



National Conference of Bar Examiners
Multistate Bar Examination - Online Practice Exam 4



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Question # 1 - Constitutional Law

A federal civil statute prohibited fishing in any body of water that was located within a national park and contained a particular endangered species of fish. The statute authorized federal district courts to enjoin knowing violators of the statute from the use of all national park facilities for up to two years. After a vacationer was found by a federal district court to have knowingly violated the statute, the court issued an injunction against his use of all national park facilities for two years. The vacationer appealed.

Before the appeals court heard the vacationer's case, Congress repealed the statute by a law that expressly made the repeal effective retroactive to a date one month before the vacationer's violation of the statute. The law also directly cited the vacationer's case and stated that it was intended to "repeal all the statutory prohibitions that formed the basis for decisions" such as that rendered against the vacationer.

On the basis of this law, the vacationer has asked the appeals court to vacate the injunction issued against him. Counsel for the United States has objected, contending that, as applied to the specific case pending in the appeals court, the law is unconstitutional.

How should the appeals court rule?

- (A) For the United States, because Congress defied the constitutional prohibition against ex post facto laws by retroactively changing the consequences for violating the statute after the violation was proved in a trial court.
- (B) For the United States, because the law's citation to the vacationer's case demonstrates that Congress intended to compel the appeals court to reach a particular result and, therefore, sought to exercise judicial powers vested exclusively in the courts by Article III.
- (C) For the vacationer, because Congress has the power to determine the laws to be applied by the federal courts and to require retroactive application of those laws to any specifically identified case that it chooses.
- (D) For the vacationer, because Congress is authorized to make substantive changes to federal civil statutes and to direct that those changes be applied by the courts to all actions in which a final judgment has not yet been rendered.

Correct. The appeals court should rule for the vacationer, because the vacationer's appeal of the district court's injunction was pending when Congress repealed the statute that authorized the injunction. Congress may change federal civil statutes and may direct federal courts to apply those changes in all actions in which a final judgment has not been rendered.



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Question # 2 - Real Property

A man obtained a bank loan secured by a mortgage on an office building that he owned. After several years, the man conveyed the office building to a woman, who took title subject to the mortgage. The deed to the woman was not recorded. The woman took immediate possession of the building and made the mortgage payments for several years.

Subsequently, the woman stopped making payments on the mortgage loan, and the bank eventually commenced foreclosure proceedings in which the man and the woman were both named parties. At the foreclosure sale, a third party purchased the building for less than the outstanding balance on the mortgage loan. The bank then sought to collect the deficiency from the woman.

Is the bank entitled to collect the deficiency from the woman?

(A) No, because the woman did not record the deed from the man.

(B) No, because the woman is not personally liable on the loan.

Correct. The woman took title to the office building subject to the mortgage but did not assume the mortgage debt. The debt is to be satisfied out of the building. The building is the principal, and the man, as transferor, is the only party liable for any deficiency. This situation can be contrasted with one in which a buyer expressly assumes the mortgage debt. In that case, the buyer would be primarily liable for any deficiency and the seller, absent a release by the mortgagee, would be secondarily liable.

(C) Yes, because the woman took immediate possession of the building when she bought it from the man.

(D) Yes, because the woman was a party to the foreclosure proceeding.



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Question # 3 - Criminal Law and Procedure

A state statute provides: "The sale of an alcoholic beverage to any person under the age of 21 is a misdemeanor."

A woman who was 20 years old, but who looked older and who had a very convincing fake driver's license indicating that she was 24, entered a convenience store, picked up a six-pack of beer, and placed the beer on the counter. The store clerk, after examining the driver's license, rang up the purchase.

Both the clerk and the store owner have been charged with violating the state statute.

If the court finds both the clerk and the store owner guilty, what standard of liability must the court have interpreted the statute to impose?

(A) Strict liability only.

(B) Vicarious liability only.

(C) Both strict and vicarious liability.

Correct. The court must have applied strict liability to convict the clerk (who did not act knowingly, and arguably not even negligently) and vicarious liability to convict the store owner for the sale by the clerk.

(D) Either strict or vicarious liability.



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Question # 4 - Evidence

A businessman was the target of a grand jury investigation into the alleged bribery of American and foreign officials in connection with an international construction project. The businessman had stated at a press conference that no bribes had been offered or taken and that no laws of any kind had been broken. The grand jury issued a subpoena requiring the businessman to testify before it. The businessman moved to quash the subpoena on the ground that his testimony could tend to incriminate him. The prosecutor responded with a grant of use immunity (under which the businessman's compelled statements before the grand jury could not be used against him in any state or federal prosecution). The businessman responded that the grant of use immunity was not sufficient to protect his Fifth Amendment rights.

Should the businessman be compelled to testify?

- (A) No, because the businessman remains subject to the risk of foreign prosecution.
- (B) No, because use immunity does not prevent the government from prosecuting the businessman on the bribery scheme.
- (C) Yes, because the businessman has denied any criminal liability and therefore his Fifth Amendment rights are not at stake.
- (D) Yes, because the grant of use immunity is coextensive with the businessman's Fifth Amendment rights.

Correct. The U.S. Supreme Court has held that if a person is guaranteed, through a grant of use immunity, that neither his statements nor the fruits of those statements can be used against him in a domestic prosecution, then he loses his right to refuse to testify because his statements cannot tend to incriminate him. Because the businessman has been protected against the use of his statements in a domestic prosecution, his statements cannot tend to incriminate him in any sense protected by the Fifth Amendment.



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Question # 5 - Constitutional Law

The United States had long recognized the ruling faction in a foreign country as that country's government, despite an ongoing civil war. Throughout the civil war, the ruling faction controlled the majority of the country's territory, and the United States afforded diplomatic immunity to the ambassador representing the ruling faction.

A newly elected President of the United States decided to recognize a rebel group as the government of the foreign country and notified the ambassador from the ruling faction that she must leave the United States within 10 days. The ambassador filed an action in federal district court for a declaration that the ruling faction was the true government of the foreign country and for an injunction against enforcement of the President's order that she leave the United States. The United States has moved to dismiss the action.

If the court dismisses the action, what will be the most likely reason?

(A) The action involves a nonjusticiable political question.

Correct. The action likely satisfies the political question doctrine and therefore should be dismissed as nonjusticiable. The President's Article II power to receive foreign ambassadors is likely a textually demonstrable commitment by the Constitution of exclusive authority to recognize foreign governments. Moreover, Article II provides no judicially manageable standards by which a court could review the constitutionality of a President's decision on whether to recognize a foreign government. Finally, because the action involves the President's administration of foreign affairs, the prudential elements of the political question doctrine also indicate that the court should dismiss the action as nonjusticiable.

(B) The action is not ripe.

(C) The action is within the original jurisdiction of the U.S. Supreme Court.

(D) The ambassador does not have standing.



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Question # 6 - Torts

An assistant to a famous writer surreptitiously observed the writer as the writer typed her private password into her personal computer in order to access her email. On several subsequent occasions in the writer's absence, the assistant read the writer's email messages and printed out selections from them.

The assistant later quit his job and earned a considerable amount of money by leaking information to the media that he had learned from reading the writer's email messages. All of the information published about the writer as a result of the assistant's conduct was true and concerned matters of public interest.

The writer's secretary had seen the assistant reading the writer's emails and printing out selections, and she has told the writer what she saw. The writer now wishes to sue the assistant for damages. At trial, the writer can show that the media leaks could have come only from someone reading her email on her personal computer.

Can the writer recover damages from the assistant?

- (A) No, because the assistant was an invitee on the premises.
- (B) No, because the published information resulting from the assistant's conduct was true and concerned matters of public interest.

(C) Yes, because the assistant invaded the writer's privacy.

Correct. By accessing the writer's email, the assistant was intruding upon her privacy. "Intrusion upon seclusion" is one category of the tort of invasion of privacy that is recognized in many states. The assistant did not have permission to access the emails, and the writer did not leave the emails exposed so that others might see them.

- (D) Yes, because the published information resulting from the assistant's conduct constituted publication of private facts concerning the writer.



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Question # 7 - Evidence

A defendant is on trial for knowing possession of a stolen television. The defendant claims that the television was a gift from a friend, who has disappeared. The defendant seeks to testify that he was present when the friend told her neighbor that the television had been given to the friend by her mother.

Is the defendant's testimony about the friend's statement to the neighbor admissible?

- (A) No, because the friend's statement is hearsay not within any exception.
- (B) No, because the defendant has not presented evidence of circumstances that clearly corroborate the statement.
- (C) Yes, as nonhearsay evidence of the defendant's belief that the friend owned the television.

Correct. The defendant is offering the friend's statement as evidence that the defendant thought that the friend owned the television (i.e., that it had not been stolen). Because the defendant is charged with knowing possession of a stolen television, his state of mind is relevant. If the defendant had heard the friend say that the television was hers, that evidence would be relevant to the defendant's state of mind regardless of the truth of the statement. Therefore, the friend's out-of-court statement is not hearsay.

- (D) Yes, under the hearsay exception for statements affecting an interest in property.



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Question # 8 - Contracts

A restaurant supplier sent a letter to a regular customer offering to sell the customer an industrial freezer for \$10,000. Two days later, the customer responded with a letter that stated: "I accept your offer on the condition that you provide me with a warranty that the freezer is merchantable." In response to the customer's letter, the supplier called the customer and stated that the offer was no longer open. The supplier promptly sold the freezer to another buyer for \$11,000.

If the customer sues the supplier for breach of contract, is the customer likely to prevail?

- (A) No, because the customer's letter added a term, making it a counteroffer.
- (B) No, because the subsequent sale to a bona fide purchaser for value cut off the claims of the customer.
- (C) Yes, because the customer's letter was an acceptance of the supplier's offer, since the warranty of merchantability was already implied in the sale.

Correct. It is true that a purported acceptance that is conditioned on an offeror's assent to a term additional to or different from the terms contained in an offer is a counteroffer. In this case, however, the customer's letter constituted an acceptance rather than a counteroffer. Under UCC § 2-314, a warranty of merchantability is implied in every contract for the sale of a good by a seller who is a merchant with respect to goods of that kind. Therefore, the condition contained in the customer's letter merely stated a term that was already implied in the sale. A contract arose when the customer mailed its letter accepting the offer. Accordingly, the supplier's attempted revocation of its offer was ineffective, and its sale of the freezer to the third party breached its contract with the customer.

- (D) Yes, because the supplier's letter was a firm offer that could not be revoked for a reasonable time.



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Question # 9 - Real Property

A credit card company obtained and properly filed a judgment against a man after he failed to pay a \$10,000 debt. A statute in the jurisdiction provides as follows: "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."

Two years later, the man purchased land for \$200,000. He made a down payment of \$20,000 and borrowed the remaining \$180,000 from a bank. The bank loan was secured by a mortgage on the land. Immediately after the closing, the deed to the man was recorded first, and the bank's mortgage was recorded second.

Five months later, the man defaulted on the mortgage loan and the bank initiated judicial foreclosure proceedings. After receiving notice of the proceedings, the credit card company filed a motion to have its judgment lien declared to be the first lien on the land.

Is the credit card company's motion likely to be granted?

(A) No, because the bank's mortgage secured a loan used to purchase the land.

Correct. The bank's mortgage is a purchase-money mortgage, meaning that the funds the bank advanced were used to purchase the land. A purchase-money mortgage executed at the same time as the purchase of the real property encumbered takes precedence over any other claim or lien, including a previously filed judgment lien. Therefore, the bank's purchase-money mortgage takes precedence over the credit card company's judgment lien.

(B) No, because the man's down payment exceeded the amount of his debt to the credit card company.

(C) Yes, because the bank had constructive notice of the judgment lien.

(D) Yes, because the bank is a third-party lender and not the seller of the land.



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Question # 10 - Criminal Law and Procedure

A woman charged with murder has entered a plea of not guilty by reason of insanity. At her trial, in which the questions of guilt and sanity are being tried together, the evidence shows that the woman stalked the victim for several hours before following him to an isolated hiking trail where she shot and killed him. Expert witnesses for the defense have testified that the woman knew that killing was illegal and wrong, but that she suffered from a serious mental illness that left her in the grip of a powerful and irresistible compulsion to kill the victim.

If the jury believes the testimony of the defense experts, under what circumstances could the jury properly acquit the woman of murder?

(A) Only if the jurisdiction follows the M'Naghten test for insanity.

(B) Only if the jurisdiction follows the ALI Model Penal Code test for insanity.

Correct. The jury could find the woman to be legally insane under the ALI Model Penal Code test, because she could not conform her conduct to the requirements of the law.

(C) If the jurisdiction follows either the M'Naghten or the ALI Model Penal Code test for insanity.

(D) Even if the jurisdiction has abolished the insanity defense.



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Question # 11 - Evidence

A plaintiff has brought a civil suit against a defendant for injuries arising out of a fistfight between them. The day after the fight, a police officer talked to the plaintiff, the defendant, and an eyewitness, and made an official police report. At trial, the plaintiff seeks to introduce from the properly authenticated police report a statement attributed to the eyewitness, who is unavailable to testify at trial, that "[the defendant] started the fight."

Should the court admit the statement from the report?

(A) No, unless the entire report is introduced.

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

Correct. The eyewitness's statement is hearsay within the hearsay report. The report itself could be admissible as a business or public record, but the hearsay within it is admissible only if it satisfies a separate hearsay exception or if it can be shown that the eyewitness had a business or public duty to report the information accurately. The eyewitness had no such duty. The eyewitness's statement is also not a present sense impression, because it was made the day after the fight, and no other hearsay exception applies.

(C) Yes, because it was based on the eyewitness's firsthand knowledge.

(D) Yes, because it is an excerpt from a public record offered in a civil case.



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Question # 12 - Torts

A man sued his neighbor for defamation based on the following facts:

The neighbor told a friend that the man had set fire to a house in the neighborhood. The friend, who knew the man well, did not believe the neighbor's allegation, which was in fact false. The friend told the man about the neighbor's allegation. The man was very upset by the allegation, but neither the man nor the neighbor nor the friend communicated the allegation to anyone else.

Should the man prevail in his lawsuit?

- (A) No, because the friend did not believe what the neighbor had said.
- (B) No, because the man cannot prove that he suffered pecuniary loss.
- (C) Yes, because the man was very upset at hearing what the neighbor had said.
- (D) Yes, because the neighbor communicated to the friend the false accusation that the man had committed a serious crime.

Correct. The core of a defamation action is the communication of a defamatory statement about the plaintiff to a third party. Here, the statement was spoken rather than written, so the rules of slander apply. Often an action in slander requires that pecuniary loss be shown, but there is no such requirement where the statement accuses the plaintiff of engaging in serious criminal conduct. Arson is a crime of moral turpitude, so the neighbor's statement falls within the exception, and special harm need not be shown.



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Question # 13 - Contracts

A seller sent an email to a potential buyer, offering to sell his house to her for \$150,000. The buyer immediately responded via email, asking whether the offer included the house's front porch swing. The seller emailed back: "No, it doesn't." The buyer then ordered a front porch swing and emailed back to the seller: "I accept your offer." The seller refused to sell the house to the buyer, claiming that the offer was no longer open.

Is there a contract for the sale of the house?

- (A) No, because the buyer's initial email was a counteroffer.
- (B) No, because the offer lapsed before the buyer accepted.
- (C) Yes, because the buyer relied on the offer by ordering the swing.
- (D) Yes, because the buyer's initial email merely asked for information.

Correct. A reply to an offer that merely requests information regarding the offer constitutes an inquiry rather than a counteroffer. The buyer's response asking whether the seller intended to include the front porch swing in his offer was an inquiry rather than a counteroffer. The buyer's subsequent email stating "I accept your offer" was an acceptance that created a contract between the parties. Therefore, the seller's attempted revocation of his offer was ineffective.



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Question # 14 - Criminal Law and Procedure

A valid warrant was issued for a woman's arrest. The police learned that a person with the woman's name and physical description lived at a particular address. When police officers went to that address, the house appeared to be unoccupied: the windows and doors were boarded up with plywood, and the lawn had not been mowed for a long time. A neighbor confirmed that the house belonged to the woman but said that the woman had not been there for several months.

The officers knocked repeatedly on the front door and shouted, "Police! Open up!" Receiving no response, they tore the plywood off the door, smashed through the door with a sledgehammer, and entered the house. They found no one inside, but they did find an illegal sawed-off shotgun. Upon her return to the house a few weeks later, the woman was charged with unlawful possession of the shotgun.

The woman has moved to suppress the use of the shotgun as evidence at her trial.

Should the court grant the motion?

- (A) No, because the officers acted in good faith under the authority of a valid warrant.
- (B) No, because the officers did not violate any legitimate expectation of privacy in the house since the woman had abandoned it.
- (C) Yes, because the officers entered the house by means of excessive force.
- (D) Yes, because the officers had no reason to believe that the woman was in the house.

Correct. Under the Fourth Amendment, the arrest warrant would have authorized forcible entry only if the officers had reason to believe that the woman was at home at the time of the entry. Here, the officers knew that the woman was not at home.



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Question # 15 - Constitutional Law

An employer owed an employee \$200 in unpaid wages. A law of the state in which the employer and the employee reside and in which the employee works provides that the courts of that state must decide claims for unpaid wages within 10 days of filing.

After the employee filed a claim in state court pursuant to this law, the employer filed a voluntary bankruptcy petition in federal bankruptcy court. In the bankruptcy proceeding, the employer sought to stay further proceedings in the unpaid wages claim on the basis of a federal statute which provides that a person who files a federal bankruptcy petition receives an automatic stay of all proceedings against him or her in all federal and state courts. No other federal laws apply.

In addition to the supremacy clause of Article VI, what is the most obvious constitutional basis for the imposition of a stay of the unpaid wages claim in the state court?

(A) Congress's power to provide for the general welfare.

(B) Congress's power to provide uniform rules of bankruptcy.

Correct. Congress's power to provide uniform rules of bankruptcy offers the most obvious constitutional basis for a federal statute requiring a stay of court proceedings against a person who has filed a federal bankruptcy petition.

(C) Congress's power to regulate the jurisdiction and procedures of the courts.

(D) Congress's power to regulate commerce among the states.



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Question # 16 - Real Property

A husband and wife acquired land as common law joint tenants with right of survivorship. One year later, without his wife's knowledge, the husband executed a will devising the land to his best friend. The husband subsequently died.

Is the wife now the sole owner of the land?

- (A) No, because a joint tenant has the unilateral right to end a joint tenancy without the consent of the other joint tenant.
- (B) No, because the wife's interest in the husband's undivided 50% ownership in the land adeemed.
- (C) Yes, because of the doctrine of after-acquired title.
- (D) Yes, because the devise to the friend did not sever the joint tenancy.

Correct. Although as a general rule a joint tenant's interest is freely alienable during his or her lifetime without the consent of the other joint tenant, that interest cannot be devised in a will. In this case, on the death of the husband, the wife's interest in the joint tenancy immediately swelled and she became the sole owner of the land as the surviving joint tenant.



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Question # 17 - Evidence

A plaintiff has sued a defendant, alleging that she was run over by a speeding car driven by the defendant. The plaintiff was unconscious after her injury and, accompanied by her husband, was brought to the hospital in an ambulance.

At trial, the plaintiff calls an emergency room physician to testify that when the physician asked the plaintiff's husband if he knew what had happened, the husband, who was upset, replied, "I saw my wife get run over two hours ago by a driver who went right through the intersection without looking."

Is the physician's testimony about the husband's statement admissible?

(A) No, because it relates an opinion.

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

Correct. The statement is offered to prove liability for the accident. As such, it is not a statement made for purposes of diagnosis or treatment. Moreover, the statement was made two hours after the accident, so it is very unlikely that the husband (who was not himself an accident victim) was under a continuous state of excitement between the time of the accident and the time he made the statement. Therefore, the statement is not admissible as an excited utterance, and no other hearsay exception applies.

(C) Yes, as a statement made for purposes of diagnosis or treatment.

(D) Yes, as an excited utterance.



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Question # 18 - Contracts

In a telephone conversation, a jewelry maker offered to buy 100 ounces of gold from a precious metals company if delivery could be made within 10 days. The jewelry maker did not specify a price, but the market price for 100 ounces of gold at the time of the conversation was approximately \$65,000. Without otherwise responding, the company delivered the gold six days later.

In the meantime, the project for which the jewelry maker planned to use the gold was canceled. The jewelry maker therefore refused to accept delivery of the gold or to pay the \$65,000 demanded by the company.

Is there an enforceable contract between the jewelry maker and the company?

(A) No, because the parties did not agree on a price term.

(B) No, because the parties did not put their agreement in writing.

Correct. The parties failed to comply with the writing requirement of UCC § 2-201(1). Under that section, a contract for the sale of goods for a price of \$500 or more is not enforceable unless there is a writing indicating a contract of sale that is signed by the party against whom enforcement is sought. In this case, the absence of such a writing signed by the jewelry maker renders the parties' oral agreement unenforceable. An exception to the writing requirement arises when a seller delivers goods that are accepted by the buyer, but in this case, the jewelry maker did not accept the gold.

(C) Yes, because the absence of a price term does not defeat the formation of a valid contract for the sale of goods where the parties otherwise intended to form a contract.

(D) Yes, because the company relied on an implied promise to pay when it delivered the gold.



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Question # 19 - Real Property

A landlord leased a building to a tenant for a 10-year term. Two years after the term began, the tenant subleased the building to a sublessee for a 5-year term. Under the terms of the sublease, the sublessee agreed to make monthly rent payments to the tenant.

Although the sublessee made timely rent payments to the tenant, the tenant did not forward four of those payments to the landlord. The tenant has left the jurisdiction and cannot be found. The landlord has sued the sublessee for the unpaid rent.

There is no applicable statute.

If the court rules that the sublessee is not liable to the landlord for the unpaid rent, what will be the most likely reason?

- (A) A sublessee is responsible to the landlord only as a surety for unpaid rent owed by the tenant.
- (B) The sublease constitutes a novation of the original lease.
- (C) The sublessee is not in privity of estate or contract with the landlord.

Correct. In a sublease, the tenant transfers a right of possession for a time shorter than the balance of the leasehold. Therefore, the sublessee and the tenant are in privity of estate with each other, but only the tenant remains in privity of estate with the landlord. There also is no privity of contract between the sublessee and the landlord, because the sublessee made no promise, either to the landlord or to the tenant, to pay rent to the landlord. Lacking privity, the sublessee is not liable to the landlord for the rent. Although privity may not be required under an equitable servitude theory, a finding for the sublessee would mean that the court did not use such a theory.

- (D) The sublessee's rent payments to the tenant fully discharged the sublessee's obligation to pay rent to the landlord.



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Question # 20 - Torts

A manufacturing plant emitted a faint noise even though the owner had installed state-of-the-art sound dampeners. The plant operated only on weekdays and only during daylight hours. A homeowner who lived near the plant worked a night shift and could not sleep when he arrived home because of the noise from the plant. The other residents in the area did not notice the noise.

Does the homeowner have a viable nuisance claim against the owner of the plant?

(A) No, because the homeowner is unusually sensitive to noise during the day.

Correct. A landowner is liable for nuisance only when his invasion of another's use and enjoyment is both substantial and unreasonable. Under the norms of the area, the plant owner is not imposing an unreasonable degree of noise upon his neighbors. An unusually noise-sensitive neighbor will not be permitted to block the plant owner's use of his own land.

(B) No, because the plant operates only during the day.

(C) Yes, because the noise is heard beyond the boundaries of the plant.

(D) Yes, because the operation of the plant interferes with the homeowner's quiet use and enjoyment of his property.



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Question # 21 - Criminal Law and Procedure

A woman was subpoenaed to appear before a grand jury. When she arrived, she was taken into the grand jury room to be questioned. She answered preliminary questions about her name and address. She was then asked where she had been at a certain time on a specified night when a murder had occurred. Before answering the question, the woman said that she wanted to consult her attorney, who was waiting outside the grand jury room, and she was allowed to do so. When she returned to the grand jury room, she stated that she refused to answer the question because the answer might incriminate her.

The prosecutor believes that the woman's nephew committed the murder. The nephew has said that he was with the woman at the time of the murder, and the prosecutor believes that this alibi is false. The prosecutor does not believe that the woman is guilty of the murder, either as a principal or as an accomplice, although he does believe that the woman may be guilty of other crimes. The prosecutor wants to compel the woman to answer the question by whatever means will result in the least harm to the prosecution's case.

Which of the following steps should the prosecutor take to get the woman to answer the question?

- (A) Request the grand jury to order the woman to answer the question.
- (B) Ask the woman's attorney to explain to the woman that the rules of evidence do not apply in grand jury proceedings, and to advise her that she cannot refuse to testify.
- (C) Prepare the documents necessary to grant the woman immunity from any future use against her of her grand jury testimony or any evidence derived from it.
Correct. A witness cannot be compelled to provide potentially incriminating testimony unless the witness is granted use and derivative-use immunity.
- (D) Prepare the documents necessary to grant the woman immunity from any future prosecution for any crime she might disclose in the course of her testimony.



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Question # 22 - Constitutional Law

Congress enacted a statute directing U.S. ambassadors to send formal letters to the governments of their host countries, protesting any violations by those governments of international treaties on weapons sales. The President prefers to handle violations by certain countries in a less formal manner and has directed ambassadors not to comply with the statute.

Is the President's action constitutional?

- (A) No, because Congress has the power to implement treaties, and therefore the statute is binding on the President.
- (B) No, because Congress has the power to regulate commerce with foreign nations, and therefore the statute is binding on the President.
- (C) Yes, because Congress has no jurisdiction over matters outside the U.S. borders.
- (D) Yes, because the President and his subordinates are the exclusive official representatives of the United States in foreign affairs.

Correct. The President's action is constitutional, because the U.S. Supreme Court has ruled that the President alone has the authority to represent the United States in foreign affairs. Because the statute intrudes on the President's authority, it is unconstitutional and has no effect.



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Question # 23 - Real Property

A woman who owned a house executed a deed purporting to convey the house to her son and his wife. The language of the deed was sufficient to create a common law joint tenancy with right of survivorship, which is unmodified by statute in the jurisdiction. The woman mailed the deed to the son with a letter saying: "Because I intend you and your wife to have my house after my death, I am enclosing a deed to the house. However, I intend to live in the house for the rest of my life, so don't record the deed until I die. The deed will be effective at my death."

The son put the deed in his desk. The wife discovered the deed and recorded it without the son's knowledge. Subsequently, the son and the wife separated, and the wife, without telling anyone, conveyed her interest in the house to a friend who immediately reconveyed it to the wife.

The woman learned that the son and the wife had separated and also learned what had happened to the deed to the house. The woman then brought an appropriate action against the son and the wife to obtain a declaration that the woman was still the owner of the house and an order canceling of record the woman's deed and the subsequent deeds.

If the court determines that the woman owns the house in fee simple, what will be the likely explanation?

(A) The deed was not delivered.

Correct. To be valid, a deed must be properly executed and delivered. Delivery is a question of the grantor's intent. In this case, the woman did not intend the deed to be effective until her death. An intent to have a transfer be effective at the grantor's death is valid in a will but not in a deed unless the deed expressly reserves a life estate, which this deed did not do. The woman remained in possession of the house and intended to retain title to the house until her death. The deed was not delivered, so she owns the house in fee simple.

(B) The wife's conduct entitles the woman to equitable relief.

(C) The woman expressly reserved a life estate.

(D) The woman received no consideration for her deed.



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Question # 24 - Contracts

A man sent an email to a friend that stated: "Because you have been a great friend to me, I am going to give you a rare book that I own." The friend replied by an email that said: "Thanks for the rare book. I am going to give you my butterfly collection." The rare book was worth \$10,000; the butterfly collection was worth \$100. The friend delivered the butterfly collection to the man, but the man refused to deliver the book.

If the friend sues the man to recover the value of the book, how should the court rule?

(A) For the man, because there was no bargained-for exchange to support his promise.

Correct. To constitute consideration, a return promise must be bargained for. A return promise is bargained for when it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise. Because the man's promise to give the rare book to the friend did not seek a return promise or performance, the friend's promise to give the man her butterfly collection did not constitute consideration for the man's promise. Accordingly, no contract arose between the parties, and the court should rule in favor of the man.

(B) For the man, because the consideration given for his promise was inadequate.

(C) For the friend, because she gave the butterfly collection to the man in reliance on receiving the book.

(D) For the friend, because she conferred a benefit on the man by delivering the butterfly collection.



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Question # 25 - Torts

Toxic materials being transported by truck from a manufacturer's plant to a warehouse leaked from the truck onto the street a few miles from the plant. A driver lost control of his car when he hit the puddle of spilled toxic materials on the street, and he was injured when his car hit a stop sign.

In an action for damages by the driver against the manufacturer based on strict liability, is the driver likely to prevail?

(A) No, because the driver's loss of control was an intervening cause.

(B) No, because the driver's injury did not result from the toxicity of the materials.

Correct. Strict liability in this situation would be based on the abnormally dangerous nature of the toxic materials. But a successful strict liability action requires that the risk that materializes be the same risk that led courts to label the activity "abnormally dangerous" in the first place. Here, the toxicity of the materials did not contribute to the driver's injury, so his only cause of action would be in negligence.

(C) Yes, because the manufacturer is strictly liable for leaks of its toxic materials.

(D) Yes, because the leak occurred near the manufacturer's plant.



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Question # 26 - Constitutional Law

Congress enacted a statute that authorized the construction of a monument commemorating the role of the United States in liberating a particular foreign nation during World War II. Another statute appropriated \$3 million for the construction. When the United States became involved in a bitter trade dispute with the foreign nation, the President announced that he was canceling the monument's construction and that he would not spend the appropriated funds. Although the actual reason for the President's decision was the trade dispute, the announcement stated that the reason was an unexpected rise in the federal deficit.

Assume that no other statutes apply.

Is the President's decision constitutional?

(A) No, because the President failed to invoke his foreign affairs powers in his announcement.

(B) No, because the President is obligated to spend funds in accordance with congressional directions.

Correct. The President's decision is unconstitutional, because Article II of the Constitution obligates the President to take care that the laws are faithfully executed. Because the appropriations statute is a valid exercise of Congress's spending power, the President must abide by the requirements of the statute.

(C) Yes, because the President is vested with inherent executive power to control federal expenditures.

(D) Yes, because the President's decision is a valid exercise of his foreign affairs powers.



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Question # 27 - Real Property

A woman borrowed \$100,000 from a bank and executed a promissory note to the bank in that amount. As security for repayment of the loan, the woman's brother gave the bank a mortgage on a tract of land solely owned by him. The brother did not sign the promissory note.

The woman subsequently defaulted on the loan, and after acceleration, the bank instituted foreclosure proceedings on the brother's land. The brother filed a timely objection to the foreclosure.

Will the bank succeed in foreclosing on the tract of land?

- (A) No, because the bank has an equitable mortgage rather than a legal mortgage.
- (B) No, because a mortgage from the brother is invalid without a mortgage debt owed by him.
- (C) Yes, because the bank has a valid mortgage.

Correct. A mortgage is security for the performance of an act. The performance may be by the mortgagor or by some other person. The mortgage granted by the brother to secure the debt of the woman is valid even though the woman also has personal liability on the debt.

- (D) Yes, because the bank is a surety for the brother's mortgage.



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Question # 28 - Criminal Law and Procedure

A defendant was validly arrested for the murder of a store clerk and was taken to a police station where he was given Miranda warnings. When an interrogator asked the defendant, "Do you understand your Miranda rights, and are you willing to give up those rights and talk to us?" the defendant replied, "Yes." When asked, "Did you kill the clerk?" the defendant replied, "No." When asked, "Where were you on the day the clerk was killed?" the defendant replied, "Maybe I should talk to a lawyer." The interrogator asked, "Are you sure?" and the defendant replied, "I'm not sure." The interrogator then asked, "Why would you want to talk with a lawyer?" and the defendant replied, "Because I killed the clerk. It was an accident, and I think I need a lawyer to defend me." At that point all interrogation ceased. Later, the defendant was formally charged with murdering the clerk.

The defendant has moved to suppress evidence of his statement "I killed the clerk" on the ground that this statement was elicited in violation of his Miranda rights.

Should the defendant's motion be granted?

- (A) No, because although the defendant effectively asserted the right to counsel, the question "Why would you want to talk with a lawyer?" did not constitute custodial interrogation.
- (B) No, because the defendant did not effectively assert the right to counsel, and his conduct prior to making the statement constituted a valid waiver of his Miranda rights.

Correct. The defendant did not effectively assert his right to counsel, because such an assertion must be unambiguous. The defendant's statement "Maybe I should talk to a lawyer" is not an unambiguous request for counsel. In addition, the defendant had unequivocally waived his Miranda rights prior to making this statement.
- (C) Yes, because although the defendant did not effectively assert the right to counsel, his conduct prior to making the statement did not constitute a valid waiver of his Miranda rights.
- (D) Yes, because the defendant effectively asserted the right to counsel, and the question "Why would you want to talk with a lawyer?" constituted custodial interrogation.



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Question # 29 - Evidence

A plaintiff has sued a defendant for personal injuries the plaintiff suffered when she was bitten as she was trying to feed a rat that was part of the defendant's caged-rat experiment at a science fair. At trial, the plaintiff offers evidence that immediately after the incident the defendant said to her, "I'd like to give you this \$100 bill, because I feel so bad about this."

Is the defendant's statement admissible?

- (A) No, because it is not relevant to the issue of liability.
- (B) No, because it was an offer of compromise.
- (C) Yes, as a present sense impression.
- (D) Yes, as the statement of a party-opponent.

Correct. An out-of-court statement by a party that is relevant to his or her liability is admissible under the exception to the hearsay rule for statements of a party-opponent. One might think that the statement would be excluded because of Rule 408, which excludes statements that are made to settle a claim. But that rule is inapplicable, because it applies only when the statement is made to compromise a disputed claim. Here, at the time the defendant made the statement, he was not contesting that he was at fault. Therefore, there was no disputed claim.



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Question # 30 - Contracts

A farmer who wanted to sell her land received a letter from a developer that stated, "I will pay you \$1,100 an acre for your land." The farmer's letter of reply stated, "I accept your offer." Unbeknownst to the farmer, the developer had intended to offer only \$1,000 per acre but had mistakenly typed "\$1,100." As both parties knew, comparable land in the vicinity had been selling at prices between \$1,000 and \$1,200 per acre.

Which of the following states the probable legal consequences of the correspondence between the parties?

- (A) There is no contract, because the parties attached materially different meanings to the price term.
- (B) There is no enforceable contract, because the developer is entitled to rescission due to a mutual mistake as to a basic assumption of the contract.
- (C) There is a contract formed at a price of \$1,000 per acre.
- (D) There is a contract formed at a price of \$1,100 per acre.

Correct. An enforceable contract requires mutual assent as determined by the parties' objective, rather than subjective, manifestations of assent. Given the parties' knowledge of the price of comparable land, the developer's offer created a reasonable understanding that the developer would purchase the land for \$1,100 per acre. Moreover, because the farmer neither knew nor had reason to know that the developer intended to purchase the land for only \$1,000 per acre, the developer will be bound to purchase it for \$1,100 per acre. Accordingly, the parties' conduct gave rise to a contract formed at \$1,100 per acre when the farmer accepted the developer's offer.



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Question # 31 - Criminal Law and Procedure

Two defendants were being tried together in federal court for bank robbery. The prosecutor sought to introduce testimony from the first defendant's prison cellmate. The cellmate would testify that the first defendant had admitted to the cellmate that he and the second defendant had robbed the bank. The prosecutor asked the court to instruct the jury that the cellmate's testimony could be considered only against the first defendant.

Can the cellmate's testimony be admitted in a joint trial over the second defendant's objection?

- (A) No, because the first defendant made the statement without Miranda warnings.
- (B) No, because the limiting instruction cannot ensure that the jury will not consider the testimony in its deliberations regarding the second defendant.
Correct. The limiting instruction is constitutionally insufficient to avoid the risk that the jury will consider the incriminating statement against the second defendant, who has no opportunity at trial to confront the first defendant.
- (C) Yes, because the first defendant's statement was a declaration against penal interest.
- (D) Yes, because the limiting instruction sufficiently protects the second defendant.



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Question # 32 - Torts

A man and his friend, who were both adults, went to a party. The man and the friend had many drinks at the party and became legally intoxicated. They decided to play a game of chance called "Russian roulette" using a gun loaded with one bullet. As part of the game, the man pointed the gun at the friend and, on her command, pulled the trigger. The man shot the friend in the shoulder.

The friend has brought a negligence action against the man. Traditional defenses based on plaintiff's conduct apply.

What is likely to be the dispositive issue in this case?

- (A) Whether the game constituted a joint venture.
- (B) Whether the friend could validly consent to the game.
- (C) Whether the friend was also negligent.

Correct. Contributory negligence is an appropriate defense to a negligence action, and here both parties seem to have been acting unreasonably in exactly the same way. Whether the argument is put in the form of the friend's carelessness in engaging in the activity or in her unreasonable assumption of risk, many states would now evaluate the defense under comparative negligence principles.

- (D) Whether the man was legally intoxicated when he began playing the game.



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Question # 33 - Real Property

A mother executed a will devising vacant land to her son. The mother showed the will to her son.

Thereafter, the son purported to convey the land to a friend by a warranty deed that contained no exceptions. The friend paid value for the land and promptly recorded the deed without having first conducted any title search. The friend never took possession of the land.

The mother later died, and the will devising the land to her son was duly admitted to probate.

Thereafter, the friend conducted a title search for the land and asked the son for a new deed. The son refused, because the value of the land had doubled, but he offered to refund the purchase price to the friend.

The friend has sued to quiet title to the land.

Is the friend likely to prevail?

(A) No, because the friend failed to conduct a title search before purchasing the land.

(B) No, because the son had no interest in the land at the time of conveyance.

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

Correct. The doctrine of estoppel by deed (sometimes referred to as after-acquired title) provides that even if the grantor has no title to the land at the time the deed is delivered, the title automatically passes to the grantee when title is so acquired, provided that the grantor asserts the quality of title conveyed in the deed. In this case, the son conveyed to the friend by a warranty deed with no exceptions.

(D) Yes, because the deed was recorded.



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Question # 34 - Criminal Law and Procedure

A prosecutor presented to a federal grand jury the testimony of a witness in order to secure a defendant's indictment for theft of government property. The prosecutor did not disclose to the grand jury that the witness had been convicted four years earlier of perjury. The grand jury returned an indictment, and the defendant pleaded not guilty.

Shortly thereafter, the prosecutor took the case to trial, calling the witness to testify before the jury. The prosecutor did not disclose the witness's prior perjury conviction until the defense was preparing to rest. Defense counsel immediately moved for a mistrial, which the court denied. Instead, the court allowed the defense to recall the witness for the purpose of impeaching him with this conviction, but the witness could not be located. The court then allowed the defense to introduce documentary evidence of the witness's criminal record to the jury before resting its case. The jury convicted the defendant.

The defendant has moved for a new trial, arguing that the prosecutor's failure to disclose the witness's prior conviction in a timely manner violated the defendant's right to due process of law.

If the court grants the defendant's motion, what will be the most likely reason?

- (A) The defendant was unable to cross-examine the witness about the conviction.
- (B) The prosecutor failed to inform the grand jury of the witness's conviction.
- (C) The court found it reasonably probable that the defendant would have been acquitted had the defense had timely access to the information about the witness's conviction.
Correct. The untimely disclosure of evidence favorable to the defense (including impeachment information) violates the Constitution if the evidence would have created a reasonable probability of a different outcome had it been disclosed earlier.
- (D) The court found that the prosecutor had deliberately delayed disclosing the witness's conviction to obtain a strategic advantage.



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Question # 35 - Constitutional Law

A motorist who resided in State A was severely injured in a traffic accident that occurred in State B. The other vehicle involved in the accident was a truck owned by a furniture manufacturer and driven by one of its employees. The manufacturer's headquarters are in State B. Its products are sold by retailers in State A, but it has no office, plant, or agent for service of process there.

The motorist brought an action against the manufacturer in a state court in State A. The manufacturer appeared specially to contest that court's jurisdiction over it. The court ruled that it had jurisdiction over the manufacturer by virtue of State A's long-arm statute.

At trial, the court instructed the jury to apply State A law, under which a plaintiff's contributory negligence is a basis for reducing an award of damages but not for denying recovery altogether. Under State B law, contributory negligence is a complete defense. The jury found that the manufacturer was negligent and that its negligence was a cause of the motorist's injuries. It also found that the motorist was negligent, though to a lesser degree than the manufacturer, and that the motorist's negligence contributed to the accident. It returned a verdict in favor of the motorist and awarded her \$1 million in damages.

The manufacturer appealed the judgment entered on this verdict, asserting error in the court's ruling on jurisdiction and in its application of State A law instead of State B law. The manufacturer raised all federal constitutional claims pertinent to these claims of error. The highest court in State A affirmed the trial court's judgment, and the U.S. Supreme Court denied the manufacturer's petition for a writ of certiorari.

The motorist has brought an action against the manufacturer in a state court in State B to collect on the judgment. The manufacturer has defended on all relevant federal constitutional grounds.

How should the State B court rule?

- (A) For the manufacturer, because a judgment entered by a court that lacks jurisdiction over one of the parties is not entitled to full faith and credit, and the State A court could not constitutionally assert jurisdiction over the manufacturer because of the manufacturer's lack of a presence in that state.
- (B) For the manufacturer, because the State A court was bound by the full faith and credit clause to apply State B law to an accident that occurred in State B and in which a State B company was involved.
- (C) For the motorist, because the manufacturer litigated the issues of jurisdiction and choice of law in the State A court, and the final judgment of that court is entitled to full faith and credit in the State B court.

Correct. The State B court should rule for the motorist, because the full faith and credit clause of the Constitution obligates the courts of each state to recognize the final judgments of the courts of every other state. Because the judgment of the State A court is final, it is entitled to full faith and credit in the State B court.
- (D) For the motorist, because the Supreme Court's denial of certiorari to review the judgment of the highest court in State A conclusively establishes that the manufacturer's federal constitutional claims are invalid.



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Question # 36 - Contracts

A buyer and a seller entered into a written contract for the sale of a copy machine, using the same form contract that they had used a number of times in the past. The contract stated that payment was due 30 days after delivery and provided that the writing contained the complete and exclusive statement of the parties' agreement.

On several past occasions, the buyer had taken a 5% discount from the contract price when paying within 10 days of delivery, and the seller had not objected. On this occasion, when the buyer took a 5% discount for paying within 10 days, the seller objected because his profit margin on this particular machine was smaller than on his other machines.

If the seller sues the buyer for breach of contract, may the buyer introduce evidence that the 5% discount was a term of the agreement?

- (A) No, because the seller timely objected to the buyer's proposal for different terms.
- (B) No, because the writing contained the complete and exclusive agreement of the parties.
- (C) Yes, because a modification made in good faith does not require consideration.
- (D) Yes, because evidence of course of dealing is admissible even if the writing contains the complete and exclusive agreement of the parties.

Correct. Under UCC § 1-303(b), course of dealing is defined as "a sequence of conduct concerning previous transactions between the parties to a particular transaction" In this case, on several past occasions the buyer had taken a 5% discount without objection from the seller, thus establishing a course of dealing. Under the UCC's parol evidence rule, course-of-dealing evidence is admissible to explain or supplement a final written agreement even if the parties intended the agreement to be complete and exclusive. Accordingly, the course-of-dealing evidence is admissible.



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Question # 37 - Evidence

A defendant is charged with aggravated assault. The physical evidence at trial has shown that the victim was hit with a lead pipe in the back of the head and on the forearms and left in an alley. The medical examiner has testified that the injuries to the victim's forearms appear to have been defensive wounds. The victim has testified that he cannot remember who attacked him with the lead pipe. He would further testify that he remembers only that a passerby found him in the alley, and that he told the passerby that the defendant had hit him with the lead pipe; he then lost consciousness. The defendant objects to this proposed testimony, arguing that it is hearsay and that the victim had no personal knowledge of the identity of the perpetrator.

Is the victim's testimony concerning his previous statement to the passerby admissible?

- (A) No, because the prosecutor has failed to show that it is more likely than not that the victim had personal knowledge of the perpetrator's identity.
- (B) No, because the victim has no memory of the attack itself and therefore cannot be effectively cross-examined.
- (C) Yes, because the victim is subject to cross-examination, and there is sufficient showing of personal knowledge.

Correct. The U.S. Supreme Court held in *United States v. Owens* that a declarant-witness is subject to cross-examination within the meaning of the hearsay exception for prior identifications even if the witness lacks all memory of the prior identification. As to personal knowledge, the evidence of defensive wounds is more than sufficient to persuade a reasonable juror that the victim saw his attacker.

- (D) Yes, because it is the victim's own out-of-court statement.



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Question # 38 - Constitutional Law

Congress recently enacted a statute creating a program that made federal loans available to family farmers who had been unable to obtain loans from private lenders. Congress appropriated a fixed sum of money to fund loans made pursuant to the program and gave a designated federal agency discretion to decide which applicants were to receive the loans.

Two weeks after the program was established, a family farmer applied to the agency for a loan. Agency officials promptly reviewed her application and summarily denied it.

The farmer has sued the agency in federal district court, claiming only that the denial of her application without the opportunity for a hearing violated the due process clause of the Fifth Amendment. The farmer claims that she could have proved at such a hearing that without the federal loan it would be necessary for her to sell her farm.

Should the court uphold the agency's decision?

- (A) No, because due process requires federal agencies to provide a hearing before making any factual determination that adversely affects an identified individual on the basis of his or her particular circumstances.
- (B) No, because the denial of a loan may deprive the farmer of an established liberty interest to pursue her chosen occupation.
- (C) Yes, because the applicable statute gives the farmer no legitimate claim of entitlement to receive a loan.

Correct. The court should uphold the agency's decision, because the due process clause does not require the government to provide the farmer an opportunity for an administrative hearing on her loan application. The farmer had no legitimate claim of entitlement to a loan, because the statute gave the agency discretion to decide which applicants were to receive the loans. The agency's denial of the farmer's application therefore did not deprive her of a property or liberty interest protected by the due process clause.

- (D) Yes , because the spending clause of Article I, Section 8, gives Congress plenary power to control the distribution of appropriated funds in any manner it wishes.



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Question # 39 - Torts

A woman signed up for a bowling class. Before allowing the woman to bowl, the instructor required her to sign a waiver explicitly stating that she assumed all risk of injuries that she might suffer in connection with the class, including injuries due to negligence or any other fault. After she signed the waiver, the woman was injured when the instructor negligently dropped a bowling ball on the woman's foot.

The woman brought a negligence action against the instructor. The instructor has filed a motion for summary judgment based on the waiver.

What is the woman's best argument in opposition to the instructor's motion?

- (A) Bowling is an inherently dangerous activity.
- (B) In circumstances like these, it is against public policy to enforce agreements that insulate people from the consequences of their own negligence.

Correct. Waivers are most easily justified when an activity poses inherent risks that are familiar to the participants and cannot be entirely eliminated without removing the pleasure from the activity. The risk that materialized here is not inherent to bowling but could arise whenever someone is careless while holding a heavy object. A court might find that it is against public policy to permit individuals or businesses to insulate themselves from the deterrent incentives provided by the threat of negligence liability. For that reason, the court might find that the waiver did not present the woman with a fair choice and could hold the waiver ineffective.
- (C) It was unreasonable to require the woman to sign the waiver before she was allowed to bowl.
- (D) When she signed the form, the woman could not foresee that the instructor would drop a bowling ball on her foot.



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Question # 40 - Constitutional Law

A state law provides that only U.S. citizens may serve as jurors in the state courts of that state. A woman who is a lawful resident alien and who has resided in the state for many years was summoned for jury duty in a state court. The woman's name was selected from a list of potential jurors that was compiled from a comprehensive list of local residents. She was disqualified from service solely because she is not a U.S. citizen.

The woman has filed an action for a declaratory judgment that the state law is unconstitutional.

Who should prevail in this action?

- (A) The state, because a state may limit to U.S. citizens functions that are an integral part of the process of self-government.

Correct. The state should prevail, because the law excluding aliens from jury service is rationally related to the state's legitimate interest in ensuring that only citizens perform functions that are central to self-government. Although strict scrutiny generally applies to state laws that discriminate against aliens, rational basis scrutiny is appropriate when alienage classifications restrict the right to participate in functions that are central to self-government, such as voting, running for office, or serving on a jury.

- (B) The state, because jury service is a privilege, not a right, and therefore it is not a liberty interest protected by the due process clause of the Fourteenth Amendment.
- (C) The woman, because the Constitution gives Congress plenary power to make classifications with respect to aliens.
- (D) The woman, because the state has not articulated a legitimate reason for prohibiting resident aliens from serving as jurors in the state's courts.



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Question # 41 - Torts

A pedestrian was crossing a street in a crosswalk when a woman walking just ahead of him was hit by a truck. The pedestrian, who had jumped out of the way of the truck, administered CPR to the woman, who was a stranger. The woman bled profusely, and the pedestrian was covered in blood. The woman died in the ambulance on the way to the hospital. The pedestrian became very depressed immediately after the incident and developed physical symptoms as a result of his emotional distress.

The pedestrian has brought an action against the driver of the truck for negligent infliction of emotional distress. In her defense, the driver asserts that she should not be held liable, because the pedestrian's emotional distress and resulting physical symptoms are not compensable.

What is the strongest argument that the pedestrian can make in response to the driver's defense?

- (A) The pedestrian saw the driver hit the woman.
- (B) The pedestrian was acting as a Good Samaritan.
- (C) The pedestrian was covered in the woman's blood and developed physical symptoms as a result of his emotional distress.
- (D) The pedestrian was in the zone of danger.

Correct. Because the pedestrian was in the path of the truck, he was under a direct physical threat from the driver's negligence. He could recover for the emotional distress that he suffered as a result of his fear for his own safety, and many courts would also allow him to recover for all other emotional distress that he suffered in connection with the event.



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Question # 42 - Contracts

A buyer purchased a new car from a dealer under a written contract that provided that the price of the car was \$20,000 and that the buyer would receive a "trade-in allowance of \$7,000 for the buyer's old car." The old car had recently been damaged in an accident. The contract contained a merger clause stating: "This writing constitutes the entire agreement of the parties, and there are no other understandings or agreements not set forth herein." When the buyer took possession of the new car, she delivered the old car to the dealer. At that time, the dealer claimed that the trade-in allowance included an assignment of the buyer's claim against her insurance company for damage to the old car. The buyer refused to provide the assignment.

The dealer sued the buyer to recover the insurance payment. The dealer has offered evidence that the parties agreed during their negotiations for the new car that the dealer was entitled to the insurance payment.

Should the court admit this evidence?

- (A) No, because the dealer's acceptance of the old car bars any additional claim by the dealer.
- (B) No, because the merger clause bars any evidence of the parties' prior discussions concerning the trade-in allowance.
- (C) Yes, because a merger clause does not bar evidence of fraud.

(D) Yes, because the merger clause does not bar evidence to explain what the parties meant by "trade-in allowance."

Correct. Under the UCC's parol evidence rule, a merger clause does not conclusively establish that an agreement is completely integrated. Moreover, a finding that an agreement is completely integrated does not necessarily bar the admission of extrinsic evidence. Although extrinsic evidence is inadmissible to supplement or contradict the express terms of a completely integrated agreement, such evidence is admissible to explain the terms of an agreement. In this case, evidence of the parties' discussions during their negotiations is admissible to aid in explaining whether they intended "trade-in- allowance" to include an assignment of the buyer's claim against her insurance company.



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Question # 43 - Real Property

A woman inherited a house from a distant relative. The woman had never visited the house, which was located in another state, and did not want to own it. Upon learning this, a man who lived next door to the house called the woman and asked to buy the house. The woman agreed, provided that the house was sold "as is." The man agreed, and the woman conveyed the house to the man by a warranty deed.

The man had purchased the house for investment purposes, intending to rent it out while continuing to live next door. After the sale, the man started to renovate the house and discovered serious termite damage. The man sued the woman for breach of contract.

There are no applicable statutes.

How should the court rule?

(A) For the woman, because the man planned to change the use of the house for investment purposes.

(B) For the woman, because she sold the house "as is."

Correct. A seller may disclaim any duty to disclose defects if the disclaimer is sufficiently clear and specific. In this case, the contract specifically noted that the house was being sold "as is." The woman made no misrepresentations regarding the condition of the house. There are no statutes that might require an owner-occupier to disclose known defects, and in any case the woman inherited the house and had never visited or lived in it. In addition, this is not the sale of a new house by a builder/seller, which may impose a warranty of habitability.

(C) For the man, because of the doctrine of caveat emptor.

(D) For the man, because he received a warranty deed.



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Question # 44 - Evidence

A man suffered a broken jaw in a fight with a neighbor that took place when they were both spectators at a soccer match.

If the man sues the neighbor for personal injury damages, which of the following actions must the trial court take if requested by the man?

- (A) Prevent the neighbor's principal eyewitness from testifying, upon a showing that six years ago the witness was convicted of perjury and the conviction has not been the subject of a pardon or annulment.
- (B) Refuse to let the neighbor cross-examine the man's medical expert on matters not covered on direct examination of the expert.

(C) Exclude nonparty eyewitnesses from the courtroom during the testimony of other witnesses.

Correct. Rule 615 provides that if a party moves to exclude prospective witnesses before they testify, "the court must order witnesses excluded so they cannot hear other witnesses' testimony."

- (D) Require the production of a writing used before trial to refresh a witness's memory.



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Question # 45 - Constitutional Law

Congress enacted a statute that made it illegal for "any employee, without the consent of his or her employer, to post on the Internet any information concerning the employer." The purpose of the statute was to prevent employees from revealing their employers' trade secrets.

Is the statute constitutional?

(A) No, because it is not narrowly tailored to further a compelling government interest.

Correct. The statute violates the freedom of speech protected by the First Amendment. The statute targets speech based on its content, because it prohibits employees from posting only "information concerning the employer" on the Internet. Because the statute is a content-based restriction on speech, it is subject to strict judicial scrutiny. Speech restrictions rarely survive strict scrutiny; the government must prove that the restriction is necessary to further a compelling government interest. Even if the government's interest in preventing employees from revealing trade secrets were deemed compelling, Congress could enact legislation utilizing less speech-restrictive means to protect trade secrets.

(B) No, because it targets a particular medium of communication for special regulation.

(C) Yes, because it leaves open ample alternative channels of communication.

(D) Yes, because it prevents employees from engaging in unethical conduct.



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Multistate Bar Examination - Online Practice Exam 4

Question # 46 - Real Property

A man owned a large tract of land. The eastern portion of the land was undeveloped and unused. A farmer owned a farm, the western border of which was along the eastern border of the man's land. The two tracts of land had never been in common ownership.

Five years ago, the farmer asked the man for permission to use a designated two acres of the eastern portion of the man's land to enlarge her farm's irrigation facilities. The man orally gave his permission for such use. Since then, the farmer has invested substantial amounts of money and effort each year to develop and maintain the irrigation facilities within the two-acre parcel. The man has been fully aware of the farmer's actions. Nothing regarding this matter was ever reduced to writing.

Last year, the man gave the entire tract of land as a gift to his nephew. The deed of gift made no reference to the farmer or the two-acre parcel. When the nephew had the land surveyed and discovered the facts, he notified the farmer in writing, "Your license to use the two-acre parcel has been terminated." The notice instructed the farmer to remove her facilities from the two-acre parcel immediately. The farmer refused the nephew's demand.

In an appropriate action between the nephew and the farmer to determine whether the farmer had a right to continue to use the two-acre parcel, the court ruled in favor of the farmer.

What is the most likely reason for the court's ruling?

- (A) The investments and efforts by the farmer in reliance on the license estop the man, and now the nephew as the man's donee, from terminating the license.

Correct. In most jurisdictions, the farmer may acquire the unconditional right to use the land following the oral license, provided that the farmer expended money and labor in reliance on the license. The farmer has acquired what is known as an irrevocable license or an equitable easement.

- (B) The nephew is merely a donee.
- (C) The farmer has acquired an easement based on prior use.
- (D) The farmer received a license coupled with an interest.



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Multistate Bar Examination - Online Practice Exam 4

Question # 47 - Torts

Upon the recommendation of her child's pediatrician, a mother purchased a vaporizer for her child, who had been suffering from respiratory congestion. The vaporizer consisted of a gallon-size glass jar, which held water to be heated until it became steam, and a metal heating unit into which the jar fit. The jar was covered by a plastic cap with an opening to allow the steam to escape. At the time the vaporizer was manufactured and sold, there was no safer alternative design.

The booklet that accompanied the vaporizer read: "This product is safe, spillproof, and practically foolproof. It shuts off automatically when the water is gone." The booklet had a picture of a vaporizer sending steam over a baby's crib.

The mother used the vaporizer whenever the child was suffering from congestion. She placed the vaporizer on the floor near the child's bed.

One night, the child got out of bed to get a drink of water and tripped over the cord of the vaporizer as she crossed the room. The top of the vaporizer separated from the base, and boiling water from the jar spilled on the child when the vaporizer tipped over. The child suffered serious burns as a consequence.

The child's representative brought an action for damages against the manufacturer of the vaporizer. The manufacturer moved to dismiss after the representative presented the evidence above.

Should the manufacturer's motion be granted?

(A) No, because a jury could find that the manufacturer expressly represented that the vaporizer was spillproof.

Correct. The vaporizer may not have been "defective," in that there was no reasonable alternative design, but the express promise by the manufacturer that it was "safe" and "spillproof," especially when combined with the manufacturer's picture suggesting that it was safe to place the vaporizer near a child's bed, could be the basis of recovery on the ground of misrepresentation.

(B) No, because the vaporizer caused a serious injury to the child.

(C) Yes, because it should have been obvious to the mother that the water in the jar would become boiling hot.

(D) Yes, because there was no safer alternative design.



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Multistate Bar Examination - Online Practice Exam 4

Question # 48 - Contracts

A buyer agreed in writing to purchase a car from a seller for \$15,000, with the price to be paid on a specified date at the seller's showroom. The contract provided, and both parties intended, that time was of the essence. Before the specified date, however, the seller sold the car to a third party for \$20,000. On the specified date, the buyer arrived at the showroom but brought only \$10,000. When the seller did not appear at the showroom, the buyer called the seller and asked whether the seller would accept \$10,000 for the car immediately and the remaining \$5,000 in six weeks. The seller told the buyer that he had sold the car to the third party.

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

(A) No, because the contractual obligations were discharged on the ground of impossibility.

(B) No, because the buyer was not prepared to tender her performance on the specified date.

Correct. Even though the facts demonstrate that the seller repudiated the contract by selling the car to a third party, the seller did not end up breaching the contract. Under UCC Article 2, a seller's tender of delivery of goods and a buyer's tender of payment are concurrent conditions of exchange. Therefore, the buyer and the seller were obligated to simultaneously tender their respective performances. Because neither party was prepared to tender performance at the time or in the manner stipulated in the contract, each party's performance obligation was discharged. Accordingly, neither the buyer nor the seller has a claim for breach of contract.

(C) Yes, because the buyer's breach was not material.

(D) Yes, because the seller anticipatorily repudiated the contract when he sold the car to the third party.



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Multistate Bar Examination - Online Practice Exam 4

Question # 49 - Criminal Law and Procedure

A state statute divides murder into degrees and defines murder in the first degree as murder committed willfully with premeditation and deliberation. The statute defines murder in the second degree as all other murder at common law and defines voluntary manslaughter as at common law.

A man hated one of his coworkers. Upon learning that the coworker was at a neighbor's house, the man grabbed his gun and went to the neighbor's house hoping to provoke the coworker into attacking him so that he could then shoot the coworker. After arriving at the house, the man insulted the coworker and bragged that he had had sexual relations with the coworker's wife two weeks earlier. This statement was not true, but it enraged the coworker, who grabbed a knife from the kitchen table and ran toward the man. The man then shot and killed the coworker.

What is the most serious homicide offense of which the man could properly be convicted?

(A) Murder in the first degree.

Correct. The killing was committed willfully with premeditation and deliberation. The killing cannot be justified as having been in self-defense, because the man was the clear aggressor who intentionally provoked the coworker so that he could shoot and kill him.

(B) Murder in the second degree.

(C) Voluntary manslaughter, because he provoked the coworker.

(D) No form of criminal homicide, because he acted in self-defense.



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Multistate Bar Examination - Online Practice Exam 4

Question # 50 - Evidence

A defendant is charged with robbing a bank. The prosecutor has supplied the court with information from accurate sources establishing that the bank is a federally insured institution and that this fact is not subject to reasonable dispute. The prosecutor asks the court to take judicial notice of this fact. The defendant objects.

How should the court proceed?

- (A) The court must take judicial notice and instruct the jury that it is required to accept the judicially noticed fact as conclusive.
- (B) The court must take judicial notice and instruct the jury that it may, but is not required to, accept the judicially noticed fact as conclusive.
Correct. The court must take judicial notice of a fact if the court is supplied with the necessary information to indicate that the fact is not subject to reasonable dispute. Rule 201(f) provides that in a criminal case, "the court must instruct the jury that it may or may not accept the noticed fact as conclusive."
- (C) The court may refuse to take judicial notice, because judicial notice may not be taken of essential facts in a criminal case.
- (D) The court must refuse to take judicial notice, because whether a bank is federally insured would not be generally known within the court's jurisdiction.



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Multistate Bar Examination - Online Practice Exam 4

Question # 51 - Evidence

The beneficiary of a decedent's life insurance policy has sued the life insurance company for the proceeds of the policy. At issue is the date when the decedent first experienced the heart problems that led to his death. The decedent's primary care physician has testified at trial that the decedent had a routine checkup on February 15. The physician then identifies a photocopy of a questionnaire completed by the decedent on that date in which the decedent wrote: "Yesterday afternoon I broke into a big sweat and my chest hurt for a while." The beneficiary now offers the photocopy in evidence.

Should the court admit the photocopy?

- (A) No, because the original questionnaire has not been shown to be unavailable.
- (B) No, because the statement related to past rather than present symptoms.
- (C) Yes, as a business record.
- (D) Yes, as a statement for the purpose of obtaining medical treatment.

Correct. The decedent's statement of his medical history was made for the purpose of diagnosis and treatment, and it is clearly pertinent to the physician's diagnosis and treatment. Therefore, it is admissible under Rule 803(4).



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Multistate Bar Examination - Online Practice Exam 4

Question # 52 - Real Property

Two friends planned to incorporate a business together and agreed that they would own all of the corporation's stock in equal proportion.

A businesswoman conveyed land by a warranty deed to "the corporation and its successors and assigns." The deed was recorded.

Thereafter, the friends had a disagreement. No papers were ever filed to incorporate the business.

There is no applicable statute.

Who owns the land?

(A) The businesswoman, because the deed was a warranty deed.

(B) The businesswoman, because the deed was void.

Correct. To be valid, a deed must be properly executed and delivered. A deed to a nonexistent grantee, such as a corporation that has not yet been legally formed, is void. At the time the businesswoman attempted to convey the land to the corporation, the corporation had not yet been legally formed, so the deed was void.

(C) The two friends as tenants in common, because they intended to own the corporation's stock in equal proportion.

(D) The two friends as tenants in common, because they were the intended sole shareholders.



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Question # 53 - Constitutional Law

A state law imposed substantial regulations on insurance companies operating within the state with respect to their rates, cash reserves, and financial practices.

A privately owned insurance company operating within the state advertised that it wanted to hire a new data processor. After reviewing applications for that position, the company hired a woman who appeared to be well qualified. The company refused to consider the application of a man who was better qualified than the woman, because he was known to have radical political views.

The man sued the company, alleging only a violation of his federal constitutional right to freedom of expression.

Is the man likely to prevail?

(A) No, because hiring decisions are wholly discretionary and thus are not governed by the First Amendment.

(B) No, because the company is not subject to the provisions of the First and Fourteenth Amendments.

Correct. The man is unlikely to prevail, because the First and Fourteenth Amendments generally apply only to the actions of governments and government officials, not to the actions of privately owned companies such as the insurance company.

(C) Yes, because the company is affected with a public interest.

(D) Yes, because the company is substantially regulated by the state, and thus its employment decisions may fairly be attributed to the state.



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Multistate Bar Examination - Online Practice Exam 4

Question # 54 - Real Property

A landlord leased a building to a tenant for a term of six years. The lease complied with the statute of frauds and was not recorded. During the lease term, the tenant sent an email to the landlord that stated: "I hereby offer to purchase for \$250,000 the building that I am now occupying under a six-year lease with you." The tenant's name was placed below the word "signed" on the message.

In response, the landlord emailed the tenant: "That's fine. We'll close in 60 days." The landlord's name was placed below the word "signed" on the reply message.

Sixty days later, the landlord refused to tender the deed to the building when the tenant tendered the \$250,000 purchase price. The tenant has sued for specific performance.

Who is likely to prevail?

- (A) The landlord, because formation of an enforceable contract to convey the building could not occur until after the lease term expired.
- (B) The landlord, because the landlord's email response did not contain a sufficient signature under the statute of frauds.
- (C) The tenant, because the email messages constitute an insufficient attornment of the lease.
- (D) The tenant, because the email messages constitute a sufficient memorandum under the statute of frauds.

Correct. The statute of frauds requires a contract for the sale of land to identify the parties, contain a description of the land, evidence an intent to buy and sell, recite (usually) a price term, and be signed by the party against whom enforcement is sought. The email messages here fulfill those requirements. Courts are liberal regarding the nature of a signature; it need only reflect an intent to authenticate the writing. Both the tenant's and the landlord's names were placed below the word "signed," which adequately reflected their desire to be bound.



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Multistate Bar Examination - Online Practice Exam 4

Question # 55 - Torts

A man was admitted to a hospital after complaining of persistent severe headaches. While he was there, hospital staff failed to diagnose his condition, and he was discharged. Two days later, the man died of a massive brain hemorrhage due to a congenital defect in an artery.

The man's wife has brought a wrongful death action against the hospital. The wife offers expert testimony that the man would have had a "reasonable chance" (not greater than 50%) of surviving the hemorrhage if he had been given appropriate medical care at the hospital.

In what type of jurisdiction would the wife's suit most likely be successful?

- (A) A jurisdiction that applies traditional common law rules concerning burden of proof.
- (B) A jurisdiction that allows recovery based on strict liability.
- (C) A jurisdiction that allows recovery for the loss of the chance of survival.

Correct. Jurisdictions that allow recovery for the loss of the chance of survival have created an exception to the traditional common law rules for establishing cause in fact. Under the traditional rules, the wife would be required to prove that reasonable action on the part of the hospital (presumably a correct diagnosis) would, more likely than not, have led to the man's survival. Here, the wife cannot establish that the chances of the man's survival would have been greater than 50% even if he had been given appropriate medical care. A jurisdiction that allows recovery for loss of the chance of survival, however, would allow the wife to recover for the reduction in her husband's chance of surviving that was caused by the failure to properly diagnose.

- (D) A jurisdiction that recognizes loss of spousal consortium.



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Multistate Bar Examination - Online Practice Exam 4

Question # 56 - Criminal Law and Procedure

A wife decided to kill her husband because she was tired of his infidelity. She managed to obtain some cyanide, a deadly poison. One evening, she poured wine laced with the cyanide into a glass, handed it to her husband, and proposed a loving toast. The husband was so pleased with the toast that he set the glass of wine down on a table, grabbed his wife, and kissed her passionately. After the kiss, the wife changed her mind about killing the husband. She hid the glass of wine behind a lamp on the table, planning to leave it for the maid to clean up. The husband did not drink the wine.

The maid found the glass of wine while cleaning the next day. Rather than throw the wine away, the maid drank it. Shortly thereafter, she fell into a coma and died from cyanide poisoning.

In a common law jurisdiction, of what crime(s), if any, could the wife be found guilty?

(A) Attempted murder of the husband and murder or manslaughter of the maid.

Correct. As to the husband, the wife intended to murder him and took a substantial step to carry out that murder; the husband would have been killed had he drunk the wine. As to the maid, a trier of fact could view the wife's conduct as depraved-heart recklessness (which would make her guilty of murder) or at the very least as criminal negligence (which would make her guilty of manslaughter).

(B) Only attempted murder of the husband.

(C) Only murder or manslaughter of the maid.

(D) No crime.



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Multistate Bar Examination - Online Practice Exam 4

Question # 57 - Contracts

A mill and a bakery entered into a written contract that obligated the mill to deliver to the bakery 1,000 pounds of flour every Monday for 26 weeks at a specified price per pound. The mill delivered the proper quantity of flour in a timely manner for the first 15 weeks. However, the 16th delivery was tendered on a Tuesday, and amounted to only 800 pounds. The mill told the bakery that the 200-pound shortage would be made up on the delivery due the following Monday. The late delivery and the 200-pound shortage will not significantly disrupt the bakery's operations.

How may the bakery legally respond to the nonconforming tender?

(A) Accept the 800 pounds tendered, but notify the mill that the bakery will cancel the contract if the exact amount is not delivered on the following Monday.

(B) Accept the 800 pounds tendered, but notify the mill that the bakery will deduct from the price any damages for losses due to the nonconforming tender.

Correct. Because the contract authorizes the delivery of flour in separate lots to be separately accepted, the parties entered into an installment contract. UCC § 2-612 adopts a "substantial impairment" standard for determining whether a buyer can reject a particular installment or cancel the entire contract. A buyer can reject an installment if a nonconformity substantially impairs that installment and the nonconformity cannot be cured. Here the mill's tender of less than the contracted-for quantity did not amount to a nonconformity that substantially impaired either the value of the 16th installment or the whole contract. The mill's proposed cure, the delivery of the remaining 200 pounds on the following Monday, is sufficient given that the late delivery and the shortage will not significantly disrupt the bakery's business. Accordingly, the bakery must accept the delivery of the tendered 800 pounds of flour but may deduct from the price any damages for losses resulting from the late delivery.

(C) Reject the 800 pounds tendered, but notify the mill that the bakery will accept delivery the following Monday if it is conforming.

(D) Reject the 800 pounds tendered, and notify the mill that the bakery is canceling the contract.



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Multistate Bar Examination - Online Practice Exam 4

Question # 58 - Evidence

A defendant is charged with mail fraud. At trial, the defendant has not taken the witness stand, but he has called a witness who has testified that the defendant has a reputation for honesty. On cross-examination, the prosecutor seeks to ask the witness, "Didn't you hear that two years ago the defendant was arrested for embezzlement?"

Should the court permit the question?

- (A) No, because the defendant has not testified and therefore has not put his character at issue.
- (B) No, because the incident was an arrest, not a conviction.
- (C) Yes, because it seeks to impeach the credibility of the witness.

Correct. The witness has testified that she knows about the defendant's reputation. The prosecutor has the right to test the basis and adequacy of that knowledge, as well as the nature of the community itself. If the witness answers that she had not heard about the arrest, that admission could indicate that she is not very knowledgeable about the defendant's reputation in the community, because such an arrest would likely have a negative effect on that reputation. If the witness says that she had heard about the arrest, a negative inference could be raised about the community itself and its view of what it is to be an honest person.

- (D) Yes, because the earlier arrest for a crime of dishonesty makes the defendant's guilt of the mail fraud more likely.



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Multistate Bar Examination - Online Practice Exam 4

Question # 59 - Constitutional Law

In order to foster an environment conducive to learning, a school board enacted a dress code that prohibited all public high school students from wearing in school shorts cut above the knee. Because female students at the school considered it unfashionable to wear shorts cut at or below the knee, they no longer wore shorts to school. On the other hand, male students at the school regularly wore shorts cut at or below the knee because they considered such shorts to be fashionable.

Female students sued to challenge the constitutionality of the dress code on the ground that it denied them the equal protection of the laws.

Should the court uphold the dress code?

- (A) No, because the dress code is not necessary to further a compelling state interest.
- (B) No, because the dress code is not substantially related to an important state interest.
- (C) Yes, because the dress code is narrowly tailored to further an important state interest.
- (D) Yes, because the dress code is rationally related to a legitimate state interest.

Correct. The court should uphold the dress code, because the code is rationally related to the state's legitimate interest in fostering a proper educational environment. The dress code should not trigger heightened judicial scrutiny, because there are no facts to suggest that the purpose of the code is to discriminate against female students.



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Multistate Bar Examination - Online Practice Exam 4

Question # 60 - Torts

A mother purchased an expensive television from an appliance store for her adult son. Two years after the purchase, a fire started in the son's living room in the middle of the night. The fire department concluded that the fire had started in the television. No other facts are known.

The son sued the appliance store for negligence. The store has moved for summary judgment.

Should the court grant the store's motion?

(A) No, because televisions do not catch fire in the absence of negligence.

(B) No, because the store sold the television.

(C) Yes, because the son is not in privity with the store.

(D) Yes, because there is no evidence of negligence on the part of the store.

Correct. The son is suing in negligence, not in strict liability. To make out a prima facie case in negligence, the son must introduce evidence that the store was negligent. However, the son has not pointed to any negligent action or omission by the store. This is not an appropriate case for *res ipsa loquitur*, because the manufacturer, rather than the store, may have been negligent or the negligence may have occurred after the sale (for example, during a repair or while the television was being used by the son).



National Conference of Bar Examiners

Multistate Bar Examination - Online Practice Exam 4

Question # 61 - Contracts

A buyer agreed to purchase a seller's house for \$250,000 "on condition that the buyer obtain mortgage financing within 30 days." Thirty days later, the buyer told the seller that the buyer would not purchase the house because the buyer had not obtained mortgage financing. The seller asked the buyer where the buyer had tried to obtain mortgage financing, and the buyer responded, "I was busy and didn't have time to seek mortgage financing."

If the seller sues the buyer for breach of contract, is the court likely to find the buyer in breach?

- (A) No, because the buyer's performance was subject to a condition that did not occur.
- (B) No, because the promise was illusory since the buyer was not obligated to do anything.
- (C) Yes, because a promise was implied that the buyer had to make reasonable efforts to obtain mortgage financing.

Correct. A performance that is subject to an express condition cannot become due unless the condition occurs or its non-occurrence is excused. However, the duty of good faith, which is implied in every contract, imposed an obligation on the buyer to make reasonable efforts to secure mortgage financing. Because the buyer made no such efforts, the non-occurrence of the condition to the buyer's obligation to purchase the house--the buyer's securing financing--was excused. Accordingly, the court is likely to find that the buyer is in breach.

- (D) Yes, because a reasonable interpretation of the agreement is that the buyer had an obligation to purchase the house for \$250,000 in 30 days.



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Multistate Bar Examination - Online Practice Exam 4

Question # 62 - Criminal Law and Procedure

In a crowded football stadium, a man saw a wallet fall out of a spectator's purse. The man picked up the wallet and found that it contained \$100 in cash. Thinking that he could use the money and seeing no one watching, the man put the wallet in the pocket of his coat. Just then, the spectator approached the man and asked if he had seen a missing wallet. The man said no and went home with the wallet.

Of what crime, if any, is the man guilty?

(A) Embezzlement.

(B) False pretenses.

(C) Larceny.

Correct. The initial taking of the wallet was a trespass, because the man knew that the wallet belonged to the spectator and he intended to convert the wallet to his own use in permanent deprivation of the spectator's right. Accordingly, the man is guilty of larceny.

(D) No crime.



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Multistate Bar Examination - Online Practice Exam 4

Question # 63 - Constitutional Law

A company owned a large tract of land that contained coal deposits that the company intended to mine. The company acquired mining equipment and began to plan its mining operations. Just as the company was about to begin mining, Congress enacted a statute that imposed a number of new environmental regulations and land-reclamation requirements on all mining operations within the United States. The statute made the company's planned mining operations economically infeasible. As a result, the company sold the tract of land to a farmer. While the sale price allowed the company to recover its original investment in the land, it did not cover the additional cost of the mining equipment the company had purchased or the profits it had expected to earn from its mining operations on the land.

In an action filed against the appropriate federal official, the company claims that the statute effected a taking of its property for which it is entitled to just compensation in an amount equal to the cost of the mining equipment it purchased and the profits it expected to earn from its mining operations on the land.

Which of the following is the most appropriate result in the action?

- (A) The company should prevail on its claims for the cost of the mining equipment and for its lost profits.
- (B) The company should prevail on its claim for the cost of the mining equipment, but not for its lost profits.
- (C) The company should prevail on its claim for lost profits, but not for the cost of the mining equipment.
- (D) The company should not prevail on its claim for the cost of the mining equipment or for its lost profits.

Correct. The company should not prevail on any aspect of its claim for just compensation. The statute did not effect a taking of the company's land or of the mining equipment, because the new regulations did not deny all economically viable use of the land. The company recovered its original investment in the land by selling it to the farmer, and the land is economically viable as farmland. The company may sell the mining equipment or use it for mining on other land. Finally, the profits the company expected to earn from its mining operations do not constitute a property interest subject to the takings clause.



National Conference of Bar Examiners

Multistate Bar Examination - Online Practice Exam 4

Question # 64 - Real Property

A tenant leased a commercial property from a landlord for a 12-year term. The property included a large store and a parking lot. At the start of the lease period, the tenant took possession and with the landlord's oral consent installed counters, display cases, shelving, and special lighting. Both parties complied with all lease terms.

The lease is set to expire next month. Two weeks ago, when the landlord contacted the tenant about a possible lease renewal, she learned that the tenant had decided not to renew the lease, and that the tenant planned to remove all of the above-listed items on or before the lease termination date. The landlord claimed that all the items had become part of the real estate and had to remain on the premises. The tenant asserted his right and intention to remove all the items.

Both the lease and the statutes of the jurisdiction are silent on the matter in dispute. At the time the landlord consented and the tenant installed the items, nothing was said about the tenant's right to retain or remove the items.

The landlord has sued the tenant to enjoin his removal of the items.

How is the court likely to rule?

- (A) For the landlord, because the items have become part of the landlord's real estate.
- (B) For the landlord as to items bolted or otherwise attached to the premises, and for the tenant as to items not attached to the premises other than by weight.
- (C) For the tenant, provided that the tenant reasonably restores the premises to the prior condition or pays for the cost of restoration.

Correct. This is a commercial lease, and the tenant has been using the items in his business. Therefore, the items are trade fixtures, and the tenant may remove them before the end of the lease term unless very substantial damage would be done by the removal. It is unlikely that the removal of these items will cause substantial damage; if so, however, the tenant must either restore the premises or pay the cost of restoration.
- (D) For the tenant, because all of the items may be removed as trade fixtures without any obligation to restore the premises.



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Multistate Bar Examination - Online Practice Exam 4

Question # 65 - Evidence

At a woman's trial for bank robbery, the prosecutor has called a private security guard for the bank who has testified, without objection, that while he was on a coffee break, the woman's brother rushed up to him and said, "Come quickly! My sister is robbing the bank!" The woman now seeks to call a witness to testify that the brother later told the witness, "I got my sister into trouble by telling a security guard that she was robbing the bank, but now I realize I was mistaken." The brother is unavailable to testify.

Is the witness's testimony admissible?

- (A) No, because the brother will be afforded no opportunity to explain or deny the later statement.
- (B) No, because the prosecutor will be afforded no opportunity to confront the brother.
- (C) Yes, because it is substantive proof that the woman did not rob the bank.
- (D) Yes, but only as an inconsistent statement to impeach the brother's credibility.

Correct. It is ordinarily true that a witness impeached with a prior inconsistent statement must be given an opportunity to explain or deny the statement. That is not possible, however, when a hearsay declarant is not produced at trial. Therefore Rule 806 provides that the ordinary requirement of a "fair opportunity to explain or deny" is not applicable to hearsay declarants who are being impeached with prior inconsistent statements. The inconsistent statement is probative of the brother's credibility, and Rule 806 permits such impeachment.



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Question # 66 - Contracts

A producer contracted to pay an inexperienced performer a specified salary to act in a small role in a play the producer was taking on a six-week road tour. The contract was for the duration of the tour. On the third day of the tour, the performer was hospitalized with a stomach disorder. The producer replaced her in the cast with an experienced actor. One week later, the performer recovered, but the producer refused to allow her to resume her original role for the remainder of the tour.

In an action by the performer against the producer for breach of contract, which of the following, if proved, would be the producer's best defense?

- (A) The actor, by general acclaim, was much better in the role than the performer had been.
- (B) The actor was the only replacement the producer could find, and the actor would accept nothing less than a contract for the remainder of the six-week tour.

Correct. After the performer became ill, the temporary impracticability doctrine excused the performer's contractual obligation and also gave the producer the right to suspend his performance obligation during the period that the performer's illness prevented her from acting. The critical issue here is whether the producer also had the right to cancel the contract. Circumstances that would give the producer the right to cancel the contract include the degree of uncertainty relating to the nature and duration of the performer's illness and the extent to which a delay in making substitute arrangements would have prevented the producer from continuing the tour. The unwillingness of the actor, the only replacement available, to take a contract for less than the remainder of the six-week tour and the uncertainty surrounding when the performer might return to work would have discharged the producer's performance obligations and justified his cancellation of the contract with the performer.

- (C) The producer offered to employ the performer as the actor's understudy for the remainder of the six-week tour at the performer's original salary, but the performer declined.
- (D) Both the producer and the performer knew that a year earlier the performer had been incapacitated for a short period of time by the same kind of stomach disorder.



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Multistate Bar Examination - Online Practice Exam 4

Question # 67 - Constitutional Law

A number of psychotherapists routinely send mailings to victims of car accidents informing the victims of the possibility of developing post-traumatic stress disorder (PTSD) as the result of the accidents, and offering psychotherapy services. Although PTSD is a possible result of a car accident, it is not common.

Many accident victims in a particular state who received the mailings complained that the mailings were disturbing and were an invasion of their privacy. These victims also reported that as a result of the mailings, their regard for psychotherapists and for psychotherapy as a form of treatment had diminished. In response, the state enacted a law prohibiting any licensed psychotherapist from sending mailings that raised the concern of PTSD to any car accident victim in the state until 30 days after the accident. The state justified the law as an effort to address the victims' complaints as well as to protect the reputation of psychotherapy as a form of treatment.

Is this law constitutional?

- (A) No, because the law singles out one type of message for prohibition while allowing others.
- (B) No, because the mailings provide information to consumers.
- (C) Yes, because mailings suggesting the possibility of developing PTSD as the result of an accident are misleading.
- (D) Yes, because the law protects the privacy of accident victims and the public regard for psychotherapy without being substantially more restrictive than necessary.

Correct. The law is constitutional, because it satisfies the First Amendment standards for government restrictions on commercial speech. The mailings contain commercial speech, because they advertise services provided by the psychotherapists. A restriction on commercial speech is subject to a form of intermediate judicial scrutiny, requiring the government to show that the restriction directly advances an important government interest and that the restriction is not substantially more extensive than necessary to protect that interest. The law here satisfies that standard; the 30-day waiting period for the psychotherapists' mailings narrowly serves the government's substantial interests in protecting both the privacy of accident victims and the public regard for psychotherapy.



National Conference of Bar Examiners

Multistate Bar Examination - Online Practice Exam 4

Question # 68 - Torts

A shopper was riding on an up escalator in a department store when the escalator stopped abruptly. The shopper lost her balance and fell down the escalator steps, sustaining injuries. Although the escalator had been regularly maintained by an independent contractor, the store's obligation to provide safe conditions for its invitees was nondelegable. The shopper has brought an action against the store for damages, and the above facts are the only facts in evidence.

The store has moved for a directed verdict.

Should the court grant the motion?

(A) No, because the finder of fact could infer that the escalator malfunction was due to negligence.

Correct. There is enough evidence here to support an inference of negligence on the part of the store. A jury could find that the malfunction was due to the negligent installation, maintenance, or operation of the escalator; the store would be responsible for all these possible causes under the nondelegable duty doctrine.

(B) No, because the store is strictly liable for the shopper's injuries.

(C) Yes, because an independent contractor maintained the escalator.

(D) Yes, because the shopper has not produced evidence of negligence.



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Multistate Bar Examination - Online Practice Exam 4

Question # 69 - Criminal Law and Procedure

A woman went to an art gallery and falsely represented that she was an agent for a museum and wanted to purchase a painting that was hanging in the gallery. The woman and the gallery owner then agreed on a price for the painting to be paid 10 days later, and the woman took the painting. When the gallery failed to receive the payment when due, the owner called the museum and discovered that the woman did not work there. The owner then notified the police.

When interviewed by the police, the woman admitted making the false representation and acquiring the painting, but she said she believed that the painting had been stolen from her by someone who worked in the gallery.

Is the woman guilty of obtaining property by false pretenses?

(A) No, because she believed that the painting belonged to her.

Correct. The crime of false pretenses, like other theft crimes, requires the intent to steal. The woman cannot properly be found guilty of obtaining property by false pretenses, because she made the false statements to obtain property that she subjectively believed belonged to her.

(B) No, because the gallery owner would have sold the painting to anyone who agreed to pay the price.

(C) Yes, because even if her representation was not material, she never intended to pay for the painting.

(D) Yes, because she knowingly made a false representation on which the gallery owner relied.



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Multistate Bar Examination - Online Practice Exam 4

Question # 70 - Real Property

For 22 years, the land records have shown a man as the owner of an 80-acre farm. The man has never physically occupied the land.

Nineteen years ago, a woman entered the farm. The character and duration of the woman's possession of the farm caused her to become the owner of the farm under the adverse possession law of the jurisdiction.

Three years ago, when the woman was not present, a neighbor took over possession of the farm. The neighbor repaired fences, put up "no trespassing" signs, and did some plowing. When the woman returned, she found the neighbor in possession of the farm. The neighbor vigorously rejected the woman's claimed right to possession and threatened force. The woman withdrew.

The woman then went to the man and told him of the history of activity on the farm. The woman orally told the man that she had been wrong to try to take his farm. She expressly waived any claim she had to the land. The man thanked her.

Last month, unsure of the effect of her conversation with the man, the woman executed a deed purporting to convey the farm to her son. The son promptly recorded the deed.

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

Who now owns the farm?

- (A) The man, because the woman's later words and actions released title to the man.
- (B) The neighbor, because the neighbor succeeded to the woman's adverse possession title by privity of possession.
- (C) The son, because he succeeded to the woman's adverse possession title by privity of conveyance.

Correct. The woman acquired title to the farm by adverse possession. The woman's title was an original title and did not derive from the man's title. The statute of frauds requires that the conveyance of the farm be in writing. Therefore, the woman's oral statement was insufficient to release the title to the man, and the woman validly conveyed the farm to her son.

- (D) The woman, because she must bring a quiet title action to establish her title to the farm before she can convey the farm to her son.



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Multistate Bar Examination - Online Practice Exam 4

Question # 71 - Contracts

An art collector paid a gallery \$1,000 to purchase a framed drawing from the gallery's collection. The price included shipping by the gallery to the collector's home. The gallery's owner used inadequate materials to wrap the drawing. The frame broke during shipment and scratched the drawing, reducing the drawing's value to \$300. The collector complained to the gallery owner, who told the collector to take the drawing to a specific art restorer to have the drawing repaired. The collector paid the restorer \$400 to repair the drawing, but not all of the scratches could be fixed. The drawing, after being repaired, was worth \$700. The gallery owner subsequently refused to pay either for the repairs or for the damage to the drawing.

In an action by the collector against the gallery owner for damages, which of the following awards is most likely?

- (A) Nothing.
- (B) \$300.
- (C) \$400.
- (D) \$700.

Correct. The gallery's use of inadequate materials to wrap the drawing constituted a breach of warranty. Therefore, the collector is entitled to be placed in the position he would have been in but for the gallery's breach. Under UCC § 2-714(2), the generally applicable standard for measuring the collector's resulting damages would be the difference between the value of the drawing as accepted and the value of the drawing if it had been as warranted. Repair costs often are used to determine this difference in value, but when repairs fail to restore the goods to their value as warranted, a further adjustment is required. Here the repairs failed to restore the drawing to its value as warranted. Therefore, the collector is entitled to recover the repair costs (\$400) plus the difference between the value of the drawing if it had been as warranted and its value after the repairs (\$1,000 - \$700 = \$300). Accordingly, the collector should recover \$700.



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Multistate Bar Examination - Online Practice Exam 4

Question # 72 - Evidence

A woman's car was set on fire by vandals. When she submitted a claim of loss for the car to her insurance company, the insurance company refused to pay, asserting that the woman's policy had lapsed due to the nonpayment of her premium. The woman sued the insurance company for breach of contract.

At trial, the woman testified that she had, in a timely manner, placed a stamped, properly addressed envelope containing the premium payment in the outgoing mail bin at her office. The woman's secretary then testified that every afternoon at closing time he takes all outgoing mail in the bin to the post office. The insurance company later called its mail clerk to testify that he opens all incoming mail and that he did not receive the woman's premium payment.

The woman and the insurance company have both moved for a directed verdict.

For which party, if either, should the court direct a verdict?

- (A) For the insurance company, because neither the woman nor her secretary has any personal knowledge that the envelope was mailed.
- (B) For the insurance company, because the mail clerk's direct testimony negates the woman's circumstantial evidence.
- (C) For the woman, because there is a presumption that an envelope properly addressed and stamped was received by the addressee.
- (D) For neither the woman nor the insurance company, because under these circumstances the jury is responsible for determining whether the insurance company received the payment.

Correct. The woman has presented sufficient evidence to trigger the presumption that her payment was received. The insurance company has presented sufficient evidence to rebut that presumption. Consequently, the presumption is taken out of the case and it is up to the fact finder to determine whether the insurance company received the payment. Therefore, it would be error to grant a directed verdict for either the woman or the insurance company.



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Multistate Bar Examination - Online Practice Exam 4

Question # 73 - Torts

A 14-year-old teenager of low intelligence received her parents' permission to drive their car. She had had very little experience driving a car and did not have a driver's license. Although she did the best she could, she lost control of the car and hit a pedestrian.

The pedestrian has brought a negligence action against the teenager.

Is the pedestrian likely to prevail?

- (A) No, because only the teenager's parents are subject to liability.
- (B) No, because the teenager was acting reasonably for a 14-year-old of low intelligence and little driving experience.
- (C) Yes, because the teenager was engaging in an adult activity.

Correct. The teenager was engaging in a dangerous adult activity, so she will be held to the adult standard of care. No adjustment will be made to that standard to reflect her low intelligence and lack of experience. Her lack of intelligence and her inexperience put others at risk, and she will be held to the standard of a reasonably prudent driver even if she is not capable of reasonable prudence.

- (D) Yes, because the teenager was not old enough to obtain a driver's license.



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Multistate Bar Examination - Online Practice Exam 4

Question # 74 - Constitutional Law

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

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

Is the mayor's action constitutional?

(A) No, because public employees have a property interest in their employment, which gives them a right to a hearing prior to discharge.

(B) No, because the mayor's action violates the employee's right to freedom of expression and association.

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

(C) Yes, because the employee has no property interest in his job since the city charter provides that he holds the job "at the pleasure of the mayor."

(D) Yes, because the mayor may require members of her administration to be politically loyal to her.



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Multistate Bar Examination - Online Practice Exam 4

Question # 75 - Real Property

In the most recent deed in the chain of title to a tract of land, a man conveyed the land as follows: "To my niece and her heirs and assigns in fee simple until my niece's daughter marries, and then to my niece's daughter and her heirs and assigns in fee simple."

There is no applicable statute, and the common law Rule Against Perpetuities has not been modified in the jurisdiction.

Which of the following is the most accurate statement concerning the title to the land?

- (A) The niece has a life estate and the daughter has a contingent remainder.
- (B) The niece has a fee simple and the daughter has no interest, because after the grant of a fee simple there can be no gift over.
- (C) The niece has a fee simple and the daughter has no interest, because she might not marry within 21 years after the date of the deed.
- (D) The niece has a defeasible fee simple determinable and the daughter has an executory interest.

Correct. The niece has a defeasible fee simple because of the limitation placed on the estate by the words "until my niece's daughter marries." If the niece's daughter marries, the estate in the niece will end automatically and will pass to the holder of the future interest (the niece's daughter). The future interest given to the daughter, a grantee, is an executory interest. The executory interest in this case does not violate the common law Rule Against Perpetuities, because it will be known within the lifetime of the validating lives--the niece and the niece's daughter--whether the condition of marriage has occurred.



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Multistate Bar Examination - Online Practice Exam 4

Question # 76 - Evidence

At a defendant's trial for mail fraud, the defendant calls his wife to testify that she committed the fraud herself without the defendant's knowledge. On cross-examination, the prosecutor asks the wife, "Isn't it true that you have fled your home several times in fear of your husband?"

Is this question proper?

- (A) No, because it is leading a witness not shown to be hostile.
- (B) No, because its probative value is outweighed by the danger of unfair prejudice to the defendant.
- (C) Yes, because by calling his wife, the defendant has waived his privilege to prevent her from testifying against him.
- (D) Yes, because it explores the wife's possible motive for testifying falsely.

Correct. A cross-examiner is entitled to question in such a way as to raise inferences about the motive of a witness to testify falsely. Here, the question raises an inference that the wife is in fear of her husband and is therefore taking the blame for her husband's crime.



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Multistate Bar Examination - Online Practice Exam 4

Question # 77 - Criminal Law and Procedure

A woman broke off her engagement to a man but refused to return the engagement ring the man had given her. One night, the man entered the woman's house after midnight to retrieve the ring. Although the woman was not at home, a neighbor saw the man enter the house and called the police. The man unsuccessfully searched for the ring for 10 minutes. As he was walking out the front door, the police arrived and immediately arrested him.

The man has been charged with burglary in a jurisdiction that follows the common law.

Which of the following, if proved, would serve as the man's best defense to the charge?

(A) The man knew that the woman kept a key under the doormat and he used the key to enter the house.

(B) The man incorrectly and unreasonably believed that he was legally entitled to the ring.

Correct. The crime of burglary requires that the breaking and entering of the dwelling have been done with the intent to commit an underlying felony (in most cases, larceny). The man's subjective belief that he was entitled to the ring (even if that belief was incorrect and unreasonable) negates the intent required for the underlying felony of larceny.

(C) The man knew that no one was at home when he entered the house.

(D) The man took nothing of value from the house.



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Multistate Bar Examination - Online Practice Exam 4

Question # 78 - Contracts

A businesswoman sold her business to a company for \$25 million in cash pursuant to a written contract that was signed by both parties. Under the contract, the company agreed to employ the businesswoman for two years as a vice president at a salary of \$150,000 per year. After six months, the company, without cause, fired the businesswoman.

Which of the following statements best describes the businesswoman's rights after the discharge?

- (A) She can recover the promised salary for the remainder of the two years if she remains ready to work.
- (B) She can recover the promised salary for the remainder of the two years if no comparable job is reasonably available and she does not take another job.
Correct. The company's unjustified termination of the businesswoman's employment constituted a breach of contract entitling the businesswoman to recover monetary damages. A wrongfully discharged employee is expected to mitigate damages by making reasonable efforts to seek comparable employment. However, if no comparable employment is reasonably available and the businesswoman does not take another job, the businesswoman is entitled to recover the promised salary for the remainder of the two years.
- (C) She can rescind the contract of sale and get back her business upon tender to the company of \$25 million.
- (D) She can get specific performance of her right to serve as a vice president of the company for two years.



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Multistate Bar Examination - Online Practice Exam 4

Question # 79 - Torts

A firstborn child was examined as an infant by a doctor who was a specialist in the diagnosis of speech and hearing impairments. Although the doctor should have concluded that the infant was totally deaf due to a hereditary condition, the doctor negligently concluded that the infant's hearing was normal. After the diagnosis, but before they learned that the infant was in fact deaf, the parents conceived a second child who also suffered total deafness due to the hereditary condition.

The parents claim that they would not have conceived the second child had they known of the high probability of the hereditary condition. They have sought the advice of their attorney regarding which negligence action against the doctor is most likely to succeed.

What sort of action against the doctor should the attorney recommend?

- (A) A medical malpractice action seeking damages on the second child's behalf for expenses due to his deafness, on the ground that the doctor's negligence caused him to be born deaf.
- (B) A wrongful birth action by the parents for expenses they have incurred due to the second child's deafness, on the ground that but for the doctor's negligence, they would not have conceived the second child.
Correct. This cause of action will be permitted in many states. The parents sought an accurate assessment of their first child, which the doctor failed to provide. Unaware of the hereditary condition, the parents conceived a second child and incurred unexpected expenses that could have been avoided had the doctor acted properly.
- (C) A wrongful life action by the parents for expenses for the entire period of the second child's life, on the ground that but for the doctor's negligence, the second child would not have been born.
- (D) A wrongful life action on the second child's behalf for expenses for the entire period of his life, on the ground that but for the doctor's negligence, he would not have been born.



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Multistate Bar Examination - Online Practice Exam 4

Question # 80 - Constitutional Law

An environmental organization's stated mission is to support environmental causes. The organization's membership is generally open to the public, but its bylaws permit its officers to refuse to admit anyone to membership who does not adhere to the organization's mission statement.

In a recent state administrative proceeding, the organization opposed plans to begin mining operations in the mountains surrounding a small town. Its opposition prevented the mine from being opened on schedule. In an effort to force the organization to withdraw its opposition, certain residents of the town attended a meeting of the organization and tried to become members, but the officers refused to admit them. The residents sued the organization, claiming that the refusal to admit them was discriminatory and violated a local ordinance that prohibits any organization from discriminating on the basis of an individual's political views. The organization responded that the ordinance is unconstitutional as applied to its membership decisions.

Are the residents likely to prevail in their claim?

(A) No, because the membership policies of a private organization are not state action.

(B) No, because the organization's right to freedom of association allows it to refuse to admit potential members who do not adhere to its mission statement.

Correct. The residents are not likely to prevail in their claim, because it would violate the environmental organization's First Amendment right to freedom of association if the state were to force the organization to accept the residents as members. The U.S. Supreme Court has held that the forced inclusion of an unwanted person in a group violates the group's freedom of association if including that person would significantly affect the group's ability to express its viewpoints. The freedom of association entitles the environmental organization to refuse membership to the residents, because admitting them would effect a change in the organization's viewpoint on the mining operations.

(C) Yes, because the action of the officers in refusing to admit the residents as members violates equal protection of the laws.

(D) Yes, because the ordinance serves the compelling interest of protecting the residents' free speech rights.



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Multistate Bar Examination - Online Practice Exam 4

Question # 81 - Contracts

On June 15, a teacher accepted a contract for a one-year position teaching math at a public high school at a salary of \$50,000, starting in September. On June 22, the school informed the teacher that, due to a change in its planned math curriculum, it no longer needed a full-time math teacher. The school offered instead to employ the teacher as a part-time academic counselor at a salary of \$20,000, starting in September. The teacher refused the school's offer. On June 29, the teacher was offered a one-year position to teach math at a nearby private academy for \$47,000, starting in September. The teacher, however, decided to spend the year completing work on a graduate degree in mathematics and declined the academy's offer.

If the teacher sues the school for breach of contract, what is her most likely recovery?

- (A) \$50,000, the full contract amount.
- (B) \$30,000, the full contract amount less the amount the teacher could have earned in the counselor position offered by the school.
- (C) \$3,000, the full contract amount less the amount the teacher could have earned in the teaching position at the academy.

Correct. The teacher is entitled to recover damages that will place her in the position she would have been in but for the school's breach. However, an injured party is expected to make reasonable efforts to mitigate the loss resulting from the other party's breach. In the case of a wrongfully discharged employee, the employee is expected to accept an offer of comparable employment. If the employee fails or refuses to do so, the employee's recovery is reduced by the amount of the loss that the employee could have avoided by accepting comparable employment. Here, the teacher's damages of \$50,000 should be reduced by the \$47,000 she would have earned if she had accepted the comparable teaching position at the private academy. Therefore, the teacher is entitled to recover \$3,000 from the school.

- (D) Nothing, because the school notified the teacher of its decision before the teacher had acted in substantial reliance on the contract.



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Multistate Bar Examination - Online Practice Exam 4

Question # 82 - Torts

A boater, caught in a sudden storm and reasonably fearing that her boat would capsize, drove the boat up to a pier, exited the boat, and tied the boat to the pier. The pier was clearly marked with "NO TRESPASSING" signs. The owner of the pier ran up to the boater and told her that the boat could not remain tied to the pier. The boater offered to pay the owner for the use of the pier. Regardless, over the boater's protest, the owner untied the boat and pushed it away from the pier. The boat was lost at sea.

Is the boater likely to prevail in an action against the owner to recover the value of the boat?

- (A) No, because the owner told the boater that she could not tie the boat to the pier.
- (B) No, because there was a possibility that the boat would not be damaged by the storm.
- (C) Yes, because the boater offered to pay the owner for the use of the pier.
- (D) Yes, because the boater was privileged to enter the owner's property to save her boat.

Correct. The boater was privileged to trespass on the owner's property under the doctrine of private necessity, because the boater's property was at risk. Because the boater's intrusion onto the pier was privileged, the owner had no right to exclude her or her boat from the pier. When the owner untied the boat, he committed an unprivileged trespass upon the boater's property, so the owner must pay for the loss of the boat.



National Conference of Bar Examiners

Multistate Bar Examination - Online Practice Exam 4

Question # 83 - Evidence

A driver sued her insurance company on an accident insurance policy covering personal injuries to the driver. The insurance company defended on the ground that the driver's injuries were intentionally self-inflicted and therefore excluded from the policy's coverage.

The driver testified at trial that she had inflicted the injuries, as her negligence had caused the crash in which she was injured, but that she had not done so intentionally. She then called as a witness her treating psychiatrist to give his opinion that the driver had been mentally unbalanced, but not self-destructive, at the time of the crash.

Should the court admit the witness's opinion?

- (A) No, because it is a statement about the driver's credibility.
- (B) No, because it is an opinion about a mental state that constitutes an element of the defense.
- (C) No, because the witness did not first state the basis for his opinion.
- (D) Yes, because it is a helpful opinion by a qualified expert.

Correct. The witness's opinion helps the jury understand a relevant mental state. The standard for qualification of an expert is not high; a psychiatrist is qualified to testify to a person's mental state.



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Question # 84 - Criminal Law and Procedure

A woman wanted to kill a business competitor. She contacted a man who she believed was willing to commit murder for hire and offered him \$50,000 to kill the competitor. The man agreed to do so and accepted \$25,000 as a down payment. Unbeknownst to the woman, the man was an undercover police officer.

In a jurisdiction that has adopted the unilateral theory of conspiracy, is the woman guilty of conspiracy to murder the business competitor?

- (A) No, because the man did not intend to kill the competitor.
- (B) No, because it would have been impossible for the woman to kill the competitor by this method.
- (C) Yes, because the woman believed that she had an agreement with the man that would bring about the competitor's death.

Correct. In jurisdictions that recognize unilateral conspiracies, it is enough that one person agree with another person to commit a crime (and in some jurisdictions, that an overt act in furtherance of that agreement be committed). It is no defense to unilateral conspiracy that the other person was feigning agreement or acting in an undercover capacity. Here, the woman agreed to commit a crime and she committed an overt act in furtherance of that agreement when she paid the man \$25,000. She therefore is guilty of conspiracy in a jurisdiction that recognizes unilateral conspiracies.
- (D) Yes, because the woman took a substantial step toward bringing about the competitor's death by paying the man \$25,000.



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Multistate Bar Examination - Online Practice Exam 4

Question # 85 - Real Property

A businessman executed a promissory note for \$200,000 to a bank, secured by a mortgage on commercial real estate owned by the businessman. The promissory note stated that the businessman was not personally liable for the mortgage debt.

One week later, a finance company obtained a judgment against the businessman for \$50,000 and filed the judgment in the county where the real estate was located. At the time the judgment was filed, the finance company had no actual notice of the bank's mortgage.

Two weeks after that filing, the bank recorded its mortgage on the businessman's real estate.

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

The finance company sued to enforce its judgment lien against the businessman's real estate. The bank intervened in the action, contending that the judgment lien was a second lien on the real estate and that its mortgage was a first lien.

Is the bank's contention correct?

(A) No, because the judgment lien was recorded before the mortgage, and the finance company had no actual notice of the mortgage.

Correct. The judgment lien was recorded first in a jurisdiction that expressly protects judgment creditors without notice. The finance company had no actual notice of the mortgage and had no constructive notice because the mortgage was not recorded until two weeks after the judgment was filed. The bank's mortgage was not a purchase-money mortgage, which would have given it priority.

(B) No, because the businessman was not personally liable for the mortgage debt, and the mortgage was therefore void.

(C) Yes, because a mortgage prior in time has priority over a subsequent judgment lien.

(D) Yes, because the recording of a mortgage relates back to the date of execution of the mortgage note.



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Multistate Bar Examination - Online Practice Exam 4

Question # 86 - Contracts

A produce distributor contracted to provide a grocer with eight crates of lettuce at the distributor's listed price. The distributor's shipping clerk mistakenly shipped only seven crates to the grocer. The grocer accepted delivery of the seven crates but immediately notified the distributor that the delivery did not conform to the contract. The distributor's listed price for seven crates of lettuce was $\frac{7}{8}$ of its listed price for eight crates. The distributor shipped no more lettuce to the grocer, and the grocer has not yet paid for any of the lettuce.

How much, if anything, is the distributor entitled to collect from the grocer?

- (A) Nothing, because the tender of all eight crates was a condition precedent to the grocer's duty to pay.
- (B) The reasonable value of the seven crates of lettuce, minus the grocer's damages, if any, for the distributor's failure to deliver the full order.
- (C) The listed price for the seven crates of lettuce, minus the grocer's damages, if any, for the distributor's failure to deliver the full order.

Correct. The distributor's nonconforming shipment constituted both an acceptance of the grocer's offer to purchase and a breach of the parties' contract. With respect to a nonconforming tender, UCC § 2-601 allows a buyer to accept the whole, reject the whole, or partially accept or reject commercial units. A buyer who accepts a tender of goods, whether conforming or nonconforming, becomes obligated to pay the seller the contract price of the goods. Accordingly, the grocer's acceptance of the nonconforming shipment obligated it to pay the distributor's listed price for the seven crates, reduced by any damages for losses resulting from the nonconforming shipment.

- (D) The listed price for the seven crates of lettuce.



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Question # 87 - Contracts

A seller borrowed \$5,000 from a bank. Soon thereafter the seller filed for bankruptcy, having paid nothing on his debt to the bank.

Five years after the debt had been discharged in bankruptcy, the seller contracted to sell certain goods to a buyer for \$5,000. The contract provided that the buyer would pay the \$5,000 to the bank "as payment of the \$5,000 the seller owes the bank." The only debt that the seller ever owed the bank is the \$5,000 debt that was discharged in bankruptcy. The seller delivered the goods to the buyer, who accepted them.

If the bank becomes aware of the contract between the seller and the buyer, and the buyer refuses to pay anything to the bank, is the bank likely to succeed in an action against the buyer for \$5,000?

- (A) No, because the buyer's promise to pay the bank was not supported by consideration.
- (B) No, because the seller's debt was discharged in bankruptcy.
- (C) Yes, because the bank was an intended beneficiary of the contract between the buyer and the seller.

Correct. The buyer and the seller entered into a bargained-for exchange for the sale and purchase of goods. Because their agreement provided that the buyer would pay to the bank the \$5,000 that the buyer had promised to pay for the goods, the bank was an intended beneficiary of the enforceable agreement between the seller and the buyer, and the buyer is obligated to pay the bank.

- (D) Yes, because no consideration is required to support a promise to pay a debt that has been discharged in bankruptcy.



National Conference of Bar Examiners

Multistate Bar Examination - Online Practice Exam 4

Question # 88 - Constitutional Law

A fatal virus recently infected poultry in several nations. Some scientific evidence indicates that the virus can be transmitted from poultry to humans.

Poultry farming is a major industry in several U.S. states. In one such state, the legislature has enacted a law imposing a fee of two cents per bird on all poultry farming and processing operations in the state. The purpose of the fee is to pay for a state inspection system to ensure that no poultry raised or processed in the state is infected with the virus.

A company that has poultry processing plants both in the state and in other states has sued to challenge the fee.

Is the fee constitutional?

- (A) No, because although it attaches only to intrastate activity, in the aggregate, the fee substantially affects interstate commerce.
- (B) No, because it places an undue burden on interstate commerce in violation of the negative implications of the commerce clause.
- (C) Yes, because it applies only to activities that take place wholly within the state, and it does not unduly burden interstate commerce.
Correct. The fee does not violate the negative implications of the commerce clause, because it does not discriminate against interstate commerce, and its burden on interstate commerce is not clearly excessive in relation to the legitimate public health benefit the inspection system will bring to the state.
- (D) Yes, because it was enacted pursuant to the state's police power, which takes precedence over the negative implications of the commerce clause.



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Question # 89 - Criminal Law and Procedure

A state statute provides as follows: "The maintenance of any ongoing enterprise in the nature of a betting parlor or bookmaking organization is a felony."

A prosecutor has evidence that a woman has been renting an office to a man, that the man has been using the office as a betting parlor within the meaning of the statute, and that the woman is aware of this use.

Which of the following additional pieces of evidence would be most useful to the prosecutor's effort to convict the woman as an accomplice to the man's violation of the statute?

- (A) The woman was previously convicted of running a betting parlor herself on the same premises.
- (B) The woman charges the man considerably more in rent than she charged the preceding tenant, who used the office for legitimate activities.
Correct. Showing that the woman benefits from the gambling would indicate her personal stake in the continuing success of the man's criminal venture (and thus her intent to aid in that venture).
- (C) The woman has personally placed bets with the man at the office location.
- (D) The man has paid the woman the rent in bills that are traceable as the proceeds of gambling activity.



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Question # 90 - Real Property

A seller conveyed residential land to a buyer by a warranty deed that contained no exceptions and recited that the full consideration had been paid. To finance the purchase, the buyer borrowed 80% of the necessary funds from a bank. The seller agreed to finance 15% of the purchase price, and the buyer agreed to provide cash for the remaining 5%.

At the closing, the buyer signed a promissory note to the seller for 15% of the purchase price but did not execute a mortgage. The bank knew of the loan made by the seller and of the promissory note executed by the buyer to the seller. The buyer also signed a note to the bank, secured by a mortgage, for the 80% advanced by the bank.

The buyer has now defaulted on both loans.

There are no applicable statutes.

Which loan has priority?

(A) The bank's loan, because the seller can finance a part of the purchase price only by use of an installment land contract.

(B) The bank's loan, because it was secured by a purchase-money mortgage.

Correct. The bank has a purchase-money mortgage, because the loan proceeds were used to help purchase the land. A purchase-money mortgage, executed at the same time as the deed to the land, takes precedence over any other lien that attaches to the property. The seller's loan could also have been secured by a purchase-money mortgage, but it was not; the buyer signed an unsecured note to the seller. The seller also may have had an equitable vendor's lien for the unpaid purchase price, but the deed recites that the full consideration was paid. Therefore, the bank's purchase-money mortgage takes priority over the seller's unsecured loan and any implied equitable vendor's lien even if the bank knew of the vendor's lien.

(C) The seller's loan, because a promissory note to a seller has priority over a bank loan for residential property.

(D) The seller's loan, because the bank knew that the seller had an equitable vendor's lien.



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Question # 91 - Torts

Unaware that a lawyer was in the county courthouse library late on a Friday afternoon, when it was unusual for anyone to be using the library, a clerk locked the library door and left. The lawyer found herself locked in when she tried to leave the library at 7 p.m. It was midnight before the lawyer's family could find out where she was and get her out. The lawyer was very annoyed by her detention but was not otherwise harmed by it.

Does the lawyer have a viable claim for false imprisonment against the clerk?

(A) No, because it was unusual for anyone to be using the library late on a Friday afternoon.

(B) No, because the clerk did not intend to confine the lawyer.

Correct. Intent to confine the claimant (or to commit some other intentional tort) is essential to establishing liability for false imprisonment. There is no evidence that the clerk had such an intent.

(C) Yes, because the clerk should have checked to make sure no one was in the library before the clerk locked the door.

(D) Yes, because the lawyer was aware of being confined.



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Question # 92 - Evidence

A plaintiff has brought a products liability action against a defendant, the manufacturer of a sport-utility vehicle that the plaintiff's decedent was driving when she was fatally injured in a rollover accident. The plaintiff claims that a design defect in the vehicle caused it to roll over. The defendant claims that the cause of the accident was the decedent's driving at excessive speed during an ice storm. Eyewitnesses to the accident have given contradictory estimates about the vehicle's speed just before the rollover. It is also disputed whether the decedent was killed instantly.

Which of the following items of offered evidence is the court most likely to admit?

- (A) A videotape offered by the defendant of a test conducted by the defendant showing that a sport-utility vehicle of the same model the decedent was driving did not roll over when driven by a professional driver on a dry test track at the top speed testified to by the eyewitnesses.
- (B) A videotape offered by the plaintiff of a television news program about sport-utility vehicles that includes footage of accident scenes in which the vehicles had rolled over.
- (C) Evidence offered by the defendant that the decedent had received two citations for speeding in the previous three years.
- (D) Photographs taken at the accident scene and during the autopsy that would help the plaintiff's medical expert explain to the jury why she concluded that the decedent did not die instantly.

Correct. This evidence is most likely to be admitted. If these photographs are offered to illustrate the expert's testimony, the jury can be instructed to use the evidence only for that purpose. Moreover, this evidence is not as prejudicial or potentially confusing to the jury as the evidence in options (A) and (B), while the evidence in option (C) is inadmissible.



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Question # 93 - Contracts

A builder borrowed \$10,000 from a lender to finance a small construction job under a contract with a homeowner. The builder gave the lender a writing that stated, "Any money I receive from the homeowner will be paid immediately to the lender, regardless of any demands from other creditors." The builder died after completing the job but before the homeowner paid. The lender demanded that the homeowner pay the \$10,000 due to the builder directly to the lender. The homeowner refused, saying that he would pay directly to the builder's estate everything that he owed the builder.

Is the lender likely to succeed in an action against the homeowner for \$10,000?

- (A) No, because the builder's death terminated the lender's right to receive payment directly from the homeowner.
- (B) No, because the writing the builder gave to the lender did not transfer to the lender the right to receive payment from the homeowner.

Correct. An assignment arises when the holder of a right, an obligee, manifests the intent to make a present transfer of that right to another, the assignee. Upon an assignment, the assignor's rights are extinguished and transferred to the assignee. An assignment is to be distinguished from a promise to do something in the future, such as the payment of money. Here, the writing in which the builder promised to pay the lender the \$10,000 he received from the homeowner did not transfer to the lender the right to receive payment directly from the homeowner, and thus it did not create an assignment.

- (C) Yes, because the builder had manifested an intent that the homeowner pay the \$10,000 directly to the lender.
- (D) Yes, because the lender is an intended beneficiary of the builder-homeowner contract.



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Question # 94 - Criminal Law and Procedure

After a defendant was indicted on federal bank fraud charges and released on bail, his attorney filed notice of the defendant's intent to offer an insanity defense. The prosecutor then enlisted the help of a forensic psychologist who was willing to participate in an "undercover" mental examination of the defendant. The psychologist contacted the defendant and pretended to represent an executive personnel agency. She told the defendant about an attractive employment opportunity and invited him to a "preliminary screening interview" to determine his qualifications for the job. As part of the purported screening process, the psychologist gave the defendant psychological tests that enabled her to form a reliable opinion about his mental state at the time of the alleged offense.

What is the strongest basis for a defense objection to the psychologist's testimony regarding the defendant's mental state?

- (A) The Fourth Amendment prohibition against unreasonable searches and seizures.
- (B) The Fifth Amendment privilege against compelled self-incrimination.
- (C) The Sixth Amendment right to the assistance of counsel.

Correct. After a defendant is indicted, the right to counsel attaches, and authorities may not use deception to deliberately elicit statements related to the crime from the defendant without the representation of counsel.

- (D) The federal common law privilege for confidential communications between psychotherapist and patient.



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Question # 95 - Torts

A man tied his dog to a bike rack in front of a store and left the dog there while he went inside to shop. The dog was usually friendly and placid.

A five-year-old child started to tease the dog by pulling gently on its ears and tail. When the man emerged from the store and saw what the child was doing to the dog, he became extremely upset.

Does the man have a viable claim against the child for trespass to chattels?

(A) No, because the child did not injure the dog.

Correct. Trespass to chattels requires that the plaintiff show actual harm to or deprivation of the use of the chattel for a substantial time. Here the child's acts caused emotional distress to the man, but the acts did not result in harm to the man's material interest in the dog.

(B) No, because the child was too young to form the requisite intent.

(C) Yes, because the child touched the dog without the man's consent.

(D) Yes, because the child's acts caused the man extreme distress.



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Question # 96 - Evidence

At the start of the trial of a defendant and a codefendant for robbery, the codefendant and her attorney offered to give the prosecutor information about facts that would strengthen the prosecutor's case against the defendant in exchange for leniency toward the codefendant. The prosecutor refused the offer. Shortly thereafter, the codefendant committed suicide.

During the defendant's trial, the prosecutor called the codefendant's attorney and asked him to relate the information that the codefendant had revealed to the attorney.

Is the attorney's testimony admissible?

(A) No, because the codefendant's communications are protected by the attorney-client privilege.

Correct. The prosecutor is asking for confidential communications between the codefendant and her attorney, which is privileged information. If the codefendant had actually provided information to the prosecutor, the privilege would have been waived as to any communications previously made to her attorney. However, the codefendant did not disclose any confidential communications.

(B) No, because the plea discussion was initiated by the codefendant rather than by the prosecutor.

(C) Yes, because the codefendant intended to disclose the information.

(D) Yes, because the information the codefendant gave to her attorney revealing her knowledge of the crime would be a statement against the codefendant's penal interest.



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Question # 97 - Torts

A mother and her six-year-old child were on a walk when the mother stopped to talk with an elderly neighbor. Because the child resented having his mother's attention diverted by the neighbor, the child angrily threw himself against the neighbor and knocked her to the ground. The neighbor suffered a broken wrist as a result of the fall.

In an action for battery by the neighbor against the child, what is the strongest argument for liability?

(A) The child intended to throw himself against the neighbor.

Correct. To recover on a claim for battery, it is sufficient for the neighbor to show that the child intended to touch the neighbor in a way that would be considered harmful or offensive, even though the child may have been too young to understand that what he was doing was wrong or to appreciate that the neighbor might be unusually vulnerable to injury.

(B) The child was old enough to appreciate that causing a fall could inflict serious injury.

(C) The child was old enough to appreciate the riskiness of his conduct.

(D) The child was not justified in his anger.



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Question # 98 - Criminal Law and Procedure

A defendant is charged with an offense under a statute that provides as follows: "Any person who, while intoxicated, appears in any public place and manifests a drunken condition by obstreperous or indecent conduct is guilty of a misdemeanor."

At trial, the evidence shows that the defendant was intoxicated when police officers burst into his house and arrested him pursuant to a valid warrant. It was a cold night, and the officers hustled the defendant out of his house without giving him time to get his coat. The defendant became angry and obstreperous when the officers refused to let him go back into the house to retrieve his coat. The officers left him handcuffed outside in the street, waiting for a special squad car to arrive. The arrest warrant was later vacated.

Can the defendant properly be convicted of violating the statute?

- (A) No, because the defendant's claim of mistreatment is valid.
- (B) No, because the statute requires proof of a voluntary appearance in a public place.

Correct. The general legal rule is that a person is not guilty of a crime unless the act constituting the crime was committed voluntarily. This rule precludes the defendant's conviction, because he did not voluntarily appear in a public place.

- (C) Yes, because the defendant voluntarily became intoxicated.
- (D) Yes, because the defendant voluntarily behaved in an obstreperous manner.



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Question # 99 - Real Property

A seller and a buyer signed a contract for the sale of vacant land. The contract was silent concerning the quality of title, but the seller agreed in the contract to convey the land to the buyer by a warranty deed without any exceptions.

When the buyer conducted a title search for the land, she learned that the applicable zoning did not allow for her planned commercial use. She also discovered that there was a recorded restrictive covenant limiting the use of the land to residential use.

The buyer no longer wants to purchase the land.

Must the buyer purchase the land?

(A) No, because the restrictive covenant renders the title unmarketable.

Correct. Unless the contract provides to the contrary, the law will imply that the seller will provide the buyer with a marketable title on the date of closing. A marketable title is not a perfect title but is a title a court will force an unwilling buyer to purchase. A right held in the land by a third party, such as the right to enforce a restrictive covenant, renders the title unmarketable, and the buyer need not purchase the land.

(B) No, because the zoning places a cloud on the title.

(C) Yes, because the buyer would receive a warranty deed without any exceptions.

(D) Yes, because the contract was silent regarding the quality of the title.



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Question # 100 - Criminal Law and Procedure

A police officer had a hunch, not amounting to probable cause or reasonable suspicion, that a man was a drug dealer. One day while the officer was on highway patrol, her radar gun clocked the man's car at 68 mph in an area where the maximum posted speed limit was 65 mph. The officer's usual practice was not to stop a car unless it was going at least 5 mph over the posted limit, but contrary to her usual practice, she decided to stop the man's car in the hope that she might discover evidence of drug dealing. After she stopped the car and announced that she would be writing a speeding ticket, the officer ordered the man and his passenger to step out of the car. When the passenger stepped out, the officer saw that the passenger had been sitting on a clear bag of what the officer immediately recognized as marijuana. The officer arrested both the man and the passenger for possession of marijuana.

At their joint trial, the man and the passenger claim that their Fourth Amendment rights were violated because the officer improperly (1) stopped the car for speeding as a pretext for investigating a hunch rather than for the stated purpose of issuing a traffic ticket and (2) ordered the passenger to step out of the car even though there was no reason to believe that the passenger was a criminal or dangerous.

Are the man and the passenger correct?

(A) No, as to both the stop of the car and the officer's order that the passenger step out of the car.

Correct. The stop of the car was constitutional, because it was objectively justifiable (regardless of the officer's subjective motivation), and both the driver and any passengers may be ordered to step out of a car during a lawful traffic stop.

(B) No as to the stop of the car, but yes as to the officer's order that the passenger step out of the car.

(C) Yes as to the stop of the car, but no as to the officer's order that the passenger step out of the car.

(D) Yes, as to both the stop of the car and the officer's order that the passenger step out of the car.