FLORIDA BAR EXAMINATION
ANSWER KEY TO EVIDENCE

1. a
2. c
3. d
4. d
5. d
6. a
7. d
8. a
9. b
10. c
11. c
12. b
13. a
14. a
15. a
16. b
17. a
18. a
19. b
20. b
21. a
22. a
23. b
24. c
25. b
26. b
27. a
28. d
29. a

FLORIDA BAR EXAMINATION
ANSWERS TO EVIDENCE

Answer to Question 1

The correct answer is (a). This question tests the rule governing judicial interrogation of witnesses. Under the federal rules of evidence, the court may question any witness called by either a party or the court. The FEC allows for the same but conditions the questioning upon whether the interests of justice require the question. Here, the only evidence presented by the state concerning the cause of the accident was Sonya's testimony. If the judge had not questioned Sonya about her ability to see at the time of the accident, the jury might have given greater weight to her testimony without considering other evidence that pointed to Ronny's potential innocence. The judge felt that the interests of justice were furthered by this questioning, so it would likely not be a reversible error.

Answer (b) is incorrect. FEC limits questioning by the court to situations where the interests of justice require it. Answer (c) is incorrect because the court is permitted to question any witness called by either the court or the parties. Answer (d) is incorrect because it appears from the facts that the line of questioning does in fact further the interests of justice.

Answer to Question 2

The correct answer is (c). Generally, a witness is subject to impeachment by evidence that the witness was convicted of a criminal offense that provides as penalties either a death sentence or imprisonment for more than one year. *Fed. R. Evid*. 609(a)(1). If the witness is not the accused, a court must allow such prior conviction evidence, subject to the *Federal Rule* providing a relevancy balancing test. *Fed. R. Evid*. 609(a)(1)a) citing *Fed. R. Evid*. 403. If the witness is the accused, a court must allow such prior conviction evidence if its probative value exceeds its prejudicial effect. *Fed. R. Evid*. 609(a)(1)(B).

Although comparable Florida law follows *Federal Rule 609*, it is different in two respects. First, it applies to any witness, regardless of whether the witness is an accused. *Fla. Stat*. ch. 90.610(1). In other words, the witness can be the accused who, for example, denies a prior conviction. Second, it does not expressly refer to a relevancy balancing test or mandate that the probative value of the prior offense must exceed its prejudicial effect. *Id*. But the *Florida Statute* providing a relevancy balancing test, implicitly applies to prior convictions that are offered to impeach a witness. *Fla. Stat.* ch. 90.403; *State v. Page*, 449 So. 2d 813 (Fla. 1984).

Answer (a) is incorrect because Florida law does not expressly mandate that the probative value of the prior offense must exceed its prejudicial effect. Answer (b) is incorrect because it erroneously suggests that impeachment evidence of a prior conviction is only admissible when the witness is the accused in a criminal case. Answer (d) is incorrect because it misstates the law.

Answer to Question 3

The correct answer is (d). Evidence of juvenile adjudications is not admissible in a Florida court for impeachment under this *Florida Rule*. *Fla. Stat*. ch. 90.610(1)(b). Answers (a), (b), and (c) are incorrect for the above reasons.

Answer to Question 4

The correct answer is (d). In Florida, "specific instances of prior consensual sexual activity between the victim and any person other than the" defendant may be admitted into evidence in a sexual battery prosecution only: 1) "if it is first established to the court in a proceeding in camera that such evidence may prove that the defendant was not the source of the semen, pregnancy, injury, or disease;" or 2) "when consent by the victim is at issue, such evidence may be admitted if it is first established to the court in a proceeding in camera that such evidence tends to establish a pattern of conduct or behavior on the part of the victim which is so similar to the conduct or behavior in the case that it is relevant to the issue of consent." *Fla. Stat.* ch. 794.022(2). Answer (a) is incorrect because it is an overbroad statement. Answers (b) and (c) are incorrect for the above reasons.

Answer to Question 5

The correct answer is (d). The *Federal Rules* consider an admission of a party opponent as an exclusion from the definition of hearsay. In other words, under the *Federal Rules,* an admission of a party opponent is not hearsay or "non-hearsay." The Florida provision considers an admission an exception to the definition of hearsay. In other words, under Florida law, an admission of a party opponent is hearsay, but it qualifies for admission as an exception to the hearsay rule. Answer (a) is incorrect for the above reasons and because there is no "*confiteor* doctrine" applicable here. Answers (b) and (c) are incorrect for reasons stated above.

Answer to Question 6

The correct answer is (a). In a criminal case in which the defendant is charged with a sexual offense, evidence of the defendant's commission of other crimes, wrongs, or acts involving a sexual offense is admissible, and may be considered for its bearing on any relevant matter. *Fla. Stat*. ch. 90.404(2)(c)1. "Sexual offense" means certain legally proscribed conduct. *Fla. Stat*. ch. 90.404(2)(c)2. Answer (b) is incorrect because it is an overbroad assertion. Answer (c) is incorrect because it is not necessary that the defendant be charged with the same sexual offense as the one for which he was previously convicted to permit its admissibility. Answer (d) is incorrect because Florida does not limit introduction of prior criminal convictions for a specified time, such as five years, as implied in this incorrect answer choice. Note that in Florida, a party may argue that the prior conviction is too remote and that the danger of unfair prejudice substantially outweighs the prior conviction's probative value.

Answer to Question 7

The correct answer is (d). In a Florida state court proceeding (civil or criminal), a foreign record of regularly conducted business activity will not be excluded as evidence by the hearsay rule when a foreign certification attests that certain elements are fulfilled. *Fla. Stat*. ch. 92.60(2).

The foreign certification must attest that:

- The record was made at or near when the occurrence of the matters according to someone with knowledge of those matters;
- The record was maintained in the course of a regularly conducted business activity;
- The business activity created the record as a regular practice; and
- If the record is "not the original, it is a duplicate of the original; unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." *Id.*

Answers (a), (b), and (d) are incorrect for the above reasons.

Answer to Question 8

The correct answer is (a). The following types of out-of-court statements made by a child victim with a physical, mental, emotional, or developmental age of 11 or less describing:

- an "act of child abuse or neglect,
- an act of sexual abuse against a child,
- the offense of child abuse,
- the offense of aggravated child abuse, or
- any offense involving an unlawful sexual act, contact, intrusion, or penetration performed in the presence of, with, by, or on the declarant child,"

not otherwise admissible, may be admissible as evidence in any civil or criminal proceeding if two elements (hearing and evidence) are satisfied. Note that the hearing and evidence requirements contain specific details not relevant to this individual question. Answers (b), (c), and (d) are incorrect for the above reasons..

Answer to Question 9

The correct answer is (b). This question tests the rule governing disclosure to witnesses of prior inconsistent statements. Under the federal rule, the prior inconsistent statement need not be shown nor its contents disclosed to the witness at the time of questioning. The FEC takes the opposite position, requiring that, upon opposing counsel's motion, the court must order either that the statement be shown to the witness or that its contents be disclosed to the witness. Here, if the prosecution requests that the statement be shown to Andrea, then the defense will be required to disclose the statement.

Answer (a) is incorrect because without the prosecution's request, the defense is not required to disclose the statement. Answer (c) is incorrect because the defense would be required to disclose the statement to Andrea if the prosecution requests. Answer (d) is incorrect because this is not extrinsic evidence.

Answer to Question 10

The correct answer is (c). Unlike the *Federal Rules*, the *Florida Rules* expressly provide that extrinsic evidence of a prior inconsistent statement by a witness is admissible if: 1) the witness denies making the statement; or 2) the witness does not distinctly admit making it. *Id.* Answers (a), (b), and (d) are incorrect for the above reasons.

Answer to Question 11

The correct answer is (c). Subject to constitutional requirements, a hearsay rule exception allows for the introduction of hearsay statements of an elderly person or disabled adult regarding certain matters after (1) the trial court conducts a hearing outside of the presence of the jury, and (2) finds that the statements are reliable and, (3) either this person or adult testifies or the person or adult is unavailable to testify and other corroborative evidence exists.

Answer (a) is incorrect for the above reasons. Answer (b) is incorrect for the above reasons and because it is a nonsense answer. There is no "*mortis factum*" doctrine. Answer (d) is incorrect for at least the reason that it incorrectly states that the hearing should be held in the presence of the jury, which is incorrect. The hearing must be held *outside* the presence of the jury.

Answer to Question 12

The correct answer is (b). Under the Federal Rules, a juror cannot testify in an inquiry about a verdict regarding statements or matters relative to jury deliberations. But two of the exceptions to this prohibition against jurors giving testimony, or an affidavit or another statement, apply when: 1) a juror was exposed to extraneous prejudicial information (e.g., a juror in sequestration reads a newspaper editorial claiming that a criminal defendant is not guilty.); or 2) a juror was subjected to an improper outside influence (e.g., an effort to tamper with the jury is discovered.). Fed. R. Evid. 606(b)(2)(A)-(B).

Under Florida law, jurors are incompetent to testify in an inquiry about the validity of a verdict or indictment regarding any matter that "essentially inheres in the verdict or indictment." Fla. Stat. ch. 90.607(2)(b). In other words, the jurors generally cannot give testimony impeaching their verdict. The Florida Evidence Code provides no express exception to this prohibition.

Answers (a), (c), and (d) are incorrect for the above reasons.

Answer to Question 13

The correct answer is (a). In Florida, a professional journalist possesses a qualified privilege not to reveal a source's identity or disclose information that the journalist has acquired when gathering news within the normal scope of employment. *Fla. Stat*. ch. 90.5015(2). This privilege does not apply to eyewitness observations, physical evidence, or audio or visual recording of crimes. *Id.* Answers (b), (c), and (d) are incorrect for the above reasons.

Answer to Question 14

The correct answer is (a). The *Florida Rules* include, and the *Federal Rules* lack, an exception to the general rule that a judge is incompetent to testify as a witness in a case over which the judge is presiding. *Fed. R. Evid.* 605; *Fla. Stat*. ch. 90.607(1)(a). The *Federal Rules* do not provide, as do the *Florida Rules,* that pursuant to the parties' agreement, a trial judge can provide evidence "on a purely formal matter to facilitate the trial of the action." *Fla. Stat.* ch. 90.607(1)(b). However, the exception does not allow for a trial judge to give evidence on an informal matter, even if the parties agreed to permit that. Answers (b), (c), and (d) are incorrect for the above reasons.

Answer to Question 15

The correct answer is (a). In Florida, a statement of a declarant's then-existing state of mind, emotion, or physical sensation, including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health can be used to:

- Prove the declarant's state of mind, emotion, or physical sensation
    - at that time or
    - at any other time if such state is an issue in an action.
- Prove or explain the declarant's acts of subsequent conduct.

Fla. Stat. ch. 90.803(3)(a)1.-2.

Answers (b), (c), and (d) are incorrect for the above reasons.

Answer to Question 16

The correct answer is (b). The *Florida Evidence Code* lacks a physician-patient privilege statute among its various evidentiary privilege statutes. The *Florida Statutes,* however, contain a provision addressing the furnishing of a patient's medical records and discussion of the patient's medical condition. *Fla. Stat.* ch. 456.057(7)(a).

Generally, such records may be furnished without the patient's written authorization in any criminal or civil action pursuant to a valid subpoena with proper notice from the party seeking such records. *Id.* These records also may be furnished without the patient's written authorization in some other statutorily circumscribed circumstances. *Id.*

Note that this statute does not provide a traditional physician-patient evidentiary privilege. Rather, the statute protects the confidentiality of patient records beyond the context of litigation.

Answer (a) is incorrect because the *Florida Evidence Code* lacks a physician-patient privilege. Answer (c) is incorrect because it erroneously implies that the records can only be disclosed because it is a criminal case and the records could not be disclosed in a civil case. Answer (d) is incorrect because it is an overbroad assertion.

Answer to Question 17

The correct answer is (a). The *Florida Rules* include, and the *Federal Rules* lack, an exception to the general rule that a judge is incompetent to testify as a witness in a case over which the judge is presiding. *Fed. R. Evid.* 605; *Fla. Stat*. ch. 90.607(1)(a). The *Federal Rules* do not provide, as do the *Florida Rules*, that pursuant to the parties' agreement, a trial judge can provide evidence "on a purely formal matter to facilitate the trial of the action." *Fla. Stat.* ch. 90.607(1)(b). However, the exception does not allow for a trial judge to give evidence on an informal matter, even if the parties agreed to permit that. Answers (b), (c), and (d) are incorrect for the above reasons.

Answer to Question 18

The correct answer is (a). In a federal court, a party generally can attack or support any witness' credibility using reputation or opinion evidence. *Fed. R. Evid*. 608(a). This evidence may only refer to the witness' character for truthfulness or untruthfulness. *Id*. Good character evidence of truthfulness (as opposed to untruthfulness) is only admissible after the witness' character for truthfulness has been attacked. *Id*.

The Florida courts follow a similar rule on attacking and supporting the credibility of a witness, including an accused. *Fla. Stat.* ch. 90.609. However, only reputation evidence, but not opinion evidence, can be used for this purpose. *Fla. Stat*. ch. 90.609(1). The reputation evidence can only refer to the witness' character relating to truthfulness. *Id.* Reputation evidence of the witness' truthful character may only be admitted after the witness' character for truthfulness has been attacked with reputation evidence. *Fla. Stat*. ch. 90.609(2).

Answers (b), (c), and (d) are incorrect for the above reasons.

Answer to Question 19

The correct answer is (b). Although it would likely be inappropriate in federal court, expressly under the *Florida Rules*, a judge may not sum up the evidence or comment to the jury upon the weight of the evidence, the credibility of the witnesses, or the guilt of the accused. *Fla. Stat.* ch. 90.106.

Answers (a), (c), and (d) are incorrect for the above reasons.

Answer to Question 20

The correct answer is (b). Florida does not have a residual or "catch-all" exception to the hearsay rule similar to *Federal Rule 807*.

Answers (a) and (c) are incorrect for the above reasons. Answer (d) is incorrect for the above reasons and answer choice D merely indicates that the statement is hearsay.

Answer to Question 21

The correct answer is (a). In Florida, a lay witness may present opinion or inference testimony if three conditions are satisfied:

1. Inability: The lay witness is unable to accurately and adequately communicate about his or her perceptions without using inferences and stating opinions; and
2. Not Misleading: The trier of fact will not be misled by the witness' opinions or inferences to the objecting party's prejudice; and
3. Not Requiring Expert**:** The opinions and inferences do not require a special knowledge, skill, experience, or training (which would require an expert).

Fla. Stat. ch. 90.701(1).

Answers (b), (c), and (d) are incorrect for the above reasons.

Answer to Question 22

The correct answer is (a). Generally, the *Federal Rule* makes evidence of a conviction inadmissible if the conviction has been the subject of pardon, annulment, or some similar procedure. *Fed. R. Evid*. 609(c). Under the *Florida Rule*, however, a pardon of the crime does not make the conviction for the crime inadmissible. *Fla. Stat*. ch. 90.610(2). A party whose witness is impeached with such a prior conviction can seek to rehabilitate the witness with evidence of the pardon. Answers (b), (c), and (d) are incorrect for the above reasons.

Answer to Question 23

The correct answer is (b). Under the *Florida Rules*, a Florida court must take notice of: 1) Florida law and statewide Florida Rules of Court; and 2) Federal law and generally most Federal Rules of Court. Law includes constitutional, decisional, and statutory law, as well as legislative resolutions. Answers (a), (c), and (d) are incorrect for the above reasons.

Answer to Question 24

The correct answer is (c). In Florida, reputation evidence for truthfulness may be introduced to impeach the testimony of a witness. (a) is incorrect because only evidence of truthfulness, not being a bully, is permitted. (b) is wrong because the rule is irrelevant in this context. (d) is incorrect because reputation, not opinion evidence, is permissible.

Answer to Question 25

The correct answer is (b). The part of any writings, statements, or benevolent gestures expressing sympathy or a general sense of benevolence pertaining to the suffering, pain, or death of someone involved in an accident that is made to him or her or to his or her family are inadmissible. *Fla. Stat*. ch. 90.4026(2).

A statement of fault, however, which is in addition to, or part of, any of the foregoing is admissible as evidence in a Florida civil action. *Id.* Answers (a), (c), and (d) are incorrect for the above reasons.

Answer to Question 26

The correct answer is (b) because when a witness is confronted with a prior inconsistent statement, the court must, upon request, order either that the statement be shown to Defendant or that its contents be disclosed to Defendant. (a) is wrong because it is the opposite of what the law provides. (c) is incorrect because Defendant is entitled to the document or a description of the contents. (d) is incorrect because the Plaintiff need not show a special need.

Answer to Question 27

The correct answer is (a) because a Florida court may, but not must, take judicial notice of the law of another state. Adjudicative facts are matters that are generally considered beyond "reasonable dispute." Matters of law are types of legal provisions like constitutions and statutes. (b)-(c) are true statements concerning the Florida Evidence Code's judicial notice provisions, which include greater specificity and guidance than do the Federal Rules of Evidence regarding judicial notice.

Answer to Question 28

The correct answer is (d). This question tests the law with regard to objections and offers of proof. FEC 90.104(1) expressly provides that a court may set aside or reverse a judgment when a substantial right of the party was affected if, in the event of excluded evidence, the court knew what the substance of the evidence was either through an offer of proof or was clear from the context of the questioning. The code does not require a party to renew an objection or offer proof to preserve the complaint on appeal if the ruling was definitive. Here, the judge's ruling was definitive, so if he could have determined from the context what the evidence presented in the testimony would have been, Glenn's attorney would not have needed to renew her objection in order to preserve the complaint on appeal.

Answers (a) and (b) are incorrect because a renewal of objection or offer of proof is not required to preserve the error on appeal. Answer (c) is incorrect because the FEC specifically allows for this remedy on appeal

Answer to Question 29

The correct answer is (a). This question tests the rules governing the use of evidence of other crimes, wrongs, or acts. Generally, under both the federal and Florida rules, such evidence is not admissible to prove conformity or propensity. In Florida, however, the code provides a specific exception for evidence of prior instances of commission of other acts of child molestation, and states that such evidence may be considered for its bearing on any matter to which it is relevant. In order to use such evidence, however, the state must furnish to the defendant or defendant's counsel a written statement of the acts or offenses it intends to offer and describe those offenses with the particularity required of an indictment or information. Here, the state failed to satisfy the

notice requirement on two counts. First, it delivered the memo nine days before the trial, thus missing the ten day mark. Second, the memo contained only a vague statement claiming the prior convictions would be introduced, which fails to satisfy the particularity requirement. Because of the lack of notice, the judge should not admit the evidence.

Answer (b) is incorrect. Even if the evidence will not be used for propensity purposes, the state still did not meet the notice requirement. Answer (c) is incorrect. Assuming the evidence was admitted, it would have to be subject to a limiting instruction if the defendant so requested. Answer (d) is incorrect because failure to provide notice renders the evidence inadmissible.