Question 1701 - Civil Procedure - Appealability and Review (6/28/2016)

The question was:

A citizen brought suit in federal court, alleging that a police officer violated her Fourth Amendment rights. The citizen asserts that the officer illegally entered her home, conducted an unlawful search, and wrongfully seized her property. The case went to trial and the verdict was for the citizen on her unlawful search and wrongful seizure of property claims but for the police officer on the illegal entry claim. Judgment was entered on the verdict. Each side timely appealed.

In the trial court, the citizen never made a motion for judgment as a matter of law on her illegal entry claim, but on appeal she argued that she should have won the illegal entry claim, as a matter of law. Although, in the trial court, the citizen failed to file motion for judgment as a matter of law on her illegal entry claim, she did timely object to the court's admission of some evidence relevant to that same claim and to a jury instruction that the district court gave as to that same claim.

When addressing the citizen's timely filed appeal, may the appellate court entertain the citizen's assignments of error with respect to the admission of evidence and the jury instruction to which the citizen objected and reverse the judgment against the citizen on her illegal entry claim and find the trial court erred in these decisions?

A: No, any errors in the admission of evidence or in the challenged jury instruction were rendered harmless in view of the citizen's waiver of her argument for judgment as a matter of law.
B: No, the appellate court lacks jurisdiction over these alleged errors.
C: Yes, the citizen's waiver of her argument for judgment as a matter of law on the illegal entry claim leaves her free to argue that the verdict should be vacated and the judgment reversed because of the errors that the citizen has identified in the admission of evidence and in the jury instructions, and the appeals court may reverse the judgment against the citizen on her illegal entry claim if it finds prejudicial error in these trial court decisions.
D: While the appellate court may entertain the citizen's assignments of error with respect to the admission of evidence and the jury instruction to which the citizen objected, it may not reverse the judgment unless the court finds that the trial court committed "plain error" in these decisions.

The explanation for the answer is:

A is incorrect. The assigned errors were not rendered harmless in view of the citizen's waiver of her argument for judgment as a matter of law. Even if the illegal entry claim properly went to the jury, errors in the admission of evidence and in jury instructions can be prejudicial errors that entitle a plaintiff to relief from the judgment (and presumably to a new trial).

B is incorrect. The appellate court does not lack jurisdiction over the alleged errors. On timely appeal from final judgment, the court has jurisdiction over appeals from interlocutory orders that are merged in that judgment, as these orders would be, and the question states that plaintiff timely objected to the evidence and the jury instruction in question.

C is correct. Because the citizen waived her argument for judgment as a matter of law, the citizen can now argue that the trial court's verdict be reversed as a result of the errors that the citizen asserts the trial court committed with respect to the admission of evidence and in the jury instructions. The appellate court has jurisdiction over these errors and may reverse the trial court's decision if it finds prejudicial error in the trial court's decision.

D is incorrect because "plain error" is the standard of review that applies to matters, jury instructions in particular, that the appellant did not timely or properly complain about in the district court; that is not the situation here.

Question 1790 - Civil Procedure - Appealability and Review (2/8/2017)

The question was:

Recipients of fax advertisements sued a management company in federal court under the federal Telephone Consumer Protection Act (TCPA), alleging that the company sent unsolicited junk fax ads in violation of the TCPA. The district court certified a class action, defining the class as the recipients of the unsolicited junk faxes sent by the management company. The management company sought leave to immediately appeal the order certifying the class, arguing that the potential damages were so great in relation to the management company's assets that, if the class certification order stood, the management company would be forced to settle, even though it has a strong case on the merits. The management company did not include in the record any information about its assets, nor did it demonstrate a significant probability that the class certification was erroneous in its appeal.

Should the appellate court grant the petition for leave to appeal?

A: Yes, in order to protect the management company from being forced to agree to a catastrophic settlement when it has a strong case on the merits.
B: Yes, because petitions for leave to appeal from a class certification were created to give appellate courts the opportunity to review class certification decisions that otherwise might forever escape appellate scrutiny due to the likelihood that such suits often settle.
C: No, because the management company made no evidentiary showing of its assets or that the potential damages were so great that, in light of those limited assets, the management company would feel compelled to settle if the class certification stood.
D: No, because the management company did not make a showing that the certification order was erroneous, there is no question of law to be decided.

The explanation for the answer is:

A is incorrect. Even though some appellate courts are inclined to grant a petition for leave to appeal from a class certification to protect a defendant from being forced to settle (even if it has a strong case on the merits), to avoid the risk of a catastrophic judgment, appellate courts will not do so absent an evidentiary showing that supports the argument.

B is incorrect. Even though the general proposition concerning the motivation to grant a petition for leave to appeal from a class certification were created to give appellate courts the opportunity to review class certification decisions that otherwise might forever escape appellate scrutiny, that does not provide adequate reason to grant this type of petition. More is required.

C is incorrect. Although the information in C is correct, it alone is not enough. The decision to grant an appeal of this kind is discretionary. D is a better answer here because the management company failed to demonstrate that the class certification order was erroneous.

D is correct. Here, the management company should provide evidence that both the class certification was erroneous and that the management company would be subjected to great pressure to settle in light of the potential damages. The question does not reveal any other reason for granting the appeal, such as the appeal raising an important question of law, a decision of which by the appellate court would be beneficial to other persons.

Question 1795 - Civil Procedure - Appealability and Review (2/8/2017)

The question was:

A man filed suit against a captain in state court for negligence and for allegedly violating federal employment law. The man's suit was then removed to federal court. While the suit was pending in federal court, the federal court held the man in civil contempt for violating a protective order that had been enacted as a safeguard against the reveal of confidential information. Following this, the federal court dismissed the federal employment law claim against the captain and remanded the negligence claim to state court from which the claims were initially removed from. The man then filed a notice of appeal from the district court's civil contempt order in the federal appellate court located in the same territory as the district court. The captain then moved to dismiss the appeal for lack of appellate jurisdiction.

Should the appellate court grant the captain's motion to dismiss?

A: No, because the remand is a final order, giving the appellate court jurisdiction over previously entered interlocutory orders including the civil contempt citation.
B: Yes, because the remand is not a final decision and no other basis for appellate jurisdiction over the civil contempt citation exists.
C: Yes, because the remand order is not reviewable on appeal since the federal appeals court lacks authority to review the remand and lacks authority to review interlocutory orders that the district court entered before it remanded the case to state court.
D: No, because civil contempt citations are immediately appealable.

The explanation for the answer is:

A is correct. Firstly, remand is considered a final order because it effectively puts the litigants out of court with the district court distancing itself from the case entirely by surrendering jurisdiction. Secondly, although the general rule is that remand orders cannot be appealed because the appellate court lacks jurisdiction, there are exceptions. Remand orders that are based on a defect in the removal procedure or a lack of federal jurisdiction cannot be appealed. However, the Supreme Court has ruled that the discretionary choice of a district court not to exercise supplemental jurisdiction is not a remand based on lack of jurisdiction but rather a remand based on discretion. In this case, the state law claims came into federal court through supplemental jurisdiction attached to the federal claims. Once the federal claims were dismissed, the court had the discretion to keep the supplemental claims or remand them back to state court. Because the remand was discretionary, the Supreme Court has held that such remands may be reviewed on appeal for abuse of discretion.

B is incorrect. In this case, the district court's remand of the man's state claims is regarded as a final decision regarding the man's civil contempt order under 28 U.S.C. § 1291 since it puts the case out of federal court. Therefore, the appellate court does have jurisdiction over the man's claim.

C incorrect. An order remanding a case to the state court from which it was removed typically is not reviewable on appeal. However, 28 U.S.C. § 2-314 1447(d) does not preclude the appeal of discretionary remands such as this; it precludes review of remands for lack of subject matter jurisdiction or for defects in removal procedure. See *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 129 S.Ct. 1862 (2009).

D is incorrect. Civil contempt citations are not immediately appealable – criminal contempt citations are. Further, if the civil contempt citation had been immediately appealable, this appeal would be untimely and hence beyond the jurisdiction of the appellate court.

Question 1798 - Civil Procedure - Appealability and Review (2/8/2017)

The question was:

Residents of a foreign country, Country A, brought suit against an American energy corporation in federal district court. The residents asserted violations of a federal act based on human rights abuses committed in Country A by Country A military personnel who had been hired by the American energy corporation. The district court found for the energy corporation, and the residents of Country A appealed. On appeal after the final judgment, the energy corporation argued for the first time that under the federal act, a corporation cannot be held liable. The residents of Country A argued that the court of appeals should not address this new argument.

May the federal court of appeals consider the newly raised argument from the energy corporation?

A: No, it is beyond the jurisdiction of the federal court of appeals to decide issues that were not presented to and decided by the district court.
B: No, the federal court of appeals may not consider arguments raised for the first time on appeal so as not to usurp the proper function of the trial court or encourage parties to withhold arguments which should be heard by the trial court.
C: Yes, despite the general reluctance of the federal court of appeals to consider issues that were not presented to the district court, the appellate courts do have discretion to hear such issues.
D: No, despite the discretion of the federal court of appeals to hear issues raised for the first time on appeal, there is not an adequate factual record for the court to review this particular issue.

The explanation for the answer is:

A is incorrect. Federal appellate courts (and the Supreme Court) have held that appellate courts do have jurisdiction to decide issues that were not presented to the district court.

B is incorrect. Although the policy arguments made in B frequently prevail, they do not always do so. Whether to entertain issues raised for the first time on appeal is regarded as within the court's discretion. Appellate courts frequently will hear new issues when they are issues of law as to which either no factual record is required or the factual record already made is adequate.

C is correct. Here, the appellate court may consider the energy corporation's new argument because the energy corporation has raised a question of law and the residents of Country A will not be prejudiced by this argument since they will have an adequate opportunity to argue this issue to the court of appeals.

D is incorrect. In this case, the kind of facts that would be pertinent (legislative history, e.g.) could be brought in through the parties' briefs; no factual record would be required or appropriate. Hence, C is a better answer than D.

Question 1792 - Civil Procedure - Appealability and Review (2/9/2017)

The question was:

A commercial landlord sued his former tenant in federal court, asserting that the tenant did substantial damage to the leased premises resulting in $80,000 worth of damages. The landlord also asserted a claim for slander due to allegedly defamatory remarks that the tenant made to prospective future tenants. The tenant counterclaimed for slander, alleging the landlord made it difficult for the tenant to find a suitable new location for its operations. The tenant also sought recovery of its security deposit. After discovery, the landlord and the tenant filed cross-motions for summary judgment on the damage to the premises and security deposit claims. The court granted summary judgment in the landlord's favor on both claims. The parties' respective claims for slander were set for trial. The landlord asked the district court to immediately enter a final judgment as to the damages and security deposit claims so the landlord could immediately collect the money due. The tenant opposed this request, providing evidence of the hardship she would suffer if she had to pay the full amount of the damages now when that amount might be reduced by the decisions on the respective claims for slander.

Should the court grant the landlord's motion for a partial final judgment?

A: Yes, because the claims at issue have been fully heard and resolved on the merits.
B: No, because the tenant made a showing of hardship coupled with the potential of the undue burden the appellate court would face if it had to hear the case twice.
C: No, because final judgment cannot be entered until all of the claims in a case have been fully adjudicated.
D: Yes, because there is no just reason to delay the entry of a final judgment.

The explanation for the answer is:

A is incorrect. Although the court may enter a partial final judgment when there has been sufficient facts to resolve an issue and the parties have been fully heard on the issue, it is within the judge's discretion to do so.

B is correct. The court here has several reasons to justify delaying entry of a partial judgment in this case, including the possibility that the tenant may win damages on her slander claim against the landlord, thereby reducing the amount of her liability, the tenant’s showing of hardship, and the potential for undue burden on the appellate court if it had to consider this case twice. As a matter of policy courts dislike piecemeal appeals and will not enter partial judgments if it seems likely that a piecemeal appeal could occur.

C is incorrect. Federal Rule of Civil Procedure 54(b) permits a court to enter a final judgment on fewer than all of the claims when a court expressly determines that there is no justifiable reason to delay entering the judgment.

D is incorrect because there are several reasons for the court to delay the judgment.

Question 1791 - Civil Procedure - Appealability and Review (2/10/2017)

The question was:

A painter brought suit against an art gallery in federal court. During the trial, the district court held that the art gallery had waived its attorney-client privilege and therefore ordered the art gallery to produce documents as to which it claimed the privilege. The court declined to certify its order for interlocutory appeal, so the art gallery timely filed a notice of appeal, arguing that the production order was immediately appealable under the collateral order doctrine.

Should the court of appeals entertain the appeal pursuant to that doctrine?

A: No, because the issue of attorney-client privilege cannot be separated from the merits of the case.
B: No, because the issue may be dealt with on an appeal after the final judgment.
C: Yes, because the issue of attorney-client privilege can be separated out from the merits of the case.
D: Yes, because the issue would be effectively unreviewable on an appeal after the final judgment.

The explanation for the answer is:

The collateral order doctrine is a narrow exception to the finality requirement for appeals. Typically only final order are reviewable by the appellate court, however under this doctrine a claim or issue may be immediately appealable if it is too important to wait. There are three requirements: (1) the lower court must have conclusively determined the disputed question; (2) the issue must be separate from and collateral to the merits of the main issue of the case; and (3) the issue must be effectively unreviewable on an appeal from the final judgment.

A is incorrect. Here the issue of attorney-client privilege relates to documents being produced during discovery and has nothing to do with the merits of the main legal claims of the case. Therefore the issue would be a collateral issue, easily separated from the merits of the case.

B is correct. The issue does not merit an appeal because it does not meet the third requirement of the test: that the issue must be effectively unreviewable on an appeal after the final judgment. The doctrine is meant to be used only for extreme cases, and so far has only been applied to cases involving matters of immunity and double jeopardy, where there exists such a right so as not to even stand trial. Here the defendant has other adequate means of vindicating its rights such as by refusing to comply with the production order, suffering sanctions for so doing, and appealing from the imposition of those sanctions, after final judgment.

C is incorrect. Even though, as stated above, the issue may be easily be separated, to merit an appeal all three requirements of the test must be met.

D is incorrect based on the reasoning stated above.

Question 1787 - Civil Procedure - Appealability and Review (2/10/2017)

The question was:

Owners of a trademark brought suit in federal district court, alleging that an electronic company was infringing its trademark and engaging in unfair competition. The owners sought a preliminary injunction and a permanent injunction against the electronic company to preclude it from continuing to infringe the owners' trademark, and also sought money damages. The electric company denied the allegations in the complaint. Sometime thereafter, the owners moved for summary judgment requesting a permanent injunction on the electric company and money damages. The district court denied the owners' motion. The owners timely appealed, contending that the denial of summary judgment constituted an interlocutory order refusing an injunction.

Does the appellate court have jurisdiction over the appeal?

A: Yes, because the district court did refuse an injunction when it denied the owners' motion for summary judgment, and its decision was an interlocutory order, as the case will continue.
B: No, because in an interlocutory order, a district court can rule only on a request for a preliminary injunction, and such an injunction was neither requested nor ruled on; a district court can rule upon a request for a permanent injunction only at the conclusion of a case.
C: No, because the denial of summary judgment did not refuse the owners' request for an injunction on the merits; the denial could not yet decide whether the requested injunction should issue.
D: No, because the denial of summary judgment also rejected the owners' request for money damages, at least temporarily, and no statutory authorization exists for interlocutory appeal of decisions that simultaneously deny both monetary and injunctive relief.

The explanation for the answer is:

A is incorrect. Here, the appellate court should hold that it does not have jurisdiction over the appeal because the denial of summary judgment did not refuse the owners' request for an injunction on the merits.

B is incorrect. An interlocutory order may deny a permanent injunction.

C is correct. Here, an appellate court would not have jurisdiction over the appeal because the district court's denial of the owners' motion for summary judgment did not refuse the owners' request for an injunction on the merits, and the denial could not yet decide whether the requested injunction should issue. See *Switzerland Cheese Ass'n. v. E. Horne's Market, Inc.*, 385 U.S. 23 (1966).

D is incorrect. There is no need for a statutory authorization for interlocutory appeal of decisions that simultaneously deny both monetary and injunctive relief. § 2-314 1292(a)(1) authorizes the interlocutory denial of an injunction and may be utilized as to the injunction denial even when an order also has the effect of temporarily denying monetary relief.

Question 1800 - Civil Procedure - Appealability and Review (2/10/2017)

The question was:

A citizen brought suit in federal court against a police officer alleging that the officer violated her Fourth Amendment rights. The citizen alleged that the officer illegally entered her home, conducted an unlawful search, and wrongfully seized her property. The case went to trial and a verdict on the unlawful search and wrongful seizure of property claims was returned in favor of the citizen. A verdict for the illegal entry claim was returned in favor of the police officer. Judgment was entered accordingly. Each side timely appealed. In the trial court, the citizen never made a motion for judgment as a matter of law on her illegal entry claim, but on appeal she argued that she should have won the illegal entry claim as a matter of law.

How should the court of appeals respond to the citizen's argument?

A: The court should entertain the argument and grant the citizen a judgment as a matter of law on her illegal entry claim if no reasonable jury could have rendered a verdict for the police officer on that claim.
B: The court should refuse to consider the citizen's argument on the ground that federal statutory law denies jurisdiction to the federal appeals courts to entertain post-trial motions for judgment as a matter of law.
C: The court should refuse to consider the citizen's argument on the ground that appellate courts are not permitted to consider motions for judgment as a matter of law for the first time on appeal.
D: The court should entertain the citizen's argument but deny the citizen's judgment as a matter of law on her illegal entry claim as the appellate court has no authority to deprive a party of the benefit of a jury verdict in its favor.

The explanation for the answer is:

A is incorrect. Appellate courts do not directly review the actions of juries; they review a trial judge's assessment of the work of the jury through a motion for judgment as a matter of law. Motions for judgment as a matter of law require parties to make such a motion before a claim goes to the jury and to renew the motion after the verdict. See Federal Rule of Civil Procedure 50.

B is incorrect because there is no statute that restricts the jurisdiction of the federal appeals courts as described in B.

C is correct. Motions for judgment as a matter of law require parties to make such a motion before a claim goes to the jury and to renew the motion after the verdict. Therefore, a party may not raise a motion as a matter of law for the first time on appeal.

D is incorrect. First, the federal appellate courts do not directly review the actions of juries. Second, it is untrue that federal appellate courts have no authority to deprive a party of the benefit of a jury verdict in its favor. In appropriate circumstances, federal appellate courts may do just that.

Question 1616 - Civil Procedure - Jurisdiction and Venue (6/19/2016)

The question was:

An art collector in State A recently had a painting from his home appraised for $50,000.00. The art collector believes he is the rightful owner of the painting; however, each of his two cousins, a historian from State B, and a teacher from State C, also claim rightful ownership of the painting. The art collector would like to resolve, once and for all, who is the true owner of the painting. Neither the historian nor the teacher has ever traveled outside the state where each presently live.

Which of the following is true regarding the art collector's ability to bring suit against the historian and teacher in federal court under the federal interpleader statute?

A: The art collector can bring an interpleader action against only the historian in State B and that court's decision will also be binding on the teacher.
B: The art collector can bring an interpleader action against the historian and the teacher in federal court in State A, even if State A's state court would not have had personal jurisdiction over the historian or the teacher under State A's long-arm statute.
C: The art collector would have been able to bring an interpleader action in federal court in State A against the historian or the teacher if the painting had been appraised at more than $75,000.
D: The art collector can bring an interpleader action against the historian and the teacher in federal court in State A, but only if a State A state court would have had personal jurisdiction over the historian and teacher under State A's long-arm statute.

The explanation for the answer is:

A is incorrect. The court's interpleader judgment will be binding only on those who have been made a party to the action. Therefore, if the art collector obtains a judgment against the historian, that decision will not also be binding on the teacher.

B is correct. Interpleader permits a person in the position of a stakeholder to require two or more claimants to litigate among themselves to determine which, if any, has the valid claim where separate actions might result in double liability on a single obligation. Interpleader is the appropriate way for the art collector to bring his suit against both cousins at the same time. Additionally, interpleader is available under Fed. R. Civ. P. 22 or under the Federal Interpleader Statute (28 U.S.C. 1335). Under the Rules, complete diversity is required. However, under the statute, only minimal diversity is required: an amount in controversy of $500 or more and diversity between any two contending claimants.

C is incorrect. Under the federal interpleader statute there is jurisdiction so long as at least $500 is in dispute and there is minimal diversity among the claimants. This is unlike Fed. R. Civ. P. 22, which relies upon the normal rules of subject matter jurisdiction.

D is incorrect. The interpleader statute allows for nationwide service of process.

Question 1606 - Civil Procedure - Jurisdiction and Venue (6/20/2016)

The question was:

A pedestrian from State A sues a motorcyclist from State B in a State A court, seeking $100,000 compensation for tortious injuries caused by the motorcyclist's allegedly negligent acts in State A. The motorcyclist then files a notice of removal in the federal court for the Eastern District of State A.

Which objection by the pedestrian would be legally valid?

A: Venue is incorrect if the accident occurred in the Western District of State A.
B: Venue is incorrect if the state court in which the original lawsuit was filed was located in the Western District of State A.
C: Venue is incorrect if the motorcyclist resides in the Western District of State A.
D: Venue is incorrect if the original lawsuit was filed in the wrong venue under state law.

The explanation for the answer is:

The correct answer is B. The federal removal statute specifies that any civil action brought in a state court may be removed by the defendant to the district court of the United States for the district and division embracing the place where such action is pending. If the state court where the action was originally filled was located in the Western District of State A, then removal would be proper to the Western District of State A, not the Eastern District of State A.

Answer A is incorrect because this is one of the venue criteria for suits originally filed in federal court. The federal removal statute specifies that removal from a state court is to be made to the judicial district which embraces the court where the state action is pending.

Answer C is incorrect because this is also one of the venue criteria for suits originally filed in federal court. The federal removal statute specifies that removal from a state court is to be made to the judicial district which embraces the court where the state action is pending.

Answer D is incorrect because this is an argument that should have been made in state court before a notice of removal is filed. This is not an appropriate argument for the federal court to hear.

Question 1711 - Civil Procedure - Jurisdiction and Venue (6/26/2016)

The question was:

A former employee sued a corporation, her former employer, in State A state court, alleging that she was illegally fired for making a workers' compensation claim. The employee was a citizen of State B, the corporation was incorporated in State C, had its principal manufacturing plant in State B and its second largest plant in State A, and was run by its board of directors from State D. Plaintiff sought in excess of $75,000, exclusive of interest and costs. Under State A workers' compensation law, as interpreted by the State A courts, this is a claim "arising under" State A workers' compensation law. The corporation removed the case to State A federal court, invoking diversity jurisdiction. Within 30 days after the filing of the notice of removal, the employee moved to remand back to state court.

How should the court rule on the motion?

A: The court should deny the motion to remand because the court has diversity jurisdiction over the case.
B: The court should grant the motion to remand because the court lacks diversity jurisdiction over the case.
C: The court should grant the motion to remand because workers' compensation suits arising under the laws of the state in which the action was filed may not be removed to federal court, notwithstanding the existence of diversity jurisdiction over the suit.
D: The court should deny the motion to remand because the motion was filed too late.

The explanation for the answer is:

A is incorrect. Pursuant to § 1445(c), a civil action in any State court arising under the workers' compensation laws of such State may not be removed to any district court of the United States. Therefore, it does not suffice that the federal court has diversity jurisdiction over the suit and the court should grant the motion to remand.

B is incorrect. Diversity jurisdiction for removal is determined on the date of the removal. On the date of the removal, the employee was a citizen of State B, the corporation was a citizen of State C and State D, and the employee sought compensation in excess of $75,000. Therefore, because the parties were diverse when the action was removed, there is diversity jurisdiction.

C is correct. Pursuant to § 1445(c), a civil action in any State court arising under the workers' compensation laws of such State may not be removed to any district court of the United States, notwithstanding the existence of diversity jurisdiction over the suit. Thus, the court should grant the motion to remand.

D is incorrect. A plaintiff must file a motion for remand 30 days after notice of the removal. Here the journalist timely filed a motion to remand.

Question 1703 - Civil Procedure - Jurisdiction and Venue (6/27/2016)

The question was:

A patient brought a negligence action in federal district court in State A against a dentist and a nurse following a root canal procedure the dentist and nurse performed. The patient sought more than $75,000 in compensatory damages from both the dentist and the nurse. The patient is a citizen of State A; the dentist is a citizen of State B; and the nurse is a citizen of State A. The nurse then moved to dismiss the case for lack of complete diversity between the parties. In opposition, the patient argued that the court can assert supplemental jurisdiction over her claim against the nurse.

Should the district court grant the nurse's motion to dismiss?

A: No; the district court should deny the motion to dismiss because the patient's claim against the dentist is a civil action within the original jurisdiction of the federal courts and the court can assert supplemental jurisdiction over the claim against the nurse because it is part of the same case or controversy as the patient's claim against the dentist.
B: Yes; the district court should grant the nurse's motion to dismiss because even though the patient's claim against the dentist is a civil action within the original jurisdiction of the federal courts, the court does not have supplemental jurisdiction over the claim against the nurse because it does not arise from the same case or controversy as the claim against the dentist.
C: Yes; the district court should grant the nurse's motion to dismiss because there is no diversity between the parties and therefore the court lacks diversity jurisdiction.
D: No; the district court should deny the motion to dismiss because the patient's claim against the dentist is a civil action within the original jurisdiction of the federal courts and the judicial economy would be served by litigating the patient's claims against the dentist and the nurse together.

The explanation for the answer is:

A is incorrect. The court lacks the power to grant supplemental jurisdiction over the patient's claim against the nurse because doing so would destroy complete diversity.

B is incorrect. Here, the patient brought suit against the dentist and the nurse following a root canal procedure that the dentist and nurse had performed. As such, the injured woman's claim against the nurse does arise out of the same case against the dentist.

C is correct. The nurse's presence in the claim prohibits the court from having diversity jurisdiction over the patient's claims against the dentist and the nurse. A plaintiff, generally, cannot use supplemental jurisdiction to overcome a lack of diversity in a diversity case.

D is incorrect. An interests in judicial economy cannot justify the exercise of jurisdiction over a set of claims that does not satisfy a grant of jurisdiction.

Question 1713 - Civil Procedure - Jurisdiction and Venue (6/28/2016)

The question was:

The rules of the courts of State X prohibit personal injury plaintiffs from alleging, in their complaints, the amount of damages they seek. A janitor from State X brought suit in state court in State X against a mechanic from State A for negligence. As alleged in the complaint, the janitor suffered multiple broken bones which required extensive surgeries and suffered from brain damage. The janitor sought compensation for those injuries for pain and suffering and reimbursement of medical expenses. The parties sought and received discovery from one another for over a year. A year after the janitor filed his action, the mechanic received timely answers to interrogatories that, for the first time, expressly indicated that the janitor sought $1 million in damages. The mechanic promptly filed with the local federal district court a notice of removal citing that the janitor's interrogatory answer stated that the janitor sought $1 million in damages. The janitor moved to remand the action.

Should the court grant the motion to remand?

A: No; the court should deny the motion to remand because the federal court has diversity jurisdiction and the removal was timely because the mechanic filed its notice of removal promptly after ascertaining from the janitor's interrogatory answers that the janitor sought $1 million in damages.
B: Yes; the court should grant the motion to remand because the mechanic's removal was untimely.
C: No; the court should deny the motion to remand because even though the removal was effected more than a year after the commencement of the action, the janitor deliberately failed to disclose the amount in controversy to prevent the mechanic from removing the case to federal court.
D: Yes; the court should grant the motion to remand because the mechanic failed to prove by a preponderance of the evidence that the amount in controversy exceeds $75,000, exclusive of interest and costs.

The explanation for the answer is:

A is incorrect. The mechanic should have been able to determine from the nature of janitor's injuries, as described in the complaint, that the jurisdictional amount was in controversy. Therefore, the interrogatory answers did not first put the mechanic on notice that the jurisdictional amount was in controversy. Thus, the removal is untimely both in the sense that it was effected more than 30 days after receipt of the complaint and in that it was effected more than a year after commencement of the action.

B is correct. The mechanic should have been able to determine from the nature of janitor's injuries, as described in the complaint, that the jurisdictional amount was in controversy. Thus, the removal is untimely both in the sense that it was effected more than 30 days after receipt of the complaint and in that it was effected more than a year after commencement of the action.

C is incorrect. The janitor did not deliberately fail to disclose the amount in controversy to prevent removal. State court rules precluded the janitor from pleading the amount in controversy and nothing prevented the mechanic from posing interrogatories to the janitor sooner, the answers to which would have disclosed how much the janitor was seeking.

D is incorrect. The mechanic did not fail to prove by a preponderance of the evidence that the amount in controversy exceeded $75,000, exclusive of interest and costs; the problem is that the removal came too late.

Question 1719 - Civil Procedure - Jurisdiction and Venue (6/28/2016)

The question was:

In a hurry to get his case on file before the statute of limitations ran on his claim, a pilot from State A filed suit against a radiologist from State C in the federal judicial district in State A, an extremely busy court. The radiologist does not reside in State A and a substantial part of the events giving rise to the claim did not occur in State A. The radiologist moved to transfer the case to State B because he travels to State B often for work. The pilot happened to have family in State B, so he consented to the transfer there. It remains up to the court in State A to decide whether to transfer the case at all, and whether to transfer it to the federal court in State B, in particular.

How should the court rule on the motion to transfer?

A: The court should grant the motion to transfer to State B because both of the parties have expressed their consent to litigating the case in State B and transfers are permitted when all parties have consented.
B: The court should grant the motion because the combination of the parties' consent and the extremely busy docket of the federal court in State A combine to justify the transfer.
C: The court should deny the motion because State B is not a district in which the action could have properly been brought originally.
D: The court should deny the motion because transfer is permitted only from one proper venue to another, for the convenience of parties and witnesses, in the interest of justice.

The explanation for the answer is:

A is incorrect. Here, the case was initially filed in an improper venue. When a case is filed in an improper venue courts must either dismiss the case or transfer the case to a venue where the case could have initially been brought. Transfers where the original venue is improper is governed by 28 U.S.C. § 1406, not 28 U.S.C. § 1404, and the former (unlike the latter) does not authorize transfer to a district to which all parties have consented.

B is incorrect. Here, because the case was initially filed in an improper venue, the parties cannot simply consent to transfer the case to a different jurisdiction. Moreover, the court may not transfer the case to State B because State B is not a court in which the action could have initially been brought. As such, neither the parties consent nor the busy docket of State A's federal court justifies the court to transfer the case to State B.

C correct. Here, the court should deny the motion because State B is not a district in which the action could have initially been brought. When parties file suit in an improper venue, a court must either dismiss the case or transfer the case to a venue where the action could have initially been brought. Here, nothing indicates that the court in State B would be a proper venue. Therefore, the court must deny the motion to transfer.

D is incorrect. Transfer is not permitted only from one proper venue to another for convenience, it also is permitted as an alternative to dismissal for improper venue.

Question 1619 - Civil Procedure - Jurisdiction and Venue (6/28/2016)

The question was:

A horse jockey from State A filed suit against an animal trainer from State B in federal court in State B seeking $80,000 as compensation for damages to his race horse as a result of the trainer's alleged negligence. The horse jockey mailed to the trainer a request for waiver of service, two copies of the waiver form, and a copy of the horse jockey's complaint.

Which of the following is true?

A: The trainer may waive service but would not be penalized for failing to do so even absent a showing of good cause for failure to waive.
B: The trainer should do nothing because there is no procedure to properly waive service.
C: The trainer must waive service or will face penalties from the court absent a showing of good cause for failure to waive.
D: State law determines whether waiver is permissible since this is a diversity action.

The explanation for the answer is:

A is incorrect. The failure to waive service without good cause will result in costs being imposed on the defendant, including the costs of service and reasonable expenses. Here, absent a showing of good cause, the trainer can be penalized for failing to waive service.

B is incorrect. Fed. R .Civ. P. 4(d) specifically provides for waiver of service.

C is correct. The plaintiff may request the defendant to waive service of process. To request a waiver of service, the plaintiff must mail the defendant a formal request to waive service, two copies of the waiver form, and a copy of the complaint. The defendant has 30 days from the date that the request was sent to return the waiver. If the defendant does not waive service of process, the plaintiff must serve him using one of the other approved methods (e.g., personal service, service at the defendant's usual abode, service upon an authorized agent, or service under a state approved method). However, the defendant will be liable for the cost of such additional service if he does not have good cause for failing to waiver service. Here, the horse jockey followed the correct protocol for waiver of service. Therefore, absent a showing of good cause, the trainer must waive service or face the court imposed penalties, such as costs of the additional service methods.

Answer D is incorrect. Fed. R. Civ. P. 4(d) provides the applicable service rules in all federal lawsuits.

Question 1620 - Civil Procedure - Jurisdiction and Venue (2/8/2017)

The question was:

A chef from State A sues a butcher from State B in a federal court in State A, seeking $100,000 compensation for tortious injuries caused in a car accident by the butcher's allegedly negligent driving while he was in State A. Apart from the single day of the car accident, the butcher has not spent any time in State A, and the butcher does not want to litigate there.

What course of action may the butcher's lawyer take?

A: File a motion to dismiss for lack of subject-matter jurisdiction because the butcher does not have minimum contacts with State A.
B: File a motion to transfer the case to State B federal court to cure a defect in personal jurisdiction.
C: File a motion to transfer venue due to the burden that would be imposed on the butcher if he were required to litigate in State A.
D: File a notice of removal in the federal district court of State B where the butcher resides.

The explanation for the answer is:

A is incorrect. Minimum contacts is relevant to personal jurisdiction, not subject-matter jurisdiction. Further, there unquestionably are minimum contacts on these facts since the accident occurred in State A. There is also subject-matter jurisdiction through diversity jurisdiction.

B is incorrect. As stated above, State A will have personal jurisdiction over the butcher because the accident occurred in State A.

C is correct. For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought. Because the suit was originally brought in a proper venue, under the Federal Rules of Civil Procedure, the court may transfer the case by discretion. It is the movant's burden to show how and why another venue would be more proper.

D is incorrect. Removal is a mechanism by which a defendant may move a case from state court to federal court. Here, the case is already in federal court. The proper mechanism to move the case would be a motion to transfer venue.

Question 1603 - Civil Procedure - Jurisdiction and Venue (2/8/2017)

The question was:

A teacher, a citizen of State A, brought suit against a librarian, a citizen of State B, in a state court in State A. The teacher seeks $100,000 as compensation for tortious injuries allegedly caused by the librarian's negligent acts in State A. The librarian files a notice of removal in the federal district court of State B. The teacher files a timely motion to remand.

How should the federal judge rule on the motion to remand?

A: Remand because the court does not have personal jurisdiction.
B: Deny because the federal court has diversity jurisdiction over the parties and the original lawsuit was not filed in State B.
C: Remand because the original lawsuit was filed in State A.
D: Deny because the original lawsuit was filed in the state in which the teacher was a citizen and the librarian was not.

The explanation for the answer is:

A is incorrect. The removal statute calls for analysis of subject-matter jurisdiction, not personal jurisdiction. Challenges to personal jurisdiction are properly made in the state court in which the suit was originally filed.

B is incorrect. The federal court does have diversity jurisdiction. However, the removal statute allows for removal only to the district where the original action is pending. Since the original lawsuit was filed in State A, the lawsuit could only be removed to State A federal court, not State B federal court.

C is correct. The removal statute allows for removal only to the district embracing where the original action is pending. Since the original lawsuit was filed in State A, the lawsuit could only be removed to State A federal court, not State B federal court.

D is incorrect. This is not a basis for removal under the removal statute.

Question 1708 - Civil Procedure - Jurisdiction and Venue (2/8/2017)

The question was:

A client sued his former attorney in federal court for malpractice. The client had retained the attorney to file and prosecute U.S. patent applications. The client alleged that if the attorney had not omitted from the client's patent application a portion of the computer source code for the client's invention, the resulting U.S. patent would not have been held invalid for indefiniteness. The malpractice claim requires analysis of U.S. patent law and proof of the patent's invalidity. Claims arising under U.S. patent law are within the exclusive jurisdiction of the federal courts. In response to the former client's complaint, the attorney moved to dismiss for lack of subject-matter jurisdiction.

How should the court rule on that motion?

A: The court should deny the motion to dismiss because plaintiff's right to relief depends on the resolution of a substantial, disputed question of federal law.
B: The court should deny the motion to dismiss because federal patent law completely preempts the plaintiff's malpractice claim.
C: The court should grant the motion to dismiss because the claim cannot arise under federal law since it is a state-law created claim.
D: The court should grant the motion to dismiss because the claim does not sufficiently raise a substantial, disputed question of federal law to support federal jurisdiction.

The explanation for the answer is:

Answer D is the correct answer. Under 28 U.S. § 1338, federal subject-matter jurisdiction extends to any case in which a well-pleaded complaint asserts either a cause of action that federal patent law creates or a state-law created claim in which a plaintiff's right to relief necessarily depends on resolution of a substantial question of federal patent law. Under Gunn v. Minton, 133 S.Ct. 1059 (2013), malpractice claims do not automatically invoke federal subject-matter jurisdiction just because there is an underlying patent claim involved in the case. Instead a four-point test is used: federal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress. Here, the plaintiff's right to relief does not depend on the resolution of a substantial, disputed question of federal patent law. The claim is a state-law created malpractice claim, and the embedded federal issue is not sufficiently substantial to support federal jurisdiction because it presents only a hypothetical question (would inclusion of computer source code in the patent application have prevented the patent from being held invalid for indefiniteness?) and is fact-bound. Therefore, Answer A is incorrect.

Answer B is incorrect because federal patent law does not completely preempt the plaintiff's malpractice claim in this case. The patent issue involved in the case is not a substantial, disputed question of federal patent law that would support federal jurisdiction.

Answer C is incorrect because a state-law created claim could still arise under federal law in some instances. Not all state-law created claims are automatically blocked from federal court. In this case, the claim is not allowed because there is not a substantial, disputed question of federal patent law that would support federal jurisdiction.

Question 1716 - Civil Procedure - Jurisdiction and Venue (2/11/2017)

The question was:

A foreign machinery manufacturer made arrangements with distributors around the world, including those in Country E. The manufacturer would sell to distributors the number of machines the distributors respectively ordered and would ship the machines to distribution centers designated by the distributors. The distributors would then be responsible for advertising, selling, delivering, and servicing the machines.

A company operating in State A purchased five machines from a State B distributor. Both states are in Country E. The manufacturer was aware of this purchase and was pleased about it. An employee of the State A company was seriously injured while using one of the machines. The employee sued the manufacturer in State A state court, alleging design defects and negligent manufacture. The manufacturer timely moved to dismiss for lack of personal jurisdiction. In opposition to the motion to dismiss, the employee argued that similar machines made by the manufacturer had been sold in State A over the last decade, generating significant profits for the manufacturer and that the State B distributor had advertised, in State A, both the product and the State B distributor's services. The State A long-arm statute authorizes the assertion of jurisdiction over the manufacturer. The only question is the constitutionality of State A's assertion of personal jurisdiction over the manufacturer.

Should the court grant the manufacturer's motion to dismiss for lack of personal jurisdiction?

A: Yes, because the manufacturer's knowledge that its machines were being advertised, sold and delivered to State A by a distributor did not amount to "purposefully availing itself" of the benefits and protections of State A's law or market.
B: Yes, because a state can assert personal jurisdiction over a foreign manufacturer only where the manufacturer is incorporated or has its principal place of business in the forum state, and the manufacturer was neither incorporated nor had its principal place of business in State A.
C: No, because a manufacturer is subject to personal jurisdiction in any state in which its product arrived through the stream of commerce, was sold to the ultimate consumer, and caused injury. The manufacturer sought to derive revenue from State A, could foresee being haled there to defend a lawsuit arising out of injury there, and suffers no unconstitutional unfairness if required to defend there.
D: No, because the manufacturer targeted Country E by establishing distributors there and thereby purposefully availed itself of the laws and market of each state, including State A.

The explanation for the answer is:

A is correct. It cannot be said that the manufacturer purposefully availed itself of the benefits and protections of State A's laws. Here, the manufacturer hired a State B distributor. Although the manufacturer was aware of the company's purchase from the distributor, the purchases were made in State B, not State A. As such, the manufacturer designed its machines in anticipation of sales in State B, but not State A. Moreover, the distributor was responsible for all advertising, not the manufacturer. The manufacturer did not engage in conduct purposefully directed toward State A, in particular. Thus, the court cannot assert personal jurisdiction over the manufacturer.

B is incorrect. This would not be an instance of general personal jurisdiction, as the claim arose out of a machine the manufacturer made which arrived in State A through the stream of commerce. It is also not true that general personal jurisdiction over a foreign manufacturer may be exercised only where the manufacturer is incorporated or has its principal place of business, although this usually is the case.

C is incorrect. A manufacturer submitting their machine into the stream of commerce is not alone sufficient to justify personal jurisdiction in any state. Here, the manufacturer did not purposefully avail itself of the benefits and protections of State A's laws. Instead, the manufacturer had a State B distributor, the sale of the machine was in State B, and the manufacturer had no control over advertising, which was the distributor's responsibility. Therefore, the court cannot exert personal jurisdiction over the manufacturer.

D is incorrect. The position taken here (that by targeting a country, a manufacturer targets each state within that country) was rejected by the United States Supreme Court.

Question 1658 - Civil Procedure - Jury Trials (6/19/2016)

The question was:

A woman, a citizen of State A, sued a State B corporation in a one-count complaint filed in the federal district court in State B. The complaint alleged that the corporation breached its lease, demanded a jury trial under the Seventh Amendment, and asked the court for a writ of ejectment. Lawyers for the corporation argue that the woman is not entitled to a jury.

How will the judge rule?

A: The woman is entitled to a jury because the Seventh Amendment applies only to suits at common law, and this is a lawsuit at common law.
B: The woman is not entitled to a jury because the Seventh Amendment applies only to suits at common law, and this is a lawsuit in equity.
C: The woman is entitled to a jury because the Federal Rules of Civil Procedure eliminated the distinction between law and equity.
D: The woman is not entitled to a jury because the Seventh Amendment applies only to suits at equity, and this is a lawsuit at common law.

The explanation for the answer is:

A is correct. Even though ejectment does not seek monetary damages, it was historically a writ at common law and hence triggers the Seventh Amendment's jury guarantee.

B is incorrect. Even though ejectment does not seek monetary damages, it historically was a writ at common law.

C is incorrect. The Federal Rules of Civil Procedure eliminated the distinction between law and equity for many purposes -- for instance, for purposes of pleading -- but not for purposes of the Seventh Amendment.

D is incorrect. The Seventh Amendment applies only to suits at common law.

Question 1758 - Civil Procedure - Jury Trials (6/27/2016)

The question was:

A patient sued a doctor, each a private party, in an action properly brought in the federal district court of State A. Neither the patient nor the doctor filed a jury demand. Neither the patient nor the doctor served the opposing party with a jury demand within 14 days after the last pleading was served.

Under these circumstances, the court is free to take each of the following actions *except* which one?

A: On motion, order a jury trial on any issue for which a jury might have been demanded.
B: In an action not triable of right by a jury, try any issue with an advisory jury.
C: In an action not triable of right by a jury, on the motion of any party, try an issue to a jury whose verdict will have the same effect as if a jury trial had been a matter of right.
D: With consent from all parties, in an action not triable of right by a jury, try any issue by a jury whose verdict has the same effect as if a jury trial had been a matter of right.

The explanation for the answer is:

A is incorrect. Fed.R.Civ.P. 38(a) allows parties to demand a jury trial on any issue for which a jury may have been demanded.

B is incorrect. Pursuant to Fed.R.Civ.P. 39(c), in an action in which a jury may not have been demanded, the court is permitted to try any issue with an advisory jury.

C is correct. If an action is not an issue for which a jury might have been demanded, no rule permits a court to grant a jury trial without the parties' consent.

D is incorrect. Fed.R.Civ.P. 39(c)(2) requires a court to obtain the parties' consent prior to trying an action that is not triable of right by jury.

Question 1757 - Civil Procedure - Jury Trials (6/28/2016)

The question was:

A nurse filed suit against a medical company in federal court in State A asserting that a drug manufactured by the medical company was the proximate cause of her injuries. The nurse filed timely and furnished the medical company with a written request of the jury instruction on proximate cause that the nurse wanted the court to give. The court informed the parties that it would not give the instruction that the nurse requested and told the parties the essence of the instruction on proximate cause the court proposed to give. The court then gave the parties an opportunity to object on the record and out of the jury's presence. The nurse objected to the court's refusal to give the instruction that the nurse proposed and stated the grounds for her objection, but the nurse did not separately object to the instruction that the court proposed to give. After the parties made their final arguments to the jury, the court instructed the jury on proximate cause. The court's instructions to the jury regarding proximate cause were modified from the instruction that the court had previously proposed to the parties. The nurse promptly objected to the judge's instruction on proximate cause. Thereafter, the jury returned a verdict for the medical company, and the trial court entered judgment for the medical company. The nurse filed a timely notice of appeal, arguing that the judge's proximate cause instruction was erroneous and prejudicial.

Is the appellate court likely to find an assignment of error?

A: No, the court will likely find the nurse's objection was untimely and that the alleged error should therefore be reviewed under the "plain error" standard of review.
B: No, the court will likely find the nurse's objection was untimely and that, as a result, the nurse waived the error, such that the appeals court would not consider this assignment of error at all.
C: Yes, the court will likely find the nurse's objection was made timely but was waived because the nurse did not timely object to the instruction the court informed the parties that it proposed to give.
D: Yes, the court will likely find that the nurse's objection was timely, that the nurse did not waive her objection, and that the appeals court would rule on the merits of the nurse's objection to the instruction that the trial court gave to the jury.

The explanation for the answer is:

A is incorrect. The nurse's objection in this case was not untimely because the nurse objected promptly once she learned of the instruction that the judge gave. Moreover, even if the nurse's objection had been untimely in this case, the appeals court would be required to review the instruction for plain error because the error would have affected the nurse's substantial right. See Rule Fed.R.Civ.P. 51(d)(2).

B is incorrect. The nurse's objection in this case was not untimely and was made promptly after the nurse learned of the instructions the judge gave to the jury. Therefore, the appeals court could find this an assignment of error.

C is incorrect. Here, the nurse's failure to timely object to the court's proposed proximate cause instruction should have no bearing on the nurse's objection to the different jury instruction that the trial court in fact gave to the jury.

D is correct. The nurse's objection in this case was not untimely because the court did not afford the parties an earlier opportunity to object to the jury instructions that the judge ultimately gave. The nurse objected once she learned of the instruction that was given. See Fed.R.Civ.P. 51(c)(2)(B).

Question 1662 - Civil Procedure - Jury Trials (6/28/2016)

The question was:

A man from State A sues a woman from State B in federal district court in State B. The man's complaint alleges that the woman violated a federal statute. The statute authorizes private causes of action, but permits only injunctive and declaratory relief. The statute entitles plaintiffs to demand a jury. In her answer, the woman requests a trial by jury. The man argues that the woman is not entitled to a jury.

How is the court likely to rule?

A: The woman is not entitled to a jury because injunctive and declaratory relief are equitable remedies, and the Seventh Amendment prohibits juries in suits in equity.
B: The woman is entitled to a jury because the federal statute authorizes jury trials in these circumstances.
C: The woman is not entitled to a jury because the federal statute does not authorize jury trials in these circumstances.
D: The woman is entitled to a jury because the Seventh Amendment guarantees a jury in these circumstances.

The explanation for the answer is:

A is incorrect. The Seventh Amendment only guarantees a jury trial to what, historically, were suits at common law, but does not prohibit Congress from statutorily granting a jury right to claims that fall outside the Seventh Amendment's guarantee.

B is incorrect. Although Congress has the power to create statutory jury rights, it has not done so here; the statute provides only that plaintiffs can demand a jury, and the Seventh Amendment does not guarantee a jury because the plaintiff is seeking exclusively equitable remedies.

C is correct. The Seventh Amendment does not guarantee a jury because the plaintiff is seeking exclusively equitable remedies. Although Congress has the power to create statutory jury rights, it has not done so here; the statute provides that plaintiffs can demand a jury, but the woman is the defendant.

D is incorrect. The Seventh Amendment only guarantees a jury to what, historically, were suits at common law, and the plaintiff's lawsuit seeks only equitable remedies.

Question 1752 - Civil Procedure - Jury Trials (7/22/2016)

The question was:

Representatives of estates of individuals who died in an airplane crash in State A file suit in federal court against the foreign manufacturer of the aircraft that crashed. Foreign manufacturers can only be sued in federal court as a result of Foreign Sovereign Immunities Act ("FSIA"), which grants federal jurisdiction over foreign instrumentalities when a foreign state engages in commercial activity. Prior to FSIA, foreign instrumentalities were not suable at common law. The representatives contended that FSIA violates the Seventh Amendment because it requires suits against foreign state instrumentalities to be tried by a judge, rather than a jury. The representatives demanded a jury trial. The representative's claim is a wrongful death action that seeks money damages and exemplifies the types of legal actions tried by juries. The foreign manufacturer moved to strike the representatives jury demand.

Should the court strike the jury demand?

A: No. The court should not strike the jury demand because the representatives' right to a jury trial under the Seventh Amendment stems from the fact that the representatives' wrongful death claim exemplifies the types of claims tried by juries.
B: No. The court should not strike the jury demand because the representatives' right to jury trial under the Seventh Amendment stems from the nature of the representative's claims and the FSIA's grant of federal jurisdiction over foreign instrumentalities.
C: Yes. The court should strike the jury demand because, to warrant protection under the Seventh Amendment, the claims must not only be legal; they must also be asserted against the type of defendant suable at common law in 1791. A sovereign was not properly a defendant in a suit at common law in 1791.
D: Yes. The court should strike the jury demand because providing a Seventh Amendment jury would violate the FSIA.

The explanation for the answer is:

A is incorrect. Although the representatives' claims exemplify the types of claims tried by juries, this does not, in and of itself, make the representatives' wrongful death claim determinative of the representative's right to a jury trial under the Seventh Amendment. The determination of whether the Seventh Amendment preserves the right to a jury trial is historical and turns on whether the claim or relief was available in 1791. Because foreign instrumentalities were not the type of defendant that was suable at common law, the representatives' claim was not available in 1791.

B is incorrect. FSIA's statutory grant of federal jurisdiction over foreign instrumentalities does not add to the representative's claim that FSIA violates the Seventh Amendment. Here, the representatives' claim and relief against the foreign manufacturer was not a claim at law recognized in 1791. Therefore, despite FSIA's grant of federal jurisdiction, the nature of the representatives' claim does not satisfy the Seventh Amendment's jury trial requirements.

C is correct. The Seventh Amendment's right to a jury trial requires that claims be both legal and be asserted against the type of defendant that was suable at common law in 1791. Foreign instrumentalities were not suable at common law in 1791. As such, the representatives' claims do not satisfy the Seventh Amendment's requirements right for a jury trial.

D is incorrect. The mere fact that providing a Seventh Amendment jury would violate FSIA is not determinative of the representatives' right to a jury trial if the FSIA's denial of a right to jury trial violates the Seventh Amendment.

Question 1657 - Civil Procedure - Jury Trials (2/8/2017)

The question was:

An employer, a citizen of State A, sues an employee, a citizen of State B, in State B state court. The one-count complaint seeks an injunction that would prevent the employee from accepting a job that the employer claims would violate a valid covenant not to compete. The employee answers the complaint, in which he demands a jury trial under the Seventh Amendment.

Will the court require a jury on the employee's legal theory?

A: No, because the Seventh Amendment has not been incorporated against the states.
B: Yes, because the Seventh Amendment only applies to suits at common law, and this is a suit in law since it involves interpretation of a contract.
C: No, because the Seventh Amendment only applies to suits at common law, and this is a suit in equity since it seeks an injunction.
D: Yes, the Seventh Amendment applies here because the injunctive relief has more than de minimus value.

The explanation for the answer is:

A is correct. The Seventh Amendment is only applicable to federal courts, not state courts. State law determines whether parties have a right to a jury in state courts.

B is incorrect. The Seventh Amendment is only applicable to federal courts, not state courts. State law determines whether parties have a right to a jury in state courts. Moreover, this would be deemed a suit in equity because it seeks only an injunction, a form of equitable relief.

C is incorrect. The Seventh Amendment is only applicable to federal courts, not state courts. State law determines whether parties have a right to a jury in state courts.

D is incorrect. The Seventh Amendment is only applicable to federal courts, not state courts. State law determines whether parties have a right to a jury in state courts. Moreover, equitable relief is not monetized to satisfy the Seventh Amendment's amount in controversy requirement.

Question 1658 - Civil Procedure - Jury Trials (2/10/2017)

The question was:

A woman, a citizen of State A, sued a State B corporation in a one-count complaint filed in the federal district court in State B. The complaint alleged that the corporation breached its lease, demanded a jury trial under the Seventh Amendment, and asked the court for a writ of ejectment. Lawyers for the corporation argue that the woman is not entitled to a jury.

How will the judge rule?

A: The woman is entitled to a jury because the Seventh Amendment applies only to suits at common law, and this is a lawsuit at common law.
B: The woman is not entitled to a jury because the Seventh Amendment applies only to suits at common law, and this is a lawsuit in equity.
C: The woman is entitled to a jury because the Federal Rules of Civil Procedure eliminated the distinction between law and equity.
D: The woman is not entitled to a jury because the Seventh Amendment applies only to suits at equity, and this is a lawsuit at common law.

The explanation for the answer is:

A is correct. Even though ejectment does not seek monetary damages, it was historically a writ at common law and hence triggers the Seventh Amendment's jury guarantee.

B is incorrect. Even though ejectment does not seek monetary damages, it historically was a writ at common law.

C is incorrect. The Federal Rules of Civil Procedure eliminated the distinction between law and equity for many purposes -- for instance, for purposes of pleading -- but not for purposes of the Seventh Amendment.

D is incorrect. The Seventh Amendment applies only to suits at common law.

Question 1636 - Civil Procedure - Law Applied by Federal Courts (6/26/2016)

The question was:

A soldier from State A filed suit against a defendant from State B in a federal court in State B seeking $100,000 in damages for injuries resulting from a car accident that occurred on an army base in State B. The defendant was not negligent, and State B tort law allows recovery only upon a showing of negligence. There is no applicable federal statute.

Which of the following statements is true?

A: The court must dismiss the soldier's claim for failure to state a claim upon which relief can be granted because the only possible source of a legal right would be state law or federal statute, and neither grants the soldier rights here.
B: The soldier might have a viable claim, but only if the court were persuaded that there was a peculiarly strong federal interest to create a federal common law of torts that applied to accidents involving servicemen on army bases.
C: The court must dismiss the soldier's claim; although federal courts used to create federal common law before *Erie*, that decision declared the end of federal common law.
D: The soldier might have a viable claim, but only if federal choice of law rules determined that State A tort law applied and if the soldier would have a valid claim under that State A law.

The explanation for the answer is:

A is incorrect. Federal common law is an additional possible source of law upon which a plaintiff's rights might be grounded. Therefore, it is not true that there is no other potential source of relief for the soldier.

B is correct. Federal courts have the authority to create federal common law and may do so in areas of peculiarly strong federal interest. Torts relating to servicemen is one such field where there is a peculiarly strong federal interest. Therefore, the soldier may have a viable claim if the court were persuaded to create a federal common law of torts relating to accidents involving servicemen on army bases.

C is incorrect. Although *Erie* declared the end of "federal general common law," federal courts continue to create federal common law in areas of peculiarly strong federal interest. Torts in relation to servicemen are one such field of peculiarly strong federal interest.

D is incorrect. A federal court sitting in diversity (as this court would be, unless the soldier's claims were grounded in federal common law) would apply the choice of law rules of the state in which the federal court is situated, not federal choice of law rules.

Question 1635 - Civil Procedure - Law Applied by Federal Courts (6/26/2016)

The question was:

Plaintiff filed a diversity action, pressing business tort claims, against Defendant in federal court in State A. The State A federal court dismissed Plaintiff's action "on the merits and with prejudice," in accordance with State A law, because all claims fell outside State A's two-year statute of limitations. Plaintiff refiled the diversity action against Defendant in federal court in State B. State B law treats dismissals on grounds of statute of limitations as dismissals without prejudice. Defendant files a motion to dismiss, citing to the State A court's judgment.

What is the State B federal court likely to do?

A: Deny Defendant's motion; the preclusive effect of the State A judgment is determined by State B law since this is a diversity action.
B: Grant Defendant's motion; the preclusive effect of the State A judgment is governed by federal common law, which incorporates State A law.
C: Deny Defendant's motion; to give prejudicial effect to a dismissal on statute of limitations grounds would violate the United States Constitution.
D: Grant Defendant's motion; the preclusive effect of the State A judgment is a substantive issue for purposes of *Erie* and hence is governed by State A state law.

The explanation for the answer is:

A is incorrect because it is State A's law that determines the preclusive effect of the State A federal court's diversity judgment, not State B's law.

B is correct. The preclusive effect of a federal court's judgment in diversity is determined by federal common law, but federal common law incorporates the law of the state in which the federal court that issued the judgment is situated.

C is incorrect. There is no such constitutional limitation.

D is incorrect. The preclusive effect of a federal court's judgment is determined by federal common law, not state law. The federal common law incorporates state law, but it still has the status of federal law.

Question 1629 - Civil Procedure - Law Applied by Federal Courts (6/27/2016)

The question was:

A geologist filed a diversity action against a farmer in federal court in State A, seeking recovery for the damage to her very expensive sports car and the broken arm that she suffered as a result of a car crash with the farmer. At trial, after two days of testimony, the jury returned a verdict for the geologist and awarded her $75,000 in compensatory damages. Under federal law, a judge who believes compensatory damages are so excessive as to "shock the conscience" can offer the plaintiff the choice between a new trial or remittitur of the excessive damages. Under substantive State A law, the court can reduce a jury's awards by way of remittitur if it thinks damages are "excessive."

Which of the following is true?

A: The farmer should submit only a motion for remittitur, on the ground that the jury's damage award "shocks the conscience."
B: The farmer should submit a joint motion for new trial and remittitur, on the ground that the jury's damage award "shocks the conscience."
C: The farmer should submit only a motion for remittitur, on the ground that the jury's damage award was "excessive."
D: The farmer should submit a joint motion for new trial and remittitur, on the ground that the jury's damage award was "excessive."

The explanation for the answer is:

A is incorrect. Under the *Erie* doctrine, a court is required to apply the substantive law of the state in which it is sitting. Federal courts sitting in diversity apply the remittitur rules of the state in which they are situated. Therefore, the appropriate remittitur standard is "excessive" rather than "shocks the conscience."

B is incorrect. Under the *Erie* doctrine, federal courts sitting in diversity apply the remittitur rules of the state in which they are situated. Therefore, he appropriate remittitur standard is "excessive" rather than "shocks the conscience."

C is incorrect. The Seventh Amendment does not allow a federal court to disregard a jury's damages finding and order remittitur. Instead, the court must offer plaintiff the choice between a new trial or the reduced award. A motion for remittitur accordingly must be paired with a motion for a new trial – and that is why Answer D is correct.

D is correct. Under the *Erie* doctrine, federal courts sitting in diversity apply the remittitur rules of the state in which they are situated; hence the appropriate remittitur standard is "excessive" rather than "shocks the conscience."

Question 1626 - Civil Procedure - Law Applied by Federal Courts (6/28/2016)

The question was:

A lumberjack properly brought a single-count complaint alleging medical malpractice against a doctor in the federal district court of State A. The jury found for the lumberjack and awarded him $2.5 million in damages. Federal law permits a judge to set aside a jury's verdict and order a new trial if the jury's award "shocks the conscience," whereas State A's tort reform statute authorizes judges to order a new trial only upon a finding of "excessive damages."

Which of the following is most true?

A: The federal court can order a new trial only if the jury's award "shocks the conscience;" the federal and state standards for ordering a new trial are different, and the federal rule accordingly preempts the state rule under the Supremacy Clause.
B: The federal court can order a new trial if it determines that the jury awarded excessive damages; State A's tort reform provision concerning new trials is substantive, and hence applies to this diversity lawsuit.
C: The federal court cannot order a new trial simply because it thinks the jury awarded excessive damages because doing so would violate the Seventh Amendment.
D: The federal court can order a new trial if it determines the jury awarded excessive damages, but only if State A's choice-of-law rules would indicate that State A law applies in this circumstance.

The explanation for the answer is:

A is incorrect. Pursuant to the federal law known as the Rules of Decision Act, federal courts are required to apply state laws "in cases where they apply." Therefore, the fact that the "shocks the conscience" standard is federal does not, on its own, mean that the federal court must apply it.

B is correct. Because this lawsuit is based on diversity jurisdiction, the question of which law is applicable is an *Erie* question. The Federal Rules of Civil Procedure do not explicitly enumerate the "shocks the conscience" rule, so the appropriate analysis is *Erie's* constitutional test, which asks whether the potentially applicable state law is substantive or procedural.

C is incorrect. The Seventh Amendment's re-examination clause does not inhibit the authority of trial courts to grant new trials for any of the reasons for which new trials have previously been granted in actions at law in the courts of the United States. Furthermore, the court's discretion includes overturning verdicts for excessiveness and ordering a new trial.

D is incorrect. Here, the district court, sitting in diversity, must apply State A's choice-of-law rules to determine which state's law should be applied, not to determine whether state or federal law is to be applied.

Question 1630 - Civil Procedure - Law Applied by Federal Courts (6/28/2016)

The question was:

A pharmacist filed a lawsuit against her employer, a hospital, in federal court in State A, claiming that the hospital violated the pharmacist's rights under Title VII's employment laws during the two weeks the pharmacist worked for the hospital. After two days of testimony, the jury returned a verdict for the pharmacist and awarded her $2,750,000 in compensatory damages. Under federal law, a judge who believes compensatory damages are so excessive as to "shock the conscience" can offer the plaintiff the choice between a new trial or remittitur of the excessive damages. Under State A law, judges can order remittitur if the court thinks damages are "excessive."

Which of the following is true?

A: The hospital should submit only a motion for remittitur, on the ground that the jury's damage award "shocks the conscience."
B: The hospital should submit only a motion for remittitur, on the ground that the jury's damage award is "excessive."
C: The hospital should submit both a motion for new trial and, in the alternative, a motion for remittitur, on the ground that the jury's damage award "shocks the conscience."
D: The hospital should submit both a motion for new trial and, in the alternative, a motion for remittitur, on the ground that the jury's damage award is "excessive."

The explanation for the answer is:

A is incorrect. The Seventh Amendment does not allow a federal court to disregard a jury's damages finding and order remittitur. Federal courts instead must offer plaintiff the choice between a new trial or the reduced award, so a motion for remittitur must be paired with a motion for a new trial.

B is incorrect. Because this is not a diversity jurisdiction lawsuit – but instead is based exclusively on federal law – this question does not raise any *Erie* issues, and federal law alone governs. Therefore "shocks the conscience," not "excessive," is the appropriate standard to apply.

C is correct. Because this is not a diversity jurisdiction lawsuit – but instead is based exclusively on federal law – this question does not raise any *Erie* issues, and federal law alone governs. Therefore "shocks the conscience," not "excessive," is the appropriate standard to apply.

D is incorrect. Because this is not a diversity jurisdiction lawsuit – but instead is based exclusively on federal law – this question does not raise any *Erie* issues, and federal law alone governs. Therefore "shocks the conscience," not "excessive," is the appropriate standard to apply.

Question 1623 - Civil Procedure - Law Applied by Federal Courts (6/28/2016)

The question was:

An oboist from State A filed a diversity action against a band director in federal court in State A, pursuant to a contract dispute in which the oboist sought $195,000 in damages. At trial, after four days of testimony, the jury returned a verdict in favor of the oboist, but found compensatory damages of only $2.25. Under federal law, a judge who believes compensatory damages are so excessive as to "shock the conscience" can offer the plaintiff the choice between a new trial or remittitur of the excessive damages. Under State A law, judges can offer plaintiffs the choice of a new trial or remittitur if the court thinks damages are "excessive," and offer defendant a choice between a new trial or additur if the court thinks damages are "inadequate."

Which of the following is true?

A: The oboist can make a motion seeking a new trial or additur on the ground that the jury's damage award shocks the conscience.
B: The oboist can make a motion seeking a new trial or additur on the ground that the jury's damage award is inadequate.
C: The oboist should make a motion for remittitur on the ground that the jury's damage award shocks the conscience.
D: The oboist's only option is to make a motion for new trial on the ground that the verdict is inadequate.

The explanation for the answer is:

A is incorrect. Although federal courts sitting in diversity apply the remittitur rules of the state in which they are situated, the Supreme Court has held that additur violates the Seventh Amendment; the Seventh Amendment does not apply to state courts, so states may have additur rules. Consequently, there are no federal additur rules and A is wrong.

B is incorrect. Although federal courts sitting in diversity apply the remittitur rules of the state in which they are situated, the Supreme Court has held that additur violates the Seventh Amendment; the Seventh Amendment does not apply to state courts, so states may have additur rules. Consequently, there are no federal additur rules and a federal court sitting in diversity does not apply the state's additur rules, therefore B is wrong.

C is incorrect. First, a federal court sitting in diversity would apply the state's remittitur rule, such that the standard would be "excessive" rather than "shocking the conscience." Second, remittitur is inapplicable to these facts.

D is correct. The oboist's only option is to file a motion for new trial on the ground that the verdict is inadequate.

Question 1623 - Civil Procedure - Law Applied by Federal Courts (2/7/2017)

The question was:

An oboist from State A filed a diversity action against a band director in federal court in State A, pursuant to a contract dispute in which the oboist sought $195,000 in damages. At trial, after four days of testimony, the jury returned a verdict in favor of the oboist, but found compensatory damages of only $2.25. Under federal law, a judge who believes compensatory damages are so excessive as to "shock the conscience" can offer the plaintiff the choice between a new trial or remittitur of the excessive damages. Under State A law, judges can offer plaintiffs the choice of a new trial or remittitur if the court thinks damages are "excessive," and offer defendant a choice between a new trial or additur if the court thinks damages are "inadequate."

Which of the following is true?

A: The oboist can make a motion seeking a new trial or additur on the ground that the jury's damage award shocks the conscience.
B: The oboist can make a motion seeking a new trial or additur on the ground that the jury's damage award is inadequate.
C: The oboist should make a motion for remittitur on the ground that the jury's damage award shocks the conscience.
D: The oboist's only option is to make a motion for new trial on the ground that the verdict is inadequate.

The explanation for the answer is:

A is incorrect. Although federal courts sitting in diversity apply the remittitur rules of the state in which they are situated, the Supreme Court has held that additur violates the Seventh Amendment; the Seventh Amendment does not apply to state courts, so states may have additur rules. Consequently, there are no federal additur rules and A is wrong.

B is incorrect. Although federal courts sitting in diversity apply the remittitur rules of the state in which they are situated, the Supreme Court has held that additur violates the Seventh Amendment; the Seventh Amendment does not apply to state courts, so states may have additur rules. Consequently, there are no federal additur rules and a federal court sitting in diversity does not apply the state's additur rules, therefore B is wrong.

C is incorrect. First, a federal court sitting in diversity would apply the state's remittitur rule, such that the standard would be "excessive" rather than "shocking the conscience." Second, remittitur is inapplicable to these facts.

D is correct. The oboist's only option is to file a motion for new trial on the ground that the verdict is inadequate.

Question 1625 - Civil Procedure - Law Applied by Federal Courts (2/8/2017)

The question was:

An instructor brought a successful single-count lawsuit against a charter school in State A federal court. The judge found that the charter school had violated federal employment laws, and awarded money damages to the instructor in the amount of $182,000. The charter school appealed and lost. The Federal Rules of Appellate Procedure permit an appellate court to punish frivolous appeals by assessing extra costs. A State A statute automatically adds a 15% penalty to an unsuccessful appeal of an award of money damages.

Which of the following is true?

A: The appellate court must assess a 15% penalty to the charter school's unsuccessful appeal since the federal court is situated in State A.
B: The appellate court must apply Federal Rules of Appellate Procedure, not the State A statute; the State A statute clashes with the federal rule, and federal law prevails over inconsistent state law.
C: The appellate court must assess a 15% penalty to the charter school's unsuccessful appeal, but only if the court determines that the State A statute is substantive rather than procedural.
D: The appellate court must apply Federal Rules of Appellate Procedure, not the State A statute, because only the federal rule applies in this circumstance.

The explanation for the answer is:

A is incorrect. The mere fact that the federal court is situated in State A does not mean that State A law applies.

B is incorrect. State A law does not apply simply because the federal court is situated in State A.

C is incorrect. This answer invokes *Erie* analysis, but is incorrect because this is a federal question case, not a diversity lawsuit and, therefore, no *Erie* analysis is necessary because only federal law applies.

D is correct. Because this is not a diversity lawsuit -- but is a federal question case – no *Erie* issues are raised, meaning that only federal law applies.

Question 1633 - Civil Procedure - Law Applied by Federal Courts (2/8/2017)

The question was:

A calligrapher brought a diversity action against an illustrator in federal court in State A. The calligrapher's single-count complaint seeks damages for breach of contract. The contract that is the subject of the lawsuit has a clause providing that "any lawsuits concerning this contract shall be brought in State C." A State A statute provides that forum selection clauses are unenforceable. The illustrator then filed a motion to transfer with the federal court in State A asking the court to transfer the action to State C.

What is the court likely to do?

A: Deny the motion, because this is a diversity action and State A law provides that forum selection clauses are unenforceable.
B: Grant the motion, because federal law provides that forum selection clauses are enforceable.
C: Grant the motion, because State A law is inapplicable since the contract has a choice-of-law provision, not a forum selection clause.
D: Consider the motion, because federal courts can weigh all factors, including the presence of a forum selection clause, when deciding a motion to transfer under the federal transfer statute. This is true even when the lawsuit is based on diversity jurisdiction.

The explanation for the answer is:

A is incorrect. The Supreme Court has ruled that the federal transfer statute, which gives federal courts discretionary power to grant transfer motions, is applicable even in diversity actions.

B is incorrect. There is no federal law giving automatic effect to forum selection clauses.

C is incorrect. The contractual provision is a forum selection clause, not a choice-of-law provision; it indicates where the lawsuit is to be filed, not what state's substantive law is to be applied.

D is correct. The court should consider the motion because the Federal Rules of Civil Procedure provide that a federal court may weigh all factors when deciding a motion to transfer under the federal transfer statute.

Question 1629 - Civil Procedure - Law Applied by Federal Courts (2/10/2017)

The question was:

A geologist filed a diversity action against a farmer in federal court in State A, seeking recovery for the damage to her very expensive sports car and the broken arm that she suffered as a result of a car crash with the farmer. At trial, after two days of testimony, the jury returned a verdict for the geologist and awarded her $75,000 in compensatory damages. Under federal law, a judge who believes compensatory damages are so excessive as to "shock the conscience" can offer the plaintiff the choice between a new trial or remittitur of the excessive damages. Under substantive State A law, the court can reduce a jury's awards by way of remittitur if it thinks damages are "excessive."

Which of the following is true?

A: The farmer should submit only a motion for remittitur, on the ground that the jury's damage award "shocks the conscience."
B: The farmer should submit a joint motion for new trial and remittitur, on the ground that the jury's damage award "shocks the conscience."
C: The farmer should submit only a motion for remittitur, on the ground that the jury's damage award was "excessive."
D: The farmer should submit a joint motion for new trial and remittitur, on the ground that the jury's damage award was "excessive."

The explanation for the answer is:

A is incorrect. Under the *Erie* doctrine, a court is required to apply the substantive law of the state in which it is sitting. Federal courts sitting in diversity apply the remittitur rules of the state in which they are situated. Therefore, the appropriate remittitur standard is "excessive" rather than "shocks the conscience."

B is incorrect. Under the *Erie* doctrine, federal courts sitting in diversity apply the remittitur rules of the state in which they are situated. Therefore, he appropriate remittitur standard is "excessive" rather than "shocks the conscience."

C is incorrect. The Seventh Amendment does not allow a federal court to disregard a jury's damages finding and order remittitur. Instead, the court must offer plaintiff the choice between a new trial or the reduced award. A motion for remittitur accordingly must be paired with a motion for a new trial – and that is why Answer D is correct.

D is correct. Under the *Erie* doctrine, federal courts sitting in diversity apply the remittitur rules of the state in which they are situated; hence the appropriate remittitur standard is "excessive" rather than "shocks the conscience."

Question 1636 - Civil Procedure - Law Applied by Federal Courts (2/10/2017)

The question was:

A soldier from State A filed suit against a defendant from State B in a federal court in State B seeking $100,000 in damages for injuries resulting from a car accident that occurred on an army base in State B. The defendant was not negligent, and State B tort law allows recovery only upon a showing of negligence. There is no applicable federal statute.

Which of the following statements is true?

A: The court must dismiss the soldier's claim for failure to state a claim upon which relief can be granted because the only possible source of a legal right would be state law or federal statute, and neither grants the soldier rights here.
B: The soldier might have a viable claim, but only if the court were persuaded that there was a peculiarly strong federal interest to create a federal common law of torts that applied to accidents involving servicemen on army bases.
C: The court must dismiss the soldier's claim; although federal courts used to create federal common law before *Erie*, that decision declared the end of federal common law.
D: The soldier might have a viable claim, but only if federal choice of law rules determined that State A tort law applied and if the soldier would have a valid claim under that State A law.

The explanation for the answer is:

A is incorrect. Federal common law is an additional possible source of law upon which a plaintiff's rights might be grounded. Therefore, it is not true that there is no other potential source of relief for the soldier.

B is correct. Federal courts have the authority to create federal common law and may do so in areas of peculiarly strong federal interest. Torts relating to servicemen is one such field where there is a peculiarly strong federal interest. Therefore, the soldier may have a viable claim if the court were persuaded to create a federal common law of torts relating to accidents involving servicemen on army bases.

C is incorrect. Although *Erie* declared the end of "federal general common law," federal courts continue to create federal common law in areas of peculiarly strong federal interest. Torts in relation to servicemen are one such field of peculiarly strong federal interest.

D is incorrect. A federal court sitting in diversity (as this court would be, unless the soldier's claims were grounded in federal common law) would apply the choice of law rules of the state in which the federal court is situated, not federal choice of law rules.

Question 1632 - Civil Procedure - Law Applied by Federal Courts (2/10/2017)

The question was:

A dancer filed a lawsuit against her employer, a ballet company, in federal court in State A, claiming that the ballet company violated the dancer's rights under Title VII's employment laws. The ballet company is a small business, and the dancer is concerned that the ballet company might not have sufficient assets to pay the judgment that the dancer hopes to win. State A law provides a method for attaching property at the start of a lawsuit to secure satisfaction of potential judgments. Federal Rule of Civil Procedure 64 provides that "every remedy is available that, under the law of the state where the court is located, provides for seizing a person or property to secure satisfaction of the potential judgment."

Which of the following is true?

A: The dancer cannot make use of State A's attachment law in this case because this is not a diversity action.
B: The dancer can make use of State A's attachment law in this case, even though the federal court is exercising only federal question jurisdiction.
C: The dancer can make use of State A's attachment law in this case, but only if she adds a state law claim to the lawsuit.
D: The dancer can make use of State A's attachment law in this case, but (1) only if she adds a state law claim to the lawsuit, and with the added condition that (2) she can attach property only up to the expected value of her state law claim.

The explanation for the answer is:

A is incorrect. The availability of state law remedies under FRCP 64 does not depend on the federal case being a diversity action.

B is correct. Federal Rule of Civil Procedure 64 incorporates state law, providing that every remedy is available that, under the law of the state where the federal court is located, provides for seizing property to secure satisfaction of a potential judgment.

C is incorrect. There is no requirement that there be some state law claim in the lawsuit.

D is incorrect. There is no such federal limitation on the value of the garnishment.

Question 1628 - Civil Procedure - Law Applied by Federal Courts (2/10/2017)

The question was:

A garbage man, a citizen of State A, sues a truck driver, a citizen of State B, in federal court in State B, seeking $125,000 as compensation for injuries suffered in a car accident that occurred in State A. State B law does not permit a court to order plaintiffs to submit to examination by physicians, but State A law does. The truck driver files a motion with the court, challenging the garbage man's claimed injuries and requests that the garbage man be ordered to submit to an examination by a physician.

Should the court grant the truck driver's motion?

A: Yes; the court should grant the truck driver's motion, but only if State B choice-of-law rules indicate that State A tort law applies in this case.
B: No; the court should deny the truck driver's motion; State B law applies because this is a diversity suit and the federal court is situated in State B.
C: Yes; the court should grant the truck driver's motion; the Federal Rules of Civil Procedure authorize courts to order a physical examination by a suitably licensed or certified examiner, and this federal rule applies in diversity cases.
D: No; the court should deny the truck driver's motion; the Federal Rules of Civil Procedure do not authorize courts to order physical examinations by physicians, and this federal rule applies in diversity cases.

The explanation for the answer is:

Answer A is incorrect. Federal procedural rules govern this question, not state law.

Answer B is incorrect. Federal procedural rules govern this question, not state law.

C is correct. Fed.R.Civ.P. 35 specifically authorizes the court where the action is pending to order a physical or mental examination of a party whose mental or physical condition, including blood group, is in controversy. That federal rule is deemed procedural and, accordingly, is applicable even in diversity actions.

D is incorrect. Federal law permits courts to order physical examinations, as stated above.

Question 1666 - Civil Procedure - Motions (6/19/2016)

The question was:

A woman filed a diversity action against a man in federal court in State A, alleging that the man failed to pay a debt due on a valid contract. The man has paid the debt, and has the cancelled checks to prove it.

What should the man's attorneys do?

A: File a motion to dismiss for failure to state a claim on which relief can be granted, attaching an affidavit with the cancelled checks.
B: File an answer and then a motion for summary judgment, attaching an affidavit with the cancelled checks.
C: File only a motion for summary judgment, attaching an affidavit with the cancelled checks.
D: File a motion for judgment as a matter of law, attaching an affidavit with the cancelled checks.

The explanation for the answer is:

A is incorrect. The woman *has* stated a valid a claim in this case; it is simply a claim to which the man has a defense.

B is correct. The man has a valid defense, but it is not one of the defenses that can be asserted in a pre-answer Rule 12 motion to dismiss. Therefore, the man accordingly must file an answer. Because the man's defense relies on material outside the pleadings, the man should file a motion for summary judgment, attaching an affidavit with the cancelled checks.

C is incorrect. While a party may file a motion for summary judgment at any time until 30 days after the close of all discovery, this does not prove to be the best course of action for the man's attorney.

D is incorrect. A motion for judgment as a matter of law is made at the time of trial, and there has not been a trial here.

Question 1674 - Civil Procedure - Motions (6/27/2016)

The question was:

A handyman filed a diversity action against a homeowner in federal court in State A, alleging that the homeowner failed to pay $150,000 due on a valid service contract between the parties for the handyman to install a bathroom in the homeowner's home. Discovery concluded in March, and at October's one-day trial the homeowner disputed the contract's validity, testifying before the jury that the handyman had installed the bathroom as a gift and that the exchanged emails referring to a "contract" between the parties had been in jest. After the close of evidence, the court gave instructions to the jury, the jury deliberated for 15 minutes, and the jury returned a verdict for the homeowner.

What should the handyman's attorney do?

A: File a motion for judgment as a matter of law.
B: File a motion for summary judgment.
C: File a motion for lack of personal jurisdiction.
D: File a motion for a new trial.

The explanation for the answer is:

A is incorrect. A motion for judgment as a matter of law is not timely in this case because a motion for judgment as a matter of law must be made after evidence has been presented but before the case has been submitted to the jury.

B is incorrect. A motion for summary judgment is not timely in this case because summary judgment is only available within 30 days after the close of all discovery.

C is incorrect. The handyman cannot make a motion for lack of personal jurisdiction because by filing his suit in State A, the handyman has submitted to the court's jurisdiction.

D is correct. Neither of the motions referred to in answers A and B are timely: A motion for judgment as a matter of law must be made after evidence has been presented but before the case has been submitted to the jury. A motion for summary judgment is only available within 30 days after the close of all discovery. Moreover, the handyman cannot make a motion for lack of personal jurisdiction because by filing his suit in State A, the handyman has submitted to the court's jurisdiction. Therefore, a motion for new trial is the only available motion. This motion could plausibly be successful on these facts and may be granted if the judge finds the verdict to be against the great weight of the evidence.

Question 1672 - Civil Procedure - Motions (6/27/2016)

The question was:

A composer's wife filed a diversity action in State A federal court against an insurance company to recover insurance proceeds pursuant to the accidental death provision of the composer's life insurance policy. The evidence shows that the composer was last seen on a business trip seven years ago, that he has not been heard from since, and that his body was never recovered. Under State A law, the party seeking recovery under an accidental death policy has the burden of establishing the insured's death. The insurance company files a motion for summary judgment. In her memorandum in opposition to the motion, the wife includes an affidavit that recites the evidence stated above and adds "To my knowledge, my husband is dead."

Which of the following is true?

A: The court should deny the insurance company's motion because the insurance company has not met its burden of showing that the composer is alive.
B: The court should grant the insurance company's motion because the party opposing summary judgment cannot establish the existence of a genuine issue of material fact simply by means of an affidavit.
C: The court should deny the insurance company's motion because the wife's affidavit establishes that there is a genuine issue of material fact.
D: The court should grant the insurance company's motion because the wife's affidavit is not made on personal knowledge.

The explanation for the answer is:

A is incorrect. The insurance company does not bear the burden of showing that the composer is alive; because the wife will have the burden of showing that the composer is dead at trial, she also bears that burden to defeat the insurance company's motion for summary judgment.

B is incorrect. Federal Rule 56 specifically provides that an affidavit based on personal knowledge can be used to support or oppose a motion for summary judgment.

C is incorrect. The wife's affidavit fails to establish that there is a genuine issue of material fact regarding the composer's death because (1) the affidavit is not based on personal knowledge and (2) it does not provide any admissible facts but merely recites her inference from the other evidence already in the record.

D is correct. Federal Rule 56 allows parties to augment the record by affidavits, but affidavits must be made on personal knowledge. Here, the wife's affidavit is not based on the wife's personal knowledge, and the other pieces of evidence are not sufficient to establish the existence of the element essential to the wife's case, namely that her husband is dead.

Question 1766 - Civil Procedure - Motions (6/28/2016)

The question was:

An insurance company filed suit in federal court against a pharmacy alleging that the pharmacy engaged in fraud when it submitted claims to be reimbursed for high-priced drugs when, in fact, the pharmacy had filled prescriptions with lower-priced generic substitutes. The insurance company sought to recoup the excess amounts it had paid the pharmacy as a result of these allegedly false claims. The complaint did not allege the pharmacy's state of mind in submitting the allegedly false claims nor did it state the particulars of the various allegedly false claim submissions. The pharmacy moved to dismiss the insurance company's complaint, alleging that the insurance company failed to meet the requirements for this type of pleading.

Should the court grant the pharmacy's motion to dismiss?

A: No, because the insurance company has met the requirements for this type of pleading by providing a short and plain statement showing that the insurance company is entitled to relief.
B: Yes, because complaints of fraud must be plead with particularity and the insurance company has failed to meet this requirement.
C: No, because the insurance company's complaint does meet the requirement for this type of pleading by providing a short statement detailing the court's jurisdiction and showing that the insurance company is entitled to relief.
D: Yes, because complaints of fraud require a party to provide specific allegations detailing malice, which the insurance company failed to provide.

The explanation for the answer is:

A is incorrect. The general rule for pleadings simply requires parties to provide a short statement detailing (1) the court's jurisdiction and (2) that the party is entitled to relief. However, claims of fraud are special pleadings that require a party to state with particularity the circumstances constituting fraud. Here, the insurance company's complaint failed to meet the requirements for this type of pleading.

B is correct. Claims of fraud are special pleadings that require a party to state with particularity the circumstances constituting fraud. Because the insurance company failed to meet the requirements for this type of pleading, the court should grant the pharmacy's motion to dismiss.

C is incorrect. Claims of fraud are special pleadings that require a party to plead more than a short statement detailing (1) the court's jurisdiction and (2) that the party is entitled to relief. Instead, for claims of fraud, a party must plead with particularity the circumstances constituting fraud. The insurance company failed to do here, which is the reason the court should grant the pharmacy's motion to dismiss.

D is incorrect. For claims of fraud, a party is only required to plead with particularity the circumstances that constitute the fraud. Allegations of a mental condition, such as malice, may be plead generally.

Question 1671 - Civil Procedure - Motions (6/28/2016)

The question was:

A man's wife filed a diversity action in State A federal court against an insurance company to recover insurance proceeds pursuant to the accidental death provision of her husband's life insurance policy. The evidence shows that the man was last seen on a business trip seven years ago and has not been heard from since. His body was never recovered. Under State A law, the party seeking recovery under an accidental death policy has the burden of establishing the insured's death. The wife and the insurance company both file motions for summary judgment.

Which of the following is true?

A: The insurance company's motion should be granted; the wife has the burden of proving at trial that the man is dead, and she has failed to produce sufficient evidence to meet this burden.
B: The insurance company's motion should be denied. Because the insurance company has moved for summary judgment, it has the burden of proving that the man is alive, and it has failed to produce sufficient evidence to meet its burden.
C: The wife's motion should be granted. The wife has the burden of proving at trial that her husband is dead and she has produced sufficient evidence to meet this burden.
D: Both motions should be denied. Because both the wife and the insurance company have filed motions for summary judgment, it would be improper for the court to grant summary judgment for either party.

The explanation for the answer is:

A is correct. Summary judgment is appropriately granted against a party who cannot sufficiently establish the existence of an essential element that the non-moving party has a burden to establish at trial. Here, the wife has the burden of proving the man is dead, and she has failed to meet this burden.

B is incorrect. The wife bears the burden of establishing the man's death in order to defeat the insurance company's motion for summary judgment. The fact that the insurance company moved for summary judgment does not displace the wife's burden.

C is incorrect. It is the wife who bears the burden of establishing the man's death to defeat the insurance company's motion for summary judgment. The evidence provided in the facts is not sufficient to meet this burden.

D is incorrect. The fact that two parties simultaneously move for summary judgment does not mean that neither is entitled to summary judgment. The court must ask which party bears the burden of proof at trial and then analyze the evidence. Here, the wife has the burden of proof at trial and, on the facts provided, has failed to meet this burden. Therefore, the insurance company's motion for summary judgment should be granted.

Question 1779 - Civil Procedure - Motions (6/28/2016)

The question was:

An engineer brought a patent infringement action against a company in federal court in State A, which was tried by a jury. During the examination of one of the company's representatives, the engineer's attorney asked whether the witness's cousin was a "bottom-feeder who swims around buying, for next to nothing, the houses of people who got kicked out." The court then warned the engineer's counsel against making such inflammatory remarks and issued an instruction to the jury in an effort to have it ignore such statements. In his closing argument, the engineer's attorney once again made several irrelevant and prejudicial remarks. The company's attorney objected to the irrelevant and prejudicial remarks made in the closing, though it had not objected earlier, and moved for a new trial.

How should the court rule on the new trial motion?

A: Deny the motion because juries can see through these patently biased kinds of statements and disregard them.
B: Deny the motion because of the company's counsel's failure to object, prior to closing arguments, to the opposing counsel's irrelevant and prejudicial remarks.
C: Grant the motion for a new trial because it is likely that the jury was biased by these inflammatory remarks, and manifest injustice would result from allowing the jury's verdict to stand.
D: Deny the motion because instructions to the jury to disregard the inflammatory statements, noting that these statements are not evidence, cures any harm otherwise done.

The explanation for the answer is:

A is incorrect. A court cannot count on the jury not to be influenced by the remarks repeatedly made by the engineer's attorney in this case.

B is incorrect. The company's counsel's failure to object to some of the irrelevant and offensive remarks should not prevent the court from awarding a new trial where it was likely that the jury was biased by the inflammatory words, and manifest injustice would result from letting its future verdict stand. Moreover, defendant did object to some of the remarks.

C is correct. The court should grant the motion for a new trial because it is likely that the jury would be biased by repetitive derogatory comments from the engineer's attorney.

D is incorrect. Where improper remarks are not single, isolated occurrences but are instead repeated reminders to the jury, the court cannot and will not count on instructions to the jury to disregard such statements, nor will it count on instructions to the jury that such remarks are not to be considered evidence.

Question 1676 - Civil Procedure - Motions (6/28/2016)

The question was:

A patient from State A filed a diversity action against an intern from State B in federal court in State A, seeking $175,000 pursuant to a contract dispute. After the patient's lawyer completed presenting evidence to the jury, but before the intern's attorney had presented evidence, the intern's lawyer submitted a motion for judgment as a matter of law, which the court promptly denied. The jury returned a verdict for the patient in the amount of $1,000. The intern's lawyer submitted a renewed motion for judgment as a matter of law and an alternative motion for new trial.

What should the judge do?

A: Deny both motions; a lawyer cannot submit both simultaneously.
B: Deny the intern's renewed motion for judgment as a matter of law; the intern's earlier motion for judgment as a matter of law was invalid because it was submitted prematurely.
C: Consider the merits of the intern's renewed motion for judgment as a matter of law; if it is granted, the judge should not consider the motion for new trial.
D: Consider the merits of the intern's renewed motion for judgment as a matter of law; if it is granted, the judge should then conditionally rule on the intern's motion for new trial.

The explanation for the answer is:

A is incorrect. A judgment as a matter of law explicitly allows filing of a renewed motion for judgment as a matter of law in conjunction with a motion for new trial.

B is incorrect. The intern’s earlier motion for judgment as a matter of law was timely; the motion may be made any time before the case is submitted to the jury, though it may be granted only after a party has been "fully heard on an issue during a jury trial."

C is incorrect. Pursuant to Federal Rule 50(c), when a court grants a renewed motion for judgment as a matter of law, the court must then also conditionally rule on the motion for a new trial. Therefore, C is incorrect because the court must consider the intern's alternative motion.

D is correct. Federal Rule 50(c) requires a court to conditionally rule on a motion for new trial if and when it grants a renewed motion for judgment as a matter of law.

Question 1776 - Civil Procedure - Motions (7/22/2016)

The question was:

A railroad brought an action for fraud against a group of personal injury lawyers in federal district court. The railroad alleged that the lawyers engaged in a scheme with purported medical experts to inundate the railroad with cases involving tortious exposure to asbestos which lacked any merit. The railroad presented various forms of circumstantial evidence, including expert testimony which stated that several of the clients in the previous asbestos cases, who were diagnosed by the purported medical experts as suffering from asbestosis, in fact had no asbestos-related disease. Both the lawyers and the medical experts testified and denied the allegations against them. The railroad then moved for a judgment as a matter of law which was denied.

After the close of the evidence, the jury returned with a verdict in favor of the personal injury lawyers. The railroad then moved for a renewed judgment as a matter of law.

When the court rules on the railroad's renewed motion for judgment as a matter of law, which of the following should it do?

A: The court should view the evidence and all reasonable inferences therefrom in the light most favorable to the personal injury attorneys, the non-moving parties.
B: The court should consider the credibility of the witnesses and resolve conflicts in testimony.
C: The court should view the evidence and all reasonable inferences therefrom in the light most favorable to the railroad, the moving party.
D: The court should order a new trial because of the policy against entering judgment as a matter of law against attorney-litigants.

The explanation for the answer is:

A is correct. When ruling on the railroad's renewed motion for judgment as a matter of law, the court should review the evidence in favor of the non-moving party.

B is incorrect. When ruling on a renewed motion for judgment as a matter of law, the court should not consider the credibility of the witnesses or attempt to resolve conflicts in testimony. Instead the court is charged with determining whether a reasonable jury would have a sufficient legal basis to find for the nonmoving party on the issue.

C is incorrect. When ruling on a renewed motion for judgment as a matter of law, the court must review the evidence in a light most favorable to the non-moving party, not the moving party.

D is incorrect. There is no policy that prohibits courts from entering judgments as a matter of law against attorney-litigants.

Question 1765 - Civil Procedure - Motions (7/22/2016)

The question was:

A truck driver from State A filed a proper diversity suit against a manufacturer from State B in federal court. Before answering the truck driver's complaint, the manufacturer timely filed a motion to dismiss for lack of personal jurisdiction. The truck driver then filed an answer to the manufacturer's pre-answer motion, detailing the manufacturer's minimum contacts in State A due to the manufacturer's selling of goods in State A. The manufacturer then made a second pre-answer motion claiming improper venue.

Should the court consider the manufacturer's defense for improper venue?

A: Yes, because a party may raise the defense of improper venue at any time.
B: No, because the truck driver's answer establishes that the manufacturer has minimum contacts in State A and, as such, the court may presume that venue is proper.
C: No, because the manufacture waived this defense by not raising it its initial pre-answer motion.
D: Yes, because a party does not need to raise the defense of improper venue in their initial pre-answer motion.

The explanation for the answer is:

A is incorrect. Federal Rule 12 forbids a defendant who makes a pre-answer motion from making a further motion presenting any defense or objection which was available to him at the time he made the first motion and which he could have included, but did not. Thus if the defendant moves, before filing his answer, to dismiss the complaint, he is barred from making a further motion presenting the defense of improper venue if that defense was available to him when he made his original motion. Here, the manufacturer should have raised the defense of improper venue in its initial pre-answer motion. Because the manufacture failed to do so, it waived this defense.

B is incorrect. Even if a party has minimum contacts in a state, a court may still find that venue is improper. Moreover, a court cannot simply presume that venue is proper for a party based on a motion from an opposing party.

C is correct. As stated above, the defense of improper venue is waived if not raised in a responsive pleading. Therefore, the manufacturer should have raised this defense in its initial pre-answer motion. Because it failed to do so, it waived this defense.

D is incorrect. As stated above, the defense of improper venue is waived if not raised in a responsive pleading. Therefore, because it was not raised in the manufacturer's initial pre-answer motion, will has been waived.

Question 1767 - Civil Procedure - Motions (2/8/2017)

The question was:

An investor sued a stockbroker in federal court on a federal statutory claim for securities fraud. The stockbroker's attorney is trying to decide whether to file a preanswer motion or to merely file an answer to the complaint that includes the stockbroker's defenses.

Which of the following is not a valid consideration in making this decision?

A: Filing a preanswer motion will extend the time that the stockbroker has to answer the complaint.
B: If the stockbroker simply files an answer, for a limited time the stockbroker will have the right to amend her answer as a matter of course, whereas the Federal Rules do not provide for the amendment of motions and a failure to raise some defenses in a preanswer motion will result in the waiver of those defenses.
C: Unlike in filing an answer, by making a preanswer motion, the stockbroker does not need to concern herself with certifying to the court that the motion is not presented for an improper purpose, that the allegations in the motion have evidentiary support, and that the legal contentions therein are warranted by existing law.
D: The stockbroker cannot request a more definite statement in her answer, but can include such a request in her preanswer motion.

The explanation for the answer is:

A is incorrect. This is a valid consideration because a preanswer motion will extend the time that the stockbroker has to answer the investor's complaint. This consideration could affect a defendant's decision whether to file a preanswer motion under Federal Rule 12 or instead to just file an answer to the complaint that includes defendant's defenses.

B is incorrect. This is a valid consideration. If the stockbroker were to file an answer without a preanswer motion, for a limited time, the stockbroker would have the ability to amend her answer. By contrast, a party may not amend its preanswer motions and if a party fails to raise a defense during those preanswer motions, except for the defense of lack of subject matter jurisdiction, these defenses will be considered waived. This consideration could affect a defendant's decision whether to file a preanswer motion under Federal Rule 12 or instead to just file an answer to the complaint that includes defendant's defenses.

C is correct. This is an invalid consideration. Written motions, just as pleadings and other papers, are governed by Federal Rule 11, which requires parties to certify that the information presented to the court is not being presented for an improper purpose, that the allegations and factual contentions have evidentiary support, and that the legal contentions therein are warranted by existing law.

D is incorrect. This is a valid consideration because a party has the ability to request a more definitive statement in its preanswer motion but not in its answer. This consideration could affect a defendant's decision whether to file a preanswer motion under Federal Rule 12 or instead to just file an answer to the complaint that includes defendant's defenses.

Question 1768 - Civil Procedure - Motions (2/8/2017)

The question was:

A shopper brought suit against a grocer in federal court for violation of the Federal Food Drug and Cosmetics Act. In its pre-answer motion, the grocer raised the defenses of lack of personal jurisdiction and lack of subject matter jurisdiction. Thereafter, the grocer realized that it arguably had available to it the defenses of improper venue and failure to join a party.

If the grocer files a second pre-answer motion raising these two additional defenses, should the court consider them?

A: Yes, the court should consider whether each defense is a valid defense to the case at bar.
B: The court should only consider whether failure to join a party is a valid defense to the case at bar, but it should refuse to consider the merits of the defense of improper venue.
C: No, the court should refuse to consider either of the grocer's additional defenses as being a valid defense to the case at bar.
D: The court should only consider whether improper venue is a valid defense to the case at bar, but it should refuse to consider the merits of the defense of failure to join a party.

The explanation for the answer is:

The defenses that must be presented in the first pre-answer motion, or if there is no pre-answer motion then in the answer, or else they will be waived are: lack of personal jurisdiction, improper venue, insufficient process, and insufficient service of process. The defense of improper venue must be raised in the first motion or else it is waived. However, the defense of failure to join a party is not one of the defenses that is automatically waived and may be raised by a later motion. Therefore, B is correct.

A is incorrect. Here the defense of improper venue should not be considered by the court because it was not raised in the first motion and consequently will be waived.

B is correct for the reasons listed above.

C is incorrect. The defense of failure to join a party is not a defense which must be raised in the first motion and therefore may be considered by the court in a later motion.

D is incorrect. The court should only recognize the defense of failure to join a party, not improper venue, which in this case has been waived.

Question 1675 - Civil Procedure - Motions (2/8/2017)

The question was:

An electrician from State A filed a diversity action against an actress from State B in federal Court in State A, alleging that the actress failed to pay the electrician $150,000 due on a valid service contract to install a kitchen in the actress' home. The actress disputed the contract's validity, testifying before the jury that the electrician installed the kitchen as a gift and that exchanged emails referring to a "contract" had been in jest. During trial, the electrician's attorney became increasingly concerned that the jury did not like his client.

What, if anything, should the electrican's attorney do after the close of evidence?

A: File a motion for judgment as a matter of law.
B: File a motion for new trial on the ground of juror misconduct.
C: There is nothing that the electrician's attorney can do at this point.
D: File a motion for summary judgment.

The explanation for the answer is:

A is correct. The electrician's attorney should file a motion for judgment as a matter of law, in which he plausibly might argue that a reasonable jury would not have a legally sufficient basis to find that there had been no contract.

B is incorrect. Filing a motion for a new trial on the ground of juror misconduct would be premature; it can be made only following the jury's verdict.

C is incorrect. It is not true that there is nothing the electrician's attorney can do. Instead, as A shows, the electrician's attorney may file a motion for judgment as a matter of law.

D is incorrect. Motions for summary judgment are pre-trial motions that are available only until 30 days after completion of discovery.

Question 1678 - Civil Procedure - Motions (2/9/2017)

The question was:

A grocer from State A filed a diversity action against a supplier from State B in federal court in State B, seeking $195,000 pursuant to a contract dispute. There was conflicting evidence as to whether there was a valid contract. During the course of the trial, the grocer's attorney submitted a motion for judgment as a matter of law, which the court ultimately denied. After the jury returned a verdict for the grocer in the amount of $1,500, the grocer submitted a motion for judgment as a matter of law and an alternative motion for new trial.

Which of the following is true?

A: The court must reject the grocer's motion for judgment as a matter of law because the jury found for the grocer.
B: If the court rejects the grocer's motion for judgment as a matter of law, it also must reject the grocer's motion for new trial.
C: The court could both reject the grocer's motion for judgment as a matter of law, and grant the grocer's motion for new trial.
D: The court cannot grant the grocer's motion for a new trial because there was evidence for the supplier.

The explanation for the answer is:

A is incorrect. The fact that the jury technically found for the grocer does not mean a Rule 50 motion for judgment as a matter of law cannot be brought where, as here, the verdict returns substantially less than what the grocer sought.

B is incorrect. The fact that the jury found for the grocer does not mean that a motion for a new trial cannot be brought where, as here, the verdict returns substantially less than what the grocer sought. A motion for a judgment as a matter of law and a motion for a new trial have different requirements.

C is correct. Motions for judgment as a matter of law and motions for new trial have different requirements, so circumstances can justify a court granting the latter but not the former. For example, there might be sufficient evidence for a judge to deny a motion for judgment as a matter of law on the ground that a reasonable jury could find for the other party (FRCP 50), yet a judge could grant a motion for new trial if she thought the jury's verdict was deeply flawed (FRCP 59).

D is incorrect. A motion for new trial can be granted where the verdict is against the weight of the evidence, i.e., even when the party against whom the motion is granted had some evidence to support her claim.

Question 1781 - Civil Procedure - Motions (2/10/2017)

The question was:

A buyer filed suit against a seller in federal court in State A. The federal district court entered a default judgment in favor of the buyer. Within one month after entry of the default judgment, the seller made a motion seeking relief from the judgment on the ground of excusable neglect. The seller made a prima facie showing that it had a meritorious defense to the buyer's claim and that the buyer would not be unfairly prejudiced by the setting aside of the default judgment. However, the record also showed that the seller had been served with the summons and complaint and knew of the action in time to appear, plead or otherwise defend against it, but failed to do any of those things.

Should the court grant the seller's motion seeking relief from judgment?

A: Yes, because the seller has demonstrated what is necessary to obtain relief from a default judgment: that its motion is timely, it has a meritorious defense to the action, and the plaintiff would not be unfairly prejudiced by having the default judgment set aside.
B: No, because seller's failure to appear, plead or otherwise defend against the lawsuit does not constitute a form of excusable neglect.
C: Yes, because courts liberally grant relief from default judgments.
D: No, but the court should set aside the entry of default.

The explanation for the answer is:

A is incorrect. While all the matters noted in answer A are necessary for the seller to get a default judgment vacated pursuant to Federal Rule of Civil Procedure 60, they are not sufficient in this case because the seller knew of the lawsuit and failed to appear, plead, or defend themselves in the lawsuit. Such action, as indicated in answer B, is not a form of excusable neglect.

B is correct. Here the seller failed to take any action to the buyer's claim despite the seller's awareness of the suit filed against him. Such behavior does not justify a court from relieving the seller from the final judgment entered against him.

C is incorrect. Although it is true that courts tend to be more liberal in granting relief from default judgments (in comparison to other judgments), the mere fact that the judgment is a default judgment does not entitle the seller to relief. Here, the seller's conduct did not amount to excusable neglect.

D is incorrect. Entries of default can be set aside under Federal Rule of Civil Procedure 55(c) only before a default judgment has been entered. After that, relief is available pursuant to Federal Rule of Civil Procedure 60 for, among other things, mistake, inadvertence, surprise, or excusable neglect.

Question 1672 - Civil Procedure - Motions (2/10/2017)

The question was:

A composer's wife filed a diversity action in State A federal court against an insurance company to recover insurance proceeds pursuant to the accidental death provision of the composer's life insurance policy. The evidence shows that the composer was last seen on a business trip seven years ago, that he has not been heard from since, and that his body was never recovered. Under State A law, the party seeking recovery under an accidental death policy has the burden of establishing the insured's death. The insurance company files a motion for summary judgment. In her memorandum in opposition to the motion, the wife includes an affidavit that recites the evidence stated above and adds "To my knowledge, my husband is dead."

Which of the following is true?

A: The court should deny the insurance company's motion because the insurance company has not met its burden of showing that the composer is alive.
B: The court should grant the insurance company's motion because the party opposing summary judgment cannot establish the existence of a genuine issue of material fact simply by means of an affidavit.
C: The court should deny the insurance company's motion because the wife's affidavit establishes that there is a genuine issue of material fact.
D: The court should grant the insurance company's motion because the wife's affidavit is not made on personal knowledge.

The explanation for the answer is:

A is incorrect. The insurance company does not bear the burden of showing that the composer is alive; because the wife will have the burden of showing that the composer is dead at trial, she also bears that burden to defeat the insurance company's motion for summary judgment.

B is incorrect. Federal Rule 56 specifically provides that an affidavit based on personal knowledge can be used to support or oppose a motion for summary judgment.

C is incorrect. The wife's affidavit fails to establish that there is a genuine issue of material fact regarding the composer's death because (1) the affidavit is not based on personal knowledge and (2) it does not provide any admissible facts but merely recites her inference from the other evidence already in the record.

D is correct. Federal Rule 56 allows parties to augment the record by affidavits, but affidavits must be made on personal knowledge. Here, the wife's affidavit is not based on the wife's personal knowledge, and the other pieces of evidence are not sufficient to establish the existence of the element essential to the wife's case, namely that her husband is dead.

Question 1666 - Civil Procedure - Motions (2/10/2017)

The question was:

A woman filed a diversity action against a man in federal court in State A, alleging that the man failed to pay a debt due on a valid contract. The man has paid the debt, and has the cancelled checks to prove it.

What should the man's attorneys do?

A: File a motion to dismiss for failure to state a claim on which relief can be granted, attaching an affidavit with the cancelled checks.
B: File an answer and then a motion for summary judgment, attaching an affidavit with the cancelled checks.
C: File only a motion for summary judgment, attaching an affidavit with the cancelled checks.
D: File a motion for judgment as a matter of law, attaching an affidavit with the cancelled checks.

The explanation for the answer is:

A is incorrect. The woman *has* stated a valid a claim in this case; it is simply a claim to which the man has a defense.

B is correct. The man has a valid defense, but it is not one of the defenses that can be asserted in a pre-answer Rule 12 motion to dismiss. Therefore, the man accordingly must file an answer. Because the man's defense relies on material outside the pleadings, the man should file a motion for summary judgment, attaching an affidavit with the cancelled checks.

C is incorrect. While a party may file a motion for summary judgment at any time until 30 days after the close of all discovery, this does not prove to be the best course of action for the man's attorney.

D is incorrect. A motion for judgment as a matter of law is made at the time of trial, and there has not been a trial here.

Question 1645 - Civil Procedure - Pretrial Procedures (6/20/2016)

The question was:

Plaintiff, a citizen of State A, sues the State B corporation for which he works in federal district court in State B. Plaintiff works in the corporation's factory located in State B, and his one-count complaint seeks damages of $125,000 for the corporation's alleged violation of the Fair Labor Standards Act, a federal law that requires that higher wages be paid for overtime work. The corporation files an answer with a single counterclaim, alleging that Plaintiff took $2,500 worth of the corporation's tools in violation of State A's wrongful conversion statute. Plaintiff then files a motion to dismiss the corporation's counterclaim.

Will Plaintiff's motion to dismiss be granted?

A: Yes, the counterclaim runs afoul of pleading requirements because it does not arise out of the transaction or occurrence that is the subject matter of the original action.
B: No, because the Federal Rules of Civil Procedure allow permissive counterclaims.
C: Yes, because the federal court does not have jurisdiction over the corporation's counterclaim.
D: No, because there is supplemental jurisdiction over this properly pled permissive counterclaim.

The explanation for the answer is:

A is incorrect. Although crossclaims are subject to this limitation, (*see* Fed.R.Civ.P. 13(g)) Federal Rule 13(b) allows permissive counterclaims, which need not bear any relationship to the subject matter of the original action.

B is incorrect. Although the Federal Rules of Civil Procedure permit permissive counterclaims (*see* Fed.R.Civ.P. 13(b)), this alone does not defeat Plaintiff's motion to dismiss.

C is correct. The corporation has properly pled a permissive counterclaim, but the federal court does not have jurisdiction over it because there is neither diversity nor supplemental jurisdiction. There is no diversity jurisdiction because the state wrongful conversion claim does not meet the $75,000 amount in controversy requirement. There is no supplemental jurisdiction because the counterclaim is not "so related to claim in the action within such original jurisdiction that they form part of the same case or controversy." *See* 28 USC 1367(a).

D is incorrect. There is no supplemental jurisdiction because the counterclaim is not "so related to claim in the action within such original jurisdiction that they form part of the same case or controversy." *See* 28 USC 1367(a).

Question 1721 - Civil Procedure - Pretrial Procedures (6/27/2016)

The question was:

In federal court, a model filed suit against a photographer for breach of contract alleging breach of contract and asking for damages. The sole defense available to the photographer was that he was a minor at the time he entered into the contract. Under applicable state law, minors may not make enforceable contracts.

Which of the following is the photographer's best course of action?

A: The photographer should answer the model's complaint, denying liability and, at trial, introduce evidence of his age at the time he contracted with the model.
B: The photographer should move to dismiss the model's complaint for failing to state a claim upon which relief can be granted.
C: The photographer should plead his age at the time he entered into the contract as an affirmative defense.
D: The photographer should move for a more definite statement, requiring the model to allege, in her complaint, the photographer's capacity to enter into an enforceable contract.

The explanation for the answer is:

A is incorrect. Incapacity to contract is an affirmative defense that will be waived if not timely raised. Although incapacity to contract is not listed in Federal Rule 8(c), that rule is not exhaustive. The photographer's position essentially is that even if everything the model alleges is true, the photographer is not liable because his minority status rendered him incapable of entering into a binding contract. This is an affirmative defense. If the photographer fails to plead the affirmative defense, the model could object to the photographer's evidence of his age at the time the contract was made.

B is incorrect. Even though this defense is "absolute," a 12(b)(6) motion for failure to state a claim upon which relief can be granted will not properly be granted if the photographer's age at the time of contracting did not appear on the face of the complaint. There is no indication that it did so.

C is correct. Incapacity to contract is an affirmative defense that will be waived if not timely raised. Although incapacity to contract is not listed in Federal Rule 8(c), that rule is not exhaustive. The photographer's position essentially is that even if everything the model alleges is true, the photographer is not liable because his minority status rendered him incapable of entering into a binding contract. This is an affirmative defense.

D is incorrect. The model may not know whether the photographer had capacity to contract; the photographer is in a better position to know that, and it's simply not necessary or particularly useful to require the model to make that allegation. Also, the court might not grant the motion.

Question 1649 - Civil Procedure - Pretrial Procedures (6/27/2016)

The question was:

A man, a citizen of State A, is the class representative of a valid class action lawsuit in federal court in State B against a State B corporation. The lawsuit claims that the corporation breached the terms of its sales contract by failing to notify consumers after the corporation became aware of certain problems with its product. The class representative and the corporation agreed to settle the case, which would bind all members of the class and provide each member with coupons worth $250 towards the future purchase of any product sold by the corporation. With a class of 100,000 members, the coupons' total value is $25 million, and attorneys' fees were set at 10% ($2.5 million).

Which of the following is true?

A: The class representative and corporation may, but need not, seek court approval of the settlement agreement.
B: The court must allow absent class members to opt out of the settlement agreement.
C: Attorneys' fees must be approved by the court, and this award will be approved.
D: The court must hold a settlement hearing.

The explanation for the answer is:

A is incorrect. The Class Action Fairness Act ("CAFA") applies when (a) any class member is of diverse citizenship from any defendant, (2) the amount in controversy exceeds $5 million, and (3) there are at least 100 members in the proposed class. Here, the elements for CAFA subject matter jurisdiction are met. The CAFA includes a number of protections that apply to settlements in all class actions in federal court. One such protection concerns coupon settlements. Pursuant to the CAFA, a court may only approve a coupon settlement after the court holds a settlement hearing to ensure that the settlement is fair. Therefore, A is incorrect because it is not true that the parties need not seek court approval for the settlement.

B is incorrect. The Federal Rules of Civil Procedure concerning class actions permit, but do not require the court to afford class members an opportunity to opt-out of the settlement before the court approves the settlement. *See* Fed.R.Civ.P. 23(e)(4).

C is incorrect. CAFA provides that attorneys' fees may not be a percentage of the value of a coupon settlement; instead, fees may be calculated on the basis of hours worked or may be a percentage of the value of the coupons that are redeemed.

D is correct. The CAFA includes a number of protections that apply to settlements in all class actions in federal court. One such protection concerns coupon settlements. Pursuant to the CAFA, a court may only approve a coupon settlement after the court holds a settlement hearing to ensure that the settlement is fair.

Question 1642 - Civil Procedure - Pretrial Procedures (6/27/2016)

The question was:

On June 1, 2012, a car manufacturer filed a lawsuit in federal court against a bolt manufacturer. The car manufacturer uses the bolt manufacturer's bolts to secure the tires on the cars that it makes. The car manufacturer seeks contractual indemnification for losses that the car manufacturer sustained from lawsuits concerning cars whose tires detached during transit due to faulty bolts. State law provides a five-year statute of limitations for contract claims, and a three-year statute of limitations for tort claims. Under state law, the statute of limitations for contractual indemnification and tortious contribution lawsuits start to run when the car manufacturer first learns of the faulty bolts. The car manufacturer first learned of the faulty bolts on August 1, 2009. Six months after filing its lawsuit, the car manufacturer decided that it would like to also file contribution claim against the bolt manufacturer as a result of the faulty bolts.

May the car manufacturer add a contribution claim?

A: Yes, because the car manufacturer filed its lawsuit within the applicable five-year statute of limitations.
B: No, because the car manufacturer did not file its contribution claim within the applicable three-year statute of limitations.
C: Most likely yes, because the car manufacturer's contribution claim relates back to the timely filed indemnification claim.
D: Most likely no, because the bolt manufacturer did not know, and should not have known, that the car manufacturer would file a contribution claim against it.

The explanation for the answer is:

A is incorrect. The car manufacturer's contribution claim is subject to a three-year statute of limitations.

B is incorrect. Pursuant to Fed.R.Civ.P. 15(c) the contribution claim relates back to the date of filing of the indemnification claim, which was filed within the three-year statute of limitations, because the indemnification claim arose out of the same conduct, transaction, or occurrence set out in the complaint. Therefore, it is not true that the car manufacturer will not be able to add his contribution claim. Instead, the car manufacturer can most likely add the claim but adding this complaint is contingent upon the car manufacturer getting the court's permission to amend its complaint since more than 21 days has passed since the complaint was served upon the bolt manufacturer.

C is correct. Pursuant to Fed.R.Civ.P. 15(c) the contribution claim relates back to the date of filing of the indemnification claim, which was filed within the three-year statute of limitations, because the indemnification claim arose out of the same conduct, transaction, or occurrence set out in the complaint. The car manufacturer can most likely add the claim but adding this complaint is contingent upon the car manufacturer getting the court's permission to amend its complaint since more than 21 days has passed since the complaint was served upon the bolt manufacturer.

D is incorrect. The "knew or should have known" rule applies to changes of party, not to additional claims or defenses asserted against existing parties.

Question 1738 - Civil Procedure - Pretrial Procedures (6/28/2016)

The question was:

A valet brought suit against a bus driver in the federal district court of State A, alleging that the bus driver's negligent driving had caused the valet injury. The bus driver denied negligence. In the course of discovery, the valet learned that in the past ten years, the bus driver had been sued five times for negligent driving; all those suits, like this one, involved allegations that the bus driver had "rear-ended" another driver's car. All five plaintiffs had won verdicts. An expert hired by the valet told the valet that psychiatrists had recently identified a syndrome in which certain persons suffer an uncontrollable impulse to "bump" cars with their vehicle.

If the valet asks the judge to order the bus driver to submit to a mental exam, and supports her motion with documents reflecting the above information obtained from the valet's expert, should the judge grant the valet's motion?

A: Yes, because a mental exam involves no pain or suffering.
B: No, because the bus driver did not place her mental state in controversy.
C: No, because the bus driver's past "rear endings" have no probative value as to whether the bus driver should be held liable to the valet.
D: Yes, because there appears to be good cause for the exam and the bus driver's mental state is in controversy.

The explanation for the answer is:

A is incorrect. The fact, if it is one, that a mental exam involves no pain or suffering, while relevant, is not a sufficient reason to grant a mental exam in light of Federal Rule 35's requirements of good cause and that the condition to be examined is "in controversy."

B is incorrect. It is not necessary that the bus driver have placed her mental state in controversy; another party can do that.

C is incorrect. The bus driver's past "rear endings," and more particularly whether the bus driver suffers from uncontrollable impulses to "bump" other cars with her vehicle, are relevant to whether she should be held liable to the valet.

D is correct. The evidence of the bus driver's history of "rear endings" and the discovery of this syndrome put the bus driver's mental state, in this regard, into controversy, and there is good cause for the exam given the relevance of the evidence and the (apparent) absence of existing medical records on the matter of the bus driver's development of this recently identified syndrome.

Question 1739 - Civil Procedure - Pretrial Procedures (6/28/2016)

The question was:

After the date for delivery had come and gone, a buyer sued the dealership that had promised to deliver to him, by June 1, 2013, a new car meeting certain specifications. The suit was filed in federal court. The dealership timely provided to the buyer the name, address and phone number of the dealership manager and of persons who worked at the auto manufacturer who had information regarding the failed delivery. The dealership did not provide the name, address or phone number of other persons who worked at the dealership who knew of the dealership's delay in delivery because the dealership did not believe these individuals had additional discoverable information and the dealership did not intend on calling these individuals as witnesses should the case proceed to trial. The buyer failed to make a timely disclosure. The buyer then moved for an order compelling further disclosures from the dealership, arguing that the dealership's initial disclosures were materially incomplete, and certifying that the buyer had, in good faith, made attempts to confer with the dealership to obtain further disclosures without court action.

Should the court grant the buyer's motion to compel?

A: No, because the dealership has no obligation to complete its initial disclosures until the buyer has made his own initial disclosures.
B: Yes, because the buyer's failure to make his own disclosures is no excuse for the dealership's failure to make complete disclosure.
C: No, because the dealership has no obligation to include in their initial disclosures information concerning individuals who have discoverable information but whom the dealership does not intend to use in support of its defenses.
D: Yes, because the buyer's failure to make his own initial disclosures is no excuse for the dealership's failure to make complete disclosure and the dealership breached its initial obligations in failing to identify the other persons who worked at the dealership and who knew about the dealership's delay in delivering the car.

The explanation for the answer is:

A is incorrect. Federal Rule 26 requires parties to make initial disclosures to other parties without a discovery request. Parties are not excused from making their initial disclosures because another party has not made their initial disclosures. However, here, the dealership has not failed to complete their initial disclosures because a party is not obligated to disclose information that the party does not intend to use to support its claims or defenses.

B is incorrect. Although this statement is true, parties are only required to disclose information that the party intends to use to support its claims or defenses. Here, as the fact pattern indicates, the dealership does not intend to use the information from the other persons from the dealership with information. Therefore, the dealership has not provided incomplete initial disclosures and the court should not grant the buyer's motion to compel.

C is correct. Federal Rule 26(a) requires parties to disclose facts only about people whom the party intends to use to support its claims or defenses. Here, as the fact pattern indicates, the dealership does not intend to use information from the other persons that the dealership did not disclose.

D is incorrect. Although it is true that the buyer's failure to make his own initial disclosures is no excuse for the dealership's failure to make complete disclosure, for the reasons stated above the dealership did not breach its Federal Rule 26(a) obligations in failing to identify the persons whom the dealership did not intend to use in support of its claims or defenses.

Question 1652 - Civil Procedure - Pretrial Procedures (6/28/2016)

The question was:

A cyclist, a citizen of State A, sued a State B corporation with its principal place of business in State C that builds and sells bicycles in federal district court in State C. The complaint asserted a single claim under State C products liability law, alleging that the cyclist suffered in excess of $85,000 in damage to person and property when the wheel on his bicycle detached in transit due to a defect in the bicycle's rear axle. The corporation purchased its rear axles from a State A manufacturer. Concerned that any defects in the rear axle may have been the fault of the manufacturer, the corporation wants the manufacturer to be part of the lawsuit.

What is the best course for the corporation's attorneys to follow?

A: Move the court to order that the manufacturer be joined as a required party.
B: Serve a summons and complaint on the manufacturer as a third party defendant.
C: Join the manufacturer as a defendant under the federal interpleader statute.
D: Nothing. The manufacturer cannot be joined in this lawsuit because doing so would destroy the court's diversity jurisdiction.

The explanation for the answer is:

A is incorrect. The manufacturer does not qualify as a required party under Federal Rule 19 because the court can accord complete relief without the manufacturer's presence, and resolution of the case would not, as a practical matter, impair or impede the manufacturer's ability to protect its interests.

B is correct. The corporation can join the manufacturer in this suit as a third party defendant because the manufacturer is or may be liable to the corporation for all or part of the cyclist's claim if the manufacturer is responsible for the defective axle.

C is incorrect. These facts concern impleader, not interpleader; interpleader is available if two or more parties claim legal rights in a specific piece of property.

D is incorrect. There would be supplemental jurisdiction over the corporation's claim against the manufacturer because the claim is sufficiently related to the cyclist's claim in the action, thereby satisfying 28 USC 1367(a).

Question 1650 - Civil Procedure - Pretrial Procedures (6/28/2016)

The question was:

A man, a citizen of State A whose pacemaker surgery was unsuccessful, sues the State B corporation that made the pacemaker in State A federal court, seeking $125,000 in a single-count products liability complaint. The corporation believes the surgeon who implanted the pacemaker committed malpractice. The state law that governs the claim allows joint and several liability, and State A does not have personal jurisdiction over the surgeon.

Which of the following is true?

A: The corporation can move the court to dismiss the action for failure to join a necessary party, and the court will be required to dismiss the action.
B: The corporation can move the court to dismiss the action for failure to join a necessary party, and the court will have some discretion in determining whether to dismiss the action.
C: The corporation will not be able to successfully move the court to dismiss the action for failure to join a necessary party.
D: The corporation can move the court to dismiss the action for lack of personal jurisdiction, because the court does not have personal jurisdiction over the surgeon.

The explanation for the answer is:

A is incorrect. The Supreme Court has ruled that a potential defendant who might be jointly and severally liable is not a necessary party for purposes of Federal Rule 19. Moreover, courts have some discretion whether to dismiss a suit even in situations where a necessary party cannot be joined.

B is incorrect. The Supreme Court has ruled that a potential defendant who might be jointly and severally liable is not a necessary party for purposes of Federal Rule 19.

C is correct. The Supreme Court has ruled that a potential defendant who might be jointly and severally liable is not a necessary party for purposes of Federal Rule 19.

D is incorrect. The surgeon has not yet been made a defendant and therefore the corporation cannot make a motion to dismiss for lack of personal jurisdiction.

Question 1740 - Civil Procedure - Pretrial Procedures (7/22/2016)

The question was:

A patient who suffered from type 1 diabetes sought treatment at a local hospital. At the same time, a physician employed by the hospital was doing laboratory research into diabetes and its effects on the human body. Some time later, the patient died. The patient's estate then brought suit against the hospital for negligence in the patient's care. The hospital retained the physician to work with its lawyers to prepare the hospital's defense. It later became clear to the hospital's lawyers that the physician would not be a good witness, and they decided against calling him as an expert at trial. Thereafter, lawyers for the patient's estate subpoenaed the physician for a deposition to inquire into the laboratory research that the physician conducted prior to and after the patient's death. The hospital's lawyers objected and moved to quash the subpoena.

Should the court grant the motion to quash?

A: No, because the patient’s estate is entitled to disclosure of experts including their qualifications, their opinions to be expressed, and the basis for those opinions.
B: Yes, unless the patient’s estate can show exceptional circumstances under which it would be impracticable to obtain facts or opinions by other means.
C: Yes, unless the patient’s estate can show a substantial need for the material and undue hardship in obtaining it in an alternative way.
D: No, because the physician has nonprivileged information that is relevant to the patient’s estate for its claims or defenses.

The explanation for the answer is:

A is incorrect because this is the general standard for discovery of a testifying expert. A party is entitled to disclosure of experts including their qualifications, their opinions to be expressed at trial, and the basis for those opinions when the expert is expected to testify at trial. Here, the physician will not be testifying for the hospital.

B is the correct answer. A party may depose testifying experts, those who are expected to be called at trial. However, a party is not entitled to depose consulting experts, those who are retained in anticipation of litigation but who are not expected to testify at trial. Disclosures from consulting experts are only discoverable upon a showing of exceptional circumstances under which it would be impracticable for the other party to obtain facts or opinions by other means. See Federal Rule 26(b)(4).

C is incorrect. This is the standard for discovery of work product. Work product of a party made in anticipation of litigation is discoverable only upon a showing of a substantial need and undue hardship in obtaining the material in an alternative way. When considering whether something falls under the scope of work product, the court may consider who wrote the document, the content and context of the document, and the date the suit was filed. Here, the patient's estate seeks to obtain information regarding the physician's research prior to and after the patient's death. This was research the physician conducted prior to and outside of the hospital's litigation. Therefore, it cannot be said that the physician's research qualifies as material produced in anticipation of litigation and thus would not qualify as work product. Instead, the appropriate standard would be that regarding a consulting expert's opinion.

D is incorrect because this is the standard for discovery in general. The discovery of material from a consulting expert requires a higher standard as stated above.

Question 1654 - Civil Procedure - Pretrial Procedures (7/22/2016)

The question was:

A man, a citizen of State A, files suit in federal court in State B as representative of a class against a State B corporation, and thereafter files a motion to certify the class consisting of approximately 250 persons from across the United States. The man claims that the corporation defrauded consumers under State B law by failing to refund taxes it collected after State B reduced its sales tax. The man seeks compensatory damages of $77,000, though no other member of the class is owed more than $100. The corporation urges the court not to certify the class.

What is the judge likely to do?

A: Certify the class, because there is diversity jurisdiction since the man's claim exceeds $75,000 and the man and the corporation have diverse citizenship.
B: Not certify the class, because the man's claims are not typical of the claims of the rest of the class.
C: Certify the class, because questions of law or fact common to class members predominate over any questions affecting only individual members, and a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.
D: Not certify the class, because there is no jurisdiction under the Class Action Fairness Act since the matter in controversy does not exceed $5,000,000.

The explanation for the answer is:

A is incorrect. There is diversity jurisdiction for this reason, but the existence of jurisdiction is not a sufficient basis for certifying a class. The class certification requirements under Rule 23(a) are as follows: (1) it is impracticable to join all members because the class is so numerous, (2) there are questions of law or fact common to the class, (3) the named party's interests are typical of the class, and (4) the named party will ensure the fair and adequate representation of the interests of the absent members of the class.

B is correct. One of the requirements for class certification, as stated above, is that the named plaintiff's interests are typical of the class. Here, this requirement is not satisfied because the man's damages of $77,000 are much greater than the damage suffered by others in the class.

C is incorrect. These are not the only requirements that must be satisfied for a class to be certified. The fact that the man's interests are not typical of the class (because the man's damages of $77,000 are much greater than the damage suffered by others in the class) does not allow the judge to certify the class.

D is incorrect. It is true that the court lacks jurisdiction under the Class Action Fairness Act for this reason, but the court would have jurisdiction to hear this case under the diversity and supplemental statutes since the man and the corporation are diverse and the man's amount in controversy exceeds $75,000. The obstacle to certification is not jurisdiction, but Federal Rule 23's requirements.

Question 1720 - Civil Procedure - Pretrial Procedures (2/7/2017)

The question was:

A plumber filed suit against a manufacturer in federal court in State A alleging that a widget negligently designed by the manufacturer caused injury to the plumber. The manufacturer's answer admitted that the manufacturer designed the widget. Ten days after the manufacturer filed her answer, the statute of limitations ran on the plumber's claim. Five days later still, the manufacturer filed an amended answer, denying that the manufacturer designed the widget that injured the plumber. The plumber moved to strike the amendment to the answer.

Should the court grant the motion to strike the manufacturer's amended answer?

A: No, the court should deny the motion to strike (permit the amendment to stand) because a court may only strike redundant, immaterial, impertinent or scandalous matter from a pleading.
B: No, the court should deny the motion to strike (permit the amendment to stand) because the manufacturer may amend her answer once "as a matter of course" within 21 days after it was served.
C: Yes, the court should grant the motion to strike (strike the amendment) because the manufacturer is bound by all admissions in the manufacturer's initial answer.
D: Yes, the court should grant the motion to strike (strike the amendment) because the statute of limitations would surely prevent the plumber from pursuing a claim against the true designer of the widget and the manufacturer lulled the plumber into believing that he had sued the true designer of the widget that injured him.

The explanation for the answer is:

A is incorrect. Federal Rule 12(f) permits courts also to strike insufficient defenses, and courts strike pleadings for reasons beyond those listed in Federal Rule 12(f).

B is correct. Pursuant to Federal Rule 15(a), a party may amend its pleading once as a matter of course within 21 days after serving it. Here, 21 days had not yet passed since the manufacturer's service of its initial answer.

C is incorrect. The manufacturer is not so bound by admissions in her initial answer that it cannot correct erroneous admissions, even without leave of court, within 21 days after service of the answer.

D is incorrect. The plumber can amend to add a claim against the true designer if the requirements of Federal Rule 15(c)(1)(C) are met.

Question 1727 - Civil Procedure - Pretrial Procedures (2/8/2017)

The question was:

A firefighter brought suit against an entertainer in federal court even though the firefighter knew that he lacked an evidentiary basis for a number of the allegations in the complaint against the entertainer. In response to the firefighter's complaint, the entertainer filed a motion to dismiss for failure to state a claim upon which relief could be granted. The entertainer then served a motion for sanctions on the firefighter. Eighteen (18) days after the entertainer's motion for sanctions, the firefighter withdrew his complaint. The entertainer then filed a motion for sanctions upon the firefighter with the court.

Should the court grant the entertainer's motion and impose sanctions on the firefighter?

A: Yes, because the firefighter filed his complaint in bad faith and should be punished for such conduct.
B: No, because the entertainer was required to file his motion for sanctions with the court prior to serving the firefighter with the motion for sanctions.
C: No, because it was improper for the entertainer to file a motion for sanctions with the court.
D: Yes, because the mere filing of a complaint with no evidentiary support warrants that automatic sanctions be imposed on a party.

The explanation for the answer is:

A is incorrect. Here, the firefighter timely withdrew his complaint after being served with the entertainer's motion for sanctions (within twenty-one (21) days of the entertainer serving the firefighter with the motion for sanctions). Thus, it was improper for the entertainer to file a motion for sanctions with the court.

B is incorrect. Pursuant to Federal Rule 11, a party wishing to file a motion for sanctions must first serve the motion for sanctions on the opposing party. If the opposing party does not withdraw or correct the matter within 21 days, then the moving party can file a motion for sanctions with the court. Therefore, B is incorrect because a party filing a motion for sanctions is not required to first file his motion with the court.

C is correct. Pursuant to Federal Rule 11, a party wishing to file a motion for sanctions must first serve the motion for sanctions on the opposing party. If the opposing party does not withdraw or correct the matter within 21 days, then the moving party can file a motion for sanctions with the court. Here, the firefighter withdrew his complaint eighteen (18) days after being served with the motion for sanctions. Therefore, it was improper for the entertainer to file a motion with the court.

D is incorrect. Although parties have a duty to file pleadings and motions with good faith, when a party makes a timely withdrawal of their bad-faith pleading after being served with a motion for sanctions, the party wishing to file a motion for sanctions can no longer do so.

Question 1651 - Civil Procedure - Pretrial Procedures (2/8/2017)

The question was:

An athlete and a cyclist, both citizens of State A, jointly file a single lawsuit against a bike manufacturer, a State B corporation, in federal court in State B. The complaint recites that the athlete was injured when the brakes of his Model C bicycle failed to deploy. The athlete seeks $125,000 in damages. The complaint also recites that the cyclist owns a Model D bicycle, and alleges that the manufacturer violated State A's fair trade act with misleading advertisements for its Model D bicycles; advertisements stated the Model D bike weighs only 15 pounds, but the cyclist's factory equipped Model D bike weighs more than 17 pounds. The cyclist seeks $98,000 in compensatory and punitive damages. All relevant actions pertaining to the lawsuit occurred in State A, and the cyclist has never been to State B.

Which of the following is the manufacturer's best option?

A: File a motion to dismiss the lawsuit for misjoinder of parties.
B: File a motion to dismiss for lack of subject matter jurisdiction, because there is not complete diversity of parties.
C: File a motion to sever and order plaintiffs to bring separate lawsuits.
D: File a motion to dismiss for lack of personal jurisdiction over the cyclist.

The explanation for the answer is:

A is incorrect. Federal Rule 21 indicates that misjoinder of parties – what we have here – is not a ground for dismissing the action.

B is incorrect. There is complete diversity of parties: both plaintiffs are from State A, and the manufacturer is from State B. Complete diversity does not require that all plaintiffs hail from different states (or that all defendants come from different states).

C is correct. The athlete and the cyclist cannot be co-plaintiffs because they do not satisfy Federal Rule 20's requirement that co-plaintiffs must assert a right to relief jointly or assert claims that arise out of the same transaction, occurrence, or series of transactions or occurrences.

D is incorrect. The cyclist has consented to State B's personal jurisdiction over him by filing the lawsuit in State B.

Question 1644 - Civil Procedure - Pretrial Procedures (2/8/2017)

The question was:

A woman met with her doctor on January 1, 2005 for a consultation and description of the cosmetic surgery the doctor would provide. The woman agreed to have the surgery on a date exactly one week later. Unhappy with the results, the woman sued the doctor in federal court in a single-count complaint, filed on December 25, 2007, which asserts that the doctor failed to obtain informed consent. Applicable state law provides a three-year statute of limitations for tort claims. Two weeks after serving the complaint, the woman's attorneys amended the complaint to add a negligence claim on the theory that the doctor was intoxicated while he performed her surgery.

Can the woman amend her complaint?

A: Yes, because the negligence claim relates back to the date of the original complaint, which was filed timely, and the woman can amend the complaint as a matter of right.
B: No, because the negligence claim does not relate back to the original complaint.
C: Yes, because the doctor knew or should have known that the woman would have brought a negligence claim against him, but for a mistake.
D: No, because the three-year statute of limitations for tort claims expired on January 1, 2008, and the woman did not file the negligence claim before that date.

The explanation for the answer is:

A is incorrect. The woman's negligence claim does not relate back to the original complaint under Federal Rule 15(c) because the doctor's alleged negligence during the operation did not arise out of the same conduct, transaction or occurrence set out in the original pleading. The alleged failure to obtain informed consent concerned the doctor's failure to adequately describe the risks and likely outcomes of the operation, while the negligence claim concerns his performance during the actual operation. Therefore because the second claim does not arise out of the same transaction or occurrence as the first claim, it cannot be added.

B is correct. The woman's negligence claim does not relate back to the original complaint under Federal Rule 15(c) for the reasons set forth above.

C is incorrect. The "knew or should have known" requirement applies to amendments that add new parties, not to additional claims against existing parties.

D is incorrect. This answer suggests that relation-back is never permitted. However, Federal Rule 15(c) allows claims to be filed after the statute of limitations normally would have run when the requirements for relation-back are satisfied.

Question 1746 - Civil Procedure - Pretrial Procedures (2/9/2017)

The question was:

A baker brought suit against a restaurant in federal court. The baker's federal court case has been pending for five years. Two weeks before the trial was to begin, the baker's attorney discovered a person whom she wished to call as a witness at trial. There was no compelling reason why the baker's attorney had not discovered this person sooner; the failure was simply due to an oversight by the investigator for the baker's lawyers. The district court already had entered its final pretrial order. That order identified all of the witnesses that each side was to call at trial and all of the documents that each side intended to offer into evidence. The newly discovered person was not listed as a witness in the pretrial order. The baker's attorney thought that the newly discovered person could be important because his testimony would corroborate the baker's testimony. The baker's attorney therefore moved the court to modify the final pretrial order to permit the newly discovered person to testify.

Should the district court grant the motion to modify the final pretrial order?

A: No, because it has no discretion to modify a final pretrial order once the order has been entered.
B: No, because the baker has not presented circumstances that demonstrate that modification of the order is necessary to prevent manifest injustice.
C: Yes, because the philosophy of the Federal Rules of Civil Procedure is to freely grant leave to amend when justice so requires.
D: Yes, because even though the Federal Rules of Civil Procedure impose a high burden to justify modification of a final pretrial order, the baker has shown justification for permitting the newly discovered person to testify.

The explanation for the answer is:

A is incorrect. The district court does have discretion to modify a final pretrial order, per Federal Rule 16(e).

B is correct. Under Federal Rule 16(e), the court should modify a final pretrial order only to prevent manifest injustice, and that showing has not been made when the baker's attorney could have found this witness before the pretrial order was entered and the newly discovered person appears to have testimony that will merely corroborate evidence that will be presented by the baker.

C is incorrect. The described philosophy applies to the amendment of pleadings, not to the modification of a final pretrial order.

D is incorrect. Here, the baker has not shown justification for permitting the newly discovered person to testify. Here, the baker's attorney could have found this witness before the pretrial order was entered and the newly discovered person appears to have testimony that will merely corroborate evidence that will be presented by the baker.

Question 1654 - Civil Procedure - Pretrial Procedures (2/10/2017)

The question was:

A man, a citizen of State A, files suit in federal court in State B as representative of a class against a State B corporation, and thereafter files a motion to certify the class consisting of approximately 250 persons from across the United States. The man claims that the corporation defrauded consumers under State B law by failing to refund taxes it collected after State B reduced its sales tax. The man seeks compensatory damages of $77,000, though no other member of the class is owed more than $100. The corporation urges the court not to certify the class.

What is the judge likely to do?

A: Certify the class, because there is diversity jurisdiction since the man's claim exceeds $75,000 and the man and the corporation have diverse citizenship.
B: Not certify the class, because the man's claims are not typical of the claims of the rest of the class.
C: Certify the class, because questions of law or fact common to class members predominate over any questions affecting only individual members, and a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.
D: Not certify the class, because there is no jurisdiction under the Class Action Fairness Act since the matter in controversy does not exceed $5,000,000.

The explanation for the answer is:

A is incorrect. There is diversity jurisdiction for this reason, but the existence of jurisdiction is not a sufficient basis for certifying a class. The class certification requirements under Rule 23(a) are as follows: (1) it is impracticable to join all members because the class is so numerous, (2) there are questions of law or fact common to the class, (3) the named party's interests are typical of the class, and (4) the named party will ensure the fair and adequate representation of the interests of the absent members of the class.

B is correct. One of the requirements for class certification, as stated above, is that the named plaintiff's interests are typical of the class. Here, this requirement is not satisfied because the man's damages of $77,000 are much greater than the damage suffered by others in the class.

C is incorrect. These are not the only requirements that must be satisfied for a class to be certified. The fact that the man's interests are not typical of the class (because the man's damages of $77,000 are much greater than the damage suffered by others in the class) does not allow the judge to certify the class.

D is incorrect. It is true that the court lacks jurisdiction under the Class Action Fairness Act for this reason, but the court would have jurisdiction to hear this case under the diversity and supplemental statutes since the man and the corporation are diverse and the man's amount in controversy exceeds $75,000. The obstacle to certification is not jurisdiction, but Federal Rule 23's requirements.

Question 1649 - Civil Procedure - Pretrial Procedures (2/10/2017)

The question was:

A man, a citizen of State A, is the class representative of a valid class action lawsuit in federal court in State B against a State B corporation. The lawsuit claims that the corporation breached the terms of its sales contract by failing to notify consumers after the corporation became aware of certain problems with its product. The class representative and the corporation agreed to settle the case, which would bind all members of the class and provide each member with coupons worth $250 towards the future purchase of any product sold by the corporation. With a class of 100,000 members, the coupons' total value is $25 million, and attorneys' fees were set at 10% ($2.5 million).

Which of the following is true?

A: The class representative and corporation may, but need not, seek court approval of the settlement agreement.
B: The court must allow absent class members to opt out of the settlement agreement.
C: Attorneys' fees must be approved by the court, and this award will be approved.
D: The court must hold a settlement hearing.

The explanation for the answer is:

A is incorrect. The Class Action Fairness Act ("CAFA") applies when (a) any class member is of diverse citizenship from any defendant, (2) the amount in controversy exceeds $5 million, and (3) there are at least 100 members in the proposed class. Here, the elements for CAFA subject matter jurisdiction are met. The CAFA includes a number of protections that apply to settlements in all class actions in federal court. One such protection concerns coupon settlements. Pursuant to the CAFA, a court may only approve a coupon settlement after the court holds a settlement hearing to ensure that the settlement is fair. Therefore, A is incorrect because it is not true that the parties need not seek court approval for the settlement.

B is incorrect. The Federal Rules of Civil Procedure concerning class actions permit, but do not require the court to afford class members an opportunity to opt-out of the settlement before the court approves the settlement. *See* Fed.R.Civ.P. 23(e)(4).

C is incorrect. CAFA provides that attorneys' fees may not be a percentage of the value of a coupon settlement; instead, fees may be calculated on the basis of hours worked or may be a percentage of the value of the coupons that are redeemed.

D is correct. The CAFA includes a number of protections that apply to settlements in all class actions in federal court. One such protection concerns coupon settlements. Pursuant to the CAFA, a court may only approve a coupon settlement after the court holds a settlement hearing to ensure that the settlement is fair.

Question 1728 - Civil Procedure - Pretrial Procedures (2/10/2017)

The question was:

A novelist wished to file suit against an editor for an alleged violation of copyright law. The novelist's attorney, a recent law school graduate, drafted and filed on behalf of the novelist, a complaint that purported to state a claim for relief under copyright law but, unbeknownst to the attorney, did not state such a claim. The attorney did not recognize the defect, so she did not request an extension or modification of existing copyright law or articulate any theory that would have supported an extension or modification of existing copyright law. The editor first moved to dismiss the complaint for failure to state a claim. Thereafter, the editor made a motion for sanctions claiming that the novelist's complaint was filed in bad faith because the legal contentions contained in the complaint could not be warranted by existing law. The novelist's attorney did not withdraw or appropriately correct the complaint for more than 21 days, and editor then moved for sanctions. The court held that the novelist's complaint was made in bad faith.

Of the sanctions listed below, which would be most appropriate?

A: The court should impose monetary sanctions on the novelist himself and require him to pay the editor all of the reasonable attorney's fees directly resulting from the violation.
B: The court should hold the novelist's attorney and the novelist jointly liable to the editor for all of the reasonable attorney's fees directly resulting from the violation, including the fees incurred by the editor in drafting the motion for sanctions and supporting memorandum.
C: The court should dismiss the novelist's complaint with prejudice.
D: The court should lecture the lawyer on the need to do careful legal research before filing a complaint or any other legal document with the court and require her to take a course in copyright law, but should impose no other sanction because no more is needed to deter repetition of the conduct at issue.

The explanation for the answer is:

A is incorrect. Federal Rule 11(c)(5)(b) states that monetary sanctions cannot be imposed on a represented party when the legal contentions contained in the pleading or motion are not warranted by existing law. Therefore, the court may not impose monetary sanctions on the novelist for his attorney's conduct.

B is incorrect. Federal Rule 11(c)(5)(b) states that monetary sanctions cannot be imposed on a represented party when the legal contentions contained in the pleading or motion are not warranted by existing law. Therefore although the court could impose monetary sanctions on the novelist's attorney, the court may not impose monetary sanctions on the novelist himself.

C is incorrect. Prohibiting the novelist from bringing a corrected copyright claim would be the most severe sanction available against the novelist. Here, the novelist is a relatively innocent party as the issue with the pleading was created by the novelist's attorney. Moreover, this may go beyond the court imposing a sanction that should be "limited to what is sufficient to deter repetition of such conduct."

D is correct. The court has discretion to impose sanctions "limited to what is sufficient to deter repetition of such conduct." Here, this would best be served by requiring the lawyer to take a course in copyright law and by lecturing the lawyer to be more diligent in conducting legal research prior to filing a complaint.

Question 1731 - Civil Procedure - Pretrial Procedures (2/10/2017)

The question was:

A group of foreign-born employees, now living in State A, brought suit against their corporate employer from State B in federal court alleging that the employer discriminated against the employees on the basis of their national origin and had denied them promotions and pay raises at the company. The employees sought damages in the amount of $100,000 to remedy the harms they believed they had suffered. The employer made a motion to join additional parties, arguing that the American-born employees of the same origin should be joined to the case because their interests will be impaired if they are left out. Some of the American-born employees that the employer wishes to join to the case are from State B. The employer insists that if the American-born employees cannot be added then the foreign-born employees' lawsuit must be dismissed.

If the court finds excluding the State B American-born employees from the suit would impair those American-born employees interests, must the court dismiss the foreign-born employees' suit?

A: Yes; the court must dismiss the foreign-born employees' suit because a court must dismiss claims when necessary parties cannot be added.
B: No; if the court determines that excluding the State B American-born employees would only impair and not prejudice the American-born employees then the court does not need to dismiss the foreign-born employees' suit.
C: Yes; the court must dismiss the foreign-born employees' suit because courts must dismiss suits when the exclusion of a potential party to the suit would impair that party's interest.
D: No; the court does not need to dismiss the foreign-born employees' suit because courts do not need to dismiss suits even when indispensable parties cannot be joined.

The explanation for the answer is:

A is incorrect. When parties to the suit cannot be joined, if the case can continue depends on whether the parties that cannot be joined are necessary or indispensable. If the party that cannot be joined is necessary, meaning that their interests will be impaired should they be excluded, then a court may still permit the original claim to go forward despite the impairment to the party that could not be joined. However, if the party that cannot be joined is indispensable, meaning that their interests would be prejudiced should they be excluded, then the court must dismiss the original claim should these parties not be joined.

B is correct. Here, the State B American-born employees cannot be added to the suit because their presence in the suit destroys diversity jurisdiction. However, the court need not dismiss the foreign-born employees' suit because the American-born employees are not indispensable parties to the suit.

C is incorrect. When a party's interest to a suit will be impaired if they are not joined, that party is only a necessary party, not an indispensable party, to the suit. Indispensable parties to a suit are those parties whose interests will be prejudiced should they not be joined to a suit. Here, the State B American-born employees are necessary not indispensable parties to the foreign-born employees' claim. Therefore, because the State B American-born employees are not indispensable parties, the court need not dismiss the foreign-born employees' claim.

D is incorrect. A court must dismiss a suit when an indispensable party to the suit cannot be joined.

Question 1688 - Civil Procedure - Verdicts and Judgments (6/19/2016)

The question was:

A biker filed a lawsuit against a driver in state court in State A, seeking compensation for damages incurred in a collision. The driver defended on the ground of contributory negligence, a full defense under State A law. The jury rendered a general verdict for the driver, thereby not identifying its specific findings. A doctor, who was also injured in the same collision, subsequently filed a jurisdictionally valid diversity lawsuit against the driver in State A federal court.

Which of the following is true?

A: The driver will be precluded from relitigating the issue of his negligence on account of the final judgment from the first lawsuit.
B: The doctor will be precluded from relitigating the issue of the driver's negligence on account of the final judgment from the first lawsuit.
C: There will be no issue preclusion on account of the first lawsuit, but there may be claim preclusion.
D: There will be neither issue preclusion nor claim preclusion on account of the first lawsuit.

The explanation for the answer is:

A is incorrect. The first lawsuit will have no issue preclusive effects on the second lawsuit because it is unclear, by virtue of the general verdict, what issue the jury decided: they either could have determined that the driver was not negligent or that the biker was contributorily negligent.

B is incorrect for the reasons stated above. Additionally, issue preclusion can apply only to a party or its privies, and the doctor was neither a party nor in privity with any of the parties in the first lawsuit.

C is incorrect. The doctor's lawsuit cannot be subject to claim preclusion because he was not a party in, nor was he in privity with any party from, the first lawsuit.

D is correct. The doctor's lawsuit against the driver cannot be subject to claim preclusion because he was not a party in, nor was he in privity with any party from, the first lawsuit.

Question 1697 - Civil Procedure - Verdicts and Judgments (6/27/2016)

The question was:

A politician, from State B, filed a lawsuit against a stockbroker, from State A, in state court in State A, seeking over $75,000 as compensation for damages incurred in a car accident. The jury found, pursuant to a special verdict, that the stockbroker had not been negligent, and awarded no damages to the politician. Six months later, an assistant, who also had been involved in the car accident, filed a jurisdictionally valid lawsuit against the stockbroker in federal court in State A.

Which of the following is true?

A: The assistant will be precluded from arguing that the stockbroker was negligent.
B: The assistant will not be precluded from arguing that the stockbroker was negligent.
C: The assistant's lawsuit will be dismissed on grounds of issue preclusion.
D: The assistant's lawsuit will be dismissed on grounds of claim preclusion.

The explanation for the answer is:

A is incorrect. The assistant will not be precluded from litigating the stockbroker's negligence because the assistant was not a party in the prior lawsuit; non-mutuality collateral estoppel cannot be asserted against someone who was not a party in the first lawsuit – doing so would violate due process.

B is correct. Here, the assistant will not be precluded from arguing that the stockbroker was negligent because the assistant was not a party in the prior law suit.

C is incorrect. As explained above, issue preclusion is not applicable to these facts and, furthermore, issue preclusion is not a sufficient reason on its own for a lawsuit to be dismissed.

D is incorrect. Claim preclusion (res judicata) only applies to a party (or its privies) in the first lawsuit, and the assistant was neither a party in the first case nor was he in privity with the stockbroker.

Question 1689 - Civil Procedure - Verdicts and Judgments (6/28/2016)

The question was:

A plumber filed a jurisdictionally valid diversity lawsuit against a dentist in federal court in State A, which applies traditional contributory negligence principles, seeking compensation for damages incurred in a car accident. The dentist defended on the ground of contributory negligence. After a four-day trial, the judge instructed the jury to issue a verdict and also to answer two written questions: (1) Was the dentist negligent and (2) was the plumber contributorily negligent? The jury answered "yes" to both and returned a verdict in favor of the plumber, awarding him damages of $95,000. None of the parties filed any post-verdict motions.

Which of the following is true?

A: The court must enter the jury's judgment.
B: The court may enter the jury's judgment.
C: The court may enter judgment for the dentist.
D: The court must order a new trial.

The explanation for the answer is:

A is incorrect. Here, the jury has entered an erroneous verdict due to its inconsistent determinations. When this happens, Federal Rule 49(b)(3) gives the court the choice among only three options: (1) to approve an appropriate judgment according to the answers, notwithstanding the verdict, (2) direct the jury to further consider its answers and verdict, or (3) order a new trial. Thus, A is incorrect because under these facts, the court does not have to enter the jury's judgment.

B is incorrect. The court may not enter the jury's judgment for the reason stated above.

C is correct. The court may enter a judgment for the dentist for the reason stated above.

D is incorrect for the reason stated above. The court may -- but need not -- order a new trial.

Question 1699 - Civil Procedure - Verdicts and Judgments (6/28/2016)

The question was:

A driver filed a lawsuit against a car manufacturer in State A federal court on the theory that the car manufacturer violated federal laws by having misleading advertising on its vehicles. A jury found, pursuant to a special verdict, that the car manufacturer's advertisements violated the law and awarded the driver damages. A delivery man subsequently filed a lawsuit against the car manufacturer in State B federal court, seeking damages on the same theory put forward in the driver's lawsuit.

Which of the following is true?

A: The car manufacturer will be precluded from relitigating the question of whether it violated the law, but only if State A law permits non-mutual offensive collateral estoppel in these circumstances.
B: The car manufacturer will be precluded from relitigating the question of whether it violated the law, but only if State B law permits non-mutual offensive collateral estoppel in these circumstances.
C: The car manufacturer will be precluded from relitigating the question of whether it violated the law, but only if federal common law permits non-mutual offensive collateral estoppel in these circumstances.
D: The car manufacturer will not be precluded from relitigating the question of whether it violated the law because the delivery man was not a party to the first lawsuit.

The explanation for the answer is:

A is incorrect. The first case in State A was a federal question lawsuit because the driver was asserting a federal claim against the car manufacturer. Federal law (more specifically, federal common law since there is no applicable statute) governs the preclusionary effect of the judgment of a federal court that exercised federal question jurisdiction. Therefore, federal law, not State A law, governs here. Furthermore, federal common law does not incorporate the law of the state where the first federal court was located; incorporation of state preclusionary law is found only where the first federal court was exercising diversity jurisdiction.

B is incorrect. Federal law, not State B law, governs here for the reasons stated in A, above.

C is correct for the reasons stated in A, above.

D is incorrect. This answer wrongly suggests that federal law does not permit non-mutual offensive collateral estoppel.

Question 1785 - Civil Procedure - Verdicts and Judgments (2/3/2017)

The question was:

An artist brought a breach of contract claim against a museum in federal court. After the suit was filed, the artist never sought discovery and did not make any motions. Two years after the suit was filed, the court dismissed the artist's claim for failure to prosecute the action. The court's dismissal order did not address the effect of that dismissal. The artist had not previously dismissed a lawsuit with the same claim prior to the court's dismissal of this action.

What effects will the dismissal order have?

A: The dismissal will be without prejudice to the artist's right to amend her complaint, re-assert essentially the same claim and prosecute the action.
B: Because the artist had not previously dismissed a lawsuit including the same claim, she will be able to re-assert the dismissed claim in a newly-filed federal court action.
C: Since the court did not rule on the merits, the court's dismissal of the artist's claim will not operate as an adjudication on the merits that precludes her from re-asserting the same claim in a newly filed action.
D: The dismissal will operate as an adjudication on the merits that precludes the artist from re-asserting the same claim in a newly filed action.

The explanation for the answer is:

A is incorrect. Here, the court entered an involuntary dismissal of the artist's claim for failure to prosecute her claim. Involuntary dismissals are with prejudice.

B is incorrect. It makes no difference whether the artist has or has not, prior to the federal court's dismissal, already dismissed a lawsuit that included the same claim. This mixes up rules concerning voluntary dismissals pursuant to Federal Rule of Civil Procedure 41(a)(1)(B) with involuntary dismissals.

C is incorrect. Involuntary dismissals are dismissals with prejudice and do operate as an adjudication on the merits.

D is correct. Involuntary dismissals are dismissals with prejudice and, as such, the artist will not be able to re-assert this same claim in a newly filed action.

Question 1783 - Civil Procedure - Verdicts and Judgments (2/8/2017)

The question was:

A zookeeper filed a breach of contract suit against a seller in federal district court in State A seeking $80,000 in damages. The seller answered the zookeeper's complaint by denying liability. She also raised res judicata as an affirmative defense because the zookeeper had a previous complaint against the seller arising out of the same occurrence which had been dismissed without prejudice by the local state court. Each party conducted discovery. Neither the seller nor the seller's attorney appeared at trial. At trial, the zookeeper introduced evidence that supported his claim that the seller breached their contract and also supported consequential damages of $200,000.

Which of the following judgments should the court enter?

A: The court should enter a judgment for the seller because the zookeeper failed to properly prosecute his case.
B: The court should enter a judgment for the zookeeper for $200,000.
C: The court should enter a judgment for the zookeeper, but only for $80,000 because this is the amount the seller thought was at stake when she defaulted.
D: The court should enter a judgment for the seller because when the zookeeper failed to reply to the seller's res judicata claim, the zookeeper admitted that the federal suit was precluded.

The explanation for the answer is:

A is incorrect. A court may file an involuntary dismissal for several reasons, one of which is a party's failure to prosecute a claim. But here, nothing indicates that the zookeeper failed to prosecute his claim. Therefore, a court would likely not enter an involuntary dismissal on this basis.

B is correct. The court should enter a judgment in this case because the seller failed to rebut the zookeeper's evidence that supported a damages award of $200,000. Thus, a judgment for $200,000 is warranted.

C is incorrect because the seller answered the complaint. Under Federal Rule 55, the failure to show up for trial is not a default. Here, the seller answered and rebutted the zookeeper's complaint so the seller did not default under the Federal Rules with respect to the $80,000 in damages. However, the seller did not show up to trial and did not rebut the evidence of $200,000 worth of consequential damages.

D is incorrect. The zookeeper was not required to reply to the seller's answer. Pursuant to Federal Rule of Civil Procedure 8(b)(6), when a response is not required, the allegation is considered denied or avoided, not admitted.

Question 1686 - Civil Procedure - Verdicts and Judgments (2/8/2017)

The question was:

A writer from State A filed a jurisdictionally valid diversity action against an editor from State B in federal court in State A, seeking $125,000 damages for a contract dispute. The writer's lawsuit was involuntarily dismissed because the State A statute of limitations for the writer's claim had run. The writer then timely refiled the lawsuit in State B, which has a longer statute of limitations. The editor then filed a motion to dismiss.

Which of the following is true?

A: The writer's lawsuit in State B unquestionably should not be dismissed because it is not time-barred under State B's statute of limitations.
B: The writer's lawsuit in State B should not be dismissed, but only if State A law does not treat dismissals on grounds of statute of limitations as an adjudication on the merits for purposes of res judicata.
C: The writer's lawsuit in State B should not be dismissed, but only if State B law does not treat dismissals on grounds of statute of limitations as an adjudication on the merits for purposes of res judicata.
D: The writer's lawsuit in State B unquestionably should not be dismissed because involuntary dismissals operate as an adjudication on the merits.

The explanation for the answer is:

A is incorrect. This answer ignores the fact that there was a prior judgment (from State A) and its preclusive effect must be analyzed; that the second lawsuit is timely under State B's statute of limitations is necessary but not sufficient on its own for the State B lawsuit to go forward.

B is correct. The preclusive effect of a federal court's involuntary dismissal of a diversity lawsuit is determined, as a matter of federal common law, by the law of the state in which the federal court that issued the dismissal is located. Therefore, the writer's lawsuit may go forward in State B only if State A's dismissal is not an adjudication on the merits under State A law.

C is incorrect. The preclusive effect of a federal court's involuntary dismissal of a diversity lawsuit is determined, as a matter of federal common law, by the law of the state in which the federal court that issued the dismissal is located. Therefore, it is State A's preclusionary law that matters, not State B's.

D is incorrect. The writer's lawsuit may go forward in State B only if State A's dismissal is not an adjudication on the merits under State A law.

Question 1699 - Civil Procedure - Verdicts and Judgments (2/10/2017)

The question was:

A driver filed a lawsuit against a car manufacturer in State A federal court on the theory that the car manufacturer violated federal laws by having misleading advertising on its vehicles. A jury found, pursuant to a special verdict, that the car manufacturer's advertisements violated the law and awarded the driver damages. A delivery man subsequently filed a lawsuit against the car manufacturer in State B federal court, seeking damages on the same theory put forward in the driver's lawsuit.

Which of the following is true?

A: The car manufacturer will be precluded from relitigating the question of whether it violated the law, but only if State A law permits non-mutual offensive collateral estoppel in these circumstances.
B: The car manufacturer will be precluded from relitigating the question of whether it violated the law, but only if State B law permits non-mutual offensive collateral estoppel in these circumstances.
C: The car manufacturer will be precluded from relitigating the question of whether it violated the law, but only if federal common law permits non-mutual offensive collateral estoppel in these circumstances.
D: The car manufacturer will not be precluded from relitigating the question of whether it violated the law because the delivery man was not a party to the first lawsuit.

The explanation for the answer is:

A is incorrect. The first case in State A was a federal question lawsuit because the driver was asserting a federal claim against the car manufacturer. Federal law (more specifically, federal common law since there is no applicable statute) governs the preclusionary effect of the judgment of a federal court that exercised federal question jurisdiction. Therefore, federal law, not State A law, governs here. Furthermore, federal common law does not incorporate the law of the state where the first federal court was located; incorporation of state preclusionary law is found only where the first federal court was exercising diversity jurisdiction.

B is incorrect. Federal law, not State B law, governs here for the reasons stated in A, above.

C is correct for the reasons stated in A, above.

D is incorrect. This answer wrongly suggests that federal law does not permit non-mutual offensive collateral estoppel.

Question 1695 - Civil Procedure - Verdicts and Judgments (2/10/2017)

The question was:

A journalist, a citizen of State A, filed a lawsuit against a grocer, a citizen of State B, in State B's state court, seeking compensation for damages to his antique automobile incurred in a car accident in State B. A jury found that the grocer drove negligently and awarded the journalist $95,000. Six months later the journalist filed a lawsuit against the grocer in federal court in State B, seeking $125,000 for personal injuries the journalist suffered in the same car accident.

What will likely happen?

A: The grocer will lose; he will be precluded from re-litigating the issue of his negligence under the doctrine of collateral estoppel.
B: The journalist will probably lose; he likely will be precluded from bringing this lawsuit under the doctrine of res judicata.
C: The grocer may not lose; though he will be precluded from re-litigating his negligence, he can litigate whether and to what extent the journalist suffered personal injuries in the accident.
D: The journalist may lose; he will be prevented from litigating in federal court unless he pleads facts that tend to establish that the expected value of his claim exceeds $75,000.

The explanation for the answer is:

A is incorrect. This lawsuit will not go forward, because the journalist will likely be barred from bring this law suit on the ground of res judicata. Additionally, even if collateral estoppel were applicable, it would not mean that that the grocer would automatically lose the case; the grocer would be precluded from re-litigating his negligence, but he still could challenge whether and to what extent the journalist suffered personal injuries in the accident.

B is correct. The journalist likely will be barred from bringing this lawsuit on the ground of res judicata (also known as claim preclusion) because there is an earlier final judgment between the same parties on the same cause of action; the federal court will apply the preclusionary rules of State B, and under most states' laws claims for personal and property damage suffered in a single car accident will be deemed to be part of a single cause of action.

C is incorrect. This lawsuit will not go forward, for the reasons explained immediately above; answer C would be correct if the lawsuit were not barred by res judicata.

D is incorrect. Although diversity jurisdiction requires an amount of controversy of more than $75,000, there is no such pleading requirement.

Question 1689 - Civil Procedure - Verdicts and Judgments (2/10/2017)

The question was:

A plumber filed a jurisdictionally valid diversity lawsuit against a dentist in federal court in State A, which applies traditional contributory negligence principles, seeking compensation for damages incurred in a car accident. The dentist defended on the ground of contributory negligence. After a four-day trial, the judge instructed the jury to issue a verdict and also to answer two written questions: (1) Was the dentist negligent and (2) was the plumber contributorily negligent? The jury answered "yes" to both and returned a verdict in favor of the plumber, awarding him damages of $95,000. None of the parties filed any post-verdict motions.

Which of the following is true?

A: The court must enter the jury's judgment.
B: The court may enter the jury's judgment.
C: The court may enter judgment for the dentist.
D: The court must order a new trial.

The explanation for the answer is:

A is incorrect. Here, the jury has entered an erroneous verdict due to its inconsistent determinations. When this happens, Federal Rule 49(b)(3) gives the court the choice among only three options: (1) to approve an appropriate judgment according to the answers, notwithstanding the verdict, (2) direct the jury to further consider its answers and verdict, or (3) order a new trial. Thus, A is incorrect because under these facts, the court does not have to enter the jury's judgment.

B is incorrect. The court may not enter the jury's judgment for the reason stated above.

C is correct. The court may enter a judgment for the dentist for the reason stated above.

D is incorrect for the reason stated above. The court may -- but need not -- order a new trial.

Question 1697 - Civil Procedure - Verdicts and Judgments (2/10/2017)

The question was:

A politician, from State B, filed a lawsuit against a stockbroker, from State A, in state court in State A, seeking over $75,000 as compensation for damages incurred in a car accident. The jury found, pursuant to a special verdict, that the stockbroker had not been negligent, and awarded no damages to the politician. Six months later, an assistant, who also had been involved in the car accident, filed a jurisdictionally valid lawsuit against the stockbroker in federal court in State A.

Which of the following is true?

A: The assistant will be precluded from arguing that the stockbroker was negligent.
B: The assistant will not be precluded from arguing that the stockbroker was negligent.
C: The assistant's lawsuit will be dismissed on grounds of issue preclusion.
D: The assistant's lawsuit will be dismissed on grounds of claim preclusion.

The explanation for the answer is:

A is incorrect. The assistant will not be precluded from litigating the stockbroker's negligence because the assistant was not a party in the prior lawsuit; non-mutuality collateral estoppel cannot be asserted against someone who was not a party in the first lawsuit – doing so would violate due process.

B is correct. Here, the assistant will not be precluded from arguing that the stockbroker was negligent because the assistant was not a party in the prior law suit.

C is incorrect. As explained above, issue preclusion is not applicable to these facts and, furthermore, issue preclusion is not a sufficient reason on its own for a lawsuit to be dismissed.

D is incorrect. Claim preclusion (res judicata) only applies to a party (or its privies) in the first lawsuit, and the assistant was neither a party in the first case nor was he in privity with the stockbroker.

Question 1687 - Civil Procedure - Verdicts and Judgments (2/10/2017)

The question was:

An accountant filed a jurisdictionally proper diversity lawsuit against a car manufacturer in State A federal court, seeking compensation under a negligence claim for damages he suffered when the ignition of his car malfunctioned. After the accountant obtained many documents and emails through discovery that indicated the manufacturer's longstanding awareness of ignition problems, the manufacturer stopped participating in the litigation. Shortly thereafter, the court issued a default judgment against the manufacturer. After the default judgment was entered, a teacher filed suit against the car manufacturer in federal court in State B. The teacher seeks damages on the same theory put forward in the accountant's lawsuit against the manufacturer.

Which of the following is true?

A: The car manufacturer will be precluded from litigating the merits of its negligence in the teacher's case since there was a default judgment against the manufacturer in the accountant's case.
B: The car manufacturer will not be precluded from litigating the merits of its negligence in the teacher's case despite there being a default judgment against the manufacturer in the accountant's case.
C: Whether or not the car manufacturer will be precluded from litigating the merits of its negligence depends on whether State A law permits non-mutual offensive collateral estoppel.
D: Whether or not the car manufacturer will be precluded from litigating the merits of its negligence depends on whether application of non-mutual offensive collateral estoppel on these facts would be unconstitutional.

The explanation for the answer is:

A is incorrect. There can be issue preclusion only with respect to issues that were actually litigated and determined in a previous lawsuit. Here, because the car manufacturer stopped responding in the accountant's suit, issue preclusion does not apply here because the issues were not actually litigated.

B is correct. There will not be collateral estoppel because the issue of the car manufacturer's negligence was not litigated and determined in the first case. Rather, the court issued a default judgment against the car manufacturer.

C is incorrect. Here, the car manufacturer will not be issue precluded regardless of whether State A law permits non-mutual offensive collateral estoppel, there is no issue preclusion on these facts for reasons apart from non-mutuality.

D is incorrect. Here, the car manufacturer will not be issue precluded regardless of whether non-mutual offensive collateral estoppel would be constitutional on these facts.

Question 659 - Constitutional Law - Individual Rights (6/19/2016)

The question was:

The constitution of a state authorizes a five-member state reapportionment board to redraw state legislative districts every ten years. In the last state legislative reapportionment, the board, by a unanimous vote, divided the greater metropolitan area, composed of a large city and several contiguous townships, into three equally populated state legislative districts. The result of that districting was that 40% of the area's total black population resided in one of those districts, 45% of the area's total black population resided in the second of those districts, and 15% resided in the third district.

A registered voter, who is black and is a resident of the city, brings suit in an appropriate court against the members of the state reapportionment board, seeking declaratory and injunctive relief that would require the boundary lines of the state legislative districts in the greater metropolitan area be redrawn. His only claim is that the current reapportionment violates the Fifteenth Amendment because it improperly dilutes the voting power of the blacks who reside in that area.

If no federal statute is applicable, which of the following facts, if proven, would most strongly support the validity of the action of the state reapportionment board?

A: In drawing the current district lines, the reapportionment board precisely complied with state constitutional requirements that state legislative districts be compact and follow political subdivision boundaries to the maximum extent feasible.
B: The reapportionment board was composed of three white members and two black members and both of the board's black members were satisfied that its plan did not improperly dilute the voting power of the blacks who reside in that area.
C: Although the rate of voter registration among blacks is below that of voter registrations among whites in the greater metropolitan area, two black legislators have been elected from that area during the last 15 years.
D: The total black population of the greater metropolitan area amounts to only 15% of the population that is required to comprise a single legislative district.

The explanation for the answer is:

Answer A is correct. Race cannot be the predominant factor in drawing the boundaries of a voting district unless the district plan can survive a strict scrutiny review. Although the strange shape of a district is not necessary for strict scrutiny to apply, a district's bizarre shape can be used to show that race was the predominant factor in drawing the district's boundaries. Answer A provides the strongest support for the validity for the argument because it provides an alternate reasoning for the redistricting in which race is not a predominate factor, and would not trigger strict scrutiny.

Answers B, C, and D fail to provide any evidence that race was not the predominate factor in redrawing the state legislative districts. Answer B is not correct because the racial makeup of the reapportionment committee does not indicate that race was not used to redraw the voting districts. Answer C is incorrect because the racial makeup of elected legislators does not indicate that race was not used to redraw the voting districts. Answer D is not correct because the small size of the black population does not indicate that race was not used to redraw the voting districts. Thus, B, C, and D are incorrect.

Question 703 - Constitutional Law - Individual Rights (6/19/2016)

The question was:

A state has a statute providing that an unsuccessful candidate in a primary election for a party's nomination for elected public office may not become a candidate for the same office at the following general election by nominating petition or by write-in votes.

A woman sought her party's nomination for governor in the May primary election. After losing in the primary, the woman filed nominating petitions containing the requisite number of signatures to become a candidate for the office of governor in the following general election. The chief elections officer of the state refused to certify the woman's petitions solely because of the above statute. The woman then filed suit in federal district court challenging the constitutionality of this state statute.

As a matter of constitutional law, which of the following is the proper burden of persuasion in this suit?

A: The woman must demonstrate that the statute is not necessary to achieve a compelling state interest.
B: The woman must demonstrate that the statute is not rationally related to a legitimate state interest.
C: The state must demonstrate that the statute is the least restrictive means of achieving a compelling state interest.
D: The state must demonstrate that the statute is rationally related to a legitimate state interest.

The explanation for the answer is:

Answer C is correct. Candidate qualifications need to be narrowly tailored to protect a compelling state interest to not violate equal protection or the First Amendment right of association, and the state has the burden to prove that its regulation meets strict scrutiny. Answer A is incorrect because for strict scrutiny, the burden is not on the individual, but rather on the state. Answer B is incorrect because rational basis would not apply, since a fundamental right is at issue. Answer D is incorrect because rational basis doesn't apply, and if it did, the plaintiff would have the burden under it.

Question 260 - Constitutional Law - Individual Rights (6/19/2016)

The question was:

While the defendant was in jail on a pending charge, his landlord called the police because rent had not been paid and because he detected a disagreeable odor coming from the defendant's apartment into the hallways.

The police officer who responded to the call knew that the defendant was in jail. He recognized the stench coming from the defendant's apartment as that of decomposing flesh and, without waiting to obtain a warrant and using the landlord's passkey, entered the apartment with the landlord's consent. The lease to these premises gave the landlord a right of entry, at any reasonable hour, for the purpose of making repairs. The police officer found a large trunk in the bedroom which seemed to be the source of the odor. Upon breaking it open, he found the remains of the defendant's former mistress.

If the defendant undertakes to challenge the search of his apartment, he has

A: standing, because the items seized in the search were incriminating in nature.
B: standing, because he still has a sufficient interest in the apartment even while in jail.
C: no standing, because his landlord authorized the search.
D: no standing, because he was out of the apartment when it occurred and had not paid his rent.

The explanation for the answer is:

B is the correct answer. The defendant has standing because he still has a sufficient interest in his apartment even while he is in jail. He has not abandoned it or the property inside. A is incorrect because the injury for standing has to be to the expectation of privacy, not just to the damage the seized items could do. C is incorrect because the landlord could not waive the defendant's Fourth Amendment rights. D is incorrect because even though he was not there and had not paid rent, he still had a privacy interest in the apartment.

Question 9 - Constitutional Law - Individual Rights (6/19/2016)

The question was:

A state requires licenses of persons "who are engaged in the trade of barbering." It will grant such licenses only to those who are graduates of barber schools located in the state, have resided in the state for two years, and are citizens of the United States.

The requirement that candidates for licenses must be citizens is

A: constitutional as an effort to ensure that barbers speak English adequately.
B: constitutional as an exercise of the state police power.
C: unconstitutional as a bill of attainder.
D: unconstitutional as a denial of equal protection.

The explanation for the answer is:

D is the correct answer. Under the Equal Protection Clause, a state statute which uses alienage as a classification must pass strict scrutiny. Here, the classification fails strict scrutiny because the state cannot prove that limiting barber licenses to citizens is necessary to achieve a compelling state interest.

A is incorrect because there is not a sufficiently close correlation between citizenship and language proficiency to satisfy strict scrutiny. B is incorrect because exercises of police power may not violate the Fourteenth Amendment. C is incorrect because this is not a bill of attainder, which is a legislative imposition of punishment without a judicial proceeding.

Question 1574 - Constitutional Law - Individual Rights (6/19/2016)

The question was:

A clerical employee of a city water department was responsible for sending out water bills to customers. His work in this respect had always been satisfactory.

The employee's sister ran in a recent election against the incumbent mayor, but she lost. The employee had supported his sister in the election campaign. After the mayor found out about this, she fired the employee solely because his support for the sister indicated that he was "disloyal" to the mayor. The city's charter provides that "all employees of the city work at the pleasure of the mayor."

Is the mayor's action constitutional?

A: No, because public employees have a property interest in their employment, which gives them a right to a hearing prior to discharge.
B: No, because the mayor's action violates the employee's right to freedom of expression and association.
C: Yes, because the employee has no property interest in his job since the city charter provides that he holds the job "at the pleasure of the mayor."
D: Yes, because the mayor may require members of her administration to be politically loyal to her.

The explanation for the answer is:

A is incorrect. A public employee has a property interest in his or her employment if the employee can be fired only for cause. Because the city's charter provides that "all employees of the city work at the pleasure of the mayor," the clerical employee does not have a property interest in his employment.

Nevertheless, the mayor's action is unconstitutional, because it violates the employee's right to freedom of expression and association protected by the First Amendment. The U.S. Supreme Court has held that the government may not fire an employee because of the employee's political views or affiliations unless certain political views or affiliations are required for the effective performance of the employee's job. The political views or affiliations of a clerical employee of a city water department are not relevant to the employee's job, and thus the employee may not be fired because of them.

B is correct. The mayor's action is unconstitutional, because it violates the employee's right to freedom of expression and association protected by the First Amendment. The U.S. Supreme Court has held that the government may not fire an employee because of the employee's political views or affiliations unless certain political views or affiliations are required for the effective performance of the employee's job. The political views or affiliations of a clerical employee of a city water department are not relevant to the employee's job, and thus the employee may not be fired because of them.

C is incorrect. It is true that the employee has no property interest in his job, and therefore he is not entitled to the constitutional protections of procedural due process. Nevertheless, the mayor's action is unconstitutional, because it violates the employee's right to freedom of expression and association protected by the First Amendment. The U.S. Supreme Court has held that the government may not fire an employee because of the employee's political views or affiliations unless certain political views or affiliations are required for the effective performance of the employee's job. The political views or affiliations of a clerical employee of a city water department are not relevant to the employee's job, and thus the employee may not be fired because of them.

D is incorrect. The mayor may require members of her administration to be politically loyal to her only if political loyalty is required for the effective performance of the job in question. The U.S. Supreme Court has held that the government may not fire an employee because of the employee's political views or affiliations unless certain political views or affiliations are required for the effective performance of the employee's job. The political views or affiliations of a clerical employee of a city water department are not relevant to the employee's job, and thus the employee may not be fired because of them. The mayor's action is unconstitutional, because it violates the employee's right to freedom of expression and association protected by the First Amendment.

Question 1341 - Constitutional Law - Individual Rights (6/19/2016)

The question was:

The United States government demonstrated that terrorist attacks involving commercial airliners were perpetrated exclusively by individuals of one particular race. In response, Congress enacted a statute imposing stringent new airport and airline security measures only on individuals of that race seeking to board airplanes in the United States.

Which of the following provides the best ground for challenging the constitutionality of this statute?

A: The commerce clause of Article I, Section 8.
B: The due process clause of the Fifth Amendment.
C: The privileges and immunities clause of Article IV.
D: The privileges or immunities clause of the Fourteenth Amendment.

The explanation for the answer is:

Answer B is correct. The U.S. Supreme Court held, in *Bolling v. Sharpe*, 347 U.S. 497 (1954), that the equal protection principles of the Fourteenth Amendment apply to actions of the federal government through the due process clause of the Fifth Amendment. The new security measures presumptively violate equal protection because they contain a racial classification: the new security measures apply only to individuals of one race. A court therefore would uphold the new security measures only if the government could prove that they are necessary to serve a compelling public interest, a standard that the government typically cannot meet. Thus, Answer B is correct.

Answer A is incorrect. The commerce clause grants Congress plenary power to regulate the safety of air travel because airlines are instrumentalities of interstate commerce.

Answer C is incorrect. The privileges and immunities clause of Article IV prohibits actions by states that improperly discriminate against the citizens of other states. The clause does not apply to actions of the federal government.

Answer D is incorrect. The privileges or immunities clause of the Fourteenth Amendment prohibits states from depriving individuals of the privileges or immunities of United States citizenship. The U.S. Supreme Court has never applied the clause to actions of the federal government.

Question 1424 - Constitutional Law - Individual Rights (7/22/2016)

The question was:

A protester entered an IRS office during business hours. He denounced the income tax and set fire to pages from his copy of the Internal Revenue Code. The fire was extinguished before it caused any other damage. The protester was arrested and charged with violating a state law that prohibited igniting a fire in a public building. He claimed that his prosecution was unconstitutional under the First Amendment.

May the protester constitutionally be convicted?

A: No, because he was exercising his right to freedom of speech by burning a copy of the code.
B: No, because the copy of the code belonged to him, and thus burning it did not infringe upon a legitimate government interest.
C: Yes, because the burning of the code was conduct rather than speech.
D: Yes, because the state law is narrowly drawn to further a substantial government interest in prohibiting the noncommunicative aspects of the act in question.

The explanation for the answer is:

Answer D is correct. The protester's burning of the tax code qualifies as expressive conduct protected by the free speech clause of the First Amendment because (1) the protester intended to communicate a message and (2) the audience was likely to understand the communication. But because the state's interest underlying the law that the protester violated (preventing the burning of public buildings) is unrelated to the message communicated by the burning of the tax code, a court will not subject the state law to strict scrutiny. Instead, the court will uphold application of the law to the protester if the law is narrowly tailored to further a substantial government interest, a standard of justification that this law should satisfy easily. Thus, Answer D is correct.

Answer A is incorrect. It is correct that the protester's burning of the tax code qualifies as expressive conduct protected by the free speech clause of the First Amendment. However, as stated above, the statue under which the protester will be convicted is not aimed at curbing free speech. Thus, the mere fact that the protester engaged in an act of free speech will not prevent a prosecution under the statute. Likewise, Answer C is incorrect. Regardless of whether the protester's actions are characterized as conduct or speech, the applicable statute in this case is not designed to deter free speech.

Answer B is incorrect. The legitimacy (and substantiality) of the government's interest in preventing the burning of public buildings is not undermined by the fact that the protester burned his own copy of the tax code.

Question 463 - Constitutional Law - Individual Rights (7/22/2016)

The question was:

According to a state statute, a candidate for state office may have his name placed on the official election ballot only if he files a petition with the appropriate state official containing a specified number of voter signatures. A politician failed to get his name placed on the state ballot as an independent candidate for governor because he failed to file a petition with the number of voter signatures required by state statute. In a suit against the appropriate state official in federal district court, the politician sought an injunction against signature requirement on the ground that it was unconstitutional.

Which of the following, if established, constitutes the strongest argument for the politician?

A: Compliance with the petition signature requirement is burdensome.
B: The objectives of the statute could be satisfactorily achieved by less burdensome means.
C: Because of the petition signature requirement, very few independent candidates have ever succeeded in getting on the ballot.
D: The motivation for the statute was a desire to keep candidates off the ballot if they did not have strong support among voters.

The explanation for the answer is:

B is the correct answer. Regulations on access to the ballot must be narrowly tailored to promote a compelling governmental interest. Therefore, if the objectives of the statute could be satisfactorily achieved by less burdensome means, the statute is not narrowly tailored.

A is incorrect because a statute may be burdensome and still pass heightened scrutiny as long as it is narrowly tailored to promote a compelling governmental interest. C is incorrect because the fact that fewer candidates from one political party make it onto the ballot is irrelevant if the requirement is narrowly tailored to promote a compelling government interest. D is incorrect because limiting the ballot to only those candidates who have strong support might be a compelling government interest.

Question 307 - Constitutional Law - Judicial Review (7/22/2016)

The question was:

As part of a comprehensive federal aid-to-education program, Congress included the following provisions as conditions for state receipt of federal funds: (1) Whenever textbooks are provided to students without charge, they must include no religious instruction and must be made available on the same terms to students in all public and private schools accredited by the state educational authority. (2) Salary supplements can be paid to teachers in public and private schools, up to ten percent of existing salary schedules, where present compensation is less than the average salary for persons of comparable training and experience, provided that no such supplement is paid to any teacher who instructs in religious subjects. (3) Construction grants can be made toward the cost of physical plant at private colleges and universities, provided that no part of the grant is used for buildings in which instruction in religious subject matters is offered.

A federal taxpayer challenges the provision that allows the distribution of free textbooks to students in a private school where religious instruction is included in the curriculum. On the question of the adequacy of the taxpayer's standing to raise the constitutional question, the most likely result is that standing will be

A: sustained, because any congressional spending authorization can be challenged by any taxpayer.
B: sustained, because the challenge to the exercise of congressional spending power is based on a claimed violation of specific constitutional limitations on the exercise of such power.
C: denied, because there is insufficient nexus between the taxpayer and the challenged expenditures.
D: denied, because, in the case of private schools, no state action is involved.

The explanation for the answer is:

B is the correct answer. While taxpayers generally lack standing to challenge general spending statutes, a tax payer will have standing where the spending violates the Establishment Clause. Because the taxpayer is alleging that the provision is advancing religion, there is a possible violation of a specific limitation on Congressional spending and the taxpayer will have standing. A is incorrect because taxpayers generally do not have standing to challenge governmental expenditures. C is incorrect because in the case of Establishment Clause challenges, the taxpayer does not need to show a special nexus in order to have standing. D is incorrect because the distribution of books paid for by federal funds is state action.

Question 121 - Constitutional Law - Relations Between Federal and State Governments (6/19/2016)

The question was:

In an effort to relieve serious and persistent unemployment in an industrialized state, its legislature enacted a statute requiring every business with annual sales in the state of over one million dollars to purchase goods and/or services in the state equal in value to at least half of the annual sales in the state of the business. Which of the following constitutional provisions is the strongest basis on which to attack this statute?

A: The due process clause of the Fourteenth Amendment
B: The equal protection clause
C: The commerce clause
D: The privileges and immunities clause of the Fourteenth Amendment

The explanation for the answer is:

C is the correct answer. By requiring certain businesses to spend a certain amount of money within the state, the state is impairing interstate commerce in violation of the commerce clause. A is incorrect because since there is no fundamental right at stake, the statute would only have to pass rational basis review, and requiring a certain amount of intrastate spending is rationally related to easing unemployment, which is a legitimate state interest. Likewise, B is incorrect since wealth is not a suspect classification and would only trigger a rational basis review. D is incorrect because the statute does not implicate any rights or privileges of national citizenship.

Question 589 - Constitutional Law - Relations Between Federal and State Governments (6/19/2016)

The question was:

An interstate bus company operates in a five-state area. A federal statute authorizes the Interstate Commerce Commission (ICC) to permit interstate carriers to discontinue entirely any unprofitable route. The interstate bus company applied to the ICC for permission to drop a very unprofitable route through the sparsely populated Shaley Mountains. The ICC granted that permission even though the interstate bus company provided the only public transportation into the region.

A man is the owner of a mountain resort in the Shaley Mountains, whose customers usually arrived on vehicles operated by the interstate bus company. After exhausting all available federal administrative remedies, the man filed suit against the interstate bus company in the trial court of the state in which the Shaley Mountains are located to enjoin the discontinuance by the interstate bus company of its service to that area. The man alleged that the discontinuance of service by the interstate bus company would violate a statute of that state prohibiting common carriers of persons from abandoning service to communities having no alternate form of public transportation.

The state court should

A: dismiss the action, because the man lacks standing to sue.
B: direct the removal of the case to federal court, because this suit involves a substantial federal question.
C: hear the case on its merits and decide for the man because, on these facts, a federal agency is interfering with essential state functions.
D: hear the case on its merits and decide for the interstate bus company, because a valid federal law preempts the state statute on which the man relies.

The explanation for the answer is:

D is the correct answer. The supremacy clause of the United States Constitution requires that where a state law conflicts with a valid federal law, the federal law preempts that state law. And because regulating interstate carriers is within Congress's commerce clause power, the federal law is valid. Answer A is incorrect because the man has standing. He has an injury to his business that was caused by the federal action, and prohibiting the discontinuance would remedy his injury. Answer B is incorrect because states have concurrent jurisdiction to decide federal questions, since state courts are courts of general jurisdiction. Answer C is incorrect because regulating interstate common carriers is not an essential state function; rather, it is a quintessential federal function.

Question 235 - Constitutional Law - Relations Between Federal and State Governments (7/22/2016)

The question was:

Congress provides by statute that any state that fails to prohibit automobile speeds of over 55 miles per hour on highways within the state shall be denied all federal highway construction funding. One of the richest and most highway-oriented states in the country refuses to enact such a statute.

The federal statute relating to disbursement of highway funds conditioned on the 55 mile-an-hour speed limit is probably

A: unconstitutional.
B: constitutional only on the basis of the spending power.
C: constitutional only on the basis of the commerce power.
D: constitutional on the basis of both the spending power and the commerce power.

The explanation for the answer is:

D is the correct answer. Under the Commerce Clause, Congress may regulate the channels of interstate commerce, which would include the federal highway system. Additionally, Congress may regulate through spending as long as there is a nexus between the general welfare, the imposed condition, and the purpose of the federal funds. A speed limit of 55 miles per hour is reasonably related to highway safety, and the funds are for highway repair. Therefore, the statute is constitutional under both powers.

A is incorrect because the statute is constitutional. B is incorrect because the Commerce Clause gives Congress broad power to regulate federal highways, a means of interstate commerce. C is incorrect because the spending power gives Congress broad power to determine how federal funds are spent for the general welfare.

Question 139 - Constitutional Law - Separation of Powers (7/22/2016)

The question was:

The Federal Automobile Safety Act established certain safety and performance standards for all automobiles manufactured in the United States. The Act creates a five-member "Automobile Commission" to investigate automobile safety, to make recommendations to Congress for new laws, to make further rules establishing safety and performance standards, and to prosecute violations of the act. The chairman is appointed by the President, two members are selected by the President pro tempore of the Senate, and two by the Speaker of the House of Representatives.

A minor United States car manufacturer seeks to enjoin enforcement of the Commission's rules.

The best argument that the car manufacturer can make is that

A: legislative power may not be delegated by Congress to an agency in the absence of clear guidelines.
B: the commerce power does not extend to the manufacture of automobiles not used in interstate commerce.
C: the car manufacturer is denied due process of law because it is not represented on the Commission.
D: the Commission lacks authority to enforce its standards because not all of its members were appointed by the President.

The explanation for the answer is:

D is the correct answer. Congress has the power to create agencies and to delegate power to those agencies. However, Congress cannot appoint members of a body with administrative or enforcement powers. Since enforcement is an executive power, the fact that some of the commission is appointed by Congress voids that power. Thus, the best argument the car manufacturer has is that the appointments by Congress would prohibit the Commission from being able to enforce its standards.

A is incorrect because Congress can delegate legislative power, and the statute provides sufficient guidelines to the Commission. B is incorrect because the commerce power would clearly reach the manufacture of automobiles, which are in the stream of interstate commerce. C is incorrect because business regulations will almost always be upheld, and representation on the Commission is not required.

Question 1491 - Constitutional Law - Separation of Powers (7/22/2016)

The question was:

Congress passed a statute providing that parties could no longer seek review in the U.S. Supreme Court of final judgments in criminal matters made by the highest court in each state.

What is the best argument supporting the constitutionality of the statute?

A: Congress has the power to make exceptions to the appellate jurisdiction of the Supreme Court.
B: Criminal matters are traditionally governed by state law.
C: The proper means of federal judicial review of state criminal matters is by habeas corpus.
D: The review of state court judgments is not within the original jurisdiction of the Supreme Court.

The explanation for the answer is:

Answer A is correct. The text of the exceptions clause of Article III does not limit congressional power to strip the U.S. Supreme Court of its appellate jurisdiction to hear particular types of cases, and the Court's own decisions arguably support the view that the exceptions clause grants Congress this power. Thus, Answer A is correct.

Answer B is incorrect. While it is true that criminal matters are traditionally governed by state law, a decision of the highest court of a state in a criminal case is subject to appellate review in the U.S. Supreme Court if the case includes a claim arising under federal law or if the case otherwise is within the federal judicial power.

Answer C is incorrect. A habeas corpus petition is not a means of direct federal judicial review of a state criminal case but rather constitutes a separate civil suit for the release of a prisoner who has been unlawfully imprisoned.

Answer D is incorrect. While it is true that the review of state court judgments is not within the original jurisdiction of the U.S. Supreme Court, the Court can review such judgments by exercising its appellate jurisdiction.

Question 592 - Constitutional Law - Separation of Powers (2/3/2017)

The question was:

A federal statute prohibits the construction of nuclear energy plants without a license from the Federal Nuclear Plant Siting Commission. The statute provides that the Commission may issue a license authorizing the construction of a proposed nuclear energy plant 30 days after the Commission makes a finding that the plant will comply with specified standards of safety, technological and commercial feasibility, and public convenience. In a severable provision, the Commission's enabling statute also provides that the Congress, by simple majorities in each house, may veto the issuance of a particular license by the Commission if such a veto occurs within 30 days following the required Commission finding.

Early last year, the Commission found that a particular energy company, met all statutory requirements and, therefore, voted to issue the energy company a license authorizing it to construct a nuclear energy plant. Because they believed that the issuance of a license to the energy company was not in accord with the applicable statutory criteria, a majority of each of the two houses of Congress voted, within the specified 30-day period, to veto the license. On the basis of that veto, the Commission refused to issue the license. Subsequently, the energy company sued the Commission in an appropriate federal district court, challenging the constitutionality of the Commission's refusal to issue the license.

In this suit, the court should hold the congressional veto of the license of the energy company to be

A: invalid, because any determination by Congress that particular agency action does not satisfy statutory criteria violates Article III, Section 1 of the Constitution because it constitutes the performance of a judicial function by the legislative branch.
B: invalid, because Article I, Section 7 of the Constitution has been interpreted to mean that any action of Congress purporting to alter the legal rights of persons outside of the legislative branch must be presented to the President for his signature or veto.
C: valid, because Congress has authority under the commerce clause to regulate the construction of nuclear energy plants.
D: valid, because there is a compelling national interest in the close congressional supervision of nuclear plant siting in light of the grave dangers to the public health and safety that are associated with the operation of such plants.

The explanation for the answer is:

Answer B is correct. Article I, § 7, cl. 3 of the United States Constitution provides that any matter that the houses of Congress can accomplish by majority vote must be presented to the President for signature or veto before it can have effect. As part of our system of checks and balances, Congress can act alone, without the assistance of the Executive Branch when the Constitution allows it, and the Constitution allows Congress to act alone only when it can command a super-majority.

Answer A is incorrect because Congress isn't reviewing the decision of the agency; rather, Congress is part of the system deciding whether to issue the license at all. Answer C is incorrect because, although Congress does have authority under the Commerce clause to regulate the construction of nuclear energy plants, its action in acting by majority vote alone was not valid. Similarly, answer D is incorrect because Congress may have a compelling interest in regulating nuclear siting for public health and safety, but its actions were invalid because it cannot act alone without a super-majority. Additionally, Congress would not have needed a compelling state interest to regulate nuclear siting, because the facts present no deprivation of a fundamental right or classification based on a protected class.

Question 897 - Contracts - Assignment of Rights and Delegation of Duties (7/23/2016)

The question was:

A flour wholesaler contracted to deliver to a producer of fine baked goods her flour requirements for a one-year period. Before delivery of the first scheduled installment, the flour wholesaler sold its business and "assigned" all of its sale contracts to Miller, Inc., another reputable and long-time flour wholesaler. The original flour wholesaler informed the baked goods producer of this transaction.

Assume that the baked goods producer accepted Miller's delivery of the first installment under the flour wholesaler-baked goods producer contract, but that the baked goods producer paid the contract price for that installment to the flour wholesaler and refused to pay anything to Miller.

In an action by Miller against the baked goods producer for the contractual amount of the first installment, which of the following, if any, will be an effective defense for the baked goods producer?

A: The baked goods producer had not expressly agreed to accept Miller as her flour supplier.
B: The baked goods producer's payment of the contractual installment to the flour wholesaler discharged her obligation.
C: The flour wholesaler remained obligated to the baked goods producer even though the flour wholesaler had assigned the contract to Miller.
D: None of the above.

The explanation for the answer is:

Answer D is correct. Under the UCC, a party may perform his duty through a delegatee unless the other party has a substantial interest in having the original party perform the contract. In other words, performance of the contract by the delegatee ordinarily does not require the assent of the other party to the contract. Because Miller is comparable to the flour wholesaler in terms of reputation and experience, the baked goods producer should not have a particular interest in having the flour wholesaler perform the contract. When the flour wholesaler sold its business and assigned its contracts of sale to Miller, the baked goods producer's agreement to the delegation was not necessary. Therefore A is incorrect.

B is incorrect because, once the other party to the contract (the baked goods producer) has received notice of an assignment of rights, she can discharge her obligation only upon payment to the *assignee* (Miller). Payment to the assignor will not discharge the obligation. C is incorrect because even though the flour wholesaler is obligated to the baked goods producer, as the obligor the baked good producer must make payment to the delegatee, not the delegator.

Question 813 - Contracts - Assignment of Rights and Delegation of Duties (7/24/2016)

The question was:

Under the terms of a written contract, a builder agreed to construct for a homeowner a garage for $10,000. Nothing was said in the parties' negotiations or in the contract about progress payments during the course of the work.

After completing 25% of the garage strictly according to the homeowner's specifications, the builder assigned his rights under the contract to a bank as security for an $8,000 loan. The bank immediately notified the homeowner of the assignment. The builder thereafter, without legal excuse, abandoned the job before it was half-complete. The builder subsequently defaulted on the loan from the bank. The builder has no assets. It will cost the homeowner at least $8,000 to get the garage finished by another builder.

If the bank sues the homeowner for $8,000, which of the following will the court decide?

A: The bank wins, because the builder-homeowner contract was in existence and the builder was not in breach when the bank gave the homeowner notice of the assignment.
B: The bank wins, because the bank as a secured creditor over the builder is entitled to priority over the homeowner's unsecured claim against the builder.
C: The homeowner wins, because his right to recoupment on account of the builder's breach is available against the bank as the builder's assignee.
D: The homeowner wins, because his claim against the builder arose prior to the builder's default on his loan from the bank.

The explanation for the answer is:

Answer C is correct. When contract rights are assigned, the assignee acquires a right against the obligor only to the extent that the obligor is under a duty to the assignor. In other words, the assignee acquires no greater rights against the obligor than the assignor had. When the builder (assignor) assigned his contract right to the bank (assignee), the bank's right to payment remained subject to any defense that the homeowner (obligor) could raise against the builder. Therefore, the builder's material breach of the construction contract is a defense that the homeowner can raise against the bank.

Answer A is incorrect because the bank's rights remain vulnerable to any defense that the homeowner can raise, regardless of whether the facts giving rise to the defense occur after the assignment or after the bank gives notice of the assignment. Answer B is incorrect because the rights the bank acquired are subject to the same defenses that the builder's were. Answer D is incorrect because the bank's status as the builder's creditor is irrelevant to whether the homeowner can raise the defense of the builder's breach against the bank.

Question 180 - Contracts - Assignment of Rights and Delegation of Duties (2/7/2017)

The question was:

A painter, who has been in the painting business for ten years and has a fine reputation, contracts to paint a farmer's barn. The farmer's barn is a standard red barn with a loft. The contract has no provision regarding assignment.

If the painter assigns the contract to a contractor, who has comparable experience and reputation, which of the following statements is correct?

A: The painter is in breach of contract.
B: The farmer may refuse to accept performance by the contractor.
C: The farmer is required to accept performance by the contractor.
D: There is a novation.

The explanation for the answer is:

Answer C is correct. Unless the contract provides otherwise, a contractual duty may be delegated to another unless the other party to the contract has a substantial interest in having the original obligor perform. Typically the other party will have a substantial interest where the contract is a personal services contract involving aesthetic taste and judgment. Although the painter-farmer contract is one for personal services (painting), the item to be painted is a standard barn and the work will be done by a painter of comparable experience and reputation. Therefore, the painter's delegation of the duty was not a breach, even if it was done without the consent of the farmer, and if the farmer refuses performance by the contractor, he will be in breach of contract. A and B are thus incorrect. D is incorrect because the mere delegation of a duty, does not create a novation; a novation would require an express agreement by all parties to substitute the contractor for the painter.

Question 395 - Contracts - Conditions (7/23/2016)

The question was:

On March 31, a seller and a buyer entered into a written agreement in which the seller agreed to fabricate and sell to the buyer 10,000 specially designed brake linings for a new type of power brake manufactured by the buyer. The contract provided that the buyer would pay half of the purchase price on May 15 in order to give the seller funds to "tool up" for the work; that the seller would deliver 5,000 brake linings on May 31; that the buyer would pay the balance of the purchase price on June 15; and that the seller would deliver the balance of the brake linings on June 30.

On May 10, the seller notified the buyer that it was doubtful whether the seller could perform because of problems encountered in modifying its production machines to produce the brake linings. On May 15, however, the seller assured the buyer that the production difficulties had been overcome, and the buyer paid the seller the first 50 percent installment of the purchase price. The seller did not deliver the first 5,000 brake linings on May 31, or at any time thereafter; and on June 10, the seller notified that it would not perform the contract.

Which of the following is *NOT* a correct statement of the parties' legal status immediately after the seller's notice on June 10?

A: The buyer has a cause of action for total breach of contract because of the seller's repudiation, but that cause of action will be lost if the seller retracts its repudiation before the buyer changes its position or manifests to the seller that the buyer considers the repudiation final.
B: The buyer can bring suit to rescind the contract even if it elects to await the seller's performance for a commercially reasonable time.
C: The buyer can await performance by the seller for a commercially reasonable time, but if the buyer awaits performance beyond that period, it cannot recover any resulting damages that it reasonably could have avoided.
D: The buyer has a cause of action for breach of contract that it can successfully assert only after it has given the seller a commercially reasonable time to perform.

The explanation for the answer is:

Answer D is correct. Under the UCC, when either party repudiates a contract for the sale of goods with respect to a performance whose loss will substantially affect the value of the contract, the non-repudiating party may await performance for a commercially reasonable time or immediately resort to remedies for breach of contract. The non-repudiating party, however, may not recover damages that he might have mitigated with reasonable effort. The repudiating party is still free to retract its repudiation unless the non-repudiating party has relied on it or otherwise indicated that he considers the repudiation final. The seller's June 10 statement that it would not perform the contract, when read in light of its earlier communications and failure to make a delivery when due, amounts to a repudiation that gives the buyer the right to bring immediate action for breach. Therefore, D is the correct answer choice because the buyer does not need to give the seller a commercially reasonable time to perform. A, B, and C are incorrect as each of the statements are accurate.

Question 982 - Contracts - Conditions (7/24/2016)

The question was:

On July 15, in a writing signed by both parties, a fixture company agreed to deliver to a druggist on August 15 five storage cabinets from inventory for a total price of $5,000 to be paid on delivery. On August 1, the two parties orally agreed to postpone the delivery date to August 20. On August 20, the fixture company tendered the cabinets to the druggist, who refused to accept or pay for them on the ground that they were not tendered on August 15, even though they otherwise met the contract specifications.

Assuming that all appropriate defenses are seasonably raised, will the fixture company succeed in an action against the druggist for breach of contract?

A: Yes, because neither the July 15 agreement nor the August 1 agreement was required to be in writing.
B: Yes, because the August 1 agreement operated as a waiver of the August 15 delivery term.
C: No, because there was no consideration to support the August 1 agreement.
D: No, because the parol evidence rule will prevent proof of the August 1 agreement.

The explanation for the answer is:

Answer B is correct. A waiver is an excuse of the nonoccurrence or delay of a condition to fulfill a duty. Under the UCC, consideration is not required for a valid waiver. When the fixture company and the druggist agreed to postpone their delivery date under the contract from August 15 to August 20, in effect the druggist waived a non-material term of the agreement and the waiver was enforceable even without consideration. The druggist, therefore, was not justified in refusing to accept or to pay for the cabinets.

A is incorrect because the July 15 agreement falls within the UCC Statute of Frauds, which requires a signed writing in order to enforce a contract for the sale of goods of $500 or more. C is incorrect because the waiver did not require consideration to be effective. D is incorrect because the parol evidence rule does not apply to promises made after the adoption of a final written contract.

Question 959 - Contracts - Conditions (2/7/2017)

The question was:

A broker needed a certain rare coin to complete a set that he had contracted to assemble and sell to a collector. On February 1, the broker obtained such a coin from a hoarder in exchange for $1,000 and the broker's signed, written promise to re-deliver to the hoarder "not later than December 31 this year" a comparable specimen of the same kind of coin without charge to the hoarder. On February 2, the broker consummated sale of the complete set to the collector.

On October 1, the market price of rare coins suddenly began a rapid, sustained rise; on October 15 the hoarder wrote the broker for assurance that the latter would timely meet his coin-replacement commitment. The broker replied, "In view of the surprising market, it seems unfair that I should have to replace your coin within the next few weeks."

After receiving the broker's message on October 17, the hoarder telephoned the broker, who said, "I absolutely will not replace your coin until the market drops far below its present level." The hoarder then sued the broker on November 15 for the market value of a comparable replacement-coin as promised by the broker in February. The trial began on December 1.

If the broker moves to dismiss the hoarder's complaint, which of the following is the hoarder's best argument in opposing the motion.

A: The hoarder's implied duty of good faith and fair dealing in enforcement of the contract required her to mitigate her losses on the rising market by suing promptly, as she did, after becoming reasonably apprehensive of a prospective breach by the broker.
B: Although the doctrine of anticipatory breach is not applicable under the prevailing view if, at the time of repudiation, the repudiatee owes the repudiator no remaining duty of performance, the doctrine applies in this case because the hoarder, the repudiatee, remains potentially liable under an implied warranty that the coin advanced to the broker was genuine.
C: When either party to a sale-of-goods contract repudiates with respect to a performance not yet due, the loss of which will substantially impair the value of the contract to the other, the aggrieved party may in good faith resort to any appropriate remedy for breach.
D: Anticipatory repudiation, as a deliberate disruption without legal excuse of an ongoing contractual relationship between the parties, may be treated by the repudiatee at her election as a present tort, actionable at once.

The explanation for the answer is:

Answer C is correct. Under the UCC, when either party to a contract for the sale of goods repudiates the contract with respect to a future performance that will substantially affect the value of that performance, the non-repudiating party may resort to any appropriate remedy for breach. A repudiation is an unequivocal statement of inability or unwillingness to perform. The broker's October 17 statement that he "absolutely will not" replace the hoarder's coin until the market drops manifests such an intent; therefore the hoarder is entitled to treat his statement as a total breach of contract, even though performance is not due until December 31.

A is incorrect because an injured party must act reasonably to mitigate damages only after the other party commits a material breach or repudiates the contract. B is incorrect because, although the common law recognizes an exception where the non-repudiating party owes no remaining duty of performance, the UCC rule (which governs the hoarder-broker contract because it is for the sale of a good) provides for no such exception. D is incorrect because repudiation typically does not entitle the non-repudiating party to bring a tort action.

Question 855 - Contracts - Conditions (2/7/2017)

The question was:

The owner of a fleet of taxis contracted with a dealer in petroleum products for the purchase and sale of the taxi fleet owner's total requirements of gasoline and oil for one year. As part of that agreement, the petroleum dealer also agreed with the taxi fleet owner that for one year the petroleum dealer would place all his advertising with the taxi fleet owner's wife who owned her own small advertising agency. When the wife was informed of the owner-dealer contract, she declined to accept an advertising account from the soap company because she could not handle both the petroleum dealer and the soap company accounts during the same year.

During the first month of the contract, the taxi fleet owner purchased substantial amounts of his gasoline from a supplier other than the petroleum dealer, and the petroleum dealer thereupon notified the wife that he would no longer place his advertising with her agency.

In an action against the petroleum dealer for breach of contract, the wife probably will

A: succeed, because she is a third-party beneficiary of the owner-dealer contract.
B: succeed, because the taxi fleet owner was acting as the wife's agent when he contracted with the petroleum dealer.
C: not succeed, because the failure of a constructive condition precedent excused the petroleum dealer's duty to place his advertising with the wife.
D: not succeed, because the wife did not provide any consideration to support the petroleum dealer's promise to place his advertising with her.

The explanation for the answer is:

Answer C is correct. Under the doctrine of constructive conditions, where one performance will take a period of time to complete while the other can be completed in an instant, completion of the longer performance is a condition precedent to the shorter performance. A party's obligation to perform a contractual duty is excused if the other party fails to satisfy a condition precedent. Implicit in a requirements contract for the purchase and sale of a good is the buyer's obligation to purchase all of its requirements for the good exclusively from the seller for the duration of the contract. Because the taxi fleet owner agreed to purchase its total requirements for gasoline and oil from the petroleum dealer for one year, its purchase of substantial amounts of gasoline from a competitor amounted to a material breach, thereby justifying the petroleum dealer's repudiation of its obligation to place advertising with the wife.

Choice A is incorrect because even if the wife was an intended beneficiary, the petroleum dealer can raise any defense against her that he can raise against the taxi fleet owner (i.e., that the taxi fleet owner committed a material breach). Choice B is incorrect because the facts show that only the taxi fleet owner was party to the contract with the petroleum dealer; the wife was, if anything, only an incidental beneficiary. Choice D is incorrect because the consideration supporting the petroleum dealer's obligation to the wife was the taxi fleet owner's promise pursuant to the requirements contract.

Question 287 - Contracts - Conditions (2/11/2017)

The question was:

A building owner and a purchaser made a written contract pursuant to which the building owner promised to convey a specified apartment house to the purchaser in return for the purchaser's promise (1) to convey a 100-acre farm to the building owner, and (2) to pay the building owner $1,000 in cash six months after the exchange of the apartment house and the farm. The contract contained the following provision: "It is understood and agreed that the purchaser's obligation to pay the $1,000 six months after the exchange of the apartment house and the farm shall be voided if the building owner has not, within three months after the aforesaid exchange, removed the existing shed in the parking area in the rear of said apartment house."

Which of the following statements concerning the order of performances is *LEAST* accurate?

A: The building owner's tendering of good title to the apartment house is a condition precedent to the purchaser's duty to convey good title to the farm.
B: The purchaser's tendering of good title to the farm is a condition precedent to the building owner's duty to convey good title to the apartment house.
C: The purchaser's tendering of good title to the farm is a condition subsequent to the building owner's duty to convey good title to the apartment house.
D: The building owner's tendering of good title to the apartment house and the purchaser's tendering of good title to the farm are concurrent conditions.

The explanation for the answer is:

C is correct. This question deals with the distinction between conditions precedent, conditions concurrent, and conditions subsequent. A condition precedent is one that must occur before an absolute duty of immediate performance arises in the other party. Conditions concurrent are conditions that can occur together with both parties bound to perform at the same time. Therefore, each condition acts as a condition precedent to the other. Finally, a condition subsequent is one which cuts off an existing duty of performance when it occurs.

Here, the building owner must convey the apartment to the purchaser, and at the same time the purchaser must convey the farm to the building owner, or no further duty arises for either party. After the purchaser conveys the farm (but no more than three months after), the building owner has a duty to remove the shed behind the apartment. Therefore, the building owner's conveyance of the apartment and the purchaser's tender of the farm are concurrent conditions, and in effect each is a condition "precedent" to the other. Thus, A, B, and D are all accurate statements.

C is the least accurate statement because the purchaser's tendering of good title to the farm does not excuse the building owner's duty to convey good title to the apartment house. Therefore, C is the correct answer.

Question 288 - Contracts - Conditions (2/11/2017)

The question was:

A building owner and a purchaser made a written contract pursuant to which the building owner promised to convey a specified apartment house to the purchaser in return for the purchaser's promise (1) to convey a 100-acre farm to the building owner, and (2) to pay the building owner $1,000 in cash six months after the exchange of the apartment house and the farm. The contract contained the following provision: "It is understood and agreed that the purchaser's obligation to pay the $1,000 six months after the exchange of the apartment house and the farm shall be voided if the building owner has not, within three months after the aforesaid exchange, removed the existing shed in the parking area in the rear of the said apartment house."

The building owner's removal of the shed from the parking area of the apartment house is

A: a condition subsequent in form but precedent in substance to the purchaser's duty to pay the $1,000.
B: a condition precedent in form but subsequent in substance to the purchaser's duty to pay the $1,000.
C: a condition subsequent to the purchaser's duty to pay the $1,000.
D: not a condition, either precedent or subsequent, to the purchaser's duty to pay the $1,000.

The explanation for the answer is:

A is the correct answer. This question deals with the difference between conditions precedent, conditions concurrent, and conditions subsequent. A condition precedent is one that must occur before an absolute duty of immediate performance arises in the other party. Conditions concurrent are conditions the can occur together with both parties bound to perform at the same time. A condition subsequent is one which cuts off an existing duty of performance when it occurs. Here, the obligation to remove the shed will give rise to the purchaser's duty to pay the $1,000. Therefore, it functions as a condition precedent to that duty. However, the condition is worded so the failure to remove the shed by the three month deadline will extinguish the purchaser's obligation to pay the $1,000, making it a condition subsequent in form. Thus, A is the appropriate response and B, C and D are incorrect.

Question 334 - Contracts - Consideration (7/23/2016)

The question was:

A man saved the life of his friend's wife who thereafter changed her will to leave the man $1,000. However, upon the wife's death she had no property except an undivided interest in real estate held in tenancy by the entirety of the husband. The property had been purchased by the husband from an inheritance.

After the wife died, the husband signed and delivered to the man the following instrument: "In consideration of [the man]'s saving my wife's life and his agreement to bring no claims against my estate based on her will, I hereby promise to pay [the man] $1,000."

Upon the husband's death, the man filed a claim for $1,000. The husband's executor contested the claim on the ground that the instrument was not supported by sufficient consideration.

With respect to the recital that the man had agreed not to file a claim against the husband's estate, what additional fact would most strengthen the man's claim?

A: The man's agreement was made in a writing he signed.
B: The man reasonably believed he had a valid claim when the instrument was signed.
C: The wife had contributed to accumulation of the real property.
D: The man paid the husband $1 when he received the instrument.

The explanation for the answer is:

Answer B is correct. A promise to surrender a legal claim is sufficient consideration to support a return promise even if the claim turns out to be invalid, so long as the person surrendering the claim has a good faith belief in its validity. As long as the man genuinely believed that he had a valid claim against the husband, his promise to relinquish such claim provides sufficient consideration to support the husband's promise to pay the man $1,000.

A is incorrect because a writing would not excuse an absence of consideration. C is incorrect because the tenancy in the entirety would preclude her devise to the man. D is incorrect because some courts will find that the payment of nominal consideration in exchange for a promise is a "mere pretense" of a bargain and is not enforceable.

Question 333 - Contracts - Consideration (7/24/2016)

The question was:

A man saved the life of his friend's wife who thereafter changed her will to leave the man $1,000. However, upon the wife's death she had no property except an undivided interest in real estate held in tenancy by the entirety of the husband. The property had been purchased by the husband from an inheritance.

After the wife died, the husband signed and delivered to the man the following instrument: "In consideration of [the man]'s saving my wife's life and his agreement to bring no claims against my estate based on her will, I hereby promise to pay [the man] $1,000."

Upon the husband's death, the man filed a claim for $1,000. The husband's executor contested the claim on the ground that the instrument was not supported by sufficient consideration.

In most states, would the man's saving of the wife's life be regarded as sufficient consideration for the husband's promise?

A: Yes, because the husband was thereby morally obligated to the man.
B: Yes, because the husband was thereby materially benefited.
C: No, because the husband had not asked the man to save her.
D: No, because the value of the man's act was too uncertain.

The explanation for the answer is:

Answer C is correct. In order to be enforceable, a promise must be supported by bargained-for consideration. Consideration is bargained for if it is sought by the promisor and given by the promisee in exchange for the promise. Although the husband's promise states that it is given "in consideration of the man's saving" the wife's life, in fact it is not sufficient consideration to support the husband's promise. The husband did not make the promise to pay $1,000 in exchange for the man's act, nor did the man save the wife's life in exchange for the husband's promise.

A and B are incorrect because neither moral obligation nor material benefit alone is a sufficient basis for finding consideration. D is incorrect because the respective values of consideration exchanged is not relevant to whether consideration is sufficient; what matters is whether the consideration was bargained for.

Question 64 - Contracts - Consideration (2/7/2017)

The question was:

While negligently driving his father's uninsured automobile, the 25-year-old son crashed into an automobile driven by the woman. Both the son and the woman were injured. The father, erroneously believing that he was liable because he owned the automobile, said to the woman: "I will see to it that you are reimbursed for any losses you incur as a result of the accident." The father also called a physician and told him to take care of the woman and that he would pay the bill.

The son, having no assets, died as a result of his injuries. One of the son's creditors wrote to the father stating that the son owed him a clothing bill of $200 and that he was going to file a claim against the son's estate. The father replied: "If you don't file a claim against my son's estate, I will pay what he owed you."

The father honestly believed that he did not owe the creditor anything and at first refused to pay anything to the creditor. If the creditor, honestly believing that the father owed him $200, then accepts $150 from the father in settlement of the claim, will the creditor succeed in an action against the father for the remaining $50?

A: Yes, because the son's debt of $200 was liquidated and undisputed.
B: Yes, because the creditor honestly believed that he had a legal right against the father for the full $200.
C: No, because the father honestly believed that the creditor did not have a legal right against him for the $200.
D: No, because the father was not contractually obligated to pay the creditor $200 in the first place.

The explanation for the answer is:

Answer C is correct. The creditor will not succeed against the father because the original contract has been discharged through accord and satisfaction. Partial payment of an original debt will satisfy as an accord and satisfaction if there is a bona fide dispute about the validity of the claim. Here, the father honestly did not believe that he owed the creditor. Therefore, the creditor's acceptance of $150 from the father "in settlement of the claim" is a valid accord and satisfaction, resulting in the discharge of the original contract. Thus, the creditor is not entitled to the remaining $50.

A is incorrect because the fact that the son's debt to the creditor was undisputed does not prevent the father's use of accord and satisfaction if the father believes in good faith that he does not owe the creditor. B is incorrect because the creditor's honest belief will not prevent the discharge of the original debt by accord and satisfaction if the creditor accepts the payment without reservation. D is incorrect because if the creditor believed in good faith that his claim against the son's estate was valid, then the creditor's forbearance of his legal right to sue was adequate consideration for the father's promise to pay $200.

Question 779 - Contracts - Consideration (2/11/2017)

The question was:

On June 1, a widget manufacturer entered into a written agreement with a tool maker in which the tool maker agreed to produce and sell to the manufacturer 12 sets of newly designed dies to be delivered August 1 for the price of $50,000, payable ten days after delivery. Encountering unexpected expenses in the purchase of special alloy steel required for the dies, the tool maker advised the manufacturer that production costs would exceed the contract price; and on July 1, the manufacturer and the tool maker signed a modification to the June 1 agreement increasing the contract price to $60,000. After timely receipt of 12 sets of dies conforming to the contract specifications, the manufacturer paid the tool maker $50,000 but refused to pay more.

Which of the following concepts of the Uniform Commercial Code, dealing expressly with the sale of goods, best supports an action by the tool maker to recover $10,000 for breach of the manufacturer's July 1 promise?

A: Bargained-for exchange.
B: Promissory estoppel.
C: Modification of contracts without consideration.
D: Unconscionability in the formation of contracts.

The explanation for the answer is:

Answer C is correct. Under the UCC, a modification to a contract for the sale of goods needs no additional consideration to be binding if the modification was made in good faith. Although the modification increasing the purchase price under the tool maker-manufacturer contract was unilateral, and therefore not supported by consideration, the modification was made in light of unexpected increased production costs, which suggests that it was proposed in good faith rather than to coerce the manufacturer into paying a higher price. Answer A is incorrect because of the UCC rule dispensing with consideration for good faith modifications. Answers B and D are incorrect because the facts do not show either detrimental reliance or unconscionability.

Question 1518 - Contracts - Defenses to Enforceability (2/11/2017)

The question was:

In a telephone conversation, a jewelry maker offered to buy 100 ounces of gold from a precious metals company if delivery could be made within 10 days. The jewelry maker did not specify a price, but the market price for 100 ounces of gold at the time of the conversation was approximately $65,000. Without otherwise responding, the company delivered the gold six days later.

In the meantime, the project for which the jewelry maker planned to use the gold was canceled. The jewelry maker therefore refused to accept delivery of the gold or to pay the $65,000 demanded by the company.

Is there an enforceable contract between the jewelry maker and the company?

A: No, because the parties did not agree on a price term.
B: No, because the parties did not put their agreement in writing.
C: Yes, because the absence of a price term does not defeat the formation of a valid contract for the sale of goods where the parties otherwise intended to form a contract.
D: Yes, because the company relied on an implied promise to pay when it delivered the gold.

The explanation for the answer is:

A is incorrect. Under UCC § 2-305, a contract may be enforceable in the absence of a price term so long as the parties otherwise intended to enter into a contract. In this case, the dispositive issue is whether the parties' oral agreement is enforceable. Under UCC § 2-201(1), a contract for the sale of goods for a price of $500 or more is not enforceable unless there is a writing indicating the contract that is signed by the party against whom enforcement is sought. In this case, the absence of such a writing signed by the jewelry maker renders the parties' oral agreement unenforceable. An exception to the writing requirement arises when a seller delivers goods that are accepted by the buyer, but in this case, the jewelry maker did not accept the gold.

B is correct. The parties failed to comply with the writing requirement of UCC § 2-201(1). Under that section, a contract for the sale of goods for a price of $500 or more is not enforceable unless there is a writing indicating a contract of sale that is signed by the party against whom enforcement is sought. In this case, the absence of such a writing signed by the jewelry maker renders the parties' oral agreement unenforceable. An exception to the writing requirement arises when a seller delivers goods that are accepted by the buyer, but in this case, the jewelry maker did not accept the gold.

C is incorrect. Under UCC § 2-305, a contract may be enforceable in the absence of a price term so long as the parties otherwise intended to enter into a contract. In this case, however, the dispositive issue is whether the parties' oral agreement is enforceable. Under UCC § 2-201(1), a contract for the sale of goods for a price of $500 or more is not enforceable unless there is a writing indicating the contract that is signed by the party against whom enforcement is sought. The absence of such a writing signed by the jewelry maker renders the parties' oral agreement unenforceable. An exception to the writing requirement arises when a seller delivers goods that are accepted by the buyer. In this case, however, the jewelry maker did not accept the gold.

D is incorrect. The dispositive issue in this case is whether the parties' oral agreement is enforceable. Under UCC § 2-201(1), a contract for the sale of goods for a price of $500 or more is not enforceable unless there is a writing indicating the contract that is signed by the party against whom enforcement is sought. The absence of such a writing signed by the jewelry maker renders the parties' oral agreement unenforceable. An exception to the writing requirement arises when a seller delivers goods that are accepted by the buyer. In this case, however, the jewelry maker did not accept the gold.

Question 310 - Contracts - Formation of Contracts (7/24/2016)

The question was:

On November 1, the following notice was posted in a privately-operated law school:

The faculty, seeking to encourage legal research, offers to any student at this school who wins the current National Obscenity Law Competition the additional prize of $500. All competing papers must be submitted to the Dean's office before May 1. A student read this notice on November 2, and thereupon intensified his effort to make his paper on obscenity law, which he started in October, a winner. The student also left on a counter in the Dean's office a signed note saying, "I accept the faculty's $500 Obscenity Competition offer." This note was inadvertently placed in a student's file and never reached the Dean or any faculty member personally. On the following April 1, the above notice was removed and the following substituted therefore:

The faculty regrets that our offer regarding the National Obscenity Law Competition must be withdrawn. The student's paper was submitted through the Dean's office on April 15. On May 1, it was announced that the student had won the National Obscenity Law Competition and the prize of $1,000. The law faculty refused to pay anything.

Assuming that the faculty's notice of November 1 was posted on a bulletin board or other conspicuous place commonly viewed by all persons in the law school, such notice constituted a

A: preliminary invitation to deal, analogous to newspaper advertisements for the sale of goods by merchants.
B: contractual offer, creating a power of acceptance.
C: preliminary invitation, because no offeree was named therein.
D: promise to make a conditional, future gift of money.

The explanation for the answer is:

Answer B is correct. An offer is a manifestation of willingness to enter a bargain, which is made in such a way that the offeree is justified in thinking that her assent will conclude a bargain. Advertisements or announcements directed to the public at large typically are construed as invitations to deal and not as offers, in part out of concern that an open-ended offer to the public would expose the offeror to excessive liability. This rationale will not apply, however, if the language in the announcement is qualified with limiting language such as "first come first served." Because the faculty's $500 offer was limited to the winner of the competition, the public posting of the faculty's notice may reasonably be construed to be an offer.

A and C are incorrect because, as explained above, an advertisement or announcement may be construed as an offer where the language of the offer is sufficiently definite. D is incorrect because the offer is not merely gratuitous but seeks the return performance of competing in and winning the writing competition.

Question 431 - Contracts - Formation of Contracts (7/24/2016)

The question was:

On June 1, a manufacturer of men's neckties received the following order from a retailer: "Ship 500 two-inch ties, assorted stripes, your catalogue No. V34. Delivery by July 1."

On June 1, the manufacturer shipped 500 three-inch ties that arrived at the retailer's place of business on June 3. The retailer immediately telegraphed the manufacturer: "Reject your shipment. Order was for two-inch ties." The retailer, however, did not ship the ties back to the manufacturer. The manufacturer replied by telegram: "Will deliver proper ties before July 1." The retailer received this telegram on June 4, but did not reply to it.

On June 30, the manufacturer tendered 500 two-inch ties in assorted stripes, designated in his catalogue as item No. V34, but the retailer refused to accept them.

Did the retailer properly reject the ties delivered on June 3?

A: Yes, because the ties were nonconforming goods.
B: Yes, because the manufacturer did not notify the retailer that the ties were shipped as an accommodation to the retailer.
C: No, because the manufacturer could accept the retailer's offer by prompt shipment of either conforming or nonconforming goods.
D: No, because the retailer waived his right to reject the ties by not returning them promptly to the manufacturer.

The explanation for the answer is:

Answer A is correct. The retailer satisfied its duty to promptly notify the manufacturer that the goods were rejected as nonconforming.

B and C are incorrect because pursuant to UCC 2-206, a seller accepts whether it ships conforming or nonconforming goods. If the seller's shipment, however, is accompanied by notice that the goods are nonconforming and are offered as an accommodation, the seller has not accepted but has made a counter offer, which the retailer could have accepted or rejected. The manufacturer's shipment without notice constituted an attempted acceptance and simultaneously a breach of contract. The retailer was entitled to perfect tender of the goods under UCC 2-601 and was free to reject goods that failed "in any respect to conform to the contract."

D is incorrect because the retailer did not waive his rights upon rejection and retention of the goods. He was under a duty to notify the seller and to hold the goods "with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them." UCC 2-602(2)(b).

Question 98 - Contracts - Formation of Contracts (7/24/2016)

The question was:

During 2006 a series of arsons, one of which damaged a huge store, occurred in a city. In early 2007 the city's City Council adopted this resolution:

The City will pay $10,000 for the arrest and conviction of anyone guilty of any of the 2006 arsons committed here. The foregoing was telecast by the city's sole television station once daily for one week. Subsequently, the store, by a written memorandum to a private detective, proposed to pay the detective $200 "for each day's work you actually perform in investigating our fire." Thereafter in August, 2007, the City Council by resolution repealed its reward offer and caused this resolution to be broadcast once daily for a week over two local radio stations, the local television station having meanwhile ceased operations. In September, 2007, an employee of the store voluntarily confessed to the detective to having committed all of the 2006 arsons. The store's president thereupon paid the detective at the proposed daily rate for his investigation and suggested that the detective also claim the city's reward, of which the detective had been previously unaware. The detective immediately made the claim. In December, 2007, as a result of the detective's investigation, the store's employee was convicted of burning the store. The city, which has no immunity to suit, has since refused to pay the detective anything, although he swears that he never heard of the city's repealer before claiming its reward.

In which of the following ways could the city reward offer be effectively accepted?

A: Only by an offeree's return promise to make a reasonable effort to bring about the arrest and conviction of an arsonist within the scope of the offer.
B: Only by an offeree's making the arrest and assisting in the successful conviction of an arsonist within the scope of the offer.
C: By an offeree's supplying information leading to arrest and conviction of an arsonist within the scope of the offer.
D: By an offeree's communication of assent through the same medium (television) used by the city in making its offer.

The explanation for the answer is:

Answer C is correct. The resolution is an offer of a reward made to the general public. A reasonable interpretation of its words and the circumstances surrounding its broadcast on television indicate that it is inviting anyone to provide the information necessary to arrest and convict. Therefore, an acceptance of this offer made by the city would be any information given that would lead to an arrest of the arsonist.

A is incorrect because the language of the reward and the nature of a reward indicate that performance is invited and not promissory acceptance. B is incorrect because it is not reasonable to interpret the words of the reward as requiring actual arrest and participation in the prosecution of an individual when the offer of reward receives such widespread broadcast to the general public. D is incorrect because in order for an offer to require a particular mode of acceptance, it must be clearly stated in the offer. If the offer is silent as to mode of acceptance, a test of reasonableness applies. It would not be reasonable to require such an unorthodox and unavailable mode of acceptance. In this case, a reasonable interpretation of the offer is to require performance, not a promissory acceptance.

Question 102 - Contracts - Formation of Contracts (2/7/2017)

The question was:

During 2006 a series of arsons, one of which damaged a huge store, occurred in a city. In early 2007 the city's City Council adopted this resolution:

The City will pay $10,000 for the arrest and conviction of anyone guilty of any of the 2006 arsons committed here. The foregoing was telecast by the city's sole television station once daily for one week. Subsequently, the store, by a written memorandum to a private detective, proposed to pay the detective $200 "for each day's work you actually perform in investigating our fire." Thereafter in August, 2007, the City Council by resolution repealed its reward offer and caused this resolution to be broadcast once daily for a week over two local radio stations, the local television station having meanwhile ceased operations. In September, 2007, an employee of the store voluntarily confessed to the detective to having committed all of the 2006 arsons. The store's president thereupon paid the detective at the proposed daily rate for his investigation and suggested that the detective also claim the city's reward, of which the detective had been previously unaware. The detective immediately made the claim. In December, 2007, as a result of the detective's investigation, the store's employee was convicted of burning the store. The city, which has no immunity to suit, has since refused to pay the detective anything, although he swears that he never heard of the city's repealer before claiming its reward.

In a suit by the detective against the city to recover the $10,000 reward, which of the following, in light of the facts given, most usefully supports the detective's claim?

A: The city was benefited as a result of the detective's services.
B: The city's offer was in the nature of a bounty, so that the elements of contract are not essential to the city's liability.
C: The fact that the city attempted to revoke its offer only a few months after making it demonstrated that the attempted revocation was in bad faith.
D: Although there was no bargained for exchange between the detective and the city, the detective's claim for the reward is supported by a moral obligation on the part of the city.

The explanation for the answer is:

Answer B is correct. If the reward were characterized as a government bounty, the detective's knowledge of the reward after obtaining the confession and the earlier attempted revocation would not be determinative.

A is incorrect because although the city benefited, the detective had no reasonable expectation of payment from the city due to his lack of knowledge of the offer, the prior revocation, and the fact that his expectation of payment was from the huge store. C is incorrect. The city was free to revoke the offer for any reason so long as the city revoked by means of general notification equal to that given to the offer. D is also incorrect because even if the reward would create a moral obligation, the city made no subsequent promise to pay the detective. If the reward itself comprised the promise upon which a moral obligation might arise, such an obligation would not arise for an individual who remained unaware of the promise.

Question 766 - Contracts - Formation of Contracts (2/7/2017)

The question was:

A wallpaper hanger sent a general contractor, this telegram: Will do all paperhanging on new Doctors' Building, per owner's specs, for $14,000 if you accept within reasonable time after main contract awarded.

/s/ the wallpaper hanger Three other competing hangers sent the general contractor similar bids in the respective amounts of $18,000, $19,000, and $20,000. The general contractor used the wallpaper hanger's $14,000 figure in preparing and submitting her own sealed bid on Doctors' Building. Before the bids were opened, the wallpaper hanger truthfully advised the general contractor that the former's telegraphic sub-bid had been based on a $4,000 computational error and was therefore revoked. Shortly thereafter, the general contractor was awarded the Doctors' Building construction contract and subsequently contracted with another paperhanger for a price of $18,000. The general contractor now sues the wallpaper hanger to recover $4,000.

Which of the following, if proved, would most strengthen the general contractor's prospect of recovery?

A: After the wallpaper hanger's notice of revocation, the general contractor made a reasonable effort to subcontract with another paperhanger at the lowest possible price.
B: The general contractor had been required by the owner to submit a bid bond and could not have withdrawn or amended her bid on the main contract without forfeiting that bond.
C: The wallpaper hanger was negligent in erroneously calculating the amount of his sub-bid.
D: The general contractor dealt with all of her subcontractors in good faith and without seeking to renegotiate (lower) the prices they had bid.

The explanation for the answer is:

Answer B is correct. Unless the promisor has given an option promise supported by consideration, generally an offer is freely revocable until the time of acceptance. However, an offer may be irrevocable to the extent necessary to avoid injustice if the offeror should reasonably expect the offer to induce substantial reliance on the part of the offeree and where there is reliance in fact. The terms of the wallpaper hanger's offer suggest that the wallpaper hanger expected the general contractor to rely on his bid by utilizing it in calculating the general contractor's overall bid, and the general contractor in fact did rely on his bid. The fact that the general contractor was required to submit a bid bond to guarantee her bid demonstrates the substantial nature of the general contractor's reliance, because it shows the general contractor cannot pass the additional wallpapering cost on to the owner. Therefore this fact, if proved, would most strengthen the general contractor's case for recovery.

A, C and D are incorrect because, although each of these factors (mitigation of damages, the wallpaper hanger's negligence and the general contractor's good faith) may weigh in the general contractor's favor, the wallpaper hanger revoked her bid prior to the general contractor's acceptance. Therefore the general contractor cannot recover from the wallpaper hanger for breach of contract unless she can demonstrate that the wallpaper hanger's bid was irrevocable on a reliance theory.

Question 622 - Contracts - Formation of Contracts (2/7/2017)

The question was:

A developer, needing a water well on one of his projects, met several times about the matter with a well driller. Subsequently, the well driller sent a developer an unsigned typewritten form captioned "WELL DRILLING PROPOSAL" and stating various terms the two had discussed but not agreed upon, including a "proposed price of $5,000." The form concluded, "This proposal will not become a contract until signed by you [the developer] and then returned to and signed by me [the well driller]."

The developer signed the form and returned it to the well driller, who neglected to sign it but promptly began drilling the well at the proposed site on the developer's project. After drilling for two days, the well driller told the developer during one of the developer's daily visits that he would not finish unless the developer would agree to pay twice the price recited in the written proposal. The developer refused, the well driller quit, and the developer hired substitute to drill the well to completion for a price of $7,500.

In an action by the developer against the well driller for damages, which of the following is the probable decision?

A: The developer wins, because his signing of the well driller's form constituted an acceptance of an offer by the well driller.
B: The developer wins, because the well driller's commencement of performance constituted an acceptance by the well driller of an offer by the developer and an implied promise by the well driller to complete the well.
C: The well driller wins, because he never signed the proposal as required by its terms.
D: The well driller wins, because his commencement of performance merely prevented the developer from revoking his offer, made on a form supplied by the well driller, and did not obligate the well driller to complete the well.

The explanation for the answer is:

Answer B is correct. An offer is a manifestation of a willingness to bargain that creates a capacity in the offeree to form a contract by consent. Since the form that the well driller sent to the developer stated that the proposal would not be a contract until signed by both parties, it is not an offer because it does not manifest an intent to conclude a contract upon mere signing by the developer. However, *after* the developer signed the form, the form became an offer that the well driller could accept either by signing the form or by manifesting assent in some other way (such as by commencing performance).

A is incorrect because the developer's signing of the form amounted to an offer and not an acceptance. C is incorrect because the well driller manifested assent by commencing performance. D is incorrect because the offer sought a return promise, which the well driller implicitly made by commencing performance.

Question 844 - Contracts - Formation of Contracts (2/7/2017)

The question was:

A son, who knew nothing about horses, inherited a thoroughbred colt whose disagreeable behavior made him a pest around the barn. The son sold the colt for $1,500 to an experienced racehorse-trainer who knew of the son's ignorance about horses. At the time of the sale, the son said to the trainer, "I hate to say it, but this horse is bad-tempered and nothing special."

Which one of the following scenarios would best support an action by the trainer, rather than the son, to rescind the sale?

A: In his first race after the sale, the horse galloped to a huge lead but dropped dead 100 yards from the finish line because of a rare congenital heart defect that was undiscoverable except by autopsy.
B: The horse won $5 million for the trainer over a three-year racing career but upon being retired was found to be incurably sterile and useless as a breeder.
C: After the horse had won three races for the trainer, it was discovered that by clerical error, unknown to either party, the horse's official birth registration listed an undistinguished racehorse as the sire rather than the famous racehorse that in fact was the sire.
D: A week after the sale, the horse went berserk and inflicted serious injuries upon the trainer that required his hospitalization for six months and a full year for his recovery.

The explanation for the answer is:

Answer A is correct. A contract may be rescinded on grounds of mutual mistake where the mistake relates to a fundamental assumption of the contract that has a material effect on the exchange, and where the party seeking rescission is found by the court not to bear the risk of the mistake. If in his first race after the sale, the horse dropped dead of a rare, undiscoverable heart condition, the trainer could make a plausible argument that the contract be rescinded on grounds of mistake. The condition related to a fundamental assumption (the horse's suitability for racing) that destroyed the subject matter of the contract, and since the heart condition was not expected or discoverable, a court might find that the trainer should not bear the risk of the mistake.

B and C are incorrect because neither of these factors relate to a fundamental assumption of the contract, since the facts suggest that the horse was purchased as a racehorse and not a breeder. D is incorrect because the risk that the horse might go beserk was one of which the trainer had notice, and was therefore a risk that he should bear.

Question 892 - Contracts - Formation of Contracts (2/7/2017)

The question was:

A buyer faxed the following signed message to his long-time widget supplier: "Urgently need blue widgets. Ship immediately three gross at your current list price of $600." Upon receipt of the fax, the supplier shipped three gross of red widgets to the buyer, and faxed to the buyer the following message: "Temporarily out of blue. In case red will help, am shipping three gross at the same price. Hope you can use them."

Upon the buyer's timely receipt of both the shipment and the supplier's fax, which of the following best describes the rights and duties of the buyer and the supplier?

A: The buyer may accept the shipment, in which case he must pay the supplier the list price, or he must reject the shipment and recover from the supplier for total breach of contract.
B: The buyer may accept the shipment, in which case he must pay the supplier the list price, or he may reject the shipment, in which case he has no further rights against the supplier.
C: The buyer may accept the shipment, in which case he must pay the supplier the list price, less any damages sustained because of the nonconforming shipment, or he may reject the shipment and recover from the supplier for total breach of contract, subject to the supplier's right to cure.
D: The buyer may accept the shipment, in which case he must pay the supplier the list price, less any damages sustained because of the nonconforming shipment, or he may reject the shipment provided that he promptly covers by obtaining conforming widgets from another supplier.

The explanation for the answer is:

Answer B is correct. Under the UCC, an order of goods for prompt shipment may be construed as inviting acceptance by a shipment of conforming or non-conforming goods. However, if the seller indicates that the shipment of non-conforming goods is offered as an accommodation to the buyer, the shipment will be construed as a counteroffer instead of an acceptance. Because the seller's note indicates that he shipped red widgets to accommodate the buyer, his shipment of red widgets was not an acceptance of the buyer's offer and therefore was also not a breach of contract. A is incorrect because if the buyer rejects the shipment, there is no contract and the buyer has no right to recover damages against the supplier. C and D are incorrect because the accommodating shipment is a counteroffer, so there will be no recovery of damages against the supplier if it is accepted.

Question 221 - Contracts - Formation of Contracts (2/7/2017)

The question was:

On May 1 a lot owner telegraphed a buyer, "Will sell you any or all of the lots in Grover subdivision at $5,000 each. Details will follow in letter." The letter contained all the necessary details concerning terms of payment, insurance, mortgages, etc., and provided, "This offer remains open until June 1."

On May 2, after he had received the telegram but before he had received the letter, the buyer telegraphed the owner, "Accept your offer with respect to lot 101." Both parties knew that there were fifty lots in the Grover subdivision and that they were numbered 101 through 150.

Assume that on May 6 the buyer telegraphed the owner, "Will take the rest of the lots," and that on May 8 the owner discovered that he did not have good title to the remaining lots. Which of the following would provide the best legal support to the owner's contention that he was not liable for breach of contract as to the remaining forty-nine lots?

A: Impossibility of performance
B: Unilateral mistake as to basic assumption
C: Termination of the offer by the buyer's having first contracted to buy lot 101
D: Excuse by failure of an implied condition precedent.

The explanation for the answer is:

Answer C is correct. When the buyer accepted the owner's offer to buy lot 101 on May 2, he implicitly rejected the offer to purchase the remaining lots, and his rejection terminated his power of acceptance as to the remaining lots. A is incorrect because at the time the contract was made on May 2, the owner either had reason to know that he did not have good title to the remaining lots or he was at fault in not knowing, and thus his performance would not be excused as impossible or impracticable. B is incorrect because both parties were mistaken as to the owner's interest in the property. D is incorrect because, although the law does imply a condition into the agreement that the owner convey marketable title, the owner's failure to do so allows the buyer to elect to either rescind or to take title with the defect and to pay the full purchase price.

Question 722 - Contracts - Formation of Contracts (2/9/2017)

The question was:

A buyer ordered from a seller 500 bushels of No. 1 Royal Fuzz peaches, at a specified price, "for prompt shipment." The seller promptly shipped 500 bushels, but by mistake shipped No. 2 Royal Fuzz peaches instead of No. 1. The error in shipment was caused by the negligence of the seller's shipping clerk.

Which of the following best states the buyer's rights and duties upon delivery of the peaches?

A: The seller's shipment of the peaches was a counteroffer and the buyer can refuse to accept them.
B: The seller's shipment of the peaches was a counteroffer but, since peaches are perishable, the buyer, if it does not want to accept them, must reship the peaches to the seller in order to mitigate the seller's losses.
C: The buyer must accept the peaches because a contract was formed when the seller shipped them.
D: Although a contract was formed when the seller shipped the peaches, the buyer does not have to accept them.

The explanation for the answer is:

Answer D is correct. Under the UCC, an order to buy goods "for prompt shipment" is interpreted as inviting acceptance either by a prompt promise to ship or by a prompt shipment of conforming or non-conforming goods. Where the goods delivered fail to conform to the contract, the buyer may reject the goods if the rejection is made within a reasonable time after delivery. When the buyer ordered 500 bushels of peaches "for prompt shipment," the seller accepted by shipping No. 2 (rather than No. 1) Royal Fuzz peaches, and therefore the buyer has the right to reject them. Answers A and B are incorrect because the prompt shipment will be interpreted as an acceptance even if the goods are non-conforming. Answer C is incorrect because although a contract was formed, the buyer has the right to reject non-conforming goods.

Question 880 - Contracts - Impracticability and Frustration of Purpose (2/7/2017)

The question was:

The manager of a state fair contracted with a renowned hog breeder to exhibit the breeder's world champion animal for the three weeks of the annual fair, at the conclusion of which the breeder would receive an honorarium of $300. Two days before the opening of the fair, the champion animal took sick with boarsitis, a communicable disease among swine, and, under the applicable state quarantine law, very probably could not be exhibited for at least a month.

Upon learning this, the manager can legally pursue which of the following courses of action with respect to his contract with the breeder?

A: Suspend his own performance, demand assurances from the breeder, and treat a failure by the breeder to give them as an actionable repudiation.
B: Suspend his own performance and recover damages from the breeder for breach of contract unless the breeder at once supplies an undiseased hog of exhibition quality as a substitute for the champion animal.
C: Terminate his own performance and treat the animal's illness as discharging all remaining duties under the contract.
D: Terminate the contract, but only if he (the manager) seeks promptly to obtain for the exhibit a suitable substitute for the champion animal from another hog owner.

The explanation for the answer is:

Answer C is correct. A contract may be rescinded on grounds of supervening impracticability where a party's performance is made impracticable without his fault due to the occurrence of an event, the non-occurrence of which was a basic assumption on which the contract was made. Such event may include the destruction or deterioration of a specific thing necessary for the performance of a duty or the necessity to comply with a governmental order. Because the breeder undertook to exhibit his world champion animal(and not any other hog), the animal's availability for exhibition is a basic assumption of the contract. The animal's illness, which requires him to be quarantined for a month under state law, renders the breeder's performance impracticable. Therefore the manager should treat both parties' obligations under the contract as discharged.

A, B and D are incorrect because the animal's illness provides a basis for excuse of the breeder's obligation. Specifically, as explained above, the breeder is not obligated to provide a substitute hog because the contract only contemplated exhibiting the champion animal.

Question 1137 - Contracts - Parol Evidence and Interpretation (7/24/2016)

The question was:

A computer company contracted in writing with a bank to sell and deliver to the bank a mainframe computer using a new type of magnetic memory, then under development but not perfected by the computer company, at a price substantially lower than that of a similar computer using current technology. The contract's delivery term was "F.O.B. the bank, on or before July 31."

Assume that the computer company tendered the computer to the bank on August 15, and that the bank rejected it because of delay.

If the computer company sues the bank for breach of contract, which of the following facts, if proved, will best support a recovery by the computer company?

A: The delay did not materially harm the bank.
B: The computer company believed, on the assumption that the bank was getting a "super deal" for its money, that the bank would not reject because of the late tender of delivery.
C: The computer company's delay in tender was caused by a truckers' strike.
D: A usage in the relevant trade allows computer sellers a 30-day leeway in a specified time of delivery, unless the usage is expressly negated by the contract.

The explanation for the answer is:

Answer D is correct. Under the UCC, any trade usage that is observed with sufficient regularity in a place, vocation, or trade so as to justify an expectation that the parties contracted with reference to it can be introduced to interpret the parties' agreement, so long as the usage can be reasonably construed as being consistent with the express terms of the contract. Indeed, the UCC defines "agreement" as including the parties' express terms as well as those that are implied by applicable trade usage. Although the written contract between the computer company and the bank called for delivery "on or before July 31," the trade usage that the computer company seeks to introduce suggests that buyers should allow for up to 30-days' leeway beyond that date. If the contract were construed in light of this usage, then the August 15 delivery would not be a breach of the contract and the bank would be in breach for refusing to take delivery on that date. The fact that buyers and sellers typically negate the usage with express language if the delivery date is to be construed strictly suggests that the trade usage is fairly persuasive evidence of the parties' intent.

A is incorrect because even an immaterial delay in delivery would entitle the bank to reject delivery of the computer. B is incorrect because such an inference would not be reasonable if the contract is literally construed as requiring delivery "on or before July 31." C is incorrect because a truckers' strike would not justify excuse on grounds of impracticability, because the facts do not suggest that the availability of ground shipment is a basic assumption on which the contract was made.

Question 1542 - Contracts - Parol Evidence and Interpretation (7/24/2016)

The question was:

A buyer purchased a new car from a dealer under a written contract that provided that the price of the car was $20,000 and that the buyer would receive a "trade-in allowance of $7,000 for the buyer's old car." The old car had recently been damaged in an accident. The contract contained a merger clause stating: "This writing constitutes the entire agreement of the parties, and there are no other understandings or agreements not set forth herein." When the buyer took possession of the new car, she delivered the old car to the dealer. At that time, the dealer claimed that the trade-in allowance included an assignment of the buyer's claim against her insurance company for damage to the old car. The buyer refused to provide the assignment.

The dealer sued the buyer to recover the insurance payment. The dealer has offered evidence that the parties agreed during their negotiations for the new car that the dealer was entitled to the insurance payment.

Should the court admit this evidence?

A: No, because the dealer's acceptance of the old car bars any additional claim by the dealer.
B: No, because the merger clause bars any evidence of the parties' prior discussions concerning the trade-in allowance.
C: Yes, because a merger clause does not bar evidence of fraud.
D: Yes, because the merger clause does not bar evidence to explain what the parties meant by "trade-in allowance."

The explanation for the answer is:

A is incorrect. A buyer's mere acceptance of goods does not waive its potential claims against a seller. The dispositive issue here is whether the parol evidence rule will allow the proffered evidence. Under that rule, a merger clause does not conclusively determine that an agreement is completely integrated. Moreover, a finding that an agreement is completely integrated does not necessarily bar the admission of extrinsic evidence. Although extrinsic evidence is inadmissible to supplement or contradict the express terms of a completely integrated agreement, such evidence is admissible to explain the terms of an agreement. In this case, evidence of the parties' discussions during their negotiations is admissible to aid in explaining whether they intended "trade-in allowance" to include an assignment of the buyer's claim against her insurance company.

B is incorrect. Under the UCC's parol evidence rule, a merger clause does not conclusively determine that an agreement is completely integrated. Moreover, a finding that an agreement is completely integrated does not necessarily bar the admission of extrinsic evidence. Although extrinsic evidence is inadmissible to supplement or contradict the express terms of a completely integrated agreement, such evidence is admissible to explain the terms of an agreement. In this case, evidence of the parties' discussions during their negotiations is admissible to aid in explaining whether they intended "trade-in allowance" to include an assignment of the buyer's claim against her insurance company.

C is incorrect. The UCC's parol evidence rule allows the introduction of extrinsic evidence to establish fraud even if an agreement is completely integrated. Because there is no indication of fraud in this case, the fraud exception is irrelevant. The dispositive issue here is whether the parol evidence rule will allow the proffered evidence. Under that rule, a merger clause does not conclusively determine that an agreement is completely integrated. Moreover, a finding that an agreement is completely integrated does not necessarily bar the admission of extrinsic evidence. Although extrinsic evidence is inadmissible to supplement or contradict the express terms of a completely integrated agreement, such evidence is admissible to explain the terms of an agreement. In this case, evidence of the parties' discussions during their negotiations is admissible to aid in explaining whether they intended "trade-in allowance" to include an assignment of the buyer's claim against her insurance company.

D is correct. Under the UCC's parol evidence rule, a merger clause does not conclusively establish that an agreement is completely integrated. Moreover, a finding that an agreement is completely integrated does not necessarily bar the admission of extrinsic evidence. Although extrinsic evidence is inadmissible to supplement or contradict the express terms of a completely integrated agreement, such evidence is admissible to explain the terms of an agreement. In this case, evidence of the parties' discussions during their negotiations is admissible to aid in explaining whether they intended "trade-in- allowance" to include an assignment of the buyer's claim against her insurance company.

Question 1020 - Contracts - Parol Evidence and Interpretation (2/7/2017)

The question was:

A buyer contracted in writing with a shareholder, who owned all of XYZ Corporation's outstanding stock, to purchase all of her stock at a specified price per share. At the time this contract was executed, the buyer's contracting officer said to the shareholder, "Of course, our commitment to buy is conditioned on our obtaining approval of the contract from our parent company." The shareholder replied, "Fine. No problem."

The shareholder is willing and ready to consummate the sale of her stock to the buyer, but the latter refuses to perform on the ground (which is true) that the parent company has firmly refused to approve the contract.

If the shareholder sues the buyer for breach of contract and seeks to exclude any evidence of the oral condition requiring the parent company's approval, the court will probably

A: admit the evidence as proof of a collateral agreement.
B: admit the evidence as proof of a condition to the existence of an enforceable obligation, and therefore not within the scope of the parol evidence rule.
C: exclude the evidence on the basis of a finding that the parties' written agreement was a complete integration of their contract.
D: exclude the evidence as contradicting the terms of the parties' written agreement, whether or not the writing was a complete integration of the contract.

The explanation for the answer is:

Answer B is correct. The parol evidence rule bars extrinsic evidence of a prior agreement where the prior agreement contradicts the terms of a final written agreement or where the prior agreement purports to add to a completely integrated agreement (i.e., one that is intended by the parties to be both the final and exclusive manifestation of the parties' understanding). An exception to the parol evidence rule applies where the extrinsic evidence is offered to prove that the written agreement is to take effect only upon the occurrence of a stated condition (even if the condition is for only one party's benefit). Because the buyer-shareholder agreement will only take effect upon approval by the parent company, extrinsic evidence of this oral understanding is admissible notwithstanding the parol evidence rule.

A is incorrect because the condition appears to be an integral part of the contract of sale. C and D are incorrect because the exception to the parol evidence rule for conditions precedent applies regardless of whether the final writing is partially or completely integrated and regardless of whether the extrinsic evidence may contradict the final writing (although these facts fail to suggest any such contradiction).

Question 251 - Contracts - Remedies (7/23/2016)

The question was:

On March 2, a landowner and a builder orally agreed that the builder would erect a boathouse on the landowner's lot and dig a channel from the boathouse, across a neighbor's lot, to a lake. The neighbor had already orally agreed with the landowner to permit the digging of the channel across the neighbor's lot. The builder agreed to begin work on the boathouse on March 15, and to complete all the work before June 1. The total price of $10,000 was to be paid by the landowner in three installments: $2,500 on March 15; $2,500 when the boathouse was completed; $5,000 when the builder finished the digging of the channel.

Assume that the landowner paid the $2,500 on March 15 and that the builder completed the boathouse according to specifications, but that the landowner then refused to pay the second installment and repudiated the contract. Assume further that the absence of a writing is not raised as a defense. Which of the following is correct?

A: The builder has a cause of action against the landowner and his damages will be $2,500.
B: The builder can refuse to dig the channel and not be liable for breach of contract.
C: The builder can refuse to dig the channel, not be liable for breach of contract, and have a cause of action against the landowner for which his damages will be $2,500.
D: The builder can refuse to dig the channel but he will liable for breach of contract.

The explanation for the answer is:

Answer B is correct. Under the doctrine of anticipatory repudiation, an unequivocal statement of unwillingness or inability to perform a future contractual obligation, if material, may be treated as a total breach of that obligation. Once a repudiation occurs, the non-repudiating party is discharged from any further performance under the contract and may immediately recover damages for total breach. When a contractor is injured due to an owner's total breach of a construction contract, the contractor generally can recover his expected profit on the entire contract along with any labor and material expenses incurred up until the time that he learned of the owner's breach, minus any progress payments made by the owner. Although the landowner repudiated the agreement just after the second $2,500 progress payment became due, the builder would be entitled to obtain as damages not only the progress payment but also his expected profit on the entire contract. Because these damages would exceed $2,500, answers A and C are incorrect. The builder is also entitled to withhold his remaining performance under the contract and will not be considered in breach. Therefore, answer D is incorrect, making B the correct answer.

Question 1369 - Contracts - Remedies (7/24/2016)

The question was:

A collector bought from a gallery a painting correctly described in the parties' signed contract as a "one-of-a-kind self-portrait" by a famous artist who had recently died. The contract price was $500,000 in cash, payable one month after a truck carrier delivered the painting to the collector.

The painting was damaged in transit. The collector timely rejected it after inspection, immediately notified the gallery of the rejection, and told the gallery that the painting would be available for pickup. The gallery then sold the painting to a third party. It informed the collector that it would pick up the painting within a couple of weeks. Two weeks later, before the gallery picked up the painting, the collector sold and delivered the painting to an art admirer for $550,000 cash, after notifying the admirer about the damage. The collector sent no money to the gallery.

If the collector's sale of the painting was NOT an acceptance of the goods, what is the maximum amount that the gallery is entitled to recover from the collector?

A: $550,000 (damages for conversion).
B: $500,000 (the collector-gallery contract price).
C: $50,000 (the excess of the market price over the contract price).
D: Only the allowance of lost profit to the gallery as a volume dealer.

The explanation for the answer is:

Answer A is correct. The collector rightfully rejected the goods. However, the collector's exercise of ownership by selling the painting, after his rejection, was wrongful against the gallery and constituted conversion. The remedy for conversion is the fair market value of the goods at the time of the conversion. The collector's sale of the painting for $550,000 provides credible evidence of the painting's fair market value at the time of the conversion. UCC §§ 2-601 cmt. 2, 1-103(b)

Answer B is incorrect. The collector's exercise of ownership by selling the painting, after his rejection, was wrongful against the gallery and constituted conversion. The gallery should not be limited to the contract price for determining the value of the painting, because the remedy for conversion is the fair market value of the goods at the time of the conversion, which occurred when the collector sold the painting for $550,000. UCC §§ 2-601 cmt. 2, 1-103(b)

Answer C is incorrect. The collector's exercise of ownership by selling the painting, after his rejection, was wrongful against the gallery and constituted conversion. The remedy for conversion is the fair market value of the goods at the time of the conversion. The collector's sale of the painting for $550,000 provides credible evidence of the painting's fair market value at the time of the conversion. UCC §§ 2-601 cmt. 2, 1-103(b)

Answer D is incorrect. The collector's exercise of ownership by selling the painting, after his rejection, was wrongful against the gallery and constituted conversion. The remedy for conversion is the fair market value of the goods at the time of the conversion. The collector's sale of the painting for $550,000 provides credible evidence of the painting's fair market value at the time of the conversion. In addition, the gallery is not a lost volume seller, because the painting was a one-of-a-kind good, which means that the gallery was operating at full capacity. UCC §§ 2-601 cmt. 2, 1-103(b)

Question 188 - Contracts - Remedies (7/24/2016)

The question was:

A buyer purchased 100 bolts of standard blue wool, No. 1 quality, from a seller. The sales contract provided that the buyer would make payment prior to inspection. The 100 bolts were shipped, and the buyer paid the seller. Upon inspection, however, the buyer discovered that the wool was No. 2 quality. The buyer thereupon tendered back the wool to the seller and demanded return of his payment. The seller refused on the ground that there is no difference between No. 1 quality wool and No. 2 quality wool.

Can the buyer resell the wool?

A: Yes, in a private sale.
B: Yes, in a private sale but only after giving the seller reasonable notice of his intention to resell.
C: yes, but only at a public sale.
D: No.

The explanation for the answer is:

Answer B is correct. Pursuant to UCC 2-711(3) and 2-706(3), the buyer had a security interest in the goods and had a right to resell. Thus, D is incorrect. A is incorrect because the buyer's right to resell at a private sale exists only if the seller is given reasonable notice. C is incorrect because the sale may be either public or private - UCC 2-706(2).

Question 1030 - Contracts - Remedies (7/24/2016)

The question was:

A tenant rented a commercial building from a landlord, and operated a business in it. The building's large front window was smashed by vandals six months before expiration of the tenant-landlord lease. The tenant, who was obligated thereunder to effect and pay for repairs in such cases, promptly contracted with a window company to replace the window for $2,000, due 30 days after satisfactory completion of work. The landlord was then unaware of the tenant-window company contract. The window company was aware that the building was under lease, but dealt entirely with the tenant.

Sixty days after the window company's satisfactory completion of the window replacement, and prior to the expiration of the tenant's lease, the tenant, then insolvent, ceased doing business and vacated the building. In so doing, the tenant forfeited under the lease provisions its right to the return of a $2,000 security deposit with the landlord. The deposit had been required, however, for the express purpose (as stated in the lease) of covering any damage to the leased property except ordinary wear and tear. The only such damage occurring during the tenant's occupancy was the smashed window. The window company's $2,000 bill for the window replacement is wholly unpaid.

Assuming that the window company has no remedy *quasi in rem* under the relevant state mechanic's lien statute, which of the following would provide the window company's best chance of an effective remedy *in personam* against the landlord?

A: An action in quasi contract for the reasonable value of a benefit unofficiously and non-gratuitously conferred on the landlord.
B: An action based on promissory estoppel.
C: An action based on an implied-in-fact contract.
D: An action as third-party intended beneficiary of the tenant-landlord lease.

The explanation for the answer is:

Answer A is correct. Generally, a party that has made a contract with another cannot later disregard the contract and bring suit in restitution against a third person, even if that third person has received a benefit from the contract. For example, where the window company has conferred a benefit (replaced the glass in the window) pursuant to its contract with the tenant, it normally would not be able to recover in restitution from the landlord. However, sometimes recovery in restitution is possible, especially where the third person (the landlord) has not already paid someone else for the work and the claimant's (the window company's) avenues to bring suit to enforce the contract have been exhausted. These and other factors suggest that restitution against the landlord would be just in this case: the tenant is insolvent, the landlord collected on a $2,000 deposit that the tenant forfeited because of the broken window, and the fact that the lease expressly contemplated the tenant fixing any damage to the property suggests that the landlord would have requested the work if given the opportunity.

B is incorrect because the landlord made no promise on which the window company relied. C is incorrect because the landlord had no knowledge of the window company-tenant contract and therefore could not have implicitly promised to do anything. D is incorrect because on these facts, the window company would be, if anything, an incidental beneficiary of the landlord-tenant contract.

Question 1356 - Contracts - Remedies (7/24/2016)

The question was:

A buyer ordered a new machine from a manufacturer. The machine arrived on time and conformed in all respects to the contract. The buyer, however, rejected the machine because he no longer needed it in his business and returned the machine to the manufacturer. The manufacturer sold many such machines each year, and its factory was not operating at full capacity.

In an action by the manufacturer against the buyer for breach of contract, which of the following is NOT a proper measure of the manufacturer's damages?

A: The contract price of the machine.
B: The difference between the contract price and the market price of the machine.
C: The difference between the contract price and the price obtained from a proper resale of the machine.
D: The profit the manufacturer would have made on the sale of the machine to the buyer.

The explanation for the answer is:

Answer A is correct. The manufacturer does not have an action for the price. Such an action is available under three circumstances, none of which is present here—(1) where the buyer has accepted the goods, (2) where the goods are lost or damaged within a commercially reasonable time after the risk of loss has passed to the buyer, or (3) where the buyer has returned or rejected the goods and the seller is unable after reasonable efforts to resell the goods. UCC § 2-709

Answer B is incorrect. UCC § 2-708(1) gives a seller the right to recover the difference between the contract price and the market price of goods when a buyer has wrongfully rejected the goods. Note, however, that because the manufacturer is a lost volume seller, it would be better off seeking damages under UCC § 2-708(2), since it is unlikely that a market differential formula will result in the recovery of any direct damages by the manufacturer with respect to what appear to be standard goods.

Answer C is incorrect. UCC &#2-706 allows a seller to recover the difference between the contract price and resale price when a buyer has wrongfully rejected the goods. Note, however, that the manufacturer would be better off seeking damages under UCC § 2-708(2), because it is a lost volume seller and it is unlikely that a resale will result in the recovery of any direct damages by the manufacturer with respect to what appear to be standard goods.

Answer D is incorrect. UCC § 2-708(2) provides the lost volume seller (a seller not operating at full capacity) with an action to recover lost profit. A recovery under UCC § 2-708(2) would adequately compensate the manufacturer for its direct damages.

Question 432 - Contracts - Remedies (7/24/2016)

The question was:

On June 1, a manufacturer of men's neckties received the following order from a retailer: "Ship 500 two-inch ties, assorted stripes, your catalogue No. V34. Delivery by July 1."

On June 1, the manufacturer shipped 500 three-inch ties that arrived at the retailer's place of business on June 3. The retailer immediately telegraphed the manufacturer: "Reject your shipment. Order was for two-inch ties." The retailer, however, did not ship the ties back to the manufacturer. The manufacturer replied by telegram: "Will deliver proper ties before July 1." The retailer received this telegram on June 4, but did not reply to it.

On June 30, the manufacturer tendered 500 two-inch ties in assorted stripes, designated in his catalogue as item No. V34, but the retailer refused to accept them.

Did the retailer properly reject the ties tendered on June 30?

A: Yes, because the manufacturer's shipping the three-inch ties on June 1 was a present breach of contract.
B: Yes, because the manufacturer's shipping the three-inch ties on June 1 was an anticipatory repudiation.
C: No, because the manufacturer cured the June 1 defective delivery by his tender of conforming goods on June 30.
D: No, because a contract for sale of goods can be modified without consideration.

The explanation for the answer is:

Answer C is correct. When the retailer rejected the ties, the agreed time for performance (July 1) had not expired. Thus, the manufacturer, who had performed in good faith and who notified the retailer of an intent to cure by shipping conforming ties, could do so as long as the conforming delivery was made within the agreed time. UCC 2-508(1). A is incorrect because although the shipment on June 1 was a breach of contract, the manufacturer preserved the right to cure before July 1. B is incorrect because anticipatory repudiation consists of an indication by the seller through words or conduct that to contract would not be completed. Here, the manufacturer did the opposite and assured the retailer that the proper ties would be delivered before July 1. D is incorrect because the contract was not modified; 500 two-inch ties were delivered by July 1.

Question 410 - Contracts - Remedies (2/7/2017)

The question was:

A landowner owned Broadacres in fee simple. For a consideration of $5,000, the landowner gave his neighbor a written option to purchase Broadacres for $300,000. The option was assignable. For a consideration of $10,000, the neighbor subsequently gave an option to his friend to purchase Broadacres for $325,000. The friend exercised his option.

The neighbor thereupon exercised his option. The neighbor paid the agreed price of $300,000 and took title to Broadacres by deed from the landowner. Thereafter, the friend refused to consummate his purchase.

The neighbor brought an appropriate action against the friend for specific performance, or, if that should be denied, then for damages. The friend counterclaimed for return of the $10,000. In this action the court will

A: grant money damages only to the neighbor.
B: grant specific performance to the neighbor.
C: grant the neighbor only the right to retain the $10,000.
D: require the neighbor to refund the $10,000 to the friend.

The explanation for the answer is:

Answer B is correct. An option promise is a promise not to revoke an offer to enter into a contract, and it requires separate consideration to be enforceable. When a party exercises an option, that party in effect accepts the offer and binds himself to the contract. The friend paid the neighbor $10,000 in exchange for the neighbor's promise not to revoke his offer to sell. When the friend exercised the option, he became obligated to purchase Broadacres for $325,000, and his failure to consummate his purchase entitled the neighbor to pursue remedies for breach of contract. Specific performance generally will be awarded for breach of contract where an award of monetary damages would be inadequate or impracticable. Contracts involving the sale of land historically have been regarded as unique, and therefore equitable relief traditionally has been allowed, even where the breaching party is the buyer. Because the obligation that the neighbor seeks to enforce is the friend's obligation to purchase Broadacres (a contract to purchase land), specific performance will be awarded.

A is incorrect because the contract involves the sale of land, and therefore the neighbor will be awarded specific performance. C is incorrect because the neighbor not only is entitled to retain the option price, but he is also entitled to a remedy for the friend's breach. D is incorrect because the friend paid the $10,000 in exchange for the option. Even if the friend failed to exercise the option, he cannot seek return of the purchase price once the option has been given to him.

Question 187 - Contracts - Remedies (2/7/2017)

The question was:

A buyer purchased 100 bolts of standard blue wool, No. 1 quality, from a seller. The sales contract provided that the buyer would make payment prior to inspection. The 100 bolts were shipped, and the buyer paid the seller. Upon inspection, however, the buyer discovered that the wool was No. 2 quality. The buyer thereupon tendered back the wool to the seller and demanded return of his payment. The seller refused on the ground that there is no difference between No. 1 quality wool and No. 2 quality wool.

What is the buyer's remedy because the wool was nonconforming?

A: Specific performance
B: Damages measured by the difference between the value of the goods delivered and the value of conforming goods
C: Damages measured by the price paid plus the difference between the contract price and the cost of buying substitute goods
D: None, since he waived his remedies by agreeing to pay before inspection

The explanation for the answer is:

Answer C is correct because a buyer is entitled to reject nonconforming goods and to obtain damages pursuant to UCC 2-712(2), which is calculated as the difference between the cost of cover for substitute goods and the contract price. A is incorrect because there are no facts to support a conclusion that blue wool No. 1 quality is unique or that there are other proper circumstances pursuant to UCC 2-716(1), such as an inability to cover. B is incorrect. The difference between the value of the goods delivered and the value of conforming goods is the appropriate remedy under UCC 2-714 for accepted goods. This would be the remedy if the buyer kept the No. 2 wool; however, the buyer tendered the goods back to the seller. D is also incorrect because payment prior to inspection does not constitute an acceptance or a waiver of any contract remedies under UCC 2-512(2).

Question 75 - Contracts - Remedies (2/7/2017)

The question was:

On March 1, a computer programming company orally agreed with a department store to write a set of programs for the department store's computer and to coordinate the programs with the department store's billing methods. A subsequent memo, signed by both parties, provided in its entirety:

The department store will pay the computer programming company $20,000 in two equal installments within one month of completion if the computer programming company is successful in shortening by one-half the processing time for the financial transactions now handled on the department store's Zenon 747 computer; the computer programming company to complete by July 1. This agreement may be amended only by a signed writing. On June 6, the computer programming company demanded $10,000, saying the job was one-half done. After the department store denied liability, the parties orally agreed that the department store should deposit $20,000 in escrow, pending completion to the satisfaction of the department store's computer systems manager. The escrow deposit was thereupon made. On July 5, the computer programming company completed the programs, having used an amount of time in which it could have earned $18,000 had it devoted that time to other jobs. Tests by the computer programming company and the department store's computer systems manager then showed that the computer programs, not being perfectly coordinated with the department store's billing methods, cut processing time by only 47 percent. They would, however, save the department store $12,000 a year. Further, if the department store would spend $5,000 to change its invoice preparation methods, as recommended by the computer programming company, the programs would cut processing time by a total of 58 percent, saving the department store another $8,000 a year. The department store's computer systems manager refused in good faith to certify satisfactory completion. The department store requested the escrow agent to return the $20,000 and asserted that nothing was owed to the computer programming company even though the department store continued to use the programs.

Assume that the computer programming company's delay in completion did not give the department store the right to renounce the contract and that the parties' escrow agreement was enforceable. Is the computer programming company entitled to recover damages for breach of the contract?

A: Yes, because the computer programming company had substantially performed.
B: Yes, because the program would save the department store $12,000 a year.
C: No, because shortening the processing time by one-half was an express condition subsequent.
D: No, because the department store's computer systems manager did not certify satisfactory completion of the programs.

The explanation for the answer is:

Answer D is correct. For this question, it is assumed that the contract was not renounced because of the time delay and that the escrow agreement was enforceable. The escrow agreement contained the express condition precedent that the work must be completed to the satisfaction of the department store's computer systems manager. Generally, failure to satisfy an express condition discharges performance. However, when the condition is one of personal satisfaction from one of the parties, and the contract involves personal judgment, the party whose satisfaction is required must act honestly and in good faith. Here, the programming company performance was not to the satisfaction of the store's computer systems manager, and the facts state that his refusal to certify satisfactory completion was done in good faith. Therefore, the programming company failed to meet a valid express condition precedent and the department store is excused from paying. Therefore, the programming company is not entitled to recover damages for breach of contract, as the department store did not breach.

A is incorrect because substantial performance will not satisfy as contract performance where an express condition precedent has not been met.

B is incorrect because the call of the question asks if the computer programming company can recover damages for breach of contract, and there was no breach of contract by the department store. While the computer programming company would be entitled to some compensation, possibly $12,000, in a quasi-contract action under the theory of unjust enrichment, the question is asking about entitlement to damages based on breach of contract, not about restitution where a contract has been held unenforceable.

C is incorrect because the condition of shortening the processing time by one-half was waived when the parties made the escrow agreement, and was replaced with the condition that the work be completed to the satisfaction of the department store's computer systems manager.

Question 867 - Contracts - Remedies (2/11/2017)

The question was:

A woman owns an exceptionally seaworthy boat that she charters for sport fishing at a $500 daily rate. The fee includes the use of the boat with the woman as the captain, and one other crew member, as well as fishing tackle and bait. On May 1, a father agreed with the woman that the father would have the full-day use of the boat on May 15 for himself and his family for $500. The father paid an advance deposit of $200 and signed an agreement that the deposit could be retained by the woman as liquidated damages in the event the father canceled or failed to appear.

At the time of contracting, the woman told the father to be at the dock at 5 a.m. on May 15. The father and his family, however, did not show up on May 15 until noon. In the meantime, the owner of the boat agreed at 10 a.m. to take a second family out fishing for the rest of the day. The second family happened to come by and inquire about the possibility of such an outing. In view of the late hour, the owner of the boat charged the family $400 and stayed out two hours beyond the customary return time. The father's failure to appear until noon was due to the fact that he had been trying to charter another boat across the bay at a lower rate and had gotten lost after he was unsuccessful in getting such a charter.

Which of the following is an accurate statement concerning the rights of the parties?

A: The woman can retain the $200 paid by the father, because it would be difficult for the woman to establish her actual damages and the sum appears to have been a reasonable forecast in light of anticipated loss of profit from the charter.
B: The woman is entitled to retain only $50 (10% of the contract price) and must return $150 to the father.
C: The woman must return $100 to the father in order to avoid her own unjust enrichment at the father's expense.
D: The woman must return $100 to the father, because the liquidated-damage clause under the circumstances would operate as a penalty.

The explanation for the answer is:

Answer A is correct. A party in breach generally is entitled to restitution of any benefit that he has conferred in the way of part performance in excess of the loss resulting from the breach. Where the parties have agreed that the breaching party's performance is to be retained as liquidated damages, the breaching party is not entitled to restitution if the liquidated damages clause is reasonable in light of the anticipated or actual damages resulting from the breach and the difficulty of proving damages. Although the father may argue that the woman was unjustly enriched to the extent that the deposit exceeded her actual loss, the woman should be able to retain the $200 deposit. Damages representing the inconvenience to the woman resulting from the father's failure to appear are difficult to estimate, and $200 was a reasonable estimate of the anticipated opportunity cost to the woman of not taking other potential customers.

B is incorrect because the common law rule on liquidated damages does not specify any maximum percentage. C and D are incorrect because the liquidated damages clause may be enforceable even if the amount of damages specified in the clause exceeds the woman's actual loss.

Question 1111 - Contracts - Remedies (2/11/2017)

The question was:

On April 1, an owner and a buyer signed a writing in which the owner, in consideration of $100 to be paid to the owner by the buyer, offered the buyer the right to purchase Greenacre for $100,000 within 30 days. The writing further provided, "This offer will become effective as an option only if and when the $100 consideration is in fact paid." On April 20, the owner, having received no payment or other communication from the buyer, sold and conveyed Greenacre to a citizen for $120,000. On April 21, the owner received a letter from the buyer enclosing a cashier's check for $100 payable to the owner and stating, "I am hereby exercising my option to purchase Greenacre and am prepared to close whenever you're ready."

Assume that, for whatever reason, the buyer prevails in the suit against the owner.

Which of the following is the buyer entitled to recover?

A: Nominal damages only, because the remedy of specific performance was not available to the buyer.
B: The fair market value, if any, of an assignable option to purchase Greenacre for $100,000.
C: $20,000, plus the amount, if any, by which the fair market value of Greenacre on the date of the owner's breach exceeded $120,000.
D: The amount, if any, by which the fair market value of Greenacre on the date of the owner's breach exceeded $100,000.

The explanation for the answer is:

Answer D is correct. Although breach of a contract for real estate typically would entitle the buyer to specific performance, specific performance is not possible in this case because the property has been sold to the citizen. As a substitute for specific performance, the buyer may recover expectation damages, or damages that are intended to give the injured party the value of the promise. Damages to an injured buyer in a contract for the sale of real estate are usually measured by the difference between the contract price and the market value of the property as of the time that the buyer learned of the breach, plus any incidental or consequential damages. So if the buyer prevails in her suit against the owner, she may recover damages equal to the excess of the market value of Greenacre over the contract price.

A is incorrect because the buyer is entitled to recover either specific performance or expectation damages. B is incorrect because the owner's breach ultimately has caused the buyer to lose Greenacre itself and not just an option to purchase Greenacre. C is incorrect because typically expectation damages are not measured by the better of the contract price-resale price differential and the contract price-market value differential (although each of these is a theoretically possible method of measuring expectation damages).

Question 242 - Contracts - Third-Party Rights (2/7/2017)

The question was:

A victim, injured by a driver in an auto accident, employed an attorney to represent him in the matter. The victim was chronically insolvent and expressed doubt whether he could promptly get necessary medical treatment. Accordingly, the attorney wrote into their contract his promise to the victim "to pay from any settlement with the driver compensation to any physician who provides professional services for the victim's injuries." The contract also provided that the attorney's duties were "non-assignable." The attorney immediately filed suit against the driver. The victim then sought and received medical treatment, reasonably valued at $1,000, from the doctor, but failed to inform the doctor of the attorney's promise.

After receiving a bill from the doctor for $1,000, the victim immediately wrote the doctor explaining that he was unable to pay and enclosing a copy of his contract with the attorney.

The victim then asked the attorney about payment of this bill, but the attorney requested a release from their employment contract, stating that he would like to refer the victim's claim to a colleague and that the colleague was willing to represent the victim in the pending lawsuit. The victim wrote a letter to the attorney releasing him from their contract and agreeing to the colleague's representation. A copy of this letter was sent to the doctor. The colleague subsequently promised the attorney to represent the victim and soon negotiated a settlement of the victim's claim against the driver which netted $1,000, all of which was paid by the victim to creditors other than the doctor. The victim remains insolvent.

In an action by the doctor against the attorney upon the attorney's employment contract with the victim, if the attorney attempted to use the victim's release as a defense, the doctor is likely to argue that

A: the release was ineffective, because the doctor had impliedly assented to the victim-attorney contract.
B: the release was ineffective, because the victim would thereby be unjustly enriched.
C: there was no consideration for the victim's release of the attorney.
D: the attorney's contract duties were too personal to be effectively delegated to the colleague.

The explanation for the answer is:

Answer A is correct. The promisor and promisee retain the power to modify or discharge a duty owed to an intended beneficiary until the beneficiary's rights vest. Rights vest when the beneficiary: (1) manifests assent to the promise, (2) sues to enforce the promise, or (3) materially changes position in reliance on the promise. Here, the doctor was an intended beneficiary of the agreement between the victim and the attorney. Although the doctor received notice of the promise before the victim and the attorney executed the release, he never expressly assented to the promise. However, the doctor can argue that by not pursuing the victim and waiting to collect from the attorney, the doctor impliedly assented to the contract and that assent made the release ineffective.

B is incorrect because unjust enrichment is not relevant to the question of whether the attorney was released, and would only be relevant in a quasi-contract action against the victim. C is incorrect because the colleague's promise to represent the victim supplied sufficient consideration to support the promise to release the attorney. D is incorrect because the question of whether the attorney's duties may be freely delegated is irrelevant since the victim assented to the delegation.

Question 1397 - Criminal Law - Constitutional Protection of Accused Persons (7/22/2016)

The question was:

A state grand jury investigating a murder learned that the key suspect might have kept a diary. The grand jury issued a subpoena duces tecum requiring the suspect to produce any diary. The subpoena made clear that the grand jury was seeking only the diary and not any testimony from the suspect. The suspect refused to produce the diary, citing the privilege against self-incrimination.

Under what circumstances, if any, may the grand jury compel production of the diary over the suspect's assertion of his Fifth Amendment privilege?

A: It may compel production without granting immunity because the suspect was not compelled to write a diary.
B: It may compel production only if the suspect is granted use and derivative use immunity from the act of production.
C: It may compel production only if the suspect is granted transactional immunity.
D: It may not compel production of a private diary under any circumstances.

The explanation for the answer is:

Answer B is correct. The Fifth Amendment privilege against self-incrimination protects only testimonial or communicative evidence, and not real or physical evidence. Therefore, it protects acts of production that would have testimonial significance by authenticating documents. Thus, Answer A is incorrect.

However, a criminal defendant may be compelled to produce documents that have testimonial significance if immunity is granted to the defendant. There are two kinds of immunity that may be granted. The broader form of immunity is "transactional immunity." Transactional immunity completely protects the witness from future prosecution for crimes related to his or her testimony. "Use and derivative use" immunity is narrower--it prevents the prosecution only from using the witness's own testimony or any evidence derived from the testimony against the witness. However, should the prosecutor acquire evidence substantiating the supposed crime--independently of the witness's testimony--the witness may then be prosecuted for the same.

Here, Answer B is correct because use and derivative use immunity sufficiently protects the constitutional privilege against self-incrimination in this situation. Thus, Answer C is incorrect because the prosecution does not need to grant the suspect transactional immunity--use and derivative use immunity sufficiently protects the constitutional privilege against self-incrimination.

Answer D is incorrect because the suspect's privilege against self-incrimination may be overcome if the suspect is granted use and derivative use immunity.

Question 1323 - Criminal Law - Constitutional Protection of Accused Persons (7/23/2016)

The question was:

A federal grand jury that was investigating drug trafficking in the jurisdiction subpoenaed a witness to testify. The prosecutor advised the witness that he had a Fifth Amendment privilege not to testify if he so chose. The witness asked that his attorney be allowed to advise him inside the grand jury room, but the prosecutor refused to allow the attorney inside. After speaking with his attorney outside the grand jury room, the witness decided to testify. During his testimony, he made self-incriminating statements.

The witness was subsequently indicted for drug crimes. The indictment was based on the witness's grand jury testimony and on evidence seized in an unconstitutional search of the witness's home.

The witness has moved to dismiss the indictment.

Should the court dismiss the indictment?

A: Yes, because the witness was denied his constitutional right to advice of counsel.
B: Yes, because the indictment was based upon illegally seized evidence.
C: No, because the witness waived his constitutional rights by testifying.
D: No, because the witness had no right to counsel inside the grand jury room and the illegally seized evidence did not affect the validity of the indictment.

The explanation for the answer is:

Answer D is correct. A grand jury witness does not have a constitutional right to counsel inside a grand jury room. *See Connecticut v. Gabbert*, 526 U.S. 286, 292 (1999) (citing *United States v. Mandujano*, 425 U.S. 564 (1976)). Thus, Answer A is incorrect. Also, the Fourth Amendment exclusionary rule does not apply to federal grand juries and is not a basis upon which a federal indictment can be dismissed. *United States v. Calandra*, 414 U.S. 338 (1974). Thus, Answer B is incorrect, and Answer D is correct.

Answer C is incorrect. The issue here does not turn on waiver, nor do the facts demonstrate a waiver of any constitutional rights. Rather, wholly apart from any waiver, none of the witness's constitutional rights were violated: a grand jury witness does not have a constitutional right to counsel inside a grand jury room, and the Fourth Amendment exclusionary rule does not apply to federal grand juries.

Question 1472 - Criminal Law - Constitutional Protection of Accused Persons (7/23/2016)

The question was:

A defendant was charged with the capital offense of first-degree murder, for which the only available penalties were death or life in prison without parole. During jury selection, the trial court, over the defendant's objection, granted the prosecution's for-cause challenge of five prospective jurors who indicated upon questioning by both parties that they personally were opposed to the death penalty and were unsure if they could ever vote to impose it. The jury convicted the defendant and, following a separate sentencing hearing, sentenced him to death.

On appeal, the defendant's only argument was that excusing the prospective jurors violated his federal constitutional right to be tried by a jury chosen from a fair cross section of the community.

How should the court of appeals rule on the conviction and the death sentence?

A: Affirm both.
B: Affirm the conviction, but reverse the death sentence and remand for a new sentencing hearing before a different jury.
C: Affirm the conviction, but reverse the death sentence and remand for resentencing to life in prison.
D: Reverse both.

The explanation for the answer is:

Answer A is correct. A trial court properly may excuse a juror for cause from serving in both the guilt and penalty phases of a capital case if a juror's views regarding the death penalty would prevent or substantially impair the juror from impartially deciding whether the death penalty is warranted in that particular case. Exclusion of such jurors does not violate the fair cross-section right of the Sixth Amendment. To establish such a violation, the defendant must show the underrepresentation of a distinct and numerically significant group in the venire to show his jury trial right was violated. Thus, Answer A is correct, and Answers B, C, and D are incorrect.

Question 619 - Criminal Law - Constitutional Protection of Accused Persons (7/23/2016)

The question was:

Police received information from an undercover police officer that she had just seen two men (whom she described) in a red pickup truck selling marijuana to schoolchildren near the city's largest high school. A few minutes later, two police officers saw a pickup truck fitting the description a half block from the high school. The driver of the truck matched the description of one of the men described by the undercover officer.

The only passenger was a young woman who was in the back of the truck. The police saw her get out and stand at a nearby bus stop. They stopped the truck and searched the driver. In the pocket of the driver's jacket, the police found a small bottle of pills that they recognized as narcotics. They then broke open a locked toolbox attached to the flatbed of the truck and found a small sealed envelope inside. They opened it and found marijuana. They also found a quantity of cocaine in the glove compartment.

After completing their search of the driver and the truck, the police went over to the young woman and searched her purse. In her purse, they found a small quantity of heroin. Both the driver and the young woman were arrested and charged with unlawful possession of narcotics.

If the driver moves to suppress the use as evidence of the marijuana and cocaine found in the search of the truck, the court should

A: grant the motion as to both the marijuana and the cocaine.
B: grant the motion as to the marijuana but deny it as to the cocaine.
C: deny the motion as to the marijuana but grant it as to the cocaine.
D: deny the motion as to both the marijuana and the cocaine.

The explanation for the answer is:

The correct answer is D. Under the automobile exception to the warrant requirement of the Fourth Amendment, the police may properly search a vehicle, including any containers contained therein, that might contain the evidence they seek without first obtaining a warrant. Therefore, if the police have reason to believe there is illegal contraband in the car, they can search the entire car for the contraband.

Here, a police officer reported that the driver of the vehicle was selling marijuana, and gave a description of the truck and the driver. This information gave the two police officers the probable cause needed to search a vehicle matching the description. The automobile exception allows the warrantless search of the vehicle, of any container in the vehicle which may contain the evidence sought, and the belongings of the people inside the vehicle. The police were thus constitutionally permitted to search the glove compartment, the locked toolbox, and the sealed envelope for more evidence of marijuana. Answers A, B, and C are incorrect because the automobile exception allows for a warrantless search of the entire car and any compartment that might contain the marijuana as long as there is probable cause for the search.

Question 661 - Criminal Law - Constitutional Protection of Accused Persons (7/23/2016)

The question was:

A man entered the police station and announced that he wanted to confess to a murder. The police advised the man of his Miranda rights, and the man signed a written waiver. The man described the murder in detail and pinpointed the location where a murder victim had been found a few weeks before. Later, a court-appointed psychiatrist determined that the man was suffering from a serious mental illness that interfered with his ability to make rational choices and to understand his rights and that the psychosis had induced his confession.

The man's confession is

A: admissible, because there was no coercive police conduct in obtaining the man's statement.
B: admissible, because the man was not in custody.
C: inadmissible, because the man's confession was a product of his mental illness and was therefore involuntary.
D: inadmissible, because under these circumstances, there was no valid waiver of Miranda warnings.

The explanation for the answer is:

The correct answer is A. The exclusionary rule is a rule meant to deter police conduct that would violate the protections afforded to the accused in the Constitution, and suppressing the evidence in this case would serve no purpose in enforcing those constitutional rights. Because there was no coercive police conduct in obtaining the man's statement, the statement should not be suppressed, and the confession is admissible.

Answer B is incorrect because it ignores the non-coercive effect of the police conduct, and the man may well have been in custody at the time of the interrogation. Answer C is incorrect because the scope of the exclusionary rule does not include the right of the defendant to confess to a crime only when totally rational and properly motivated. There must be some type of coercive police activity necessary to find that the man's confession was not voluntary and inadmissible. Answer D is incorrect because the protections of Miranda, as well as the exclusionary rule, will only apply to cases involving police misconduct; the confession was voluntarily given here. This analysis derives from the United States Supreme Court case of *Colorado v. Connelly*.

Question 1164 - Criminal Law - Constitutional Protection of Accused Persons (7/23/2016)

The question was:

FBI agents, without a warrant and without permission of Mexican law enforcement or judicial officers, entered Mexico, kidnapped an American citizen wanted in the United States for drug smuggling violations, and forcibly drove him back to Texas. Thereafter, the agents, again without a warrant, broke into the Texas home of a woman wanted as a confederate of the kidnapped person, and arrested her.

The kidnapped person and the woman were both indicted for narcotics violations. Both moved to dismiss the indictment on the ground that their arrests violated the Fourth Amendment.

The court should

A: grant the motions of both the kidnapped person and the woman.
B: grant the motion of the kidnapped person and deny the motion of the woman.
C: grant the motion of the woman and deny the motion of the kidnapped person.
D: deny the motions of both the kidnapped person and the woman.

The explanation for the answer is:

The correct answer is D. An unlawful arrest does not serve an adequate reason to dismiss an indictment. Although the kidnapped person and the woman may have been arrested in violation of the Fourth Amendment, the remedy for that violation is not the dismissal of the indictment against them. Answers A, B, and C are incorrect because the remedies for an unlawful arrest do not include the dismissal of an indictment against properly charged defendants. Regardless of the propriety of the arrest, a court will not dismiss an otherwise properly obtained indictment.

Question 1107 - Criminal Law - Constitutional Protection of Accused Persons (7/24/2016)

The question was:

A defendant entered a guilty plea to a charge of embezzlement. Her attorney hired a retired probation officer as a consultant to gather information for the preparation of a sentencing plan for the defendant that would avoid jail. For that purpose, the consultant interviewed the defendant for three hours.

Thereafter, the prosecution undertook an investigation of the defendant's possible involvement in other acts of embezzlement. The consultant was subpoenaed to testify before a grand jury. The consultant refused to answer any questions concerning her conversation with the defendant. The prosecution has moved for an order requiring her to answer those questions.

The motion should be

A: denied, on the basis of the attorney-client privilege.
B: denied, due to the absence of probable cause to believe the interview developed evidence relevant to the grand jury's inquiry.
C: granted, because the consultant is not an attorney.
D: granted, because exclusionary evidentiary rules do not apply in grand jury proceedings.

The explanation for the answer is:

The correct answer is A. The attorney-client privilege extends not only to discussions between the attorney and the client, but also to any who are advised of confidential information at the direction of the attorney, including consultants and investigators. The information the consultant obtained was confidential information gathered at the direction of the defendant's attorney and in the preparation for a criminal case, and is thus privileged. The consultant cannot be ordered to divulge privileged information.

Answer B is incorrect because there is no requirement that there exist probable cause to believe the evidence is relevant before the inquiry can be made before the grand jury. Answer C is incorrect because the attorney-client privilege extends not only to the attorney, but also to confidential information garnered at the attorney's request. Answer D is incorrect because some evidence rules, including allegations of privilege, do apply to grand jury proceedings.

Question 1600 - Criminal Law - Constitutional Protection of Accused Persons (7/24/2016)

The question was:

A police officer had a hunch, not amounting to probable cause or reasonable suspicion, that a man was a drug dealer. One day while the officer was on highway patrol, her radar gun clocked the man's car at 68 mph in an area where the maximum posted speed limit was 65 mph. The officer's usual practice was not to stop a car unless it was going at least 5 mph over the posted limit, but contrary to her usual practice, she decided to stop the man's car in the hope that she might discover evidence of drug dealing. After she stopped the car and announced that she would be writing a speeding ticket, the officer ordered the man and his passenger to step out of the car. When the passenger stepped out, the officer saw that the passenger had been sitting on a clear bag of what the officer immediately recognized as marijuana. The officer arrested both the man and the passenger for possession of marijuana.

At their joint trial, the man and the passenger claim that their Fourth Amendment rights were violated because the officer improperly (1) stopped the car for speeding as a pretext for investigating a hunch rather than for the stated purpose of issuing a traffic ticket and (2) ordered the passenger to step out of the car even though there was no reason to believe that the passenger was a criminal or dangerous.

Are the man and the passenger correct?

A: No, as to both the stop of the car and the officer's order that the passenger step out of the car.
B: No as to the stop of the car, but yes as to the officer's order that the passenger step out of the car.
C: Yes as to the stop of the car, but no as to the officer's order that the passenger step out of the car.
D: Yes, as to both the stop of the car and the officer's order that the passenger step out of the car.

The explanation for the answer is:

A is correct. The stop of the car was constitutional, because it was objectively justifiable (regardless of the officer's subjective motivation), and both the driver and any passengers may be ordered to step out of a car during a lawful traffic stop.

B is incorrect. It is correct that the stop of the car was constitutional, because it was objectively justifiable (regardless of the officer's subjective motivation). However, it is also correct that both the driver and any passengers may be ordered to step out of a car during a lawful traffic stop.

C is incorrect. It is correct that both the driver and any passengers may be ordered to step out of a car during a lawful traffic stop. However, it is also correct that the stop of the car here was constitutional, because it was objectively justifiable (regardless of the officer's subjective motivation).

D is incorrect. The stop of the car was constitutional, because it was objectively justifiable (regardless of the officer's subjective motivation), and both the driver and any passengers may be ordered to step out of the car during a lawful traffic stop.

Question 749 - Criminal Law - Constitutional Protection of Accused Persons (2/6/2017)

The question was:

A statute provides: A person commits the crime of rape if he has sexual intercourse with a female, not his wife, without her consent.

A man is charged with the rape of a woman. At trial, the woman testifies to facts sufficient for a jury to find that the man had sexual intercourse with her, that she did not consent, and that the two were not married. The man testifies in his own defense that he believed she consented to sexual intercourse and that she was his common-law wife.

At the conclusion of the case, the court instructed the jury that in order to find the man guilty of rape, it must find beyond a reasonable doubt that he had sexual intercourse with the woman without her consent.

The court also instructed the jury that it should find the defendant not guilty if it found either that the woman was the man's wife or that the man reasonably believed that the woman had consented to the sexual intercourse, but that the burden of persuasion as to these issues was on the defendant.

The jury found the man guilty, and the man appealed, contending that the court's instructions on the issues of whether the woman was his wife and whether he reasonably believed she had consented violated his constitutional rights.

The man's constitutional rights were

A: violated by the instructions as to both issues.
B: violated by the instruction as to whether the woman was his wife, but not violated by the instruction on belief as to consent.
C: violated by the instruction on belief as to consent, but not violated by the instruction as to whether the woman was his wife.
D: not violated by either part of the instructions.

The explanation for the answer is:

The correct answer is B. When the time of the decision comes, the jury must be instructed how to decide the issue if their minds remain in doubt. If all the evidence is in and the issue is balanced in the mind of the jury, then the party with the burden of persuasion must lose. In a criminal prosecution, each element of a crime must be proved beyond a reasonable doubt. In this case, the prosecution must prove three things: (1) that the man had sexual intercourse with a woman (2) who was not his wife and (3) without her consent. All three must be proven by the prosecution beyond a reasonable doubt, and this burden of persuasion will not be shifted onto the defendant. Therefore, the burden of persuasion about whether the woman was the man's wife must be on the prosecution, and the judge's instruction to the contrary was a violation of the defendant's constitutional rights.

A jury instruction that places the burden of persuasion on the defendant regarding an affirmative defense, in this case regarding the man's reasonable belief that the woman had consented, is not improper and does not violate the man's constitutional rights. Therefore, placing the burden on the defendant to show that he reasonably believed that the woman had consented would not violate his constitutional rights.

Answer A is incorrect because placing the burden on the man to persuade the jury that he had a reasonable belief of consent does not go to the elements of the charge of rape and instead is an affirmative defense. Answers C and D are incorrect because the prosecution bears the burden of persuasion for each element of the offense.

Question 1047 - Criminal Law - Constitutional Protection of Accused Persons (2/7/2017)

The question was:

The police had, over time, accumulated reliable information that a suspect operated a large cocaine-distribution network, that he and his accomplices often resorted to violence, and that they kept a small arsenal of weapons in his home.

One day, the police received reliable information that a large brown suitcase with leather straps containing a supply of cocaine had been delivered to the suspect's home and that it would be moved to a distribution point the next morning. The police obtained a valid search warrant to search for and seize the brown suitcase and the cocaine and went to the suspect's house.

The police knocked on the suspect's door and called out, "Police. Open up. We have a search warrant." After a few seconds with no response, the police forced the door open and entered. Hearing noises in the basement, the police ran down there and found the suspect with a large brown suitcase and put handcuffs on the suspect. A search of his person revealed a switchblade knife and a .45-caliber pistol. The suspect cursed the police and said, "You never would have caught me with the stuff if it hadn't been for that lousy snitch Harvey!" The police then fanned out through the house, looking in every room and closet. They found no one else, but one officer found an Uzi automatic weapon in a box on a closet shelf in the suspect's bedroom. In addition to charges relating to the cocaine in the suitcase, the suspect is charged with unlawful possession of weapons.

The suspect moves pretrial to suppress the use as evidence of the weapons seized by the police and of the statement he made.

As to the switchblade knife and the .45-caliber pistol, the suspect's motion to suppress should be

A: granted, because the search and seizure were the result of illegal police conduct in executing the search warrant.
B: granted, because the police did not inform the suspect that he was under arrest and did not read him his Miranda rights.
C: denied, because the search and seizure were incident to a lawful arrest.
D: denied, because the police had reasonable grounds to believe that there were weapons in the house.

The explanation for the answer is:

The correct answer is C. The suspect was under arrest at the time, and the search of his person was a proper search incident to arrest. Once a person is placed under arrest, police officers have the right to search the person and the immediate surroundings of the person for any weapons and evidence of the crime without first having to obtain a warrant.

Answer A is incorrect because the police officers acted properly in the execution of the search warrant and were allowed to search the suspect for any weapons upon his arrest. Answer B is incorrect because the suspect does not need to be informed that he is under arrest before the search incident to the arrest can take place. In addition, whether or not the suspect received his Miranda warnings prior to the search is irrelevant to the search incident to arrest and the finding of physical evidence on his person.

Answer D is incorrect because the officers' reasonable belief that there are weapons present would not, without more, authorize the search of the suspect. Answer D is a misstatement of the standard for reviewing the constitutionality of the search in this case. The knife and the .45 caliber pistol were found on his person and were found pursuant to a search incident to arrest, so the suspect's motion to suppress these pieces of evidence should be denied.

Question 1120 - Criminal Law - Constitutional Protection of Accused Persons (2/13/2017)

The question was:

A marijuana farmer had been missing for several months. The sheriff's department received an anonymous tip that a rival marijuana farmer had buried the marijuana farmer in a hillside about 200 yards from the rival's farmhouse. The sheriff's deputies went to the rival's farm. They cut the barbed wire that surrounded the hillside and entered, looking for the grave. They also searched the adjacent fields on the rival's farm that were within the area enclosed by the barbed wire and discovered clothing that belonged to the marijuana farmer hanging on a scarecrow. The rival observed their discovery and began shooting. The deputies returned fire. The rival dashed to his pickup truck to escape. Unable to start the truck, he fled across a field toward the barn. A deputy tackled him just as he entered the barn.

As the rival attempted to get up, the deputy pinned his arms behind his back. Another deputy threatened, "Tell us what you did with the marijuana farmer or we will shut you down and see your family on relief." The rival responded that he had killed the marijuana farmer in a fight but did not report the incident because he did not want authorities to enter his land and discover his marijuana crop. Instead, he buried him behind the barn. The rival was thereafter charged with murder.

If the rival moves to exclude the introduction of the marijuana farmer's clothing into evidence, the court should

A: grant the motion, because the deputies had not obtained a warrant.
B: grant the motion, because the deputies' conduct in its entirety violated the rival's right to due process of law.
C: deny the motion, because the rival had no expectation of privacy in the fields around his farmhouse.
D: deny the motion, because the clothing was not the rival's property.

The explanation for the answer is:

The correct answer is C. The fields around the rival's farmhouse are considered held out to the public under the "open fields" doctrine, so the rival did not have a reasonable expectation of privacy in them or in the scarecrow on which the victim's clothes were hanging. Because the fields were not protected by the Fourth Amendment, the police officers' search did not violate the rival's constitutional rights. The rival's motion to suppress should be denied.

Answer A is incorrect because the rival had no reasonable expectation of privacy in lands visible to the public, and the police officer's did not need to obtain a warrant to see the evidence.

Answer B is incorrect because it is a misstatement of the relevant law regarding search and seizure; answer B refers to the rival's right to due process of law, whereas search and seizure law is covered by the fourth amendment.

Answer D is incorrect because actual ownership of the searched or seized property is not the deciding factor in determining the propriety of the search. Because the clothing was on the rival's land when the search and seizure occurred, the fact that it belonged to somebody else is irrelevant. Therefore, because the rival did not have a reasonable expectation of privacy in the lands around his farmhouse, the clothing should not be suppressed.

Question 619 - Criminal Law - Constitutional Protection of Accused Persons (2/15/2017)

The question was:

Police received information from an undercover police officer that she had just seen two men (whom she described) in a red pickup truck selling marijuana to schoolchildren near the city's largest high school. A few minutes later, two police officers saw a pickup truck fitting the description a half block from the high school. The driver of the truck matched the description of one of the men described by the undercover officer.

The only passenger was a young woman who was in the back of the truck. The police saw her get out and stand at a nearby bus stop. They stopped the truck and searched the driver. In the pocket of the driver's jacket, the police found a small bottle of pills that they recognized as narcotics. They then broke open a locked toolbox attached to the flatbed of the truck and found a small sealed envelope inside. They opened it and found marijuana. They also found a quantity of cocaine in the glove compartment.

After completing their search of the driver and the truck, the police went over to the young woman and searched her purse. In her purse, they found a small quantity of heroin. Both the driver and the young woman were arrested and charged with unlawful possession of narcotics.

If the driver moves to suppress the use as evidence of the marijuana and cocaine found in the search of the truck, the court should

A: grant the motion as to both the marijuana and the cocaine.
B: grant the motion as to the marijuana but deny it as to the cocaine.
C: deny the motion as to the marijuana but grant it as to the cocaine.
D: deny the motion as to both the marijuana and the cocaine.

The explanation for the answer is:

The correct answer is D. Under the automobile exception to the warrant requirement of the Fourth Amendment, the police may properly search a vehicle, including any containers contained therein, that might contain the evidence they seek without first obtaining a warrant. Therefore, if the police have reason to believe there is illegal contraband in the car, they can search the entire car for the contraband.

Here, a police officer reported that the driver of the vehicle was selling marijuana, and gave a description of the truck and the driver. This information gave the two police officers the probable cause needed to search a vehicle matching the description. The automobile exception allows the warrantless search of the vehicle, of any container in the vehicle which may contain the evidence sought, and the belongings of the people inside the vehicle. The police were thus constitutionally permitted to search the glove compartment, the locked toolbox, and the sealed envelope for more evidence of marijuana. Answers A, B, and C are incorrect because the automobile exception allows for a warrantless search of the entire car and any compartment that might contain the marijuana as long as there is probable cause for the search.

Question 146 - Criminal Law - Constitutional Protection of Accused Persons (2/15/2017)

The question was:

Police officers were concerned about an increase in marijuana traffic in the defendant's neighborhood. One night, several police officers, accompanied by dogs trained to sniff out marijuana, went into the back yard of the defendant's house and onto his porch. The defendant and his friend were inside having dinner. The dogs acted as if they smelled marijuana. The police officers knocked on the back door. The defendant answered the door and let them in. The defendant was immediately placed under arrest. After a brief search, the police officers confiscated a large quantity of marijuana which they found in the defendant's linen closet.

The defendant's motion to prevent introduction of the marijuana into evidence will most probably be

A: denied, because the search was incident to a valid arrest.
B: denied, because the defendant permitted the police officers to enter his house.
C: granted, because under the circumstances the police activity violated the defendant's reasonable expectations of privacy.
D: granted, because this kind of detection by trained dogs has not been scientifically verified and cannot be the basis for probable cause.

The explanation for the answer is:

The correct answer is C. The defendant has a reasonable expectation of privacy in his back yard and porch, and the police, by entering the porch with the dogs, were conducting an illegal, warrantless search. The defendant's motion to exclude the evidence should be granted. Answer A is incorrect because the arrest was not valid; the defendant was arrested due to the illegal, warrantless search. Furthermore, a search incident to arrest is limited to the defendant and the area within his immediate control. In this case, the evidence was found in a linen closet in the defendant's residence after the defendant had been placed under arrest. This exceeded the scope of a valid search incident to an arrest.

Answer B is incorrect because permitting police officers to enter a residence does not allow the police to search the entire residence. The police officers would have needed to obtain the consent to search as well as the consent to enter if the evidence was not in plain sight. Since the evidence was in a closet and no consent to search was given, the evidence should be excluded. Answer D is incorrect because dogs trained in drug detection can be used to provide the basis for probable cause to search.

Question 480 - Criminal Law - Constitutional Protection of Accused Persons (2/15/2017)

The question was:

A defendant is indicted in state court for bribing a public official. During the course of the investigation, police had demanded and received from the defendant's bank the records of the defendant's checking account for the preceding two years. The records contained incriminating evidence.

On the basis of a claim of violation of his constitutional rights, the defendant moves to prevent the introduction of records in evidence. His motion should be

A: granted, because a search warrant should have been secured for seizure of the records.
B: granted, because the records covered such an extensive period of time that their seizure unreasonably invaded the defendant's right of privacy.
C: denied, because the potential destructibility of the records, coupled with the public interest in proper enforcement of the criminal laws, created an exigent situation justifying the seizure.
D: denied, because the records were business records of the bank in which the defendant had no legitimate expectation of privacy.

The explanation for the answer is:

The correct answer is D. The records sought were the records of the bank, not the defendant, and the Supreme Court has held that a person has no reasonable expectation of privacy in the bank records of their account. See U.S. v. Miller. Answer A is incorrect because, since there is no reasonable expectation of privacy in records that belong to the bank, there is no constitutional requirement that the police obtain a search warrant before the records can be seized. Answer B is incorrect because the period of time of the records seized is of little or no relevance to the determination of the propriety of the seizure itself. Because the defendant did not have a reasonable expectation of privacy in his bank records, obtaining those records, even for the previous two years, did not violate his rights. Answer C is incorrect because it misstates the reason the records can be seized. There were no exigent circumstances to authorize the seizure of the bank records. However, the seizure is proper because the defendant did not have a reasonable expectation of privacy.

Question 872 - Criminal Law - Constitutional Protection of Accused Persons (2/15/2017)

The question was:

A defendant was arrested in the victim's apartment after her neighbors had reported sounds of a struggle, and the police arrived to find the defendant bent over the victim's prostrate body. The victim was rushed to the hospital where she lapsed into a coma. Despite the explanation that he was trying to revive the victim after she suddenly collapsed, the defendant was charged with attempted rape and assault after a neighbor informed the police that she had heard the victim sobbing, "No, please no, let me alone."

At trial, the forensic evidence was inconclusive. The jury acquitted the defendant of attempted rape but convicted him of assault. While he was serving his sentence for assault, the victim, who had never recovered from the coma, died. The defendant was then indicted and tried on a charge of felony murder. In this common-law jurisdiction, there is no statute that prevents a prosecutor from proceeding in this manner, but the defendant argued that a second trial for attempted rape and assault would violate the double jeopardy clause.

His claim is

A: correct, because he was acquitted of the attempted rape charge.
B: correct, because he was convicted of the assault charge.
C: incorrect, because the victim had not died at the time of the first trial and he was not placed in jeopardy for murder.
D: incorrect, because he was convicted of the assault charge.

The explanation for the answer is:

Answer A is correct. The attempted rape charge cannot be the basis for the felony-murder charge because the defendant has been acquitted of the charge and to use it would violate the double jeopardy clause. The double jeopardy clause forbids the state from prosecuting, or punishing, a defendant twice for the same action. In this case, the defendant was placed in jeopardy during the original trial for attempted rape, and to use that charge again as the underlying felony in a felony murder charge would put him in jeopardy again. Assault, at common law, is not a felony and cannot be used as the basis for a felony-murder charge.

Answer B is incorrect because it is the acquittal on the attempted rape charge that violates the defendant's rights under the double jeopardy clause and not the conviction of the assault charge. Answer C is incorrect because the defendant is charged with felony murder based on the felony of attempted rape. He has been placed in jeopardy already for the attempted rape. Although the prosecutor may proceed on a different theory of murder, proceeding on a felony-murder charge with the underlying felony being attempted rape would violate double jeopardy. Answer D is incorrect because the conviction on the assault charge ignores the acquittal on the felony charge of attempted rape, which is the basis for the felony murder charge. The conviction for one of the charged offenses does not mean that the defendant was not subject to jeopardy on the other charge that he was acquitted of. Because the defendant was already placed in jeopardy for the attempted rape charge, it cannot be used as the basis of a new charge of felony murder.

Question 1450 - Criminal Law - General Principles (7/23/2016)

The question was:

A defendant was charged with battery, defined as at common law. At trial, an expert witness testified for the defense that the defendant, an athlete, was under the influence of a performance-enhancing drug at the time he committed the battery and that he would not have done so had he not been so influenced. The defendant asked for an instruction to the effect that if the jury believed that he was influenced by the drug at the time of the crime and would not have committed it otherwise, it had to acquit him.

Which of the following circumstances would most aid the defendant's argument in favor of such an instruction?

A: Evidence that the defendant is addicted to this drug and has an overwhelming urge to consume it.
B: Evidence that the defendant's coach, who gave him the drug, told him it was only an aspirin.
C: Evidence that the victim of the assault taunted the defendant about his use of the drug immediately before the assault.
D: Expert testimony that a reasonable person, on consuming this drug, may experience uncontrollable rages.

The explanation for the answer is:

Answer B is correct. Battery is the unlawful application of force to the person of another resulting in either an offensive touching or bodily injury. Battery is also a general intent crime. "General intent" is an awareness of all the factors constituting the crime. Voluntary intoxication is not a valid defense to a general intent crime. Thus, the most helpful fact supporting an intoxication defense would be evidence that the intoxication was involuntary, which could be shown by evidence demonstrating that the defendant was tricked into taking a substance that he did not know was an intoxicant. Answer B is correct.

As stated above, voluntary intoxication would not be a defense to the crime of battery, and the fact that a defendant was addicted to a drug does not make intoxication with that drug involuntary for purposes of the criminal law. Thus, Answer A is incorrect.

Nor would the victim's taunting constitute a valid defense. The victim's taunting would not support an intoxication instruction, which would be proper only if there was evidence showing that the intoxication was involuntary. Thus, Answer C is incorrect.

Answer D is incorrect. The expert testimony would not support an instruction because voluntary intoxication, regardless of the intoxicant's effects, is not a defense to the crime of battery.

Question 831 - Criminal Law - General Principles (7/23/2016)

The question was:

A bartender is charged with the statutory offense of "knowingly violating a regulation of the State Alcoholic Beverage Control Board" and that he knowingly violated regulation number 345-90 issued by the State Alcoholic Beverage Control Board. That regulation prohibits the sale of alcoholic beverages to any person under the age of 18 and also prohibits the sale of any alcoholic beverage to a person over the age of 17 and under the age of 22 without the presentation of such person's driver's license or other identification showing the age of the purchaser to be 18 or older.

The evidence showed that the bartender worked in a tavern and sold a bottle of beer to a person who was 17 years old and that the bartender did not ask for or see the purchaser's driver's license or any other identification.

Which of the following, if found by the jury, would be of the most help to the bartender?

A: The purchaser had a driver's license that falsely showed his age to be 21.
B: The bartender had never been told he was supposed to check identification of persons over 17 and under 22 before selling them alcohol.
C: The bartender did not know that the regulations classified beer as an alcoholic beverage.
D: The bartender mistakenly believed the purchaser to be 24 years old.

The explanation for the answer is:

The correct answer is D. The regulation stating that bartenders must require people between the ages of 18 and 21 to show identification of their age carries with it the implication that people above the age of 21 are not required to show identification. The bartender's best argument is that, since he mistakenly believed the purchaser to be 24 years old, he was allowed to sell them beer and was not required to obtain identification; in relying on that statute, he did not ascertain the minor's age. This may allow him to argue that the regulation contains a mens rea element requiring that he knowingly violate the law. Because the bartender did not knowingly sell alcohol to the minor, he should be acquitted.

Answer A is incorrect because the fact that the purchaser could have presented a fake identification does not excuse the bartender's not asking to see it; his only legitimate excuse would be that he believed the person to be over 21 and that the statute includes a mens rea requirement. Answer B is incorrect because ignorance of the law is generally not an excuse, and the bartender's not being told that he has to check identification does not affect the offense's mens rea requirement. When a crime requires that the defendant act knowingly, he must have been aware that his conduct was of a particular nature, or at least know that his conduct will necessarily or very likely cause a particular result. Here, he must have been aware of the fact that he was selling to a minor, or to someone between the ages of 18 and 21, not the fact that his conduct was violating that regulation.

Answer C is incorrect because, again, ignorance of the law is no excuse, and not knowing that beer is an alcoholic beverage does not excuse the bartender's actions. If the jury found that the bartender mistakenly believed the purchaser to be 24-years-old, the bartender could argue that he relied on the statute's requiring identification from 18 to 21 year olds, and thus did not meet the mens rea requirement of the regulation.

Question 808 - Criminal Law - General Principles (7/23/2016)

The question was:

Plagued by neighborhood youths who had been stealing lawn furniture from his back yard, a homeowner remained awake each night watching for them. One evening the homeowner heard noises in his backyard. He yelled out, warning intruders to leave. Receiving no answer, he fired a shotgun filled with nonlethal buckshot into bushes along his back fence where he believed the intruders might be hiding. A six-year-old child was hiding in the bushes and was struck in the eye by some of the pellets, causing loss of sight.

If the homeowner is charged with second-degree assault, which is defined in the jurisdiction as "maliciously causing serious physical injury to another," he is

A: not guilty, because the child was trespassing and he was using what he believed was nondeadly force.
B: not guilty, because he did not intend to kill or to cause serious physical injury.
C: guilty, because he recklessly caused serious physical injury.
D: guilty, because there is no privilege to use force against a person who is too young to be criminally responsible.

The explanation for the answer is:

The correct answer is C. Proof of malice does not need to be proof of an actual specific intent to kill or harm another; it can be implied from a defendant's gross recklessness with regard to human life shown. In this case, the homeowner fired a shotgun into bushes where he believed people were hiding. This action would support a finding of malice. The shooting caused the child to lose his sight, which is a serious injury. Therefore, the homeowner is guilty of second-degree assault.

Answer A is incorrect because the child's status as a trespasser does not automatically allow the homeowner to inflict serious bodily harm. In addition, the homeowner's belief that the force would be non-deadly would not negate the finding that he acted maliciously. Answer B is incorrect because a finding of malice does not require the intent to kill or to cause serious physical injury. Malice can also be shown by the homeowner acting extremely recklessly with regard to human life. Answer D is incorrect because it is a misstatement of the law regarding the use of force. The homeowner, when he fired a shotgun into bushes by his back fence, acted maliciously and caused a serious injury to another. He should be found guilty of second degree assault.

Question 422 - Criminal Law - General Principles (2/6/2017)

The question was:

Which of the following is most likely to be found to be a strict liability offense?

A: A city ordinance providing for a fine of not more than $200 for shoplifting.
B: A federal statute making it a felony to possess heroin.
C: A state statute making it a felony to fail to register a firearm.
D: A state statute making the sale of adulterated milk a misdemeanor.

The explanation for the answer is:

D is the correct answer and can be reached through the process of elimination. A strict liability crime is a light-penalty public welfare offense, which does not require that the actor have mens rea; rather, the actor need only perform the action prohibited by statute. Although for public policy concerns we impose punishment without mens rea, the punishment is usually lighter than that for a crime where intent, recklessness, or knowledge has been proved.

Answers B and C can be eliminated immediately as they are both felony crimes, which are subject to more severe penalties. Answer A is not the best answer because it is not a public welfare offense, but an ordinance against theft. This leaves choice D as the best answer. The sale of adulterated milk is clearly a matter of public welfare and as such could be subject to a strict liability statute. A, B, and C are incorrect.

Question 1510 - Criminal Law - General Principles (2/15/2017)

The question was:

A woman charged with murder has entered a plea of not guilty by reason of insanity. At her trial, in which the questions of guilt and sanity are being tried together, the evidence shows that the woman stalked the victim for several hours before following him to an isolated hiking trail where she shot and killed him. Expert witnesses for the defense have testified that the woman knew that killing was illegal and wrong, but that she suffered from a serious mental illness that left her in the grip of a powerful and irresistible compulsion to kill the victim.

If the jury believes the testimony of the defense experts, under what circumstances could the jury properly acquit the woman of murder?

A: Only if the jurisdiction follows the M'Naghten test for insanity.
B: Only if the jurisdiction follows the ALI Model Penal Code test for insanity.
C: If the jurisdiction follows either the M'Naghten or the ALI Model Penal Code test for insanity.
D: Even if the jurisdiction has abolished the insanity defense.

The explanation for the answer is:

A is incorrect. The jury could not find the woman to be legally insane under the M'Naghten test, which requires either that she did not know the nature and quality of the act she was committing or that she did not know the difference between right and wrong.

B is correct. The jury could find the woman to be legally insane under the ALI Model Penal Code test, because she could not conform her conduct to the requirements of the law.

C is incorrect. The jury could not find the woman to be legally insane under the M'Naghten test, which requires either that she did not know the nature and quality of the act she was committing or that she did not know the difference between right and wrong. The jury could find the woman to be legally insane under the ALI Model Penal Code test, because she could not conform her conduct to the requirements of the law.

D is incorrect. The woman committed all the elements of murder and can be excused from responsibility only if she meets a recognized defense of insanity.

Question 529 - Criminal Law - Homicide (7/23/2016)

The question was:

The defendant and his friend were fooling around with a pistol in the friend's den. The defendant aimed the pistol in the friend's direction and fired three shots slightly to the friend's right. One shot ricocheted off the wall and struck his friend in the back, killing him instantly.

The most serious crime of which the defendant can be convicted is

A: murder.
B: voluntary manslaughter.
C: involuntary manslaughter.
D: assault with a dangerous weapon.

The explanation for the answer is:

The correct answer is A. At common law, murder is defined as the unlawful killing of another human with malice aforethought. By firing multiple shots from a pistol extremely close to his friend, the defendant was acting with reckless indifference to an unjustifiably high risk to human life. This reckless indifference would qualify as malice aforethought, and would support a murder conviction. Because the defendant's actions could support a murder conviction, B, C, and D are incorrect as they are less serious offenses.

Question 1042 - Criminal Law - Homicide (2/3/2017)

The question was:

At a party, the defendant and the victim agreed to play a game they called "spin the barrel." The victim took an unloaded revolver, placed one bullet in the barrel, and spun the barrel. The victim then pointed the gun at the defendant's head and pulled the trigger once. The gun did not fire. The defendant then took the gun, pointed it at the victim, spun the barrel, and pulled the trigger once. The gun fired, and the victim fell over dead.

A statute in the jurisdiction defines murder in the first degree as an intentional and premeditated killing or one occurring during the commission of a common-law felony, and murder in the second degree as all other murder at common law. Manslaughter is defined as a killing in the heat of passion upon an adequate legal provocation or a killing caused by gross negligence.

The most serious crime for which the defendant can properly be convicted is

A: murder in the first degree, because the killing was intentional and premeditated and, in any event, occurred during commission of the felony of assault with a deadly weapon.
B: murder in the second degree, because the defendant's act posed a great threat of serious bodily harm.
C: manslaughter, because the defendant's act was grossly negligent and reckless.
D: no crime, because the victim and the defendant voluntarily agreed to play a game and each assumed the risk of death.

The explanation for the answer is:

The correct answer is B. The defendant's pointing a loaded weapon at the victim and pulling the trigger posed a great threat of serious bodily injury to the victim, and, because it resulted in the victim's death, the defendant should be convicted of murder in the second degree. Murder in the second degree is murder with malice aforethought, done without premeditation and deliberation. The defendant's actions were done with reckless indifference to an unjustifiably high risk to human life, and will support a finding of malice aforethought.

Answer A is incorrect because there is no evidence that the defendant intended to kill the victim. Because the statute defines first degree murder as the premeditated and intentional killing of another, and there is no evidence that the defendant intended to kill the victim, she will not be convicted of murder in the first degree. In addition, answer A is also incorrect because the underlying felony in a felony murder charge must be sufficiently independent of the actual killing. In this case, the underlying felony of assault with a deadly weapon would merge into the homicide charge and would not be independent enough to allow for a proper felony murder charge. The defendant cannot be properly convicted of first degree murder under either theory.

Answer C is incorrect because manslaughter is not the most serious crime for which the defendant can properly be convicted. In addition, the defendant's actions were beyond mere negligence, and the killing of the victim was done with malice aforethought. The defendant should be convicted of murder in the second degree.

Answer D is incorrect because a victim's voluntarily playing the game and his assumption of risk are irrelevant to the determination of criminal responsibility. The most serious crime for which the defendant can be properly convicted is second degree murder.

Question 696 - Criminal Law - Homicide (2/7/2017)

The question was:

A bank teller was fired by the president of a bank. The teller wanted to take revenge against the president, but decided against attempting it personally, because he knew the president was protected around the clock by bank security guards. The teller knew a man who had a violent temper and was very jealous. The teller falsely told the man that the man's wife was having an affair with the bank president. Enraged, the man said, "What am I going to do?" The teller said, "If it were my wife, I'd just march into his office and blow his brains out." The man grabbed a revolver and rushed to the bank. He walked into the bank, carrying the gun in his hand. One of the security guards, believing a holdup was about to occur, shot and killed the man.

If charged with murder of the man, the teller should be found

A: guilty, based upon extreme recklessness.
B: guilty, based upon transferred intent.
C: not guilty, because he did not intend for the man to be shot by the security guard.
D: not guilty, because he did not shoot the man, and he was not acting in concert with the security guard.

The explanation for the answer is:

The correct answer is A. Murder is the unlawful killing of a human being with malice aforethought. Malice does not require the intent to kill; in some cases, there may be "implied malice" if there was gross or extreme recklessness to human life on the part of the defendant. In the question, the teller, knowing the man to be violent and jealous, lied to him, and suggested he commit murder. By taking actions that ensured the man would be walking into a heavily guarded bank with a gun, the teller acted with extreme recklessness; this is enough to show implied malice aforethought. Therefore, the teller should be found guilty of murder. An additional facet of the question raises the issue of whether the teller was a "proximate cause" of the man's death. The general test is whether the death was foreseeable; a defendant will be held criminally liable for the foreseeable consequences of their actions. In this case, by ensuring the man would enter a heavily guarded bank with the intent to kill the president and armed with a gun, it was foreseeable that the man would be killed.

Answer B is incorrect because transferred intent does not apply in cases where the actor doing the killing is different than the one who has the intent to kill the president. The teller's intent to kill the president will not transfer to the security guard's' action of killing the man. Answer C is incorrect because the "implied malice" doctrine does not require that the teller have the intent that the man be killed; it is sufficient that the death of the man was a foreseeable result of the actions the teller put into motion, and that those actions were taken with extreme recklessness. Answer D is incorrect because the charge does not require that the teller be the one to shoot the man or that he act in concert with the security guard. Because the teller proximately caused the death of the man and did so with malice aforethought, the teller should be found guilty of murder.

Question 1255 - Criminal Law - Homicide (2/7/2017)

The question was:

A man, despondent and angry over losing his job, was contemplating suicide. With his revolver in his pocket, he went to a bar and drank until he was very intoxicated. He overheard a customer on the next barstool telling the bartender how it was necessary for companies to downsize in order to keep the economy strong. The man turned to the customer and said, "Why don't you shut the hell up." The customer responded, "This is a free country, and I can say what I want," all the while shaking his finger at the man. The man became enraged, snatched his revolver from his pocket, and shot the customer, killing him.

A state statute defines first-degree murder as "knowingly causing the death of another person after deliberation upon the matter." Deliberation is defined as "cool reflection for any length of time, no matter how brief." Second-degree murder is defined as "knowingly causing the death of another person." Manslaughter is defined as at common law.

What crime did the man commit?

A: Manslaughter, because there was a reasonable explanation for his becoming enraged.
B: First-degree murder, because deliberation can take place in an instant.
C: First-degree murder, because he contemplated taking a human life before becoming intoxicated.
D: Second-degree murder, because he knowingly caused the customer's death without deliberation.

The explanation for the answer is:

Answer D is correct. While the man's intoxication prevented the kind of "cool reflection" required for first-degree murder, it did not preclude the mental state required for second-degree murder.

Answer A is incorrect. There was no reasonable explanation for the man becoming enraged. Although his intoxication prevented the kind of "cool reflection" required for first-degree murder, it did not preclude the mental state required for second-degree murder.

Answer B is incorrect. Even assuming that deliberation can be instantaneous, the man's intoxicated anger prevented the kind of "cool reflection" required for deliberation. However, while his intoxication prevented the mental state required for first-degree murder, it did not preclude the mental state required for second-degree murder.

Answer C is incorrect. The man did not deliberate upon taking the life "of another person" (as required by the statute) before becoming intoxicated. Although his intoxication prevented the kind of "cool reflection" required for first-degree murder, it did not preclude the mental state required for second-degree murder.

Question 708 - Criminal Law - Homicide (2/14/2017)

The question was:

One evening, a bar patron had several drinks and then started to drive home. As he was proceeding down Main Boulevard, an automobile pulled out of a side street to his right. The bar patron's car struck this automobile broadside. The driver of the other car was killed as a result of the collision. A breath analysis test administered after the accident showed that the bar patron satisfied the legal definition of intoxication.

If the bar patron is prosecuted for manslaughter, his best chance for acquittal would be based on an argument that

A: the other driver was contributorily negligent.
B: the collision would have occurred even if the bar patron had not been intoxicated.
C: because of his intoxication he lacked the *mens rea* needed for manslaughter.
D: driving while intoxicated requires no *mens rea* and so cannot be the basis for misdemeanor manslaughter.

The explanation for the answer is:

The correct answer is B. The bar patron's best argument for acquittal is that, because the accident would have occurred even if the bar patron had not been intoxicated, his reckless action giving rise to the manslaughter charge was not a cause in fact ('but for' cause) of the other driver's death. Because the action that the bar patron took was not a cause in fact, he cannot be convicted of manslaughter.

Answer A is incorrect because contributory negligence is a civil issue and does not apply to criminal manslaughter cases. Answer C is incorrect because voluntary intoxication is only a defense to specific intent crimes, not to crimes involving criminal negligence, such as manslaughter. The bar patron's argument that he was too intoxicated to be criminally negligent will not succeed. Answer D is incorrect because the argument that the bar patron did not commit manslaughter by virtue of there being no underlying misdemeanor ignores the possibility that the bar patron committed manslaughter by virtue of carrying out a criminally negligent act. Answer D is an ineffective defense. The bar patron's best chance for acquittal is to argue that, because the collision would have occurred even if the bar patron had not been intoxicated, the criminally negligent acts he took were not the cause in fact of the death.

Question 700 - Criminal Law - Inchoate Crimes (7/23/2016)

The question was:

A girl told a man she would like to have sexual intercourse with him and that he should come to her apartment that night at 7 p.m. After the man arrived, he and the girl went into the bedroom. As the man started to remove the girl's blouse, the girl said she had changed her mind. The man tried to convince her to have intercourse with him but after ten minutes of her sustained refusals, the man left the apartment. Unknown to the man, the girl was 15 years old. Because she appeared to be older, the man believed her to be about 18 years old.

A statute in the jurisdiction provides: "A person commits rape in the second degree if he has sexual intercourse with a girl, not his wife, who is under the age of 16 years."

If the man is charged with attempting to violate this statute, he is

A: guilty, because no mental state is required as to the element of rape.
B: guilty, because he persisted after she told him she had changed her mind.
C: not guilty, because he reasonably believed she had consented and voluntarily withdrew after she told him she had changed her mind.
D: not guilty, because he did not intend to have intercourse with a girl under the age of 16.

The explanation for the answer is:

The correct answer is D. An attempt charge requires that the defendant have the intent to commit the crime and that the defendant take substantial steps toward the commission of the crime. The man did not have the intent to commit rape in the second degree, and therefore, should be found not guilty.

Answer A is incorrect because, although the charge of rape in the second degree does not require the man to know that the girl is under the age of 16, he cannot be found to have committed attempted rape because he did not have the requisite intent to commit the crime. Attempt is a specific intent crime. Even if the underlying crime has a lesser mens rea requirement, the man cannot be convicted of attempt without having the specific intent that rape in the second degree be committed.

Answer B is incorrect because it ignores the specific intent requirement for an attempt charge and instead addresses the issue of whether or not the man committed a "substantial step" toward the commission of the offense. However, he cannot be convicted of rape in the second degree even if he is found to have committed a substantial step toward it, because he lacked the requisite mental state.

Answer C is incorrect because it ignores the specific intent requirement for an attempt charge, and because consent is irrelevant to rape in the second degree or attempt to commit rape in the second degree. Therefore, because the man lacked the requisite mental state for an attempt charge, he should be found not guilty.

Question 405 - Criminal Law - Inchoate Crimes (7/23/2016)

The question was:

A man, his brother, and his cousin are charged in a common law jurisdiction with conspiracy to commit larceny. The state introduced evidence that they agreed to go to a neighbor's house to take stock certificates from a safe in the neighbor's bedroom, that they went to the house, and that they were arrested as they entered the neighbor's bedroom.

The man testified that he thought the stock certificates belonged to the cousin, that the neighbor was improperly keeping them from the cousin, and that he went along to aid in retrieving the cousin's property.

The brother testified that he suspected the man and the cousin of being thieves and joined up with them in order to catch them. He also testified that he made an anonymous telephone call to the police alerting them to the crime and that the call caused the police to be waiting for them when they walked into the neighbor's bedroom.

The cousin did not testify.

If the jury believes both the man and the brother, they should find the cousin

A: guilty, because there was an agreement, and the entry into the bedroom is sufficient for the overt act.
B: guilty, because he intended to steal.
C: not guilty, because a conviction would penalize him for exercising his right not to be a witness.
D: not guilty, because the man and the brother did not intend to steal.

The explanation for the answer is:

The correct answer is D. A charge of conspiracy requires an agreement between at least two individuals with the intent to achieve the objective of the agreement. Because neither the man nor the brother entered the agreement with the intent to commit the larceny, there is no conspiracy to commit the crime, and the cousin cannot be found guilty of conspiracy to commit larceny.

Answers A and B are incorrect because only the cousin entered into the agreement with the intent to achieve the objective of the agreement (larceny). Therefore, there was no true conspiracy between two or more parties. Answer C is incorrect as a misstatement of the law. A conviction would not be a penalty for failing to testify because the conviction would not be based upon an inference drawn from the cousin's silence.

Question 595 - Criminal Law - Inchoate Crimes (7/23/2016)

The question was:

A jurisdiction has the following decisional law on questions of principal and accomplice liability:

CASE A: The defendant, a hardware store owner, sold several customers an item known as "SuperTrucker," which detects police radar and enables speeders to avoid detection. When one of the devices broke down and the speeder was arrested, he confessed that he often sped, secure in the knowledge that his "SuperTrucker" would warn him of police radar in the vicinity. Held: The defendant guilty as an accomplice to speeding.

CASE B: The defendant told a man that the defendant had stored some stereo equipment in a self-storage locker. He gave the man a key and asked the man to pick up the equipment and deliver it to the defendant's house. The man complied, and removed the equipment from the locker, using the key. In fact, the equipment belonged to the defendant's neighbor, whose locker key the defendant had found in the driveway. Held: The defendant guilty as an accomplice to burglary.

CASE C: A city council member accepted a bribe from the defendant in exchange for his vote on the defendant's application for a zoning variance. A statute prohibits the taking of bribes by public officials. Held: The defendant not guilty as an accomplice to the city council member's violation of the bribery statute.

CASE D: The defendant, an innkeeper, sometimes let his rooms to prostitutes, whom he knew to be using the rooms to ply their trade. He charged the prostitutes the same price as other guests at his inn. Held: The defendant not guilty as an accomplice to prostitution.

A plastic surgeon agreed to remove the fingerprints from the hands of "Fingers" Malloy, whom the surgeon knew to be a safecracker. The surgeon charged his usual hourly rate for the operation. Afterward, Malloy burglarized a bank safe and was convicted on burglary.

Charged with burglary, the surgeon should be

A: convicted on the authority of Case A.
B: convicted on the authority of Case B.
C: acquitted on the authority of Case C.
D: acquitted on the authority of Case D.

The explanation for the answer is:

The correct answer is A. Case A illustrates the rule that a defendant is guilty as an accomplice if he provides an individual with aid in committing an offense and the assistance could not be for a legitimate purpose. In this case the surgeon is removing the fingerprints from a known safecracker. Therefore, the surgeon has given substantial aid to the burglary and the surgeon can be convicted on the authority of case A.

Case B illustrates the rule that a defendant who provides substantial encouragement or assistance to an unwitting third-person in the commission of a crime will be liable as an accomplice to the crime. The safecracker is not an unwitting third person, so case B is not the proper authority. Case C presents an instance where the person being charged as an accomplice is not the person the statute intended to penalize. The surgeon aided the safecracker's burglarizing, and is the type of person the statute meant to cover. Thus, case C is not a proper source of authority. Case D illustrates the rule that a defendant would not be guilty as an accomplice for providing a means for an offense to occur when there is a legitimate purpose for providing the good or service. There was not a legitimate reason for the surgeon to remove the safecracker's fingerprints, so case D is not the best source of authority.

Question 270 - Criminal Law - Inchoate Crimes (7/23/2016)

The question was:

Two bullies hated a bartender and agreed to start a fight with the bartender and, if the opportunity arose, to kill him.

The two bullies met the bartender in the street outside a bar and began to push him around. Three men who also hated the bartender stopped to watch. One of the men threw one of the bullies a knife. A second man told the bully, "Kill him." The third man, who made no move and said nothing, hoped that the bully would kill the bartender with the knife. One bully held the bartender while the other bully stabbed and killed him.

On a charge of murdering the bartender, the third man who made no move and said nothing is

A: not guilty, because mere presence, coupled with silent approval and intent, is not sufficient.
B: not guilty, because he did not tell the bully ahead of time that he hoped the bully would murder the bartender.
C: guilty, because he had a duty to stop the killing and made no attempt to do so.
D: guilty, because he was present and approved of what occurred.

The explanation for the answer is:

The correct answer is A. Mere presence, even if accompanied by silent approval and intent, is insufficient actus reus to make a person criminally responsible for the actions of another. The man's mere presence, even if he had the requisite intent, will not make him accountable, and he should be found not guilty. Answer A is correct.

Answer C is incorrect because there is no affirmative duty to save the life of another, except in rare, usually familial, relationships; mere failure to stop a murder does not make one accountable for the actions of the murderer. Answer D is incorrect; mere presence and approval lack the sufficient actus reus requirement for criminal liability for the actions of another. There must be some verbal encouragement made or aid given. Answer B is incorrect; while informing the actor beforehand that you approve of his actions may, in some rare circumstances, be sufficient to act as "encouragement," it is not the only way for the man to be found accountable for the bully's actions.

Question 497 - Criminal Law - Inchoate Crimes (7/23/2016)

The question was:

A statute in a jurisdiction makes it a crime to sell ammunition to a minor (defined as a person under the age of eighteen). The courts have interpreted this statute as creating a strict liability offense that does not require knowledge of the age of the purchaser and as creating vicarious liability. A minor, who was sixteen years old, but looked four or five years older, entered a store and asked a clerk for a box of .22 caliber shells. The store owner had instructed her employees not to sell ammunition to minors. The clerk asked the minor his age. The minor said he was twenty. The clerk then placed a box of shells on the counter and asked, "Anything else?" The minor said that was all he wanted but then discovered he did not have enough money to pay for the shells, so the clerk put the box back onto the shelf.

If the owner of the store is charged with attempting to violate the statute, her best argument would be that

A: it was impossible for the sale to have occurred.
B: she had strictly instructed her employees not to sell ammunition to minors.
C: the minor lied about his age.
D: the clerk did not have the mental state needed for attempt.

The explanation for the answer is:

The correct answer is D. To be convicted of attempt, a person must have the intent that the crime be committed, and take a substantial step toward the commission of the offense. In this case, the clerk did not have the intent to sell ammunition to minors, and the store owner, as his accessory, should be found not guilty of attempting to sell ammunition to minors.

Answer A is incorrect because it was not, in fact, impossible for the offense to occur and only legal impossibility is a defense to an attempt charge. Although the sale of the ammunition was not completed, that is insufficient for a showing of impossibility, and factual impossibility is not a defense to an attempt charge.

Answer B is incorrect because, even though she instructed her employees not to sell ammunition to minors, the crime is one of strict liability. For strict liability crimes, it does not matter what the store owner's, or the clerk's as her agent, state of mind was. If they sold ammunition to a minor, they would be guilty of the offense. However, for a charge of attempt, there must exist the intent to commit the offense.

Answer C is incorrect because, once again, the crime is one of strict liability. The minor's lie about his age, the clerk's belief of his age, or whether that belief was reasonable, are all irrelevant for strict liability offenses. The store owner's best argument for acquittal would be that, since the clerk had no intent to commit the crime, there can be no proper attempt charge.

Question 1589 - Criminal Law - Inchoate Crimes (7/23/2016)

The question was:

A state statute provides as follows: "The maintenance of any ongoing enterprise in the nature of a betting parlor or bookmaking organization is a felony."

A prosecutor has evidence that a woman has been renting an office to a man, that the man has been using the office as a betting parlor within the meaning of the statute, and that the woman is aware of this use.

Which of the following additional pieces of evidence would be most useful to the prosecutor's effort to convict the woman as an accomplice to the man's violation of the statute?

A: The woman was previously convicted of running a betting parlor herself on the same premises.
B: The woman charges the man considerably more in rent than she charged the preceding tenant, who used the office for legitimate activities.
C: The woman has personally placed bets with the man at the office location.
D: The man has paid the woman the rent in bills that are traceable as the proceeds of gambling activity.

The explanation for the answer is:

A is incorrect. The woman's prior conviction would not necessarily show that she has a personal stake in the continuing success of the man's criminal venture (and thus an intent to aid in that venture).

B is correct. Showing that the woman benefits from the gambling would indicate her personal stake in the continuing success of the man's criminal venture (and thus her intent to aid in that venture).

C is incorrect. Showing that the woman has placed bets would confirm that she knows that the premises are being used for gambling. However, it would not necessarily show that she has a personal stake in the continuing success of the man's criminal venture (and thus an intent to aid in that venture).

D is incorrect. The source of the rent payments, assuming that the rent is not above the market price for the premises, would not necessarily show that the woman has a personal stake in the continuing success of the man's criminal venture (and thus an intent to aid in that venture).

Question 593 - Criminal Law - Inchoate Crimes (7/23/2016)

The question was:

A jurisdiction has the following decisional law on questions of principal and accomplice liability:

CASE A: The defendant, a hardware store owner, sold several customers an item known as "SuperTrucker," which detects police radar and enables speeders to avoid detection. When one of the devices broke down and the speeder was arrested, he confessed that he often sped, secure in the knowledge that his "SuperTrucker" would warn him of police radar in the vicinity. Held: The defendant guilty as an accomplice to speeding.

CASE B: The defendant told a man that the defendant had stored some stereo equipment in a self-storage locker. He gave the man a key and asked the man to pick up the equipment and deliver it to the defendant's house. The man complied, and removed the equipment from the locker, using the key. In fact, the equipment belonged to the defendant's neighbor, whose locker key the defendant had found in the driveway. Held: The defendant guilty as an accomplice to burglary.

CASE C: A city council member accepted a bribe from the defendant in exchange for his vote on the defendant's application for a zoning variance. A statute prohibits the taking of bribes by public officials. Held: The defendant not guilty as an accomplice to the city council member's violation of the bribery statute.

CASE D: The defendant, an innkeeper, sometimes let his rooms to prostitutes, whom he knew to be using the rooms to ply their trade. He charged the prostitutes the same price as other guests at his inn. Held: The defendant not guilty as an accomplice to prostitution.

A college student purchased narcotics from a dealer whom he believed to be a "street person" but who was in fact an undercover police agent. The student has been charged as an accomplice to the sale of narcotics.

He should be

A: convicted on the authority of Case A.
B: convicted on the authority of Case B.
C: acquitted on the authority of Case C.
D: acquitted on the authority of Case D.

The explanation for the answer is:

The correct answer is C. Case C presents an instance where the person being charged as an accomplice is not the person the statute intended to penalize. If a statue defines a crime that necessarily involves more than one person and only provides for liability for one person, it is presumed that the legislative intent was to immunize the other person from liability as an accomplice. In case C, the statute prohibits the *taking* of bribes by a public official. Since the defendant was only a private person giving a bribe, he would not be guilty as an accomplice under the statute. In the present case, the college student is purchasing narcotics, but is being charged as an accomplice to the *sale* of narcotics. Therefore, the college student is not the person that the statute intends to target, and should be acquitted of the accomplice charge based on the authority of case C.

Case A illustrates the rule that a defendant is guilty as an accomplice if he provides an individual with the means to commit an offense and the assistance could not be for a legitimate purpose. The college student did not assist in the sale of narcotics, so case A is not the proper authority. Case B illustrates the rule that a defendant who provides substantial encouragement or assistance to an unwitting third-person in the commission of a crime will be liable as an accomplice to the crime. The student did not sell narcotics through a third-person, so case B is not the proper authority. Case D illustrates the rule that a defendant would not be guilty as an accomplice for providing a means for an offense to occur when there is a legitimate purpose for providing the good or service. The college student did not assist in the sale of narcotics, and had no legitimate purpose for buying narcotics off the street, so case D is not the proper authority.

Question 1354 - Criminal Law - Inchoate Crimes (2/13/2017)

The question was:

A drug dealer agreed with another individual to purchase heroin from the individual in order to sell it on a city street corner. Unbeknownst to the drug dealer, the other individual was an undercover police officer whose only purpose was to arrest distributors of drugs. The drug dealer made a down payment for the heroin and agreed to pay the remainder after he sold it on the street. As soon as the undercover officer handed over the heroin, other officers moved in and arrested the dealer.

The jurisdiction follows the common law approach to conspiracy.

Could the dealer properly be convicted of conspiring to distribute drugs?

A: No, because there was no overt act.
B: No, because there was no plurality of agreement.
C: Yes, because neither an overt act nor plurality of agreement is required at common law.
D: Yes, because the dealer believed all the elements of conspiracy were present and cannot take advantage of a mistake of fact or law.

The explanation for the answer is:

Answer B is correct. The dealer cannot be convicted of conspiring to distribute drugs. The common law requires plurality of agreement and does not criminalize "unilateral" conspiracy where only one person actually agreed to commit the crime and the other only feigned agreement. Here, the drug dealer agreed to buy and distribute the heroin, but the individual--an undercover police officer--merely feigned an intent to be a part of the crime as part of his undercover operation. Thus, Answer B is correct.

Answer A is incorrect. The common law does not require an overt act for conspiracy. In any event, payment for the drugs likely would qualify as an overt act in jurisdictions imposing such a requirement.

Answer C is incorrect. Plurality of agreement is required unless the question specifically states that the jurisdiction follows the Modern Penal Code's unilateral approach to conspiracy. Because the undercover officer was feigning his agreement to purchase and sell the heroin, there was no plurality of agreement and thus no conspiracy.

Answer D is incorrect. The dealer could not properly be convicted of conspiracy, because there was no plurality of agreement. Accordingly, the dealer could not properly be convicted for conspiring with an undercover officer.

Question 854 - Criminal Law - Inchoate Crimes (2/15/2017)

The question was:

A man walked into a store that had a check-cashing service and tried to cash a $550 check which was payable to him. The attendant on duty refused to cash the check because the man did not have two forms of identification, which the store's policies required. The man, who had no money except for the check and who needed cash to pay for food and a place to sleep, became agitated. He put his hand into his pocket and growled, "Give me the money or I'll start shooting." The attendant, who knew the man as a neighborhood character, did not believe that he was violent or had a gun. However, because he felt sorry for the man, he handed over the cash. The man left the check on the counter and departed. The attendant picked up the check and found that the man had failed to endorse it.

If the man is guilty of any crime, he is most likely guilty of

A: robbery.
B: attempted robbery.
C: theft by false pretenses.
D: larceny by trick.

The explanation for the answer is:

The correct answer is B. The man attempted to take the property of another, with the intent to permanently deprive the owner of the property, by the threat of force. The man had the intent to commit a robbery, and took substantial steps, by putting his hand in his pocket and threatening the attendant, toward the commission of that robbery. Although it was factually impossible for the man to have committed robbery, because the attendant was not afraid and gave the money to the man out of sympathy rather than because of force or the threat of force, factual impossibility is not a defense to an attempt charge. The man committed attempted robbery.

Answer A is incorrect because the man did not commit a robbery. The attendant did not give the man the money because of force or the threat of force, but rather because he felt sorry for the man. A conviction for robbery requires the money be given due to force or the threat of force, and not because of sympathy.

Answer C is incorrect because, at common law, false pretenses requires the obtaining of the possession and title of property of another through fraud or misrepresentation. Regardless of whether the check was properly endorsed, the man did not obtain the money through fraud, but rather through the sympathy of the attendant. Therefore, he did not commit false pretenses.

Answer D is incorrect for the same reason. At common law, larceny by trick is obtaining the possession, with the owner's consent, of the property of another by fraud or misrepresentation, with the intent to permanently deprive the owner of said property. The attendant did not give away the property because of misrepresentation, but rather sympathy. The man, however, did have the intent to commit a robbery, and took substantial steps towards the commission of the offense, and is most likely guilty of attempted robbery.

Question 593 - Criminal Law - Inchoate Crimes (2/15/2017)

The question was:

A jurisdiction has the following decisional law on questions of principal and accomplice liability:

CASE A: The defendant, a hardware store owner, sold several customers an item known as "SuperTrucker," which detects police radar and enables speeders to avoid detection. When one of the devices broke down and the speeder was arrested, he confessed that he often sped, secure in the knowledge that his "SuperTrucker" would warn him of police radar in the vicinity. Held: The defendant guilty as an accomplice to speeding.

CASE B: The defendant told a man that the defendant had stored some stereo equipment in a self-storage locker. He gave the man a key and asked the man to pick up the equipment and deliver it to the defendant's house. The man complied, and removed the equipment from the locker, using the key. In fact, the equipment belonged to the defendant's neighbor, whose locker key the defendant had found in the driveway. Held: The defendant guilty as an accomplice to burglary.

CASE C: A city council member accepted a bribe from the defendant in exchange for his vote on the defendant's application for a zoning variance. A statute prohibits the taking of bribes by public officials. Held: The defendant not guilty as an accomplice to the city council member's violation of the bribery statute.

CASE D: The defendant, an innkeeper, sometimes let his rooms to prostitutes, whom he knew to be using the rooms to ply their trade. He charged the prostitutes the same price as other guests at his inn. Held: The defendant not guilty as an accomplice to prostitution.

A college student purchased narcotics from a dealer whom he believed to be a "street person" but who was in fact an undercover police agent. The student has been charged as an accomplice to the sale of narcotics.

He should be

A: convicted on the authority of Case A.
B: convicted on the authority of Case B.
C: acquitted on the authority of Case C.
D: acquitted on the authority of Case D.

The explanation for the answer is:

The correct answer is C. Case C presents an instance where the person being charged as an accomplice is not the person the statute intended to penalize. If a statue defines a crime that necessarily involves more than one person and only provides for liability for one person, it is presumed that the legislative intent was to immunize the other person from liability as an accomplice. In case C, the statute prohibits the *taking* of bribes by a public official. Since the defendant was only a private person giving a bribe, he would not be guilty as an accomplice under the statute. In the present case, the college student is purchasing narcotics, but is being charged as an accomplice to the *sale* of narcotics. Therefore, the college student is not the person that the statute intends to target, and should be acquitted of the accomplice charge based on the authority of case C.

Case A illustrates the rule that a defendant is guilty as an accomplice if he provides an individual with the means to commit an offense and the assistance could not be for a legitimate purpose. The college student did not assist in the sale of narcotics, so case A is not the proper authority. Case B illustrates the rule that a defendant who provides substantial encouragement or assistance to an unwitting third-person in the commission of a crime will be liable as an accomplice to the crime. The student did not sell narcotics through a third-person, so case B is not the proper authority. Case D illustrates the rule that a defendant would not be guilty as an accomplice for providing a means for an offense to occur when there is a legitimate purpose for providing the good or service. The college student did not assist in the sale of narcotics, and had no legitimate purpose for buying narcotics off the street, so case D is not the proper authority.

Question 996 - Criminal Law - Other Crimes (7/23/2016)

The question was:

An employee admired his supervisor's wristwatch and frequently talked about how much he wished he had one like it. The supervisor decided to give the employee the watch for his birthday the following week.

On the weekend before the employee's birthday, the employee and supervisor attended a company picnic. The supervisor took his watch off and left it on a blanket when he went off to join in a touch football game. The employee strolled by, saw the watch on the blanket, and decided to steal it. He bent over and picked up the watch. Before he could pocket it, however, his supervisor returned. When he saw the employee holding the watch, he said, "I know how much you like that watch. I was planning to give it to you for your birthday. Go ahead and take it now." The employee kept the watch.

The employee has committed

A: larceny.
B: attempted larceny.
C: embezzlement.
D: no crime.

The explanation for the answer is:

The correct answer is A. The employee took possession of the watch without the owner's consent and with the intent to permanently deprive the owner of it, and is thus guilty of larceny. The fact that the supervisor later gave the employee permission to take the watch does not change the fact that the employee, when he took the watch, did not have the supervisor's permission to take it and had the intent to steal it. Although he only picked the watch up, that was enough asportation because it was part of the carrying away process.

Answer B is incorrect because the employee did not merely attempt to take the watch; he did take it with the intent to steal it. The attempted larceny charge merged into the larceny charge when the employee committed the larceny. Answer C is incorrect because the employee, when he took the watch, did not have the supervisor's permission to take it. Answer D is incorrect because the employee committed the crime of larceny. Although he later had the owner's permission to take the property, when the employee took the watch, he did not have the owner's consent and he intended to deprive the owner of the watch. Therefore, the employee is guilty of larceny.

Question 1360 - Criminal Law - Other Crimes (7/23/2016)

The question was:

A woman told a man to accompany her into her friend's unlocked barn and retrieve an expensive black saddle that she said she had loaned to the friend. The man accompanied the woman to the friend's barn, opened the door, found a black saddle hanging high above the ground, and climbed a ladder to reach it. He handed the saddle down to the woman, and the two left with it together. In fact, the saddle belonged to the friend, and when the friend discovered the saddle missing, she suspected that the woman was the thief. The friend used a screwdriver to break into the woman's house to find the saddle. Upon discovering the saddle on the woman's kitchen table, the friend took it back and called the police.

The jurisdiction follows the common law, except that burglary covers structures in addition to dwellings and the nighttime element has been eliminated.

Which, if any, of these individuals is guilty of burglary?

A: All of them.
B: Only the friend.
C: The man and the woman.
D: Only the woman.

The explanation for the answer is:

Answer D is correct. Only the woman had the requisite criminal intent. Burglary requires unlawful entry with intent to commit a felony (in this case, larceny). Persons taking back their own property or taking property in the honest but mistaken belief that the property belongs to someone who has authorized them to take it lack the intent to steal required for larceny.

Answer A is incorrect. The friend and the man lacked the requisite criminal intent. Burglary requires unlawful entry with intent to commit a felony (in this case, larceny). Persons taking back their own property or taking property in the honest but mistaken belief that the property belongs to someone who has authorized them to take it lack the intent to steal required for larceny.

Answer B is incorrect. The friend lacked the requisite criminal intent. Burglary requires unlawful entry with intent to commit a felony (in this case, larceny). Persons taking property in the honest belief that the property belongs to them lack the intent to steal required for larceny.

Answer C is incorrect. The man lacked the requisite criminal intent. Burglary requires unlawful entry with intent to commit a felony (in this case, larceny). Persons taking property in the honest but mistaken belief that the property belongs to them or to someone who has authorized them to take it lack the intent to steal required for larceny.

Question 883 - Criminal Law - Other Crimes (7/23/2016)

The question was:

The owner of a house told his neighbor that he was going away for two weeks and asked the neighbor to keep an eye on his house. The neighbor agreed. The owner gave the neighbor a key to use to check on the house.

The neighbor decided to have a party in the owner's house. He invited a number of friends. One friend, a pickpocket, went into the owner's bedroom, took some of the owner's rings, and put them in his pocket.

Which of the following is true?

A: The neighbor and the pickpocket are guilty of burglary.
B: The neighbor is guilty of burglary and the pickpocket is guilty of larceny.
C: The neighbor is guilty of trespass and the pickpocket is guilty of larceny.
D: The pickpocket is guilty of larceny and the neighbor is not guilty of any crime.

The explanation for the answer is:

The correct answer is D. The neighbor is not criminally responsible for the pickpocket's theft, and the neighbor had permission to be in the residence. The neighbor is not guilty of any crime. The pickpocket, however, took the owner's property, without the owner's consent, and put them in his pocket, and is thus guilty of larceny.

Answer A is incorrect because neither the neighbor, nor the pickpocket, committed a burglary. At common law, burglary is defined as the breaking and entering into a dwelling with the intent to commit a felony therein. The neighbor had the owner's permission to be in the residence, and there is no evidence that the neighbor had the intent to commit a felony or theft in the residence. The neighbor is not guilty of burglary. Likewise, the pickpocket had permission to be in the residence and, since he was invited into the dwelling, there is no evidence that the pickpocket broke into the house. There is also no evidence that the pickpocket entered the party with the intent to commit a felony or a theft.

Answer B is incorrect because the neighbor did not commit a burglary and is not criminally responsible for the pickpocket's actions, because he did not have the intent that the larceny occur, and he did not knowingly aid and abet the pickpocket in the commission of the crime. However, the pickpocket did take, and carry away, the owner's rings, with the intent to deprive the owner of them, and is thus guilty of larceny.

Answer C is incorrect because the neighbor had permission to be in the residence by its owner. Trespass does not appear in the area of criminal law as a crime on its own, but as an element of other crimes, i.e. if a taking must be by trespass, then it must occur without the victim's consent. However, trespass is only a prima facie action by itself in torts. It is true that the neighbor likely committed that tort because having a party was likely outside the scope of the owner's consent. However, since trespass is generally a tort and not a crime, the neighbor committed no crime. The pickpocket is not guilty of trespass either. The pickpocket is guilty of larceny, but the neighbor committed no crime.

Question 172 - Criminal Law - Other Crimes (7/23/2016)

The question was:

In which of the following situations is the defendant most likely to be guilty of larceny?

A: The defendant took a woman's television set, with the intention of returning it the next day.
B: The defendant went into a man's house and took $100 in the belief that the man had damaged the defendant's car to that amount.
C: Mistakenly believing that larceny does not include the taking of a dog, the defendant took his neighbor's dog and sold it.
D: Unreasonably mistaking a man's car for his own, the defendant got into the man's car in a parking lot and drove it home.

The explanation for the answer is:

The correct answer is C. Larceny, at common law, is the taking of another's property without the owner's consent with the intent to permanently deprive the owner of that property. The defendant in answer C took the neighbor's dog with the intent to permanently deprive ownership. Mistake of law is not a defense to larceny, so the defendant will be found guilty.

Answer A is incorrect. Larceny is a specific intent crime. If the defendant did not have the intent to permanently deprive the owner of the property, the defendant cannot be found guilty of larceny. Answer B is incorrect. If the defendant honestly believes that he is entitled to the money or property of another for the payment of a debt, then the defendant will not have the intent to take the property of another. The defendant in answer B believed he had a valid claim to the property, and thus lacked the requisite intent to commit larceny. Answer D is incorrect. Larceny is a specific intent crime. Therefore, the defendant's mistake of fact about the ownership of the car would preclude a conviction for larceny as the defendant did not have the intent to take the property of another.

Question 1296 - Criminal Law - Other Crimes (7/23/2016)

The question was:

A defendant was charged with assault and battery in a jurisdiction that followed the "retreat" doctrine, and he pleaded self-defense. At his trial, the evidence established the following: A man and his wife were enjoying a drink at a tavern when the defendant entered and stood near the door. The wife whispered to her husband that the defendant was the man who had insulted her on the street the day before. The husband approached the defendant and said, "Get out of here, or I'll break your nose." The defendant said, "Don't come any closer, or I'll hurt you." When the husband raised his fists menacingly, the defendant pulled a can of pepper spray from his pocket, aimed it at the husband's face, and sprayed. The husband fell to the floor, writhing in pain.

Should the defendant be convicted?

A: No, because he had no obligation to retreat before resorting to nondeadly force.
B: No, because there is no obligation to retreat when one is in an occupied structure.
C: Yes, because he failed to retreat even though there was an opportunity available.
D: Yes, because the husband did not threaten to use deadly force against him.

The explanation for the answer is:

Answer A is correct. The majority rule is that there is no duty to retreat prior to using deadly force. The non-aggressor may use deadly force in self-defense even if the use of deadly force could be avoided by retreating. However, the question states that the jurisdiction follows the "retreat" rule. In such a jurisdiction, a non-aggressor may use deadly force only after making a proper retreat. No retreat is necessary if it cannot be made in complete safety. Additionally, there is no obligation to retreat unless the defender intends to use deadly force. Here, the accused used pepper spray on the victim--a nondeadly force--and therefore there was no need to retreat.

Answer B is incorrect. This answer correctly states that the defendant should not be convicted, but it misstates the legal basis for this conclusion. The reason the defendant was not required to retreat was because he used nondeadly force and not because he was in an occupied structure.

Answer C is incorrect. As explained above, even where safe retreat is possible, it is not required before using nondeadly force in self-defense.

Answer D is incorrect. A response of nondeadly force is justified where the defender reasonably believes the other is about to inflict unlawful bodily harm, which need not be deadly harm.

Question 1465 - Criminal Law - Other Crimes (7/23/2016)

The question was:

A man asked his girlfriend to lend him something he could use to break into his neighbor's padlocked storage shed in order to steal a lawn mower. She handed him a crowbar. He took the crowbar but then found a bolt cutter that the neighbor had left outside the shed. Using the bolt cutter, he cut the padlock on the shed and took the mower, which he then used to mow his girlfriend's lawn. She was surprised and pleased by this gesture.

Burglary in the jurisdiction applies to any structure or building, and there is no nighttime element.

The girlfriend has been charged as an accomplice to burglary and larceny.

Of which crimes, if any, is she guilty?

A: Burglary and larceny.
B: Burglary, but not larceny, because she intended to assist only in the breaking.
C: Larceny, but not burglary, because she provided no actual assistance to the breaking but received a benefit from the larceny.
D: Neither burglary nor larceny, because she provided no actual assistance.

The explanation for the answer is:

Answer A is correct. To be guilty as an accomplice, the alleged accomplice must give aid, counsel, or encouragement to the principal with the intent to encourage the crime. Here, the girlfriend is guilty as an accomplice to both burglary and larceny because she provided aid to the man with the intent of helping him not only to break into the shed but also to steal the mower (the object of the breaking); the fact that the man ultimately used an alternative means to accomplish his crimes does not eliminate the girlfriend's accomplice liability. Thus, Answer A is correct, and Answers B, C, and D are incorrect.

Question 51 - Criminal Law - Other Crimes (2/15/2017)

The question was:

A homeowner met a man, who was known to him to be a burglar, in a bar. The homeowner told the man that he needed money. He promised to pay the man $500 if the man would go to the homeowner's house the following night and take some silverware. The homeowner explained to the man that, although the silverware was legally his, his wife would object to his selling it.

The homeowner pointed out his home, one of a group of similar tract houses. He drew a floor plan of the house that showed the location of the silverware. The homeowner said that his wife usually took several sleeping pills before retiring, and that he would make sure that she took them the next night. He promised to leave a window unlocked.

Everything went according to the plan except that the man, deceived by the similarity of the tract houses, went to the wrong house. He found a window unlocked, climbed in and found silver where the homeowner had indicated. He took the silver to the cocktail lounge where the payoff was to take place. At that point police arrested the two men.

If the homeowner and the man are charged with a conspiracy to commit burglary, their best argument for acquittal is that

A: the man was the alter ego of the homeowner.
B: they did not intend to commit burglary.
C: there was no overt act.
D: there was no agreement.

The explanation for the answer is:

The correct answer is B. A charge of conspiracy requires an agreement to commit a crime. Specifically, at least two of the co-conspirators must intend that the crime be committed. Although the man and the homeowner did agree to carry out certain actions, they did not have intent to commit a crime. This lack of intent is their best defense to a conspiracy charge.

Answer A is incorrect. Even if the man were considered an alter ego of the homeowner, that would not be a defense to a charge of conspiracy. Conspiracy punishes the agreement, regardless of who has proposed it. Answer C is incorrect. In some states, conspiracy requires the commission of an overt act, and the actions taken here by the man and homeowner were sufficient. The planning, the homeowner's encouragement and providing of the plans, and the man's breaking into the house, were all overt actions done in the commission of the conspiracy. Answer D is incorrect; although lack of an agreement is a defense to conspiracy, the facts here clearly indicate that there was an agreement.

Question 937 - Criminal Law - Other Crimes (2/15/2017)

The question was:

A defendant was upset because he was going to have to close his liquor store due to competition from a discount store in a new shopping mall nearby. In desperation, he decided to set fire to his store to collect the insurance. While looking through the basement for flammable material, he lit a match to read the label on a can. The match burned his finger and, in a reflex action, he dropped the match. It fell into a barrel and ignited some paper. The defendant could have put out the fire, but instead left the building because he wanted the building destroyed. The fire spread and the store was destroyed by fire. The defendant was eventually arrested and indicted for arson.

The defendant is

A: guilty, because he could have put out the fire before it spread and did not do so because he wanted the building destroyed.
B: guilty, because he was negligent in starting the fire.
C: not guilty, because even if he wanted to burn the building there was no concurrence between his *mens rea* and the act of starting the fire.
D: not guilty, because his starting the fire was the result of a reflex action and not a voluntary act.

The explanation for the answer is:

The correct answer is A. Arson is not a specific intent crime; instead it requires malice on the part of the defendant. To establish malice in an arson case, the prosecution need only show that the defendant recklessly disregarded an obvious or high risk that the burning of the structure would occur. It is important to note that questions on the MBE that are testing on other arson issues (such as malice) will often impliedly follow the modern trend that the structure does not need to be the dwelling of another. Since the answer choices focus on intent, do not get hung up on the fact that the defendant's actions do not fall within the common law definition of arson.

Answer B is incorrect because negligence alone is insufficient proof of malicious burning. However, the defendant's recklessness, combined with the obvious risk of the burning, demonstrates malice. Answer C is incorrect because arson requires only the malicious burning of the building, not the specific intent to burn the building down. Answer D is incorrect because the burning need not be intentional, as long as it is a foreseeable consequence of the defendant's actions. By allowing a minor fire that he started to spread throughout the building with the intent to destroy the building, the defendant maliciously burned the property and is guilty of arson.

Question 729 - Evidence - Hearsay and Circumstances of Its Admissibility (7/22/2016)

The question was:

A man and his friend were charged with burglary of a warehouse. They were tried separately. At the man's trial, the friend testified that he saw the man commit the burglary. While the friend was still subject to recall as a witness, the man calls the friend's cellmate to testify that the friend said, "I broke into the warehouse alone because [the man] was too drunk to help."

The evidence of the friend's statement is

A: admissible as a declaration against penal interest.
B: admissible as a prior inconsistent statement.
C: inadmissible, because it is hearsay not within any exception.
D: inadmissible, because the statement is not clearly corroborated.

The explanation for the answer is:

The correct answer is B. The friend's statement to his cellmate is a prior inconsistent statement to his earlier testimony that he saw the man commit the burglary. Although the cellmate's testimony is hearsay and not admissible for the truth of the matter asserted, it may be used for impeachment purposes. As a foundational matter, the friend must be given an opportunity to explain or deny the allegedly inconsistent statement, but this can occur after the cellmate testifies.

Answer A is incorrect because the statement against interest exception to the hearsay rule only applies when the declarant is unavailable, and here the friend is still available as a witness. Answer C is incorrect because although testimony about a witness's prior inconsistent unsworn statement is hearsay, it can still be used to impeach the witness. Answer D is incorrect because a prior inconsistent statement can be used to impeach even if the statement is not clearly corroborated.

Question 118 - Evidence - Hearsay and Circumstances of Its Admissibility (7/23/2016)

The question was:

A defendant is tried for armed robbery of a bank.

At the request of police, the teller who was robbed prepared a sketch bearing a strong likeness to the defendant, but the teller died in an automobile accident before the defendant was arrested. At trial the prosecution offers the sketch. The sketch is

A: admissible as an identification of a person after perceiving him.
B: admissible as past recollection recorded.
C: inadmissible as hearsay not within any exception.
D: inadmissible as an opinion of the teller.

The explanation for the answer is:

The correct answer is C. The sketch amounts to an out-of-court statement of an unavailable witness and is inadmissible as hearsay not within any exception. The sketch is a statement by the teller that the man depicted committed the robbery, and, since the teller is unavailable to testify, the sketch should be found to be inadmissible.

Answer A is incorrect because the exception to the hearsay rule that allows the introduction of a statement of identification after perceiving the person requires that the declarant be available at the trial and subject to cross-examination. Since the teller is unavailable, the sketch would not meet the requirements of that exception to the hearsay rule. Answer B is incorrect because the past recollection recorded exception to the hearsay rule only applies if the witness is available on the stand to testify as to the sketch. If the witness is unavailable, the prior statement, in this case in the form of a sketch, remains an out-of-court statement that is being offered for the truth of the matter asserted and should be held inadmissible. Answer D is incorrect because it ignores the fact that the statement is hearsay. The sketch is inadmissible hearsay and should not be allowed into evidence.

Question 964 - Evidence - Hearsay and Circumstances of Its Admissibility (7/23/2016)

The question was:

A plaintiff sued a driver for damages for the death of the plaintiff's husband, resulting from an automobile collision. At trial, the driver calls the husband's doctor to testify that the day before his death, the husband, in great pain, said, "It was my own fault; there's nobody to blame but me." The doctor's testimony should be admitted as

A: a statement against interest.
B: a dying declaration.
C: a statement of the husband's then existing state of mind.
D: an excited utterance.

The explanation for the answer is:

The correct answer is A. The husband's statement taking fault for the accident, at the time it was made, tended to subject the husband to civil liability, and would render invalid any claim he had against the driver. A reasonable person in the husband's position would not have made the statement unless he believed it to be true. The statement is admissible under the statement against interest exception to the hearsay rule.

Answer B is incorrect because there is no evidence that the husband made the statement knowing his death was imminent or that the statement concerned the cause or circumstances of his death. Although he was in great pain, there is no indication that the husband knew he was going to die and was making the statement as a dying declaration .

Answer C is incorrect because the husband's statement is being offered to prove he was at fault for the accident, not to prove what was in his mind when he died. In addition, the statement is a statement of memory or belief to prove the fact remembered or believed - that he was at fault. As such, it is specifically excluded from the definition of a statement of then existing mental state and is inadmissible.

Answer D is incorrect because there is no evidence that the husband's statement related to a startling event and was made while he was under the stress of excitement caused by the event or condition. The husband may have been in great pain, but his statement was not an excited utterance because of the accident. The doctor's testimony should be admitted as a statement against interest.

Question 1244 - Evidence - Hearsay and Circumstances of Its Admissibility (7/23/2016)

The question was:

A homeowner sued a plumber for damages resulting from the plumber's allegedly faulty installation of water pipes in her basement, which caused flooding. At trial, the homeowner was prepared to testify that when she first detected the flooding, she turned off the water and called the plumber at his emergency number for help and that the plumber responded, "I'll come by tomorrow and redo the installation for free."

Is the homeowner's testimony regarding the plumber's response admissible?

A: No, because the statement was an offer in compromise.
B: No, because it is hearsay not within any exception.
C: Yes, as a subsequent remedial measure.
D: Yes, as evidence of the plumber's fault.

The explanation for the answer is:

Answer D is correct. This is a party admission, admissible as a hearsay exemption under Rule 801(d)(2)(A). A statement made by a party cannot be excluded as hearsay when offered against him by the opponent. Moreover, the statement is probative. A person who makes a statement like this is likely to think he is at fault, and this is probative evidence that indeed he is at fault. Thus, Answer D is correct, and Answer B is incorrect, because the statement is not hearsay.

Answer A is incorrect. Federal Rule of Evidence 408 protects statements concerning a claim that is disputed as to validity or amount. However, in this case there was no pending dispute at the time the statement was made. The homeowner was simply calling for help and had not complained about the plumber's work or in any other way indicated that there was a dispute between the parties. Accordingly, the statement does not qualify as an offer in compromise.

Answer C is incorrect. This answer correctly states that the statement is admissible, but it misstates the reason why this is so. Federal Rule of Evidence 407 excludes evidence of measures taken that, had they been taken prior to the event that caused the injury, would have made the injury or harm less likely to occur. Here, no "measure" was taken at all. The plaintiff wants to introduce a statement, not any action that would have made the injury less likely to occur. Therefore Rule 407 is inapplicable.

Question 1021 - Evidence - Hearsay and Circumstances of Its Admissibility (7/23/2016)

The question was:

At the defendant's trial for theft, a witness, called by the prosecutor, testified to the following: 1) that from his apartment window, he saw thieves across the street break the window of a jewelry store, take jewelry, and leave in a car, 2) that his wife telephoned police and relayed to them the license number of the thieves' car as the witness looked out the window with binoculars and read it to her, and 3) that he has no present memory of the number, but that immediately afterward he listened to a playback of the police tape recording giving the license number (which belongs to the defendant's car) and verified that she had relayed the number accurately.

Playing the tape recording for the jury would be

A: proper, because it is recorded recollection.
B: proper, because it is a public record or report.
C: improper, because it is hearsay not within any exception.
D: improper, because the witness's wife lacked first-hand knowledge of the license number.

The explanation for the answer is:

The correct answer is A. The witness has testified that he now has insufficient recollection to enable him to testify fully and accurately, but that he once had knowledge of the license plate number. The witness has also testified that the tape recording is a record, which he adopted when the matter was fresh in his memory, in which the witness's knowledge of the license plate number is correctly contained. The tape recording is therefore admissible under the recorded recollection exception to the hearsay rule.

Answer B is incorrect because records of law enforcement personnel are generally not admissible against a criminal defendant. Answer C is incorrect because the statement, although hearsay, is admissible under the prior recollection recorded exception to the hearsay rule. Answer D is incorrect because it is the witness who had first-hand knowledge of the license plate number, and he adopted his wife's statement immediately after it was made. The witness's first-hand knowledge, combined with his adoption of his wife's statements into the tape, make the tape admissible as a prior recollection recorded.

Question 256 - Evidence - Hearsay and Circumstances of Its Admissibility (7/23/2016)

The question was:

The driver of a car and three passengers were injured when their car was struck by a truck owned by Mammoth Corporation and driven by a Mammoth employee. A second Mammoth employee was riding as a passenger in the truck. The issues in this case include the negligence of the Mammoth employee in driving too fast and failing to wear glasses, and the negligence of the driver of the car in failing to yield the right of way.

The car driver's counsel seeks to introduce the written statement from the Mammoth truck's passenger that the Mammoth employee had left his glasses (required by his operator's license) at the truck stop when they had left five minutes before the accident. The judge should rule the statement admissible only if

A: The driver of the car first proves that the truck passenger is an agent of Mammoth and that the statement concerned a matter within the scope of his agency.
B: The driver of the car produces independent evidence that the Mammoth employee who was driving was not wearing corrective lenses at the time of the accident.
C: The truck passenger is shown to be beyond the process of the court and unavailable to testify.
D: the statement was under oath in affidavit form.

The explanation for the answer is:

The correct answer is A. The passenger's written statement is an out-of-court statement that is being offered for the truth of the matter asserted, and would typically be considered inadmissible as hearsay. However, if the passenger's statement is an admission by a party opponent, it would be admissible as nonhearsay under the federal rules. Here, the passenger's statement would be admissible as a vicarious admission by a party opponent if the passenger is an agent of Mammoth and the statement concerned a matter within the scope of the agency.

Answer B is incorrect because, even if there was independent evidence that the Mammoth employee was not wearing corrective lenses at the time of the accident, that fact would not change the determination that the passenger's written statement is inadmissible hearsay. Hearsay, even if corroborated, is still hearsay. Answer C is incorrect because the passenger's availability to testify is irrelevant to the determination of whether the written statement is inadmissible hearsay. Even if the passenger is unavailable, the statement would still be inadmissible. Answer D is incorrect because affidavits are insufficient to be considered admissible as prior testimony. Unless the driver of the car can show that the passenger's written hearsay statement amounted to an admission by a party opponent, the statement should be held inadmissible.

Question 660 - Evidence - Hearsay and Circumstances of Its Admissibility (7/23/2016)

The question was:

A corporation sued a defendant for ten fuel oil deliveries not paid for. The defendant denied that the deliveries were made. At trial, the corporation calls its office manager to testify that the corporation's employees always record each delivery in duplicate, give one copy to the customer, and place the other copy in the corporation's files; that he (the office manager) is the custodian of those files; and that his examination of the files before coming to court revealed that the ten deliveries were made.

The office manager's testimony that the invoices show ten deliveries is

A: admissible, because it is based on regularly kept business records.
B: admissible, because the office manager has first-hand knowledge of the contents of the records.
C: inadmissible, because the records must be produced in order to prove their contents.
D: inadmissible, because the records are self-serving.

The explanation for the answer is:

The correct answer is C. The business records themselves would be admissible under the business records exception to the hearsay rule; however, the office manager's testimony regarding the content of the records would be excluded under the best evidence rule. Oral testimony regarding a writing's contents is only permitted after it has been shown that the original document is unavailable.

Answer A is incorrect because, although the records themselves may be admissible, the office manager's testimony regarding the content of the records is inadmissible. Answer B is incorrect because the office manager's firsthand knowledge of the records may provide the authentication and identification of the records themselves, but his testimony about what is contained in the records must be shown by the original document if available. Answer D is incorrect because the self-serving nature of the records and the office manager's testimony is irrelevant in determining whether the testimony is admissible.

Question 964 - Evidence - Hearsay and Circumstances of Its Admissibility (2/15/2017)

The question was:

A plaintiff sued a driver for damages for the death of the plaintiff's husband, resulting from an automobile collision. At trial, the driver calls the husband's doctor to testify that the day before his death, the husband, in great pain, said, "It was my own fault; there's nobody to blame but me." The doctor's testimony should be admitted as

A: a statement against interest.
B: a dying declaration.
C: a statement of the husband's then existing state of mind.
D: an excited utterance.

The explanation for the answer is:

The correct answer is A. The husband's statement taking fault for the accident, at the time it was made, tended to subject the husband to civil liability, and would render invalid any claim he had against the driver. A reasonable person in the husband's position would not have made the statement unless he believed it to be true. The statement is admissible under the statement against interest exception to the hearsay rule.

Answer B is incorrect because there is no evidence that the husband made the statement knowing his death was imminent or that the statement concerned the cause or circumstances of his death. Although he was in great pain, there is no indication that the husband knew he was going to die and was making the statement as a dying declaration .

Answer C is incorrect because the husband's statement is being offered to prove he was at fault for the accident, not to prove what was in his mind when he died. In addition, the statement is a statement of memory or belief to prove the fact remembered or believed - that he was at fault. As such, it is specifically excluded from the definition of a statement of then existing mental state and is inadmissible.

Answer D is incorrect because there is no evidence that the husband's statement related to a startling event and was made while he was under the stress of excitement caused by the event or condition. The husband may have been in great pain, but his statement was not an excited utterance because of the accident. The doctor's testimony should be admitted as a statement against interest.

Question 256 - Evidence - Hearsay and Circumstances of Its Admissibility (2/15/2017)

The question was:

The driver of a car and three passengers were injured when their car was struck by a truck owned by Mammoth Corporation and driven by a Mammoth employee. A second Mammoth employee was riding as a passenger in the truck. The issues in this case include the negligence of the Mammoth employee in driving too fast and failing to wear glasses, and the negligence of the driver of the car in failing to yield the right of way.

The car driver's counsel seeks to introduce the written statement from the Mammoth truck's passenger that the Mammoth employee had left his glasses (required by his operator's license) at the truck stop when they had left five minutes before the accident. The judge should rule the statement admissible only if

A: The driver of the car first proves that the truck passenger is an agent of Mammoth and that the statement concerned a matter within the scope of his agency.
B: The driver of the car produces independent evidence that the Mammoth employee who was driving was not wearing corrective lenses at the time of the accident.
C: The truck passenger is shown to be beyond the process of the court and unavailable to testify.
D: the statement was under oath in affidavit form.

The explanation for the answer is:

The correct answer is A. The passenger's written statement is an out-of-court statement that is being offered for the truth of the matter asserted, and would typically be considered inadmissible as hearsay. However, if the passenger's statement is an admission by a party opponent, it would be admissible as nonhearsay under the federal rules. Here, the passenger's statement would be admissible as a vicarious admission by a party opponent if the passenger is an agent of Mammoth and the statement concerned a matter within the scope of the agency.

Answer B is incorrect because, even if there was independent evidence that the Mammoth employee was not wearing corrective lenses at the time of the accident, that fact would not change the determination that the passenger's written statement is inadmissible hearsay. Hearsay, even if corroborated, is still hearsay. Answer C is incorrect because the passenger's availability to testify is irrelevant to the determination of whether the written statement is inadmissible hearsay. Even if the passenger is unavailable, the statement would still be inadmissible. Answer D is incorrect because affidavits are insufficient to be considered admissible as prior testimony. Unless the driver of the car can show that the passenger's written hearsay statement amounted to an admission by a party opponent, the statement should be held inadmissible.

Question 282 - Evidence - Hearsay and Circumstances of Its Admissibility (2/15/2017)

The question was:

A plaintiff sues a department store for personal injuries, alleging that while shopping she was knocked to the floor by a merchandise cart being pushed by a stock clerk and her back was injured as a result.

The stock clerk testified that the plaintiff fell near the cart but was not struck by it. Thirty minutes after the plaintiff's fall, the stock clerk, in accordance with regular practice at the department store, had filled out a printed form, "Employee's Report of Accident," in which he stated that the plaintiff had been leaning over to spank her young child and in so doing had fallen near his cart. Counsel for the department store offers in evidence the report, which had been given to him by the stock clerk's supervisor.

The judge should rule the report offered by the department store

A: admissible as *res gestae*.
B: admissible as a business record.
C: inadmissible, because it is hearsay, not within any exception.
D: inadmissible, because the stock clerk is available as a witness.

The explanation for the answer is:

The correct answer is C. The stock clerk's written report is an out-of-court statement that is being offered for the truth of the matter asserted - that the plaintiff fell and was not hit by the cart. Thus, it is hearsay. The stock clerk's written report does not fall within any of the exceptions to the hearsay rule and is inadmissible.

Answer A is incorrect because the report is being offered for the truth of the matter asserted - that the plaintiff fell on her own accord - and not to show any state of mind of the stock clerk. Answer B is incorrect because the accident report is the type of business record that the department store keeps in the regular course of business, but quotes the stock clerk's own statement about the accident. A business record that quotes parties or witnesses is generally not within the exception because the person being quoted in the report is under no duty to accurately convey information about the incident. Answer D is incorrect because the stock clerk's availability as a witness is not the best choice for the rationale of the judge when ruling on the admissibility of the report. Further, whether the stock clerk is available or not, the report is still hearsay and inadmissible.

Question 752 - Evidence - Hearsay and Circumstances of Its Admissibility (2/15/2017)

The question was:

In the prosecution of a defendant for murdering a victim, the defendant testified that the killing had occurred in self-defense when the victim tried to shoot him. In rebuttal, the prosecution seeks to call a witness, the victim's father, to testify that the day before the killing, the victim told her father that she loved the defendant so much she could never hurt him.

The witness's testimony is

A: admissible within the hearsay exception for statements of the declarant's then existing state of mind.
B: admissible, because the victim is unavailable as a witness.
C: inadmissible as hearsay not within any exception.
D: inadmissible, because the victim's character is not at issue.

The explanation for the answer is:

The correct answer is A. The victim's statement to her father that she loved the defendant and could never hurt him is admissible as a statement of a then-existing mental or emotional condition. The witness's testimony is being introduced to show the victim's existing emotional and mental state when she made the statement, and is admissible as an exception to the hearsay rule.

Answer B is incorrect because, for the purposes of the then-existing mental or emotional condition exception to the hearsay rule, it is irrelevant whether the declarant is available or not. Answer C is incorrect because, although the statement may be hearsay, it is admissible under the then-existing emotional state exception to the hearsay rule. Answer D is incorrect because the victim's character, as far as the self-defense claim goes, is at issue in the case. In addition, the statement itself goes to the victim's state of mind when the statement was made and not to her general character for violence or non-violence.

Question 1062 - Evidence - Hearsay and Circumstances of Its Admissibility (2/15/2017)

The question was:

In a jurisdiction without a Dead Man's Statute, a deceased man's estate sued the defendant claiming that the defendant had borrowed $10,000 from the deceased man, which had not been repaid as of the man's death. The man was run over by a truck. At the accident scene, while dying from massive injuries, the man told a police officer to "make sure my estate collects the $10,000 I loaned to the defendant."

The police officer's testimony about the deceased man's statement is

A: inadmissible, because it is more unfairly prejudicial than probative.
B: inadmissible, because it is hearsay not within any exception.
C: admissible as an excited utterance.
D: admissible as a statement under belief of impending death.

The explanation for the answer is:

The correct answer is B. The deceased man's statement to the police officer is an out-of-court statement that is being offered for the truth of the matter asserted - that the deceased man loaned the defendant $10,000. As such, it is hearsay, and it is inadmissible because it does not meet the requirements for any exception to the hearsay rule.

Answer A is incorrect because the statement is inadmissible as hearsay, not because the statement is not probative . Answer C is incorrect because the deceased man's statement was about the loan and not related to a startling event or condition, so it is not an excited utterance. Answer D is incorrect because the deceased man's statement was about the loan and not concerning the cause or circumstances of what the declarant believed to be impending death. As such, it is not a dying declaration. Because the deceased man's statement is hearsay, and it does not meet the requirements of any exception, it is inadmissible.

Question 151 - Evidence - Presentation of Evidence (7/22/2016)

The question was:

Re-direct examination of a witness must be permitted in which of the following circumstances?

A: To reply to any matter raised in cross-examination.
B: Only to reply to significant new matters raised in cross-examination.
C: Only to reiterate the essential elements of the case.
D: Only to supply significant information inadvertently omitted on direct examination.

The explanation for the answer is:

The correct answer is B. Re-direct examination must be permitted only if there were significant new matters raised on cross-examination. Answer A is incorrect because, although the extent of re-direct is in the sound discretion of the court and the court may permit re-direct on some minor matters, the court is only required to permit re-direct on matters that were not discussed on direct. A court may limit re-direct examination at its discretion, but must allow it to reply to new and significant matters raised on cross-examination. Not every matter raised in cross-examination must be permitted to be questioned about in re-direct, only those that raise significant new issues.

Answer C is incorrect because re-direct examination is not for the reiteration of prior testimony or the essential elements of the crime. Rather, re-direct examination is allowed to address new issues raised during cross-examination. Answer D is incorrect because supplying significant information inadvertently omitted on direct examination is done by re-opening direct examination as opposed to re-direct examination.

Question 1381 - Evidence - Presentation of Evidence (7/23/2016)

The question was:

A plaintiff sued a defendant for injuries allegedly suffered when he slipped and fell on the defendant's business property. At trial, without asking that the defendant's property manager be declared a hostile witness, the plaintiff called him solely to establish that the defendant was the owner of the property where the plaintiff fell. On cross-examination of the manager, the defendant's attorney sought to establish that the defendant had taken reasonable precautions to make the property safe for business invitees.

Should the defendant's cross-examination of the manager be permitted over the plaintiff's objection?

A: No, because cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness.
B: No, because the court has not declared the manager hostile.
C: Yes, because the cross-examiner is entitled to explore matters relevant to any issue in the case, including credibility.
D: Yes, because the manager is the agent of a party, as to whom the scope of cross-examination is unlimited.

The explanation for the answer is:

Answer A is correct. This is a correct statement of the scope of cross-examination, as set forth by Rule 611(b) of the Federal Rules of Evidence, in the absence of any permission by the court to inquire into other matters. If a witness is declared hostile, the examining party may be allowed to examine the witness by leading questions. But a declaration that a witness is hostile does not mean that the cross-examination can go beyond the scope of direct examination. The rule governing the scope of cross-examination is the same for hostile and non-hostile witnesses. Thus, Answer B is incorrect.

Under Rule 611(b) of the Federal Rules of Evidence, cross-examination should be limited to the subject matter of the direct examination and matters affecting credibility. Thus, Answer A is correct. Although the court has discretion under this rule to permit inquiry into additional matters, the defendant is not "entitled" to a wider scope of cross-examination. Thus, Answer C is incorrect. Furthermore, there is no such rule permitting cross-examination of unlimited scope of an agent of a party. The scope of cross-examination for all witnesses is controlled by Rule 611(b) of the Federal Rules of Evidence. Thus, Answer D is incorrect.

Question 796 - Evidence - Presentation of Evidence (7/23/2016)

The question was:

In the prosecution of a defendant for forgery, the defense objects to the testimony of a government expert on the ground of inadequate qualifications. The government seeks to introduce a letter from the expert's former criminology professor, stating that the expert is generally acknowledged in his field as well qualified.

On the issue of the expert's qualifications, the letter may be considered by

A: the jury, without regard to the hearsay rule.
B: the judge, without regard to the hearsay rule.
C: neither the judge nor the jury, because it is hearsay not within any exception.
D: both the judge and the jury, because the letter is not offered for a hearsay purpose.

The explanation for the answer is:

The correct answer is B. Preliminary questions concerning the qualification of a person to be a witness shall be determined by the court. In making its determination, the court is not bound by the rules of evidence except those with respect to privileges. The letter, although hearsay, may be considered by the judge in determining whether the witness is qualified as an expert.

Answer A is incorrect because the judge, not the jury, determines the qualifications of a person to be a witness. Answer C is incorrect because the rules of evidence, including the rule against hearsay, do not apply to the judge's making the initial determination whether the witness is qualified to testify as an expert. Answer D is incorrect because the determination is to be made by the judge only, and because the letter should be used outside the presence of the jury.

Question 672 - Evidence - Presentation of Evidence (7/23/2016)

The question was:

During litigation on a federal claim, a plaintiff had the burden of proving that a defendant received a notice. The plaintiff relied on the presumption of receipt by offering evidence that the notice was addressed to the defendant, properly stamped, and mailed. The defendant, on the other hand, testified that she never received the notice.

Which of the following is correct?

A: The jury must find that the notice was received.
B: The jury may find that the notice was received.
C: The burden shifts to the defendant to persuade the jury of nonreceipt.
D: The jury must find that the notice was not received, because the presumption has been rebutted and there is uncontradicted evidence of nonreceipt.

The explanation for the answer is:

The correct answer is B. The jury may, but is not required to, find that the notice was received. The plaintiff's presumption under the mail box rule, that a properly addressed, stamped and mailed notice reached its destination, imposes on the party against whom it is directed (here, the defendant) the burden of presenting evidence to rebut or meet the presumption. In response to the presumption under the mail box rule, the defendant testified that she never received the notice. The jury is thus empowered to judge the credibility of both sides and can, but is not required to, find that the notice was received.

Answer A is incorrect because the plaintiff's presumption that notice was received was rebutted by the defendant's testimony that she did not receive it. The jury is not required to find that the notice was received. Answer C is incorrect because the burden of proof does not shift to the defendant; it remains throughout the trial upon the party on whom it was originally cast (the plaintiff in this case). The defendant does not need to persuade the jury of non-receipt. Answer D is incorrect because the rebuttal of a presumption does not require a finding for the rebutting party. In addition, the evidence that the notice was not received was contradicted by evidence of the properly mailed notice. The jury, as fact finder, may find the notice was received, but is not required to.

Question 1381 - Evidence - Presentation of Evidence (2/15/2017)

The question was:

A plaintiff sued a defendant for injuries allegedly suffered when he slipped and fell on the defendant's business property. At trial, without asking that the defendant's property manager be declared a hostile witness, the plaintiff called him solely to establish that the defendant was the owner of the property where the plaintiff fell. On cross-examination of the manager, the defendant's attorney sought to establish that the defendant had taken reasonable precautions to make the property safe for business invitees.

Should the defendant's cross-examination of the manager be permitted over the plaintiff's objection?

A: No, because cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness.
B: No, because the court has not declared the manager hostile.
C: Yes, because the cross-examiner is entitled to explore matters relevant to any issue in the case, including credibility.
D: Yes, because the manager is the agent of a party, as to whom the scope of cross-examination is unlimited.

The explanation for the answer is:

Answer A is correct. This is a correct statement of the scope of cross-examination, as set forth by Rule 611(b) of the Federal Rules of Evidence, in the absence of any permission by the court to inquire into other matters. If a witness is declared hostile, the examining party may be allowed to examine the witness by leading questions. But a declaration that a witness is hostile does not mean that the cross-examination can go beyond the scope of direct examination. The rule governing the scope of cross-examination is the same for hostile and non-hostile witnesses. Thus, Answer B is incorrect.

Under Rule 611(b) of the Federal Rules of Evidence, cross-examination should be limited to the subject matter of the direct examination and matters affecting credibility. Thus, Answer A is correct. Although the court has discretion under this rule to permit inquiry into additional matters, the defendant is not "entitled" to a wider scope of cross-examination. Thus, Answer C is incorrect. Furthermore, there is no such rule permitting cross-examination of unlimited scope of an agent of a party. The scope of cross-examination for all witnesses is controlled by Rule 611(b) of the Federal Rules of Evidence. Thus, Answer D is incorrect.

Question 1274 - Evidence - Presentation of Evidence (2/15/2017)

The question was:

The defendant, a young doctor, is charged with falsely claiming deductions on her federal income tax return. At trial, a witness testified for the defendant that she has a reputation in the community for complete honesty. After a sidebar conference at which the prosecutor gave the judge a record showing that the defendant's medical school had disciplined her for altering her transcript, the prosecutor proposes to ask the witness on cross-examination: "Have you ever heard that the defendant falsified her medical school transcript?"

Is the prosecutor's question proper?

A: No, because it calls for hearsay not within any exception.
B: No, because its minimal relevance on the issue of income tax fraud is substantially outweighed by the danger of unfair prejudice.
C: Yes, because an affirmative answer will be probative of the defendant's bad character for honesty and, therefore, her guilt.
D: Yes, because an affirmative answer will impeach the witness's credibility.

The explanation for the answer is:

Answer D is correct. The incident can be offered on cross-examination of the character witness, the proper purpose being to show that the witness's assessment of the defendant's character for honesty is not credible. The intent of the question is to test the witness's knowledge of the defendant's reputation on the one hand, and the quality of the community on the other. If the witness hasn't heard about the falsification, he might not be very plugged in to the community and so might be a poor reputation witness. On the other hand, if the witness answers "yes," then the jury might infer that the community in which the defendant has a reputation for complete honesty may be setting the honesty bar pretty low. In either case, the alleged falsification is probative impeachment whether or not it occurred. Note that the courts require that the cross-examiner must have a good faith belief that the event actually occurred before inquiring into the act on cross-examination. In this case, that good faith standard is met by the evidence presented at the sidebar conference that the defendant was disciplined in medical school.

The question does not call for a statement that would be used for its truth. Therefore, it is not hearsay. Likewise, the alleged incident is not offered to prove income tax fraud. Rather, the intent of the question is to test the witness's knowledge of the defendant's reputation on the one hand, and the quality of the community on the other. If the witness hasn't heard about the falsification, he might not be very plugged in to the community and so might be a poor reputation witness. On the other hand, if the witness answers "yes," then the jury might infer that the community in which the defendant has a reputation for complete honesty may be setting the honesty bar pretty low. In either case, the alleged falsification is probative impeachment whether or not it occurred. Thus, answers A and B are incorrect.

Answer C is incorrect. Federal Rule of Evidence 405 prohibits evidence of specific acts indicative of a person's character when that character evidence is offered to prove that a person acted in accordance with the character trait on the occasion in question at trial. Thus, the prosecutor may not introduce the incident involving the medical school transcript for the inference that, because the defendant acted dishonestly on that occasion, she likely acted dishonestly with regard to her tax return.

Question 1413 - Evidence - Presentation of Evidence (2/15/2017)

The question was:

A plaintiff sued a defendant, alleging that she was seriously injured when the defendant ran a red light and struck her while she was walking in a crosswalk. During the defendant's case, a witness testified that the plaintiff had told him that she was "barely touched" by the defendant's car.

On cross-examination, should the court allow the plaintiff to elicit from the witness the fact that he is an adjuster for the defendant's insurance company?

A: No, because testimony about liability insurance is barred by the rules of evidence.
B: No, because the reference to insurance raises a collateral issue.
C: Yes, for both substantive and impeachment purposes.
D: Yes, for impeachment purposes only.

The explanation for the answer is:

Answer D is correct. Although FRE 411 generally bars evidence of liability insurance to prove negligence or wrongful conduct, it contains an exception allowing the use of such evidence to prove bias. The fact that the witness is an adjuster for the defendant's insurance company is a legitimate ground for impeachment for bias. Thus, Answer A is incorrect. Furthermore, the witness's employment by the insurance company is therefore not collateral. Thus, Answer B is incorrect.

Answer C is incorrect. The evidence is not admissible for substantive purposes. FRE 411 bars evidence of liability insurance to prove negligence or wrongful conduct. However, the rule contains an exception allowing the use of such evidence to prove bias. Thus, the fact that the witness is an adjuster for the defendant's insurance company is a legitimate ground for impeachment for bias but not a basis for admission as substantive evidence. Thus, Answer D is correct.

Question 674 - Evidence - Privileges and Other Policy Exclusions (7/22/2016)

The question was:

The plaintiff sued the defendant for damages for physical injuries allegedly caused by the defendant's violation of the federal civil rights law. The incident occurred wholly within a particular state but the case was tried in federal court. The state code says, "The common-law privileges are preserved intact in this state."

At trial, the defendant called the plaintiff's physician to testify to confidential statements made to him by the plaintiff in furtherance of medical treatment for the injuries allegedly caused by the defendant. The plaintiff objects, claiming a physician-patient privilege.

The court should apply

A: state law and recognize the claim of privilege.
B: federal law and recognize the claim of privilege.
C: state law and reject the claim of privilege.
D: federal law and reject the claim of privilege.

The explanation for the answer is:

The correct answer is D. As a general rule, whether a privilege applies in federal court is governed by the federal common law as it has been interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which state law supplies the rule of decision, whether a privilege applies shall be determined in accordance with state law. Since this case arose out of a violation of the federal civil rights law, the court should apply the federal common law in determining the propriety of the physician-client privilege. At common law, the federal courts do not recognize a physician-client privilege, so the claim of privilege should be rejected.

Answer A is incorrect because the suit is in federal court based on a violation of a federal civil rights law, so the federal common law is the applicable standard. Answer B is incorrect because there is no physician-client privilege recognized in federal common law. Answer C is incorrect because the suit is in federal court based on a violation of a federal civil rights law, so the federal common law is the applicable standard.

Question 954 - Evidence - Privileges and Other Policy Exclusions (2/15/2017)

The question was:

A defendant was charged with the sale of narcotics. The federal prosecutor arranged with the defendant's wife for her to testify against her husband in exchange for leniency in her case. At trial, the prosecution calls the wife, who had been granted immunity from prosecution, to testify, among other things, that she saw her husband sell an ounce of heroin.

Which of the following statements is most clearly correct in the federal courts?

A: The defendant's wife cannot be called as a witness over her husband's objection.
B: The defendant's wife can be called as a witness but cannot testify, over the defendant's objection, that she saw him sell heroin.
C: The defendant's wife can refuse to be a witness against her husband.
D: The defendant's wife can be required to be a witness and to testify that she saw her husband sell heroin.

The explanation for the answer is:

The correct answer is C. The wife's proposed testimony could lead to her invoking the adverse spousal privilege, a privilege against testifying against her husband. That privilege, however, only exists at the wife's discretion. The witness spouse, in this case the defendant's wife, alone has a privilege to refuse to testify adversely against her husband; she may be neither compelled to testify nor foreclosed from testifying. The choice is hers.

Answer A is incorrect because the adverse spousal privilege is the wife's, and the determination of whether to testify or not is her decision to make. The defendant cannot object and force his wife not to testify. Answer B is incorrect because the defendant's wife can testify, if she wishes, that she saw her husband sell heroin. Her testimony about her firsthand knowledge of the sale does not require that the wife disclose any privileged marital communication from her husband. She will testify as to what she saw. Answer D is incorrect because the adverse spousal privilege still exists. If the wife wishes not to testify against her husband, she cannot be compelled, in federal court, to do so.

Question 674 - Evidence - Privileges and Other Policy Exclusions (2/15/2017)

The question was:

The plaintiff sued the defendant for damages for physical injuries allegedly caused by the defendant's violation of the federal civil rights law. The incident occurred wholly within a particular state but the case was tried in federal court. The state code says, "The common-law privileges are preserved intact in this state."

At trial, the defendant called the plaintiff's physician to testify to confidential statements made to him by the plaintiff in furtherance of medical treatment for the injuries allegedly caused by the defendant. The plaintiff objects, claiming a physician-patient privilege.

The court should apply

A: state law and recognize the claim of privilege.
B: federal law and recognize the claim of privilege.
C: state law and reject the claim of privilege.
D: federal law and reject the claim of privilege.

The explanation for the answer is:

The correct answer is D. As a general rule, whether a privilege applies in federal court is governed by the federal common law as it has been interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which state law supplies the rule of decision, whether a privilege applies shall be determined in accordance with state law. Since this case arose out of a violation of the federal civil rights law, the court should apply the federal common law in determining the propriety of the physician-client privilege. At common law, the federal courts do not recognize a physician-client privilege, so the claim of privilege should be rejected.

Answer A is incorrect because the suit is in federal court based on a violation of a federal civil rights law, so the federal common law is the applicable standard. Answer B is incorrect because there is no physician-client privilege recognized in federal common law. Answer C is incorrect because the suit is in federal court based on a violation of a federal civil rights law, so the federal common law is the applicable standard.

Question 1258 - Evidence - Privileges and Other Policy Exclusions (2/15/2017)

The question was:

In a personal injury case, the plaintiff sued a retail store for injuries she sustained from a fall in the store. The plaintiff alleged that the store negligently allowed its entryway to become slippery due to snow tracked in from the sidewalk. Before the lawsuit was filed, when the plaintiff threatened to sue, the store's manager said, "I know that there was slush on that marble entry, but I think your four-inch-high heels were the real cause of your fall. So let's agree that we'll pay your medical bills, and you release us from any claims you might have." The plaintiff refused the offer. At trial, the plaintiff seeks to testify to the manager's statement that "there was slush on that marble entry."

Is the statement about the slush on the floor admissible?

A: No, because it is a statement made in the course of compromise negotiations.
B: No, because the manager denied that the slippery condition was the cause of the plaintiff's fall.
C: Yes, as a statement by an agent about a matter within the scope of his authority.
D: Yes, because the rule excluding offers of compromise does not protect statements of fact made during compromise negotiations.

The explanation for the answer is:

Answer A is correct. Federal Rule of Evidence 408 excludes "[e]vidence of conduct or statements made in compromise negotiations." Here, there was a dispute, and the manager's statement was made in an effort to settle that dispute. Therefore, the entire statement is inadmissible under Rule 408. While normally an admission of fact accompanying an offer to pay medical bills would be admissible, here, the offer to pay medical bills was part of a settlement negotiation, making any accompanying admissions of fact inadmissible.

Answer B is incorrect. If not for Federal Rule of Evidence 408, which protects compromise negotiations, the statement about the slippery condition would be admissible even though the manager denied that it was the cause. Under Federal Rule of Evidence 801(d)(2)(A), party admissions are not considered hearsay when offered against the party who made the admission. Therefore, the plaintiff would be allowed to offer the part of the statement that favors the plaintiff's case, while the part that favors the defendant's case would be excluded as hearsay. The latter part would not be admissible under Rule 801(d)(2)(A), because it would be offered by the manager who made the statement.

Answer C is incorrect. The statement was by an agent about a matter within his authority, but that only means that the statement is not excluded as hearsay. There is another ground for exclusion, so the statement is inadmissible even though it satisfies the hearsay rule. Federal Rule of Evidence 408 excludes evidence of conduct or statements made in compromise negotiations.

Answer D is incorrect. Federal Rule of Evidence 408 protects not only offers of compromise, but also "conduct or statements made in the course of compromise negotiations." The rationale is to allow the parties and counsel to speak freely during settlement negotiations, without having to worry that their statements will be used against them at trial. Here, there is a dispute, and the manager's statement was made in an attempt to settle that dispute. Therefore, the statement would be excluded under Rule 408.

Question 761 - Evidence - Privileges and Other Policy Exclusions (2/15/2017)

The question was:

The defendant is on trial for the crime of obstructing justice by concealing records subpoenaed May 1, in a government investigation. The government calls an attorney to testify that on May 3, the defendant asked him how to comply with the regulations regarding the transfer of records to a safe-deposit box in Mexico.

The testimony of the attorney is

A: privileged, because it relates to conduct outside the jurisdiction of the United States.
B: privileged, because an attorney is required to keep the confidences of his clients.
C: not privileged, provided the attorney knew of the concededly illegal purpose for which the advice was sought.
D: not privileged, whether or not the attorney knew of the concededly illegal purpose for which the advice was sought.

The explanation for the answer is:

The correct answer is D. The attorney-client privilege covers confidential communications made during a legal consultation between an attorney and client. However, if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud, the privilege does not apply. Because the defendant sought the lawyer's advice to aid in the plan to commit the crime of obstructing justice, there is no valid attorney-client privilege.

Answer A is incorrect because the location of the illegal conduct is irrelevant for the determination of whether the attorney-client privilege applies. The fact that the defendant was seeking to transfer records to a safe-deposit box in Mexico is irrelevant. Answer B is incorrect because, although an attorney is required to keep the confidences of his clients, the attorney-client privilege does not apply to crimes or frauds being committed or planning to be committed. Answer C is incorrect because the attorney does not need to know of the illegal purpose before the privilege will be found not to apply. The attorney's ignorance of his client's purpose is irrelevant.

Question 528 - Evidence - Relevancy and Excluding Relevant Evidence (2/15/2017)

The question was:

A plaintiff sued a defendant for slander, alleging that the defendant had publicly accused the plaintiff of being a thief. In his answer, the defendant admitted making the accusation, but alleged that it was a true statement.

At trial, the defendant offers evidence that the plaintiff stole a ring worth $10,000 from a jewelry store.

Evidence concerning this theft should be

A: admitted, because specific instances of conduct may be proved when character is directly in issue.
B: admitted, because the plaintiff's action constituted a felony.
C: excluded, because character must be shown by reputation or opinion.
D: excluded, because its relevance is substantially outweighed by the danger of unfair prejudice.

The explanation for the answer is:

The correct answer is A. Because the defendant is asserting that his statement was true, it must be determined whether or not the plaintiff is a thief. In cases in which character or a trait of character of a person is an essential element, that element may be proven by specific instances of that person's conduct. Therefore, evidence that the plaintiff stole a ring on a prior occasion should be admissible to prove the truth of the defendant's statement.

Answer B is incorrect because the fact that the crime is a felony is only important if it is used for impeachment. In this case, the evidence that the plaintiff stole a ring is being used to prove the truth of an allegedly slanderous statement and the plaintiff's character trait for thievery is an essential element of the defendant's defense.

Answer C is incorrect because, although character evidence is generally shown by reputation or opinion, in cases where a character trait is essential to the defense of a claim, specific instances of conduct are admissible.

Answer D is incorrect because the issue of whether the plaintiff is a thief is an essential element of the defense to a defamation charge. Therefore, the evidence that the plaintiff is a thief is highly probative and has very little danger of unfair prejudice. Because the plaintiff's prior theft is an essential to the defense of the alleged defamation, evidence of specific instances of conduct can be used to prove the existence of that character trait.

Question 379 - Evidence - Relevancy and Excluding Relevant Evidence (2/15/2017)

The question was:

The defendant is tried on a charge of driving while intoxicated. When the defendant was booked at the police station, a videotape was made that showed him unsteady, abusive, and speaking in a slurred manner. If the prosecutor lays a foundation properly identifying the tape, should the court admit it in evidence and permit it to be shown to the jury?

A: Yes, because it is an admission.
B: Yes, because its value is not substantially outweighed by unfair prejudice.
C: No, because the privilege against self-incrimination is applicable.
D: No, because specific instances of conduct cannot be proved by extrinsic evidence.

The explanation for the answer is:

The correct answer is B. The videotape is relevant evidence on the issue of whether the defendant was intoxicated, and it is more probative than prejudicial. If a proper foundation is laid, there is no reason to exclude the videotape from evidence.

Answer A is incorrect because the videotape is not hearsay. It is not an out-of-court statement being offered for the truth of the matter asserted. In addition, a videotape is not an admission, it is evidence recounting the events of the night in question. Answer C is incorrect because the privilege against self-incrimination does not extend to physical reactions or statements made without a custodial interrogation. The defendant's unsteady appearance, his abusive language, and his speaking in a slurred manner are not statements that would be protected by his privilege against self-incrimination. Answer D is incorrect because it is inapplicable to the issue in this question. Specific incidents of conduct regarding the underlying charge, in this case the defendant's appearance and actions, can certainly be proven by the extrinsic evidence of the videotape. The videotape, if a foundation is properly laid, is probative evidence that should be admitted into evidence and shown to the jury.

Question 643 - Evidence - Relevancy and Excluding Relevant Evidence (2/15/2017)

The question was:

The defendant, charged with armed robbery of a store, denied that he was the person who had robbed the store.

In presenting the state's case, the prosecutor seeks to introduce evidence that the defendant had robbed two other stores in the past year.

This evidence is

A: admissible, to prove a pertinent trait of the defendant's character and the defendant's action in conformity therewith.
B: admissible, to prove the defendant's intent and identity.
C: inadmissible, because character must be proved by reputation or opinion and may not be proved by specific acts.
D: inadmissible, because its probative value is substantially outweighed by the danger of unfair prejudice.

The explanation for the answer is:

The correct answer is D. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of an accused person in order to show action in conformity therewith. The prosecutor is seeking to introduce evidence that the defendant robbed two other stores in order to prove that the defendant robbed this particular store; this evidence is inadmissible. The probative value of the other robberies is substantially outweighed by the danger of unfair prejudice to the defendant.

Answer A is incorrect because the other robberies do not prove any "pertinent trait" to an armed robbery charge beyond being evidence that, since the defendant robbed two other stores, he must have robbed this one. The rules of evidence specifically exclude the prior robberies from being used to show that the defendant's present actions were in conformity with those prior robberies.

Answer B is incorrect because, although evidence of other crimes may be admissible to show intent or identity, these prior crimes are not being offered for those purposes. There are no facts to indicate that the prior robberies are being used to prove anything other than that the defendant committed this particular robbery because he committed two prior robberies; this is an impermissible use of evidence of other crimes. Unless there are specific qualities present in the prior convictions that tie the prior crimes to the particular robbery that the defendant is currently on trial for, the evidence of the prior crimes is inadmissible.

Answer C is incorrect because specific acts, including prior crimes, can be used for some purposes; however, they cannot be used to prove present action in conformity with the prior crimes.

Question 1145 - Evidence - Relevancy and Excluding Relevant Evidence (2/15/2017)

The question was:

At a defendant's murder trial, the defendant calls his first witness to testify that the defendant has a reputation in their community as a peaceable and truthful person. The prosecutor objects on the ground that the witness's testimony would constitute improper character evidence.

The court should

A: admit the testimony as to peaceableness, but exclude the testimony as to truthfulness.
B: admit the testimony as to truthfulness, but exclude the testimony as to peaceableness.
C: admit the testimony as to both character traits.
D: exclude the testimony as to both character traits.

The explanation for the answer is:

The correct answer is A. Although evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, there is an exception that allows the accused to offer evidence of a trait of character that is pertinent to the trial. In a case where the charge is murder, the accused's reputation in the community as being a peaceable person would be a pertinent trait and should be admissible if proposed by the accused. However, the accused's reputation in the community as a truthful person would not be pertinent to the murder charge, and should be inadmissible. Because the defendant has not testified, his reputation in the community as a truthful person would be irrelevant and inadmissible.

Answer B is incorrect because the evidence for truthfulness should be excluded and the evidence of peaceableness should be admitted. Answer C is incorrect because the evidence for truthfulness should be excluded and the evidence of peaceableness should be admitted. Answer D is incorrect because the evidence for truthfulness should be excluded and the evidence of peaceableness should be admitted.

Question 1301 - Evidence - Relevancy and Excluding Relevant Evidence (2/15/2017)

The question was:

In a suit based on a will, the distribution of $1 million depends upon whether the wife survived her husband when both died in the crash of a small airplane. An applicable statute provides that, for purposes of distributing an estate after a common disaster, there is a rebuttable presumption that neither spouse survived the other. A witness has been called to testify that as she approached the plane she heard what she thought was a woman's voice saying, "I'm dying," although by the time the husband and wife were removed from the wreckage they were both dead.

Is the witness's testimony admissible?

A: No, because the matter is governed by the presumption that neither spouse survived the other.
B: No, because the witness's testimony is too speculative to support a finding.
C: Yes, because the hearsay rule does not apply to statements by decedents in actions to determine rights under a will.
D: Yes, because it is relevant and not otherwise prohibited.

The explanation for the answer is:

Answer D is correct. The testimony is not barred by the hearsay rule or any other rule and is relevant on the issue of whether the wife survived the husband. The dying woman's statement is not being offered for its truth but only to prove that she could speak and therefore was alive. The witness's testimony is based on her perception and memory and thus satisfies Rule 701 of the Federal Rules of Evidence.

Answer A is incorrect. The majority common law rule, which is followed by Rule 301 of the Federal Rules of Evidence, adopts the "bursting bubble" view under which a presumption disappears when sufficient counterproof is offered about the presumed fact. Here the testimony of the witness, although not conclusive, is sufficient to rebut the presumption that neither spouse survived the other and to support a jury finding that the wife outlived the husband. Therefore, the presumption is no longer controlling, and the witness's testimony is admissible.

Answer B is incorrect. The testimony is not "too speculative." A witness need not be absolutely certain of matters about which the witness testifies. Here the testimony is based on the perception and memory of the witness and thus satisfies Rule 701 of the Federal Rules of Evidence.

Answer C is incorrect. The statement by the woman is not hearsay because it is not being offered to prove the truth of the matter asserted. It is being offered to prove that the woman was alive at the time she made the statement and hence is relevant on the issue of whether she survived her husband, even if by only a few minutes.

Question 1583 - Evidence - Relevancy and Excluding Relevant Evidence (2/15/2017)

The question was:

A driver sued her insurance company on an accident insurance policy covering personal injuries to the driver. The insurance company defended on the ground that the driver's injuries were intentionally self-inflicted and therefore excluded from the policy's coverage.

The driver testified at trial that she had inflicted the injuries, as her negligence had caused the crash in which she was injured, but that she had not done so intentionally. She then called as a witness her treating psychiatrist to give his opinion that the driver had been mentally unbalanced, but not self-destructive, at the time of the crash.

Should the court admit the witness's opinion?

A: No, because it is a statement about the driver's credibility.
B: No, because it is an opinion about a mental state that constitutes an element of the defense.
C: No, because the witness did not first state the basis for his opinion.
D: Yes, because it is a helpful opinion by a qualified expert.

The explanation for the answer is:

A is incorrect. The witness is not offering to testify that the driver is telling the truth. (If the witness were to do so, the testimony would be inadmissible, because credibility is a question for the jury to assess.) The witness is offering to testify only to the driver's pertinent mental state, which is permissible in a civil case such as this.

B is incorrect. Rule 704(b), which prohibits an expert from testifying that a criminal defendant had or did not have the requisite mental state to commit the crime charged, is applicable to criminal cases only. There is no absolute bar to such testimony in a civil case such as this.

C is incorrect. Under Rule 705, an expert may state an opinion "without first testifying to the underlying facts or data."

D is correct. The witness's opinion helps the jury understand a relevant mental state. The standard for qualification of an expert is not high; a psychiatrist is qualified to testify to a person's mental state.

Question 56 - Evidence - Writings Recordings and Photographs (7/23/2016)

The question was:

In a narcotics conspiracy prosecution against the defendant, the prosecutor offers in evidence a tape recording of a telephone call allegedly made by the defendant. A lay witness is called to testify that the voice on the recording is the defendant's. Her testimony to which of the following would be the *LEAST* sufficient basis for admitting the recording?

A: She had heard the same voice on a similar tape recording identified to her by the defendant's brother.
B: She had heard the defendant speak many times, but never over the telephone.
C: She had, specifically for the purpose of preparing to testify, talked with the defendant over the telephone at a time after the recording was made.
D: She had been present with the defendant when he engaged in the conversation in question but had heard only the defendant's side of the conversation.

The explanation for the answer is:

The correct answer is A. The recording can be authenticated by the testimony of a lay witness who, through first-hand knowledge, is familiar with the defendant's voice. However, the testimony of the witness in answer A is the least likely to provide a sufficient basis for admitting the recording. The witness's knowledge of the defendant's voice in answer A is based solely on the hearsay statement of the defendant's brother. The witness in answer A has no first-hand knowledge of the defendant's voice.

Answer B is incorrect because first-hand knowledge of a voice, even if not over the telephone, is sufficient to authenticate an audiotape identification. Answer C is incorrect because the witness may become familiar with the defendant's voice at any time. Answer D is incorrect because the witness was present during the recording of the conversation and can reliably identify the defendant's voice on the tape.

Question 793 - Evidence - Writings Recordings and Photographs (7/23/2016)

The question was:

A plaintiff sued a defendant for unlawfully using the plaintiff's idea for an animal robot as a character in the defendant's science fiction movie. The defendant admitted that he had received a model of an animal robot from the plaintiff, but he denied that it had any substantial similarity to the movie character. After the model had been returned to the plaintiff, the plaintiff destroyed it.

In order for the plaintiff to testify to the appearance of the model, the plaintiff

A: must show that he did not destroy the model in bad faith.
B: must give advance notice of his intent to introduce the oral testimony.
C: must introduce a photograph of the model if one exists.
D: need not do any of the above, because the "best evidence rule" applies only to writings, recordings, and photographs.

The explanation for the answer is:

The correct answer is D. The best evidence rule only applies to writings, recordings and photographs, and the plaintiff's robot is none of those. The plaintiff, since he has personal knowledge of the appearance, can testify as to the appearance of the model without having to introduce the model into evidence. Answers A, B, and C are incorrect because those requirements only apply for the introduction of writings, recordings, and photographs into evidence.

Question 279 - Evidence - Writings Recordings and Photographs (7/23/2016)

The question was:

In a trial between a farmer and an equestrian, an issue arose about the equestrian's ownership of a horse, which had caused damage to the farmer's crops.

The farmer seeks to introduce in evidence a photograph of his cornfield in order to depict the nature and extent of the damage done. The farmer testified that the photograph was taken within a week after the alleged occurrence, and fairly and accurately portrays the condition of the cornfield after the damage was done. The judge should rule the photograph

A: admissible because the farmer testifies that it fairly and accurately portrays the condition of the cornfield after the damage was done.
B: admissible because the farmer testifies that the photograph was taken within a week after the alleged occurrence.
C: inadmissible because the farmer failed to call the photographer to testify concerning the circumstances under which the photograph was taken.
D: inadmissible because it is possible to describe the damage to the cornfield through direct oral testimony.

The explanation for the answer is:

The correct answer is A. To authenticate a photograph in order to introduce it into evidence requires the proponent to establish that the photograph fairly and accurately portrays the scene it represents. Because the farmer testified that the photograph fairly and accurately portrays the condition of the cornfield after the damage was done, it should be admitted into evidence.

Answer B is incorrect because the proximity in time to the incident is not the determining factor in the admissibility of a photograph. The determining factor is whether the photograph fairly and accurately depicts the scene it represents. Answer C is incorrect because it is no longer necessary to show the circumstances around the taking of the photograph before the photograph can be admitted into evidence. Answer D is incorrect because testimony regarding what is in the photograph does not preclude the admission of the photograph. If the photograph fairly and accurately depicts the nature and extent of damage done, the photograph should be admitted into evidence.

Question 214 - Evidence - Writings Recordings and Photographs (7/23/2016)

The question was:

A defendant has denied his purported signature on a letter which has become critical in a breach of contract suit between the defendant and the plaintiff. At trial, the plaintiff's counsel calls a teacher who testifies that she taught the defendant mathematics in school ten years earlier, knows his signature, and proposes to testify that the signature to the letter is that of the defendant.

The defendant's counsel objects. The trial judge should

A: sustain the objection on the ground that identification of handwriting requires expert testimony and the teacher does not, per se, qualify as an expert.
B: sustain the objection on the ground that the best evidence of the defendant's handwriting would be testimony by a person who had examined his writing more recently than ten years ago.
C: overrule the objection on the ground that a schoolteacher qualifies as an expert witness for the purpose of identifying handwriting.
D: overrule the objection on the ground that a layman may identify handwriting if she has seen the person in question write, and has an opinion concerning the writing in question.

The explanation for the answer is:

The correct answer is D. A non-expert who is familiar with the handwriting in question is permitted to give an opinion as to the identity of the handwriting. Handwriting is one of the areas in which courts will accept testimony regarding a lay person's opinion, if the opinion is based on the perception of the witness and the opinion would be helpful to the trier of fact.

Answer A is incorrect because identification of handwriting does not need to be given by expert testimony; any person sufficiently familiar with another's handwriting is allowed to give his opinion. Answer B is incorrect because the mere fact that there may be someone more familiar with the handwriting does not preclude the teacher from testifying as to her opinion that the writing is the defendant's. The best evidence rule does not apply in this case as the original writing is being used. The fact that the teacher has not seen the defendant's signature in ten years only goes to the weight that the trier of fact should give the testimony. Answer C is incorrect because the teacher does not need to be qualified as an expert before she is allowed to testify as to her opinion regarding the defendant's handwriting.

Question 131 - Evidence - Writings Recordings and Photographs (2/15/2017)

The question was:

A plaintiff sued a defendant for a libelous letter received by an investigator. The authenticity and contents of the letter are disputed. The investigator, if permitted, will testify that, "I received a letter that I cannot now find, which read: 'Dear investigator, You inquired about [the plaintiff]. We fired him last month when we discovered that he had been stealing from the stockroom. [The defendant].'" The testimony should be admitted in evidence *only* if the

A: jury finds that the investigator has quoted the letter precisely.
B: jury is satisfied that the original letter is unavailable.
C: judge is satisfied that the investigator has quoted the letter precisely.
D: judge finds that the original letter is unavailable.

The explanation for the answer is:

The correct answer is D. Preliminary questions concerning the admissibility of evidence shall be determined by the court. It is up to the judge to determine whether the investigator can testify as to the authenticity and contents of the libelous letter. Since the libelous letter is the one that's authenticity and contents are being challenged, the plaintiff must prove the content of the writing by using the original letter, if available. However, other evidence of the contents of the letter would be admissible only if the judge finds that the original letter is unavailable.

Answer A is incorrect because it is the judge, not the jury, who determines the admissibility of the evidence. Answer B is incorrect for the same reason. Answer C is incorrect because it misstates the applicable standard for the determination of whether testimony is permitted as to the contents of a missing letter.

Question 1461 - Evidence - Writings Recordings and Photographs (2/15/2017)

The question was:

A plaintiff, who had been injured in an automobile collision with the defendant, sued the defendant for damages. The defendant denied negligence and denied that the plaintiff's injuries were severe. At trial, the plaintiff has offered in evidence a color photograph of himself made from a videotape taken by a television news crew at the scene of the collision. The plaintiff has demonstrated that the videotape has since been routinely reused by the television station and that the footage of the plaintiff was erased. The photograph shows the plaintiff moments after the collision, with his bloodied head protruding at a grotesque angle through the broken windshield of his car.

Should the photograph be admitted over the defendant's objection?

A: No, because the plaintiff has failed to establish that a duplicate could not be found.
B: No, because the plaintiff has failed to produce the original videotape or a duplicate.
C: Yes, because it tends to prove a controverted fact.
D: Yes, because a photograph that establishes a disputed fact cannot be excluded as prejudicial.

The explanation for the answer is:

Answer C is correct. Photographs are often useful evidence in establishing disputed facts. However, under FRE 403, the judge always has the right to exclude such evidence if the danger of unfair prejudice substantially outweighs the probative value of the photograph. In this case, the photograph is admissible. The defendant has denied that the plaintiff's injuries were severe. Therefore, the plaintiff is entitled to show the severity of his injuries by introducing the photograph. The evidence relates directly to the appropriate amount of damages and is not unfairly prejudicial. Thus, Answer C is correct, and Answer D is incorrect.

Answers A and B are incorrect. A showing was made that the original videotape was erased, so it cannot be produced. The photograph offered was made from the videotape. Therefore the photograph is either a duplicate of the original or an original itself if it is found to be a print from a negative. FRE 1001(d) provides that "[a]n 'original' of a photograph includes the negative or a print from it." Under this definition, if the photograph being offered is found to be a print from the negative of the videotape, then it is itself an "original" and no showing of unavailability is required.

Question 23 - Real Property - Contracts (7/26/2016)

The question was:

A buyer and seller entered into a valid, enforceable written contract by which the buyer agreed to purchase Blackacre, which was the seller's residence. One of the contract provisions was that after closing, the seller had the right to remain in residence at Blackacre for up to 30 days before delivering possession to the buyer. The closing took place as scheduled. Title passed to the buyer and the seller remained in possession.

Within a few days after the closing, the new house next door that was being constructed for the seller was burned to the ground, and at the end of the 30-day period the seller refused to move out of Blackacre; instead, he tendered to the buyer a monthly rental payment in excess of the fair rental value of Blackacre. The buyer rejected the proposal and that day brought an appropriate action to gain immediate possession of Blackacre. The contract was silent as to the consequences of the seller's failure to give up possession within the 30-day period, and the jurisdiction in which Blackacre is located has no statute dealing directly with this situation, although the landlord-tenant law of the jurisdiction requires a landlord to give a tenant 30 days notice before a tenant may be evicted. The buyer did not give the seller any such 30-day statutory notice.

The buyer's best legal argument in support of his action to gain immediate possession is that the seller is a

A: trespasser *ab initio*.
B: licensee.
C: tenant at sufferance.
D: tenant from month to month.

The explanation for the answer is:

The correct answer is B. The buyer's best legal argument is that the seller is a mere licensee who does not hold any property rights with regard to Blackacre. A license is a contractual right to use land that is owned by another party. Because it is a contractual right rather than a property right, the owner of the property is free to terminate or revoke that license at any time. While the licensee may have contractual remedies available to her where a wrongful revocation occurs, these do not affect the property rights of the owner. Therefore, answer B represents the buyer's best argument.

Answer A is incorrect because the seller was contractually entitled to enter the land. Answers C and D are incorrect because the buyer's best argument is that the seller is a licensee without property rights rather than a tenant (since tenants do have limited property rights).

Question 1100 - Real Property - Contracts (2/6/2017)

The question was:

A banker owned Goldacre, a tract of land, in fee simple. The banker and a buyer entered into a written agreement under which the buyer agreed to buy Goldacre for $100,000, its fair market value. The agreement contained all the essential terms of a real estate contract to sell and buy, including a date for closing. The required $50,000 down payment was made. The contract provided that in the event of the buyer's breach, the banker could retain the $50,000 deposit as liquidated damages.

Before the date set for the closing in the contract, the buyer died. On the day that the administratrix of the buyer's estate was duly qualified, which was after the closing date, the administratrix made demand for return of the $50,000 deposit. The banker responded by stating that she took such demand to be a declaration that the administratrix did not intend to complete the contract and that the banker considered the contract at an end. The banker further asserted that she was entitled to retain, as liquidated damages, the $50,000. The reasonable market value of Goldacre had increased to $110,000 at that time.

The administratrix brought an appropriate action against the banker to recover $50,000. In answer, the banker made no affirmative claim but asserted that she was entitled to retain the $50,000 as liquidated damages as provided in the contract.

In such lawsuit, judgment should be for

A: the administratrix, because the provision relied upon by the banker is unenforceable.
B: the administratrix, because the death of the buyer terminated the contract as a matter of law.
C: the banker, because the court should enforce the express agreement of the contracting parties.
D: the banker, because the doctrine of equitable conversion prevents termination of the contract upon the death of a party.

The explanation for the answer is:

A is correct. A seller is entitled to keep a buyer's deposit as liquidated damages following the buyer's breach of the contract, as long as that amount appears to be reasonable in light of the seller's anticipated and actual damages. Many courts will uphold the retention of a deposit of 10% of the sale price or less without inquiry to its reasonableness. The facts indicate that the sale price of Goldacre was set at the "reasonable market value," which was $100,000 at the time of contracting and had increased to $110,000 by the time set for closing. Therefore, the banker did not have actual damages, because she can sell it for $10,000 more, and the most the banker can legally retain is $11,000. Thus, she will not be able to enforce a liquidated damages clause in any higher amount.

The administratrix has not sought specific performance of the contract, so the only issue being considered by the court is liquidated damages, so answer A is correct. Answer B is incorrect because the doctrine of equitable conversion would keep the contract alive after the buyer's death, and the banker would close with the buyer's estate. Answer D is incorrect because the banker is not seeking to prevent termination of the contract (through specific performance); she is merely seeking damages. Answer C is incorrect because the court will not enforce an agreement that violates the law, even if both parties have assented to it.

Question 143 - Real Property - Contracts (2/7/2017)

The question was:

A landlord, the owner in fee simple of a small farm consisting of thirty acres of land improved with a house and several outbuildings, leased the same to a tenant for a ten-year period. After two years had expired, the government condemned twenty acres of the property and allocated the compensation award to the landlord and tenant according to their respective interest so taken. It so happened, however, that the twenty acres taken embraced all of the farm's tillable land, leaving only the house, outbuildings, and a small woodlot. There is no applicable statute in the jurisdiction where the property is located nor any provision in the lease relating to condemnation. The tenant quit possession, and the landlord brought suit against him to recover rent. The landlord will

A: lose, because there has been a frustration of purpose which excuses the tenant from further performance of his contract to pay rent.
B: lose, because there has been a breach of the implied covenant of quiet enjoyment by the landlord's inability to provide the tenant with possession of the whole of the property for the entire term.
C: win, because of the implied warranty on the part of the tenant to return the demised premises in the same condition at the end of the term as they were at the beginning.
D: win, because the relationship of landlord and tenant was unaffected by the condemnation, thus leaving the tenant still obligated to pay rent.

The explanation for the answer is:

Answer D is correct. Where the government exercises its condemnation powers, the taking will affect not only the owner of the land, but also any tenants who are leasing that land. The extent of the effect on the tenant's rights depends upon whether there was a complete or partial taking. Where there has been a complete taking (meaning the government has taken all of the property that the tenant was leasing), the lease is automatically terminated, and the tenant has no further obligation to make payments. If, however, there was only a partial taking (meaning some but not all of the land being leased was taken), the tenant is still responsible for making payments, but only in an amount proportionate to the land that was not taken. Note that in the case of a partial taking, the tenant will share in the monies paid by the government to the landlord for the taking to the extent of the tenant's rent liability in the portion of land that was taken. In this case, the facts indicate that part but not all of the land the tenant was leasing was taken by the government. Because there was only a partial taking, the tenant's lease is still in effect.

Answer A is incorrect because frustration of purpose is irrelevant to the tenant's contractual obligation to pay for the land he is still leasing (whether he chooses to use that land or not). Answers B and C are incorrect because a government's exercise of its constitutional taking powers does not implicate the warranty of quiet enjoyment, nor does it make a tenant liable for the land taken.

Question 1316 - Real Property - Mortgages (7/26/2016)

The question was:

A man borrowed money from a bank and executed a promissory note for the amount secured by a mortgage on an office building that he owned. Several years later, the man sold the building. As specified in the contract of sale, the deed to the buyer provided that the buyer agreed "to assume the existing mortgage debt" on the building.

Subsequently, the buyer defaulted on the mortgage loan to the bank, and appropriate foreclosure proceedings were initiated. The foreclosure sale resulted in a deficiency.

There is no applicable statute.

Is the buyer liable for the deficiency?

A: No, because even if the buyer assumed the mortgage, the man is solely responsible for any deficiency.
B: No, because the buyer did not sign a promissory note to the bank and therefore has no personal liability.
C: Yes, because the buyer assumed the mortgage and therefore became personally liable for the mortgage loan and any deficiency.
D: Yes, because the transfer of the mortgage debt to the buyer resulted in a novation of the original mortgage and loan and rendered the buyer solely responsible for any deficiency.

The explanation for the answer is:

Answer C is correct. With a mortgage assumption, a buyer who assumes a mortgage debt becomes primarily liable for that debt. In this case, the man, absent a release by the bank, also is liable, although he is only secondarily liable. This situation can be contrasted with one in which the buyer might have purchased "subject to the mortgage," in which case only the man would be liable for any deficiency.

Answer A is incorrect. An assumption of a mortgage makes a buyer primarily liable for any deficiency. Thus, in this case, the buyer is primarily liable. Absent a release by the bank, the man also is liable, although he is only secondarily liable. This situation can be contrasted to one in which the buyer might have purchased "subject to the mortgage," in which case only the man would be liable for any deficiency.

Answer B is incorrect. The agreement in the contract to assume the mortgage created the primary liability for the deficiency in the buyer. The buyer did not have to sign the promissory note to become liable. Absent a release by the bank, the man also is liable, although he is only secondarily liable for any deficiency.

Answer D is incorrect. A novation occurs when the bank agrees to substitute the personal liability of the buyer for that of the original debtor, who is then released. In that case there would be an assumption with novation. Here there was no agreement by the bank to release the man from liability and to substitute the buyer as being solely liable for the debt. The buyer assumed the mortgage debt and became primarily liable, while the man remains secondarily liable.

Question 1394 - Real Property - Ownership (2/6/2017)

The question was:

A grantor owned two tracts of land, one of 15 acres and another of 5 acres. The two tracts were a mile apart.

Fifteen years ago, the grantor conveyed the smaller tract to a grantee. The grantor retained the larger tract. The deed to the grantee contained, in addition to proper legal descriptions of both properties and identifications of the parties, the following language:

"I, the grantor, bind myself and my heirs and assigns that in the event that the larger tract that I now retain is ever offered for sale, I will notify the grantee and his heirs and assigns in writing, and the grantee and his heirs and assigns shall have the right to purchase the larger tract for its fair market value as determined by a board consisting of three qualified expert independent real estate appraisers."

With appropriate references to the other property and the parties, there followed a reciprocal provision that conferred upon the grantor and her heirs and assigns a similar right to purchase the smaller tract, purportedly binding the grantee and his heirs and assigns.

Ten years ago, a corporation acquired the larger tract from the grantor. At that time, the grantee had no interest in acquiring the larger tract and by an appropriate written document released any interest he or his heirs or assigns might have had in the larger tract.

Last year, the grantee died. The smaller tract passed by the grantee's will to his daughter. She has decided to sell the smaller tract. However, because she believes the corporation has been a very poor steward of the larger tract, she refuses to sell the smaller tract to the corporation even though she has offered it for sale in the local real estate market.

The corporation has brought an appropriate action for specific performance of the right of first refusal after taking all of the necessary preliminary steps in its effort to exercise its right to purchase the smaller tract.

The daughter has asserted all possible defenses.

The common law Rule Against Perpetuities is unmodified in the jurisdiction, and there are no applicable statutes.

If the court rules for the daughter, what will be the likely reason?

A: The provision setting out the right to purchase violates the Rule Against Perpetuities.
B: The grantee's release 10 years ago operates as a waiver regarding any right to purchase that the corporation might have.
C: The two tracts of land were not adjacent parcels of real estate, and thus the right to purchase is in gross and is therefore unenforceable.
D: Noncompliance with a right to purchase gives rise to a claim for money damages, but not for specific performance.

The explanation for the answer is:

Answer A is correct. Fifteen years ago, each of the parties granted a reciprocal right of first refusal (or a preemptive right) to the other. A right of first refusal is a conditional option. It provides that if the owner ever decides to sell the property, the person or entity holding the right of first refusal has the right to purchase the property on specified terms. In this case, the purchase price was to be set by three qualified expert independent real estate appraisers and was thus fair. These rights of first refusal, however, violate the common law Rule Against Perpetuities. The right to purchase is triggered by the decision to sell the land. In this case, that decision might occur more than 21 years after a life in being at the time the right was granted. Thus, under the common law, the right of first refusal is struck ab initio. The question notes that the common law Rule Against Perpetuities is unmodified in this jurisdiction. Thus, there are no applicable statutory reforms to the rule. And because the daughter prevails, there must be no applicable exceptions to the common law rule.

Answer B is incorrect. Ten years ago, the grantee had the right to purchase the larger tract of land under the right of first refusal (or a preemptive right) given to the grantee. The grantee chose not to exercise that right. The fact that the grantee chose not to exercise the right of first refusal has no effect on whether the grantor can exercise the reciprocal right of first refusal regarding the grantee's land. In this case, however, the reciprocal rights of first refusal violate the

common law Rule Against Perpetuities and would be struck at once, with neither party able to enforce the right.

Answer C is incorrect. Fifteen years ago each of the parties granted a reciprocal right of first refusal (or a preemptive right) to the other. A right of first refusal is a conditional option. It provides that if the owner ever decides to sell the property, the one holding the right of first refusal has the right to purchase it. A right of first refusal may have been granted as to only one of the tracts of land. Here, the rights were reciprocal as to two tracts of land. It does not matter that the tracts were not adjacent. The reciprocal rights of first refusal, however, violate the common law Rule Against Perpetuities and would be struck at once, with neither party able to enforce the right. The right of first refusal is triggered by the decision to sell the land. In this case, that decision might occur more than 21 years after a life in being at the time the right was granted. Thus, under the common law, the right of first refusal is struck ab initio. The question notes that the common law Rule Against Perpetuities is unmodified in this jurisdiction. Thus, there are no applicable statutory reforms to the rule. And because the daughter prevails, there must be no applicable exceptions to the common law rule.

Answer D is incorrect. Fifteen years ago each of the parties granted a reciprocal right of first refusal (or a preemptive right) to the other. The reciprocal rights of first refusal, however, violate the common law Rule Against Perpetuities and would be struck at once, with neither party able to enforce the right either for money damages or for specific performance. The right of first refusal is triggered by the decision to sell the land. In this case, that decision might occur more than 21 years after a life in being at the time the right was granted. Thus, under the common law, the right of first refusal is struck ab initio. The question notes that the common law Rule Against Perpetuities is unmodified. Thus, there are no applicable statutory reforms to the rule. And because the daughter prevails, there must be no applicable exceptions to the common law rule.

Question 315 - Real Property - Rights in Land (7/26/2016)

The question was:

A landowner held 500 acres in fee simple absolute. In 2010 the owner platted and obtained all required governmental approvals of two subdivisions of 200 acres each.

In 2010 and 2011 commercial buildings and parking facilities were constructed on one, Royal Center, in accordance with the plans disclosed by the plat for each subdivision. Royal Center continues to be used for commercial purposes.

The plat of the other, Royal Oaks, showed 250 lots, streets, and utility and drainage easements. All of the lots in Royal Oaks were conveyed during 2010 and 2011. The deeds contained provisions, expressly stated to be binding upon the grantee, his heirs and assigns, requiring the lots to be used only for single-family, residential purposes until 2035. The deeds expressly stated that these provisions were enforceable by the owner of any lot in the Royal Oaks subdivision.

At all times since 1999, the 200 acres of Royal Center have been zoned for shopping center use, and the 200 acres in Royal Oaks have been zoned for residential use in a classification which permits both single-family and multiple-family use.

Assume that the owner now desires to open his remaining 100 acres as a residential subdivision of 125 lots (with appropriate streets, etc.). He has, as an essential element of his scheme, the feature that the restrictions are identical with those he planned for the original Royal Oaks residential subdivision and, further, that lot owners in Royal Oaks should be able to enforce (by lawsuits) restrictions on the lots in the 100 acres. The zoning for the 100 acres is identical with that for the 200 acres of Royal Oaks residential subdivision. Which of the following best states the chance of success for his scheme?

A: He can restrict use only to the extent of that imposed by zoning (that is, to residential use by not more than four dwelling units per lot).
B: He cannot restrict the 100 acres to residential use because of the conflicting use for retail commercial purposes in the 200 acres comprising the shopping center.
C: He cannot impose any enforceable restriction to residential use only.
D: Any chance of success depends upon the 100 acres being considered by the courts as part of a common development scheme which also includes the 200 acres of Royal Oaks.

The explanation for the answer is:

D is correct. The restrictions described in the facts constitute equitable servitudes. An equitable servitude in a deed is only enforceable where a party can establish: 1) intent for the restriction to be enforceable by subsequent grantees, 2) that the subsequent grantee had notice of the servitude, and 3) that the restriction touches and concerns the land. In this case, the facts indicate that all three elements can be established. The express language of the deeds indicates that the restriction is intended to bind subsequent grantees. The recording of those deeds would provide later purchasers with record notice of the restriction. And a restriction on what can be built on the land clearly meets the requirement that the restriction touch and concern that land, so an enforceable equitable servitude was created. For an equitable servitude to bind an entire subdivision, however, it must be found in the common building plan for that subdivision. If it is, then anyone who owns a plot of land within the subdivision is bound by the restrictions and may file suit to enforce those restrictions against other owners.

In this case, the facts state that a subdivision plan outlining restrictions that would apply to all plats within it was approved by the local government. But that subdivision plan was only for the original 200 acres of Royal Oaks. The only way that owners in the new 100 acre development will be able to bind owners in the original 200 acres, and vice-versa, is if they are all viewed as living in an area developed under a common plan. Therefore, answer D is correct, and the owner will only succeed if he convinces a court that the entire 300 acres is a subdivision developed under a common plan.

Answer A is incorrect because zoning is irrelevant to determining whether the restrictions are binding. Answer B is incorrect because there are two separate subdivisions, and the owner is only trying to expand one of them. Answer C is incorrect because there is no explicit limit on the types of restriction a subdivision may impose.

Question 469 - Real Property - Rights in Land (7/26/2016)

The question was:

A realty company developed a residential development which included single-family dwellings, town houses, and high-rise apartments for a total of 25,000 dwelling units. Included in the deed to each unit was a covenant under which the grantee's "heirs and assigns" agreed to purchase electrical power only from a plant the realty company promised to build and maintain within the development. The realty company constructed the plant and necessary power lines. The plant did not supply power outside the development. An appropriate and fair formula was used to determine price.

After constructing and selling 12,500 of the units, the realty company sold its interest in the development to an investor company. The investor company operated the power plant and constructed and sold the remaining 12,500 units. Each conveyance from the investor company contained the same covenant relating to electrical power that the realty company had included in the 12,500 conveyances it had made.

A woman bought a dwelling unit from a man, who had purchased it from the realty company. Subsequently, the woman, whose lot was along the boundary of the development, ceased buying electrical power from the investor company and began purchasing power from General Power Company, which provided such service in the area surrounding the development. Both General Power and the investor company have governmental authorization to provide electrical services to the area. The investor company instituted an appropriate action against the woman to enjoin her from obtaining electrical power from General Power. If judgment is for the woman, it will most likely be because

A: the covenant does not touch and concern the land.
B: the mixture of types of residential units is viewed as preventing one common development scheme.
C: the covenant is a restraint on alienation.
D: there is no privity of estate between the woman and the investor company.

The explanation for the answer is:

Answer A is correct. The realty company has attempted to impose an equitable servitude on the residents of the subdivision. An equitable servitude in a deed is only enforceable where a party can establish: 1) intent for the restriction to be enforceable by subsequent grantees, 2) that the subsequent grantees had notice of the servitude, and 3) that the restriction touches and concerns the land. In this case, the facts clearly indicate that there was an intent for the restriction to be enforceable, and that the language of the deeds put subsequent grantees on notice. The restriction, however, does not touch and concern the land; it does not serve to make the land more useful or valuable in any way. Therefore, the restriction will not bind the woman, and answer A is correct.

Answer B is incorrect because mixing types of residential units does not negate the provisions of a common development scheme. Answer C is incorrect because the attempted restriction does not purport to limit an owner's alienation rights. Answer D is incorrect because privity is a requirement for covenants running with the land, not equitable servitudes.

Question 440 - Real Property - Rights in Land (7/26/2016)

The question was:

The owner of Stoneacre entered into a written agreement with a miner. Under this written agreement, which was acknowledged and duly recorded, the miner, for a five-year-period, was given the privilege to enter on Stoneacre to remove sand, gravel, and stone in whatever quantities the miner desired. The miner was to make monthly payments to the owner on the basis of the amount of sand, gravel, and stone removed during the previous month. Under the terms of the agreement, the miner's privilege was exclusive against all others except the owner, who reserved the right to use Stoneacre for any purpose whatsoever including the removal of sand, gravel, and stone.

One year after the agreement was entered into, the state brought a condemnation action to take Stoneacre for a highway interchange. In the condemnation action, is the miner entitled to compensation?

A: Yes, because he has a license, which is a property right protected by the due process clause.
B: Yes, because he has a *profit a prendre*, which is a property right protected by the due process clause.
C: No, because he has a license, and licenses are not property rights protected by the due process clause.
D: No, because he has a *profit a prendre*, which is not a property right protected by the due process clause.

The explanation for the answer is:

B is correct. The agreement between the owner and miner created a *profit a prendre* for the miner. A profit gives the holder a right to enter onto another's land for the purpose of removing some sort of natural resource. Rather than a license, a profit is a property right, and is thereby afforded all the usual statutory and constitutional protections associated with such rights. Because the miner has a property right in Stoneacre, a governmental taking will entitle the miner to share in any condemnation award given to the owner. Therefore, answer B is correct.

Answers A and C are incorrect because the miner's profit is a right, not a license. Answer D is incorrect because the profit is afforded constitutional protection like any other property right.

Question 15 - Real Property - Rights in Land (7/26/2016)

The question was:

A man owned Goldacre, a tract of land, in fee simple. At a time when Goldacre was in the adverse possession of a stranger, the man's neighbor obtained the oral permission of the man to use as a road or driveway a portion of Goldacre to reach adjoining land, Twin Pines, which the neighbor owned in fee simple. Thereafter, during all times relevant to this problem, the neighbor used this road across Goldacre regularly for ingress and egress between Twin Pines and a public highway.

The stranger quit possession of Goldacre before acquiring title by adverse possession. Without any further communication between the man and the neighbor, the neighbor continued to use the road for a total period, from the time he first began to use it, sufficient to acquire an easement by prescription. The man then blocked the road and refused to permit its continued use. The neighbor brought suit to determine his right to continue use of the road. The neighbor should

A: win, because his use was adverse to the stranger's and once adverse it continued adverse until some affirmative showing of a change.
B: win, because the neighbor made no attempt to renew permission after the stranger quit possession of Goldacre.
C: lose, because his use was with permission.
D: lose, because there is no evidence that he continued adverse use for the required period after the stranger quit possession.

The explanation for the answer is:

Answer C is correct. The neighbor had the man's express permission to use the road, so that use was never adverse. The neighbor incorrectly argues that he has acquired an easement by prescription. To establish an easement by prescription, a party must show: 1) adverse, 2) continuous, 3) visible, and 4) unpermitted use of the area for the length of the statutory time period. Although the neighbor's use was continuous, visible, and lasted for the length of the statutory time period, that use was not adverse or unpermitted. Answer A is incorrect because the use must be adverse to the owner of the property. Answer B is incorrect because the man's original grant of permission was sufficient, and did not need to be renewed because the stranger never acquired title by adverse possession. Answer D is incorrect because despite the stranger's adverse possession, the neighbor's use was never adverse due to the owner's permission.

Question 397 - Real Property - Titles (7/26/2016)

The question was:

At a time when an owner held Lot 1 in the Fairoaks subdivision in fee simple, the owner's son executed a warranty deed that recited that the owner's son conveyed Lot 1, Fairoaks, to his girlfriend. The deed was promptly and duly recorded.

After the recording of the deed from the owner's son to his girlfriend, the owner conveyed Lot 1 to his son by a warranty deed that was promptly and duly recorded. Later, the owner's son conveyed the property to a buyer by warranty deed, and the deed was promptly and duly recorded. The buyer paid the fair market value of Lot 1 and had no knowledge of any claim of the girlfriend.

In an appropriate action, the buyer and the girlfriend contest title to Lot 1. In this action, judgment should be for

A: the girlfriend, because the girlfriend's deed is senior to the buyer's.
B: the buyer, because the buyer paid value without notice of the girlfriend's claim.
C: the girlfriend or the buyer, depending on whether a subsequent grantee is bound, at common law, by the doctrine of estoppel by deed.
D: the girlfriend or the buyer, depending on whether the girlfriend's deed is deemed recorded in the buyer's chain of title.

The explanation for the answer is:

Answer A is incorrect because it suggests that the girlfriend wins for being first in time. While this answer would be correct in a jurisdiction with a race recording statute, the type of statute was not provided by the question.

Answer B is incorrect because it suggests that the buyer wins because he is a bona fide purchaser who paid value and had no notice of the girlfriend's claim. Although this answer would be correct if the jurisdiction is governed by a notice statute, the facts do not provide what statute is in effect. Therefore, answer B may also be eliminated.

Answer C is incorrect. This question does involve estoppel by deed, but only as it applies between the grantor and the original grantee (i.e., the son and the girlfriend). The doctrine of estoppel by deed states that if a grantor purports to convey title that he does not actually hold, his subsequent acquisition of title to the property will automatically bring into effect the the prior benefit conveyed to the grantee. In other words, even though the son did not have title at the time of the conveyance to the girlfriend, when he did obtain title, the girlfriend’s title became valid. The grantor then may be estopped by the grantee from denying he conveyed valid title. However, this right is only held by the grantee against the grantor. The grantee has no such right against a subsequent purchaser. Therefore C is incorrect because the subsequent grantee, here the buyer, is not bound by estoppel by deed. The girlfriend may only apply the doctrine against the son, not the buyer.

Under the doctrine of estoppel, if the grantor transfers his later-acquired title to a subsequent purchaser, it will also be valid title. The issue becomes whether the buyer is a subsequent bona fide purchaser, and what was his burden of searching title. To be a subsequent bona fide purchaser, the buyer must not have had notice, actual or constructive, of the original grantee. If the original grantee properly recorded, the subsequent buyer would have been on notice and therefore cannot be a valid subsequent bona fide purchaser. Thus D is the correct answer because the issue turns on whether the girlfriend’s deed was properly recorded.

Question 1140 - Real Property - Titles (7/26/2016)

The question was:

A landowner owned Blackacre in fee simple and conveyed Blackacre to a teacher by warranty deed. An adjoining owner asserted title to Blackacre and brought an appropriate action against the teacher to quiet title to Blackacre. The teacher demanded that the landowner defend the teacher's title under the deed's covenant of warranty, but the landowner refused. The teacher then successfully defended at her own expense.

The teacher brought an appropriate action against the landowner to recover the teacher's expenses incurred in defending against the adjoining owner's action to quiet title to Blackacre.

In this action, the court should decide for

A: the teacher, because in effect it was the landowner's title that was challenged.
B: the teacher, because the landowner's deed to her included the covenant of warranty.
C: the landowner, because the title the landowner conveyed was not defective.
D: the landowner, because the adjoining owner may elect which of the landowner or the teacher to sue.

The explanation for the answer is:

C is correct. The covenant of warranty is a guarantee by the seller that the title being conveyed is marketable, and that the grantor will defend any valid claims against that title. A breach of the covenant of warranty is established when a third party interferes with possession of the land, not when a third party makes a claim against the grantee. Consequently, the grantor is not required to defend the grantee or his heirs in any action against title; rather, he must only defend against lawful or reasonable claims for title. In this case, the facts do not indicate that any valid claim existed because the teacher prevailed over the adjoining owner in an action to quiet title. Because the landowner conveyed good title, and did not fail to defend against any valid claims that existed at the time of the conveyance, the landowner should prevail, and answer C is correct.

Answer B is incorrect because, although the landowner's deed to the teacher did include the covenant of warranty, the teacher would only be entitled to recover if the adjoining owner's claim was successful. Answers A and D are incorrect because the teacher was the only party who held title and thereby the only party the adjoining owner could have sued.

Question 1209 - Real Property - Titles (2/7/2017)

The question was:

A landowner executed an instrument in the proper form of a deed, purporting to convey his land to a friend. The landowner handed the instrument to the friend, saying, "This is yours, but please do not record it until after I am dead. Otherwise, it will cause me no end of trouble with my relatives." Two days later, the landowner asked the friend to return the deed to him because he had decided that he should devise the land to the friend by will rather than by deed. The friend said that he would destroy the deed and a day or so later falsely told the landowner that the deed had been destroyed. Six months later, the landowner, who had never executed a will, died intestate, survived by a daughter as his sole heir at law. The day after the landowner's death, the friend recorded the deed from him. As soon as the daughter discovered this recording and the friend's claim to the land, she brought an appropriate action against the friend to quiet title to the land.

For whom should the court hold?

A: The daughter, because the death of the landowner deprived the subsequent recordation of any effect.
B: The daughter, because the friend was dishonest in reporting that he had destroyed the deed.
C: The friend, because the deed was delivered to him.
D: The friend, because the deed was recorded by him.

The explanation for the answer is:

Answer C is correct. A deed must be delivered to be valid. Delivery is a question of intent. The words of the landowner included "This is yours," showing the necessary intent to strip himself of dominion and control and to immediately transfer the title. In addition, handing the deed to the friend raises a rebuttable presumption of delivery. Recording the deed is not required to transfer title, and thus the request not to record the document until later is irrelevant so long as delivery was made.

Answer A is incorrect. The deed to the friend was valid because it was in the proper form and was delivered to him. Delivery occurred at the time the landowner handed the deed to the friend. At that time the landowner was competent. The friend's subsequent recording of the deed had no effect on the deed's validity.

Answer B is incorrect. The deed to the friend was valid because it was in the proper form and was delivered to him. Delivery occurred at the time the deed was handed to the friend with the words "This is yours." The subsequent misrepresentation that the friend made that he had destroyed the deed had no effect on the prior valid delivery.

Answer D is incorrect. Recording a document has no effect on its validity. In this case, the deed to the friend was valid because it was in the proper form and was delivered to him. His subsequent recording of the deed had no effect on his claim of ownership, although recording will now provide constructive notice of his ownership.

Question 995 - Torts - Intentional Torts (7/26/2016)

The question was:

A pedestrian was crossing a street at a crosswalk. A bystander, who was on the sidewalk nearby, thought he saw a speeding automobile heading in the pedestrian's direction. However, the automobile was obviously coming to a stop at the traffic light. Nevertheless, the bystander ran into the street and pushed the pedestrian onto the sidewalk. The pedestrian fell to the ground and broke her leg.

In an action for battery brought by the pedestrian against the bystander, will the pedestrian prevail?

A: Yes, because the bystander could have shouted a warning instead of pushing the pedestrian out of the way.
B: Yes, because the pedestrian was not actually in danger and the bystander should have realized it.
C: No, because the driver of the car was responsible for the pedestrian's injury.
D: No, because the bystander's intent was to save the pedestrian, not to harm her.

The explanation for the answer is:

B is the correct answer. The bystander acted intentionally to push the pedestrian. That push resulted in a harmful contact, and thus the bystander may be liable for battery. The issue here is whether the bystander was privileged to push the pedestrian for the pedestrian's safety. A person is privileged to use reasonable force to protect another as long as the "batterer" reasonably believes there is a threat to the other person's safety that requires contact to remove her from harm's way. Therefore, A is incorrect. Under the facts, the bystander believed a speeding car was headed for the pedestrian and a push was the only thing that would get her out of the way. However, because the bystander's belief was not reasonable, he has no privilege and will be liable for battery. Thus B is the best choice. C is incorrect because the actions of the driver will not cut short the bystander's liability for an intentional harmful or offensive contact. Only the bystander's own privilege will do that. D is incorrect because the bystander’s motivation would not provide a defense to the battery charge if his beliefs about the situation were unreasonable.

Question 1002 - Torts - Intentional Torts (7/26/2016)

The question was:

The police in a large city notified local gas station attendants that a woman recently had committed armed robberies at five city gas stations. The police said that the woman was approximately 75 years old, had white hair, and drove a vintage, cream-colored Ford Thunderbird. Attendants were advised to call the police if they saw her, but to not attempt to apprehend her. Armed robbery is a felony under state law.

A traveler was passing through the city on a cross-country journey. The traveler was a 75-year-old woman who had white hair and drove a vintage, cream-colored Ford Thunderbird. When the traveler drove into a gas station, the owner of the station thought the traveler must be the robber wanted by the police. After checking the oil at the traveler's request, the owner falsely informed the traveler that she had a broken fan belt, that her car could not be driven without a new belt, that it would take him about an hour to replace it, and that she should stay in his office for consultation about the repair. The traveler was greatly annoyed that her journey was delayed, but she stayed in the owner's office while she waited for her car. The owner telephoned the police and, within the hour, the police came and questioned the traveler. The police immediately determined that the traveler was not the woman, and the traveler resumed her journey without further delay.

In the traveler's action for false imprisonment against the owner, the traveler will

A: not prevail, because the owner reasonably believed that the traveler was the wanted woman.
B: not prevail, because the traveler suffered no physical or mental harm.
C: prevail, because the traveler reasonably believed she could not leave the owner's premises.
D: prevail, because the owner lied to the traveler about the condition of her car.

The explanation for the answer is:

A is the correct answer. False imprisonment occurs when the plaintiff is confined against her will and is aware of the confinement, or has suffered actual injury. Here, the traveler was not confined to the office, but was confined to the gas station premises through the owner's misrepresentation of fact. Actual injury is not required if the plaintiff was aware of her confinement. Thus B can be eliminated.

This is an issue of legal justification. In this case, the owner is protected by the privilege of arrest. For a private citizen to make an arrest without a warrant when a felony has occurred, two things must be true: (i) a felony must have in fact been committed, and (ii) the private citizen must have reasonable grounds to believe that the person arrested did commit the felony. The privilege is also limited by three factors: the amount of time of the detention, the amount of force used to detain, and the means of restraint must all be found reasonable. A is the correct answer because a felony has actually occurred, and the owner did reasonably believed that the traveler committed it. Therefore he was legally justified in the detention of the traveler by the privilege of arrest.

C and D are incorrect because any claim the traveler may have of false imprisonment would be beat out by the owner's privilege of arrest.

Question 488 - Torts - Intentional Torts (7/26/2016)

The question was:

A well-known politician was scheduled to address a large crowd at a political dinner. Just as he was about to sit down at the head table, the defendant pushed the politician's chair to one side. As a result, the politician fell to the floor. The politician was embarrassed at being made to look foolish before a large audience but suffered no physical harm.

Assume that the defendant knew that the politician was about to sit in the chair before he pushed it. If the politician asserts a claim against the defendant for damages because of his embarrassment, will the politician prevail?

A: Yes, because the defendant knew that the politician was about to sit on the chair.
B: Yes, because the defendant negligently failed to notice that the politician would fall.
C: No, because the politician suffered no physical harm along with his embarrassment.
D: No, because the defendant intended moving the chair to be a good-natured practical joke on the politician.

The explanation for the answer is:

A is the correct answer. The call of the question does not give a specific claim, but the key word here is "embarrassment." This is a dignitary tort claim. A battery consists of the unlawful application of force to the person resulting in bodily injury or offensive touching, without consent or privilege. Battery is a general intent crime, and the force need not be applied directly. Here, the defendant set into motion an action with purpose or knowledge to a substantial certainty that the offensive contact would result. Therefore, the defendant committed a battery and the politician can recover for the harm to his dignity.

B is incorrect. Negligence allows pain and suffering, but only for actual damages. A claim based on embarrassment must necessarily involve a dignitary tort, such as battery, to succeed. C is incorrect. All that is required is an offensive touching; physical harm is not required. D is incorrect. Because the defendant pushed the chair knowing that the politician was about to sit on it, the defendant's intent to be funny is irrelevant as battery only requires a general intent to bring about the harmful or offensive contact. The defendant is still liable for any unintended injuries that may occur as a result.

Question 1437 - Torts - Intentional Torts (7/26/2016)

The question was:

A farmer kept antiques in an uninhabited farmhouse on his property. The farmhouse had been broken into several times in the past, and some of the farmer's goods had been stolen. Instead of posting "No Trespassing" signs, the farmer decided to install an alarm system to deter intruders.

While the farmer was in the farmhouse installing the alarm system, he heard a window open in the adjoining room. The farmer crept very quietly to the door of the room, threw the door open, and found an intruder, a young child. The farmer immediately struck the child, a 10-year-old girl, very hard in the face, breaking her nose.

In an action on behalf of the child against the farmer to recover for the injury to her nose, is the child likely to prevail?

A: No, because the farmer did not use deadly force.
B: No, because the farmer had probable cause to believe that the child was a thief.
C: Yes, because the farmer should have posted a "No Trespassing" sign.
D: Yes, because the farmer used excessive force.

The explanation for the answer is:

Answer D is correct. The farmer was privileged to use reasonable force to prevent or end a trespasser's intrusion upon his land or to protect his property, but he was not privileged to use force that threatened serious bodily injury unless he was himself in danger of serious bodily harm. The force the farmer used was sufficient to and did in fact cause serious bodily injury. The child appeared to pose no threat of bodily harm to the farmer and could have been deterred by less forceful means.

Answer A is incorrect. The child can state a claim for battery because there was an intentional infliction of a harmful contact. To support a battery action, the contact need not involve force so great as to threaten death.

Answer B is incorrect. The force the farmer used was likely to and did in fact inflict serious bodily harm. Even if the child had been a thief, the privilege to use reasonable force to protect one's property does not extend to the use of force likely to cause serious bodily harm when there is no threat of such harm to oneself. The child appeared to pose no threat of bodily harm to the farmer and could have been deterred by less forceful means.

Answer C is incorrect. The farmer was not required to have posted a warning in order to have had a privilege to protect his property by the use of reasonable force, although the absence of a warning sign may become a factor in determining whether the steps he took were in fact reasonable. In evaluating whether his actions were reasonable as a defense of his property, the court will ask whether the force he used was excessive. The child appeared to pose no threat of bodily harm to the farmer and could have been deterred by less forceful means. Because the force the farmer used was greater than necessary and was intended to cause serious bodily harm, it was excessive as a defense of property.

Question 3 - Torts - Intentional Torts (7/26/2016)

The question was:

A lender met an individual who had borrowed money from him on the street, demanded that the borrower pay a debt owed to him, and threatened to punch the borrower in the nose. A fight ensued between them. A man came upon the scene just as the lender was about to kick the borrower in the head. Noting that the lender was getting the better of the fight, the man pointed a gun at him and said, "Stop, or I'll shoot." If the lender asserts a claim against the man based on assault, will he prevail?

A: Yes, because the man threatened to use deadly force.
B: Yes, because the man was related to the borrower.
C: No, because it was apparent that the lender was about to inflict serious bodily harm upon the borrower.
D: No, because the lender was the original aggressor by threatening the borrower with a battery.

The explanation for the answer is:

C is the best answer. The man has a privilege to defend the borrower as long as the man reasonably believes that the borrower would also have the privilege of self-defense. In addition, the use of force in defense of another cannot exceed the force that the victim is being threatened with. The key issue here is whether the man's use of threatened deadly force (the gun) to defend against a kick by the lender would exceed that privilege. C is the best answer because it provides the correct justification for the man's threat to use deadly force.

A is incorrect. The man's threat alone will not cause the lender to prevail because the man can assert the privilege of defense of another, which, if successful, would negate the man's liability. B is incorrect for two reasons. First, it relies on a fact not presented in the question. Furthermore, it refers to the outdated requirement that only family members or those with a special duty to protect the victim were allowed the privilege of defense. Under the modern view, anyone with a reasonable belief that the victim would have a right of self-defense is privileged to intervene. D is incorrect because it incompletely states the rule of self-defense. Generally, only the force that reasonably appears to be necessary to prevent the harm is privileged. If more force than necessary is used, the actor loses the privilege. Therefore, if the lender had not been appearing to use substantial force likely to cause serious injury, his designation as the initial aggressor would not bar his assault claim against the man.

Question 906 - Torts - Intentional Torts (7/26/2016)

The question was:

A real estate developer was trying to purchase land on which he intended to build a large commercial development. An elderly widow had rejected all of the developer's offers to buy her ancestral home, where she had lived all her life and which was located in the middle of the developer's planned development. Finally, the developer offered her $250,000. He told her that if she rejected it, state law authorized him to have her property condemned. He subsequently parked a bulldozer in front of her house.

The widow then consulted her nephew, a law student, who researched the question and advised her that the developer had no power of condemnation under state law. The widow had been badly frightened by the developer's threat, and was outraged when she learned that the developer had lied to her.

If the widow sues the developer for damages for emotional distress, will she prevail?

A: Yes, because the developer's action was extreme and outrageous.
B: Yes, because the widow was frightened and outraged.
C: No, because the widow did not suffer emotional distress that was severe.
D: No, because it was not the developer's purpose to cause emotional distress.

The explanation for the answer is:

C is the correct answer. The developer intentionally tried to frighten the widow into selling him her land with an outrageous and extreme threat. This is an intentional tort issue. The elements of intentional infliction of emotional distress ("IIED") are: (1) defendant's intentional (with purpose or knowledge to a substantial certainty) or reckless (2) extreme and outrageous conduct (3) causes plaintiff severe emotional distress. Severe emotional distress can be evidenced physically, but physical injury is not required.

Here, the developer actions were extreme and outrageous. However, the facts state only that the widow was "frightened" and "outraged", and this is not sufficient to show "severe" emotional distress. Therefore, C is correct and B is incorrect. A is incorrect because extreme and outrageous conduct is not sufficient to support a claim of IIED without the suffering of severe emotional distress. D is incorrect because causing the severe emotional distress through recklessness will suffice.

Question 1176 - Torts - Intentional Torts (2/3/2017)

The question was:

As a seller, an encyclopedia salesman, approached the grounds on which a homeowner's house was situated, he saw a sign that said, "No salesmen. Trespassers will be prosecuted. Proceed at your own risk." Although the seller had not been invited to enter, he ignored the sign and drove up the driveway toward the house. As he rounded a curve, a powerful explosive charge buried in the driveway exploded, and the seller was injured.

Can the seller recover damages from the homeowner for his injuries?

A: Yes, because the homeowner was responsible for the explosive charge under the driveway.
B: Yes, because the homeowner, when he planted the charge, intended to harm a possible intruder.
C: No, because the seller ignored the sign, which warned him against proceeding further.
D: No, because the homeowner reasonably feared that intruders would come and harm him or his family.

The explanation for the answer is:

A is the correct answer. The homeowner has committed the intentional tort of battery against the salesman. Battery has three elements: (i) an act by the defendant which brings about harmful or offensive contact; (ii) intent on the part of the defendant to bring about harmful or offensive contact; and (iii) causation. Here, the homeowner committed the required act by placing the explosives under his driveway which caused the harm to the salesman. Causation is still present even though the the contact was indirect. It is sufficient causation if the defendant sets in motion the force that brings about the harmful contact. Therefore, A is the correct answer.

B is incorrect because it lists a motive. Battery requires only a general intent that the actor know with substantial certainty that the consequences of his actions will likely result. Here, the homeowner had a general intent if he knew with substantial certainty that his actions would likely bring about the consequences, i.e. that placing the explosives would likely cause an explosion. He did not have to intend any injuries nor intent to harm trespassers, like the salesman. Motive is distinguishable from intent. Motive impels a person to act to achieve a result. Intent denotes a purpose to use a particular means to effect that result. Motive is not relevant for establishing the prima facie case.

C is incorrect because the homeowner may never use deadly force, such as explosives, to keep trespassers from entering his property. The salesman’s status as a trespasser is not relevant and not a defense here.

D is incorrect because nothing in the fact pattern suggests that the homeowner or his family is in danger. The homeowner would have had a limited privilege to use direct force, equal to the threat against him, if there was a threat to his own personal safety. Such facts would change the situation from defense of property to a self defense analysis. However, the facts do not place the homeowner in any type of jeopardy at all.

Question 902 - Torts - Intentional Torts (2/10/2017)

The question was:

A gardener's backyard, which is landscaped with expensive flowers and shrubs, is adjacent to a golf course. While a golfer was playing golf on the course, a thunderstorm suddenly came up. As the golfer was returning to the clubhouse in his golf cart, lightning struck a tree on the course, and the tree began to fall in the golfer's direction. In order to avoid being hit by the tree, the golfer deliberately steered his cart onto the gardener's property, causing substantial damage to the gardener's expensive plantings.

In an action by the gardener against the golfer to recover damages for the harm to his plantings, the gardener will

A: prevail, because, although occasioned by necessity, the golfer's entry onto the gardener's property was for the golfer's benefit.
B: prevail, for nominal damages only, because the golfer was privileged to enter the gardener's property.
C: not prevail, because the lightning was an act of God.
D: not prevail, because the golfer's entry onto the gardener's property was occasioned by necessity and therefore privileged.

The explanation for the answer is:

A is the correct answer. The golfer has the "incomplete" privilege of private necessity, which allows trespass (without being branded the legal status of trespasser) onto the property of another to avoid a serious personal threat to life or property, but keeps liability for any actual damage caused by the intrusion. The golfer's need to escape a falling tree in a thunderstorm qualifies as an emergency sufficient to invoke a necessity privilege. The privilege of private necessity means that the golfer is only liable for actual damages, thus A is the appropriate choice.

B is incorrect. The golfer is not legally a trespasser due to the private emergency that caused him to take refuge on the gardener's property. The golfer's privilege to trespass is incomplete, however, so he must pay the gardener for any actual damages to the property as a result of the golfer's actions.

C is incorrect. An act of God is generally used as a defense (superseding cause) in negligence to cut short liability. Instead, the sudden storm created an emergency situation that justified the golfer's intrusion onto the gardener's property. Because it was a personal emergency, however, the golfer is subject to the provisions of the incomplete privilege of private necessity and must pay the gardener for any actual damage to the gardener's property as a result of the entry.

D is incorrect. If this had been a public emergency/necessity there would have been complete privilege with no liability. Private necessity, however, is an incomplete privilege, and the golfer is liable for any actual damages he caused.

Question 488 - Torts - Intentional Torts (2/10/2017)

The question was:

A well-known politician was scheduled to address a large crowd at a political dinner. Just as he was about to sit down at the head table, the defendant pushed the politician's chair to one side. As a result, the politician fell to the floor. The politician was embarrassed at being made to look foolish before a large audience but suffered no physical harm.

Assume that the defendant knew that the politician was about to sit in the chair before he pushed it. If the politician asserts a claim against the defendant for damages because of his embarrassment, will the politician prevail?

A: Yes, because the defendant knew that the politician was about to sit on the chair.
B: Yes, because the defendant negligently failed to notice that the politician would fall.
C: No, because the politician suffered no physical harm along with his embarrassment.
D: No, because the defendant intended moving the chair to be a good-natured practical joke on the politician.

The explanation for the answer is:

A is the correct answer. The call of the question does not give a specific claim, but the key word here is "embarrassment." This is a dignitary tort claim. A battery consists of the unlawful application of force to the person resulting in bodily injury or offensive touching, without consent or privilege. Battery is a general intent crime, and the force need not be applied directly. Here, the defendant set into motion an action with purpose or knowledge to a substantial certainty that the offensive contact would result. Therefore, the defendant committed a battery and the politician can recover for the harm to his dignity.

B is incorrect. Negligence allows pain and suffering, but only for actual damages. A claim based on embarrassment must necessarily involve a dignitary tort, such as battery, to succeed. C is incorrect. All that is required is an offensive touching; physical harm is not required. D is incorrect. Because the defendant pushed the chair knowing that the politician was about to sit on it, the defendant's intent to be funny is irrelevant as battery only requires a general intent to bring about the harmful or offensive contact. The defendant is still liable for any unintended injuries that may occur as a result.

Question 1304 - Torts - Intentional Torts (2/10/2017)

The question was:

A landowner who owned a large tract of land in the mountains sought to protect a herd of wild deer that lived on part of the land. Although the landowner had posted signs that said, "No Hunting—No Trespassing," hunters frequently intruded to kill the deer. Recently, the landowner built an eight-foot-high chain-link fence, topped by three strands of barbed wire, across a gully on her land that provided the only access to the area where the deer lived.

A wildlife photographer asked the landowner for permission to enter the property to photograph the deer. Because the landowner feared that any publicity would encourage further intrusions, she denied the photographer's request. Frustrated, the photographer attempted to climb the fence. He became entangled in the barbed wire and suffered extensive lacerations. The wounds became infected and ultimately caused his death. The photographer's personal representative has sued the landowner.

Is the personal representative likely to prevail?

A: Yes, because the landowner may not use deadly force to protect her land from intrusion.
B: Yes, because the landowner had no property interest in the deer that entitled her to use force to protect them.
C: No, because the photographer entered the landowner's land after the landowner had refused him permission to do so and therefore was a trespasser.
D: No, because the potential for harm created by the presence of the barbed wire was apparent.

The explanation for the answer is:

Answer D is correct. The landowner is privileged to protect her property from intrusion by a means not intended or likely to cause death or serious bodily harm. The fact that the barbed wire presents its own warning and is not a hidden trap makes it a reasonable device for discouraging trespassers. The plaintiff will not recover because the potential for harm created by the presence of the barbed wire was apparent, and the photographer assumed the risk of injury by trespassing onto the landowner's property despite the barbed wire fence.

Answer A is incorrect. Although barbed wire did cause death in this case, it is not considered to be "deadly force." The statement is true but not applicable to these facts.

Answer B is incorrect. The landowner had a property interest in the land, and she was entitled to protect that interest even if her motive was primarily to protect the deer.

Answer C is incorrect. The landowner's refusal to permit others to enter her land was clear both before and after she denied the photographer's individual request to enter. Therefore, the photographer would have been a trespasser whether or not the landowner had specifically told him not to enter. Also, even trespassers can sue for injuries caused by some devices designed to protect land (e.g., hidden traps and deadly force).

Question 998 - Torts - Intentional Torts (2/10/2017)

The question was:

A plaintiff suffered a serious injury while participating in an impromptu basketball game at a public park. The injury occurred when the plaintiff and the defendant, on opposing teams, each tried to obtain possession of the ball when it rebounded from the backboard after a missed shot at the basket. During that encounter, the plaintiff was struck and injured by the defendant's elbow. The plaintiff now seeks compensation from the defendant.

At the trial, evidence was introduced tending to prove that the game had been rough from the beginning, that elbows and knees had frequently been used to discourage interference by opposing players, and that the plaintiff had been one of those making liberal use of such tactics.

In this action, will the plaintiff prevail?

A: Yes, because the defendant intended to strike the plaintiff with his elbow.
B: Yes, because the defendant intended to cause harmful or offensive contact with the plaintiff.
C: No, because the plaintiff impliedly consented to violent play.
D: No, because the defendant did not intentionally use force that exceeded the players' consent.

The explanation for the answer is:

D is correct. The plaintiff and the defendant were voluntarily participating in a basketball game that "had been rough from the beginning." By taking part in the physically interactive basketball game, the plaintiff gave his implied consent to contact that, outside the game, might have otherwise been considered a harmful or offensive. That consent, however, is limited to ordinary game conduct. If the defendant's intentional contact reached a level of force that fell outside the scope of ordinary gamesmanship among the group of players, then he exceeded his privilege and the plaintiff will prevail. Thus, A, B and C are incorrect.

Question 881 - Torts - Intentional Torts (2/10/2017)

The question was:

The manager of a department store noticed that a customer was carrying a scarf with her as she examined various items in the blouse department. The manager recognized the scarf as an expensive one carried by the store. The customer was trying to find a blouse that matched a color in the scarf, and, after a while, found one. The manager then saw the customer put the scarf into her purse, pay for the blouse, and head for the door. The manager, who was eight inches taller than the customer, blocked the customer's way to the door and asked to see the scarf in the customer's purse. The customer produced the scarf, as well as a receipt for it, showing that it had been purchased from the store on the previous day. The manager then told the customer there was no problem and stepped out of her way.

If the customer brings a claim against the store based on false imprisonment, the store's best defense would be that

A: by carrying the scarf in public view and then putting it into her purse, the customer assumed the risk of being detained.
B: the manager had a reasonable belief that the customer was shoplifting and detained her only briefly for a reasonable investigation of the facts.
C: the customer should have realized that her conduct would create a reasonable belief that facts existed warranting a privilege to detain.
D: the customer was not detained, but was merely questioned about the scarf.

The explanation for the answer is:

B is the correct answer. The manager had a "shopkeeper's (or merchant's) privilege" to detain the customer. For the privilege to be valid, the manager must have had reasonable grounds to believe that the customer was stealing or attempting to steal store property, the detention must be for a reasonable period of time, and it must be conducted in a reasonable manner. If the manager had held the customer after the issue of the stolen scarf had been settled, or after the goods had been recovered in an attempt to obtain a signed confession, the customer's claim for false imprisonment would prevail. B is the best defense because it addresses the elements of the privilege as they pertain to the facts of the situation.

Choice A does not describe a complete defense. The statement only addresses reasonable grounds. Choice C incorrectly provides a negligence standard of comparative fault. This is an intentional tort issue, however. Choice D does not describe a successful defense. False imprisonment has no specific time requirement. If the customer did not feel free to leave, there is a false imprisonment issue that the manager must address to prevail.

Question 1582 - Torts - Intentional Torts (2/10/2017)

The question was:

A boater, caught in a sudden storm and reasonably fearing that her boat would capsize, drove the boat up to a pier, exited the boat, and tied the boat to the pier. The pier was clearly marked with "NO TRESPASSING" signs. The owner of the pier ran up to the boater and told her that the boat could not remain tied to the pier. The boater offered to pay the owner for the use of the pier. Regardless, over the boater's protest, the owner untied the boat and pushed it away from the pier. The boat was lost at sea.

Is the boater likely to prevail in an action against the owner to recover the value of the boat?

A: No, because the owner told the boater that she could not tie the boat to the pier.
B: No, because there was a possibility that the boat would not be damaged by the storm.
C: Yes, because the boater offered to pay the owner for the use of the pier.
D: Yes, because the boater was privileged to enter the owner's property to save her boat.

The explanation for the answer is:

A is incorrect. The boater was privileged to trespass on the owner's property under the doctrine of private necessity, because the boater's property was at risk. Because the boater's intrusion onto the pier was privileged, the owner had no right to exclude her or her boat from the pier. In telling the boater that she could not tie the boat to the pier, the owner was asserting a right that he did not possess. When the owner untied the boat, he committed an unprivileged trespass upon the boater's property, so the owner must pay for the loss of the boat.

B is incorrect. The boater was privileged to trespass on the owner's property under the doctrine of private necessity, because her property was at risk. In order to establish that privilege, the boater need not establish that harm to the boat was inevitable, but only that her actions were reasonable given the circumstances. Because the boater's intrusion onto the pier was privileged, the owner had no right to exclude her or her boat from the pier. When the owner untied the boat, he committed an unprivileged trespass upon the boater's property, so the owner must pay for the loss of the boat.

C is incorrect. The boater is likely to prevail, but it is because the boater was privileged to trespass on the owner's property under the doctrine of private necessity. Because the boater's property was at risk, her intrusion onto the pier was privileged, and the owner had no right to exclude her or her boat from the pier. Whether or not the boater offered to pay the owner is irrelevant to the privilege of private necessity. When the owner untied the boat, he committed an unprivileged trespass upon the boater's property, so the owner must pay for the loss of the boat.

D is correct. The boater was privileged to trespass on the owner's property under the doctrine of private necessity, because the boater's property was at risk. Because the boater's intrusion onto the pier was privileged, the owner had no right to exclude her or her boat from the pier. When the owner untied the boat, he committed an unprivileged trespass upon the boater's property, so the owner must pay for the loss of the boat.

Question 1288 - Torts - Intentional Torts (2/10/2017)

The question was:

A law student rented a furnished apartment. His landlord began to solicit his advice about her legal affairs, but he refused to provide it. The landlord then demanded that he vacate the apartment immediately. The landlord also began engaging in a pattern of harassment, calling the student at home every evening and entering his apartment without his consent during times when he was at school. During these unauthorized visits she removed the handles from the bathroom and kitchen sinks, but did not touch anything belonging to the student. The lease has a year to run, and the student is still living in the apartment. The student has sued the landlord for trespass to land.

Is he likely to prevail?

A: No, because he has no standing to sue for trespass.
B: No, because the landlord caused no damage to his property.
C: Yes, for compensatory damages only.
D: Yes, for injunctive relief, compensatory damages, and punitive damages.

The explanation for the answer is:

Answer D is correct. The student is in legal possession of the apartment and thus has an interest that can be vindicated in a trespass action. Under these facts demonstrating a pattern of ongoing malicious behavior, the law student is unlikely to be limited to compensatory damages. In addition to compensatory damages for emotional distress and the removal of the faucets, the student is entitled to punitive damages (demonstrated by the landlord's malicious intent and ill will). Because the lease is still in effect and the trespasses are repeated and ongoing, injunctive relief should also be available. Thus, Answer D is correct, and Answers A, B and C are incorrect.

Question 1250 - Torts - Intentional Torts (2/10/2017)

The question was:

An associate professor in the pediatrics department of a local medical school was denied tenure. He asked a national education lobbying organization to represent him in his efforts to have the tenure decision reversed. In response to a letter from the organization on the professor's behalf, the dean of the medical school wrote to the organization explaining truthfully that the professor had been denied tenure because of reports that he had abused two of his former patients. Several months later, after a thorough investigation, the allegations were proven false and the professor was granted tenure. He had remained working at the medical school at full pay during the tenure decision review process and thus suffered no pecuniary harm.

In a suit for libel by the professor against the dean of the medical school, will the professor prevail?

A: No, because the professor invited the libel.
B: No, because the professor suffered no pecuniary loss.
C: Yes, because the dean had a duty to investigate the rumor before repeating it.
D: Yes, because the dean's defamatory statement was in the form of a writing.

The explanation for the answer is:

Answer A is correct. The professor can state a prima facie case of defamation, but he cannot prevail because the dean has a valid defense based on his reasonable belief that the professor invited him to speak. By authorizing his agents to investigate his case, the professor apparently consented to limited publication in response to their inquiries. Ill will, if it existed, would be irrelevant to this defense.

Answer B is incorrect. This answer correctly states that the professor will lose, but it misstates the legal basis for this conclusion. Some jurisdictions may require evidence of pecuniary loss for oral statements that are not slander per se, but this is a written statement. At common law, damages to the professor's reputation would be presumed. As explained above, the professor cannot prevail-despite stating a prima facie case of defamation because the dean has a valid defense based on his reasonable belief that the professor invited him to speak.

Answer C is incorrect because the tort of defamation does not turn on whether an investigation, reasonable or not, has been conducted.

Answer D is incorrect. An written statement of this sort would ordinarily support an action for defamation if there were no defense or privilege. In this case, despite stating a prima facie case of defamation, the professor cannot prevail because the dean has a valid defense based on his reasonable belief that the professor invited him to speak. By authorizing his agents to investigate the case, the professor apparently consented to limited publication in response to their inquiries.

Question 642 - Torts - Intentional Torts (2/10/2017)

The question was:

A plaintiff and a defendant were in the habit of playing practical jokes on each other on their respective birthdays. On the plaintiff's birthday, the defendant sent the plaintiff a cake containing an ingredient that he knew had, in the past, made the plaintiff very ill. After the plaintiff had eaten a piece of the cake, he suffered severe stomach pains and had to be taken to the hospital by ambulance. On the way to the hospital, the ambulance driver suffered a heart attack, which caused the ambulance to swerve from the road and hit a tree. As a result of the collision, the plaintiff suffered a broken leg.

In a suit by the plaintiff against the defendant to recover damages for the plaintiff's broken leg, the plaintiff will

A: prevail, because the defendant knew that the cake would be harmful or offensive to the plaintiff.
B: not prevail, because the ambulance driver was not negligent.
C: not prevail, because the defendant could not reasonably be expected to foresee injury to the plaintiff's leg.
D: not prevail, because the ambulance driver's heart attack was a superseding cause of the plaintiff's broken leg.

The explanation for the answer is:

A is the correct answer. The defendant intentionally fed the plaintiff a substance that he knew would make the plaintiff very ill. Despite the red-herring stating that the two "were in a habit of playing practical jokes," this is a battery. A battery is caused by an intentional harmful or offensive contact to the plaintiff's person or an extension thereof, without consent or privilege. The actual touching need not be done personally by the defendant as long as the defendant set into motion an action with purpose or knowledge to a substantial certainty that the offensive or harmful touching would result.

B, C and D are incorrect. Intentionally wrongful actions render the defendant liable for all consequences of those acts, even if unintended and unforeseen. Any possible negligence of the ambulance driver will likely have no effect on the plaintiff's claim against the defendant.

Question 1448 - Torts - Intentional Torts (2/10/2017)

The question was:

A rancher and his neighbor were involved in a boundary dispute. In order to resolve their differences, each drove his truck to an open pasture area on his land where the two properties were separated by a fence. The rancher was accompanied by four friends, and the neighbor was alone.

The neighbor got out of his truck and walked toward the fence. The rancher got out but simply stood by his truck. When the neighbor came over the fence, the rancher shot him, inflicting serious injury.

In a battery action brought by the neighbor against the rancher, the rancher testified that he actually thought his neighbor was armed, although he could point to nothing that would have reasonably justified this belief.

Is the neighbor likely to prevail?

A: No, because the rancher was standing on his own property and had no obligation to retreat.
B: No, because the rancher suspected that the neighbor was armed.
C: Yes, because deadly force is never appropriate in a property dispute.
D: Yes, because it was unreasonable for the rancher to consider the use of a gun necessary for self-defense.

The explanation for the answer is:

Answer D is correct. While the rancher's belief that deadly force was necessary to protect himself from harm may have been actual, it was not reasonable. To justify the use of force sufficient to cause death or serious bodily injury, a defendant must have more than a subjective suspicion that such force is necessary. A defendant must have an actual and reasonable belief that he himself is threatened with force of that sort. In this case, the rancher's belief that the neighbor was armed was not reasonable, nor did he have a *reasonable* belief that the neighbor meant to harm him. Thus, Answer D is correct and Answer B is incorrect.

Answer A is incorrect. The majority of states that recognize a right to stand one's ground rather than retreat limit the right to an owner who is confronted in his home, not one simply standing outside on land that he owns. Also, even if the rancher had no obligation to retreat, he used deadly force, which was not justifiable unless he had a reasonable belief that he himself was threatened with that degree of force and needed to use deadly force to defend himself. The disparity in numbers here, as well as the fact that the rancher's belief that the defendant was armed was not supported by any evidence, indicate that his decision to shoot was unreasonable.

Answer C is incorrect. It is true that force sufficient to cause serious bodily injury cannot be used to protect property, but a property dispute can escalate to a situation in which the participants are in danger of bodily harm. In this case, the rancher will argue that he feared that the neighbor was going to shoot him. If he reasonably feared the use of deadly force against his person, he could respond with the same degree of force even though the dispute began as a fight over property. However, because the rancher's fear was not reasonable, he was not justified in using deadly force.

Question 735 - Torts - Intentional Torts (2/10/2017)

The question was:

A defendant, an inexperienced driver, borrowed a car from the plaintiff, a casual acquaintance, for the express purpose of driving it several blocks to the local drug store. Instead, the defendant drove the car, which then was worth $12,000, 100 miles to another city. While the defendant was driving in the other city the next day, the car was hit by a negligently driven truck and sustained damage that will cost $3,000 to repair. If repaired, the car will be fully restored to its former condition.

If the plaintiff asserts a claim against the defendant based on conversion, the plaintiff should recover a judgment for

A: $12,000.
B: $3,000.
C: $3,000 plus damages for the loss of the use of the car during its repair.
D: nothing, because the defendant was negligent.

The explanation for the answer is:

A is the correct answer. When the defendant intentionally used the car to drive beyond the local drug store to the other city, he interfered with the plaintiff's possessory interest in his car by using it beyond the scope of the plaintiff's permission to do so. When the defendant kept dominion of the car overnight and continued to drive it the next day in the other city, the conduct constituted such a substantial possessory interference that the plaintiff had a claim for conversion as a result. The conversion occurred even if the defendant did not intend to get into an accident and was not negligent while driving the car. In a claim for conversion, the plaintiff may recover the fair market value of the car, which was $12,000 before it was damaged.

B and C are incorrect. The defendant's interference was substantial, so the plaintiff is entitled to full market value of the car. If the defendant had damaged the car while driving to the local drug store, he would only be liable for the $3,000 in actual damages in a claim for trespass to chattels. The facts, however, support a claim for conversion.

D is incorrect. The defendant's interference was intentional and a conversion. Therefore, the defendant's lack of negligence will not protect him from liability.

Question 750 - Torts - Negligence (7/26/2016)

The question was:

An actress, who played the lead role in a television soap opera, was seriously injured in an automobile accident caused by the defendant's negligent driving. As a consequence of the actress's injury, the television series was canceled, and a supporting actor was laid off. Although the supporting actor looked for other work, he remained unemployed.

In an action against the defendant, can the supporting actor recover for his loss of income attributable to the accident?

A: Yes, because the defendant's negligence was the cause in fact of the supporting actor's loss.
B: Yes, because the supporting actor took reasonable measures to mitigate his loss.
C: No, because the defendant had no reason to foresee that by injuring the lead actress he would cause harm to the supporting actor.
D: No, because the defendant's liability does not extend to economic loss to the supporting actor that arises solely from physical harm to the lead actress.

The explanation for the answer is:

D is the correct answer. With the exception of a wrongful death claim allowed by statute, a negligence action for pure economic loss to a plaintiff as the result of an injury suffered by a third party is generally not recoverable. Here, because the supporting actor is seeking to recover damages as a result of the television series being cancelled and being laid off, these damages constitute economic damages and therefore are not recoverable. Courts, as a policy matter, will refuse to find proximate cause in such cases. Thus A, B and C are incorrect.

Question 977 - Torts - Negligence (7/26/2016)

The question was:

A plaintiff sustained personal injuries in a three-car collision caused by the concurrent negligence of all three drivers. In the plaintiff's action for damages against the other two drivers, the jury apportioned the negligence 30% to the plaintiff, 30% to driver #1, and 40% to driver #2. The plaintiff's total damages were $100,000.

Assume that the state has retained the common-law rule pertaining to contribution and that the state's comparative negligence statute provides for a system of pure comparative negligence but abolishes joint and several liability.

If the plaintiff chooses to pursue the claim against driver #1 alone, she will be entitled to collect at most

A: $70,000 from driver #1, and then driver #1 will be entitled to collect $40,000 from driver #2.
B: $30,000 from driver #1, and then driver #1 will be entitled to collect $10,000 from driver #2.
C: $30,000 from driver #1, and then driver #1 will be entitled to collect nothing from driver #2.
D: nothing from driver #1, because his percentage of fault is not greater than that of the plaintiff.

The explanation for the answer is:

C is the correct answer. The facts tell you that joint and several liability has been abolished, which means that each defendant is liable only for his own share of the damages, not the entire award. In addition, contribution between tortfeasors is only available where one defendant has paid more than his determined share of the damages. C is the only answer that appropriately applies these principles.

A is incorrect. It states a joint and several liability standard of application to the facts. B is incorrect. Driver #1 can collect nothing from driver #2. They are not jointly and severally liable and driver #1 has not paid out more than his share of liability, so contribution is not available to him. D is a misstatement of law. In pure comparative negligence, the plaintiff can recover all of her damages, minus the percentage attributed to her own fault. The plaintiff is entitled to $30,000 from driver #1.

Question 1240 - Torts - Negligence (7/26/2016)

The question was:

The personnel director of an investment company told a job applicant during an interview that the company was worth millions of dollars and that the company's portfolio would triple in the next several months. The applicant was very excited about the company's prospects and accepted an offer to work for the company. Two days later, the applicant read in the newspaper that the investment company had filed for bankruptcy reorganization. As a result of reading this news, the applicant suffered severe emotional distress but he immediately found another comparable position.

Is the applicant likely to prevail in his action for negligent misrepresentation?

A: No, because the applicant did not suffer any physical injury or pecuniary loss.
B: No, because the personnel director's statement was purely speculative.
C: Yes, because the applicant relied on the personnel director's misrepresentations about the investment company.
D: Yes, because the personnel director should have foreseen that his misrepresentations would cause the applicant to be distressed.

The explanation for the answer is:

Answer A is correct. The situations in which a plaintiff can recover for purely emotional distress caused by negligence are limited, and this is not one of them. Recovery for negligent misrepresentation is usually limited to pecuniary loss unless it involves a risk of physical harm. In this case, the applicant found a comparable position promptly, so he suffered no harm from the personnel director's misrepresentation other than his emotional distress.

Answer B is incorrect. This answer correctly states that the applicant will not prevail, but it misstates the legal basis for this conclusion. It is not the case that the director's statement is purely speculative. Some of the information conveyed to the job applicant was factual; it was clearly intended to assure the applicant that the company was in fact at the time economically strong, and to induce reliance. The applicant will lose because the situations in which a plaintiff can recover for purely emotional distress caused by negligence are limited, and this is not one of them. Recovery for negligent misrepresentation is usually limited to pecuniary loss unless it involves a risk of physical harm.

Answer C is incorrect. Reliance is essential for recovery in negligent misrepresentation, but it is not sufficient. Moreover, the situations in which a plaintiff can recover for purely emotional distress caused by negligence are limited, and this is not one of them.

Answer D is incorrect. Recovery for negligent misrepresentation does not extend to all foreseeable harms. The applicant cannot prevail, because recovery for negligent misrepresentation is usually limited to pecuniary loss unless it involves a risk of physical harm. In this case, the applicant found a comparable position promptly, so he suffered no harm from the personnel director’s misrepresentation other than his emotional distress.

Question 1532 - Torts - Negligence (7/26/2016)

The question was:

A man and his friend, who were both adults, went to a party. The man and the friend had many drinks at the party and became legally intoxicated. They decided to play a game of chance called "Russian roulette" using a gun loaded with one bullet. As part of the game, the man pointed the gun at the friend and, on her command, pulled the trigger. The man shot the friend in the shoulder.

The friend has brought a negligence action against the man. Traditional defenses based on plaintiff's conduct apply.

What is likely to be the dispositive issue in this case?

A: Whether the game constituted a joint venture.
B: Whether the friend could validly consent to the game.
C: Whether the friend was also negligent.
D: Whether the man was legally intoxicated when he began playing the game.

The explanation for the answer is:

A is incorrect. The fact that the man and the friend might have been engaged in a joint venture would be relevant if the action were being brought by a third party who was not part of the venture but who had been injured as a consequence of their activities. It is irrelevant to a suit among participants in a joint venture unless it indicates an assumption of risk.

B is incorrect. It is likely that consent to this activity would be routinely found to be against public policy, although the consequences of such a determination would vary from state to state. But consent is a defense more appropriately raised in an intentional tort case, not a case for negligence. There is no indication that the friend consented to any negligence, and in any case she was too intoxicated to give a valid consent.

C is correct. Contributory negligence is an appropriate defense to a negligence action, and here both parties seem to have been acting unreasonably in exactly the same way. Whether the argument is put in the form of the friend's carelessness in engaging in the activity or in her unreasonable assumption of risk, many states would now evaluate the defense under comparative negligence principles. It is irrelevant whether the jurisdiction is a contributory negligence jurisdiction or a comparative negligence jurisdiction, whether the friend was negligent at all would be the dispositive issue in the case.

D is incorrect. The man's intoxication would not insulate him from liability to those he injured while in that state. He would still be held to the "reasonably prudent person" standard.

Question 59 - Torts - Negligence (7/26/2016)

The question was:

A property owner owns a hotel. When the International Order of Badgers came to town for its convention, its members rented 400 of the 500 rooms, and the hotel opened its convention facilities to them. During their convention, the members littered both the inside and the outside of the hotel with debris and bottles. The hotel manager knew that objects were being thrown out of the hotel windows. At his direction, hotel employees patrolled the hallways telling the guests to refrain from such conduct. The owner was out of town and was not aware of the problems which were occurring. During the convention, as a pedestrian walked past the hotel on the sidewalk, he was hit and injured by an ashtray thrown out of a window in the hotel by an unknown person. The pedestrian sued the owner for damages for his injuries.

Will the pedestrian prevail in his claim against the owner?

A: Yes, because a property owner is strictly liable for acts on his premises if such acts cause harm to persons using the adjacent public sidewalks.
B: Yes, because the person who threw the ashtray cannot be identified.
C: No, because the owner had no personal knowledge of the conduct of the hotel guests.
D: No, because the hotel employees had taken reasonable precautions to prevent such an injury.

The explanation for the answer is:

D is the correct answer. The injured person was not a guest, but a passerby, so the principle that innkeepers are liable for slight negligence does not apply to this situation. Instead, the pedestrian was a licensee, so the owner had a duty to exercise reasonable care in conducting active operations. Because the hotel employees took reasonable precautions against injury to a passerby, the owner will not be found liable.

A is incorrect. The strict liability standard does not apply to active operations unless the activity being performed is ultra-hazardous (such as demolition or the storage of hazardous waste). The hosting of a convention is not an ultra-hazardous activity, so the owner is not strictly liable for any harm caused by active operations. B is incorrect because the owner has not breached his duty of care, and is not liable even if the actual wrongdoer cannot be identified. C is incorrect because if the owner's employees had not acted with reasonable care, then the owner could be vicariously liable for the pedestrian's injury on a theory of respondeat superior even if the owner had no personal knowledge of the conduct of the hotel guests.

Question 799 - Torts - Negligence (7/26/2016)

The question was:

A supermarket is in a section of town where there are sometimes street fights and where pedestrians are occasionally the victims of pickpockets and muggers. In recognition of the unusual number of robberies in the area, the supermarket posted signs in the store that read:

Warning: There are pickpockets and muggers at work in this part of the city. The supermarket is not responsible for the acts of criminals.

Other than posting the signs, the supermarket took no other precautions to prevent criminal activity on the premises.

One evening, a customer drove to the supermarket to see about a special on turkeys that the supermarket was advertising. She decided that the turkeys were too large and left the store without purchasing anything. In the parking lot, she was attacked by an unknown man who raped her and then ran away.

If the customer sues the supermarket, the result should be for the

A: plaintiff, because the supermarket failed to take reasonable steps to protect customers against criminal attack in its parking lot.
B: plaintiff, because the supermarket is liable for harm to business invitees on its premises.
C: defendant, because the warning signs were visible to the customer.
D: defendant, because the rapist was the proximate cause of the customer's injuries.

The explanation for the answer is:

A is the correct answer. The supermarket has a duty to take reasonable steps to make the conditions on its premises, indoors and outdoors, reasonably safe; to conduct active operations with reasonable care for the presence of its invitees; and, under limited circumstances, to use reasonable care to protect its customers against the foreseeable harmful/criminal acts of third persons or animals. Because the supermarket had actual knowledge of violent crimes occurring on the premises, the failure to take reasonable steps to protect customers will give rise to liability. Thus, C is incorrect.

B is incorrect. The supermarket is not strictly liable. Negligence must be proven for the customer to prevail in a claim for damages.

D is incorrect. The rapist was the actual cause of the customer's injuries. The issue in this question, however, is whether the supermarket acted reasonably to meet its burden of care in protecting the plaintiff, its customer, from the known or discoverable dangerous conditions on its premises.

Question 623 - Torts - Negligence (7/26/2016)

The question was:

In an action brought against a defendant by a pedestrian's legal representative, the only proof that the legal representative offered on liability were that: (1) the pedestrian was killed instantly while walking on the shoulder of the highway; (2) the defendant was driving the car that struck the pedestrian; and (3) there were no living witnesses to the accident other than the defendant, who denied negligence.

The jurisdiction has adopted a rule of pure comparative negligence.

If, at the end of the plaintiff's case, the defendant moves for directed verdict, the trial judge should

A: grant the motion, because the legal representative has offered no specific evidence from which reasonable jurors may conclude that the defendant was negligent.
B: grant the motion, because it is just as likely that the pedestrian was negligent as that the defendant was negligent.
C: deny the motion, because the pedestrian was in violation of the state highway code.
D: deny the motion, because, in the circumstances, negligence on the part of the defendant may be inferred.

The explanation for the answer is:

D is correct. The pedestrian's personal representative made a claim based on res ipsa loquitur, because proof of negligence must be inferred. The doctrine of *res ipsa loquitur* is generally applied in situations where negligence clearly occurred and (1) the defendant had exclusive control of the instrumentality during the relevant time and, (2) the plaintiff shows that he was not responsible for the injury. A directed verdict (also called Judgment as a Matter of Law) allows judgment if the evidence, when viewed in the light most favorable to the nonmoving party, is such that a reasonable person/jury could not disagree. The pedestrian died after being struck by the defendant's car, driven by the defendant. The pedestrian was on the side of the road at the time he was hit. A reasonable inference therefore is that the defendant was driving negligently. Therefore, the pedestrian's estate will prevail because a reasonable person could determine that the defendant was negligent. Thus A is incorrect.

B is incorrect. The facts will not be construed in favor of the defendant because he was the party that made the motion.

C is incorrect. This is a pure comparative negligence jurisdiction. If the defendant's defense is that the pedestrian violated a safety code, the subsequent issues of applicability and of comparative responsibility cannot be decided in a directed verdict. A directed verdict is only given if the evidence, when viewed in the light most favorable to the nonmoving party, is such that a reasonable person/jury could not disagree.

Question 1568 - Torts - Negligence (7/26/2016)

The question was:

A shopper was riding on an up escalator in a department store when the escalator stopped abruptly. The shopper lost her balance and fell down the escalator steps, sustaining injuries. Although the escalator had been regularly maintained by an independent contractor, the store's obligation to provide safe conditions for its invitees was nondelegable. The shopper has brought an action against the store for damages, and the above facts are the only facts in evidence.

The store has moved for a directed verdict.

Should the court grant the motion?

A: No, because the finder of fact could infer that the escalator malfunction was due to negligence.
B: No, because the store is strictly liable for the shopper's injuries.
C: Yes, because an independent contractor maintained the escalator.
D: Yes, because the shopper has not produced evidence of negligence.

The explanation for the answer is:

A is correct. There is enough evidence here to support an inference of negligence on the part of the store. A jury could find that the malfunction was due to the negligent installation, maintenance, or operation of the escalator; the store would be responsible for all these possible causes under the nondelegable duty doctrine.

B is incorrect. Landowners and occupiers are not strictly liable even for injuries to their business invitees. The court should not grant the motion, but it is because the fact finder could infer negligence on the part of the store.

C is incorrect. Even if the malfunction were due to the negligence of the independent contractor, the store would also be responsible under the nondelegable duty doctrine. These facts illustrate a common situation in which that doctrine is applied: the defendant owns a building and invites the public to enter the building for the defendant's financial benefit. There is enough evidence here to support an inference of negligence on the part of the store. A jury could find that the malfunction was due to the negligent installation, maintenance, or operation of the escalator; the store would be responsible for all these possible causes under the nondelegable duty doctrine.

D is incorrect. There is enough evidence here to support an inference of negligence on the part of the store. A jury could find that the malfunction was due to the negligent installation, maintenance, or operation of the escalator; the store would be responsible for all these possible causes under the nondelegable duty doctrine.

Question 795 - Torts - Negligence (7/26/2016)

The question was:

A defendant and a group of his friends are fanatical basketball fans who regularly meet at each others' homes to watch basketball games on television. Some of the group are fans of team A, and others are fans of team B. When the group has watched televised games between these two teams, fights sometimes have broken out among the group. Despite this fact, the defendant invited the group to his home to watch a championship game between teams A and B.

During the game, the defendant's guests became rowdy and antagonistic. Fearing that they would begin to fight, and that a fight would damage his possessions, the defendant asked his guests to leave. They refused to go and soon began to fight. The defendant called the police, and a police officer was sent to the defendant's home. The officer sustained a broken nose in his efforts to stop the fighting.

The officer brought an action against the defendant alleging that the defendant was negligent in inviting the group to his house to watch this championship game. The defendant has moved to dismiss the complaint.

The best argument in support of this motion would be that

A: a rescuer injured while attempting to avert a danger cannot recover damages from the endangered person.
B: a police officer is not entitled to a recovery based upon the negligent conduct that created the need for the officer's professional intervention.
C: as a matter of law, the defendant's conduct was not the proximate cause of the officer's injury.
D: The defendant did not owe the officer a duty to use reasonable care, because the officer was a mere licensee on the defendant's property.

The explanation for the answer is:

B is the correct answer because it states what is known as "The Firefighter's Rule." The officer was injured by a peril that he was employed to confront. If the peril was created through negligence or was caused by a strict liability activity, the officer generally has no claim against the landowner (the defendant). Most states use the rule to treat the officer as a mere licensee who must take the premises as he finds them. This would allow the officer to recover in limited cases involving premises open to the public. In the facts of this situation, however, the officer was called to the defendant's private residence, where recovery would be barred. Thus, D is incorrect.

A is incorrect. If the policeman were an ordinary rescuer, he could recover damages if his injury was a foreseeable result of negligent conduct by the individual he was rescuing. It is the officer's status as a professional emergency worker that creates the bar to recovery.

C is incorrect. Generally, the Firefighters Rule has been interpreted to mean that the defendant had no duty to the officer either to avoid creating the danger which needed the officer's services, or to protect the officer from any associated harms that the defendant had no knowledge of. If there is no duty, then the issue of proximate cause does not arise.

Question 457 - Torts - Negligence (7/26/2016)

The question was:

A bicycle company manufactured a bicycle that was sold to a retail bicycle dealer which in turn sold it to a bicyclist. Shortly thereafter, while the bicyclist was riding the bicycle along a city street, he saw a traffic light facing him turn from green to yellow. He sped up, hoping to cross the intersection before the light turned red. However, the bicyclist quickly realized that he could not do so and applied the brake, which failed. To avoid the traffic that was then crossing in front of him, the bicyclist turned sharply to his right and onto the sidewalk, where he struck a pedestrian. Both the pedestrian and the bicyclist sustained injuries.

Assume that it is found that the brake failure resulted from a manufacturing defect in the bicycle, and that the defect would have been discovered by a reasonable inspection of the bicycle. If the pedestrian asserts a claim based on negligence against the bicycle company, will the pedestrian prevail?

A: Yes, because the bicycle company placed a defective bicycle into the stream of commerce.
B: Yes, because the defect could have been discovered through the exercise of reasonable care by the bicycle company.
C: No, because the pedestrian was not a purchaser of the bicycle.
D: No, because the bicyclist was negligent in turning into the sidewalk.

The explanation for the answer is:

B is the correct answer. The call of this question is negligence. Under a negligence claim, if the bicycle company failed to exercise due care, which caused the bike to be different than intended or more dangerous than others of its kind, any person who was foreseeably and actually harmed by the defect can bring a negligence action. The bicycle company has a duty to exercise due care in its manufacturing, which would include a reasonable inspection. Because the bicycle company failed to provide a reasonable inspection of the bicycle, the pedestrian will prevail.

A is incorrect. The call of the question is a negligence claim, this is a strict liability standard. C is incorrect because the pedestrian is a foreseeable plaintiff, and privity is not required. D is incorrect because the bicyclist's negligence could lead to an action for contribution by the bicycle company, but it would not cut short the bicycle company's liability.

Question 1259 - Torts - Negligence (2/3/2017)

The question was:

In a civil action, a plaintiff sued a decedent's estate to recover damages for injuries she suffered in a collision between her car and one driven by the decedent. At trial, the plaintiff introduced undisputed evidence that the decedent's car had swerved across the centerline of the highway into oncoming traffic, where it had collided with the plaintiff's car. The decedent's estate introduced undisputed evidence that, before he swerved across the centerline, the decedent had suffered a fatal heart attack, which he had no reason to foresee, and that, just prior to the heart attack, the decedent had been driving at a reasonable speed and in a reasonable manner. A statute makes it a traffic offense to cross the median of a highway.

In this case, which party is likely to prevail?

A: The decedent's estate, because its rebuttal evidence is undisputed.
B: The decedent's estate, because the plaintiff has not established a prima facie case of liability.
C: The plaintiff, because the accident was of a type that does not ordinarily happen in the absence of negligence on the actor's part.
D: The plaintiff, because the decedent crossed the median in violation of the statute.

The explanation for the answer is:

Answer A is correct. The plaintiff's evidence that the decedent violated the statute and crossed over the centerline establishes a prima facie case of negligence. However, the prima facie case of negligence may be rebutted by showing that compliance with the statute was beyond the defendant's control. Here, the decedent's estate successfully rebutted the plaintiff's evidence by providing an undisputed explanation of how the accident happened that is inconsistent with a finding of negligence (the decedent's unforeseeable heart attack made her unable to comply with the statute or, indeed, with any standard of care).

Answer B is incorrect. This answer correctly states that the decedent's estate will prevail, but it misstates the legal basis for this conclusion. As explained above, the decedent's estate successfully rebutted the plaintiff's prima facie case of negligence by providing an uncontested explanation of how the accident happened that is inconsistent with a finding of negligence (the decedent's unforeseeable heart attack made him unable to comply with the statute or, indeed, with any standard of care).

Answer C is incorrect. It may or may not be true that accidents of this type do not ordinarily happen in the absence of negligence, but whether they do is irrelevant. As explained above, the decedent's estate has successfully rebutted the plaintiff's prima facie case of negligence by providing an undisputed explanation of how the accident happened that is inconsistent with a finding of negligence (the decedent's unforeseeable heart attack made him unable to comply with the statute or, indeed, with any standard of care).

Answer D is incorrect. As explained above, the decedent's estate has successfully rebutted the plaintiff's evidence by providing an undisputed explanation of how the accident happened that is inconsistent with a finding of negligence (the decedent's unforeseeable heart attack made him unable to comply with the statute or, indeed with any standard of care).

Question 884 - Torts - Negligence (2/6/2017)

The question was:

A man's father died in a hospital. The hospital maintains a morgue with refrigerated drawers a bit larger than the human body. The decedent's body was placed in such a drawer awaiting pickup by a mortician. Before the mortician called for the body, a hospital orderly placed two opaque plastic bags in the drawer with the decedent's body. One bag contained the decedent's personal effects, and the other contained an amputated leg from some other hospital patient. It is stipulated that the hospital was negligent to allow the amputated leg to get into the decedent's drawer. The mortician delivered the two opaque plastic bags to the man, assuming both contained personal effects. The man was shocked when he opened the bag containing the amputated leg. The man sued the hospital to recover for emotional distress. At the trial, the man testified that the experience had been extremely upsetting, that he had had recurring nightmares about it, and that his family and business relationships had been adversely affected for a period of several months. He did not seek medical or psychiatric treatment for his emotional distress.

Who should prevail?

A: The man, because of the sensitivity people have regarding the care of the bodies of deceased relatives.
B: The man, because hospitals are strictly liable for mishandling dead bodies.
C: the hospital, because the man did not require medical or psychiatric treatment.
D: the hospital, because the man suffered no bodily harm.

The explanation for the answer is:

A is correct. The hospital assumed a duty of care regarding the decedent's body and in such cases, most courts today would allow stand-alone emotional harm to be recoverable where: there has been mishandling of a dead body, the person affected was in a special relationship to the deceased, and the emotional suffering was severe.

The hospital stipulated to its negligence. Therefore, the man's special relationship to the decedent as his son, and the evidence of his emotional distress, should be sufficient to prevail. The standard is one of negligence and physical harm is not required. Thus B, C and D are incorrect.

Question 650 - Torts - Negligence (2/10/2017)

The question was:

An eight-year-old child went to the grocery store with her mother. The child pushed the grocery cart while her mother put items into it. The child's mother remained near the child at all times. Another customer in the store noticed the child pushing the cart in a manner that caused the customer no concern. A short time later, the cart the child was pushing struck the customer in the knee, inflicting serious injury.

Assume that the child was negligent and the child's mother did not adequately supervise the child. If the customer brings an action, based on negligence, against the child's mother, will the customer prevail?

A: Yes, because the child was negligent.
B: Yes, because the child's mother is responsible for any harm caused by the child.
C: Yes, because the child's mother assumed the risk of her child's actions.
D: Yes, because the child's mother did not adequately supervise the child's actions.

The explanation for the answer is:

D is the correct answer. Parents have a number of affirmative duties based on their special relationship to their minor children. This includes the duty to exercise reasonable care in the control of the parent's minor children. A parent who is physically present and who fails to exercise control of her child is generally not vicariously liable for the child's tortious behavior; rather the parent may be liable for his or her own negligence in failing to control the child. Because the child's mother was not adequately supervising her daughter, and it was foreseeable that the child could potentially injure someone, the customer is likely to prevail.

A and B are incorrect. Parents have a number of affirmative duties, based on their special relationship to their minor children. This includes the duty to exercise reasonable care in the control of their children. Liability is generally limited to actions that were foreseeable by the parent.

C is an incorrect statement of law. Assumption of risk must be knowing and expressed or implied. More importantly, it is used as a defense by the defendant against a claim of negligence by the plaintiff. The mother cannot "assume the risk" of the child's behavior unless the mother was the plaintiff herself in an action. This choice wants you to think vicarious liability, but this is only meant to trick you.

Question 298 - Torts - Negligence (2/10/2017)

The question was:

A woman's 12-year-old daughter had some difficulty getting along with other children in the neighborhood, especially with the younger ones. Thinking the experience would be good for her, the woman recommended her daughter to a parent as a baby sitter for his five-year-old child but did not mention her daughter's difficulties or her lack of prior experience as a baby sitter. The woman and the parents were longstanding social acquaintances. On the evening the daughter was to sit, the parents told the daughter that she should treat their child firmly, but that it would be preferable not to spank him since he did not take kindly to it. They did not tell the daughter sitter they had experienced trouble retaining baby sitters because of their child's temper tantrums.

Later in the evening when the child became angry upon being told to go to his room for being naughty, the daughter spanked him, but only moderately hard. The child then threw a hardcover book at the daughter, hitting her in the eye. As the daughter tried to catch the child to take him to his room, the child fled around the house and out the back door, knocking over and breaking an expensive lamp.

The back yard was completely dark. The daughter heard the child screaming and banging at the back door, which had closed and locked automatically, but she did nothing. After twenty minutes had passed, she heard a banging and crying at the front door, but still she did nothing. Then the noise stopped. In a few minutes the daughter went outside and found the child lying on the steps unconscious and injured.

If a claim is asserted on behalf of the child against the woman for damages based on her daughter's conduct, the woman will probably be liable, because

A: parents are vicariously liable for the intentional torts of their children.
B: she has a nondelegable duty to control the actions of her child.
C: respondeat superior applies.
D: she was negligent.

The explanation for the answer is:

D is the correct answer. Parents have a number of affirmative duties, based on their special relationship to their minor children. This includes the duty to exercise reasonable care in the control of their minor children. Liability is generally limited to actions that were foreseeable by the parent. A parent who fails to exercise control regarding a known propensity of his child is generally not vicariously liable for the child's tortious behavior; rather the parent is liable for their own negligence in failing to control the child. In this case, the woman was aware that her daughter had trouble dealing with younger children and had no experience as a babysitter. It was, therefore, foreseeable that when she recommended her daughter to babysit, the twelve year old would encounter difficulties that she could not handle, which would result in harm to the child she was caring for. The question states that the woman will (only) *probably* be liable, because the conduct of her daughter must be specific in its foreseeability. General concerns would not be enough.

A is incorrect. A parent who fails to exercise control regarding a known propensity of his child is generally not vicariously liable for the child's tortious behavior; rather the parent is liable for their own negligence in failing to control the child.

B is overly broad and thus incorrect. A parent's duty to control can be delegable to other caretakers or custodians (who must be physically present with the child before the duty attaches) to exercise care in control of the child.

C is incorrect. Unless the child is actively an employee or agent of the parent, *respondeat superior* would not apply. Even though the woman actively recommended her daughter as a babysitter, the daughter's actions as a babysitter are not under her mother's control, and the daughter is not acting with her mother's authority as an agent.

Question 1121 - Torts - Negligence (2/10/2017)

The question was:

A passenger departed on an ocean liner knowing that it would be a rough voyage due to predicted storms. The ocean liner was not equipped with the type of lifeboats required by the applicable statute.

The passenger was swept overboard and drowned in a storm so heavy that even a lifeboat that conformed to the statute could not have been launched.

In an action against the operator of the ocean liner brought by the passenger's representative, will the passenger's representative prevail?

A: Yes, because the ocean liner was not equipped with the statutorily required lifeboats.
B: Yes, because in these circumstances common carriers are strictly liable.
C: No, because the storm was so severe that it would have been impossible to launch a statutorily required lifeboat.
D: No, because the passenger assumed the risk by boarding the ocean liner knowing that it would be a rough voyage.

The explanation for the answer is:

C is the correct answer. In an action for negligence, the plaintiff must allege duty, breach, causation and damages. The key issue here is not whether the ocean liner breached a duty to have a specific type of lifeboat, but whether the storm was so severe that its independent intervention superseded even the launching of a statutorily adequate lifeboat. This is an "act of god" situation. The facts state that the storm was too rough for even a conforming lifeboat to be launched, thus breaking the causal connection between the ship's duty to have a certain type of lifeboat and the passenger's death.

A is incorrect. The lifeboats could not have been launched in the storm even if the ocean liner had been properly equipped. B is incorrect. Common carriers are subject to a higher standard of care, not strict liability. Even a claim in strict liability, however, must show that the defendant's activity or condition is a proximate (legal) cause of the harm in order to prevail; this is a conclusion which is not supported by the facts. D is incorrect. Assumption of risk is no longer a complete bar to recovery in a negligence claim, absent instructions to follow the common law. Even if it could be shown that the passenger was fully aware and expressedly or impliedly agreed to accept a known risk of deadly storms, it would only go to damages and would not prevent the passenger from prevailing.

Question 758 - Torts - Negligence (2/10/2017)

The question was:

A plaintiff's three-year-old daughter was killed in an automobile accident. At the plaintiff's direction, the child's body was taken to a mausoleum for interment. Normally, the mausoleum's vaults are permanently sealed with marble plates secured by "tamper-proof" screws. After the child's body was placed in a mausoleum, however, only a fiberglass panel secured by caulking compound covered her vault. About a month later, the child's body was discovered in a cemetery located near the mausoleum. It had apparently been left there by vandals who had taken it from the mausoleum.

As a result of this experience, the plaintiff suffered great emotional distress.

If the plaintiff sues the mausoleum for the damages arising from her emotional distress, will she prevail?

A: No, because the plaintiff experienced no threat to her own safety.
B: No, because the mausoleum's behavior was not extreme and outrageous.
C: Yes, because the mausoleum failed to use reasonable care to safeguard the body.
D: No, because the plaintiff suffered no physical harm as a consequence of her emotional distress.

The explanation for the answer is:

C is correct. The mausoleum did not intentionally act in an extreme and outrageous way, so this is a negligent infliction of emotional distress issue. The mausoleum was negligent in its failure to adhere to its own standard in securing the child's body, and it was foreseeable that its failure to do so would cause emotional harm to the child's mother when the body of her three-year old daughter was mishandled. The mausoleum breached its duty of care regarding the child's body and the majority of courts allow standalone emotional harm to be recoverable where there has been a mishandling of a dead body of a relative resulting in severe emotional distress.

A is incorrect because the mausoleum directly created a foreseeable risk of harm by directly causing severe emotional distress through its failure to properly secure the vault. B is incorrect because extreme and outrageous behavior is an element of an intentional infliction of emotional distress claim, and the mausoleum did not intentionally act in an extreme and outrageous manner. D is incorrect because no physical harm is required when the negligent infliction of emotional distress action arises from the mishandling of a relative's corpse.

Question 337 - Torts - Negligence (2/10/2017)

The question was:

A pedestrian started north across the street in a clearly marked north-south crosswalk with the green traffic light in her favor. The pedestrian was in a hurry, and so before reaching the north curb on the street, she cut to her left diagonally across the street to the east-west crosswalk and started across it. Just after reaching the east-west crosswalk, the traffic light turned green in her favor. She proceeded about five steps further across the street to the west in the crosswalk when she was struck by a car approaching from her right that she thought would stop, but did not. The car was driven by a driver, 81 years of age, who failed to stop his car after seeing that the traffic light was red against him. The pedestrian had a bone disease, resulting in very brittle bones, that is prevalent in only 0.02 percent of the population. As a result of the impact the pedestrian suffered a broken leg and the destruction of her family heirloom, a Picasso original painting that she was taking to her bank for safekeeping. The painting had been purchased by the pedestrian's grandmother for $750 but was valued at $500,000 at the time of the accident.

The pedestrian had filed suit against the driver. The driver's attorney has alleged that the pedestrian violated a state statute requiring that pedestrians stay in crosswalks, and that if the pedestrian had not violated the statute she would have had to walk 25 feet more to reach the impact point and therefore would not have been at a place where she could have been hit by the driver. The pedestrian's attorney ascertains that there is a statute as alleged by the driver, that his measurements are correct, that there is a state statute requiring observance of traffic lights, and that the driver's license expired two years prior to the collision.

The violation of the crosswalk statute by the pedestrian should not defeat her cause of action against the driver because

A: the driver violated the traffic light statute at a later point in time than the pedestrian's violation.
B: pedestrians are entitled to assume that automobile drivers will obey the law.
C: the pedestrian was hit while in the crosswalk.
D: the risks that the statute was designed to protect against probably did not include an earlier arrival at another point.

The explanation for the answer is:

D is the correct answer. The question instructs an analysis based on the use of a safety statute. To determine why the pedestrian should prevail in her cause of action despite her violation of the crosswalk statute, look to the rule. Safety statutes are used only if the statute violated was designed to protect the particular class of foreseeable victim that the plaintiff belonged to, and the harm the plaintiff suffered was the type that the statute was designed to protect. If the safety statute applies, in a majority jurisdiction it establishes duty and breach (negligence *per se*), while in a minority jurisdiction it only serves as evidence of negligence. Causation must still be argued to prevail. The only answer that addresses the rule itself is D.

A is irrelevant because it only addresses timing. B is an overly broad assumption. C, while a true statement, is inapplicable to the call of the question. A, B, and C are incorrect.

Question 932 - Torts - Negligence (2/10/2017)

The question was:

A defendant has a small trampoline in his backyard which, as he knows, is commonly used by neighbor children as well as his own. The trampoline is in good condition, is not defective in any way, and normally is surrounded by mats to prevent injury if a user should fall off. Prior to leaving with his family for the day, the defendant leaned the trampoline up against the side of the house and placed the mats in the garage.

While the defendant and his family were away, the plaintiff, aged 11, a new boy in the neighborhood, wandered into the defendant's yard and saw the trampoline. The plaintiff had not previously been aware of its presence, but, having frequently used a trampoline before, he decided to set it up, and started to jump. He lost his balance on one jump and took a hard fall on the bare ground, suffering a serious injury that would have been prevented by the mats.

An action has been brought against the defendant on the plaintiff's behalf to recover damages for the injuries the plaintiff sustained from his fall. In this jurisdiction, the traditional common-law rules pertaining to contributory negligence have been replaced by a pure comparative negligence rule.

In his action against the defendant, will the plaintiff prevail?

A: No, because children likely to be attracted by the trampoline would normally realize the risk of using it without mats.
B: No, because the plaintiff failed to exercise reasonable care commensurate with his age, intelligence, and experience.
C: No, because the plaintiff entered the defendant's yard and used the trampoline without the defendant's permission.
D: No, because the plaintiff did not know about the trampoline before entering the defendant's yard and thus was not "lured" onto the premises.

The explanation for the answer is:

A is the correct answer. Because all four conclusions start with "No," scrutiny must be directed at the reasoning for why the plaintiff's claim cannot prevail against the defendant. The issue here is the defendant's duty to known child trespassers (also referred to as the attractive nuisance doctrine). The defendant would be liable for dangers caused by use of the trampoline on his land if he knew or should have known that: (1) children came to his property when the defendant and his family were not home, (2) children played on the trampoline, (3) use of the trampoline would likely cause injury because the children would not realize the danger of using the trampoline without the mats, and (4) the expense of remedying the situation was slight compared to the probability of injury.

The facts indicate that while the neighborhood children commonly used the defendant's trampoline, the plaintiff was new to the neighborhood and so was unknown to the defendant. The plaintiff is also 11, potentially old enough to understand the risks. The defendant knew that the local children would be aware of the need for mats because the neighborhood children "commonly" used it and would know better. Thus, A is the best response.

B is incorrect because it provides the test used for determining a child's standard of care in a negligence action and is not applicable here. C is incorrect because lack of permission does not provide a defense for a claim based on the attractive nuisance doctrine. D is incorrect because the courts now reject the traditional requirement that the child must be "lured" onto the premises by the attractive nuisance.

Question 1080 - Torts - Negligence (2/10/2017)

The question was:

A man's car sustained moderate damage in a collision with a car driven by a woman. The accident was caused solely by the woman's negligence. The man's car was still drivable after the accident. Examining the car the next morning, the man could see that a rear fender had to be replaced. He also noticed that gasoline had dripped onto the garage floor. The collision had caused a small leak in the gasoline tank.

The man then took the car to a mechanic, who owns and operates a body shop, and arranged with the mechanic to repair the damage. During their discussion the man neglected to mention the gasoline leakage. Thereafter, while the mechanic was loosening some of the damaged material with a hammer, he caused a spark, igniting vapor and gasoline that had leaked from the fuel tank. The mechanic was severely burned.

The mechanic has brought an action to recover damages against the man and woman. The jurisdiction has adopted a pure comparative negligence rule in place of the traditional common-law rule of contributory negligence.

In this action, will the mechanic obtain a judgment against the woman?

A: No, because there is no evidence that the woman was aware of the gasoline leak.
B: No, because the mechanic would not have been harmed had the man warned him about the gasoline tank.
C: Yes, because the mechanic was not negligent in failing to discover the gasoline leak himself.
D: Yes, because the mechanic's injury was a proximate consequence of the woman's negligent driving.

The explanation for the answer is:

D is the correct answer. The key sentence is, "The collision had caused a small leak in the gasoline tank." Also, the woman's negligent driving "solely" caused the accident. It is foreseeable that a car accident could rupture a gas tank leading the gasoline to ignite and causing severe burn damage to anyone in or near the car. The manner of the accident is not determinative; the mechanic's injury was a foreseeable result of the accident. The mechanic's injury was not so removed in time and circumstance as to offend fundamental fairness. In addition, courts consider negligent conduct on the part of those who are hired to treat or repair injuries to be foreseeable consequences of the original tortfeasor's negligent conduct, and will not find that the subsequent acts supersede the original liability unless there is some unforeseeable, independently tortious conduct. D is the best choice because it addresses the issue of proximate cause, which will determine the woman's liability to the mechanic.

A is incorrect. The woman is not required to know of the gas leak. It is a foreseeable consequence of the car accident.

B reaches the wrong conclusion. While choice B may contain a true statement, the man's failure to warn the mechanic will not be enough to supersede and preclude recovery from the woman. The igniting gas was a foreseeable injury; the manner in which it occurred is not determinative.

C is incorrect. The mechanic's comparative negligence will affect the amount of damages he may recover from the woman but will not prevent him from prevailing in his claim. A pure comparative negligence jurisdiction allows a plaintiff to recover all of his damages except the portion attributed, by the court, to his own negligence.

Question 941 - Torts - Negligence (2/10/2017)

The question was:

A college student purchased a large bottle of No-Flake dandruff shampoo, manufactured by a shampoo company. The box containing the bottle stated in part: "CAUTION--Use only 1 capful at most once a day. Greater use may cause severe damage to the scalp." The college student read the writing on the box, removed the bottle, and threw the box away. The college student's roommate asked to use the No-Flake, and the college student said, "Be careful not to use too much." The roommate thereafter used No-Flake twice a day, applying two or three capfuls each time, notwithstanding the label statement that read: "Use no more than one capful per day. See box instructions." The more he used No-Flake, the more inflamed his scalp became, the more it itched, and the more he used. After three weeks of such use, the roommate finally consulted a doctor who diagnosed his problem as a serious and irreversible case of dermatitis caused by excessive exposure to the active ingredients by No-Flake. These ingredients are uniquely effective at controlling dandruff, but there is no way to remove a remote risk to a small percentage of persons who may contract dermatitis as the result of applying, for prolonged periods of time, amounts of No-Flake substantially in excess of the directions. This jurisdiction adheres to the traditional common-law rules pertaining to contributory negligence and assumption of risk.

If the roommate asserts a claim against the college student for his dermatitis injuries, the college student's best defense will be that

A: the roommate was contributorily negligent.
B: the roommate assumed the risk.
C: the college student had no duty toward the roommate, who was a gratuitous donee.
D: the college student had no duty toward the roommate, because the shampoo company created the risk and had a nondelegable duty to foreseeable users.

The explanation for the answer is:

A is the correct answer. The college student warned his roommate to "be careful" not to use "too much" of the shampoo. The college student has the duty of a reasonably prudent person to warn his roommate that the shampoo has risks associated with it; this duty is unaffected by the fact that his roommate did not pay for the use of the shampoo. Thus C is incorrect. Once he did, the roommate did not assume the risk because he was unaware of the dangers and so could not expressly or impliedly agree to them by using the product. Thus B is incorrect. The roommate, however, cannot take refuge in willful ignorance. He had a duty to read the warning on the label of the bottle, which clearly said no more than one capful per day should be used on his head. The roommate had a duty to himself to act in a reasonable and prudent way, which he breached. Under the facts of this problem, a finding of contributory negligence would be a complete bar to recovery because this is a common-law rule jurisdiction. A is correct because it is the college student's best chance at eliminating any liability to his roommate for damages. B and C are incorrect.

D is incorrect. The roommate has a claim for products liability against the shampoo company. The term "nondelegable duty" does not apply to manufacturers in strict liability claims. The shampoo company's duty does not cut short the college student's duty to warn his roommate when loaning him the shampoo.

Question 649 - Torts - Negligence (2/10/2017)

The question was:

An eight-year-old child went to the grocery store with her mother. The child pushed the grocery cart while her mother put items into it. The child's mother remained near the child at all times. Another customer in the store noticed the child pushing the cart in a manner that caused the customer no concern. A short time later, the cart the child was pushing struck the customer in the knee, inflicting serious injury.

If the customer brings an action, based on negligence, against the grocery store, the store's best defense will be that

A: a store owes no duty to its customers to control the use of its shopping carts.
B: a store owes no duty to its customers to control the conduct of other customers.
C: any negligence of the store was not the proximate cause of the customer's injury.
D: a supervised child pushing a cart does not pose an unreasonable risk to other customers.

The explanation for the answer is:

D is the correct answer and can be reached by the process of elimination. D is the only choice that uses the language of the negligence standard as it applies to the facts. The other choices are overly broad generalizations of law and can be eliminated immediately. The issue is not general cart use or customer behavior. It is whether the actions of a young, supervised child posed a foreseeable danger to other customers. The grocery store has a duty to take reasonable steps to make the conditions on the premises reasonably safe, to conduct active operations with reasonable care for the presence of its invitees, and, under limited circumstances, to protect its customers against the acts of third persons or animals. The child was in the care and control of her mother at all times. The store's best defense is that the supervised child was not a foreseeable cause of severe harm such that the store had a duty to intervene to protect the customer. A, B and C are incorrect.

Question 340 - Torts - Negligence (2/10/2017)

The question was:

A pedestrian started north across the street in a clearly marked north-south crosswalk with the green traffic light in her favor. The pedestrian was in a hurry, and so before reaching the north curb on the street, she cut to her left diagonally across the street to the east-west crosswalk and started across it. Just after reaching the east-west crosswalk, the traffic light turned green in her favor. She proceeded about five steps further across the street to the west in the crosswalk when she was struck by a car approaching from her right that she thought would stop, but did not. The car was driven by a driver, 81 years of age, who failed to stop his car after seeing that the traffic light was red against him. The pedestrian had a bone disease, resulting in very brittle bones, that is prevalent in only 0.02 percent of the population. As a result of the impact, the pedestrian suffered a broken leg and the destruction of her family heirloom, a Picasso original painting that she was taking to her bank for safekeeping. The painting had been purchased by the pedestrian's grandmother for $750 but was valued at $500,000 at the time of the accident.

The pedestrian had filed suit against the driver. The driver's attorney has alleged that the pedestrian violated a state statute requiring that pedestrians stay in crosswalks, and that if the pedestrian had not violated the statute, she would have had to walk 25 feet more to reach the impact point and therefore would not have been at a place where she could have been hit by the driver. The pedestrian's attorney ascertains that there is a statute as alleged by the driver, that his measurements are correct, that there is a state statute requiring observance of traffic lights, and that the driver's license expired two years prior to the collision.

The pedestrian's violation of the crosswalk statute should not be considered by the jury because

A: there is no dispute in the evidence about factual cause.
B: as a matter of law the violation of the statute results in liability for all resulting harm.
C: as a matter of law the driver's conduct was an independent intervening cause.
D: as a matter of law the injury to the pedestrian was not the result of a risk the statute was designed to protect against.

The explanation for the answer is:

A is incorrect. Ultimately, the pedestrian's violation of the statute should not be a question for the jury because it is a question of law and not fact. The pedestrian's violation of the statute may qualify as negligence per se, meaning it may serve as evidence of a duty and breach as a matter of law. A is incorrect because there is no dispute that the pedestrian breached the statute, thus, there is no question of fact regarding the violation of the statute. However, there is a dispute as to causation of the damages, thus A is incorrect.

B is incorrect because even if it is determined that the violation of the statute is negligence per se, this does not result in liability for any and all damage that follows. C is incorrect because the issue is the applicability of a safety statute in determining a legal standard of care. This answer deals with causation, which is still a question for the jury.

Finally, D is correct because safety statutes are used to establish duty and breach only if the violated statute was designed to protect the particular class of foreseeable victim that the plaintiff belonged to, and the harm the plaintiff suffered was the type that the statute was designed to protect. Here, the pedestrian was hit by the driver when she was already in the other crosswalk, so she was not in the class of people that the statute was designed to protect, namely, pedestrians crossing streets outside of crosswalks. D appropriately acknowledges the test and distinction and is the correct response.

Question 40 - Torts - Negligence (2/10/2017)

The question was:

A homeowner owns a house in a city. On the lawn in front of his home and within five feet of the public sidewalk there was a large tree. The roots of the tree caused the sidewalk to buckle severely and become dangerous. An ordinance of the city requires adjacent landowners to keep sidewalks in safe condition. The homeowner engaged a contractor to repair the sidewalk, leaving it to the contractor to decide how the repair should be made.

The contractor dug up the sidewalk, cut back the roots of the tree, and laid a new sidewalk. Two days after the homeowner had paid the contractor the agreed price of the repair, the tree fell over onto the street and damaged a parked car belonging to a driver.

The driver has asserted claims against the homeowner and the contractor, and both defendants admit that cutting the roots caused the tree to fall.

If the driver recovers a judgment against the homeowner due to the homeowner's vicarious liability, does the homeowner have any recourse against the contractor?

A: No, because payment by the homeowner was an acceptance of the work.
B: No, because the homeowner selected the contractor to do the work.
C: Yes, because the judgment against the homeowner was based on vicarious liability.
D: Yes, because the homeowner's conduct was not a factual cause of the harm.

The explanation for the answer is:

C is correct. A judgment against an individual based on vicarious liability is a finding that the individual must pay for the wrong committed by a third-party based on the special relationship between the parties. If the homeowner is held for damages caused by the contractor based on a theory of vicarious liability, then the homeowner has the right to seek indemnification from the contractor for the amount of the judgment.

A is incorrect. Being paid for services does not limit one's liability for negligence. B is incorrect because the selection of the contractor by the homeowner would only be relevant if the judgment obtained by the driver was for negligent hiring. D comes to the correct conclusion but is not the best answer. For the homeowner to bring a successful indemnification claim against the contractor, there must have been a judgment against the homeowner based on vicarious liability.

Question 945 - Torts - Negligence (2/10/2017)

The question was:

While a driver was taking a leisurely spring drive, he momentarily took his eyes off the road to look at some colorful trees in bloom. As a result, his car swerved a few feet off the roadway, directly toward a pedestrian, who was standing on the shoulder of the road waiting for a chance to cross. When the pedestrian saw the car bearing down on him, he jumped backwards, fell, and injured his knee.

The pedestrian sued the driver for damages, and the driver moved for summary judgment. The foregoing facts are undisputed.

The driver's motion should be

A: denied, because the record shows that the pedestrian apprehended an imminent, harmful contact, with the driver's car.
B: denied, because a jury could find that the driver negligently caused the pedestrian to suffer a legally compensible injury.
C: granted, because the proximate cause of the pedestrian's injury was his own voluntary act.
D: granted, because it is not unreasonable for a person to be distracted momentarily.

The explanation for the answer is:

B is the correct answer. A motion for summary judgment will be granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. A question of fact exists as to whether the driver's negligence caused the pedestrian's reaction, or whether the pedestrian's injury was the result of his own act. Since a motion for summary judgment by the driver can only be rendered for the driver or denied, B is the only possible answer.

A is incorrect. The driver did not act with the purpose of causing the pedestrian to apprehend an imminent harmful or offensive touching. The driver was merely inattentive, which is negligent rather than intentional.

C is incorrect. The pedestrian's action was a cause in fact of his injury, but not necessarily the proximate cause. A summary judgment can only be granted if, as a matter of law, the driver is entitled to judgment and no material fact is in dispute. Clearly the driver and the pedestrian are disputing which of them is responsible for the pedestrian's taking the jump backwards.

D is incorrect. While momentary distraction may not be unreasonable, the driver had a duty to drive safely, which was breached.

Question 59 - Torts - Negligence (2/10/2017)

The question was:

A property owner owns a hotel. When the International Order of Badgers came to town for its convention, its members rented 400 of the 500 rooms, and the hotel opened its convention facilities to them. During their convention, the members littered both the inside and the outside of the hotel with debris and bottles. The hotel manager knew that objects were being thrown out of the hotel windows. At his direction, hotel employees patrolled the hallways telling the guests to refrain from such conduct. The owner was out of town and was not aware of the problems which were occurring. During the convention, as a pedestrian walked past the hotel on the sidewalk, he was hit and injured by an ashtray thrown out of a window in the hotel by an unknown person. The pedestrian sued the owner for damages for his injuries.

Will the pedestrian prevail in his claim against the owner?

A: Yes, because a property owner is strictly liable for acts on his premises if such acts cause harm to persons using the adjacent public sidewalks.
B: Yes, because the person who threw the ashtray cannot be identified.
C: No, because the owner had no personal knowledge of the conduct of the hotel guests.
D: No, because the hotel employees had taken reasonable precautions to prevent such an injury.

The explanation for the answer is:

D is the correct answer. The injured person was not a guest, but a passerby, so the principle that innkeepers are liable for slight negligence does not apply to this situation. Instead, the pedestrian was a licensee, so the owner had a duty to exercise reasonable care in conducting active operations. Because the hotel employees took reasonable precautions against injury to a passerby, the owner will not be found liable.

A is incorrect. The strict liability standard does not apply to active operations unless the activity being performed is ultra-hazardous (such as demolition or the storage of hazardous waste). The hosting of a convention is not an ultra-hazardous activity, so the owner is not strictly liable for any harm caused by active operations. B is incorrect because the owner has not breached his duty of care, and is not liable even if the actual wrongdoer cannot be identified. C is incorrect because if the owner's employees had not acted with reasonable care, then the owner could be vicariously liable for the pedestrian's injury on a theory of respondeat superior even if the owner had no personal knowledge of the conduct of the hotel guests.

Question 691 - Torts - Negligence (2/10/2017)

The question was:

The plaintiff was a passenger in a car that was struck in the rear by a car driven by a student. The collision resulted from the student's negligence in failing to keep a proper lookout. The plaintiff's physician found that the collision had aggravated a mild osteoarthritic condition in her lower back and had brought on similar, but new, symptoms in her neck and upper back.

Six months after the first accident, the plaintiff was a passenger in a car that was struck in the rear by a car driven by a doctor. The collision resulted from the doctor's negligence in failing to keep a proper lookout. The plaintiff's physician found that the second collision had caused a general worsening of the plaintiff's condition, marked by a significant restriction of movement and muscle spasms in her back and neck. The physician believes the plaintiff's worsened condition is permanent, and he can find no basis for apportioning responsibility for her present worsened condition between the two automobile collisions.

The plaintiff brought an action for damages against the student and the doctor. At the close of the plaintiff's evidence, as outlined above, each of the defendants moved for a directed verdict in his favor on the ground that the plaintiff had failed to produce evidence on which the jury could determine how much damage each defendant had caused. The jurisdiction adheres to the common law rules regarding joint and several liability.

The plaintiff's best argument in opposition to the defendants' motions would be that the defendants are jointly and severally liable for the plaintiff's entire harm, because

A: the wrongdoers, rather than their victim, should bear the burden of the impossibility of apportionment.
B: the defendants breached a common duty that each of them owed to the plaintiff.
C: each of the defendants was the proximate cause in fact of all of the plaintiff's damages.
D: the defendants are joint tortfeasors who aggravated the plaintiff's preexisting condition.

The explanation for the answer is:

A is the correct answer. This choice may seem tricky because it is a policy argument, not a rule. The reasoning in A, however, dates back to *Summers v. Tice*, 33 Cal.2d 80, 199 P.2d 1 (1948), when two negligent hunters fired but only one bullet hit the plaintiff. The issue is cause-in-fact, which requires proof of actual cause of harm, and is impossible for the plaintiff to prove under the facts of this question. Without cause-in-fact, the plaintiff will not recover, despite clear injury and evidence of negligence (breach of duty of ordinary care in driving) by the defendants. Where the requirement of actual proof under these facts would result in a harsh result on an innocent victim, courts have traditionally held the defendants to be jointly and severally liable for the cause-in-fact, considering the injury to be indivisible as a matter of policy. Thus A, which states the applicable policy, is the better answer.

B is incorrect. The issue is not duty, which was proven, but rather cause-in-fact. C is a misstatement of the law. Proximate, or legal causation, is a separate element from cause-in-fact. If the plaintiff cannot show cause-in-fact, the issue of legal (proximate) cause would not be reached to determine its merit. D is an incorrect conclusion. This is a legal conclusion, which is a judicial determination. The plaintiff is defending against a motion for directed verdict by the defendants, which means that the status of the defendants as joint tortfeasors has not yet been decided.

Question 1035 - Torts - Negligence (2/10/2017)

The question was:

A plaintiff, who was driving at an excessive speed, applied her brakes to stop at a traffic light. Due to damp, fallen leaves, her car skidded and came to a halt perpendicular to the roadway. The defendant, who was also driving at an excessive speed and was immediately behind the plaintiff, saw the plaintiff's car perpendicular to the roadway. Although the defendant had sufficient distance to come to a slow, controlled stop, he decided not to slow down but, rather, to swerve to the left in an effort to go around the plaintiff's car. Due to oncoming traffic, the space was insufficient and the defendant's car collided with the plaintiff's car, severely injuring the plaintiff.

The plaintiff filed a personal injury action against the defendant in a jurisdiction in which contributory negligence is a bar to recovery. At trial, the jury finds that the defendant was more at fault than the plaintiff, and that the defendant had a last clear chance to avoid the accident. However, the jury also found that plaintiff was the legal cause of the accident, and that she assumed the risk by speeding.

Will the plaintiff prevail?

A: Yes, because the defendant was more than 50% at fault.
B: Yes, because the defendant had the last clear chance.
C: No, because the plaintiff's conduct was a legal cause of the accident.
D: No, because, in speeding, the plaintiff assumed the risk.

The explanation for the answer is:

Choice B is correct. The facts stipulate that this is a contributory negligence jurisdiction. Because the plaintiff was speeding, they would fall within the contributory negligence rule. This is confirmed by the jury finding that the plaintiff was a legal cause of the accident. However, the jury also found that the defendant had the last clear chance to avoid the accident, which means the plaintiff’s contributory negligence will be disregarded as a defense. Therefore, the plaintiff will win and B is the best answer.

A is incorrect. Answer A provides the modified (hybrid) form of comparative negligence (comparative responsibility) and is an inappropriate standard to apply in a contributory negligence jurisdiction. C is incorrect because although the plaintiff was contributorily negligent, the fact that the defendant had the last clear chance to avoid the accident prevents the defendant from using that negligence to bar recovery. D is also incorrect. Any risk assumed by the plaintiff's due to her speeding is wiped away by the defendant’s last clear chance to avoid to accident.

Question 1464 - Torts - Negligence (2/10/2017)

The question was:

A hotel employed a carefully selected independent contractor to rebuild its swimming pool. The hotel continued to operate while the pool was being rebuilt. The contract between the hotel and the contractor required the contractor to indemnify the hotel for any liability arising from the contractor's negligent acts. A guest of the hotel fell into the excavation, which the contractor had negligently left unguarded.

In an action by the guest against the hotel to recover for his injuries, what would be the most likely outcome?

A: Liability, because the hotel had a nondelegable duty to the guest to keep a safe premises.
B: Liability, because the contract between the hotel and the contractor required the contractor to indemnify the hotel for any liability arising from the contractor's negligent acts.
C: No liability, because the contractor was the actively negligent party.
D: No liability, because the hotel exercised reasonable care in employing the contractor.

The explanation for the answer is:

Answer A is correct. Ordinarily, someone who hires an independent contractor would not be vicariously liable for the contractor's negligence. However, a landowner who holds his land open to the public has a nondelegable duty to keep the premises safe for business visitors. Such a landowner is liable for any negligence that causes a guest to be injured by unsafe conditions on the premises, even the negligence of an independent contractor.

Answer B is incorrect. While it is true that the hotel would most likely be liable, the contract between the hotel and the contractor is irrelevant to the hotel's potential liability to the guest. Should the guest successfully sue the hotel, the contract would allow the hotel to bring an action for indemnification against the contractor, but the contract does not affect the hotel's liability to its guests. The hotel's liability, as stated above, would arise from its nondelegable duty to the guest to keep a safe premises.

Answer C is incorrect. Because the hotel had a nondelegable duty to keep the premises safe for business visitors, the court will hold the hotel liable for the contractor's negligence, whether that negligence was active or passive. Distinctions based on active, as opposed to passive, negligence are outmoded, and, even if they applied, they address the apportionment of damages between defendants, not the responsibility of a defendant to a plaintiff.

Answer D is incorrect. If the hotel had not exercised reasonable care in selecting a contractor, that would be an alternative basis for imposing liability on the hotel. However, even when a hotel has carefully selected an independent contractor, it still has a nondelegable duty to keep the premises safe for business visitors such as hotel guests and will be held vicariously liable for the contractor's negligence.

Question 1013 - Torts - Negligence (2/10/2017)

The question was:

A company designed and built a processing plant for the manufacture of an explosive chemical. An engineer was retained by the company to design a filter system for the processing plant. She prepared an application for a permit to build the plant's filter system and submitted it to the state's Department of Environmental Protection (DEP). As required by DEP regulations, the engineer submitted a blueprint to the DEP with the application for permit. The blueprint showed the entire facility and was signed and sealed by her as a licensed professional engineer.

After the project was completed, a portion of the processing plant exploded, injuring the plaintiff. During discovery in an action by the plaintiff against the engineer, it was established that the explosion was caused by a design defect that was unrelated to the filter system designed by the engineer. However, the defect was present in the blueprint signed by the engineer.

In that action, will the plaintiff prevail?

A: Yes, because the engineer signed, sealed, and submitted a blueprint that showed the design defect.
B: Yes, because all of the plant's designers are jointly and severably liable for the defect.
C: No, because the engineer owed no duty to the plaintiff to prevent the particular risk of harm.
D: No, because the engineer was an independent contractor.

The explanation for the answer is:

C is the correct answer. While this looks like a products liability question, it is a professional malpractice issue. The company designed and built the processing plant. The engineer was retained solely for the purpose of designing a filter system for the plant. She had a duty to exercise skill in the design of the filter system, commensurate with her professional training and standards. The engineer's use of the company's blueprint for the proper permit did not impute liability onto the engineer for the entire facility, as a permit is nothing more than a license (permission) to proceed with construction, not a guarantee against defect. Thus A is incorrect. While the manufacturer of a defective product is subject to strict liability, strict liability does not apply to the performance of services. The engineer provided a service and will be held to a negligence standard. Thus C is the correct answer, and A is incorrect.

B is incorrect. The facts indicate that the processing plant was not a joint enterprise. The engineer was not in partnership with the company and was not in a business association with the company for the limited purpose of building the plant. The engineer was hired solely to perform a design service as an independent contractor. The engineer's design was not the cause of the injury, and she cannot be held liable for the company's design.

D is incorrect. The plaintiff is suing the engineer directly; the engineer's status as an independent contractor will not provide a defense.

Question 1446 - Torts - Negligence (2/10/2017)

The question was:

A driver negligently ran into a pedestrian who was walking along a road. The pedestrian sustained an injury to his knee, causing it to buckle from time to time. Several months later, the pedestrian sustained an injury to his shoulder when his knee buckled, causing him to fall down a flight of stairs. The pedestrian then brought an action against the driver for the injuries to his knee and shoulder.

In the pedestrian's action against the driver, assume that the jury finds that the pedestrian's fall was a normal consequence of the original injury, but that the driver could not have foreseen that his negligence would cause the pedestrian's fall. For which of his injuries may the pedestrian recover damages?

A: For the injuries to his knee and shoulder, because the driver takes the victim as he finds him.
B: For the injuries to his knee and shoulder, because the pedestrian's fall down a flight of stairs was a normal consequence of his original injury.
C: For the injury to his knee only, because the injury to the pedestrian's shoulder is separable.
D: For the injury to his knee only, because the driver could not have foreseen that his negligent driving would cause the pedestrian to fall down a flight of stairs.

The explanation for the answer is:

Answer B is correct. The driver is liable for the full extent of the consequential damages arising from injuries to the pedestrian even if some of the injuries did not materialize for some time after the accident. While mere passage of time may cause statute of limitations problems if substantially longer than several months is involved, the passage of time in itself will not give rise to a proximate cause limitation.

Answer A is incorrect. The phrase "takes the victim as he finds him" refers to the principle that a negligent defendant must pay for the full extent of the injuries to the plaintiff even if the plaintiff was unusually vulnerable to injury. There is no indication in the facts that the pedestrian was unusually vulnerable before the accident.

Answer C is incorrect. The separability of an injury becomes an issue when two or more defendants cause harm to the plaintiff; separability relates to the question of whether damages for specific injuries can be allocated among the defendants. Here we are dealing with the consequences of multiple injuries caused by a single defendant, not the question of whether responsibility should be apportioned among several defendants.

D is incorrect. In this case, there is no proximate cause or foreseeability limitation on the extent of damages. However, whether the pedestrian's fall down the flight of stairs was a natural consequence of the original injury is a question of fact for the jury to decide. Because the jury found that the fall was a natural consequence of the original injury, the pedestrian can recover for both injuries.

Question 857 - Torts - Other Torts (7/26/2016)

The question was:

The owner of a truck leasing company asked one of his employees to deliver $1,000 to the dealership's main office. The following week, as a result of a dispute over whether the money had been delivered, the owner instructed the employee to come to the office to submit to a lie detector test.

When the employee reported to the owner's office for the test, it was not administered. Instead, without hearing the employee's story, the owner shouted at him, "You're a thief!" and fired him. At the time the owner accused the employee of stealing, the owner believed the charge to be true. The owner's shout was overheard by several other employees who were in another office that was separated from the owner's office by a thin partition. The next day, the employee accepted another job at a higher salary. Several weeks later, upon discovering that the money had not been stolen, the owner offered to rehire the employee.

In a suit for slander by the employee against the owner, the employee will

A: prevail, because the employee was fraudulently induced to go to the office for a lie detector test, which was not, in fact, given.
B: prevail, because the owner should have foreseen that the statement would be overheard by other employees.
C: not prevail, because the owner made the charge in good faith, believing it to be true.
D: not prevail, because the statement was made to the employee alone and intended for his ears only.

The explanation for the answer is:

B is the correct answer. Don't fall for the red-herring of the "fraudulent polygraph test." The reason the employee went to the office is not relevant to the analysis of the slander action. The key phrases are "You're a thief" and "was overheard by several employees." The employee must prove that the owner's statement about him was a false and defamatory communication of fact, published knowingly or foreseeably to a third person who understood it was defamatory and which, as a result, caused harm to the employee. Because the statement was verbal (slander), the employee would also normally need to plead and prove special damages (pecuniary). The owner's accusation fell into one of four categories of exceptions, however, which do not require special damages. Exceptions include allegations regarding (1) criminal activity, (2) misconduct or incompetence in the plaintiff's trade or occupation, (3) sexual misconduct, and (4) the plaintiff's having a "loathsome" disease. Choice B addresses the only issue that is in dispute, which is whether the owner published the defamatory statement. Thus C is incorrect. In doing so, B also utilizes the negligence test of foreseeability, which is the correct test (for private individuals) under the facts. Choice D is subjective and is not the appropriate "reasonable person" foreseeability test. Thus, A, C, and D are incorrect.

Question 769 - Torts - Other Torts (7/26/2016)

The question was:

A woman and a man, who were professional rivals, were attending a computer industry dinner where each was to receive an award for achievement in the field of data processing. The man engaged the woman in conversation away from the rest of the party and expressed the opinion that if they joined forces, they could do even better. The woman replied that she would not consider the man as a business partner and when the man demanded to know why, she told him that he was incompetent.

The exchange was overheard by another person who attended the dinner. The man suffered emotional distress but no pecuniary loss.

If the man asserts a claim against the woman based on defamation, will the man prevail?

A: No, because the man suffered no pecuniary loss.
B: No, because the woman's statement was made to the man and not to the person who overheard the statement.
C: No, because the woman did not foresee that her statement would be overheard by another person.
D: No, because the woman did not intend to cause the man emotional distress.

The explanation for the answer is:

C is the correct answer. The prima facie case for defamation requires defamatory language concerning the plaintiff, publication of that language by the defendant to a third person, and damage to the reputation of the plaintiff. Here, the issue is whether there was publication by the defendant. The publication requirement is satisfied where there is communication of the defamatory statement to a third person who understood it. That communication can be either intentional, or the result of negligence. Therefore, if the woman had no reason to foresee that her statement would be overheard by another person, then there was no negligent or intentional communication and the man will not prevail on his defamation claim.

A is incorrect because the defamatory statement was verbal, so the man would also normally need to prove special damages (pecuniary). However, the woman's comment was one regarding the man's trade or occupation, making it slander per se, and injury will be presumed. B is incorrect because a defamatory communication can be made negligently as well as intentionally. D is incorrect because the man does not need to show that the woman intended to cause him emotional distress; in this case injury is presumed.

Question 1075 - Torts - Other Torts (7/26/2016)

The question was:

When two parents were told that their child should repeat second grade, they sought to have him evaluated by a psychologist. The psychologist, who charged $300, determined that their child had a learning disability. Based upon the report, the school board placed the child in special classes. At an open meeting of the school board, the parents asked that the $300 they had paid to the psychologist be reimbursed by the school district. A reporter attending the meeting wrote a newspaper article about this request, mentioning the child by name. The parents were aware that the reporter was at the meeting.

In a privacy action brought by the child's legal representative against the newspaper, the plaintiff will

A: recover, because the story is not newsworthy.
B: recover, because the child is under the age of consent.
C: not recover, because the story is a fair and accurate report of what transpired at the meeting.
D: not recover, because the parents knew that the reporter was present.

The explanation for the answer is:

C is the correct answer. While the call of the question does not specify which claim is being made, there are only two possible privacy torts available under the facts. The first is defamation, which is defendant's false and defamatory communication of fact, published knowingly or foreseeably to a third person who understood it was defamatory and which, as a result, caused harm to the plaintiff. Truth, however, is an absolute defense to defamation. The second claim would be for public disclosure of private facts. To prevail, the plaintiff must show that the defendant published private information about the plaintiff, and that the private information being publicized is non-newsworthy and would be highly offensive to a reasonable person. This tort does not require that the information be false. Here, the facts indicate that the meeting was open, so the information disclosed was not private. Additionally, the facts do not indicate that the information was so offensive that it would violate ordinary decency standards.

B is incorrect because the Supreme Court has held that a newspaper cannot be held liable for publicizing a name that is a matter of public record. A is incorrect because any fact disclosed at a public meeting is considered newsworthy. D is incorrect because the parents' knowledge of the reporter's presence is irrelevant because the meeting was open.

Question 157 - Torts - Other Torts (7/26/2016)

The question was:

In 1970, a cattle company bought a 150-acre tract of agricultural land well suited for a cattle feed lot. The tract was ten miles from the city and five miles from the nearest home. By 2006, the city limits extended to the cattle company's feed lot. About 10,000 people lived within three miles of the cattle-feeding operation.

The cattle company land is outside the city limits and no zoning ordinance applies. The cattle company uses the best and most sanitary feed lot procedures, including chemical sprays, to keep down flies and odors and frequently removes manure. Despite these measures, residents of the city complain of flies and odors. An action has been filed by five individual homeowners who live within half a mile of the cattle company feed lot. Flies in the area are five to ten times more numerous than in other parts of the city, and extremely obnoxious odors are frequently carried by the wind to the plaintiffs' homes. The odors do not affect any other part of the city. The flies and odors are a substantial health hazard.

If plaintiffs assert a claim based on public nuisance, plaintiffs will

A: prevail because plaintiffs sustained harm different from that suffered by the public at large.
B: prevail because the cattle company's acts interfered with a person's enjoyment of his property.
C: not prevail, because only the state may bring an action based on public nuisance.
D: not prevail, because plaintiffs came to the nuisance.

The explanation for the answer is:

A is the correct answer. The cattle lot qualifies as a public nuisance because it unreasonably interferes with the health and property rights of the community. Although public nuisances generally must be prosecuted by public authorities, recovery for a public nuisance is possible if a private party suffered some unique damage not suffered by the general public. Because the plaintiffs suffered a different harm than the public at large, they will prevail. Consequently, A is correct and C is incorrect.

B is incorrect because interference with a plaintiff's private enjoyment of his land is insufficient, the interference must cause unique damages. D is incorrect. Generally if the purchaser bought in good faith, the purchaser is entitled to the reasonable use or enjoyment of the land. Therefore, coming to the nuisance does not automatically preclude a nuisance action.

Question 1467 - Torts - Other Torts (2/6/2017)

The question was:

A newspaper published an editorial in which an editor asserted that a candidate for high political office was a user of illegal drugs. The accusation was untrue. The editor acted unreasonably in not investigating the accusation before publishing it; however, the editor honestly believed that the accusation was true.

The candidate sued the editor for defamation.

Is the candidate entitled to recover?

A: No, because the accusation appeared in an editorial and was, therefore, merely an opinion.
B: No, because the editor honestly believed that the accusation was true.
C: Yes, because calling someone an illegal drug user is defamatory per se.
D: Yes, because the accusation was false and was injurious to the candidate's reputation.

The explanation for the answer is:

Answer B is correct. To bring a claim for defamation, a plaintiff must establish the following common law elements: (i) defamatory language, (ii) "of or concerning" the plaintiff, (iii) publication of the defamatory language by the defendant to a third person, and (iv) damage to the plaintiff's reputation. However, in a defamation action that involves a matter of public concern--here, a claim brought by a candidate for public office--the plaintiff must establish more than mere negligence with regard to the truth or falsity of the allegedly defamatory statement of fact. The plaintiff must establish that the defendant acted with actual malice, that is, that the defendant in fact knew the statement to be false or entertained serious doubts as to the truth of the statement. Here, the candidate cannot establish actual malice on the part of the editor in publishing the statement because the editor honestly believed the accusation was true. Thus, Answer B is correct.

Answer A is incorrect. The assertion that the candidate used illegal drugs purported to be a statement of fact, not a statement of opinion. Defamation turns on what is conveyed in the statement published by the defendant. The context may influence what is conveyed, but facts may be stated in editorials or advertisements as well as in news reports. In this case, it is true that the candidate will not recover, but the reason is that he cannot show the actual malice required to defame a political candidate because the editor believed the statement about the candidate's drug use to be true.

Answer C is incorrect. The plaintiff in a defamation action must establish that a statement is defamatory, and accusing someone of a criminal act is indeed "defamatory per se." However, a political candidate, like a political official, must also establish that the defendant acted with actual malice, that is, that the defendant in fact knew the statement to be false or entertained serious doubts as to the truth of the statement. Here, the candidate cannot establish that essential element of his case.

Answer D is incorrect. A political candidate who brings a defamation action must establish not only that the statement was defamatory but also that the defendant acted with actual malice. To show actual malice, the plaintiff must demonstrate that the defendant in fact knew the statement to be false or entertained serious doubts as to the truth of the statement. The evidence does not support a finding of actual malice in this case.

Question 68 - Torts - Other Torts (2/10/2017)

The question was:

A labor leader in a city was divorced ten years ago. Both he and his first wife have since married other persons. Recently, a newspaper in another city ran a feature article on improper influences it asserted had been used by labor officials to secure favorable rulings from government officials. The story said that in 1990 the labor leader's first wife, with his knowledge and concurrence, gave sexual favors to the mayor of the city and then persuaded him to grant concessions to the labor leader's union, with which the city was then negotiating a labor contract. The story named the labor leader and identified his first wife by her former and current surnames. The reporter for the newspaper believed the story to be true, since it had been related to him by two very reliable sources. However, after publication the story turned out to be false.

The labor leader's first wife suffered emotional distress and became very depressed. If she asserts a claim based on defamation against the newspaper, she will

A: prevail, because the story concerned her personal, private life.
B: prevail because the story was false.
C: not prevail, because the newspaper did not print the story with knowledge of its falsity or with reckless disregard for its truth or falsity.
D: not prevail because the newspaper exercised ordinary care in determining the story was true or false.

The explanation for the answer is:

D is correct. The labor leader's first wife is a private person suing for defamation on an issue of public concern. Because the first wife is not a public figure, she does not need to prove the *New York Times* (New York Times v. Sullivan) standard of malice, but rather the *Gertz* (Gertz v. Robert Welch) standard: that the newspaper (1) published false information and (2) was negligent in investigating the accuracy of the information, resulting in (3) actual harm to the first wife. Here, the first wife will not prevail because the reporter believed the story was true and it was confirmed by two very reliable sources. Therefore, the newspaper was not negligent in its publication and D is the correct answer.

C is incorrect because it gives the *New York Times* standard which only applies to public figures. A is incorrect because the matter is of public concern and is therefore newsworthy, requiring the use of the *Gertz* standard.

B is not the best answer because though the story turned out to be false, the plaintiff will not win unless she can also show that the newspaper was negligent in determining whether the story was true, and that its negligence caused her actual harm.

Question 1359 - Torts - Other Torts (2/10/2017)

The question was:

A recently established law school constructed its building in a quiet residential neighborhood. The law school had obtained all of the necessary municipal permits for the construction of the building, which included a large clock tower whose clock chimed every hour. The chimes disturbed only one homeowner in the neighborhood, who had purchased her house prior to the construction of the building. The homeowner was abnormally sensitive to ringing sounds, such as bells and sirens, and found the chimes to be extremely annoying.

In a nuisance action by the homeowner against the law school, will the homeowner be likely to prevail?

A: Yes, because the chimes interfere with the homeowner's use and enjoyment of her property.
B: Yes, because the homeowner purchased her house prior to the construction of the building.
C: No, because the chimes do not disturb the other residents of the neighborhood.
D: No, because the law school had obtained the requisite municipal permits to erect the clock tower.

The explanation for the answer is:

Answer C is correct. Private nuisance is a substantial, unreasonable interference with another's use or enjoyment of property. The person claiming nuisance must actually possess, or have a right of immediate possession to, the property. A substantial interference is an interference that is offensive or annoying to the average person in the community--the plaintiff's hypersensitivities are irrelevant. An unreasonable interference is an interference where the severity of the inflicted injury outweighs the utility of the defendant's conduct. Whether an invasion constitutes a nuisance turns on whether it causes significant harm of a kind that would be suffered by a normal member of the community. Here, the plaintiff is hypersensitive to the chimes. However, no other members of the community are bothered by the noise, and thus, the chimes are not a nuisance.

Answer A is incorrect. The interference with the homeowner's use and enjoyment of her property must be substantial and unreasonable. Here, only one abnormally sensitive person was disturbed by the chimes.

Answer B is incorrect. Priority in time may be a factor in determining the character of a neighborhood, but it is not determinative of whether an invasion is a nuisance.

Answer D is incorrect. Compliance with government requirements is not a defense to a claim of private nuisance.

Question 475 - Torts - Other Torts (2/10/2017)

The question was:

A customer ordered some merchandise from a store. When the merchandise was delivered, the customer decided that it was not what he had ordered, and he returned it for credit. The store refused to credit the customer's account, continued to bill him, and, after 90 days, turned the account over to a bill collector for collection.

The bill collector showed up at the customer's house at 7 p.m. on a summer evening while many of the customer's neighbors were seated on their porches. When the customer opened the door, the bill collector, who was standing just outside the door, raised an electrically amplified bullhorn to his mouth. In a voice that could be heard a block away, the bill collector called the customer a "deadbeat" and asked him when he intended to pay his bill to the store.

The customer, greatly angered, slammed the door shut. The door struck the bullhorn and jammed it forcibly against the bill collector's face. As a consequence, the bill collector lost some of his front teeth.

If the customer asserts a claim based on defamation against the bill collector, will the customer prevail?

A: Yes, because the bill collector's remarks were heard by the customer's neighbors.
B: Yes, because the bill collector's conduct was extreme and outrageous.
C: No, because the bill collector did not know that the customer owed no money to the store.
D: No, because the customer did not suffer any special damages.

The explanation for the answer is:

D is correct. A claim for defamation must prove that there was a defamatory communication of fact made about the plaintiff, published to a third person who understood it was defamatory, and a resulting harm to the plaintiff. In the case of slander (verbal defamation), the plaintiff must plead and prove special damages (pecuniary). Four exceptions, which do not require special damages, include if the defendant made allegations regarding (1) criminal activity, (2) misconduct regarding plaintiff's occupation, (3) sexual misconduct, and (4) plaintiff having a "loathsome" disease. The bill collector's verbal statements do not fit into any of the exceptions. Therefore, because the customer suffered no special damages, he will not prevail.

A is incorrect. Publication is not the issue here. The facts state that the customer's neighbors were out and that the collector used a bullhorn. The issue is whether the customer suffered pecuniary damages as a result of the action. B gives the test for intentional infliction of emotional distress. This question specifically gives you a claim for defamation. C is incorrect. Malice is not at issue here, so the bill collector's good faith belief about the truth of his statement is irrelevant.

Question 1075 - Torts - Other Torts (2/10/2017)

The question was:

When two parents were told that their child should repeat second grade, they sought to have him evaluated by a psychologist. The psychologist, who charged $300, determined that their child had a learning disability. Based upon the report, the school board placed the child in special classes. At an open meeting of the school board, the parents asked that the $300 they had paid to the psychologist be reimbursed by the school district. A reporter attending the meeting wrote a newspaper article about this request, mentioning the child by name. The parents were aware that the reporter was at the meeting.

In a privacy action brought by the child's legal representative against the newspaper, the plaintiff will

A: recover, because the story is not newsworthy.
B: recover, because the child is under the age of consent.
C: not recover, because the story is a fair and accurate report of what transpired at the meeting.
D: not recover, because the parents knew that the reporter was present.

The explanation for the answer is:

C is the correct answer. While the call of the question does not specify which claim is being made, there are only two possible privacy torts available under the facts. The first is defamation, which is defendant's false and defamatory communication of fact, published knowingly or foreseeably to a third person who understood it was defamatory and which, as a result, caused harm to the plaintiff. Truth, however, is an absolute defense to defamation. The second claim would be for public disclosure of private facts. To prevail, the plaintiff must show that the defendant published private information about the plaintiff, and that the private information being publicized is non-newsworthy and would be highly offensive to a reasonable person. This tort does not require that the information be false. Here, the facts indicate that the meeting was open, so the information disclosed was not private. Additionally, the facts do not indicate that the information was so offensive that it would violate ordinary decency standards.

B is incorrect because the Supreme Court has held that a newspaper cannot be held liable for publicizing a name that is a matter of public record. A is incorrect because any fact disclosed at a public meeting is considered newsworthy. D is incorrect because the parents' knowledge of the reporter's presence is irrelevant because the meeting was open.

Question 969 - Torts - Other Torts (2/10/2017)

The question was:

Two law school classmates had competed for the position of editor of the law review. One of the students had a higher grade point average, but the other student was elected editor, largely in recognition of a long and important note that had appeared in the review over her name. During the following placement interview season, the student with the higher GPA was interviewed by a representative of a nationally prominent law firm. In response to the interviewer's request for information about the authorship of the law review note, the student said that he had heard that the note attributed to the law review editor was largely the work of another student. However, the student knew that the law review editor had written the note on her own. The firm told the law review editor that it would not interview her because of doubts about the authorship of the note. This greatly distressed her. In fact the note had been prepared by the law review editor without assistance from anyone else. If the law review editor asserts a claim against the other student based on defamation, she will

A: recover, because the other student's statement was false.
B: recover, because the other student had substantial doubts about the accuracy of the information he gave the interviewer.
C: not recover, because the law review editor did not prove pecuniary loss.
D: not recover, because the statement was made by the other student only after the interviewer inquired about the authorship of the note.

The explanation for the answer is:

B is the correct answer. The facts clearly indicate that the student with the higher GPA made a false statement about the law review editor, which was published to a potential employer, and which damaged the law review editor. The issue is what level of proof the law review editor needs in order to prevail in her claim. The two students are, at first glance, private parties. The student being interviewed, however, is speaking to a potential employer and within his position as a member of the law review staff. As such, he will most likely be found to have had a qualified privilege to talk about the law review editor's authorship during his job interview. Nevertheless, the student's qualified privilege is lost if the statement was made with knowledge that it was false or with reckless disregard for its truth. Because the student knew that the law review editor had written the note herself, B is the best answer.

A is incorrect because falsity alone is not sufficient where the speaker has a qualified privilege. When a plaintiff is suing on a statement that does not involve a matter of public concern, the plaintiff is not required to prove falsity; while the defendant may prove truth as an affirmative defense, the fact that something is false is not sufficient to prove a defamation claim. C is incorrect because a claim for slander generally requires proof of special or pecuniary damages. However, the allegation against the law review editor is one of trade or professional misconduct and special damages are presumed. D is incorrect because the question by the interviewer triggered the qualified privilege, but the privilege is not absolute. The law review editor will still prevail if she can show that the other student made the statement with knowledge or in reckless disregard of its truth or falsity.

Question 852 - Torts - Other Torts (2/10/2017)

The question was:

A newspaper, printed an article that stated:

"Kitchen, the popular restaurant on the town square, has closed its doors. Kitchen employees have told [the newspaper] that the closing resulted from the owner's belief that Kitchen's general manager has embezzled thousands of dollars from the restaurant over the last several years. A decision on reopening the restaurant will be made after the completion of an audit of Kitchen's books."

The plaintiff, who is Kitchen's general manager, brought a libel action against the newspaper based on the publication of this article. The parties stipulated that the plaintiff never embezzled any funds from Kitchen. They also stipulated that the plaintiff is well known among many people in the community because of his job with Kitchen.

The case went to trial before a jury.

The defendant's motion for a directed verdict in its favor, made at the close of the evidence, should be granted if the

A: record contains no evidence that the plaintiff suffered special harm as a result of the publication.
B: record contains no evidence that the defendant was negligent as to the truth or falsity of the charge of embezzlement.
C: evidence is not clear and convincing that the defendant published the article with "actual malice."
D: record contains uncontradicted evidence that the article accurately reported what the employees told the newspaper.

The explanation for the answer is:

B is the correct answer. The plaintiff is a private party and not a public figure, despite being "well-known" in the community, because the plaintiff is not an elected official or a celebrity, and has not placed himself at the forefront of a public controversy. However, the matter involved is of public concern. To determine if a matter is of public concern, the court will look at the content, form, and context of the publication. Here, the content was about the closing of a popular local restaurant, the form was a newspaper article, and the context was a communication to the entire readership of the newspaper. Because the matter is of public concern, the plaintiff must prove fault, i.e. that the newspaper published the statement with at least negligence as to its truth or falsity. Therefore, if the plaintiff cannot prove the defendant was negligent as to the truth or falsity of the embezzlement charge, the defendant's motion for a directed verdict will be granted.

A is incorrect. Proof of special damages is only required for slander (verbal defamation) and libel (statement in print) that is not defamatory on its face, which requires reference to extrinsic facts to show its defamatory content. Harm is presumed when the libel is defamatory on its face (per se), as here, where the statement accused the plaintiff of embezzlement. C is an incorrect standard. Actual malice is only required if the plaintiff is a public figure. D is incorrect because the newspaper can still be held liable if it was negligent in determining the veracity of the employee's statement.

Question 179 - Torts - Products Liability (7/26/2016)

The question was:

A water pipe burst in the basement of a grocery store, flooding the basement and damaging cases of canned goods on the floor. The plumbing contractor's workmen, in repairing the leak, knocked over several stacks of canned goods in cases, denting the cans. After settling its claims against the landlord for the water leak and against the plumbing contractor for the damage done by his workmen, the grocery store put the goods on special sale.

Four weeks later, a customer was shopping in the grocery store. Several tables in the market were covered with assorted canned foods, all of which were dirty and dented. A sign on each of the tables read: "Damaged Cans - Half Price."

The customer was having a guest over for dinner that evening and purchased two dented cans of tuna, packed by a canning company, from one of the tables displaying the damaged cans. Before the guest arrived, the customer prepared a tuna casserole which she and the guest later ate. Both became ill, and the medical testimony established that the illness was caused by the tuna's being unfit for consumption. The tuna consumed by the customer and the guest came from the case that was at the top of one of the stacks knocked over by the workmen. The tuna in undamaged cans from the same canning company's shipment was fit for consumption.

If the guest asserts a claim against the grocery store, the most likely result is that the guest will

A: recover on the theory of *res ipsa loquitur*.
B: recover on the theory of strict liability.
C: not recover, because the grocery store gave proper warning.
D: not recover, because the guest was not the purchaser of the cans.

The explanation for the answer is:

B is the correct answer. Strict liability can be imposed upon the grocery store for the sale of any product which is in a defective condition or is unreasonably dangerous to the user. Liability for physical harm to the guest is available provided that: (1) the grocery store is engaged in the business of selling groceries, and (2) the dented tuna can was not substantially changed by anyone else before the guest consumed it. The use of tuna within a casserole was a reasonable and foreseeable use which would not cut short the grocery store's liability. In addition, any person who is foreseeably (and in fact) injured by the grocery store's defective product can bring an action.

D is incorrect because privity of contract is not required; anyone who is injured by the product has standing to sue. A is incorrect because while there is an inference of negligence from the spoilt tuna, the negligence could be attributable to the canning company, the store, or the customer. Thus, the guest will not recover on a negligence theory based on the doctrine of *res ipsa loquitur*.

C is incorrect because the grocery store did not give proper warning. It only stated the cans were dented, not that they might (or did) contain spoiled food. Consequently, the grocery store will not be able to assert that customer had assumed the risk because the customer had not been adequately warned.

Question 940 - Torts - Products Liability (2/10/2017)

The question was:

A college student purchased a large bottle of No-Flake dandruff shampoo, manufactured by a shampoo company. The box containing the bottle stated in part: "CAUTION--Use only 1 capful at most once a day. Greater use may cause severe damage to the scalp." The college student read the writing on the box, removed the bottle, and threw the box away. The college student's roommate asked to use the No-Flake, and college student said, "Be careful not to use too much." The roommate thereafter used No-Flake twice a day, applying two or three capfuls each time, notwithstanding the label statement that read: "Use no more than one capful per day. See box instructions." The more he used No-Flake, the more inflamed his scalp became, the more it itched, and the more he used. After three weeks of such use, the roommate finally consulted a doctor who diagnosed his problem as a serious and irreversible case of dermatitis caused by excessive exposure to the active ingredients by No-Flake. These ingredients are uniquely effective at controlling dandruff, but there is no way to remove a remote risk to a small percentage of persons who may contract dermatitis as the result of applying, for prolonged periods of time, amounts of No-Flake substantially in excess of the directions. This jurisdiction adheres to the traditional common-law rules pertaining to contributory negligence and assumption of risk.

The roommate asserts a claim for his injuries against the shampoo company based on strict liability in tort. Three important facts were established at trial: The roommate misused the No-Flake shampoo, the roommate was contributorily negligent in continuing to use No-Flake shampoo when his scalp began to hurt and itch, and the roommate was a remote user and not in privity with the shampoo company. Which of the following would constitute a defense for the shampoo company?

A: The roommate misused the No-Flake shampoo.
B: The roommate misused the shampoo and was contributorily negligent in continuing to use No-Flake shampoo when his scalp began to hurt and itch.
C: The roommate was not in privity with the shampoo company.
D: The product was substantially changed from the condition in which it was sold

The explanation for the answer is:

D is correct. Any user who is injured by a defective product can bring a products liability claim based on strict liability in tort as long as they can satisfy the requirements for the prima facie case. The four elements of the case are: (1) a strict duty owed by a commercial supplier, (2) breach of that duty, (3) actual and proximate causation, and (4) damages. In a products liability claim, the main difference between a negligence and strict liability claim is that the negligence standard of care is replaced with an absolute duty to make safe. In a strict liability case, the plaintiff need only prove that the product was unreasonably dangerous to show a breach of duty. Thus, in contrast to a negligence action, a retailer in a strict liability action may be liable simply because it was a commercial supplier of a defective product.

Additionally, in a strict liability claim, the product must be expected to, and must in fact, reach the user or consumer without substantial change in the condition in which it is supplied. In this case, since the college student removed and disposed of the box containing the adequate warning before the shampoo reached the roommate, the product was substantially changed from the condition in which it was sold, and there is not adequate causation to sustain the roommate's claim.

Answer A is incorrect. The roommate's misuse of the product would not provide a defense to a strict liability action in a jurisdiction that maintains traditional contributory negligence rules. Even if the misuse rose to the level that the roommate was contributorily negligent, this is not a defense where the plaintiff simply failed to recognize the danger or guard against its existence. Therefore, B is also incorrect. Answer C is incorrect because privity is not required in a products liability claim based on strict liability, the injured party must only be a foreseeable user. Thus, A, B, and C are incorrect while D is the correct answer choice.

Question 293 - Torts - Products Liability (2/10/2017)

The question was:

A widow recently purchased a new uncrated electric range for her kitchen from a local retailer. The range has a wide oven with a large oven door. The crate in which the manufacturer shipped the range carried a warning label that the stove would tip over with a weight of 25 pounds or more on the oven door. The widow has one child, aged 3. Recently, the child was playing on the floor of the kitchen while the widow was heating water in a pan on the stove. The widow left the kitchen for a moment, and the child opened the oven door and climbed on it to see what was in the pan. The child's weight (25 pounds) on the door caused the stove to tip over forward. The child fell to the floor and the hot water spilled over her, burning her severely. The child screamed. The widow ran to the kitchen and immediately gave her first aid treatment for burns. The child thereafter received medical treatment.

The child's burns were painful. They have now healed and do not bother her, but she has ugly scars on her legs and back. The child's claim is asserted on her behalf by the proper party.

If the child asserts a claim based on strict liability against the local retailer, she must establish that

A: the local retailer did not inform the widow of the warning on the crate.
B: the stove was substantially in the same condition at the time it tipped over as when it was purchased from the local retailer.
C: the local retailer made some change in the stove design or had improperly assembled it so that it tipped over more easily.
D: the local retailer knew or should have known that the stove was dangerous because of the ease with which it tipped over.

The explanation for the answer is:

B provides the correct test. Strict liability can be imposed upon the local retailer (and up the chain to manufacturer) for the sale of any product which is in a defective condition or unreasonably dangerous to the user and results in physical harm. The retailer is liable for any resulting physical harm to the child, provided that (1) the retailer is engaged in the business of selling stoves (and/or in addition to other products), and (2) the condition of the stove was not substantially changed as from when it was sold. The retailer is clearly a seller of stoves, so the second element must be proven by the child to prevail on a strict liability claim. The additional elements stated in A, C or D might have been necessary to prove negligence, but are not required in a strict liability claim based on sale of defective product, so A, C and D are incorrect.

Question 110 - Torts - Products Liability (2/10/2017)

The question was:

A storekeeper who owns a large hardware store sells power saws for both personal and commercial use. He often takes old power saws as trade-ins on new ones. The old power saws are then completely disassembled and rebuilt with new bearings by the storekeeper's employees and sold by the storekeeper as "reconditioned saws."

A purchaser, the owner and operator of a cabinet-making shop, informed the storekeeper that he wanted to buy a reconditioned circular saw for use in his cabinet making business. However, the blade that was on the saw he picked out had very coarse teeth for cutting rough lumber. The purchaser told the storekeeper that he wanted a saw blade that would cut plywood. The storekeeper exchanged the coarse blade for a new one with finer teeth that would cut plywood smoothly, but used the original shaft. The new blade was manufactured by Saw-Blade Company, which uses all available techniques to inspect its products for defects. The reconditioned saw had been manufactured by Power Saw Company.

The week after the saw was purchased, an employee, who works for the purchaser in the purchaser's cabinet-making shop, was injured while using the saw. The employee's arm was severely cut. As a result, the cabinetmaking shop was shut down for a week until a replacement for the employee could be found.

If the employee was injured while cutting plywood when the shaft holding the saw blade came loose when a bearing gave way and the shaft and blade flew off the saw, and if the employee asserts a claim based on strict liability in tort against Power Saw Company, the employee will probably

A: recover because the shaft that came loose was a part of the saw when it was new.
B: recover, because Power Saw Company was in the business of manufacturing dangerous machines.
C: not recover, because the employee was not the buyer of the power saw.
D: not recover, because the saw has been rebuilt by the storekeeper.

The explanation for the answer is:

D is the correct answer. A threshold requirement for a products liability claim is that the defect must have existed at the time the product left the defendant's control. Here, the original saw blade was removed and replaced. Therefore, the defect with the bearing did not exist at the time the saw left the Power Saw Company's control. Furthermore, the reconditioning of the saw by the shopkeeper was a substantial alteration of the product, which will sever the strict liability of the Power Saw Company.

A and B are incorrect because the product was substantially altered before reaching the consumer. C is incorrect because any person who is within the foreseeable zone of risk can bring a products liability claim based on strict liability.

Question 582 - Torts - Products Liability (2/10/2017)

The question was:

A 16-year old boy purchased an educational chemistry set manufactured by Chemco.

The teenager invited his friend and classmate, the plaintiff, to assist him in a chemistry project. Referring to a library chemistry book on explosives and finding the chemistry set contained all of the necessary chemicals, the teenager and the plaintiff agreed to make a bomb. During the course of the project, the teenager carelessly knocked a lighted Bunsen burner into a bowl of chemicals from the chemistry set. The chemicals burst into flames, injuring the plaintiff. Although the chemistry set was as safe as possible, and its educational benefits exceeded its risks, the set did not contain a warning that it could be used to make dangerous explosives.

In a suit by the plaintiff against Chemco, based on strict liability, the plaintiff will

A: prevail, because the chemistry set did not contain a warning that its contents could be combined to form dangerous explosives.
B: prevail, because manufacturers of chemistry sets are engaged in an abnormally dangerous activity.
C: not prevail, because the teenager's negligence was the cause in fact of the plaintiff's injury.
D: not prevail, because the chemistry set was as safe as possible, consistent with its educational purposes, and its benefits exceeded its risks.

The explanation for the answer is:

D is the best answer. The facts indicate that the chemistry set was exactly as it was designed. This is a defective design case. For strict liability to apply in defective design, the plaintiff must prevail in a risk-utility balancing test where the plaintiff must show that the risk and severity of his injuries were predictable. In some jurisdictions, the court would then consider the feasibility of alternative designs. Other jurisdictions shift the burden to the defendant (once plaintiff proves causation) requiring the manufacturer to show that the chemistry set was as safe as possible, with its educational utility and benefits outweighing the risks.

A is incorrect because the students did not use the set directions, but rather a library book. Failure to warn is not the issue.

B is incorrect. Abnormally dangerous activity on the part of the manufacturer is irrelevant to this question. Ultra-hazardous activities by landowners and occupiers give rise to strict liability or any resulting injury because the inherent danger or peculiar risk is unreasonably high when compared to their social utility, even in the absence of negligence and where all the proper precautions have been taken. At issue in this question is the purchase of a product, not the conditions on the land where the manufacturer resides.

C comes to the incorrect conclusion. The teenager's actions will not determine whether a products liability claim will prevail. The actions may go to damages as a defense, but will not be part of the case in chief, which is at issue in this question. If the design is found to be defective, the teenager's negligence will not set aside Chemco's strict liability to the plaintiff.

Question 838 - Torts - Strict Liability (7/26/2016)

The question was:

A chemical company manufactured a liquid chemical product known as XRX. Some XRX leaked from a storage tank on the chemical company's property, seeped into the groundwater, flowed to a farmer's adjacent property, and polluted the farmer's well. Several of the farmer's cows drank the polluted well water and died.

If the farmer brings an action against the chemical company to recover the value of the cows that died, the farmer will

A: prevail, because a manufacturer is strictly liable for harm caused by its products.
B: prevail, because the XRX escaped from the chemical company's premises.
C: not prevail, unless the farmer can establish that the storage tank was defective.
D: not prevail, unless the chemical company failed to exercise reasonable care in storing the XRX.

The explanation for the answer is:

B is the correct answer. This is not a products liability question, but rather a strict liability question. The chemical company's storage of XRX was a use of the land which was not common to the area and which presented a serious risk of harm that could not be eliminated even if undertaken with due care. Because the chemicals were ultrahazardous and in an unusual accumulation, the chemical company is strictly liable for all damages which are "the natural consequences of its escape." As an abnormally dangerous use of the land, B is the best choice because it accurately reflects the determinative issue, which was the escape of the chemicals. The farmer does not need to show negligence or defect to recover against the chemical company. Thus A, C and D are incorrect.

Question 1311 - Torts - Strict Liability (7/26/2016)

The question was:

Under the Federal Tort Claims Act, with certain exceptions not relevant here, the federal government is liable only for negligence. A federally owned and operated nuclear reactor emitted substantial quantities of radioactive matter that settled on a nearby dairy farm, killing the dairy herd and contaminating the soil. At the trial of an action brought against the federal government by the farm's owner, the trier of fact found the following: (1) the nuclear plant had a sound design, but a valve made by an engineering company had malfunctioned and allowed the radioactive matter to escape; (2) the engineering company was universally regarded as a quality manufacturer of components for nuclear plants; and (3) there was no way the federal government could have anticipated or prevented the emission of the radioactive matter.

If there is no other applicable statute, for whom should the trial judge enter judgment?

A: The farm owner, on the ground that the doctrine of res ipsa loquitur applies.
B: The farm owner, on the ground that one who allows dangerous material to escape to the property of another is liable for the damage done.
C: The government, on the ground that a case under the Federal Tort Claims Act has not been proved.
D: The government, on the ground that the engineering company is the proximate cause of the farm owner's damage.

The explanation for the answer is:

Answer C is correct. There has been no finding of negligence on the part of the government. The trier of fact found that the government had selected a reliable manufacturer for the component part and could not have anticipated or prevented the malfunction. The court should therefore enter judgment for the defendant, on the ground that a case under the Federal Tort Claims Act has not been proved.

Answer A is incorrect. Res ipsa loquitur applies only to situations in which a lay jury could say that the accident would not ordinarily occur in the absence of the defendant's negligence. This is not such a situation because it involves complex machinery beyond the ordinary experience of a lay jury. Also, another potential defendant is involved, and the findings of the jury are inconsistent with a conclusion that this is the sort of accident that would not ordinarily occur in the absence of the government's negligence.

Answer B is incorrect. This is the principle of *Rylands v. Fletcher*, a case based on strict liability rather than on negligence, and the Federal Tort Claims Act only permits actions based on negligence. *See Rylands v. Fletcher*, [1868] All E.R. 1.

Answer D is incorrect. The actions of more than one defendant may be considered the proximate cause of the harm to the plaintiff. Moreover, while proximate cause is necessary to establish liability in negligence, it is not sufficient. Given the findings of the trier of fact, the farm owner has not established breach of a duty by the government.

Question 1311 - Torts - Strict Liability (2/10/2017)

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