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Question # 1 - Contracts

In January, a teacher contracted with a summer camp to serve as its head counselor at a salary of $10,000 for 10 weeks of service from the first of June to the middle of August. In March, the camp notified the teacher that it had hired someone else to act as head counselor and that the teacher's services would not be needed. In April, the teacher spent $200 traveling to interview at the only other nearby summer camp for a position as its head counselor. The teacher was not chosen for that job. The teacher then took a position teaching in a local summer school at a salary of $6,000 for the same 10-week period as the summer camp.

In a breach-of-contract action against the camp, to which of the following amounts, as damages, is the teacher entitled?

(A) $4,000.

(B) $4,200.

(B) Correct. The teacher is entitled to be put in the position he or she would have been in if the contract had been performed. Application of this principle leads to recovery of the difference between the contract salary ($10,000) and the amount earned at the local summer school ($6,000), PLUS the reasonable expenses incurred in seeking to mitigate after the breach ($200 travel expenses). Mitigation expenses can be recovered, if reasonable, even if those particular expenses are not connected to a successful mitigation attempt.

(C) $10,000.

(D) $10,200.

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Question # 2 - Constitutional Law

A federal statute imposes an excise tax of $100 on each new computer sold in the United States. It also appropriates the entire proceeds of that tax to a special fund, which is required to be used to purchase licenses for computer software that will be made available for use, free of charge, to any resident of the United States.

Is this statute constitutional?

(A) No, because the federal government may not impose any direct taxes on citizens of the United States.

(B) No, because this statute takes without just compensation the property of persons who hold patents or copyrights on computer software.

(C) Yes, because it is a reasonable exercise of the power of Congress to tax and spend for the general welfare.

(C) Correct. Article I, Section 8, Clause 1 of the Constitution gives Congress broad power to tax and to spend for the general welfare. Courts defer to reasonable congressional taxing measures, such as the statute at issue in this case, as well as to expenditures that reasonably further the general welfare.

(D) Yes, because the patent power authorizes Congress to impose reasonable charges on the sale of technology and to spend the proceeds of those charges to advance the use of technology in the United States.

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Question # 3 - Criminal Law and Procedure

Nine gang members were indicted for the murder of a tenth gang member who had become an informant. The gang leader pleaded guilty. At the trial of the other eight, the state's evidence showed the following: The gang leader announced a party to celebrate the recent release of a gang member from jail. But the party was not what it seemed. The gang leader had learned that the recently released gang member had earned his freedom by informing the authorities about the gang's criminal activities. The gang leader decided to use the party to let the other gang members see what happened to a snitch. He told no one about his plan. At the party, after all present had consumed large amounts of liquor, the gang leader announced that the released gang member was an informant and stabbed him with a knife in front of the others. The eight other gang members watched and did nothing while the informant slowly bled to death. The jury found the eight gang members guilty of murder and they appealed.

Should the appellate court uphold the convictions?

(A) No, because mere presence at the scene of a crime is insufficient to make one an accomplice.

> (A) Correct. The eight gang members are not guilty of murder, because they took no affirmative act and were merely present at what turned out to be a crime scene. *See generally* Wayne R. LaFave, Principles of Criminal Law § 10.4, at 442-49 (2003).

(B) No, because murder is a specific intent crime, and there is insufficient evidence to show that they intended to kill.

(C) Yes, because the gang members made no effort to save the informant after he had been stabbed.

(D) Yes, because voluntary intoxication does not negate criminal responsibility.

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Question # 4 - Real Property

A landlord leased an apartment to a tenant by written lease for two years ending on the last day of a recent month. The lease provided for $700 monthly rental. The tenant occupied the apartment and paid the rent for the first 15 months of the lease term, until he moved to a new job in another city. Without consulting the landlord, the tenant moved a friend into the apartment and signed an informal writing transferring to the friend his "lease rights" for the remaining nine months of the lease. The friend made the next four monthly $700 rental payments to the landlord. For the final five months of the lease term, no rent was paid by anyone, and the friend moved out with three months left of the lease term. The landlord was on an extended trip abroad, and did not learn of the default and the vacancy until last week. The landlord sued the tenant and the friend, jointly and severally, for $3,500 for the last five months' rent.

What is the likely outcome of the lawsuit?

(A) Both the tenant and the friend are liable for the full $3,500, because the tenant is liable on privity of contract and the friend is liable on privity of estate as assignee.

(A) Correct. An assignment arises when a tenant transfers all or some of the leased premises to another for the remainder of the lease term, retaining no interest in the assigned premises. In this case, prior to the agreement with the friend, the tenant had privity of contract with the landlord because of the lease. The tenant also had privity of estate because the tenant was in possession of the apartment. Subsequently, an assignment arose when the tenant transferred the premises to the friend for the remainder of the lease term of nine months. The friend was then in privity of estate with the landlord as to all promises that run with the land, including the covenant to pay rent. The tenant was not released by the landlord, however, and thus remained liable on privity of contract.

(B) The friend is liable for $1,400 on privity of estate, which lasted only until he vacated, and the tenant is liable for $2,100 on privity of contract and estate for the period after the friend vacated.

(C) The friend is liable for $3,500 on privity of estate and the tenant is not liable, because the landlord's failure to object to the friend's payment of rent relieved the tenant of liability.

(D) The tenant is liable for $3,500 on privity of contract and the friend is not liable, because a sublessee does not have personal liability to the original landlord.

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Question # 5 - Evidence

In a civil trial for professional malpractice, the plaintiff sought to show that the defendant, an engineer, had designed the plaintiff's flour mill with inadequate power. The plaintiff called an expert witness who based his testimony solely on his own professional experience but also asserted, when asked, that the book *Smith on Milling Systems* was a reliable treatise in the field and consistent with his views. On cross-examination, the defendant asked the witness whether he and Smith were ever wrong. The witness answered, "Nobody's perfect." The defendant asked no further questions. The defendant called a second expert witness and asked, "Do you accept the Smith book as reliable?" The second witness said, "It once was, but it is now badly out of date." The plaintiff requested that the jury be allowed to examine the book and judge for itself the book's reliability.

Should the court allow the jury to examine the book?

(A) No, because the jury may consider only passages read to it by counsel or witness.

(A) Correct. Federal Rule of Evidence 803(18), the learned treatise exception, provides that if the court finds a publication to be a reliable authority, then "statements" may be read into evidence, but that the publication may not be received as an exhibit. Thus, the jury is not allowed to bring learned treatises into the jury room. There is a concern that if juries were allowed unrestricted access to the whole publication, they may rely on parts of the publication that are not germane to the case. Moreover, the intent of the rule is that juries need to be guided through the pertinent parts of the publication by the testifying experts.

(B) No, because the plaintiff's expert in testifying did not rely on the treatise but on his own experience.

(C) Yes, because an expert has testified that the treatise is reliable.

(D) Yes, because the jury is the judge of the weight and credibility to be accorded both written and oral evidence.

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Question # 6 - Torts

A driver, returning from a long shift at a factory, fell asleep at the wheel and lost control of his car. As a result, his car collided with a police car driven by an officer who was returning to the station after having responded to an emergency. The police officer was injured in the accident. The police officer sued the driver in negligence for her injuries. The driver moved for summary judgment, arguing that the common-law firefighters' rule barred the suit.

Should the court grant the motion?

(A) No, because the firefighters' rule does not apply to police officers.

(B) No, because the police officer's injuries were not related to any special dangers of her job.

(B) Correct. The driver could be held liable for his negligence because being struck by a car in normal traffic is not one of the special risks inherent to dangerous police work.

(C) Yes, because the accident would not have occurred but for the emergency.

(D) Yes, because the police officer was injured on the job.

Question # 7 - Contracts

A lumber supplier agreed to sell and a furniture manufacturer agreed to buy all of the lumber that the manufacturer required over a two-year period. The sales contract provided that payment was due 60 days after delivery, but that a 3% discount would be allowed if the manufacturer paid within 10 days of delivery. During the first year of the contract, the manufacturer regularly paid within the 10-day period and received the 3% discount. Fifteen days after the supplier made its most recent lumber delivery to the manufacturer, the supplier had received no payment from the manufacturer. At this time, the supplier became aware of rumors from a credible source that the manufacturer's financial condition was precarious. The supplier wrote the manufacturer, demanding assurances regarding the manufacturer's financial status. The manufacturer immediately mailed its latest audited financial statements to the supplier, as well as a satisfactory credit report prepared by the manufacturer's banker. The rumors proved to be false. Nevertheless, the supplier refused to resume deliveries. The manufacturer sued the lumber supplier for breach of contract.

Will the manufacturer prevail?

(A) No, because the contract was unenforceable, since the manufacturer had not committed to purchase a definite quantity of lumber.

(B) No, because the supplier had reasonable grounds for insecurity and was therefore entitled to cancel the contract and refuse to make any future deliveries.

(C) Yes, because the credit report and audited financial statements provided adequate assurance of due performance under the contract.

(C) Correct. A party to a contract with reasonable grounds to worry that the other party might not perform can request adequate assurances of performance, pursuant to Uniform Commercial Code § 2-609. The supplier in this case did so, but the information provided by the manufacturer would be regarded as satisfying the request for an assurance of performance. Therefore the supplier's refusal to continue performance constituted a breach of contract for which the manufacturer is entitled to compensation.

(D) Yes, because the supplier was not entitled to condition resumption of deliveries on the receipt of financial status information.

Question # 8 - Constitutional Law

A toy manufacturer that has its headquarters and sole manufacturing plant in the state of Green developed a "Martian" toy that simulates the exploration of Mars by a remote-controlled vehicle. It accurately depicts the Martian landscape and the unmanned exploratory vehicle traversing it. The toy is of high quality, safe, durable, and has sold very well. Other toy manufacturers, all located outside Green, developed similar toys that are lower in price. These manufacturers have contracts to sell their Martian toys to outlets in Green. Although these toys are safe and durable, they depict the Martian landscape less realistically than the toys manufactured in Green. Nevertheless, because of the price difference, sales of these toys have cut severely into the sales of the Martian toys manufactured in Green. The Green legislature subsequently enacted a law "to protect the children of Green from faulty science and to protect Green toy manufacturers from unfair competition." This law forbids the sale in Green of any toy that purports to represent extraterrestrial objects and does not satisfy specified scientific criteria. The Martian toy manufactured in Green satisfies all of these criteria; none of the Martian toys of the competing manufacturers meets the requirements.

Is the Green law constitutional?

(A) No, because it abrogates the obligations of the contracts between the other toy manufacturers and their Green outlets who have agreed to sell their Martian toys.

(B) No, because it imposes an undue burden on interstate commerce.

(B) Correct. The commerce clause (Article I, Section 8, Clause 3 of the Constitution) gives Congress the power to regulate commerce among the states and, by negative implication, restricts the regulatory power of the states with respect to interstate commerce. Any state law that has a substantial effect on interstate commerce must not be protectionist or otherwise impose an undue burden on interstate commerce. A protectionist law benefits in-state interests at the expense of out-of-state interests. A state law that discriminates against interstate commerce is protectionist unless it serves a legitimate local interest that cannot be served by nondiscriminatory legislation. By barring the sale in Green of the Martian toys manufactured in other states, the state law has a substantial effect on interstate commerce. Although the law does not explicitly discriminate against the out-of-state toy manufacturers, it has a purely discriminatory effect against them, and the state has less discriminatory alternatives available to protect the legitimate interests cited in the law. The state law therefore violates the negative implications of the commerce clause.

(C) Yes, because it deals only with a local matter, the sale of toys in Green stores.

(D) Yes, because the state's interest in protecting the state's children from faulty science justifies this burden on interstate commerce.

Question # 9 - Real Property

A landowner executed an instrument in the proper form of a deed, purporting to convey his land to a friend. The landowner handed the instrument to the friend, saying, "This is yours, but please do not record it until after I am dead. Otherwise, it will cause me no end of trouble with my relatives." Two days later, the landowner asked the friend to return the deed to him because he had decided that he should devise the land to the friend by will rather than by deed. The friend said that he would destroy the deed and a day or so later falsely told the landowner that the deed had been destroyed. Six months ago, the landowner, who had never executed a will, died intestate, survived by a daughter as his sole heir at law. The day after the landowner's death, the friend recorded the deed from him. As soon as the daughter discovered this recording and the friend's claim to the land, she brought an appropriate action against the friend to quiet title to the land.

For whom should the court hold?

(A) The daughter, because the death of the landowner deprived the subsequent recordation of any effect.

(B) The daughter, because the friend was dishonest in reporting that he had destroyed the deed.

(C) The friend, because the deed was delivered to him.

(C) Correct. A deed must be delivered to be valid. Delivery is a question of intent. The words of the landowner included "this is yours," showing the necessary intent to strip himself of dominion and control over the deed and to immediately transfer the title. In addition, handing the deed to the grantee raises a rebuttable presumption of delivery. Recording the deed is not required and thus the request not to record the document until later is irrelevant so long as delivery was present.

(D) The friend, because the deed was recorded by him.

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Question # 10 - Criminal Law and Procedure

An undercover police detective told a local drug dealer that she wanted to buy cocaine, but that she needed time to raise the necessary funds. The drug dealer said that he needed time to get the cocaine. They agreed to meet again in 10 days. An hour later, without a warrant, other officers forcibly entered the drug dealer's apartment and arrested him for attempted possession of a controlled substance.

If the drug dealer is prosecuted in a common-law jurisdiction for attempted possession of cocaine, should he be convicted?

(A) No, because he had not taken sufficient acts toward commission of the crime.

(A) Correct. The common law of attempt required that the defendant commit some act (beyond mere "preparation") toward bringing about the intended crime. Wayne R. LaFave, Principles of Criminal Law § 10.4, at 442-49 (2003). Here, the drug dealer took no act, much less any act that would qualify at common law, toward obtaining the cocaine. *See, e.g., People v. Warren*, 489 N.E.2d 240 (N.Y. 1985) (finding no common law attempt on much stronger facts for prosecution than this fact pattern). Indeed, the drug dealer likely would not be guilty of attempt even under the Model Penal Code's broadened standards because there was no "substantial step" toward commission of the crime. *See* MPC § 5.01(1)(c).

(B) No, because he was illegally arrested.

(C) Yes, because by objective standards an agreement between them had occurred.

(D) Yes, because his intention to obtain the cocaine was unequivocally expressed.

Question # 11 - Torts

During a comprehensive evaluation of an adult patient's psychiatric condition, the psychiatrist failed to diagnose the patient's suicidal state. One day after the misdiagnosis, the patient committed suicide. The patient's father, immediately after having been told of his son's suicide, suffered severe emotional distress, which resulted in a stroke. The patient's father was not present at his son's appointment with the psychiatrist and did not witness the suicide. The father brought an action against the psychiatrist to recover for his severe emotional distress and the resulting stroke.

Will the father prevail?

(A) No, because the father did not sustain a physical impact.

(B) No, because the psychiatrist's professional duty did not extend to the harms suffered by the patient's father.

(B) Correct. In most situations, a medical professional's duty of care extends only to his or her patient. Unlike *Tarasoff v. The Regents of California*, the patient here posed no threat to others. Considerations of privacy and confidentiality usually lead courts to deny a duty on the part of therapists to non-patients when only the patient himself is at risk.

(C) Yes, because the father was a member of the patient's immediate family.

(D) Yes, because the psychiatrist reasonably could have foreseen that a misdiagnosis would result in the patient's suicide and the resulting emotional distress of the patient's father.

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Question # 12 - Evidence

In a civil trial arising from a car accident at an intersection, the plaintiff testified on direct that he came to a full stop at the intersection. On cross-examination, the defendant's lawyer asked whether the plaintiff claimed that he was exercising due care at the time, and the plaintiff replied that he was driving carefully. At a sidebar conference, the defendant's lawyer sought permission to ask the plaintiff about two prior intersection accidents in the last 12 months where he received traffic citations for failing to stop at stop signs. The plaintiff's lawyer objected.

Should the court allow defense counsel to ask the plaintiff about the two prior incidents?

(A) No, because improperly failing to stop on the recent occasions does not bear on the plaintiff's veracity and does not contradict his testimony in this case.

(A) Correct. Under Federal Rule of Evidence 608(b), a witness can be impeached with prior bad acts that bear upon truthfulness. Failing to stop at a stop sign has no bearing on truthfulness. As a general matter, a witness also can be impeached with evidence that contradicts a part of his testimony that bears on an important issue in dispute. However, in this case, the prior bad acts do not contradict the witness's testimony that he stopped on this occasion. Essentially, the defendant is trying to show that the plaintiff is a careless driver. Carelessness is a character trait, and evidence of a person's character is not admissible in a civil case to prove how that person acted on the occasion in question.

(B) No, because there is no indication that failing to stop on the recent occasions led to convictions.

(C) Yes, because improperly failing to stop on the recent occasions bears on the plaintiff's credibility, since he claims to have stopped in this case.

(D) Yes, because improperly failing to stop on the recent occasions tends to contradict the plaintiff's claim that he was driving carefully at the time he collided with the defendant.

Question # 13 - Constitutional Law

According to a state law, state employees may be fired only "for good cause." A woman who was a resident and an employee of the state was summarily fired on the sole ground that she had notified federal officials that the state was not following federal rules governing the administration of certain federally funded state programs on which she worked. The state denied the woman's request for a hearing to allow her to contest the charge. There is no record of any other state employee having been terminated for this reason.

In a suit to enjoin the state from firing her, which of the following claims provides the LEAST support for the woman's suit?

(A) Firing her unconstitutionally abridges her freedom of speech.

(B) Firing her unconstitutionally denies her a privilege or immunity of state citizenship protected by Article IV.

(B) Correct. The privileges and immunities clause of Article IV, Section 2, Clause 1 of the Constitution does not apply on these facts. The clause only reaches actions by a state that discriminate against citizens of other states. The woman is a citizen of the state that employed her because she was a resident of that state (Fourteenth Amendment, Section 1).

(C) Firing her violates the supremacy clause of Article VI because it interferes with the enforcement of federal rules.

(D) Firing her without affording an opportunity for a hearing is an unconstitutional denial of procedural due process.

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Question # 14 - Contracts

A landowner and a contractor entered into a written contract under which the contractor agreed to build a building and pave an adjacent sidewalk for the landowner at a price of $200,000. Later, while construction was proceeding, the landowner and the contractor entered into an oral modification under which the contractor was not obligated to pave the sidewalk, but still would be entitled to $200,000 upon completion. The contractor completed the building. The landowner, after discussions with his landscaper, demanded that the contractor pave the adjacent sidewalk. The contractor refused.

Has the contractor breached the contract?

(A) No, because the oral modification was in good faith and therefore enforceable.

(B) Yes, because a discharge of a contractual obligation must be in writing.

(C) Yes, because the parol evidence rule bars proof of the oral modification.

(D) Yes, because there was no consideration for the discharge of the contractor's duty to pave the sidewalk.

(D) Correct. This contract is governed by the common law of contracts, and not the Uniform Commercial Code. The prevailing common law view is that a modification to a contract requires consideration to be valid. Here, there was no consideration for the elimination of the contractor's duty to pave the sidewalk. The contractor actually promised to do less than it was under a pre-existing duty to do, and so there was no enforceable modification of the contract.

Question # 15 - Real Property

A landowner conveyed his land by quitclaim deed to his daughter and son "as joint tenants in fee simple." The language of the deed was sufficient to create a common-law joint tenancy, which is unmodified by statute. The daughter then duly executed a will devising her interest in the land to a friend. Then the son duly executed a will devising his interest in the land to a cousin. The son died, then the daughter died. Neither had ever married. The daughter's friend and the cousin survived.

After both wills have been duly probated, who owns what interest in the land?

(A) The cousin owns the fee simple.

(B) The daughter's friend and the cousin own equal shares as joint tenants.

(C) The daughter's friend and the cousin own equal shares as tenants in common.

(D) The daughter's friend owns the fee simple.

(D) Correct. A joint tenancy is not devisable or inheritable, and cannot be severed by a will. In this case, the son and the daughter received title as joint tenants with right of survivorship. On the death of the son, the interest of the daughter swelled and she then owned the land alone and in fee simple. She had the right to devise that interest by her will to the friend.

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Question # 16 - Evidence

A defendant was charged with burglary. At trial, a police officer testified that, after the defendant was arrested and agreed to answer questions, the officer interrogated him with a stenographer present, but that he could not recall what the defendant had said. The prosecutor presented the officer with a photocopy of the stenographic transcript of the interrogation. The officer, after looking at it, was prepared to testify that he recalled that the defendant admitted to being in the area of the burglary. The defendant objected to the officer's testimony on the ground that it violated the "original document" rule (also known as the "best evidence" rule).

Should the officer's testimony concerning the defendant's recorded confession be admitted?

(A) No, because a photocopy cannot be used without a showing that the original is unavailable.

(B) No, because the stenographer has not testified to the accuracy of the transcript.

(C) Yes, because a photocopy is a duplicate of the original.

(D) Yes, because the prosecutor is not attempting to prove the contents of the document.

(D) Correct. The prosecutor is trying to prove what the defendant said, not what the transcript says. Accordingly, Federal Rule of Evidence 1003, the best evidence rule, is not relevant. It would be different, for example, if this were a contract and the parties differed over the wording of a clause in the contract. In this case, the copy of the transcript is properly used under Federal Rule of Evidence 612 to revive the officer's recollection.

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Question # 17 - Criminal Law and Procedure

A state legislature passed a statute providing that juries in criminal trials were to consist of 6 rather than 12 jurors, and providing that jury verdicts did not have to be unanimous but could be based on 5 votes out of 6 jurors. A defendant was tried for murder. Over his objection, he was tried by a jury composed of 6 jurors. The jurors found him guilty by a vote of 5 to 1 and, over the defendant's objection, the court entered a judgment of conviction, which was affirmed on appeal by the state supreme court. The defendant seeks to overturn his conviction in a habeas corpus action in federal court, claiming his constitutional rights were violated by allowing a jury verdict that was not unanimous and by allowing a jury composed of fewer than 12 members.

How is the federal court likely to rule in this action?

(A) It will set aside the conviction, because the jury was composed of fewer than 12 members.

(B) It will set aside the conviction, because the 6-person jury verdict was not unanimous.

(B) Correct. The Constitution requires unanimity where only a 6-person jury is used. *Williams v. Florida*, 339 U.S. 78 (1970).

(C) It will set aside the conviction for both reasons.

(D) It will uphold the conviction.

Question # 18 - Real Property

A grantor executed an instrument in the proper form of a warranty deed purporting to convey a tract of land to his church. The granting clause of the instrument ran to the church "and its successors forever, so long as the premises are used for church purposes." The church took possession of the land and used it as its site of worship for many years. Subsequently, the church wanted to relocate and entered into a valid written contract to sell the land to a buyer for a substantial price. The buyer wanted to use the land as a site for business activities and objected to the church's title. The contract contained no provision relating to the quality of title the church was bound to convey. There is no applicable statute. When the buyer refused to close, the church sued the buyer for specific performance and properly joined the grantor as a party.

Is the church likely to prevail?

(A) No, because the grantor's interest prevents the church's title from being marketable.

(A) Correct. The warranty deed conveyed a fee simple determinable title to the church and the grantor retained the future interest which is the possibility of reverter. The future interest becomes possessory immediately upon the occurrence of the limitation. A title is unmarketable when a reasonable person would not purchase it. This buyer plans to use the land as a site for business purposes, which would cause the limitation to occur and the title to be forfeited automatically to the grantor.

(B) No, because the quoted provision is a valid restrictive covenant.

(C) Yes, because a charitable trust to support religion will attach to the proceeds of the sale.

(D) Yes, because the grantor cannot derogate from his warranty to the church.

Question # 19 - Evidence

In a civil trial for fraud arising from a real estate transaction, the defendant claimed not to have been involved in the transaction. The plaintiff called a witness to testify concerning the defendant's involvement in the fraudulent scheme, but to the plaintiff's surprise the witness testified that the defendant was not involved, and denied making any statement to the contrary. The plaintiff now calls a second witness to testify that the first witness had stated, while the two were having a dinner conversation, that the defendant was involved in the fraudulent transaction.

Is the testimony of the second witness admissible?

(A) No, because a party cannot impeach the party's own witness.

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

(C) Yes, but only to impeach the first witness.

(C) Correct. Prior statements that are inconsistent with a witness's present testimony impeach the witness's credibility because they tend to show that the witness's trial testimony is not believable. The prior inconsistent statement was not made under oath, and so does not fit the exemption to the hearsay rule provided by Federal Rule of Evidence 801(d)(1)(A). There is no other hearsay exception that is satisfied under the facts. Therefore the statement is admissible only to impeach the witness and not for its truth.

(D) Yes, to impeach the first witness and to prove the defendant's involvement.

Question # 20 - Torts

A car owner washed her car while it was parked on a public street, in violation of a statute that prohibits the washing of vehicles on public streets during rush hours. The statute was enacted only to expedite the flow of automobile traffic. Due to a sudden and unexpected cold snap, the car owner's waste water formed a puddle that froze. A pedestrian slipped on the frozen puddle and broke her leg. The pedestrian sued the car owner to recover for her injury. At trial, the only evidence the pedestrian offered as to negligence was the car owner's admission that she had violated the statute. At the conclusion of the proofs, both parties moved for a directed verdict.

How should the trial judge proceed?

(A) Deny both motions and submit the case to the jury, because, on the facts, the jury may infer that the car owner was negligent.

(B) Deny both motions and submit the case to the jury, because the jury may consider the statutory violation as evidence that the car owner was negligent.

(C) Grant the car owner's motion, because the pedestrian has failed to offer adequate evidence that the car owner was negligent.

(C) Correct. The pedestrian offered no evidence supporting the claim of negligence except the statute, and the statute does not speak to the risk that materialized in this case. Accordingly, the car owner's motion should be granted.

(D) Grant the pedestrian's motion, because of the car owner's admitted statutory violation.

Question # 21 - Constitutional Law

Two tenured professors at a state university drafted a new university regulation prohibiting certain kinds of speech on campus. Students, staff, and faculty convicted by campus tribunals of violating the regulation were made subject to penalties that included fines, suspensions, expulsions, and termination of employment. The regulation was widely unpopular and there was a great deal of public anger directed toward the professors who drafted it. The following year, the state legislature approved a severable provision in the appropriations bill for the university declaring that none of the university's funding could be used to pay the two professors, who were specifically named in the provision. In the past, the professors' salaries had always been paid from funds appropriated to the university by the legislature, and the university had no other funds that could be used to pay them.

If the professors challenge the constitutionality of the appropriations provision, is the court likely to uphold the provision?

(A) No, because it amounts to the imposition of a punishment by the legislature without trial.

(A) Correct. The provision is a bill of attainder in violation of Article I, Section 10, Clause 1 of the Constitution. A bill of attainder is a law that provides for the punishment of a particular person without trial. The challenged provision satisfies this definition because it deprives two named professors of their salaries, and thus, their employment.

(B) No, because it was based on conduct the professors engaged in before it was enacted.

(C) Yes, because the Eleventh Amendment gives the state legislature plenary power to appropriate state funds in the manner that it deems most conducive to the welfare of its people.

(D) Yes, because the full faith and credit clause requires the court to enforce the provision strictly according to its terms.

Question # 22 - Criminal Law and Procedure

Police officers received a tip that drug dealing was occurring at a certain ground-floor duplex apartment. They decided to stake out the apartment. The stakeout revealed that a significant number of people visited the apartment for short periods of time and then left. A man exited the apartment and started to walk briskly away. The officers grabbed the man and, when he struggled, wrestled him to the ground. They searched him and found a bag of heroin in one of his pockets. After discovering the heroin on the man, the police decided to enter the apartment. They knocked on the door, which was opened by the woman who lived there. The police asked if they could come inside, and the woman gave them permission to do so. Once inside, the officers observed several bags of heroin on the living room table. The woman is charged with possession of the heroin found on the living room table. She moves pretrial to suppress the heroin on the ground that it was obtained by virtue of an illegal search and seizure.

Should the woman's motion be granted?

(A) No, because the tip together with the heroin found in the man's pocket provided probable cause for the search.

(B) No, because the woman consented to the officers' entry.

(B) Correct. The woman's consent justified the officers' entry, and the heroin was properly seized because it was in plain view. *See, e.g., Illinois v. Rodriguez*, 497 U.S. 177 (1990).

(C) Yes, because the officers' decision to enter the house was the fruit of an illegal search of the man.

(D) Yes, because the officers did not inform the woman that she could refuse consent.

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Question # 23 - Real Property

A landowner died, validly devising his land to his wife "for life or until remarriage, then to" their daughter. Shortly after the landowner's death, his daughter executed an instrument in the proper form of a deed, purporting to convey the land to her friend. A year later, the daughter died intestate, with her mother, the original landowner's wife, as her sole heir. The following month, the wife re-married. She then executed an instrument in the proper form of a deed, purporting to convey the land to her new husband as a wedding gift.

Who now owns what interest in the land?

(A) The daughter's friend owns the fee simple.

(A) Correct. The landowner's wife had a determinable life estate, evidenced by the words "for life" and "until remarriage" in the landowner's will. The daughter had a vested remainder and an executory interest. Both of the daughter's interests could be assigned to the friend. On the remarriage of the landowner's wife, the wife's life estate ended and it automatically went to the holder of the future interest, who was then the daughter's friend.

(B) The wife owns the fee simple.

(C) The wife's new husband has a life estate in the land for the wife's life, with the remainder in the daughter's friend.

(D) The wife's new husband owns the fee simple.

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Question # 24 - Contracts

During negotiations to purchase a used car, a buyer asked a dealer whether the car had ever been in an accident. The dealer replied: "It is a fine car and has been thoroughly inspected and comes with a certificate of assured quality. Feel free to have the car inspected by your own mechanic." In actuality, the car had been in an accident and the dealer had repaired and repainted the car, successfully concealing evidence of the accident. The buyer declined to have the car inspected by his own mechanic, explaining that he would rely on the dealer's certificate of assured quality. At no time did the dealer disclose that the car had previously been in an accident. The parties then signed a contract of sale. After the car was delivered and paid for, the buyer learned about the car's involvement in a major accident.

If the buyer sues the dealer to rescind the transaction, is the buyer likely to succeed?

(A) No, because the buyer had the opportunity to have the car inspected by his own mechanic and declined to do so.

(B) No, because the dealer did not affirmatively assert that the car had not been in an accident.

(C) Yes, because the contract was unconscionable.

(D) Yes, because the dealer's statement was intentionally misleading and the dealer had concealed evidence of the accident.

(D) Correct. When a seller induces a buyer's consent to a contract by means of a material misrepresentation, the resulting contract is voidable at the election of the buyer. In this case, the buyer asked a direct question about whether the car had ever been in an accident, and the seller gave an answer that a reasonable buyer would take as an assurance that the seller at least had no knowledge of the car's involvement in an accident. The accident history of the car would be material to the decision of a buyer. The seller's statement, taken in context, and in light of the seller's active steps to conceal evidence of the damage and repair, would be the legal equivalent of a statement that the car had not been in an accident. The seller actively concealed the damage, and would not escape responsibility for misleading the buyer merely because the seller did not answer the question more directly--by saying, for example, "No, the car has never been in an accident."

Question # 25 - Constitutional Law

A state constitution provides that in every criminal trial "the accused shall have the right to confront all witnesses against him face to face." A defendant was convicted in state court of child abuse based on testimony from a six-year-old child. The child testified while she was seated behind one-way glass, which allowed the defendant to see the child but did not allow the child to see the defendant. The defendant appealed to the state supreme court claiming that the inability of the witness to see the defendant while she testified violated both the United States Constitution and the state constitution. Without addressing the federal constitutional issue, the state supreme court reversed the defendant's conviction and ordered a new trial. The state supreme court held that "the constitution of this state is clear, and it requires that while testifying in a criminal trial, a witness must be able to see the defendant." The state petitioned the United States Supreme Court for a writ of certiorari.

On which ground should the United States Supreme Court DENY the state's petition?

(A) A state may not seek appellate review in the United States Supreme Court of the reversal of a criminal conviction by its own supreme court.

(B) The decision of the state supreme court was based on an adequate and independent state ground.

(B) Correct. The Supreme Court may not review a judgment by the highest court of a state if that judgment is supported entirely by state law and is wholly independent of the interpretation and application of federal law. In this case, although the defendant claimed a violation of the Sixth Amendment of the U.S. Constitution, the state supreme court based its decision entirely on the state constitution without addressing the federal constitutional issue.

(C) The Sixth Amendment to the United States Constitution does not require that a witness against a criminal defendant be able to see the defendant while the witness testifies.

(D) The state supreme court's decision requires a new trial, and therefore it is not a final judgment.

Question # 26 - Criminal Law and Procedure

A husband and wife took their 12-year-old son to a political rally to hear a controversial United States senator speak. The speaker was late, and the wife stepped outside to smoke a cigarette. While there, she saw a man placing what she believed to be a bomb against a wall at the back of the building. She went back inside and told her husband what she had seen. Without alerting anyone, they took their son and left. Some 20 minutes later, the bomb exploded, killing eight persons and injuring 50. In the jurisdiction, murder in the first degree is defined as an intentional homicide committed with premeditation and deliberation; murder in the second degree is defined as all other murder at common law; and manslaughter is defined as either a homicide in the heat of passion arising from adequate provocation or a homicide caused by gross negligence or reckless indifference to consequence.

As to the deaths of the eight persons, what crime, if any, did the wife commit?

(A) Manslaughter.

(B) Murder in the first degree.

(C) Murder in the second degree.

(D) No crime.

(D) Correct. The wife did not have a legal duty, enforceable by the criminal laws, to warn the others about the bomb. *See* Wayne R. LaFave, Principles of Criminal Law § 5.2, at 213-17 (2003).

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Question # 27 - Criminal Law and Procedure

A woman decided to steal a necklace that belonged to her neighbor. She knew where the neighbor kept the necklace because she had been in the neighbor's house on many occasions when the neighbor had taken off the necklace and put it away in a jewelry box in the bathroom. One night, the woman went to the neighbor's house. The neighbor was away and the house was dark. The woman opened the bathroom window, saw the jewelry box on the counter, and started to climb inside. As her leg cleared the window sill, the neighbor's cat let out a loud screech. Terrified, the woman bolted back outside and fled.

The crimes below are listed in descending order of seriousness. What is the most serious crime committed by the woman?

(A) Burglary.

(A) Correct. The woman is guilty of burglary because she unlawfully entered the neighbor's house at night with intent to commit a felony (larceny). The woman's actions constituted the requisite "entry" of the neighbor's house. *See* Wayne R. LaFave, Substantive Criminal Law § 21.1 (2d ed. 2003) (To constitute burglary it is "sufficient if any part of the actor's person intruded, even momentarily, into the structure. Thus it has been held that the intrusion of a part of a hand in opening a window, or the momentary intrusion of part of a foot in kicking out a window, constituted the requisite entry.").

(B) Attempted burglary.

(C) Attempted larceny.

(D) No crime.

Question # 28 - Torts

A host pointed an unloaded revolver at her guest, threatening to shoot him. The guest knew that the revolver was not loaded, and that the ammunition for the revolver was stored in a locked basement closet, two stories below where the two were then standing.

In an action brought by the guest against the host for assault, will the guest prevail?

(A) No, because the host did not intend to shoot her guest.

(B) No, because the host did not put her guest in apprehension of an imminent contact.

(B) Correct. The tort of assault requires that the plaintiff have an apprehension of an imminent bodily contact. That result did not occur here, because the guest knew that the revolver was not loaded and that the ammunition was in a locked basement closet.

(C) Yes, because the ammunition was accessible to the host.

(D) Yes, because the host threatened her guest with a revolver.

Question # 29 - Evidence

A defendant has pleaded not guilty to a federal charge of bank robbery. The principal issue at trial is the identity of the robber. The prosecutor calls the defendant's wife to testify to the clothing that the defendant wore as he left their house on the day the bank was robbed, expecting her description to match that of eyewitnesses to the robbery. Both the defendant and his wife object to her testifying against the defendant.

Should the wife be required to testify?

(A) No, because the defendant has a privilege to prevent his wife from testifying against him in a criminal case.

(B) No, because the wife has a privilege not to testify against her husband in a criminal case.

(B) Correct. This is a correct statement of federal common law, established by the Supreme Court in *Trammel v. United States*. If the witness and the defendant are married at the time of trial, the witness cannot be placed in contempt for refusing to testify against the defendant. The rationale for the rule is to preserve marital harmony, which would otherwise be damaged by one spouse testifying against the other.

(C) Yes, because the interspousal privilege does not apply in criminal cases.

(D) Yes, because the wife's viewing of the defendant's clothing was not a confidential communication.

Question # 30 - Contracts

On January 5, a creditor lent $1,000 to a debtor under a contract calling for the debtor to repay the loan at the rate of $100 per month payable on the first day of each month. On February 1, at the debtor's request, the creditor agreed to permit payment on February 5. On March 1, the debtor requested a similar time extension and the creditor replied, "Don't bother me each month. Just change the date of payment to the fifth of the month. But you must now make the payments by cashier's check." The debtor said, "Okay," and made payments on March 5 and April 5. On April 6, the creditor sold the loan contract to a bank, but did not tell the bank about the agreement permitting payments on the fifth of the month. On April 6, the bank wrote to the debtor: "Your debt to [the creditor] has been assigned to us. We hereby inform you that all payments must be made on the first day of the month."

Can the debtor justifiably insist that the payment date for the rest of the installments is the fifth of each month?

(A) No, because a contract modification is not binding on an assignee who had no knowledge of the modification.

(B) No, because although the creditor waived the condition of payment on the first of the month, the bank reinstated it.

(C) Yes, because although the creditor waived the condition of payment on the first of the month, the creditor could not assign to the bank his right to reinstate that condition.

(D) Yes, because the creditor could assign to the bank only those rights the creditor had in the contract at the time of the assignment.

(D) Correct. An assignee succeeds to a contract as the contract stands at the time of the assignment. In this case, the parties had modified the contract as to the time payment was due. (Note that there was consideration for the promise to accept payments later; the consideration was the debtor's promise to make future payments by cashier's check.) Accordingly, the debtor can insist that the payments be due on the fifth of each month.

Question # 31 - Contracts

A buyer entered into a written contract to purchase from a seller 1,000 sets of specially manufactured ball bearings of a nonstandard dimension for a price of $10 per set. The seller correctly calculated that it would cost $8 to manufacture each set. Delivery was scheduled for 60 days later. Fifty-five days later, after the seller had completed production of the 1,000 sets, the buyer abandoned the project requiring use of the specially manufactured ball bearings and repudiated the contract with the seller. After notifying the buyer of his intention to resell, the seller sold the 1,000 sets of ball bearings to a salvage company for $2 per set. The seller sued the buyer for damages.

What damages should the court award to the seller?

(A) $2 per set, representing the difference between the cost of production and the price the buyer agreed to pay.

(B) $6 per set, representing the difference between the cost of manufacture and the salvage price.

(C) $8 per set, representing the lost profits plus the unrecovered cost of production.

(C) Correct. The Uniform Commercial Code controls. The seller is entitled to be put in the position it would have been in if the contract had been performed. The proper measure of damages here is set out in UCC § 2-708(2), which provides that a seller is entitled to the profit the seller would have made ($2 per set), plus an allowance for costs reasonably incurred ($8 per set), minus payments received for resale of the goods ($2 per set)--here, the salvage. Accordingly, the seller should recover $2 + $8 - $2 = $8 per set.

(D) Nominal damages, as the seller failed to resell the goods by public auction.

Question # 32 - Torts

A construction company was digging a trench for a new sewer line in a street in a high-crime neighborhood. During the course of the construction, there had been many thefts of tools and equipment from the construction area. One night, the construction company's employees neglected to place warning lights around the trench. A delivery truck drove into the trench and broke an axle. While the delivery driver was looking for a telephone to summon a tow truck, thieves broke into the delivery truck and stole $350,000 worth of goods. The delivery company sued the construction company to recover for the $350,000 loss and for $1,500 worth of damage to its truck. The construction company stipulated that it was negligent in failing to place warning lights around the trench, and admits liability for damage to the truck, but denies liability for the loss of the goods.

On cross-motions for summary judgment, how should the court rule?

(A) Deny both motions, because there is evidence to support a finding that the construction company should have realized that its negligence could create an opportunity for a third party to commit a crime.

(A) Correct. A negligent tortfeasor is not generally liable for the criminal acts of third parties made possible by his negligence, but there is an exception when the tortfeasor should have realized the likelihood of the crime at the time of his negligence. The issue of foreseeability is generally a question for the jury. In this case, there had been many thefts from the construction area during the course of construction. Accordingly, there was enough evidence to support a jury verdict for the plaintiff, but it was not so overwhelming as to require the judge to take the rare step of granting summary judgment for the plaintiff.

(B) Grant the construction company's motion, because no one could have foreseen that the failure to place warning lights could result in the loss of a cargo of valuable goods.

(C) Grant the construction company's motion, because the criminal acts of third persons were a superseding cause of the loss.

(D) Grant the delivery company's motion, because but for the construction company's actions, the goods would not have been stolen.

Question # 33 - Constitutional Law

Several public high school students asked the superintendent of the public school district whether the minister of a local church could deliver an interdenominational prayer at their graduation ceremony in the school auditorium. None of the students or their guests at graduation would be required to pray while the minister delivered the prayer.

Would the minister's delivery of such a prayer at the public high school graduation be constitutional?

(A) No, because it would be an unconstitutional establishment of religion.

(A) Correct. The Supreme Court has held that officially sponsored prayers as part of public high school commencement ceremonies, like the prayer at issue in this case, violate the establishment clause of the First Amendment.

(B) No, because it would deny attendees who are not members of the minister's denomination the right to freely exercise their religion.

(C) Yes, because none of the students or their guests would be required to pray at the graduation ceremony.

(D) Yes, because the idea for the prayer originated with the students and not with school officials.

Question # 34 - Evidence

At the defendant's trial for a gang-related murder, the prosecution introduced, as former testimony, a statement by a gang member who testified against the defendant at a preliminary hearing and has now invoked his privilege against self-incrimination.

If the defendant now seeks to impeach the credibility of the gang member, which of the following is the court most likely to admit?

(A) Evidence that the gang member had three misdemeanor convictions for assault.

(B) Testimony by a psychologist that persons with the gang member's background have a tendency to fabricate.

(C) Testimony by a witness that at the time the gang member testified, he was challenging the defendant's leadership role in the gang.

(C) Correct. This is evidence of "bias." It shows that the declarant had a motive to implicate the defendant falsely, because by doing so he would remove the defendant from the position that he wanted to have. Evidence of bias is considered important and, generally speaking, it is liberally admitted. Note that the gang member can be impeached even though he is not at trial to testify. Federal Rule of Evidence 806 allows parties to impeach a hearsay declarant in the same ways that would be permitted if the declarant were to testify. This is because a hearsay declarant is essentially a witness in the case.

(D) Testimony by a witness that the gang member is a cocaine dealer.

Question # 35 - Criminal Law and Procedure

A defendant was charged with manslaughter. At the preliminary hearing, the magistrate dismissed the charge on the grounds that the evidence was insufficient. The prosecutor then brought the case before a grand jury. After hearing the evidence presented by the prosecutor, the grand jury refused to return an indictment. The prosecutor waited a few months until a new grand jury had been impaneled and brought the case before that grand jury, which returned an indictment charging the defendant with manslaughter. The defendant moves to dismiss the indictment on double jeopardy grounds.

Should the motion be granted?

(A) No, because jeopardy had not attached.

(A) Correct. Jeopardy does not attach at a preliminary hearing (*Collins v. Loisell*, 262 U.S. 426, 429 (1923)) or at a grand jury proceeding (*United States v. Williams*, 504 U.S. 36, 49 (1992)). *See generally Serfass v. United States*, 420 U.S. 377, 388 (1975) (jeopardy attaches in jury trial when the jury is sworn and in bench trial when the court begins to hear evidence).

(B) No, because there has been no conviction or acquittal.

(C) Yes, because any proceeding after the preliminary hearing would violate double jeopardy.

(D) Yes, because bringing the case before the second grand jury was a violation of double jeopardy.

Question # 36 - Constitutional Law

Congress passed a statute directing the United States Forest Service, a federal agency, to issue regulations to control campfires on federal public lands and to establish a schedule of penalties for those who violate the new regulations. The statute provided that the Forest Service regulations should "reduce, to the maximum extent feasible, all potential hazards that arise from campfires on Forest Service lands." The Forest Service issued the regulations and the schedule of penalties directed by Congress. The regulations include a rule that provides for the doubling of the fine for any negligent or prohibited use of fire if the user is intoxicated by alcohol or drugs.

Which of the following is the best argument for sustaining the constitutionality of the Forest Service's rule providing for the fines?

(A) The executive branch of government, of which the Forest Service is part, has inherent rule-making authority over public lands.

(B) The rule is issued pursuant to a valid exercise of Congress's power to delegate rule-making authority to federal agencies.

(B) Correct. Congress may delegate rule-making authority to federal agencies through statutes that provide an intelligible principle governing the exercise of that authority. The Supreme Court has been very deferential in applying the intelligible principle requirement, and the statute's provision of authority to the Forest Service to issue regulations controlling campfires and establishing a penalty schedule likely satisfies the requirement.

(C) The rule is justified by a compelling governmental interest in safeguarding forest resources.

(D) The rule relates directly to law enforcement, which is an executive rather than legislative function, and hence it does not need specific congressional authorization.

Question # 37 - Evidence

A defendant was charged with aggravated assault. At trial, the victim testified that the defendant beat her savagely, but she was not asked about anything said during the incident. The prosecutor then called a witness to testify that when the beating stopped, the victim screamed: "I'm dying-don't let [the defendant] get away with it!"

Is the testimony of the witness concerning the victim's statement admissible?

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

(B) No, because the victim was not asked about the statement.

(C) Yes, as a statement under belief of impending death, even though the victim did not die.

(D) Yes, as an excited utterance.

(D) Correct. Federal Rule of Evidence 803(2) admits a hearsay statement that would otherwise be barred under Rule 802 where the statement "relat[es] to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." In this case, the assault was a startling event, and the victim made the statement immediately after the beating, trying to identify the perpetrator. Thus, all the admissibility requirements of Rule 803(2), the excited utterance exception, are met.

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Question # 38 - Contracts

A bakery offered a chef a permanent full-time job as a pastry chef at a salary of $2,000 per month. The chef agreed to take the position and to begin work in two weeks. In her employment application, the chef had indicated that she was seeking a permanent job. One week after the chef was hired by the bakery, a hotel offered the chef a position as a restaurant manager at a salary of $2,500 a month. The chef accepted and promptly notified the bakery that she would not report for work at the bakery.

Is the bakery likely to prevail in a lawsuit against the chef for breach of contract?

(A) No, because a contract for permanent employment would be interpreted to mean the chef could leave at any time.

(A) Correct. This is the correct answer, because the characterization of employment as "permanent" creates an employment-at-will relationship. In an employment-at-will relationship, either party can terminate the agreement at any time, without the termination being considered a breach (unless the termination was to violate an important public policy--which is not the case here). Accordingly, the chef is not liable for breach of contract.

(B) No, because the position the chef took with the hotel was not substantially comparable to the one she had agreed to take with the bakery.

(C) Yes, because the chef's acceptance of a permanent position meant that she agreed to leave the bakery only after a reasonable time.

(D) Yes, because the chef's failure to give the bakery a chance to match the salary offered by the hotel breached the implied right of first refusal.

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Question # 39 - Real Property

A creditor received a valid judgment against a debtor and promptly and properly filed the judgment in the county. Two years later, the debtor purchased land in the county and promptly and properly recorded the warranty deed to it. Subsequently, the debtor borrowed $30,000 from his aunt, signing a promissory note for that amount, which note was secured by a mortgage on the land. The mortgage was promptly and properly recorded. The aunt failed to make a title search before making the loan. The debtor made no payment to the creditor and defaulted on the mortgage loan from his aunt. A valid judicial foreclosure proceeding was held, in which the creditor, the aunt, and the debtor were named parties. A dispute arose as to which lien has priority. A statute of the jurisdiction provides: "Any judgment properly filed shall, for 10 years from filing, be a lien on the real property then owned or subsequently acquired by any person against whom the judgment is rendered." A second statute of the jurisdiction provides: "No unrecorded conveyance or mortgage of real property shall be good against subsequent purchasers for value without notice, who shall first record."

Who has the prior lien?

(A) The aunt, because a judgment lien is subordinate to a mortgage lien.

(B) The aunt, because she is a mortgagee under a purchase money mortgage.

(C) The creditor, because its judgment was filed first.

(C) Correct. This is a race notice jurisdiction which protects a bona fide purchaser for value without notice who records first. The creditor filed first, giving the aunt constructive notice of the judgment lien. Accordingly, the judgment lien has priority.

(D) The creditor, because the aunt had a duty to make a title search of the property.

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Question # 40 - Torts

The personnel director of an investment company told a job applicant during an interview that the company was worth millions of dollars and that the company's portfolio would triple in the next several months. The applicant was very excited about the company's prospects and accepted an offer to work for the company. Two days later, the applicant read in the newspaper that the investment company had filed for bankruptcy reorganization. As a result of reading this news, the applicant suffered severe emotional distress but he immediately found another comparable position.

Is the applicant likely to prevail in his action for negligent misrepresentation?

(A) No, because the applicant did not suffer any physical injury or pecuniary loss.

(A) Correct. The situations in which a plaintiff can recover for purely emotional distress caused by negligence are limited, and this is not one of them. Recovery for negligent misrepresentation is usually limited to pecuniary loss unless it involves a risk of physical harm. In this case, the applicant found a comparable position promptly, so he suffered no harm from the personnel director's misrepresentation aside from his emotional distress.

(B) No, because the personnel director's statement was purely speculative.

(C) Yes, because the applicant relied on the personnel director's misrepresentations about the investment company.

(D) Yes, because the personnel director should have foreseen that his misrepresentations would cause the applicant to be upset.

Question # 41 - Constitutional Law

A city zoning ordinance requires anyone who proposes to operate a group home to obtain a special use permit from the city zoning board. The zoning ordinance defines a group home as a residence in which four or more unrelated adults reside. An individual applied for a special use permit to operate a group home for convicts during their transition from serving prison sentences to their release on parole. Although the proposed group home met all of the requirements for the special use permit, the zoning board denied the individual's application because of the nature of the proposed use. The individual sued the zoning board seeking declaratory and injunctive relief on constitutional grounds.

Which of the following best states the appropriate burden of persuasion in this action?

(A) Because housing is a fundamental right, the zoning board must demonstrate that denial of the permit is necessary to serve a compelling state interest.

(B) Because the zoning board's action has the effect of discriminating against a quasi-suspect class in regard to a basic subsistence right, the zoning board must demonstrate that the denial of the permit is substantially related to an important state interest.

(C) Because the zoning board's action invidiously discriminates against a suspect class, the zoning board must demonstrate that denial of the permit is necessary to serve a compelling state interest.

(D) Because the zoning board's action is in the nature of an economic or social welfare regulation, the individual seeking the permit must demonstrate that the denial of the permit is not rationally related to a legitimate state interest.

(D) Correct. The zoning board's denial of the permit discriminated against neither a suspect class nor a quasi-suspect class. Nor did it unduly burden the exercise of a fundamental right. The denial therefore triggers rational basis scrutiny.

Question # 42 - Criminal Law and Procedure

State troopers lawfully stopped a driver on the turnpike for exceeding the speed limit by four miles per hour. One trooper approached the car to warn the driver to drive within the speed limit. The other trooper remained in the patrol car and ran a computer check of the license number of the driver's car. The computer check indicated that there was an outstanding warrant for the driver's arrest for unpaid traffic tickets. The troopers then arrested the driver. After handcuffing her, the troopers searched her and the car, and discovered 10 glassine bags of heroin in a paper bag on the back seat of the car. Later it was learned that the driver had paid the outstanding traffic tickets 10 days earlier and the warrant had been quashed, but the clerk of the court had failed to update the computer, which continued to list the warrant as outstanding. The driver was charged with unlawful possession of heroin. Her attorney filed a motion to suppress the use as evidence of the heroin found in the car.

Should the motion be granted?

(A) No, because the troopers could reasonably rely on the computer report and the search was incident to arrest.

(A) Correct. Evidence generally will not be suppressed where police reasonably held a good faith belief that their actions leading to its discovery were authorized by a valid warrant. *See Arizona v. Evans*, 514 U.S. 1 (1995) (good faith exception to exclusionary rule applied where arrest and resulting incidental search were based on warrant that was quashed 17 days earlier but, due to court employees' clerical error, still showed up in computer database). In this case, the computer check on the license number of the driver's car revealed that there was an outstanding warrant for the driver's arrest based on unpaid parking tickets. The police had no reason to believe that the warrant was invalid, so the search of the car was proper.

(B) No, because troopers may lawfully search the passenger compartment of a car incident to a valid traffic stop.

(C) Yes, because there was no arrest for the traffic violation and no lawful arrest could be made on the basis of the warrant.

(D) Yes, because there was no probable cause or reasonable suspicion to believe drugs were in the car.

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Question # 43 - Contracts

A debtor owed a lender $1,500. The statute of limitations barred recovery on the claim. The debtor wrote to the lender, stating, "I promise to pay you $500 if you will extinguish the debt." The lender agreed.

Is the debtor's promise to pay the lender $500 enforceable?

(A) No, because the debtor made no promise not to plead the statute of limitations as a defense.

(B) No, because there was no consideration for the debtor's promise.

(C) Yes, because the debtor's promise provided a benefit to the lender.

(D) Yes, because the debtor's promise to pay part of the barred antecedent debt is enforceable.

(D) Correct. A promise to pay a debt after the running of the statute of limitations, like the promise in this case, is enforceable without consideration. The enforcement of such a promise is a long-established exception to the requirement that there be consideration to support the enforcement of promises.

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Question # 44 - Evidence

A homeowner sued a plumber for damages resulting from the plumber's allegedly faulty installation of water pipes in her basement, causing flooding. At trial, the homeowner was prepared to testify that when she first detected the flooding, she turned off the water and called the plumber at his emergency number for help. The plumber responded, "I'll come by tomorrow and redo the installation for free."

Is the plumber's response admissible?

(A) No, because it is an offer in compromise.

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

(C) Yes, as a subsequent remedial measure.

(D) Yes, as evidence of the plumber's fault.

(D) Correct. This is a party admission, admissible as a hearsay exemption under Rule 801(d)(2)(A). A statement made by a party cannot be excluded as hearsay when offered against him by the opponent. Moreover, the statement is probative. A person who makes a statement like this is likely to think he is at fault, and this is probative evidence that indeed he is at fault.

Question # 45 - Real Property

An investor purchased a tract of land, financing a large part of the purchase price by a loan from a business partner that was secured by a mortgage. The investor made the installment payments on the mortgage regularly for several years. Then the investor persuaded a neighbor to buy the land, subject to the mortgage to his partner. They expressly agreed that the neighbor would not assume and agree to pay the investor's debt to the partner. The investor's mortgage to the partner contained a due-on-sale clause stating, "If Mortgagor transfers his/her interest without the written consent of Mortgagee first obtained, then at Mortgagee's option the entire principal balance of the debt secured by this Mortgage shall become immediately due and payable." However, without seeking his partner's consent, the investor conveyed the land to the neighbor, the deed stating in pertinent part " . . . , subject to a mortgage to [the partner]," and giving details and recording data related to the mortgage. The neighbor took possession of the land and made several mortgage payments, which the partner accepted. Now, however, neither the neighbor nor the investor has made the last three mortgage payments. The partner has sued the neighbor for the amount of the delinquent payments.

In this action, for whom should the court render judgment?

(A) The neighbor, because she did not assume and agree to pay the investor's mortgage debt.

> (A) Correct. A grantee who does not assume the mortgage, but rather takes subject to the mortgage, is not personally liable for the debt. In this case, there was no express assumption. In fact, the parties agreed that the neighbor was not assuming the mortgage debt. The land is primarily liable and the grantor, the investor, is a surety for the debt.

(B) The neighbor, because she is not in privity of estate with the partner.

(C) The partner, because the investor's deed to the neighbor violated the due-on-sale clause.

(D) The partner, because the neighbor is in privity of estate with the partner.

Question # 46 - Constitutional Law

A purchaser bought land in the mountain foothills just outside a resort town and planned to build a housing development there. Soon thereafter, the county in which the land was located unexpectedly adopted a regulation that, for the first time, prohibited all construction in several foothill and mountain areas, including the area of the purchaser's property. The purpose of the county's regulation was "to conserve for future generations the unique natural wildlife and plant habitats" in the mountain areas. Since the adoption of the regulation, the purchaser has been unable to lease or sell the property at any price. Several realtors have advised the purchaser that the property is now worthless. The purchaser sued the county, claiming that the regulation has taken the purchaser's property and that the county therefore owes the purchaser just compensation.

Is the court likely to rule in favor of the purchaser?

(A) No, because the county did not take title to the property from the purchaser.

(B) No, because the regulation has not caused or authorized any uninvited physical invasion or intrusion onto the property.

(C) Yes, because the conservation objective of the county ordinance is not sufficiently compelling to justify the substantial diminution in the property value.

(D) Yes, because the effect of the county's regulation is to deny the purchaser's investment-backed expectation and essentially all economically beneficial use of the property.

(D) Correct. A government regulation that eliminates the investment-backed expectation and economic value of an individual's property is a taking within the meaning of the Fifth Amendment, as applied to the county by the Fourteenth Amendment. Because the regulation has this effect, it constitutes a taking of the purchaser's property, for which the county must pay just compensation. Because the county did not compensate the purchaser for the land, the county has violated the takings clause.

Question # 47 - Criminal Law and Procedure

A woman who is a computer whiz decided to dedicate herself to exposing persons who traffic in child pornography. She posted a number of sexually oriented photographs on her web site. The file for each photograph contained an embedded Trojan horse program. The defendant downloaded one of those photographs onto his personal computer. Using the embedded program, the woman entered the defendant's computer and found a file containing a pornographic photograph of a child. She copied the file and turned it over to a federal law enforcement agency. A federal agent told her that a successful prosecution would require more than one photograph and offered her a monetary reward for additional photos leading to a conviction of the defendant. The woman entered the defendant's computer again, and this time she found hundreds of child pornography photos, which she turned over to the federal agency. The defendant is charged with multiple counts of violating federal statutes regarding child pornography. He moves to suppress the photographs that the woman discovered on his computer. The motion is based on both the Fourth Amendment and a federal statute forbidding interception of electronic communication without permission. The parties have stipulated that the woman's conduct in downloading photos from the defendant's computer violated the interception statute.

How should the court rule on the defendant's motion to suppress?

(A) Deny it as to all photographs.

(B) Grant it as to all photographs, because the woman acted without probable cause.

(C) Grant it as to all photographs, because the woman violated the federal interception statute.

(D) Grant it only as to the second set of photographs.

(D) Correct. Because authorities encouraged and offered to reward the second computer search, the woman was acting as a government agent with regard to that search, which did in fact violate the Fourth Amendment because it was conducted without a warrant. *See United States v. Jarrett*, 338 F.3d 339, 344-48 (4th Cir. 2003) (describing relevant considerations, and finding on facts less compelling than these that private hacker was not government agent).

Question # 48 - Contracts

A car dealer owed a bank $10,000, due on June 1. The car dealer subsequently sold an automobile to a buyer at a price of $10,000, payable at $1,000 per month beginning on June 1. The car dealer then asked the bank whether the bank would accept payments of $1,000 per month for 10 months beginning June 1, without interest, in payment of the debt. The bank agreed to that arrangement and the car dealer then directed the buyer to make the payments to the bank. When the buyer tendered the first payment to the bank, the bank refused the payment, asserting that it would accept payment only from the car dealer. On June 2, the bank demanded that the car dealer pay the debt in full immediately. The car dealer refused to pay and the bank sued the car dealer to recover the $10,000.

In this suit, which of the following arguments best supports the bank's claim for immediate payment?

(A) The agreement to extend the time for payment was not in writing.

(B) The car dealer could not delegate its duty to pay to the buyer.

(C) The car dealer gave no consideration for the agreement to extend the time of payment.

> (C) Correct. The bank had a right to insist on payment of the note, and promised to allow the car dealer to pay the debt in installments. There was no consideration for the bank's promise. There WOULD have been consideration if the dealer had assigned its right to receive payment from the retail buyer; the benefit to the bank would have been the addition of another obligor from whom it could expect payment. There was no assignment here, but rather an instruction to the retail buyer to redirect his payments. Accordingly, the bank may reinstate the due date despite its earlier waiver; it is not bound by the installment agreement and may demand full payment at once.

(D) The car dealer's conduct was an attempted novation that the bank could reject.

Question # 49 - Evidence

A defendant was charged in federal court with selling a controlled substance (heroin) in interstate commerce. At trial, the prosecutor introduced evidence that the defendant obtained the substance from a supplier in Kansas City and delivered it in Chicago. The defendant denied that the substance in question was heroin, but he introduced no contrary evidence on the issue of transportation.

Which of the following instructions regarding judicial notice may the judge legitimately give the jury?

(A) "If you find that the defendant obtained the drugs in Kansas City and delivered them to Chicago, I instruct you to find that the substance was sold in an interstate transaction."

(B) "If you find that the defendant obtained the drugs in Kansas City and delivered them to Chicago, then the burden of persuasion is on the defendant to establish that the transaction was not interstate."

(C) "If you find that the defendant obtained the drugs in Kansas City and delivered them to Chicago, then you may, but you are not required to, find that the transaction was interstate in nature."

(C) Correct. This instruction complies with Federal Rule of Evidence 201(g), which states that in a criminal case, "the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed." A judicially-noticed fact in a criminal case allows the court to instruct on a permissible inference, but nothing more.

(D) "I instruct you that there is a presumption that the substance was sold in an interstate transaction, but the burden of persuasion on that issue is still on the government."

Question # 50 - Torts

An associate professor in the pediatrics department of a local medical school was denied tenure. He asked a national education lobbying organization to represent him in his efforts to have the tenure decision reversed. In response to a letter from the organization on the professor's behalf, the dean of the medical school wrote to the organization explaining truthfully that the professor had been denied tenure because of reports that he had abused two of his former patients. Several months later, after a thorough investigation, the allegations were proven false and the professor was granted tenure. He had remained working at the medical school at full pay during the tenure decision review process and thus suffered no pecuniary harm.

In a suit for libel by the professor against the dean of the medical school, will the professor prevail?

(A) No, because the professor invited the libel.

(A) Correct. The professor can state a prima facie case of defamation, but he cannot prevail because the dean has a valid defense based on his reasonable belief that the professor invited him to speak. By authorizing his agents to investigate his case, the professor apparently consented to limited publication in response to their inquiries. Ill will, if it existed, would be irrelevant to this defense.

(B) No, because the professor suffered no pecuniary loss.

(C) Yes, because the dean had a duty to investigate the rumor before repeating it.

(D) Yes, because the dean's defamatory statement was in the form of a writing.

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Question # 51 - Constitutional Law

A man bought an antique car from a car dealer in State A. Under State A law, a person who buys from such a dealer acquires good title, even if the property was stolen from a previous owner. The man showed the car at an antique car show in State B. A woman recognized the car as having been stolen from her. Under State B law, a person whose property is stolen may reclaim it, even if the current possessor is an innocent purchaser. The woman sued the man in a State B court to reclaim the car. The man defended, claiming that he had good title under the law of State A. Nevertheless, the State B court applied State B law, and the woman prevailed. The man did not appeal. The sheriff gave the woman possession of the car. Several months later, the woman drove the car to State A. The man brought a new suit against the woman, claiming that the State B court in the prior suit should have applied the State A law, which protected innocent purchasers. The woman appeared and moved to dismiss the suit.

What should the State A court do?

(A) Apply the federal law of sale of goods, because the car has moved in interstate commerce.

(B) Apply the State A law, because the car is currently located in State A.

(C) Dismiss the suit, because the State A court must give full faith and credit to the State B judgment.

(C) Correct. The full faith and credit clause of the Constitution (Article IV, Section 1) prohibits state courts from re-litigating cases in which the courts of another state have rendered final judgment. Accordingly, the court in State A should dismiss the suit.

(D) Remove the case to federal court, because the car has moved in interstate commerce, and therefore the case raises a federal question.

Question # 52 - Real Property

A rancher and a farmer own adjacent tracts of rural land. For the past nine years, the rancher has impounded on her land the water that resulted from rain and melting snow, much of which flowed from the farmer's land. The rancher uses the water in her livestock operation. Recently, the farmer increased the size of his farming operation and built a dam on his land near the boundary between the two tracts. Because of the dam, these waters no longer drain from the farmer's land onto the rancher's land. There is no applicable statute. The rancher sued the farmer to restrain him from interfering with the natural flow of the water onto her land.

Who is likely to prevail?

(A) The farmer, because he has the right to use all of the water impounded on his land.

> (A) Correct. This water is diffuse surface water. Although there are different views regarding the way an owner may expel such water, an owner such as the farmer may impound such water, especially in the absence of any malice.

(B) The farmer, because the rancher's past impoundment of water estops her from asserting the illegality of the farmer's dam.

(C) The rancher, because she has acquired riparian rights to use the water.

(D) The rancher, because the farmer is estopped to claim all of the surface water on his land.

Question # 53 - Torts

A dentist was anesthetizing a patient's gum before pulling a tooth. Although the dentist used due care, the hypodermic needle broke off in the patient's gum, causing injury. The needle broke because of a manufacturing defect that the dentist could not have detected.

Is the patient likely to recover damages in an action against the dentist based on strict products liability and malpractice?

(A) No, on neither basis.

(A) Correct. The strict products liability suit would fail because the dentist was not in the business of selling the product, and the malpractice suit would fail because the plaintiff could not establish that the defendant departed from the professional standard of care.

(B) Yes, based on malpractice, but not on strict products liability.

(C) Yes, based on strict products liability, but not on malpractice.

(D) Yes, on both bases.

Question # 54 - Contracts

A bottling company sent a purchase order to a wholesaler that stated, "Ship 100,000 empty plastic bottles at the posted price." Two days after receipt of this purchase order, the wholesaler shipped the bottles and the bottling company accepted delivery of them. A week after the bottles were delivered, the bottling company received the wholesaler's acknowledgement form, which included a provision disclaiming consequential damages. After using the bottles for two months, the bottling company discovered a defect in the bottles that caused its products to leak from them. The bottling company recalled 10,000 of the bottles containing its product, incurring lost profits of $40,000.

Assuming all appropriate defenses are seasonably raised, will the bottling company succeed in recovering $40,000 in consequential damages from the wholesaler?

(A) No, because buyers are generally not entitled to recover consequential damages.

(B) No, because the bottling company's acceptance of the goods also constituted an acceptance of the terms included in the wholesaler's acknowledgement.

(C) Yes, because the disclaimer of consequential damages is unconscionable.

(D) Yes, because the wholesaler's acknowledgement did not alter the terms of an existing contract between the parties.

(D) Correct. Under Uniform Commercial Code § 2-206, an offer to buy goods for prompt shipment is accepted when the seller ships the goods. The contract was created in this case when the wholesaler shipped the bottles. The terms consisted of the negotiated terms plus UCC gap-fillers. The subsequent acknowledgment form was an ineffective effort to modify the terms, and these proposed modifications were not accepted by the buyer.

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Question # 55 - Criminal Law and Procedure

A state statute defines murder in the first degree as "knowingly causing the death of another person after deliberation upon the matter." Second-degree murder is defined as "knowingly causing the death of another person." Manslaughter is defined as at common law. Deliberation is defined as "cool reflection for any length of time, no matter how brief." The defendant, despondent and angry over losing his job, was contemplating suicide. He took his revolver, went to a bar, and drank until he was very intoxicated. A customer on the next stool was telling the bartender how it was necessary for companies to downsize and become more efficient in order to keep the economy strong. The defendant turned to him and said, "Why don't you shut the hell up." The customer responded, "This is a free country and I can say what I want," all the while shaking his finger at the defendant. The finger-shaking, combined with his already bad disposition and the alcohol, enraged the defendant. Trembling with fury, he snatched his revolver from his pocket and shot and killed the customer.

What crime did the defendant commit?

(A) Manslaughter, because there was a reasonable explanation for his becoming enraged.

(B) Murder in the first degree, because deliberation can take place in an instant.

(C) Murder in the first degree, because he contemplated taking a human life before becoming intoxicated.

(D) Murder in the second degree, because he knowingly caused the customer's death without deliberation.

(D) Correct. The defendant's intoxication did not preclude the mental state required for second-degree murder. *See* Wayne R. LaFave, Substantive Criminal Law § 9.5(b) (2d ed. 2003) (it is "generally held" that "intoxication cannot further reduce the homicide from second degree murder down to manslaughter").

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Question # 56 - Constitutional Law

A state statute requires, without exception, that a woman under the age of 18 notify one of her parents at least 48 hours before having an abortion. A proper lawsuit challenges the constitutionality of this state statute.

In that suit, should the court uphold the constitutionality of the statute?

(A) No, because a 48-hour waiting period is excessively long and, therefore, it imposes an undue burden on a woman's right to procure an abortion.

(B) No, because the state law does not provide a bypass procedure that would allow a court to authorize a minor to obtain an abortion without prior parental notification under appropriate circumstances.

(B) Correct. The Supreme Court has held that parental notification requirements violate a minor's right to an abortion unless there is a satisfactory judicial bypass procedure. Such a procedure must allow a court to approve an abortion for a minor without parental notification if the court finds: (1) the minor is sufficiently mature and informed to make an independent decision to obtain an abortion; or (2) the abortion would be in the minor's best interest. Because no such bypass procedure is included in the statute at issue, the court will hold the statute unconstitutional.

(C) Yes, because parents' rights to supervise their minor daughter's health care outweighs any individual right she may have.

(D) Yes, because such parental notification and waiting-period requirements do not impose an undue burden on a minor's right to procure an abortion.

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Question # 57 - Real Property

A businessman owned a hotel, subject to a mortgage securing a debt he owed to a bank. The businessman later acquired a nearby parking garage, financing a part of the purchase price by a loan from a financing company, secured by a mortgage on the parking garage. Two years thereafter, the businessman defaulted on the loan owed to the bank, which caused the full amount of that loan to become immediately due and payable. The bank decided not to foreclose the mortgage on the hotel at that time, but instead properly sued for the full amount of the defaulted loan. The bank obtained and properly filed a judgment for that amount. A statute of the jurisdiction provides: "Any judgment properly filed shall, for ten years from filing, be a lien on the real property then owned or subsequently acquired by any person against whom the judgment is rendered." There is no other applicable statute, except the statute providing for judicial foreclosure of mortgages, which places no restriction on deficiency judgments. Shortly thereafter, the bank brought an appropriate action for judicial foreclosure of its first mortgage on the hotel and of its judgment lien on the parking garage. The financing company was joined as a party defendant, and appropriately counterclaimed for foreclosure of its mortgage on the parking garage, which was also in default. All procedures were properly followed and the confirmed foreclosure sales resulted in the following: The net proceeds of the sale of the hotel to a third party were $200,000 less than the bank's mortgage balance. The net proceeds of the sale of the parking garage to a fourth party were $200,000 more than the financing company's mortgage balance.

How should the $200,000 surplus arising from the bid on the parking garage be distributed?

(A) It should be paid to the bank.

(A) Correct. The foreclosure sale of the bank's mortgage on the hotel was insufficient to pay the businessman's debt to the bank. The bank had received a judgment against the businessman for the entire amount of the defaulted loan. This lien was properly recorded and applied to all property owned by the businessman during the ten-year time period, including the parking garage. (The bank may have decided on this course of action because it deemed the businessman's equity in the garage was significant and the timing was bad for a hotel foreclosure.) After the financing company was paid in full from the funds generated by the foreclosure sale of its mortgage on the parking garage, the additional funds generated by that sale would be paid to the bank not as a deficiency judgment, but because of the unsatisfied amount of the prior money judgment.

(B) It should be paid to the businessman.

(C) It should be paid to the financing company.

(D) It should be split equally between the bank and the financing company.

Question # 58 - Evidence

In a personal injury case, the plaintiff sued a retail store for injuries she sustained from a fall in the store. The plaintiff alleged that the store negligently allowed its entryway to become slippery due to snow tracked in from the sidewalk. When the plaintiff threatened to sue, the store's manager said, "I know that there was slush on that marble entry, but I think your four-inch-high heels were the real cause of your fall. So let's agree that we'll pay your medical bills, and you release us from any claims you might have." The plaintiff refused the offer. At trial, the plaintiff seeks to testify to the manager's statement that "there was slush on that marble entry."

Is the statement about the slush on the floor admissible?

(A) No, because it is a statement made in the course of compromise negotiations.

(A) Correct. Federal Rule of Evidence 408 excludes "[e]vidence of conduct or statements made in compromise negotiations." Here, there is a dispute, and the manager's statement was made in an effort to settle that dispute. As such the entire statement is protected under Rule 408.

(B) No, because the manager denied that the slippery condition was the cause of the plaintiff's fall.

(C) Yes, as an admission by an agent about a matter within the scope of his authority.

(D) Yes, because the rule excluding offers of compromise does not protect statements of fact made during compromise negotiations.

Question # 59 - Torts

In a civil action, the plaintiff sued a decedent's estate to recover damages for the injuries she suffered in a collision between her car and one driven by the decedent. At trial, the plaintiff introduced undisputed evidence that the decedent's car swerved across the median of the highway, where it collided with an oncoming car driven by the plaintiff. The decedent's estate introduced undisputed evidence that, prior to the car's crossing the median, the decedent suffered a fatal heart attack, which she had no reason to foresee, and that, prior to the heart attack, the decedent had been driving at a reasonable speed and in a reasonable manner. A statute makes it a traffic offense to cross the median of a highway.

In this case, for whom should the court render judgment?

(A) The decedent's estate, because its evidence is undisputed.

> (A) Correct. The plaintiff's evidence that the decedent violated the statute and crossed over into her lane of traffic does establish a prima facie case of negligence. However, the decedent's estate successfully rebutted the plaintiff's evidence by providing an undisputed explanation of how the accident happened that is inconsistent with a finding of negligence (the decedent's unforeseeable heart attack made her unable to comply with the statute, or indeed with any standard of care).

(B) The decedent's estate, because the plaintiff has not established a prima facie case of liability.

(C) The plaintiff, because the accident was of a type that does not ordinarily happen in the absence of negligence on the actor's part.

(D) The plaintiff, because the decedent crossed the median in violation of the statute.

Question # 60 - Constitutional Law

A group of students at a state university's law school wished to debate the future of affirmative action in that state and at that law school. For this debate they requested the use of a meeting room in the law school that is available on a first-come, first-served basis for extracurricular student use. Speakers presenting all sides of the issue were scheduled to participate. The law school administration refused to allow the use of any of its meeting rooms for this purpose solely because it believed that "such a debate, even if balanced, would have a negative effect on the morale of the law school community and might cause friction among the students that would disrupt the institution's educational mission."

Is the refusal of the law school administration to allow the use of its meeting room for this purpose constitutional?

(A) No, because the law school administration cannot demonstrate that its action was necessary to vindicate a compelling state interest.

(A) Correct. The law school's denial of the meeting room to the student group violates the speech clause of the First Amendment. The meeting rooms are a limited public forum because the law school made the rooms generally available for extracurricular student use. Because the meeting rooms are a limited public forum, the law students had a First Amendment right to use a room for expressive activity consistent with their purpose (i.e., extracurricular student use). Because the law school's denial of the room was based on the content of the students' expression, the denial must be tested by strict scrutiny, which requires the law school to prove that its denial was necessary to serve a compelling governmental interest. It is unusual for the courts to uphold content-based speech restrictions at strict scrutiny, and the law school's concerns here are clearly insufficient to meet that test.

(B) No, because the law school administration cannot demonstrate that its action was rationally related to a legitimate state interest.

(C) Yes, because the law school administration's only concern was the adverse effect of such a discussion of affirmative action on the immediate audience and the mission of the institution.

(D) Yes, because the law students do not have a right to use a state-owned law school facility for a meeting that is not organized and sponsored by the law school itself.

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Question # 61 - Real Property

A fee-simple landowner lawfully subdivided his land into 10 large lots. The recorded subdivision plan imposed no restrictions on any of the 10 lots. Within two months after recording the plan, the landowner conveyed Lot 1 to a buyer, by a deed that contained no restriction on the lot's use. There was then a lull in sales. Two years later, the real estate market in the state had generally improved and, during the next six months, the landowner sold and conveyed eight of the remaining nine lots. In each of the eight deeds of conveyance, the landowner included the following language: "It is a term and condition of this conveyance, which shall be a covenant running with the land for the benefit of each of the 10 lots [with an appropriate reference to the recorded subdivision plan], that for 15 years from the date of recording of the plan, no use shall be made of the premises herein conveyed except for single-family residential purposes." The buyer of Lot 1 had actual knowledge of what the landowner had done. The landowner included the quoted language in part because the zoning ordinance of the municipality had been amended a year earlier to permit professional offices in any residential zone. Shortly after the landowner's most recent sale, when he owned only one unsold lot, the buyer of Lot 1 constructed a one-story house on Lot 1 and then conveyed Lot 1 to a doctor. The deed to the doctor contained no reference to any restriction on the use of Lot 1. The doctor applied for an appropriate certificate of occupancy to enable her to use a part of the house on Lot 1 as a medical office. The landowner, on behalf of himself as the owner of the unsold lot, and on behalf of the other lot owners, sued to enjoin the doctor from carrying out her plans and to impose the quoted restriction on Lot 1.

Who is likely to prevail?

(A) The doctor, because Lot 1 was conveyed without the inclusion of the restrictive covenant in the deed to the first buyer and the subsequent deed to the doctor.

> (A) Correct. To be binding, a restrictive covenant must be placed on property at the time it is conveyed. Here, neither the deed to the first buyer nor the deed to the doctor contains the restrictive covenant. The burden cannot be attached to Lot 1 at a later time by someone who has no interest in Lot 1. Therefore, the doctor may proceed with her plan to use part of the property as a medical office.

(B) The doctor, because zoning ordinances override private restrictive covenants as a matter of public policy.

(C) The landowner, because the doctor, as a successor in interest to the first buyer, is estopped to deny that Lot 1 remains subject to the zoning ordinance as it existed when Lot 1 was first conveyed by the landowner to the first buyer.

(D) The landowner, because with the first buyer's knowledge of the facts, Lot 1 became incorporated into a common scheme.

Question # 62 - Contracts

A seller and a buyer have dealt with each other in hundreds of separate grain contracts over the last five years. In performing each contract, the seller delivered the grain to the buyer and, upon delivery, the buyer signed an invoice that showed an agreed upon price for that delivery. Each invoice was silent in regard to any discount from the price for prompt payment. The custom of the grain trade is to allow a 2% discount from the invoice price for payment within 10 days of delivery. In all of their prior transactions and without objection from the seller, the buyer took 15 days to pay and deducted 5% from the invoice price. The same delivery procedure and invoice were used in the present contract as had been used previously. The present contract called for a single delivery of wheat at a price of $300,000. The seller delivered the wheat and the buyer then signed the invoice. On the third day after delivery, the buyer received the following note from the seller: "Payment in full in accordance with signed invoice is due immediately. No discounts permitted." s/Seller.

Which of the following statements concerning these facts is most accurate?

(A) The custom of the trade controls, and the buyer is entitled to take a 2% discount if he pays within 10 days.

(B) The parties' course of dealing controls, and the buyer is entitled to take a 5% discount if he pays within 15 days.

(B) Correct. The Uniform Commercial Code controls. UCC § 2-202, which is the UCC embodiment of the parol evidence rule, explicitly provides that, while a final written expression of agreement may not be contradicted by any prior agreement, it may be explained or supplemented "by course of dealing or usage of trade or by course of performance." A course of dealing, when inconsistent with a usage of trade, controls. Therefore, the agreement in this case should be interpreted to embody the course of dealing of the parties, which provided for a 5% discount if payment was made within 15 days.

(C) The seller's retraction of his prior waiver controls, and the buyer is entitled to no discount.

(D) The written contract controls, and the buyer is entitled to no discount because of the parol evidence rule.

Question # 63 - Torts

A bus passenger was seated next to a woman whom he did not know. The woman stood to exit the bus, leaving a package on the seat. The passenger lightly tapped the woman on the back to get her attention and to inform her that she had forgotten the package. Because the woman had recently had back surgery, the tap was painful and caused her to twist and seriously injure her back.

If the woman sues the passenger to recover for the back injury, will she prevail?

(A) No, because she is presumed to have consented to the ordinary contacts of daily life.

(A) Correct. The woman gave no indication that she did not want to be subjected to the ordinary touches that are part of life in a crowded society. In the absence of such an indication from her, the passenger was entitled to believe that she implicitly consented to a light tap to get her attention. The passenger's touch was neither unreasonable nor inconsistent with ordinary social norms privileging such contacts.

(B) No, because she was not put in apprehension because of the touching.

(C) Yes, because the passenger intentionally touched her.

(D) Yes, because the passenger's intentional touching seriously injured her.

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Question # 64 - Constitutional Law

The president issued an executive order in an effort to encourage citizens to use the metric (Celsius) system of temperatures. Section 1 of the executive order requires the United States Weather Bureau, a federal executive agency, to state temperatures only in Celsius in all weather reports. Section 2 of the executive order requires all privately owned federally licensed radio and television stations giving weather reports to report temperatures only in Celsius. No federal statute is applicable.

Is the president's executive order constitutional?

(A) Section 1 is constitutional, but Section 2 is not.

(A) Correct. Section 1 of the executive order is constitutional. The president, as the chief executive officer of the U.S. government, has authority to direct the actions of federal executive agencies, so long as the president's directives are not inconsistent with an act of Congress. (The facts state that there is no applicable statute here.) Section 2 of the executive order is unconstitutional. At least as a general rule, the president does not have authority to direct the actions of persons outside the executive branch unless the president's direction is authorized by an act of Congress. There are no circumstances presented in the facts (such as a sudden attack on the U.S.) that might justify an exception to this general rule.

(B) Section 2 is constitutional, but Section 1 is not.

(C) Sections 1 and 2 are constitutional.

(D) Sections 1 and 2 are unconstitutional.

Question # 65 - Evidence

In a civil action for misrepresentation in the sale of real estate, the parties contested whether the defendant was licensed by the State Board of Realtors, a public agency established by statute to license real estate brokers. The defendant testified she was licensed. On rebuttal, the plaintiff offers a certification, bearing the seal of the secretary of the State Board of Realtors. The certification states that the secretary conducted a thorough search of the agency's records and all relevant databases, and that this search uncovered no record of a license ever having been issued to the defendant. The certification is signed by the secretary.

Is the certification that there was no record of a license issuance admissible?

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

(B) No, because the writing was not properly authenticated.

(C) Yes, for the limited purpose of impeaching the defendant.

(D) Yes, to prove the nonexistence of a public record.

(D) Correct. The certification is hearsay, but it qualifies under Federal Rule of Evidence 803(10), the hearsay exception for a certification offered to prove the absence of a public record. The certification is offered for the proper inference that if a license had been issued, it would have been recorded in the public record. Thus, the fact that there was no record found is probative evidence that a license was never issued. To be admissible, the certification must be prepared by a public official and must on its face indicate that a diligent search of the records was conducted. This certification satisfies the requirements of the exception.

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Question # 66 - Real Property

A seller entered into a written contract to sell a tract of land to an investor. The contract made no mention of the quality of title to be conveyed. Thereafter, the seller and the investor completed the sale, and the seller delivered a warranty deed to the investor. Soon thereafter, the value of the land increased dramatically. The investor entered into a written contract to sell the land to a buyer. The contract between the investor and the buyer expressly provided that the investor would convey a marketable title. The buyer's attorney discovered that the title to the land was not marketable, and had not been marketable when the original seller conveyed to the investor. The buyer refused to complete the sale. The investor sued the original seller on multiple counts. One count was for breach of the contract between the seller and the investor for damages resulting from the seller's failure to convey to the investor marketable title, resulting in the loss of the sale of the land to the subsequent buyer.

Who is likely to prevail on this count?

(A) The investor, because the law implies in the contract a covenant that the title would be marketable.

(B) The investor, because the original seller is liable for all reasonably foreseeable damages.

(C) The original seller, because her contract obligations as to title merged into the deed.

(C) Correct. Although a marketable title will be implied in a contract for the sale of land, the doctrine of merger provides that one can no longer sue on title matters contained in the contract of sale after the deed is delivered and accepted. The investor's remedy, if there is one, would be based on the deed he received and not on the contract of sale.

(D) The original seller, because she did not expressly agree to convey marketable title.

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Question # 67 - Torts

A consumer became physically ill after drinking part of a bottle of soda that contained a large decomposed snail. The consumer sued the store from which she bought the soda to recover damages for her injuries. The parties agreed that the snail was put into the bottle during the bottling process, over which the store had no control. The parties also agreed that the snail would have been visible in the bottle before the consumer opened it.

Will the consumer prevail in her action against the store?

(A) No, because the consumer could have seen the snail in the bottle.

(B) No, because the store was not responsible for the bottling process.

(C) Yes, because the consumer was injured by a defective product sold to her by the store.

(C) Correct. The seller of a product with a manufacturing defect that is dangerous to the health of a consumer is strictly liable for the injuries it causes.

(D) Yes, because the store had exclusive control over the bottle before selling it to the consumer.

Question # 68 - Evidence

A defendant is on trial for attempted fraud. The state charges that the defendant switched a price tag from a cloth coat to a more expensive fur-trimmed coat and then presented the latter for purchase at the cash register. The defendant testified in her own behalf that the tag must have been switched by someone else. On cross-examination, the prosecutor asks whether the defendant was convicted on two prior occasions of misdemeanor fraud in the defrauding of a retailer by the same means of switching the price tag on a fur-trimmed coat.

Is the question about the convictions for the earlier crimes proper?

(A) It is not proper either to impeach the defendant or to prove that the defendant committed the crime.

(B) It is proper both to prove that the defendant committed the crime and to impeach the defendant.

(B) Correct. Under Federal Rule of Evidence 404(b), prior bad acts can be admitted to prove the defendant's conduct if offered for some purpose other than to show that the defendant is a bad person. In this case, the bad acts are very similar to the acts in dispute, and tend to show non-character purposes such as intent, knowledge, lack of accident, and modus operandi (i.e., that the defendant has a tendency to engage in particularized activity that sets her apart from others). Thus the bad acts can be offered as proof that the defendant committed the crime charged. Moreover, the convictions are automatically admissible to impeach the defendant's character for truthfulness; fraud convictions clearly involve dishonesty or false statement, and so the court "shall" admit the convictions under Rule 609(a)(2).

(C) It is proper to impeach the defendant, but not to prove that the defendant committed the crime.

(D) It is proper to prove the defendant committed the crime, but not to impeach the defendant.

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Question # 69 - Criminal Law and Procedure

In a criminal trial, the evidence showed that the defendant's neighbor tried to kill the defendant by stabbing him. The defendant ran to his room, picked up a gun, and told his neighbor to back off. The neighbor did not, but continued her attack and stabbed him in the arm. The defendant then shot the neighbor twice. The neighbor fell to the floor and lay quietly moaning. After a few seconds, the defendant fired a third shot into the neighbor. The jury found that the neighbor died instantly from the third shot and that the defendant was no longer in fear of being attacked by her.

The defendant could properly be convicted of which of the following degrees of criminal homicide, if any?

(A) Attempted murder only.

(B) Manslaughter only.

(C) Murder or manslaughter.

(C) Correct. Whether the defendant is guilty of murder, or guilty only of manslaughter, depends upon whether he fired the third shot in the heat of passion provoked by the neighbor's earlier attack. *See* Wayne R. LaFave, Principles of Criminal Law § 14.2, at 599 (2003).

(D) No degree of criminal homicide.

Question # 70 - Real Property

When a homeowner became ill, he properly executed a deed sufficient to convey his home to his nephew, who was then serving overseas in the military. Two persons signed as witnesses to qualify the deed for recordation under an applicable statute. The homeowner handed the deed to his nephew's friend and said, "I want [the nephew] to have my home. Please take this deed for him." Shortly thereafter, the nephew's friend learned that the homeowner's death was imminent. One day before the homeowner's death, the nephew's friend recorded the deed. The nephew returned home shortly after the homeowner's death. The nephew's friend brought him up to date, and he took possession of the home. The homeowner died intestate, leaving a daughter as his sole heir. She asserted ownership of his home. The nephew brought an appropriate action against her to determine title to the home. The law of the jurisdiction requires only two witnesses for a will to be properly executed.

If the court rules for the nephew and against the daughter, what is the most likely explanation?

(A) The deed was delivered when the homeowner handed it to the nephew's friend.

> (A) Correct. A gift may be made of real estate. A deed is required as are the elements for a gift. The homeowner had the requisite donative intent as shown by his words. Delivery occurred when the homeowner physically handed the deed to the nephew's friend as the agent of the nephew. Acceptance is presumed if the gift is beneficial. At this point, the homeowner could not recall the gift.

(B) The delivery of the deed was accomplished by the recording of the deed.

(C) The homeowner's death consummated a valid gift causa mortis to the nephew.

(D) The homeowner's properly executed deed was effective as a testamentary document.

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Question # 71 - Criminal Law and Procedure

A woman drove her car through the drive-through lane of a fast-food restaurant in the afternoon. When she reached the microphone used to place orders, she said, "There's a man across the street with a rifle. He can see everything you do. If you do not do exactly what I tell you, he will shoot you. Put all the money from the register into a sack and give it to me when I drive up." The clerk did not see anyone across the street and was unsure whether anyone was there. However, unwilling to risk harm to himself, he put $500 in a paper bag and handed it to the woman when she drove up to the delivery window. The woman drove off with the money but was arrested a short time later. She had lied about the man with a rifle and had acted alone.

Of what crime or crimes can the woman be convicted?

(A) Embezzlement.

(B) Obtaining property by false pretenses.

(C) Robbery and larceny.

(D) Robbery or larceny.

(D) Correct. All the elements of larceny and robbery (which "may be thought of as aggravated larceny") were present. *See* Wayne R. LaFave, Substantive Criminal Law § 20.3 (2d ed. 2003). The woman's threat of immediate harm to the clerk was sufficient to constitute the intimidation required for robbery. *See id.* § 20.3(d)(2).

Question # 72 - Torts

A four-year-old child sustained serious injuries when a playmate pushed him from between two parked cars into the street, where he was struck by a car. The child, by his representative, sued the driver of the car, the playmate's parents, and his own parents. At trial, the child's total injuries were determined to be $100,000. The playmate's parents were determined to be 20% at fault because they had failed to adequately supervise her. The driver was found to be 50% at fault. The child's own parents were determined to be 30% at fault for failure to adequately supervise him. The court has adopted the pure comparative negligence doctrine, with joint and several liability, in place of the common-law rules relating to plaintiff's fault. In addition, the common-law doctrines relating to intra-family liability have been abrogated.

How much, if anything, is the child's representative entitled to recover from the driver?

(A) $30,000.

(B) $50,000.

(C) $100,000.

(C) Correct. Under joint and several liability, the entire amount can be collected from any one of the defendants. That defendant, in turn, can seek to recover a proportional share of the damages from the other defendants.

(D) Nothing.

Question # 73 - Constitutional Law

The childhood home of a former U.S. president is part of a national park located in a city. The National Park Service entered into a contract with an independent antique collector to acquire items owned by residents of the city during the president's lifetime. According to the contract, the collector purchases items and then sells them to the Park Service at a price equal to the collector's cost plus a 10% commission. Purchases by antique collectors are ordinarily subject to the sales tax of the state in which the city is located. The collector files suit in state court to enjoin collection of the tax on these purchases, claiming that the sales tax is unconstitutional as applied to them.

Should the state court issue the injunction?

(A) No, because as the purchaser of these antiques, the collector rather than the federal government is liable for the tax.

(A) Correct. The incidence of the state sales tax on the collector's purchases of antiques is on the collector, who is independent of the National Park Service.

(B) No, because the suit is within the exclusive jurisdiction of the federal courts.

(C) Yes, because the federal government is contractually obligated to pay the amount of the sales tax when it covers the collector's cost of these antiques.

(D) Yes, because under the supremacy clause, the federal program to acquire these antiques preempts the state sales tax on the purchase of these items.

Question # 74 - Evidence

The defendant, a young doctor, is charged with falsely claiming deductions on her federal income tax return. At trial, a witness testified for the defendant that she has a reputation in the community for complete honesty. After a sidebar conference at which the prosecutor gave the judge a record showing that the defendant's medical school had disciplined her for altering her transcript, the prosecutor proposes to ask the witness on cross-examination: "Have you ever heard that the defendant falsified her medical school transcript?"

Is the prosecutor's question proper?

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

(B) No, because its minimal relevance on the issue of income tax fraud is substantially outweighed by the danger of unfair prejudice.

(C) Yes, because an affirmative answer will be probative of the defendant's bad character for honesty and, therefore, her guilt.

(D) Yes, because an affirmative answer will impeach the witness's credibility.

(D) Correct. The incident can be offered on cross-examination of the character witness, the proper purpose being to show that the witness's assessment of the defendant's character for honesty is not credible. The intent of the question is to test the witness's knowledge of the defendant's reputation on the one hand, and the quality of the community on the other. If the witness hasn't heard about the falsification, he might not be very plugged in to the community and so might be a poor reputation witness. On the other hand, if the witness answers "yes," then the jury might infer that the community in which the defendant has a reputation for complete honesty may be setting the honesty bar pretty low. In either case, the alleged falsification is probative impeachment whether or not it occurred. Note that the courts require that the cross-examiner must have a good faith belief that the event actually occurred before inquiring into the act on cross-examination. In this case, that good faith standard is met by the evidence presented at the sidebar conference that the defendant was disciplined in medical school.

Question # 75 - Torts

A homeowner owned a large poisonous snake which had been defanged and was kept in a cage. A storm damaged the homeowner's house and the snake's cage, allowing it to escape. During the cleanup after the storm, a volunteer worker came across the snake. The worker tried to run away from the snake and fell, breaking his arm.

In a suit by the worker against the homeowner based on strict liability in tort to recover for his injury, will the worker prevail?

(A) No, because the snake's escape was caused by a force of nature.

(B) No, because the worker should have anticipated an injury during his volunteer work.

(C) Yes, because the homeowner did not take adequate precautions to secure the snake.

(D) Yes, because the worker's injury was the result of his fear of the escaped snake.

(D) Correct. An owner of a wild animal or an abnormally dangerous animal is strictly liable for harm caused by that animal's dangerous nature. Even though the snake was defanged, the worker had no reason to know this; his injury falls within the risk run by the homeowner because it was caused by the worker's foreseeable reaction to seeing the escaped snake.

Question # 76 - Real Property

A buyer validly contracted in writing to buy land from a seller. The contract had no contingencies and was silent as to risk of loss if there were damage to, or destruction of, property improvements between contract and closing, and as to any duty to carry insurance. As soon as the parties signed the contract, the seller (who had already moved out) canceled her insurance covering the land. The buyer did not know this and did not obtain insurance. A few days later, three weeks before the agreed closing date, the building on the land was struck by lightning and burned to the ground. There is no applicable statute. In an appropriate action, the buyer asserted the right to cancel the contract and to recover his earnest money. The seller said the risk of fire loss passed to the buyer before the fire, so the buyer must perform.

If the seller prevails, what is the most likely explanation?

(A) Once the parties signed the contract, only the buyer had an insurable interest and so could have protected against this loss.

(B) The buyer's constructive possession arising from the contract gave him the affirmative duty of protecting against loss by fire.

(C) The seller's cancellation of her casualty insurance practically construed the contract to transfer the risk of loss to the buyer.

(D) Upon execution of the contract, the buyer became the equitable owner of the land under the doctrine of equitable conversion.

(D) Correct. Although jurisdictions differ on which party has the risk of loss, a finding for the seller in this case means the jurisdiction hearing the case places the risk of loss on the equitable owner of the property, the buyer, under the doctrine of equitable conversion.

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Question # 77 - Criminal Law and Procedure

A customer asked to see an expensive watch in a jewelry store. In conversation with the clerk, the customer falsely claimed to be the son of the mayor. When handed the watch, he asked if he could put it on, walk around a bit so he could see how it felt on his wrist, and then briefly step outside to observe it in natural light. The clerk agreed, saying, "I know I can trust someone like you with the merchandise." The customer walked out of the store wearing the watch and never returned. A week later, the clerk was at a gathering when she spotted the customer wearing the watch. She told him that he must either pay for the watch or give it back. He hissed, "I'll knock your block off if you mess with me." Intimidated, the clerk backed off. The following list of crimes is in descending order of seriousness.

What is the most serious crime the customer committed?

(A) Robbery.

(B) Larceny.

(B) Correct. The customer committed a trespassory taking and carrying away of another's property with the intent to steal it. *See* Wayne R. LaFave, Principles of Criminal Law § 16.2, at 671 (2003). He obtained possession of, but not title to, the watch by lying about a present fact. *See id.* § 16.2(e), at 674.

(C) False pretenses.

(D) Embezzlement.

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Question # 78 - Evidence

In a civil action for breach of an oral contract, the defendant admits that there had been discussions, but denies that he ever entered into an agreement with the plaintiff.

Which of the following standards of admissibility should be applied by the court to evidence proffered as relevant to prove whether a contract was formed?

(A) Whether a reasonable juror would find the evidence determinative of whether the contract was or was not formed.

(B) Whether the evidence has any tendency to make the fact of contract formation more or less probable than without the evidence.

(B) Correct. This is the standard of relevance applied by the judge in determining admissibility under Federal Rule of Evidence 401. Under that rule, evidence is relevant if it has "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."

(C) Whether the evidence is sufficient to prove, absent contrary evidence, that the contract was or was not formed.

(D) Whether the evidence makes it more likely than not that a contract was or was not formed.

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Question # 79 - Contracts

A mother, whose adult son was a law school graduate, contracted with a tutor to give the son a bar exam preparation course. "If my son passes the bar exam," the mother explained to the tutor, "he has been promised a job with a law firm that will pay $55,000 a year." The tutor agreed to do the work for $5,000, although the going rate was $6,000. Before the instruction was to begin, the tutor repudiated the contract. Although the mother or the son reasonably could have employed, for $6,000, an equally qualified instructor to replace the tutor, neither did so. The son failed the bar exam and the law firm refused to employ him. It can be shown that had the son received the instruction, he would have passed the bar exam.

If the mother and the son join as parties plaintiff and sue the tutor for breach of contract, how much, if anything, are they entitled to recover?

(A) $1,000, because all other damages could have been avoided by employing another equally qualified instructor.

(A) Correct. The victim of a breach is entitled to recover only those damages which could not reasonably have been avoided. Failure to take reasonable steps to mitigate damages defeats only a claim for consequential damages. It does not deprive the victims of the breach of the opportunity to claim damages measured by the difference between contract and market price. Here, the mother and son could have paid just $1,000 more to hire a substitute teacher, and they are entitled to recover this amount--which is the amount necessary to put them in the position they would have been in had the contract been performed.

(B) $55,000, because damages of that amount were within the contemplation of the parties at the time they contracted.

(C) Nominal damages only, because the mother was not injured by the breach and the tutor made no promise to the son.

(D) Nothing, because neither the mother nor the son took steps to avoid the consequences of the tutor's breach.

Question # 80 - Constitutional Law

A federal statute required the National Bureau of Standards to establish minimum quality standards for all beer sold in the United States. The statute also provided that public proceedings must precede adoption of the standards, and that once they were adopted, the standards would be subject to judicial review. No standards have yet been adopted. Several officials of the National Bureau of Standards have indicated their personal preference for beer produced by a special brewing process commonly referred to as pasteurization. However, these officials have not indicated whether they intend to include a requirement for pasteurization in the minimum beer quality standards to be adopted by the Bureau. A brewery that produces an unpasteurized beer believes that its brewing process is as safe as pasteurization. The brewery is concerned that, after the appropriate proceedings, the Bureau may adopt quality standards that will prohibit the sale of any unpasteurized beer. As a result, the brewery sued in federal district court to enjoin the Bureau from adopting any standards that would prohibit the sale of unpasteurized beer in this country.

How should the district court dispose of the suit?

(A) Determine whether the Bureau could reasonably believe that pasteurization is the safest process by which to brew beer, and if the Bureau could reasonably believe that, refuse to issue the injunction against the Bureau.

(B) Determine whether the process used by the brewery is as safe as pasteurization and, if it is, issue the injunction against the Bureau.

(C) Refuse to adjudicate the merits of the suit at this time and stay the action until the Bureau has actually issued beer quality standards.

(D) Refuse to adjudicate the merits of the suit, because it does not involve a justiciable case or controversy.

(D) Correct. The federal courts lack power to entertain a suit that is not ripe for adjudication, because such a suit does not present a "case" or "controversy" within the meaning of Article III, Section 2, Clause 1 of the Constitution. The court should dismiss the suit because the Bureau has yet to announce the beer-quality standards, and therefore the case is not ripe.

Question # 81 - Contracts

A landowner entered into a single contract with a builder to have three different structures built on separate pieces of property owned by the landowner. Each structure was distinct from the other two and the parties agreed on a specific price for each. After completing the first structure in accordance with the terms of the contract, the builder demanded payment of the specified price for that structure. At the same time, the builder told the landowner that the builder was "tired of the construction business" and would not even begin the other two structures. The landowner refused to pay anything to the builder.

Is the builder likely to prevail in a suit for the agreed price of the first structure?

(A) No, because substantial performance is a constructive condition to the landowner's duty to pay at the contract rate.

(B) No, because the builder's cessation of performance without legal excuse is a willful breach of the contract.

(C) Yes, because the contract is divisible, and the landowner will be required to bring a separate claim for the builder's failure to complete the other two structures.

(D) Yes, because the contract is divisible, but the landowner will be able to deduct any recoverable damages caused by the builder's failure to complete the contract.

(D) Correct. Contract law acknowledges the fact that parties sometimes embody obligations which are in most respects separable into a single document or agreement. The rules for damages permit the separable components to be treated separately, which is appropriate here, since the structures were to be built on separate pieces of land, and there were prices related to each distinct property. Another rationale for the divisibility of obligations is to avoid a forfeiture.

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Question # 82 - Real Property

An uncle was the record title holder of a vacant tract of land. He often told friends that he would leave the land to his nephew in his will. The nephew knew of these conversations. Prior to the uncle's death, the nephew conveyed the land by warranty deed to a woman for $10,000. She did not conduct a title search of the land before she accepted the deed from the nephew. She promptly and properly recorded her deed. Last month, the uncle died, leaving the land to the nephew in his duly probated will. Both the nephew and the woman now claim ownership of the land. The nephew has offered to return the $10,000 to the woman.

Who has title to the land?

(A) The nephew, because at the time of the deed to the woman, the uncle was the owner of record.

(B) The nephew, because the woman did not conduct a title search.

(C) The woman, because of the doctrine of estoppel by deed.

(C) Correct. Estoppel by deed applies to validate a deed, and in particular a warranty deed, that was executed and delivered by a grantor who had no title to the land at that time, but who represented that he or she had such title and who thereafter acquired such title. In this case, estoppel by deed would apply in the woman's favor to estop the nephew from claiming ownership of the land upon the death of his uncle.

(D) The woman, because she recorded her deed prior to the uncle's death.

Question # 83 - Torts

A customer fell and injured himself when he slipped on a banana peel while shopping at a grocer's store. The banana peel was fresh and clean except for a mark made by the heel of the customer's shoe. In an action brought by the customer against the grocer, these are the only facts in evidence.

Should the trial judge permit the case to go to the jury?

(A) No, because the customer had an obligation to watch where he stepped.

(B) No, because there is not a reasonable basis for inferring that the grocer knew or should have known of the banana peel.

(B) Correct. Unlike slip-and-fall cases in which res ipsa loquitur is appropriate, the condition of the banana peel does not indicate that it has been on the ground for any significant period of time. Therefore, there is not enough evidence to support a jury verdict that the store staff was negligent in failing to remove it before the customer's fall.

(C) Yes, because it is more likely than not that the peel came from a banana offered for sale by the grocer.

(D) Yes, because the grocer could foresee that a customer might slip on a banana peel.

Question # 84 - Constitutional Law

The United States Congress enacted a federal statute providing that any state may "require labeling to show the state or other geographic origin of citrus fruit that is imported into the receiving state." Pursuant to the federal statute, a state that produced large quantities of citrus fruit enacted a law requiring all citrus fruit imported into the state to be stamped with a two-letter postal abbreviation signifying the state of the fruit's origin. The law did not impose any such requirement for citrus fruit grown within the state. When it adopted the law, the state legislature declared that its purpose was to reduce the risks of infection of local citrus crops by itinerant diseases that have been found to attack citrus fruit. A national association of citrus growers sued to have the state law declared unconstitutional. The association claims that the law is prohibited by the negative implications of the commerce clause of the Constitution.

Which of the following is the best argument in favor of the state's effort to have this lawsuit dismissed?

(A) Any burden on interstate commerce imposed by the state law is outweighed by a legitimate state interest.

(B) Congress has the authority to authorize specified state regulations that would otherwise be prohibited by the negative implications of the commerce clause, and it has done so in this situation.

(B) Correct. Congress may use its commerce power (Article I, Section 8, Clause 3 of the Constitution) to permit states to discriminate against interstate commerce. The federal statute here explicitly authorizes states to enact state-of-origin labeling requirements on imported citrus fruit.

(C) The state law does not discriminate against out-of-state citrus growers or producers.

(D) The state law furthers a legitimate state interest, the burden it imposes on interstate commerce is only incidental, and the state's interest cannot be satisfied by other means that are less burdensome to interstate commerce.

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Question # 85 - Contracts

In financial straits and needing $4,000 immediately, a nephew orally asked his uncle for a $4,000 loan. The uncle replied that he would lend the money to the nephew only if the nephew's mother "guaranteed" the loan. At the nephew's suggestion, the uncle then telephoned the nephew's mother, told her about the loan, and asked if she would "guarantee" it. She replied, "Surely. Lend my son the $4,000 and I'll repay it if he doesn't." The uncle then lent $4,000 to the nephew, an amount the nephew orally agreed to repay in six weeks. The next day, the nephew's mother wrote to him and concluded her letter with the words, "Son, I was happy to do you a favor by promising your uncle I would repay your six-week $4,000 loan if you don't. /s/ Mother." Neither the nephew nor his mother repaid the loan when it came due and the uncle sued the mother for breach of contract. In that action, the mother raised the statute of frauds as her only defense.

Will the mother's statute-of-frauds defense be successful?

(A) No, because the amount of the loan was less than $5,000.

(B) No, because the mother's letter satisfies the statute-of-frauds requirement.

(B) Correct. There is a statute-of-frauds requirement in cases of promises to answer for the debt of another. But the memorandum sufficient to satisfy the statute needn't be written at the time of the making of the promise, nor need it be a writing addressed to the promisee. In this case, the mother's letter to her son, the nephew, satisfies the requirement of the statute of frauds.

(C) Yes, because the mother's promise to the uncle was oral.

(D) Yes, because the nephew's promise to the uncle was oral.

Question # 86 - Criminal Law and Procedure

After a liquor store was robbed, the police received an anonymous telephone call naming a store employee as the perpetrator of the robbery. Honestly believing that their actions were permitted by the U.S. Constitution, the police talked one of the employee's neighbors into going to the employee's home with a hidden tape recorder to engage him in a conversation about the crime. During the conversation, the employee admitted committing the robbery. The employee was charged in state court with the robbery. He moved to suppress the recording on the grounds that the method of obtaining it violated his constitutional rights under both the state and federal constitutions. Assume that a clear precedent from the state supreme court holds that the conduct of the police in making the recording violated the employee's rights under the state constitution, and that the exclusionary rule is the proper remedy for this violation.

Should the court grant the employee's motion?

(A) No, because the employee's federal constitutional rights were not violated, and this circumstance overrides any state constitutional provisions.

(B) No, because the police were acting in the good-faith belief that their actions were permitted by the federal Constitution.

(C) Yes, because the making of the recording violated the state constitution.

> (C) Correct. A state may grant broader rights under its own constitution than are granted by the federal Constitution. *See Michigan v. Long*, 463 U.S. 1032 (1983). Here, the state has a clear precedent that the recording violated the employee's state constitutional rights, and that it should be excluded as a remedy. The court should apply this precedent to grant the employee's motion.

(D) Yes, because use of the recording would violate the neighbor's federal constitutional rights.

Question # 87 - Evidence

At a civil trial for slander, the plaintiff showed that the defendant had called the plaintiff a thief. In defense, the defendant called a witness to testify, "I have been the plaintiff's neighbor for many years, and people in our community generally have said that he is a thief."

Is the testimony concerning the plaintiff's reputation in the community admissible?

(A) No, because character is an essential element of the defense, and proof must be made by specific instances of conduct.

(B) Yes, to prove that the plaintiff is a thief, and to reduce or refute the damages claimed.

(B) Correct. In slander cases, where the defendant makes a statement that the plaintiff has an unsavory character, the plaintiff's character is considered "in issue" (i.e., an essential element of the claim or defense under the substantive law) in two respects: First, the plaintiff's actual character will determine whether the defendant was incorrect in his assessment, and thus liable for slander, because truth is a defense. Second, the plaintiff will allege that he is damaged by the statement, which is another way of saying that his true character has been besmirched; but if the plaintiff actually has a bad reputation anyway, then damages are limited. Thus, in slander cases like the one in this question, character evidence is relevant both to whether the plaintiff has a certain character and to the extent of damages. Under Federal Rule of Evidence 405, when character is "in issue" it can be proved by evidence of reputation, opinion, or specific acts.

(C) Yes, to prove that the plaintiff is a thief, but not on the issue of damages.

(D) Yes, to reduce or refute the damages claimed, but not to prove that the plaintiff is a thief.

Question # 88 - Torts

A law student rented a furnished apartment. His landlord began to solicit his advice about her legal affairs, but he refused to provide it. The landlord then demanded that he vacate the apartment immediately. The landlord also engaged in a pattern of harassment, calling the student at home every evening and entering his apartment without his consent during times when he was at school. During these unauthorized visits she removed the handles from the bathroom and kitchen sinks, but did not touch anything belonging to the student. The lease has a year to run, and the student is still living in the apartment. The student has sued the landlord for trespass to land.

Is he likely to prevail?

(A) No, because he has no standing to sue for trespass.

(B) No, because the landlord caused no damage to his property.

(C) Yes, for compensatory damages only.

(D) Yes, for injunctive relief, compensatory damages, and punitive damages.

(D) Correct. There is evidence supporting compensatory damages (emotional distress, the removal of the faucets) and punitive damages (malicious intent, ill will). Because the lease is still in effect and the trespasses are repeated and ongoing, injunctive relief should also be available.

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Question # 89 - Contracts

On May 1, an uncle mailed a letter to his adult nephew that stated: "I am thinking of selling my pickup truck, which you have seen and ridden in. I would consider taking $7,000 for it." On May 3, the nephew mailed the following response: "I will buy your pickup for $7,000 cash." The uncle received this letter on May 5 and on May 6 mailed a note that stated: "It's a deal." On May 7, before the nephew had received the letter of May 6, he phoned his uncle to report that he no longer wanted to buy the pickup truck because his driver's license had been suspended.

Which of the following statements concerning this exchange is accurate?

(A) There is a contract as of May 3.

(B) There is a contract as of May 5.

(C) There is a contract as of May 6.

(C) Correct. The uncle's original letter was not an offer. It was merely a statement indicating a possible interest in selling the truck, and a suggestion as to a price that might be acceptable. It would be regarded, if anything, as a statement soliciting an offer. The nephew's letter, mailed on May 3, constituted an offer to buy the pickup. The uncle's note, mailed on May 6, constituted an acceptance of the nephew's offer, and was effective when mailed. And so a contract arose on May 6.

(D) There is no contract.

Question # 90 - Real Property

On a parcel of land immediately adjacent to a woman's 50-acre farm, a public school district built a large consolidated high school that included a 5,000-seat lighted athletic stadium. The woman had objected to the district's plans for the stadium and was particularly upset about nighttime athletic events that attracted large crowds and that, at times, resulted in significant noise and light intensity levels. On nights of athletic events, the woman and her family members wore earplugs and could not sleep or enjoy a quiet evening until after 10 p.m. In addition, light from the stadium on those nights was bright enough to allow reading a newspaper in the woman's yard.

Which of the following doctrines would best support the woman's claim for damages?

(A) Constructive eviction.

(B) Private nuisance.

(B) Correct. Damages may be awarded if a private nuisance is proven. A private nuisance is a substantial and unreasonable interference with the use or enjoyment of one's land. The facts demonstrate a non-trespassory invasion of the woman's property rights.

(C) Public nuisance.

(D) Waste.

Question # 91 - Criminal Law and Procedure

Four men are charged with conspiracy to commit a series of bank robberies. Nine successful bank robberies took place during the period of the charged conspiracy. Because the robbers wore masks and gloves and stole the bank surveillance tapes, no direct identification of the robbers by the witnesses has been made. Some circumstantial evidence ties each of the men to the overall conspiracy. During cross-examination, a prosecution witness testified that one defendant was in jail on other charges during six of the robberies. That defendant's lawyer has moved for a judgment of acquittal at the close of the government's case.

Should the motion be granted?

(A) No, because a conspirator is not required to agree to all of the objects of the conspiracy.

(B) No, because a conspirator need not be present at the commission of each crime conspired upon.

(B) Correct. A co-conspirator need not be present at the commission of each crime, nor does the arrest of one co-conspirator automatically terminate the conspiracy where other co-conspirators continue to carry out the goals of the conspiracy. *See, e.g., United States v. Williams*, 87 F.3d 249, 253 (8th Cir. 1996); *United States v. Mealy*, 851 F.2d 890, 901 (7th Cir. 1988); *United States v. Ammar*, 714 F.2d 238, 253 (3d Cir. 1983); *United States v. Killian*, 639 F.2d 206, 209 (5th Cir. 1981).

(C) Yes, provided the defendant has complied with the rule requiring pretrial notice of alibi.

(D) Yes, regardless of compliance with the alibi rule, because the government is bound by exculpatory evidence elicited during its case-in-chief.

Question # 92 - Contracts

A seller and a buyer entered into a contract obligating the seller to convey title to a parcel of land to the buyer for $100,000. The agreement provided that the buyer's obligation to purchase the parcel was expressly conditioned upon the buyer's obtaining a loan at an interest rate no higher than 10%. The buyer was unable to do so, but did obtain a loan at an interest rate of 10.5% and timely tendered the purchase price. Because the value of the land had increased since the time of contracting, the seller refused to perform. The buyer sued the seller.

Will the buyer prevail?

(A) No, because an express condition will only be excused to avoid forfeiture.

(B) No, because the contract called for a loan at an interest rate not to exceed 10% and it could not be modified without the consent of the seller.

(C) Yes, because the buyer detrimentally changed position in reliance on the seller's promise to convey.

(D) Yes, because the buyer's obtaining a loan at an interest rate no higher than 10% was not a condition to the seller's duty to perform.

(D) Correct. Courts look beyond the words of a condition, and if it is clear that the purpose of the condition was to benefit or protect one of the parties, the language of the condition will be interpreted as if that intention had been embodied in the contract terms. In this case it is clear that the language of the condition was intended for the benefit of the buyer, and so the seller's duty was not subject to the condition.

Question # 93 - Torts

A bright nine-year-old child attended a day care center after school. The day care center was located near a man-made duck pond on the property of a corporation. During the winter, the pond was used for ice skating when conditions were suitable. At a time when the pond was only partially frozen, the child sneaked away from the center and walked out onto the ice covering the pond. The ice gave way, and the child fell into the cold water. He suffered shock and would have drowned had he not been rescued by a passerby. At the time of the incident, the pond was clearly marked with signs that stated, "THIN ICE - NO SKATING." When the child left the day care center, the center was staffed with a reasonable number of qualified personnel, and the center's employees were exercising reasonable care to ensure that the children in their charge did not leave the premises. The jurisdiction follows a rule of pure comparative negligence.

In a suit brought on the child's behalf against the corporation, who is likely to prevail?

(A) The child, because the corporation owes a duty to keep its premises free of dangerous conditions.

(B) The child, because the pond was an attractive nuisance.

(C) The corporation, because the danger of thin ice may reasonably be expected to be understood by a nine-year-old child.

(C) Correct. This is not a case in which the trespasser failed to appreciate the risk. The obviousness of the risk was buttressed by a warning sign written in words that a "bright nine-year-old child" should be able to read and understand.

(D) The corporation, because the day care center had a duty to keep the child off the ice.

Question # 94 - Torts

[NOTE: These facts are repeated from question #93.] A bright nine-year-old child attended a day care center after school. The day care center was located near a man-made duck pond on the property of a corporation. During the winter, the pond was used for ice skating when conditions were suitable. At a time when the pond was only partially frozen, the child sneaked away from the center and walked out onto the ice covering the pond. The ice gave way, and the child fell into the cold water. He suffered shock and would have drowned had he not been rescued by a passerby. At the time of the incident, the pond was clearly marked with signs that stated, "THIN ICE - NO SKATING." When the child left the day care center, the center was staffed with a reasonable number of qualified personnel, and the center's employees were exercising reasonable care to ensure that the children in their charge did not leave the premises. The jurisdiction follows a rule of pure comparative negligence.

In a suit brought on the child's behalf against the day care center, who is likely to prevail?

(A) The child, because he left the center while he was under the center's care.

(B) The child, because the day care center is located near a pond.

(C) The day care center, because it was not negligent.

(C) Correct. Under the facts as described, there is no evidence of lack of reasonable care by the day care center.

(D) The day care center, because the child was a trespasser.

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Question # 95 - Constitutional Law

A man intensely disliked his neighbors, who were of a different race. One night, intending to frighten his neighbors, he spray-painted their house with racial epithets and threats that they would be lynched. The man was arrested and prosecuted under a state law providing that "any person who threatens violence against another person with the intent to cause that person to fear for his or her life or safety may be imprisoned for up to five years." In defense, the man claimed that he did not intend to lynch his neighbors, but only to scare them so that they would move away.

Can the man constitutionally be convicted under this law?

(A) No, because he was only communicating his views and had not commenced any overt action against the neighbors.

(B) Yes, because he was engaged in trespass when he painted the words on his neighbors' house.

(C) Yes, because his communication was a threat by which he intended to intimidate his neighbors.

(C) Correct. The Supreme Court has held that a threat communicated with the intent to intimidate the recipient, like the communication in this case, is not protected by the speech clause of the First Amendment.

(D) Yes, because his communication was racially motivated and thus violated the protections of the Thirteenth Amendment.

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Question # 96 - Criminal Law and Procedure

A defendant was charged with assault and battery in a jurisdiction that followed the "retreat" doctrine, and he pleaded self-defense. At his trial, the evidence established the following: A man and his wife were enjoying a drink at a tavern when the defendant entered and stood near the door. The wife whispered to her husband that the defendant was the man who had insulted her on the street the day before. The husband approached the defendant and said, "Get out of here, or I'll break your nose." The defendant said, "Don't come any closer, or I'll hurt you." When the husband raised his fists menacingly, the defendant pulled a can of pepper spray from his pocket, aimed it at the husband's face, and sprayed. The husband fell to the floor, writhing in pain.

Should the defendant be convicted?

(A) No, because he had no obligation to retreat before resorting to nondeadly force.

(A) Correct. There is no obligation to retreat unless the defender intends to use deadly force. *See* Wayne R. LaFave, Principles of Criminal Law § 9.4(f), at 411 (2003).

(B) No, because there is no obligation to retreat when one is in an occupied structure.

(C) Yes, because he failed to retreat even though there was an opportunity available.

(D) Yes, because the husband did not threaten to use deadly force against him.

Question # 97 - Contracts

An innkeeper, who had no previous experience in the motel or commercial laundry business and who knew nothing about the trade usages of either business, bought a motel and signed an agreement with a laundry company for the motel's laundry services. The one-year agreement provided for "daily service at $500 a week." From their conversations during negotiation, the laundry company knew that the innkeeper expected laundry services seven days a week. When the laundry company refused to pick up the motel's laundry on two successive Sundays and indicated that it would not ever do so, the innkeeper canceled the agreement. The laundry company sued the innkeeper for breach of contract. At trial, clear evidence was introduced to show that in the commercial laundry business "daily service" did not include service on Sundays.

Will the laundry company succeed in its action?

(A) No, because the laundry company knew the meaning the innkeeper attached to "daily service," and, therefore, the innkeeper's meaning will control.

(A) Correct. When parties attach significantly different meanings to the same material term, the meaning that controls is that "attached by one of them if at the time the agreement was made . . . that party did not know of any different meaning attached by the other, and the other knew the meaning attached by the first party." Restatement (Second) of Contracts § 201. In this case, the innkeeper did not know, at the time of contract formation, that the laundry company attached a different meaning to the term "daily service" than its apparent meaning of "every day." Conversely, the laundry company knew the innkeeper thought he was contracting for "every day" service. Accordingly, the innkeeper's understanding of the term will control.

(B) No, because the parties attached materially different meanings to "daily service," and, therefore, no contract was formed.

(C) Yes, because the parol evidence rule will not permit the innkeeper to prove the meaning she attached to "daily service."

(D) Yes, because the trade usage will control the interpretation of "daily service."

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Question # 98 - Real Property

A landowner orally gave his neighbor permission to share the use of the private road on the landowner's land so that the neighbor could have more convenient access to the neighbor's land. Only the landowner maintained the road. After the neighbor had used the road on a daily basis for three years, the landowner conveyed his land to a grantee, who immediately notified the neighbor that the neighbor was not to use the road. The neighbor sued the grantee seeking a declaration that the neighbor had a right to continue to use the road.

Who is likely to prevail?

(A) The grantee, because an oral license is invalid.

(B) The grantee, because the neighbor had a license that the grantee could terminate at any time.

(B) Correct. A license is permission to use the land of another. It is revocable, and is not subject to the statute of frauds. In this case, because the neighbor had the landowner's permission to use the road and did not expend any money, property, or labor pursuant to the agreement, the neighbor had a license that was effectively revoked by the grantee.

(C) The neighbor, because the grantee is estopped to terminate the neighbor's use of the road.

(D) The neighbor, because the neighbor's use of the road was open and notorious when the grantee purchased the land.

Question # 99 - Contracts

A carpenter contracted with a homeowner to remodel the homeowner's home for $10,000, to be paid on completion of the work. On May 29, relying on his expectation that he would finish the work and have the homeowner's payment on June 1, the carpenter contracted to buy a car for "$10,000 in cash, if payment is made on June 1; if payment is made thereafter, the price is $12,000." The carpenter completed the work according to specifications on June 1 and demanded payment from the homeowner on that date. The homeowner, without any excuse, refused to pay. Thereupon, the carpenter became very excited, suffered a minor heart attack, and, as a result, incurred medical expenses of $1,000. The reasonable value of the carpenter's services in remodeling the homeowner's home was $13,000.

In an action by the carpenter against the homeowner, which of the following should be the carpenter's measure of recovery?

(A) $10,000, the contract price.

(A) Correct. The carpenter is entitled to the contract price for the work done. The other items of damage are unrecoverable either because they were unforeseeable at the time the contract was made or because they were not caused by the breach. No unjust enrichment claim is viable on these facts, because an unjust enrichment claim cannot exceed the contract price when all of the work giving rise to the claim has been done and the only remaining obligation is the payment of the price. This limitation on unjust enrichment claims was recapitulated in the well known case of *Oliver v. Campbell*, 273 P.2d 15 (Cal. 1954), and represents the current rule in such cases.

(B) $11,000, the contract price plus $1,000 for the medical expenses incurred because the homeowner refused to pay.

(C) $12,000, the contract price plus $2,000, the bargain that was lost because the carpenter could not pay cash for the car on June 1.

(D) $13,000, the amount the homeowner was enriched by the carpenter's services.

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Question # 100 - Evidence

A plaintiff sued her employer, alleging that poor working conditions had caused her to develop a stomach ulcer. At trial, the plaintiff's medical expert testified to the cause of the plaintiff's ulcer and stated that his opinion was based in part on information in a letter the plaintiff's personal physician had written to the plaintiff's employer, explaining why the plaintiff had missed work.

When offered to prove the cause of the plaintiff's condition, is the letter from the plaintiff's doctor admissible?

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

(A) Correct. The doctor's letter is not a business record under Federal Rule of Evidence 803(6), because it was not prepared in the ordinary course of regularly conducted activity. In addition, it cannot be admitted simply because an expert relies upon it. Rule 703 does allow an expert to rely on hearsay in reaching a conclusion, so long as other experts in the field would reasonably rely on such information. But the rule distinguishes between expert *reliance* on the hearsay and *admitting* the hearsay at trial for the jury to consider. Generally speaking, hearsay will not be admissible when offered only because the expert relied upon it. The probative value of the hearsay in illustrating the basis of the expert's opinion must substantially outweigh the risks of prejudice and confusion that will occur when the jury is told about the hearsay. That strict balancing test is not met in this case. There is no other exception that appears even close to being applicable (and none listed in the possible answers), so the letter is inadmissible hearsay.

(B) No, because the plaintiff's physician is not shown to be unavailable.

(C) Yes, because it was relied upon by the plaintiff's medical expert.

(D) Yes, under the business records exception to the hearsay rule.