case for false imprisonment.

Second, Customer could try to assert a claim for common law defamation. This requires a defamatory statement of or concerning the plaintiff as well as publication and damages. It is unclear in Fla. whether falsity and fault cure also a part of prima facie case for common law defamation, but the best guess is no. Here, we have a defamatory statement ("stolen & consumed a controlled substance)." We also have the of or concerning plaintiff element and an intentional publication to a third party (the police officer). The statement tends to adversely affect Customer's reputation for honesty and sobriety. Customer therefore has a solid prima facie case. This is libel (written) & damages are presumed.

Manager and State may argue an absolute or qualified privilege. The absolute privilege for judicial proceedings is however, inapplicable before actual charges are filed. The best defense is a qualified privilege. A qualified privilege is available in several socially useful circumstances. One includes making out a complaint to police officer. The privilege is available if defendant acted in good faith, was interested in the transaction, the statement was limited to the \\'s interest and the \\' offered the statement in a proper manner. There is no showing of bad faith here and the other elements appear to be met. Manager & State will bear the burden of proof. Customer could only violate this qualified privilege by a showing of express malice by a preponderance of the evidence. Express malice requires that the primary purpose of the statement to be to harm or injure the plaintiff. Where there is an argument that Manager was reckless, this is not sufficient in FLA. (as opposed to the NY Times v. Sullivan actual malice standard used in many states). Customer could probably make out a prima facie case of defamation but Manager & State also could assert a qualified privilege.

There is also a weak argument for malicious prosecution. Malicious prosecution requires initiation of criminal charges, termination in plaintiff's favor, no probable cause, bad faith and damages. Here we have criminal charges levied via a notice to appear, a termination in Customer's favor and damages (presumably time, attys fees, etc). The problem is there is no showing of bad faith on the part of Manager. While there is also an argument there was no probable cause, the lack of bad faith will be fatal to Customer's claim.

As mentioned above, Customer may be able to assert a claim for negligent hiring against the State. The problem with this claim would be the requirement of actual damages. There is little evidence in the facts that Customer suffered actual damages b/c of the confinement, defamatory statement or prosecution.

In conclusion, Customer's best claim is false imprisonment. Her possible claims for negligence, defamation and malicious prosecution are unlikely to prevail. (Customer should be able to recover nominal damages (or actual if shown) from Manager and vicariously from the State.

QUESTION NUMBER 3 (February 2002 Bar Examination)

Testator (T) and Wife (W), who are husband and wife and Florida residents, were involved in a fatal accident. T was killed instantly and W died one hour later. At the time of the accident, T had an interest in the following described properties as indicated:

<u>Property</u>	<u>Titled</u>
Family residence	T & W, Husband and Wife
Rental property	T & Friend
\$100,000.00 bank account at City Bank	T in trust for Fred
\$500,000.00 brokerage account at Bull Brokerage	T

T's validly executed will left his entire estate to W provided she survived him. If W failed to survive T, the will left everything including "my account at City Bank" to a testamentary trust. The stated purpose of the trust was to provide for T's children and grandchildren taking into consideration the standard of living to which the children were accustomed at the time of T's death. The will named T's brother, Bob, and sister, Sissy, as cotrustees. The will contained the following provisions:

The trustees should distribute so much of the trust principal or income that the trustees deem necessary or desirable in their absolute and uncontrolled discretion to provide for the health, education and welfare of my natural children and others as the trustees in their discretion may deem appropriate during the term of the children's natural lives and upon the death of my last surviving child, the remaining assets, if any, shall be distributed in equal shares to my grandchildren. No part of the interest of any beneficiary of this trust shall be subject in any event to sale, alienation, hypothecation, pledge, transfer or subject to any debt of said beneficiary or process in aid of execution of said judgment.

The will further provided "if any person dies with me in a common disaster and such person is required to survive me in order to take property under this will, then such property shall vest as if such person predeceased me."

T is survived by three adult children:

1. Fred, T's son from his first marriage who was adopted by his ex-wife's second husband;
2. Alice, his adopted child with W; and,
3. Ned, his child with W.

Sissy declines to act as trustee due to health problems.

There is a properly recorded judgment against Ned for failure to repay a bank loan.

Bob retains you to give him legal advise as to the trust. Advise Bob as to each of the following issues including the reasons for your advice:

1. Is the trust valid?
2. Assuming the trust is valid, will any of the assets fund the testamentary trust? Discuss each asset.
3. Assuming the trust is valid and funded, who will be the trustee or trustees?
4. Assuming the trust is valid and funded, who will be the beneficiary or beneficiaries?
5. Can bank reach or garnish any interest that Ned may have in the trust?



SELECTED ANSWER TO QUESTION 3 (February 2002 Bar Examination)

1) Trust Validity:

The Validity of the trust, and its applicability at all, depend on whether W is deemed to have survived and takes all under the will or not. T's will expressly requires W's survival of him to take under the will. However, T's will also contains a clause addressing simultaneous death in which case, the beneficiary under the will is deemed to predecease T. The facts state that W survived T by one hour. Florida does not follow the Uniform Probate Code requirement that a person survive by 120 hours. Therefore, under Florida law, W survived. However, T's will states that if he and a beneficiary die in a "common disaster" the beneficiary shall be deemed to have predeceased. No mention is made in this clause of a situation where we are unable to determine which party died first. In addition, W is the only beneficiary named in the will with a survivorship requirement. Therefore, on these facts, it appears that even though W actually survived, because she and T died in a "common disaster", she will be deemed to have predeceased T and his estate goes to the trust. The facts state that the will was validly executed and therefore, the estate will pour-over into this trust. The trust was created in the will and is considered a testamentary trust, trustees are named, certain and identifiable property will make the corpus of the trust and the trust is for a valid legal purpose. One possible question would be T's identification of trust beneficiaries. For a private trust, the beneficiaries must be identifiable. In this case, T's will states that the trust is for the health, education and welfare of his natural children "and others." The Court would have to decide whether this "and others" makes the trust invalid due to uncertainty of beneficiaries.

2) Trust Assets:

The facts state that T had an interest in four assets. I will discuss each separately. First the family residence titled in the name of both T and W as husband and wife. In Florida, property conveyed to both husband and wife is held as a tenancy by the entirety whether the parties are designated as husband and wife in the deed or not. One aspect of tenancy by the entirety is that it includes a right of survivorship. Therefore, W takes this property under the right of survivorship and it will pass through her estate. Second, the rental property is held in the name of T and Friend. In order to be a joint tenancy, it would have to state as much in addition to a right of survivorship. Because this information was not included, it is assumed that T and Friend held this property as tenants in common. Therefore, T's undivided one-half interest passes to his estate and could then go to the trust.

Third, the \$100,000 bank account at City Bank held "in trust for Fred" is commonly referred to as a Totten Trust. T retained ownership of the account and was able to withdraw funds until his death. The Totten Trust will only go to the named beneficiary, Fred, if it still existed at T's death and was not specifically devised to someone else. In this case, T's will specifically mentioned his account at City Bank and directed that those funds become a part of the trust. As a result, Fred does not have a claim to the \$100,000 and it should go to the trust. Finally, the \$500,000 brokerage account in T's name only should be available to fund the trust.

3) Trustees:

T's will named Bob and Sissy as co-trustees. The facts state that Sissy declined to act as trustee due to health problems. T's brother, Bob, should be able to act as trustee, provided he is at least 18 years of age and has not been convicted of a felony. The facts do not indicate that T named co-trustees for a particular reason or that Sissy was to provide particular services that cannot be provided by Bob alone. Therefore, the Court should allow Bob to serve as sole trustee as long as he posts the required bond.

4) Beneficiaries:

Assuming the "and others" problem mentioned earlier is corrected, the beneficiaries of the trust should be Alice and Ned, T's children, and the remainder on their death to T's grandchildren. Fred would not take as a beneficiary because he was adopted by his step-father after T's divorce to his first wife, thereby terminating his inheritance rights to T or T's family. As an adopted child, Alice takes as if she were a natural child of T and W. The Rule against perpetuities may raise an issue if the interests in T's grandchildren don't vest within a life in being plus 21 years. However, in Florida the trust will survive if the interests vest under the common law RAP, stated above, or if the interests actually vest within 90 years, which changed December 31, 2001 to 360 years. Therefore, RAP shouldn't be a problem under either statute. The facts do not state the year.

5) Ned's Interest:

The terms of the trust created by T include a spendthrift provision, which prevents Ned from assigning his interest in the trust and also prevents Ned's creditors from attaching the trust corpus. However, as distributions are made to Ned, those distributions can be attached. In addition, this is a discretionary trust for the "health, education and welfare" of the beneficiaries. Therefore, Ned has no power to compel the trustee to make any distributions to him. As a result, Ned's creditors cannot compel distributions. The judgment against Ned is for a bank loan. Had this debt been for child support or alimony, the Court might allow the creditor to reach Ned's interest in the trust only on a showing that all other possible alternatives have been exhausted and this is a last resort.

PART II

SAMPLE MULTIPLE-CHOICE QUESTIONS AND ANSWERS

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

The answers appear on page 35.

MULTIPLE-CHOICE EXAMINATION INSTRUCTIONS

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

1. This booklet contains segments 4, 5 and 6 of the General Bar Examination. It is composed of 100 multiple-choice, machine-scored items. These three afternoon segments have the same value as the three morning segments.
2. The person on each side of you should have a booklet with a different colored cover. Please determine that the person on each side of you is using a different colored cover. If he or she is using an examination paper with the same colored cover, please notify a proctor at once.
3. When instructed, without breaking the seal, take out the answer sheet.
4. Use a No. 2 pencil to mark on the answer sheet.
5. On the answer sheet, print your name as it appears on your badge, the date and your badge/ID number.
6. In the block on the right of the answer sheet, print your badge/ID number and blacken the corresponding bubbles underneath.
7. Then STOP. Do not break the seal until advised to do so by the examination administrator.
8. Use your pledge 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. Should you complete your answers before the period is up, and more than ten minutes remain before the end of the session, you may turn in your question booklet and answer sheet outside the examination room to one of the proctors. If, however, fewer than ten minutes remain, please remain at your seat until time is called and the Board has collected all question booklets and answer sheets.
13. **THESE QUESTIONS AND YOUR ANSWERS ARE THE PROPERTY OF THE BOARD AND ARE NOT TO BE REMOVED FROM THE EXAMINATION AREA NOR ARE THEY TO BE REPRODUCED IN ANY FORM.**

SAMPLE MULTIPLE-CHOICE QUESTIONS

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

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

 - (A) must appoint Defendant a lawyer.
 - (B) must appoint Defendant a lawyer if the State subsequently charges Defendant by information.
 - (C) need not appoint Defendant a lawyer if the judge states in writing that Defendant will not go to jail for more than six months if convicted.
 - (D) need not appoint Defendant a lawyer if the judge states in writing that Defendant will not go to jail at all if convicted.
4. Which statement best describes the profit sharing relationship of a general partnership where the partners have agreed only on voting percentage and the voting shares are unequal?
 - (A) Partners share in proportion to their contributions to the capital and assets of the partnership.
 - (B) Partners share in proportion to their voting percentage.
 - (C) Partners share equally.
 - (D) Partners cannot share until they unanimously agree upon a distribution.

5. Billy was charged with grand theft. The trial began on a Thursday afternoon. The jury was empaneled, sworn and released for the day. Since Friday was the Fourth of July, the judge asked the jurors to return on Monday. The trial began again on Monday morning at 8:30. By late evening the judge had instructed the jury. Due to the lateness of the hour, the jurors were sequestered for the evening to allow them to get an early start the next morning. The jurors returned Tuesday morning and were unable to reach a verdict. Unable to reach a verdict, the trial judge allowed the jurors to go home that evening. On Wednesday morning, the jury assembled and returned a verdict of guilty.

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

- (A) The fact that the jurors did not begin to consider evidence until several days after they were empaneled.
 - (B) The fact that the jury was allowed to go home after being sworn.
 - (C) The fact that the jury took several days to return a verdict.
 - (D) The fact that the jury was allowed to go home after they began deliberations.
6. Kendall and Thornton agree to form a partnership, but both agree that only Kendall will manage the business and make all business decisions and execute all contracts with third parties. After that time, Thornton then enters into a long-term service contract for the partnership with Clark, who does not know of the internal agreement. The contract of Thornton with Clark is
- (A) enforceable, as the partners' agreement cannot withhold statutory authority of a general partner to bind the partnership.
 - (B) enforceable, as Clark has no knowledge of Thornton's lack of authority.
 - (C) unenforceable, as Thornton is unauthorized to execute the contract by the partner agreement.
 - (D) unenforceable, as Clark had an obligation to confirm Thornton's authority prior to entering into a service contract with the partnership.
7. The State of Florida is prosecuting a former police officer for extortion of money from prostitutes. One of the State's witnesses is Sally. Sally has an adult conviction for vehicular homicide. She was charged with driving a car in a reckless manner resulting in the death of her sister, a passenger in the car. Sally pleaded nolo contendere, was adjudicated guilty and received a suspended sentence although she could have received a sentence of state imprisonment up to 5 years. At trial, evidence of this conviction is
- (A) admissible to impeach Sally because vehicular homicide carries a maximum penalty in excess of 1 year.
 - (B) inadmissible to impeach Sally because she never admitted her guilt since she entered a plea of nolo contendere.
 - (C) inadmissible to impeach Sally because she received a suspended sentence.
 - (D) inadmissible to impeach Sally because she is only a witness and not the criminal defendant.

8. A defendant charged with first-degree murder shall be furnished with a list containing names and addresses of all prospective jurors
- (A) upon court order.
 - (B) upon request.
 - (C) upon request and showing of good cause.
 - (D) under no circumstances.
9. Cooper is suing March for money damages. Because he believes portions of March's deposition are highly favorable to his case, Cooper's attorney intends to read parts of the deposition at trial instead of calling March to the stand. March objects to Cooper's use of the deposition at trial. What is the court's likely ruling?
- (A) Cooper may use the deposition at trial, but, if requested, he must read all parts that in fairness ought to be considered with the part introduced.
 - (B) Cooper may use the deposition at trial, but only to contradict or impeach March's prior inconsistent statements or pleadings.
 - (C) Cooper may not use the deposition at trial, as March is able to testify and no exceptional circumstances exist.
 - (D) Cooper may not use the deposition at trial, as this would make March his witness and immune to impeachment.
10. Jan sues the Chicago Times for defamation in a Florida circuit court. At trial, Jan wishes to offer into evidence a copy of the edition of the Times containing the allegedly libelous article. Before the newspaper may be admitted, Jan must
- (A) call as a witness an employee of the Times to testify that the proffered newspaper was in fact published by the Times.
 - (B) have a certification affixed to the newspaper signed by an employee of the Times attesting to its authenticity.
 - (C) establish that the newspaper has been properly certified under the law of the jurisdiction where the newspaper was published.
 - (D) do nothing because the newspaper is self-authenticating.
11. Defendant was arrested on February 1 and released one month later on March 1 after being charged with a felony. On December 1 of the same year as his arrest, he filed a motion to discharge since no trial or other action had occurred to that point. The court held a hearing 3 days after the motion was filed. Defendant should be
- (A) discharged because more than 175 days passed between arrest and the filing of the motion to discharge.
 - (B) discharged because more than 175 days passed between his release from jail and the filing of the motion to discharge.
 - (C) brought to trial within 90 days of the filing of the motion to discharge.
 - (D) brought to trial within 10 days of the hearing on the motion to discharge.

12. Bill, a single man, owned pasture land in Deerwoods, Florida, which he leased to a tenant. He also owned a condominium in Miami, which he held for investment. In his will, he devised the pasture land to his son Tommy and the condominium to his daughter Julie. All other assets would pass equally to Tommy and Julie.

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

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

13. Anderson and Parker decide to form a corporation which will locate missing children. Which of the following would be a proper name for the corporation?

- (A) ANDERSON
- (B) FBI Consultants, Incorporated
- (C) Private Eye Partners
- (D) Child Finder Company

14. At trial, during the plaintiff's case-in-chief, the plaintiff called as a witness the managing agent of the defendant corporation, who was then sworn in and testified. Defense counsel objected to the plaintiff's questions either as leading or as impeaching the witness. In ruling on the objections, the trial court should

- (A) sustain all the objections and require the plaintiff to pursue this type of interrogation only during the plaintiff's cross-examination of this witness during the defendant's case-in-chief.
- (B) sustain the leading question objections but overrule the other objections because a party is not permitted to ask leading questions of his own witness at trial.
- (C) sustain the impeachment questions but overrule the other objections because a party is not permitted to impeach his own witness at trial.
- (D) overrule all the objections because the witness is adverse to the plaintiff and therefore may be interrogated by leading questions and subjected to impeachment.

15. Rainbow Corporation has outstanding 1,000 shares of voting common stock and 1,000 shares of nonvoting preferred. The preferred has a liquidation preference equal to its par value of \$100 per share plus a 3 percent noncumulative dividend. Rainbow submits to its stockholders a proposal to authorize a new class of preferred stock with redemption rights that would come ahead of the old preferred stock. At a shareholders' meeting, 700 common and 400 preferred vote in favor of the proposal. Which of the following statements is correct?

- (A) The proposal is validly approved because overall a majority of the outstanding shares did approve.
- (B) The proposal is invalidly approved because a majority of the preferred shareholders did not approve.
- (C) The vote of the preferred stockholders does not matter because it was nonvoting stock.
- (D) The proposal is invalidly approved because a two-thirds vote of each class is required.

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

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

- (A) only Bob Wilson is liable.
- (B) Bob Wilson and Ted Lamar are liable jointly.
- (C) Bob Wilson is liable for the entire amount and Ted Lamar is liable only to the extent the debt cannot be collected from Bob Wilson.
- (D) only the de facto partnership arising from the relationship between Wilson and Lamar is liable.

17. At the close of all the evidence in a jury trial, Defendant moves for a directed verdict. After much argument, the court denies the motion. Subsequently, the jury returns a verdict for Plaintiff.

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

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

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

SAMPLE MULTIPLE-CHOICE QUESTIONS WITH PERFORMANCE TEST COMPONENT

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

Florida Statutes 47.011 Where actions may be begun.

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

Florida Statutes 47.021 Actions against defendants residing in different counties.

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

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

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

23. Assume for this question only that the trial court granted the motion to transfer and the action brought by Payne was transferred to Broward County. Who is responsible for payment of the service charge of the clerk of the court to which the action was transferred?

- (A) Bryant only as the party who moved for the transfer.
- (B) Bryant and Davis as the defendants in the action.
- (C) Payne only as the party who commenced the action.
- (D) Clerk of the Court for Dade County as the transferring jurisdiction.

ANSWER KEY FOR MULTIPLE-CHOICE QUESTIONS

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