National Conference of Bar Examiners

Multistate Bar Examination - Online Practice Exam 2

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Question # 1 - Evidence

In a suit based on a will, inheritance of $1 million depended upon whether the wife had survived her husband when both died in the crash of a small airplane. An applicable statute provided that, for purposes of distributing an estate after a common disaster, there was a rebuttable presumption that neither spouse had survived the other. A witness was 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 two occupants 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.

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.

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Question # 2 - Criminal Law and Procedure

A defendant was lawfully arrested without a warrant for bank robbery. He was not given *Miranda* warnings, but was immediately taken to a police station where he and five other men were placed in a lineup to be viewed by the bank teller. Each man was required to say the words spoken by the bank robber: "Give me all your money. I've got a gun." After all the men in the lineup spoke those words, the teller identified the defendant as the robber.

The defendant subsequently moved to suppress the testimony of the teller, claiming the lineup violated his privilege against self-incrimination. At a suppression hearing, the teller testified that she had not gotten a good look at the robber's face, because the robber had been wearing a hat pulled down over most of his face, but that she was certain the defendant was the robber because she had recognized his voice at the lineup.

Should the defendant's motion be granted?

(A) No, because being required to speak at the lineup, while compelled, was not testimonial or communicative.

Correct. The defendant properly could be required to utter the words spoken by the bank robber. The privilege against self-incrimination extends only to compelled "testimonial" communications; "[t]hus, even though the act may provide incriminating evidence, a criminal suspect may be compelled . . . to make a recording of his voice." *United States v. Hubbell*, 530 U.S. 27, 34–35 (2000) (citing *United States v. Wade*, 388 U.S. 218 (1967)).

(B) No, because testimony of a witness based on firsthand observation is not subject to exclusion as the fruit of the poisonous tree.

(C) Yes, because the defendant was compelled to speak at the lineup, and this compelled speech led to the witness's identification testimony.

(D) Yes, because the defendant was never informed that he could refuse to make a statement and that any statement could be used as evidence against him.

Question # 3 - Constitutional Law

A city owned and operated a municipal bus system. The city sold space on its buses for the posting of placards. Decisions on the type of placards that could be posted on the buses were left wholly to the discretion of the administrator of the bus system. Although most of the placards that appeared on city buses were commercial advertisements, the administrator had often sold space on the buses for placards promoting various political, charitable, and religious causes.

A circus bought space on the city buses for placards advertising its forthcoming performances. An animal rights organization asked the administrator to sell it space for a placard with photographs showing the mistreatment of animals in circus shows.

The administrator denied the organization's request. She said that the display of this placard would be offensive to the circus, which had paid a substantial sum to place its placards on the buses, and that she had been told by a circus employee that none of the photographs on the organization's placard depicted an animal belonging to this particular circus. Under the relevant city ordinance, the administrator's decision was final.

The organization sued the administrator in an appropriate court for a declaration that she could not, consistent with the First Amendment as made applicable to the states by the Fourteenth Amendment, refuse to sell the organization space for its placard for the reasons she gave.

Will the organization prevail?

(A) No, because the administrator's denial of space to the organization was a reasonable time, manner, and place restriction of speech.

(B) No, because a public official may not allow the use of public facilities for the propagation of a message that he or she believes may create a false or misleading impression.

(C) Yes, because a public official may not refuse to permit the dissemination of a message in a public forum wholly on the basis of its content unless that denial is necessary to serve a compelling government interest.

Correct. The space on city buses used for the posting of placards qualifies as a designated public forum because it is public property that the city has decided to open for an expressive use. The organization's placard was consistent with the city's designated use of the forum. The city administrator's denial of space to the organization was based on the content of the placard and therefore triggered strict scrutiny, which requires that the denial be necessary to serve a compelling government interest. The reasons cited for the city's denial of the organization's request do not implicate compelling government interests that would justify a content-based speech restriction.

(D) Yes, because a public official may not refuse to allow the use of any public facility to publish a message dealing with an issue of public concern.

Question # 4 - Torts

A landowner who owned a large tract of land in the mountains sought to protect a herd of wild deer that frequented the area. 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 chain-link fence, topped by three strands of barbed wire, across a gully on her land that provided the only access to the area frequented by the deer.

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 brought an action against the landowner.

Will the plaintiff 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.

(D) No, because the potential for harm created by the presence of the barbed wire was apparent.

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. *See* Restatement (Second) of Torts § 84 & cmt. c.

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Question # 5 - Torts

A smoker and a nonsmoker were seated at adjoining tables in a small restaurant. The smoker's table was in the smoking section, and the nonsmoker's table was in the nonsmoking section. When the smoker lit a cigarette, the nonsmoker politely requested that he not smoke, explaining that she had a severe allergy to cigarette smoke. The smoker ignored the nonsmoker's request and continued to smoke. As a result, the nonsmoker was hospitalized with a severe allergic reaction to the smoke.

The nonsmoker brought a battery action against the smoker.

Which of the following questions will NOT be an issue in the battery action?

(A) Did the smoker intend to cause the nonsmoker's contact with the cigarette smoke?

(B) Does smoke have the physical properties necessary for making the kind of contact required for battery?

(C) Is contact with cigarette smoke from a lawful smoking section in a restaurant the kind of contact one must endure as a voluntary restaurant patron?

(D) Was the smoker's conduct unreasonable under the circumstances?

Correct. Whether the defendant's conduct was reasonable under the circumstances is irrelevant if in fact the defendant intended to make a harmful or offensive contact with the plaintiff. It would be relevant in a negligence action, but not in a battery action.

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Question # 6 - Criminal Law and Procedure

A federal officer had probable cause to believe a woman had participated in a bank robbery. Two days after the robbery, the woman checked into a local hotel room. When the woman left for the evening, the hotel manager opened the hotel room door so the officer could enter the room and look inside. The officer did not find any of the stolen money but did see, lying open on the bed, the woman's diary. The diary contained an entry describing the woman's involvement in robbing the bank.

The woman was charged in federal court with bank robbery. She moved to suppress the diary.

Should the court suppress the diary?

(A) Yes, because the officer had no warrant.

Correct. The Fourth Amendment protects the woman's expectation of privacy in her dwelling, including her temporary hotel room dwelling. Absent exigent circumstances, which were not present in this fact pattern, the Fourth Amendment would require the officer to have obtained a warrant before entering the hotel room. *See Minnesota v. Olson*, 495 U.S. 91 (1990).

(B) Yes, because admitting the diary would violate the woman's privilege against self-incrimination.

(C) No, because the hotel manager had actual authority to allow the officer into the hotel room.

(D) No, because the officer reasonably relied on the hotel manager's apparent authority to allow the officer into the hotel room.

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Question # 7 - Real Property

Thirty years ago, a landowner conveyed land by warranty deed to a church (a charity) "so long as the land herein conveyed is used as the site for the principal religious edifice maintained by said church."

Twenty years ago, the landowner died intestate, survived by a single heir.

One year ago, the church dissolved and its church building situated on the land was demolished.

There is no applicable statute. The common law Rule Against Perpetuities is unmodified in the jurisdiction.

In an appropriate action, the landowner's heir and the attorney general, who is the appropriate official to assert public interests in charitable trusts, contest the right to the land.

In such action, who will prevail?

(A) The landowner's heir, as successor to the landowner's possibility of reverter.

Correct. The conveyance to the church created a fee simple determinable. The future interest retained by the grantor is a possibility of reverter. The church's right to possession ended automatically when the church stopped using the land as the site for its principal religious edifice. The heir inherited the possibility of reverter retained by the landowner and is entitled to possession.

(B) The landowner's heir, because a charity cannot convey assets donated to it.

(C) The attorney general, because *cy pres* should be applied to devote the land to religious purposes to carry out the charitable intent of the landowner.

(D) The attorney general, because the landowner's attempt to restrict the church's fee simple violated the Rule Against Perpetuities.

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Question # 8 - Constitutional Law

With the advice and consent of the Senate, the President entered into a self-executing treaty with a foreign country. The treaty provided that citizens of both nations were required to pay whatever torts damages were awarded against them by a court of either nation.

A man and a woman who were U.S. citizens and residents of the same state were traveling separately in the foreign country when their cars collided. The foreign court awarded the woman a judgment for $500,000 in damages for her injuries from the accident.

In federal district court in their home state, the woman filed suit against the man to enforce the judgment. The man filed a motion to dismiss for lack of jurisdiction.

Should the court grant the motion to dismiss?

(A) Yes, because the citizenship of the parties is not diverse.

(B) Yes, because the traffic accident was a noncommercial transaction outside interstate commerce.

(C) No, because the case falls within the federal question jurisdiction of the court.

Correct. The court has federal question jurisdiction over the case because it "arises under" a treaty of the United States, as provided for by Article III of the Constitution.

(D) No, because the treaty power is plenary and not subject to judicial review.

Question # 9 - Contracts

A fugitive was wanted for murder. The authorities offered the following reward: "$20,000 to anyone who provides information leading to the arrest and conviction of this fugitive." A private detective knew of the reward, located the fugitive, and brought him to the authorities, who arrested him. The authorities then determined that while the fugitive had, in fact, committed the crime, he had been directed to commit the crime by his boss. The authorities and the fugitive then agreed that in exchange for the fugitive's testimony against his boss, all charges against the fugitive would be dropped. The fugitive testified and was released. The authorities refused to pay the reward to the private detective on the ground that the fugitive was never convicted.

Would the private detective be likely to prevail in a breach of contract action against the authorities?

(A) No, because the private detective failed to notify the authorities that he had accepted the reward offer.

(B) No, because the express conditions set out in the reward were not met.

(C) Yes, because the authorities' agreement with the fugitive was against public policy.

(D) Yes, because the authorities themselves prevented the conviction of the fugitive.

Correct. A performance that is subject to an express condition cannot become due unless the condition occurs or its nonoccurrence is excused. The detective's entitlement to the award was subject to two conditions—the arrest and conviction of the fugitive. The first, the arrest, was satisfied when the detective delivered the fugitive to the authorities. The second, the conviction, did not occur. Its nonoccurrence is excused, however, under the doctrine of prevention, which requires that a party refrain from conduct that prevents or hinders the occurrence of a condition. Restatement (Second) of Contracts §§ 225, 245 cmt. a.

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Question # 10 - Evidence

A defendant was on trial for burglary. The prosecutor called the arresting officer to testify that shortly after the arrest the defendant had orally admitted her guilt to him. Before the officer testified, the defendant objected that no *Miranda* warning had been given, and she requested a hearing outside the presence of the jury to hear evidence on that issue.

How should the court proceed?

(A) The court should grant the request, because the hearing on the admissibility of the confession must be conducted outside the presence of the jury.

Correct. *Miranda* warnings must be given before a confession made by a person under arrest can be admitted. Since the defendant contends that no *Miranda* warnings were given, she is entitled to a hearing on the issue. Under Rule 104(c) of the Federal Rules of Evidence, the hearing must be conducted outside the presence of the jury.

(B) The court may grant or deny the request, because the court has discretion whether to conduct preliminary hearings in the presence of the jury.

(C) The court should deny the request and rule the confession inadmissible, because only signed confessions are permitted in criminal cases.

(D) The court should deny the request and rule the confession admissible, because it is the statement of a party-opponent.

Question # 11 - Torts

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 that the nuclear plant had a sound design, but that a valve made by the Acme Engineering Company had malfunctioned and allowed the radioactive matter to escape, that Acme Engineering Company is universally regarded as a quality manufacturer of components for nuclear plants, and that 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 plaintiff, on the ground that the doctrine of res ipsa loquitur applies.

(B) The plaintiff, on the ground that one who allows dangerous material to escape to the property of another is liable for the damage done.

(C) The defendant, on the ground that a case under the Federal Tort Claims Act has not been proved.

Correct. The trier of fact has found no evidence of negligence on the part of the defendant. The defendant selected a reliable manufacturer for the component part and could not have anticipated or prevented the malfunction. *See* Restatement (Second) of Torts § 298.

(D) The defendant, on the ground that the Acme Engineering Company is the proximate cause of the owner's damage.

Question # 12 - Criminal Law and Procedure

A state statute provides as follows: "In all criminal cases, whenever the Constitution permits, the burden of proof as to a defense claimed by the defendant shall rest on the defendant, and the magnitude of the burden shall be as great as the Constitution permits."

The same state defines the crime of forcible rape as follows: "Forcible rape consists of sexual penetration inflicted on an unconsenting person by means of force or violence. Consent of the victim is a complete defense to a charge of rape."

At a defendant's trial for forcible rape, he testified that the alleged victim had consented to having sexual intercourse with him.

How should the trial judge instruct the jury regarding the issue of consent?

(A) The burden of proving that the victim consented, by a preponderance of the evidence, rests on the defendant.

(B) The burden of proving that the victim consented, by clear and convincing evidence, rests on the defendant.

(C) The burden of proving that the victim consented, by proof beyond a reasonable doubt, rests on the defendant.

(D) The burden of proving that the victim did not consent, by proof beyond a reasonable doubt, rests on the prosecution.

Correct. The state statute includes lack of consent as an element of the offense. Accordingly, due process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged." *Patterson v. New York*, 432 U.S. 197 (1977); *see also Mullaney v. Wilbur*, 421 U.S. 684 (1975).

Question # 13 - Contracts

A buyer and a seller entered into a contract for the sale of 10,000 novelty bracelets. The seller had the bracelets in stock. The contract specified that the seller would ship the bracelets by a third-party carrier. However, the contract did not specify either who was to pay the costs of carriage or the place of tender for the bracelets.

On the above facts, when would the risk of loss of the bracelets pass to the buyer?

(A) When the contract was made.

(B) When the bracelets were identified to the contract by the seller, assuming the goods conformed to the contract.

(C) When the bracelets were delivered to a carrier and a proper contract for their carriage was made.

Correct. Under UCC § 2-509(1), a contract that requires the seller to ship goods to the buyer by a third-party carrier is either a shipment or a destination contract. Comment 5 to UCC § 2-503 provides that where the contract is otherwise silent, a shipment contract is presumed where the contract requires shipment by a third-party carrier. Since this is a shipment contract, the risk of loss would pass from the seller to the buyer when the seller duly delivered the goods to the third-party carrier.

(D) When the bracelets were unloaded on the buyer's premises by the carrier.

Question # 14 - Constitutional Law

A state legislature received complaints from accident victims who, in the days immediately following their accidents, had received unwelcome and occasionally misleading telephone calls on behalf of medical care providers. The callers warned of the risks of not obtaining prompt medical evaluation to detect injuries resulting from accidents and offered free examinations to determine whether the victims had suffered any injuries.

In response to these complaints, the legislature enacted a law prohibiting medical care providers from soliciting any accident victim by telephone within 30 days of his or her accident.

Which of the following is the most useful argument for the state to use in defending the constitutionality of the law?

(A) Because the commercial speech that is the subject of this law includes some speech that is misleading, the First Amendment does not limit the power of the state to regulate that speech.

(B) Because the law regulates only commercial speech, the state need only demonstrate that the restriction is rationally related to achieving the state's legitimate interests in protecting the privacy of accident victims and in regulating the medical profession.

(C) The state has substantial interests in protecting the privacy of accident victims and in regulating the practice of medical care providers, and the law is narrowly tailored to achieve the state's objectives.

Correct. The law regulates only commercial speech, and the First Amendment invalidates any law regulating such speech unless the law is narrowly tailored to serve a substantial government interest. The U.S. Supreme Court has held that a law barring the solicitation of accident victims within a limited time period following an accident was narrowly tailored to serve the state's substantial interest in protecting the privacy of the victims.

(D) The law is a reasonable time, place, and manner regulation.

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Question # 15 - Evidence

A defendant was charged with murder. While walking down the hallway during a recess in the defendant's trial, the judge overheard the defendant say to his attorney, "So what if I did it? There's not enough proof to convict." Upon the judge's reporting the incident to counsel, the prosecutor called the judge as a witness in the trial.

Is the judge's testimony regarding the defendant's statement admissible?

(A) Yes, as the statement of a party-opponent.

(B) Yes, because the defendant's statement, although otherwise privileged, was made without reasonable efforts to preserve confidentiality.

(C) No, because the statement was a privileged attorney-client communication.

(D) No, because a judge may never testify in a trial over which he or she is presiding.

Correct. Rule 605 of the Federal Rules of Evidence provides that a "judge presiding at the trial may not testify in that trial as a witness."

Question # 16 - Real Property

A man borrowed money from a bank and executed a promissory note for the amount secured by a mortgage on his residence. Several years later, the man sold his residence. As provided by the contract of sale, the deed to the buyer provided that the buyer agreed "to assume the existing mortgage debt" on the residence.

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 seller 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.

Correct. With a mortgage assumption, the buyer who assumes the mortgage debt becomes primarily liable. The man, absent a release by the bank, also is liable, although the man is secondarily liable. This situation can be contrasted with one in which the buyer purchased "subject to the mortgage," in which case only the man would be liable for 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.

Question # 17 - Contracts

In a written contract, an architect agreed to draw up the plans for and to supervise construction of a client's new house. In return, the client agreed to pay the architect a fee of $10,000 to be paid upon the house's completion. After completion, the client claimed erroneously but in good faith that the architect's plans were defective. The client orally offered to pay the architect $7,500 in full settlement of the claim for the fee. The architect orally accepted that offer despite the fact that the reasonable value of his services was in fact $10,000. The client paid the architect $7,500 pursuant to their agreement.

The architect subsequently sued the client for the remaining $2,500. In a preliminary finding, the trier of fact found that there were no defects in the architect's plans.

Will the architect be likely to prevail in his action against the client for $2,500?

(A) Yes, because payment of $7,500 cannot furnish consideration for the architect's promise to surrender his claim.

(B) Yes, because the oral agreement to modify the written contract is not enforceable.

(C) No, because the architect's promise to accept $7,500 became binding when the client made the payment.

Correct. The architect's agreement to accept a payment for less than the amount due constituted an effective accord, supported by consideration, which was satisfied with the payment of $7,500. Consideration is present because of the good faith dispute as to the amount owed. By compromising, each party surrenders its respective claim as to how much is owed. Restatement (Second) of Contracts § 74.

(D) No, because the architect's acceptance of partial payment constituted a novation.

Question # 18 - Evidence

A defendant's house was destroyed by fire and she was charged with arson. To prove that the defendant had a motive to burn down her house, the government offered evidence that the defendant had fully insured the house and its contents.

Should the court admit this evidence?

(A) No, because the probative value of the evidence of insurance upon the issue of whether the defendant intentionally burned her house down is substantially outweighed by the dangers of unfair prejudice and confusion of the jury.

(B) No, because evidence of insurance is not admissible upon the issue of whether the insured acted wrongfully.

(C) Yes, because evidence of insurance on the house has a tendency to show that the defendant had a motive to burn down the house.

Correct. Although this evidence is certainly not conclusive that the defendant committed arson (many people fully insure their houses), it is relevant to the issue of whether the defendant would have had a financial incentive to commit the arson. The defendant might be able to generate cash more quickly by burning down the house and collecting insurance proceeds than by attempting to sell the house. To be relevant under Rule 401 of the Federal Rules of Evidence, the evidence need only have "any tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Therefore, evidence that has only the slightest probative value can be admitted under this rule.

(D) Yes, because any conduct of a party to the case is admissible when offered against the party.

Question # 19 - Torts

The owner of a shopping mall hired a construction company to design and construct the entryway to the mall. The construction company negligently selected an unusually slippery material for the floor covering. A customer at the mall slipped on the floor of the entryway, sustaining injuries. The customer sued the mall owner for the construction company's negligent design of the mall's entryway.

Will the injured customer recover damages?

(A) No, if the construction company was an independent contractor.

(B) No, if no customers had previously slipped on the floor.

(C) Yes, if the customer intended to make a purchase at the mall.

(D) Yes, if the mall's duty to maintain safe conditions was nondelegable.

Correct. Although employers are not usually liable for the negligence of independent contractors, there are limits on the ability of employers to circumvent liability in this way. Work in public places often gives rise to a nondelegable duty on the part of the landowner.

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Question # 20 - Contracts

On June 1, a seller agreed, in a writing signed by both the seller and the buyer, to sell an antique car to a buyer for $20,000. The car was at the time on display in a museum in a different city and was to be delivered to the buyer on August 1. On July 15, before the risk of loss had passed to the buyer, the car was destroyed by fire without fault of either party. Subsequent to the contract but before the fire, the car had increased in value to $30,000. The seller sued the buyer for the contract price of $20,000, and the buyer counterclaimed for $30,000.

Which of the following will the court conclude?

(A) Both claims fail.

Correct. UCC § 2-613 provides that where goods, identified at the time the contract was made, are totally destroyed before the risk of their loss has passed to the buyer and without the fault of either party, the contract is avoided and each party is relieved of its respective obligation to perform. Under UCC § 2-501, the goods were identified at the time of contract formation since the parties agreed to the delivery of a specific automobile. In addition, the facts state that the car was destroyed without the fault of either party and before the risk of loss had passed. Therefore the contract is avoided. Since each party's performance is discharged, neither party can assert a valid claim against the other.

(B) Only the seller's claim prevails.

(C) Only the buyer's claim prevails.

(D) Both claims prevail.

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Question # 21 - Constitutional Law

A report released by a Senate investigating committee named three U.S. citizens as helping to organize support for terrorist activities. All three were employed by the U.S. government as park rangers.

Congress enacted a statute naming the three individuals identified in the report and providing that they could not hold any position of employment with the federal government.

Which of the following constitutional provisions provides the best means for challenging the constitutionality of the statute?

(A) The bill of attainder clause.

Correct. A bill of attainder is a legislative act that singles out particular individuals for punishment without a trial; bills of attainder are explicitly prohibited by the Constitution. The U.S. Supreme Court held, in *United States v. Lovett*, 328 U.S. 303 (1946), that a statute barring particular individuals from government employment qualified as punishment within the meaning of the constitutional provision prohibiting bills of attainder.

(B) The due process clause.

(C) The *ex post facto* clause.

(D) The takings clause.

Question # 22 - Real Property

A seller owned a single family house. A buyer gave the seller a signed handwritten offer to purchase the house. The offer was unconditional and sufficient to satisfy the statute of frauds, and when the seller signed an acceptance an enforceable contract resulted.

The house on the land had been the seller's home, but he had moved to an apartment, so the house was vacant at all times relevant to the proposed transaction. Two weeks after the parties had entered into their contract, one week after the buyer had obtained a written mortgage lending commitment from a lender, and one week before the agreed-upon closing date, the house was struck by lightning and burned to the ground. The loss was not insured, because three years earlier, the seller had let his homeowner's insurance policy lapse after he had paid his mortgage debt in full.

The handwritten contract was wholly silent as to matters of financing, risk of loss, and insurance. The buyer declared the contract voided by the fire, but the seller asserted a right to enforce the contract despite the loss.

There is no applicable statute.

If a court finds for the seller, what is the likely reason?

(A) The contract was construed against the buyer, who drafted it.

(B) The lender's written commitment to make a mortgage loan to the buyer made the contract of sale fully binding on the buyer.

(C) The risk of loss falls on the party in possession, and constructive possession passed to the buyer on the contract date.

(D) The risk of loss passed to the buyer on the contract date under the doctrine of equitable conversion.

Correct. Under the doctrine of equitable conversion, the risk of loss goes to the party with the equitable title if the contract is silent. Equitable conversion occurs when the contract is capable of specific performance. This contract was silent regarding the risk of loss and there were no conditions to be met. The buyer thus had the equitable title at the time of the loss. If there is no statute, the Uniform Vendor and Purchaser Act, which places the risk of loss on the one in possession, is not applicable. The court found for the seller, and thus the minority common law rule, which places the risk on the seller under these facts, is inapplicable.

Question # 23 - Criminal Law and Procedure

A federal grand jury was investigating drug trafficking in the jurisdiction. It subpoenaed a witness to testify, and the prosecutor advised the witness that he had a Fifth Amendment privilege not to testify if he so chose. The witness asked that his counsel be allowed to advise him inside the grand jury room, but the prosecutor refused to allow the attorney inside. The witness, after speaking with his attorney outside the grand jury room, decided to testify and ended up making self-incriminating statements.

The witness subsequently was 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 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.

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)). 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).

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Question # 24 - Torts

A hiker sustained a head injury when he was struck by a limb that fell from a tree. At the time of his injury, the hiker was walking through a forest on private property without the property owner's knowledge or permission. It was determined that the limb fell because the tree was infested with termites.

In an action by the hiker against the property owner to recover for his head injury, will the hiker prevail?

(A) No, because the property owner could not foresee that anyone would be injured.

(B) No, because the property owner breached no duty to the hiker, who was a trespasser.

Correct. A possessor of land is not required to exercise reasonable care to make his land safe for trespassers. Restatement (Second) of Torts § 333.

(C) Yes, because the property owner had a duty to prevent the trees on his property from becoming dangerous.

(D) Yes, because the property owner is liable for hidden dangers on his property.

Question # 25 - Criminal Law and Procedure

United States customs officials received an anonymous tip that heroin would be found inside a distinctively marked red package mailed from a foreign country to the United States. Pursuant to this tip, United States customs officers opened the red package and found heroin inside. They then resealed the package and left the heroin inside it. The FBI was notified and, as agents watched, the package was delivered to the address.

The FBI then secured a warrant to search the house for the package. About two hours after the package was delivered, the warrant was executed at the house. The man who opened the door was arrested, and the agents found the package, unopened, in an upstairs bedroom closet. After seizing the package, the agents looked through the rest of the house. In a footlocker in the basement, they found a machine gun.

The man was charged with, among other crimes, unlawful possession of the machine gun. He moved to suppress its use as evidence.

Should the court grant the motion to suppress the machine gun?

(A) Yes, because the search exceeded the authority granted by the warrant.

Correct. The warrant was valid, but its validity was triggered by and limited to the delivered package. *See United States v. Grubbs*, 547 U.S. 90 (2006). Accordingly, once the only object of that search was discovered, the warrant did not authorize a further exploratory search of the house. *See Horton v. California*, 496 U.S. 128 (1990).

(B) Yes, because the initial search by the customs officers was without probable cause.

(C) No, because, having found the package, the agents had probable cause to believe more narcotics could be located in the house and the gun was found in a proper search for narcotics.

(D) No, because narcotics dealers are often armed and the search was justified to protect the agents.

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Question # 26 - Contracts

A homeowner and a contractor entered into a contract for the construction of a home for the price of $300,000. The contractor was to earn a profit of $10,000 for the job. After the contractor had spent $45,000 on labor and materials, including $5,000 on oak flooring not yet installed, the homeowner informed the contractor that the homeowner had lost his job and could not pay for any services. The homeowner told the contractor to stop working immediately. The reasonable market value of the labor and materials provided by the contractor at that point, including the oak flooring, was $40,000. The contractor used the $5,000 worth of oak flooring on another job.

In an action by the contractor against the homeowner for damages, which of the following would be the largest amount of damages recoverable by the contractor?

(A) $40,000, the reasonable value of the services the contractor had provided.

(B) $40,000, the contractor's construction costs.

(C) $50,000, the contractor's construction costs of $45,000 plus the $10,000 profit minus the $5,000 saved by reusing the oak flooring on another job.

Correct. $50,000 represents the contractor's expectation measure of recovery and gives the contractor the benefit of the bargain—this amount would place the contractor in the position he would have been in but for the breach. It is also the greatest amount the contractor is able to recover. The general expectation formula permits the contractor to recover $50,000 and can be computed as follows:

General expectation formula = loss in value + other loss – cost avoided – loss avoided:

LIV = the difference between the performance the nonbreaching party should have received under the contract and what was actually received, if anything, in this case, $300,000 less $0

OL = consequential and incidental damages, if any, in this case, $0

CA = the additional costs the nonbreaching party can avoid by rightfully discontinuing performance under the contract as a result of the other party's breach, in this case, $290,000 less $45,000

LA = the beneficial effects of the breach due to the nonbreaching party's ability to salvage or reallocate resources that otherwise would have been devoted to performing under the contract, in this case, $5,000

So $300,000 + $0 – $245,000 – $5,000 = $50,000.

Restatement (Second) of Contracts § 347; E. Allen Farnsworth, Contracts § 12.9 (4th ed. 2004).

(D) $55,000, the contractor's construction costs of $45,000 plus the $10,000 profit.

Question # 27 - Real Property

A man died testate. The man's estate consisted of a residence as well as significant personal property. By his duly probated will, the man devised the residence to a friend who was specifically identified in the will. The residue of the estate was given to a stated charity.

The man's friend, although alive at the time the man executed the will, predeceased the man. The friend's wife and their child, who has a disability, survived the man.

The value of the residence has increased significantly because of recent zoning changes. There is credible extrinsic evidence that the man wanted his friend to own the residence after the man's death so that the friend and his wife could care for their child there.

There is no applicable statute.

If both the charity and the child claim the residence, to whom should the estate distribute the residence?

(A) The charity, because the devise to the friend adeemed.

(B) The charity, because the devise to the friend lapsed.

Correct. A deceased person cannot take and hold title to property. If a named beneficiary predeceases the testator, the gift to that beneficiary lapses. In this case, the gift to the friend lapsed because the friend predeceased the man. The gift of the residence was a specific gift, and the lapse of this specific gift passes the residence through the residuary clause of the will. The charity is the residuary taker. There is no applicable anti-lapse statute which might have substituted the friend's child as the beneficiary of the bequest if the friend were a protected beneficiary under the statute.

(C) The child, because extrinsic evidence exists that the man's intent was to benefit the child.

(D) The child, because no conditions of survivorship were noted in the will.

Question # 28 - Constitutional Law

Several sites on a mountain within federal public lands are regarded as sacred to a group that for years has gathered there to perform religious ceremonies. The United States Forest Service recently issued a permit to a private developer to construct a ski facility in an area that includes the sites that are sacred to the group.

The group filed suit in federal district court against the Forest Service to force cancellation of the permit. The group claimed solely that the permit violated its First Amendment right to the free exercise of religion. The Forest Service conceded that the group's religious beliefs were sincere and that the ski facility would adversely affect the group's religious practices.

In order to prevail in its First Amendment claim, what must the group show?

(A) Construction of the ski facility will have a discriminatory impact on the group's religious practices in relation to the practices of other religious groups.

(B) The burden on the group's religious practices imposed by construction of the ski facility outweighs the government's interest in allowing the facility.

(C) The Forest Service can achieve its legitimate interest in allowing the ski facility by issuing a permit that is less burdensome on the group's religious practices.

(D) The permit issued by the Forest Service is aimed at suppressing the religious practices of the group.

Correct. The court will exercise strict scrutiny only if the challenger can show that the government action targeted the religious practice in question. A court typically invalidates government action at strict scrutiny.

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Question # 29 - Evidence

A defendant was charged with battery for allegedly attacking a man as they left a local bar together. No one else witnessed the fight. At trial, each testified that he had acted only in self-defense. The defendant called his next-door neighbor as a witness to testify as to the defendant's reputation both for truthfulness and for peacefulness. The government objected to the testimony in its entirety.

How should the court proceed?

(A) Admit the evidence in its entirety.

(B) Admit the evidence regarding the defendant's reputation for peacefulness, but exclude the evidence regarding his truthfulness.

Correct. The defendant's character for peacefulness is a pertinent trait of character under Rule 404(a)(1) of the Federal Rules of Evidence. Rule 405 allows the defendant to offer evidence of his reputation for peacefulness. The evidence of the defendant's truthfulness must be excluded, because there is no indication that the defendant's character for truthfulness while testifying has been attacked.

(C) Exclude the evidence regarding the defendant's reputation for peacefulness, but admit the evidence regarding his truthfulness.

(D) Exclude the evidence in its entirety.

Question # 30 - Torts

A cigarette maker created and published a magazine advertisement that featured a model dressed as a race-car driver standing in front of a distinctive race car. In fact, the car looked almost exactly like the very unusually marked one driven by a famous and popular driver. The driver in the ad was not identified, and his face was not shown in the advertisement. The cigarette maker published the advertisement without obtaining the famous driver's permission. The race-car driver sued the cigarette maker for economic loss only, based on common law misappropriation of the right of publicity. The cigarette maker moved to dismiss the complaint.

Will the cigarette maker's motion to dismiss the complaint be granted?

(A) No, because there are sufficient indicia of the driver's identity to support a verdict of liability.

Correct. A common law right of publicity can be violated when an advertisement, viewed as a whole, leaves little doubt that the ad is intended to depict a specific celebrity who has not consented to the use of his identity.

(B) Yes, because the driver is a public figure.

(C) Yes, because there was no mention of the driver's name in the ad.

(D) Yes, because the driver did not claim any emotional or dignitary loss.

Question # 31 - Criminal Law and Procedure

In a city, a number of armed bank robberies were committed near closing time by a masked man wearing a white hooded sweatshirt and blue sweatpants. Police saw a man wearing a white hooded sweatshirt and blue sweatpants pacing nervously outside one of the city's banks just before it closed. The police stopped the man and frisked the outer layers of his clothing for weapons, but found none. They asked the man what he was doing outside the bank and pointed out that he was wearing clothing similar to clothing worn by the perpetrator of recent robberies. After pausing for several moments, the man confessed. The police had not provided him with any *Miranda* warnings.

After being charged with the bank robberies, the man moved to suppress his confession. The parties agreed, and the court properly found, that the police had reasonable suspicion but not probable cause at all times before the man confessed.

Should the man's motion to suppress be granted?

(A) Yes, because the confession was the fruit of a Fourth Amendment violation, even though there was no *Miranda* violation.

(B) Yes, because the confession was the fruit of a *Miranda* violation, even though there was no Fourth Amendment violation.

(C) Yes, because the confession was the fruit of both a Fourth Amendment violation and a *Miranda* violation.

(D) No, because there was neither a Fourth Amendment violation nor a *Miranda* violation.

Correct. There was neither a Fourth Amendment violation nor a *Miranda* violation. There was no Fourth Amendment violation because the stop, frisk, and questioning were permissible, under *Terry v. Ohio*, 392 U.S. 1 (1968), based on reasonable suspicion. There was no *Miranda* violation because warnings are not required for *Terry* stops. *See Berkemer v. McCarty*, 468 U.S. 420, 439–40 (1984).

Question # 32 - Real Property

A man owned property that he used as his residence. The man received a loan, secured by a mortgage on the property, from a bank. Later, the man defaulted on the loan. The bank then brought an appropriate action to foreclose the mortgage, was the sole bidder at the judicial sale, and received title to the property as a result of the foreclosure sale.

Shortly after the foreclosure sale, the man received a substantial inheritance. He approached the bank to repurchase the property, but the bank decided to build a branch office on the property and declined to sell.

If the man prevails in an appropriate action to recover title to the property, what is the most likely reason?

(A) He had used the property as his residence.

(B) He timely exercised an equitable right of redemption.

(C) The court applied the doctrine of exoneration.

(D) The jurisdiction provides for a statutory right of redemption.

Correct. A jurisdiction may, by statute, provide a statutory right of redemption, which sets out an additional time period after the foreclosure sale during which the prior mortgagor and perhaps others have the option to pay a certain sum of money and redeem the title to the property. The right arises only by statute and only after there has been a foreclosure of the mortgage.

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Question # 33 - Real Property

A farmer borrowed $100,000 from a bank and gave the bank a promissory note secured by a mortgage on the farm that she owned. The bank promptly and properly recorded the mortgage, which contained a due-on-sale provision.

A few years later, the farmer borrowed $5,000 from a second bank and gave it a promissory note secured by a mortgage on her farm. The bank promptly and properly recorded the mortgage.

Subsequently, the farmer defaulted on her obligation to the first bank, which then validly accelerated the debt and instituted nonjudicial foreclosure proceedings as permitted by the jurisdiction. The second bank received notice of the foreclosure sale but did not send a representative to the sale. At the foreclosure sale, a buyer who was not acting in collusion with the farmer outbid all other bidders and received a deed to the farm.

Several months later, the original farmer repurchased her farm from the buyer, who executed a warranty deed transferring the farm to her. After the farmer promptly and properly recorded that deed, the second bank commenced foreclosure proceedings on the farm. The farmer denied the validity of the second bank's mortgage.

Does the second bank continue to have a valid mortgage on the farm?

(A) Yes, because of the doctrine of estoppel by deed.

(B) Yes, because the original owner reacquired title to the farm.

(C) No, because the purchase at the foreclosure sale by the buyer under these facts eliminated the second bank's junior mortgage lien.

Correct. The first bank had priority. The second bank was a necessary party to the foreclosure proceeding and was given notice of the sale. When the second bank failed to appear at the foreclosure proceeding, or to take any other action, the buyer at the sale received the title the farmer had at the time the mortgage was given to the first bank, which was free of any mortgage liens. The buyer and the farmer did not act in collusion, so there could be no claim of fraud when the farmer reacquired her original interest in the farm.

(D) No, because of the due-on-sale provision in the farmer's mortgage to the first bank.

Question # 34 - Evidence

At a trial of a contract dispute, the plaintiff offered to testify to what the defendant said in a private conversation between the two of them, which the plaintiff had secretly recorded on an audiotape that she did not offer in evidence.

Is the plaintiff's testimony admissible?

(A) Yes, because the plaintiff has personal knowledge of the statement of a party-opponent.

Correct. What the defendant said to the plaintiff, even in a private conversation, is an admission of a party-opponent and is admissible under Rule 801(d)(2)(A) of the Federal Rules of Evidence. The plaintiff has personal knowledge of what the defendant said and can testify about it. The fact that the audiotape might be better evidence of what the defendant actually said makes no difference. The best evidence rule applies only when a witness testifies about the content of a writing or recording. Here the plaintiff would not be testifying about the content of the audiotape but rather about what she personally heard.

(B) Yes, because the original document rule does not apply to audiotapes.

(C) No, because the statement must be proved by introduction of the audiotape itself.

(D) No, because of the plaintiff's deception, even if the recording was not illegal.

Question # 35 - Torts

A manufacturing plant located near a busy highway uses and stores highly volatile explosives. The owner of the plant has imposed strict safety measures to prevent an explosion at the plant. During an unusually heavy windstorm, a large tile was blown off the roof of the plant and crashed into the windshield of a passing car, damaging it. The driver of the car brought a strict liability action against the owner of the plant to recover for the damage to the car's windshield.

Is the driver likely to prevail?

(A) No, because the damage to the windshield did not result from the abnormally dangerous aspect of the plant's activity.

Correct. Although the manufacture of explosives may be an abnormally dangerous activity, strict liability for injuries caused by such activities is limited to the kind of harm that makes the activity abnormally dangerous. This accident could have occurred when a roof tile fell from a building that housed a perfectly safe and ordinary activity. The owner may, however, be liable for negligence. *See* Restatement (Second) of Torts § 519(2).

(B) No, because the severity of the windstorm was unusual.

(C) Yes, because the plant's activity was abnormally dangerous.

(D) Yes, because the plant's location near a busy highway was abnormally dangerous.

Question # 36 - Contracts

While waiting in line to open an account with a bank, a customer read a poster on the bank's wall that said, "New Customers! $25 FOR 5 MINUTES. If you stand in line for more than five minutes, we will pay you $25! We like happy customers! (This offer may be withdrawn at any time.)" The customer started timing his wait and just as five minutes was about to pass, the bank manager tore the poster down and announced, "The $25 stand-in-line promotion is over." The customer waited in line for 10 more minutes before being served.

In the customer's action against the bank for $25, will the customer prevail?

(A) No, because the bank withdrew its offer before the customer completed the requested performance.

(B) No, because the bank's statement was a nonbinding gift promise.

(C) Yes, because the bank could not revoke its offer once the customer had commenced performance.

Correct. Restatement (Second) of Contracts § 45 provides that where an offer invites acceptance by performance, the offeree's beginning of performance creates an option contract which precludes the offeror from revoking its offer.

(D) Yes, because the customer's presence in line served as notice to the bank that he had accepted.

Question # 37 - Constitutional Law

A federal statute required that any individual or entity owning more than 100 cars had to ensure that at least 10 percent of those cars were electric-powered.

A city filed suit in federal district court against the federal official who enforced this requirement. The city sought an injunction prohibiting enforcement of the statute on the ground that it was unconstitutional.

Should the court grant the injunction?

(A) No, because the statute is valid under the commerce clause and does not violate the Tenth Amendment.

Correct. The statute satisfies the commerce clause because it regulates a commercial activity (the purchase of cars) that, when aggregated, has a substantial effect on interstate commerce. The statute does not violate the Tenth Amendment as applied to the city because it does not commandeer the city to regulate the conduct of others pursuant to congressional direction. Instead, it directly regulates the city on the same terms as other entities engaged in the same conduct, which is permissible under the Tenth Amendment.

(B) No, because the federal government has sovereign immunity and cannot be sued without its explicit consent.

(C) Yes, because the statute violates the reserved rights of the states under the Tenth Amendment.

(D) Yes, because as applied to state and local governments, the statute exceeds Congress's power under the commerce clause.

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Question # 38 - Criminal Law and Procedure

A driver stopped at a red light in his home state. A stranger opened the passenger door, got in, and pointed a gun at the driver. The stranger then directed the driver to keep driving. They drove several miles, crossed into a neighboring state, and drove several more miles. When they reached a remote location, the stranger ordered the driver to pull over. The stranger then robbed the driver of his wallet and cash, and ordered him out of the car. The stranger drove off in the driver's car.

The stranger is charged with kidnapping in the neighboring state, which has adopted the Model Penal Code.

Could the stranger properly be convicted of kidnapping in the neighboring state?

(A) Yes, because the driver was transported under threat of force in the neighboring state.

Correct. The movement in the neighboring state would constitute sufficient "asportation" for a kidnapping conviction, and was more than incidental to the robbery. *See* 3 Wayne R. LaFave, Substantive Criminal Law § 18.1(b) (discussing Model Penal Code § 212.1).

(B) Yes, because the driver in effect paid ransom for his release.

(C) No, because any kidnapping took place in the driver's home state.

(D) No, because the restraint was incidental to the robbery.

Question # 39 - Contracts

On June 1, a seller received a mail order from a buyer requesting prompt shipment of a specified computer model at the seller's current catalog price. On June 2, the seller mailed to the buyer a letter accepting the order and assuring the buyer that the computer would be shipped on June 3. On June 3, the seller realized that he was out of that computer model and shipped to the buyer a different computer model and a notice of accommodation. On June 5, the buyer received the seller's June 2 letter and the different computer model, but not the notice of accommodation.

At that juncture, which of the following is a correct statement of the parties' legal rights and duties?

(A) The buyer can either accept or reject the different computer model and in either event recover damages, if any, for breach of contract.

Correct. UCC § 2-206(1)(b) provides that a seller's shipment of conforming goods with a notice of accommodation does not constitute an acceptance and breach, but rather a counteroffer, which the buyer is free to either accept or reject. Section 2-206(1)(b) also provides, however, that a contract calling for prompt shipment can be accepted by either a prompt promise to ship or by the prompt shipment of goods. The seller accepted the buyer's offer by a promise to ship when he mailed his June 2 letter. UCC § 2-601 allows a buyer to accept or reject nonconforming goods and in either event recover damages. The buyer has an action for breach since the computer shipped on June 3 failed to conform to the contract formed on June 2 when the seller mailed his letter of acceptance.

(B) The buyer can either accept or reject the different computer model, but if he rejects it, he will thereby waive any remedy for breach of contract.

(C) The seller's prompt shipment of nonconforming goods constituted an acceptance of the buyer's offer, thereby creating a contract for sale of the replacement computer model.

(D) The seller's notice of accommodation was timely mailed and his shipment of the different computer model constituted a counteroffer.

Question # 40 - Evidence

A plaintiff sued a ladder manufacturer for injuries he suffered to his neck and back when a rung of the ladder on which he was standing gave way. When the plaintiff's back and neck continued to be very sore after more than two weeks, his treating physician sent him to an orthopedist for an evaluation. Though the orthopedist did not treat the plaintiff, he diagnosed an acute cervical strain. At trial, the plaintiff called the orthopedist to testify that in response to the orthopedist's inquiry about how the plaintiff had injured his back, the plaintiff told him, "I was standing near the top of a 15-foot ladder when I abruptly fell, landing hard on my back, after which the ladder toppled onto my neck."

Should the statement be admitted?

(A) Yes, because the plaintiff is present and can be cross-examined about it.

(B) Yes, because it was made for the purpose of medical diagnosis or treatment.

Correct. This statement fits Rule 803(4) of the Federal Rules of Evidence as a statement made for the purpose of medical diagnosis. This rule allows not only statements made to treating physicians, but also statements made to other doctors for evaluation or diagnosis.

(C) No, because it was not made to a treating physician.

(D) No, because it relates to the inception or the cause of the injury rather than the plaintiff's physical condition.

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Question # 41 - Constitutional Law

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.

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.

(C) The privileges and immunities clause of Article IV.

(D) The privileges or immunities clause of the Fourteenth Amendment.

Question # 42 - Torts

A consumer bought an electric kitchen blender from the manufacturer. Soon after the purchase, the consumer was using the blender in an appropriate way when the blender jar shattered, throwing a piece of glass into the consumer's eye.

The consumer brought an action against the manufacturer based solely on strict product liability. The consumer's expert testified that the blender was defectively designed. However, because the blender jar was destroyed in the accident, the expert could not determine whether the accident was caused by the design defect or a manufacturing defect. The manufacturer's expert testified that the blender was not defective.

If, at the conclusion of the evidence, both parties move for directed verdicts, how should the trial judge rule?

(A) Direct a verdict for the manufacturer, because the consumer's expert was unable to specify the nature of the defect.

(B) Direct a verdict for the manufacturer, because the consumer's action was brought solely on a strict liability theory.

(C) Direct a verdict for the consumer, because the blender was new when the jar shattered.

(D) Deny both motions and send the case to the jury, because a jury reasonably could conclude that the harm probably was caused by a defect present in the product when it was sold.

Correct. A jury could conclude that the blender was defective at the time of sale because the accident is the sort of accident that ordinarily occurs as a result of a defect and no other cause was identified, but the jury is not required to draw that conclusion. *See* Restatement (Third) of Torts (Products Liability) § 3 illus. 1.

Question # 43 - Constitutional Law

Congressional committees heard testimony from present and former holders of licenses issued by state vocational licensing boards. According to the testimony, the boards had unfairly manipulated their disciplinary proceedings in order to revoke the licenses of some license holders as a means of protecting favored licensees from competition.

In response, Congress enacted a statute prescribing detailed procedural requirements for the disciplinary proceedings of all state vocational licensing boards. For example, the statute required the state boards to provide licensees with adequate notice and opportunity for an adjudicatory hearing in all disciplinary proceedings. The statute also prescribed criteria for the membership of all state vocational licensing boards that were designed to ensure that the boards were likely to be neutral.

Which of the following provides the best source of authority for this federal statute?

(A) Section 5 of the Fourteenth Amendment.

Correct. Section 5 of the Fourteenth Amendment gives Congress the power to enforce the provisions of the Fourteenth Amendment by appropriate legislation. Congressional legislation is appropriate within the meaning of Section 5 if (1) it seeks to prevent or remedy actions by state or local governments that violate provisions of the Fourteenth Amendment, and (2) its requirements are congruent with and proportional to the Fourteenth Amendment violations it addresses. In this case, the legislation seeks to prevent actions by state agencies that violate the due process clause of the Fourteenth Amendment, and the requirements of the legislation appear to be proportional to and congruent with the Fourteenth Amendment violations Congress has sought to prevent.

(B) The general welfare clause of Article I, Section 8.

(C) The privileges and immunities clause of Article IV, Section 2.

(D) The takings clause of the Fifth Amendment.

Question # 44 - Real Property

A seller who owned land in fee simple entered into a valid written agreement to sell the land to a buyer by installment purchase. The contract stipulated that the seller would deliver to the buyer, upon the payment of the last installment due, "a warranty deed sufficient to convey a fee simple title." The contract contained no other provision that could be construed as referring to title.

The buyer entered into possession of the land. After making 10 of the 300 installment payments obligated under the contract, the buyer discovered that there was outstanding a valid and enforceable mortgage on the land, securing the payment of a debt in the amount of 25 percent of the purchase price that the buyer had agreed to pay. There was no evidence that the seller had ever been late in payments due under the mortgage and there was no evidence of any danger of insolvency of the seller. The value of the land was then four times the amount due on the debt secured by the mortgage.

The buyer quit possession of the land, stopped making payments on the contract, and demanded that the seller repay the amounts that the buyer had paid under the contract. After the seller refused the demand, the buyer sued the seller to recover damages for the seller's alleged breach of the contract.

In such action, should damages be awarded to the buyer?

(A) Yes, because in the absence of a contrary express agreement, an obligation to convey marketable title is implied.

(B) Yes, because an installment purchase contract is treated as a mortgage and the outstanding mortgage impairs the buyer's equity of redemption.

(C) No, because an installment purchase contract is treated as a security device.

(D) No, because the time for the seller to deliver marketable title has not arrived.

Correct. Title does not have to be marketable until the closing date when all payments have been received. The buyer still has 290 payments to make. A mortgage can render title unmarketable but it is most likely that title will be marketable when all payments have been made by the buyer under the agreement. The seller has made all mortgage payments timely. The amount of the mortgage debt is 25 percent of the purchase price the buyer will pay, and the land is four times more valuable than the debt owed, so it is likely that the mortgage debt will be paid off by the time the seller must provide the warranty deed, and thus the buyer is not entitled to damages at this time.

Question # 45 - Contracts

On May 1, a seller and a buyer entered into a written contract, signed by both parties, for the sale of a tract of land for $100,000. Delivery of the deed and payment of the purchase price were scheduled for July 1. On June 1, the buyer received a letter from the seller repudiating the contract. On June 5, the buyer bought a second tract of land at a higher price as a substitute for the first tract. On June 10, the seller communicated a retraction of the repudiation to the buyer.

The buyer did not tender the purchase price for the first tract on July 1, but subsequently sued the seller for breach of contract.

Will the buyer likely prevail?

(A) No, because the seller retracted the repudiation prior to the agreed time for performance.

(B) No, because the buyer's tender of the purchase price on July 1 was a constructive condition to the seller's duty to tender a conveyance.

(C) Yes, because the seller's repudiation was nonretractable after it was communicated to the buyer.

(D) Yes, because the buyer bought the second tract as a substitute for the first tract prior to the seller's retraction.

Correct. The buyer's purchase of the second tract, which occurred before the seller's attempted retraction, constituted a material change in position and thus terminated the seller's ability to retract his repudiation. Restatement (Second) of Contracts § 256.

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Question # 46 - Torts

A driver negligently ran over a pedestrian. A bystander witnessed the accident from across the street. The bystander ran to the pedestrian, whom he did not know, and administered first aid, but the pedestrian died in the bystander's arms. The bystander suffered serious emotional distress as a result of his failure to save the pedestrian's life, but he experienced no resulting physical manifestations. The bystander brought a negligence action against the driver.

Is the bystander likely to prevail?

(A) No, because the bystander assumed the risk.

(B) No, because the bystander had no familial or other preexisting relationship with the pedestrian.

Correct. Even states that allow witnesses who are not in the zone of danger to recover for the emotional distress of observing an accident limit recovery to witnesses who are closely related to the injured person.

(C) Yes, because danger invites rescue.

(D) Yes, because the bystander was in the zone of danger.

Question # 47 - Constitutional Law

A state legislature conducted an investigation into a series of fatal accidents in the state involving commercial trucks with trailer exteriors made of polished aluminum. The investigation revealed that the sun's glare off of these trucks blinded the drivers of other vehicles. The state's legislature then enacted a law prohibiting commercial trucks with polished aluminum trailer exteriors from traveling on the state's highways.

Litigation over the state law resulted in a final decision by the United States Supreme Court that the law impermissibly burdened interstate commerce and, therefore, was unconstitutional. Congress later enacted a statute permitting any state to enact a law regulating the degree of light reflectiveness of the exteriors of commercial trucks using the state's highways.

Is this federal statute constitutional?

(A) No, because the U.S. Supreme Court has already determined that state laws of this type impermissibly burden interstate commerce.

(B) No, because Article III vests the judicial power in the federal courts, the essence of judicial power is the ability to render a final judgment, and this statute overrules a final judgment of the federal Supreme Court.

(C) Yes, because Article I, Section 8 grants Congress authority to enact statutes authorizing states to impose burdens on interstate commerce that would otherwise be prohibited.

Correct. The usual rule prohibiting Congress from enacting a statute overruling a constitutional decision of the U.S. Supreme Court does not apply to enactments based on Congress's commerce power because the Constitution gives Congress plenary authority to regulate conduct that is within the commerce power. The congressional statute permitting any state to regulate the degree of light reflectiveness of the exteriors of commercial trucks using the state's highways is a valid enactment of the commerce power because commercial trucks are instrumentalities of interstate commerce.

(D) Yes, because Article I, Section 8 grants Congress authority to enact statutes for the general welfare, and Congress could reasonably believe that state laws regulating the light reflectiveness of the exteriors of trucks promote the general welfare.

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Question # 48 - Evidence

A plaintiff sued a defendant for wrongful death arising out of a traffic collision between the plaintiff's decedent and the defendant. At trial, the investigating traffic officer authenticated a tape recording of her shift-end dictation of comments used in preparing the written report of her factual findings. She testified that the tape recording was accurate when made and that she currently had no clear memory of the details of the investigation.

Is the tape recording admissible as evidence?

(A) Yes, under the past recollection recorded exception to the hearsay rule.

Correct. This statement meets the requirements of Rule 803(5) of the Federal Rules of Evidence, the past recollection recorded exception to the hearsay rule. The witness once had knowledge but now has insufficient recollection to testify fully and accurately about her investigation. She made the recording when the matter was fresh in her memory, and she has testified that the recording was an accurate reflection of her memory.

(B) Yes, under the public records exception to the hearsay rule.

(C) No, because it is hearsay and is a police report being offered against the defendant in a wrongful death case.

(D) No, because the police report itself is the best evidence.

Question # 49 - Contracts

A debtor's liquidated and undisputed $1,000 debt to a creditor was due on March 1. On March 15, the creditor told the debtor that if the debtor promised to pay the $1,000 on or before December 1, then the creditor wouldn't sue to collect the debt. The debtor orally agreed. On April 1, the creditor sued the debtor to collect the debt that had become due on March 1. The debtor moved to dismiss the creditor's complaint.

Should the court grant the debtor's motion?

(A) No, because there was no consideration to support the creditor's promise not to sue.

Correct. The law supports the settlement of debts and claims. However, consideration is required for a settlement to be enforceable. Under the pre-existing duty rule, the creditor's promise to forbear from suing to collect was not supported by consideration from the debtor since the amount due was liquidated and the debtor promised to do nothing more than he was already obligated to do. The creditor's promise here was not supported by consideration from the debtor since it allowed for payment of an undisputed amount, $1,000, after the time for payment of the debt had passed. Restatement (Second) of Contracts §§ 73, 74; E. Allen Farnsworth, Contracts § 4.23 (4th ed. 2004).

(B) No, because there was no consideration to support the debtor's promise to pay $1,000 on December 1.

(C) Yes, because a promise to allow a debtor to delay payment on a past debt is enforceable without consideration.

(D) Yes, because the debtor was bargaining for the creditor's forbearance.

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Question # 50 - Criminal Law and Procedure

A man who had become very drunk left a bar and started to walk home. Another patron of the bar, who had observed the man's condition, followed him. The patron saw the man stumble and fall to the ground near an alley. The patron then began to pull out a gun but saw that the man had passed out asleep in the gutter. The patron reached into the man's pocket, grabbed his wallet, and started to walk away. When the patron heard police officers approaching, he dropped the wallet and ran off.

The crimes below are listed in descending order of seriousness.

What is the most serious crime for which the patron properly could be convicted?

(A) Robbery.

(B) Larceny.

Correct. Larceny requires a trespassory taking and carrying away of the personal property of another with intent to steal it. All the elements were satisfied here. The asportation (carrying away) element requires movement of only a slight distance, so it was satisfied here even though the patron ultimately discarded the wallet. *See* 3 Wayne R. LaFave, Substantive Criminal Law § 19.3(b).

(C) Attempted robbery.

(D) Attempted larceny.

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Question # 51 - Contracts

On March 1, a homeowner contacted a builder about constructing an addition to the homeowner's house. The builder orally offered to perform the work for $200,000 if his pending bid on another project was rejected. The homeowner accepted the builder's terms and the builder then prepared a written contract that both parties signed. The contract did not refer to the builder's pending bid. One week later, upon learning that his pending bid on the other project had been accepted, the builder refused to perform any work for the homeowner.

Can the homeowner recover for the builder's nonperformance?

(A) No, because efficiency principles justify the builder's services being directed to a higher-valued use.

(B) No, because the builder's duty to perform was subject to a condition.

Correct. The condition exception to the parol evidence rule permits the admission of extrinsic evidence to establish an oral condition to the parties' performance under the contract. Restatement (Second) of Contracts § 217.

(C) Yes, because the builder's attempt to condition his duty to perform rendered the contract illusory.

(D) Yes, because the parol evidence rule would bar the builder from presenting evidence of oral understandings not included in the final writing.

Question # 52 - Constitutional Law

A city passed an ordinance requiring individuals to obtain a license in order to care for children under the age of 12 for pay. To receive such a license, the ordinance required the individuals to complete 10 hours of instruction in child care, undergo a background check, and pay a $100 fee. The ordinance affected women disproportionately to men, because female babysitters far outnumbered male babysitters in the city. City officials who promoted the measure said that the certification process would ensure that babysitters were adequately regulated for the health and safety of the city's children.

Is the ordinance constitutional?

(A) No, because it has a disparate impact on women without a showing that the ordinance is necessary to advance a compelling government interest.

(B) No, because it infringes on the freedom of contract without a compelling government interest.

(C) Yes, because any burden it imposes is clearly outweighed by an important government objective.

(D) Yes, because it is rationally related to a legitimate government objective.

Correct. The disparate impact of a law on women, without more, does not constitute sex discrimination and thus is insufficient by itself to trigger heightened judicial scrutiny of the constitutionality of the law. In order for the ordinance to be considered discriminatory against women, a court must find that the city adopted the ordinance because it would have a disparate impact on women, and there are no facts upon which to base such a finding. The ordinance is constitutional because it is rationally related to a legitimate government objective.

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Question # 53 - Real Property

By a valid written contract, a seller agreed to sell land to a buyer. The contract stated, "The parties agree that closing will occur on next May 1 at 10 a.m." There was no other reference to closing. The contract was silent as to quality of title.

On April 27, the seller notified the buyer that she had discovered that the land was subject to a longstanding easement in favor of a corporation for a towpath for a canal, should the corporation ever want to build a canal.

The buyer thought it so unlikely that a canal would be built that the closing should occur notwithstanding this outstanding easement. Therefore, the buyer notified the seller on April 28 that he would expect to close on May 1.

When the seller refused to close, the buyer sued for specific performance.

Will the buyer prevail?

(A) No, because the easement renders the seller's title unmarketable.

(B) No, because rights of third parties are unresolved.

(C) Yes, because the decision to terminate the contract for title not being marketable belongs only to the buyer.

Correct. If a contract of sale is silent as to quality of title, the court will imply a marketable title, and an easement does affect the marketability of title. But while the seller has a duty to deliver a marketable title, the requirement of marketable title is for the benefit of the buyer. The buyer may waive the right to have a marketable title, which is what the buyer did in this fact situation.

(D) Yes, because the seller did not give notice of the easement a reasonable time before the closing date.

Question # 54 - Criminal Law and Procedure

A drug dealer agreed with another individual to purchase heroin from the individual in order to sell it on a city street corner. Unknown 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.

Correct. 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. 2 Wayne R. LaFave, Substantive Criminal Law § 12.2(c)(6).

(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.

Question # 55 - Constitutional Law

Residents of a city complained that brightly colored signs detracted from the character of the city's historic district and distracted motorists trying to navigate its narrow streets. In response, the city council enacted an ordinance requiring any "sign or visual display" visible on the streets of the historic district to be black and white and to be no more than four feet long or wide.

A political party wanted to hang a six-foot-long red, white, and blue political banner in front of a building in the historic district. The party filed suit to challenge the constitutionality of the sign ordinance as applied to the display of its banner.

Which of the following would be the most useful argument for the political party?

(A) The ordinance is not the least restrictive means of promoting a compelling government interest.

(B) The ordinance is not narrowly tailored to an important government interest, nor does it leave open alternative channels of communication.

Correct. Because the ordinance is a content-neutral restriction of expression, it must satisfy intermediate scrutiny, which requires the city to prove that the ordinance is narrowly tailored to an important government interest and that it leaves open alternative channels of communication.

(C) The ordinance imposes a prior restraint on political expression.

(D) The ordinance effectively favors some categories of speech over others.

Question # 56 - Contracts

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.

Correct. The manufacturer does not have an action for the price, which is available under three circumstances, none of which is present here—where the buyer has accepted the goods, the goods are lost or damaged within a commercially reasonable time after the risk of loss has passed to the buyer, or the seller is unable after reasonable efforts to resell the goods. UCC § 2-709.

(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.

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Question # 57 - Contracts

An insurance company issued an insurance policy to a homeowner. The policy failed to contain certain coverage terms required by a state insurance statute. When the homeowner suffered a loss due to a theft that was within the policy's terms, the insurance company refused to pay, claiming that the contract was unenforceable because it violated the statute.

Will the homeowner succeed in an action against the insurance company to recover for the loss?

(A) No, because the insurance policy is not a divisible contract.

(B) No, because the insurance policy violated the statute.

(C) Yes, because the homeowner belongs to the class of persons intended to be protected by the statute.

Correct. A contract that violates a state statute may be declared unenforceable on grounds of public policy. Where, however, the contract violates a policy that was intended for the benefit of a contracting party seeking relief, the contract may be enforceable in order to avoid frustrating the policy behind the statute. Accordingly, public policy would not prevent the enforcement of the contract by those within the class of persons, including the homeowner, that the statute was intended to protect. Restatement (Second) of Contracts § 179 cmt. c, illus. 4; E. Allen Farnsworth, Contracts § 5.6 (4th ed. 2004).

(D) Yes, because the insurance policy would be strictly construed against the insurance company as the drafter.

Question # 58 - Criminal Law and Procedure

A foreign diplomat discovered that a small person could enter a jewelry store by crawling through an air vent. The diplomat became friendly with a woman in a bar who he believed was small enough to crawl through the air vent. Without telling her that he was a diplomat, he explained how she could get into the jewelry store. She agreed to help him burglarize the store. Someone overheard their conversation and reported it to the police. Shortly thereafter, the police arrested the diplomat and the woman. Both were charged with conspiracy to commit burglary.

Before trial, the diplomat moved to dismiss the charge against him on the ground that he was entitled to diplomatic immunity. The court granted his motion. The woman then moved to dismiss the conspiracy charge against her.

The jurisdiction has adopted the Model Penal Code version of conspiracy.

Should the woman's motion to dismiss the conspiracy charge against her be granted?

(A) No, because the diplomat's defense does not negate any element of the crime.

Correct. Model Penal Code section 5.03(1), by defining conspiracy as requiring agreement by the defendant but not by two or more persons, adopts a unilateral interpretation of conspiracy. In addition, many jurisdictions that require a bilateral conspiracy still allow conviction if one of the co-conspirators agreed to the crime but cannot be convicted based on lack of capacity or some other defense personal to the co-conspirator. 2 Wayne R. LaFave, Substantive Criminal Law § 12.4(c)(1).

(B) No, because the woman was not aware of the diplomat's status.

(C) Yes, because a conspiracy requires two guilty participants.

(D) Yes, because but for the diplomat's conduct, no conspiracy would have occurred.

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Question # 59 - Torts

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 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.

Correct. 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. Restatement (Second) of Torts § 821F illus. 1.

(D) No, because the law school had the requisite municipal permits to erect the clock tower.

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Question # 60 - Criminal Law and Procedure

A woman told a man to go into her friend's unlocked barn and retrieve an expensive black saddle that she said she had loaned to the friend. The man went to the friend's barn, opened the door, found a black saddle, and took it back to the woman's house. The friend had in fact not borrowed a saddle from the woman, and when the friend discovered her black 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 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) Only the man.

(D) Only the woman.

Correct. Only the woman had the requisite criminal intent. Burglary requires unlawful entry with intent to commit a felony (in this case, larceny). 3 Wayne R. LaFave, Substantive Criminal Law § 21.1(e). 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. 3 Wayne R. LaFave, Substantive Criminal Law § 19.5(a).

Question # 61 - Evidence

A plaintiff sued his insurance company for the full loss of his banquet hall by fire. The insurance company defended under a provision of the policy limiting liability to 50 percent if "flammable materials not essential to the operation of the business were stored on the premises and caused a fire." The insurance company called the keeper of the city fire inspection records to identify a report prepared and filed by the fire marshal as required by law, indicating that shortly before the fire, the fire marshal had cited the plaintiff for storing gasoline at the banquet hall.

Is the report admissible?

(A) No, because it is hearsay not within any exception.

(B) No, because the proceeding is civil, rather than criminal.

(C) Yes, as a public record describing matters observed as to which there was a duty to report.

Correct. The report is admissible as a public record under Rule 803(8) of the Federal Rules of Evidence. The facts of the problem indicate that the fire marshal had a legal duty to report. The fact that the fire marshal issued the citation indicates that he observed gasoline being stored in the banquet hall.

(D) Yes, as a record of regularly conducted activity, provided the fire marshal is unavailable.

Question # 62 - Real Property

A rectangular parcel of undeveloped land contained three acres and had 150 feet of frontage on a public street. The applicable zoning ordinance required that a buildable lot contain at least two acres and have frontage of not less than 100 feet on a public street.

A brother and sister owned the land as tenants in common, the brother owning a one-third interest and the sister owning a two-thirds interest. Neither of them owned any other real property.

The sister brought an appropriate action to partition the land and proposed that a two-acre rectangular lot with 100 feet of frontage be set off to her and that a one-acre rectangular lot with 50 feet of frontage be set off to the brother. The brother's defense included a demand that the land be sold and its proceeds be divided one-third to the brother and two-thirds to the sister.

Who will prevail?

(A) The brother, because partition by sale is the preferred remedy, unless a fair price is not the likely result of a sale.

(B) The brother, because the zoning ordinance makes it impossible to divide the land fairly.

Correct. A tenant in common may bring an action to partition the property. Partition in kind, in which there is a physical division of the common property, is preferred; however, a partition by sale is allowed when a fair and equitable physical division of the property is impossible. The applicable zoning ordinance requires a frontage of 100 feet on a public street in order to build. It would not be fair or equitable to convey only 50 feet of frontage to the brother, who then could not build on his lot.

(C) The sister, because partition by sale is not appropriate if the subject property can be physically divided.

(D) The sister, because the ratio of the two lots that would result from her proposal conforms exactly to the ownership ratio.

Question # 63 - Criminal Law and Procedure

A woman promised to pay $10,000 to a hit man if he would kill her neighbor in any manner that could not be traced to her. The hit man bought a gun and watched the neighbor's house for an opportunity to shoot him. One evening, unaware of the hit man's presence, the neighbor tripped as he was walking toward his house, falling and hitting his head against the front steps. Believing that the neighbor was unconscious, the hit man ran over to him and shot him twice in the chest.

When the woman learned of the neighbor's death, she paid the hit man $10,000. A medical examiner determined that the neighbor was already dead when the hit man shot him.

The crimes below are listed in descending order of seriousness.

What is the most serious crime for which the woman properly could be convicted?

(A) Murder.

(B) Attempted murder.

Correct. The woman cannot be guilty of murder, because the hit man did not in fact cause the neighbor's death, but she can be convicted of attempted murder. 1 Wayne R. LaFave, Substantive Criminal Law § 6.4(b) (discussing *People v. Dlugash*, 363 N.E.2d 1155 (N.Y. 1977)).

(C) Conspiracy.

(D) Solicitation.

Question # 64 - Contracts

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

After completing 25 percent of the garage according to the homeowner's specifications, the builder demanded $2,000 as a reasonable progress payment. The homeowner refused, and the builder abandoned the job.

If each party sues the other for breach of contract, which of the following will the court decide?

(A) Both parties are in breach, and each is entitled to damages, if any, from the other.

(B) Only the builder is in breach and liable for the homeowner's damages, if any.

Correct. Where one party's performance requires a period of time, that party must complete its performance before the other party is required to perform unless the language or circumstances indicate otherwise. Here the parties did not provide for progress payments. Therefore the builder was required to complete performance before the homeowner was obligated to pay for any of the work the builder had performed. The builder's abandonment of the job constituted a wrongful repudiation giving the homeowner an action for breach. Restatement (Second) of Contracts §§ 234, 235.

(C) Only the homeowner is in breach and liable for the builder's damages, if any.

(D) Both parties took reasonable positions, and neither is in breach.

Question # 65 - Torts

A company manufactured metal stamping presses that were usually sold with an installed safety device that made it impossible for a press to close on a worker's hands. The company strongly recommended that its presses be purchased with the safety device installed, but would sell a press without the safety device at a slightly reduced price.

Rejecting the company's advice, a worker's employer purchased a stamping press without the safety device. The press closed on the worker's hand, crushing it.

In an action brought by the worker against the company, will the worker prevail?

(A) Yes, because the company's press was the cause in fact of the worker's injury.

(B) Yes, because the company sold the press to the worker's employer without an installed safety device.

Correct. A product is defective if it fails to include a feasible safety device that would prevent injuries foreseeably incurred in ordinary use.

(C) No, because the failure of the worker's employer to purchase the press with a safety device was a superseding intervening cause of the worker's injury.

(D) No, because the company strongly recommended that the worker's employer purchase the press with the safety device.

Question # 66 - Constitutional Law

In one state, certain kinds of advanced diagnostic medical technology were located only in hospitals, where they provided a major source of revenue. In many other states, such technology was also available at "diagnostic centers" that were not affiliated with hospitals.

A group of physicians announced its plan to immediately open in the state a diagnostic center that would not be affiliated with a hospital. The state hospital association argued to the state legislature that only hospitals could reliably handle advanced medical technologies. The legislature then enacted a law prohibiting the operation in the state of diagnostic centers that were not affiliated with hospitals.

The group of physicians filed suit challenging the constitutionality of the state law.

What action should the court take?

(A) Uphold the law, because the provision of medical services is traditionally a matter of legitimate local concern that states have unreviewable authority to regulate.

(B) Uphold the law, because the legislature could rationally believe that diagnostic centers not affiliated with hospitals would be less reliable than hospitals.

Correct. The law does not trigger heightened judicial scrutiny because it neither classifies regulatory subjects on a constitutionally suspect basis nor unduly burdens the exercise of a fundamental right. The appropriate constitutional standard of review therefore is whether the law is rationally related to a legitimate government interest. The apparent legislative judgment that diagnostic centers not affiliated with hospitals would be less reliable than hospitals is rational, regardless of whether it is in fact correct.

(C) Invalidate the law, because it imposes an undue burden on access to medical services in the state.

(D) Dismiss the suit without reaching the merits, because the suit is not ripe.

Question # 67 - Torts

While driving his open-bed truck with a friend in the open bed, the driver swerved, throwing his friend to the pavement. The friend sustained severe injuries. The friend had often ridden in the open bed of the driver's truck, and on some of those occasions the driver had swerved to frighten his friend. The friend sued the driver to recover both compensatory damages for his injuries and punitive damages.

Which cause of action would NOT permit the friend to recover punitive damages?

(A) Assault.

(B) Battery.

(C) Negligence.

Correct. Punitive damages are not available in ordinary negligence cases. Restatement (Second) of Torts § 908(2).

(D) Recklessness.

Question # 68 - Evidence

A plaintiff sued an individual defendant for injuries suffered in a collision between the plaintiff's car and the defendant's truck while the defendant's employee was driving the truck. The plaintiff sought discovery of any accident report the employee might have made to the defendant, but the defendant responded that no such report existed. Before trial, the defendant moved to preclude the plaintiff from asking the defendant in the presence of the jury whether he destroyed such a report, because the defendant would then invoke his privilege against self-incrimination.

Should the court allow the plaintiff to ask the defendant about the destruction of the report?

(A) No, because a report that was prepared in anticipation of litigation is not subject to discovery.

(B) No, because no inference may properly be drawn from invocation of a legitimate privilege.

(C) Yes, because a party in a civil action may not invoke the privilege against self-incrimination.

(D) Yes, because the defendant's destruction of the report would serve as the basis of an inference adverse to the defendant.

Correct. If a party destroys evidence, it is proper for the jury to draw an inference that the evidence was adverse to that party. It is also proper for the jury to draw an adverse inference *in a civil case* from a party's assertion of the privilege against self-incrimination. Thus, the court should allow the question to be asked, because it is proper regardless of how the defendant responds.

Question # 69 - Contracts

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 that had recently died. The contract price was $100,000 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 and immediately notified the gallery of the rejection. 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 the painting to an art admirer for $120,000 cash, after notifying her about the damage.

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) $120,000 (damages for conversion).

Correct. The collector rightfully rejected the goods. However, the collector's exercise of ownership of the painting, after his original rejection, caused the gallery to otherwise dispose of the goods. Therefore, the collector's conduct in selling the painting 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 $120,000 provides credible evidence of the painting's fair market value at the time of the conversion. UCC §§ 2-601 cmt. 2, 1-103.

(B) $100,000 (the collector-gallery contract price).

(C) $20,000 (the excess of the market price over the contract price).

(D) Only the allowance of lost profit to the gallery as a volume dealer.

Question # 70 - Real Property

Six years ago, a landlord and a tenant entered into a 10-year commercial lease of land. The written lease provided that, if a public entity under the power of eminent domain condemned any part of the land, the lease would terminate and the landlord would receive the entire condemnation award. Thereafter, the city condemned approximately two-thirds of the land.

The tenant notified the city and the landlord that an independent appraisal of the value of the tenant's possessory interest established that it substantially exceeded the tenant's obligation under the lease and that the tenant was entitled to share the award. The appraisal was accurate.

In an appropriate action among the landlord, the tenant, and the city as to the right of the tenant to a portion of the condemnation award, for whom will the court likely find?

(A) The landlord, because the condemnation superseded and canceled the lease.

(B) The landlord, because the parties specifically agreed as to the consequences of condemnation.

Correct. The landlord and the tenant agreed in the lease that if any part of the land was condemned, the lease would terminate and the landlord would receive the entire condemnation award.

(C) The tenant, because the landlord breached the landlord's implied warranty of quiet enjoyment.

(D) The tenant, because otherwise the landlord would be unjustly enriched.

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Question # 71 - Constitutional Law

In order to reduce the federal deficit, Congress enacted a statute imposing a five percent national retail sales tax. The tax was levied upon all retail sales in the United States and applied equally to the sales of all kinds of goods.

Is this tax constitutional as applied to retail sales of newspapers?

(A) Yes, because it is within Congress's power to tax.

Correct. The tax clause of Article I, Section 8 gives Congress plenary power to raise revenue through taxes. Application of the tax to the sale of newspapers does not violate the freedom of the press protected by the First Amendment because the tax is generally applicable and in no way targets press operations.

(B) Yes, because the tax is necessary to serve the compelling interest of balancing the federal budget.

(C) No, because retail sales taxes are within the taxing power of the states.

(D) No, because the imposition of a tax on the sale of newspapers violates the freedom of the press.

Question # 72 - Criminal Law and Procedure

The police suspected a woman of growing marijuana in her private residence. Narcotics officers went to her neighborhood in the middle of the night. Nothing unlawful could be seen from the street, so the officers walked into the neighbors' yard and looked through the woman's kitchen window, which had neither drapes nor shades. The officers observed what appeared to be marijuana plants being cultivated under grow lights in the kitchen. Using this information, the officers obtained a search warrant. The execution of that warrant netted numerous marijuana plants.

The woman was charged with possession of marijuana. She moved to suppress the marijuana plants recovered when the warrant was executed, claiming that the evidence supporting the warrant was obtained through a search that violated the Fourth Amendment.

Should the marijuana plants be suppressed?

(A) No, because regardless of the lawfulness of the police conduct beforehand, they did obtain a warrant to search the woman's home.

(B) No, because the woman could have no reasonable expectation of privacy concerning activities that she exposed to the view of her neighbors.

Correct. The marijuana plants were in plain view of the neighbors, and the woman has no standing to complain of any police trespass on the neighbors' property. *See Horton v. California*, 496 U.S. 128 (1990).

(C) Yes, because the officers' clandestine observation of the plants violated the woman's reasonable expectation of privacy concerning activities occurring in her home.

(D) Yes, because no unlawful activities could be observed by the officers from any public vantage point.

Question # 73 - Real Property

A niece inherited vacant land from her uncle. She lived in a distant state and decided to sell the land to a colleague who was interested in purchasing the land as an investment. They orally agreed upon a price, and, at the colleague's insistence, the niece agreed to provide him with a warranty deed without any exceptions. The price was paid, the warranty deed was delivered, and the deed was promptly and properly recorded. Neither the niece nor the colleague had, at that point, ever seen the land.

After recording the deed, the colleague visited the land for the first time and discovered that it had no access to any public right-of-way and that none of the surrounding lands had ever been held in common ownership with any previous owner of the tract of land.

The colleague sued the niece for damages.

For whom will the court find?

(A) The colleague, because lack of access makes title unmarketable.

(B) The colleague, because the covenants of warranty and quiet enjoyment in the deed were breached.

(C) The niece, because no title covenants were breached.

Correct. Lack of access may render title unmarketable under the contract of sale; however, the time to challenge marketable title is prior to the acceptance of the deed. Under the doctrine of merger, the remedy, if any, is on the title covenant in the deed. Lack of access does not violate any of the title covenants. The colleague received the title the niece said she had. No one had a superior title and thus the covenants of seisin, right to convey, quiet enjoyment, and general warranty were not breached. The covenant against encumbrances provides protection for interests held by third parties such as easements for access. The land was not subject to an express easement nor may any easement be implied based on either prior use or necessity because the lands were never held in common ownership.

(D) The niece, because the agreement to sell was oral.

Question # 74 - Evidence

In a prosecution for aggravated battery, a police officer testified that when he arrested the defendant, he took a knife from the defendant and delivered it to the medical examiner. The medical examiner testified that the knife blade was consistent with the victim's wound but admitted on cross-examination that any number of other knives could also have caused the wound.

Should the judge grant a motion to strike the medical examiner's testimony?

(A) No, because the probative worth of this evidence is for the jury to assess.

Correct. This evidence has some probative value because it links the knife in defendant's possession to the type of knife that could have caused the victim's wound. The evidence is not very strong, because other knives could also have caused the wound. But how much weight to give to the evidence is a decision for the jury. Rule 401 of the Federal Rules of Evidence requires only that evidence have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Thus to be relevant, evidence need only have *some* probative value in establishing a fact. The Advisory Committee's Note to Rule 401 quotes the famous statement "A brick is not a wall," making the point that evidence is admissible even if it is only a single brick that is a part of a large wall of evidence establishing a party's case.

(B) Yes, because in light of the medical examiner's admission, his testimony has insufficient probative value.

(C) Yes, because the medical examiner could not state the probability that the wound was caused by the defendant's knife.

(D) Yes, because the probative value is substantially outweighed by the danger of unfair prejudice.

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Question # 75 - Torts

In a plaintiff's action for battery, the evidence established that the plaintiff was bad-tempered and, the defendant knew, carried a gun and used it often; that the plaintiff struck the defendant first; that during the altercation, the plaintiff repeatedly tried to get to his gun; and that the blows inflicted upon the plaintiff by the defendant resulted in the plaintiff being hospitalized.

Which finding of fact would be most likely to result in a verdict for the defendant?

(A) The defendant used no more force than he actually believed was necessary to protect himself against death or serious bodily harm.

(B) The defendant used no more force than he reasonably believed was necessary to protect himself against death or serious bodily harm.

Correct. The privilege of self-defense permits the use of force reasonably believed to be necessary given the threat posed by the plaintiff. *See* Restatement (Second) of Torts § 63(1).

(C) The defendant, in fact, feared death or serious bodily harm.

(D) The defendant was justified in retaliating against the plaintiff because the plaintiff struck the first blow.

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Question # 76 - Evidence

A defendant was on trial for perjury for having falsely testified in an earlier civil case that he knew nothing about a business fraud. In the perjury trial, the defendant again testified that he knew nothing about the business fraud. In rebuttal, the prosecutor called a witness to testify that after the civil trial was over, the defendant admitted to the witness privately that he had known about the fraud.

Is the witness's testimony in the perjury trial admissible?

(A) Yes, but only to impeach the defendant's testimony.

(B) Yes, both to impeach the defendant's testimony and as substantive evidence of the perjury.

Correct. This statement is admissible both to impeach the defendant's testimony as a prior inconsistent statement and as substantive evidence, because it is an admission of a party-opponent under Rule 801(d)(2)(A) of the Federal Rules of Evidence.

(C) No, because it is hearsay not within any exception.

(D) No, because it relates to the business fraud and not to the commission of perjury.

Question # 77 - Real Property

A landowner mortgaged her land to a nationally chartered bank as security for a loan. The mortgage provided that the bank could, at its option, declare the entire loan due and payable if all or any part of the land, or an interest therein, was sold or transferred without the bank's prior written consent.

Subsequently, the landowner wanted to sell the land to a neighbor by an installment land contract, but the bank refused to consent. The neighbor's credit was good, and all mortgage payments to the bank were fully current.

The landowner and the neighbor consulted an attorney about their proposed transaction, their desire to complete it, and the bank's refusal to consent.

What would the attorney's best advice be?

(A) Even if the landowner transfers to the neighbor by land contract, the bank may accelerate the debt and foreclose if the full amount is not paid.

Correct. The mortgage contains a valid due-on-sale clause. If the landowner conveys the land without the prior consent of the bank, the bank may accelerate the debt. A sale by use of an installment land contract is a transfer of the land which can trigger the due-on-sale clause.

(B) The due-on-sale clause is void as an illegal restraint on alienation of the fee simple, so they may proceed.

(C) By making the transfer in land contract form, the landowner will prevent enforcement of the due-on-sale clause if the mortgage payments are kept current.

(D) The due-on-sale clause has only the effect that the proposed transfer will automatically make the neighbor personally liable on the debt, whether or not the neighbor specifically agrees to assume it.

Question # 78 - Contracts

On March 1, an excavator entered into a contract with a contractor to perform excavation work on a large project. The contract expressly required that the excavator begin work on June 1 to enable other subcontractors to install utilities. On May 15, the excavator requested a 30-day delay in the start date for the excavation work because he was seriously behind schedule on another project. When the contractor refused to grant the delay, the excavator stated that he would try to begin the work for the contractor on June 1.

Does the contractor have valid legal grounds to cancel the contract with the excavator and hire a replacement?

(A) Yes, because the excavator committed an anticipatory repudiation of the contract by causing the contractor to feel insecure about the performance.

(B) Yes, because the excavator breached the implied covenant of good faith and fair dealing.

(C) No, because the excavator would be entitled to specific performance of the contract if he could begin by June 1.

(D) No, because the excavator did not state unequivocally that he would delay the beginning of his work.

Correct. An anticipatory repudiation occurs when a party unequivocally manifests an intention not to perform or an inability to perform. Expressions of doubt as to a party's ability to perform or a mere request by a party (excavator) that the other party (contractor) consider modifying their agreement would not constitute an anticipatory repudiation. Restatement (Second) of Contracts § 250 cmt. b.

Question # 79 - Constitutional Law

In response to the need for additional toxic waste landfills in a state, the state's legislature enacted a law authorizing a state agency to establish five new state-owned and state-operated toxic waste landfills. The law provided that the agency would decide the locations and sizes of the landfills after an investigation of all potential sites and a determination that the particular sites chosen would not endanger public health and would be consistent with the public welfare.

A community in the state was scheduled for inspection by the agency as a potential toxic waste landfill site. Because the community's residents obtained most of their drinking water from an aquifer that ran under the entire community, a citizens' group, made up of residents of that community, sued the appropriate officials of the agency in federal court. The group sought a declaratory judgment that the selection of the community as the site of a toxic waste landfill would be unconstitutional and an injunction preventing the agency from selecting the community as a site for such a landfill. The agency officials moved to dismiss.

Which of the following is the most appropriate basis for the court to dismiss this suit?

(A) The case presents a nonjusticiable political question.

(B) The interest of the state in obtaining suitable sites for toxic waste landfills is sufficiently compelling to justify the selection of the community as a location for such a facility.

(C) The Eleventh Amendment bars suits of this kind in the federal courts.

(D) The case is not ripe for a decision on the merits.

Correct. The case arguably is not ripe for adjudication because the agency's inspection does not itself pose any risk of harm to residents of the community. The residents face a risk of harm only if the agency selects their community as a site for a landfill, but on these facts it is unclear whether or when the community would be selected.

Question # 80 - Real Property

A man contacted his lawyer regarding his right to use a path that was on his neighbor's vacant land.

Fifteen years ago, after a part of the path located on his land and connecting his cabin to the public highway washed out, the man cleared a small part of his neighbor's land and rerouted a section of the path through the neighbor's land.

Twelve years ago, the neighbor leased her land to some hunters. For the next 12 years, the hunters and the man who had rerouted the path used the path for access to the highway.

A month ago, the neighbor discovered that part of the path was on her land. The neighbor told the man that she had not given him permission to cross her land and that she would be closing the rerouted path after 90 days.

The man's land and the neighbor's land have never been in common ownership.

The period of time necessary to acquire rights by prescription in the jurisdiction is 10 years. The period of time necessary to acquire title by adverse possession in the jurisdiction is 10 years.

What should the lawyer tell the man concerning his right to use the rerouted path on the neighbor's land?

(A) The man has fee title by adverse possession of the land included in the path.

(B) The man has an easement by necessity to use the path.

(C) The man has an easement by prescription to use the path.

Correct. The man is claiming a right to use the land of the neighbor, which is an easement. An easement by prescription requires that the use be without the neighbor's permission for the requisite period of time. The man has used the path for the past 15 years without the neighbor's permission. His use was open and notorious in that the neighbor could have seen him. His use was continuous and without interruption by the neighbor. His use was actual. An easement acquired by prescription need not be exclusive. With an easement, the owner may make any use of the easement area that does not interfere with the use made by the easement holder unless the easement is expressly noted as exclusive. The use by the tenants of the neighbor did not interfere with the man's use, nor did his use interfere with theirs.

(D) The man has no right to use the path.

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Question # 81 - Evidence

A plaintiff sued a defendant for injuries allegedly suffered when he slipped and fell on the defendant's business property. 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.

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.

(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.

Question # 82 - Torts

As a shopper was leaving a supermarket, an automatic door that should have opened outward opened inward, striking and breaking the shopper's nose. The owner of the building had installed the automatic door. The lease, pursuant to which the supermarket leased the building, provided that the supermarket was responsible for all maintenance of the premises.

The shopper sued the supermarket. At trial, neither the shopper nor the supermarket offered any testimony, expert or otherwise, as to why the door had opened inward. At the conclusion of the proofs, both the shopper and the supermarket moved for judgment.

How should the trial judge rule?

(A) Grant judgment for the shopper, because it is undisputed that the door malfunctioned.

(B) Grant judgment for the supermarket, because the shopper failed to join the owner of the building as a defendant.

(C) Grant judgment for the supermarket, because the shopper failed to offer proof of the supermarket's negligence.

(D) Submit the case to the jury, because on these facts negligence may be inferred.

Correct. Under the theory of res ipsa loquitur, the jury can infer negligence where an accident would ordinarily not occur in the absence of negligence and the defendant is responsible for the instrumentality that inflicted the injury. Restatement (Second) of Torts § 328D.

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Question # 83 - Torts

A man owned a much-loved cat, worth about $25, that frequently trespassed on a neighbor's property. The neighbor repeatedly asked the man to keep the cat on his own property, but the trespasses did not diminish. Aware of the man's attachment to the cat, the neighbor killed the cat with a shotgun in full view of the man. As a consequence, the man suffered great emotional distress.

In an action by the man against the neighbor, which of the following claims would be likely to result in the greatest monetary recovery?

(A) Battery.

(B) Intentional infliction of mental suffering.

Correct. The tort of intentional infliction of mental suffering or emotional distress allows recovery for personal injury despite the absence of physical injury or touching. On these facts, the neighbor was aware that his conduct would cause severe emotional distress, and he could be asked to compensate the man for the man's emotional suffering, as well as for the value of the cat. *See* Dan B. Dobbs, The Law of Torts § 303 (2000).

(C) Trespass to a chattel.

(D) Conversion.

Question # 84 - Constitutional Law

National statistics revealed a dramatic increase in the number of elementary and secondary school students bringing controlled substances to school for sale. In response, Congress enacted a statute requiring each state legislature to enact a state law making it a crime for any person to sell, within 1,000 feet of any elementary or secondary school, any controlled substance that had previously been transported in interstate commerce.

Is the federal statute constitutional?

(A) No, because Congress has no authority to require a state legislature to enact any specified legislation.

Correct. The U.S. Supreme Court held, in *New York v. United States*, 505 U.S. 144 (1992), that the concept of federalism embedded in the Tenth Amendment disables Congress from requiring states to enact laws or to administer federal law.

(B) No, because the sale of a controlled substance in close proximity to a school does not have a sufficiently close nexus to interstate commerce to justify its regulation by Congress.

(C) Yes, because it contains a jurisdictional provision that will ensure, on a case-by-case basis, that any particular controlled substance subject to the terms of this statute will, in fact, affect interstate commerce.

(D) Yes, because Congress possesses broad authority under both the general welfare clause and the commerce clause to regulate any activities affecting education that also have, in inseverable aggregates, a substantial effect on interstate commerce.

Question # 85 - Evidence

When a man entered a bank and presented a check for payment, the bank teller recognized the signature on the check as a forgery because the check was drawn on the account of a customer whose handwriting she knew. The bank teller called the police. Before the police arrived, the man picked up the check from the counter and left.

The man was charged with attempting to cash a forged check. At trial, the prosecutor called the bank teller to testify that the signature on the check was forged.

Is the bank teller's testimony admissible?

(A) Yes, because a bank teller is by occupation an expert on handwriting.

(B) Yes, because it is rationally based on the bank teller's perception and is helpful to the jury.

Correct. Rule 701 of the Federal Rules of Evidence allows lay opinion testimony when it is rationally based on the perception of the witness and is helpful to the jury. Here the teller knew the signature of the bank customer on whose account the check was drawn. This knowledge made it possible for her to recognize the signature on the check as a forgery. Her testimony that the signature was a forgery is testimony that the signature on the check presented was different from the signature of the owner of the account (a signature she knows). Obviously the owner of the account would be a stronger prosecution witness than the teller in establishing that the signature was forged, but this doesn't mean that the teller would not be allowed to testify.

(C) No, because the bank teller was at fault in allowing loss of the original by failing to secure the check.

(D) No, because it is not possible for either the jury or an expert to compare the signature on the missing check with a signature established as genuine.

Question # 86 - Contracts

An accountant and a bookkeeper, as part of a contract dissolving their accounting business, agreed that each would contribute $100,000 to fund an annuity for a clerk who was a longtime employee of the business. The clerk's position would be terminated due to the dissolution, and he did not have a retirement plan. The accountant and the bookkeeper informed the clerk of their plan to fund an annuity for him. The clerk, confident about his financial future because of the promised annuity, purchased a retirement home. The accountant later contributed his $100,000 to fund the annuity, but the bookkeeper stated that he could afford to contribute only $50,000. The accountant agreed that the bookkeeper should contribute only $50,000.

Does the clerk have a valid basis for an action against the bookkeeper for the unpaid $50,000?

(A) No, because the clerk was bound by the modification of the agreement made by the accountant and the bookkeeper.

(B) No, because the clerk was only a donee beneficiary of the agreement between the accountant and the bookkeeper, and had no vested rights.

(C) Yes, because the clerk's reliance on the promised retirement fund prevented the parties from changing the terms.

Correct. The power of the bookkeeper and the accountant to modify their duty was terminated when the clerk, an intended beneficiary, materially relied on the promised performance by purchasing the retirement home. Restatement (Second) of Contracts §§ 302, 311.

(D) Yes, because the promises to establish the fund were made binding by consideration from the clerk's many years of employment.

Question # 87 - Real Property

Twenty-five years ago, a man who owned a 45-acre tract of land conveyed 40 of the 45 acres to a developer by warranty deed. The man retained the rear five-acre portion of the land and continues to live there in a large farmhouse.

The deed to the 40-acre tract was promptly and properly recorded. It contained the following language:

"It is a term and condition of this deed, which shall be a covenant running with the land and binding on all owners, their heirs and assigns, that no use shall be made of the 40-acre tract of land except for residential purposes."

Subsequently, the developer fully developed the 40-acre tract into a residential subdivision consisting of 40 lots with a single-family residence on each lot.

Although there have been multiple transfers of ownership of each of the 40 lots within the subdivision, none of them included a reference to the quoted provision in the deed from the man to the developer, nor did any deed to a subdivision lot create any new covenants restricting use.

Last year, a major new medical center was constructed adjacent to the subdivision. A doctor who owns a house in the subdivision wishes to relocate her medical offices to her house. For the first time, the doctor learned of the restrictive covenant in the deed from the man to the developer. The applicable zoning ordinance permits the doctor's intended use. The man, as owner of the five-acre tract, however, objects to the doctor's proposed use of her property.

There are no governing statutes other than the zoning code. The common law Rule Against Perpetuities is unmodified in the jurisdiction.

Can the doctor convert her house in the subdivision into a medical office?

(A) No, because the owners of lots in the subdivision own property benefitted by the original residential covenant and have the sole right to enforce it.

(B) No, because the man owns property benefitted by the original restrictive covenant and has a right to enforce it.

Correct. The restrictive covenant created 25 years ago placed a burden (that the land must be kept residential) on the 40-acre tract of land and gave the right to enforce the promise to the man who retained the ownership of the benefitted retained five-acre tract of land. The man may enforce the promise because he owns the benefitted land.

(C) Yes, because the original restrictive covenant violates the Rule Against Perpetuities.

(D) Yes, because the zoning ordinance allows the doctor's proposed use and preempts the restrictive covenant.

Question # 88 - Contracts

On March 1, a mechanic contracted to repair a textile company's knitting machine by March 6. On March 2, the textile company contracted to manufacture and deliver specified cloth to a customer on March 15. The textile company knew that it would have to use the machine then under repair to perform this contract. Because the customer's order was for a rush job, the two parties included in their contract a liquidated damages clause, providing that the textile company would pay $5,000 for each day's delay in delivery after March 15.

The mechanic was inexcusably five days late in repairing the machine, and, as a result, the textile company was five days late in delivering the cloth to the customer. The textile company paid $25,000 to the customer as liquidated damages and then sued the mechanic for $25,000. Both the mechanic and the textile company knew when making their contract on March 1 that under ordinary circumstances the textile company would sustain few or no damages of any kind as a result of a five-day delay in the machine repair.

Assuming that the $5,000-per-day liquidated damages clause in the contract between the textile company and the customer is valid, which of the following arguments will serve as the mechanic's best defense to the textile company's action?

(A) Time was not of the essence in the contract between the mechanic and the textile company.

(B) The mechanic had no reason to foresee on March 1 that the customer would suffer consequential damages in the amount of $25,000.

Correct. Assuming other requirements are met, an aggrieved party is entitled to recover consequential damages only if they were reasonably foreseeable to the breaching party. The textile company did not inform the mechanic of its contract with the customer, and thus the mechanic had no reason to know what impact his failure timely to perform would have on the textile company's relationship with its customer. Restatement (Second) of Contracts § 351; E. Allen Farnsworth, Contracts § 12.14 (4th ed. 2004).

(C) By entering into the contract with the customer while knowing that its knitting machine was being repaired, the textile company assumed the risk of any delay loss to the customer.

(D) In all probability, the liquidated damages paid by the textile company to the customer are not the same amount as the actual damages sustained by the customer in consequence of the late delivery of the cloth.

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Question # 89 - Real Property

Five years ago, an investor who owned a vacant lot in a residential area borrowed $25,000 from a friend and gave the friend a note for $25,000 due in five years, secured by a mortgage on the lot. The friend neglected to record the mortgage. The fair market value of the lot was then $25,000.

Three years ago, the investor discovered that the friend had not recorded his mortgage and in consideration of $50,000 conveyed the lot to a buyer. The fair market value of the lot was then $50,000. The buyer knew nothing of the friend's mortgage. One month thereafter, the friend discovered the sale to the buyer, recorded his $25,000 mortgage, and notified the buyer that he held a $25,000 mortgage on the lot.

Two years ago, the buyer needed funds. Although she told her bank of the mortgage claimed by the investor's friend, the bank loaned her $15,000, and she gave the bank a note for $15,000 due in two years secured by a mortgage on the lot. The bank promptly and properly recorded the mortgage. At that time, the fair market value of the lot was $75,000.

The recording act of the jurisdiction provides: "No conveyance or mortgage of real property shall be good against subsequent purchasers for value and without notice unless the same be recorded according to law."

Both notes are now due and both the investor and the buyer have refused to pay. The lot is now worth only $50,000.

What are the rights of the investor's friend and the bank in the lot?

(A) Both mortgages are enforceable liens and the friend's has priority because it was first recorded.

(B) Both mortgages are enforceable liens, but the bank's has priority because the buyer was an innocent purchaser for value.

(C) Only the friend's mortgage is an enforceable lien, because the bank had actual and constructive notice of the investor's fraud.

(D) Only the bank's mortgage is an enforceable lien, because the buyer was an innocent purchaser for value.

Correct. The friend does not have an enforceable lien. The friend did have a lien on the lot when the investor granted the friend a mortgage. The friend, however, did not record the mortgage. The investor then sold the lot to the buyer. The buyer had no actual notice of the mortgage to the friend. The buyer had no notice based on possession because the lot was vacant. The buyer had no constructive notice of the mortgage because the mortgage to the friend had not been recorded when the buyer received title. The lot is located in a notice jurisdiction. Thus, the buyer took the lot free of any prior unrecorded documents. The buyer was an innocent purchaser for value at the time the buyer received title. Later notice to the buyer and a later recording of the friend's mortgage are irrelevant.

Question # 90 - Criminal Law and Procedure

A woman offered to pay her friend one-third of the stolen proceeds if the friend would drive the getaway car to be used in a bank robbery. The friend agreed but made the woman promise not to hurt anyone during the robbery.

The woman then drove to a sporting goods store, where she explained to the store owner that she needed a small firearm for use in a bank robbery. The store owner responded that he would charge extra because the woman was so unwise as to confide her unlawful plans for using the weapon, and he sold her a handgun at four times the regular price.

During the robbery, the woman used the gun to threaten a bank teller into handing over the money. The gun discharged by accident and killed a bank customer.

At common law, who in addition to the woman could properly be convicted of murder in the death of the customer?

(A) Both the friend and the store owner.

Correct. The friend is responsible for the unintended but reasonably foreseeable acts of her coconspirator in furtherance of the conspiracy. 2 Wayne R. LaFave, Substantive Criminal Law § 13.3(b) (discussing *Pinkerton v. United States*, 328 U.S. 640 (1946)). The store owner's sale of the gun, combined with his knowledge of the woman's plan to use it in a crime and his financial benefit from that knowledge, should suffice to impose accomplice liability. 2 Wayne R. LaFave, Substantive Criminal Law § 13.2(b).

(B) Neither the friend nor the store owner.

(C) Only the friend.

(D) Only the store owner.

Question # 91 - Evidence

A pedestrian sued a driver for injuries suffered in a hit-and-run accident. At trial, the pedestrian called a witness who testified that he saw the accident and that as the car sped off he accurately dictated the license number into his properly operating pocket dictating machine. The witness stated that he no longer remembered the number.

May the tape recording be played?

(A) Yes, as a present sense impression only.

(B) Yes, as a recorded recollection only.

(C) Yes, as a present sense impression and as a past recollection recorded.

Correct. The statement is admissible as a present sense impression under Rule 803(1) of the Federal Rules of Evidence because it describes or explains an event or condition and was "made while the declarant was perceiving the event or condition, or immediately thereafter." It is also admissible under Rule 803(5) of the Federal Rules of Evidence because it is a record "concerning a matter about which a witness once had knowledge but now has insufficient recollection to testify fully and accurately," and it was made by the witness "when the matter was fresh in the witness' memory" and "reflect[s] that knowledge correctly."

(D) No, because it is hearsay not within any exception.

Question # 92 - Criminal Law and Procedure

A man decided to steal a car he saw parked on a hill. When he got in and started the engine, the car began rolling down the hill. The man quickly discovered that the car's brakes did not work. He crashed through the window of a store at the bottom of the hill.

The man was charged with larceny of the car and with the crime of knowingly damaging the store's property. At trial, the judge instructed the jury that if the jury found both that the man was guilty of larceny of the car and that the damage to the store was the result of that larceny, then it should also find him guilty of malicious damage of property.

The man was convicted on both counts. On appeal, he argued that the conviction for malicious damage of property should be reversed because the instruction was not a correct statement of the law.

Should the man's conviction be affirmed?

(A) Yes, because his intent to steal the car provides the necessary mental element.

(B) Yes, because he was committing a felony.

(C) No, because the instruction wrongly described the necessary mental state.

Correct. The instruction was wrong because to have acted knowingly, the man must have been practically certain that his conduct would damage the store. 1 Wayne R. LaFave, Substantive Criminal Law § 5.2(b).

(D) No, because it would violate double jeopardy to convict the man of two crimes for a single act.

Question # 93 - Contracts

A seller and a buyer entered into a written agreement providing that the seller was to deliver 1,000 cases of candy bars to the buyer during the months of May and June. Under the agreement, the buyer was obligated to make a selection by March 1 of the quantities of the various candy bars to be delivered under the contract. The buyer did not make the selection by March 1, and on March 2 the seller notified the buyer that because of the buyer's failure to select, the seller would not deliver the candy bars. The seller had all of the necessary candy bars on hand on March 1 and made no additional sales or purchases on March 1 or March 2. On March 2, after receiving the seller's notice that it would not perform, the buyer notified the seller of its selection and insisted that the seller perform. The seller refused.

If the buyer sues the seller for breach of contract, is the buyer likely to prevail?

(A) No, because a contract did not exist until selection of the specific candy bars, and the seller withdrew its offer before selection.

(B) No, because selection of the candy bars by March 1 was an express condition to the seller's duty to perform.

(C) Yes, because a delay of one day in making the selection did not have a material effect on the seller.

Correct. UCC § 2-311 imposes a duty on a buyer to cooperate by specifying the assortment of goods where the contract fails to so provide. A seller can treat the buyer's failure to specify as a breach by failure to accept the contracted-for goods only if the buyer's failure to specify materially impacts the seller's performance. The seller had an available supply of candy bars and had entered into no new contracts. These facts support the conclusion that the buyer's failure to select did not materially impact the seller's performance. Therefore the seller unjustifiably refused to accept the buyer's selection of goods. UCC § 2-311.

(D) Yes, because upon the buyer's failure to make a selection by March 1, the seller had a duty to make a reasonable selection.

Question # 94 - Real Property

A grantor owned two tracts of land, one of 15 acres and another of five 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:

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 brought an appropriate action for specific performance after taking all of the necessary preliminary steps in its effort to exercise its rights to purchase the smaller tract.

The daughter asserted all possible defenses.

The common law Rule Against Perpetuities is unmodified in the jurisdiction.

If the court rules for the daughter, what is the reason?

(A) The provision setting out the right to purchase violates the Rule Against Perpetuities.

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 one holding the right of first refusal has the right to purchase it. In this case, the price for the purchase was to be set by three qualified expert independent real estate appraisers and was thus fair. The right, however, violates the common law Rule Against Perpetuities. The right to purchase is triggered by the decision of one to sell his or her 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 question is written with the daughter winning, any statute which may exempt a commercial transaction is inapplicable.

(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.

Question # 95 - Constitutional Law

In order to combat terrorism, Congress enacted a statute authorizing the President to construct surveillance facilities on privately owned property if the President determined that the construction of such facilities was "necessary to safeguard the security of the United States." The statute provided no compensation for the owner of the land on which such facilities were constructed and provided that the surveillance facilities were to be owned and operated by the United States government.

Pursuant to this statute, the President has determined that the construction of a surveillance facility on a very small, unused portion of an owner's large tract of land is necessary to safeguard the security of the United States. The construction and operation of the facility will not affect any of the uses that the owner is currently making of the entire tract of land.

The owner has filed suit to challenge the constitutionality of the construction of a surveillance facility on the parcel of land at issue without compensation.

How should the court rule?

(A) It would be a taking of the owner's property for which the owner must be compensated.

Correct. Any permanent physical occupation by the government of private property is a taking for which just compensation to the property owner is required. It is irrelevant that in this case the portion of the owner's tract of land to be occupied by the government is unused and very small. Nor is it relevant that in this case the construction and operation of the facility will not affect any of the uses that the owner is currently making of the entire tract of land. The permanent physical occupation by the government of the owner's land would be sufficient by itself to constitute a taking.

(B) It would single out the owner for adverse treatment in violation of the equal protection component of the Fifth Amendment.

(C) It would not interfere with any use the owner is currently making of the entire tract of land and, therefore, would not entitle the owner to any compensation.

(D) It would be valid without any compensation, because it has been determined to be necessary to protect a compelling government interest in national security.

Question # 96 - Torts

A child was bitten by a dog while playing in a fenced-in common area of an apartment complex owned by a landlord. The child was the guest of a tenant living in the complex, and the dog was owned by another tenant. The owner of the dog knew that the dog had a propensity to bite, but the landlord did not have any notice of the dog's vicious propensities.

In an action by the child against the landlord, will the child prevail?

(A) Yes, because in these circumstances a landlord is strictly liable.

(B) Yes, because a landlord's duty to protect a tenant's guests from dangerous conditions is nondelegable.

(C) No, because the landlord did not have any notice of the dog's vicious propensities.

Correct. Any duty that the landlord may have is at most a duty to act reasonably. If the landlord had no reason to know that the dog posed a risk to those on his property, his failure to take precautions against that risk was not negligent. Restatement (Second) of Torts §§ 343, 509.

(D) No, because a landlord owes no duty to a tenant's gratuitous guests.

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Question # 97 - Criminal Law and Procedure

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, could the grand jury compel production of the diary over the suspect's 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.

Correct. Use and derivative use immunity sufficiently protects the constitutional privilege against self-incrimination in this situation. *Kastigar v. United States*, 406 U.S. 441 (1972).

(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.

Question # 98 - Evidence

A defendant was on trial for tax evasion. The IRS, seeking to establish the defendant's income by showing his expenditures, called on the defendant's attorney to produce records showing only how much the defendant had paid his attorney in fees.

Should the demand for the attorney's fee records be upheld?

(A) Yes, because it calls for relevant information not within the attorney-client privilege.

Correct. The attorney-client privilege applies only to confidential communications made for the purpose of facilitating legal representation of the client, and the amount the defendant paid in legal fees does not qualify as such a communication. Fee arrangements and payments are generally outside the protection of the attorney-client privilege.

(B) Yes, because the attorney-client privilege cannot be invoked to conceal evidence of a crime.

(C) No, because the records are protected by the attorney-client privilege.

(D) No, because the records are protected by the attorney work-product doctrine.

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Question # 99 - Criminal Law and Procedure

A man was angered after he was unexpectedly laid off from his longtime job as a factory assembly worker. The next day, he returned to the factory floor and indiscriminately fired shotgun rounds in the air. The man later testified, without contradiction, that he had not intended to kill anyone but simply sought to exact revenge on the factory's owners by shutting down operations for the day. Unfortunately, one of the bullets ricocheted off the wall and killed the man's best friend.

The crimes below are listed in descending order of seriousness.

On these facts, what is the most serious offense for which the man properly could be convicted?

(A) Murder.

Correct. The man could properly be convicted of murder, even though he lacked specific intent to kill, because his conduct created such a high risk of death and was so devoid of social utility that he could be found to have acted with a "depraved heart." *See* 2 Wayne R. LaFave, Substantive Criminal Law § 14.4(a), at 437–41 (2d ed. 2003).

(B) Voluntary manslaughter.

(C) Involuntary manslaughter.

(D) Assault.

Question # 100 - Torts

A food company contracted with a delivery service to supply food to remote areas. The contract between the food company and the delivery service was terminable at will. The delivery service then entered into a contract with an airline company to provide an airplane to deliver the food. The contract between the delivery service and the airline company was also terminable at will.

The food company was displeased with the airline company because of a previous business dispute between them. Upon learning of the delivery service's contract with the airline company, the food company terminated its contract with the delivery service in order to cause the airline company to lose the business. When the food company terminated the delivery service's contract, the delivery service had no choice but to terminate the airline company's contract.

If the airline company sues the delivery service for tortious interference with contract, will the airline company prevail?

(A) No, because the airline company and the delivery service were the parties to the contract.

Correct. The tort of interference with contract provides a cause of action against those who improperly interfere with the performance of a contract between another and a third person. In this case, the plaintiff and the defendant were parties to the contract, and any action between them would be based on the contract, rather than on tort. The proper defendant in the tort action would be the food company. *See* Restatement (Second) of Torts § 766.

(B) No, because the airline company was not in privity with the food company.

(C) Yes, because the delivery service did not terminate the contract because of poor performance.

(D) Yes, because the delivery service's termination of the contract made it a party to the food company's acts.